



Removing Salt (and Other Ailments) From Employers' Wounds: Recent Case Developments at the National Labor Relations Board

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The National Labor Relations Board (the "Board") recently issued a number of decisions, including three notable employer-friendly cases. Although approximately 90 percent of all Board decisions historically have been unanimous, a small number of cases tend to be decided along political party lines because three of the Board's five members traditionally are members of the party in the White House. These split cases often involve shifts in Board precedent. In four decisions issued in early October, existing Board law was modified significantly, consistent with a trend of the "Bush Board" to establish precedent more favorable to employers. Not surprisingly these decisions each split 3-2 along party lines. Only time will tell if Congress, or a new Board appointed after the 2008 presidential election, will restore former Board law.

I. Cutting Back on Salt(ing)

In *Toering Electric Co.*, 35 NLRB No. 18 (September 29, 2007), the Board altered its analysis in union "salting" cases, much to the benefit of non-union employers. The practice of "salting" is not a new tactic in union organizing. Salting occurs when a union organizer seeks employment solely for the purpose of attempting to organize the other employees. Often the salt stays just long enough to help the organizing effort and provoke the employer into conduct that may form the basis of unfair labor practice charges. Successful ULPs can result in substantial back pay awards and weaken the employer's ability to fight future organizing efforts due to remedial "cease and desist" orders issued by the Board. After the organizing effort, the salt usually quits and moves on to another workplace.

What Does It Mean? Until *Toering*, the practice of salting was entirely lawful. Salts were protected from discriminatory refusals to hire or terminations on the basis of their union activities, even if the salt had no genuine interest in working for the employer. In reversing this practice, the Board held that seeking work to "generate meritless unfair labor practices" is not protected activity under the National Labor Relations Act (the "NLRA"). Accordingly, *Toering* placed on the Board's General Counsel the ultimate burden of proving an individual's genuine interest in seeking to establish an employment relationship. If the General Counsel fails to meet its burden, the salting is deemed unprotected under the NLRA. As a result, non-union employers may experience fewer instances of salting.

II. When The Empire Strikes Back: Retaliatory Lawsuits Against Unions

Marking a striking departure from previous Board precedent, the Board in *BE&K Construction Co.*, 351 NLRB No. 20 (September 29, 2007), held that the filing and maintenance of a reasonably based lawsuit does **not** violate the NLRA, regardless of the employer's motive for bringing the suit. Previously the Board had staunchly maintained that **all** reasonably based, yet unsuccessful, lawsuits filed in retaliation against union activity violated the NLRA. However, following the U.S. Supreme Court's unanimous reversal of the Board's prior 1999 decision in the same case, on remand the Board held that the U.S. Constitution's First Amendment right to petition the government for redress protects employers who file reasonably based lawsuits against unions. Accordingly, even if a lawsuit is filed by an employer to retaliate against a union and the case is ultimately dismissed, the filing and prosecution of the case will not constitute an unfair labor practice unless the suit is "objectively baseless" and "no reasonable litigant could reasonably expect success on the merits."

What Does It Mean? In essence, the Board has adopted a rule similar to the standard applicable to civil litigation in federal and state courts, which permit courts to sanction parties for filing frivolous lawsuits. In practical terms, the decision paves the way for employers to pursue legitimate claims against unions without fear that the litigation will be held by the Board to be retaliatory and an unfair labor practice, which could have resulted in "make whole" remedies, including an award of attorney's fees to the union.

III. The Board Cuts Back On Voluntary Election Bar

In a much-anticipated case, the Board reconsidered its approach to its recognition bar doctrine. *Dana Corp.*, 351 NLRB No. 28 (September 29, 2007). For approximately 40 years, the Board had barred for a "reasonable time" (usually about 6 months) any attempt to decertify a union that had been voluntarily recognized by an employer. In *Dana Corp.*, the Board held that an employer's voluntary recognition of a union will not bar the processing of a conflicting petition filed during the first 45 days after recognition. Thus, employees seeking a decertification election (or a rival union seeking certification) can file a petition soon after an employer recognizes a union and the Board will not dismiss it. Following the 45 day period, if a competing petition is not filed, the recognized union will still enjoy a presumption of majority status for a "reasonable" period of time.

What Does It Mean? The Republican-controlled majority of the Board stated that this change to the recognition bar rule protects employee free choice in the voluntary recognition process and supports a preference for resolving questions concerning representation through a Board-conducted secret ballot election. The Democrats on the Board vehemently dissented from the majority's reasoning: "Sadly, today's decision will surely enhance already serious disenchantment with the Act's ability to protect the right of employees to engage in collective bargaining...the Board's task is to balance the Act's twin interests in promoting stable bargaining relationships and employee free choice...the appropriate balance was struck 40 years ago...nothing in the majority decision justifies its radical departure...."

IV. The Board Clarifies Dues Check-Off During Contract Hiatus

In a recent consolidated decision, the Board held that two employers lawfully ceased checking off union dues after their labor contracts expired. *Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino*, 351 NLRB No. 32 (September 29, 2007). The check-off provisions at issue were in contracts without union security provisions. Historically the Board has held that union security clauses, and their implementing check-off provisions, cannot be enforced in the absence of a contractual agreement because of the legal limitations on union security. However, in agreements without a union security clause, the law has been unsettled regarding whether dues check-off provisions survive contract expiration. Here, the Board found that the employers' unilateral cessation of the dues check-off after contract expiration did not violate the NLRA because the language of the dues check-off provisions linked them to the duration of the contracts. Unfortunately, the Board did not use this opportunity to fashion a broad general rule regarding dues check-off. Instead, the Board limited its holding to "the specific facts of this case," focusing its analysis on the specific contract language contained in the contracts before the Board.

What Does It Mean? The decision helps to clarify the circumstances under which employers may unilaterally terminate dues check-off upon contract expiration without fear of running afoul of the NLRA. These recent decisions make clear that employers should not rely on Board precedence because it is changing daily, generally to the benefit of employers under the current Board. Look before you leap – the law may be better than you think!

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