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AN 8(f) EMPLOYER REPLACES UNION MEMBERS

Recently, the U. S. Appeals Court in the D.C. Circuit considered whether by discharging its welders (Boilermaker members) after their Section 8(f) agreement had expired, the company was motivated by an intent to discriminate in violation of the employees' statutory rights, or reflected the company's long-standing business practice to rely on union hiring halls under Section 8(f) agreements for craft employees. *Hawaii Dredging Constr. Co., Inc., v. NLRB*, No. 15-1039 and 15-1424 (May 26, 2017). The NLRB found that the company had violated Sections 8(a)(3) and (1) of the NLRA by terminating the welders because of their union membership. However, the Appeals Court remanded the case to the NLRB because the NLRB had failed to adequately address record evidence regarding the company's understanding of its twenty-year practice and because it appeared that the NLRB had strayed from its precedent.

Under a Section 9(a) collective bargaining agreement, the employer and the union have an obligation, upon expiration of their agreement, to bargain in good faith and to maintain the *status quo* as to all mandatory subjects of bargaining until they reach a new agreement or an impasse. On the other hand, under a Section 8(f) bargaining relationship, the parties are not obligated to bargain upon the expiration of their agreement and the *status quo* need not be maintained.

In this case, the company and the Boilermakers had a Section 8(f) contractual relationship for at least 20 years. Upon expiration of the agreement, the parties agreed to bargain for a new agreement. The parties negotiated the terms of a new agreement, but were at odds whether certain benefit provisions were to be included in the agreement. After more negotiations, the company sent the Boilermakers what it thought was a final agreement. However, the Boilermakers refused to sign it and requested changes that the company thought had already been negotiated. The company then filed an unfair labor practice charge with the NLRB based on the Boilermakers' refusal to sign the agreement. On that same day, the Boilermakers refused to honor a request from the company for members to work on company projects. In the ensuing week, the Boilermakers had timely responded to only one of the company's thirteen requests for workers. About two months later, the NLRB dismissed the company's charge against the Boilermakers, finding that there was no complete agreement on the terms of the successor collective bargaining agreement, and therefore the Boilermakers' refusal to sign the agreement was not an unfair labor practice.

A few days later, the company terminated its relationship with the Boilermakers, stating that "based upon [the] Regional Director's finding" that no current agreement exists, and since their prior agreement had terminated September 30, 2010, the company "does not intend to utilize members of the Boilermaker's Union for future work." That same day, the company temporarily ceased performing all welding work. Within a week, the company entered into a Section 8(f) agreement with the United Association of Journeymen and Apprentice Plumbers & Pipefitters ("Pipefitters"). Under the new agreement, Boilermakers members could continue to work for the company only if they became members of the Pipefitters. Eight of the thirteen former Boilermaker members ultimately resumed work for the company as members of the Pipefitters.

Shortly thereafter, the Boilermakers filed a charge with the NLRB, alleging that the company had violated Sections 8(a)(3) and (1) of the Act by terminating the thirteen welders because they were members of the Boilermakers. After an evidentiary hearing, an ALJ found no statutory violation. The ALJ observed that "consistent with its longstanding practice, the [company] refused to go 'open shop' and would only employ craft workers who were affiliated with a union and were operating under a [collective bargaining agreement], regardless of any particular union affiliation." The ALJ further recognized that being a member of the Boilermakers and the lack of a contract went "hand in hand." The ALJ added that "employees suffered economic disadvantage because of their union's insistence on demands unacceptable to the [company]" was par for the course in bargaining disputes and not Section 8(a)(3) discrimination "absent some unlawful intention."

The ALJ concluded that even assuming protected conduct was a motivating factor, the company's requirement to have its craft work performed pursuant to Section 8(f) collective bargaining agreements is a legitimate nondiscriminatory reason for its actions.

On review of the ALJ decision, the NLRB was confronted with deciding whether the company's discharge of members of the Boilermakers constituted unlawful discrimination or reflected adherence to the company's business model of requiring all craft work to be performed under Section 8(f) agreements. The Board reversed the ALJ, with one member dissenting. A majority of the Board found the discharges were unlawful. The NLRB rejected the ALJ's finding that company officials believed the company only hired craft workers under collective bargaining agreements and identified two periods when the company knowingly operated without an agreement in place. The NLRB also found that the company's conduct was inherently destructive of Boilermakers members' right to membership in the union of their choosing, unencumbered by the threat of adverse employment action.

On appeal, the Appellate Court focused on the NLRB's failure to adequately explain its conclusion that the gap periods defeated the company's defense and never confronted the evidence relied on by the ALJ. The Appellate Court concluded that in view of the evidence regarding the company's twenty-year practice, and the company's credited evidence, the Board was giving inappropriate emphasis to the gap periods. Moreover, the Court criticized the NLRB for its lack of a finding that the company's business model was designed to, or in fact operated to, single out particular unions for discriminatory treatment without regard to the absence of a current collective bargaining agreement. Therefore, because the NLRB's analysis failed to engage with evidence credited by the ALJ in the context of Section 8(f) for purposes of determining whether the company violated Sections 8(a)(3) and (1), the case was remanded to the NLRB for further consideration.

The lesson to be learned from this case is that it is important to transform an 8(f) bargaining relationship into a 9(a) majority status relationship. Under a 9(a) relationship, upon the expiration of the collective bargaining agreement, the employer must bargain in good faith and maintain the *status quo* as to all mandatory subjects of bargaining until a new agreement is reached or an impasse occurs. Under a 9(a) relationship an employer cannot refuse to recognize the union as the collective bargaining representative of its employees upon the expiration of their collective bargaining agreement.

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