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The NLRB Delivers Three Opinions with an Eye Towards Unions

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With the end of Wilma Liebman's tenure on the National Labor Relations Board ("Board") and the Board's fiscal year coming to end, it is not a surprise to see some major employment and labor decisions come to fruition. Last Tuesday, the NLRB issued announcements regarding three recently released, union-friendly decisions.

Lamons Gasket Company, 357 NLRB No. 72 (August 26, 2011)

In *Lamons*, the Board overruled its previous *Dana Corp*, 351 NLRB 434 (2007) decision by holding that any decertification petition will be barred "for a reasonable period of time" when an employer voluntarily recognizes a union as a collective bargaining representative for a particular unit of their workforce.

In defining what constitutes a "reasonable period of time," the Board held that decertification will be barred for "no less than 6 months after the parties' first bargaining session and no more than 1 year." In addition, a "multifactor analysis" would be used for evaluating whether a reasonable period has elapsed. This analysis, as set forth in *Lee Lumber and Bulding Material Corp.,* 334 NLRB 399, 402 (2001), considers,

> *(1) Whether the parties are bargaining for an initial contract;*
> *(2) The complexity of the issues being negotiated and of the parties' bargaining processes;*
> *(3) The amount of time elapsed since bargaining commenced and the number of bargaining sessions;*
> *(4) The amount of progress made in negotiations and how year the parties are to concluding an agreement; and*
> *(5) Whether the parties are at impasse.*

Moreover, the Board determined that the burden is on the General Counsel to prove that a reasonable period has ***not*** elapsed after the initial six months of bargaining.

UGL-UNICCO Service Company, 357 NLRB No. 76 (August 26, 2011)

In a some-what similar case, *UGL-UNICCO,* the Board overruled their previous decision in *MV Transportation*, 337 NLRB 770 (2002), and concluded that the bar against decertification will also apply in successor situations. More specifically, in the situation of a sale or merger, a union's status can no longer be challenged within six months of the first bargaining session by 30% of the company's employees, a new employer, or a rival union.

In making this decision, the Board noted a few modifications to the notion of "successor bar," as set forth in *St. Elizabeth Manor*, 326 NLRB No. 36 (1999), which in its "basic" form,

> *Appl[ies] in those situations where the successor has abided by its legal obligation to recognize an incumbent union, but where the "contract bar" doctrine is inapplicable, either because the successor has not adopted the predecessor's collective-bargaining agreement or because an agreement between the union and the successor does not serve as a bar under existing rules.*

In such cases, the Board held, "the union is entitled to a reasonable period of bargaining, during which no question concerning representation that challenges its majority status may be raised through a petition for an election filed by employees, by the employer, or by a rival union; nor, during this period, may the employer unilaterally withdraw recognition from the union based on a claimed loss of majority support, whether arising before or during the period"

Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (August 26, 2011)

In the Board's final decision, they overruled a 1991 decision in *Park Manor Care Center*, 305 NLRB 872 (1991), which set forth a special test for determining an appropriate bargaining unit in nursing homes, rehabilitation centers, and other non-acute health care facilities.

In doing so, the Board "return[ed] to the application of our traditional community-of-interest approach." Moreover,

> *In cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees.*

In other words, where a union seeks to establish a "readily identifiable" smaller unit from a larger group of employees, and where those employees "share a community of interest," the NLRB will approve the smaller unit, unless the employer can show that the employees in the larger unit "share an **overwhelming** community of interest" with the employees in the smaller unit; thereby, eradicating the need for the smaller unit.