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Labor Board Continues Push For Injunctive Relief

Courts may intervene while administrative hearings are pending

By PETER J. MURPHY

In recent months, the National Labor Relations Board has received increased media coverage due to organizational changes, including President Barack Obama's January 2012 recess appointment of three new members to the board. During this period of change at the executive level, the NLRB's regional offices have continued to pursue unfair labor practice charges against employers, and to seek injunctive relief from district courts while administrative hearings are pending.

Injunctive relief petitions filed in district courts doubled from 2010 to 2011, and the NLRB has continued this increased pace in 2012. Recent cases from Connecticut and other states demonstrate that the NLRB has succeeded with such petitions, including obtaining orders that an employer rehire terminated or outsourced employees prior to the conclusion of the underlying administrative hearing.

Such orders can have a significant impact on an employer's business. Therefore, when an unfair labor complaint is filed, an employer must anticipate a related request for injunctive relief and be prepared to assert an appropriate defense.

NLRB Authority

During the pendency of administrative proceedings on an unfair labor complaint, Section 10(j) of the National Labor Relations Act allows the NLRB to petition a district court for "appropriate temporary relief" that the court deems "just and proper." When seeking injunctive relief under §10(j) of the Act, the NLRB does not have to meet the heightened "likelihood of success on the merits" standard applicable to requests for injunctive relief in other civil cases. Instead, injunctive relief may be issued when the district court finds "reasonable cause to believe that unfair labor practices have been committed."

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This less demanding standard is applicable to requests for prohibitory injunctions, as well as to requests for mandatory injunctions — which normally requires a petitioner to demonstrate "a clear showing" to obtain the injunctive relief requested or that "extreme or very serious damage" will result if the injunction is denied. As recent cases demonstrate, district courts can and do order mandatory injunctive relief, such as the reinstatement of outsourced or terminated employees, under this less demanding standard.

Stamford Plaza Case

In March, U.S. District Judge Mark R. Kravitz ordered employees reinstated in a §10(j) injunction petition filed against the Stamford Plaza Hotel. In June 2011, a union organizing drive at the hotel targeted employees in housekeeping, maintenance, the front desk and the kitchen. The campaign was successful, particularly in regard to housekeeping, where 20 of 22 employees signed authorization cards, and maintenance, where four out of the five employees signed authorization cards. Shortly after those cards were collected, the hotel subcontracted out the housekeeping and maintenance operations to two separate subcontractors.

Kravitz noted that these arrangements were made in "apparent haste," as the hotel had previously turned down offers to subcontract with one of the subcontractors. In addition, Kravitz found that the evidence

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suggested that the hotel subcontracted the housekeepers and maintenance operations to separate subcontractors in order to frustrate further unionization attempts. Kravitz "easily" found that there was "reasonable cause" to believe the hotel had committed an unfair labor practice and that the general counsel would prevail at the underlying administrative hearing.

In regard to the issue of "just and proper" relief, the hotel noted that the administrative law judge was still considering the underlying charge, and all of the affected employees were still employed at the hotel with the subcontractors. Therefore, the hotel reasonably argued that injunctive relief was not appropriate because life was "not dramatically different" than it was before and there was no risk of imminent harm. Kravitz rejected this argument, noting that that §10(j) anticipates maintaining the status quo that existed before the onset of alleged unfair labor practices, not the current status quo. In addition, the judge noted that restoring the prior status quo was important so as to eliminate the impact the hotel's actions had on the employees' efforts to unionize. Therefore, Kravitz ordered immediate reinstatement of the employees to the hotel's payroll.

Other Reinstatements

Kravitz's order is consistent with other §10(j) orders of injunctive relief issued by district courts in 2011 and 2012 — especially in regard to his order of reinstatement. For example, in Frankl v. Pacific Beach Hotel, a district court judge in Hawaii recently ordered the hotel to reinstate an employee, for the second time, as the court determined that it was reasonably likely that the administrative law judge would find that the employee had been terminated due to his union activities and to discourage union activities and membership.

Similarly, in the case of Ahearn v. Remington Lodging and Hospitality, the district court in Alaska found in February 2012 that it was reasonably likely that the hotel committed an unfair labor practice when it discharged four employees for distributing union handbills on the hotel's property. At the time of the hearing on the request for injunctive relief, the hotel already had rehired all of the terminated employees, with full back pay and benefits. Nevertheless, the court found that the hotel's actions were "not sufficient to remedy the violation as it failed to adequately repudiate its conduct" or assure employees it would not engage in such conduct in the future. The court ordered the hotel to, among other things, refrain from discharging or disciplining employees for engaging in protected activity. In addition, the court ordered the hotel to read the court's order to employees in both English and Spanish.

Adverse Impact

Orders of reinstatement during the pendency of administrative proceedings can be problematic for employers. This has not, however, persuaded courts to limit the use of mandatory injunctions in §10(j) cases. For example, in Gold v. Engineering Contractors Inc., the NLRB claimed that the contractor had repudiated one union contract, failed to abide by another union contract and terminated 19 employees associated with those unions.

In response to the NLRB's request for a mandatory injunction ordering reinstatement, the contractor argued that the employees only had skills in areas of work that had been subcontracted. As a result, the contractor argued that, if the employees were reinstated prior to the conclusion of the administrative proceedings, it would either have to break those subcontracts or pay the reinstated employees to do nothing — thereby causing the employer irreparable injury. The court rejected this argument, noting that a delay could cause the employees to seek employment elsewhere and further chill the employee's union rights.

The employer's concerns in Gold were not unwarranted, as other cases demonstrate that administrative law judges do not always find that reinstated employees suffered an unfair labor practice. For example, in November 2011 a California district court vacated a prior order in favor of the NLRB, which ordered a retirement community home to reinstate employees pending completion of the administrative hearing. In that case, the administrative law judge found that the replacement of the terminated workers was not unlawful and that reinstatement was not required. Thus, the district court's prior order of reinstatement was erroneous.

Moving Forward

As these recent cases demonstrate, in 2012 the NLRB will continue its aggressive approach to seeking injunctive relief under §10(j) of the Act. In particular, employers can expect to see the NLRB requesting mandatory injunctive relief, including orders of reinstatement, in cases involving employee discharge or subcontracting. Given the favorable legal standard applicable to such requests, and the NLRB's recent success in prevailing on such requests, employers must be prepared to present strong legal arguments and persuasive evidence in response to §10(j) requests for injunctive relief.•