McNEES WHITEPAPER

The National Labor Relations Board 2021 Year End Review

AN OVERVIEW OF MAJOR DEVELOPMENTS IN LABOR LAW

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McNees

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Introduction

2021 was the first year of National Labor Relations Board under President Biden. For years, the Board's decisions and its approach generally have swung back and forth depending on whether there was a Republican or Democratic presidential administration. We have typically referred to that as the pendulum swinging back and forth. The decisions and views swing back and forth depending on who is in office and selecting the majority of the Board members.

During the last couple of administrations, the pendulum has been swinging so hard, we thought it might snap! And that aggressive approach seemed to continue when the Biden administration took office in January of 2021. The first order of business for the Administration, at least with respect to the NLRB, was to terminate then Board General Counsel, Peter Robb. Historically, Presidents had allowed an outgoing general counsel to complete his or her term of office.

Robb's term would have ended in September of 2021. The Biden administration broke with tradition and fired him, and after a brief stint with an acting General Counsel, President Biden appointed Jennifer Abruzzo to replace him as the General Counsel.

In an unrelated case, in which the removal of Mr. Robb was challenged, the Board determined that the President did have the authority to discharge the General Counsel prior to the expiration of his or her term. On December 30, 2021, in Aakash, Inc. d/b/a Park Central Care and Rehabilitation, 371 NLRB No. 46 (2021), the Board rejected an employer's argument that a complaint filed against it by Ms. Abruzzo was invalid because she was not lawfully appointed to the General Counsel position. In essence, the argument was because Mr. Robb was not properly removed, Ms. Abruzzo could not be validly appointed.

The Board, relying on some recent U.S. Supreme Court precedent, found that the President did have the authority to discharge Mr. Robb and appoint Ms. Abruzzo as the General Counsel. The Board also noted that the Senate subsequently confirmed Ms. Abruzzo, thus removing any cloud over her appointment.

The decision in Aakash was split down political lines, as you might expect, with the three (3) democratic members, Chairman McFerran, and members Wilcox and Prouty, supporting the decision and the two republican members, Kaplan and Ring dissenting.

Those five members reflect the makeup of the Board at the end of 2021, with Wilcox and Prouty being appointed during the 2021 calendar year.

Although the Board was not fully constituted until part way through the year, the Board did accomplish a good bit of work. In Fiscal Year 2021, the Board issued 243 decisions in contested cases, including 136 ULP cases and 107 representational cases. The agency reported that it recovered over $56.8 million in backpay, fees, dues and reimbursements for employees. In addition, over 6,300 employees were offered reinstatement. In its Annual Performance and Accountability Report, the Board again highlighted its effort to reduce its backlog of cases and efforts to close cases faster.

The Board also reported that nearly 90 percent of initial elections were held within 56 days of the filing of the petition, with a median of about 35 days from the filing of the petition. While the Board did not complete any significant rulemaking in 2021, the Board's new General Counsel was also busy issuing advice memoranda including several that repealed or replaced guidance provided under the Trump Board. The Board also issued a number of critical decisions throughout the year.

We summarize the key labor law developments from 2021.

General Counsel Advice Memoranda

As noted, it is common for transitions of presidential administrations to be accompanied by shifts in policy and enforcement priorities of the Board. Shortly after a new administration enters office, the Board's General Counsel identifies and attempts to effectuate these shifts through the issuance of advice memoranda. The transition from the Trump administration to the Biden administration was no different.

After Mr. Robb's termination, as outlined above, Peter Ohr was designated as Acting General Counsel until Ms. Abruzzo was nominated and confirmed as the new General Counsel. Both Ohr and Abruzzo wasted little time issuing advice memoranda to alter the trajectory of the Board's approach to enforcement.

GC 21-02.

In February, Mr. Ohr started by issuing GC 21-02, which rescinded ten memoranda issued during the Trump Administration. Mr. Ohr indicated that the recissions were warranted because the memoranda were either inconsistent with Act or no longer necessary. Specifically, Mr. Ohr rescinded the following:

- GC 18-04, Guidance on Handbook Rules Post-Boeing. This memorandum gave advice to Regions on the placement of employer rules into categories for determining validity under prior Board case law.
- GC 18-06, Responding to Motions to Intervene by Decertification Petitioners and Employees. This memorandum instructed Regions not to oppose intervention in unfair labor practice hearings by employees who have filed a decertification petition.
- GC 19-01, General Counsel's Instructions Regarding Section 8(b)(1)(A) Duty of Fair Representation Charges. This memorandum sought to change Board law to require unions defending a duty of fair representation allegation

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on the basis of mere negligence to show and establish reasonable procedure to track grievances.

- GC 19-03, Deferral Under Dubo Manufacturing Company. This memorandum instructed Regions to defer certain unfair labor practice charges in which grievances have been filed.
- GC 19-04, Union's Duty to Properly Notify Employees of their General Motors/Beck Rights and to Accept Dues Checkoff Revocations after Contract Expiration. Among other things, this memorandum required Regions to attempt to get the Board to require unions identify the reduced amount of dues and fees in the initial Beck
- GC 19-05, General Counsel's Clarification Regarding Section 8(b)(1)(A) Duty of Fair Representation Charges. This memorandum provided clarification for the directions given in GC 19-01.
- GC 19-06, Beck Case Handling and Chargeability Issues in Light of United Nurses & Allied Professionals. This memorandum placed the burden on the union to provide detailed explanations of the unions methods to determine what expenses were chargeable in agency fee objector cases.
- GC 20-08, Changes to Investigative Practices. This memorandum related to recording testimony of witnesses during investigations.
- GC 20-09, Guidance Memorandum on Make Whole Remedies in Duty of Fair Representation Cases. This memorandum required Regions to argue for the adoption of an "arguable merit" standard in duty of fair representation cases. Under this argument, unions would be liable for faulty grievance handling unless the grievance lacked "arguable merit."
- GC 20-13, Guidance Memorandum on Employer Assistance in Union Organizing. This memorandum encouraged Regions to urge the Board to prohibit "more than ministerial aid" in union decertification cases.

GC 21-03.

After eliminating the General Counsel Memoranda that he found objectionable, Mr. Ohr quickly began to identify new points of emphasis. In GC 21-03, Mr. Ohr sought to combat what he viewed as a narrowing of Section 7 rights – i.e., the right to engage in concerted activity for mutual aid or protection. The memorandum specifically referenced two recent Board decisions: Alstate Maintenance and Quicken Loans. In Alstate, an employee commented to his supervisor that he did not want to do an assigned task because he did not receive a tip from the customer for doing the same task previously. The Board found that the comment was not concerted action for "mutual aid or protection." In Quicken Loans, an employee commented that handling a customer's call was a "waste of time." Again, the Board determined that the comment was not concerted activity for mutual aid or protection because it did not bear any relationship to improving working conditions.

Despite these holdings, Mr. Ohr indicated in GC 21-03 that he would "robustly" enforce employee's Section 7 rights. For example, he stated that employee advocacy can be considered for mutual aid or protection "even when the employees have not explicitly connected their activity to workplace concerns." According to Mr. Ohr, this includes political and social justice advocacy when there is a nexus to employees' "interests as employees." Examples provided in the memorandum included minimum wage issues and protests in response to crackdowns on undocumented workers. As for whether activity is "concerted," Ohr emphasized that some activity is inherently concerted, particularly if it relates to "vital elements" of employment. Vital elements, according to GC 21-03, include wages, work schedules, job security, workplace health/safety, and racial discrimination. Concerns about such elements may be inherently concerted even though group action has not yet been contemplated.

GC 21-04.

After Ms. Abruzzo was confirmed in July, she issued GC 21-04. It identified a lengthy list of case categories that she believes requires centralized consideration at the Regional Advice Branch ("Advice"). Accordingly, GC 21-04 directs Regions to submit certain cases to "allow the Regional Advice Branch to reexamine these areas and counsel the General Counsel's office on whether change is necessary to fulfill the Act's mission." Clearly, the categories of cases identified for Advice tend to foretell where Ms. Abruzzo will focus her enforcement efforts going forward. Of interest, the following are some of the case categories identified:

1. Employer Handbook Rules. This includes cases involving the applicability of Boeing to confidentiality rules, non-disparagement rules, social media rules, media communication rules, civility rules, and professional manner rules, among others.
2. Confidentiality Provisions/Separation Agreements and Instructions. This encompasses cases that apply Board caselaw that permit confidentiality, non-disparagement, and waiver of claims in separation agreements. It also includes cases involving confidentiality rules applicable during workplace investigations and contained in arbitration agreements.
3. What Constitutes Protected Concerted Activity. Similar to Ohr's focus in GC 21-03, these cases are those that apply Alstate and/or Quicken Loans to determine if activity is "concerted" and "for mutual aid and protection." It also includes cases evaluating employee's right to use employers' emails and electronic platforms.
4. Wright Line/General Counsel's Burden. This includes cases requiring the General Counsel show heightened animus, among other things, in discrimination cases.
5. Remedial Issues. This includes cases where remedial measures above and beyond backpay are paid in exchange for a waiver of claims, and cases in which settlement agreements are a reach over the objections of the General Counsel or charging party.
6. Union Access. This focuses on cases applying Board case law that permits property owners to exclude off duty contractor employees seeking access to engage in Section 7 activity.

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7. Union Dues. These cases relate to an employer's cessation of checking off and remitting dues after the contract expiration. It also includes cases in which Board case law requires verification to a Beck objector that the union's financial information has been audited and does not include lobbying costs.
8. Employee Status. This refers to cases addressing independent contractor status of workers.
9. Board Jurisdiction Over Religious Institutions. This refers to cases in which the Board determines whether it has jurisdiction over religious educational institutions.
10. Employer Duty to Recognize and/or Bargain. There are a number of case-types that fall within this category, including: use of the "contract coverage" standard to allow unilateral employer action; anticipatory withdraw cases; successor rights in setting initial terms of employment; and cases in which the employer does not trigger obligation to furnish financial information by claiming "competitive disadvantage" instead of inability to pay (among several others).

GC 21-05.

A week after issuing GC 21-04, Ms. Abruzzo issued GC 21-05 regarding her intent to aggressively seek Section 10(j) injunctions (when necessary). She indicated that there are certain unfair labor practices that are more likely to lead to remedial failure, and therefore, warrant injunctive relief: discharges that occur during an organizing campaign, violations that result in Gissel bargaining orders, violations that occur between certification and the first contract, withdrawal of recognition of incumbent unions, and cases involving successors refusal to bargain and/or hire. Ms. Abruzzo directed Regions to submit recommendations to the Injunction Litigation Branch as to whether or not to seek injunctive relief on these types of cases.

GC 21-06/07.

In September, Ms. Abruzzo issued GC 21-06 and 21-07 related to remedial measures. The focus is to pursue remedies (beyond just backpay) in both litigated and settled cases. Some of the remedies Ms. Abruzzo directs that Regions to seek include the following:

Unlawful Discharge Cases

1. Consequential Damages (g., health care expenses, credit card late fees, or loss of home or care resulting from unlawful discharge).
2. Front Pay.
3. Liquidated backpay.
4. Compensation for work performed under unlawfully imposed terms.
5. Employer sponsorship of work authorizations.

Unlawful Conduct During Organizing

1. Union access (including equal time to address employees if convened for captive audience meetings).
2. Reimbursement of organizational costs to re-run election.
3. Reading of Notice to Employees and Explanation of Rights.
4. Publication of notice in newspapers.

Failure to Bargain Cases

1. Bargaining Schedules (not less than twice per week for six hours).
2. Submission of progress reports.
3. 12-month insulation period from the date employer comes into compliance.
4. Reinstatement of unlawfully withdrawn proposals.
5. Reimbursement of expenses.
6. Use of a mediator.

Settlements (in addition to those listed above)

1. Reinstatement
2. Front Pay.
3. Outplacement services.
4. Neutral references.
5. No-contest of unemployment compensation.
6. Language in the settlement agreement allowing the Board to enter summary judgment without trial or any other hearing in the event of non-compliance.
7. Letters of apology.
8. Exclusion of non-admission clauses.
9. Notice to employees via email.

GC 21-08.

Finally, in September Ms. Abruzzo issued GC 21-08 addressing the statutory rights of athletes at academic institutions. GC 21-08 reinstates a prior memorandum (GC 17-01) that found student athletes on scholarship met the definition of "employee" under the Act and common law. Ms. Abruzzo also stated that classifying athletes as "student-athletes" is a misclassification that has a chilling effect on their Section 7 rights. Accordingly, she intends to seek independent violations of the Act where the institution misclassifies the athlete as a "student-athlete."

A Summary of the Board's Significant Decisions

As noted above, there were a number of significant Board decisions in 2021, and some of the key decisions are summarized here.

Board Holds Employer's Instruction to Witnesses to Keep Their Investigate Interviews Confidential Was Lawful

In *Alcoa Corporation*, 370 NLRB No. 107 (2021), the Board held that the employer did not violate the NLRA by instructing witnesses to keep their investigative interviews confidential. In that case, the employer's labor relations specialist (Carr) investigated reports of misconduct by an employee. As part of his investigation, Carr interviewed ten individuals, including six bargaining unit employees. During those interviews, Carr told

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each employee "to keep in mind that their interview conversation was confidential, to keep the conversation confidential, including from supervisors and other employees, and to decline to answer if others asked about the conversation." An administrative law judge found that the instructions violated Section 8(a)(1) of NLRA, which provides that it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the[ir] rights" under the NLRA. The Board disagreed and reversed.

In so ruling, the Board applied its decisions in two prior cases: *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019) and *Watco Transloading, LLC*, 369 NLRB No. 93 (2020). In *Apogee*, the Board held that investigative confidentiality rules that by their terms apply only for the duration of an open investigation are categorically lawful under Boeing Co., 365 NLRB No. 154 (2017). The Board also noted that its holding did not apply to rules that would apply to nonparticipants in an investigation or that would prohibit employees (participants or nonparticipants) from discussing the events giving rise to the investigation.

In *Watco*, the Board extended the Apogee framework to an employer's one-on-one confidentiality instruction with one caveat: In *Apogee*, the Board found that employees would reasonably interpret a general investigative confidentiality policy that is silent as to duration as not limited to open investigations. By contrast, in *Watco*, the Board held that "where it is presented with an oral one-on-one confidentiality instruction limited to a single specific investigation . . . the Board [will] assess the surrounding circumstances to determine what employees would have reasonably understood concerning the duration of required confidentiality."

Applying this precedent, the Board found that Carr's confidentiality instructions were lawful because, considering the circumstances surrounding the interview and its aftermath, the employees would have reasonably understood that the confidentiality requirement was limited to the duration of the investigation. In this regard, the Board noted that upon conclusion of the investigation, the employer promptly complied with the union's request for investigatory interview notes and written statements provided by unit employees, a "clear signal" that the employer no longer considered any of the information disclosed to be confidential. The Board also noted that the employer took no adverse action when one of the interviewed employees informed Carr that he had discussed his interview with the union's grievance chair. Moreover, the Board found no evidence that Carr's instructions applied to anyone other than the employees whom he interviewed or that they prevented those employees or any other employees from discussing the events giving rise to the investigation.

Finally, the employer was not required to prove a superior management interest in confidentiality. The Board observed that the interest in encouraging participation in workplace investigations is "self-evident."

Alcoa is the latest in a series of decisions under the Trump Board that have restored employers' ability to require that internal investigations be kept confidential.

Board Holds Employers May Withhold Investigation-Related Information from Union Until Conclusion of Investigation

In *United States Postal Service,* 371 NLRB No. 7 (2021) (USPS), the Board considered when an employer must provide investigation-related information requested by a union. The employer notified the union of a pre-disciplinary interview of an employee. Before the interview, the union requested records and documents, including questions to be asked at the interview. The employer denied the request and stated it would provide information if it "took action." Following the investigation, the employer issued a notice of removal to the employee but did not provide any of the requested information to the union until four weeks later.

Under the NLRA, when a union requests relevant information, the employer has a duty to provide the information in a timely manner or to adequately explain why the information will not be provided. An unreasonable delay in providing information, like a refusal to provide the information in the first place, is a violation of the NLRA.

Nevertheless, the Board in USPS held that when an employer schedules an investigatory interview of an employee alleged to have committed misconduct and, prior to that interview, a union requests relevant information concerning the interview, the employer may refuse to provide such information while the investigation is ongoing but must provide the information at the conclusion of the investigation. In so holding, the Board declined to extend an employee's Weingarten rights to include a union's request for pre-interview information.

Under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), employees have a right to request that a union representative attend any interview the employee reasonably fears may result in discipline. And in *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048 (1982), the Board explained that for the Weingarten right to representation to be meaningful, an employer need only provide a "general statement of the subject matter of the interview, which identifies . . . the misconduct for which discipline may be imposed." The right to know the general subject matter of an interview, however, is very different from having access to the entire file of an ongoing investigation, which is what the union requested in USPS.

Accordingly, the Board held that the employer in USPS did not have an obligation to provide the requested information before the conclusion of its investigation. However, the employer did have an obligation to provide such information after the

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conclusion of its investigation, and therefore it violated the NLRA by failing to do so until four weeks later, which was an unreasonable delay.

USPS strikes a balance between an employer's right to control its investigatory processes and its duty to furnish relevant information requested by a union.

Board Overrules Lutheran Heritage and Holds Unlawful Application of Otherwise Lawful Policy Does Not Make Policy Unlawful to Maintain

In *AT&T Mobility, Inc.*, 370 NLRB No. 121 (2021), the Board held that the application of an otherwise lawful rule or policy to restrict the exercise of Section 7 rights, which is an unfair labor practice, does not make the rule unlawful to maintain.

The employer had a "no-recording" policy that prohibited employees from recording telephone or other conversations with their co-workers, managers, or third parties unless the recordings were approved in advance by the employer's legal department, required by business need, and complied with applicable law and company policies. One of the employer's employees, a union steward (Davis), accompanied another employee to a meeting at which the employee was terminated. Davis recorded the meeting on his company and personal cell phones. After it was discovered that he had recorded the meeting, Davis met with a manager, who told Davis that the recording violated the no-recording policy and that the manager "did not want anyone held accountable for not following policy."

The Board first held that the no-recording policy was lawful under *Boeing Co.,* 365 NLRB No. 154 (2017), which held that no-recording rules "as a type" are Category 1 rules and therefore lawful to maintain. However, the Board also held that the employer unlawfully applied the no-recording policy to Davis. In that regard, the Board found that Davis was engaged in protected activity when he recorded the meeting because he was acting in his capacity as union steward "policing the parties' collective bargaining agreement and preserving evidence for use in a possible grievance." And because Davis' only act of "not following policy" was protected activity, the Board found that the manager's application of the policy (he "did not want anyone held accountable for not following policy") was an unspecified threat that adverse action would be taken against Davis if he engaged in such protected activity in the future.

Having found the no-recording policy lawful under Boeing, but that it was applied unlawfully, the Board had to consider whether the policy became unlawful to maintain because of its unlawful application. Under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if a rule has been "applied to restrict" the exercise of Section 7 rights, the rule is automatically unlawful to maintain. For several reasons, the *AT&T Mobility* Board disagreed with this categorical approach and overruled *Lutheran Heritage*.

First, the "applied to restrict" standard fails to give any weight to an employer's legitimate interests in continuing to maintain a lawful rule. Second, the Board cited precedent that supported its view that a rule remains lawful to maintain notwithstanding its application to restrict Section 7 rights. Third, the remedy for an "applied to restrict" violation – revision or rescission of the rule – is practically meaningless. The rule is already lawful on its face – so it cannot be revised to make it lawful – and because the rule is lawful on its face, the employer can simply reinstate the rule, if it so chooses once the notice-posting period expires. Finally, the "applied to restrict" standard undermines the predictability and certainty that the Board sought to foster in *Boeing*, which established a systematic framework for determining what types of rules are and are not lawful to maintain. Under the "applied to restrict" standard, however, the certainty as to lawful status of a rule "can be undone by a single, isolated unlawful application of that rule." Finally, the Board decided to apply its holding retroactively because doing so would not result in manifest injustice.

AT&T Mobility is another example of the Trump Board's efforts to bring welcome clarity and certainty to "rules-maintenance questions," and it flows logically from Boeing – which, interestingly, overruled a different prong of the *Lutheran Heritage* framework. Employers have the certainty that, not only are certain types of rules lawful to maintain, but they also continue to be lawful to maintain even if applied unlawfully. *AT&T Mobility* also reaffirmed that the application of a rule or policy to restrict the exercise of Section 7 rights continues to be an unfair labor practice, and thus employers should be alert to potential protected activity when applying their rules and policies. And if an employer is found to have unlawfully applied a rule or policy, the employer must be careful not do so again. The Board warned that "a second unlawful application of an otherwise lawful rule could result in loss of the right to maintain the rule."

Board Retains the "Contract-Bar" Doctrine

In *Mountaire Farms, Inc.*, 370 NLRB No. 110 (2021), the Board declined to rescind or modify the contract-bar doctrine. Under the contract-bar doctrine, a valid collective bargaining agreement is a bar to a representation petition (e.g., an employee petition to decertify the union) during the term of the agreement, but for no longer than three years. During this "contract bar" period, representation petitions filed with the Board will be dismissed unless they are filed during the 30-day period – known as the "window period" – that begins 90 days and ends 60 days before the agreement expires. The subsequent 60-day period preceding and including the agreement's expiration date is known as the "insulated period" because no petition may be filed during that period. For collective bargaining agreements in the health care industry, the insulated period is 90 days; thus, the 30-day window period begins 120 days and ends 90 days before the contract expires.

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The contract-bar doctrine is not specifically found in the NLRA but was developed by the Board to strike a balance between its dual responsibilities of promoting labor relations stability and effectuating employee free choice concerning representation. However, the current doctrine has been criticized for giving undue emphasis to the former at the expense of the latter.

In *Mountaire Farms*, the Board undertook a general review of the contract-bar doctrine. The Board previously issued a Notice and Invitation to File Briefs, inviting the parties and interested amicus curiae to file briefs on whether the Board should rescind, retain, or modify the doctrine. After considering the briefs, and arguments for and against modifications to the contract-bar doctrine, the Board decided not to modify the doctrine at this time.

The Board acknowledged the "considerable" concerns and arguments raised by some parties and amici about the doctrine. Specifically, they noted that, for the window period to serve its intended purpose, employees must be able to readily ascertain when the window opens, but the relevant date is not always readily ascertainable. If employees cannot determine when the window period opens and closes, the efficacy of the window period is negated. "Although we share this concern," the Board wrote, "a sufficiently compelling case has not been made for any particular proposed modification."

In a footnote, Chairman McFerran noted that she did not share her colleagues' concerns about the window period and employees' ability to ascertain when the window period opens and closes. Thus, it seems unlikely that the Biden Board will revisit the contract-bar doctrine anytime soon.

Board Rejects Attack on "Scabby the Rat"

In *Int'l Union of Operating Eng'rs, Local Union No. 150 a/w Int'l Union of Operating Eng'rs*, AFL-CIO, 371 NLRB No. 8 (2021) (IUOE), the Board held that a union's display of "Scabby the Rat" and banners near the entrance of a trade show did not violate the NLRA.

"Scabby the Rat," the 12-foot inflatable rat with red eyes, fangs, and claws, has become a regular and prominent fixture at union rallies and demonstrations, including at the sites of "neutral" or "secondary" employers. In *IUOE*, the union displayed the inflatable rat and two large banners near the public entrance of a recreational vehicle trade show. The display targeted an RV supplier, whose products and services were displayed at the trade show, and which did business with a company with which the union had a labor dispute.

The question in *IUOE* was whether the union violated Section 8(b)(4)(ii)(B) of the NLRA by displaying the rat and banners at the trade show entrance. Section 8(b)(4)(ii)(B) provides that it is an unfair labor practice for a union "to threaten, coerce, or restrain any person . . . where . . . an object thereof is . . . forcing or requiring any person to . . . cease doing business with any other person." The Board previously issued a Notice and Invitation to File Briefs to afford the parties and interested amici an opportunity to weigh in.

Ultimately, the Board held that the display did not violate Section 8(b)(4)(ii)(B) and dismissed the complaint, for the reasons stated in two concurring opinions by Chairman McFerran and Members Kaplan and Ring, respectively. Chairman McFerran believed the outcome was dictated by the Board's prior decisions in Carpenters Local 1506 (*Eliason & Knuth of Arizona*), 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15* (*Brandon Regional Medical Center*), 356 NLRB 1290 (2011), which held that union displays of banners and an inflatable rat at the worksites of secondary employers did not violate Section 8(b)(4).

In their concurring opinion, Members Kaplan and Ring observed that Section 8(b)(4) was enacted by Congress to protect neutral employers from becoming embroiled in labor disputes not their own. They also observed, however, that the Supreme Court has made clear that enforcement of Section 8(b)(4) can conflict with the First Amendment. Thus, relying on the Supreme Court's decision in *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), they found that the rat-and-banner display did not violate Section 8(b)(4)(ii)(B). Interpreting Section 8(b)(4)(ii)(B) to prohibit this display, they argued, would raise serious First Amendment concerns because the display was "clearly expressive activity[] conveying the Union's message." Moreover, they were not persuaded that "Scabby the Rat" must be deemed intimidating or coercive simply because of its sheer size or appearance.

Thus, Scabby the Rat is here to stay, and the rat-and-banner displays will likely proliferate at rallies and demonstrations targeting neutral employers who, unfortunately, happen to do business with companies that employ the union's members.

Board Decisions on Appeal

It was a fairly active year for Board decisions on appeal, with over twenty reported decisions from the federal Courts of Appeal in 2021. We discuss a few here.

D.C. Circuit Finds Employer Discriminatorily Applied Company Policies Related to Email Use

In Communications Workers of America, *AFL-CIO v. NLRB*, 6 F.4th 15 (D.C. Cir. 2021), the D.C. Circuit reversed the Board's decision that the employer (T-Mobile) did not discriminatorily apply its policies related to email use. In this case, a customer service representative (Befort) sent a mass email through her company email account and from a company computer inviting her co-workers to join ongoing union organizing efforts. In response to her email, T-Mobile reprimanded Befort and sent a facility-wide email stating that the company did not "allow mass communication for any non-business purpose" and that

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employees may not use social media during work.

The Board found that T-Mobile did not unlawfully discriminate against Befort because other mass emails that T-Mobile permitted to be sent were not similar in character to Befort's email. The Board also found that the rules announced in T-Mobile's facility-wide email were not promulgated in response to union activity, but to Befort's impermissible use of its email system. The D.C. Circuit concluded that the Board's findings were not supported by substantial evidence.

First, the court acknowledged the Board's decision in *Caesars Entertainment*, 368 NLRB 143 (2019) (which we discussed two years ago), under which "facially neutral restrictions on the use of employer IT resources are generally lawful to maintain, provided that they are not applied discriminatorily." But here, the court found that T-Mobile applied its policies discriminatorily. In this regard, T-Mobile cited three specific policies that it claimed barred Befort's mail, but the court found that none of them covered her email, and thus T-Mobile could not have applied those policies in a neutral manner.

The T-Mobile also argued, more generally, that it did not allow "mass communication for any non-business purpose." However, the record showed that T-Mobile permitted other mass emails with non-business purposes, such as an email asking about a lost phone charger and emails containing birth announcements and baby shower notices. Moreover, the court faulted the Board for relying on a "post hoc line" between permissible and impermissible emails that, the court argued, the Board drew to explain why Befort's email was not similar in character to the other mass emails.

Finally, because the court found that T-Mobile discriminated against Befort, the court also found that T-Mobile promulgated work rules in response to Befort's union activity, and therefore such rules violated the NLRA.

This case is a reminder that the Board's employer-friendly rule in *Caesars Entertainment* is not absolute. Under *Caesars Entertainment*, employers may prohibit employees from using company-owned email systems to send non-business (including union-related) communications, even during non-working time. But employers must apply these policies evenhandedly and not selectively. Employers must also be careful when stating their rationales for disciplining employees. The court noted that Befort's manager specifically referred to "union-related" conduct when reprimanding Befort, and these statements suggested T-Mobile was singling out Befort's email because of its union content.

Second Circuit Approves "Contract Coverage" Test, But Concludes Employer Violated the NLRA by Unilaterally Imposing Six-Day Workweek

In *International Brotherhood of Electrical Workers, Local Union 43 v. NLRB*, 9 F.4th 63 (2d Cir. 2021) (*IBEW)*, the Second Circuit considered the Board's new "contract coverage" test for determining whether an employer's unilateral change of terms or conditions of employment is permissible. In *IBEW*, the employer, ADT, implemented a mandatory six-day workweek for technicians without first bargaining with the union.

In general, an employer violates the NLRA if it changes terms and conditions of employment without first notifying and bargaining with the union. However, an employer does not violate the NLRA if the collective bargaining agreement grants the employer the right to unilaterally change a term or condition of employment. Prior to 2019, the Board applied a "clear and unmistakable waiver" standard for determining whether a CBA permitted an employer's unilateral change. That standard considered whether the text of the CBA "unequivocally and specifically" permitted the employer's action such that the union could be said to have "waived" its right to bargain the issue.

In *MV Transportation, Inc.,* 368 NLRB No. 66 (2019), the Board abandoned the "clear and unmistakable waiver" standard and replaced it with a more employer-friendly "contract coverage" test. Under that test, an employer's unilateral change is permissible if it was "within the compass or scope of contractual language granting the employer the right to act unilaterally." Applying its newly-adopted test, the Board held that ADT had no duty to bargain with the union because the CBA's plain language granted it the right to unilaterally impose the six-day workweek.

The Second Circuit first concluded that the contract coverage standard was rational and consistent with the NLRA. The court observed that this standard obviates many of the deficiencies of the clear and unmistakable waiver standard, including its tendency to undermine contractual stability, alter the parties' negotiated bargain, and cause the Board to sit in judgment of contract terms, which it is prohibited from doing. It also "harmonized" the Board's approach with ordinary principles of contract interpretation.

Applying the contract coverage standard, however, the Second Circuit concluded that the plain language of the CBA did not permit ADT's unilateral imposition of the six-day workweek. The court noted that the CBA's scheduling provisions restricted technicians' hours and work schedules and did not contemplate a six-day workweek or grant ADT the right to impose such a workweek unilaterally. Further, while the CBA did give ADT the right to impose an additional shift on some technicians, ADT failed to comply with the contractual prerequisites to do so unilaterally. Finally, the court found that the Board erred by construing two other provisions of the CBA to grant ADT the right to act unilaterally.

IBEW is a mixed result: The Second Circuit approved the contract coverage standard but found the CBA did not permit ADT to take unilateral action.

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D.C. Circuit Holds New Test for Determining Access Rights of Onsite Contractor Employees is Arbitrary

In a defeat for the Board, the D.C. Circuit held that its new test for allowing a property owner to prohibit an onsite contractor's employees from accessing the property to engage in Section 7 activity is arbitrary. *Local 23, American Federation of Musicians v. NLRB*, 12 F.4th 778 (D.C. Cir. 2021) (AFM).

In *AFM*, a symphony contracted with a performing arts center (Tobin Center) to perform most of its shows at the center. The symphony musicians were employees of the symphony, not the Tobin Center. After the Tobin Center prohibited the musicians from distributing leaflets on its premises, their union filed unfair labor practice charges against Tobin Center.

The ALJ applied the then-governing standard in *New York New York, LLC*, 356 NLRB 907 (2011), under which a property owner may exclude a contractor's employees who are "regularly employed on the property" and seek to engage in Section 7 activity "only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason." The ALJ found the Tobin Center violated the NLRA because the musicians regularly worked at the Tobin Center, and the Tobin Center failed to show significant interference or an alternative justification for exclusion.

The Board reversed and adopted a new standard that broadened the circumstances under which property owners can bar onsite contractor employees from accessing the property for Section 7 activity:

[A] property owner may exclude from its property off-duty contractor employees seeking access to the property to engage in Section 7 activity unless (i) those employees work both regularly and exclusively on the property and (ii) the property owner fails to show that they have one or more reasonable nontrespassory alternative means to communicate their message.

The Board found that the musicians did not work regularly or exclusively at the Tobin Center, and even if they did, they had alternative nontrespassory channels of communication to communicate their message.

The D.C. Circuit reviewed the Board's decision and held that its new test was arbitrary. In this regard, the first step of the test considers whether the employees work both "regularly" and "exclusively" on the property. The court found that the Board failed to adequately explain these terms, and the Board's examples were inconsistent with the stated logic of the first step – to identify employees with a "sufficient connection" to the property.

Moreover, the second step of the test considers whether the property owner fails to show that contractor employees have one or more reasonable nontrespassory alternative means to communicate their message. In other words, the property owner must prove that contractor employees have reasonable alternative means for communicating their message in order to exclude them from its property. However, the court found that Board failed to actually impose this burden on the Tobin Center, but simply deemed the requisite showing to have been made. Therefore, the Board's application of the second step was also arbitrary.

The D.C. Circuit remanded the case to the Board for further proceedings. Although the Board may attempt to re-apply its new test, it is unlikely that the Biden Board will do so. Rather, it is more likely that the Biden Board will reinstate something similar to the *New York New York* test, which would grant broader rights of access to contractor employees.

D.C. Circuit Holds that Employers May Express Even "Baseless" Opinions

Section 8(c) of the NLRA provides that the "express[ion] of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." Thus, employers may express their opinions on unions, and such opinions are protected if they contain neither threat nor promise. In *Trinity Services Group, Inc. v. NLRB*, 998 F.3d 978 (D.C. Cir. 2021), the D.C. Circuit considered whether Section 8(c) protects opinions that the Board considers "baseless."

Trinity Services involved a mix-up over the amount of paid leave to which an employee was entitled. The employee belonged to a union, which had negotiated a different paid-leave plan from Trinity's other nonunionized facilities. The employee's boss blamed the union for the discrepancy: "[T]hat is a problem that the Union created regarding [paid leave]"; "You need to fix that with the Union"; "[T]hat's the problem with the Union."

A divided panel of the Board found that the boss's remarks violated the NLRA because they had a reasonable tendency to interfere with employees' labor rights. The majority reasoned that there was "no objective basis for blaming the Union, rather than [Trinity]" for the mix-up. On the other hand, the dissent reasoned that, although it was unfair to blame the union entirely, the boss's remarks were a "lawful expression" of "personal opinion" and therefore protected under Section 8(c).

Trinity appealed to the D.C. Circuit, which sustained Trinity's appeal. The court first found that the remarks were opinions under Section 8(c) and contained no threats or promises, and no reasonable employee would have inferred threats or promises from the remarks. The court then rejected the Board's argument that there should be an exception under Section 8(c) for "misstatements," even if they contain no threat or promise. "Absent threats or promises," the court stated, "§ 8(c) unambiguously protects 'any views, argument, or opinion' – even those that the agency finds misguided, flimsy, or daft."

continued

Trinity Services confirms that Section 8(c) means what it says. An employer's opinion that contains neither threat nor promise is protected expression – regardless of how misguided or baseless the Board thinks the opinion is.

Summary

The Biden administration wasted no time in shaking things up at the Board, and in doing so started the push of the pendulum again. We have detailed the most important developments here and will continue to keep you up to speed on further developments throughout the year. Please subscribe to our blog so you do not miss any key updates: www.palaborandemploymentblog.com

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