2017 NLRB UPDATE and RECENT CASES

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A. Fiscal Year 2016 (10/1/15 – 9/30/16) Case Statistics

- Total Representation Case Petitions 2537

- RC Petitions 2029
- RD Petitions 313

- Median Days Between Petition Filing and Election Compared to Prior Years and Election Results

	Median Number of Days	With Election Agreement	With Contested Cases
FY 2013	38	37	59
FY 2014	38	37	59
FY 2015	33	32	55.5
FY 2016	23	23	35

	Elections Conducted	Percent Won by Union
RC	1396	73%
RD	173	40%

- Total Unfair Labor Practice Charges 21,326
- Merit Rate 37.1%
- Settlement Rate 93%
- Number of Complaints Issued 1,272
- Litigation Success Rate (cases won in whole or part) 89%

B. Cases

Total Security Management, Inc. 364 NLRB No. 116 (2016)

Issue; Whether an employer has a statutory obligation to bargain before imposing discretionary discipline on unit employees when a union has been certified or lawfully recognized as the employees bargaining representative but has not yet entered into a collective-bargaining agreement.

Analysis
In a 3 to 1 decision the Board held that the Employer's discretionary discharge of three employees for asserted misconduct without providing the Union notice or an opportunity to bargain over the discharges before implementing them violated section 8(a)(5) of the NLRA.

The Board noted that, like other terms and conditions of employment, discipline is a mandatory subject of bargaining and employers may not unilaterally impose "serious" discipline. Serious discipline is that which has an inevitable and immediate impact on an employee's tenure, status or earnings such as suspensions, demotion or discharge. Once a union is chosen an employer may not continue to act unilaterally with respect to terms and conditions of employment even where it has previously done so routinely or at regularly scheduled intervals.

An employer need not bargain to agreement or impasse before implementing discipline. However, if an employer has properly implemented its disciplinary decision without first reaching agreement or impasse the employer must bargain with the union to agreement or impasse after imposing discipline.

An employer is not precluded from unilaterally implementing serious discipline in the face of exigent circumstances. Exigent circumstances exist if the employer has a reasonable good faith belief that an employee's continued presence on the job presents a serious, imminent danger to its business or that an employee engaged in unlawful conduct, or poses a significant risk of exposing an employer to legal liability for the employee's conduct or threatened safety, health or security in or outside the workplace.

The imposition of disciplinary actions such as suspension, demotion or discharge without notice or an opportunity to bargain would necessitate backpay and reinstatement to make employees whole. Where an employer complies with its obligation to bargain to agreement or impasse after it has imposed discipline the appropriate backpay period would generally run from the date of the unilateral discipline to the date the parties reached agreement or impasse.

E. I. Dupont De Nemours-Louisville Works 364 NLRB No. 113 (2016)

Issue: Whether unilateral changes made by the Employer to represented units of employees health benefit plans after the expiration of collective bargaining agreements (CBAs) violated section 8(a)(5).

Facts:
The Employer established a benefits Plan with a reservations clause giving the Employer the sole right to change or discontinue the Plan in its discretion provided that changes in price or level of coverage are announced at the time of annual enrollment and are not changed during the Plan year unless coverage provided by an independent third-party provider is significantly curtailed or decreased during the Plan year. The Employer and Union had CBAs with the reservation language covering 2 units. During their terms the Employer made changes, both regular and intermittent as outlined in the Plan. The Employer did not follow any set criteria.

Following the expiration of the CBAs and during bargaining the Employer continue to make numerous unilateral changes to the Plan as it had in the past. The Union demanded to bargain and the Employer refused to bargain with regard to one bargaining unit and did not bargain to impasse with regard to the other bargaining unit. In each instance the Employer cited its past practice of making changes during the terms of the expired CBAs. The Employer did not contend that the changes were compelled by exigent economic circumstances.

Analysis
The Board in a 3 to 1 decision held that unilateral, post CBA expiration discretionary changes are unlawful notwithstanding an expired management rights clause or an ostensible past practice of discretionary changes developed under that clause. The Board expressly overruled the

Courier-Journal cases, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004) as well as *Capitol Ford*, 343 NLRB 1058 (2004) to the extent they held otherwise. Similarly, the Board disavowed conflicting dicta language in *Beverly Health and Rehabilitation Services*, 346 NLRB 1319 (2006)

The Pennsylvania Virtual Charter School 364 NLRB No. 87 (2016)

Issue: Whether the Board has jurisdiction over nonprofit corporation operating a charter school and if so whether the Board should exercise its discretion and decline jurisdiction.

Facts:
The Employer opposed the Board asserting jurisdiction contending that it is a political subdivision of the Commonwealth of Pennsylvania. The record demonstrated that a group of private individuals applied to the local school district for the charter which was granted. Subsequent renewals of the charter were approved by the Department of Education. The Employer received public funding to operate its school pursuant to a contract with the government. The record also demonstrated that the trustees and administrators of the charter school were not public officials or responsible to public officials.

Analysis:
The Board found that the two prong test of NLRB *v. National Gas Utility District of Hawkins County*, 402 U. S. 600 (1971) had not been met. Under the *Hawkins County* test an entity may be considered a political subdivision if it is either (1) created directly by the state so as to constitute a department or administrative arm of the government or (2) administered by individuals who are responsible to public officials or to the general electorate. With regard to the first prong it was significant that the entity was created by private individuals. Moreover, an entity is not exempt merely because it receives funding or operates pursuant to a contract with a government entity. Rather it was concluded that the relationship of the corporate entity was more akin to that of a government subcontractor than a government department. With regard to the second prong it was significant and dispositive that the charter school's teachers and administrators were subject solely to private appointment and removal.

With regard to whether the Board should exercise its discretion and decline to exercise its jurisdiction the Employer argued it only had a de

minimis impact on interstate commerce and that by exercising its jurisdiction the Board would be effectively supplanting state control over its public education and the state's ability to regulate labor relations at the schools in question. The Board rejected both arguments. With regard to the de minimis argument the Board noted that the Employer was one of 14 cyber charter schools in the state and that it alone served approximately 3000 students and had an operating budget in the millions of dollars. With regard to the state control of labor relations argument the Board noted that argument only applied if the Employer was a state school and the Board found that it was not.

King Soopers, Inc., 364 NLRB No. 93 (2016)

Issue: Whether the Board should modify the current make-whole remedy to require respondents to fully compensate discriminatees for search-for-work expenses and expenses incurred with interim employment.

Analysis
Pursuant to its "broad discretionary" authority under Section 10(c), the Board historically awarded search-for-work and interim expenses as part of a standard make-whole remedy. These expenses include increased transportation costs, room and board, and the cost of moving. However the Board has also historically treated these expenses as an offset to interim earnings, rather as a separate element of the backpay award.

The practical effect of the Board's traditional approach was less than make-whole relief for the most seriously aggrieved victims of unlawful conduct. Thus discriminatees who are unable to find interim employment do not receive any compensation for their search-for work expenses. Additionally, discriminatees who find jobs that pay wages lower than the amount of their expenses do not receive full compensation for the search-for-work and interim employment expenses because they do receive credit for any expenses over the amount of their interim earnings.

In the future in other to fully compensate discriminatees for their losses the Board will no longer offset search-for-work and interim employment expenses but will treat them in a manner consistent with the treatment of other losses suffered by the discriminatee.

The Trustees of Columbia University 364 NLRB No. 90 (2016)

Issue: Whether students who perform services at a university in connection with their studies are statutory employees within the meaning of Section 2(3) of the National Labor Relations Act.

Analysis
The Board in a 3-1 decision overruled *Brown University*, 342 NLRB 483 (2004) and held that student assistants who have a common-law employment relationship with their university are statutory employees under the Act. The Board noted that the broad language of Section 2(3) defined employee as including "any employee" with certain exceptions-none of which encompassed students employed by their universities. The Board further noted that it had the statutory authority to treat student assistants as statutory employees, where they perform work, at the direction of the university and are compensated. The Board went on to state that "statutory coverage is permitted by virtue of an employment relationship", and that, "it is not foreclosed by the existence of some other, additional relationship that the Act does not reach." In overruling *Brown University* the Board in essence returned to the rationale of *New York University*, 332 NLRB 1205 (2000) which *Brown* had overruled.

Minteq International, Inc., 364 NLRB No. 63 (2016)

Issue: Whether the Employer unlawfully required new employees to sign a Non-Compete and Confidentiality Agreement (NCCA) without giving the Union notice and the opportunity to bargain and also maintained two unlawfully overbroad rules in the NCCA.

Facts:
The Employer without bargaining with the Union began requiring new employees to sign the NCCA that bound them to its terms from the date of signing until 18 months after their employment ended with the Employer. An employee who signed the NCCA subsequently left the Employer and began working for a competitor. The employee then received notification from the Employer reminding him of his obligations under the NCCA, one of which prohibited him from working for a competitor for 18 months. The employee informed the Union who filed a charge with Board. Thereafter, while the charge was pending, the Employer and Union negotiated a new CBA that contained a management-rights clause giving

the Employer the right to hire employees, to determine their qualifications and to issue, amend and revise work rules and Standards of Conduct. The CBA also contained a zipper clause stating that each party had the right to bargain about any subject as to which the Act imposed an obligation to bargain. Neither party raised or requested to bargain concerning the NCCA.

Analysis

The Board found that the NCCA was a mandatory subject of bargaining because it settled an aspect of the relationship between the Employer and employees both during and after their employment. Thus, because employment was conditioned on employees' acceptance of the NCCA provisions, they "clearly affect employees' terms and conditions of employment." The Board further noted that implementation of the NCCA was not among the class of managerial decisions at the core of entrepreneurial control that an employer is not required to bargain over. Rather, the NCCA affected important aspects of the terms and conditions of employment by limiting employees' use of information gained at work and restricting their ability to work elsewhere as well as imposing rules both lawful and unlawful governing employees' conduct.

The Board also found that neither the management-rights clause of the expired CBA nor the Union's failure to request bargaining during negotiations for the new CBA constituted waivers of its right to bargain over the NCCA. The Board noted that it will not infer waiver of a statutory right from generally worded management-rights clauses. In this regard the management-rights clause made no reference to non-compete/non-disclosure agreements. With regard to the negotiations, the Board noted that the NCCA had already been unlawfully in effect for over two years suggesting that a request to bargain would have been futile. Moreover, the Union, upon learning of the NCCA's existence, promptly filed a charge with the Board clearly indicating that the Union had not acquiesced in its implementation.

Regarding various employee rules contained in the NCCA, the Board found two rules to be unlawfully overbroad and two rules to be lawful:

Interference with Relationships rule

The Employer maintained a rule that in essence prohibited its employees

from intentionally soliciting or encouraging any present or future customer or supplier to terminate or alter their relationship with the company.

The Board found that employees would reasonably construe the rule to prohibit lawful Section 7 activity such as asking customers to boycott the Employer's products in support of a labor dispute with the Employer. The ability of employees to communicate with customers about terms and conditions of employment for mutual aid or protection is a right protected by Section 7 of the Act.

At-Will Employee rule

The NCCA acknowledged that it did not affect the employees' status as an employee-at-will and that no additional right was provided that changes such status.

In contrast the CBA contained a "just cause" for discharge provision which applied to non-probationary employees. The Board found the NCCA at-will clause to be unlawfully broad noting that there was nothing in the NCCA that suggested it applied only to new or probationary employees. The Board found that the rule purported to give all employees at-will status.

Confidential Information rule

The NCCA defined confidential information as referring to any information not generally known in the relevant trade or industry and gave specific examples of the types of proprietary information considered to be confidential and ended with the phrase "and any other information which is identified as confidential by the company…."

The Board found that the "any other information prohibition" did not stand alone and must be read in context with the general definition of confidential information alone with the specific examples, none of which referred to terms and conditions of employment information. Accordingly, employees reading this rule would reasonably understand it to refer to the preceding examples of proprietary information. Therefore the rule was found to be lawful.

Remedy rule
This rule gave the Employer the right, in the event of a breach or violation of the NCCA, to proceed directly to court to obtain the remedies of specific performance and injunctive relief without the necessity of posting a bond or other undertakings.

The Board found this rule not to be unlawful on its face noting that it made no reference to terms and conditions of employment or employees exercise of their Section 7 rights and therefore employees would not read the rule as an independent restriction on their Section 7 rights.

American Baptist Homes of the West d/b/a Piedmont Gardens
364 NLRB No.13 (2016)

Issue: Whether the Employer unlawfully permanently replaced striking employees because it was motivated by "an independent unlawful purpose" within the meaning of *Hot Shoppes, Inc.,* 146 NLRB 802 (1964)

Facts:
On July 9, 2010 the Union sent the Employer two letters notifying it that "unless and until a mutually agreeable resolution had been reached" the Union would commence a strike on August 2, and "unconditionally" offer to return to work on August 7. Approximately 80 of the 100 unit employees commenced the strike on August 2. After receiving the strike notification the Employer engaged a staffing agency and extended temporary employment offers to approximately 60 to 70 employees at a cost in excess of $300,000. Although informing the staffing agency that the length of the jobs would be 3 days, the Employer began permanently replacing striking employees on August 3. Between August 3 and 6, the Employer made approximately 44 offers of permanent employment to temporary and on-call employees.

The Employer in affidavit testimony admitted that it was motivated by a desire to avoid a future strike. In communications between the parties' attorneys the Employer stated that it wanted to teach the strikers and the Union a lesson and wanted to avoid any future strikes. At hearing the Employer also admitted that it did not believe it could repeatedly afford to engage the staffing agency and acknowledged that the cost of agreeing to the Union's proposals over the 3-year life of the contract was $250,000.

Analysis

The administrative law judge (ALJ) found that under the *Hot Shoppes* doctrine an "independent unlawful purpose" is established only when the employer's hiring of permanent replacements is "unrelated to or extraneous to the strike itself." The ALJ held that motivations of teaching the strikers a lesson and ensuring that the strikers would not strike again were related to the underlying strike and therefore did not run afoul of the *Hot Shoppes* doctrine.

The Board disagreed and found that the Employer's permanent replacement of the strikers violated the Act. The Board noted that the basic premise of *Hot* Shoppes is that an employer has a legal right to replace economic strikers at will and the motive for such replacements is immaterial, absent evidence of an "independent unlawful purpose." Thus under *Hot Shoppes,*the act of permanently replacing strikers in and of itself without more is not a violation of the Act. However the Board further held that the phrase in question did not require that the independent unlawful purpose be unrelated or extrinsic to the parties' bargaining relationship or to the underlying strike. In the *Piedmont Gardens* case the Board found that evidence of the Employer's independent unlawful purpose or motivation was proven by the Employer's two stated reasons for hiring permanent replacements:

1. To punish the strikers and the Union, and 2. To avoid future strikes.

T-Mobile USA, Inc., 363 NLRB No. 171 (2016)

Issue: Whether the Employer's maintenance of various work rules and policies would be reasonably construed by its employees to prohibit Section 7 activity under the Act under *Lutheran Heritage Village-Livonia* 343 NLRB 646 (2004)

The Rules and Policies

1. Acceptable Use Policy – prohibiting employees from permitting "non-approved individuals access to information or information resources, or any information transmitted by, received from or stored in these resources" without prior written approval
2. Commitment to Integrity – prohibiting arguing . . . with co-workers, subordinates or supervisors; failing to treat others with respect; or failing to demonstrate appropriate teamwork

3. Requiring employees to maintain a positive work environment by communicating in a manner that is conducive to effective working relations
4. Prohibiting employees from making recordings in the workplace

Analysis

With regard to rules 1 and 2 the Board agreed with the ALJ and found that they violated Section 8(a)(1). The ALJ found that rule 1 restricted Section 7 activity by precluding the disclosure and discussion of employee contact information without a business need to do so. The ALJ also noted that employees are not required to get an employer's permission prior to engaging in Section 7 activities. The ALJ found that rule 2 was so ambiguous that employees would reasonably construe the language as prohibiting Section 7 protected activity. In particular the ALJ noted that employees could reasonably interpret the rule to prohibit heated discussions and arguments about terms and conditions of employment as well as arguments in support of or against unionization.

The Board, contrary to the ALJ, also found rules 3 and 4 to violate Section 8(a)(1). With regard to rule 3 the Board found that employees would reasonably construe the rule to restrict potentially controversial or contentious communications and discussions including those protected by Section 7 of the Act out of fear that the Employer could find them to be inconsistent with a "positive work environment." With regard to rule 4 the Board noted that following the issuance of the ALJ's decision the Board had issued *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190 (2015) and *Whole Foods Market* 363 NLRB No. 87 (2015). In those cases the Board found that employer rules broadly prohibiting recording in the workplace on employees' own time and in nonwork areas restricted Section 7 activity in violation of Section 7 of the Act. The Board noted that photography, and audio or video recording as well as the posting of photographs and recordings on social media, may be protected if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present.