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The NLRB in 2007

Will the 'Roll-Backs' of the Bush Board Survive the 2008 Election?

By Paul Snitzer and Christopher Durham

In 2007, the National Labor Relations Board ("NLRB"), a majority of which was composed of appointees of President Bush, issued a series of important and, in some cases, unanticipated decisions. To the labor community, the decisions represented a significant roll-back of well-established employee rights, while to the management community, they represented hard-won but less-than-revolutionary changes in some settled rules.

In any case, while certain of these decisions can be objectively viewed as surprising, in light of Supreme Court and other federal precedent, at least some in the management community may argue that a similar surprising spate of decisions, although with a pro-labor bent, emanated from the National Labor Relations Board at the tail-end of the Clinton administration.

Now, with the 2008 election rapidly approaching, whether these 2007 decisions are fated to become solidly enshrined Board precedent, or subject to being overruled by a newly constituted Board, is, like so much else, at stake.

E-mails for Unions and the NLRB As Rip Van Winkle

Proving once again that a law can be applied to circumstances that were not imagined at the time of its enactment, in 2007 the Board issued a ground-breaking decision applying the rules of the National Labor Relations Act, a Depression-era statute, to e-mail technology. The Board's e-mail decisions proved once again that the application of age-old rules to unexpected modern phenomena is an endeavor bound to provoke controversy.

In December 2007, the Board held — 3-2 — that an employer's policy prohibiting employee use of the employer's e-mail system for "non-job-related solicitations" did not violate the Act because employees have no statutory right to use an employer's e-mail system to assist in unionization. *Register-Guard*, 351 NLRB No. 70 (2007). The Board found that an employer has a basic property right to regulate and restrict employee use of its e-mail system. The dissent found that the Board's reasoning "fail[ed] to recognize that e-mail has revolutionized communication both within and outside the workplace," and "confirms that the NLRB has become the Rip Van Winkle of administrative agencies."

In this same decision, the Board also modified its test for determining whether an employer discriminatorily enforced a policy against union activity. The previous standard prohibited employers from allowing employees to use the employer's equipment or other resources for *any* non-work purposes, while at the same time prohibiting use for union purposes. The Board narrowed that test and found that an employer may permit a wide variety of non-work related e-mails, such as party invitations and baby announcements, while prohibiting union messages, as long as it also prohibits solicitations to support most other groups or organizations

Pouring Salt(s) in Union Wounds

In two 2007 decisions, the Board significantly affected the rights of union "salts." Salting occurs when a union sends its agents to a non-union workplace to obtain employment and then to organize the employees at the facility, or to provoke the employer into committing unfair labor practices.

In *Toering Electric Co.*, 351 NLRB No. 18 (2007), a divided Board for the first time held that an applicant for employment is not entitled to protection against discrimination based on union affiliation or activity unless that applicant is "genuinely interested" in an employment relationship with the employer. This decision reversed Board law that an applicant for employment enjoys the same protection against such discrimination as that afforded to employees.

The dissent, beyond criticizing the Board for issuing a decision without briefing or oral argument, also argued that the new rules were not consistent with either the Supreme Court's decision in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), which held that salts are protected employees under the Act without suggesting a distinction based on the salt's intent in submitting an application, or a line of Title VII "tester" cases in which, like some union salts, an individual applies for a job to gather evidence of unlawful discrimination.

In the other "salt" case, *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118, the Board held in another 3-2 decision that even where an employer unlawfully refused to hire a worker because of his or her union activity, where that worker is a union salt, the Board will no longer apply in back pay proceedings the rebuttable presumption that the worker would have continued to work indefinitely for the employer, and will instead require the General Counsel to prove that the union salt would have continued to work indefinitely. Under the Board's prior precedent, the back pay period for applicants whom an employer unlawfully refused to hire based on union affiliation ran from the date of the violation until the employer extended an offer of instatement or reinstatement.

The dissent again castigated the Board majority for making a decision "without any party having raised the issue, without the benefit of briefing, and without a sound legal or empirical basis." The dissent found that the decision "treats salts as a uniquely

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disfavored class of discriminatees, notwithstanding the Supreme Court's ruling that salts are protected employees."

Curing the 'Poisonous Fruit'

An employer cannot, under the Act, secretly spy on its workers using videotape technology, without first notifying the employee's union of its intent to do so and bargaining about it if requested. Until 2007, an employer that did secretly tape its workers without first bargaining could not use the resulting evidence to deprive of a remedy employees who were subsequently disciplined because of the facts that were caught on tape.

The 2007 Board found that even where an employer tapes its workers without giving their union the required opportunity to bargain, the evidence obtained through this activity was not so "poisonous" after all, and that employees disciplined based on conduct observed in the videotapes would have no remedy for reinstatement or back pay. *Anheuser-Busch*, 351 NLRB No. 40.

The first time it considered the case in 2004, the Board came to the same conclusion, but the federal appellate court remanded the case because the Board failed to distinguish its prior precedent. The Board responded by overturning the precedent it had previously failed to distinguish. Accordingly, the disciplined employees were not entitled to "make-whole" relief. The Board also reduced the availability of back pay in *St. George Warehouse*, 351 NLRB NO. 42, holding that once an employer produces evidence in a back pay hearing that the fired employees had access to other job opportunities in the area, the NLRB General Counsel bears the burden of producing evidence that the fired employees took reasonable steps to obtain employment.

This decision, shifting the burden of production on the "mitigation of damages" defense, was not only a change from the Board's prior precedent, but also from the approach adopted by federal courts under discrimination statutes, which place the burden on the offending employer to demonstrate that the discharged employee failed to exercise reasonable diligence to find employment.

Card-Check Recognition No Longer Conclusively Settles The Bargaining Relationship

In recent years, unions seeking to organize employers have increasingly eschewed the Board's secret ballot election process in favor of organizing employees by securing voluntary "card check" recognition from employers. Under this strategy, a union gathers authorization cards signed by a majority of employees, and asks the employer to recognize the union without holding a Board election. If the employer agrees to recognize the union, employees were, until 2007, barred from challenging the union's majority status for a reasonable period of time.

In *Dana Corp.*, 351 NLRB No. 28, the Board modified the "recognition bar" doctrine and ruled that an employer's voluntary recognition of a union, in good faith and based on a demonstrated majority status, will no longer immediately prevent employees from rejecting the union or trying to elect a different union by filing the appropriate petition. Instead, employees will have 45 days after receiving notice of the recognition to seek to reject the union, by filing a decertification petition, or to support the filing of a petition by a rival union.

The dissent characterized this decision as a "radical departure" from "well-settled, judicially approved precedent." Although the Board majority asserted that its decision did not interfere with the "voluntarism" of the card check process, the dissent countered that the decision casts upon voluntary recognition a "disfavored status by allowing a minority of employees to hijack the bargaining process just as it is getting started" and "effectively discourages voluntary recognition altogether."

Strike One, You're Out

Another area of Board law that saw the Board change course in 2007 involved the reinstatement of economic strikers. In *Jones Plastic & Engineering Company*, 351 NLRB No. 11, the Board held that an employer that hired "at-will" replacement workers during a strike lawfully refused to reinstate economic strikers who made unconditional offers to return to work, overruling prior precedent established under the Clinton Board in its 1997 *Target Rock* decision to the extent it held that "at-will employment is inconsistent with or detracts from an otherwise valid showing of permanent replacement status."

In *Jones Plastic*, the Board held that the employer met its burden to prove strikers were permanently replaced by demonstrating a mutual understanding between the employer and the replacements that their jobs are "permanent" by having its replacement employees sign statements, which included an at-will disclaimer, that they were "permanent replacements" for employees "presently on strike." That, along with the lack of any other evidence that the replacements were temporary, was sufficient to establish permanent replacement status notwithstanding the at-will disclaimer. The dissent chastised the majority's decision, claiming that the Board was "anxious to make a show of reversing precedent."

Winning Isn't Everything

In a recent case involving employer lawsuits against unions, a divided Board held that an employer's reasonably based but unsuccessful lawsuit against a union does not violate the Act. The Board held in *BE&K Construction Co.*, 351 NLRB No. 29, that a reasonably based "loser" lawsuit is permitted even if the employer's motive in filing it is to impose litigation costs on a union in retaliation for its protected activities. The Board held that a suit lacks a reasonable basis only "if no reasonable litigant could realistically expect to win."

Arbitration or Bust

Of course, not every decision of the Board in 2007 overruled prior precedent or rejected an employee claim. In one decision having particular relevance to another "hot" area of employment law — the use of mandatory arbitration agreements — the Board held in *Bill's Electric, Inc.*, 350 NLRB No. 31, that arbitration policies which prohibit, or give the impression of prohibiting, access to the Board's processes, are unlawful. The Board found that an employer's mandatory arbitration policy was unlawful because the policy would be read by applicants and employees as "substantially restricting, if not totally prohibiting, their access to the Board's processes."

Conclusion

Cynics may suggest that the NLRB's rulings on hot topics and in controversial areas are based on overly outcome determinative rationales, resulting over time in the creation or application of inconsistent rules, at least until the Supreme or appellate courts demand a degree of justifiable uniformity. Employers who are encouraged by any of the controversial rules issued by the Board in 2007 should realize, before acting on the basis of those rules, that a different Board in 2009 or 2010 may take a very different approach.