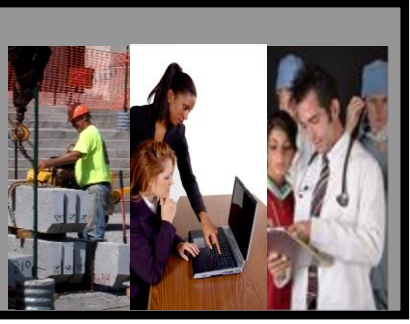
Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
August 10, 2023 Edition



NATIONAL LABOR RELATIONS BOARD ORDERS RELUCTANT EMPLOYERS TO BARGAINING TABLES, SETTING SCHEDULES AND REQUIRING PROGRESS REPORTS

In the struggle to incentivize employers to collectively bargain in good faith with their employees' unions, the National Labor Relations Board ("NLRB" or "Board") has been deploying a fresh tactic: mandatory bargaining schedules. Although the remedy has been around since 2011 – it first appeared in a case called *All Seasons Climate Control*, 357 N.L.R.B. 718 (2011) – the remedy was used only in the most extreme cases, such as where the employer engaged in "egregious misconduct." However, this year has seen a string of cases imposing mandatory bargaining schedules: *Crushin' It LLC*, 372 N.L.R.B. No. 100 (June 29, 2023) (employer, which engaged in serious and pervasive unfair labor practices and refused to recognize or bargain with the union, was ordered to bargain with the Union for a minimum of 15 hours a week until agreement or impasse reached), *Columbus Electric Cooperative, Inc.*, 372 N.L.R.B. No. 89 (June 8, 2023) (employer ordered to submit bargaining progress reports every 30 days) and *Amerigal Construction Co., Inc.*, 372 N.L.R.B. No. 103 (July 7, 2023) (employer ordered to bargain for a minimum of 24 hours per month for at least 6 hours per session, with written bargaining reports submitted every 15 days).

While the National Labor Relations Act ("NLRA" or "Act") prohibits the Board from forcing parties to accept an agreement or include certain provisions in their agreements, the idea behind these mandated bargaining schedules is to ensure that the parties at least come to the bargaining table. Then, if an employer breaches these specific mandates, it becomes easier for the Board to prove in federal court that an employer was not bargaining in good faith. Otherwise, where employers engage in "surface bargaining" or merely go through the motions, it may be more difficult to prove that those actions did not comprise "good faith bargaining."

Mandating bargaining schedules and requiring progress reports is consistent for the Board under General Counsel Jennifer Abruzzo, who has signaled since the beginning of her tenure in 2021 that she is focused on increasing the Board's power to hold accountable those who endeavor to break federal labor laws. Encouraging Regional offices to utilize the entire playbook of remedies (and giving those remedies teeth) is one of the ways in which this Board, under Abruzzo, has sought to reverse several years of doctrinal shifts under the Trump-era Board. As with most unfair labor practice proceedings, the Board considers the totality of the circumstances in each individual case. Enhanced remedies become more important in situations where an employer's behavior suggests that it considers the consequences of being charged with unfair labor practices or refusing to bargain as merely the cost of doing business.

LONG-SHOT WIN FOR LONGSHORMEN

Recently, the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit" or "Court"), based in Virginia, held that a lawsuit brought by the International Longshoremen's Association ("ILA" or "Union") was not an unfair labor practice. The case is *S.C. State Ports. Auth. v. NLRB*, No. 23-1059 (4th Cir. July 28, 2023).

The ILA represents workers on ships and at terminals on the East and Gulf Coasts "from Maine to Texas." The ILA has negotiated a series of collective bargaining agreements called "Master Contracts" with an association of shipping carriers and other employers called the United States Maritime Alliance ("USMX") and the Master Contract recognizes the existing work jurisdiction of ILA employees and bars USMX from contracting out that work to non-union members. The Master Contract also deals with a "hybrid labor model" that governs work at certain Southern ports where non-union employees operate lifts and ILA members perform the rest of the longshore work. Section 7(b) of the Master Contract also requires USMX to "formally notify any port authority contemplating the development of or intending to develop a new container handling facility that USMX members may be prohibited from using that new facility if the work at that facility is not performed by Master Contract bargaining-unit employees."

In 2020, the South Carolina State Ports Authority ("Ports Authority") planned to operate a new terminal in the Port of Charleston under the hybrid model. The ILA, USMX, and Ports Authority and State of South Carolina met several times but could not agree to a work arrangement. The State and Ports Authority brought a charge with the National Labor Relations Board ("NLRB" or "Board") alleging that the Section 7(b) of the Master Contract violated the National Labor Relations Act ("Act") as it was an agreement barring an employer from doing business with another party. The Ports Authority opened the new terminal with hybrid labor and the USMX members sent their ships. The ILA promptly sued the USMX in New Jersey state court for breach of contract and alleged $300 million in damages but did not ask for injunctive relief like assigning work to its members. The State, Ports Authority and USMX filed more charges with the Board claiming the ILA's lawsuit violated the Act. The NLRB found for the ILA and the Ports Authority appealed to the Fourth Circuit.

The primary issue before the Court was whether the ILA's New Jersey lawsuit violated the Act. A union's lawsuit is an unfair labor practice only if it is baseless or has an objective that is illegal under federal law. No party argued the lawsuit was baseless, so the court focused on whether it had an illegal objective. The Act prohibits unions and employers from agreeing to cease doing business with any other person and also prohibits unions from pressuring employers into such agreements. There is an exemption for "primary" activity, meaning the union's efforts directed at its own employer on a topic the employer can control. "Secondary" activity is directed at affecting business relations of neutral employers and is tactically calculated to achieve the union's objectives outside of the primary employer-employee relationship.

However, the Supreme Court has emphasized the distinctions from secondary "purposes" and secondary "effects" – if a union has no unlawful purpose to disrupt the business relations of a neutral employer, any effects outside the bargaining unit, no matter how severe, are irrelevant. Further, the Supreme Court has found that preserving work is a lawful objective. Lawful work-preservation must first have as its objective the preservation of work traditionally performed by employees represented by the union, and second the employer must have the power to give the employees the work in question.

Here, as to whether ILA members traditionally performed the work, the Ports Authority argued the ILA did not traditionally operate the lifts at the new terminal. However, the Court did not focus on the terminal in question but the overall bargaining unit work that is, loading and unloading generally and East and Gulf Coast ports. As to whether the lawsuit sought to preserve that work, the Court found that the New Jersey lawsuit follows the ILA's 40-year fight to preserve traditional work in the face of technological advances. Further, at non-hybrid ports, ILA members perform all the lift work.

For the prong regarding whether USMX has the right to control the work, the Court held that USMX's members own or lease their containers and determined what ports they call on, thus giving them ultimate control of who performed the lift-equipment work. While USMX cannot control who operates the cranes at a specific terminal, USMX and its members can control which terminal they send their containers to. Therefore, USMX and its members had control over the relevant work.

The Court further ruled that Section 8(b) of the Master Contract did not violate the Act. Judge Niemeyer dissented, arguing lLA's lawsuit sought to gain, not preserve, union work.

TRADER JOE'S SUES UNION FOR TRADEMARK INFRINGEMENT

In an unusual gambit in its ongoing labor dispute with an insurgent union, grocery giant Trader Joe's has sued the Union, Trader Joe's United, for violation of the store's trademarks in its merchandise. The suit was filed in the United States District Court for the Central District of California. *Trader Joe's Co v. Trader Joe's United*, No. 2:23-cv-05664.

The lawsuit alleges that the tote bags, mugs, buttons, and other supportive items the Union has been selling are likely to cause "consumer confusion" and send a message that the grocer supports the Union. The sales, part of the Union's efforts at financial support, violate the federal trademark law, according to the suit.

At present, the Union has succeeded in organizing four stores, and the National Labor Relations Board filed a complaint against the company last week for allegedly retaliating against the unionizing workers at the Hadley, Massachusetts store.

Trader Joe's said in the lawsuit that it first contacted the Union in late June to take down its products featuring the "Trader Joe's United" name in the company's distinctive font. According to the complaint, Trader Joe's United responded earlier this month that it

would not comply with the demands and accused the grocer of retaliating against its unionization efforts.

Trader Joe's alleged in its complaint that it was not seeking to block sales of the Union's merchandise altogether. It asked the court to order the Union to stop misusing its trademarks and requested an unspecified amount of money damages.

The lawsuit enters unclear areas at the intersection of intellectual property, labor law, and fair use, the concept that otherwise protected intellectual property may be used if there is no profit motive in that use or if the use is, for example, satirical or educational. The grocer describes the use of its marks here as “purely commercial” and that the sales are doing it “irreparably harm.” Conversely, the Union called the lawsuit “retaliation” and “simply one more act of union-busting.”

The Trader Joe’s dispute is one of many ongoing high profile labor disputes, including Amazon, Starbucks, and Apple. Meanwhile, in 2022, Medieval Times USA brought similar accusations against a Union which was organizing it.

Ultimately, the Trader Joe’s suit will turn on whether there is actual consumer confusion and is, in that way, a rather typical trademark case in an atypical setting. Running against this analysis is the question of the traditionally vibrant language permitted in a labor dispute and free speech rights more broadly. The rarity of this sort of case suggests that summary resolution is unlikely and if a settlement is not reached, a long litigation slog is likely. While one reaction is that a Union should not be confused with a grocer, the Union is selling items which may very well be available in a store and using the store’s logo. Moreover, the use of “United” by the Union, rather than “union” on the items may militate toward confusion.

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