Labor & Employment Issues
In Focus
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BROWNING-FERRIS REDUX SOWS CONFUSION – D.C. CIRCUIT UPHOLDS OBAMA BOARD JOINT EMPLOYER RULE BUT REMANDS TO TRUMP BOARD FOR APPLICATION

In the latest twist of the ongoing National Labor Relations Board ("NLRB" or "Board") joint-employer saga, the U.S. Court of Appeals for the D.C. Circuit issued a 2-1 decision along party lines, affirming the Board's more expansive articulation of the joint-employer standard. *Browning-Ferris Indus. of California, Inc. v. NLRB*, No. 16-1028, (Dec. 28, 2018) ("*BFI*"). Judge Patricia Millett's majority opinion appears to disrupt the current, Republican-controlled Board's proposed rulemaking, yet produces new uncertainties with respect to the standard's application.

In August of 2015, the Board under President Obama held in *BFI* that it would no longer require a joint employer to actually exercise control over employees' terms and conditions of employment, reversing years of unduly restrictive analysis. The Board, instead, would consider probative: (1) authorized but unexercised control over employees and (2) indirect control over terms and conditions of employment. Relying on instances of both direct and indirect control, as well as reserved authority to control, the Board concluded that the two germane entities were joint employers. While *BFI* awaited appellate review, the Republican-controlled Board fast tracked another case (*Hy-Brand*) to reverse *BFI*. Ultimately, however, the Board unanimously vacated *Hy-Brand* after the NLRB Inspector General concluded that Member Emanuel should have been recused. Unsuccessful in adjudication, on September 14, 2018, the Board published a notice of proposed rulemaking to mandate "direct and immediate control" as a requirement for joint-employer status. The rulemaking process remains ongoing and complex, with NLRB General Counsel Peter Robb recently commenting that Republican rule does not go far enough.

The D.C. Circuit first recounted the history of joint-employer, noting that the test is determined by the common law of agency, a purely legal question for the courts, rather than the NLRB. Considering the Board's rulemaking, Judge Millett explained that there is "no point to waiting for the Board to take the first bite of an apple that is outside of its orchard" and advised that the Board's rulemaking "must color within the common-law lines identified by the judiciary."

The Court found extensive support in precedent and the Restatement (Second) of Agency for the proposition that joint-employer status considers reserved but unexercised right to control workers. Judge Millett seemed to reject the notion that "actual exercise" warrants much additional significance, but found it unnecessary to address whether reserved control alone could establish a joint-employer relationship. The Court also upheld the Board's conclusion that evidence of indirect control was probative to the joint-employer inquiry, suggesting that to ignore it would defy precedent and common sense, essentially inviting employer manipulation. But again, the Court declined to address whether indirect control could be dispositive.

Despite upholding the Board's joint-employer articulation, the Court rejected its application of the same. Judge Millett explained that the Board failed to "differentiate between

those aspects of indirect control relevant to status as an employer, and those quotidian aspects of common-law third-party contract relationships." The Court identified the Board's reliance on the use of a "cost-plus contract" as problematic because it is a frequent feature of contracting relationships. Moreover, Judge Millett concluded that the Board failed to provide sufficient guidance as to what constitutes "indirect" control. Accordingly, the Court remanded the case to the Board for further proceedings.

Judge Randolph issued a dissent, arguing that the Court should have waited for the conclusion of the NLRB's rulemaking because the rulemaking process can be educational and the result may have implications on the ongoing *BFI* proceedings, themselves. Judge Randolph further objected on the merits, disputing the majority's interpretation of common law and expressing that the majority did not appreciate the broad spectrum of business relationships in which indirect control may not be relevant.

The D.C. Circuit decision represents a win for unions, establishing the Obama Board's interpretation of joint-employer as common law and seemingly undermining Republican rulemaking. As recognized by Judge Randolph, though, rulemaking may be challenged in another circuit, thereby creating an opportunity for a circuit split and ultimately Supreme Court review. Additionally troubling is Judge Millett's contentions on indirect control, suggesting that common contracting terms should not be considered in determining joint-employer status. This language is even more concerning considering the Republican controlled Board now empowered to define indirect control. Therefore, while a victory, the D.C. Circuit opinion cannot be considered an unqualified success for unions.

NFL BOOTS SECURITY CONSULTANT STATUTORY CLAIMS TO ARBITRATION

In a comprehensive review of current federal arbitration rules in New York, U.S. District Court Judge Lorna Schofield blocked the wage and age statutory lawsuit of various security consultants, granting the National Football League's ("NFL") summary judgment motion to compel arbitration instead. *Buckley v. The National Football League*, SDNY No. 18-civ.-3309 (Nov. 16, 2018).

Judge Schofield first determined that the consultants were bound by an arbitration provision broad enough to cover their dispute. Consultants who had signed their agreements as owners or managers of their entities argued that they never submitted their personal claims under the Fair Labor Standards Act ("FLSA") or Age Discrimination in Employment Act ("ADEA") to arbitration since they did not sign personally. Judge Schofield disagreed, invoking the doctrine that "one who receives a 'direct benefit' from a contract containing an arbitration clause is 'estopped from denying its obligation to arbitrate.'" Consultants received the direct benefit of compensation under their agreements and so became bound to arbitrate thereunder, she ruled. Furthermore, since the agreements provided for broad arbitration concerning "any dispute arising out of or related to this Agreement," consultants' wage and discrimination claims and even the issue of employment verses independent contractor, were presumptively covered. Indeed, even consultants' objection that the NFL defrauded them into entering the agreements as independent contractors fell within the scope of the arbitration clause since consultants challenged the whole agreement for fraud, not arbitration in particular.

Judge Schofield also rejected the consultants' argument that FLSA and ADEA claims could not be arbitrated. She explained the agreements' arbitration clauses did not forbid the assertion of those statutory rights and consultants did not show that the AAA filing and administrative fees rose "so high as to make access to the forum impracticable." On the contrary, the Court approvingly cited AAA rules authorizing arbitrators to "grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law." Finding no bar overcoming the broad presumption favoring arbitration, Judge Schofield stayed the lawsuit "to allow the arbitration to proceed and conclude."

TO "PROTECT" NEUTRALS, TRUMP BOARD REQUIRES UNION PICKETING TO PROMISE COMPLIANCE WITH LAW

Shortly before the New Year, the National Labor Relations Board ("NLRB" or "Board") issued a decision upholding a longstanding but controversial common situs picketing requirement. *Desert Sun Enterprises Limited*, 367 NLRB No. 61 (Dec. 27, 2018). In contravention of two circuit courts, the Board held that the National Labor Relations Act ("NLRA" or "Act") requires unions to affirmatively communicate to neutral employers that unions will conform to the law when they elect to notify neutrals of their intention to picket a common situs (a location in which a neutral and primary employer do business).

In October of 2013, IBEW Local 357, in a dispute with Desert Sun Enterprises, learned that Desert Sun was performing work at the Las Vegas Convention Center. The Union sent a letter to another labor organization, seeking a "strike sanction" against Desert Sun because of the employer's failure to pay area standards. Local 357 courtesy-copied the Las Vegas Convention Center.

Chairman Ring and Member Kaplan explained that for over fifty years the Board has held that a union's notification to a neutral at a common situs of its intention to picket must include "clear indication" that picketing would conform to Board law (i.e., *Moore Dry Dock*). *Moore Dry Dock* provides that picketing at a common situs is lawful if: (1) limited to times when the situs of dispute is located on the secondary employer's premises; (2) at the time of picketing the primary employer is engaged in its normal business at the situs; (3) the picketing is limited to places reasonably close to the situs; and (4) the picketing discloses clearly that the dispute is with the primary employer. The Board majority acknowledged that the Ninth and D.C. Circuits rejected its "unqualified-threat rule" and that it had never clearly explained the rule. Nevertheless, the Board concluded that the rule "is necessary to further important policy objectives," namely to protect neutral parties. The Board asserted that a broadly worded and unqualified notice is "inherently coercive" because neutrals would assume that they are being targeted and conclude that it would be prudent to cease doing business with the primary employer. The majority alleged that the burden imposed on the union is minimal and that it does not "expect unions to necessarily cite *Moore Dry Dock* or use any specific legalese." Rather, a union must "make clear in some manner that it will comply with legal limitations on common situs picketing so as to not entangle neutrals." Accordingly, the Board found Local 357 in violation of the Act.

Member McFerran dissented, criticizing the majority's standard as "formalistic" and ignorant of the realities of labor relations. McFerran explained that the NLRA prohibits unions from threatening, coercing, or restraining neutrals. Quoting the Ninth Circuit, she alleged that

mere failure to "invoke a particular incantation or to announce that picketing will be conducted in a lawful matter" would not communicate an intent to harm a neutral. McFerran argued that one must consider the factual circumstances as a whole, including the context of the union's statement, to determine whether such a statement would violate the Act.

The Board's decision maintains a standard rejected by the D.C. Circuit as "without foundation in the Act, relevant case law or any general legal principles," but appears to attempt to offer additional justification. It is likely that this case will provide the Ninth or D.C. Circuit another opportunity to test the Board's rationale. However, unions wishing to avoid this expensive and lengthy process should tailor notices to neutral employers carefully.

BOARD OVERRIDES DISMISSAL OF DECERT PETITION DESPITE ALJ FINDINGS OF UNFAIR LABOR PRACTICES

On December 19, 2018, the NLRB, in a 3-1 decision, reversed the Brooklyn Regional Director's decision which dismissed a decertification petition filed in 2014 on the basis of unfair labor practices that were settled in 2016 after they were found by Administrative Law Judges to be meritorious but before they were resolved by the Board. *Cablevision Systems Corp. (Communications Workers of America, AFL-CIO),* 327 NLRB No. 59. Board member Lauren McFerran issued a strong dissent, questioning how the majority could simply "erase" the credited evidence by three separate ALJs of the employer's serious and widespread unfair labor practices in the period surrounding the filing of the decertification petition and overrule the Regional Director's discretionary decision that the petition was tainted by the employer's ULPs.

The Communications Workers of America ("CWA" or "Union") was certified as the exclusive collective bargaining representative of the employer's Brooklyn employees in February, 2012. Beginning early in 2013, the Union filed a number of unfair labor practice ("ULP") charges alleging violations of sections 8(a)(5), (3) and (1) of the National Labor Relations Act ("Act"). The Regional Director issued ULP complaints which were consolidated for trial before ALJ Steven Fish. While those complaints were pending, the Union filed additional charges of violations of sections 8(a)(5), (3) and (1) covering a time period from July through December, 2014. The Regional Director found merit and issued complaints which were consolidated for hearing before ALJ Raymond Green.

On October 16, 2014, the decertification petition was filed and on November 12, 2014, the Regional Director dismissed the petition subject to reinstatement in accordance with the Board's blocking charge policy in light of the ULP complaints pending before ALJs Fish and Green. The employer requested review of that decision, but while its request was pending before the Board, Judge Fish issued his decision and concluded that at various times in January, 2013 and in July and August 2013, the employer committed a number of ULPs, including making unilateral changes in the terms and conditions of employment without bargaining with CWA, threatening that bargaining would be futile, refusing to promptly reinstate ULP strikers, and also violating section 8(a)(1) at its Bronx facility. On April 19, 2016, Judge Green issued his decision and found that the employer had conducted unlawful coercive poll asking workers if they wished to continue to be represented by the Union in July, 2014 and that the employer unlawfully threatened to cause the arrest of an employee who was playing pro-union songs on his car radio in the parking lot of the employer's headquarters. Exceptions were filed.

On June 30, 2016, the Board denied the employer's request for review of the Regional Director's dismissal of the decertification petition, relying on allegations in the case before Judge Fish. On July 1, 2016, the parties submitted a joint motion for approval of a non-Board settlement agreement which settled all the charges in Judge Fish's case, Judge Green's case and a third case that was heard by Judge Mindy Landow involving the employer's unlawful discharge of an employee from its Jericho, New York facility in 2015. The settlement provided that the parties would extend, renew and modify the current CBA for an additional three years through June, 2019. The Board approved the settlement agreement and remanded the case to the Regional Director; the CWA then withdrew the ULP charges which were litigated in all three cases.

Barely one month later, in August, 2016, the decertification petitioner requested to reinstate her petition. The Regional Director denied the request on the ground that Judges Fish and Green had found merit to the ULP charges that had ultimately been settled. The Regional Director applied settled law (*Master Slack Corp.,* 271 NLRB 78 (1984)) which required dismissal of a decertification petition where there is a causal relationship between the employer's conduct and the loss of support for the union which taints the petition.

The three-member Board majority overturned that decision and held that the Regional Director should have followed the Board's decision in *Truserv Corp.,* 349 NLRB 227 (2007). In *Truserv,* the Board held that when processing of a decertification petition has been block by ULP charges, the petition should normally be reinstated and processed when the charges are resolved by a settlement because a settlement does not constitute a finding or an admission that an employer has committed unfair labor practices. The Regional Director had reasoned that, unlike *Truserv,* here the ULPs were litigated, evidentiary records were made, and three ALJs found that the employer had committed numerous and egregious ULPs which affected the bargaining unit. Thus, she determined that the ALJs Fish and Green made findings that supported dismissal of the petition.

The Board ignored the ALJs finding purely on the ground that the ULP cases had been settled without the employer admitting any unlawful conduct. According to the majority, "a judge's violation finding is insufficient" to render *Truserv* inapplicable because the charges were settled "prior to final action by the Board." Because, according to the majority, neither ALJ Fish's decision nor ALJ Green's decision was a final decision by the Board, those decisions "became a nullity" when the employer and the Union settled the charges and the Regional Director approved the Union's request to withdraw the charges.

The majority also expressed its view that giving any determinative effect to the ULP findings of the ALJs would contravene the employer's due process rights and further would be unfairly harsh to the decertification petitioner because she would never have an opportunity to challenge those findings.

Dissenting member Lauren McFerran criticized the majority for abdicating their independent duty to protect employee free choice. As she pointed out, there was no good reason to treat the employer's misconduct as if it never happened or to treat the settlement agreement as if it disposed of the crucial issue of whether the petition was tainted by the ULP conduct of the employer. She said that the fact that the parties settled the case does preclude the legal conclusion that the employer violated the Act, but there remains the separate factual

question of whether the petition was tainted. The majority, she says, ignored that fundamental point in its mechanical application of *Truserv.*

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