BUTZEL LONG
ATTORNEYS AND COUNSELORS

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NLRB Rules That Employer And Union Can Lawfully Negotiate Contract Terms Before The Union Represents A Majority Of The Employees

The Employee Free Choice Act will not be enacted during the next two years. But the pro-union National Labor Relations Board will continue to issue rulings that will help unions organize new members.

The latest example of this NLRB trend is a decision involving Dana Corporation and the UAW. Dana Corporation, 356 NLRB #49 (2010). In a 2 to 1 decision, the NLRB ruled that Dana and the UAW, which represented Dana employees at 9 other facilities, did not violate federal labor law by entering a Letter of Agreement before the UAW represented the employees at a non-unionized Dana facility. The Letter was not even disclosed to the Dana employees whom the UAW wanted to organize.

In the Letter, Dana agreed to the following regarding UAW organizing of those employees:

- to tell the employees that Dana was "totally neutral" about UAW representation of the employees.
- to give the UAW a list of the names and addresses of the employees.
- to permit the UAW to meet with employees on Dana property in non-work areas.
- to recognize and bargain with the UAW upon proof of the UAW's majority support among the employees, which would be determined by a check of signed union authorization cards.

In brief, Dana agreed to neutrality, voluntary recognition based on card check, and UAW access to its property. The legality of these specific agreements was not challenged in this case.

But the Letter of Agreement was far more than an agreement that would permit the UAW to organize the Dana employees without any objection by Dana. In the Letter, Dana and the UAW also agreed in advance on certain collective bargaining issues even before the UAW represented a majority of the Dana employees. If the UAW acquired majority support and, as a result of voluntary recognition by Dana, became the employees' exclusive collective bargaining representative, then the resulting collective bargaining agreement would reflect these "pre-recognition" agreements. The legality of the negotiation of the Letter and the "pre-recognition" agreements was challenged in this case.

The "pre-recognition" agreements included the following:

- The UAW would not "erode" Dana's healthcare "solutions and concepts," including premium sharing, deductibles, and out-of-pocket maximums.
- The length of the collective bargaining agreement would be 4 years, and Dana and the UAW would discuss a 5-year duration.
- Certain terms "must be included" in the collective bargaining agreement, including "minimum classifications," the "importance of attendance," "flexible compensation," and "mandatory overtime when necessary (after qualified volunteers)."
- Mandatory "interest arbitration" if Dana and the UAW could not reach a contract after 6 months of bargaining: a "neutral" party would "select either Dana's final offer or the UAW's" on "unresolved issues."

A 2-member NLRB majority – Chair Wilma Liebman and Member Mark Pearce - ruled that the negotiation of the Letter and the Letter's "pre-recognition" agreements were lawful. According to that majority, the Letter "did no more than create a framework for future collective bargaining, if… the UAW were first able to provide proof of majority status by means of a card-check conducted by a neutral third party." The Letter and the "pre-recognition" agreements amounted to lawful "permissible cooperation."

The NLRB majority rejected the claim the "the negotiation of the" Letter "itself precluded a truly free choice" about union representation by the non-unionized Dana employees. The Letter and its "pre-recognition" agreements did not lead Dana's non-unionized employees "to believe that recognition of the UAW was a foregone conclusion or, by the same token, that rejection of UAW representation by employees was futile." Rather, the NLRB majority concluded that considering the Letter "as a whole, …nothing…presents UAW representation as a fait accompli or…otherwise constitutes unlawful support of the UAW."

Member Brian Hayes dissented, stating that by negotiating "substantive contract provisions" in the Letter, both Dana and the UAW, which was a "minority union" at that time, violated federal labor law. In his opinion, the NLRB majority's decision threatens to cause "the establishment of collective-bargaining relationships based on self-interested union-employer agreements that preempt employee choice and input as to their representation and desired terms and conditions of employment."

According to Member Hayes, a problem with the Letter was that "Dana has undisputedly reached an agreement with the UAW before employees …designated it as their representative." He analyzed the Letter's contents and effects as follows:

- The Letter "was a contract."
- The Letter "did more than establish a purely procedural framework for potential future bargaining."
- As a result of the Letter, Dana and the UAW "significantly limited the parameters for negotiation of a number of substantive issues."

Consequently, the Letter "impermissibly signaled that the UAW already had a say in the determination of substantive terms and conditions of employment for Dana's" employees, "among whom the UAW did not yet have majority support, giving the UAW 'a marked advantage over any other in securing the adherence of employees.'" Member Hayes further warned that permitting "pre-recognition" agreements, such as the Dana – UAW Letter of Agreement, could "encourage the escalation of top-down organizing, by which unions organize employers first and employees last."

Member Hayes also warned of the effect of this kind of "pre-recognition" agreement on the employees' exercise of their legal right to select or not to select union representation. Employees "who are aware that their employer has already agreed with a union on contract terms applicable to them may be substantially deterred from exercising their right to decide whether they want to be represented by that union, by another union, or by no union. They would reasonably view the determination of the representation question as a fait accompli."

To summarize, Dana and the UAW voluntarily and lawfully agreed to recognition based on card check, neutrality during the UAW's organizing campaign, UAW access to Dana's facility, and mandatory arbitration of unresolved bargaining issues. The Dana decision, however, approved a tactic that facilitates the use of "top-down" union organizing: Dana's and the UAW's negotiation of substantive terms of a collective bargaining agreement, which were not disclosed to the employees, before the employees had selected the UAW as their union and before Dana had recognized the UAW based on signed union cards from a majority of the employees. The risk to employees' free exercise of their right to select or not to select union representation, as Member Hayes warned, is clear: a union can negotiate a "pre-recognition" deal with an employer before the union has been selected by a majority of the employees and, if selected by a majority of the employees, can agree to a collective bargaining agreement that was determined by the union and the employer in advance and without the employees' knowledge or input. The approval by the 2-member NLRB majority of the Dana – UAW Letter of Agreement and its "pre-recognition" agreement elevated the institutional interest of a union to organize new members over the legal right of the employees to freely select their own labor union and then to bargain for a collective bargaining agreement based on what they want. Labor unions may seek to induce employers to agree to neutrality, voluntary recognition based on card check, and union access to the employer's facility in exchange for "pre-recognition" agreements that would be acceptable to or demanded by employers. By approving the use of this form of "sweetheart" deal, the Dana decision represents another effort by the current pro-union NLRB to help make it easier for unions to organize new members, even at the expense of the employees' rights.

For additional information, please contact your Butzel Long attorney or the author of this E-news Bulletin.

Gary W. Klotz
313 225 7034
klotz@butzel.com

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