December, 2010

B&K LABOR UPDATE

Recent NLRB Decisions Newsletter

In April 2010, President Obama filled National Labor Relations Board vacancies with recess appointments of Craig Becker and Mark Pearce, both union-side labor attorneys. Member Pearce was confirmed on June 22, 2010. They joined Chairman Wilma Liebman, former in-house legal counsel for the Bricklayers and Allied Craftsmen as well as the International Brotherhood of Teamsters. Currently, the only other member of the Board is Brian Hayes, former Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions.

Consistent with its make-up, the newly constituted Board has issued a series of labor friendly decisions. Samples of significant recent cases, a majority of which favor unions, are highlighted below.

Inside this Issue

Defamation

The new Board upheld broad free speech rights of union members during organizational campaigns while holding the employer accountable for actions taken by its agents. In *DHL Express, Inc.*, 355 NLRB No. 144 (August 27, 2010), the employees voted against union certification. The union subsequently filed an unfair labor practice charge with respect to the employer's conduct leading up to the election. The issue centered on employee Ellis Sleiman's article in the union's newsletter stating the employer's consultant "admitted to a personal role of misrepresenting union members" at one of the employer's mandatory meetings. At the next meeting, the consultant told Sleiman that he believed the article was defamatory and unless a retraction was printed, he would file a defamation lawsuit. The employee refused.

Defamation cont.

The Board found the employee's comments were protected activity under the Act because the statements were neither maliciously untrue nor defamatory. Further, the Board held that because the labor consultant was hired by the employer, the consultant was an agent of the company. Therefore, the threats of the consultant, and indirectly the employer, violated Section 8(a)(1) of the Act. The Board determined that the employer also violated the Act by discriminatorily issuing Sleiman a disciplinary warning, reducing his work hours and giving him a negative review. Based on the employer's violations, the Board directed a second election. We hope this is but the first in a series of decisions that expand protections for employees from coercive pre-election conduct.

State Law Preemption

A New York law prohibiting the use of state funds to discourage employee organization did not interfere with an employer's rights in connection with a representation election. In *Independence Residences, Inc.*, 355 NLRB No. 153 (August 27, 2010), the employer objected to a union election based solely on New York State Labor Law Section 211-a, which bars the use of state funds for purposes of encouraging or discouraging employees from participating in union organization. The employer claimed that this law was preempted by Federal labor law, and, as a result, constituted grounds for overturning the election results. The employer also alleged that the law impeded its ability to communicate with employees.

The Board majority refused to set aside the election because the employer failed to show that the statute had impacted election conditions such that the employees' free choice was affected. Further, the Board reviewed the circumstances of the election and found the employer was still able to engage in a "vigorous anti-union campaign" such that the limitation of not using state funds did not significantly affect its rights.

Finally, the Board did not find that the New York law was preempted. This is a departure from the Board's former standard allowing employers and unions to engage in non-coercive speech without being subject to state interference. This decision may lay the groundwork for greater state regulation in the election process.

Dues Checkoff

The Board refused to address a hot-button issue related to whether dues-checkoff in right-to-work states is a mandatory subject of bargaining. In *Hacienda Resort, Hotel and Casino*, 355 NLRB No. 154 (August 27, 2010), the Board members were divided 2-2 on the merits and unanimously agreed to follow Board tradition of requiring three votes to overturn precedent. Thus, the Board affirmed the Administrative Law Judge's recommended Order finding no violation where the employer unilaterally ceased dues-checkoff after contract expiration.

Voluntary Recognition of Unions

The new Board set the stage to revisit the landmark *Dana Corp.*, 351 NLRB 434 (2007), decision and may potentially adjust the prior decision or overrule it completely to establish new rules for voluntary recognition. The *Dana Corp.* decision granted employees the right to file a decertification petition within 45 days after an employer recognizes a union by card check. For 40 years prior to *Dana Corp.*, the Board barred for a "reasonable time" (usually around 6 months) any attempt to decertify a union that had been voluntarily recognized by an employer. In *Rite Aid Store #6473*, 355 NLRB No. 157 (August 27, 2010), the Board granted review and solicited amicus briefs relating to the Board's *Dana Corp.* decision. This is a significant development and may result in the Board returning to a "reasonable time" standard.

Employer's Inability to Pay and Obligation to Furnish Information

The Board reinforced the rights of unions to review the financial statements of employers. In *Stella D'oro Biscuit Co., Inc.*, 355 NLRB No. 158 (August 27, 2010), during bargaining, the employer provided a financial summary showing 2007 losses. The union then requested a complete statement, rather than a summary. The employer brought the 19-page financial statement to the next bargaining session and allowed the union to review it, but did not allow the union to make copies. The union filed an unfair labor practice.

Board precedent requires an employer that asserts an inability to pay during bargaining to substantiate its claim. During collective negotiations, the employer in this case cited a cornucopia of financial issues. However, the employer did not expressly claim inability to pay in response to bargaining demands from the union. Nevertheless, the Board determined that the employer's statements about operating at a loss, investments in new equipment, and needing labor costs concessions constituted such a claim. Further, the Board ruled that the employer had an obligation to provide the union with the requested financial information. The offer to allow the union the opportunity to view the statement, but not retain possession, was not sufficient.

Protesting at Secondary Sites, Banners

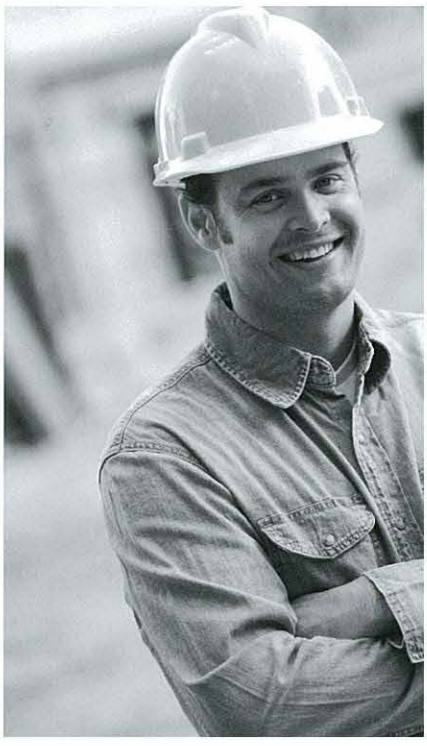
The Board narrowed the definition of picketing and allowed other means of protest at secondary employer locations. In *Local 1506, United Brotherhood of Carpenters and Joiners of America (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (August 27, 2010), the union was involved in a primary labor dispute with the employer over allegations that the employer failed to pay wages and benefits that accord with area standards. The union engaged in "peaceful protest activities" at three locations where the primary employer was providing services. The locations involved secondary companies with no collective bargaining relationship with the union. At each facility, the union placed and maintained a banner denouncing the secondary employer on a public sidewalk or public right-of-way outside the secondary employer's facility. The union also distributed fliers to interested members of the public.

The Board held that the union did not violate the Act. According to the Board, absent the "use of traditional picket signs, patrolling, blocking of ingress or egress, or some other evidence of coercion," the display of banners will not be considered unlawful. The Board also rejected the argument that the holding of a stationary banner is proscribed picketing, finding no support in either the Act or its legislative history of an intention to bar the mere display of a banner.

In *Carpenters Local 1506*, 355 NLRB No. 219 (September 30, 2010), the Board expanded on the framework set forth in *Eliason & Knuth* and found that bannering, regardless of its proximity to the entrance of the facility, was protected so long as it did not impair ingress or egress or force any form of confrontation between the banner holders and those entering or exiting the premises. The Board stated that it was "unwilling to draw an arbitrary line at some distance from the entrance to a secondary's premises and hold that stepping over that line somehow transforms peaceful, expressive activity into coercion in the absence of some further evidence of coercion." With this holding, the Board has increased protections for bannering.

The Board again followed the *Eliason & Knuth* framework in determining what constitutes prohibited movement by a bannering party. In *Southwest Regional Council of Carpenters (Richie's Installations, Inc.)*, 355 NLRB No. 227 (October 7, 2010), the Board held that de minimis movement by individuals holding a banner was not barred under the Act. The Board found the following movement to be acceptable: carrying the banner to its place of display; moving the banner to avoid obstructing others or trespassing; and moving to avoid the sun.

Finally, in *Southwest Regional Council of Carpenters, Local 1506*, 356 NLRB No. 11 (October 27, 2010), the Board determined lawful area standards picketing five days before bannering did not warrant distinction from *Eliason*. Therefore, the bannering was not in violation of the Act.



Access for Union Organizers

In *Research Foundation of the State University of New York at Buffalo*, 355 NLRB No. 170 (August 27, 2010), the union contested the election results of a 35-35 vote by postdoctoral associates based on the employer's conduct during organizing. The union alleged that the employer interfered with the employees' protected activity by threating union agents with arrest while they were in the employer's workplace and in view of unit employees.

Under Board and New York State law, the employer has a right to prevent union organizers from trespassing on its exclusively held property. Here, an organizer met with an employee of the Research Foundation in a state building. A Research Foundation official interrupted the meeting and told the organizer to leave the premises or he would call the police. The union filed an unfair labor practice charge and the employer raised a defense that it had a property interest and the right to expel the organizer. The Board rejected the employer's defense. Since the property was State owned, only the State or its agent could demand the organizer to leave the premises. Accordingly, the employer's actions were determined to be sufficient grounds to set aside the election.

Beck Objections

In *International Association of Machinists and Aerospace Workers, AFL-CIO*, 355 NLRB No. 174 (August 27, 2010), the Board reviewed a union's application of its Beck objection policy. In *Communication Workers of America v. Beck*, 487 U.S. 735, 745 (1988), the Supreme Court held that objecting members may only be required to pay the portion of dues that the union expends on activities related to collective bargaining and contract enforcement. The Board has held that the legality of union procedures implementing *Beck* is measured using a duty of fair representation standard. A union breaches its duty of fair representation if its actions affecting employees that it represents are arbitrary, discriminatory, or in bad faith.

In this case, the union required objectors to renew their Beck objections annually. The Board ruled that the union's requirement violated the union's duty of fair representation because the union failed to provide a sound rationale for its policy. The union's reasons for the annual renewal (helped it maintain correct addresses of objectors and objectors are provided opportunity to reconsider their positions) were not sufficient.

Organizing

In *Catholic Social Services, Diocese of Belleville*, 355 NLRB No. 167 (August 27, 2010), the employer argued that it was exempt from Board jurisdiction because it was a religious organization. In general, the Board will not assert jurisdiction over a non-profit religious organization. However, in this case, the Board did not simply accept the employer's "religious defense" at face value. Instead, the Board examined the actual purpose/function of the organization. The employer provided secular social services, i.e. resident childcare, as well as religious instruction. Moreover, the purpose of the facility was to provide childcare in a residential treatment facility for abused and neglected children. The Board found that despite the religious instruction, because the employer operated as a licensed child welfare agency and not a religious school, jurisdiction was deemed proper over the employer.

This decision reveals the intention of the Board to provide closer scrutiny to employers claiming exemption from the requirements of the Act.

Successor Bar

The Bush Board found that "an incumbent union in a successorship situation is entitled to – and only to – a rebuttable presumption of continued majority status, which will not serve to bar an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status." *MV Transportation*, 337 NLRB 770 (2002). The former, union-friendly doctrine, provided that once a successor employer's obligation to recognize an incumbent union attached, the union was entitled to a reasonable period of time for bargaining without challenge to its majority status. *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999).

In *UGL-UNICCO Service Company*, 355 NLRB No. 155 (August 27, 2010), the Board granted an intervenor's request for review, finding the request raised substantial issues regarding whether the Board should modify or overrule *MV Transportation* and return to the doctrine set forth in *St. Elizabeth Manor, Inc.* The review could result in a more labor-friendly position on this significant issue.

Referral Systems

The Board struck down a non-union employer association's attempt to avoid Salts. In *KenMor Electric Co., Inc.*, 355 NLRB No. 173 (August 27, 2010), the union claimed the employer violated Sections 8(a)(3) and (1) by maintaining a discriminatory referral system.

Independent Electrical Contractors ("IEC"), a nonunion trade association, maintained a referral system whereby it forwarded job applications to interested employer members. IEC's objectionable practices in relation to the system included: (1) no recordkeeping; (2) a policy of not revealing to applicants which IEC members had received or reviewed their applications; (3) a policy of not permitting applicants to review their filed applications; (4) a $50 application fee for all applicants who filed more than one application within a 30-day period, except for former employees of IEC members who had recently been laid off; and (5) reviewing only those applications that had been filed with IEC within the last few days. IEC also allowed members to lend their employees to other members so that the member would not have to advertise and open the workforce to union applicants.

The Board reviewed the referral system in its totality and found that the system, rather than the individual components themselves, interfered with the rights of job applicants who were union members. Therefore, the system violated the Act.

Duty to Furnish Information/Alter Egos

The duty to furnish information applies to the union as well as the employer. In *Service Employees Int'l Union, Local 715*, 355 NLRB No. 65 (August 6, 2010), Local 715, the bargaining representative at Stanford Hospital, informed Stanford that it no longer existed. The Local 521 (a sister local) website indicated that Local 715 had merged with 521. However, Local 715's legal counsel informed Stanford that Local 715 still represented the unit. The employer, understandably confused, sent Local 715 an information request seeking information related to Local 715, Local 521, and Local 715's counsel.

Due to the merger of Locals 715 and 521, the Board applied an alter-ego type standard in reviewing whether 715 was required to respond to the request. According to the Board, where an employer requests information pertaining to an apparent third party union, it must have an objective basis for believing the information would be relevant in relation to the employer's collective bargaining obligation. Given the circumstances, the Board found Local 715 had an obligation to provide information regarding itself and Local 521. However, the union's legal representation was not relevant to the collective bargaining relationship and the union was not required to respond to that request.

Relevant Court Decisions

The District Court for the Western District of New York and the Second Circuit Court of Appeals recently decided cases regarding jurisdictional disputes and arbitration. The cases involved a dispute between a Carpenters local and Laborers Local 210 over which union had jurisdiction over the performance of certain caisson work (the drilling of deep foundations for various structures) involving the use of pipes. McKinney, the employer, awarded work for two caisson jobs to the Carpenters. Local 210 protested and sought to arbitrate the work award as a contractual dispute. McKinney filed for a permanent stay of arbitration. The District Court granted McKinney's request finding the dispute was jurisdictional in nature. Constr. Industry Employers Ass'n and McKinney Drilling Co. v. Local 210, 2008 U.S. Dist. LEXIS 118417 (W.D.N.Y. Aug. 20, 2008) (McKinney I). The decision was affirmed by the Second Circuit. *Constr. Indus. Emplrs. Ass'n v. Local Union No. 210*, 580 F.3d 89 (2d Cir. 2009).

While the parties were litigating McKinney's request for a stay of arbitration, the employer awarded other caisson work to the Carpenters. Local 210 responded with a grievance. McKinney denied the grievance. On review, the District Court found this to be a classic jurisdictional dispute due to the impossibility to satisfy both unions. *Laborers Int'l Union of N. America, Local 210 v. McKinney Drilling Co.*, 2009 U.S. Dist. LEXIS 105657 (W.D.N.Y. Nov. 10, 2009). According to the District Court judge "[b]y claiming that it is entitled to be paid for work that was performed by members of another union under that union's CBA, Local 210 is indeed raising a jurisdictional dispute." Thus, the Court concluded that the dispute was not subject to arbitration. The Second Circuit affirmed. *Laborers Int'l Union of N. America, Local 210 v. McKinney Drilling* Co., 189 L.R.R.M. 2074 (2nd Cir. 2010).

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