6/17/08

The Bush Board's Massacre on Union and Employee Rights

The following is just a sample of the decisions issued by the Bush-appointed Board which have had significant negative impact on employees, unions, or both.

1. Expansion of Supervisory Status under Section 2(11) to exclude employees from coverage of the Act. ***Oakwood Healthcare, Inc., 348 NLRB No. 37 (9/29/06); Golden Crest Healthcare Center, 348 NLRB No. 39 (9/29/06); Croft Metals, Inc., 348 NLRB No. 38 (9/29/06).***

2. Further burdens on unions in providing information to non-member *Beck* objectors, by requiring unions to provide a breakdown of chargeable/non-chargeable expenditures for all affiliates to which they pay per capita assessments. ***Teamsters Local Union No. 579, 350 NLRB No. 87 (9/7/07)***

3. Refusing to impose *Gissel* bargaining orders and other special remedies for egregious and widespread illegal conduct by an employer. ***Hialeah Hospital, 343 NLRB 391 (2004); Intermet Stevensville, 350 NLRB No. 94 (9/17/07); Albertson's, Inc., 351 NLRB No. 21 (9/29/07).***

4. Overturning 40+ years of labor law to require that employees may petition for an election within a 45 day period after an employer has granted voluntary recognition to a union pursuant to Section 9(a) of the Act. (Based on the premise that an election was the best mechanism for determining employee sentiments on union representation.) ***Dana Corp., 351 NLRB No. 28 (9/29/07).***

5. On the same day that ***Dana Corp.*** was decided, the Board, in an astonishing act of hypocrisy, decided that employees in a decertification situation were *not* entitled to an election, and the employer could withdraw recognition based solely on a petition signed by a majority of employees which requested only a *vote.* ***Wurtland Nursing & Rehabilitation Center, 351 NLRB No. 50 (9/29/07).*** Apparently, the Board's emphasis on the importance of an election in ***Dana Corp.*** only applies to an effort to vote a union IN, and not when certain employees are seeking to vote a union OUT.

6. For the first time in the history of the NLRA, requiring employers who have not violated the Act to post certain notices. (Unlike the FLSA, OSHA, and others, the NLRA has never required employers to post notices in the workplace advising employees of their rights). Not surprisingly, this very first standard "posting" requirement foisted upon employers, is a rule requiring that notices be posted by employers advising employees of their right to *decertify* a union, once a majority of them have already signed cards authorizing the union to represent them. ***Dana Corp., supra.***

7. Denying or reducing back pay awards for illegally fired employees by shifting burdens of proof, and determining that employees did not make efforts to find employment within two weeks following discharge would be denied back pay. ***St. George Warehouse, 351 NLRB No. 42 (9/30/07); The Grosvenor Resort, 350 NLRB No. 86 (9/30/07); Domsey Trading Corp., 351 NLRB No. 33 (9/30/07).***

8. Sanctioning and abetting an employer's right to extort a waiver of claims from an illegally fired employee, and denying unlawfully employees a remedy under the Act if they signed a release of claims, even if done in order to obtain severance pay needed to feed their families, pay medical bills, etc. (This is in sharp contrast to the EEOC, which holds that such releases of statutory liability are void, unenforceable, and against public policy). ***BP Amoco Chemical-Chocolate Bayou, 351 NLRB No. 39 (9/29/07).***

9. Condoning hiring discrimination by shifting the burden of proof from the employer to the employee to prove the individual had a "genuine interest in employment" (in particular, a blatant attack on "salting" efforts by construction industry unions). ***Toering Electric Co., 351 NLRB No. 18 (9/29/07)***

10. Significantly limiting back pay in unlawful hiring cases where the individual who was unlawfully discriminated against is a union organizer "salt" (whether or not the employer knew of the individual's status), thereby once again sanctioning an employer's unlawful hiring activity by significantly decreasing or entirely eliminating any penalty for the unlawful conduct. ***Oil Capitol Sheet Metal, Inc., 349 NLRB No. 118 (2007).***

11. Allowing an employer to use evidence obtained through illegal unilateral changes to discharge employees, by finding that the employees were fired for "cause", even though the evidence supporting the "cause" for termination, was obtained illegally. (Apparently, the fruit from the poisonous tree is not poisonous under the NLRA). ***Anheuser-Bush, Inc., 351 NLRB No. 40 (9/29/07)***

12. Sanctioning lawsuits brought by employers against employees or unions in retaliation for activity protected by the Act. This was a reversal of prior law. The Board held that as long as the suit was "reasonably based" (a ridiculously low standard as articulated by the Board), it is not a violation of the Act to bring it, even if the sole reason was to retaliate for protected activity by employees. ***BE&K Construction Co., 351 NLRB No. 29 (9/29/07).***

13. Legalizing coercive employer interrogation, implied threats, and other coercive statements made during an organizing drive. ***Sunshine Piping, Inc., 350 NLRB No. 90 (9/10/07); Suburban Electrical Engineers/Contractors, 351 NLRB No. 1 (9/20/07).***

14. Refusing to give weight to circumstantial evidence of anti-union animus to prove an unlawful discharge or refusal to hire. ***Pro-Tec Fire Services, Ltd., 351 NLRB No. 8 (9/27/07); Dial One Hoosier Heating & Air Conditioning Co., 351 NLRB No. 48 (9/29/07).***

15. Reversing credibility determinations by the ALJ who heard the testimony. (The Board had rarely disturbed an ALJ's credibility determination prior to the Bush Board). ***Marshall Engineered Product Co., 351 NLRB No. 47 (9/29/07); Domsey Trading Corp., supra.***

16. Further eroding the right to strike by expanding the category of employees who can be deemed "permanent" replacements, to include employees who were specifically told they were "at will" when hired, and that they could be fired at any time for any reason. ***Jones Plastic & Engineering, 351 NLRB No. 11 (9/27/07).***

17. Allowing employers to discriminate against employees who engage in email transmissions involving union business through the enforcement of a policy prohibiting communications relating to union activity, thus violating well-established law that such a rule is both overly broad, and constitutes discrimination against union activities, to the extent the employer allows other non-business communications over its email system. ***California Newspapers Partnership d/b/a ANG Newspapers, 350 NLRB No. 89 (9/10/07)***

18. Allowing employer supervisory personnel to lawfully threaten employees with store closure and/or job loss. (Saying "chief executive officer would rather close stores than. . .deal with unions in any way, shape or form" and that "workers who are interested in forming a union might find themselves unemployed rather than better "employed"). ***Fresh Organics, Inc. d/b/a Real Foods Company. 350 NLRB No. 32 (7/24/07)***

19. Denying justice by delaying the issuance of decisions. Many of the decisions issued by the Bush Board had been pending for anywhere between five and seven years. The passage of time makes enforcement in the Circuit court more difficult, and allows the employers time to eradicate union supporters, turn employees against the union, and, in particular, argue "turnover" to defeat the enforcement of a *Gissel* bargaining order.

20. Issuing an unprecedented number of decisions in which one or more of an ALJ's findings of a violation were reversed. In probably 8 to 9 out of every 10 decisions involving 8(a)(1) and (3) allegations, the Bush Board strained to find at least one allegation where the ALJ had found a violation, to reverse and dismiss.

21. Alienating a fellow Board member (Wilma Liebman) to the degree that she writes a dissenting opinion in virtually every case decided, and has openly criticized the Bush appointees, making statements such as that the Bush Board has "regularly found that employee statutory rights must yield to countervailing business interests"; and that the Bush Board has "almost reflexively overruled key decisions made by the Clinton Board".

22. In general, the Bush Board has acted as an arm of corporate America, rather than the Agency whose mission is to encourage and support collective bargaining and the rights of employees to elect a representative of their choice. The damage done by the Bush Board cannot be minimized, disregarded or ignored. Until a new Board comprised of labor friendly (or even labor neutral) members is seated, the reversal of all of the decisions outlined above cannot even begin to occur. Time is of the essence.

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