

What's Been Going On at the Board?

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Overview

- Rule Making
- Decisions
 - Unit Determination
 - Access
 - Physical
 - Electronic
 - Membership
 - Contract Interpretation and Enforcement
- General Counsel Memos

Rule Making

- Election Procedure
- Joint Employer
- Graduate Students
- 8(f) to 9(a) Conversion
- Voluntary Recognition
- Blocking Charges

Election Procedure

- Massive Delay
- Some minor changes that actually make sense
 - All “days” are business days the agency is open
 - Clarifies when response/opposition briefs are allowed
 - Clarifies observers should be from the bargaining unit
 - Gives consistency on how to request to file an oversized brief

Recap of the 2015 Rules

- 8 days between service of petition and hearing
- 3 business days between hearing and regional director's receipt of transcript
- ??? days from transcript to Decision and Direction of Election
 - At least 1, even in no issue cases
 - May not resolve all issues
- At least 3 working days from DDE to have Notice of Election posted prior to election
 - Includes 2 days to produce the voter eligibility list
- Up to 10 days for the Union to have the list

How Long To Get To An Election (Status Quo)

- Stipulated Election Agreement:
 - 23 days after petition is filed (national median)
- Directed Election (DDE):
 - 34 days after petition (national median)
 - 8 days between petition and hearing
 - At least 3 and median 7 days between hearing and DDE
 - Add 10 days for the eligibility list* (no less than 3 days)
 - Assume 2 weeks or more after DDE

What About the New Rules?

- 14 Business Days between Petition and Hearing (had been 8 calendar days)
 - Statement of Position (8 business days before hearing)
 - Response to Statement of Position* (3 business days before hearing)
- 5 Business Days for Closing Briefs
- Election Scheduled for no earlier than 20 business days after the DDE

What's the Total?

- 39 Business Days (14+5+20)
- If the election was filed for today, January 31, at best, the election would be held on March 27 if the DDE were issued the day of the hearing
 - That is 56 calendar days
- That is the best case scenario (and very unlikely)
 - More likely is 67 calendar days (7 bus. days for DDE) – April 7

Where Can Days Get Added?

- Extend the hearing date – no limit
- 10 addition business days for the closing brief
- Delays in issuing the DDE (assume an increase in the current average of 10 days)
- DDE issued without an election date
 - Date provided later in a separate document

What Gets Litigated?

- **Everything**
 - No deferral of issues of unit scope, eligibility, and supervisory status
 - Expands hearing beyond “question of representation” to include “other issues in the case that have been properly raised”

What Else Changes?

- Union required to provide a written response to the Statement of Position prior to hearing
- Additional days between the issuing of the Notices and the requirement to post
- Additional days to make the voter eligibility list available to the Union
- Appeal Process

Filing an Appeal

- If filed within 10 days, the election moves forward and ballots are impounded (does not act as a stay)
- Can file closer in time to the election or after the election
- A certification of results cannot issue while an appeal is pending (even if no challenged ballots or objections)

Recap

- The new rules will make the election process much longer
- Employers know this and will not agree to stipulated elections on a shortened time frame
- No reason for Employers not to push to a hearing except for the requirement of providing the Union with the preliminary voter list

What are Some Ways to Use the New Rules?

- Ask for everything by subpoena quickly
 - This will require a motion to revoke the subpoena before the employer's statement of position is due
- Oppose all delays
- Inoculate, including on the delay and what the employer will do with it

Is Voluntary Recognition An Alternative?

- For the moment
 - However, the “Election Protection Rule” is currently in notice and comment rule making
 - Return to *Dana Corp.* standard for voluntary recognition
 - Require production of evidence of majority support of 8(f)/9(a) conversion
 - Vote and impound if blocking charges are filed

Other Outstanding Rule Making

- Graduate Students/Teaching Assistants at private universities
- Joint Employer (*BFI, Hy-Brand*)
 - DOL issued a rule on Joint Employer
 - It is about exercised control as compared to ability to control.
 - It ignores economic dependence

Unit Determination

- First, there was *Park Manor Care Center*, 305 NLRB 872 (1991)
- Then, there was *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (2011)
- Then, *PCC Structural, Inc.*, 365 NLRB No. 160 (2017)
 - *PCC* gets “clarified”

The Boeing Company

- 368 NLRB No. 67 (2019)
- Applies the “traditional community of interest standard” but with a twist
- 3 Step Analysis
 - Evaluate whether the petitioned for unit shares a community of interest with each other
 - Evaluate whether the excluded employees have meaningfully distinct interests that outweigh similarities
 - Apply appropriate unit configurations in specific industries

What Does it Mean?

- *Boeing* reflects a shift on the burden – the Union has to prove not just that the unit sought is appropriate but that no other unit is appropriate
- Tends to lead to more wall-to-wall or broader units

Access

- There was supposed to be rulemaking. But they did it by issuing decisions instead
- These decisions limit the access of employees and union representatives

Physical Access

- *Kroger Mid-Atlantic*, 368 NLRB No. 64 (2019)
 - Union rep can't pass a petition in front of the store unless the employer has allowed others to pass petitions on similar issues
 - This overrules *Sandusky Mall, Co.*, 329 NLRB 618 (1999) and reinstates *Jean Country*, 291 NLRB 11 (1988) and limits the “discrimination exception” in *NLRB v. Babcock & Wilcox, Inc.*, 351 U.S. 105 (1956)

UPMC and its subsidiary UPMC Presbyterian Shadyside

- 368 NLRB No. 2 (2019)
- Limits the right of union representatives to meet with employees in locations on the employer's premises open to the public
- Overruled *Ameron Automotive Centers*, 265 NLRB 511 (1982)
- This is another limitation on the exceptions to *Babcock & Wilcox*

Bexar County Performing Arts Center Foundation d/b/a Tobin Center

- 368 NLRB No. 46 (2019)
 - Limits access of employees who work for a contractor of the property owner unless the employee “regularly” and “exclusively” works at the location.
 - Overturns *New York, New York Hotel & Casino*, 356 NLRB 907 (2011)
 - Property Owner must show reasonable other means of communication

Electronic Access

- First, there was *Register Guard*, 351 NLRB 110 (2007).
- Then, there was *Purple Communications, Inc.* 361 NLRB 1050 (2014)
- Now, return to the dark ages of *Register Guard* in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019)
- Use of email is not a statutory right and the Employer can eliminate use of email for protected concerted activity – But can it really?

Membership

- Dues Deduction
- *Beck* Notices
- Duty of Fair Representation

Dues Deductions

- *Valley Hospital Medical Center*, 368 NLRB No. 139 (2019)
 - Overturns *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015) and returns the parties to *Bethlehem Steel*, 136 NLRB 1500 (1962)
- Employer can cease making dues deductions after expiration of the CBA

Beck Notices and Security

- Private sector employees think *Janus* applies to them. It doesn't
- GC Robb wrote a memo
 - Can't collect dues until the individual gets notice of right to not be a member and the amount of reduction that would be applied
- Advocating for ability to drop dues check-off authorization at any time

Duty of Fair Representation

- Remember – Failure to return calls and provide status on a regular basis to worker will be considered a breach of the DFR
- Hiring Halls are a big target

Contract Interpretation

- *MV Transportation*
 - Change from “clear and unmistakable waiver” to “contract coverage standard”
 - Old: Unless the union waived the right to bargain before a change was made in the CBA, it was a unilateral change for the employer to do it.
 - New: Unless the CBA prevents the change, if the management rights clause (or any other clause) may possibly permit it, the employer is free to make it. Silence in the CBA may be the employer’s right to act.

Confidentiality

- *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019)
 - An employer can require confidentiality of an on-going investigation.
 - This cannot limit the right to talk about events that occur before the investigation.
 - The confidentiality requirement should not continue after the investigation concludes
- Overturns *Banner Estrella Medical Center*, 362 NLRB 1108 (2015)

Info Requests

- *NP Palace LLC d/b/a Palace Station Hotel & Casino, 368 NLRB No. 148 (2019)*
 - *Overturms Mercedes-Benz of San Diego, 357 NLRB No. 114 (2011)*
- Customer complaints about bargaining unit employees are not presumptively relevant
- Employer can engage in accommodative bargaining on confidential documents while testing certification

Questions?