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Sixth Circuit Panel Questions Board's Emergency Pay Increase Ruling

Labor Relations Update on **May 13, 2024**

On May 9, 2024, the U.S. Court of Appeals for the Sixth Circuit heard oral argument regarding the National Labor Relations Board ("NLRB") exception allowing an employer to unilaterally make decisions during an emergency. The Board sought court enforcement of its ruling that Metro Man IV LLC failed to notify SEIU Healthcare Michigan about its emergency decisions to increase pay and hire non-union workers and failed to bargain about those decisions and their effects.

Background

Metro Man, a company doing business in Detroit as a health and rehabilitation center, was faced with a staffing shortage due to the Pandemic in March 2020. Approximately 70% of staff stopped coming to work when residents started contracting Covid-19. In response, without notifying the union, the company increased pay $2 per hour and when that did not improve staffing, hired non-union workers. The company removed the increase when it determined the emergency ended (i.e., once the facility was Covid free in June) and discharged the new workers before the end of the year. In December 2022, the Board ruled that while the emergency allowed the company to make the wage and staffing decisions, the company violated Sections 8(a)(5) and (1) of the National Labor Relations Act ("NLRA") when it failed to notify the union of its changes and failed to bargain over the decisions and their effects after the need for an immediate decision passed.

Sixth Circuit Oral Argument

During oral argument, Judge John Nalbandian, appeared to adopt an argument presented by Metro Man, stating that the Board was “expanding its power” when it required the employer to bargain with the union over the pay increase in response to its pandemic-based staffing shortage. In response, the NLRB attorney attempted to clarify, claiming, “[t]he Board isn’t expanding its rule; the Board is interpreting its rule on a different set of facts, which perhaps has broader implications.” The attorney also argued that the permissible employer’s decision to increase pay during the emergency was separate from its decision of when the increase would end, which it could not unilaterally determine months later. In response, Judge John Bush pushed back, observing, “I think the benchmark that was set was it would end when Covid was out of the facility,” a reference to the employer’s original staff announcement that the increase would be in place as long as Covid patients were in the building.

During one exchange, the attorney for Metro Man provided a sobering reminder of the context in which the employer found itself during that emergency. In response to Judge Nalbandian’s question of why the employer couldn’t have emailed the union informing it about the pay and personnel changes, the attorney responded: “When you’re spending 12 hours a day trying to get people to pick up dead bodies and you’re going to 7-11 to get bags of ice, you don’t have a lot of time on your hands.” However, it is worth noting that the Administrative Law Judge specifically rejected a Metro Man employee’s testimony that she was unable to contact the union regarding the increase due to having no time, given she conceded she was able to use email and company phones in April and June.

Takeaways

Based on the exchanges between the panel and the parties, the panel appeared skeptical of the Board second-guessing the employer’s actions during a dire emergency. It remains to be seen whether the Sixth Circuit will uphold the Board’s ruling that Metro Man violated the NLRA. While these cases are difficult, with courts often being asked to revisit times of catastrophe to determine whether the parties acted in accordance with the law, hopefully, this case will provide more guidance as to when an employer needs to bargain over decisions made during an emergency, which aspects of those decisions need to be bargained, as well as when notice of such decisions is required. As always, we will continue to update you on these developments.

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