



EMPLOYMENT AND LABOR UPDATE

NLRB Pendulum Swings, Board Reverses Precedent Concerning Voluntary Recognition and Successor Employers

On August 30, 2011, the National Labor Relations Board (“NLRB” or “Board”) released a pair of decisions overruling prior Board cases, in an apparent effort to strengthen the role of unions in two contexts: voluntary recognition, and what happens to existing bargaining relationships following a change in ownership. In the Board’s words, the animating principle behind both decisions is the same: “that a newly created bargaining relationship should be given a reasonable chance to succeed before being subject to challenge.” *Lamons Gasket Co.*, 357 NLRB No. 72, slip op. at 6 (Aug. 26, 2011). In the view of Board Member Brian Hayes, however, who dissented in both decisions, both may reflect “a policy choice” by the Board majority more than anything else. *UGL-UNICCO Serv. Co.*, 357 NLRB No. 76, slip op. at 12 (Aug. 26, 2011) (Hayes, dissenting).

The Voluntary Recognition Bar: *Lamons Gasket Co.*

In *Lamons Gasket Co.*, the NLRB overruled the Board’s 2007 decision in *Dana Corp.*, 351 NLRB 434 (2007), concerning the “recognition bar” in place following the voluntary recognition by an employer of a union as the representative of the employer’s employees. In *Dana Corp.*, the Board had held that when an employer grants voluntary recognition to a union, there followed a 45-day “window period” during which employees could file a decertification petition supported by a 30-percent showing of interest, leading to secret-ballot election to determine whether the union should be decertified. In *Lamons*, the Board stated that this “extraordinary process” was “fundamentally, grounded on a suspicion that the employee choice which must precede any voluntary recognition is often not free and uncoerced, despite the law’s requirement that it be so.” 357 NLRB No. 76, slip op. at 2. In the *Lamons* Board’s view, data from cases since that time demonstrate that such suspicions were unwarranted—and in fact, disserved the purposes of the National Labor Relations Act. Voluntary recognition based on evidence that a majority of the employees in a prospective bargaining unit support a union is lawful and creates a legally enforceable relationship between the employer and union, just as certification following a Board election does. Yet, in the current Board’s view, *Dana* “undermined employees’ free choice by subjecting it to official question and by refusing to honor it for a significant period of time, without sound justification.” *Id.*

The Board in *Lamons* thus jettisoned the *Dana Corp.* requirements and returned to the prior standard, which had been in place since 1966. Under that standard, following voluntary recognition, a union’s representative status may not be challenged “for a reasonable period of time.” *Id.* at 10. The Board then further determined that a “reasonable period” would depend on the circumstances, but that it would extend for no less than 6 months after the parties’ first bargaining session and no more than 1 year. *Id.*

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Thus, employers who voluntarily agree to recognize a union based upon the union's presentation of authorization cards or other evidence of majority support now may be assured that that recognition will be in effect to allow bargaining for at least 6 months to a year. No decertification petitions or representation challenges may be filed by the employees or rival unions, and the employer may not withdraw recognition, during that time.

The Successor Bar: *UGL-UNICCO Service Co.*

In *UGL-UNICCO Service Co.*, the Board applied a similar analysis to the question of at what point, after a successor employer recognizes an incumbent union as the representative of its employees, a union's representative status may be subject to challenge. At various times in the past, the Board's answer has been that "the previously chosen representative is entitled to represent the employees in collective bargaining with their new employer for a reasonable period of time" before a challenge may occur. 357 NLRB No. 76, slip op. at 1 (citing *St. Elizabeth Manor*, 329 NLRB 341 (1999)). At various other times, including most recently since 2002, however, the Board has discarded that rule and the "successor bar" that it created. In *MV Transportation*, 337 NLRB 770 (2002), the Board thus held that the majority status of an incumbent union recognized by a successor could be challenged immediately following a sale or merger. In *UGL-UNICCO* the Board now reverts to its prior stance, resurrecting the successor bar and prohibiting challenges for a reasonable period of time following successorship. (The Board does at least have the awareness to recognize its "policy oscillations" in regard to this issue. 357 NLRB No. 76, slip op. at 3.)

The current Board majority views the successor bar as mitigating the destabilizing consequences of a successorship transaction for collective bargaining. Even though a successor in an asset purchase or merger may be required to recognize an incumbent union, the law allows the successor to determine which of its employees to keep, whether to assume or reject any existing collective bargaining agreements, and what the initial terms and conditions of employment will be. Making matters worse, as the Board explains, "In a setting where everything that employees have achieved through collective bargaining may be swept aside, the union must now deal with a new employer and, at the same time, persuade employees that it can still effectively represent them." *Id.* at 5. The successor bar gives the union a bit of breathing space, as both it and the employees weather the transitions following a sale. In the current Board's view, it thus serves the NLRA's "overriding policy" of preserving industrial peace by promoting stability in collective bargaining relationships.

The tradeoff, which the Board had previously emphasized in *MV Transportation*, is that the successor bar may interfere with employee freedom of choice, another bedrock principle underlying the NLRA. The Board here concludes, however, that "a 'successor bar,' given the important statutory policies it serves, does not unduly burden employee free choice, because it extends . . . only for a reasonable period of bargaining . . . , 'not in perpetuity.'" *Id.* at 8 (citations omitted).

In that regard, the Board endeavors to define what constitutes a "reasonable period" for the successor bar to remain in effect. It concludes that where a successor employer adopts the predecessor's existing terms and conditions of employment as the starting point for negotiations, without making unilateral changes as it has the right to do, the reasonable period of bargaining will be 6 months. Where, however, the successor unilaterally announces and establishes initial terms and conditions of employment before bargaining, the reasonable period will be a minimum of 6 months and a maximum of 1 year from the date of the first bargaining session. The difference turns on the amount of destabilization the Board deems likely to occur in the two scenarios.

In short, following a sale, if an employer is obligated as a successor to recognize the union as the representative of its employees, the Board has now created a 6-month to one year protected period during which the union's representational status may not be challenged. As with the recognition bar, during that time, there may be no decertification petitions by employees, representation petitions by rival unions, or withdrawals of recognition by the employer.

Plainly, employers entering into new collective bargaining relationships should seek experienced counsel in navigating the NLRB’s “oscillating” requirements—which undoubtedly will continue to shift. At Sidley Austin, LLP, our Employment and Labor attorneys are skilled at following and anticipating changes in the regulatory and legal environment in which our clients operate. If you have questions about the voluntary recognition bar, the successor bar, or any other employment or labor issue, please contact us.

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