Ogletree Deakins

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The Practical NLRB Advisor

Another NLRB reversal: Independent-contractor standard restored

In this Issue

A Teamsters union local wants to represent 90 MegaTrans shuttle van drivers who transport passengers to and from Newark Liberty International Airport. The drivers work under a franchise agreement with MegaTrans Northeast (MTN), an independent franchise of MegaTrans America, which has licensed MTN to operate a MegaTrans shuttle service in the Newark, New Jersey area.

Previously, MTN hired full-time employees as shuttle drivers. The drivers drove company-owned vans, were paid hourly wages, from which payroll taxes were withheld, received fringe benefits, sick time and vacation pay, and were assigned to specific shifts in accordance with company needs and passenger demand. However, in 2013, MTN adopted a franchise model, and now contracts with driver franchisees. As business owners, the driver franchisees retain the profits of their enterprise and have complete control over their work schedules and routes.

For the right to operate an MTN airport franchise, drivers sign the company's non-negotiable franchise agreement, which expressly states that drivers are non-employee franchisees and independent business operators. The drivers are required to pay a one-time franchise fee of $500. In addition, they complete a combined 50 hours of online and on-the-road training. A flat weekly fee of $575 entitles franchisees to utilize MTN's proprietary dispatch software and GPS

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BRIAN IN BRIEF

A number of management-side observers are beginning to express frustration with the pace of change at the National Labor Relations Board (NLRB). Many believed that, once in place, the new Board majority would immediately roll back the multiple excesses of its predecessor. Yet, a large number of the Obama Board's more radical and controversial decisions and actions still remain intact. Like most hopes, this one has not survived its initial contact with reality.

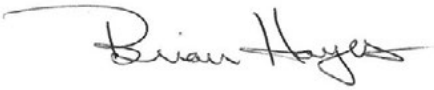
That reality has erected a number of roadblocks to the Board's progress. First, the Board sets policy almost exclusively through its decisions and can only decide issues in "live" cases. Since unions file the vast majority of all unfair labor practice claims and election petitions, they effectively control which cases reach the Board. Fearing adverse results from the current majority, unions have sought to deprive the Board of its decisional oxygen. The recent drop in initial case filings and the withdrawal of appeals by unions are symptomatic of this strategy.

Second, the sheer volume of precedent that was reversed by the Obama Board makes the task even more daunting. By one estimate, more than 4,000 years of precedent had been jettisoned. Third, the new majority has been dogged by extraneous issues ranging from recusal and ethics claims to a hostile House caucus. Lastly, the Board's own decision to adopt the most aggressive rulemaking agenda in the agency's history has impeded its decisional output.

On the plus side, if the multiple rulemaking efforts are successfully completed, the current Board may achieve an unmatched degree of doctrinal stability in several critical areas. Minimizing the prospect of future ideological flip-flopping could prove to be the Trump Board's greatest legacy. On the minus side, however, rulemaking is an extraordinarily time-consuming process. It is even more difficult at the NLRB since the agency has only rarely exercised its rulemaking authority and, thus, has little institutional knowledge or experience with what is a complex procedure.

As this issue of the *Practical NLRB Advisor* details, we see that the current Board can take the rulemaking walk and still chew decisional gum at the same time. For example, the decision in *SuperShuttle* is one of great significance with respect to the critical issue of independent-contractor status. If the current Board can summon up the time and resources to complete the extensive rulemaking agenda described in this issue and also push out reversals in some Obama-Board marquee cases, it may yet fulfil its expectations.

Sincerely,



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About Ogletree Deakins' *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

Ogletree Deakins' *Practical NLRB Advisor* seeks to inform clients of the critical issues that arise under the National Labor Relations Act and to suggest practical strategies for working successfully with the Board. The firm's veteran traditional labor attorneys will update you on the critical issues in NLRB practice with practical, "how to" advice and an insider's perspective. Assisting us in this venture are the editors of Wolters Kluwer Legal and Regulatory Solutions' *Employment Law Daily.*

The *Practical NLRB Advisor* does not provide legal advice. However, it does seek to alert employers of the myriad issues and challenges that arise in this area of practice so that they can timely consult with their attorneys about specific legal concerns.

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device, and also covers MTN's administrative and payment processing costs. Utilization of the dispatch software is required under the franchise agreement.

Franchisees bid for customer pickup requests through MTN's dispatch system, and they are free to accept or decline a trip. MTN sets passenger fares, and franchisees may not deviate from those rates. Franchisees turn in all receipts to MTN every week; MTN then issues a reimbursement check for fares earned in excess of the franchisees' weekly fees. In addition to accepting assignments through the dispatch system, franchisees have the option of bidding for additional hotel "circuits," which provide continuous shuttle service from area hotels to the airport.

The franchise agreement imposes certain obligations on the franchisees. For example, they are restricted from using other rideshare services or a cell phone to solicit customers. They may use only MTN-approved equipment and uniforms. Although they purchase their own vans, which cost about $30,000, MTN requires the vans to be of a specific make and model, to be painted in the purple and yellow MegaTrans color scheme, and to bear the company name and logo, for which drivers pay a $250 decal fee. MTN inspects franchisee vehicles six times a year and reserves the right to inspect a vehicle at any other time. Franchisees must purchase insurance through MTN's designated insurer and indemnify MTN against liability for claims arising from franchisees' actions. Franchisees pay their own gas, tolls, and maintenance costs.

Franchisees may hire relief drivers to operate their shuttle vans, but the franchisee must be the principal driver of the vehicle, and the relief driver must be under the franchisee's direct supervision. A franchisee must give written notice to MTN when hiring a relief driver, and the driver must complete MTN's training program and satisfy other eligibility criteria. MTN is otherwise not involved in the relationship between franchisees and their relief drivers.

Under the terms of the franchise agreement, MTN may terminate a franchisee's contract for misconduct. The agreement lists 25 examples of conduct for which a contract may be terminated, such as excessive passenger complaints, falsifying driving records, or working for a competitor. A franchisee that violates a conduct rule must pay liquidated damages to MTN.

In addition to the franchise agreement, franchisees must comply with the terms of MTN's contract with the Newark airport authority, a quasi-public agency. The 100-page document sets forth extensive requirements dictating how MTN must operate its shuttle operations. Franchisees must obtain a permit issued by airport operations, be screened for drug and alcohol use, undergo criminal and driving history background checks as required by the U.S. Department of Transportation, and complete further training on permit requirements, customer service, and disciplinary guidelines, among other mandates. The airport contract also requires the franchisees to wear a uniform identifying themselves as representatives of MegaTrans and prohibits them from independently soliciting passengers at the airport. The franchisees must pick up passengers within 15 minutes of a pickup request, provide every passenger with a receipt, maintain a passenger log and customer complaint procedure, drive in a "safe and competent manner," and keep their vehicles in excellent condition. Finally, the airport contract provides that franchisees are to act in a courteous and professional manner, avoid foul language and unruly conduct, and refrain from consuming food or drink in plain sight.

The union has filed an election petition with the National Labor Relations Board (NLRB) contending that the drivers are not independent-contractor "franchisees" but are, in fact, statutory employees entitled to organize under the National Labor Relations Act (NLRA). Will the NLRB regional director issue a direction of election?

Entrepreneurs aren't employees. Two years ago, the NLRB's regional director, being obliged to follow then-current Board law, would likely have called for a representation election. The NLRB had recently issued a decision in *FedEx Home Delivery* that "refined" the Board's independent-contractor standard, minimizing the weight of *entrepreneurial opportunity* as a factor in analyzing whether an individual is an "employee" within the meaning of Section 2(3) of the NLRA or an independent contractor, excluded from coverage under the Act. According to the divided 2014 ruling, an individual's opportunity for financial gain (or loss) was just one subordinate element of *another* factor: whether the worker renders service to the putative employer "as part of an independent business."

However, on January 25, 2019, the current four-member NLRB issued a full Board decision abandoning the

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Obama-era "refinement" and restoring the Board's long-standing test of independent-contractor status. In *SuperShuttle DFW, Inc.*, the Republican majority affirmed the importance of entrepreneurial opportunity to the analysis—clarifying, in fact, that entrepreneurial opportunity is the *primary* determinant of independent-contractor status under the Act.

"The Board majority's decision in *FedEx* did far more than merely 'refine' the common-law independent contractor test," the Board majority wrote in *SuperShuttle*, quoting the precedential ruling: it "'fundamentally shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic realities, i.e., a test that greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of 'right to control' factors relevant to perceived economic dependency.'" Notably, the U.S. Court of Appeals for the District of Columbia Circuit had previously denied the Board's petition for enforcement in *FedEx Home Delivery*, pointing out that entrepreneurial opportunity was an "animating principle" of the analysis and a "more accurate proxy" to capture "the distinction between an employee and an independent contractor."

As the majority explained, "entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain. Indeed, employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa."

Informed by entrepreneurial opportunity. Historically, the NLRB has looked at a number of factors when considering whether an individual is an independent contractor. With *FedEx Home Delivery*, the analysis focused on the "employer control" side of the proverbial coin. Thus, in deciding whether the driver franchisees in our hypothetical "MegaTrans" franchise are statutory employees under that analysis, considerable weight would have been placed on the fact that the drivers perform the "core" of MTN's business, i.e., transporting passengers. Moreover, the contractual expectations placed on franchisees might be construed as evidence of employer-like control over the franchisees' work. Indeed, Member Lauren McFerran, the lone Democratic holdover from the *FedEx Home Delivery* Board, emphasized these points in dissenting from the majority's finding that the shuttle van drivers in *SuperShuttle* were independent contractors.

However, when the facts of our MTN hypothetical are viewed through the "prism" of entrepreneurial opportunity, a different picture emerges—one of independent business operators exercising significant control:

- The franchisees retain all of the profits of their business and also assume the risk of loss.
- They are also entirely free to set their own schedules and to decide which passengers to service. Apart from setting baseline performance expectations under the franchise agreement, MTN exercises no control over the drivers and provides no day-to-day direction or supervision.
- The drivers supply their own shuttle vans—the primary instrumentality of their work.
- They have the ability to earn more income by fulfilling more passenger requests, bidding for hotel circuits, and hiring drivers to operate their vehicles for additional hours.

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The common-law factors

- The extent of control that, by the agreement, the master may exercise over the details of the work
- Whether or not the one employed is engaged in a distinct occupation or business
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision
- The skill required in the particular occupation
- Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work
- The length of time for which the person is employed
- The method of payment, whether by the time or by the job
- Whether or not the work is part of the regular business of the employer
- Whether or not the parties believe they are creating the relation of master and servant
- Whether the principal is or is not in business

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Thus, under the *SuperShuttle* standard, the regional director would likely conclude that the MTN franchisees are independent contractors, not MTN employees, and deny the Teamsters' election petition.

***SuperShuttle* takeaways.** The *SuperShuttle* decision marks a significant reversal of Obama-era decisional law by the NLRB. It involves a particularly critical legal issue in today's economy. It is obviously significant in the context of traditional labor law and may well have a spillover effect in employment law generally. The ruling is decidedly favorable to businesses, particularly to those in the growing gig economy sector and those with business models that rely on the services of independent entrepreneurs. The decision enables these businesses to contract with individual entrepreneurs with greater confidence that they will not unwittingly be taking on statutory employees, at least in the eyes of the NLRB. As a consequence, they become less vulnerable to union organizing, the disruptive effects of labor picketing, or the risk of liability for unfair labor practice charges.

The NLRB made clear, however, that it did not intend to "mechanically apply the entrepreneurial opportunity principle to each common-law factor in every case," pointing out that an analysis of independent-contractor status is intended to be "qualitative, rather than strictly quantitative" and is one that is invariably fact-specific. Thus, businesses must continue to exercise caution when contracting with putative independent contractors and when structuring independent-contractor relationships and agreements. A business may want to evaluate all the circumstances of its relationship and carefully draft appropriate agreements and contracts.

Finally, it must be kept in mind that the *SuperShuttle* decision addresses independent-contractor status *under the NLRA only*. The maddening reality for employers is that there are a number of different tests for independent-contractor status and the tests vary based on the statute in question and the regulatory agency making the analysis. For example, the U.S. Department of Labor has recently issued a rulemaking containing revised guidance on how independent contractors are to be defined under the Fair Labor Standards Act and the Internal Revenue Service in recent years has reframed its own independent-contractor test. The business community must also be wary of state agencies, many of which aggressively pursue allegations of independent-contractor misclassification in an effort to fill state coffers with employment tax dollars. ■

Serving other "masters"

Our MTN scenario also illustrates a factor that has often been misconstrued, or caused confusion, in analyzing relationships involving the transportation industry or other heavily regulated businesses. Thus, in those instances, as in our hypothetical, the franchise agreements typically impose a number of rules and restrictions on the franchisee. In most instances, this is because the work activity is one that is subject to regulation by the state or one of its regulatory authorities.

"Some of the rules under which these independent contractors operate do not originate with the putative employer. They are simply imposed by the state transportation authority or other regulatory body through the franchise holder," notes C. Thomas Davis, co-chair of Ogletree Deakins' Traditional Labor Relations Practice Group. These entities mandate both licensure and operational requirements as conditions of operating a particular business within their jurisdictions.

However, as the Board reiterated in *SuperShuttle*, although these mandates can impose considerable restraints on a franchisee's operations, they are not *employer* control for purposes of the independent-contractor analysis. "The Board has held that requirements imposed by governmental regulations do not constitute control by an employer; instead, they constitute control by the governing body," the majority wrote. "The Board has stated that employee status will be found only where 'pervasive control' by the private employer '(exceeds) governmental requirements to a significant degree.'"

General Counsel's office opines on gig workers

On May 14, 2019, the NLRB Division of Advice released a memorandum (dated April 16, 2019) finding that "drivers providing personal transportation services using . . . app-based ride-share platform[s]" were independent contractors and not statutory employees under the NLRA. The Division reached this conclusion in *Uber Technologies, Inc.*, using the common-law agency test outlined by the NLRB in its recent decision in *SuperShuttle*. Analyzing the economic relationship between the rideshare company and the drivers "through the prism of entrepreneurial opportunity," the agency concluded that the drivers have "significant opportunities for economic gain and, ultimately, entrepreneurial independence," cementing their status as independent contractors.

Under Uber's commission-based system, the company retains portions of the drivers' fares. While this practice might ordinarily be indicative of employee status, the General Counsel's office found this fact to be neutral here because Uber's business model avoids the kind of driver control traditionally associated with such commission systems. Uber also limits the drivers' selection of trips, sets passenger fares, and exercises other, less significant forms of control. However, the drivers are free on any given day, at any moment, to decide how best to serve their economic objectives: by fulfilling ride requests through the Uber app, by working for a competing rideshare service, or by pursuing a different venture altogether. The surge pricing and other financial incentives that Uber uses to meet rider demand not only reflects the company's "hands off" approach, they also provide greater entrepreneurial opportunity for drivers, the memorandum concluded. Moreover, the drivers operate without supervision, make significant capital investments in their work, and understand themselves to be independent contractors—all solidly supporting their status as such. Ultimately, the reality that the drivers exercise virtually complete control over their cars, work schedules, and log-in locations, along with freedom to work for Uber competitors, invested them with a level of entrepreneurial freedom consistent with independent-contractor status.

"This advice memoranda is significant inasmuch as it will serve to effectively mandate regional office dismissal in many of these gig economy cases involving the independent-contractor question," said Ogletree Deakins shareholder and former NLRB member, Brian E. Hayes. "Since there will be few, if any, complaints issued or elections directed, there will be little opportunity for the Board to 'refine' or 'particularize' its views in *SuperShuttle*. So, unless there are already cases in the Board's decisional pipeline that would serve as vehicles to expand upon or refine *SuperShuttle*, that case will likely serve as the doctrinal basket into which the Board has effectively placed all its eggs."

A stand-alone violation?

In 2018, the NLRB invited briefing by interested parties in a call for briefs in *Velox Express, Inc.*, to address the related but separate question of whether an employer's misclassification of an employee as an independent contractor constituted a stand-alone violation of the NLRA. Since independent contractors are not "employees," they are not protected under the NLRA. Thus, runs the argument, misclassifying individuals as such effectively restrains them from exercising their rights under Section 7 of the NLRA. If the argument were countenanced, the NLRB could effectively invalidate an independent-contractor agreement even in the absence of any adverse employment action against any individual.

NLRB rulemaking: 'Joint employer' and beyond

In its December 28, 2018, decision in *Browning-Ferris Industries of California, Inc. v. National Labor Relations Board,* a divided three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit held that certain factors relied on by the Obama-era National Labor Relations Board (NLRB) in establishing its controversial joint-employer standard in *Browning-Ferris Industries* were legitimate and consistent with the common law. In particular, the appeals court majority observed that a putative joint employer's *reserved right to control* the individuals in question, as well as the *indirect control* that it exercises over those individuals, were relevant factors in the assessment of joint-employer status. Such factors, the court noted, are rooted in the common-law definition of "employer." Thus, the majority found no error in the Obama Board's joint-employer test "as including consideration of both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment."

The intervening decision by the D.C. Circuit in Browning-Ferris *poses some challenges for the Trump Board as it attempts to finalize its rulemaking.*

However, because the NLRB did not sufficiently articulate "the scope of the indirect-control element's operation," the appeals court remanded the case so that the Board could more fully flesh out this aspect of its joint-employer analysis. The "scope" issue is critical, since virtually every business-to-business commercial transaction results in one employer exerting some degree of "indirect control" over the employment conditions of the other. The question is: how much is too much?

The decision by the appeals court in *Browning-Ferris* was based on a standard that the Board established through case adjudication. However, even as the case was pending in the D.C. Circuit, the Trump Board had already embarked on an effort to narrow the definition of "joint employment" through the process of agency rulemaking. Under the proposed rule published by the Board, an employer may be considered a joint employer of a separate employer's employees *only* if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. The putative joint employer must also possess and *actually* exercise substantial *direct and immediate* control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

The intervening decision by the D.C. Circuit in *Browning-Ferris* poses some challenges for the Trump Board as it attempts to finalize its rulemaking. Most particularly, the decision and proposed rule may arguably be at odds over the common-law indicia of joint employment and the extent to which the Board's standard must be informed by the common law. Indeed, the Board had requested comments on all aspects of the proposed rule, *including* the current state of the common law on joint-employment relationships. Among the specific questions posed include:

- Does the common law dictate the approach of the proposed rule or of *Browning-Ferris?*
- Does the common law leave room for either approach?
- Do the examples set forth in the proposed rule provide useful guidance and suggest proper outcomes?
- What further examples, if any, would furnish additional useful guidance?

Many management-side observers believe that the D.C. Circuit's misgivings, and subsequent remand to the Board, on the question of the "scope" of indirect control affords the Trump Board ample latitude to craft a final rule that acknowledges the common-law factors, but construes the more problematic ones narrowly for the purpose of determining "employer" status under the National Labor Relations Act (NLRA).

Joint-employer rule status. Where does the NLRB's joint-employer rule currently stand? Now that the comment deadline has passed, the Administrative Procedure Act (APA) requires review and response to all substantive comments. According to NLRB Chairman John Ring, the Board received nearly 29,000 comments "from interested organizations, unions, academics, business owners and

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individual workers all over the United States." Reportedly, a large number of individual comments are actually form letters prepared by various unions and sent by individual employees at the unions' urging. The number of "substantive" comments is reportedly around 2,500. The APA, however, requires that the Board consider and respond to all substantive comments. Even the lesser of the two figures is plainly substantial and will require considerable time for the Board to review and assess.

"The number of comments reflects the public's strong interest in the Board providing greater clarity in this important area of the law," Ring said.

DOL proposes a joint-employer rule

The U.S. Department of Labor has published its own proposed rule to "revise and clarify the responsibilities of employers and joint employers to employees in joint employer arrangements." The agency said that the proposed changes, published in the *Federal Register* on April 9, 2019, are intended to promote certainty for employers and employees, reduce litigation, establish greater uniformity among court decisions, and encourage innovation in the economy.

The proposed rule includes a four-factor test for joint-employer situations in which an employer and joint employer are jointly responsible for the employee's wages. The test considers whether the potential joint employer actually exercises the power to:

- Hire or fire the employee;
- Supervise and control the employee's work schedules or conditions of employment;
- Determine the employee's rate and method of payment; and
- Maintain the employee's employment records.

The proposed rule also provides examples of putative joint-employment scenarios, set out in a fact sheet that would further assist in clarifying joint-employer status, notably in the franchise industry.

More rulemaking to come

The NLRB has rarely exercised its rulemaking authority because the process is complex and time-consuming. It has, instead, relied on individual case adjudication to establish policy. Rulemaking, however, has greater stability and longevity. It is considerably more difficult to upend by a future Board that has a different ideological composition. Given the importance and controversy surrounding the joint-employer issue, as well as the necessity for a degree of stability and predictability, the Trump Board opted to address the matter through the rulemaking route.

Recently, the NLRB formally revealed its intention to tackle other critical matters of doctrinal labor law through rulemaking. The semiannual Unified Agenda of Federal Regulatory and Deregulatory Actions, issued by the Office of Management and Budget's Office of Information and Regulatory Affairs, outlines the NLRB's planned rulemaking activity based on a submission prepared at the direction of Chairman Ring. The list of Long-Term Actions/Short-Term Actions reveals that, in addition to the joint-employer standard, the NLRB will promulgate formal rules addressing the following issues.

Access rule. For the first time, the Board confirmed that it will promulgate a rule outlining the parameters of permissible union activity on employer property. Chairman Ring and Member Emanuel had previously signaled their interest in addressing this complex area of law through rulemaking in comments they made several months ago during an American Bar Association meeting. The appearance of the issue on the regulatory agenda now makes that interest official.

"What can employees, off-duty employees, and non-employees do, and where can they do it? Current law often lacks clarity on these issues," noted Brian E. Hayes, former NLRB member and co-chair of Ogletree Deakins' Traditional Labor Relations Practice Group. Hayes added that a formal regulation broadly addressing all forms of union-related activity by all parties on employer property would serve to establish clear-cut and predictable rules regarding these questions for employers, employees, and unions.

Recently, the Supreme Court of the United States denied a petition for certiorari in *Capital Medical Center v. National*

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Labor Relations Board, a case involving off-duty hospital employees who held picket signs on hospital property next to a nonemergency entrance. The lower appeals court essentially deferred to the Obama Board's decision in the case, which found the activity to be protected, largely because it equated the picket sign activity with verbal solicitation or handbilling. The Board's current General Counsel has expressed doubt as to the propriety of that decision, and it seems unlikely that the current Board, if presented with the same facts, would construe the statutory protections in the same way the Obama Board did in *Capital Medical.* Given the degree of deference paid by appellate courts to Board decisions that construe ambiguous provisions of the NLRA, it is altogether possible that a reviewing court would also affirm a subsequent Board decision that reached an opposite result from the one in *Capital Medical*. Rulemaking, as opposed to case adjudication, might serve to eliminate this anomalous prospect and to provide clear and stable "rules of the road" for all parties.

Rulemaking, as opposed to case adjudication, might serve to eliminate this anomalous prospect and to provide clear and stable "rules of the road" for all parties.

Status of college students. The Board has repeatedly flip-flopped on the issue of whether students, including graduate student assistants, who perform services at private colleges or universities in connection with their studies are statutory employees under the NLRA. If these individuals are "employees," they are entitled to unionize and engage in collective bargaining under the NLRA. On the other hand, if they are not "employees," the NLRA simply does not apply to them. Shifting policy with regard to this issue can be particularly disruptive. Consequently, all parties involved might be better served by a rulemaking that establishes a stable standard for determining "employee" status for such students.

Various representation issues. The NLRB also indicated it will promulgate a rule addressing voluntary or "card check" recognition under the Act, another controversial issue that has been the subject of both labor activism and legislative action.

The Board also intends to amend its representation election regulations with a specific focus on its long-standing "blocking charge" policy, under which a region will typically hold an election petition in abeyance if there is an outstanding unfair labor practice charge alleging conduct that, if proven, could interfere with employee free choice.

Finally, the NLRB's agenda includes rulemaking on how Section 9(a) bargaining relationships are established in the construction industry. Given the unique nature of hiring in this industry, Section 8(f) of the NLRA allows construction industry employers and unions to enter into a collective bargaining agreement (CBA) even before the employer has hired any employees on a given job. Such pre-hire agreements, or so-called "8(f) agreements," are an exception to the rule that employers and unions cannot lawfully enter into a relationship or execute a CBA absent proof that the union represents a majority of the covered employees.

Because there has been no showing of majority support, an employer can unilaterally terminate an 8(f) relationship whenever the underlying CBA expires. All other bargaining relationships are governed by Section 9(a) of the NLRA. Because a 9(a) relationship *is* predicated on a showing of majority support, an employer cannot simply terminate the relationship when the underlying CBA expires. A 9(a) relationship is permanent, and an employer is legally bound to negotiate a new CBA when the old one expires. A Section 8(f) agreement can, however, "convert" into a 9(a) relationship if there is evidence of majority support during the term of the 8(f) agreement. That said, there has been a continuing debate over exactly what "evidence" is necessary to find such a conversion. Rulemaking would hopefully end this debate by specifying what evidence is necessary to conclude that an 8(f) relationship has converted to one under 9(a).

Obama election rule. The revision of current NLRB representation-case procedures is included among the agency's "long-term actions" in its regulatory agenda. Long-term actions refer to rules that are currently under consideration but are unlikely to be issued within the

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next 12 months. In December 2017, the Board issued a formal request for information seeking public comment on possible amendments to the election rule adopted by the Obama Board in 2014. The public comment period closed in April 2018.

"The Agenda reflects the Board majority's strong interest in continued rulemaking," Chairman Ring said in a press statement. "Addressing these important topics through rulemaking allows the Board to consider and issue guidance in a clear and more comprehensive manner." The Board has not identified a target date for issuance of a formal notice of proposed rulemaking on these matters, however. ■

Fifth Board seat remains empty

With the August 2018 departure of Democrat Mark Gaston Pearce, and Pearce's surprising renomination by President Trump for a third term now put to rest through Congressional inaction and Pearce's eventual withdrawal, the National Labor Relations Board (NLRB) carries on without a fifth member. Currently the Board is comprised of three Republican appointees and one Democrat, Lauren McFerran, whose term will expire in December 2019.

While its case inventory is relatively light by historical standards, there are undoubtedly significant issues in the decisional pipeline. Moreover, the current Board has a far more aggressive rulemaking agenda than any earlier o ne.

Several names have surfaced as possible nominees to fill the open Democratic seat. Generating the most chatter thus far is Jennifer Abruzzo, whose nomination reportedly has been urged by the AFL–CIO. Abruzzo, a long-term NLRB official, most recently served as acting general counsel before departing the agency in December 2017 to join the Communications Workers of America.

While organized labor is enthusiastic about the prospect of an Abruzzo nomination, management-side practitioners appear to be divided. A number of management advocates have noted that Abruzzo's nearly 25 years as a high-level career employee at the agency will compel her recusal from many ongoing cases that will make their way to the Board. She has, no doubt, been personally and substantially involved in a large number of these cases and, thus, would be subject to permanent recusal from any decisional participation in such cases. Since she would be effectively a "non-vote" on certain key cases, some management attorneys perceive a strategic advantage to her nomination.

On the other hand, some management-side practitioners oppose Abruzzo's appointment because—by virtue of her lengthy tenure at the agency—she would effectively "hit the ground running" and knows "where all the proverbial bodies are buried." Moreover, she has long-running relationships with the staff on the General Counsel side of the agency—a staff that has often been at odds with current General Counsel Peter B. Robb.

No rush to nominate. The most likely scenario is that President Trump will not name any nominee until at least December, when Member McFerran's term expires. Management interests are exerting pressure on the White House *and* the Senate to simply leave the seat open for now. As a historical matter, that is exactly what has happened of late when there is an empty seat that would be occupied by someone of the opposite party to the president.

Philip Miscimarra, the last Republican nominee to serve during the Obama era, spent a substantial amount of his term as the sole Republican on the Board. When the term of fellow Republican Harry Johnson expired, the Obama White House simply did not move to fill the empty seat. Brian E. Hayes, another Republican serving during the Obama administration, faced an identical situation for the majority of his tenure. Thus, recent history certainly appears to be on the side of those arguing to leave that seat open.

Democrats introduce sweeping pro-union legislation

On May 2, 2019, Democratic lawmakers in both houses of Congress introduced legislation that would fundamentally and radically change the National Labor Relations Act (NLRA), expanding union organizing opportunities, stripping employer rights and protections, and imposing onerous new penalties on employers for violations of the statute.

The Protecting the Right to Organize Act (PRO Act) (H.R. 2474; S. 1306) would provide employees with a private right to sue an employer in federal court for violations of the NLRA and to pursue compensatory relief and liquidated damages if they are discharged or face other reprisal for engaging in NLRA-protected activity. The legislation would also impose potential personal liability on corporate directors and officers for employer violations.

Among other provisions, the legislation would:

- restore the controversial Obama National Labor Relations Board's (NLRB) persuader rule and codify its provisions;
- resurrect the failed Employee Free Choice Act (EFCA) and make card-check recognition the primary method for union certification;
- reinstate the Obama NLRB's notice-posting rule—a 2011 rulemaking that a federal appeals court had invalidated as an infringement on an employer's free speech rights under the NLRA;

According to a bill summary, H.R. 2474 "prevents employers from interfering in representation cases."

- codify into law the NLRB's overreaching *Browning-Ferris* joint-employer standard;
- narrow the definition of "independent contractor" so that a greater number of individuals would be designated as statutory employees;
- overturn the Supreme Court's 2018 opinion in *Epic Systems Corp. v. Lewis*, which held that the NLRA does not bar class action waivers in mandatory arbitration agreements;
- require the Board to seek injunctive relief reinstating any individual believed to have been discharged in violation of the Act while his or her case is adjudicated;
- reverse the Supreme Court's 2002 decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, which foreclosed back pay awards to undocumented workers who were not legally employed in the country;
- prohibit employers from holding "captive audience" meetings during a union election campaign;
- prohibit employers from hiring permanent strike replacements;
- allow unions to engage in secondary boycotts of employers that are not involved in a direct labor dispute;
- impose an affirmative bargaining order if an employer interferes in a representation election, if the union can show through signed authorization cards that it enjoyed majority support prior to the election;
- mandate mediation and binding interest arbitration for first contracts;
- empower the NLRB to enforce its own rulings instead of filing a petition for enforcement in a circuit court; and
- preempt state right-to-work laws, authorizing unions to impose "fair share" fees on private-sector nonunion employees.

According to a bill summary, H.R. 2474 "prevents employers from interfering in representation cases." In the bill sponsors' view, union elections "exist to determine workers' free choice, not corporations' preference about how their employees should exercise protected rights." Consequently, they seek to minimize the role of employers in educating their workforces about unionization and the implications of third-party interference with the employment relationship.

The PRO Act has very little chance of clearing Congress given the Republican-controlled Senate. However, the legislation is worth tracking because it presents a detailed wish list of organized labor's legislative goals: a far-reaching and radical reworking of U.S. labor law.

Moreover, employers may want to bear in mind the history of the EFCA legislation. When it was first introduced, most in the management community viewed the bill as so radical that it would never be passed or signed into law. However, the bill eventually came within a single vote of Congressional passage, and had it cleared that hurdle, it would certainly have been signed into law by President Obama. ■

Taking the air out of the rat balloon

"Construction employers and general contractors are all too familiar with Scabby the Rat," wrote Timothy C. Kamin, a shareholder in the Milwaukee office of Ogletree Deakins. Unions often bring out the inflatable rodent during labor disputes with employers that use nonunion labor. Kamin noted that Scabby—an attention-grabber that stands as tall as 30 feet—"has infested construction job sites as part of trade union protest activities targeting employers that are not signatory to union labor agreements."

"Over the past 30-plus years, there has been significant litigation over efforts to exterminate the rats," according to Kamin. These have included legal challenges under the National Labor Relations Act (NLRA) by employers contending that displaying Scabby on jobsites is unlawfully coercive toward secondary employers that are not implicated in the labor dispute.

The legal fights have also involved government ordinances that bar the display of Scabby and his associates on public property and rights of way, and the countervailing claim by labor organizations that such restrictions impermissibly interfere with First Amendment rights. There have been recent developments on both fronts—neither of which is favorable for Scabby and his pals.

The municipal rat trap. On the local ordinance front, the latest blow to Scabby comes from a lawsuit brought by Local 330 of the Construction and General Laborers' Union against Grand Chute, Wisconsin, over the town's enforcement of its sign ordinance. In the case, the union engaged in informational picketing at a car dealership after discovering that the dealership had hired a nonunion masonry contractor to perform work there. A 12-foot version of Scabby made its appearance in the median directly across from the dealership. However, a town official instructed the union to deflate the rat because it violated the town's sign ordinance.

On February 14, 2019, the U.S. Court of Appeals for the Seventh Circuit upheld the ordinance prohibiting the rat display, and rejected the union's challenge. The appeals court affirmed a district court's judgment that, although the union's use of Scabby to protest employer practices was constitutionally protected speech, the ordinance was content neutral and narrowly tailored to its purpose (i.e., banning signs that obstruct vision or distract drivers), and the union had "alternate means of communicating its message." The circuit court's decision may put a significant damper on organized labor's attempts to protect Scabby on constitutional grounds.

Scabby loses friends at the Labor Board. An even more existential threat to Scabby comes in the form of an 18-page Advice Memorandum released to the public on May 14, 2019. As the memo notes, in a series of cases beginning with *United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 (Eliason & Knuth of Arizona, Inc.)*, the Obama Board likened "bannering," and then, by extension, balloon displays, to "handbilling" rather than "picketing." Characterizing bannering and displaying Scabby as the same thing as handbilling served to insulate the activity from secondary boycott claims. A Republican minority dissented with respect to this entire line of cases, arguing that banners and balloon displays were more akin to picketing than handbilling and thus, when deployed against "neutral" employers, ran afoul of the NLRA's secondary boycott prohibitions.

In the subject Advice Memorandum, the General Counsel's office rejects the view of the Obama Board majority and adopts the view urged by the dissent in these cases. Thus, the General Counsel has instructed regional offices to issue secondary boycott complaints in these cases.

This development is very likely to burst Scabby's balloon. ■

For many years, unions have used Scabby the Rat as a symbol of protest. In a prescient episode of Ogletree Deakins' Third Thursdays with Ruthie podcast, firm attorneys Ruthie L. Goodboe and Brian E. Hayes discussed the legal issues surrounding the use of Scabby and foreshadowed the Advice Memorandum that would arrive two months later.

Third Thursdays with Ruthie: Picketing, Bannering, and Scabby the Rat

NLRB clarifies union obligations

By way of both Board decision and General Counsel memoranda, the National Labor Relations Board (NLRB) has recently addressed a number of issues regarding the obligation of labor unions to the member and nonmember employees that they represent. While these issues do not directly impact an employer's compliance obligations under federal labor law, it is useful for unionized businesses to be aware of them, particularly where they implicate grievance processing, payroll deductions for dues objectors, and employees' rights relative to the union that represents them.

***Beck* objectors: verified information and only core expenses.** A four-member panel of the NLRB has held that private-sector unions must provide *Beck* dues objectors with verification that the financial information they are obliged to provide to such objectors has been independently verified by an auditor. This requirement arises from "basic considerations of fairness" inherent in unions' statutory duty of fair representation, the Board explained (*United Nurses and Allied Professionals (Kent Hospital)*, March 1, 2019).

In *Kent Hospital,* the union provided dues objectors with information about their reduced fee amounts and charts setting forth the major categories of union expenses. The union asserted that the expenses had been verified by a certified public accountant but did not provide the verification letter to the objectors. The Board found that the union violated Section 8(b)(1)(A) of the National Labor Relations Act (NLRA) by failing to do so. A union must inform an objector of the percentage of dues reduction, the basis of the calculation, and the right to challenge the union's figures. The absence of a verification letter created uncertainty for the objectors as to whether the union's claimed expenses were actually incurred, thereby preventing them from making an informed decision about whether to challenge the union's chargeability calculations.

While these issues do not directly impact an employer's compliance obligations under federal labor law, it is useful for unionized businesses to be aware of them, particularly where they implicate grievance processing, payroll deductions for dues objectors, and employees' rights relative to the union that represents them.

Moreover, the Board held that a union may *not* charge *Beck* objectors for lobbying activities related to proposed legislation, even where the legislation involves a matter that may also be the subject of collective bargaining. Such expenses are not sufficiently related to the union's representational duties. A union's authority to compel financial support from nonmembers cannot extend beyond those expenses "necessary to 'performing the duties of an exclusive representative,'" the Board said.

In reaching its decision, the current Board largely adopted the dissenting opinion from the original *Kent Hospital* case in 2012, which was authored by Brian E. Hayes, a former NLRB member and now co-chair of Ogletree Deakins' Traditional Labor Relations Practice Group. In the original case, the then-majority upheld the chargeability of lobbying expenses. That decision was subsequently vacated and remanded because two Board members who voted in the case were improperly seated. The reissued majority decision tracks Hayes' earlier dissent.

On May 3, 2019, General Counsel Peter B. Robb released a memorandum (GC 19-06) discussing case handling and chargeability issues in light of the *Kent Hospital* decision. The memo, dated April, 29, 2019, makes it clear that unions bear the burden of establishing that the expenses they have charged to nonmember objectors are "germane to collective bargaining, contract administration, and grievance handling." The NLRB will no longer require that agency fee objectors explain why a particular expenditure is nonchargeable or provide evidence in support of their contentions. Rather, the region should contact the *union* for a detailed explanation of the union's chargeability decisions for each major category of expenses, as well as the method that the union used to

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determine the portion of expenses chargeable in mixed-expenditure categories.

Robb further instructed that unions may not satisfy their *Beck* obligations, as construed in *Kent Hospital*, merely by deducting the salary and benefit expenses for its lobbyists; they must also account for the "spillover costs" of their lobbying activities, such as overhead expenses, the preparation of lobbying literature, and similar expenditures. Moreover, challenges to "a union's chargeability calculations should not be dismissed on non-effectuation grounds merely because the nonchargeable expenditures, or the amount of the arguable overcharge, might be de minimis. Where a union's calculations contain a defect that results in *Beck* objectors being overcharged, for example, by improperly offsetting certain revenues against nonchargeable expenses, the Board has not hesitated to find a violation even where the amount of the excess charge was less than one percent of dues," he noted. "Accordingly, Regions should fully investigate the propriety of a union's allocation calculations without regard to the amount or percentage of the expense in question or the magnitude of the alleged overcharge."

General Counsel provides guidance on *Beck* rights.
NLRB General Counsel Peter Robb issued a memorandum (GC 19-04) on February 22, 2019, "Unions' Duty to Properly Notify Employees of Their General Motors/Beck Rights and to Accept Dues Checkoff Revocations after Contract Expiration."

Under current law, unions are required to inform employees how much their dues will be reduced only once they decide to become *Beck* objectors. Robb, however, notes that it is difficult for an employee to make an informed decision about whether to become a *Beck* objector without first knowing the amount of savings that would result from that decision. In its 2014 decision in *United Food & Commercial Workers International Union, Local 700 (Kroger Limited Partnership)*, the Board acknowledged that unions must provide a *Beck* notice to employees but declined to require unions to provide this financial information at the initial notice stage. The General Counsel has now called for the Board to overrule *Kroger* and "require that a union must provide the reduced amount of dues and fees for objectors in the initial *Beck* notice."

"... an employer that continues to check off an employee's dues following receipt of the employee's written revocation request made at or following expiration of a governing contract, as well as a union that receives such dues, does so without employee authorization..."

Robb also advised that "any dues-checkoff authorization that restricts the statutory right of employees to revoke their authorizations at expiration of a current contract or during a period in which no contract is in effect is improper and unlawful." He stressed that the Labor Management Relations Act (LMRA) "creates an unconditional statutory right for employees to revoke their dues-checkoff authorizations upon cessation of the governing collective-bargaining agreement, whether by expiration or termination." As a result, a dues-checkoff authorization's pre-expiration window period that requires employees "to submit their revocation request 60-75 days *before* contract expiration is inconsistent with, and restricts, the right of an employee to seek and effectuate revocation immediately upon contract expiration." Robb concluded: "[B]ecause such windows may operate to eliminate or cut short the employee's statutory right to revoke at contract expiration, they are facially invalid."

The General Counsel takes the "position that an employer that continues to check off an employee's dues following receipt of the employee's written revocation request made at or following expiration of a governing contract, as well as a union that receives such dues, does so without employee authorization in violation of [NLRA] Section 8(b)(1)(A) and 8(a)(3)." Moreover, "because an employee may reasonably rely on an authorization's otherwise unlawful language to request revocation during the window, he or she must be permitted to revoke during that earlier period as well." Robb directed the regions to issue complaints "where a dues-checkoff authorization purports to limit an

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employee's right to revoke that authorization at cessation of the contract term by imposing an earlier revocation window period."

General Counsel clarifies union burden in fair representation cases. On March 26, 2019, Robb issued a follow-up memorandum (GC-19-05) clarifying his position regarding duty-of-fair-representation charges against unions in light of additional questions raised following his October 2018 memo on the topic (GC 19-01). The earlier memo provided guidance for regions in situations where a union asserts "mere negligence" as a defense to a charge that it has breached its duty of fair representation in violation of NLRA Section 8(b)(1)(A). Robb earlier noted that where a union has lost track or forgotten about a grievance, "mere negligence" ordinarily will not excuse the union *unless* it can show that it was following a reasonable tracking system or reasonable procedures for handling grievances. Likewise, when a union is accused of failing to communicate the status of a grievance or to respond to a charging party's inquiries, it must have a reasonable explanation for its failure to communicate. "Otherwise in both circumstances, such conduct is not considered 'mere negligence,' but constitutes arbitrary conduct and therefore violates Section 8(b)(1)(A)," Robb wrote.

After GC-19-01 was issued, questions arose as to whether the memo's case-handling instructions apply to union decisions on whether to pursue a grievance, as well as the extent to which the regions need to analyze a union's justification for not pursuing a grievance. "There is no requirement that a union have a specific tracking system or procedures for handling grievances," Robb clarified, explaining that his earlier memo "did *not* alter the analysis concerning a union's decision whether or not to pursue a grievance violated the duty of fair representation." Consistent with the agency's past treatment of the union duty of fair representation, he wrote, "Having some kind of tracking system and procedures is a possible defense for failing to properly handle a grievance or to inform a grievant about its status." Therefore, he instructed that "Regions need not look behind a union's assertion of a reasonable decision not to pursue grievances unless there is evidence that those decisions were made in bad faith or involved gross negligence, or where there could be no reasonable basis for the union's decision." ■

DOL to impose new reporting requirements

Labor organizations are also regulated by the U.S. Department of Labor's Office of Labor-Management Standards (OLMS). Recently, OLMS announced it would increase its oversight role by promulgating a new rule to capture financial information about union trusts—information that "has largely gone unreported despite the significant impact such trusts have on a labor organization's financial operations and their members' interests," the agency said. The proposed rule would establish a Form T-1 to be used by labor organizations to file annual trust financial reports with OLMS. The Form T-1 will capture financial information pertinent to "trusts in which a labor organization is interested," in order to better effectuate the union reporting requirements under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).

The LMRDA's reporting provisions provide union members with the necessary information to ensure that labor organization funds are properly accounted for and to enable them "to maintain democratic control over their labor organizations," according to OLMS. "Labor organization members are better able to monitor their labor organization's financial affairs and to make informed choices about the leadership of their labor organization and its direction when labor organizations disclose financial information as required by the LMRDA." Union financial transparency also safeguards union funds, deters union officers from using the organization's funds improperly, and serves the public interest, the agency said.

Other NLRB developments

U.S. Supreme Court

Justices deny review of stationary picketing decision. In its April 1, 2019, order list, the Supreme Court of the United States denied review of *Capital Medical Center v. National Labor Relations Board*, a decision by the U.S. Court of Appeals for the District of Columbia Circuit upholding the National Labor Relations Board's (NLRB) determination that off-duty hospital employees were engaged in protected activity when they held picket signs on hospital property next to a non-emergency entrance. The Board had applied the framework set out in *Republic Aviation Corp. v. National Labor Relations Board*, a 1945 Supreme Court decision, concluding that this precedent should govern in cases involving picketing on company property, as distinguished from leafletting.

In *Republic Aviation*, the high court approved the NLRB's adoption of a presumption that an employer cannot prevent off-duty employees from soliciting union support on company property; to overcome the presumption, an employer must show "special circumstances" are present that make prohibition necessary "to maintain production or discipline." The NLRB has subsequently modified the *Republic Aviation* presumption based on the nature of the workplace. Thus, it has held that in the hospital setting, the ability to administer patient care without disturbance must be figured into the analysis. As a result, the Board has previously found that a ban on union solicitation activity in immediate patient-care areas is not presumptively invalid; however, outside immediate care areas, the presumption still exists.

The *Republic Aviation* presumption has been applied primarily in cases involving oral solicitation of union support or distribution of union-related literature, not in cases involving picketing. In *Capital Medical Center*, the Board held that the employees' stationary, peaceful picketing was not likely to interfere with patient care, rejecting the hospital's argument that picketing is inherently more disruptive than other Section 7 activity. Consequently, the hospital could not overcome the *Republic Aviation* presumption. The appeals court affirmed, concluding the presumption was properly applied in this case. The hospital contended that the NLRB failed to balance the hospital's property rights against the employees' Section 7 rights. But the appeals court said this argument was "misconceived," noting that this balance is accounted for in the *Republic Aviation* analysis.

The hospital's petition for certiorari asked whether the Board and appeals court correctly determined that *Republic Aviation* was the proper framework to apply "when employees seek to engage in informational picketing immediately in front of the main entrances to the employer's acute care hospital."

General Counsel Peter B. Robb has previously signaled his desire to revisit the Obama Board's reasoning in this case. In an early General Counsel Memorandum (GC 18-02), Robb cited *Capital Medical Center* and the underlying issue as one meriting a closer look. In that initial memo, Robb indicated his intent to review all cases involving significant legal issues that were either the result of an Obama Board reversal of precedent or generated one or more dissents. Such cases, the memo noted, might warrant an "alternative analysis." To that end, the General Counsel directed the regions to submit to the Division of Advice any cases involving off-duty employee access to property, including cases that apply *Republic Aviation* to picketing by off-duty employees, and all cases that equate picketing with handbilling. Relatedly, the Board itself has indicated it plans to take up formal rulemaking on the broader issue of which specific forms or employee conduct on employer property are, and are not, protected under Section 7 of the National Labor Relations Act (NLRA).

Circuit court decisions

Discredited testimony dooms petition for review. The D.C. Circuit enforced an NLRB order finding that a nursing facility unlawfully discharged employees who were instrumental in an ongoing union organizing effort. The employer fired five employees after a supervisor photographed them sleeping on the job. Four of the five were key union activists.

The employer contended it would have discharged the individuals regardless of their union advocacy, but it based this assertion solely on the testimony of a supervisor. The administrative law judge (ALJ) refused to credit the supervisor's testimony. The ALJ noted the supervisor's implausible timeline of events, her failure to photograph other

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sleeping employees who were not union supporters, and the fact that she did not try to wake them despite insisting they had put patients at risk by sleeping on the job. The supervisor additionally asserted that she did not see the employees' pro-union lanyards and buttons and thus did not know they were union supporters. However, she did claim to recall other "significant details" about how they were sleeping because she was within "arm's reach" of them. The appeals court found no reason to disturb these underlying factual findings.

It was unknown whether the fifth employee supported the union. However, because she was fired with the others on advice of counsel in order to provide "cover" for the firing of the pro-union employees and to avoid "diluting" the stated justification for firing them, her discharge also violated the NLRA (*Novato Healthcare Center v. National Labor Relations Board*, March 5, 2019).

"Majority status rule" doesn't apply to faculty subgroups. The D.C. Circuit, in *University of Southern California v. National Labor Relations Board,* found that the NLRB's extension of *Pacific Lutheran University*'s "majority status rule" to faculty subgroups conflicted with the Supreme Court's 1980 decision in *National Labor Relations Board v. Yeshiva University*. In *Yeshiva*, the Court held that while the NLRA covers university employees, faculty members may be excluded from coverage -as "managerial employees" where they play a significant role in formulating school policy and governance. The Obama-era Board repeatedly sought to limit the reach of *Yeshiva.* In *Pacific Lutheran,* a 3–2 decision, the Obama Board established a very narrow analytical framework for determining managerial status—one that would make any finding of managerial status far less likely. Among the criteria in *Pacific Lutheran,* the Obama Board held that where a particular aspect of school governance was effectuated through a committee structure, faculty participation in such committees only "counted" if a majority of the committee seats were held by faculty members. This requirement has come to be known as the "majority status rule." *Pacific Lutheran* was not appealed to the federal courts.

In *University of Southern California,* the Obama Board sought to further extend the majority status rule by applying it to petitioned-for faculty subgroups. The underlying petition involved only non-tenure-track faculty at the university's School of Art and Design. This subgroup did not hold a majority on any faculty governance committee. The D.C. Circuit, however, found that the subgroup majority status rule was unfaithful to *Yeshiva* and rested on a fundamental misunderstanding of the Supreme Court decision, which focused on the faculty as a body and placed an emphasis on faculty collegiality, the appeals court found. The appeals court remanded the case to the Board. Observers believe that the current Board, with its changed composition, may jettison all, or part, of the *Pacific Lutheran* test (*University of Southern California v. National Labor Relations Board*, March 12, 2019).

Challenge to appropriateness of bargaining unit fails. The D.C. Circuit rejected an employer's arguments and found no error in the NLRB's certification of an election win by the Teamsters at the employer's Kutztown, Pennsylvania, facility. The appeals court first rejected the claim that the single-site bargaining unit found appropriate by the Board was incorrect. The court noted that in light of "'the significant evidence of local autonomy over labor relations matters at the Kutztown facility' and 'the considerable distance between the Kutztown facility and the other facilities,'" the NLRB reasonably found that a single-facility bargaining unit was appropriate. Factors such as "geographic proximity, employee interchange and

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NLRB to reconsider its jurisdiction over charter schools

The NLRB has issued an order in *KIPP Academy Charter School* granting review, in part, and inviting briefs as to whether the Board should exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) of the NLRA. Should the Board decide to decline jurisdiction, it would necessarily modify or overrule its 2016 decisions in *Hyde Leadership Charter School—Brooklyn* and *The Pennsylvania Virtual Charter School*.

NLRA Section 14(c)(1) provides that the Board may "decline to assert jurisdiction over any labor dispute involving any class or category of employers, where . . . the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction."

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transfer, functional integration, administrative centralization, common supervision, and bargaining history" favored a single-facility bargaining unit rather than a unit encompassing all of UPS Ground's facilities.

In addition, the court held the regional director "did not abuse his discretion by declining to decide, before the election, whether two employees in disputed job classifications . . . were part of the bargaining unit. It is common practice to permit such employees to vote under challenge," the court observed, and that practice did not "imperil the bargaining unit's right to make an informed choice." Further, the Board reasonably determined that a driver was an employee under the NLRA, not a statutory supervisor; consequently, his conduct in support of the union did not taint the election. Finally, the court held that the regional director "properly directed a mail-ballot election" after determining that travel distances and traffic and weather conditions might hinder employees' ability to vote (*UPS Ground Freight, Inc. v. National Labor Relations Board*, April 19, 2019).

[T]he Board reasonably determined that a driver was an employee under the NLRA, not a statutory supervisor; consequently, his conduct in support of the union did not taint the election.

Workers temporarily at plant rightly excluded from unit. Four permanent employees from another of their employer's power plants, who were sent to a municipal plant for a few days to train new employees, were properly excluded from a Board-certified bargaining unit at the municipal plant, the U.S. Court of Appeals for the Sixth Circuit found. A fifth employee who worked at the plant five days per week for approximately four months, and then one day a week for a brief stint, was also properly excluded. The parties agreed that the temporarily assigned workers did not share a community of interest with the regular employees of the municipal plant, but they disagreed over whether the Board needed to resolve more clearly the status of future temporary workers at the plant. The regional director found that the company lacked plans to temporarily assign other workers to the municipal plant. Observing that rulings premised on contingent events create contingent law, the appeals court held that the regional director reasonably decided to avoid drawing lines based on unseen future events (*American Municipal Power, Inc. v. National Labor Relations Board*, March 11, 2019).

Material job changes warranted new look at status. Sixteen years after a determination that an employer's buyers were managerial employees who should be excluded from a bargaining unit, a regional director correctly determined that intervening material changes in their job duties had sufficiently diminished the buyers' role to warrant finding them to be non-managerial. The U.S. Court of Appeals for the Tenth Circuit noted that, over the years, the buyers had less involvement in the procurement process and less input into evaluating supplier responses to requests for quotations. The dilution of their duties supported the conclusion that they had lost their managerial status (*National Labor Relations Board v. Wolf Creek Nuclear Operating Corporation*, January 29, 2019).

Request to reopen record properly denied. A federal contractor contended that under its contract with the Internal Revenue Service (IRS), it had "no choice" but to fire three security guards who had let individuals enter the agency's facility undetected. In the resulting NLRB case, the contractor sought to reopen the administrative record to present evidence of the "Performance Work Statement" in its IRS contract setting out 35 employee "actions, behaviors, or conditions" that constitute "cause for immediate removal from performing on the contract," as well as an email from the IRS contract specialist. But neither document contradicted the NLRB's findings that any IRS directives were merely permissive and that immediate discharge, in contravention of the progressive discipline policy in the contractor's collective bargaining agreement (CBA), was discretionary. Reopening the record would not compel a different result in this unfair labor practice proceeding; thus, the NLRB did not abuse its discretion when it refused to do so, held the U.S. Court of Appeals for the Eleventh Circuit (*Security Walls, Inc. v. National Labor Relations Board,* April 23, 2019).

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NLRB rulings

Rideshare drivers don't belong with bus drivers. Ride service associates (RSAs) hired by Disney to transport resort guests who hail "Minnie Vans" using the rideshare app were erroneously included among an existing bargaining unit of bus drivers, held a three-member panel of the NLRB. A regional director erred in applying the *Premcor, Inc*. principles when clarifying an existing unit after he concluded that the RSAs perform the same basic functions as bus drivers. Under *Premcor*, the Board views a new job classification as already belonging in the bargaining unit, rather than being added to it by accretion, if employees in the new classification perform the same basic duties historically performed by bargaining unit employees. On review, the Board found that RSAs and bus drivers do *not* perform the same basic functions. The panel additionally found that accretion was unwarranted under the *Safeway Stores* standard because the union did not establish that the RSAs had little or no separate group identity, or that they shared an overwhelming community of interest with employees in the existing unit (*Walt Disney Parks and Resorts U.S. dba Walt Disney World Co.*, January 25, 2019).

Informant information was lawfully withheld. Michigan Bell lawfully denied a union's request for information regarding the identity of an employee who warned the company about a pending union-staged "family night" in which employees intended to refuse to work mandatory overtime, as well as a list of people to whom the employer

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Board reins in definition of employee 'concerted activity'

A skycap who complained about the tipping habits of a soccer team was not engaged in concerted activity merely because he voiced his complaint in front of other skycaps and used the word "we," a divided four-member panel of the NLRB ruled, expressly rejecting the notion that the skycap's use of the plural pronoun necessarily conferred statutory protection. A majority further held that an individual gripe is not automatically protected under the NLRA merely because it is made in the presence of coworkers. Finding that his complaint was neither concerted activity nor undertaken for the purpose of mutual aid or protection, the Board held the respondent employer did not unlawfully discharge the skycap for refusing his supervisor's directive to assist the soccer team with its equipment.

In a favorable decision for employers, the Board in *Alstate Maintenance, LLC*, issued January 11, 2019, narrowed the scope of "concerted activity" subject to NLRA protection. "[T]o be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action," the Board majority wrote.

The NLRB restored the standard for concerted activity articulated in *Meyers Industries*. In *Meyers I*, the Board held that for an employee's activity to be "concerted" within the meaning of the NLRA, the activity must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." "Thus, under *Meyers II*, an individual employee who raises a workplace concern with a supervisor or manager is engaged in concerted activity if there is evidence of 'group activities'—e.g. prior or contemporaneous discussion of the concern between or among members of the workforce—warranting a finding that the employee was indeed bringing to management's attention a 'truly group complaint,' as opposed to a personal grievance." An employee's efforts to "induce group action" could also be concerted in some cases.

Under these standards, the Board majority found that the skycap did not engage in concerted activity. There was no contention he was bringing a truly group complaint to the attention of management, and the record was devoid of evidence of past or present "group activities." Moreover, the *substance* of the statement did not evidence an attempt to induce group action. Where a statement "looks

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disseminated the information about the informant. A divided three-member panel of the NLRB held that the employer successfully rebutted the presumptive relevance of that information. However, it also held the employer did not rebut the presumptive relevance of a *description* of the information that the informant provided. The description was relevant to the union's evaluation and prosecution of a grievance because it directly answered the question of what the employer knew about the potential for a family night. Thus, withholding *this* information was unlawful (*Michigan Bell Telephone Company*, January 24, 2019).

Airport operations subject to the RLA. A divided NLRB concluded that a company that provides fueling, cargo, and cleaning services to several airlines at LaGuardia Airport was subject to the Railway Labor Act and thus fell outside the Board's jurisdiction. Giving substantial deference to the National Mediation Board (NMB) and its traditional six-factor carrier control test, the majority found that five of the six factors established that the air carriers exercised sufficient control over the company to warrant NMB jurisdiction, and that this finding was consistent with prior NMB precedent. Accordingly, the Board granted the employer's request for review of the regional director's direction of election and vacated a union's certification (*Primeflight Aviation Services, Inc.*, January 31, 2019).

Pre-election raffle was an unlawful promise of benefits. A raffle held by an employer two weeks before a union election was a promise of benefit intended to influence employee votes, a three-member panel of the NLRB ruled. The company offered cash prizes of $900 and $450—the equivalent of one year's and six months' worth of union dues, respectively—to remind employees how much dues would cost them. It pitched the raffle as an opportunity for employees "to learn all the REAL FACTS about the union and what it actually can—and cannot—do." However, the employer could have achieved the same purpose without the prizes by

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forward to no action at all, it is more than likely to be mere 'griping.'"

Noting that NLRB decisions post–*Meyers Industries* have blurred the distinction between protected group activity and unprotected individual activity, the Board overruled any prior rulings in conflict with the *Meyers* line of cases, including the Obama-era holding in *Wyndham Resort Development Corp. dba Worldmark By Wyndham*, which held that an employee engaged in concerted activity simply by protesting publicly in a group setting.

The Board majority outlined five factors that would support an inference that a statement made by an employee in a group setting is protected concerted activity:

1. "[T]he statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment."
2. "[T]he decision affects multiple employees attending the meeting."
3. "[T]he employee who speaks up [at the meeting] did so to protest or complain about the decision, not merely . . . to ask questions about how the decision has been or will be implemented."
4. "[T]he speaker protested or complained about the decision's effect on the work force generally or some portion of the work force, not solely about its effect on the speaker him- or herself."
5. "[T]he meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand."

"The current NLRB appears to be reining in the Obama Board's very expansive notion of what constitutes protected concerted activity," noted Ogletree Deakins' Brian E. Hayes, a former Board member and dissenter in the *Worldmark* case. Bernard J. Bobber of Ogletree Deakins' Milwaukee office further observed that "[t]he Board may not be done reshaping Section 7 analysis yet. It also indicated interest in reconsidering other cases that 'arguably conflict' with the standard set out in the *Meyers Industries* cases."

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simply conveying this message directly, the Board reasoned. Thus, employees could view the raffle as an attempt to influence the election (*Valmet, Inc.,* February 4, 2019).

New position was a check on unit members; accretion improper. Material receiving coordinators (MRCs), who perform checks on the work of weighmasters at a solid waste disposal facility, are not an appropriate accretion to an existing bargaining unit comprised of weighmasters and other job classifications. The MRCs work in close proximity to unit members, they share supervision, and their work is functionally integrated, but they have a separate identity and a complete lack of interchange with bargaining unit members. This was likely by design, an NLRB panel surmised, since the position was expressly created "to serve as management's 'eyes and ears' by observing and reporting weighmasters' infractions." The positions were created in response to theft schemes that had been carried out by unit members, resulting in a $2-million loss and the discharge of the participating unit employees. The union seeking accretion could not meet its burden of showing the MRCs shared an overwhelming community of interest with bargaining unit members (*Recology Hay Road*, February 27, 2019).

An employer is free to insist that it is only interested, at that time, in hearing the employee's own account of the matter under investigation[.]

Critical factors weighed against accretion. Highlighting its critical importance in the accretion analysis, the NLRB held that the absence of employee interchange weighed against the accretion of unrepresented employees at one hospital into an existing bargaining unit at another of the employer's hospitals. The Board additionally noted that the parties' bargaining history and other factors militated against accretion. Accordingly, it was unwilling to clarify the unit to include the unrepresented employees (*Schuylkill Medical Center South Jackson Street dba Lehigh Valley Hospital—Schuylkill South Jackson Street*, February 28, 2019).

Union to be made whole for dues. On remand from the Ninth Circuit for the fourth time, a three-member NLRB panel accepted the appeals court's finding that the "standard remedy of make-whole relief" was required to rectify an employer's "unfair labor practice of ceasing dues checkoff without bargaining to impasse" following expiration of a CBA. Accordingly, the employer was ordered "to make a [u]nion whole for any dues it would have received but for the [employer's] failure to comply with the dues-checkoff arrangement" (*Hacienda Hotel, Inc. Gaming Corp. dba Hacienda Resort Hotel and Casino*, March 5, 2019).

Union president was not deprived of rep. An employer did not violate a union president's *Weingarten* rights during an investigatory hearing, the NLRB held. When the hearing participants began talking all at once, the employer sought to regain control of the meeting by instructing attendees on both sides to stop talking and by limiting when participants could speak. The union president was then instructed to prepare a written statement about the underlying incident that prompted the meeting. A question-and-answer session followed, with the union president writing out his answers. Ultimately, the union president was issued a final written warning.

On these facts, the Board concluded that the employer did not deny the union president the "advice and active assistance" of his representatives during the meeting. An employer is free to insist that it is only interested, at that time, in hearing the employee's own account of the matter under investigation, and the investigator's actions were consistent with these principles. Moreover, the union representatives present were permitted to ask their own questions before the meeting ended. Thus, the president was not denied the assistance of a representative "when it [was] most useful to both employee and employer," the NLRB held. However, the employer did violate the NLRA when it refused to allow the union's attorney to act as the union president's *Weingarten* representative and when it failed to bargain over an accommodation in response to the union's request that it furnish the complaint that led to the disciplinary action in the first place (*PAE Applied Technologies, LLC,* March 8, 2019).

Dispatchers were statutory supervisors. An electric utility's dispatchers used independent judgment while assigning

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employees in the field to repair outages and therefore were statutory supervisors under NLRA Section 2(11), the NLRB held in a decision on remand from the U.S. Court of Appeals for the Fifth Circuit. The appeals court had found in an earlier decision in the same case that the Board ignored significant evidence indicating that the dispatchers possessed supervisory authority. Accepting this ruling as the law of the case on remand and looking to the evidence underscored by the court, the Board held the dispatchers satisfied the *Oakwood Healthcare* test of supervisory authority and were properly excluded from a bargaining unit. It dismissed a refusal-to-bargain complaint and granted the employer's unit clarification petition—filed way back in 2003—to exclude the dispatchers (*Entergy Mississippi, Inc.*, March 21, 2019).

A Board ALJ ruled that the confidentiality clause in Pfizer, Inc.'s mandatory arbitration agreement violates the NLRA because it is a policy or work rule that employees would "reasonably construe" as prohibiting them from discussing the substance of what occurred during the arbitration process.

ALJ: Confidentiality clause in arbitration agreement unlawful. A Board ALJ ruled that the confidentiality clause in Pfizer, Inc.'s mandatory arbitration agreement violates the NLRA because it is a policy or work rule that employees would "reasonably construe" as prohibiting them from discussing the substance of what occurred during the arbitration process. The ALJ found that such prohibition impermissibly interfered with employees' substantive right under Section 7 to discuss and publicly disclose their *terms and conditions* of employment. Before reaching the merits of the issue, the ALJ resolved numerous threshold questions about the Board's authority to construe the language of an arbitration agreement, as well as whether it should do so under its *The Boeing Co.* framework or apply contract law principles (*Pfizer, Inc.*, March 21, 2019).

NLRB overrules the extension of the *Love's Barbeque* remedy. In *Love's Barbeque*, the NLRB held that where a putative successor employer unlawfully discriminated against hiring *all or almost all* of the predecessor's employees, it would be deemed a "perfectly clear" successor and, as such, would lose the right to unilaterally set the initial terms and conditions of employment. A successor employer is typically free to set its own initial terms and conditions of employment without first bargaining with an incumbent union. The "perfectly clear successor" doctrine creates an exception to this rule. Thus, where an employer indicates an intent to hire all or substantially all of a predecessor's employees, it may be required to first bargain with the incumbent union before making any changes to the terms and conditions of employment.

Love's Barbeque extended this obligation to putative successors that discriminate in hiring all or substantially all of the predecessor's employees. In 1996, in *Galloway School Lines,* the Board extended the so-called *Love's Barbeque* remedy even further to situations where an employer discriminates in hiring *a majority* of a predecessor's employees in an attempt to avoid becoming a successor at all. In a 3–1 decision, however, the current Board overruled *Galloway*, finding it was an unwarranted extension of the *Love's Barbeque* remedial doctrine (*Ridgewood Health Care Center, Inc.,* April 2, 2019).

Employer lawfully stopped deducting union dues. A manufacturer reasonably believed that its employees' dues-checkoff authorizations did not conform to Wisconsin's right-to-work law, a divided three-member NLRB panel found. Accordingly, its three-month cessation of dues checkoff was lawful. The employer stopped deducting dues after notifying the union that its union-security provision and dues-checkoff form did not comply with the new state law, enacted in 2015. The union argued that dues checkoff was governed by federal law, but the employer "had a sound arguable basis for its belief that" the CBA, viewed in light of the Wisconsin right-to-work law, authorized it to stop deducting dues. Moreover, the employer did not act in bad faith by ceasing the dues deductions unilaterally. Given that the CBA required that only checkoff authorizations "conforming to applicable law" were to be honored and the employer's reasonable position that the authorizations it had in its possession did not "conform to applicable law," it had no duty to bargain with the union before refusing to honor the checkoff authorizations. Also, when the union provided it with new signed checkoff authorizations, the employer promptly resumed deducting and remitting the dues (*Metalcraft of Mayville, Inc.*, April 17, 2019).

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CBA's harassment policy can't be applied to worker covered by another CBA. In a 2–1 decision, the NLRB held that an employer and employer association acted unlawfully when they applied the anti-discrimination policy and attendant procedures of their contract with one union against an employee represented by another union and covered under a different contract. The employer and association implemented an arbitrator's disciplinary ruling that suspended an employee for 28 days and required him to attend unpaid diversity training and to sign a statement that he would abide by the anti-discrimination policy in the future. However, the bargaining agreement that covered the employee expressly precluded applying the policies and procedures set forth in any other agreement. The Board found that the employee had in fact been subjected to the anti-discrimination provisions of a multi-employer bargaining agreement that did not cover his position. That agreement contained a new formal investigative and disciplinary process for anti-discrimination claims. However, since it was adopted without giving the employee's own union prior notice and an opportunity to bargain, it constituted an unlawful unilateral change in the employee's terms and conditions of employment (*Pacific Maritime Association*, May 2, 2019).

Manager's provocation cancels out steward's misconduct. Although a union steward used profanity and engaged in "aggressive physical conduct" during a confrontation with a manager in an area visible to employees and customers, he did not lose the protection of the NLRA. There was evidence employees and managers regularly used profanities similar to the steward's, and the employer's tolerance of such conduct undercut the claim that the steward's profane outbursts were so egregious as to warrant the loss of protection. The steward was clearly acting in his capacity as union representative when he approached the manager to communicate an employee's complaints about alleged mistreatment; the steward began using profanities only after the manager began to yell and point his finger. Further, it was the manager, not the steward, who chose to extend the confrontation by following the steward. Had the manager simply walked away, as the steward had done, the confrontation would have ended. In light of all the circumstances, the steward's conduct did not lose the NLRA's protection. Thus, the Board held the employer violated the NLRA when it discharged the long-tenured worker for using profanity and for "gross insubordination." (*Greyhound Lines, Inc.*, May 6, 2019).

Union workers permissibly denied "appreciation day" off. In a 2–1 decision, the NLRB held that the general counsel failed to demonstrate that Merck's refusal to offer a one-time, company-wide paid holiday only to employees covered by CBAs was unlawfully motivated. Merck successfully argued that its refusal to extend the day off to union-represented employees was based on a history of the unions involved refusing to agree to Merck's requests for midterm contract changes. Merck was not actively engaged in bargaining with any of the units at the time it granted the day off, and the benefit was not called for in any of the extant labor contracts. Thus, extending the benefit would require midterm bargaining. Merck decided not to do so since, in the past, the unions had consistently refused to agree to its requested midterm contract changes. There are approximately 23,000 employees in Merck's U.S.-based workforce, some 2,700 of whom are unionized.

The Board noted that consideration of prior bargaining positions and extant contractual benefits is not unusual in the course of a collective bargaining relationship, nor was it evidence of anti-union animus. Thus, it concluded that Merck's decision was a rational business decision and a reasonable strategy to apply leverage within the context of its ongoing bargaining relationships with the unions (*Merck, Sharp & Dohme Corp.*, May 7, 2019).

Pre-election statements didn't warrant new election. Management's pre-election comments to janitorial employees indicating that they would be discharged if the union won and they failed to pay union dues were not objectionable, a divided NLRB panel ruled. The day before the election, the employer's vice president and operations manager had conversations with a majority of the bargaining unit employees in which they falsely indicated that the workers would automatically be required to pay union dues if the union won, and would be discharged if they didn't. In a recorded conversation, the VP specifically said that if the union won, "we know for sure" that "you have to join as a condition of your employment" and "you will be paying the union dues." The NLRB's regional director correctly found that the company officials misstated the law when they characterized union membership and the payment of dues

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as a "condition of employment" if the union won the election. However, this "mere misstatement of the law does not constitute objectionable conduct," held the majority. Viewed "in the overall context of the organizing campaign," "mere misrepresentations regarding the [u]nion's ability to compel membership or enforce the payment of dues do not rise to the level of [an unlawful threat]," it found. Therefore, the Board reversed a regional director's direction of a second election and certified the results of the election in which the union lost 10–9 (*Didlake, Inc.*, May 10, 2019).

***Atlantic Steel* test applies to employee confrontations.** A unanimous Board panel adopted an ALJ's finding that a union steward's profanity-laced tirade directed at *a fellow employee* lost the protection of the NLRA and justified the imposition of disciplinary measures. Under its decision in *Atlantic Steel*, the Board typically applies a four-factor analysis to determine if activity that is clearly protected under the NLRA nonetheless loses such protection because of the manner in which the activity occurs. Thus, in determining if an employee's otherwise protected behavior loses that protection, the Board typically considers the *place* of any such discussion, its *subject matter,* the *nature* of any employee outburst, and whether the employee behavior was in response to any *employer unfair labor practice.* The *Atlantic Steel* test is typically applied where an employee who is concededly involved in protected activity also engages in "over-the-top" behavior in a related confrontation with *a supervisor or manager.* In this case, the union steward, who was plainly involved in protected concerted activity, wound up in a vociferous confrontation with a *fellow employee*. The steward was subsequently disciplined. The Board upheld the discipline based on the *Atlantic Steel* analysis, finding that it applies with equal force to employee-to-employee workplace confrontations in the context of otherwise protected activity (*Entergy Nuclear Operations, Inc.,* May 21, 2019).

A unanimous Board panel adopted an ALJ's finding that a union steward's profanity-laced tirade directed at a fellow employee *lost the protection of the NLRA and justified the imposition of disciplinary measures.*

Volkswagen plant's election petition dismissed, then rescheduled. In the latest chapter in the United Auto Workers' (UAW) sputtering attempt to represent 1,700 workers at a Volkswagen plant in Chattanooga, Tennessee, the NLRB instructed a regional director to dismiss a petition filed by the UAW's international union to represent a plant-wide bargaining unit of production and maintenance employees at the facility. A UAW local (Local 42) had been certified in 2015 as bargaining representative of a unit comprised solely of the plant's maintenance employees. Volkswagen challenged the certification by engaging in a technical "refusal to bargain."

While that representation dispute was still pending, the international union filed an election petition seeking representation of a "wall-to-wall" bargaining unit. The local then disclaimed its interest in the smaller unit, withdrew its election petition, and filed a joint motion with Volkswagen to dismiss its pending complaint. On May 6, 2019, the regional director dismissed the complaint and revoked the local's certification. Volkswagen then filed an emergency motion to stay the international union's election proceedings, which the Board granted. The international union requested a lift of the stay on May 9.

A divided NLRB panel, however, held the one-year certification bar blocked the international union's petition because it was seeking to represent workers previously represented by Local 42. The fact that the local had been certified three years ago was irrelevant: its certification year would begin with the first bargaining session following court enforcement of the Board's order, and Volkswagen had yet to come to the bargaining table. The majority also held that Local 42's subsequent disclaimer of interest had no bearing on the validity of the international union's subsequently filed petition, nor did the fact that the regional director had subsequently revoked the certification. Member Lauren McFerran dissented; Member William J. Emanuel was recused (*Volkswagen Group of America Chattanooga Operations, LLC*, May 22, 2019).

As the Board's decision noted, the problem was that the petition was filed *before* any disclaimer of interest and was therefore improper *when filed.* The Board further noted that the union could now immediately refile. The union did so,

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and a week later, the NLRB's regional director, on May 29, scheduled an election at the Chattanooga plant for June 12, 13, and 14, among a wall-to-wall unit of employees, including all full-time and regular part-time production and maintenance employees, at the Volkswagen Group of America Chattanooga Operations facility. The workers voted 833 to 776 to reject the union.

Motion to compel arbitration was lawful. An employer did not violate the NLRA by filing a motion to compel an employee to arbitrate his Title VII race discrimination and retaliation claims pursuant to the terms of its long-standing dispute resolution program (DRP), a divided three-member panel of the NLRB held. When the employee was fired, the union grieved his discharge under the grievance procedure set out in the parties' CBA. This contractual process was separate from the company's DRP. The grievance procedure eventually resulted in the discipline being upheld. Meanwhile, the employee filed employment discrimination charges, the Equal Employment Opportunity Commission issued a right-to-sue notice, and he filed a lawsuit. The employer then filed a motion to dismiss or stay, and to compel arbitration.

The employer first asserted that the employee had to pursue his claims under the CBA's grievance-arbitration procedures or, in the alternative, that the employee had to submit his claim to the DRP. It was the first time the employer had suggested that the DRP might apply to a former bargaining unit employee, and it was undisputed the employer had never given the union notice or an opportunity to bargain over the potential application of the DRP to the employee. That prompted an unfair labor practice charge and an ALJ's finding that the employer violated Section 8(a)(5) of the NLRA by attempting to unilaterally apply the DRP to a bargaining unit employee through the federal court motion to compel. As part of the proposed remedy, the ALJ ordered the employer to withdraw its federal court assertion that the employee's claim was subject to the DRP. The employer countered that it had no bargaining obligation since it sought to enforce the DRP against a *former* employee. Moreover, its federal court claims were neither baseless nor retaliatory, so the Board was precluded from interfering with its litigation claims.

The Board reversed the ALJ, holding that the employer's motion to compel in federal court was consistent with First Amendment principles and finding no unlawful objective on the employer's part that would except it from the Supreme Court's decision in *Bill Johnson's Restaurants v. National Labor Relations Board* (*Anheuser-Busch, LLC*, May 22, 2019). ■

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