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J. Michael Lightner

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WINDS OF CHANGE ARE BLOWING FROM THE OBAMA NLRB

*J. Michael Lightner**

With the swearing-in of Republican Brian Hayes as the newest Member of the National Labor Relations Board (“NLRB” or “Board”) on June 29, 2010, the five-member Board was brought back to full strength for the first time since December 2007. However, the full strength status was short lived. Barely two months later, the Board was down to four members when Member Peter C. Schaumber’s term expired in late August. Thus, the Obama Board now consists of three Democrats and one Republican. Even if Mr. Schaumber is replaced with another Republican, the Democratic majority may revisit a number of George W. Bush Board decisions that favor employers and take a more employee-friendly approach to their decisions. Four separate decisions issued on August 27, 2010 seem to confirm this expectation.

As discussed below, the difference in the Barack Obama Board’s approach from that of the Bush Board may be observed in two ways: (1) the Board is inviting comment on Bush Board legal holdings as to whether they should be endorsed, reversed, or modified; and (2) long-standing NLRB legal principles are being applied to the facts of a case in a significantly different manner than would have occurred under the Bush Board.

Two of the August 27, 2010 decisions fall into the first category—*Lamons Gasket Co.*¹ and *UGL-UNICCO Service Co.*² In the *Lamons Gasket Co.* decision, the Board granted review of a Regional Director’s Decision and Direction of Election.³ The Director applied the Bush Board’s *Dana Corp.*⁴ decision to find that there was no recognition bar

* Regional Director, National Labor Relations Board, Region 22 (Newark, New Jersey).

1. 355 N.L.R.B. No. 157 (Aug. 27, 2010). Rite Aid Store #6473, the main employer in the decision, has withdrawn its Request for Review by the Board. However, the Rite Aid decision is a consolidation of two Request for Review cases, so the decision will now be known by the name of the second employer, Lamons Gasket Company.

2. 355 N.L.R.B. No. 155 (Aug. 27, 2010).

3. *Lamons Gasket Co.*, 355 N.L.R.B. No. 157, slip op. at 1.

4. 351 N.L.R.B. 434 (2007).

to the filing of the underlying petition.⁵ In so doing, the Board indicated it was considering whether to reverse or modify the *Dana* holding and return to the *Keller Plastics* recognition-bar doctrine.⁶ *Keller Plastics* had been in place for decades prior to the *Dana* decision.⁷ It held that whenever an employer voluntarily recognizes a union as the exclusive collective bargaining representative of its employees, the union enjoys an irrebuttable presumption of majority support among those employees for a “reasonable period of time” following such recognition.⁸ Prior to *Dana*, the Board consistently held that the legitimate voluntary recognition of a union constituted a bar to filing representation petitions during the *Keller Plastics* “reasonable period of time” following recognition.⁹ The *Dana* decision significantly altered the recognition-bar doctrine. It required that upon the grant of recognition, the employer must post a notice to employees for forty-five days informing them of the recognition, and that there would be no recognition bar to any petitions filed within the forty-five day period.¹⁰ Only after the expiration of the forty-five day posting period without a petition being filed will a recognition bar attach.¹¹ In the *Lamons Gasket Co.* decision, the Board did not actually reverse or modify *Dana*, but it invited the parties and *amici* to submit briefs as to whether it should do so.¹² The Board asked that the submissions address several issues relating to the filer’s experience under *Dana*: whether the application of *Dana* has furthered or hindered employees’ representation choices, whether *Dana* has furthered or hindered collective bargaining, whether *Dana* should apply to recognition of an incumbent union for newly acquired or merged facilities, whether substantial compliance should be sufficient to satisfy the *Dana* notice-posting requirements and if the Board reverses or modifies *Dana*, whether it should do so retroactively or prospectively only.¹³

UGL-UNICCO Service Co. is another decision in the category of

5. See *Lamons Gasket Co.*, 355 N.L.R.B. No. 157, slip op. at 1.

6. See *id.* The *Keller Plastics* recognition-bar doctrine establishes that parties can rely on the representative status of a voluntarily recognized union for a reasonable period of time. *Keller Plastics E., Inc.*, 157 N.L.R.B. 583, 587 (1996).

7. See *Dana Corp.*, 351 N.L.R.B. at 437 (acknowledging that the recognition-bar doctrine was established in *Keller Plastics* in 1966—forty-one years before the *Dana Corp.* decision).

8. *Keller Plastics*, 157 N.L.R.B. at 587.

9. See, e.g., *Rockwell Int’l Corp.*, 220 N.L.R.B. 1262, 1263 (1975).

10. *Dana Corp.*, 351 N.L.R.B. at 442-43.

11. See *id.* at 441.

12. *Lamons Gasket Co.*, 355 N.L.R.B. No. 157, slip op. at 1 (Aug. 27, 2010).

13. Notice and Invitation to File Briefs, *Lamons Gasket Co.*, 355 N.L.R.B. No. 157 (2010) (No. 31-RD-1578).

cases in which the Obama Board is revisiting a Bush Board holding. There, the Board granted review of a Regional Director's Decision and Direction of Election as to whether it should reverse or modify *MV Transportation*.¹⁴ *MV Transportation* had previously reversed the successor bar doctrine.¹⁵ Under that doctrine, as set forth in *St. Elizabeth Manor, Inc.*,¹⁶ once a successor employer's obligation to recognize an incumbent union has attached, the union is entitled to the same "reasonable period of time" established in the *Keller Plastics* decision.¹⁷ During this time, the union's presumption of majority support is irrebuttable and representation petitions are barred.¹⁸ *MV Transportation* reversed *St. Elizabeth Manor*, holding that recognition by a successor employer establishes only a rebuttable presumption of majority support and does not bar the filing of any petitions.¹⁹ In *UGL-UNICCO*, the Board did not rule on the viability of *MV Transportation*, but similar to its *Lamons Gasket Co.* procedure, solicited briefs from the parties and *amici* as to whether it should do so.²⁰

Before moving on, it is worth noting that to the extent the Obama Board is inclined to revisit Bush Board decisions with which it may disagree, there is a significant difference as to how quickly it would be able to do so. Specifically, there is a difference between cases arising as representation case ("RC") issues, and those involving unfair labor practice ("ULP") issues. Procedurally, the only way a ULP issue can come before the Board is through a finding by a Regional Director that the ULP allegations have merit and a ULP complaint is issued. In this regard, Regional Directors are bound to apply existing Board law in deciding the merits of ULP allegations, unless and until, a current Board changes that law. Most of the Bush Board ULP decisions found that certain employer conduct does not constitute a ULP. As long as those decisions remain valid, Regional Directors will be dismissing ULP allegations, not issuing complaints. Dismissals may be appealed only to the NLRB General Counsel, not the Board.²¹ Therefore, in order for any of these ULP issues to get before the Board, the General Counsel will have to decide to grant appeals of these dismissals and authorize

14. 337 N.L.R.B. 770 (2002); *UGL-UNICCO Serv. Co.*, 355 N.L.R.B. No. 155, slip op. at 1 (Aug. 27, 2010).

15. See *MV Transp.*, 337 N.L.R.B. at 770.

16. 329 N.L.R.B. 341 (1999).

17. See *id.* at 344; *Keller Plastics E., Inc.*, 157 N.L.R.B. 583, 587 (1996).

18. *St. Elizabeth Manor*, 329 N.L.R.B. at 346.

19. *MV Transp.*, 337 N.L.R.B. at 770.

20. See *UGL-UNICCO Serv. Co.*, 355 N.L.R.B. No. 155, slip op. at 1 (Aug. 27, 2010).

21. See *id.*

complaints which seek to reverse a Bush Board holding. The General Counsel could also decide on his or her own to place an issue before the Board by requiring Regional Directors to submit all cases raising that issue to the Office of the General Counsel so that the General Counsel can select one to use as the vehicle for Board consideration. Since these scenarios involve sensitive policy and political concerns, it remains to be seen whether—and if so, how quickly—the current Acting General Counsel will be inclined to act.²²

RC cases, on the other hand, are non-adversarial proceedings in which issues are resolved through the issuance of a written Decision of the Regional Director. RD Decisions are directly reviewable by the Board upon request by any party. So, even though the Director must continue to apply Bush Board holdings when deciding an issue, any party may test the holding through seeking Board review—as was done in both the *Lamons Gasket Co.* and *UGL-UNICCO* cases. Accordingly, I would expect that the Bush Board decisions most likely to come under scrutiny by the Obama Board in the near future will be limited to the numerous RC issues.

The other two August 27, 2010 decisions for consideration herein are in the second category described above: cases which do not involve possible changes in existing Board law but only how the law is applied to similar sets of facts. The first case is *Kiewit Power Constructors Co.*²³ Here, the issue was whether employees who were discharged while engaged in protected concerted activity lost that protection by engaging in misconduct in the course of the protected activity.²⁴ The employer was a construction company building turbines and other structures at a power plant.²⁵ For a period of time the electricians working on the site, who were represented by an electrical workers' union, were permitted to take fifteen minute breaks in the morning and afternoon.²⁶ The workers

22. In June 2010, former General Counsel Ron Meisburg resigned and was replaced temporarily by an Acting General Counsel, Lafe Solomon. Press Release, NLRB, Veteran NLRB Attorney Lafe Solomon Named Acting General Counsel (June 20, 2010), available at http://www.nlrb.gov/shared_files/Press%20Releases/2010/R-2753.pdf. Mr. Solomon will serve as Acting General Counsel indefinitely pending the nomination and confirmation of a new General Counsel by the President. No such nomination has yet been announced.

23. 355 N.L.R.B. No. 150 (Aug. 27, 2010).

24. See *Kiewit*, 355 N.L.R.B. No. 150, slip op. at 1. The National Labor Relations Act states, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" 29 U.S.C. § 157 (2006).

25. *Kiewit*, 355 N.L.R.B. No. 150, slip op. at 1.

26. *Id.*

were allowed to leave the construction area and take their breaks in trailers known as “dry shacks.”²⁷ As the construction progressed to the upper floors, the time it took the employees to get to and from the dry shacks increased such that, eventually, this practice resulted in twenty-five to thirty minutes of downtime per break.²⁸ Eventually, the employer decided to require that the breaks be taken in place at their workstations to limit the break periods to the intended fifteen minutes.²⁹ The employees objected to this change and continued to take their breaks in the dry shacks.³⁰ The employer responded by informing them that they would be disciplined if they continued to take breaks in the dry shacks.³¹ The next day, several crews ignored the admonition and took their breaks in the dry shacks.³² Upon observing this conduct the employer prepared warnings for those employees and sent a manager to deliver them to the employees at their work stations.³³ Present at one of the workstations was a crew of several employees, including the two employees at issue.³⁴ After the warnings were distributed a crew member asked if they would be written up again if they repeated their conduct during the afternoon break.³⁵ When the manager responded in the affirmative, the first employee stated in an angry tone that he had been out of work for a year and that “it was going to get ugly” if he were terminated and that the manager had “better bring his boxing gloves.”³⁶ The second employee chimed in that he, too, had been out of work and “it was going to get ugly.”³⁷ Both employees were terminated the following day for threatening the manager and others with physical violence.³⁸

The Board determined that the applicable legal standard is that of the thirty-one-year-old decision in *Atlantic Steel Co.*³⁹ to determine whether employee misconduct that occurs during the course of otherwise protected activity is “so opprobrious” as to lose the protection of the

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *See id.*

35. *Id.* at 1-2.

36. *Id.* at 2.

37. *Id.*

38. *Id.*

39. 245 N.L.R.B. 814 (1979).

National Labor Relations Act (“NLRA” or “Act”).⁴⁰ That decision established a four-factor test to determine whether an employee has engaged in misconduct.⁴¹ The factors include: (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee’s outburst, and (4) whether the outburst was provoked by the employer’s unfair labor practice.⁴² A determination must be made for each factor as to whether it favors or does not favor protection of the conduct.⁴³ In applying this test, the Board majority, consisting of Chairman Wilma B. Liebman and Member Mark Gaston Pearce, found that as to the first factor, the employees’ remarks were made in a work area and obviously heard by other employees.⁴⁴ While under some circumstances this would weigh against protection, the majority found that since it was the employer who chose to deliver the warnings in a group setting in a work area, such that it should reasonably have expected that employees would react and protest on the spot, the employer cannot complain that other employees witnessed the event.⁴⁵ Therefore, the Board found that application of the first factor favored protection or, at least, was neutral.⁴⁶ As to the second factor, the majority found that this factor weighed in favor of protection because the subject matter—the employees’ protest over the use of discipline to enforce a material change in working conditions by altering the break policy—was clearly protected activity.⁴⁷

The most difficult analysis was that involving the third factor, the nature of the outburst. The majority itself refers to drawing a line between cases in which employees engaged in concerted activity “that exceed the bounds of lawful conduct in a moment of animal exuberance [and] . . . flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for service.”⁴⁸ The majority proceeded to find that the employees’ remarks fell “short of the kind of unambiguous physical threat” that would cross the line.⁴⁹ They found that the remarks were “single, brief, and spontaneous reactions,” unaccompanied by any threatening gestures and capable of interpretation

40. *Kiewit*, 355 N.L.R.B. No. 150, slip op. at 2 (citing *Atlantic Steel*, 245 N.L.R.B. at 816).

41. *See Atlantic Steel*, 245 N.L.R.B. at 816.

42. *Id.*

43. *See id.*

44. *Kiewit*, 355 N.L.R.B. No. 150, slip op. at 2.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 3 (citing *Prescott Indus. Prods. Co.*, 205 N.L.R.B. 51, 51-52 (1973)).

49. *Id.* at 3.

as merely figures of speech suggesting the filing of grievances or a labor dispute.⁵⁰ The Board concluded that the nature of the outburst was, at least, ambiguous and could not be construed as unprotected physical threats.⁵¹ This factor weighed in favor of protection.⁵²

As for the fourth factor of provocation, the Board found that, inasmuch as “the conduct . . . was not provoked by an unfair labor practice,” this factor weighed against protection.⁵³ The majority concluded that, having found that only one of the four factors weighed against protection, the employees’ conduct did not lose its protection, and the discharges were unlawful.⁵⁴

In pointed contrast, Member Schaumber strongly disagreed. In his dissent, he focused almost entirely on the third factor—the nature of the conduct.⁵⁵ He had no trouble finding the remarks to be completely unambiguous threats of physical harm by not only relying on the words themselves, but also on the testimony that the manager felt threatened with violence (which the majority found to be an irrelevant subjective perception).⁵⁶ He also referred to the current business climate in which employers must adopt zero-tolerance policies towards conduct which may threaten or lead to violence, and he found that the employees’ remarks could reasonably be interpreted to fall into that category.⁵⁷ As Member Schaumber’s views were usually shared by the majority of the Bush Board, I believe it is clear that the Bush Board would have found this conduct to be clearly on the other side of the line described in the *Prescott* decision.

Finally, the other case which reflects differing interpretations of existing law is the decision in *E.I. DuPont Be Nemours, Louisville Works*.⁵⁸ This is a Section 8(a)(5) case.⁵⁹ The issue was whether an employer’s unilateral change to the employees’ health insurance plan was privileged because the union had waived its right to notice and bargaining through past practice.⁶⁰ The employer and the union were

50. *Id.*

51. *See id.*

52. *Id.*

53. *Id.*

54. *See id.* at 3–4.

55. *See id.* at 6 (Schaumber, dissenting).

56. *See id.*

57. *See id.* at 5.

58. 355 N.L.R.B. No. 176, slip op. at 1 (Aug. 27, 2010).

59. *Id.* at 1. Section 8(a)(5) of the NLRA states that it is unlawful for an employer to “refuse to bargain collectively with the representatives of his employees.” National Labor Relations Act, 29 U.S.C. § 158 (2006).

60. *E.I. DuPont*, 355 N.L.R.B. No. 176, slip op. at 1.

parties to successive collective bargaining agreements that provided employees with a Beneflex Plan under which the employer provided health care and other benefits.⁶¹ “The parties incorporated the Beneflex Plan, which included a reservation of rights provision granting the [employer the right] to modify benefits . . . on an annual basis, into their . . . agreements.”⁶² The employer unilaterally exercised this right without union objection during the terms of successive contracts from 1994 until the expiration of a contract in 2002.⁶³ “Following expiration of the [contract] in . . . 2002, and while the parties were negotiating a successor agreement, the [employer] continued . . . to make unilateral changes to the Beneflex Plan.”⁶⁴ The Union objected, asserting that in the absence of a current contract, the employer had to bargain before making the changes.⁶⁵ The employer refused to do so, “citing its past practice of making such unilateral changes under the reservation of rights clause.”⁶⁶ The Board majority, consisting of Chairman Liebman and Member Craig Becker, agreed with the union and found the employer’s unilateral changes violated Section 8(a)(5) of the Act.⁶⁷

In finding that there was no past practice sufficient to establish that the union had waived its right to bargain, the majority distinguished this situation from the *Courier-Journal*⁶⁸ decisions.⁶⁹ In those cases, there was a past practice of union acquiescence in unilateral changes made both during a contract’s term and during hiatus periods.⁷⁰ In *E.I. DuPont*, there was no past practice of permitting unilateral changes during any hiatus periods; the past practice was limited only to changes made during periods when a contract was in effect.⁷¹ The majority found the reservations of rights provision in the Beneflex Plan to be the functional equivalent of a contractual management rights clause.⁷² To extend the “*Courier-Journal* decisions to [this] situation . . . would conflict with settled law that a management-rights clause does not survive the expiration” of collective bargaining agreements.⁷³ The

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *See id.*

68. 342 N.L.R.B. 1148 (2004); 342 N.L.R.B. 1093 (2004).

69. *See E.I. DuPont*, 355 N.L.R.B. No. 176, slip op. at 1-2.

70. *See Courier-Journal*, 342 N.L.R.B. at 1094; *Courier-Journal*, 342 N.L.R.B. at 1148.

71. *See E.I. DuPont*, 355 N.L.R.B. No. 176, slip op. at 1-2.

72. *See id.* at 2.

73. *Id.*

majority notes, in response to Member Schaumber's dissent, that a management rights clause is simply a contractual provision granting the employer the right to act unilaterally with respect to mandatory subjects for bargaining.⁷⁴ It does not matter whether such rights are expressed as a free-standing term of an agreement or as a component of another term, as in this case.⁷⁵ Either way, such provisions operate as waivers of unions' rights to bargain and, as such, have no effect in the absence of a contract unless a past practice of giving them effect in between contracts exists.

As noted, there is a vigorous dissent by Member Schaumber. He rejects the notion that the reservation of rights language in the Beneflex Plan is akin to a management rights clause.⁷⁶ While not disputing—or even disagreeing with—the majority's statement of applicable legal principles, he argues that the majority has applied the *Courier-Journal* holding too narrowly.⁷⁷ The reservation of rights provision is not a separate term of the contract, but instead an essential component of the Beneflex Plan only. The union agreed to the component when inclusion of the plan was initially agreed upon.⁷⁸ Thus, it is part of the status quo for the employees' benefit plan, and the right to make unilateral changes at any time is a part of that status quo.⁷⁹ It is not dependent on the existence of a collective bargaining agreement.⁸⁰ Member Schaumber states:

Further, in contrast to management-rights clauses which cover subjects not otherwise dealt with in the contract, the reservation of rights clause in the Beneflex Plan is itself a part of the benefits plan to which the parties agreed contractually. The [employer] and the Union struck a deal, under which unit employees would receive the benefits provided under the Plan, subject to the Plan's terms and conditions, one of which is the [employer's] reservation of a right to make changes to the Plan. . . . The [employer] *never* agreed to provide benefits under the Plan uncoupled from a unilateral right to make changes therein.⁸¹

It appears from this statement that Member Schaumber believes that the issue of a past practice is irrelevant. The reservation of rights

74. *Id.*

75. *See id.*

76. *See id.* at 6.

77. *See id.* at 7.

78. *See id.* at 6.

79. *See id.*

80. *See id.*

81. *Id.*

language is merely one component of the Plan and does not exist independently from it. Therefore, since the Plan survives the expiration of the agreement as a term and condition of employment, the reservation of rights provision in the plan also survives.

However, he does proceed to discuss the issue of past practice and asserts that the majority misinterpreted and incorrectly limited the holding of the *Courier-Journal* decisions.⁸² He argues that those cases should be read to mean that once the parties by their actions have created a “past practice authorizing an employer’s unilateral action,” that past practice becomes the status quo for the action affected.⁸³ Further, until changed by the parties, past practice remains in effect at all times regardless of whether or not a contract is in effect.⁸⁴

Finally, the dissent expands its reasoning broadly to incorporate a discussion of the “big picture.” It asserts that dismissal of the complaint is consistent with current economic realities facing large companies and their need to address the pension, health, and welfare needs of all employees, both represented and unrepresented.⁸⁵ The majority’s holding, the dissent argues, would create chaos.⁸⁶ It would require a large employer to “freeze in place, unit by unit as contracts expire and successor agreements are not immediately concluded, extant benefit-plan terms at the moment of expiration, creating a checkerboard of plans,” driving up costs and causing employers to simply stop offering such plans to represented employees.⁸⁷ Member Schaumber expressed similar social and economic commentary in his dissent in the *Kiewit* case:

An unfortunate development of our times has been the escalation and severity of workplace violence and the proliferation of litigation flowing from such incidents. Behavior that might once have been accepted as part of the “rough and tumble” of labor relations must now be viewed through a different lens by employers confronted with the task of protecting both the safety of their employees and the corporate fisc against protracted and expensive lawsuits alleging a host of claims from negligent supervision and hiring to hostile work environments.⁸⁸

82. See *id.* at 7.

83. *Id.*

84. See *id.*

85. *Id.*

86. See *id.*

87. *Id.*

88. *Kiewit Power Constructors Co.*, 355 N.L.R.B. No. 150, slip op. at 5 (Aug. 27, 2010) (Schaumber, dissenting).

Member Schaumber's "macro" approach in these two decisions, in which he seems to be expressing sympathy for the impact of external forces on employer decision-making, stands in contrast to the majority's preference to focus on the protection of employees' rights in their workplaces. Interestingly, Chairman Liebman, in supporting the call for labor law reform in recent years, has noted that the Act has remained unchanged in any meaningful way for decades.⁸⁹ She expressed the view that reform was needed, at least in part, because of major changes in the workplace and the U.S. economy from many years ago.⁹⁰ I would note, however, that her remarks have been with regard to the need for legislative changes to the Act and, therefore, do not necessarily mean that she agrees with Member Schaumber's view that external, real world concerns should play a role in deciding individual cases.

89. Susan J. McGlorick, *Chairman Liebman Tells ABA She Hopes Board Will Take a More Dynamic Approach*, 41 Daily Lab. Rep. (BNA) C-1 (Mar. 3, 2009)).

90. *Id.*

