NLRB UPDATE: Key NLRB Precedents Likely to Fall Under Liebman Board

9/14/2009

In February 2009, President Obama appointed long-time Board member Wilma Liebman as Chairperson of the National Labor Relations Board (NLRB). As a member of the Bush-era Board under former Chairperson Robert Battista, Ms. Liebman dissented from most of the critical pro-employer decisions issued under the Battista Board. Analysis of Liebman's dissenting opinions provides a legal roadmap – charting the likely course the Liebman Board will take if presented with the opportunity to reconsider the issues addressed in these critical decisions.

Ford and Harrison's NLRB UPDATE is a 10-part series, analyzing critical decisions issued by the Bush-appointed Battista Board that likely will be overturned in the next few years if reconsidered by the Obama-appointed Liebman Board. Please see our web site at http://www.fordharrison.com for the earlier Parts of this series.

NLRB UPDATE PART VII: LIEBMAN BOARD MAY "RE-CLARIFY" THE REINSTATEMENT RIGHTS OF ECONOMIC STRIKERS

Jones Plastic & Engineering Co., 351 NLRB No. 11 (September 27, 2007).

Battista Board Clarifies the Reinstatement Rights of Economic Strikers

In *Jones Plastic & Engineering Co.*, 351 NLRB 61 (2007), the Battista Board clarified the reinstatement rights of economic strikers by holding that an employer can lawfully decline to reinstate economic strikers even where the employer had classified the replacement workers as "at-will" employees. According to the Board majority, a replacement worker's "at-will status" is not necessarily inconsistent with "permanent replacement status." Accordingly, the employer is under no obligation to displace the permanent replacement even if the economic striker makes an unconditional offer to return to work.

Overview

In 2001, the United Steelworkers organized the production and maintenance employees at Jones Plastic's facility in Camden, Tennessee. After failing to reach agreement with the employer, the Steelworkers called for an economic strike. Jones Plastic continued operating through the strike, in part by hiring replacement workers. The union later made an unconditional offer for all the economic strikers to return to work. Jones Plastic rejected the strikers' offers to return to work claiming it had permanently replaced the striking employees. The union filed unfair practice charges against Jones Plastic, claiming the employer failed to return the strikers to work in violation of Sections 8(a)(1)

and (3) of the Act.

Typically, under long-standing Board precedent, an economic striker who unconditionally offers to return to work is entitled to immediate reinstatement unless the employer has hired a "permanent replacement" for the striker in order to continue operating during the strike. Moreover, at the conclusion of the strike, an employer is not required to displace permanent replacements in favor of returning strikers. However, permanent replacement status is an affirmative defense that the employer must establish by showing a mutual understanding that the employer hired the replacement workers as "permanent replacements."

Because Jones Plastic hired the replacements as "at-will employees" who could be terminated at any time, the union argued that the strike replacements could not be "permanent" replacements. In making this argument, the union relied on *Target Rock*, 324 NLRB 373 (1997), a Clinton-era decision in which the Board had held that proof of at-will employment did not support an employer's position that its strike replacement workers were "permanent replacements" as recognized by federal labor law. Without fully endorsing the union's position, the General Counsel noted that a broad reading of *Target Rock* arguably could deprive at-will replacement employees of "permanent replacement" status.

Accordingly, the General Counsel petitioned the Board to clarify the extent to which the at-will status of replacement workers forecloses a finding of permanent replacement status.

Majority Holding in Jones Plastic

In *Jones Plastic & Engineering Co.*, the Board held that hiring strike replacement workers as "at-will employees" does not undermine the employees' status as "permanent strike replacements." Thus, the Board found that the employer could lawfully decline to reinstate economic strikers even though the employer had classified the replacement workers as "at-will" employees.

According to the Board majority, the employer's issuance of at-will disclaimers informing the replacement employees their employment was for "no definite period" and could be terminated for "any reason, at any time, with or without cause" did not undermine their status as permanent replacements because independent evidence unequivocally established that the employer had hired the employees as permanent strike replacements. More specifically, the employer issued forms to the replacement employees confirming their status as permanent replacements and, in many cases, naming the striker whom the individual was replacing. The employer also informed the strikers it had begun to hire replacement workers and advised that they risked permanent replacement if they did not return to work. Based on the employer's actions, a 3-2 Board majority concluded the replacement employees understood the employer would not displace them by returning strikers at the end of the strike – which is the meaning of "permanence" in the strike context.

The Dissent Criticizes the Majority as Overreaching To Overturn Precedent

Members Liebman and Walsh dissented. *See Jones Plastics*, 351 NLRB at 67. According to the dissent, the majority was so "[a]nxious to make a show of

reversing precedent" that it misread *Target Rock*. According to the dissent:

Each step in the majority's analysis is erroneous. *Target Rock* does not state that an employer's declaration that replacements are "at-will employees" precludes a finding that those replacements are permanent. Nor has that ever been the law. Rather, the question is whether the employer can establish that it and the replacement employees shared a mutual understanding that the replacements were permanent.

Id. at 67 (footnote omitted).

Nevertheless, the dissent concluded that that Jones Plastic unlawfully failed to reinstate the strikers after they made an unconditional offer to return to work. According to the dissent, merely informing strike replacements that they are "permanent replacements" does not establish a "mutual understanding that the replacements were permanent." Thus, the dissent found that, despite using the term "permanent replacement," the employer nonetheless "undercut that statement by failing to give the replacements any assurance that they had rights vis-à-vis the strikers."

Significance for Employers

Based on the dissent in *Jones Plastic & Engineering Co*., if the Liebman Board has the opportunity to review the reinstatement rights afforded to economic strikers, employers will need to establish unequivocally the status of the replacement workers as "permanent replacements." In that regard, it is not enough for the employer merely to state it is hiring the employees as "permanent replacements." Rather, the dissent apparently suggests that the designation as "permanent employee" must be accompanied by an explanation of what "permanent replacement" means.

Thus, when hiring "permanent replacements" during an economic strike, employers should expressly inform the replacement workers that their status as "permanent replacements" means the employer will not displace them with returning strikers either because the strike ends or because a former striker makes an unconditional offer to return to work.

For more information concerning the Ford & Harrison NLRB Update and the other precedents the Liebman Board will likely overturn, contact the Ford & Harrison attorney with whom you usually work, or the author of this Alert, John Bowen, a partner in our Minneapolis office at jbowen@fordharrison.com or 612-486-1703.

LOOK FOR PART VIII OF NLRB UPDATE NEXT WEEK