Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
September 20, 2019 Edition

NLRB FURTHER LIMITS UNION ORGANIZING ACCESS, REVERSING DECADES OLD PRECEDENT

In what has now become routine, on September 6, 2019, the National Labor Relations Board ("NLRB" or "Board"), by a 3-1 majority, reversed a decades old precedent and further limited union representatives' rights to even be near company property. In *Kroger Limited Partnership and Mid-Atlantic and United Food and Commercial Workers Union Local 400*, case 05–CA–155160 (September 6, 2019), the Board approved Kroger Supermarket's calling of police on union organizers in a shared shopping center parking lot.

The union representatives were in the shared parking lot at a shopping center in Portsmouth, Virginia, collecting customer signatures protesting the transfer of union employees from this Kroger location. Historically, Kroger had permitted other groups to congregate in the parking lot, and, as such, the Administrative Law Judge had ruled that Kroger was acting in a discriminatory manner in ejecting the union representatives, relying on a 1999 NLRB precedent, *Sandusky Mall Co.*, 329 NLRB 618 (1999), *enf. denied in relevant part* 242 F.3d 682 (6th Cir. 2001).

The Board disagreed. Instead of following *Sandusky's* view protecting union representatives and requiring employers to grant access to nonemployee union agents for any purpose if the employer has allowed "substantial civic, charitable, and promotional activities" by other nonemployees, the Board majority held that "*Sandusky Mall* and its progeny have been roundly rejected by the courts of appeals" and limited it to "situations where an employer ejects nonemployee union agents seeking to engage in activities similar in nature to activities the employer permitted other nonemployees to engage in on its property." Thus, the majority ruled that *Sandusky Mall* improperly stretched the concept of discrimination well beyond "its accepted meaning in a manner that finds no support in Supreme Court precedent or the policies of the Act." Importantly, the Board found that union organizers are not "civic or charitable" organizations.

Instead, the majority adopted a standard that "a denial of access to nonemployee union agents violate(s) the Act (where) an employer denied access to nonemployee union agents while allowing access to other nonemployees for activities similar in nature to those in which the union agents sought to engage." Thus, an employer may deny access to nonemployees seeking to engage in protest activities on its property while allowing nonemployee access for "a wide range of charitable, civic, and commercial activities that are not similar in nature to protest activities." Moreover, the majority continued that "an employer may ban nonemployee access for union organizational activities if it also bans comparable organizational activities by groups other than unions." It is not clear what constitutes "comparable organizational activities."

The Board's sole remaining Democratic Member Lauren McFerran strongly dissented, arguing that the majority has, in precedent eviscerating cases, crafted miniscule distinctions in order to save employer positions. "In a series of decisions reversing board precedent without

prior notice, the majority has made it increasingly easy for employers to exclude both employees and union organizers from property open to the public, in order to prevent their exercise of labor-law rights," McFerran said. Here, McFerran wrote, the majority has stretched so far as to virtually eliminate the discrimination exception to banning union representatives from company property.

In her dissent which features a tone of increasing disbelief, Member McFerran begins in 1956, when the United States Supreme Court in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) established the general rule that an employer may validly prevent nonemployee distribution of union literature unless employees are inaccessible to the union or the employer "discriminate[s] against the union by allowing other distribution." She then walks through the ensuing 65 years of Board and Court precedent to underscore the extent to which the majority is off course, finally landing on her conclusion that "Section 8(a)(1) is intended affirmatively to promote the exercise of Section 7 rights (union solicitation and distribution, for example), and not simply to shield protected concerted activity from reprisal." Thus, the question is whether there has been an unreasonable interference with the exercise of Section 7 rights.

Building on this, Member McFerran continued that "nonemployee access cases start from the premise that some interference with Section 7 rights has occurred—the employer has precluded employees from receiving an organizational message from union organizers or from those organizers communicating a pro-union message to the public on the employees' behalf." To decide whether a violation has occurred, the Board must then, she wrote, balance the union rights with an employer's legitimate interests, "including (in this context) the right to exclude unwanted persons from its property." Thus, she concludes, "where an employer regularly has permitted nonemployees to engage in solicitation and distribution on its property, but has denied access to union representatives, the evidence strongly suggests that permitting the union to engage in substantially the same activity would not interfere with the employer's use of the property."

Kroger is another step in a series of rulings which send the message to actively organizing unions that the Trump Board will bend to great extremes to stop your efforts.

THE NLRB MAKES IT EASIER FOR EMPLOYERS TO MAKE UNILATERAL CHANGES

On September 10, 2019, in the latest of a series of employer-friendly decisions from the National Labor Relations Board's Republican majority, a three member majority, over the dissent of Board member Lauren McFerran, relaxed its standard for determining if and when businesses violate federal labor law by changing workers' conditions of employment without bargaining with their union first. By its decision, the Board held that *M.V. Transportation, Inc.* did not violate the National Labor Relations Act ("Act") when it made certain unilateral changes in terms and conditions of employment at its Las Vegas facility without first discussing them with the Amalgamated Transit Union local union that represented the coach operators, mechanics and other employees employed at the facility; however, the Board also found that the Employer did violate the Act when it unilaterally updated certain other workplace policies at the facility without bargaining with the union first. The decision is *M.V. Transportation, Inc.* (28-CA-173726; 368 NLRB No. 66).

In reaching its decision, the Board abandoned its "clear and unmistakable waiver" standard for determining whether an employer's change to the terms of unionized workers' employment absent bargaining contravenes the Act. The Board majority said that the "clear and unmistakable waiver" benchmark had been rejected by the D.C. Circuit in a 1993 case called *NLRB v. Postal Service* and by several other appellate courts. In rejecting the "clear and unmistakable waiver" standard the Board adopted the "contract coverage" standard for determining whether a unionized employer's unilateral change in a term or condition of employment violates the Act.

Under the "clear and unmistakable waiver" test, a unionized business would violate the Act if it made a unilateral change to working conditions unless there was a provision in its collective bargaining agreement that specifically allowed the employer to take the action in question. Under the "clear and unmistakable waiver" standard, the Board would find that an employer's unilateral change violated the Act unless a contractual provision unequivocally and specifically referred to the type of employer action at issue. Although the Board reaffirmed that standard in 2007 and has adhered to it ever since, the D.C. Circuit has applied the "contract coverage" standard for more than 25 years, and it sanctioned the Board in 2016 for continuing to advocate for application of the "clear and unmistakable waiver" standard in proceedings before that court.

Under the "contract coverage" or "covered by the contract" standard, the Board will examine the plain language of the parties' collective-bargaining agreement to determine whether the change made by the employer was within the scope of contractual language granting the employer the right to act unilaterally. If it was, the Board will honor the plain terms of the parties' agreement and the employer will not have violated the Act by making the change without bargaining. If the agreement does not cover the employer's disputed action, the employer will have violated the Act unless it demonstrates that the union waived its right to bargain over the change or that it was privileged to act unilaterally for some other reason.

In other words, under the "covered by the contract" standard the Board will look at the language in CBAs to see if any disputed changes by an employer fall under management's authority under the contract to act unilaterally. If so, the Board will hold that the employer didn't commit an unfair labor practice under the Act by making the change without first bargaining with the union over it. Conversely, if the employer acted outside the bounds of the CBA's management rights language, then the NLRB will find that the employer did violate the Act unless the business is able to show that the union waived its right to bargain over the change or that the company had the legal authority to act unilaterally on some other basis, according to the labor board. "We believe that the contract coverage test is more consistent with the purposes of the Act and sound labor policy than is the clear and unmistakable waiver standard," the majority said after listing a series of reasons for why it believes the previous standard is no longer viable. "Because it gives effect to the plain meaning of language in collective-bargaining agreements, the contract coverage standard we adopt today is fully consistent with recent Supreme Court precedent."

In her dissent, Board member McFerran called the ruling a "grave threat" to collective bargaining, that it upends core NLRB precedent and gives employers "wide berth" to sidestep unions when they want to make changes in the terms and conditions of workers' employment. She also said the decision has the potential to lead to labor instability by encouraging employers to seek broad management-rights provisions in CBAs that unions will likely resist and by leading

more employers to make unilateral changes to key terms of employment like wages or benefits. McFerran wrote that "The majority makes it easier for employers to unilaterally change employees' terms and conditions of employment — wages, hours, benefits, job duties, safety practices, disciplinary rules, and more — in a manner that will frustrate the bargaining process, inject uncertainty into labor-management relationships, and ultimately increase the prospect for labor unrest." She also that the Board's decision to apply the new standard to pending cases rests on shaky legal footing.

This new legal threshold established by the Board will likely focus much greater attention on management rights clauses. Employers will clearly seek to expand their authority contained in their management rights clause while unions will seek to do whatever possible to limit that authority. The battle begins.

SPLIT DC CIRCUIT ENFORCES OBAMA BOARD "PERFECTLY CLEAR SUCCESSOR" RULE, FLASHING "SLOW" FOR EXPECTED TRUMP BOARD REVERSAL

In a split 2:1 panel decision, the United States Court of Appeals for the D.C. Circuit applied a 2016 Obama Board precedent to hold a national bus company bound to its predecessor's labor agreement when it promised to retain most of the prior workforce without clearly informing the workers of new terms and conditions of employment. *First Student v. NLRB*, D.C. Cir. No. 18-1091 (Sept. 3, 2019).

First Student Inc. bid for a Michigan school district bus contract in February 2012. At that time, the bus workers of the incumbent company were covered by a United Steelworkers labor contract due to expire in August. First Student officials met with over 40 employees in March, promising them jobs and to hire as many as possible, but referring to certain job terms other than wages as being "subject to negotiations." After winning its bid and offering to hire 41 of 55 of its predecessor's employees, a majority of its workforce, First Student rejected the existing unexpired contract, imposed new wage terms unilaterally, and offered to bargain with the Union. The Union filed refusal to bargain unfair labor practice charges with the National Labor Relations Board ("NLRB" or "Board"), contending that First Student had become a clear successor bound to its predecessor's contract pending Union negotiations for new terms. A divided Obama Board agreed and First Student appealed.

Judge Judith Rogers, joined by Judge Wilkins, agreed with the Board. Reviewing Supreme Court and Board precedent establishing the "perfectly clear successor" doctrine, Judge Rogers reiterated that where a successor essentially continues its predecessor's business, expressing its intent to hire most of its union workers without first establishing new terms and conditions of employment, the successor thereby implicitly assumes the existing collective bargaining agreement until it negotiates new terms with the union. An employer can avoid such contract successorship by clearly informing the workforce of new terms prior to offering new employment. Otherwise, Judge Rogers explained, employees may be lulled into believing their employment has not been altered when they begin, only to see tables turned without negotiations. As developed by the Board and courts, noted Judge Rogers, the "perfectly clear successor" rule strikes a fair balance between the new employer's right to set new terms if it clearly so states its intention, and employee expectations of status quo pending negotiations if the employer does not. Here, reasoned Judge Rogers, First Student became a "perfectly clear successor" when it expressed its intention to hire the predecessor's workers in March,

even though actual hiring began in May. First Student's reference to negotiations did not expressly put employees on notice that their contract wages would not continue and so the employer could not unilaterally alter such terms prior to negotiations or impasse. Senior Judge Silberman dissented in part, insisting that the "perfectly clear successor" rule required that all, not just a majority, of the predecessor's employees be hired, a position the majority dismissed as unsupported in case law.

The DC Circuit decision runs counter to the recent employer friendly wave of precedent busting decisions from the Trump NLRB. Indeed, a recent Trump Board decision cut back on relief under the perfectly clear successor doctrine and likely presages more of the same on precedents restricting business freedoms. Unions seeking to reverse Robb and Ring decisions they believe desert precedent and logic in favor of dogma and politics must seek Appeals Court review, and explain why deference is not due to the Board. As the only Circuit Court of Appeals which can hear appeals from the Board arising anywhere in the country, the DC Circuit sits best positioned for that process. The DC Court thus may soon pick up an increasing number of such appeals, driven in part by the flashing red lights of *First Student*.

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