Insight

IN-DEPTH DISCUSSION

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Appeals Court Upholds Board Finding of Failure to Bargain over Job Relocation

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The D.C. Circuit recently enforced the National Labor Relations Board's January 3, 2012 order holding that an automotive dealership had violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act by failing to bargain with the union about the effects of the relocation of a group of mechanics. *Dodge of Naperville, Inc. and Burke Automotive Group, Inc.*, 357 NLRB No. 183 (D.C. Cir. Aug. 4, 2015). The ruling highlights the risks employers face by failing to engage in effects bargaining where required and by unlawfully withdrawing recognition from a union even if such withdrawal is simply "premature."

The dispute involved two car dealerships owned by one company, a unionized facility located in Naperville, Illinois, and a larger non-union facility in Lisle, Illinois. On June 20, 2009, the company closed the Naperville dealership and moved those operations to the Lisle location after the car manufacturer informed the company that it could not keep both franchises. The company then informed the six mechanics employed in Naperville that they could immediately transfer to a non-union position at the Lisle dealership without any union benefits. The company notified the mechanics that if they did not accept employment at Lisle, they would be viewed as having quit and stopped honoring the Naperville collective bargaining agreement.

At the Lisle facility, the former Naperville mechanics worked alongside other Lisle mechanics under common supervision. They were also paid the same as the Lisle mechanics, at a rate lower than the Naperville mechanics had earned under their union contract. The union contacted the company and requested the opportunity to bargain over the effects of the move. The company refused, explaining that the union no longer represented a majority of the mechanics in the bargaining unit.

The union filed charges alleging the company violated Sections 8(a)(5) and 8(a)(1) of the NLRA by failing to bargain with the union about the effects of the relocation on the Naperville mechanics. The administrative law judge (ALJ) found merit to those allegations and held that the company had unlawfully withdrawn recognition of the union as the exclusive representative of the mechanics of the Naperville bargaining unit, unlawfully repudiated the collective bargaining agreement, unilaterally changed terms and conditions of employment, and constructively discharged the Naperville mechanics who resigned. The Board affirmed the ALJ's decision.

In reviewing the Board's decision, the D.C. Circuit first noted that, while an employer is "free to make decisions about the scope and direction of its enterprise, including whether to shut down or relocate part of the business," the employer must bargain with the union over the effects of that decision on the employees represented by the union. The scope of an employer's duty to bargain over such effects, the court explained, depends on the nature of the change imposed, and mandatory subjects of effects bargaining often include "initial wages, benefits, seniority rights, and working conditions at the new location."

The D.C. Circuit also noted that Board law establishes that the duty to engage in effects bargaining "persists even if the employer's management decision renders the historic unit inappropriate for other purposes." Thus, an employer cannot avoid effects bargaining by waiting until after the change is complete and then arguing that the bargaining unit no longer exists. Accordingly, the D.C. Circuit held that the company was required to engage in effects bargaining concerning the Naperville mechanics.

The court then turned to the "more difficult question" – whether the Naperville unit became an "inappropriate unit for other collective bargaining purposes once those employees were moved to Lisle." An employer may lawfully withdraw recognition if the union no longer enjoys support from a majority of employees in the relevant unit, and the company argued that the Naperville unit lost its distinct identity when it began working side-by-side with the non-union Lisle mechanics in a single, merged group.

Under Board law, an employer is not obligated to continue to recognize a union as the bargaining representative of one group of its employees when that represented group is merged with an unrepresented group in such a manner that the original represented group is no longer identifiable. The test is whether the represented unit retains a distinct community of interest after the merger so as to remain appropriate for bargaining, and if that distinct community of interest remains, the Board likely will permit that standalone unit to continue as it had before. Here, the Board acknowledged that the merged group of mechanics in Lisle worked under the same terms and conditions of employment and that this would normally prohibit a finding of two identifiable units. However, because these terms and conditions were put into place for the former Naperville employees without the required effects bargaining and were unlawful, the changes should be disregarded. The Board reasoned that the employer's failure to engage in effects bargaining "ma[de] it impossible to assess what the terms and conditions of the Naperville employees would have been after relocation, had the Respondent not acted unlawfully." The D.C. Circuit acknowledged that while there is uncertainty about what the relocation would have looked like had effects bargaining taken place, the Board found that it would be unfair to permit the company to benefit from the uncertainty created by its unlawful refusal to bargain, and "we cannot say this was error." The D.C. Circuit thus upheld the Board's conclusion that the company "unlawfully withdrew recognition of the Union when it did so immediately upon the relocation, prior to any effects bargaining."

Employer Takeaways

While employers remain free to make unilateral decisions about the scope and direction of their business regardless of whether they are unionized, those decisions usually include an effects bargaining obligation if the decision impacts the terms and conditions of employment of bargaining unit employees. Failure to engage in effects bargaining before or during a change in operations may result in broad Board orders requiring the employer to engage in effects bargaining months or years later, after NLRB resolution of unfair labor practice proceedings, and to make whole bargaining unit members for any losses they incurred during the interim period. Effects bargaining under these circumstances can create operational difficulties and is usually very costly. Thus, employers should be certain they are complying with their bargaining obligations in connection with any business transition or change that affects bargaining unit employees.

Additionally, employers who are merging a smaller unionized operation into a larger non-union operation should not assume that they can unilaterally withdraw recognition from the union. If the union employees are not fully integrated into the larger non-union operation, then the employer may still have an obligation to recognize and bargain with the union as it did before, because the union employees still share a distinct community of interest separate from other employees.