Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
March 9, 2023 Edition

D.C. CIRCUIT SINKS 2021 BOARD DECISION FOR “WANT OF REASONED DECISION MAKING”

Last week, the D.C. Circuit Court of Appeals vacated and remanded, as arbitrary and capricious, a 2021 decision from the National Labor Relations Board (“NLRB” or “Board”) because it “lacks support in the record,” “defies established law,” and “creates a new rule without reasoned justification.” *International Organization of Masters, Mates & Pilots, ILA, AFL-CIO v. National Labor Relations Board*, No. 21-1249 (D.C. Cir. Mar. 3, 2023).

The conflict began as a dispute over whether cargo ship operator Sunrise Operations, LLC (“Sunrise”), had a duty to bargain with its vessels’ licensed deck operators (“LDOs”). Since 1981, the International Organization of Masters, Mates & Pilots, ILA, AFL-CIO (“Union” or “IOM”), has been the lawful and voluntarily recognized bargaining representative for the LDOs on four container ships that carry goods between California and Hawaii. The Union filed unfair labor practice charges with the NLRB claiming that Sunrise refused to provide information related to collective bargaining and subsequently refused to participate in arbitration.

At a hearing before an NLRB Administrative Law Judge (“ALJ”), Sunrise primarily argued that it had no duty to bargain with the LDO unit because the LDOs are “supervisors,” thus placing them outside of the NLRB’s jurisdiction. But the ALJ, after a fact-intensive inquiry, found that the LDOs’ bargaining unit was an appropriate “mixed” unit of both employees and supervisors. As such, the ALJ determined that the NLRB did have jurisdiction, and Sunrise had violated the National Labor Relations Act (“Act”). Sunrise filed exceptions to contest the ALJ’s decision and made essentially the same argument before the Board—that because the LDOs were supervisors, the NLRB did not have jurisdiction. However, upon review, a two-member majority consisting of Member William Emanuel and Member John Ring essentially ignored Sunrise’s own argument—that the LDOs were supervisors in fact—but ruled in favor of the company anyway because Sunrise had “believed” that all the LDOs were supervisors. Chairman McFerran dissented, chastising her colleagues for “tak[ing] an uncomplicated case and steer[ing] it far off course.”

Finding no basis upon which the Board or a reviewing court “has held that an employer’s unannounced beliefs about workers’ supervisory status determines whether the Board has jurisdiction to enforce the NLRA,” the Court vacated the Board’s decision for “want of reasoned decision making.” The Court pointed to the absurd implications of allowing such a ruling to stand: any employer could challenge the Board’s jurisdiction simply by asserting that it simply believed the workers in a unit did not meet the statutory

definition of "employee." The Court remanded the case back to the Board for reconsideration.

IT'S NOT JUST COFFEE, IT'S STARBUCKS' UNION BUSTING NLRB ADMINISTRATIVE LAW JUDGE FINDS

On March 1, 2023, National Labor Relations Board ("NLRB") Administrative Law Judge ("ALJ") Michael A. Rosas found that Starbucks violated the National Labor Relations Act ("Act") on hundreds of occasions in Buffalo and Rochester area stores that had the effect of discouraging union activity ("Decision"). *Starbucks Corporation*, JD-17-23 (NLRB Division of Judges). Most importantly, ALJ Rosas found that Starbucks engaged in "egregious and widespread misconduct demonstrating a general disregard for the employees' fundamental rights[.]" *See* Decision at *196.

The Decision pertains to activity by Starbucks in the Buffalo and Rochester area stores during the period from August 2021 to July 2022 when organizing efforts by the baristas' labor group, Workers United ("Union"), began to percolate. During that time, Starbucks committed a litany of unfair labor practices by, *inter alia*, promising to increase benefits in response to Union activity, closing stores to avoid unionization, illegally surveilling employees, overstaffing and transferring employees to dilute Union support in stores, and even terminating employees. From the beginning of the organizing efforts, ALJ Rosas explained, Starbucks sent high ranking executives and other officials to the Buffalo area to combat unionization and provided no explanation as to how the company previously decided which markets to visit.

ALJ Rosas ordered an array of remedies adverse to the company including reinstatement of terminated workers, backpay, the re-opening of certain locations, granting Union access, and physical and digital notice postings in all U.S. stores and on social media. Additionally, Starbucks' executives Howard Schultz, Chief Executive Officer, and Denise Nelson, Senior Vice President, have been ordered to read or be present at the reading to Buffalo-area employees explaining their rights under the Act and the aforementioned violations.

ALJ Rosas also granted the NLRB General Counsel's request for the extraordinary remedy of a *Gissel* bargaining order for the Camp Road location because Starbucks "committed numerous unfair labor practices at Camp Road and throughout the Buffalo market, most of which are likely to remain in the employees' minds … and make it extremely unlikely that a fair rerun of the election could ever be had." *See* Decision at *187. While the traditional remedy for these types of unfair labor practices is the holding of an election after the atmosphere is cleansed of any employer misconduct, in *Gissel*, the Supreme Court held that a bargaining order is warranted when an employer's conduct is so egregious as to render the holding of a fair election unlikely because the union's strength has been significantly undermined by said violations. *NLRB v. Gissel Packing Co.*, 395 U.S.575, 610 (1969). As such, despite the Union losing the election in late 2021,

Starbucks must now bargain with the Union at the Camp Road Store. Starbucks can appeal the Decision but has yet to indicate whether it intends to file a challenge.

D.C. DISTRICT COURT APPLIES APPEALS' COURT TRILOGY TO LIMIT WITHDRAWAL LIABILITY

The District Court for the District of Columbia recently applied three federal Appeals Court cases to vacate an arbitration award of withdrawal liability against an employer who claimed that the pension plan had incorrectly used the wrong interest rate in its calculations. *Emps' Ret. Plan of Nat'l Educ. Ass'n v. Clark City Educ. Assn.,* No. 20-3443 (RDM) (Feb. 27, 2023).

The Employees Retirement Plan of the National Education Association ("Plan") assessed withdrawal liability of over $3.2M against Clark County Education Association ("Association") using a modified fixed income interest rate. The Association challenged the assessment in arbitration as contrary to the appellate decisions on the issue. *United Mine Workers of Am. 1974 Pension Plan v. Energy West Mining Co*., 39 F. 4th 730 (D.C. Cir. 2022), certiorari pending, ___ US ___; *Sofco Erectors, Inc. v. Trustees of Ohio Operating Engineers Pension Fund*, 15 F.4th 407 (6th Cir. 2021); *GCIU-Employer Ret. Fund v. MNG Enterprises, Inc*., 51 F.4th 1092 (9th Cir. 2022). These decisions all held that, under the Multi-Employer Pension Plan Amendments Act ("MPPAA"), a plan assessing withdrawal liability must use an interest rate at least close to the rate used in calculating the plan's funding projections ("funding method"). The arbitrator followed the judicial precedent, rejecting the Plan actuary's choice of a fixed income method for calculating withdrawal liability rather than the funding method, and the Plan appealed.

District Judge Randolph D. Moss also applied the judicial decisions, especially *Energy West* from the D.C. Circuit, which he deemed binding, and *Energy West*, now on certiorari to the U.S. Supreme Court. Under that line, explained District Judge Moss, the interest rate a plan uses to calculate pension plan withdrawal liability must reflect the plan's specific individual characteristics, and the assumptions and methods must be consistent with reasonable actuarial practices. Here, the Plan used a 5% interest rate reflecting fixed income investments that comprised only 40% of the Plan's actual assets rather than the 7.3% rate the Plan used to calculate actual investment return on its portfolio. In calculating withdrawal liability, the higher interest rate on return of investments means the plan expects to have more money from its investments and therefore needs less money to cover any withdrawal liability shortfall. The difference in rate assumptions was dramatic; the funding method adopted by the Court reduced the withdrawal liability from $3.2M to about $160,000. While *Energy West* and its sister decisions do not "deprive actuaries of all flexibility" nor "require their estimates to encompass the expected return of all the plan's assets," reasoned District Judge Moss, an assessment that "fails to take account of likely returns on most of the fund's investments" fails MPPAA's requirement of the "best estimate of anticipated experience under the plan."

Interestingly, District Judge Moss' stress on the "the best estimate of anticipated experience under the plan" did not uphold the arbitrator's award. In a "blend" of judicial

and actuarial debate, District Judge Moss held that a plan might be bound to use the funding method only where the actuary testified that the funding method was the plan's "best estimate." However, where the actuary could justify a lower interest rate based on factors tied to the plan's actual experience, the withdrawal liability calculation might use that lower rate, so long as it is not disproportionate to the funding method. For example, in this case, 40% of the Plan's assets were in fixed income investments, and so, in calculating withdrawal liability, the actuary might be able to use a somewhat lower rate that reflected the Plan's actual anticipated experience based on its asset mix. Since the arbitrator's award merely equated the withdrawal liability calculation with the funding method, the Court held that the award was not reasonable and remanded the case to the arbitrator for further analysis consistent with the Court's opinion.

STATE PERB FINDS COURT SYSTEM VIOLATED TAYLOR LAW BY FAILING TO NEGOTIATE THE UNILATERAL IMPLEMENTATION OF ITS VACCINE AND TESTING MANDATE POLICIES

On February 24, 2023, New York State Public Employment Relations Board ("PERB") Regional Director Mariam Manichaikul ruled that the Unified Court System ("UCS" or "Court System") failed to undertake legally required bargaining before implementing the COVID-19 mandate policies and ordered the Court System to reinstate and make whole all affected court employees, with interest, and return to the bargaining table with approximately 10 unions ("Unions") representing non-judicial Court System employees throughout the State ("Decision").

The Unions respectively filed improper practice charges claiming the Court System violated § 209-a.1(a) and (d) of the Public Employees' Fair Employment Act ("Taylor Law") when it unilaterally implemented mandatory COVID-19 Vaccination and Testing Policies ("Policies"). Throughout the proceedings, the Court System raised an array of defenses including its constitutional mission, the emergency privilege, and that the subject matter of the work rules constituted a prohibited or permissive subject of bargaining.

Regional Director Manichaikul easily rejected the claim that the Policies were prohibited subjects of bargaining because, as is required under the applicable PERB standard, no statute or law, including the U.S. and State Constitutions for which the Court System relied, either explicitly or implicitly, carved out collective bargaining over vaccine mandates or otherwise supplied the legislative intent to prohibit said topics from negotiations.

While Regional Director Manichaikul found that UCS was not required to bargain over its decisions to mandate COVID-19 vaccination and testing, the Court System was required to negotiate the Policies because the "extensive procedures" implicated various terms and conditions of employment, including leave time, compensation, job security, and medical privacy, and threated non-compliance with disciplinary action. In rejecting the Court System's defense that this was an emergency, Regional Director Manichaikul found that the Court System did not bargain with the Unions before implementing the Policies and it showed "no genuine desire to negotiate thereafter." *See* Decision at 28.

Based upon the foregoing, Regional Director Manichaikul found that the Court System violated the Taylor Law and issued a broad remedial order to restore the *status quo ante*. At this juncture, each of the parties can file exceptions to the Decision, though none have been filed to date.

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