

NLRB Reverses Decades Old Rules on Dues Check-offs and Witness Statements

January 2013

Toward the end of 2012 the NLRB issued several startling opinions that in two instances overturned decades of precedent. As a result of these decisions, employers can no longer discontinue the union dues check-off upon the expiration of a collective bargaining agreement, and must now provide the union with witness statements in response to a pre-arbitration discovery request, unless the employer proves the existence of a “legitimate and substantial confidentiality interest” that outweighs the union’s need for the information.

Dues Check-off

In WKYC-TV, Inc. 359 NLRB No. 30 (2012), the NLRB overruled Bethlehem Steel, 136 NLRB No. 1500 (1962), which had long held that a dues deduction provision in a collective bargaining agreement terminated upon expiration of the agreement. Under Bethlehem Steel, dues deduction clauses were treated similarly to those covering union security, management rights, and arbitration clauses; which all become void upon contract expiration. Previously, if the employer and union were unable to reach an agreement by the time the collective bargaining agreement expired, the employer was free to stop deducting dues from employee paychecks and remitting them to the union. Thus, if a union wanted to continue to collect dues while it attempted to negotiate a new agreement, the union would have to collect the dues itself. This made it much more difficult for the union to fund its activities, and gave the company a great deal of leverage.

The new ruling now requires dues deduction clauses to be treated like other mandatory subject provisions of the agreement that are governed by a “status quo” obligation after contract expiration. As a result, an employer may only stop deducting dues after good faith negotiations result in an impasse permitting unilateral action, unless the collective bargaining agreement includes an explicit waiver by the union of its right to negotiate over this issue.

In reaching its decision, the NLRB stated that “we find compelling statutory and policy reasons to abandon the Bethlehem Steel rule.” The Board pointed out that having the dues deduction provision survive the expiration of the collective bargaining agreement helped preserve the status quo, and nothing in federal labor law or policy indicates that dues deduction provisions should be treated less favorably than other terms and conditions of employment for purposes of the status quo rule.

The NLRB also noted that Section 302(c)(4) of the National Labor Relations Act, which exempts dues check-off from the Act’s prohibition against employer payments to unions, indicates that Congress intended a dues check-off arrangement would continue beyond the life of the collective bargaining agreement. Because the NLRB is overturning 50 years of precedent, it decided the new rule would only be applied prospectively.

Separately, the Board acknowledged that regardless of the employer’s ongoing obligation to continue dues deductions following contract expiration, individual employees may cancel their authorization for payroll deductions pursuant to the terms of the authorization card signed by the employee.

Given the Board’s new position, employers may want to consider bargaining harder over dues check-off and union security clauses, especially in initial bargaining following certification of the unit. Also, employers should consider proposing language specifically disabling dues

check-off at contract termination, and perhaps extending the management rights clause beyond contract termination, as well as better nailing down exactly what will survive or terminate upon the expiration of the agreement term.

Witness Statements

For more than 30 years, under Anheuser-Busch, Inc., 237 NLRB 982 (1978), the NLRB held that witness statements obtained by an employer during an investigation were exempt from disclosure in pre-arbitration discovery. The rationale behind the rule was to encourage witnesses to make statements without the fear of reprisal or intimidation. In the recent case of American Baptist Homes of the West, 359 NLRB No. 46 (2012), the NLRB concluded that the reasoning in Anheuser-Busch was “flawed.”

Going forward, witness statements must be turned over in pre-arbitration discovery, unless the employer can prove the need for confidentiality outweighs the union’s need for the information. An employer may no longer summarily refuse to furnish the requested information, but instead must timely raise any confidentiality concerns and seek an accommodation from the union. If an accommodation cannot be reached, and the issue is litigated, the employer must prove the existence of a “legitimate and substantial confidentiality interest” that outweighs the union’s need for the information. In applying this balancing test, the NLRB will consider the sensitivity and confidentiality of the information at issue based on the specific facts of the case. To meet its burden, employers should mark any statements confidential and be prepared to show the witnesses would not have provided the statements had they known they would be produced, or that they fear intimidation or harassment if they were to be released.

In obtaining witness statements, employers must also continue to comply with the Board’s Johnnie’s Poultry rules that require the employer to explain the purpose of the interview,

explain that the interview is voluntary, and assure the employee there will be no reprisal for participating, or refusing to do so.

This decision is expected to make it more difficult for an employer to get written statements from witnesses when such witnesses realize their identity and statements will be disclosed to the union and the employee being disciplined.

For more information or assistance, contact scott@schaffer-law.com or 860-216-1965.

www.schaffer-law.com