Labor & Employment Issues
In Focus

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SIXTH CIRCUIT RULES SHIPPING PORT OPERATOR PLAUSIBLY ALLEGED STEVEDORES ORCHESTRATED ILLEGAL SECONDARY BOYCOTT

After a federal district court in Ohio dismissed an action against the International Longshoremen's Association, Local 1982 ("Union"), the United States Court of Appeals for the Sixth Circuit reversed, finding that Midwest Terminals, which operates the Toledo Port ("Midwest" or "Employer"), plausibly alleged that the Union orchestrated illegal secondary boycotts on several occasions in 2017 and 2018. The case is *Midwest Terminals of Toledo Int'l, Inc. v. Int'l Longshoremen's Ass'n*, No. 22-1330 (6th Cir. July 18, 2023).

Section 8(b)(4)(ii)(B) of the National Labor Relations Act ("NLRA" or "Act") makes it an unfair labor practice for a labor organization to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce [with the object of] . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." In other words, a union cannot "threaten, coerce, or restrain" someone engaged in commerce if that action is intended to force a neutral party to stop doing business with union members' employer.

Midwest brought its claims under Section 303 of the Labor Management Relations Act ("LMRA"), which provides a private right of action to parties injured by a union's unfair labor practices. According to Midwest's Complaint, the Union hatched a scheme in 2017 to pressure Midwest into signing a new collective bargaining agreement; the Union and Midwest had not had a valid contract in place since 2012. The Complaint alleges that the Union set out to induce this pressure by "prevent[ing] neutral shipping companies from utilizing the Toledo Port." Because Coast Guard regulations require that ships entering or leaving the Port be captained by a licensed pilot, Union officials coordinated with the Lakes Pilots Association, Inc. ("LPA"), who agreed to refuse to move ships for the neutral companies whenever they saw Union members picketing. But Midwest claims the pickets were not "genuine" – Midwest employees, including Union members, still reported to work. The "pickets" were merely meant to indicate to ship pilots – independent contractors hired by neutral shipping companies – that they should refuse to dock or board ships while the picket lines were active.

Here, Midwest claimed in its Complaint that the Union "successfully orchestrated intermittent blockades of the Toledo Port, which led neutral shipping companies to cease dealing with Midwest for several months." Alone, that sort of coercion might not be enough to adequately claim an illegal secondary boycott. However, Midwest also claimed that a Union official had admitted that it was his goal was to make neutral shipping companies

"abandon their cargo at Midwest" and subsequently "stop doing business" with Midwest. Because the Employer alleged both illegal conduct and an illegal objective, the Sixth Circuit held that it plausibly alleged a violation of the Act and the Union was thus not entitled to a motion to dismiss.

NATIONAL LABOR BOARD JETTISONS *BOEING* RULE AND REVISES ANALYSIS FOR WORKPLACE RULES

On August 2, 2023, the National Labor Relations Board ("Board" or "NLRB") adopted a new test to determine if a workplace rule violates the National Labor Relations Act ("Act"). The case is *Stericycle, Inc.*, 372 NLRB No. 113 (2023). Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights – *i.e.*, the right to self-organize, collectively bargain, and engage in other protected concerted activity. The Board has scrutinized workplace rules for nearly 25 years and clarifies its position with *Stericycle*.

The Board's recent scrutiny of workplace rules began in 1998 with *Lafayette Park Hotel*, 326 NLRB 824 (1998). There, the Board decided the test for workplace rules would be "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights" and if there was a likely chilling effect, the Board could find there is an unfair labor practice. *Stericycle*, slip op. at 3. A few years later in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board modified Layfette Park to mean "the relevant inquiry begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does not, a violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id*. at 4 (internal citation and quotation omitted).

In 2017, the Board changed direction in *Boeing Co.*, 365 NLRB No 154 (2017). In *Boeing*, the Board changed the analysis to evaluating (1) the nature and extent of the potential impact on NLRA rights and (2) the legitimate justifications associated with the rule. *Stericycle*, slip op. at 6. This balancing test weighed heavily in favor of employers.

With *Stericycle*, the Board focused on what the Supreme Court defined as the dominant purpose of the Act: to protect the right of employees to organize for mutual aid without employer interference. Going forward, when determining whether a workplace rule violates the Act, the Board will first assess whether the challenged work rule has a reasonable tendency to chill employees from exercising their Section 7 rights. *Id*. at 9. "In doing so, the Board will interpret the rule from the perspective of the reasonable employee who is economically dependent on her employer and thus inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in." If a reasonable employee would find the rule prohibits protected activity, it is presumptively unlawful. *Id.* The burden then shifts to the employer to rebut the presumption by proving

that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. *Id.*

And so, workplace rules will be evaluated on a case-by-case basis.

THE SCOPE OF *WEINGARTEN* RIGHTS IN THE CONTEXT OF COUNSELING MEMORANDUMS

On June 26, 2023, NYS Public Employment Relations Board ("PERB" or "Board") Administrative Law Judge Parker dismissed an improper practice charge ("Charge") filed by the Madison County Deputy Sheriff's Association ("Association") claiming that the county sheriff's department ("Department") violated Section 209-a.1(g) of the Taylor Law ("Act") by denying union representation to unit member and union president Deputy Derrick Kruser during a meeting where he received a counseling memo for derogatory remarks towards a sergeant. *Madison County Sheriff's Department*, 56 PERB ¶ 4541 (2023). The ALJ dismissed the Charge, ruling that based on the context of the meeting, Kruser was not the target of potential disciplinary action. Thus, representation rights, commonly known as *Weingarten* Rights, did not attach.

The crux of the dispute centered on whether Kruser, who was presented with the pre-written counseling memo during the meeting, was the target of potential disciplinary action at that time he invoked *Weingarten*. According to the Department, the focus of the meeting was not to investigate or extract more details from Kruser but simply to inform him about it. While the testimony diverged regarding the exact questions posed to Kruser at the meeting, the general consensus was that any questions asked were not investigatory in nature. All parties, however, agreed that Kruser admitted to the statement and apologized.

Section 209-a.1(g) of the Act emphasizes that public employees have the right to representation during employer questioning when it appears the employee might face potential disciplinary action. The Board, when determining if the unit member should have been granted representation, considers the totality of circumstances, like the content of questioning, verbal and written statements by the employer before questioning, and treatment of similarly situated employees. Furthermore, to claim a violation under Section 209-a.1(a) of the Act, there must be evidence that the employer deliberately acted to deprive the employee of their rights.

The determining factor was the context and nature of the Department's questioning. In this case, the pre-written memo and the lack of substantial investigatory questioning led the ALJ to conclude that the situation did not warrant representation. Beyond the denial of representation, the Association alleged in the Charge anti-union animus towards Kruser due to a statement made by a Department representative about Kruser "running the place" in violation of Section 209-a.1(a) of the Act. To establish a violation of §209-a.1(a) of the Act, the charging party must prove that the employer acted

deliberately for the purpose of depriving employees of § 202 protected rights. However, as the ALJ explained, the mere denial of representation, consistent with PERB precedent, does not necessarily confirm a violation of Section 209-a.1(a) of the Act. Since the primary charge regarding denial of representation under Section 209-a.1(g) was not validated, the secondary claim under § 209-a.1(a) also lacked merit.

This decision highlights the need for employees to be well-acquainted with the circumstances under which *Weingarten* rights apply. If attending a meeting where potential disciplinary action may arise, which may be apparent from the nature of the meeting, its context, and the distinction between informative and investigatory questioning, employees should consult with union representatives immediately if they believe they have a right to representation before the meeting.

PLUMBERS LOCAL UNION NO. 1 RATIFIES THREE-YEAR INDUSTRY-WIDE AGREEMENT

On June 29, 2023, the members of Plumbers Local Union No. 1 ratified a three-year collective bargaining agreement with the Association of Contracting Plumbers of the City of New York, Inc. that pertains to plumbing construction work in New York City. The contract provides for a $7.50 wage and fringe benefits package increase over the three-year term. The first-year increase of $2.00 is allocated between a wage increase of $1.20 per hour and $.80 per hour contribution to the Welfare Fund to maintain the current benefits package. Apprentice wages will also be increased in the first year. Looking forward to the future, the parties agreed to apply the agreement to carbon capture systems and other new technologies.

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