SEBRIS BUSTO JAMES Employment Law Note October 2011

National Labor Relations Board Update: Board Reverses or "Clarifies" Several of Its Prior Decisions

By *Mark Busto*

The National Labor Relations Board (the "Board") has issued a number of recent noteworthy opinions either overturning prior Board decisions or clarifying longstanding Board rules. Specifically, in recent months, the Board has: (1) allowed the formation of so-called "micro-units"; (2) revived the successor bar doctrine; (3) eliminated the early opportunity for employees to decertify a voluntarily-recognized union; and (4) limited an employer's ability to unilaterally enact workplace rules without first engaging in bargaining. These developments are a major victories for organized labor and are likely not the last ones labor will receive from the Obama Board.

Micro-Units. In determining whether a petitioned-for bargaining unit is appropriate, the Board normally looks to whether the employees in the proposed unit share a "community of interests." Congress, however, amended the NLRA in 1974 to require more comprehensive units in certain healthcare settings, such as acute care hospitals, to prevent a proliferation of bargaining units. In *Speciality Healthcare and Rehabilitation Center of Mobile*, 356 NLRB 56 (Aug. 26, 2011) the Board announced that it would apply the community of interest test to non-acute care settings, such as nursing homes. As a result, the Board allowed certification of a bargaining unit comprised of 53 certified nursing assistants who had similar "training, certification, supervision, uniforms, pay rates, work assignments, shifts and work areas," and that excluded 33 other non-supervisory personnel. The Board held that once the community of interest test is met, it will find the petitioned-for unit appropriate, *even if the petitioned-for unit could be placed in a larger unit which would also be appropriate*, unless the party opposing the unit can show an overwhelming community of interest with those in the petitioned for unit. The Board's decision applies broadly and opens the door to "micro-units," where union chances for election victories will be greater than in larger, more encompassing units.

Successor Bar. Labor law recognizes a number of "bars" to the ability of employees, employers and other unions to file decertification or election petitions under certain conditions. The Board discarded one such bar—the "successor bar"—in 2002. Under that rule, when a successor employer acted in accordance with its legal obligations to recognize an incumbent union, the union was entitled to represent the employees in collective bargaining with the new employer for a reasonable period of time, without challenge to its representative status. In *UGL-UNICCO Service Co.*, 357 NLRB 76 (Aug. 26, 2011) the Board reinstated the successor bar and defined the reasonable period of time during which the presumption of majority support applies. Specifically, in situations where the successor employer adopts the existing terms and conditions of employment as the starting point for bargaining, the presumption lasts for a period of six months from the date of the parties' first negotiations. In situations where the employer unilaterally sets such terms and conditions, however, the period lasts between six months and one year, depending on a number of factors. The burden is on the party invoking the successor bar to prove that a reasonable period of time has *not* elapsed. Ultimately, the Board's decision will make it more difficult to usurp an incumbent union. Employers should, therefore, carefully consider the nature of any union obligations they will incur as a part of any due diligence in a merger or acquisition.

Voluntary Recognition Bar. Another "bar" recognized by the Board is the "voluntary recognition" bar which prevents the processing of an election petition for a reasonable period of time following an employer's voluntary recognition of a union based on a showing of majority support for the union. The Board modified this doctrine in *Dana Corp.*, 351 NLRB 434 (2007) to provide a 45-day window during which a 30% minority of employees could petition for decertification of the union, and further required that employers post a notice advising employees of their right to seek decertification. In *Lamons Gasket Company*, 357 NLRB 72 (Aug. 26, 2011) the Board reversed *Dana*, rejecting the 45-day window period and the posting requirement. The Board also defined the reasonable period of time during which the voluntary recognition bar would apply to be a period of not less than six months and no more than one year from the parties' first bargaining session. The burden is on the General Counsel to demonstrate that additional bargaining is required. Application of the voluntary recognition bar will make it more difficult to decertify a union once recognized. Employers should, therefore, satisfy themselves that the union has made a proper showing of uncoerced majority support before voluntarily recognizing a union.

Mandatory Bargaining. As a general matter, work rules that affects the terms and conditions of employment are considered mandatory subjects of bargaining. Work rules that are enforced through discipline are also presumptively mandatory subjects of bargaining. As a result, prior to enacting such work rules, employers must give the union notice of the proposed rule and an opportunity to bargain over the substance of the rule. In *Peerless Publications*, 283 NLRB 334 (1987), the Board adopted a rule allowing employers to unilaterally enact work rules that would otherwise be subject to mandatory bargaining, where such rules went to the "core purpose" of the employer's business. In *Virginia Mason Hospital*, 357 NLRB 53 (2011) the NLRB sharply limited application of the rule announced in *Peerless*. Specifically, the Board found that the "core purpose" test was not met where a hospital failed to bargain with the union prior to implementing a work rule designed to prevent the spread of infectious diseases by requiring its nurses to either receive flu shots or wear masks during work. Before implementing new work rules, employers must carefully consider whether the rule is a mandatory subject of bargaining. If it is, the union must be given appropriate notice and opportunity to bargain before the rule is implemented.