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SOME CURRENT THINKING AT THE BOARD FROM BROOKLYN AND BEYOND

*Alvin P. Blyer**

The National Labor Relations Act (“NLRA” or “Act”) is now seventy-five years old. Recently, the National Labor Relations Board (“NLRB” or “Board”), which is authorized to administer the Act, has had its share of turmoil. Its efficiency has been hampered by having only two Board members for more than two years, and more recently, by the Supreme Court’s decision in *New Process Steel, L.P. v. NLRB*,¹ holding that the two-Board-member panel lacked authority to, among other things, adjudicate unfair labor practices.² Indeed, through the years, there has been a good deal of criticism aimed at the Board for an alleged lack of efficiency. Nonetheless, the statute endures, and much more often than not, it works.

In October 2010, there was a great deal of talk about the mid-term political elections. Accordingly, it seems appropriate to discuss two interesting and unusual election proceedings that arose in a different arena—the Brooklyn office of the NLRB. These cases caused some difficulty for the Board. In one case, the election was held one-and-a-half years ago, and in the other, the election was conducted more than seven years ago.

One of the two matters was *Affiliated Computer Services, Inc.*³ In this case, the employer filed timely objections after the Board conducted an election and the union received a majority of the votes cast.⁴ On August 27, 2010, the Board issued its decision overruling the employer’s objections and confirming the union’s victory.⁵

The objections that caused disagreement between the only two members on the Board at the time involved two letters written to the

* Regional Director, National Labor Relations Board, Region 29 (Brooklyn, New York).

1. 130 S. Ct. 2635 (2010).

2. *See id.* at 2444.

3. 355 N.L.R.B. No. 163, slip op. at 1 (Aug. 27, 2010).

4. *See id.* at 1 n.1.

5. *See id.* at 1.

employer—one written by a U.S. Congressman and the other by a New York State Senator.⁶ The lawmakers distributed the letters to eligible voters before the union election and expressed a concern that the employer might not have been treating its employees fairly.⁷ The letters warned of forthcoming layoffs, expressed support for the union and noted that the employer opposed the union.⁸ The politicians also referenced their positions on transportation committees that oversee the employer's operations.⁹

In overruling the objections, the Board majority noted that public officials are entitled to express their personal opinions about unionization efforts to an employer and contended that those reading their letters would reasonably construe them as expressions of their personal views on the subject rather than as endorsements of the union.¹⁰ More significantly, the decision rejected the dissent's view that the letters would be misinterpreted by voters because of the references to their positions on the transportation committees.¹¹ The dissent noted that these letters may be construed as veiled threats to take action adverse to the employer's business interests unless the employees voted in favor of the union.¹² In short, the Board members disagreed over how employees would perceive the written comments of the politicians. The majority opined that the letters would not mislead reasonable employees to conclude that the government (including the Board) was supporting the union or that adverse consequences would be visited on the employer by these politicians absent a union victory.¹³

The second case, *Independence Residences, Inc.*,¹⁴ also decided on August 27, 2010, involved an election held in 2003.¹⁵ The outcome of the election was decidedly in favor of representation.¹⁶ After employees cast their ballots, the employer filed timely objections, claiming that campaign laws of New York State prevented a fair election from being held.¹⁷ Specifically, Section 211-a of the New York Labor Law

6. *See id.*

7. *See id.*

8. *See id.* at 3 (Schaumber, dissenting).

9. *Id.*

10. *See id.* at 2.

11. *See id.* at 2-3.

12. *See id.* at 3-4 (Schaumber, dissenting).

13. *See id.* at 2.

14. 355 N.L.R.B. No. 153, slip op. at 1 (Aug. 27, 2010).

15. *Id.*

16. *See id.*

17. *See id.* at 2.

prohibited the employer from using state funds to: (1) train managers, supervisors, or other administrative employees in methods to encourage or discourage unionization; (2) hire attorneys, consultants, or contractors to encourage or discourage unionization; and (3) pay employees whose principal job duties are to engage in such activity.¹⁸ It also provided that records must be kept to show that state funds were not used for prohibited purposes, and set forth strong civil penalties for non-compliance.¹⁹ The employer claimed that the law was invalid because it was pre-empted by federal law and asserted that it was compelled to comply with the law in light of the penalties for non-compliance since the law had not yet been declared invalid.²⁰ Nonetheless, the employer had at its disposal \$130,000 in private donations and interest income to wage an anti-union campaign.²¹ The employer used some of the funds to pay for the flyers and letters it sent to employers pointing out the wisdom of casting votes against union representation.²² The employer also held two mandatory employee meetings during work hours shortly before the election and conducted group and individual meetings to advise eligible employees that unionization was not in their best interest.²³ The employer stated that it would have run its campaign differently if it did not have to comply with section 211(a).²⁴ The employer testified that it would have conducted a more “aggressive,” “stronger” campaign and would have directly told employees to vote no.²⁵ In addition, the employer discussed the possibility of hiring a consultant, which it did not do.²⁶

In overruling the employer’s objections based on section 211-a, the Board assumed, *arguendo*, that the state law at issue was pre-empted, but declined the employer’s invitation to conclude, as a matter of law, that the election be set aside.²⁷ In this particular situation, the Board majority felt the proper focus was on whether “the atmosphere was so tainted as to warrant setting aside the election.”²⁸ Put differently, the Board was concerned with whether the “surrounding conditions

18. N.Y. LAB. LAW § 211-a(2) (McKinney 2002).

19. *Id.* § 211-a(3)-(4).

20. *See Independence*, 355 N.L.R.B. No. 153, slip op. at 1.

21. *See id.* at 3.

22. *See id.*

23. *See id.*

24. *See id.* at 4.

25. *Id.*

26. *See id.* at 8.

27. *See id.* at 7-8.

28. *Id.* at 8 (quoting *Delta Brands, Inc.*, 344 N.L.R.B. 252, 253 (2005)).

enable[d] employees to register a free and untrammelled choice for or against a bargaining representative.”²⁹

Applying that language, the Board noted that section 211-a did not prohibit *all* kinds of campaign activity. Rather, the statute limited the use of state funds to support certain specified activities.³⁰ Further, the Board pointed out that the state law at issue imposed no limitation on an employer’s right to use money from non-state sources for a union campaign.³¹ According to the Board, the employer engaged in a vigorous campaign against the union (which included the commission of unfair labor practices), and that the election results were not close.³²

The dissent contended that the state law at issue “plainly chilled the exercise of covered employers’ section 8(c) rights, and the concomitant section 7 rights of employees to access to [sic] information in opposition to unionization.”³³ However, this argument did not get much assistance from the employer who did a poor job in elaborating how section 211-a stifled its campaign, other than to suggest it might have hired a consultant and would have directly told its employees to vote no.³⁴ Thus, when the dissent stated that the majority gave controlling weight to its judgment that the employer was able to campaign “enough,” the dissent’s view was not enhanced by the employer’s failure to establish what it might have done during the campaign had there been no section 211-a. Having failed to set that out, the majority was in a position to conclude the state law had no real impact on what employees learned during the campaign and how they voted.

As noted earlier, both of these cases were not decided promptly, and there have been concerns as to whether the substantial delay in issuing these decisions frustrated employee choice. However, after the Board’s decision in *Affiliated*, the employer—which had been taken over by a major corporation—responded favorably to the union’s request to bargain, and negotiations for a contract are underway. In the *Independence* case, the outcome for the employees who cast a majority of votes for union representation is not as sanguine, since the victorious union in the election has gone through some changes, and its successor

29. *Id.* at 5 (quoting *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948)).

30. *Id.*

31. *See id.*

32. *Id.*

33. *Id.* at 15 (Schaumber & Hayes, dissenting).

34. *See id.* at 4, 8. It should be noted that the employer could have hired a consultant with non-state funds. *Id.* at 8. Furthermore, telling and employer to vote “no” directly is not prohibited by section 211-a. N.Y. LAB. LAW § 211-a (McKinney 2002).

may not be interested in representing the employees in question.

Apart from the pending political elections, another much less publicized issue has been the appointment of Lafe Solomon, a career Board Attorney, as the Acting General Counsel of the Board. While it is not clear how long he will serve, he has already expressed a desire to invigorate and reform the NLRB 10(j) program.³⁵ Accordingly, it seems appropriate to mention two very recent 10(j) cases authorized by the Board that arose in the Brooklyn office.

In *NLRB v. One Stop Kosher Supermarket, Inc.*,³⁶ Region 29 sought 10(j) relief to require the employer to bargain with the union after it recognized the union and then refused to engage in negotiations for a contract. The employer also refused to provide information to the union that it had requested for bargaining.³⁷ On June 29, 2010, a federal district court judge granted our request for 10(j) relief, and ordered the employer to commence negotiations with the union for an initial contract and to provide the requested information.³⁸ Thereafter, the employer complied with the court's order.

Interestingly, the court required the parties to immediately commence negotiations for a contract out of concern that the Board may not pass on the case promptly.³⁹ However, it directed the parties not to implement the terms of any collective bargaining agreement until the Board rendered its decision in the underlying administrative hearing.⁴⁰ While this was a novel approach toward possible Board delay, it was also an odd way of dealing with the problem, given that the court found that the irreparable harm which justified 10(j) relief was the loss of benefits employees were experiencing because bargaining was not going forward.⁴¹ The district court noted that retroactive application of an eventual contract was possible, but noted that the employer was not guaranteeing that it would accede to such a demand.⁴² Further, Board law precluded the Board from directing retroactive application of any

35. Section 10(j) enables the Board to petition any US district court for temporary relief or a restraining order upon issuance of a complaint. National Labor Relations Act, 29 U.S.C. § 160(j) (2006).

36. No. 10-CV-1956 (FB)(VVP), 2010 WL 2633856, at *1 (E.D.N.Y. June 29, 2010). The ALJ has not issued his decision yet in this case, nor has the federal court ruled on our 10(j) case.

37. *See id.*

38. *Id.* at *5.

39. *See id.* at *4.

40. *See id.*

41. *See id.* at *3-4

42. *Id.* at *4.

contract that might be negotiated.⁴³ Thus, in one stroke, the court noted that employees are likely to suffer harm because of lost wages and benefits but was willing to delay the receipt of any negotiated improvements in their wages and benefits until the Board issued its decision. As a practical matter, this concern was never realized, because as of this writing, the Board's decision requiring bargaining with the union has not been issued and no first contract has yet been reached.

The second 10(j) case of recent vintage out of the Brooklyn office involved Jung Sun Laundry Group Corp., a company that launders linens, tablecloths, and related items for a number of large hotels.⁴⁴ Here, the heart of our 10(j) case sought to require the employer to offer reinstatement to about 103 strikers who were denied reinstatement after they sought to return to work after a three-hour work stoppage. The work stoppage was caused by the cessation of health insurance by the union's Welfare Fund after the employer failed to make timely welfare contributions on behalf of the unit employees.⁴⁵ At the time of the strike, negotiations were in progress for a successor contract, but soon after the failure to reinstate the strikers, negotiations ceased.

We argued that, as time passes, the union would experience irreparable harm due to the predictable erosion of support as employees are not reinstated. Moreover, with the passage of time, fewer victims of discrimination will likely accept reinstatement once offered, because they have lost interest in further employment, have accepted other jobs, or have relocated. As a result, absent immediate offers of reinstatement, the union will suffer loss of support among the unit and, as a consequence thereof, will have increased difficulty in negotiating a favorable successor contract thereby depriving employees of wage and benefit improvements they might otherwise receive. Further, the failure to immediately reinstate the strikers, we argued, sends the wrong message to their replacements and decreases the likelihood that they would be willing to support the union when the union returns to the bargaining table. Finally, the failure to grant injunctive relief will mean that an important aspect of the Board's relief will be rendered meaningless as many of the discriminatees, months or years from now, will no longer desire reinstatement.

On November 15, 2010, in an unpublished decision, Judge Carol B.

43. *See id.*

44. *See* Laundry, Dry Cleaning Workers & Allied Indus. Health Fund, Unite Here! v. Jung Sun Laundry Grp. Corp., No. 08-CV-2771 (DLI) (RLM), 2009 WL 704723, at *1 (E.D.N.Y. Mar. 16, 2009).

45. *See id.* at *1-2.

Amon of the United States District Court, Eastern District of New York, found that the Board had established reasonable cause to believe the employer had violated the Act, as alleged, and that temporary relief was just and proper.⁴⁶ In granting the relief sought, the court noted that it was appropriate to do so to insure that the striking employees return to work and have healthcare coverage, and to avoid evictions among the striking employees, pending the Board's administrative proceedings.⁴⁷ The Court concluded that temporary relief was "just and proper to restore the status quo, prevent irreparable harm, and further the ends of the National Labor Relations Act."⁴⁸ Whether the court decision amounts to no more than a pyrrhic victory will depend on whether the employer continues its operations so that jobs are available for the 103 workers denied reinstatement.

46. Blyer v. Jung Sun Laundry Grp. Corp., No. 10-CV-2975 (CBA), at 12 (E.D.N.Y filed Nov. 15, 2010).

47. *See id.* at 15.

48. *Id.* at 18.

