Proskauer

Cemex Survives: Board Declines Chance to Overturn Novel Representation Framework

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

On March 25, 2026, the National Labor Relations Board issued a decision in *St. John's College*, Case 28-RM-337949, and declined to overturn the Board's August 2023 decision in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023). *Cemex* upended 50 years of precedent by establishing a new, easier way for unions to establish representation. The Board instead ruled on a narrower procedural matter – broadening how quickly an employer must file a petition to test a union's majority status after receiving a demand for recognition – and did not directly address whether *Cemex* should be overturned.

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 (an "RM 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 novel framework.

The Case

In *St. John's College*, the Union demanded recognition in December 2023. Over three months later, the employer filed an election petition with the Board to test the Union's asserted majority status. The Region dismissed St. John's petition since it was filed more than 14 days after the Union's demand for recognition. The employer filed a Request for Review to the Board.

The Board overturned the Region's determination, holding that St. John's failure to file a petition within two weeks did not require its dismissal because *Cemex* does not generally limit an employer's ability to file an RM petition. The Board clarified that *Cemex*'s two week filing deadline only applied where the filing of an RM petition may shield an employer from unfair labor practice liability under *Cemex* – e.g., where an employer is refusing to bargain with a union – and the issue of that deadline was best left open until it could be addressed in a later unfair labor practice proceeding.

The Board also declined the employer's invitation to overturn *Cemex*, instead stating that those arguments are "not properly cognizable in this representation proceeding." Since *Cemex* was an unfair labor practice case, it appears the Board likely will only address its continued applicability in that context.

Takeaways

Cemex lives on. Notwithstanding the Sixth Circuit's recent rejection of the *Cemex* framework in *Brown-Forman*, as reported on here, the framework continues to apply at the Board.

While many expected that the Board in Trump's second administration would quickly overturn *Cemex*, likely via a representation petition – the procedural posture where the issue would first come up – the decision in *St. John's College* indicts just the opposite. The Board's approach here instead appears consistent with the Board's broader current goal of clearing its substantial backlog, which has led to the Board ruling narrowly in some recent cases.

The Board did somewhat expand an employer's ability to file an RM petition to test a union's majority status more than two weeks after it received a demand for recognition, but left open the key question of whether a "late" filed RM petition would serve as a defense to a later unfair labor practice charge. We will need to wait for a later unfair labor practice case in order to gain clarity on this important question.

For the time being, *Cemex* remains good law.

We will continue monitoring the issue for any further guidance, and we are here to assist with practical ways to respond to this uncertainty.

Related Professionals

- **Paul Salvatore**
  Partner
- **Joshua S. Fox**
  Partner
- **Yonatan Grossman-Boder**
  Special Labor Relations Counsel
- **Justin Chuang**
  Associate