Labor Board Makes Historic Shift: Employers Gain More Leeway to Unilaterally Change Job Terms

by Meggen E. Lindsay - Wednesday, September 11, 2019

Employers with unionized work forces will have an easier time claiming that their unilateral actions are allowed under the language of their collective bargaining agreements, in a significant decision released Tuesday that aligns the National Labor Relations Board (NLRB) more closely with the federal appellate courts that have considered the issue.

In a 3-1 decision in *M.V. Transportation, Inc.*, the NLRB's Republican majority adopted the "contract coverage" standard and abandoned their long-held "clear and unmistakable waiver" standard for considering whether an employer's unilateral action is permitted by the parties' labor contract.

The lone Democratic member of the Labor Board dissented, claiming the ruling will "impose a new standard that gives employers wide berth to make unilateral changes in represented employees' terms and conditions of employment without first bargaining with their union."

The New Standard

Employers are required under the National Labor Relations Act (NLRA) to bargain in good faith with their unions about so-called "mandatory subjects" of bargaining, such as wages, hours, and other terms and conditions of employment. An employer who makes a material, substantial,

and significant change regarding a mandatory subject of bargaining without first providing the union notice and a meaningful opportunity to bargain about the change to agreement or impasse violates the NLRA, absent a valid defense.

One such defense for employers is that by virtue of the parties' agreement, the union has waived its right to bargain over particular change or type of change. It is this question—how an employer is able to prove that a union has waived its right to bargain over a topic—that the Board has substantially revised.

Under the newly implemented "contract coverage" or "covered by the contract" standard, the NLRB will examine the plain language of the parties' collective bargaining agreement to determine whether the change made by the employer was within the "compass or scope" of contractual language granting the employer the right to act unilaterally. If it was, the NLRB will honor the plain terms of the parties' agreement and the employer will not have violated the Act by making the change without bargaining.

The NLRB explained the "contract coverage" test, which it will apply retroactively to all pending cases, by way of the following example: if an agreement contains a management-rights provision that broadly grants the employer the right to implement new rules and policies and to revise existing ones, the employer would not violate the NLRA by unilaterally implementing new attendance or safety rules or by revising existing disciplinary or off-duty-access policies.

In both of the above instances, the employer's changes would have been within the compass or scope of a contract provision granting the employer the right to act without further bargaining with the union.

Previous Test Criticized

This test is notably different than the now-abandoned "clear and unmistakable waiver" standard that has been in place since 1949. Under that standard, the NLRB would find that an employer's unilateral change violated the Act unless a contractual provision *unequivocally and specifically* referred to the type of employer action at issue.

This standard has been criticized for many years by the U.S. Court of Appeals for the D.C. Circuit, which has review over all NLRB decisions. For example, in a 1992 decision, the D.C. Circuit observed that "the union would almost invariably prevail . . . because it almost always could find some ambiguity in the relevant contractual language."

Given the D.C. Circuit's long-standing refusal to enforce NLRB decisions that applied the waiver standard, as well the Seventh and First Circuits' rejection of the standard, Chairman John Ring, in writing for the majority, described the NLRB's past "dogged adherence to the clear and unmistakable waiver standard as an exercise in futility."

In the case at issue, the NLRB considered whether a Las Vegas facility of transit company MV Transportation, Inc., made unlawful unilateral changes when it revised and implemented its existing work policies. They concluded that the broad language of the management rights

clause in the parties' contract covered all of the employer's unilateral changes and that the company therefore did not violate the NLRA.

Bottom Line

This decision does not relieve employers of their obligation to bargain in good faith with unions regarding employees' wages, hours and other terms and conditions of employment.

However, when collective bargaining agreements contain management rights clauses that broadly authorize an employer to change work rules or conditions, it will be easier for employers to argue that a unilateral change was encompassed by the scope of the contract language granting an employer the right to do so.

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