Labor & Employment Issues
In Focus

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"All that serves labor serves the Nation. All that harms labor is treason to America. No line can be drawn between these two. If any man tells you he loves America, yet hates labor, he is a liar. If any man tells you he trusts America, yet fears labor, he is a fool. There is no America without labor, and to fleece the one is to rob the other."
Abraham Lincoln

THIRD CIRCUIT BACKS UNION RIGHT TO PRODUCTION OF PURCHASE AGREEMENT IN PARTS RELEVANT TO COLLECTIVE BARGAINING

The U.S. Court of Appeals for the Third Circuit enforced an order of the U.S. National Labor Relations Board ("NLRB" or "Board") in part that a seller employer must produce portions of its purchase agreement relevant to effects bargaining upon union demand, but not the Board's order for production of the entire agreement. Cr*ozier-Chester Med. Ctr. V. NLRB*, No. 18-1640 & 1973 (3d.Cir. Jan. 23, 2019). The majority's 39 page decision details the respective burdens of union and employer, including confidentiality.

Crozer-Keystone Health Systems ("Crozer") was purchased by Prospect Medical Holdings {"Prospect") in 2016 pursuant to a purchase agreement ("PA"). Crozer informed its employees of the sale, that they would apply for position but that Prospect would set new terms and conditions of employment. The Pennsylvania Association of Staff Nurses and Allied Professionals (the "Union') began effects bargaining with Crozer and demanded the full PA. Crozer refused, citing the PA's confidentiality clause but offered to produce only relevant non-confidential portions. The Union filed unfair labor charges with the NLRB and both the NLRB Administrative Law Judge and Board panel 2:1 ordered production of the full PA. Crozer appealed.

In a 2:1 decision, the Court of Appeals agreed with the Board as to production for all PA portions relevant to effects bargaining, but not as to those portions not relevant to effects bargaining. The Court noted the employer's general duty to honor union requests for information relevant to collective bargaining under Section 8(a)(5) of the National Labor Relations Act ("NLRA"). In light of that duty, Crozer's refusal to produce any portions of the PA so long as the Union insisted on all violated the employer's duty. Rather, analogizing to the rules of federal court discovery, Cozer should have produced those PA portions it deemed relevant, disputing only the balance. Moreover, to the extent Cozer denied production of the entire or portions of the PA based on the PA's confidentiality clause, the employer bore the burden of proving that anything withheld was actually confidential, and did not meet that burden. On the other hand, the Court declined to enforce the whole Board decision as punitive, since it required Cozer to produce more than the NLRA required, such as portions of the PA not relevant to bargaining. The dissent would have denied enforcement of the Board's order entirely for the Union's refusal to specify and limit its request to relevant, non-confidential documents.

NLRB CALLS HALT TO A MAIL-BALLOT UNION ELECTION

On September 24, 2020 the National Labor Relations Board ("NLRB") suspended a union election in Texas where the votes were to be conducted by mail because of the COVID-19 pandemic. *Airgas USA v. N.L.R.B.*, 16-RC-262896 (9/24/20). This is the fourth time since August 25 that the Trump NLRB has granted an employer's request to halt a mail-ballot union election with little to no justification.

In *Airgas*, a group of drivers in Grand Prairie, Texas sought to join an International Brotherhood of Teamsters affiliate. The local NLRB Regional Director Timothy Watson called for a mail-ballot election based on the conditions of the COVID-19 pandemic in Dallas County. The ballots had been scheduled to be mailed September 25.

The employer objected to voting by mail, arguing that Watson failed to address specific conditions at the company's location or how the COVID-19 safeguards it instituted would protect workers in a potential in-person election. The employer further argued that COVID-19 "is part of daily life for Airgas and its employees who report to work every day to perform essential work." The Teamsters opposed the halt of the mail-ballot election by arguing that the employer failed to show how a vote by mail would cause a harm to the employer.

In its opinion, the Trump appointed NLRB majority failed to explain its reasoning for halting the election other than stating that the employer's call to stop mail-balloting raised "substantial issues warranting review." Lauren McFerran, the NRLB's sole Democratic member, dissented in the case. McFerran argued that she "would deny the Employer's requests for a stay and review of the Regional Director's decision to order a mail-ballot election due to the threat posed by the COVID-19 pandemic. The mechanics of an election, including whether it is to be conducted by mail ballot, lie within the discretion of the Regional Director. See *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998). Here, the Regional Director clearly and rationally considered all the relevant circumstances, including those supporting the Employer's argument for a manual election, but on balance concluded that a mail-ballot election was warranted in this case. Although individual Board Members might themselves have struck the balance differently were they deciding the case in the first instance, that is not the applicable standard. Applying the correct standard, there is no basis to conclude that the Regional Director "clearly abused" his discretion. *National Van Lines*, 120 NLRB 1343, 1346 (1958)."

HOUSE ISSUED AND NLRB REJECTED SUBPOENAS TO EXPLORE NLRB MEMBERS' CONFLICTS

In the aftermath of the National Labor Relations Board's ("NLRB or Board") dramatic change in the requirements for workers and unions to establish joint employer liability, the House of Representatives issued subpoenas to compel the Board to produce all records related to conflicts of interest among the Republican Board Members. The Board declined to comply with the subpoenas.

The subpoenas were issued by Democratic Members of the House on the House Committee on Education and Labor and reflect an ongoing conflict with NLRB Chairman John Ring and his

continuing failure to produce records voluntarily. The Committee subpoena seeks any records related to efforts by the Trump Administration to undo Obama era rules which expanded the "joint employer" rule, permitting workers and their representatives to pursue claims not only against direct employers but related entities as well.

The Democratic House Members believe that the Republican Members of the Board who reversed the Obama era rule, in particular Chairman Ring, were conflicted. Specifically, Committee Chair Bobby Scott (D-Va.), stated that "the NLRB's sole motivation for refusing to produce requested documents is to cover up misconduct." The NLRB called the subpoena "unprecedented" and maintained that the Committee had already reviewed some of the relevant documents, while the remainder were part of Board internal deliberations and thus not reviewable. As a result of the Board's position, the resolution of the subpoena is likely to end up in Court.

The current dispute stems from conflict of interest concerns over Member William Emanuel dating back to 2017, where the NLRB inspector general determined that Member Emanuel should have recused himself from a previous joint employer matter due to the involvement of the law firm where he had previously worked, Littler Mendelson, in the matter. The new subpoena focuses on the unusual lengths the labor board's Trump-appointed majority subsequently went to as it sought to get rid of the more expansive joint-employer rule. House Democrats argue those efforts raise additional ethical concerns.

In a letter dated this past Tuesday, NLRB solicitor Fred Jacob said "the Board respects the Committee's serious decision to issue a subpoena for the three documents and understands the gravity of that decision." The Board letter went on to say that "even in response to a subpoena, however, unrestricted release to the Committee of these pre-decisional documents would undermine the Board's legitimate interest in a confidential deliberative process." The NLRB said in its letter that Democratic staff turned down an offer to review the documents in private, at NLRB headquarters.

NLRB Chairman John Ring (R) said previously that handing over the documents would set an unworkable precedent for the Board. "Guarding its deliberations from public release is essential to sound decision making," Jacob wrote Tuesday.

The agency's denial will likely require Congressman Scott to hold a contempt vote in committee to enforce the subpoena, which would need support from most of the panel's 28 Democrats. That would need to be followed by a vote in the full House—a logistically complicated endeavor that would not likely happen until after the November election—and a civil lawsuit, to force the NLRB to produce the documents.

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