Recent NLRB Decision Reinforces that Most "Bannering" Does Not Violate the NLRA

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By Doug A. Hass

Over the past 12 months, the National Labor Relations Board has considered whether certain union activities directed at a "secondary employer"—an employer doing business with the "primary employer" with which the union has a dispute—violated the National Labor Relations Act (NLRA). Section 8(b)(4)(ii)(B) of the NLRA generally prohibits "secondary activities" that are threatening, coercive, or restraining and are aimed at forcing a secondary employer to stop doing business with another person or company. Since September 2010, the Board has decided in several cases that "bannering," a union practice of displaying a large banner outside of a secondary employer's location, does not violate this secondary activity prohibition in the NLRA. This past spring, the Board extended its reasoning to cover other types of bannering as well, such as the display of large inflatable rats or similar balloons. This month, a majority of the Board again reaffirmed the broad, although not unlimited, protection for bannering under the NLRA and First Amendment.

In the first of a group of decisions released in late September 2010, *United Brotherhood of Carpenters Local 1506 (Eliason & Knuth of Arizona)*, the Board dismissed a complaint brought by four construction contractors that had an ongoing dispute with a Carpenters union local. In support of its efforts, the union had displayed banners at three secondary sites where the construction contractors were working. The union placed the banners—each three to four feet high and as long as 20 feet—outside of the entrances to the secondary employers' work sites. Union members held the banners on public sidewalks or rights-of-way, but did not otherwise patrol, carry picket signs, or interfere with the secondary employers' work sites. The Board dismissed unfair labor practice charges, finding that "nonconfrontational" displays of stationary banners differed from traditional picketing and similar activities. The Board found no support in either the text of the NLRA or the legislative history to suggest that Congress intended Section 8(b)(4)(ii)(B) to prohibit the peaceful, stationary display of a banner. In addition, the Board's majority cited a desire to avoid the serious First Amendment issues raised by any prohibition on the use of banners, specifically finding that the union's display of the banners was protected speech under the First Amendment.

As we reported in a previous FR Alert, on May 26, 2011, the Board extended this precedent further. In *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, the Board held that neither displaying a 16-foot-tall, 12-foot-wide balloon rat nor holding a leaflet constituted picketing under the NLRA. Returning to its First Amendment theme from *Eliason*, the majority also drew an analogy to the Supreme Court's decision in *Snyder v. Phelps* that provided First Amendment protection to church members picketing a military funeral.

In its most recent decision on the topic, on August 11, 2011, the Board reaffirmed its views on bannering by finding that a union did not violate the NLRA by displaying a large stationary banner that proclaimed "shame" on various secondary employers during a labor dispute with a construction company. In *Carpenters & Joiners of America, Local 1827*, several unions had disputes with construction firms over wages and benefits, and conducted bannering activities at area companies that did business with the construction firms, including State Farm, UPS, and a local Hyatt hotel. For

example, the union displayed banners that stated “State Farm Insurance, a Greedy Corporate Citizen” near State Farm offices in Denver, but kept them on public sidewalks at least 24 feet from the offices’ entrances. The banners did not mention a labor dispute, but union agents passed out leaflets explaining their claim against the construction company. The Board found no evidence that the union agents had blocked access to State Farm’s offices, and reiterated the First Amendment protection, declining “to place labor organizations’ speech into a special and disfavored category.” Again citing *Eliason*, the majority found that the unions’ bannering was not picketing and did not “threaten, coerce, or restrain” the secondary employers.

These rulings continue to solidify unions’ ability to deploy numerous tactics against secondary employers, with few restrictions. Provided that any displays are stationary and at least somewhat removed from the immediate entrance to the secondary employer’s place of business, the Board’s recent rulings give unions almost unfettered, First Amendment-protected rights to display banners, balloons, and similar messages. The most recent decision affirms that unions can involve innocent secondary employers in their labor disputes, regardless of the likelihood that the general public might mistakenly assume that the union has a dispute with that employer.

While the Board has given broad protection to union bannering, some limits remain. Secondary employers who face bannering action should take careful note of the union’s activities, and keep a detailed log of any resulting effects on company operations. Under certain circumstances, secondary employers may still be able to take legal action against the union, despite the Board’s broad rulings.

More Information

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