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Recent D.C. Circuit Decisions: Trimming the NLRB's Sails

NLRB

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Douglas Darch and Jonathon Hitz

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In *Consol. Commc'ns, Inc. v. NLRB*, 837 F.3d __, Nos. 14-1135 & 14-1140 (D.C. Cir. Sept. 13, 2016), the panel consisting of Judges Millett, David S. Tatel, and Janice Rogers Brown held the NLRB misapplied its earlier decision in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), *enf'd*, 765 F.2d 148 (9th Cir. 1985) and in addition, tha the NLRB applied the incorrect burden of proof in striker misconduct cases. In *Consol. Commc'ns*, the employer discharged a striking employee for strike misconduct. The NLRB determined, however, that the termination was an unfair labor practice. The D.C. Circuit refused to enforce the NLRB's order because, the court said, the NLRB had ignored or misapplied the analysis in *Clear Pine Mouldings* in analyzing the striker's termination.

According to the D.C. Circuit, the analysis for striker misconduct is whether the alleged misconduct by a striking employee reasonably tends to coerce or intimidate non-striking employees. If the answer is ''yes,'' the striker forfeits the protections of the NLRA. Instead of applying that analysis, the D.C. Circuit concluded, the NLRB had incorrectly focused solely on whether the striking employee had engaged in an act of violence. In addition, the panel found the NLRB incorrectly shifted the burden of proof to the employer from the General Counsel. The D.C. Circuit remanded the decision and instructed the NLRB to apply the proper analysis and burden in the first instance. Judge Millett, who authored the D.C. Circuit's decision, also wrote a separate concurring opinion ''to convey . . . substantial concern with the too-often cavalier and enabling approach that

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the Board's decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes.'' Judge Millett stressed that the days of a ''boys will be boys'' attitude towards picket line conduct should come to an end.

In *Verizon New Eng., Inc. v. NLRB*, 826 F.3d 480 (D.C. Cir. 2016), Judge Brett M. Kavanaugh authored the majority opinion in which Judge Karen L. Henderson concurred in part and concurred in judgment and Judge Sri Srinivasan concurred in part and dissented in part. Judge Kavanaugh opined that the NLRB misapplied the ''highly deferential standard, known as the *Spielberg-Olin* standard'' when reviewing an arbitrator's award interpreting the language of the parties' agreement.

Under the Board's *Spielberg-Olin* standard, the NLRB will defer to an arbitration award unless the award is ''clearly repugnant'' to the NLRA. In *Verizon New Eng.*, an arbitrator was tasked with interpreting whether a no-strike clause in the parties' agreement, which prohibited ''picketing'' on the employer's property, barred employees from displaying pro-union signs in their car windows when parked on the edge of (but within) the employer's property. The arbitrator interpreted the no-strike clause as prohibiting the posting of pro-union signs in car windows parked anywhere on the employer's property. The NLRB refused to defer to the arbitrator's ruling and in fact reached the opposite result.

In reviewing the NLRB's decision, all three members of the D.C. Circuit appellate panel agreed that the correct analysis to be applied was whether the union had waived a Section 7 NLRA right. In undertaking that analysis, the first question was whether the union could waive the particular right at issue, and the second question was whether the arbitrator found the collective bargaining agreement contained such a waiver. If the answer to both questions was ''yes,'' according to the D.C. Circuit, the NLRB was obligated to follow the arbitrator's award. A majority of the appellate panel determined that the answers to both questions were yes, upheld the arbitrator's order, and rejected the NLRB's decision and order as ''unreasonable.''

In a case arising under a different section of the National Labor Relations Act, the D.C. Circuit again held the NLRB had not followed its own precedent. In *NLRB v. Sw. Reg'l Council of Carpenters*, 826 F.3d 460 (D.C. Cir. 2016), the Board determined an employer had provided unlawful assistance to a union. (The employer had convened a meeting of its employees and introduced union-representatives who solicited authorization cards.) The D.C. Circuit appellate panel consisting of Judges Thomas B. Griffith, Stephen F. Williams, and David B. Sentelle held that the NLRB had failed to follow its own precedent, and that the Board's order failed to provide a reasoned justification for such a departure. The Court specifically noted the NLRB's prior rulings evaluated nearly identical conduct and legal questions and were, therefore, controlling, and rejected the Board's attempt to distinguish them.

In another ruling, the D.C. Circuit appellate panel consisting of Judges Tatel, Pillard, and Williams upheld the NLRB's decision finding musicians were employees and not independent contractors, but in its holding set a standard for when the Board's determinations are, and are not, entitled to deference by the appellate court. In *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563 (D.C. Cir. 2016), the panel held the Board was not entitled to ''special credence'' when it applies factors or analysis under external law such as the Restatement of Agency. The D.C. Circuit held, however, that the Board's analysis was entitled to deference if the NLRB ''made a choice between two fairly conflicting views,'' because that choice was a ''judgment about facts.'' In so holding, the D.C. Circuit set boundaries for the NLRB's analysis and approach to independent contractor relationship determinations—a hot button topic currently.

In *DirecTV, Inc. v. NLRB*, 837 F.3d __, Nos. 11-1273, 11-1274 & 11-1294 (D.C. Cir. Sept. 16, 2016), a 2-1 majority of the D.C. Circuit appellate panel upheld the NLRB's determination that the employees at issue there—while disloyal—were not so ''flagrantly'' disloyal so as to forfeit the protections of the NLRA. In the opinion upholding the Board's decision, authored by Judge Srinivasan and joined by Judge Judith Ann Wilson Rogers, the majority expressly noted the panel was not being called upon to decide ''where . . . the line between protected and unprotected activity should be drawn.'' The majority explained it was preserving the holdings and analysis in two prior decisions: *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992) and *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532 (D.C. Cir 2006), in which the D.C. Circuit had rejected the NLRB's findings, reversed the NLRB's decisions, and upheld discharges of employees—finding they had engaged in disloyal conduct. The majority in *DirecTV*, however, found substantial evidence to support the Board's decision that employees had not engaged in ''flagrantly disloyal'' conduct by participating in a television interview in which they publicly aired grievances regarding a new pay policy. By relying on *Hormel* and *Endicott* and refusing to draw a line between protected and unprotected activity, the D.C. Circuit tempered the long-term application of its majority opinion.

The dissenter in *DirectTV*, appellate Judge Brown, was critical of the majority's opinion, observing ''the majority's approach cannot even claim internal logic.'' More broadly though, she condemned the NLRB itself for being too pro-employee, stating:

> neither common sense nor the ordinary rules of statutory construction are in evidence—a lacuna that indicts the unconstitutionally generous standards of review through which federal courts routinely cede statutory interpretation to biased administrative tribunals. This case, for example, demonstrates the lengths to which the Board will go to contort an evenhanded Act into an anti-employer manifesto.

September 2016 culminated with the D.C. Circuit court, in a rare move, sanctioning the Board in *Heartland Plymouth Court MI v. NLRB*, 838 F.3d __, Nos. 15-1034 & 15-1045 (D.C. Cir. Sept. 30, 2016), by awarding attorneys fees to the employer. The majority appellate panel in that case consisted of appellate Judges Brown and Douglas H. Ginsburg, with a dissent by appellate Judge Millett. The issue there revolved around the NLRB's non-acquiescence policy, which treats Court of Appeals' decisions as applicable only to the decision at bar as ''the law of the case'' and as inapplicable to any other case arising before the NLRB.

In *Heartland Plymouth Court*, the NLRB refused to apply the D.C. Circuit's longstanding ''covered by'' analysis, which forecloses an inquiry into whether a union has waived its right to bargain about a matter where the matter is ''covered by'' a collective bargain-

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ing agreement (and eliminates the need to bargain over the matter covered during the term of the agreement). The NLRB claimed it was applying its non-acquiescence policy because the Board needed time to obtain U.S. Supreme Court review of its policy choice. Rejecting that claim, the D.C. Circuit pointed out that the NLRB had never attempted to gain U.S. Supreme Court review of the ''covered by'' analysis, and instead had actually opposed U.S. Supreme Court review when an employer had sought review of the issue.

The D.C. Circuit court panel also noted that on every occasion between 1997 and 2003 when the U.S. Supreme Court had granted review of an NLRB decision, the Court had rejected the NLRB's position. The majority held, ''[b]ecause the Board's actions go beyond whatever limited justification nonacquiescence may have, we agree . . . that the Board is guilty of bad faith.'' The majority went further and expressly noted its concerns that the Board's policy of non-acquiescence ''allows agencies to work their will on not only the courts, but on the American people too.'' The dissenting panel member, Judge Millett, decided not to join the majority, but stated a smaller fee award against the NLRB would have been appropriate for the time spent by the employer ''rebutting the Board's frail argument.''

The NLRB had its own victories before the D.C. Circuit Court of Appeals, and prevailed in a number of cases. The lesson for employers and unions alike, however, is that when on the losing end of an NLRB decision, an appeal to the D.C. Circuit should not be automatically rejected out of fear of pro-employee or pro-administration bias.

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