Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
August 25, 2022 Edition

DRIP, DRIP, DRIP: STARBUCKS LOSES AGAIN AT THE NLRB AND GOES OFFENSIVE

In another in a series of defeats at the National Labor Relations Board ("NLRB" or "Board"), as its employees across the United States continue to organize, on August 18, 2022, United States District Judge Sheryl H. Lipman, sitting in the United States District Court for the Western District of Tennessee, ruled that Starbucks must reinstate seven of its workers whom it unlawfully fired in response to their protected organizing activities.

According to the Court, upon being made aware of the organizing efforts at the Memphis area store, Starbucks immediately began a retaliation campaign which included disciplining the employees who began the organizing drive, closing the store on days where rallies were planned, removing pro-union material from the bulletin board, including support from customers, and finally firing the seven employees deemed the leaders.

Workers United won a Union election on June 15, 2022 and now Starbucks has been ordered to bargain. "Today's federal court decision ordering Starbucks to reinstate the seven unlawfully fired Starbucks workers in Memphis is a crucial step in ensuring that these workers, and all Starbucks workers, can freely exercise their right to join together to improve their working conditions and form a union," said NLRB General Counsel Jennifer Abruzzo. "Starbucks, and other employers, should take note that the NLRB will continue to vigorously protect workers' right to organize without interference from their employer."

Unrelated to the above case, but in response to the ongoing nation-wide organizing drive of Starbucks stores, and in direct response to its loss at an Overland Park, Kansas store, on August 15, 2022, the company issued a 16-page broadside pointed directly at the NLRB, accusing it of, among other things colluding with the Union organizing Starbucks' in such ways as advising the Union of the status of voting so that the Union could target under-voting groups and "collaborating with Union agents to cover up misbehavior." In the letter, Starbucks' Counsel, relying on "a career NLRB professional" for "truthfully reporting events," asked for an immediate suspension of mail-ballot elections involving Starbucks until the company's charges are investigated. The letter comes in response to an 80% loss rate for Starbucks over the course of more than 220 elections and nearly 20 unfair labor practice charges being filed against it by the Board.

The Starbucks letter suggests a ratcheting up of its defense against organizing drives from merely borderline legal tactics, reflected in the volume of unfair labor practice charges, to a global public relations campaign to accuse the neutral NLRB of bias often enough and loudly enough so as to undermine the integrity of the process. The letter can be found here: https://aboutblaw.com/4ty. The NLRB has not responded to the letter, citing ongoing litigation.

DEMOCRATIC MEMBER PANEL OF NLRB ISSUES BARGAINING ORDER AGAINST "HALLMARK" ANTI-UNION ORGANIZING VIOLATIONS

North Texas Investment Group d/b/a Whitehawk Worldwide, 370 NLRB No. 122 (Aug. 11, 2022) ("*Whitehawk*") illustrates the influence the labor-experienced members of the National Labor Relations Board ("NLRB" or "Board") can have on the cases presented to the Board. In *Whitehawk*, a panel of Members Wilcox and Prouty, both union-experienced Biden appointees, combined to order an employer to bargain with a union seeking to represent its employees, over the dissent of Member Ring, a Trump appointee.

In June 2020, the International Union of Security, Police & Fire Professionals of America ("SPFPA" or "Union") presented Whitehawk with authorization cards from 20 of 24 employees and requested recognition. Whitehawk refused and the Union filed for an election with the NLRB. Whitehawk's response was "immediate, swift and retributive," found the Board. Whitehawk's VP for HR and its site manager combined to fire the workers' two lead Union supporters, threaten all other employees with the same fate, selectively disciplined three employees under its broad confidentiality policy and warned that bargaining would be futile. SPFPA filed numerous unfair labor practice charges against Whitehawk, and the NLRB Regional Director "blocked" the election.

All three-members of the NLRB panel agreed on the above facts followed by a cease-and-desist order, reinstatement and notice reading to the employees, but split on further relief. Members Wilcox and Prouty, both of whom had represented unions, imposed a "broad" cease and desist order and notice reading by or in the presence of the chief perpetrators, the VP of HR or site manager. In addition, Wilcox and Prouty reasoned that while the employer's unfair labor practices did not rise to "Category I" "outrageous and pervasive" status necessitating a bargaining order in place of election, they met "Category II" "possibility of a fair election is slight" standards and so warranted a bargaining order in place of election. *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). Wilcox and Prouty noted that the employer's discharge of two Union supporters, threats against other workers, discipline and dismissal of collective bargaining as futile constituted "hallmark" violations "highly coercive of employees." The "gravity and coercive impact of these violations" was heightened, explained the panel majority, by the small size of the unit and the high level of management actors. Whitehawk's "entire course of conduct reveals continued hostility toward employee rights and thus evidences a strong likelihood of a recurrence of unlawful conduct ...," thus justifying a *Gissel* bargaining order, concluded Wilcox and Prouty. Ring disagreed, arguing that traditional remedies would suffice to assure a fair election.

Whitehawk thus highlights that now, more than ever, Board panel composition counts.

RAILWAY STRIKE ON THE HORIZON?

While the Railway Labor Act ("RLA") makes strikes and lockouts difficult, placing numerous obstacles in the way of the negotiating parties before either can use its ultimate weapons, 115,000 railway workers have been moving closer to a rare strike. A consortium of 13 International Unions has been negotiating new agreements with the largest railway group, which represents industry behemoths BNSF, Union Pacific, Norfolk Southern, and CSX, amongst others ("Railways"), since 2019. Recently, the Brotherhood of Locomotive Engineers ("BLE") voted by a 99.5% majority to authorize a strike. Since the last agreement expired, in 2019, wages have not budged, resulting in ever increasing wage demands by the Unions as their members fall farther behind. Most recently, the International Unions proposed an increase of 31.2 percent over five years, while the Railways reportedly want 17 percent. In addition to wage differences, the Railways want larger health care contributions from the workers.

On top of these common issues, working conditions, particularly related to safety and service standards, most prominently the Railways' demand for one-person crews, are on the table, even though the Railways have earned record profits.

Despite these deep disagreements, the railways workers cannot strike without meeting very specific requirements, in place for the transportation industries the government has deemed "essential." Before a strike would be possible, under the RLA, failure to negotiate a new contract triggers a series of events, all designed to avoid a strike and the disruption to the economy it would cause. First, unions are outright banned from taking labor action for so-called "minor disputes," which means anything other than the terms of a collective bargaining agreement being negotiated. Next, the contracts for the employees of the Railways do not expire, but are negotiated by the company or unions triggering a "Section 6 notice" to start the negotiating process. Then, after unsuccessful negotiation, the parties go to mediation under the National Mediation Board ("NMB"), an executive branch office. If mediation reaches an impasse, both parties can consent to binding arbitration, meaning an arbitrator determines the new terms of the contract both parties must accept. If either the Railways or the International Unions do not agree, the federal government gets more involved. In this case, the International Unions declined binding arbitration.

After a 30-day cooling off period, if the NMB thinks the dispute could result in a significant disruption to the economy, it will notify the President. The President can then do one of two things: create a Presidential Emergency Board (PEB), a three-member panel to hear everyone out and craft its own deal, or the President can do nothing, allowing events to take their course, up to and including a strike. Here, President Biden appointed a Board. The PEB had 30 days to issue its recommendation followed by another mandatory 30-day cooling off period. At this point, the two sides can either accept or reject the PEB recommendation. Both sides must agree to end the impasse and If they reach a tentative agreement, the members of each union must ratify it.

Last week, the PEB issued its report recommending that the unions be given a 24% wage raise, plus signing bonuses, between the International Unions' 31.2% ask and the Railways proposed 17%. The PEB also recommended additional worker contributions to health care. Both sides now have the thirty days to negotiate a contract based on the PEB recommendations, at which point a strike would be possible if no agreement is reached, although Congress could then intercede to prevent the concomitant damage to the economy. The International Unions have so far not commented but on social media indicated concerns about the PEB's failure to address working conditions, particularly not guaranteeing two person crews.

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

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