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Labor Law Bulletin

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Labor Board Issues Three Decisions Unions Will Not Like

The National Labor Relations Board has just issued several important employer-friendly decisions. The Bush-appointed majority of the five-member Board has (i) created a window period for filing election petitions following an employer's voluntary recognition of a union, (ii) stiffened the evidentiary requirements for determining whether an employer violates the National Labor Relations Act by refusing to hire union organizers, also known as "salts," and (iii) sanctioned the hiring of permanent striker replacements on an at-will basis.

Employees Can Mount Immediate Challenge to Voluntary Recognition. In *Dana Corp. and Metaldyne Corp.*, 351 NLRB No. 28 (2007), the Board modifies its long-standing recognition-bar doctrine. Since 1966, the Board has held that an employer's voluntary recognition of a union based on a card showing of majority support bars the filing of a decertification petition, or an election petition from a rival union, for a reasonable period of time, generally at least six months. During this period, the parties have an opportunity to bargain and enter into a labor contract. Because voluntary recognition eliminates the risk of losing an election, unions increasingly are pressuring employers to sign neutrality agreements that call for recognition based on card signatures, and are lobbying hard for state and federal laws mandating recognition on this basis.

In *Dana/Metaldyne,* the Board concluded that the voluntary recognition process should not be treated the same as the choice expressed in a Board-conducted, secret-ballot election. Accordingly, the recognition bar doctrine now provides a 45-day window period for the filing of petitions after voluntary recognition. Specifically, there will be no bar to an election following a grant of voluntary recognition unless (a) affected employees are given notice of the recognition and of their right to file an election petition within 45 days, and (b) no validly supported petition is filed within the 45-day period. Unless these requirements are met, the signing of a post-recognition contract will not bar an election petition.

To comply with the notice requirement, the employer and/or union must provide written notice to the applicable Regional Office of the Board of the grant of voluntary recognition. The Regional Office will send an official NLRB notice, to be posted conspicuously in the workplace for 45 days, alerting employees to the recognition and their right to file an election petition or support another union's petition to represent them. Any such petition must still be supported by a showing of interest from at least 30 percent of the bargaining unit.

If the 45-day period expires without a valid petition being filed, the recognition-bar doctrine kicks in and the recognized union's status as exclusive bargaining representative will not be subject to challenge for a reasonable period of time, thus permitting the employer and union an opportunity to negotiate a labor contract.

Because *Dana/Metaldyne* marks a significant departure from preexisting law, the modified recognition-bar doctrine will apply only prospectively to voluntary recognition agreements that predate the decision.

"Salts" Not Protected Unless They Really Want to Be Hired. In *Toering Electric Co.*, 351 NLRB No. 18 (2007), the Board makes it harder to prove that an employer violated the Act by refusing to hire a pro-union job applicant. This situation typically arises when union "salts"—paid organizers—try to infiltrate an employer's workforce and file unfair labor practice charges if they are not hired.

Up to now, the Board's General Counsel had to show that the employer was hiring or had concrete plans to hire, the union applicant had the relevant training or experience, and antiunion animus played a role in the decision not to hire. The burden then shifted to the employer to show that it would not have hired the applicant even in the absence of his union affiliation.

Toering adds the new requirement that the union applicant had a "genuine interest" in seeking employment. If the General Counsel makes that showing, the employer may present evidence to the contrary, for example, that the applicant had refused similar employment in the past, made belligerent or offensive comments on the application, behaved in a disruptive, insulting or antagonistic manner during the application process, or engaged in other conduct inconsistent with a genuine interest in being hired.

Toering will make it tougher for union organizers to "salt" a workplace. However, an unintended consequence may be that unions will engage in more covert forms of organizing, thus requiring greater diligence on the part of employers.

Permanent Strike Replacements Can Be Employed at Will. Under the Act, economic strikers who unconditionally offer to return to work are entitled to immediate reinstatement unless the employer has a legitimate and substantial reason for refusing reinstatement. Such business justification can be shown by evidence that the strikers were permanently replaced in order to continue business operations during a strike.

In *Jones Plastic & Engineering*, 351 NLRB No. 11 (2007), the issue was whether employees hired during a strike on an at-will basis—meaning they can be fired at any time, with or without cause—could be deemed *permanent* replacements for striking employees. The Board majority concludes that at-will employment is not inconsistent with employment as a permanent replacement under the Act. It agrees with the General Counsel's argument that "permanent" refers only to an employer's intention to keep replacement employees on the job after strikers unconditionally offer to return to work, while "at-will" merely reminds the replacements that state law gives the employer the right to terminate any employee with or without cause.

Jones should give employers greater flexibility in determining how they will continue operations during a labor-related work stoppage.

If you have any questions about these decisions or NLRB matters in general, please contact Kevin Hennessy (312-609-7868), Jim Petrie (312-609-7660), Mark Stolzenburg (312-609-7512), or any other Vedder Price attorney with whom you have worked.

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