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Not So Fast: D.C. Circuit Resists Invitation to Reject NLRB Deference

Labor Relations Update on **July 9, 2024**

On July 5, 2024, in *Hospital de la Concepcion v. NLRB*, the D.C. Circuit was the first federal appeals court to weigh in on deference afforded to the National Labor Relations Board ("NLRB") in the wake of the landmark U.S. Supreme Court ruling in *Loper Bright Enterprises, et al. v. Raimondo, Secretary of Commerce, et al.* As we recently outlined here, the Supreme Court overturned "*Chevron* deference" in its June 28, 2024 ruling, doing away with 40-year precedent for courts tasked with interpreting ambiguous statutes administered by administrative agencies of deferring to the relevant agency's construction of a statute, now requiring courts to apply their own construction of the law in question.

However, when faced with the opportunity to follow suit and insert its own judgment on various issues in question, the D.C. Court reiterated deference was warranted when reviewing certain aspects of Board decisions.

Background

In March 2020, due to lockdown measures issued by the governor of Puerto Rico for COVID-19, Hospital de la Concepcion ("HDLC"), saw declining daily patient volumes. Based on financial forecasting indicating its operating expenses would soon surpass its revenues, HDLC informed its employees that it would suspend some employees without pay, reduce compensation of exempt employees, and reduce work schedules of others.

A representative of the union for four units of employees, including medical technologists and nurses, requested that HDLC (1) withdraw its decision to reduce unit employees' work schedules because it had not provided the union with notice or an opportunity bargain over the decision prior to implementation or (2) provide the union with information relevant to the decision. HDLC declined to withdraw its decision and only partially responded to the information requests.

An Administrative Law Judge ("ALJ") found that HDLC violated Sections 8(a)(1) and (5) of the National Labor Relations Act by failing to (1) bargain with the union and (2) provide the union with relevant requested information. The Board affirmed the ALJ's findings and conclusions, and ordered that HDLC, among other things, rescind its unilateral decision; provide the union with notice and opportunity to bargain over changes in unit employees' wages, hours or other terms and conditions of employment; and furnish the union with the information it requested.

HDLC challenged the Board's decision and order on several grounds, including that the relevant collective bargaining agreements ("CBAs") authorized it to take such unilateral action; it had no statutory obligation to respond to the union's information requests, but it adequately provided requested information; its failure to bargain was excusable under the economic exigency defense; and the Board's calculation of the employees' make-whole remedy was improper.

D.C. Circuit's Decision

The court articulated its standard of review of Board decisions, reiterating that a "very high degree of deference" was warranted, indicating it would set aside a Board order only "when it departs from established precedent without reasoned justification, or when the Board's factual determinations are not supported by substantial evidence."

The court acknowledged that the Board's interpretation of contract language was not owed special deference, but rather, the court would interpret contract language under "ordinary principles of contract law." Following those principles, the court held that the CBA did not grant HDLC the unilateral authority to make the changes at issue. The court explained that while the management rights clause in the CBA allowed unilateral changes to work shifts, this contractual right was not synonymous with the ability to change the total number of hours worked.

The court found the remainder of HDLC's arguments unavailing due to Board precedent or procedural missteps by HDLC.

- The court rejected HDLC's challenge regarding its response to the union's information requests on two bases: first, HDLC *did* have a duty to bargain over the decision, so it was obligated to provide the union with the information requested, and second, HDLC's partial substantive responses to some requests and asserted objections in response to the remaining requests were clearly deficient given the

information was relevant to a mandatory subject of bargaining.

- The court rejected HDLC's exigent circumstances defense because the case at issue was not a dire financial emergency, but rather a "gloomy economic outlook." The court noted that the employer's argument of expected sustained operating losses failed to overcome the high bar of Board precedent for economic exigency.
- Finally, the court held HDLC's argument that it had a sound arguable basis to unilaterally act was inapplicable because such analysis was reserved for contract modification cases, not unilateral change violations, and its challenge of the Board's make-whole remedy was waived due to its failure to object to the nature of the remedy in its answering brief before the Board.

Takeaways

While in stark contrast with the decision in *Loper*, the D.C. Circuit's decision was not completely unexpected. Supreme Court and lower federal court deference to the Board's interpretation of federal labor law is well-established, including decisions predating *Chevron.*

Additionally, the quasi-judicial nature of the Board is well-recognized, including in this decision, where the D.C. Circuit cited several Board decisions as the basis for its holdings. It is worth noting that the court did not completely defer to the Board, as it recognized its obligation to interpret contract language under ordinary principles of contract law and engaged in its own review of the management rights clause in the parties' CBA.

While the *Loper* decision has called many recent agency rules into jeopardy, the Board can breathe a brief sigh of relief that at least the D.C. Circuit—which has jurisdiction to hear any appeal of a NLRB decision—is not looking to engage in similar upending of the long-standing precedent of deferring to its decisions at the first chance it gets. It remains to be seen if Circuit Courts in other jurisdictions adopt a different view in light of *Loper* that could potentially create a split that leads to the Supreme Court reconsidering its standard of review for NLRB determinations.

We will continue to stay on top of these important developments.

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