ALERTS AND UPDATES

New NLRB Decision Likely to Aid Union Organizing

December 15, 2010

On December 6, 2010, the National Labor Relations Board (NLRB) held—in *Dana Corporation and UAW*[1]—that an agreement by a union and a company on significant terms of a future collective-bargaining agreement *prior* to the union's demonstration of majority support from the company's employees does not violate the law.

Facts of the Case

Dana Corporation (Dana) and the UAW entered into a letter of agreement (LOA) that required Dana to be "totally" neutral to union representation of its employees, to announce this neutrality to its employees; to tell employees that it believed it could have a constructive and positive relationship with the union for the benefit of the employees; to provide the union with the names and addresses of its employees upon demand; to permit the union to have access to and meet with the employees while at work; to voluntarily recognize the union as the exclusive representative of the employees based only on a card-check; and, in the event the parties could not negotiate an agreement, to have the terms of the collective-bargaining agreement (CBA) determined by an arbitrator. The union agreed not to intimidate or coerce employees into signing cards.

All of these commitments, in one form or another, have been approved previously by the NLRB as within the law. What was unusual in this case was the rest of the LOA. In consideration for its commitments, Dana obtained the union's agreement that, in any future collective-bargaining agreement, it would agree to eight provisions that Dana thought were essential, including mandatory overtime, flexible compensation, attendance controls, minimum classifications, continuous improvement and teamwork programs, and healthcare cost controls.

While Dana issued a press release, announcing the agreement and committing to a positive relationship with the UAW, there is no evidence that the public or employees were told about the UAW's agreement to the eight key provisions that would be in any future CBA.

In concluding that the agreement between Dana and the union on key provisions of a prospective collective-bargaining agreement did not constitute illegal assistance of the union by the employer, the NLRB also concluded that the free choice of the employees was not hindered because they still could refrain from signing union cards.

The dissenting member of the board, Brian Hayes, while acknowledging that "procedural" agreements controlling the organizing process were lawful, maintained that the decision in this case was contrary to numerous NLRB precedents that prohibit agreements on the terms of a collective-bargaining agreement between employers and minority unions. The majority, consisting of Chairman Wilma Liebman and board member Mark Pearce, distinguished this case from precedents on the basis that here there was no explicit recognition of the union and the agreement was not a complete contract, but only an understanding of broad principles to provide a framework on bargainable issues if the union achieved majority status. Such agreements, said the majority, fulfilled the intent of the National Labor Relations Act because they promote labor peace.

Analysis

Setting aside the lofty words about cooperation and labor peace, the effects of the decision appear to promote and assist unions to obtain new members. If played out to its reasonable, logical extension, the decision would permit a practice that the NLRB has historically found illegal: top-down organizing. Top-down organizing occurs when a union that does not represent a majority of an employer's employees reaches an agreement with the employer that results in the employer's support for the union in organizing its employees. The agreements customarily include union commitments to at least some elements of a future collective-bargaining agreement, if not to a complete agreement. By "organizing" employers in this way, the union's path to organizing the employees would be greatly eased. In the process, however, employees are often denied the ability to make informed and thoughtful decisions about whether to be represented by and pay dues to a labor organization.

Consider the following scenario: A union conducts a corporate campaign against an employer, seeking to coerce the employer to enter into a neutrality and cooperation agreement like that in this case. The union's "price" for stopping the campaign also includes an agreement by the employer that, if a card-check results in the union's recognition, the employer would agree to contributing into the union's underfunded defined-benefit pension plan. Although in this situation, the quid pro quo would be less favorable to the employer than the deal in the case before the NLRB, the factual pattern is sufficiently similar that it would likely produce the same result.

At the other end of the continuum, an employer can use the road map of this case to justify dangling a neutrality and cooperation agreement before a labor organization as the reward for agreeing in secret to vital issues in a future collective-bargaining agreement.

Either way, the employees' rights would be impeded, and labor agreements would, in some key respects, come within the complete control of union leaders and secret deals, extracted often in the context of coercive conduct.

This case highlights the extent this NLRB is prepared to go to make union organizing easier, even without the Employee Free Choice Act. Other "rules" are also within the NLRB's domain, such as the time between petitions and elections, the access of union organizers to the workplace, the definition of "supervisor," the inclusion of agency employees in bargaining units with regular employees, the right of employees to elections to undo a voluntary recognition, the control of union solicitations over electronic media, the ability of employers to have "captive audience" meetings with employees and the legality of various confidentiality, conduct and privacy rules seemingly unrelated to unions and union activity.

What This Means for Employers

The reasoning and view of the world that resulted in this case is likely to prevail for the foreseeable future. Consequently, employers who wish to preserve the benefits of a union-free environment should consider acting now to educate their employees about unions and to have policies or programs that neutralize the appeal of unions. By creating workplaces where employees perceive that union representation is unnecessary or undesirable, employers can potentially avoid union organizing efforts.

For Further Information

If you have any questions about this *Alert* or would like more information, please contact any member of the Employment, Labor, Benefits and Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.

Note

1. *Dana Corp. and UAW*, 7-CA-46965, 47078, 14083, 47079, 14119 and 14120.