LABOR BOARD BLUES

The Trump NLRB is rolling back protections for workers' rights

LEGAL CORNER
HARVEY MARS, ESQ.

Harvey Mars is counsel to Local 802. Legal questions from members are welcome. E-mail them to **HsmLaborLaw@HarveyMarsAttorney.com**. Harvey Mars's previous articles in this series are archived at **www.HarveyMarsAttorney.com**. (Click on "Publications & Articles" from the top menu.) Nothing here or in previous articles should be construed as formal legal advice given in the context of an attorney-client relationship.

THE PREAMBLE TO the National Labor Relations Act, the federal law that guides American labor-management relations, makes it crystal clear that the Act was specifically intended to promote and encourage collective bargaining amongst employees. Section 151 (1) of the Act states:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

In furtherance of this national policy the Obama Administration's National Labor Relations Board strove to expand the contours of the law to encourage organization and bargaining. It did so in several ways, but most significantly by expanding the scope of employers who are covered by the Act as well as the form and types of bargaining units that employees could form.

In its 2015 decision *Browning-Ferris*, the NLRB liberalized the parameters of when multiple employers can be considered joint employers subject to unionization. That decision was heralded as possibly a game changer for union organizing efforts, especially in industries where employees were hired through subcontractors and franchises. (See my column in the November 2015 issue of Allegro, available at **www.Local802afm.org**.) The NLRB, during this period, issued a decision (*Specialty Healthcare*) permitting employees to organize "micro-units" that contain smaller fractions of a larger unit of employees who potentially share a community of interest. The import of that decision was that employees would not have to organize large units of employees to achieve a bargaining order from the NLRB. This made it easier for graduate assistants and school employees to form bargaining units.

On Dec. 14, 2017, these precedents were overruled by the newly composed Trump NLRB with its Republican majority. This was not unexpected, as the NLRB's new General Counsel Peter Robb, a management-side labor attorney, has made it clear that the NLRB was not going to be adopting new theories or expanding rights, but would be relying upon or returning to existing precedent to decide cases. Thus, the NLRB in its *Hy-Brand Industrial Contractors* decision restored its prior precedent with regard to joint employer status, which now relies upon the pre-*Browning-Ferris* direct control standard as it had for many years. Likewise, in *PCC Structurals, Inc.*, the NLRB restored the traditional community of interest standard for determining whether a bargaining unit is an appropriate one, and overruled the "overwhelming community of interest standard" that was used as justification for the creation of micro units.

Whenever the political pendelum swings, the NLRB is affected. But the speed in which the NLRB is overrulling its precedents is alarming.

One cannot help but wonder how these decisions are justifiable under Section 151(1), as they serve no purpose but to reduce rights that the NLRB created in furtherance of the national policy codified in the NLRA. However, this is not a new story. The political pendulum has impacted the NLRB for many years and many precedents have been created and reversed (sometimes repeatedly) when the political composition of the NLRB has changed. Yet, the brevity with which these changes have occurred and process by which they have occurred expose the blatant partisan interests that influence this supposed neutral adjudicatory body. These decisions were made by votes of three to two. The deciding votes were made by NLRB member William Emanuel, a former partner in Littler Mendelson, a notorious law firm that specializes in union avoidance. Mr. Emanuel, who joined the NLRB last September, has had to recuse himself in more than four dozen cases in which his prior law firm was involved. However, while Littler Mendelson was not involved in the matters at hand, they had advanced support on several occasions for the outcome that was determined by their former partner. It is clear that Mr. Emanuel was selected for the NLRB to achieve these reversals. The questionable ethics of the process by which the precedents were overruled tarnish the reputation of the NLRB. It also leads to the question why practicing attorneys (from both sides of the fence) are appointed to the NLRB, rather than appointment from the ranks of the many administrative law judges who decide cases day after day for the NLRB.

It is true that the pendulum has swung back and forth many times at the NLRB. We should not be so naïve as to believe that this will change anytime soon. However, I yearn for a day when NLRB members decide cases in accordance with the explicit policy set forth in the National Labor Relations Act, rather than the interest of the political party that appointed them.