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NLRB ISSUES RAFT OF PRO-UNION DECISIONS AS TIME EXPIRES

By Timothy Ryan

In the last days of Summer 2016, as the political make-up of the National Labor Relations Board (NLRB) was about to change, the Board suddenly issued 20 decisions in a single week. The reason for this unusual output was not some legal requirement or particular deadline but rather a long held tradition at the Board.

NLRB member Kent Hirozawa's term ended August 27, 2016. Hirozawa was a Democrat appointed by President Obama to the five-member Board. With the departure of member Harry Johnson last year and the recent departure of Hirozawa, the Board was reduced from its usual five members to three. Two of those members are Democrats, and one is a Republican. The Supreme Court has found that three members

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constitute a quorum, and, thus, the Board can continue to make binding decisions. However, it has long been the practice of the Board to not make major changes in the law without the support of at least three Board members. With the departure of member Hirozawa, the now three-member Board is ideologically split between two Democrats and one Republican. It seems unlikely that any major changes will be made to NLRB law with three votes supporting the change until new members are appointed by the next President. This tradition of requiring three members to change existing law must have been on the minds of the Board members as the summer, and Mr. Hirozawa's term, came to an end. As the number of remaining days of Mr. Hirozawa's term shortened, the Board engaged in a flurry of activity, issuing decisions making major changes in the law that many view as strongly pro-union and which are likely to have real significance to employers.

In *United States Postal Service*, 364 NLRB No. 116 (August 27, 2016), on Hirozawa's last day on the job, the Board reversed years of precedent and substantially limited the authority of its administrative law judges. Previously, administrative law judges (ALJ) could approve settlements of unfair labor practice complaints, even if the General Counsel of the NLRB or the charging party objected. Provided that the settlement proposed by an employer "substantially remedied" the violations alleged in a complaint, and as long as the administrative law judge concluded that the settlement was reasonable given the nature of the violations alleged and the litigation risks, he or she had the authority to approve a settlement, even if the General Counsel or the charging party didn't think it was fair or appropriate.

There are times in litigation when the settlement of a case should make sense to all parties. However, sometimes the NLRB's general counsel or a charging party will refuse to settle on any terms other than their own. In those situations, an administrative law judge was able to take the proposed settlement over the objection of the general counsel or a charging party by applying the factors noted above. That authority is gone.

In *U.S. Postal Service*, the Board abandoned precedent and held that an ALJ cannot approve a settlement over the objection of the general counsel or a charging party unless the settlement provides "full relief".

The Board's decision in *U.S. Postal Service* will give the general counsel and a charging party much more leverage in settlement negotiations and may cause more cases to go to trial when a more appropriate result may have been achieved with a good faith settlement approved by an ALJ.

In *Columbia University*, 364 NLRB No. 90 (August 29, 2016), the Board tackled, again, the issue of whether student teaching assistants in private universities are employees covered by the National Labor Relations Act and are therefore able to unionize.

This is not the first time that the Board has grappled with this issue. In 2000, in the last year of the Clinton Administration, in a case involving New York University, the NLRB concluded that graduate assistants were in fact employees. Four years later, during the Bush Administration, in a case involving Brown University, the Board reversed its position and held that graduate teaching and research assistants were not employees because their relationship to the school was "primarily educational". In its late summer decision in *Columbia University*, the Board concluded that its previous decision in the Brown case was wrong and that its decision in that case to treat graduate assistants as non-employees "deprived an entire category of workers of the protection of the Act, without a convincing justification in either the statutory language or

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the policies of the Act. Instead, in *Columbia*, the Board concluded that the language of the Act "supports the conclusion that student assistants who are common-law employees are covered by the Act, unless compelling and statutory policy considerations require an exception".

Phillip Miscimarra, the only dissenter in the case, and the Board's only Republican, expressed his concern that treating students as employees and allowing unions to represent them in collective bargaining would detract from student education. Miscimarra also worried about "the risks and uncertainties associated with collective bargaining—including the risk of breakdown and resort to economic weapons—governing the single most important financial decision that students and their families will ever make."

The United Auto Workers, the union representing the Columbia graduate assistants, has announced that it expects graduate assistants at other Ivy League schools such as Harvard and Yale to follow Columbia's lead.

Last year, the Board issued a decision that radically expanded the joint employer doctrine. *Browning Ferris Industries*, 362 NLRB No. 186 (2015). Under established law, a joint employer is generally one who does not hire, fire, supervise, or determine wages and benefits of another employer's employees but who still bears responsibilities to those employees under the National Labor Relations Act. Prior to *Browning*, the test of whether two employers, for example, a business using an independent staffing agency, were joint employers and could be combined in a single unit for collective bargaining purposes was if they "shared or codetermined matters governing the essential terms and conditions of employment". In *Browning*, the Board expanded its joint employer doctrine to include not just employers who do exercise authority to control terms and conditions of employment of another employer's employees but also those who merely have the *right* to do so, even if unexercised.

Browning set the stage for the Board's decision in late August in *Miller & Anderson*, 364 NLRB No. 39 (July 11, 2016). *Miller* reversed years of precedent by holding that the Board would no longer require consent of both employers to include jointly employed employees in a single unit for a union election.

With the one-two punch of *Browning* and *Miller*, an employer using employees of another employer in its business, for example, cleaning or janitorial services, caterers, management companies which staff and operate its business, and staffing agencies providing additional help, runs the risk that it may be found to be a joint employer of these employees. If so, without their consent, the employer may find itself at a bargaining table negotiating with a union over the terms and conditions of its vendors' employees.

There are other cases in which the Board made last minute changes to existing law before Member Hirozawa ended his term. For example:

- In *King Soopers, Inc.*, 364 NLRB No. 93 (August 25, 2016), the Board changed its practice of compensating workers who have been unlawfully terminated. The Board's prior rule, since 1938, had been that the expenses incurred searching for a new job were treated as off sets to interim earnings, and then that amount was subtracted from lost wages to determine the amount of back pay. Under the Board's new approach, job search, moving, and training expenses are separate elements of damages, not merely deductions from interim earnings, and must be reimbursed by an employer who is determined to have unlawfully terminated a worker.

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- In *Total Security Management Illinois*, 364 NLRB No.106 (August 26, 2016), the Board concluded that newly organized employers who have not yet negotiated a collective bargaining agreement must give the union notice of and an opportunity to bargain over serious discipline it intends to impose on an employee before it imposes the discipline. The risk in not negotiating such discipline is that the NLRB may find the discipline illegal.

Is there more to come before the presidential election? Tradition at the Board would require that the Board have at least three members who would sign off on a decision making a major change in the law. With two Democratic and one Republican member, it seems unlikely that the Board could put together a three-person decision that would unanimously change existing law. On the other hand, the current Board has been aggressively pro-union and might just decide to break with tradition and make changes while it can with only two votes.

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