



## NLRB ISSUES SIGNIFICANT DECISIONS AT YEAR'S END

As the term of Member Brian Hayes expired at the end of 2012, the National Labor Relations Board issued a flurry of recent decisions. The decisions highlight the Board's continuing foray into the non-union workplace through increasingly broad interpretations of protected concerted activity; grant a new right to unions to receive pre-arbitration witness statements and the right to bargain over pre-imposition of suspension, demotion, or termination during first contact negotiations; and continue to strike down arbitration agreements in the non-union setting.

### OBLIGATION TO BARGAIN OVER PRE-IMPOSITION OF DISCIPLINE

*Alan Ritchey, Inc.*, 359 NLRB No. 40 (December 14, 2012). The Board found that after the union has been selected as the employees' bargaining representative, but before the first contract has been agreed to, the employer must bargain over discretionary discipline before it is imposed. Such discretionary discipline is a mandatory subject of bargaining, and a pre-imposition duty to bargain is triggered

before a suspension, demotion, discharge, or any other discipline that alters the terms and conditions of employment. Lesser discipline, such as oral or written warnings, require only post-imposition bargaining if requested by the union. With regard to pre-imposition bargaining, an obligation attaches only with regard to discretionary aspects of disciplinary actions and requires that the employer provide the union with notice and the opportunity to bargain before the disciplinary action is imposed. An employer need not bargain to impasse before imposition, "so long as it exercises its discretion within existing standards." The Board carved out an exception to this bargaining obligation in exigent circumstances, which will be defined on a case-by-case basis. Such circumstances may include, for example, instances where "an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel[.]" such as where the employee has engaged in unlawful conduct potentially exposing the employer to liability or "threatens safety, health, or security in or outside the workplace." Thus, an employer may act unilaterally

in such circumstances and is not required to provide the union with notice or the opportunity to bargain. Employers negotiating first contracts will now need to carefully analyze whether a suspension, demotion, or discharge involves any discretion, and if so, unless there are exigent circumstances, the employer must notify the union it is considering imposing discipline and allow the union to request bargaining over the decision to discipline.

## UNION'S RIGHT TO WITNESS STATEMENTS PRE-ARBITRATION

***Stephens Media, LLC, d/b/a Hawaii Tribune-Herald***, 359 NLRB No. 39 (December 14, 2012). In the first of two decisions issued in the same week regarding making witness statements available to a union, the Board held that an employer was required to furnish the union with a statement signed by an employee and obtained during the course of a workplace investigation. According to the Board, the statement was not protected from disclosure as a witness statement under *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978) because the signing employee did not receive any assurance of confidentiality from the employer. Further, the statement was not privileged from disclosure by the work product doctrine because the employer could not establish that the statement was prepared in anticipation of litigation but instead was obtained as part of a routine investigation. A note on the statement that it was prepared at the advice of counsel in preparation for arbitration was insufficient evidence of the employer's motivation at the time it was prepared, where the note was added sometime after the statement was signed.

***American Baptist Homes of the West d/b/a Piedmont Gardens***, 359 NLRB No. 46 (December 15, 2012). The Board overturned 30 years of case law to hold that an employer may need to furnish to the union relevant witness statements made during the course of an investigation unless the employer proves the existence of a "legitimate and substantial confidentiality interest" that outweighs the union's need for the information. In adopting this approach, the Board overruled *Anheuser-Busch*, in which it held that witness statements obtained during an employer's investigation of

workplace misconduct were exempt from the employer's pre-arbitration disclosure obligations. The Board held, over the dissent of Member Hayes, that there is no fundamental difference between witness statements and other types of information typically disclosed such that a blanket exemption is warranted. Instead, where an employer argues that it has a confidentiality interest in protecting witness statements from disclosure, the Board will consider the sensitivity and confidentiality of the information at issue based on the specific facts of the case. Under this approach, an employer may not refuse to furnish the requested information but must timely raise any confidentiality concerns and seek an accommodation from the union. In light of its departure from long-standing precedent, the Board decided to apply its decision only prospectively and not to any cases where the employer's refusal to provide witness statements occurred prior to the date of this decision. This decision, taken together with the Board's recent decision in *Stephens Media*, will make it more difficult for an employer to get written statements from witnesses. When the witnesses realize that their identity will be disclosed and their statements provided to the union, which will in turn share the statements with the employee being disciplined, it is unlikely that witnesses will be as forthcoming.

## BEWARE OF DISCIPLINE BASED UPON SOCIAL MEDIA POSTS

***Hispanics United of Buffalo, Inc.***, 359 NLRB No. 37 (December 14, 2012). The Board held that an employer violated Section 8(a)(1) of the NLRA by discharging five employees for Facebook postings they made in response to a colleague's posted criticism of their job performance. This case makes it clear that the Board supports the view of Acting General Counsel Lafe Solomon, who has made social media a cornerstone of the Board's recent activism in non-union workplaces. According to the Board, the comments constituted concerted activity under Section 7 and were therefore protected activity under the NLRA. In this case, an employee posted her colleague's criticism on Facebook after learning that the colleague intended to discuss her criticism with management. The Board found that the employees' Facebook responses to the initial posting

constituted concerted activity for the “purpose of mutual aid or protection” because (i) the responding employees made common cause with the posting employee; and (ii) the employees “were taking a first step towards taking group action to defend themselves against accusations they could reasonably believe [their colleague] was going to make to management.” Notwithstanding a lack of evidence of any group action to be taken in response to the criticism, the Board found, over the dissent of Member Hayes, that a concerted objective could be inferred from the initial poster’s “mutual aid” objective of preparing her coworkers for a group defense to the criticism. The Board rejected the employer’s argument that the terminations were justified because the employees’ comments violated company policy against harassment and bullying. Employers need to tread carefully when imposing discipline based upon employee posts in social media. Policies need to be very specific and harassment or disparagement narrowly defined to include unlawful harassment and disparagement of the employer’s products or services only.

## **ADDITIONAL REMEDIES FOR DISCRIMINATEES**

*Latino Express, Inc.*, 359 NLRB No. 44 (December 18, 2012). In this case, the Board reviewed its remedial strategies and held that employers must: (i) file a report with the Social Security Administration allocating back-pay awards to the appropriate calendar quarters; and (ii) reimburse a discriminatee for any federal and state income taxes he may owe as a result of receiving a lump-sum back-pay award covering a period of more than one year. Underlying the Board’s remedial policy is that the victim of an unfair labor practice be restored to the situation he would have obtained but for the unfair practice. Requiring the filing of a back-pay allocation report with the SSA would allow the employee to reap the full Social Security benefit he would have received had the unfair labor practice never occurred. Similarly, the tax reimbursement ensures that the employee is not liable for the difference between his taxes owed upon receipt of the lump-sum back-pay award and those he would have owed had he received his wages when they were or would have been earned.

## **EMPLOYEE DISCUSSIONS ABOUT JOB SECURITY PROTECTED**

*Sabo, Inc. d/b/a/ Hoodview Vending Co.*, 359 NLRB No. 36 (December 14, 2012). The Board continued to broadly define “protected concerted activity” and held that employee conversations about job security are inherently concerted within the meaning of Section 7 of the NLRA and protected thereunder even when there is no evidence of contemplated future group action. In this case, the employee, a route driver, was terminated after asking a coworker whether he had seen a job posting for a route driver and stating her belief that their employer was planning to fire someone in this position. The Board found that the employer violated Section 8(a)(1) by terminating the employee for having a protected conversation. Over the dissent of Member Hayes, the Board reasoned that job security and wages are, in the employee’s view, the “most vital” terms and conditions of employment; therefore, much like discussions concerning wages, discussions concerning job security are inherently concerted. According to the Board, to hold otherwise would chill employees in their exercise of Section 7 rights.

## **ARBITRATION AGREEMENT IN NON-UNION SETTING STRUCK DOWN**

*Supply Technologies, LLC*, 359 NLRB No. 38 (December 14, 2012). In this case, the Board held that an employer violated Section 8(a)(1) of the NLRA by (i) instituting a mandatory grievance-arbitration program that restricts employees’ Section 7 right to file unfair labor practice charges or other processes before the Board; and (ii) threatening to discharge, and actually discharging, employees who did not sign and accept the unlawful policy. The Board found, over the dissent of Member Hayes, that the documents setting forth the program at issue were ambiguous such that a reasonable employee could construe them as interfering with his or her right to file charges with the Board. Language in the alternative dispute resolution agreement that the company and employees were free to file a charge or complaint with a government agency was insufficient to clarify the availability of Board procedures where language elsewhere in the agreement suggested, but did not explicitly state, that

such charges could not be filed. This case represents the Board's continuing focus on arbitration agreements. This is an issue that will be ultimately decided by the courts, given that several cases are pending before different federal appeals courts.

## UNION OBJECTORS NOT ENTITLED TO AUDIT VERIFICATION LETTER CONCERNING UNION EXPENSES

*United Nurses and Allied Professionals*, 359 NLRB No. 42 (December 14, 2012). In this case, the Board examined several issues related to union audits and expenses. Based on its analysis, the Board found that the duty of fair representation does not impose upon the union a per se obligation to provide objectors with an audit verification letter. The Board also addressed the chargeability of lobbying expenses, holding first that those expenses "that are germane to collective bargaining, contract administration, or grievance adjustment" are chargeable to objectors. The Board explained that, consistent with *Communications Workers v. Beck*, 487 U.S. 735 (1988), a union's political expenses are chargeable as long as they relate to the union's representative duties. A union bears the burden of justifying its claimed expenses and the percentages of each that are chargeable. The Board also found that a union may charge objectors for extra-unit lobbying expenses as long as they were incurred for services that are otherwise chargeable and that may ultimately benefit local members by virtue of their participation in an expense-pooling arrangement. It emphasized that a union can demonstrate ultimate benefit to local members where the charge is reciprocal in nature, whereby the contributing local reasonably expects other locals to contribute to covering the cost of similar future activities conducted on the contributing local's behalf. "When a participating local contributes to otherwise chargeable lobbying on behalf of the parent union or another local, it can reasonably expect that its own lobbying costs will be partially covered by the contributions of other locals."

## EMPLOYER MAY NOT UNILATERALLY STOP DUES CHECK-OFF AFTER CONTRACT EXPIRATION

*WKYC-TV, Inc.*, 359 NLRB No. 30 (December 12, 2012). The Board overturned 50 years of its case law to hold that an employer no longer has the unilateral right to stop withholding union dues from employee paychecks after expiration of the collective bargaining. It has been longstanding law that an employer's obligations under dues deduction clauses were like union security, management rights, and arbitration clauses, which become ineffective after contract expiration. In *WKYC-TV, Inc.*, however, the Board found, over the dissent of Member Hayes, that dues deduction clauses should be treated like other provisions of the agreement that relate to mandatory subjects of bargaining and be subject to a "status quo" obligation after contract expiration. As a result of this new decision, an employer may stop deducting dues only after good faith negotiations result in impasse unless the collective bargaining agreement included an explicit waiver by the union of its right to negotiate over this issue. In its decision, the Board did acknowledge that, regardless of the employer's ongoing obligations to comply with dues deduction following contract expiration, individual employees may cancel their authorization for payroll deductions pursuant to the terms of the authorization card signed by the employee. This case is important because it deprives the employer of a useful tool to get a union to come to an agreement. This is especially true now when most bargaining is concessionary and unions are being asked to take pay cuts and contribute more to help insurance. Stopping dues check-off was a way to put lawful economic pressure on the union.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

**Willis J. Goldsmith**

New York

+1.212.326.3649

[wgoldsmith@jonesday.com](mailto:wgoldsmith@jonesday.com)

**Brian W. Easley**

Chicago

+1.312.269.4230

[beasley@jonesday.com](mailto:beasley@jonesday.com)

**James S. Urban**

Pittsburgh

+1.412.394.7906

[jsurban@jonesday.com](mailto:jsurban@jonesday.com)

**Jessica Kastin**

New York

+1.212.326.3923

[jkastin@jonesday.com](mailto:jkastin@jonesday.com)

**Stanley Weiner**

Cleveland

+1.216.586.7763

[sweiner@jonesday.com](mailto:sweiner@jonesday.com)

**F. Curt Kirschner, Jr.**

San Francisco

+1.415.875.5769

[ckirschner@jonesday.com](mailto:ckirschner@jonesday.com)

**Patricia A. Dunn**

Washington

+1.202.879.5425

[pdunn@jonesday.com](mailto:pdunn@jonesday.com)

**E. Michael Rossman**

Columbus

+1.614.281.3866

[emrossman@jonesday.com](mailto:emrossman@jonesday.com)

**George S. Howard, Jr.**

San Diego

+1.858.314.1166

[gshoward@jonesday.com](mailto:gshoward@jonesday.com)

**Doreen S. Davis**

New York

+1.212.326.3833

[ddavis@jonesday.com](mailto:ddavis@jonesday.com)

**Robert L. Ford**

San Francisco

+1.415.875.5740

[rlford@jonesday.com](mailto:rlford@jonesday.com)

**G. Roger King**

Columbus

+1.614.281.3874

[rking@jonesday.com](mailto:rking@jonesday.com)

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