

NLRB Nixes Reopening Remedy after Remand from D.C. Circuit

Labor Relations Update on **December 21, 2022**

In a 2-1 decision (Members Kaplan and Ring in the Majority, with Member Prouty dissenting), the National Labor Relations Board (“NLRB” or “Board”) revisited its 2020 decision in *RAV Truck & Trailer Repairs, Inc.*, 369 NLRB No. 36, reversing the decision in part. Notably, the Board reversed its earlier order requiring the Company to reopen a facility that was closed due to union animus, citing the passage of time and futility of doing so at this stage. The Board’s decision on remand demonstrates the impact that an appeal that lasts several years can have on the impact of a remedial order by the NLRB.

Factual Background and Procedural History

In 2020, the Board held that the Company violated the National Labor Relations Act (“NLRA”) by unlawfully discharging one employee and laying off another because of their union involvement. The Board also found that the Company closed its facility in efforts to prevent union organizing there. As part of its remedy, the NLRB ordered the Company to reopen and restore the closed facility.

The Company appealed to the U.S. Court of Appeals for the District of Columbia. On appeal, the D.C. Circuit affirmed the Board’s decision that dismissing the employees violated the NLRA, but the Court remanded for further consideration concerning the lawfulness of the Company’s closure of its facility.

The Court also held that “the Board did not properly consider whether its order to restore the RAV auto repair shop would be legally permissible, necessary, or unduly burdensome.” The Court then criticized the Board’s order requiring the Company to restore the facility, finding that, given these circumstances, the Board’s ruling ordering the Company to “reopen and restore RAV’s business operation as it existed on May 14, 2018” was not “even factually possible.” The Court noted that the Company’s lease terminated on May 31, 2018, which had no relation to the union organizing activity.

NLRB’s Decision on Remand

On remand—more than 4.5 years after the facility closed—the NLRB held that the Company’s facility closure was unlawful and motivated by the employees’ union organizing activity in violation of long-standing Board precedent. The Board concluded that the “suspicious timing” of the closure immediately after the two layoffs was “strong evidence” of union animus.

However, the Board agreed with the D.C. Circuit that its requirement to reopen the shop would be unduly burdensome, because restoring the facility would require the Company to “either renew its old lease, which ended over 4 years ago, or enter into a new one.” In particular, here, the Board cited the “passage of time,” as well as other factors, which contributed to its finding that its prior restoration and bargaining orders are no longer appropriate.

Takeaways

This decision demonstrates the bounds of the Board’s remedial powers and highlights how it may be strategically advantageous for companies to appeal to the Circuit. This may be especially true with respect to orders that require parties to restore the status quo in a manner that could be factually difficult to accomplish many years later—like reinstatement, bargaining orders, reopening closed facilities, etc. In such cases, like *RAV Truck*, appealing to the Circuit could be an attractive option for employers, as the passage of time could make compliance many years later a futile endeavor.

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