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MUSICIANS LOSE MAJOR RIGHTS TO LEAFLET

The NLRB, under Trump, deals a blow

IN A STARTLING DEVELOPMENT, the NLRB under President Trump recently ruled against AFM Local 23 (San Antonio, Texas) in a case that could send a chilling effect to other AFM locals across the country.

But first, some background.

The preamble of the National Labor Relations Act contains a pronouncement of its objectives and overarching policy. This section, which is probably the most important portion of the statute, 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 by 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."

Thus, the NLRA has declared it to be the sacrosanct policy of the United States to promote and encourage the free exercise of collective bargaining and self-organizational rights of workers in the workplace.

To this end, the National Labor Relations Board under President Obama made great strides to expand the rights of workers to organize and bargain collectively. It did this in at least four ways. The NLRB under Obama:

- expanded the groups of workers who could organize to include college athletes and teaching assistants;
- enlarged the definition of joint employer, which allowed more workers to organize;
- took away some of the objections that employers could make in challenging a union election;
- shortened the amount of time workers would have to wait to participate in a union election.

But now it is clear that the labor board under Trump has done its utmost to curtail the expansion of workers' rights.

Let me more blunt. The board is taking extreme measures to eliminate many of the longstanding protections that employees have enjoyed under the NLRA.

A case in point is a recent board decision involving AFM Local 23, which represents the musicians in the San Antonio Symphony.

The case is Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts (16-CA-193636; 368 NLRB No. 46), decided on Aug. 23, 2019.

The facts in the case involve an informational picket that the musicians had set up at the Tobin Center in 2017 to protest the San Antonio Ballet's decision to perform to taped music rather than use live musicians as they had done in the past. This decision had eliminated a significant portion of the musicians' income. The San Antonio Symphony performs approximately 70 percent of its rehearsals and performances at the Tobin Center, but occasionally performs elsewhere and is not the only organization that utilizes the center.

The center barred the musicians from handing out their leaflets on its property – which is open to the public – and forced them to move across the street.

AFM Local 23 filed an unfair labor practice charge against the center. The union asserted that under longstanding precedent, musicians were well within their rights to leaflet on the center's property.

The precedent the union relied upon was established by the NLRB in its 2011 decision involving the New York, New York Hotel in Las Vegas. The board held that a private property owner's property rights must yield to the rights of workers to demonstrate, if the workers were employed at that location, unless the property owner could demonstrate that the activity would significantly interfere with the property owner's use of the property.

Based upon this precedent and others, the San Antonio musicians won the first round at the regional labor board. The Tobin Center then appealed the decision to the NLRB in Washington, D.C.

The NLRB, which has been stacked with judges by President Trump, overruled the regional board without even asking for public comment or any amicus ("friends of the court") briefings.

In deciding for the center, the labor board eviscerated its prior standard and developed an entirely new one that held that a property owner may exclude from its property "off-duty contractor employees seeking access to the property" unless those employees work both *regularly* and *exclusively* on the property, and unless the property owner fails to show that they have one or more reasonable "non-trespassory alternative means to communicate their message."

A brief examination of this new standard reveals that it will be impossible for any group of employees to satisfy it.

First, employees must demonstrate that they work both *regularly* (which the musicians did) and *exclusively* on the property. I cannot fathom the rationale for the exclusivity requirement. When employees work regularly at a job site, they have a significant enough connection with it not to be considered trespassers. Further, freelance musicians (or any freelance workers) rarely work *exclusively* at one location – or for one employer. The board has established a standard that is impossible to satisfy.

However, even if it were possible to meet the first threshold, the second portion of the new standard is equally fatal. A property owner will always be able to demonstrate that there are alternative means for employees to exercise their rights to communicate their message. In this case, the board pointed out that the musicians could have used the internet, social media, print advertisements and other means. Of course, the board did not consider the obvious truth: the best way for the musicians to get their point across was to leaflet the very patrons who were going to see the ballet at the Tobin Center.

These weaknesses in the board's decision were succinctly pointed out by the board's lone dissenter, Lauren McFerran. She wrote that "the inevitable result of their new standard will be to ensure that employer property rights will almost invariably prevail, stripping important labor law rights from a significant segment of American workers who work on property owned by someone other than their employer."

We can only hope that this awful decision will be overturned by an appellate court on the grounds that it entirely violates this country's policy of protecting workers' rights under labor law. This decision demonstrates that American workers are under siege by the very entity meant to protect their right to organize for mutual aid and protection.