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On the Rocks: Sixth Circuit Rejects Cemex NLRB Representation Framework at Distillery

Labor Relations Update on **March 9, 2026**

On March 6, 2026, the Sixth Circuit issued its decision in *Brown-Forman Corporation v. NLRB*, marking the first appellate rejection of the National Labor Relations Boards' ("NLRB" or "Board") *Cemex* framework. As previously reported, in August 2023, the Board issued *Cemex*, which upended 50 years of precedent by establishing a new framework for union recognition demands and lowering the bar for issuing remedial bargaining orders.

The Sixth Circuit's decision does not overturn the *Cemex* entirely—the NLRB will continue to apply *Cemex* until the Supreme Court or the Board reverses the decision. Still, the decision represents the first appellate crack in the novel framework and may hasten its expected reconsideration.

Background

Cemex drastically changed how unions qualify as the exclusive bargaining representative for a bargaining unit. Under *Cemex,* when confronted with a demand for recognition, employers must decide within two weeks whether to (a) accept recognition and bargain or (b) file an election petition to test the union's majority status. Additionally, *Cemex* replaced the longstanding *Gissel* standard for issuing bargaining orders. Under the new framework, if the Board finds that an employer committed unfair labor practices that frustrate a free, fair, and timely election, the Board will dismiss the election proceedings and issue a bargaining order as a default remedy.

Since *Cemex* was issued, many employers have challenged this framework.

Brown-Forman Corporation v. NLRB arose out of an organizing campaign at Brown-Forman's Woodford Reserve bourbon distillery in Kentucky. As the organizing campaign gained momentum, Brown-Forman announced compensation and benefit increases: the company implemented a $4-per-hour across-the-board raise, adjusted pay progression and merit increases, and allowed employees to save vacation hours around the holidays. The company also gave employees bottles of bourbon shortly before the vote.

The union lost the election decisively, 45-14. The Union filed objections, alleging the company committed multiple unfair labor practices that interfered with the election. The Board agreed and set aside the election.

Relying on *Cemex*, the Board issued a bargaining order requiring Brown-Forman to recognize and bargain with the union, without ordering a re-run election. The company appealed to the Sixth Circuit.

The Sixth Circuit's Holding

The Sixth Circuit agreed that substantial evidence supported the Board's finding that Brown-Forman committed unfair labor practices. The court found that the well-timed benefits—conferring what the employees wanted after learning of growing union support—were designed to coerce employees and discourage union membership.

However, the Sixth Circuit refused to enforce the bargaining order, holding that the *Cemex* opinion was "rulemaking under the guise of an adjudication." Critically, the court noted that the *Cemex* Board had already determined that the existing *Gissel* standard allowed it to resolve the parties' dispute—yet then proceeded to create an entirely new forward-looking standard derived from "decades of experience" rather than the case-specific facts.

The court stressed that while the Board can develop policy through adjudication, it cannot use adjudication to create a "hard-and-fast rule" of general applicability that does not serve its case-specific remedial responsibilities. The court noted that the *Cemex* standard was designed to generally deter future employer misconduct rather than remedy the specific dispute before the Board.

The court therefore granted Brown-Forman's petition for review, denied the Board's cross-petition for enforcement, and remanded for proceedings consistent with its opinion.

Judge Mathis, appointed by President Biden, dissented from the Opinion, arguing that the Board properly exercised its policymaking authority through adjudication. The dissent emphasized that Congress gave the Board broad discretion to choose between rulemaking and adjudication, and that the majority's approach "exalt[s] form over [administrative] necessity." Judge Mathis would have enforced the bargaining order, finding *Cemex* consistent with the Board's remedial authority and Supreme Court precedent in *Gissel.*

Takeaways

The Sixth Circuit's decision marks the first time a court of appeals has invalidated the *Cemex* bargaining order standard. Still, *Cemex* remains operative at the Board, which will likely continue applying it until overturned by the Supreme Court or—more likely—by the Board itself through adjudication or rulemaking.

The Board has been expected to overturn *Cemex* once a third Republican Board member is appointed—now, there are currently only two Republican Board members. Generally, as the Board recently reaffirmed, the NLRB continues to apply precedents unless it has a "a three-member majority to overrule it." It remains to be seen whether *Brown-Forman* hastens that reconsideration.

The Sixth Circuit's explanation that *Cemex* constituted improper "rulemaking under the guise of an adjudication" potentially serves as a warning to the NLRB regardless of which party controls the Board. Both Democratic and Republican-majority Boards have announced broad policy changes through adjudication rather than rulemaking. We will continue to monitor whether other circuits adopt this reasoning, which may push the Board toward greater use of its rulemaking authority.

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