Insights, News & Events

IT'S 2012 AND THE NLRB IS OFF TO A FAST – AND CONTROVERSIAL – START

Publication
Feb 1, 2012

(Labor Letter, February 2012)

The 2011 calendar year was one of the more interesting years for the National Labor Relations Board (NLRB). The Board became a lightning rod for controversy and partisan politics due to its controversial decisions to utilize its rarely-used rulemaking authority to rewrite the rulebook on union elections and to require employers to post what many consider a pro-union National Labor Relations Act (NLRA) poster in its workplace.

Moreover, the Board's decision to pursue litigation against one of America's largest employers, Boeing, Inc., which effectively delayed the opening and creation of jobs at its new production facility in South Carolina, stirred activity in Congress, resulting in numerous Committee hearings where sanctions such as reducing NLRB funding and demanding information to justify the conduct of the Board were contemplated. Disagreements between Board members played out on the public stage in a rather unusual written letter campaign between Board members accusing one another of, among other things, abusing the power of the administrative agency according to political motivations and refusing to participate or even attend Board meetings.

This past year also brought to a conclusion the term of Chairman Wilma Liebman, who is considered by many as the most employee-oriented chairman in the history of the Board. During her tenure, Liebman, who in the past often found herself writing the dissenting opinion, authored many majority-backed decisions with favorable employee outcomes.

The dustup surrounding the Boeing complaint, the retirement and replacement of Chairman Liebman, the ultimate institution of the final rules regarding "quickie"

elections and the NLRA postings, brought 2011 to a contentious finish. As 2012 began it was anyone's guess as to what the Board had in store for us this year. Fortunately (or unfortunately) it did not take long to find out.

THREE DAYS INTO THE NEW YEAR...

On January 3, 2012, the NLRB issued a decision on the question of whether employees could lawfully waive their right to pursue class or collective actions in a judicial or arbitral forum. As a case of first impression for the Board, the decision had a profound effect on the validity of individual arbitration agreements signed by employees.

While the issue was new to the Board, there has been much litigation at the federal level concerning the enforceability of class action waivers. The most recent important decision being that of the U.S. Supreme Court in *AT&T Mobility v. Concepcion*. In the *AT&T Mobility* case, the Supreme Court upheld the validity of class action waivers and consumer arbitration agreements, holding that the Federal Arbitration Act, which favored the enforceability of such agreements, preempted a California state law invalidating such class action waivers in *consumer* agreements. Although *AT&T Mobility* was not an employment case, its reasoning and the similar reasoning of other federal courts had been applied by employers across the country to support the enforceability of class action waivers in employment arbitration agreements.

The Board's decision came in the case of *D.R. Horton*. The opinion was authored by Obama appointee Chairman Mark Gaston Pearce and joined by Obama appointee Member Craig Becker. It held that employees' ability to join together as a class for purposes of bringing a claim against their employer constitutes "concerted activity" for purposes of "mutual aid or protection" under Section 7 of the NLRA. Accordingly, the Board held that the mandatory arbitration agreement waiving class actions required by the employer was an unlawful restraint on statutorily protected labor rights. The Board's decision has important implications for both unionized and non-union employers, and serves as a reminder that protected, concerted activity under the NLRA **is not** limited to union-related activity.

WHAT HORTON STANDS FOR

The case involved national homebuilder D.R. Horton, who, over the past several years, began requiring each new and current employee to execute an arbitration agreement. This arbitration agreement provided that all employment-related disputes must be resolved through individual arbitration and that the employees could not pursue class or collective litigation claims.

Notably, the arbitration clause at issue in this case was not found in a collective bargaining agreement. In fact, no union was elected as the exclusive bargaining representative for these employees. Rather, the clause was contained in what D.R. Horton called a Mutual Arbitration Agreement (MAA), which the company imposed unilaterally as a condition of employment.

Michael Cuda was employed by D.R. Horton as a superintendent from July 2005 to April 2006. Like all D.R. Horton employees, Cuda's continued employment was conditioned upon his signing of the MAA, which he did in early 2006. In 2008, Cuda retained the services of an attorney to represent him in a wage-hour case, where he claimed he was misclassified as an overtime-exempt employee.

Cuda's attorney then notified D.R. Horton that his firm had been retained to represent Cuda and a nationwide class of similarly situated superintendents in a Fair Labor Standards Act (FLSA) arbitration action. Horton refused to consent to arbitration, noting that Cuda had failed to give an effective notice of an intent to arbitrate, and citing the language of the MAA that barred arbitration of collective claims. In response, Cuda filed an unfair labor practice charge against D.R. Horton under Section 8(a)(1) of the NLRA.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7 of the Act. Section 7 of the Act provides that employees shall have the right "to engage in…concerted activities for the purpose of collective bargaining or other mutual aid or protection."

In holding that the MAA violated Section 8(a)(1) of the Act, the Board found that any individual who files a class or collective action concerning wages, hours or working conditions, whether in court or before an arbitrator, is seeking to initiate or induce group action which is "at the core of what Congress intended to protect by adopting the broad language of Section 7" and that "[s]uch conduct is not peripheral but central to the Act's purposes." Because D.R. Horton's arbitration agreement explicitly restricted such class or collective actions, the Board concluded that the agreement violated Section 8(a)(1) of the Act and was an unfair labor practice.

But the Board's analysis didn't stop there. It still needed to reconcile the apparent conflict between its holding and those of the Supreme Court which ostensibly supported the opposite outcome. The Board distinguished an earlier Supreme Court ruling in *14 Penn Plaza LLC*, where the Court held that in exchange for bargaining concessions by the employer, a union could lawfully negotiate an arbitration clause requiring that employees arbitrate their statutory age discrimination claims.

While recognizing that a union may waive certain Section 7 rights in exchange for employer concessions, in this case the MAA was not a collectively-bargained

provision but rather a unilaterally imposed condition of employment. The Board further distinguished cases decided by the Supreme Court concerning its consistent deference to the Federal Arbitration Act (FAA) and its policy of promoting the enforceability of individual arbitration agreements. For example, the Board distinguished the recent *AT&T Mobility* case based on the fact that the case was about consumer class actions, whereas *D.R. Horton* involved the workplace and substantive rights granted to all employees under the NLRA. Furthermore, the Board explained that *AT&T Mobility* involved a conflict between the FAA and state law, whereas *D.R. Horton* addressed the interaction of two federal statutes (the FLSA and FAA), a key distinction, said the Board.

In its closing, the Board tempered its holding stating that "[o]nly a small percentage of arbitration agreements are potentially implicated by the holding in this case." For example, the Board explained, the NLRA only covers certain classes of "employees," which excludes supervisors, government employees and independent contractors; and only protects "concerted activity."

The Board also left open several questions surrounding the waiver of class claims by leaving alone the more difficult questions of 1) whether an employer can require employees, as a condition of employment, to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration and 2) whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.

The litigation is likely far from over. Due to the sweeping effect this holding has on the enforceability on what has become a relatively common employment agreement, we can realistically anticipate a ruling from a federal circuit court of appeals and possibly even the Supreme Court on this issue.

FOUR DAYS INTO THE NEW YEAR...

The same day that the *D.R. Horton* decision was reached marked the end of the Board term for Member Craig Becker. The loss of Member Becker left the Board with only two members – one less than required for maintaining a quorum within the agency. In light of a recent Supreme Court decision, which held that the authority of the five-seat Board could not be delegated to a panel with fewer than three members, the Board was effectively stripped of the authority to reach final decisions in NLRB proceedings.

But this lack of quorum lasted less than a week. On January 4th President Obama announced his intent to utilize his constitutional authority to grant recess appointments to Democrats Sharon Block and Richard F. Griffin, and Republican Terrence F. Flynn. Block and Griffin had originally been nominated on December 15, 2011, but the Senate Health, Education, Labor and Pensions Committee had not acted on the nominations. The recess appointees were all sworn in as members on January 9, 2012.

Almost immediately after notifying Congress of his intent to recess appoint the new NLRB members, an uproar arose in both the House and Senate accusing the President of abusing his executive authority by unilaterally appointing Board members during a *pro forma* recess – a recess in which Congress is technically in session but no business is being conducted. This prompted the Department of Justice to issue a letter arguing that President Obama's *pro forma* recess appointments were indeed constitutional.

This did not prevent employer associations, such as the National Federation of Independent Business, the Coalition for a Democratic Workplace and the National Right to Work Legal Defense, from filing their own legal actions asserting that the recess appointment of the three members to the National Labor Relations Board was "unconstitutional, null and void," and, under the holding of *New Process Steel*, the Board now lacks a quorum necessary to implement rules or otherwise enforce the National Labor Relations Act.

And remember, 2012 is only a few weeks old. It should be an interesting year.

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