

Labor Management

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Although declining to overturn the results of a representation election in *Delta Brands Inc.*, the NLRB's decision serves as a warning to employers that the Board will continue to scrutinize workplace policies and rules contained in employee handbooks.

Despite Victory for Employer, NLRB Decision Reminds Employers that Improper Handbook Language Can Overturn Election Results

by Michael Mankes and Laurie Hubbard

In a decision that must be viewed by employers as both a relief and a reminder, a divided National Labor Relations Board held that an overbroad non-solicitation policy found in an employee handbook was not sufficient to overturn a union representation election. *Delta Brands Inc.*, 344 N.L.R.B. 10 (2005). Although the Board in *Delta Brands* ruled in the employer's favor, the Board's conclusion turned on very specific facts and suggested that even a slight variation of the facts would have rendered a different result. Thus, while the good news — that the Board declined to overturn the election despite an unlawful policy — is noteworthy, *Delta Brands* is more cautionary tale than cause for celebration. The continuing trend of unions challenging the legality of seemingly innocuous handbook language and work rules must remain a concern to both union and non-union employers.

A Continuing Trend

Union attacks on employee handbooks are not new. Historically, the Board has been receptive to such attacks and willing to scrutinize handbook language and work rules. For example, in *Lafayette Park Hotel*, 326 N.L.R.B. No. 69 (1998), in overturning an employer-won election, the Board held that an employer's work rule prohibiting "false, vicious, profane or malicious statements" about the employer was unlawfully vague. The Board reasoned that a rule prohibiting the distribution of "false" statements "fails to define the area of permissible conduct in a manner clear to employees and thus causes employees to refrain from engaging in protected activities." The Board further held that a rule requiring employees to leave the premises immediately after their shift ended was unlawfully broad

because it had the effect of denying off-duty workers access to nonworking areas, such as the parking lot, to engage in concerted activity.

The Board further considered the issue in *Freund Baking Co.*, 336 N.L.R.B. 847 (2001), finding an employee handbook objectionable because it contained what the Board concluded was an overbroad "Confidential Information" policy. The policy prohibited employers from disclosing or using proprietary or confidential information except as their job required. The Board concluded that employees could reasonably view the policy as prohibiting them from discussing their wages and working conditions with a union or others outside the company, and thus precluded them from engaging in concerted activity. As a result of the maintenance of this single handbook rule, the Board set aside a representation election that the company had won **30 votes to 3!** The Board found it irrelevant that there was no evidence the employer enforced the rule or the rule influenced employees' conduct, but, rather, held that the simple fact the rule was maintained was sufficient.

The Board's Holding in *Delta Brands*

In *Delta Brands*, the employee handbook contained a no-solicitation policy that prohibited "vending, soliciting, or collecting contributions for any purpose unless authorized by management." Under established Board precedent, the policy was unlawfully overbroad because it could be viewed as prohibiting employees from engaging in union-related solicitation, a protected right, without management approval. After the company won a representation election 10 votes to 8, an NLRB hearing officer recommended that the election be set aside because of the policy, concluding

that maintenance of the policy alone reasonably could have affected the results of the election.

The Board rejected the Hearing Officer's recommendation and held that, based on the specific facts of the case, the unlawful policy alone did not justify setting aside the election. The Board explained that an election will only be overturned where the union proves that the conduct in question (1) affected employees in the bargaining unit, and (2) had a reasonable tendency to affect the outcome of the election. In this case, the no-solicitation rule was not adopted in response to a union organizing campaign and was contained in a 36-page handbook. Only one employee had received the handbook during the critical pre-election period. There was no evidence that employees' attention was ever drawn to the rule, that the rule was ever enforced, or that employees were affected by the rule's existence. The Board concluded that, under these circumstances, the mere existence of the rule could not have affected the results of the election. Further, the Board reasoned that the union seeking to represent the employees had the "interest" and "know-how" to inform employees of their rights. Despite the fact that the Board's ruling is seemingly at odds with earlier decisions in which the Board has presumed that employees are affected by unlawful handbook language, the majority opinion maintained that its analysis of the circumstantial evidence is not a departure from Board precedent.

The Board's consideration of the surrounding circumstances and decision not to overturn the election certainly may be viewed as a positive result for employers. That said, *Delta Brands* is not a complete victory. The Board expressly stated that it was not altering its long-standing position that unlawfully vague or overbroad handbook language or work rules *may be sufficient* to overturn an employer-won election. The Board ruled simply that, under the very specific facts of this case, the mere existence of the overbroad no-solicitation policy was not sufficient to set aside the election. Indeed, the Board suggested that, under different circumstances (e.g., where the union presents evidence that employees were affected by the policy or where more employees received the handbook during the pre-election period), it would reach a different conclusion.

Moreover, the Board's decision to let the election stand was not unanimous. In a spirited dissent, Member Liebman sharply criticized the majority,

accusing them of ignoring precedent and creating new requirements of proof that a union must satisfy to set aside an election. In Member Liebman's view, an employer's maintenance of an unlawful rule alone is sufficient grounds to set aside an election, regardless of the circumstantial evidence. She explains that a handbook rule represents an ongoing term and condition of employment, and employees are presumed to be aware of the rule and to have been affected by it.

Potential Ramifications for Employers

Delta Brands is a reminder to both union and non-union employers that their employee handbooks may be subject to attack by unions and scrutiny by the NLRB. While the NLRB ruled in favor of the employer in this case, it did so based on very specific facts, and indicated that it would have reached a different conclusion had the surrounding circumstances been different. Moreover, employers must be mindful of the minority view expressed by Member Liebman, that unlawfully vague or overbroad handbook language is always justification to overturn an employer-won election. Given the frequent changes in the Board's composition, in time, this view could become the majority position.

In light of *Delta Brands* and previous Board decisions on this issue, employers must continue to ensure that their handbook language is regularly reviewed. Many of the policies and rules on which unions and the Board focus are fairly common and seemingly innocuous, and may be difficult to identify and adequately revise without the assistance of counsel. The mere existence of such handbook language, however, can have significant consequences. For nonunion employers, it may be the difference between winning and losing a union election. In addition to overturning employer-won elections, the Board could award a union special access rights to the employer's facility during the weeks prior to an election. For union employers, the potential ramifications are equally disastrous. Improper handbook language could serve to invalidate a decertification election. A union's handbook challenge could also turn an economic strike into an unfair labor practice strike, which would deprive an employer of its right to permanently replace striking employees. A careful review of handbook policies *before* a union challenge could effectively reduce the risk that your company will lose hard-fought ground in a labor dispute.

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