NLRB Update – Impacting Both Non-Union and Union Workplaces

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Dish Network, LLC, 365 NLRB No. 47 (2017)

The employer violated the Act by prohibiting an employee from discussing his suspension with coworkers. The Board held an employer's efforts to restrict those discussions is unlawful absent its ability to demonstrate a legitimate and substantial business justification that outweighs the infringement on the employee's Section 7 rights. The record did not show that the employer offered any justification for its prohibition.

The employer was also found to have violated Section 8(a)(1) through the maintenance and enforcement of its "Arbitration Agreement." This issue is pending review through other cases.

Aqua-Aston Hospitality, LLC, dba Aston Waikiki Beach Hotel, 365 NLRB No. 53 (2017)

Holds that an employer may lawfully discipline an employee for engaging in misconduct in the course of his otherwise protected activity, but only if it had a good faith and correct belief that such misconduct occurred.

The Board held that the employer violated Section 8(a)(1) during meetings with employees by: (a) directing employees to stop participating in union-organized rallies; (b) directing employees to stop visiting the homes of coworkers to engage in union and/or other protected concerted activities; (c) indirectly threatening employees with the loss of their jobs for engaging in union and/or protected concerted activities by telling them that they were lucky to have jobs; and (d) telling employees to apologize to the employer for engaging in union and/or protected concerted activities.

The employer argued that the fact that many of the employees did not speak English means that the Board was applying the wrong standard and the remarks should be judged by a "reasonable employee" standard that assumes an English-speaking employee who understood his comments fully. In assessing the lawfulness of communications in a multilingual workplace, language barriers cannot be ignored. Moreover, the Board noted that the identity of the speaker in employee meetings and his position of relative power in the workplace are also given consideration in determining whether a statement is unlawful, and when an employer uses a high-level manager to voice its antiunion message, that message takes on an especially coercive quality and is unlikely to be forgotten.

The Board also found a violation of the Act by a security guard, when he threatened employees with discipline for distributing union literature near the lower lobby of the hotel. An employer may be held liable for unfair labor practices committed by security guards acting in their official capacity. The Board rejected the employer's argument that the lower lobby of the hotel was a work area. Activities such as security, maintenance and valet parking, which typically occur in a hotel lobby, are incidental to a hotel's primary function, and thus insufficient to transform a hotel's front entrance area into a "work area" where an employer may lawfully ban employee distributions.

Keystone Automotive Industries, Inc., 365 NLRB No. 60 (2017)

An employer's specific promises of better pay if employees voted against a union during captive audience meetings was a conduct deemed sufficient to set aside an election and direct that a new one be held.

The Board stated that depending on what is said and the context in which it is said, even comparisons and statements of fact may nevertheless convey implied promises of benefits. Here, the employer's comments, including that "a 'reasonable person' could expect to receive a 12.5% wage increase if the Employer won the election," was so specific that it outweighed the lawful content of the employer's wage survey data which it said was to be used for considering whether to grant wage increases regardless of the outcome of the election. Moreover, the employees in question were aware of wage increases provided to employees in other locations. Despite the employer noting that it was not making promises, the objection based upon the employer's promises was sustained and a new election was ordered.

Matrix Equities, Inc., 365 NLRB No. 69 (2017)

The 3-member Board held that an employer did not unlawfully discharge an employee in an attempt to suppress future protected concerted activity.

The charging party was a human resource employee. He had been hired to identify compliance issues. Prior to being discharged he had not engaged in any conduct that is itself protected by Section 7. Rather, the employee sought to raise a number of workplace issues and communicate his dissatisfaction, but many of these amounted to individual complaints (e.g., the music playing too loudly on the office radio). He never suggested that he intended to raise any concerns on behalf of other employees. According to a letter he submitted to the employer, wage disparities, FLSA misclassification, and benefits policies made him give serious thought to contacting the Board and organizing a union. The Board noted that his complaints were individual, not "concerted," and rejected arguments that the employer discharged the employee to suppress his plan to engage in Section 7 activity.

Allways East Transportation, Inc., 365 NLRB No. 71 (2017)

A majority of the Board held that the employer was a successor employer and violated the Act by failing and refusing to recognize and bargain with the union of the predecessor. The majority also held that the employer, because it was a successor, unlawfully failed to respond to the union's information request. However, the majority concluded that the employer did not unlawfully unilaterally change the wage rates of employees; nor did the employer have a duty to bargain with the union prior to terminating an employee under the circumstances presented.

The majority noted the essence of successorship is not premised on an identical re-creation of the predecessor's customers and business, but rather, on the new employer's

conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor. The majority found substantial continuity of operations because the successor performed the same general business service and the employees were performing the same general jobs. The majority rejected the "minor differences" in operations as insufficient to preclude a successorship finding.

MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort & Casino, 365 NLRB No. 76 (2017)

An employer that denied access to its club to former employees and thereby violated Section 8(a)(1). The employer had a longstanding past practice of granting access to former employees to socialize at its establishments as it would to any other member of the public.

The employer operated the Grand Sierra Resort in Reno that includes a hotel, casino, restaurants, clubs, bars, and a pool. The employee in question had filed a wage-hour complaint against the employer following her employment, an action brought on behalf of herself and other employees. The majority concluded that the employer expressly retaliated against the employee for engaging in the protected concerted activity on matters concerning the workplace despite the fact that the matters involved her former employer. This retaliation, the majority found, would chill employees from exercising their Section 7 rights.

Miscimarra dissented, noting that it was impossible for the General Counsel to establish that the "no trespass" policy could have affected her terms or conditions of employment because she no longer worked there. He further noted that other current employees who joined the lawsuit were not barred from the property, thereby precluding a finding of disparate treatment based on her assertion of Section 7 rights.

Rainbow Medical Transportation, LLC, 365 NLRB No. 80 (2017)

The employer violated the Act by discharging an employee after concerns raised by employees during a business meeting as to the employer's processing of reports required for payment of wages. Employer officials noted that such discussions should be held in private and not in a group meeting setting. The Board concluded the employee engaged in concerted activity.

The initial burden to prove that protected conduct was a motivating factor in an employer's adverse employment action is met by showing protected activity, the employer's knowledge of protected activity, and the employer's animus against protected activity. There is not requirement to make some additional showing of particularized motivating animus toward the employee's own protected activity or to further demonstrate some additional, undefined connection between the employee's protected activity and the adverse action.

Butler Medical Transport, LLC, 365 NLRB No. 112 (2017)

In a mixed ruling, the Board concluded that an employee was properly discharged for engaging in conduct, speech and Facebook posts that were not protected under the Act. The employee's post stated: "Hey everybody!!!!! IM F***IN BROKE DOWN IN THE SAME S***

I WAS BROKE IN LAST WEEK BECAUSE THEY DON'T WANTA BUY NEW S***!!!! CHA-CHINNNGGGGGG CHINNNG—at Sheetz Convenience Store." The Employer is a provider of ambulance services to nursing home and hospitals and the employee's post suggested his ambulance had broken down due to failures on the part of the Employer. In fact, the evidence suggested that the issue was with the employee's girlfriend's car. If that was the case, then the employee was not engaged in concerted, protected activity. If the post was a false statement regarding his ambulance then it was deemed maliciously false and not protected.

As to a second employee, he claimed that he had been terminated for Facebook postings regarding a former employee's termination, seeking support from others and threatening to go to "the labor board." A majority of the Board found his discharge to be a violation. Not only were his posts considered concerted, protected activity, but his termination was also the result of the employer's enforcement of an overly broad social media policy. The policy required employees to promise they would "refrain from using social networking sights which could discredit Butler Medical Transport or damage its image." The majority found that the employee's Facebook post was conduct that otherwise implicates the concerns underlying Section 7. Thus, even if the employee's posts did not constitute protected concerted activity, his discharge was still unlawful because his posts "touche[d] the concerns animating Section 7."

Macy's, Inc., 365 NLRB No. 116 (2017)

An employer's rules prohibiting the use of customer information did not violate Section 8(a)(1). The majority held that, while employees generally have a Section 7 right to appeal to their employer's customers for support in a labor dispute, the disputed rules do not restrict such appeals. Instead, they prohibit the disclosure of information about customers obtained from the Respondent's confidential records.

There was no allegation that the rules at issue explicitly restricted Section 7 rights, were issued in response to union activity, or were applied to restrict the exercise of Section 7 rights. As it has so often recently, the majority considered whether employees would reasonably understand the rules to restrict Section 7 activity. Unlike so many recent decisions, here, the majority found that the restriction on the use of customers' social security numbers and credit card numbers and the restriction on the use of customer contact information could not reasonably be construed to prohibit Section 7 activity. The majority also found that the employer's "Use and Protection of Personal Data" and "Confidentiality and Acceptable Use of Company Systems" rules to be lawful to the extent they prohibited the use or disclosure of social security numbers or account numbers or the use of customer names and contact information obtained from the Respondent's own confidential records.

Readyjet, Inc., 365 NLRB No. 120 (2017)

The Board concluded that the employer here violated the Act by interrogating employees, disciplining employees for participating in a lawful strike, and threatening retaliation against employees.

Member Miscamarra concurred in the decision, but disagreed with two of the remedies ordered by the Board. First, he disagreed with ordering the employer to compensate employees for any search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. He would adhere to the Board's former approach of treating search-for-work and interim employment expenses as an offset against interim earnings. Second, he disagreed with the order that the notice be read aloud to employees. He noted that this was an extraordinary remedy for serious and widespread unfair labor practices and he did not find unfair labor practices relating to, at most only five employees as widespread in a unit of 240 employees.

This dissent is likely a precursor of the new Board majority's approach to remedies.

Outokumpu Stainless Steel USA, LLC, 365 NLRB NO. 127 (2017)

Here, a 2-member majority determined that an employer breached a settlement agreement and granted a motion for default judgment. The settlement agreement resolved two unfair labor practices. Under the terms of the settlement agreement, the employer agreed to rescind an allegedly overbroad no-discussion-during-work-hours policy, rescind the discipline issued to employees and inform them of the same, allow employees to discuss the union during working hours, and post an official NLRB notice at its facility and on its intranet.

Before posting the notice, the employer emailed to its employees and posted on its main bulletin board a letter challenging the allegations and details of the settlement. The employer alleged that the charges had been brought by the union to effectively "block the election from occurring." The letter blamed the union for preventing employees from exercising their "right to vote and have a choice" and it settled only to avoid a Board hearing that would further delay their right to vote. This letter remained posted right next to the Board notice agreed to in the settlement agreement.

The Region told the employer that the company's "rebuttal" letter constituted noncompliance with the settlement agreement and ordered the Respondent to repost the NLRB notice for an additional 60 days with additional notice provisions and language stating that the side letter "did not properly represent" the Board's findings or the purpose of the information in the NLRB notice. The employer refused and denied breaching the agreement.

The Board found that the employer's posting of a side letter violated the terms of the settlement agreement in two ways: (1) the side letter attempted to "minimize the effect of the Board's notice" and suggests to employees that the Board's notice is being posted as a mere formality; (2) the settlement specifically required the employer to post the parties' agreed-upon notice, and the agreement should therefore be read as requiring the posting of that notice and nothing that detracts from that notice.

The Boeing Co., 365 NLRB No. 154

A three-member Board majority established a new standard for the evaluation of employer rules/policies under the Act. The issue was whether the employer's facially neutral

rule was unlawful under the "reasonably construe" standard. The Board overruled *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

In *Lutheran Heritage*, the Board stated that:

> [O]ur inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Here, the employer implemented a rule that restricted the use of camera-enabled devices such as cell phones on its property without a valid business need. The rule did not explicitly restrict any activity protected by the Act; it was not adopted in response to protected activities; and it was not applied to restrict such activities. The employer presented evidence that the rule was justified by the need to maintain confidentiality of the work performed at its facilities, some of which is classified, and by the need to secure the facilities and work performed there against espionage by competitors, foreign governments, and international terrorists.

The majority completely rejected *Lutheran Heritage* and noted that its standard created a contradiction in holding that employer policies cannot be either broad or simply stated because of the risk they might imply a restriction on protected activities. This "standard" would require that an employer accurately predict how a policy might be read in any possible scenario and anticipate, identify, and carve out whatever may offend to prevent ambiguity and ensure a lawful rule under the Act.

The Board announced a new standard and in doing so, found the employer policy here valid. If a facially neutral rule may, when reasonably interpreted, potentially interfere with employee rights under the Act, the Board will evaluate both: (i) the nature and extent of the potential impact on employee rights; and (ii) the employer's legitimate business justifications for the rule. To help balance these considerations, the Board set forth three categories of rules:

- Category 1 will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, a "harmonious interactions and relationships" rule and other rules requiring employees to abide by basic standards of civility.

- Category 2 includes rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of

NLRA rights. In such case, they may still be valid if any adverse impact on protected conduct is outweighed by legitimate business justifications.

- Category 3 includes rules that the Board will designate as unlawful to maintain because they would prohibit or limit Section 7 protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rules such as prohibiting employees from discussing wages or benefits with one another.

Unite Here! Local 5, 365 NLRB No. 169

A 2-1 Board majority held that the union violated the Act when it repeatedly blocked vehicle access to the entrance and exit of the employer's hotel property even though the blocking was in the context of otherwise peaceful picketing. The union engaged in organizational picketing activity either once per week or once every other week for approximately 13 months. On at least six separate picketing days, the union intentionally blocked each vehicle entering and exiting the *porte cochere* of the Aston Hotel, preventing each vehicle from moving for approximately two to four minutes. The undisputed purpose of blocking traffic was to "annoy" the driver and bring attention to the union's message. These pickets were sometimes "small" (15-37 picketers) and at other times quite "large" (75-200 picketers). In addition to blocking customer ingress and egress, it was undisputed that the union blocked employee ingress and egress, although there was no strike involved.

PCC Structurals, Inc., 365 NLRB No. 160

A Board majority overturned the Board's controversial decision in *Specialty Healthcare*, 357 NLRB No. 83 (2011), and returned to the Board's prior standard for determining the appropriateness of bargaining units.

Before *Specialty Healthcare*, if and when an employer challenged whether a representation petition sought to represent an appropriate unit, the Board applied a "community of interest" test, in which it weighed a number of factors: (1) whether the employees are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; (4) are functionally integrated with the employer's other employees; (5) have frequent contact with other employees; (6) interchange with other employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised. Considering these factors on a case-by-case basis, the Board would determine "whether the petitioned-for employees share[d] a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit."

Then, in *Specialty Healthcare*, in the context of a non-acute health care facility, the Board controversially changed the relevant standard and held that, if the petitioned-for unit shared a community of interest, the Board deemed the unit appropriate, even if employees in the petitioned-for unit also shared a community of interest with a larger group of employees who

were not included in the requested unit. An employer could only expand the petitioned-for unit to include additional employees if it could prove that the additional employees shared an overwhelming community of interest with the petitioned-for employees. This broad standard was applied not only in non-acute healthcare, but in other industries.

In *PCC Structurals*, the union petitioned for a unit of approximately 100 full-time and regular part-time welders and specialists employed by the employer across three Oregon facilities, while the employer sought to expand the petitioned-for unit to a wall-to-wall unit of over 2,500 production employees. Applying *Specialty Healthcare*, the Regional Director concluded that the employees in the petitioned for unit were "readily identifiable" as a group and that they shared a community of interest, but did not share an overwhelming community of interest with the rest of the production employees.

The majority held that *Specialty Healthcare* was "fundamentally flawed" and cited numerous policy considerations which required a return to the traditional community of interest standard, which pre-dated *Specialty Healthcare*. The majority noted that *Specialty Healthcare* was an unwarranted departure from the traditional test and was a departure from decades of precedent.

Ironically, the dissenting members, who had voted in the majority in Specialty Healthcare where decades of precedent were summarily ignored, somehow claimed the majority's decision was an "abuse of discretion."

Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156

A three-member Board majority rejected the controversial *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery* ("*Browning-Ferris*"), 362 NLRB No. 1886 (2015), decision and returned to its prior test for joint employers.

In *Browning-Ferris*, the Board majority held that, even when two entities have never exercised joint control over essential terms and conditions of employment, and even when any joint control is not "direct and immediate," the two entities will still be joint employers based on the mere existence of "reserved" joint control, or based on indirect control or control that is "limited and routine." The *Hy-Brand* majority determined that this *Browning-Ferris* was a "distortion of common law as interpreted by the Board and the courts, it is contrary to the Act, it is ill-advised as a matter of policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations." The majority also criticized *Browning-Ferris* for subjecting countless entities to joint-employment obligations, even in the absence of direct and immediate control from the putative joint employer.

Hy-Brand Industrial Contractors, Ltd., 366 NLRB No. 26 (Vacating Original Decision)

Then, not long after Hy-Brand I, a unanimous three-member panel vacated the Board's decision in *Hy-Brand*, above, and reinstated the Board's decision in *Browning-Ferris.* The panel stated that the Board's Designated Agency Ethics Official had determined that Member **Emanuel** should have been disqualified from participating in this proceeding. Further action on this case is pending.

Hendrickson USA, 366 NLRB No. 7

This was a union organizing from August 2015. Near the outset of the campaign, the employer held an employee meeting during which it discussed, in part, the effect of signing a union authorization card. The employer's representative stated that if employees signed the authorization cards "at that point [they would] no longer have a voice." He further stated that the company wanted to "talk directly with its employees" and did not want a "third-party to have to intervene." The Board's General Counsel characterized these statements as conveying that employees who signed an authorization card would no longer have direct access to their employer.

A few days later, the company sent a letter to employees and their families. In part, the letter read: "IF our plant were to be unionized, and the collective bargaining process to begin, none of the benefits, compensation, or job security that you currently enjoy would be guaranteed. The Company and any recognized Union would begin the negotiating process from scratch. Which means all of the wages, benefits, and terms and conditions of employment that you currently enjoy at our plant would not be the starting point for negotiations toward a Union contract."

The company later showed a PowerPoint presentation to employees, extolling the then-current workplace culture. The presentation offered some examples of what might be lost if the union were elected and it the slides included the following examples:"[l]oss of our direct relationship;" "you'll be giving up your right to speak for and represent yourself;" "the culture will definitely change," "relationships suffer," and "flexibility is replaced by inefficiency." The presentation went on to note that, if the union was voted in, employees would "lose their right to speak for and represent themselves; every change to wages, hours and working conditions would require negotiations 'controlled by the union—not you.'"

The Board unanimously determined that the employer violated the Act when it stated that the parties would "begin the negotiating process from scratch." The ALJ had explained in her decision, however, that "when employees are represented, their bargaining representatives deal directly with their employers through a shop steward, and it is simply fact that the direct relationship that existed before unionization no longer exists."

The majority adopted the ALJ's finding that the employer acted unlawfully when it stated that, if the union was elected "the culture would definitely change, relationships would suffer, and flexibility would be replaced by inefficiency."

KHRG Employer, LLC, 366 NLRB No. 22

An employee was legally terminated after he intentionally used a security passcode to lead a group of employees and nonemployees into a secure area of the Respondent's hotel while in the process of presenting a petition to management. Deemed a flagrant violation of the employee's security protocols, his actions caused him to lose the protection of the Act.

The employee led a group of employees and non-employees to seek a meeting with management and in the process he lied to a security guard and said that the group did not include non-employees. Thereafter, the employee led the employee delegation to a secure area and used his passcode to allow the group to enter into an area where cash, corporate checks, personnel files, guest contracts, financial information, and employees' personal items were stored.

The delivery of the petition by employees constituted protected concerted activity, if that's all it had been. However, when an employer defends a discharge based on employee misconduct that is a part of the employee's protected concerted activity, the employer's motive is not at issue. Instead, such discharges are considered unlawful unless the misconduct at issue was so egregious as to lose the protection of the Act. The Board balances employees' right to engage in concerted activity, allowing some leeway for impulsive behavior, against employers' right to maintain order in the workplace.

A majority of a three member panel found that the employee's actions lost the protection of the Act. The panel held that the employee "flagrantly violated the hotel's security protocol and unnecessarily placed at potential risk the security of other employees and the Respondent's property, including valuables, confidential files, and financial documents."

Tito Contractors, Inc., 366 NLRB No. 47

A panel of the Board found the employer had discriminatorily promulgated and enforced an overtime policy which required that employees obtain advance management approval for overtime work among other violations.

Just six days after employees began to engage in protected concerted activity by filing a wage and hour lawsuit, the Respondent issued the new policy. It announced that the lawsuit was a surprise and noted that it would need to cut employee hours. The employer's superintendent stated that the memorandum announcing the overtime policy change meant that those employees suing the Respondent could not work overtime.

The panel found that the employer's action was motivated by animus against the protected activity. The Respondent could not establish that it would have implemented the

policy in the absence of the overtime lawsuit. Indeed, the panel held that, though the policy was facially neutral, it was promulgated for an unlawful, retaliatory purpose.

The panel did make clear, however, that its decision does not suggest that an employer could never lawfully respond to an FLSA lawsuit through a policy designed to limit overtime work such as if a new policy was solely motivated by legitimate business concerns and was not discriminatorily applied.