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Not A Clean Break: Cautionary Tale for Employers Looking To Close Plants

Labor Relations Update on **August 31, 2023**

In a very active end of summer for labor law, the National Labor Relations Board ("Board") ruled in a 2-1 decision, in *Quickway Transportation, Inc.*, 372 NLRB No. 127, that a company's closure of a terminal where its drivers were unionized violated the National Labor Relations Act ("NLRA"). The Board found that the company violated Sections 8(a)(3) and (5) of the NLRA for firing unionized truck drivers in order to chill unionism at other locations— even though the company did not actually know about any other ongoing unionization efforts at its other locations—and failing to bargain with the union over the decision or the effects of the decision.

Factual Background

In *Quickway*, drivers at a company's Louisville terminal voted to unionize in the summer of 2020. The lead-up to the election and its results were contentious. Management objected to the results of the election, but these objections were overruled by the Board, and management eventually agreed to bargain with the union.

However, after the first bargaining session, the company feared the financial ramifications of failing to reach a deal in bargaining and incurring a strike. In response, the company withdrew from an existing contract with an external distributor that made up over 95% of the drivers' business at the terminal, then fired all the drivers at the terminal, and subleased the building to a third-party for the term of the lease.

Plant Closure Violated the NLRA under the *Darlington* Factors

The union filed an unfair labor practice charge, alleging a number of violations, including that the plant closure violated Sections 8(a)(3), (a)(5) and 8(a)(1) of the NLRA.

The standard set by the Supreme Court decision in *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), applied to the facts of the case. Under *Darlington,* a partial-closure of a business violates Section 8(a)(3) "if [it was] motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect."

To establish a violation of the Act, the NLRB General Counsel must demonstrate that (i) the employer closed the plant for anti-union reasons, (ii) the employer had interests in other businesses, (iii) the decision was motivated by a desire to chill unionism at other locations, and (iv) the chilling effect at other locations was reasonably foreseeable.

The ALJ found that the plant closure did not violate the NLRA, because the decision to close the plant was not motivated in part to chill unionism at the company's other locations. However, the Board's majority disagreed.

The Board concluded that while there was no "credible evidence" that the company actually knew there was active union campaigning at any of its other locations, , management at the Louisville terminal was concerned that union activity could "infect" drivers at other locations, and took actions to make sure that drivers at a nearby branch did not interact with the Louisville truck drivers. The Board also observed that the Louisville terminal had a mechanic shop operated by the company that was not yet unionized, which led to the Board's conclusion that the proximity of the non-union workers to the unionized workers could reasonably lead to the inference that the company wanted to chill union activity in the remaining employees at the terminal.

The other factors under the *Darlington* test were less disputed. The ALJ and NLRB majority both agreed that several incidents in the run-up to the election, and after the union was elected, established that the company ceased operations at the terminal because of union animus.

The Board majority also held that the company violated Section 8(a)(5) of the Act, for failing to bargain with the union over the plant closure decision. While employers may unilaterally close part of their business "for purely economic reasons" under *First National Maintenance v. NLRB*, 452 U.S. 666 (1981), since the Board found that the purported entrepreneurial decision here was motivated by anti-union reasons, the decision was not exempt form a bargaining obligation.

Member Kaplan's Dissent

Board Member Marvin Kaplan disagreed with the Board's application of *Darlington*, and dissented, stating that there was no motive to chill unionism at other company locations based on the evidence adduced before the ALJ, "because the [company] was unaware of ongoing union activity at any other terminal, nor did it believe that union organizing at any other terminal was imminently intended."

Takeaways

As a practical matter, the impact of the Board's decision here for the company was significant, as the Board required the company to reopen and restore its business at the Louisville terminal that existed on December 9, 2020, when it closed, as well as offer reinstatement to the employees who were unlawfully discharged and make them whole for all loss of earnings, other benefits, and other direct or foreseeable pecuniary harms suffered, among other things.

While the holding in *Quickway* does not overturn existing Board precedent like many other cases recently published, the decision shows that the current composition of the Board will closely scrutinize plant closures under the *Darlington* factors.

Rather than strictly construing actual knowledge of union activity at other locations, the Board majority here inferred animus from "the presence or absence of several factors including, *inter alia*, contemporaneous union activity at the employer's remaining facilities, geographic proximity of the employer's facilities to the closed operation, the likelihood that employees will learn of the circumstances surrounding the employer's unlawful conduct through employee interchange or contact, and, of course, representations made by the employer's officials and supervisors to the other employees."

Employers should take heed of these factors and how this current composition of the Board would evaluate them in the event of a plant closure.

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