SIGNIFICANT ISSUES UNDER THE NATIONAL LABOR RELATIONS ACT

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The latter part of August saw the NLRB make a number of changes to doctrinal law.

- *Cemex Construction Materials Pacific, LLC,* 372 NLRB No. 130 (Aug. 25, 2023) -- Board overrules *Linden Lumber Division, Summer & Co.*, 190 NLRB 718 (1971), rev'd. sub nom *Truck Drivers Union Local 413 v. NLRB*, 487 F.2d 1099 (D.C. Cir 1973), affd. 419 U.S. 301 (1974) and changes a more than 50-year-old framework governing whether, when and how unions may become the exclusive collective bargaining representatives of appropriate units of employees. Specifically, the Board determined that where an employer is confronted with a demand for recognition it may, instead of recognizing the union, promptly file a petition pursuant to Section 9(c)(1)(B) of the Act to test the union's majority support and/or challenge the appropriateness of the unit or may await the processing of a petition previously filed by the union. However, if the employer commits an unfair labor practice that would require setting aside the election, the petition, regardless of which party filed it, will be dismissed and the Board will issue a remedial bargaining order. This, of course, runs counter the prior rubric in which an employer could turn the demanding union away, majority or not, and force it to file for an NLRB election under Section 9(c)(1)(A) of the Act. Unions of course will still be free to file petitions of their own, and the impact of employer unfair labor practices on those petitions – where they would be sufficient to set an election aside – will be the same as where the employer filed the petition and result in a remedial bargaining order. Where an employer confronted with a demand for recognition does nothing, the Board under *Cemex* finds that it violates Section 8(a)(5) and (1) by refusing to recognize.

- *Stericycle, Inc.*, 372 NLRB No. 113 -- Board overrules its earlier decision in *The Boeing Co*., 365 NLRB No. 154 (2017) and *LA Specialty Produce Co*., 368 NLR No. 93 (2019), and changes its approach to determining whether an employer's handbook rules violate the Act. The new standard requires a showing that the challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights.[1] The Board will interpret work rules from the perspective of an employee who is subject to the rule and economically dependent upon their employer and who contemplates engaging in Section 7 activity. Should this initial showing be made, however, it would result in a rebuttable presumption that the rule is unlawful. The employer could rebut the presumption by establishing that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule.

[1] This initial portion of the standard is similar to other familiar Board doctrines. *See, e.g., Lush Cosmetics*, 372 NLRB No. 54 (2023) (where the Board found an unspecified threat of reprisal, concluding that a statement in a letter would have a reasonable tendency to coerce employees in the exercise of their Section 7 rights).

- *Wendt Corp*., 372 NLRB No. 135, and *Tecnocap LLC*, 372 NLRB No. 136 – Board overrules its earlier decision in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017) and holds that an employer relying on past practice to make unilateral changes during collective bargaining negotiations, including pursuant to a management rights clause (*Teconcap*), will typically commit an unfair labor practice and any defense claiming past practice will be limited to those situations where the employer proves its action is consistent with a longstanding practice that is not the product of discretion. Under *Raytheon*, the employer would need to establish a longstanding regular and consistent past practice similar in kind and degree to the action under review to privilege that action. In *Wendt*, the issue was whether a series of layoffs were privileged under *Raytheon*. The Board initially rejected that the layoffs were similar in kind and degree to prior layoffs. *Wendt Corp*., 369 NLRB No. 135 (2020). The D.C. Circuit remanded having found that the Board's decision failed to address additional layoffs. *Wendt Corp. v. National Labor Relations Board*, 26 F.4th 1002 (2022). On remand, the Board overruled the *Raytheon* standard.

- *American Federation for Children*, 372 NLRB No. 137 (Aug. 26, 2023) -- Board overrules its earlier decision in *Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019) to find that employees who advocate for individuals who do not meet the NLRA's definition of employee under Section 2(3), may nevertheless be engaged in mutual aid or protection. Here, an employee (Raybon) of a national school choice advocacy non-profit concertedly advocated for an employee who lost her eligibility to work in the United States (Ascencio) and who the employer was in an ongoing effort to sponsor for a work permit at the time a new management official (Smith) arrived. Raybon believed Smith did not understand what she felt was the importance of securing the work permit. The Board finds that Ascencio was a statutory employee but, even she wasn't, Raybon's activity on her behalf was for mutual aid or protection. Those activities led to her discharge which the Board found unlawful.

- *Intertape Polymer Corp*., 372 NLRB No. 133 (Aug. 25, 2023) – Here we have three discharged employees where the issue is whether the adverse actions taken against them violated Section 8(a)(3) and (1). The ALJ applied *General Motors, LLC*, 369 NLRB No. 127 (2020) which was subsequently overruled in *Lion Elastomers, LLC*, 372 NLRB No. 83 (2023), which reinstated context specific standards, including the loss of protection test in *Atlantic Steel Co*., 245 NLRB 814 (1979) to determine whether outbursts toward managers occurring during otherwise protected activity lost the protection of the Act.[2] So, the case was remanded to the ALJ to apply *Atlantic Steel* with respect to the three employees. However, the case also involved discipline governed by the Board's familiar *Wright Line* standard. The Board's consideration of those allegations also featured it addressing the impact of another case on the application of the *Wright Line* standard – namely *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120 (2019). That decision had caused confusion about the kind of animus the General Counsel needed to show to satisfy her burden under *Wright Line* – i.e., did it need to be particularized animus. The Board reaffirmed that *Wright Line* required the GC to show union or protected activity; employer knowledge of that activity; and employer animus against union or other protected activity. And

[2] The *Atlantic Steel* test provides that in such situations, the Board consider (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, in any way, provoked by an employer's unfair labor practice.

the Board reaffirmed that motivation may be inferred from direct and circumstantial evidence. Significantly, the Board made clear that the General Counsel is not required to provide direct evidence of *particularized* motivating animus to establish her burden.

- *Miller Plastic Products*, 372 NLRB No. 134 (Aug. 25, 2023) – Board overrules *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019), which narrowed how the Board construed concerted activity where such activity took place in a group setting. Specifically, the *Alstate* Board thought that in the group or meeting setting a statement to a supervisor must either bring a truly group complaint regarding a workplace issue to management's attention or the totality of the circumstances must support a reasonable inference that the employee making the statement was seeking to initiate, induce or prepare for group action. Then the *Alstate* majority set out a list of five relevant factors that would support such an inference.

  > (1) the meeting was called to announce a decision affecting terms and conditions of employment;
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  > (2) the decision affects multiple employees;
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  > (3) the speaker protests or complains rather than merely asks questions;
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  > (4) the speaker complains about the decision's effect on the work force, not just him- or herself; and
  >
  > (5) the meeting was the first opportunity employees had to address or discuss the decision with each other.

  The decision in *Alstate* also overruled *Worldmark by Wyndham,* 356 NLRB 765 (2011), another group setting case to the extent the majority charged that it appeared to set a per se rule that an employee's protest in a group context is always concerted. The *Miller* Board reinstates *Worldmark*. Fundamentally, what the *Miller* Board does is to criticize imposing a requirement that would confine a finding of concerted activity to a cramped list of factors. Instead, the question of whether an employee has engaged in concerted activity is factual and based on the totality of the circumstances. *Miller* marks a return to that setting in overruling *Alstate*.

However, there is an issue the Board did not tackle in this late August swirl of decisions. That is the subject of the remainder this discussion.

The Board's 1948 decision in *Shell Oil*, 77 NLRB 1306, stands for the general proposition that the Act does not require employers to afford represented and unrepresented employees the same levels of wages and benefits. Id. at 1310. Put another way, when an employer extends additional benefits to unrepresented employees, provided these are *new* benefits, it is permitted to withhold them from the represented employees as part of a bargaining strategy absent evidence that withholding them was discriminatorily motivated. *See K.A.G. West*, 362 NLRB 981 (2015).[3]

[3] Mindful of the employer's right to exclude represented employees from a new benefit conferred on non-bargaining unit employees, at the same time, an employer may run afoul of Section 8(a)(1) by the manner in which it describes that exclusion. *See Constellation Brands, U.S. Operations Inc., d/b/a Woodbridge Winery*, 367

Keeping this in context, we are discussing *new* rather than *existing* benefits. For example, if an employer withheld a regularly-issued wage increase from newly-unionized employees while granting it to non-union employees, such would constitute inherently destructive conduct, inasmuch as the wage increase would be considered an existing term and condition of employment. *See Arc Bridges I*, 355 NLRB 1222 (2010).[4]

However, this section is focused on new benefits. The General Counsel believes the same inherently destructive concept should apply where an employer withholds those while conferring them on non-unit employees -- even absent evidence of actual animus. Thus, it is the General Counsel's position that *Shell Oil* should be overruled and a different approach be embraced that is centered on the inherently destructive concept. That concept itself derives from the United States Supreme Court's decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), which involved withholding accrued vacation benefits from strikers while granting those same benefits to non-strikers – "discrimination in its simplest form." *Great Dane*, 388 U.S. at 32.

Once an employer's conduct is deemed inherently discriminatory or inherently destructive of important employee rights, the employer has the burden of justifying its actions, that is, by establishing that they were motivated by legitimate business considerations. The Board then balances the employer's interest against the resulting harm to employees. Conduct could also be found lawful if, notwithstanding being inherently discriminatory, it nevertheless serves a compelling statutory purpose.

In urging the Board to overrule *Shell Oil*, the General Counsel suggests a different framework that would avoid the inherent discrimination associated with the *Shell* standard and would concurrently encourage collective bargaining:

A New Framework –

Before granting a new benefit, an employer should first provide the union with reasonable advance notice of the intended improvement and offer it to the union on the same terms, without prejudice as to further bargaining in subsequent negotiations. If the union consents to the change, the employer must proceed with granting the benefit to represented employees and unrepresented employees as scheduled -- even if negotiations for a contract are underway. This would require the Board to recognize an additional exception to the general rule that where negotiations are in progress an employer must refrain from implementing any changes until an overall good faith impasse has been reached. *See Bottom Line Enterprises*, 302 NLRB 373 (1991). Thus, the employer would still have an obligation to negotiate over the subject at issue in bargaining for an overall agreement and would be prohibited from refusing to do so on grounds

NLRB No. 79, slip op. at 11 (2019) ("It is not in the offering or granting of different wages and benefits that the violation lies. Rather the sin lies in conveying the message that employees who choose union representation are automatically ineligible . . . for no other reason than the mere fact that they chose to be represented.")

[4] This is essentially the corollary of the practice which lacks discretion and may still serve as a defense to the unilaterally imposed wage increase under *Wendt* or *Teneocap*.

the topic had already been negotiated. To the extent this may put the union in a better position going into subsequent negotiations, it only does so to eliminate discrimination along Section 7 lines.

If the union fails to respond to the offer, it waives by inaction its right to be consulted as well as employees' right to non-discrimination and the employer will not violate Section 8(a)(3) if it implements the benefit only for the unrepresented. Should the union reject the offer, the employer must institute the benefit only for the unrepresented employees in order to avoid violating Section 8(a)(5) and doing so would not violate Section 8(a)(3).

Where parties reach an agreement, Section 8(d) holds each party to the bargain they struck. Specifically, when a new benefit poised to be granted to non-unionized employees is already contained in the collective bargaining agreement, the employer would not be required to offer it to the union before providing the benefit to unrepresented employees.[5]

The General Counsel's position in no way presents the proverbial Hobson's choice for employers. Any assertion to the contrary conflates the situation presented by *Shell Oil* cases – a union in place – with Board doctrinal law involving situations where there is no union in place. The tables below demonstrate the distinctions:

CONTEXT 1 –

[5] A subject is contained in the contract when it is explicitly addressed by a contract clause or when it is "inseparably bound up with . . . a subject expressly covered by the contract." *C&S Industries, Inc*., 158 NLRB 454, 459 (1966).

SITUATION	CURRENT LAW	GC's SUGGESTED APPROACH
Union in place/Employer Confers New Benefit on Non-Represented Employees and Withholds benefit from Unionized Employees	*Shell Oil* provides that where the Employer wishes to introduce a new benefit, and confers that new benefit only on the non-unionized personnel and to the exclusion of those who are unionized, it has the right to do that absent a showing of discriminatory motive – essentially as a bargaining tactic.	Employer must provide Union with reasonable advance notice of intended improvement and offer it to Union on same terms without prejudice as to further bargaining in subsequent negotiations. If Union consents, Employer must grant the benefit and has a continuing bargaining obligation over the subject. If Union fails to respond, it waives; if union rejects, benefit may only be conferred on non-unit personnel.
Union in Place/Employer Gives Existing Benefit to Unrepresented Employees but Withholds said Existing Benefit from Newly Unionized Employees	*Arc Bridges I* – Board finds Section 8(a)(3) violation where employer withholds established raise – conferred every year based on an annual review of finances – from newly organized employees simply based on their union status. Employer argued *Shell Oil*, which Board rejected, finding such action to be inherently destructive of important employee rights. Note DC Circuit did not enforce *Arc Bridges I* disagreeing with the Board's conclusion that the benefit at issue was an *existing* one as opposed to a *new* one, which, under extant law gave the employer the right to withhold it from the unionized group.	GC Advocates no Change to this Approach

CONTEXT 2

SITUATION	CURRENT LAW	GC's SUGGESTED APPROACH
Union is Organizing/Employer Confers Raise or Benefit on Employees Being Organized	If done for purposes of inducing employees to vote against the Union and reasonably calculated to do so, this interferes with employees' right to organize. Board will look to the timing of the raise or benefit in drawing an inference that the raise was given to persuade employees to vote no. Employer bears the burden of showing a legitimate business reason for granting the benefit during the organizing campaign. *See CVS*, 372 NLRB No. 91. Burden can be met by a showing that the benefits granted were governed by something other than the pending election or organizing drive.	GC advocates no change to this approach
Union is Organizing/Employer Wants to Confer Raise or Benefit on the Employees Being Organized and is Concerned Doing So Will Open it Up to Liability	Employer may, in order to avoid creating the appearance of interfering with the election, tell employees that implementation of expected benefits will be deferred until after the election regardless of the outcome. Board has found these are comprehensible standards and guidelines for employer conduct during the critical period prior to an election. *Noahs Area Bagels*, 331 NLRB at 189; *Woodcrest Health Care*, 366 NLRB No. 70 at 5	GC Advocates No Change to this Approach

CONTEXT 3

SITUATION	CURRENT LAW	GC's SUGGESTED APPROACH
Raises/Improvements Given to Non-Unit Employees Only – Employees Being Organized are Excluded from the Improvement	Again, if done to influence employees into not supporting the organizing union, an employer may not take the position that it would violate the Act to confer any benefit/improvement on employees being organized. It has the *Noah's Area Bagels* option set out above in Context 2. Excluding the employees being organized in an effort to prompt them to abandon support of the union is inherently destructive. See *Woodcrest Healthcare Center*, 366 NLRB No. 70.	GC Advocates no Change to this Approach

What the General Counsel's suggested approach would do is to harmonize the employer's non-discrimination obligations pre-election (set out in the table above) with those it has post-election where a union has become the exclusive collective bargaining representative of the employees.

Extant law in the pre-election context, whether the employer is granting a benefit to those being organized or withholding it and giving it to non-unit personnel, is for the employer to behave as though the union was not on the scene. But it is discriminatory and destructive of employee rights to grant benefits to influence the vote or to exclude unionizing employees from benefits because they are unionizing. This effectively looks to the purpose the employer has in taking the action it took. Was its purpose to influence organizing employees to stop? If so, there is a violation – as inherently destructive of employee rights.

Thus, extant law in the pre-election context achieves two goals: (1) to ensure that employers do not unfairly influence elections, i.e., employee interest or support in a union; and (2) to reassure employees that their union activity will not be held against them. But in the post-election context, current law under *Shell Oil* seemingly abandons both of these goals, or at the very least, is unconcerned with them – instead prioritizing employers' right to a bargaining tactic.

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