Proskauer

The NLRB Allows Employer and Union to Agree to Contract Framework as Part of Neutrality Agreement

December 10, 2010

In a long-watched case, the National Labor Relations Board ("Board") has dismissed a complaint that an auto parts manufacturer entered into an unlawful letter of agreement ("LOA") with a union establishing ground rules for union organizing, voluntary recognition and substantive issues to be addressed in collective bargaining for its yet-to-be-organized employees. In its 2-1 decision, the Board found that the Dana Corporation ("Dana") and the United Auto Workers union ("UAW") did *not* violate the unorganized employees' rights by signing the LOA even though the UAW did not represent the employees at the time of the agreement. The decision, in which Board Member Becker recused himself and Board Member Hayes dissented, is a significant departure from the Board's established precedent.

Background

In 2002, the UAW sought to organize 300 employees at Dana's St. Johns, Michigan plant. Dana and the UAW had a long-standing relationship covering over two thousand employees at nine of the company's other plants, and Dana voluntarily entered into the LOA.

The LOA contained many provisions that are typical in card-check/neutrality agreements, including providing a list of employee addresses to start the representation process, union access to the facility to meet with employees in nonwork areas, and a guarantee that there would be no strikes or lockouts from the time the UAW requested an employee list until they reached a negotiated collective bargaining agreement.

Unlike typical agreements, this LOA also established a framework for future collective bargaining agreements. In particular, Dana and the UAW agreed that any resulting collective bargaining agreement would include minimum classifications, flexible compensation, mandatory overtime, competitive health-care costs, and a minimum four year term. Finally, the LOA provided for interest arbitration on any issue not resolved in negotiations.

In December 2003, after the UAW requested a list of employees at the St. Johns facility, three employees filed an unfair labor practice charge with the Detroit regional office of the Board. The employees claimed that the pre-recognition LOA violated the National Labor Relations Act.

In September 2004, the general counsel issued a complaint alleging that, by "entering into" and "maintain[ing]" the LOA, Dana gave unlawful assistance to the union in violation of Section 8(a)(2) and (1) and the union coerced employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the National Labor Relations Act. However, an NLRB Administrative Law Judge dismissed the complaint in April 2005, on both procedural and substantive grounds.

The NLRB Decision

It has long been understood that an employer cannot lawfully enter into any type of agreement with a union covering wages, hours, or other terms and conditions of employment prior to the Union establishing that it represents a majority of the employer's workforce in a unit appropriate for bargaining.

In *International Ladies' Garment Workers Union v. NLRB (Bernard-Altman)*, 366 U.S. 731 (1961), the Supreme Court found that the employer violated the law by signing a collective bargaining agreement with the union ending a strike before the union had obtained majority support. By entering into the agreement, the court found the employer unlawfully recognized a minority union as the exclusive bargaining representative, and the union unlawfully accepted the recognition.

In *Majestic Weaving*, 147 NLRB 859 (1964), the Board relied on *Bernard -Altman* to determine an employer unlawfully recognized a union which did not have majority support, and negotiated the terms of a collective bargaining agreement with that union prior to it obtaining majority status.

In the *Dana* decision, Chairman Liebman and Member Pearce have held that these established precedents were not applicable to the facts of this case. The Board distinguished *Majestic Weaving* because the LOA established only a "framework for future collective bargaining," whereas in *Majestic Weaving*, the full collective bargaining agreement was negotiated and signed (conditioned on the union's obtaining majority support). The Board further held in *Dana* that the LOA was not a grant of exclusive recognition to the union because it only set forth "principles that would inform future bargaining on particular topics."

The Board made clear that this new position was rooted in a desire to *encourage* employers to voluntarily recognize unions. Indeed, the decision makes clear that "The Board should hesitate before creating new obstacles to voluntary recognition, as adopting the General Counsel's position would do." Moreover, the Board recognized (and supported the idea) that "[i]n practice, an employer's willingness to voluntarily recognize a union may turn on the employer's ability to predict the consequences of doing so."

That said, the Board refused to create a specific bright line rule as to what employers and Unions could agree prior to a legitimate, majority recognition. Instead, the Board emphasized that "each case must stand or fall on its own particular facts."

What The Decision Means for Employers

This case gives an additional tool to unions, and willing employers, who wish to provide additional definition to the organizing process and to the collective bargaining which follows. However, as Board member Hayes stated in his dissent, this case also threatens to undermine the role and interests of employees in the union representation process, to the extent that they view their employer's entry into such an agreement as giving the union a "cloak of authority", thereby inhibiting employee free choice.

Finally, the case is also an example of the Board's ability to create new law by distinguishing established case law based on factual nuances rather than acknowledging that it is overruling long-standing precedent.

Related Professionals

- **Mark Theodore**
  Partner
- **Michael J. Lebowich**
  Partner
- **Mark W. Batten**
  Partner