Asher, Gittler & D'Alba, Ltd.
Release: Volume 44 No. 35

NLRB SETS NEW STANDARD FOR PROTECTING EMPLOYEES' RIGHT TO CHOOSE THEIR OWN BARGAINING REPRESENTATIVE IN *CEMEX* DECISION

On August 25, 2023, the National Labor Relations Board issued its decision in *Cemex Construction Materials Pacific, LLC*. This decision, combined with the Board's recent proposed final rule to make Board-sponsored representation election procedures more efficient, will have wide-reaching impact on employees' ability to gain recognition of union representation and engage in collective bargaining. Simply put, in *Cemex*, the Board articulates a new standard for employers to meet when faced with notice of employees' desire to bargain collectively, which will protect employees' right to choose their own representatives and deter employers from committing unfair labor practices which undermine employee free choice.

This case began in 2018, when the International Brotherhood of Teamsters ("the Union") worked to organize a bargaining unit of approximately 366 ready-mix cement truck drivers and driver trainers at Cemex ("the Employer")'s locations in California and Nevada. By November 2018, the Union had collected authorization cards showing that at least 57% of the proposed bargaining unit supported the Union. The Union filed for a representation election, and the Employer began an aggressive campaign to undermine the Union. The Employer, among other things, threatened employees with discharge, replacement, and loss of work if they voted for the Union, threatened to close certain work locations if the Union was elected, placed employees under surveillance, hired security guards in the days leading up to the election, and disciplined and discharged one employee because of her Union organizing activities. At the election on March 7, 2019, the Union was narrowly defeated by a margin of 179 to 166.

The Board's Administrative Law Judge found that the Employer committed more than two-dozen unfair labor practices by its conduct in opposition to the Union, and ordered a new election with special access remedies for the Union. The General Counsel filed exceptions, argued that a *Gissell* bargaining order was a more appropriate remedy, and urged the Board to consider a return to the previous standard articulated in *Joy Silk Mills*, 85 NLRB 1263 (1949). The Board agreed, however, instead of returning wholly to *Joy Silk Mills*, the Board articulated a new, simpler standard which preserves employee choice.

In *Joy Silk Mills*, the Board held that where there is evidence that an employer's insistence on an election to verify majority support is motivated by a rejection of the collective bargaining principle rather than a bona fide doubt of the union's majority, a bargaining order is an appropriate remedy. Over the years that followed, several cases eroded the availability of a bargaining order as a remedy for an employer's failure to recognize and bargain with employees' representatives, culminating in *Linden Lumber*, 190 NLRB 718 (1971). In *Linden Lumber*, the Board held, and the Supreme Court affirmed, that when faced with employees' request for voluntary recognition of a union, an employer may lawfully decline and force employees to request a Board-sponsored election. This set the stage for employers to be able to undermine and chill employees' right to choose their representatives by engaging in unfair labor practices during the pre-election period with no real consequences, and made it harder

for employees to gain employer recognition of their chosen representative and proceed to collective bargaining. In the *Cemex* decision, the Board found that "the current scheme for remedying unlawful failures to recognize and bargain with employees' designated bargaining representatives is inadequate to safeguard the fundamental right to organize and bargain collectively," and so it overruled *Linden Lumber* and adopted a new standard:

> [A]n employer violates section 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files [an RM petition] to test the union's majority status or the appropriateness of the unit.

In other words, the Board's new standard requires employers to act affirmatively and promptly when faced with a request for voluntary recognition. If a unit of employees approaches an employer with a request for voluntary recognition, the employer must bargain or immediately request an election itself. Then, if the employer engages in unfair labor practices during the pendency of the election which would interfere with employee free choice, the Board may issue a bargaining order. The Board reasoned that this standard is appropriate where an employer otherwise would take action to undermine employees' choice to be represented by a union, because in those cases, the pre-election assertion of majority support may be the best evidence of current employees' desires. This new standard reduces opportunities for employers to interfere in or delay elections, and relieves the Board of the need to evaluate an employer's subjective good or bad faith. In articulating this standard, the Board has spoken decisively in favor of interpreting the Act in the broadest fashion and in favor of employees' right to choose their representatives.

While nothing in *Cemex* precludes a union from requesting a Board election rather than a card count to establish majority support, the decision appropriately upholds the purpose of the Act, to give employees "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 USC § 151. If the Board's standard is upheld and appropriately applied, many current hurdles to collective bargaining will effectively be removed. The Board's decision in *Cemex* returns to the important premise of *Joy Silk Mills*, that the appropriate remedy for an employer's interference in a full, fair, and free representation election is an order to bargain with the union that expressed majority support. Now, going forward, unions should face fewer hurdles between the point of gaining majority support and bargaining a unit's first contract, which is a momentous win for unions and employees.

ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Boulevard, Suite 720
Chicago, IL 60606 – 312.263.1500
www.ulaw.com

Dated. September 13, 2023

U.S. News & Report's Best Law Firms Designation is for Chicago Tier 1 rankings in Employment Law (Individuals), Labor Law (Union), and Litigation (Labor and Employment) and a National Tier 2 ranking in Litigation (Labor and Employment).