COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

HAMPDEN COUNTY

NO. SJC-13795

DANIEL HAMEL, TODD NEUMANN, WILLIAM FREEMAN, JAMES O'CONNELL, AND JAMES CHOQUETTE,
Plaintiffs-Appellees,

v.

WESTERN MASSACHUSETTS ELECTRIC COMPANY (D/B/A EVERSOURCE ENERGY),
Defendant-Appellant.

APPEAL FROM A DECISION OF THE SUPERIOR COURT DENYING MOTION TO COMPEL ARBITRATION

BRIEF OF THE APPELLANT WESTERN MASSACHUSETTS ELECTRIC COMPANY (D/B/A EVERSOURCE ENERGY)

CHRISTOPHER M. PARDO, BBO # 674674
NICHOLAS D. STELLAKIS, BBO # 644981
HUNTON ANDREWS KURTH LLP
60 State Street, Suite 2400
Boston, Massachusetts 02109
(617) 648-2800
cpardo@hunton.com
nstellakis@hunton.com

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Appellant NSTAR Electric Company d/b/a Eversource Energy ("NSTAR") states that its parent company is Eversource Energy and that Eversource Energy owns 100% of its stock. Western Massachusetts Electric Company ("WMEC"), the nominal defendant in this case, is a predecessor of NSTAR that merged with NSTAR at the end of 2017.

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

Should the trial court have compelled arbitration of Plaintiffs' labor dispute where:

(a) the dispute falls within the subject matter covered by the arbitration agreement in a collective-bargaining agreement (the "CBA") that binds the individual Plaintiffs;

(b) the Union, acting as the Plaintiffs' representative, acknowledged this fact and, accordingly, initially sought to resolve the dispute pursuant to that arbitration agreement in that CBA; but

(c) the Union, to avoid an adverse arbitration decision, recast those same claims under state law and asserted them in Superior Court—first in the Union's own name, and then most recently (in this case) in the names of individuals active in Union management—on behalf of a putative class coextensive with the Union?

INTRODUCTION

This dispute began when NSTAR, a utility company, changed work schedules for employees in accordance with a collective-bargaining agreement (the "CBA") that requires arbitration of any dispute "regarding hours, wages or working conditions." RA/233. This one change generated no fewer than four proceedings, as the union representing the affected employees (the "Union") jockeyed to find the most advantageous forum for just such a dispute.

First, the Union filed an unfair labor practice charge with the National Labor Relations Board ("NLRB"). RA/378.

Second, as would be expected in a dispute plainly involving "hours, wages or working conditions," the Union filed a grievance with NSTAR seeking arbitration under the arbitration provision of the CBA—claiming, *inter alia*, that NSTAR's conduct violated the Massachusetts Wage Act and the Massachusetts Overtime Act. RA/386.

Third, after a contemporaneously pending labor-arbitration decision denying a sister union's virtually identical grievance, the Union tried a different tack, filing a lawsuit in the Union's name on behalf of the affected employees in Superior Court, once again

claiming violations of the Wage Act and Overtime Act. RA/388. The court dismissed the lawsuit because the Union had no standing to bring such a case. RA/401.

Fourth, the Union, undeterred, devised yet another strategy to avoid the adverse labor arbitration decision: *this* lawsuit. Nominally individual plaintiffs—who are in fact all current or former Union members active in management of the Union, acting on behalf of a putative class entirely congruent with the Union—once again demand that their collective-bargaining dispute over wages and hours be heard and decided by a Massachusetts state court.

The Superior Court's denial of NSTAR's motion to compel arbitration should be reversed. NSTAR seeks only what the Union, on behalf of Plaintiffs, agreed to *and actually commenced* long ago: arbitration of this routine, and plainly arbitrable, labor dispute.

STATEMENT OF THE CASE

This is an interlocutory appeal from the Superior Court's denial of NSTAR's motion to compel arbitration under G. L. c. 150C, § 2.[1]

[1] The parties also argued, and the Court addressed, whether the equivalent provisions of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and the Massachusetts Arbitration Act, G. L. c. 251, § 1, *et seq.*, would require arbitration. RA/539.

Chapter 150C requires arbitration of labor disputes wherever the dispute is "covered by the provision for arbitration" in a collective-bargaining agreement. G. L. c. 150C, §2 (a); see also G. L. c. 150C, § 1 (declaring that an arbitration provision in a collective-bargaining agreement applying to matters "including but not restricted to any controversy dealing with rates of pay, wages, hours or other terms and conditions of employment of any employee or employees" shall be valid).

In their Superior Court complaint (as noted, the fourth proceeding concerning this labor dispute), the individual Plaintiffs allege, on behalf of a putative class, that NSTAR violated the Wage Act (G. L. c. 149, §§ 148 & 150) and the Overtime Act (G. L. c. 151, §§ 1A & 1B) in connection with a change that NSTAR made to workers' schedules. RA/015.

NSTAR removed this latest case to federal court after limited discovery to establish federal jurisdiction under § 301 of the Labor Management Relations Act, 29 U.S.C. § 301 ("LMRA"), *Hamel v. Western Mass. Elec. Co.*, No. CV 22-30097-MGM, 2023 WL 12051503 at *1 (D. Mass. Aug. 4, 2023). NSTAR moved for summary judgment on the grounds of complete preemption under the LMRA.

Id. Plaintiffs opposed that motion and moved to remand to state court. *Id*. The federal court granted Plaintiffs' motion to remand and, in so doing, denied the motion for summary judgment as moot. *Id.*[2]

After the case was remanded to the Superior Court, NSTAR moved to compel arbitration. RA/150. The Superior Court judge denied that motion on May 6, 2024, based on two legally erroneous determinations. *First*, the court ruled that the CBA does not cover "disputes by individual employees against [NSTAR]," even though that is the clear purpose of the CBA. RA/537. *Second*, the Superior Court conflated principles of federal preemption with what was actually at issue in the motion to compel arbitration, namely the underlying arbitrability of the dispute. RA/540 (applying federal-preemption principles to hold Plaintiffs' claims not "entangled with CBA terms")].[3]

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[2] NSTAR disagrees with and reserves all right to challenge the federal court's decision allowing Plaintiffs' motion to remand at the appropriate time. This interlocutory appeal is limited to the Superior Court's order denying NSTAR's motion to compel arbitration.

[3] In addition to conflating preemption with arbitrability, the Superior Court incorrectly presumed that the question of whether the LMRA substantively preempts Plaintiffs' claims had been resolved. But neither the federal court nor the Superior Court has weighed in on the validity of NSTAR's affirmative defense of LMRA preemption with the benefit of a fulsome record. *See* RA/040.

NSTAR timely noticed this interlocutory appeal under G. L. c. 150C, § 16, and Mass. R. App. P. 3.[4] RA/542.

STATEMENT OF FACTS

I. The Parties enter into the CBA.

NSTAR Electric Company ("NSTAR") is a utility company providing electric, gas, and water service in Massachusetts, Connecticut, and New Hampshire. NSTAR advertises and does business as "Eversource Energy."[5] NSTAR, through its predecessor Western Massachusetts Electric Company ("WMEC"), entered into a collective-bargaining agreement with the International Brotherhood of Electrical Workers Union ("IBEW"), Local 455 (the "Union"), effective from October 1, 2016, until October 1, 2020 (the "CBA"). RA/193.

[4] As the docket in this case reflects, the appeal was stayed as the Parties made attempts over several months to resolve their dispute through mediation.

[5] In their Complaint below, Plaintiffs correctly identified that d/b/a, but named the wrong defendant: WMEC, the nominal defendant in this case, merged with NSTAR at the end of 2017, several years before the instant Complaint was filed. RA/160 n. 1-2; *Hamel*, 2023 WL 12051503, at *1. The Superior Court, in its opinion below, referred to NSTAR by its d/b/a, "Eversource."

The CBA governs all aspects of the terms and conditions of employment, including wages, hours of work, and premium pay. RA/193. The CBA recognizes the Union "as sole bargaining agent for the employees with regard to wages, hours of employment, or other conditions of employment." RA/196. Accordingly, the CBA throughout imposes requirements on individual employees, on NSTAR, and on the Union. See, e.g., RA/197 § IV(b) (each employee agrees not to engage in any strike, stoppage, or work slowdown); RA/198 § IV(e) (Union agrees on behalf of itself and employees not to interfere with NSTAR in, *inter alia*, assignment of work).

One of the obligations imposed by the CBA on individual employees is the requirement, common in collective-bargaining agreements, that labor disputes be submitted to arbitration. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960) ("A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957) ("Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike.").

Specifically, the CBA requires arbitration of "any difference, dispute or grievance . . . regarding hours, wages, or working conditions or the interpretation or application of any of the provisions of the [CBA]." See RA/233 § XVI(b). The procedure is initiated when "the *aggrieved employee or employees* . . . present the grievance verbally to the foreman or immediate supervisor," with the Union given a right to be notified and be present at any meeting where the grievance is "adjusted." *Id*. (emphasis added). "[T]he arbitrator's decision or award shall be in writing and shall be final and binding on all parties." See RA/235 § XVI(b).

The individual Plaintiffs are all current or former NSTAR employees and members of the Union. Plaintiff James Choquette belonged to the Union and has since retired, while Plaintiffs Daniel Hamel, Todd Neumann, William Freeman, and James O'Connell, are Union members who remain deeply involved in the Union's management and who are knowledgeable about the text of the CBA. See RA/356, 16:5-17:22, 20:22-21:2, 25:16-18; RA/269, 10:22, 15:19-21, 16:8-10. In fact, Hamel signed the CBA in his capacity as Union President. RA/249.

The class that these Plaintiffs seek to represent is entirely coextensive with the Union: Union membership has at all relevant times been a condition of employment, RA/196, and the putative class consists of all individuals who are or have been previously employed by NSTAR under the working rules of which Plaintiffs now complain. RA/018.

II. The Union complains about a schedule change.

Those complaints began with a change that NSTAR made affecting employees' daily schedules. See RA/017 ¶¶ 13 & 14.[6] Before then, employees generally worked "straight eights," that is, eight-hour shifts, each with a 20-minute paid meal break. *Id*. ¶ 13. After the adjustment, employees were required to work eight and one-half hour shifts, with a half-hour unpaid meal break. *Id*. ¶ 14.

Plaintiffs complain, in essence, that they were required to work without pay during those half-hour periods. According to Plaintiffs, NSTAR "failed and refused to relieve the members of the Plaintiff Class of work duties during the one-half hour meal break." *Id.* ¶ 15. For example, Plaintiffs claim that during the half-hour periods,

[6] For purposes of this appeal, unless stated otherwise, NSTAR assumes the truth of the allegations in the Complaint.

NSTAR required workers to safeguard NSTAR's vehicles and equipment, and to remain in radio and company phone contact with supervisors and coworkers. *Id.* ¶ 16.

This was not the first time NSTAR employees represented by the IBEW raised such complaints. NSTAR made the same change for employees represented by another IBEW local union in Connecticut more than two years before the change at issue here. RA/372, 57:2-19. There, the union filed a grievance and proceeded to arbitration pursuant to the collective-bargaining agreement, which is materially identical to the current CBA. RA/361, 97:9-22; RA/372, 57:2-19. The labor arbitrator denied the grievance, meaning the IBEW lost.

III. The Union jumps from approach to approach to challenge the schedule change.

This suit is the Union's fourth attempt to resolve this labor dispute on behalf of its Union membership.

First, on February 2, 2018, before the scheduling change was implemented, the Union filed an unfair labor practice charge with the NLRB. RA/378. In the NLRB charge, the Union complained that NSTAR's schedule changes constituted "unilateral changes in terms and conditions of employment" affecting "hours/conditions." RA/379.

Second, two weeks later, Brian Kenney, the Union's former Business Manager, signing as "Union Representative" and acting on behalf of the entire Union, initiated a grievance regarding the schedule change by submitting a "Grievance Form." RA/386. Consistent with the CBA's arbitration provision, which contemplated that the "aggrieved employee or employees" would initiate such a grievance, that form included a signature line for the "Aggrieved Employee," though Mr. Kenney left that line blank. *Id.* The form asserted that NSTAR had "violated the Collective Bargaining Agreement, Massachusetts Wage Act, Massachusetts Overtime Law," along with any other "pertinent Practices and Policies" by "not compensating Employees for compensable work during meal breaks." *Id.* The form requested a settlement described as: "Make employees whole for all lost wages and profits." *Id.* This grievance has never been withdrawn. RA/361, 98:8-11.

Third, after their sister union lost a virtually identical arbitration grievance in Connecticut, the Union pivoted to a new forum—state court ("First State Action").[7] The Connecticut arbitration loss was "a

[7] Although Mr. Kenney denied the loss motivated a subsequent venue change, it is undisputed that the "unpopular decision" on Local 457's grievance (Mr. Kenney's description), which came out in April

big deal," according to Plaintiff Hamel, and was a "big topic of conversation" among all Union members. RA/372, 57:2-58:14. The First State Action raised precisely the same issues as the unfair labor practice charge and the still-pending grievance. Just like the grievance, the First State Action asserted claims based on the scheduling change and arising under the Wage Act and Overtime Act. *Compare* First State Action (RA/388), with RA/378 (unfair labor practice charge) and RA/386 (grievance).

NSTAR removed the First State Action to the federal district court on the grounds of complete preemption. Although the federal court determined that complete preemption did not apply, and therefore no federal jurisdiction existed, the case was later dismissed by the state court because the Union lacked standing. See *Hamel v. Western Mass. Elec. Co.*, 2023 WL 12051503 at **2-4 (D. Mass. Aug. 4, 2023) (describing procedural history of First State Action); Remand Decision, *Loc. 455, Int'l Bhd. of Elec. Workers, AFLCIO v. W. Mass. Elec. Co.*, No. 18-30188-MGM (D. Mass. Sept. 16, 2019) (RA/392);

2018, was followed only a few months later by the Union choosing what he called a "different avenue"—the First State Action filed in September 2018. RA/361, 97:6-99:12; RA/388.

Decision on Def.'s Mot. to Dismiss, *Loc. 455, Int'l Bhd. of Elec. Workers, AFL-CIO v. W. Mass. Elec. Co.*, Hampden Super. Court, No. 1879-CV-00678 (May 11, 2020), RA/403-408.

Fourth, the Plaintiffs filed this action (the "Second State Action") "mirroring the union's claims in" the First State Action and seeking to resolve the same underlying labor dispute over wages and hours. RA/536. Any differences between this Second State Action, the First State Action, the grievance, and the unfair labor practice charge remain entirely nominal: the persons named as individual Plaintiffs here are all current or former Union members deeply involved in Union management, and with knowledge of the CBA (and the prior labor arbitration decision involving virtually identical claims establishing that NSTAR's practices complied with the law). See RA/356, 16:5-17:22, 20:22-21:2, 25:16-18; RA/369, 10:22, 15:19-21, 16:8-10. At the same time, the class they seek to represent is, as noted above, coextensive with Union membership. Meanwhile, the complaint in this Second State Action makes precisely the same claims, based on the same alleged facts and the same underlying statutes, as did the complaint in the First State Action, and as did the grievance before it.

IV. The Superior Court denies arbitration.

NSTAR promptly moved to compel arbitration pursuant to G. L. c. 150C, § 2 ("Failure to arbitrate; application to superior court, procedure"). See RA/150; RA/153. NSTAR argued that, in addition to the LMRA's "strong federal policy in favor of" protecting arbitration under collective-bargaining agreements, RA/167. (citing, *inter alia*, *Cavallaro v. UMass Mem'l Healthcare, Inc.*, 678 F.3d 1, 5 (1st Cir. 2012)), arbitration should be compelled under G. L. c. 150C, § 2 and under the correlative provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (the "FAA"). RA/170-175. NSTAR argued that the dispute was plainly within the coverage of the CBA's arbitration provision, as the Union had long ago conceded when it filed the grievance, RA/170, and the Union's continued efforts to avoid arbitration since that time, via multiple state court actions, were simply improper forum-shopping. RA/161.

In response, Plaintiffs argued, *inter alia*, that arbitration could not be required as a matter of ordinary contract law. Plaintiffs maintained that as individuals, they had simply "never agreed to arbitrate anything," given that they were "*not parties* to the CBA,"

which was instead signed by NSTAR and by the Union. RA/417-418.(emphasis in original).

Plaintiffs also argued that arbitration of Plaintiffs' individual statutory claims under the CBA could not be compelled in any event because, they said, the CBA did not "clearly and unmistakably" waive the statutory forum. RA/418; citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 260 (2009).] Plaintiffs called *Pyett* the "only case that matters." RA/418.

The Superior Court judge declined to compel arbitration. "[A]s an initial matter," the court agreed with Plaintiffs on their contract-law argument, holding that the CBA's arbitration provision "covers disputes between [NSTAR] and the union, but not disputes by individual employees against [NSTAR], as is the case here." RA/537. Further, relying on principles of federal preemption under the LMRA, the court ruled that the CBA's arbitration provision did not cover the dispute because resolution of the dispute would "not require an analysis or interpretation of the CBA terms," the sort of "entanglement" between claim and CBA that is required for LMRA § 301 preemption; he leapt from this to the conclusion that the subject matter of the parties' dispute was not even *covered by* the CBA's

arbitration provision. RA/538-540. As the court put it, "*[b]ecause the plaintiffs' Wage Act and Overtime Claims are not entangled with CBA terms*, the arbitration provision in the CBA does not apply. . . ." RA/540. (emphasis added). In light of its rulings, the court determined it need not reach the parties' arguments under *Pyett*. *Id.*

STANDARD OF REVIEW

Review is de novo. Because the trial court "summarily determined" NSTAR's motion to compel arbitration, G. L. c. 150C, § 2, on appeal, NSTAR's motion to compel arbitration is treated like a motion for summary judgment. See *Miller v. Cotter*, 448 Mass. 671, 676 (2007). Moreover, federal law requires that, in light of the strong national policy favoring arbitration, any "[d]oubts" as to whether a dispute must be arbitrated pursuant to a CBA "should be resolved in favor of coverage" and submitted to arbitration. *Warrior & Gulf*, 363 U.S. at 583; see also *id.* at 577-79 (explaining the rationale underlying this legal principle).

SUMMARY OF ARGUMENT

This case should be sent back to the forum originally chosen by the Union while acting as the exclusive collective bargaining

representative of the Plaintiffs: arbitration. The path to that result is straightforward.

First, contrary to the ruling of the Superior Court, the individual Plaintiffs here—just like the Union they help manage— are governed by the CBA and bound by its arbitration provision. *Infra* at 25-28.

Second, the language of the CBA plainly covers the subject matter of this dispute, as the Union long ago conceded. *Infra* at 28-31.

Third, the test for federal *preemption*, relied upon by the trial court in ruling that Plaintiffs' claims are not arbitrable, does not govern. *Infra* at 31-32.

Fourth, and finally, the "waiver" rule announced in *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79-80 (1998), and applied in *Pyett*, does not give Plaintiffs the right to ignore the CBA's arbitration provision. *Wright, Pyett*, and their progeny, are inapposite, given the critical fact that here, the Plaintiffs' Union previously commenced arbitration of this precise dispute on Plaintiffs' behalf. *Infra* at 32-39.

ARGUMENT

I. The Plaintiffs are bound by the CBA, including the arbitration provision.

The arbitration provision binds the Plaintiffs because the Union bargained for that provision as part of the CBA.

Of course, not all of the Plaintiffs signed the CBA, and they are not identified by name as the "parties" to that CBA. It is also true that a contract, including a contract to arbitrate, generally binds only the parties to that contract. See, e.g., *Constantino v. Frechette*, 73 Mass. App. Ct. 352, 354-59 (2008). But it does not follow that, as the trial court held here, the CBA's arbitration provision "covers disputes between [NSTAR] and the union, but not disputes by individual employees against [NSTAR]. . . ." RA/537. Plaintiffs cannot escape the CBA's arbitration mandate on the basis of general contract law. Not only does any such argument fail, it also ignores that the CBA is "more than a contract." As the Supreme Court explained in 1960 in one of its seminal traditional labor cases:

> The collective bargaining agreement states the rights and duties of the parties. ***It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship.*** It calls into being a new common law—the common law of a particular industry or of a particular plant.

Warrior & Gulf, 363 U.S. at 578-79 (internal citations and footnotes omitted; emphasis added).

On the contrary, the Union's agreement to arbitrate of course binds the Plaintiffs with respect to matters covered by that agreement because the Union contracted for that arbitration procedure on their behalf, at their direction, and as their exclusive collective bargaining representative. 29 U.S.C. § 159(a) ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .).

Specifically, the Plaintiffs "designated the Union as their 'exclusive representativ[e] . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.'" *Pyett*, 556 U.S. at 255 (quoting 29 U.S.C. § 159(a)); RA/196 (explaining Union is "sole bargaining agent for the employees with regard to wages, hours of employment, or other conditions of employment."). And, just "[a]s in any contractual negotiation, a union may agree to the inclusion of an arbitration

provision in a collective-bargaining agreement in return for other concessions from the employer. Courts generally may not interfere in this bargained-for exchange." *Pyett*, 556 U.S. at 257. Accordingly, there is simply *no distinction* "between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *Id.* at 258.

The CBA here actually recognizes and embodies this straightforward rule, in that it anticipates that the arbitration procedure will be commenced by one or more aggrieved *individual* employees, rather than by the signatory Union itself. RA/233 § XVI(b).

The trial court recognized this principle, but failed to give it effect. See RA/537 ("The CBA's grievance and arbitration procedure requires that *the aggrieved employees* first submit a grievance.") (emphasis added). As noted above, the form used to present a grievance for resolution therefore makes provision first for the signature of the employee submitting the dispute for resolution, and then for the Union as the *representative* of that individual employee, rather than as a formal party to the arbitration. RA/361, 98:8-99:12.

II. The arbitration provision covers this dispute

This dispute is plainly covered by the language of the arbitration agreement.

A. The language of the CBA shows that this dispute is arbitrable.

The CBA provides that the arbitration procedures binding the Plaintiffs "*shall* be followed" should "any difference, dispute, or grievance arise between the Employer and the Union *regarding hours, wages, or working conditions or the interpretation of any of the provisions of the agreement*" during the term of the CBA. RA/233. (emphasis added).

A dispute over whether payment must be made for work allegedly required during scheduled half-hour break periods is plainly a "difference, dispute, or grievance" that has arisen "regarding hours, wages, or working conditions." Plaintiffs here demand wages for hours worked, while NSTAR disputes that they worked during those hours or that they are owed any wages. Plaintiffs claim that their working conditions (specifically, a work schedule purportedly requiring unpaid work during breaks) are illegal; NSTAR disputes that allegation.

B. The Union admitted through conduct and its own past practices that this dispute is arbitrable.

Plaintiffs' Union—their elected, exclusive representative for employment matters—agreed that this dispute is covered by the CBA's arbitration procedures.

Years ago, on behalf of Plaintiffs and other Union members, the Union invoked the CBA's arbitration procedures to decide *exactly* the same dispute that is now before this Court. RA/386. Eliminating any doubt that statutory claims under the Wage Act or Overtime Act "count" as disputes over "hours, wages, or working conditions" covered by the arbitration agreement, the Union actually *invoked those very statutes by name* when it submitted that grievance. *Id.*

Curiously, the Union did not bother to retract or dismiss that grievance before arguing now that this dispute was somehow *not* covered by the CBA's arbitration provision. Instead, the Union merely walked away from that arbitration procedure (it "never did anything with it"), such that (in the words of the Union's formal representative, Mr. Kenney) the grievance, in the Union's eyes at least, somehow withered away. RA/361, 98:8-24 ("It means—I can't say it enough—it died on the vine."). That colorful description is wishful thinking, but the critical point is that the Union's admission through conduct and

discussion of its past practices remains: this dispute is covered by the arbitration provision. RA/361, 98:8-99:12 (further explaining that grievance Union filed was consistent with its past practice); *Providence Journal Co. v. Providence Newspaper Guild*, 271 F.3d 16, 21 (1st Cir. 2001) (explaining that past practice of parties in collective bargaining relationship can be both "interpretive device" and "relevant evidence").

C. Public policy compels arbitration.

Any doubt that this run-of-the-mill wage dispute about work hours is covered by the arbitration provision must be resolved in favor of arbitration.

Given the strong national policy favoring arbitration, any "[d]oubts" as to whether a dispute must be arbitrated pursuant to a CBA "should be resolved in favor of coverage." See *Warrior & Gulf*, 363 U.S. at 578; *Johnson Controls Sec. Sols., LLC v. Int'l Bhd. of Elec. Workers, Loc. 103*, 24 F.4th 87, 90–91 (1st Cir. 2022). Thus, in the absence of any express provision excluding a given claim from the CBA's grievance and arbitration provision, "***only the most forceful evidence of a purpose to exclude*** the claim from arbitration can prevail." *Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1, 8

(1st Cir. 2014), quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (emphasis added).

III. The Superior Court erred by conflating preemption with arbitrability.

The court below conflated two distinct issues: federal preemption and arbitrability.

The Superior Court applied principles of federal preemption under the LMRA. Under the LMRA, whether a dispute is "preempted" (and therefore the case must be dismissed) depends in part on whether the dispute requires the CBA to be "interpreted" or merely "consulted" (or, said differently, whether Plaintiffs' claims are "entangled" with interpretation of the CBA). See RA/540 n. 6. The court ruled that, in its view, the dispute did not require "interpretation" of the CBA, therefore was not arbitrable. Thus, the court wrote:

> *Because the plaintiffs' Wage Act and Overtime Act claims are not entangled with CBA terms*, the arbitration provision in the CBA does not apply. . . .

RA/540 (emphasis added). The court's conclusion does not follow.

The parties agreed to arbitrate more than just disputes over "interpretation of any of the provisions of" the CBA. RA/233 § XVI. The CBA's arbitration provision includes a disjunctive "or" separating (a) disputes over the interpretation of the CBA from (b) *other*

arbitrable disputes that *may or may not* involve interpretation of the CBA. Specifically, the arbitration procedure must be followed should "any difference, dispute, or grievance arise between the Employer and the Union regarding hours, wages, or working conditions ***or*** the interpretation of any of the provisions of the agreement" during the term of the CBA. RA/233 § XVI. (emphasis added).

As NSTAR argued below, this lawsuit involves both (i) a dispute over hours, wages, and working conditions *and* (ii) disputes over the interpretation of the CBA. For this reason, even if this suit is not a dispute over interpretation of the CBA (and it is), it is *also* a dispute over hours, wages, and working conditions. That means this case is arbitrable. The trial court's decision to the contrary ignored the clear terms of the CBA's arbitration provision and was therefore incorrect as a matter of law.

IV. Plaintiffs identify no reason to ignore the arbitration provision.

Plaintiffs identify no reason to disregard the terms of the arbitration provision and the strong federal policy in favor of arbitration.

In their opposition to NSTAR's motion to compel, Plaintiffs cited *Pyett*, arguing that it was "the only case that matters." RA/418.

In truth, Plaintiffs rely principally upon an important predecessor to *Pyett*, namely *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79-80 (1998).

Wright held that, in order for a CBA to waive the rights of an individual union member to assert a federal antidiscrimination claim against the employer in court, the arbitration provision of the CBA would need to include a "clear and unmistakable" waiver of the individuals' right to a judicial forum. *Id.* The *Wright* court did not, however, decide whether such a waiver, if sufficiently clear, would be *enforceable*. *Id.* at 397. That was the issue subsequently decided in *Pyett*, where the Court held that an express waiver in the CBA at issue did indeed prohibit litigation of federal antidiscrimination claims (in that case, ADEA claims) by individual union members. *Pyett*, 556 U.S. at 274.

Pyett has since been extended by lower Courts to individual claims brought by union members under state statutes as well as federal ones, see, e.g., *McLean v. Garage Mgmt. Corp.*, No. 10 CIV. 3950 DLC, 2011 WL 1143003, at *5 (S.D.N.Y. Mar. 29, 2011), with the First Circuit noting that what is required to meet the *Pyett* standard is something like "specific enumeration of the statutory claims" that

must be arbitrated. *Cavallaro v. UMass Mem'l Healthcare, Inc*., 678 F.3d 1, 7, n.7 (1st Cir. 2012) (citation omitted). But neither *Wright, Pyett*, or their progeny require litigation here rather than arbitration.

As a threshold matter, it should be noted that Plaintiffs' citation to *Wright* and *Pyett* demonstrates the fundamental error of their argument (and the trial court's conclusion) that Plaintiffs are somehow not contractual "parties" to the CBA, and are thus not bound by the CBA at all as a matter of contract law. If that were true, there would be no need for the doctrines announced in *Wright* and *Pyett*—no court would ever need to decide whether a waiver in a CBA's arbitration provision was sufficiently "clear and unmistakable," and thus binding on an individual union member, since the arbitration procedure would not be binding on individual "non-parties" in any event. One clear lesson of *Wright*, *Pyett*, and their progeny is that individual union members *are* generally bound by the terms of CBAs; the various cases then decide whether the (binding) arbitration provisions in those CBAs *nevertheless* permit union members to pursue their individual statutory claims in court.

Neither *Wright* nor *Pyett* applies because neither addressed the circumstances of *this* case.

In *Wright*, the individual plaintiff longshoreman believed he had been discriminated against under the Americans with Disabilities Act ("ADA") and he therefore "contacted the [u]nion to ask how he could get back to work." 525 U.S. at 74. *Instead of filing a grievance*, the union "told him to obtain counsel and file a claim under the ADA," which he did, filing a lawsuit in federal court. *Id.* The U.S. Supreme Court searched the relevant CBA's language to determine whether the purported requirement to arbitrate the dispute was "particularly clear." *Id.* at 79-80. Finding that the arbitration provision was not sufficiently "clear and unmistakable" to waive the longshoreman's right to file an individual ADA claim in federal court, the Supreme Court declined to compel arbitration. *Id.* at 80-82.

In *Pyett*, individual union members sought to pursue age discrimination claims in federal court. 556 U.S. at 254. In contrast to *Wright*, in *Pyett*, the union had previously initiated arbitration of those age discrimination claims, though it had later withdrawn those grievances from arbitration. *Id.* at 253. But the effect of that union conduct on the plaintiffs' individual claims was never an issue in *Pyett*, since the arbitration provision of the applicable CBA *was*

sufficiently clear and unmistakable to require arbitration of the individuals' age-discrimination claims. *Id.* at 274.

This case thus presents a scenario importantly different from both *Wright* and *Pyett*. Here, as in *Wright*, the arbitration provision lacks specific enumeration of individual statutory claims that must be arbitrated. But, quite unlike both *Wright* and *Pyett*, the conduct of the Union with respect to those claims is not only relevant to determining their arbitrability, it is decisive.

Here there is *no need* to search the CBA's arbitration provision for a "clear and unmistakable waiver" of a judicial forum with respect to Plaintiffs' claims, because something indisputably clear and unmistakable has already transpired: the Union—the Plaintiffs' designated, exclusive representative for employment matters—has already *specifically enumerated, and then pursued arbitration of,* Plaintiffs' statutory claims.

Among other things, the Union filed a grievance asserting the same exact claims at issue in the instant matter, RA/386, and, to try to later circumvent the CBA, pursued a different strategy only after a labor arbitrator in a virtually identical case rejected a sister union's grievance. RA/361, 97:9-22; RA/372, 57:2-19.

Pyett and its progeny tell us that a union can, with the stroke of a pen, commit its members to arbitrate any number of statutory claims, so long as there is fair warning to union members: the commitment must be clear and unmistakable, with something like specific enumeration of the statutory claims that must be arbitrated. Unions have "wide authority to bind union members to terms and conditions of employment, including the negotiation of contract provisions relating to individual members." *Vattiat v. U.S. W. Commc'ns, Inc.*, 214 F. Supp. 2d 1091, 1102 (D. Or. 2001). This includes the authority to submit disagreements to arbitration so as to bind individual union members. See *Johnson v. United Food & Com. Workers, Int'l Union Loc. No. 23*, 828 F.2d 961, 965 (3d Cir. 1987).

The moment Mr. Kenney signed the grievance form raising the claims now at issue in this lawsuit under the dispute-resolution provisions of the CBA, the die was just as surely cast in favor of arbitration. See *BourgeoisWhite, LLP v. Sterling Lion, LLC*, 91 Mass. App. Ct. 114, 119 (2017) ("waiver is the intentional relinquishment of a known right" and "may be express or inferred from a party's conduct and the surrounding circumstances") (citations and internal quotation marks omitted). And this Court should avoid interfering

with that arbitration process, given the strong federal policy in favor of arbitration—substantive federal law which, by virtue of the Supremacy Clause, is applicable in state as well as federal courts. See *NCR Corp. v. CBS Liquor Control, Inc.*, 874 F. Supp. 168, 171 (S.D. Ohio 1993), *modified on reconsideration*, No. C-3-01-031, 1993 WL 767119 (S.D. Ohio Dec. 24, 1993), *and aff'd sub nom. NCR Corp. v. Sac-Co.*, 43 F.3d 1076 (6th Cir. 1995).

To hold otherwise would be to encourage exactly the strategic behavior on display here, in this fourth proceeding over the same 2018 labor dispute. The Union, no doubt anticipating a loss in its chosen, bargained-for, and agreed-upon forum (arbitration), converted that *very same dispute, already sent to labor arbitration by the Union*, into a state lawsuit by "individuals" (Union management personnel) on behalf of a putative "class" (the rest of the Union) in state court. To allow such maneuvering would result in absurd consequences—consequences that the Supreme Court has warned against for decades. See, e.g., *Warrior & Gulf*, 363 U.S. at 578-79

Importantly, conservation of court resources, and the timely administration of justice, are not the only crucial principles at stake in this battle over arbitrability. Because "arbitration of labor disputes is

part and parcel of the collective bargaining process itself," and because a union's attempt to sidestep the grievance procedure undermines "the very heart of the system of industrial self-government," this Court should compel exactly what the Plaintiffs bargained for and commenced: arbitration of their labor dispute. *Id.* at 581.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the trial court, and remand with instructions that the trial court (a) stay these proceedings and (b) compel arbitration of the parties' dispute pursuant to the terms of the CBA.

Respectfully submitted,

NSTAR ELECTRIC COMPANY (d/b/a Eversource Energy),

By their attorneys,

/s/ Christopher M. Pardo

Christopher M. Pardo, BBO #674674
Nicholas D. Stellakis, BBO #644981
Hunton Andrews Kurth LLP
60 State Street, Suite 2400
Boston, Massachusetts 02109
Tel: (617) 648-2800
cpardo@hunton.com
nstellakis@hunton.com

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF COMPLIANCE WITH RULE 16(k)

Pursuant to Mass. R. App. P. 16(k), I hereby certify that the foregoing document complies with all court rules, including but not limited to Mass R. App. P. 16, 18, 20, and 21. I further certify that this document complies with M.A.C. Rule 20 and Mass. R. App. P. 20 because it was produced using Microsoft Word 365 in 14-point proportional font Times New Roman and contains 5,770 total non-excluded words as counted using the word count feature of Microsoft Word 365.

/s/ Christopher M. Pardo
Christopher M. Pardo, BBO #674674

CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. P. 13(e), I certify that on April 2, 2025, I served this brief and the corresponding Record Appendix by email and Electronic Filing System upon:

Paul F. Kelly, Esq.
James A.W. Shaw, Esq.
Jocelyn B. Jones, Esq.
Ryan M. Quinn, Esq.
SEGAL ROITMAN, LLP
33 Harrison Ave., 7th Floor
Boston, MA 02111
(617) 742-0208
pkelly@segalroitman.com
jshaw@segalroitman.com
jjones@segalroitman.com
rquinn@segalroitman.com

/s/ Christopher M. Pardo
Christopher M. Pardo, BBO #674674

ADDENDUM

ADDENDUM TABLE OF CONTENTS

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION NO. 2179CV00001

DANIEL HAMEL & others[1]

vs.

WESTERN MASSACHUSETTS ELECTRIC COMPANY
d/b/a EVERSOURCE ENERGY

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO COMPEL ARBITRATION

I. Introduction

The plaintiffs, who are five employees of the defendant, Western Massachusetts Electric Company, d/b/a Eversource Energy ("Eversource"),[2] filed this action on behalf of themselves and similarly situated employees, alleging that Eversource has failed to pay wages for the time they have worked during lunch breaks, in violation of the Massachusetts Wage Act, G.L. c. 149, §§ 148 & 150 (Count 1), and has failed to pay them for overtime, in violation of the Overtime Act, G.L. c. 151, §§ 1A & 1B (Count 2). Eversource now moves pursuant to G.L. c. 150C, §2(a), to compel arbitration pursuant to the collective bargaining agreement ("CBA"). After a hearing and consideration of the record, the court *denies* Eversource's motion to compel arbitration.

II. Procedural History of the Case and Related Litigation

A. Wage Act and Overtime Act Claims by Union in 2018 Action

In 2018, the union representing Eversource employees filed a lawsuit complaining that since early 2018, Eversource has violated the Wage Act and the Overtime Act by not compensating employees for working during their lunch breaks. See *Local 455, Int'l Brotherhood of Electrical*

[1]Todd Neumann, William Freeman, James O'Connell, and James Choquette.
[2]Although the defendant has clarified that effective December 31, 2017, Western Massachusetts Electric Company merged with NSTAR Electric Company, the court refers to the defendant as it is named in the complaint.

Workers, AFL-CIO v. *Western Mass. Elec. Co. d/b/a Eversource Energy,* No. 1879CV00678. Eversource removed that case to the Federal District Court (Case 3:18-cv-30188-MGM), where Eversource argued that the Federal court had jurisdiction, despite the fact that the complaint consisted of only two State statutory claims. Eversource asserted that the claims were preempted by Federal law, § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, which confers Federal jurisdiction over suits for violations of CBAs in industries affecting commerce. See § 301 ("Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . .").

On September 16, 2019, Federal District Court Judge Mark G. Mastroianni allowed the plaintiff union's motion to remand the case to the Superior Court. He rejected Eversource's preemption argument because the resolution of neither claim required an interpretation of the CBA, since the union plaintiff only sought pay under State law, not under any CBA provisions.

Upon remand to the Superior Court, Eversource moved to dismiss that action on the grounds that (1) the union lacked standing, and (2) the claims were preempted by § 301 of the LMRA. On May 8, 2020, the court (Mulqueen, J.) held that individual employees would have standing to sue in their own right for the alleged Wage Act and Overtime Act violations, but that the union lacked standing. On that basis, Judge Mulqueen allowed Eversource's motion to dismiss, but also addressed and rejected Eversource's second argument, that the State law claims were preempted by § 301 of the LMRA. Judge Mulqueen noted that § 301 "cannot be read broadly to preempt nonnegotiable rights conferred on individual employees as a matter of State law." *Livadas* v. *Bradshaw,* 512 U.S. 107, 122-123 (1994). Moreover, whether preemption applies "turns on whether [their claims assert] a nonnegotiable State law right independent of the CBA, or whether

the claims [are] 'inextricably intertwined' with [the CBA]." *Butler v. Verizon New England, Inc.*, 68 Mass. App. Ct. 317, 319 (2007). Judge Mulqueen reasoned that the § 301 preemption did not apply because: (1) the claims asserted nonnegotiable State law rights independent of the CBA; (2) the claims were not inextricably intertwined with the CBA; and (3) the CBA terms were irrelevant to the dispute apart from the need to refer to the bargained-for wage rates to ascertain damages.

B. Individual Employees Filed This Suit

In light of Judge Mulqueen's dismissal of the union's suit for lack of standing, individual employees filed this action, mirroring the union's claims in the 2018 lawsuit. On July 21, 2022, Eversource removed this case to the United States District Court, District of Massachusetts and asserted again that the Federal court had jurisdiction in accordance with § 301 of the LMRA. See *Hamel* v. *Western Mass. Elec. Co.*, Case 3:22-cv-30097-MGM p. 2 (Aug. 4, 2023, Mastroianni, J.). Judge Mastroianni again rejected Eversource's argument that the § 301 preemption applied, and explained that the Wage Act and Overtime Act claims: (1) do not involve a dispute over the CBA's terms; (2) do not require a court to interpret the CBA's terms; (3) raise purely factual questions about the parties' conduct or Eversource's motives; and (4) require no more than a bare consultation of the CBA to calculate damages. See *id.* at pp. 2-9. Consequently, Judge Mastroianni remanded this case to the Superior Court.

III. Defendant's Motion to Compel Arbitration

Back in the Superior Court, Eversource now moves under G.L. c. 150C, §2(a),[3] to compel arbitration of the plaintiffs' Wage Act and Overtime Act claims, arguing that "the preemptive effect of § 301 of the LMRA precludes parties from filing suit before exhausting the contractual

[3]General Laws c. 150C, § 2(a), provides in pertinent part that a party may file a motion in Superior Court to compel another party to an agreement to proceed to arbitration, and that the court shall direct the parties to arbitration unless the claims do not state a controversy covered by the arbitration provision in the parties' agreement.

procedures." (See Def's Mem., #18.1 at p. 9). Those contractual procedures include the arbitration provision in the CBA, which is as follows:

> "During the term of this agreement, should any difference, dispute or grievance arise between the Employer and the Union regarding hours, wages, or working conditions or the interpretation of any of the provisions of the agreement, . . . the following procedure shall be followed. . . ."[4]

The CBA's grievance and arbitration procedure requires that the aggrieved employees first submit a grievance. If the initial steps in the process do not resolve the matter, the "difference, dispute, or grievance . . . shall be referred for settlement to an impartial arbitrator . . . ."

As an initial matter, the arbitration provision covers disputes between Eversource and the union, but not disputes by individual employees against Eversource, as is the case here.

Eversource's latest § 301 preemption argument is presented at a new procedural juncture and on a record containing limited discovery. It fails. The expanded record before this court confirms that the plaintiffs' claims are independent of the CBA terms and can be decided with no more than a mere consultation of the CBA provisions.

This conclusion is not altered by any of the CBA provisions referenced by Eversource or by the discovery supplied to the court. The fact that the CBA requires Eversource to pay overtime wages to employees who work outside their regular hours of employment or over 40 hours in a week does not transform the plaintiffs' claims into ones based upon the CBA terms as opposed to the Wage Act and the Overtime Act. See *Butler*, 68 Mass. App. Ct. at 323 (even if dispute resolution under CBA and State law would require addressing the same set of facts, as long as the State law

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[4]Pursuant to the CBA, the union is the "sole bargaining agent for the employees with regard to wages, hours of employment, or other conditions of employment." The CBA provides that "An overtime rate of one and one-half times the hourly rate of a regular . . . employee will be paid to such employee for all hours of work performed by such employee (1) outside the employee's regular hours of employment or (2) beyond forty hours in any one week . . . . " (CBA pp. 8-9). Section 12 of the CBA refers to a schedule of wage rate ranges for specific classifications of employees. (CBA pp. 25-26).

claim can be resolved without interpreting CBA, the claim is independent of the CBA for purposes of §301 preemption).

Eversource next points out that the CBA establishes different wage rates depending on whether the employees work part-time, full-time, on a temporary or permanent basis, or whether they are working normally or under an on-call or call-out schedule, on holidays or Sundays, in emergencies, or in another company's facilities. (See Def's Mem. #18.1 at p. 3). From that, Eversource speculates that determining the plaintiffs' wages might require calculations of double time or other increased payments in accordance with the CBA, because the CBA: (1) "outlines multiple ways in which an employee may receive premium pay for hours that do not qualify as overtime," (2) bars duplicative and "pyramiding" of overtime wages, and (3) "potential offset is a key factor in assessing damages." (See Def's Mem. # 18.1 at p. 18).

Those wage rate variations, along with any premium pay and offsets, are irrelevant here. The plaintiffs' Wage Act and Overtime Act claims are based exclusively on wages earned during normal, full-time, weekly work schedules. (See Complaint, pars. 20, 23, and 31). The plaintiffs do not complain of any statutory violations related to working non-regular shift hours such as during emergencies or when employees have been directed to work for another company at another location. Although Eversource employees can work hours other than their normally scheduled workweeks, in this lawsuit, the plaintiffs are not asserting claims relative to double time, Sunday pay, premium pay, or for any other wage rates apart from a normal 42 1/2 scheduled workweek. (See Kenney Dep. pp. 155-159; Hamel Dep. p. 141). Nothing in the record supports an inference that the determination of liability or damages would entail calculations of offsets, premium wages, or any wage calculations apart other than wages earned during normally scheduled 42-hour workweeks. The plainitiffs' claims are not as Eversource portrays them and their resolution will

not require an analysis or interpretation of the CBA terms. Contrast *Rose v. RTBN Fed. Credit Union*, 1 F.4th 56, 59 (1st Cir. 2021) (resolution of plaintiff's claims under Massachusetts Wage Act and Overtime Act, seeking compensation for time spent travelling to branch that was not plaintiff's regular work site, required application of various CBA provisions to calculate wages).

This dispute does not fall within the scope of the parties' agreement to arbitrate. It follows that Eversource has not shown that arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, *et seq.*, or the Massachusetts Arbitration Act (MAA), G.L. c. 251, §§ 1, *et seq.*, is the proper course here. The plaintiffs do not allege that Eversource violated any negotiated CBA terms. (See Complaint, Kenney Dep. pp. 155-159, and Hamel Dep. p. 141). The plaintiffs' Wage Act and Overtime Act claims do not otherwise constitute a dispute regarding negotiable terms of hours, wages, or working conditions or the interpretation of any of the provisions of the agreement. Instead, the claims here are based on the plaintiffs' nonnegotiable rights under Massachusetts statutory law. See *Butler*, 68 Mass. App. Ct. at 322-323 (§ 301 does not preempt employees' nonnegotiable rights conferred in State law; in deciding whether State cause of action is preempted, court assesses whether legal character of claim is independent of rights under CBA, not whether grievance from same facts could be pursued). Contrast *Cavallaro v. UMass. Memorial Healthcare, Inc.*, 678 F.3d 1, 7-8 (1st Cir. 2012) (resolution of Wage Act claim alleging, *inter alia*, that employees were not compensated for attending training sessions, required analysis of whether employees complied with obligation set forth in CBA of submitting timely requests to attend training; therefore, statutory claim was preempted by entanglement with CBA interpretation). In sum, the CBA's arbitration provision is not susceptible of an interpretation that covers the plaintiffs' claims, and, accordingly, Eversource's motion to compel arbitration is denied. See *Local 285,*

Service Employees Int'l Union, AFL-CIO v. Nonotuck Resource Assocs., Inc., 64 F.3d 735, 738 (1st Cir. 1995).[5]

IV. The Parties' Debate About Whether the CBA had to Contain a Clear Waiver of the Plaintiffs' Private Right of Action in Order for the Court to Compel Arbitration

The Wage Act and the Overtime Act both give employees asserting violations of those laws a private right of action in the court system. See G.L. c. 149, § 150; G.L. c. 151, § 1B. The parties dispute whether, notwithstanding their private rights of action, the plaintiffs can be compelled to resolve their claims through arbitration even if the CBA does not clearly and unmistakably waive employees' right to seek a remedy in court. This debate is immaterial here. Because the plaintiffs' Wage Act and Overtime Act claims are not entangled with CBA terms, the arbitration provision in the CBA does not apply, and there is no need for this court to consider whether an express waiver of State statutory claims would be required in order to compel the parties to resolve claims through arbitration.[6]

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[5]This conclusion obviates the need to address Eversource's argument that it did not waive its purported right to compel arbitration by not moving to compel arbitration years earlier.

[6]The plaintiffs maintain that compelled arbitration is impermissible unless the CBA clearly and expressly waives the plaintiffs' right to file a lawsuit alleging Wage Act and Overtime Act violations. It is uncontroverted that the arbitration provision in the CBA here does not contain such an express waiver. Eversource asserts that such an express waiver is only required for Federal statutory claims, not State statutory claims as brought here.

On this question, the parties debate the significance and scope of the holding in *14 Penn Plaza v. Pyett*, 556 U.S. 247, 274 (2009), in which the Supreme Court held that a provision in a CBA that clearly and unmistakably requires union members to arbitrate a claim that the employer violated the Federal Age Discrimination in Employment Act (ADEA) is enforceable. See, e.g., *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80 (1998) (an agreement to arbitrate statutory anti-discrimination claims must be explicitly stated in CBA to be enforceable); *Coleman v. Southern Wine & Spirits of Calif., Inc.*, No. 11-501 SC, 2011 WL 3359743, *7 (N.D. Cal. 2011) (CBA validly required arbitration of State statutory discrimination claims where CBA provided, "It is desire of both parties to this Agreement that disputes . . . arising hereunder involving interpretation or application of the terms of this Agreement, including any statutory or common law claims of sex, race, age, disability or other prohibited discrimination, shall be settled . . . by final and binding arbitration").

Even if this court were to reach this issue, Eversource's position is without support. In its post-hearing supplemental brief, Eversource points to four cases in which the arbitration provisions in the CBAs did not identify specific State statutory claims, yet those claims were held to be preempted under § 301. Those decisions do not help Eversource, because in those cases, the courts determined that the statutory claims were preempted by § 301 due to their entanglement with CBA terms. The courts did not consider motions to compel arbitration and did not rule on the issue of whether the CBAs contained provisions in which the union or employees clearly and unmistakably waived statutory rights to pursue remedies for those claims in court. See *Cavallaro v. UMass Memorial Healthcare, Inc.*, 678 F.3d 1, 5-8 (1st Cir. 2012); *Clee v. MVM, Inc.*, 91 F.Supp.3d 54, 61 (D. Mass. 2015); *Reyes v. S.J. Servs., Inc.*, Civ.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Defendant's Motion to Compel Arbitration (#18) is **DENIED**.

Jeremy C. Bucci
Justice of the Superior Court

May 6, 2024

No. 1:12-cv-11715-DPW, 2014 WL 5485943, *12 (D. Mass. Sept. 22, 2014); and *Arnstein v. MVM, Inc.*, Civ. No. 1:12-cv-10666-RWZ, WL 4863043, *3 (D. Mass. Oct. 12, 2012).

The four cases cited by Eversource are distinguishable from this case in additional ways. In *Cavallaro*, the court explained that once a case is removed from State court to Federal court and it has been determined that the claims are entangled with interpretation of the CBA, the same entanglement issues, coupled with a "broadly based grievance and arbitration provision in the CBA," warrant Federal courts' dismissal of such claims in deference to the grievance and arbitration remedies set forth in the CBAs. *Id.* at 6. The *Cavallaro* court: (1) assumed that the two State statutory wage-related claims asserted would not be waivable, see *id.* at 7; (2) acknowledged that an arbitration clause in a CBA can waive a judicial forum for a claim under the Fair Labor Standards Act "only if such waiver is 'clear and unmistakable,'" see *id.* at 7; (3) stated that the nature of the Wage Act claim, as alleged in that case, required an interpretation of the CBA because one aspect of it was that the employer did not pay employees during training sessions, and compensation for those periods hinged on whether the employees made a timely request to attend training, as required by the CBA, see *id.* at 8; and (4) concluded that interpretation of the CBA was required due to complicated wage calculations and possible offsets under the CBA, such as "premium pay above [the] state mandatory rate; the two State statutory claims were preempted due to "entanglement with CBA interpretation," see *id.* at 7-8.

In *Clee v. MVM, Inc.*, 91 F.Supp.3d 54, 59 (D. Mass. 2015), the court reiterated the familiar principle that a Federal court has jurisidiction under § 301 over State claims by one whose employment is governed by a CBA if resolution of the State law claim is substantially dependent upon analysis of the CBA terms. In contrast to this case, in *Clee*, the plaintiff's State statutory wage-related claims were substantially dependent upon an analysis of CBA provisions and, therefore, the § 301 preemption applied and removal to the Federal court was proper. *Id.* at 61.

In *Reyes v. S.J. Services, Inc.* Civ. No. 1:12-cv-11715-DPW, 2014 WL 5485943, *12 (D. Mass. Sept. 22, 2014), the court held that the plaintiffs' claims under the Wage Act were preempted under § 301 because, *inter alia*, the disputed issue of which hours counted as working hours was a question of contractual interpretation and therefore was governed by Federal law.

In *Arnstein v. MVM, Inc.*, Civ. No. 1:12-cv-10666-RWZ (Dkt. No. 1-2, 2012 WL 4863043, *3 (D. Mass. Oct. 12, 2012), the court explained that the plaintiffs' claims under the Wage Act and the Overtime Act were preempted by § 301 because their resolution required interpreting the CBA's terms. Those terms entailed necessary, federally-imposed restrictions on the plaintiffs' breaks in their security work for the Federal government (i.e., whether the plaintiffs were working and should have been compensated while on breaks but while required to carry work radios and not leave the employment site). See *id.* at *3: The CBA also provided for deviations from typical procedures contained in the CBA, and recognized the Federal government's "broad discretion" to direct the employer's activities. See *id.* Those provisions rendered the analysis and resolution of the *Arnstein* plaintiffs' Wage Act and Overtime Act claims dependent upon the CBA terms, in contrast to the case before this court.

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 150C. Collective Bargaining Agreements to Arbitrate (Refs & Annos)

M.G.L.A. 150C § 1

§ 1. Legal status of agreements

Currentness

A written agreement or a provision in a written agreement between a labor organization or organizations, as defined in subsection (5) of section two of chapter one hundred and fifty A, and an employer or employers or association or group of employers to submit to arbitration any existing controversy or any controversy thereafter arising between parties to the agreement, including but not restricted to any controversy dealing with rates of pay, wages, hours or other terms and conditions of employment of any employee or employees, shall be valid, enforceable and irrevocable, except as otherwise provided by law or in equity for the revocation of any contract.

Credits
Added by St.1959, c. 546, § 1.

Notes of Decisions (75)

M.G.L.A. 150C § 1, MA ST 150C § 1
Current through Chapter 341 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 150C. Collective Bargaining Agreements to Arbitrate (Refs & Annos)

M.G.L.A. 150C § 2

§ 2. Failure to arbitrate; application to superior court; procedure

Currentness

(a) A party aggrieved by the failure or refusal of another to proceed to arbitration under an agreement described in section one may apply to the superior court for an order directing the parties to proceed to arbitration. The court shall order arbitration unless (1) the opposing party denies the existence of the agreement to arbitrate; or (2) the claim sought to be arbitrated does not state a controversy covered by the provision for arbitration; provided, that an order for arbitration shall not be refused where a dispute concerning the interpretation or application of the arbitration provision is itself made subject to arbitration or on the ground that the claim in issue lacks merit or bona fides or because no fault or grounds for the claim have been shown. In either event the court shall proceed summarily to the determination of the issue so raised and shall, if it finds for the applicant, order arbitration; otherwise, the application shall be denied.

(b) Upon application, the superior court may stay an arbitration proceeding commenced or threatened if it finds (1) that there is no agreement to arbitrate, or (2) that the claim sought to be arbitrated does not state a controversy covered by the provision for arbitration and disputes concerning the interpretation or application of the arbitration provision are not themselves made subject to arbitration. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily determined, and if the court finds for the applicant it shall order a stay of arbitration, otherwise the court shall order the parties to proceed to arbitration; provided that an order to stay arbitration shall not be granted on the ground that the claim in issue lacks merit or bona fides or because no fault or grounds for the claim sought to be arbitrated have been shown.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under paragraph (a) of this section, the application shall be made therein. Otherwise and subject to section fifteen, the application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect to such issue only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

Credits
Added by St.1959, c. 546, § 1.

Notes of Decisions (33)

M.G.L.A. 150C § 2, MA ST 150C § 2
Current through Chapter 341 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 150C. Collective Bargaining Agreements to Arbitrate (Refs & Annos)

M.G.L.A. 150C § 16

§ 16. Appeals

Currentness

An appeal may be taken from (1) an order denying an application to compel arbitration made under paragraph (a) of section two; (2) an order granting an application to stay arbitration made under paragraph (b) of section two; (3) an order confirming or denying confirmation of an award; (4) an order modifying or correcting an award; (5) an order vacating an award without directing a rehearing; or (6) a judgment or decree entered pursuant to the provisions of this chapter.

Such appeal shall be taken in the manner and to the same extent as from orders or judgments in an action.

Credits
Added by St.1959, c. 546, § 1. Amended by St.1997, c. 19, § 93.

Notes of Decisions (60)

M.G.L.A. 150C § 16, MA ST 150C § 16
Current through Chapter 341 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

End of Document

27A Sec. Lit. Forms and Analysis Appendix 9

Securities Litigation: Forms and Analysis | November 2024 Update

APPENDICES

APPENDIX 9. Federal Arbitration Act, 9 U.S.C. §§ 1–15

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration

was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the some force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

§ 16. Appeals

(a) An appeal may be taken from—
(1) an order—
(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—
(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 149. Labor and Industries (Refs & Annos)

M.G.L.A. 149 § 148

§ 148. Payment of wages; commissions; exemption by contract; persons deemed employers; provision for cashing check or draft; violation of statute

Currentness

Every person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week, or to within seven days of the termination of the pay period during which the wages were earned if such employee is employed seven days in a calendar week, or in the case of an employee who has worked for a period of less than five days, hereinafter called a casual employee, shall, within seven days after the termination of such period, pay the wages earned by such casual employee during such period, but any employee leaving his employment shall be paid in full on the following regular pay day, and, in the absence of a regular pay day, on the following Saturday; and any employee discharged from such employment shall be paid in full on the day of his discharge, or in Boston as soon as the laws requiring pay rolls, bills and accounts to be certified shall have been complied with; and the commonwealth, its departments, officers, boards and commissions shall so pay every mechanic, workman and laborer employed by it or them, and every person employed in any other capacity by it or them in any penal or charitable institution, and every county and city shall so pay every employee engaged in its business the wages or salary earned by him, unless such mechanic, workman, laborer or employee requests in writing to be paid in a different manner; and every town shall so pay each employee engaged in its business if so required by him; but an employee absent from his regular place of labor at a time fixed for payment shall be paid thereafter on demand; provided, however, that the department of telecommunications and energy, after hearing, may authorize a railroad corporation or a parlor or sleeping car corporation to pay the wages of any of its employees less frequently than weekly, if such employees prefer less frequent payments, and if their interests and the interests of the public will not suffer thereby; and provided, further, that employees engaged in a bona fide executive, administrative or professional capacity as determined by the attorney general and employees whose salaries are regularly paid on a weekly basis or at a weekly rate for a work week of substantially the same number of hours from week to week may be paid bi-weekly or semi-monthly unless such employee elects at his own option to be paid monthly; and provided, further, that employees engaged in agricultural work may be paid their wages monthly; in either case, however, failure by a railroad corporation or a parlor or sleeping car corporation to pay its employees their wages as authorized by the said department, or by an employer of employees engaged in agricultural work to pay monthly the wages of his or her employees, shall be deemed a violation of this section; and provided, further, that an employer may make payment of wages prior to the time that they are required to be paid under the provisions of this section, and such wages together with any wages already earned and due under this section, if any, may be paid weekly, bi-weekly, or semi-monthly to a salaried employee, but in no event shall wages remain unpaid by an employer for more than six days from the termination of the pay period in which such wages were earned by the employee. For the purposes of this section the words salaried employee shall mean any employee whose remuneration is on a weekly, bi-weekly, semi-monthly, monthly or annual basis, even though deductions or increases may be made in a particular pay period. The word “wages” shall include any holiday or vacation payments due an

employee under an oral or written agreement. An employer, when paying an employee his wage, shall furnish to such employee a suitable pay slip, check stub or envelope showing the name of the employer, the name of the employee, the day, month, year, number of hours worked, and hourly rate, and the amounts of deductions or increases made for the pay period.

Compensation paid to public and non-public school teachers shall be deemed to be fully earned at the end of the school year, and proportionately earned during the school year; provided, however, that payment of such compensation may be deferred to the extent that equal payments may be established for a 12 month period including amounts payable in July and August subsequent to the end of the school year.

Every railroad corporation shall furnish each employee with a statement accompanying each payment of wages listing current accrued total earnings and taxes and shall also furnish said employee with each such payment a listing of his daily wages and the method used to compute such wages.

This section shall apply, so far as apt, to the payment of commissions when the amount of such commissions, less allowable or authorized deductions, has been definitely determined and has become due and payable to such employee, and commissions so determined and due such employees shall be subject to the provisions of section one hundred and fifty.

This section shall not apply to an employee of a hospital which is supported in part by contributions from the commonwealth or from any city or town, nor to an employee of an incorporated hospital which provides treatment to patients free of charge, or which is conducted as a public charity, unless such employee requests such hospital to pay him weekly. This section shall not apply to an employee of a co-operative association if he is a shareholder therein, unless he requests such association to pay him weekly, nor to casual employees as hereinbefore defined employed by the commonwealth or by any county, city or town.

No person shall by a special contract with an employee or by any other means exempt himself from this section or from section one hundred and fifty. The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section. Every public officer whose duty it is to pay money, approve, audit or verify pay rolls, or perform any other official act relative to payment of any public employees, shall be deemed to be an employer of such employees, and shall be responsible under this section for any failure to perform his official duty relative to the payment of their wages or salaries, unless he is prevented from performing the same through no fault on his part.

Any employer paying wages to an employee by check or draft shall provide for such employee such facilities for the cashing of such check or draft at a bank or elsewhere, without charge by deduction from the face amount thereof or otherwise, as shall be deemed by the attorney general to be reasonable. The state treasurer may in his discretion in writing exempt himself and any other public officer from the provisions of this paragraph.

An employer paying his employees on a weekly basis on July first, nineteen hundred and ninety-two shall, prior to paying said employees on a bi-weekly basis, provide each employee with written notice of such change at least ninety days in advance of the first such bi-weekly paycheck.

Whoever violates this section shall be punished or shall be subject to a civil citation or order as provided in section 27C.

Credits

Amended by St.1932, c. 101, § 1; St.1935, c. 350; St.1936, c. 160; St.1943, c. 378; St.1943, c. 467; St.1943, c. 563; St.1946, c. 414; St.1951, c. 28; St.1955, c. 506; St.1956, c. 259; St.1960, c. 416; St.1966, c. 319; St.1970, c. 760, § 12; St.1971, c. 387; St.1971, c. 590; St.1977, c. 664; St.1979, c. 633; St.1987, c. 559, § 29; St.1990, c. 162, § 1; St.1991, c. 138, § 331; St.1992, c. 133, §§ 502 to 504; St.1993, c. 110, § 181; St.1996, c. 151, §§ 426, 427; St.1997, c. 164, § 117; St.1998, c. 236, § 10; St.2008, c. 532, eff. April 15, 2009.

Notes of Decisions (515)

M.G.L.A. 149 § 148, MA ST 149 § 148
Current through Chapter 341 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 149. Labor and Industries (Refs & Annos)

M.G.L.A. 149 § 150

§ 150. Complaint for violation of certain sections; defenses; payment after complaint; assignments; loan of wages to employer; civil action

Currentness

The attorney general may make complaint or seek indictment against any person for a violation of section 148. On the trial no defence for failure to pay as required, other than the attachment of such wages by trustee process or a valid assignment thereof or a valid set-off against the same, or the absence of the employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of payment of the wages so earned by him, shall be valid. The defendant shall not set up as a defence a payment of wages after the bringing of the complaint. An assignment of future wages payable weekly under section one hundred and forty-eight shall not be valid if made to the person from whom such wages are to become due or to any person on his behalf, or if made or procured to be made to another person for the purpose of relieving the employer from the obligation to pay weekly. A loan made by an employee to his employer of wages which are payable weekly under section one hundred and forty-eight, whether made directly to the employer or to another person or persons on his behalf, shall not be valid as a defense on the trial of a complaint for failure to pay such wages weekly, unless such loan shall have been made with the approval of the attorney general.

An employee claiming to be aggrieved by a violation of sections 33E, 52E, 148, 148A, 148B, 148C, 150C, 152, 152A, 159C or 190 or section 19 of chapter 151 may, 90 days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within 3 years after the violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits; provided, however, that the 3 year limitation period shall be tolled from the date that the employee or a similarly situated employee files a complaint with the attorney general alleging a violation of any of these sections until the date that the attorney general issues a letter authorizing a private right of action or the date that an enforcement action by the attorney general becomes final. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees.

Credits

Amended by St.1932, c. 101, § 2; St.1993, c. 110, § 182; St.1996, c. 151, § 428; St.1999, c. 127, § 145; St.2002, c. 32, § 3; St.2004, c. 125, § 12, eff. Sept. 8, 2004; St.2005, c. 99, § 2, eff. Dec. 28, 2005; St.2008, c. 80, § 5, eff. July 12, 2008; St.2014, c. 148, § 2, eff. April 1, 2015; St.2014, c. 260, § 11, eff. Aug. 8, 2014; St.2014, c. 292, § 1, eff. Nov. 18, 2014; St.2014, c. 505, § 2, eff. July 1, 2015.

Notes of Decisions (224)

M.G.L.A. 149 § 150, MA ST 149 § 150
Current through Chapter 341 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

End of Document

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title IV. Certain Writs and Proceedings in Special Cases (Ch. 246-258e)
Chapter 251. Uniform Arbitration Act for Commercial Disputes (Refs & Annos)

M.G.L.A. 251 § 1

§ 1. Validity of agreements; non-applicability to collective bargaining agreements

Currentness

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. The provisions of this chapter shall not apply to collective bargaining agreements to arbitrate, which are subject to the provisions of chapter one hundred and fifty C, except as provided by the provisions of chapter one hundred and fifty-two.

Credits

Added by St.1960, c. 374, § 1. Amended by St.1991, c. 398, § 96.

Notes of Decisions (91)

M.G.L.A. 251 § 1, MA ST 251 § 1
Current through Chapter 341 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

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United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations

29 U.S.C.A. Ch. 7, Refs & Annos
Currentness

29 U.S.C.A. Ch. 7, Refs & Annos, 29 USCA Ch. 7, Refs & Annos
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter I. General Provisions

29 U.S.C.A. § 141

§ 141. Short title; Congressional declaration of purpose and policy

Currentness

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

CREDIT(S)

(June 23, 1947, c. 120, § 1, 61 Stat. 136.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 10918

<Feb. 16, 1961, 26 F.R. 1427>

Ex. Ord. No. 10918, Feb. 16, 1961, 26 F.R. 1427, formerly set out as a note under this section, which established the President's Advisory Committee on Labor-Management Policy, was revoked by Ex. Ord. No. 11710, Apr. 4, 1973, 38 F.R. 9071, formerly set out as a note under this section.

EXECUTIVE ORDER NO. 11710

<Apr. 4, 1973, 38 F.R. 9071>

Ex. Ord. No. 11710, Apr. 4, 1973, 38 F.R. 9071, as amended by Ex. Ord. No. 11729, July 12, 1973, 38 F.R. 18863, formerly set out as a note under this section, which established the National Commission for Industrial Peace, was revoked by Ex. Ord. No. 11823, Dec. 12, 1974, 39 F.R. 43529.

EXECUTIVE ORDER NO. 11809

<Sept. 30, 1974, 39 F.R. 35565>

Ex. Ord. No. 11809, Sept. 30, 1974, 39 F.R. 35565, formerly set out as a note under this section, which established the President's Labor-Management Committee, was revoked by Ex. Ord. No. 11948, Dec. 20, 1976, 41 F.R. 55705, set out as a note under section 5 U.S.C.A. App. 2 § 14.

EXECUTIVE ORDER NO. 14025

<April 26, 2021, 86 F.R. 22829>

Worker Organizing and Empowerment

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy and Findings. The National Labor Relations Act (29 U.S.C. 151) proclaims that the policy of the United States is to encourage worker organizing and collective bargaining and to promote equality of bargaining power between employers and employees. In the Federal Service Labor-Management Relations Statute (5 U.S.C. 7101(a)(1)), the Congress found that "experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them ... safeguards the public interest, ... contributes to the effective conduct of public business, and ... facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment."

In the past few decades, the Federal Government has not used its full authority to promote and implement this policy of support for workers organizing unions and bargaining collectively with their employers. During this period, economic change in the United States and globally, technological developments, and the failure to modernize Federal organizing and labor-management relations laws to respond appropriately to the reality found in American workplaces, have made worker organizing exceedingly difficult.

The result has been a steady decline in union density in the United States and the loss of worker power and voice in workplaces and communities across the country. This decline has had a host of negative consequences for American workers and the economy, including weakening and shrinking America's middle class. Meanwhile, some workers have been excluded from opportunities to organize unions and bargain collectively with their employers by law or practice, and so have never been able to build meaningful economic power or have a voice in their workplaces.

Confirming the policies declared in Federal labor laws, substantial evidence shows that union membership increases wages, the likelihood of receiving employer-provided benefits, and job security. Union membership also gives workers the means to build the power to ensure that their voices are heard in their workplaces, their communities, and in the Nation.

Therefore, it is the policy of my Administration to encourage worker organizing and collective bargaining.

Sec. 2. Task Force on Worker Organizing and Empowerment. There is hereby established within the Executive Office of the President the Task Force on Worker Organizing and Empowerment (Task Force).

(a) The Vice President shall serve as Chair of the Task Force. In addition to the Vice President, the Task Force shall consist of the following officials or their designees:

(i) the Secretary of Labor, who shall serve as Vice Chair of the Task Force;

(ii) the Secretary of the Treasury;

(iii) the Secretary of Defense;

(iv) the Secretary of the Interior;

(v) the Secretary of Agriculture;

(vi) the Secretary of Commerce;

(vii) the Secretary of Health and Human Services;

(viii) the Secretary of Housing and Urban Development;

(ix) the Secretary of Transportation;

(x) the Secretary of Energy;

(xi) the Secretary of Education;

(xii) the Secretary of Veterans Affairs;

(xiii) the Secretary of Homeland Security;

(xiv) the Administrator of the Environmental Protection Agency;

(xv) the Administrator of General Services;

(xvi) the Administrator of the Small Business Administration;

(xvii) the United States Trade Representative;

(xviii) the Director of the Office of Management and Budget;

(xix) the Director of the Office of Personnel Management;

(xx) the Chair of the Council of Economic Advisers;

(xxi) the Assistant to the President for Domestic Policy;

(xxii) the Assistant to the President for Economic Policy;

(xxiii) the Assistant to the President and National Climate Advisor; and

(xxiv) the heads of such other executive departments, agencies, and offices as the President may from time to time designate upon the recommendation of the Chair of the Task Force.

(b) The Task Force and its members shall identify executive branch policies, practices, and programs that could be used, consistent with applicable law, to promote my Administration's policy of support for worker power, worker organizing, and collective bargaining. This identification shall include policies, practices, and programs that could be used to promote worker power in areas of the country with hostile labor laws, for marginalized workers (including women and persons of color) and hard-to-organize industries, and in changing industries. The Task Force and its members also shall identify statutory, regulatory, or other changes that may be necessary to make policies, practices, and programs more effective means of supporting worker organizing and collective bargaining.

(c) The functions of the Task Force are advisory in nature only; the purpose of the Task Force is to make recommendations regarding changes to policies, practices, programs, and other changes that would serve the objectives of this order.

(d) The Task Force should invite the National Labor Relations Board, the Federal Labor Relations Authority, the National Mediation Board, and other executive agencies, boards, and commissions with responsibility for implementing laws concerning worker organizing and collective bargaining to consult, as appropriate and consistent with applicable law, with the Task Force.

(e) The Chair may establish such sub-committees or other working groups composed of Task Force members or their representatives as may be necessary to accomplish the objectives of this order.

(f) Consistent with the objectives of this order and applicable law, the Task Force may gather relevant information from labor organizations, other worker advocates, academic and other experts, and other entities and persons it identifies that will assist the Task Force in accomplishing the objectives of this order.

(g) The Task Force shall, within 180 days of the date of this order, submit to the President recommendations for actions as described in subsection (b) of this section to promote worker organizing and collective bargaining in the public and private sectors, and to increase union density. The Task Force may, at the Chair's discretion, recommend appropriate or time-sensitive individual actions to promote worker organizing and collective bargaining before the deadline established by this section. The Task Force and its members shall work to implement all recommendations that the President may approve, to the extent permitted by law, and shall report their progress as directed by the Chair.

Sec. 3. Definitions. For purposes of this order:

(a) “Policies, practices, and programs” includes regulations; guidance and other formal policy documents; procurements; grants and other direct or indirect Federal investments; tax and trade administration and enforcement; administration and enforcement of labor, employment, and other relevant laws; property management; and human resources management and labor relations.

(b) “Worker organizing and collective bargaining” encompasses the private sector, State and local governments, and the Federal Government. It also includes those sectors of the economy and those workers who have not historically been able to unionize, or whose ability to effectively collectively bargain or organize has been undermined.

(c) the term “agency” refers to all agencies described in section 3502(1) of title 44, United States Code, except for the agencies described in section 3502(5) of title 44.

Sec. 4. Revocations. (a) Executive Order 13845 of July 19, 2018 (Establishing the President's National Council for the American Worker), and Executive Order 13931 of June 26, 2020 (Continuing the President's National Council for the American Worker and the American Workforce Policy Advisory Board), are revoked.

(b) The Director of the Office of Management and Budget and the heads of executive departments and agencies shall promptly consider taking steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing Executive Order 13845 or Executive Order 13931, as appropriate and consistent with applicable law, including the Administrative Procedure Act (5 U.S.C. 551 et seq.). In addition, they shall abolish any personnel positions, committees, task forces, or other entities established pursuant to Executive Order 13845 or Executive Order 13931, as appropriate and consistent with applicable law.

Sec. 5. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

J.R. BIDEN JR.

Notes of Decisions (240)

O'CONNOR'S CROSS REFERENCES
See also 29 C.F.R. pt. 100.

29 U.S.C.A. § 141, 29 USCA § 141
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter I. General Provisions

29 U.S.C.A. § 142

§ 142. Definitions

Currentness

When used in this chapter--

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in subchapter II of this chapter.

CREDIT(S)

(June 23, 1947, c. 120, Title V, § 501, 61 Stat. 161.)

Notes of Decisions (22)

29 U.S.C.A. § 142, 29 USCA § 142
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter I. General Provisions

29 U.S.C.A. § 143

§ 143. Saving provisions

Currentness

Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

CREDIT(S)

(June 23, 1947, c. 120, Title V, § 502, 61 Stat. 162.)

Notes of Decisions (28)

29 U.S.C.A. § 143, 29 USCA § 143
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter I. General Provisions

29 U.S.C.A. § 144

§ 144. Separability

Currentness

If any provision of this chapter, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

CREDIT(S)

(June 23, 1947, c. 120, Title V, § 503, 61 Stat. 162.)

Notes of Decisions (1)

29 U.S.C.A. § 144, 29 USCA § 144
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
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Subchapter II. National Labor Relations

29 U.S.C.A. Ch. 7, Subch. II, Refs & Annos
Currentness

29 U.S.C.A. Ch. 7, Subch. II, Refs & Annos, 29 USCA Ch. 7, Subch. II, Refs & Annos
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter II. National Labor Relations (Refs & Annos)

29 U.S.C.A. § 151

§ 151. Findings and declaration of policy

Currentness

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby 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.

CREDIT(S)

(July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136.)

Notes of Decisions (556)

O'CONNOR'S CROSS REFERENCES

See also 29 C.F.R. pts. 101, 102.

29 U.S.C.A. § 151, 29 USCA § 151

Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter II. National Labor Relations (Refs & Annos)

29 U.S.C.A. § 152

§ 152. Definitions

Currentness

When used in this subchapter--

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign

country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means--

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person. [1]

CREDIT(S)

(July 5, 1935, c. 372, § 2, 49 Stat. 450; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 137; Pub.L. 93-360, § 1(a), (b), July 26, 1974, 88 Stat. 395; Pub.L. 95-598, Title III, § 319, Nov. 6, 1978, 92 Stat. 2678.)

Notes of Decisions (1827)

O'CONNOR'S CROSS REFERENCES

See also 29 C.F.R. §§100.503, 102.1, pt. 101.

O'CONNOR'S ANNOTATIONS

Generally

NLRB v. Cabot Carbon Co., 360 U.S. 203, 211 (1959). "[N]othing in [§152(5)] indicates that the broad term 'dealing with' is to be read as synonymous with the more limited term 'bargaining with.'"

Employee

Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891-92 (1984). "[T]he [NLRA] squarely applies to 'any employee.' … Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee.'"

NLRB v. Hendricks Cty. Rural Elec. Membership Corp., 454 U.S. 170, 189-90 (1981). "[T]he [NLRB] has never followed a practice of depriving all employees who have access to confidential business information from the full panoply of rights afforded by the [NLRA]. Rather, … the [NLRB], while declining to create any implied exclusion from the definition of 'employee' for confidential employees, has applied a labor-nexus test in identifying those employees who should be excluded from bargaining units because of access to confidential business information. We cannot ignore this consistent, longstanding interpretation of the NLRA by the [NLRB]."

Bayside Enters. v. NLRB, 429 U.S. 298, 300-01 (1977). "[T]he term 'agricultural laborer' in [NLRA §3(f), now 29 U.S.C. §152(f)] shall have the meaning specified in [FLSA] §3(f) [now 29 U.S.C. §203(f)]. … This statutory definition includes farming in both a primary and a secondary sense. The raising of poultry is primary farming, but hauling products to or from a farm is not primary farming. Such hauling may, however, be secondary farming if it is work performed 'by a farmer or on a farm as an incident to or in conjunction with such farming operations….' [¶] An employer's business may include both agricultural and nonagricultural activities." *See also* ***Holly Farms Corp. v. NLRB***, 517 U.S. 392, 399-400 (1996).

Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 168 (1971). "The ordinary meaning of 'employee' does not include retired workers; retired employees have ceased to work for another for hire."

FedEx Home Delivery v. NLRB, 563 F.3d 492, 495-96 (D.C.Cir.2009). "To determine whether a worker should be classified as an employee or an independent contractor, the [NLRB] and this court apply the common-law agency test…. *At 497:* [W]hile all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism."

Winkie Mfg. Co. v. NLRB, 348 F.3d 254, 257-58 (7th Cir.2003). "[I]f an employee is to be placed in a unit, that employee may vote in the representation election. The [NLRB's] test for determining whether seasonal workers are eligible to vote is

whether the 'seasonal employees … share sufficient interests in employment conditions with the other employees to warrant their inclusion in the unit.' This determination depends upon those employees' expectation of future reemployment…. [T]he [NLRB] regularly assesses the following factors: the size of the area labor force, the stability of the employer's labor requirements and the extent to which it is dependent upon seasonal labor, the actual reemployment season-to-season of the worker complement, and the employer's recall or preference policy regarding seasonal employees."

Employer--Generally

Radio & TV Broad. Technicians Local Un. 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965). "[T]he [NLRB] considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise…. The controlling criteria … are interrelation of operations, common management, centralized control of labor relations and common ownership." *See also* ***Spurlino Materials, LLC v. NLRB***, 805 F.3d 1131, 1141 (D.C.Cir.2015).

Browning-Ferris Indus. v. NLRB, 911 F.3d 1195, 1209 (D.C.Cir.2018). "[F]or roughly the last 25 years, the governing framework for the joint-employer inquiry has been whether both employers 'exert significant control over the same employees' in that they 'share or co-determine those matters governing the essential terms and conditions of employment.' [¶] The question [now] is whether the common-law analysis of joint-employer status can factor in both (i) an employer's authorized but unexercised forms of control, and (ii) an employer's indirect control over employees' terms and conditions of employment. [¶] The [NLRB's] conclusion that joint-employer status considers not only the control an employer actually exercises over workers, but also the employer's reserved but unexercised right to control the workers and their essential terms and conditions of employment, finds extensive support in the common law of agency. *At 1216:* The [NLRB] also ruled that an employer's control need not 'be exercised directly and immediately' 'to be relevant to the joint-employer inquiry'; indicia of 'indirect[ ]' control can also be considered. The [NLRB] again correctly discerned the content of the common law--indirect control can be a relevant factor in the joint-employer inquiry. But in failing to distinguish evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting, the [NLRB] overshot the common-law mark. *At 1221:* [The correct] legal standard is the common-law principle that a joint employer's control--whether direct or indirect, exercised or reserved--must bear on the 'essential terms and conditions of employment,' … and not on the routine components of a company-to-company contract." *See also* ***NLRB v. Browning-Ferris Indus.***, 691 F.2d 1117, 1124 (3d Cir.1982) (entities are joint ERs if they exert significant control over EEs and share or co-determine matters governing essential terms and conditions of employment). *But see* ***SEIU, Local 32BJ v. NLRB***, 647 F.3d 435, 442-43 (2d Cir.2011) (essential element of joint-ER determination is immediate control over EEs).

Employer--Native American

Pauma v. NLRB, 888 F.3d 1066, 1073 (9th Cir.2018). "Although the NLRA is ambiguous as to its application to tribal employers, the [NLRB's] determination that such employers are covered by the Act is a 'reasonably defensible' interpretation of the NLRA. *At 1075:* [W]e uphold [the NLRB's] determination that tribal employers are subject to the NLRA."

Employer--Political Subdivision

NLRB v. Natural Gas Util. Dist., 402 U.S. 600, 602-03 (1971). "Federal, rather than state, law governs the determination, under [NLRA] §2(2) [now 29 U.S.C. §152(2)], whether an entity created under state law is a 'political subdivision' of the State and therefore not an 'employer' subject to the Act."

Voices for Int'l Bus. & Educ., Inc. v. NLRB, 905 F.3d 770, 772 (5th Cir.2018). "The [NLRA] does not apply to a 'political subdivision' of a state. *At 773:* The Act does not define 'political subdivision.' The NLRB has long defined it to include two situations: when an entity is '(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.' *At 774:* The key is that for both of the Board's definitions of political subdivision, ultimate authority over policymaking remains with the public."

Jurisdiction--Affecting Commerce

McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-21 (1963). Held: NLRA does not apply to foreign-registered vessels with foreign crew members. *See also* ***Benz v. Compania Naviera Hidalgo, S.A.***, 353 U.S. 138, 143-44 (1957) (LMRA does not apply to foreign ships with foreign crews).

U.S. v. Ricciardi, 357 F.2d 91, 95 (2d Cir.1966). "The general statutory definition in 29 U.S.C. §142(1) makes clear that an industry may be one 'affecting commerce' if a labor dispute in the industry would tend to burden commerce. To apply this jurisdictional test, the relevant industry must first be determined. [T]he relevant industry for the purposes of 29 U.S.C. §186(a)(1) and (b)(1) comprises all business activities in the same field as the business activities of employers whose employees were represented by the recipients of the allegedly unlawful payments. *At 96:* [T]he [LMRA], of which the predecessor of the present … §186 was a part, referred to the definition of 'commerce' used in … §142(3), and … the definition of 'industry affecting commerce' in … §142(1)[ ] closely parallels the definition of 'affecting commerce' in … 29 U.S.C. §152(7)."

Jurisdiction--Preemption of State Law

Glacier Nw., Inc. v. International Bhd. of Teamsters Local Un. No. 174, 598 U.S. 771, 779 (2023). "We granted certiorari to resolve whether the NLRA preempts [ER's] tort claims alleging that the Union intentionally destroyed its property during a labor dispute. [¶] As the party asserting preemption, the Union bears the burden of (1) advancing an interpretation of the NLRA that is not plainly contrary to its language and that has not been authoritatively rejected by the courts or the [NLRB], and then (2) putting forth enough evidence to enable the court to find that the NLRA arguably protects the [EEs'] conduct. *At 780:* The [NLRB] has long taken the position … that the NLRA does not shield strikers who fail to take 'reasonable precautions' to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden cessation of work. *At 781:* [F]ar from taking reasonable precautions to mitigate foreseeable danger to [ER's] property, the Union executed the strike in a manner designed to compromise the safety of [ER's equipment] and destroy its [product]. Such conduct is not arguably protected by the NLRA; on the contrary, it goes well beyond the NLRA's protections. *At 783:* [T]he Union's decision to initiate the strike during the workday and failure to give [ER] specific notice do not themselves render its conduct unprotected. Still, they are relevant considerations in evaluating whether strikers took reasonable precautions, whether harm to property was imminent, and whether that danger was foreseeable. *At 785:* Because the Union took affirmative steps to endanger [ER's] property rather than reasonable precautions to mitigate that risk, the NLRA does not arguably protect its conduct." (Internal quotes omitted.)

New York Tel. Co. v. New York State DOL, 440 U.S. 519, 544 (1979). State laws providing for payment or nonpayment of unemployment-compensation benefits to striking workers are not preempted because "Congress was aware of the possible impact of unemployment compensation on the bargaining process. The omission of any direction concerning payment to strikers in either the [NLRA] or the Social Security Act implies that Congress intended that the States be free to authorize, or to prohibit, such payments." *See also* ***Livadas v. Bradshaw***, 512 U.S. 107, 134-35 (1994) (nonenforcement of state minimum-standards law governing wage-payment procedures and in connection with CBAs containing arbitration clauses not preempted); ***Fort Halifax Packing Co. v. Coyne***, 482 U.S. 1, 6-7 (1987) (state minimum-standards law for requiring severance pay in plant closings not preempted); ***Metropolitan Life Ins. v. Massachusetts***, 471 U.S. 724, 758 (1985) (state minimum-standards law for health-care benefits provided under insurance plans not preempted).

Lodge 76, IAMAW v. Wisconsin Empl. Relations Comm'n, 427 U.S. 132, 140 (1976). The state regulation of conduct that Congress "left 'to be controlled by the free play of economic forces [is preempted].'" *See also* ***Chamber of Commerce v. Brown***, 554 U.S. 60, 71-73 (2008) (state statute making union-related advocacy prohibitively expensive for ERs receiving state funds was preempted); ***Building & Constr. Trades Council v. Associated Builders & Contractors***, 507 U.S. 218, 227 (1993) ("We have held consistently that the NLRA was intended to supplant state labor regulation, not all legitimate state activity that affects labor."); ***Golden State Transit Corp. v. City of L.A.***, 475 U.S. 608, 619 (1986) (conditioning franchise renewal on settlement of strike by prescribed date was preempted).

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242 (1959). In enacting the NLRA and creating the NLRB to enforce it, Congress gave the NLRB "'primary interpretation and application of its rules … and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision….' *At 244:* When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by [NLRA] §7 [now 29 U.S.C. §157], or constitute an unfair labor practice under [NLRA] §8 [now 29 U.S.C. §158], due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *See also* ***Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters***, 436 U.S. 180, 207 (1978) (state-law trespass action against union not preempted); ***Farmer v. United Bhd. of Carpenters & Joiners***, 430 U.S. 290, 304-05 (1977) (state-law action against union for intentional infliction of emotional distress not preempted); ***Linn v. United Plant Guard Workers***, 383 U.S. 53, 63-64 (1966) (state-law defamation action against union not preempted); ***Retail Prop. Trust v. United Bhd. of Carpenters & Joiners***, 768 F.3d 938, 941-42 (9th Cir.2014) (state-law trespass and nuisance actions against union not preempted); ***Lontz v. Tharp***, 413 F.3d 435, 442-43 (4th Cir.2005) (state-law wrongful-discharge claims not completely preempted by 29 U.S.C. §§157, 158).

Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1024 (9th Cir.2010). To avoid preemption of a state law, there are "two alternative ways to show that a state action constitutes non-regulatory market participation: (1) a state can affirmatively show that its action is proprietary by showing that the challenged conduct reflects its interest in efficiently procuring goods or services, or (2) it can prove a negative--that the action is *not* regulatory--by pointing to the narrow scope of the challenged action. We see no reason to require a state to show both that its action *is* proprietary and that the action is *not* regulatory." *See also* ***Cardinal Towing & Auto Repair, Inc. v. City of Bedford***, 180 F.3d 686, 693 (5th Cir.1999).

Supervisors

NLRB v. Kentucky River Cmty. Care, Inc., 532 U.S. 706, 713 (2001). "Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'" *See also* ***NLRB v. Health Care & Ret. Corp.***, 511 U.S. 571, 577-78 (1994) (discussing third prong of test); ***NLRB v. Yeshiva Univ.***, 444 U.S. 672, 683 (1980) (EE may be excluded as managerial only if she represents management interests by taking or recommending discretionary actions that effectively control or implement ER policy); ***NLRB v. NSTAR Elec. Co.***, 798 F.3d 1, 11-12 & n.9 (1st Cir.2015) (collecting cases; questioning whether secondary indicia--evidence, such as job title, that is not directly related to §152(11)'s listed supervisory functions--can support finding of supervisory status).

Pac Tell Grp. v. NLRB, 817 F.3d 85, 91 (4th Cir.2015). "It is the burden of the party asserting supervisory status to prove by a preponderance of the evidence that particular persons qualify as supervisors under the [NLRA]. [¶] The Act's definition of 'supervisor' is intended to distinguish true supervisors vested with genuine management prerogatives, from employees such as straw bosses, lead men, and set-up men who are protected by the Act even though they perform minor supervisory duties. Accordingly, the exercise of independent judgment requires that a person act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data. Judgment is not independent under the Act if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a [CBA]." (Internal quotes omitted.) *See also* ***Entergy Miss., Inc. v. NLRB***, 810 F.3d 287, 296 (5th Cir.2015); ***NLRB v. NSTAR Elec. Co.***, 798 F.3d 1, 13 (1st Cir.2015); ***Lakeland Health Care Assocs. v. NLRB***, 696 F.3d 1332, 1339 (11th Cir.2012); ***Rochelle Waste Disposal, LLC v. NLRB***, 673 F.3d 587, 593-94 (7th Cir.2012).

Footnotes

1 So in original. Probably should be “persons”.

29 U.S.C.A. § 152, 29 USCA § 152
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter II. National Labor Relations (Refs & Annos)

29 U.S.C.A. § 153

§ 153. National Labor Relations Board

Currentness

(a) Creation, composition, appointment, and tenure; Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947, is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) Annual reports to Congress and the President

The Board shall at the close of each fiscal year make a report in writing to Congress and to the President summarizing significant case activities and operations for that fiscal year.

(d) General Counsel; appointment and tenure; powers and duties; vacancy

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

CREDIT(S)

(July 5, 1935, c. 372, § 3, 49 Stat. 451; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 139; Pub.L. 86-257, Title VII, §§ 701(b), 703, Sept. 14, 1959, 73 Stat. 542; Pub.L. 93-608, § 3(3), Jan. 2, 1975, 88 Stat. 1972; Pub.L. 95-251, § 3, Mar. 27, 1978, 92 Stat. 184; Pub.L. 97-375, Title II, § 213, Dec. 21, 1982, 96 Stat. 1826.)

Notes of Decisions (192)

O'CONNOR'S CROSS REFERENCES

See also 29 C.F.R. §102.182, pts. 101, 103.

O'CONNOR'S ANNOTATIONS

NLRB v. Noel Canning, 573 U.S. 513, 519 (2014). "[T]he Recess Appointments Clause [U.S. Const. art. II, §2, cl. 3] gives the President alone the power 'to fill up all Vacancies that may happen during the Recess of the Senate….' [¶] [W]hen the appointments [to the NLRB] took place, the Senate was in the midst of a 3-day [intra-session] recess. *At 538:* We … conclude … that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause. [¶] If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. *At 556:* We … hold that the Constitution empowers the President to fill any existing vacancy during any recess--intra-session or inter-session--of sufficient length. *At 557:* [But] the Recess Appointments Clause [did] not give the President the constitutional authority to make the appointments [to the NLRB during the Senate's three-day recess]." *See also* ***NLRB v. SW Gen., Inc.***, 580 U.S. 288, 308-09 (2017) (person serving in acting capacity in position subject to Senate approval, such as NLRB general counsel, cannot continue in that position after nomination by President to same job on permanent basis).

New Process Steel, L.P. v. NLRB, 560 U.S. 674, 676 (2010). "The question in this case is whether, following a delegation of the [NLRB's] powers to a three-member group, two members may continue to exercise that delegated authority once the group's (and the [NLRB's]) membership falls to two. We hold that two remaining [NLRB] members cannot exercise such authority. *At 680-81:* Interpreting the statute to require the [NLRB's] powers to be vested at all times in a group of at least three members is consonant with the [NLRB] quorum requirement, which requires three participating members 'at all times' for the [NLRB] to act. The interpretation likewise gives material effect to the three-member requirement in the delegation clause. The vacancy clause still operates to provide that vacancies do not impair the ability of the [NLRB] to take action, so long as the quorum is satisfied. And the interpretation does not render inoperative the group quorum provision, which still operates to authorize a

three-member delegee group to issue a decision with only two members participating, so long as the delegee group was properly constituted." *See also* 29 C.F.R. §102.182; ***D.R. Horton, Inc. v. NLRB***, 737 F.3d 344, 353-54 (5th Cir.2013).

Exela Enter. Sols., Inc. v. NLRB, 32 F.4th 436, 441 (5th Cir.2022). "[N]o provision of the NLRA protects the General Counsel of the NLRB from removal. Whereas Congress clearly and unequivocally provided removal protections to the Board Members, it did not grant those same protections to the General Counsel. *At 445:* Because we hold that the NLRA does not provide tenure protections to the General Counsel of the Board, President … lawfully removed former-General Counsel … without cause. The prosecution brought by then-Acting General Counsel … was proper." *See also* ***NLRB v. Aakash, Inc.***, 58 F.4th 1099, 1105-06 (9th Cir.2023).

NLRB v. Bluefield Hosp. Co., 821 F.3d 534, 541-42 (4th Cir.2016). The NLRB "has construed the [NLRA] as authorizing Regional Directors to exercise delegated authority during a period in which the [NLRB] lacks a quorum. *At 544:* [W]e give deference to the [NLRB's] interpretation and conclude that the Regional Director's authority to act was not abrogated during the period when the [NLRB] lacked a quorum." *See also* ***Hospital of Barstow, Inc. v. NLRB***, 897 F.3d 280, 283 (D.C.Cir.2018); ***UC Health v. NLRB***, 803 F.3d 669, 675-76 (D.C.Cir.2015).

Kreisberg v. HealthBridge Mgmt., 732 F.3d 131, 139-40 (2d Cir.2013). NLRA §3, now 29 U.S.C. §153, "specifies the General Counsel's §10 enforcement function and provides that the General Counsel shall have 'such other duties as the [NLRB] may prescribe or as may be provided by law.' The plain, broad language of [29 U.S.C.] §153(d) permits a properly constituted [NLRB] to delegate its §10(j) power and enable the General Counsel to prosecute NLRA violations before a federal district court." *See also* ***NLRB v. FLRA***, 613 F.3d 275, 279-80 (D.C.Cir.2010).

29 U.S.C.A. § 153, 29 USCA § 153
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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29 U.S.C.A. § 154

§ 154. National Labor Relations Board; eligibility for reappointment; officers and employees; payment of expenses

Currentness

(a) Each member of the Board and the General Counsel of the Board shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No administrative law judge's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no administrative law judge shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this subchapter shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

CREDIT(S)

(July 5, 1935, c. 372, § 4, 49 Stat. 451; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 139; Pub.L. 95-251, § 3, Mar. 27, 1978, 92 Stat. 184.)

Notes of Decisions (3)

29 U.S.C.A. § 154, 29 USCA § 154
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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29 U.S.C.A. § 155

§ 155. National Labor Relations Board; principal office, conducting inquiries throughout country; participation in decisions or inquiries conducted by member

Currentness

The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

CREDIT(S)

(July 5, 1935, c. 372, § 5, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.)

Notes of Decisions (4)

O'CONNOR'S CROSS REFERENCES
See also 29 C.F.R. pts. 101, 103.

29 U.S.C.A. § 155, 29 USCA § 155
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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29 U.S.C.A. § 156

§ 156. Rules and regulations

Currentness

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

CREDIT(S)

(July 5, 1935, c. 372, § 6, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.)

Notes of Decisions (103)

O'CONNOR'S CROSS REFERENCES
See also 5 C.F.R. pt. 7101; 29 C.F.R. pts. 100 to 103.

29 U.S.C.A. § 156, 29 USCA § 156
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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29 U.S.C.A. § 157

§ 157. Right of employees as to organization, collective bargaining, etc.

Currentness

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

CREDIT(S)

(July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.)

Notes of Decisions (1307)

O'CONNOR'S CROSS REFERENCES
See also 29 C.F.R. §102.1.

O'CONNOR'S ANNOTATIONS

Antiretaliation
Eastex, Inc. v. NLRB, 437 U.S. 556, 565-67 (1978). "[T]he 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause. To hold that activity of this nature is entirely unprotected--irrespective of location or the means employed--would leave employees open to retaliation for much legitimate activity that could improve their lot as employees. [T]his could 'frustrate the policy of the [NLRA] to protect the right of workers to act together to better their working conditions'…."

NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260-61 (1975). "The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of [NLRA] §7 [now 29 U.S.C. §157] that '[e]mployees shall have the right … to engage in … concerted activities for the purpose of … mutual aid or protection.' This is true even though the employee alone may have an immediate stake in the outcome; he seeks 'aid or protection' against a perceived threat to his employment security. The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by

exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview."

Editor's note: To invoke the right to representation, the employee must request representation and must reasonably believe the investigation may result in disciplinary action.

Arbitration Agreements

Epic Sys. v. Lewis, 584 U.S. 497, 511-12 (2018). NLRA §7, now 29 U.S.C. §157, "focuses on the right to organize unions and bargain collectively. … But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the [FAA]. [¶] The notion that §7 confers a right to class or collective actions seems pretty unlikely when … procedures like that were hardly known when the NLRA was adopted in 1935. *At 525:* Congress has instructed that arbitration agreements [waiving the right to collective action] must be enforced as written. While Congress is … free to amend this judgment, we see nothing suggesting it did so in the NLRA--much less that it manifested a clear intention to displace the [FAA]."

Concerted Activity

NLRB v. City Disposal Sys., 465 U.S. 822, 829 (1984). "[A]n individual's assertion of a right grounded in a [CBA] is recognized as 'concerted activit[y]' and therefore accorded the protection of [NLRA] §7 [now 29 U.S.C. §157]. *At 830:* The term 'concerted activit[y]' is not defined in the Act but it … embraces the activities of employees who have joined together in order to achieve common goals. *At 835:* [I]n enacting §7 …, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way. Nor … does it appear that Congress intended to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process. Instead, what emerges from the general background of §7 … is a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining and enforcement of [CBAs]." *See also* ***MCPc Inc. v. NLRB***, 813 F.3d 475, 483-84 (3d Cir.2016) (individual conduct is concerted activity when EE seeks to initiate, induce, or prepare for group action; touchstone is relationship between individual EE's actions and fellow EEs); ***Fortuna Enters. v. NLRB***, 789 F.3d 154, 157-58 (D.C.Cir.2015) (listing ten factors to consider in determining whether EEs' work stoppage is protected concerted activity); ***Trompler, Inc. v. NLRB***, 338 F.3d 747, 749-50 (7th Cir.2003) (protests precipitated by ER's decisions about supervisors are protected only if they relate to terms and conditions of employment and are conducted using reasonable means).

NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962). "We cannot agree that employees necessarily lose their right to engage in concerted activities under [NLRA] §7 [now 29 U.S.C. §157] merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of §7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made." *See also* ***Glendale Assocs. v. NLRB***, 347 F.3d 1145, 1153 (9th Cir.2003) (language of §157 is broad enough to protect picketing sister company owned by parent company).

NLRB v. Local Un. No. 1229, IBEW, 346 U.S. 464, 475 (1953). "The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough. The difficulty arises in determining whether, in fact, the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge. *At 476:* [Here, EEs'] attack related itself to no labor practice of the company. It made no reference to wages, hours or working conditions. The policies attacked were those of finance and public relations for which management, not technicians, must be responsible. *At 477:* [EEs' attack] was a concerted separable attack purporting to be made in the interest of the public rather than in that of [EEs]."

Kiewit Power Constructors Co. v. NLRB, 652 F.3d 22, 26 (D.C.Cir.2011). "'[A]n employee who is engaged in [protected] activity can, by opprobrious conduct, lose the protection of the [NLRA].' Although 'employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect' in the workplace. When deciding whether the employee's otherwise-protected complaint about workplace policies tipped the balance and forfeited the protection of the Act, the NLRB considers four factors: '(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.' *At 28:* In determining which actions are 'opprobrious' and thus count against protecting the employee, we defer to the NLRB's distinction between merely intemperate remarks, which the Act protects, and actual threats, which it does not." *See also* ***NLRB v. Pier Sixty, LLC***, 855 F.3d 115, 122-23 & n.38 (2d Cir.2017) (NLRB has developed nine-factor "totality of the circumstances" test to use in social-media cases).

IUOE, Local 513 v. NLRB, 635 F.3d 1233, 1233 (D.C.Cir.2011). "The [NLRB] has held since 1977 that it is a *per se* unfair labor practice in violation of [NLRA] §8(b)(1)(A) …, [now] 29 U.S.C. §158(b)(1)(A), for a union to discipline a union member who complied with an employer's safety rules. We agree with the union that the [NLRB's] policy does not accord with the [NLRA]. *At 1234-35:* The union's argument is rather simple and direct: without a finding of concerted activity (protected by [NLRA] §7 [now 29 U.S.C. §157]) on the part of [ER's] employees, it is analytically impossible for the [NLRB] to conclude that [EE] either engaged in or refrained from engaging in such activities. Therefore, the union cannot be held to have restrained or coerced [EE] in the exercise of his §7 rights." *But see* ***NLRB v. General Teamsters Local No. 439***, 175 F.3d 1173, 1176 (9th Cir.1999) (accepting NLRB's interpretation of §158(b)(1)(A)).

Five Star Transp. v. NLRB, 522 F.3d 46, 52 (1st Cir.2008). "It is long established that concerted activity engaged in for sanctioned purposes may lose the veil of protection afforded it by the [NLRA] if carried out through abusive means. Where concerted activity entails communications with a third party, … such activity is protected if it meets a two-part test: (1) the communication indicates to the third party that it is related to an ongoing dispute between an employer and employees; and (2) the communication itself is not 'so disloyal, reckless or maliciously untrue as to lose the Act's protection.'" *See also* ***DirecTV, Inc. v. NLRB***, 837 F.3d 25, 38-39 (D.C.Cir.2016) (to assess whether communication is so disloyal as to lose NLRA's protection, EE's intent can be considered in determining whether communication was primarily aimed to draw public support or instead to gratuitously cause harm to ER); ***OPW Fueling Components v. NLRB***, 443 F.3d 490, 496 (6th Cir.2006) (EE's motive is relevant in determining whether action is concerted activity; abusive conduct is unprotected under NLRA). *But see* ***MikLin Enters. v. NLRB***, 861 F.3d 812, 821-22 (8th Cir.2017) (communication may not be protected even if it references ongoing dispute; critical question is not EE's motive but whether EE's public communications reasonably targeted ER's labor practices or impermissibly disparaged quality of ER's product or services).

Self-Organization

Beth Israel Hosp. v. NLRB, 437 U.S. 483, 491 (1978). "[T]he right of employees to self-organize and bargain collectively … encompasses the right effectively to communicate with one another regarding self-organization at the jobsite."

Emporium Capwell Co. v. Western Addition Cmty. Org., 420 U.S. 50, 61-62 (1975). NLRA §7, now 29 U.S.C. §157, "affirmatively guarantees employees … collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.' [¶] Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule. If the majority of a unit chooses union representation, the NLRA permits it to bargain with its employer to make union membership a condition of employment, thereby imposing its choice upon the minority. … '[T]he complete satisfaction of all who are represented is hardly to be expected.' *At 70:* The policy of industrial self-determination as expressed in §7 does not require fragmentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination."

Guard Publ'g v. NLRB, 571 F.3d 53, 61 (D.C.Cir.2009). "'The right to wear union buttons or other insignia while at work is generally protected by … NLRA [§7, now 29 U.S.C. §157].' 'In the absence of special circumstances, an employer's prohibition against wearing such insignia violates [NLRA] §8(a)(1) [now 29 U.S.C. §158(a)(1)].' When it bans the wearing of union insignia, the employer bears the burden of overcoming the presumption of an unfair labor practice by demonstrating that special circumstances exist. [¶] Special circumstances may include … ensuring employee safety, protecting the employer's product, or maintaining a certain employee image (especially with respect to uniformed employees)." *See also* ***In-N-Out Burger, Inc. v. NLRB***, 894 F.3d 707, 714-15 (5th Cir.2018); ***Boch Imps., Inc. v. NLRB***, 826 F.3d 558, 570-71 (1st Cir.2016); ***Washington State Nurses Ass'n v. NLRB***, 526 F.3d 577, 580-81 (9th Cir.2008); ***Mt. Clemens Gen. Hosp. v. NLRB***, 328 F.3d 837, 844 (6th Cir.2003).

Albertson's, Inc. v. NLRB, 301 F.3d 441, 449 (6th Cir.2002). "The general rule is that an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property. However, … an employer may post his property against nonemployee distribution of union literature if (1) reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and (2) if the employer's notice or order does not discriminate against the union by allowing other distribution (the discrimination exception). *At 451:* [T]he term discrimination … means favoring one union over another, or allowing employer-related information while barring similar union-related information. [¶] [A]n employer does not discriminate against a union where the employer allows charities to disseminate information on the employer's property while it bars unions from doing the same…." (Internal quotes omitted.) *See also* ***Salmon Run Shopping Ctr. LLC v. NLRB***, 534 F.3d 108, 114-15 (2d Cir.2008).

29 U.S.C.A. § 157, 29 USCA § 157
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29 U.S.C.A. § 158

§ 158. Unfair labor practices [Statutory Text & Notes of Decisions subdivisions I to VI]

Currentness

<Notes of Decisions for 29 USCA § 158 are displayed in multiple documents.>

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible [1] and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) the terms “any employer”, “any person engaged in commerce or an industry affecting commerce”, and “any person” when used in relation to the terms “any other producer, processor, or manufacturer”, “any other employer”, or “any other person” shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3): *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d). The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

CREDIT(S)

(July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Pub.L. 86-257, Title II, § 201(e), Title VII, §§ 704(a) to (c), 705(a), Sept. 14, 1959, 73 Stat. 525, 542 to 545; Pub.L. 93-360, § 1(c) to (e), July 26, 1974, 88 Stat. 395, 396.)

Notes of Decisions (5978)

O'CONNOR'S CROSS REFERENCES

Executive Order: No. 14063, Feb. 4, 2022, 87 Fed. Reg. 7363.

See also 29 U.S.C.A. §160; 29 C.F.R. §§101.22 to 101.25, 103.1 to 103.3, 405.7, 406.6, pt. 1420; NLRB Form 509. NLRB decisions and forms are available at www.nlrb.gov.

O'CONNOR'S ANNOTATIONS

Building & Construction Employers--§8(f)

Colorado Fire Sprinkler, Inc. v. NLRB, 891 F.3d 1031, 1038 (D.C.Cir.2018). "'[A] construction-industry contract will be *presumed* to be governed by [NLRA] §8(f) [now 29 U.S.C. §158(f)] unless the employer and union clearly intended to create [an NLRA] §9(a) [now 29 U.S.C. §159(a)] agreement.' [¶] [T]he [NLRB] bore the burden of proof to overcome the presumption of continued §8(f) status with 'clear[ ]' evidence that *both* the Union and the Company intended to transition to a §9(a) relationship. *At 1039:* [T]he [NLRB] must demand clear evidence that the employees--not the union and not the employer--have independently chosen to transition away from a §8(f) pre-hire arrangement by affirmatively choosing a union as their §9(a) representative. [¶] '[C]ontract language' and the 'intent' of the union and company alone generally cannot overcome the §8(f) presumption, and certainly not when 'the record contains strong indications that the parties had only a §8(f) relationship.' While such language could be a relevant factor, the 'proposition that contract language alone can establish the existence of a §9(a) relationship runs roughshod over the principles' of employee choice 'established in' Supreme Court precedent. [¶] Conversely, … when there is strong evidence of employee majority support in the record, such as authorization cards signed by employees, then a union's offer to provide concrete evidence of its majority status can convert a §8(f) relationship into a §9(a) one. Whether the employer viewed that evidence is beside the point; what matters is that the affirmative evidence of majority support exists in the record."

Baker Concrete Constr., Inc. v. Reinforced Concrete Contractors Ass'n, 820 F.3d 827, 830 (6th Cir.2016). "'It is settled that if an employer employs one or fewer unit employees on a permanent basis that the employer, without violating [NLRA] §8(a)(5) [now 29 U.S.C. §158(a)(5)], may withdraw recognition from a union, repudiate its contract with the union, or unilaterally change employees' terms and conditions of employment without affording a union an opportunity to bargain.' *At 831:* 'A construction industry employer who employs a single employee pursuant to a §8(f) pre-hire agreement is entitled to repudiate the agreement by conduct sufficient to put the union and the employee on notice that the agreement has been terminated.'" *See*

also ***J.W. Peters, Inc. v. Bridge, Structural & Reinforcing Iron Workers, Local Un. 1***, 398 F.3d 967, 973-75 (7th Cir.2005); ***Laborers Health & Welfare Trust Fund v. Westlake Dev.***, 53 F.3d 979, 982 (9th Cir.1995).

United Bhd. of Carpenters & Joiners v. Operative Plasterers' & Cement Masons' Int'l, 721 F.3d 678, 692-93 (D.C.Cir.2013). "A union that is party to [an NLRA] §8(f) [now 29 U.S.C. §158(f)] agreement serves as the [NLRA] §9(a) [now 29 U.S.C. §159(a)] exclusive bargaining representative of the unit it purports to represent for the duration of the §8(f) agreement. But its §9(a) status is limited in significant respects. A union party to a §9(a) agreement is entitled to a conclusive presumption of majority status for up to three years, during which time decertification petitions are barred. But under §8(f), a union is entitled to no such presumption and parties may therefore file decertification petitions at any time during a §8(f) relationship. Moreover, when a §9(a) agreement expires, the presumption of majority support requires the employer to continue bargaining with the union unless the union has in fact lost majority support or the employer has a good-faith reason to believe such support has been lost. But 'because the union enjoys no presumption that it ever had majority support' under §8(f), the employer can refuse to bargain once a §8(f) agreement expires. [¶] Even while operative, a §8(f) agreement is not set in stone. If a union party to an 8(f) agreement 'successfully seeks majority support, the prehire agreement attains the status of a [§9(a) CBA] executed by the employer with a union representing a majority of the employees in the unit.' 'Generally, a union seeking to convert its section 8(f) relationship to a section 9(a) relationship may either petition for a representation election or demand recognition from the employer by providing proof of majority support.' But 'a vote to reject the signatory union will void the 8(f) agreement and will terminate the 8(f) relationship.'" *See also* ***Flying Food Grp. v. NLRB***, 471 F.3d 178, 182 (D.C.Cir.2006).

Sheet Metal Workers' Int'l v. McElroy's, Inc., 500 F.3d 1093, 1097 (10th Cir.2007). NLRA §8(f), now 29 U.S.C. §158(f), "creates an exception to the NLRA's general rule prohibiting a union and an employer from signing a [CBA] recognizing the union as the exclusive bargaining representative before a majority of employees have authorized the union to represent their interests. [¶] [U]nilateral termination of a pre-hire [CBA] prior to expiration is prohibited, [but] nothing in the NLRA prohibits either party from repudiating a pre-hire obligation upon its expiration."

Certification--Challenge

Coffman v. Queen of Valley Med. Ctr., 895 F.3d 717, 727 (9th Cir.2018). "First, to preserve a challenge to [a union] certification, the employer must refuse to bargain immediately after the union's certification. Second, if the employer does not immediately refuse to bargain, it waives its right to challenge the union's certification. *At 728:* [W]hen the employer engages in bargaining discussions, it commits to negotiations and thereby waives any challenge to certification."

Discrimination--Generally

Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805 (1945). "[I]f a rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discriminates within the meaning of [NLRA] §8(3) [now 29 U.S.C. §158(a)(3)] in that it discourages membership in a labor organization."

NLRB v. Rockline Indus., 412 F.3d 962, 970 (8th Cir.2005). "Engaging in protected activity does not shield employees from legitimate disciplinary action by their employer. … Having disciplined an employee who has engaged in protected activity, it is not enough that an employer put forth *a* nondiscriminatory justification for discipline. It must be *the* justification."

Discrimination--Economic Pressure

NLRB v. International Bhd. of Teamsters, 353 U.S. 87, 89 (1957). "The question presented by this case is whether the non-struck members of a multi-employer bargaining association committed an unfair labor practice when, during contract negotiations, they temporarily locked out their employees as a defense to a union strike against one of their members which imperiled the employers' common interest in bargaining on a group basis. *At 97:* [The NLRB] correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action was lawful." *See also* ***NLRB v. Brown***, 380 U.S. 278, 285-86 (1965).

NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938). "Although [NLRA] §13 [now 29 U.S.C. §163] provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer … has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by [ER] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. But the claim put forward is that the unfair labor practice indulged by [ER] was discrimination in reinstating striking employees by keeping out certain of them for the sole reason that they had been active in the union. As we have said, the strikers retained … the status of employees. Any such discrimination in putting them back to work is, therefore, prohibited by [NLRA] §8 [now 29 U.S.C. §158]." *See also* ***Healthcare Emps. Un., Local 399 v. NLRB***, 463 F.3d 909, 920 (9th Cir.2006) (decision to subcontract out work coupled with knowledge of union activity strongly indicated antiunion animus); ***Local 15, IBEW v. NLRB***, 429 F.3d 651, 661-62 (7th Cir.2005) (partial lockout of striking EEs is obvious disparate treatment).

Discrimination--Proof

NLRB v. Transportation Mgmt., 462 U.S. 393, 398 (1983), *overruled on other grounds*, ***Director, OWCP, DOL v. Greenwich Collieries***, 512 U.S. 267 (1994). "[I]f the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice. He does not violate the NLRA, however, if any antiunion animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause." *See also* ***Big Ridge, Inc. v. NLRB***, 808 F.3d 705, 713 (7th Cir.2015) (under NLRB's ***Wright Line*** analysis, NLRB must show that antiunion animus was substantial or motivating factor for discharge); ***Nichols Aluminum, LLC v. NLRB***, 797 F.3d 548, 554 (8th Cir.2015) (same); ***Bally's Park Place, Inc. v. NLRB***, 646 F.3d 929, 935 (D.C.Cir.2011) (same).

NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967). "The statutory language 'discrimination … to … discourage' means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose. *At 34:* [I]f it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the [NLRB] can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. [I]f the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him."

NLRB v. Erie Resistor Corp., 373 U.S. 221, 227-28 (1963). "When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, … many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices. … Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by the showing of an intent to encroach upon protected rights. [¶] The outcome may well be the same when intent is founded upon the inherently discriminatory or destructive nature of the conduct itself. [T]he employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the [NLRA]. Nevertheless, his conduct *does* speak for itself--it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended."

Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 675 (1961). "The existence of discrimination may at times be inferred by the [NLRB], for 'it is permissible to draw on experience in factual inquiries.' [¶] But surely discrimination cannot be inferred from the face of the instrument when the instrument specifically provides that there will be no discrimination against

'casual employees' because of the presence or absence of union membership. *At 676-77:* Nothing is inferable from the present hiring-hall provision except that employer and union alike sought to route 'casual employees' through the union hiring hall and required a union member who circumvented it to adhere to it. [¶] We cannot assume that a union conducts its operations in violation of law or that the parties to this contract did not intend to adhere to its express language. Yet we would have to make those assumptions to agree with the [NLRB] that it is reasonable to infer the union will act discriminatorily. [¶] The [NLRB] has no power to compel directly or indirectly that the hiring hall be included or excluded in collective agreements. Its power … is restricted to the elimination of discrimination. Since the present agreement contains such a prohibition, the [NLRB] is confined to determining whether discrimination has in fact been practiced. If hiring halls are to be subjected to regulation that is less selective and more pervasive, Congress[,] not the [NLRB,] is the agency to do it."

Discrimination--Refusal to Hire--Generally

Progressive Elec., Inc. v. NLRB, 453 F.3d 538, 546 (D.C.Cir.2006). "An employer violates [NLRA §8(a)(3), now 29 U.S.C. §158(a)(3)], and in turn §8(a)(1) [now §158(a)(1)], by refusing to consider or hire job applicants on account of their union affiliation. *At 547:* To establish violations of §8(a)(3) in an antiunion animus case …, the General Counsel … has the initial burden to show that the 'protected activity was a motivating factor in the adverse employment decision.' More specifically, … the General Counsel must establish: '(1) that the [employer] was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.'" *See also* ***Fluor Daniel, Inc. v. NLRB***, 332 F.3d 961, 968 (6th Cir.2003); ***IUOE, Local 150 v. NLRB***, 325 F.3d 818, 828-29 (7th Cir.2003).

Lucas v. NLRB, 333 F.3d 927, 932 (9th Cir.2003). "Because hiring halls provide a centralized source for generating continued employment, … we have held that unions may not use a hiring hall to discipline particular individuals or to discriminate against non-union members in order to encourage or discourage union membership…. Thus, when a union operates an exclusive hiring hall, it cannot act in an unreasonable, arbitrary, or invidious manner in regard to an employee. *At 935:* [I]n administering a hiring hall, a union has a heightened duty of fair dealing that requires it to operate by reference to objective criteria." (Internal quotes omitted.) *See also* ***NLRB v. Local 334, LiUNA***, 481 F.3d 875, 880 (6th Cir.2007) (requiring union member to use nonexclusive hiring hall when other prospective EEs are not required to is arbitrary and discriminatory); ***Jacoby v. NLRB***, 325 F.3d 301, 309 (D.C.Cir.2003) (union is not strictly liable for inadvertent mistakes when otherwise operating its hiring hall pursuant to prescribed criteria and standards).

Discrimination--Refusal to Hire--Successorship

Adams & Assocs. v. NLRB, 871 F.3d 358, 370 (5th Cir.2017). "'[T]o establish a violation of [NLRA] §8(a)(3) and (1) [now 29 U.S.C. §158(a)(1), (a)(3)] in cases where a refusal to hire is alleged in a successorship context, the [NLRB] has the burden to prove that the employer failed to hire employees of its predecessor and was motivated by antiunion animus.' Once this is shown, 'the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive.' … Antiunion animus need not be the sole motivating factor for the employer's refusal to hire, only 'a substantial or motivating factor….'"

Discrimination--Union Security

Communications Workers of Am. v. Beck, 487 U.S. 735, 745 (1988). "Taken as a whole, [NLRA] §8(a)(3) [now 29 U.S.C. §158(a)(3)] permits an employer and a union [in a non-right-to-work state] to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the 'membership' that may be so required has been 'whittled down to its financial core.' [T]his 'financial core' [does not include] the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." *See also* ***Janus v. American Fed'n of State, Cty., & Mun. Emps., Council 31***, 585 U.S. 878, 929-301 (2018) (public-sector EEs cannot be charged agency fees

unless EE affirmatively consents to pay); ***Marquez v. Screen Actors Guild, Inc.***, 525 U.S. 33, 44 (1998) (union does not breach duty of fair representation when it negotiates security-clause tracking §158(a)(3)); ***Lehnert v. Ferris Faculty Ass'n***, 45 U.S.C. §152, *Chargeable Activities* (discussing "chargeable activities" under RLA).

NLRB v. General Motors Corp., 373 U.S. 734, 734-35 (1963). "The issue here is whether an employer commits an unfair labor practice … when it refuses to bargain with a certified union over the union's proposal for the adoption of the 'agency shop.' … We have concluded that this type of arrangement does not constitute an unfair labor practice and that it is not prohibited by [NLRA] §8 [now 29 U.S.C. §158]. *At 745:* We hold that the employer was not excused from his duty to bargain over the proposal on the theory that his acceding to it would necessarily involve him in an unfair labor practice. Whether a different result obtains in States which have declared such arrangements unlawful is an issue still to be resolved…." *See also* ***Retail Clerks v. Schermerhorn***, 373 U.S. 746, 755-56 (1963).

Duty to Bargain--Generally

NLRB v. Curtin Matheson Sci., Inc., 494 U.S. 775, 777-78 (1990). "Upon certification by the NLRB as the exclusive bargaining agent for a unit of employees, a union enjoys an irrebuttable presumption of majority support for one year. … After the first year, the presumption continues but is rebuttable. [A]n employer may rebut that presumption by showing that, at the time of the refusal to bargain, either (1) the union did not *infact* enjoy majority support, or (2) the employer had a 'good-faith' doubt, founded on a sufficient objective basis, of the union's majority support. *At 790:* Unions do not inevitably demand displacement of all strike replacements. *At 796:* We hold that the [NLRB's] refusal to adopt a presumption that striker replacements oppose the Union is rational and consistent with the [NLRA]." *See also* ***Fall River Dyeing & Finishing Corp. v. NLRB***, 482 U.S. 27, 41 (1987) (presumption continues despite change in ERs); ***NLRB v. Transpersonnel, Inc.***, 349 F.3d 175, 186-87 (4th Cir.2003) (ER has burden to prove loss of majority status or good-faith doubt); ***BPH & Co. v. NLRB***, 333 F.3d 213, 217-18 (D.C.Cir.2003) (no good-faith doubt if unfair labor practices significantly contribute to loss of majority support).

NLRB v. IBEW, Local 340, 481 U.S. 573, 586 (1987). "[D]iscipline of a supervisor member is prohibited under [NLRA] §8(b)(1)(B) [now 29 U.S.C. §158(b)(1)(B)] only when that member is engaged in §8(b)(1)(B) activities--that is, collective bargaining, grievance adjustment, or some other closely related activity (*e.g.*, contract interpretation …). *At 595:* Section 8(b)(1)(B) was enacted to protect the integrity of the processes of grievance adjustment and collective bargaining--two private dispute-resolution systems on which the national labor laws place a high premium. Although some union discipline might impermissibly affect the manner in which a supervisor-member carries out §8(b)(1)(B) tasks or coerce the employer in its selection of a §8(b)(1)(B) representative, union discipline directed at supervisor-members without §8(b)(1)(B) duties, working for employers with whom the union neither has nor seeks a collective-bargaining relationship, cannot and does not adversely affect the performance of §8(b)(1)(B) duties." *See also* ***Williamson v. NLRB***, 643 F.3d 481, 489 (6th Cir.2011) (gathering information from multiple unions and reporting it back to ER is not §8(b)(1)(B) activity).

First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 678-79 (1981). "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business. *At 686:* We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is *not* part of [NLRA] §8(d)'s [now 29 U.S.C. §158(d)'s] 'terms and conditions,' … over which Congress has mandated bargaining." *See also* ***Ford Motor Co. v. NLRB***, 441 U.S. 488, 503 (1979) (in-plant food services and prices are subject to mandatory bargaining); ***Fibreboard Paper Prods. v. NLRB***, 379 U.S. 203, 211-12 (1964) (bargaining on contracting out plant maintenance performed by EEs in bargaining unit is mandatory).

H.K. Porter Co. v. NLRB, 397 U.S. 99, 102 (1970). "[W]hile the [NLRB] does have power under the [NLRA] to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a CBA [as a remedy for unfair labor practice]."

NLRB v. Insurance Agents' Int'l Un., 361 U.S. 477, 490 (1960). "The scope of [NLRA] §8(b)(3) [now 29 U.S.C. §158(b)(3)] and the limitations on [NLRB] power which were the design of [NLRA] §8(d) [now 29 U.S.C. §158(d)] are exceeded … by inferring a lack of good faith not from any deficiencies of the union's performance at the bargaining table by reason of its attempted use of economic pressure, but … because tactics designed to exert economic pressure were employed during the course of the good-faith negotiations. Thus the [NLRB] in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. … Our labor policy is not presently erected on a foundation of government control of the results of negotiations. Nor does it contain a charter for the [NLRB] to act at large in equalizing disparities of bargaining power between employer and union."

NLRB v. Truitt Mfg., 351 U.S. 149, 153-54 (1956). "[A] refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith. [¶] We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. … The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met." *See also* ***KLB Indus. v. NLRB***, 700 F.3d 551, 556-57 (D.C.Cir.2012) (ER pleading poverty must open its books for full financial audit, but competitive-disadvantage claim is insufficient to require full audit; NLRB's discovery principles authorize union to request specific information to verify ER's stated position).

NLRB v. American Nat'l Ins., 343 U.S. 395, 409 (1952). "Any fears the [NLRB] may entertain that use of management functions clauses will lead to evasion of an employer's duty to bargain collectively as to 'rates of pay, wages, hours and conditions of employment' do not justify condemning all bargaining for management functions clauses covering any 'condition of employment' as *per se* violations of the [NLRA]. The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of [NLRA] §8(d) [now 29 U.S.C. §158(d)] to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether."

J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944). "Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the [NLRA] looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. … Wherever private contracts conflict with [the NLRB's] functions, they obviously must yield or the Act would be reduced to a futility. *At 338:* It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group."

Ohio Edison Co. v. NLRB, 847 F.3d 806, 810 (6th Cir.2017). "[A] request to bargain need follow no specific form or be made in any specific words so long as there is a clear communication of meaning, and the employer understands that a demand is being made. [¶] First, the bargaining representative must do more than merely protest the change; it must meet its obligation to request bargaining. … Second, in determining whether a union has requested bargaining, statements and acts of the union or the employer cannot be viewed in isolation." (Internal quotes omitted.)

NLRB v. Enterprise Leasing Co., 722 F.3d 609, 616 (4th Cir.2013). "[W]e presume the validity of [an NLRB-supervised] election and will overturn such an election only if the [NLRB] has clearly abused its discretion. [¶] A party seeking to have an election set aside bears a heavy burden and must prove by specific evidence not only that improprieties occurred, but also that they prevented a fair election. When evaluating whether a party has met this heavy burden, we must be mindful of the real world environment in which an election takes place. Although the [NLRB] strives to maintain laboratory conditions in

elections, clinical asepsis is an unattainable goal. An election is by its nature a rough and tumble affair, and a certain amount of exaggerations, hyperbole, and appeals to emotion are to be expected. [¶] The [NLRB's] findings of fact are conclusive as long as they are supported by substantial evidence on the record considered as a whole. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. While the [NLRB] may not base its inference on pure speculation it may draw reasonable inferences from the evidence." (Internal quotes omitted.) *See also* ***ManorCare v. NLRB***, 823 F.3d 81, 85-86 (D.C.Cir.2016) (listing factors to consider when determining whether threat is likely to interfere with free election).

Local Un. No. 47, IBEW v. NLRB, 927 F.2d 635, 640-41 (D.C.Cir.1991). "When the question is one of waiver, the union's intent to relinquish its statutory rights 'must be clear and unmistakable.' [¶] We accord no special deference, however, to ultimate legal conclusions that rest on the [NLRB's] interpretation of a collective bargaining contract. … Where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say the union has 'waived' its statutory right to bargain; rather, the contract will control and the 'clear and unmistakable' intent standard is irrelevant." *See also* ***Columbia Coll. Chi. v. NLRB***, 847 F.3d 547, 552 (7th Cir.2017).

Duty to Bargain--Mandatory Subjects

NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958). "[G]ood faith [on the mandatory subjects of bargaining under §158] does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining."

Local Joint Exec. Bd. v. NLRB, 657 F.3d 865, 876 (9th Cir.2011). "[I]n a right-to-work state, where dues-checkoff does not exist to implement union security, dues-checkoff is akin to any other term of employment that is a mandatory subject of bargaining. [ERs'] unilateral termination of dues-checkoff in this case was … 'in effect a refusal to negotiate … which reflect[ed] a cast of mind against reaching agreement.' In ceasing dues-checkoff without bargaining to impasse, [ERs] therefore violated [NLRA] §8(a)(5) [now 29 U.S.C. §158(a)(5)]."

National Steel Corp. v. NLRB, 324 F.3d 928, 932 (7th Cir.2003). "[M]atters that are both plainly germane to the working environment and not among those managerial decisions, which lie at the core of entrepreneurial control are mandatory subjects of collective bargaining. [¶] [T]he use of hidden surveillance cameras is a mandatory subject of collective bargaining because … the installation and use of such cameras [is] analogous to physical examinations, drug/alcohol testing requirements, and polygraph testing, all of which the [NLRB] has found to be mandatory subjects of bargaining." (Internal quotes omitted.) *See also* ***NLRB v. Mining Specialists, Inc.***, 326 F.3d 602, 607 (4th Cir.2003) (bonus plan established as compensation is mandatory subject of bargaining).

Duty to Bargain--Obligation to Provide Information

NLRB v. Acme Indus., 385 U.S. 432, 435-36 (1967). "There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement. The only real issue in this case … is whether the [NLRB] must await an arbitrator's determination of the relevancy of the requested information before it can enforce the union's statutory rights under [NLRA] §8(a)(5) [now 29 U.S.C. §158(a)(5)]." Held: No. *See also* ***Detroit Edison Co. v. NLRB***, 440 U.S. 301, 314-15 (1979) (duty to supply information under §8(a)(5) turns on circumstances of particular case). *But see* ***NLRB v. C&C Plywood Corp.***, 385 U.S. 421, 429-30 (1967) (when no arbitration agreement exists, parties can file complaint with NLRB to determine applicability of provision).

NLRB v. USPS, 660 F.3d 65, 65-66 (1st Cir.2011). NLRA §8(a)(5), now 29 U.S.C. §158(a)(5), "imposes on [ER] the duty to bargain collectively, which includes the obligation to furnish relevant information to a labor union for purposes of collective bargaining. The Privacy Act, 5 U.S.C. §552a(b), meanwhile, imposes on [ER] the obligation to protect the privacy of its employees' personal information unless they consent to disclosure. *At 69:* [A]n employer … is not automatically obliged to

disclose 'all the information in the manner requested.' Rather, an employer's duty to disclose information under §8(a)(5), as well as 'the type of disclosure' necessary to satisfy this duty, … turns on 'the circumstances of the particular case'…. In evaluating these circumstances, there is no 'absolute rule' that a union's need for relevant information must always trump all other interests. [¶] [Under ***Detroit Edison Co. v. NLRB***, 440 U.S. 301 (1979),] a union's interest in relevant information must accommodate other, competing interests, such as privacy. '[A] balancing is required' as between 'the need to know by the union to allow it to effectively carry out its functions as bargaining representative of the employees,' and an 'employer's legitimate right to privacy, in which the relevancy of the information sought and the safeguards provided to the employer to protect its privacy interest are the principal elements to be considered.' *At 72:* Thus, the fact that information may be disclosed 'as required by law' does not itself defeat all expectations of privacy, nor does it create an expectation that the information will be disclosed automatically whenever it is relevant to a union." *See also* ***New York & Presbyterian Hosp. v. NLRB***, 649 F.3d 723, 729-30 (D.C.Cir.2011).

Duty to Bargain--Relocation of Work

NLRB v. Gaylord Chem. Co., 824 F.3d 1318, 1325 (11th Cir.2016). "Generally, if an employer relocates and the new plant is considered merely a continuation of the old one, the employer must continue to recognize and bargain with the union which represented the employees at the old plant. The continuity requirement ensures that despite changes in management, plant location or production techniques, workplace conditions remain sufficiently unchanged such that the union can still fairly be presumed to command majority support in the unit. [¶] In assessing whether this continuity has been established, the [NLRB] looks to whether the employer has maintained the same operational methods, managerial hierarchy, customers, and services or products, as well as changes in either the size, makeup, or the identity of the employee complement." (Internal quotes omitted.)

Duty to Bargain--Successorship

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987). In determining whether an employer is a successor employer, "the focus is on whether there is 'substantial continuity' between the enterprises. Under this approach, the [NLRB] examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." *See also* ***Dean Transp. v. NLRB***, 551 F.3d 1055, 1062 (D.C.Cir.2009) (NLRB may find substantial continuity even where successor ER takes over discrete portion of predecessor's bargaining unit); ***Waterbury Hotel Mgmt. v. NLRB***, 314 F.3d 645, 654 (D.C.Cir.2003) (acquisition of substantial assets is not a prerequisite for successorship).

Golden State Bottling Co. v. NLRB, 414 U.S. 168, 170 (1973). "The principal question … is whether the *bona fide* purchaser of a business, who acquires and continues the business with knowledge that his predecessor has committed an unfair labor practice in the discharge of an employee, may be ordered by the [NLRB] to reinstate the employee with backpay. *At 180:* [A]*bona fide* purchaser, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor…. [¶] The tie between the offending employer and the *bona fide* purchaser of the business, supplied by [an NLRB] finding of a continuing business enterprise, establishes the requisite relationship of dependence. … There will be no adjudication of liability against a *bona fide* successor 'without affording [it] a full opportunity at a hearing, after adequate notice, to present evidence on the question of whether it is a successor which is responsible for remedying a predecessor's unfair labor practices. The successor [will] also be entitled, of course, to be heard against the enforcement of any order issued against it.'" *See also* ***NLRB v. Leiferman Enters.***, 649 F.3d 873, 878-79 (8th Cir.2011).

NLRB v. Burns Int'l Sec. Servs., 406 U.S. 272, 284 (1972). "[A]lthough successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them. *At 294-95:* Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the

successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by [NLRA] §9a …, [now] 29 U.S.C. §159(a)." *See also* ***Creative Vision Res. v. NLRB***, 882 F.3d 510, 518-19 (5th Cir.2018) (successor must clearly announce intent to establish new terms before or simultaneously with expression of intent to retain EEs); ***S&F Mkt. St. Healthcare LLC v. NLRB***, 570 F.3d 354, 359 (D.C.Cir.2009) ("perfectly clear" exception is intended to prevent ER from inducing possibly adverse reliance from EEs it misled or lulled into not looking for other work); ***3750 Orange Place L.P. v. NLRB***, 333 F.3d 646, 663 (6th Cir.2003) (listing factors for determining when successor's obligation to bargain with incumbent union accrues).

HealthBridge Mgmt. v. NLRB, 902 F.3d 37, 43 (2d Cir.2018). "[A]n employer may not 'avoid the obligations of a [CBA] through a sham transaction or technical change in operations' that amounts to a 'disguised continuance.' Thus, … an employer may not in succession terminate its employees, cease its operations, form a new company to engage in the same business, hire back the same employees to perform the same work, and do so without honoring the parties' CBA. Nor can an employer terminate its employees only to rehire a subset of them (to perform the same work), without regard to their seniority under the CBA, even if the employer shifts the putatively new employees onto the payroll of another entity."

NLRB v. Lily Transp., 853 F.3d 31, 33 (1st Cir.2017). "[U]nder the 'successor bar doctrine,' as adopted by the [NLRB] in ***UGL-UNICCO Serv. Co.***, 357 N.L.R.B. 801 (2011), an incumbent union is entitled to represent a successor employer's employees for a reasonable period of time for bargaining before its majority status may be questioned. *At 38:* [This] is an adequately explained interpretive change reflecting the [NLRB's] judgment of a reasonable balance between the [NLRA] §7 [now 29 U.S.C. §157] right of employee choice and the need for some period of stability to give the new relationships a chance to settle down."

Community Hosps. of Cent. Cal. v. NLRB, 335 F.3d 1079, 1082 (D.C.Cir.2003). "'A (1) successor employer is required to recognize and negotiate with the bargaining agent of the predecessor's employees if (2) the bargaining unit remains appropriate and (3) the successor does not have a good faith doubt of the union's continuing majority support.' *At 1084:* In reviewing the [NLRB's] selection of a bargaining unit, we are mindful that 'the [NLRB] need only select *an* appropriate unit, not *the most* appropriate unit.'" *See also* ***Shares, Inc. v. NLRB***, 433 F.3d 939, 944-45 (7th Cir.2006).

Duty to Bargain--Unilateral Changes

NLRB v. Katz, 369 U.S. 736, 743 (1962). "A refusal to negotiate *in fact* as to any subject which is within [NLRA] §8(d) [now 29 U.S.C. §158(d)], and about which the union seeks to negotiate, violates §8(a)(5) [now 29 U.S.C. §158(a)(5)] though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of §8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal." *See also* ***NLRB v. Whitesell Corp.***, 638 F.3d 883, 890 (8th Cir.2011) (whether parties have reached impasse is case-specific inquiry).

NLRB v. Metro Man IV, LLC, 113 F.4th 692, 699-700 (6th Cir.2024). "[I]f an employer unilaterally alters certain terms of employment without bargaining, it violates §8(a)(5) [now 29 U.S.C. §158(a)(5)]. There is an exception, however, where exigent economic circumstances justify immediate action. If an employer can prove that an 'unforeseen occurrence, having a major economic effect ... requires the company to take immediate action,' then it may make unilateral changes without first bargaining with the union. [¶] Even if an employer's decisional-bargaining obligations are excused, it may be required to bargain with the Union over the *effects* of its unilateral decisions[, under 29 U.S.C. §159(a),] if they involve 'pay, wages, hours of employment, or other conditions of employment.' … Effects-bargaining 'must be conducted in a meaningful manner and at a meaningful time, and the [NLRB] may impose sanctions to insure its adequacy.'"

PG Publ'g Co. v. NLRB, 83 F.4th 200, 205 (3d Cir.2023). "[I]n general, an employer commits an unfair labor practice, violative of [NLRA] §§8(a)(1) and 8(a)(5) [now 29 U.S.C. §158(a)(1) and (a)(5)], when, after the expiration of a CBA and during negotiations for a successor CBA, the employer alters the post-expiration status quo regarding the terms and conditions of

employment without first negotiating with its employees to an overall impasse on the successor CBA. *At 212-13:* The dispute over the [CBA provision] boils down to this: whether ordinary contract principles or the heightened standard applicable to the waiver of a statutory right, i.e., the clear-and-unmistakable-waiver standard, should apply in determining whether a provision in an expired CBA becomes part of the post-expiration status quo for purposes of future labor negotiations. [T]he terms of an expired CBA 'retain legal significance because they *define the status quo*.' We are thus directed to the language of the CBA in question, and to the ordinary principles of contract interpretation, to determine whether a particular term forms part of the status quo. If the language of the CBA does not indicate that the term in question persists as part of the status quo, the inquiry ends. If, but only if, the contract indicates in some fashion that the term does form part of the post-expiration status quo--and therefore continues to govern the parties by operation of the NLRA--then the employer must meet the clear-and-unmistakable-waiver standard if it wishes to assert that its employees have waived their statutory right to the benefits of the contested term." *See also* ***Cibao Meat Prods. v. NLRB***, 547 F.3d 336, 340 (2d Cir.2008) (ER may not stop paying EE benefits after CBA expires unless parties have reached an impasse); ***More Truck Lines, Inc. v. NLRB***, 324 F.3d 735, 739 (D.C.Cir.2003) (if CBA has expired, ER may not unilaterally alter wage rates set in CBA).

IBEW, Local Un. 43 v. NLRB, 9 F.4th 63, 71-72 (2d Cir.2021). "For many years, the Board employed a 'clear and unmistakable waiver' standard for determining whether a CBA permitted an employer's unilateral change to an established policy. Under that standard, we asked whether the text of the CBA 'unequivocally and specifically' permitted the employer's action such that the union could be said to have 'waived' its right to bargain the issue. [¶] Recently, however, the Board abandoned its 'clear and unmistakable waiver' standard in favor of a 'contract coverage' test. [P]arties to a CBA have *already* bargained with respect to any matter 'covered by' the contract. Thus, 'where the employer acts pursuant to a claim of right under the parties' agreement, the resolution of the refusal to bargain charge rests on an interpretation of the contract'--not on a 'waiver' analysis. Because the question of waiver is irrelevant, the standard does not require a CBA to 'specifically mention, refer to or address the employer decision at issue.' Instead, it calls on courts to 'apply[ ] ordinary principles of contract interpretation,' recognizing that a CBA 'establishes principles to govern a myriad of fact patterns' and 'bargaining parties [cannot] anticipate every hypothetical grievance and ... address it in their contract.' In short, the contract coverage standard asks only that we 'examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. *At 73:* [W]e ... adopt the contract coverage standard as rational and consistent with the [NLRA]." *See also* ***Bath Mar. Draftsmen's Ass'n v. NLRB***, 475 F.3d 14, 25 (1st Cir.2007); ***NLRB v. USPS***, 8 F.3d 832, 836-37 (D.C.Cir.1993); ***Chicago Tribune Co. v. NLRB***, 974 F.2d 933, 937 (7th Cir.1992).

Wayneview Care Ctr. v. NLRB, 664 F.3d 341, 347-48 (D.C.Cir.2011). "An employer violates [its] duty to bargain [under §158(a)(5)] if, absent a final agreement or a bargaining impasse, he unilaterally imposes changes in the terms and conditions of employment. A bargaining impasse is reached when good faith negotiations have exhausted the prospects of concluding an agreement, … and there is no realistic possibility that continuation of discussion at that time would be fruitful…. The burden of establishing impasse lies with the party asserting it. The [NLRB] considers a number of factors to determine whether impasse exists, including the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations." (Internal quotes omitted.) *See also* ***Carey Salt Co. v. NLRB***, 736 F.3d 405, 411-12 (5th Cir.2013) (proper inquiry is not whether union expected or wished to prolong discussions, but whether both parties realized that any discussions would be useless when ER negotiators declared impasse); ***ATC Vancom v. NLRB***, 370 F.3d 692, 696 (7th Cir.2004) (ER violates §158(a)(1) and (5) when it makes midterm changes in CBA provisions related to mandatory subjects of bargaining).

Expression of Views

National Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 959 (D.C.Cir.2013), *overruled on other grounds*, ***American Meat Inst. v. U.S. Dept. of Agric.***, 760 F.3d 18 (D.C.Cir.2014). "Suppose that [NLRA] §8(c) [now 29 U.S.C. §158(c)] prevents the [NLRB] from charging an employer with an unfair labor practice for posting a notice advising employees of their right not to join a union. Of course §8(c) clearly does this. How then can it be an unfair labor practice for an employer to refuse to post a government notice informing employees of their right to unionize (or to refuse to)? Like the freedom of speech guaranteed in the First Amendment,

§8(c) necessarily protects--as against the [NLRB]--the right of employers (and unions) not to speak. [¶] We … conclude that the [NLRB's] rule violates §8(c) because it makes an employer's failure to post the [NLRB's] notice an unfair labor practice, and because it treats such a failure as evidence of anti-union animus in cases involving, for example, unlawfully motivated firings or refusals to hire--in other words, because it treats such a failure as evidence of an unfair labor practice."

Featherbedding

NLRB v. Gamble Enters., 345 U.S. 117, 118 (1953). Is there "an unfair labor practice, within the meaning of [NLRA] §8(b)(6) [now 29 U.S.C. §158(b)(6)] when [a union] insists that the management of one of an interstate chain of theaters shall employ a local orchestra to play in connection with certain programs, although that management does not need or want to employ that orchestra[?]" Held: No.

Health-Care Strikes--Notice

NLRB v. Special Touch Home Care Servs., 708 F.3d 447, 455-56 (2d Cir.2013). "Congress's decision to require *union* notification via [NLRA] §8(g) [now 29 U.S.C. §158(g)] trumps [ER's] interests in enforcing its call-in rule, regardless of whether its argued basis for doing so is business-related or safety-oriented. [T]o hold otherwise would constitute a rejection of the balance struck by Congress in enacting §8(g). [¶] [T]he union notification provision is intended as a sufficient safeguard to enable health care workers to strike; there is no requirement that individual employees provide notice. The [NLRB], and this Court, have recognized this principle repeatedly."

SEIU, United Healthcare Workers-W. v. NLRB, 574 F.3d 1213, 1218 (9th Cir.2009). "Although the individual decision to refuse to cross the picket line, or in this case to refuse overtime, does not require notice because of the absence of union action, notice is required when a refusal to work is the direct result of union action against a healthcare institution." *See also* ***Civil Serv. Emps. Ass'n v. NLRB***, 569 F.3d 88, 94-95 (2d Cir.2009) (EEs who picket without providing notice under §158(g) and do not strike are within the law); ***Bry-Fern Care Ctr., Inc. v. NLRB***, 21 F.3d 706, 711 (6th Cir.1994) (key to §158(g) is whether the institution is a health-care institution, not whether EEs are health-care EEs).

Minnesota Licensed Practical Nurses Ass'n v. NLRB, 406 F.3d 1020, 1024 (8th Cir.2005). "[T]he plain language of [NLRA] §8(g) [now 29 U.S.C. §158(g)] bars a union from unilaterally extending the date and time of the strike as disclosed in the union's ten-day notice." *See also* ***Beverly Health & Rehab. Servs. v. NLRB***, 317 F.3d 316, 321 (D.C.Cir.2003) (§158(g) prohibits unilateral extension of notice).

Interference by Employer

BE&K Constr. Co. v. NLRB, 536 U.S. 516, 536-37 (2002). "Because there is nothing in the statutory text indicating that §158(a)(1) must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, we decline to do so. Because the [NLRB's] standard for imposing liability under the NLRA allows it to penalize such suits, its standard is thus invalid. We do not decide whether the [NLRB] may declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity, since the [NLRB's] standard does not confine itself to such suits."

Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 361 (1998). "[A]n employer who believes that an incumbent union no longer enjoys the support of a majority of its employees has three options: to request a formal, [NLRB]-supervised election, to withdraw recognition from the union and refuse to bargain, or to conduct an internal poll of employee support for the union. The [NLRB] has held that the latter two are unfair labor practices unless the employer can show that it had a 'good faith reasonable doubt' about the union's majority support. We must decide whether the [NLRB's] standard for employer polling is rational and consistent with the [NLRA]. *At 380:* We conclude that the [NLRB's] 'reasonable doubt' test for employer polls is facially rational and consistent with the Act." *See also****New Concepts for Living, Inc. v. NLRB***, 94 F.4th 272, 288 (3d Cir.2024) (ER's poll is lawful only if (1) poll's purpose is to assess a union's claim of majority, (2) this purpose is communicated to EEs, (3)

assurances against reprisal are given, (4) EEs are polled by secret ballot, and (5) ER has not engaged in unfair labor practices or otherwise created a coercive atmosphere); ***Pacific Coast Sup. v. NLRB***, 801 F.3d 321, 326 (D.C.Cir.2015) (under post-2001 NLRB standard, ER cannot withdraw recognition and refuse to bargain unless it can prove by preponderance of evidence that incumbent union has lost majority support).

Lechmere, Inc. v. NLRB, 502 U.S. 527, 538 (1992). "To say that our cases require accommodation between employees' and employers' rights is a true but incomplete statement, for the cases also go far in establishing the *locus* of that accommodation where nonemployee organizing is at issue. So long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place. It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights…." *See also* ***Hudgens v. NLRB***, 424 U.S. 507, 522 (1976) (accommodation depends on nature and strength of 29 U.S.C. §157 rights and private-property rights asserted in context); ***NLRB v. United Steel Workers***, 357 U.S. 357, 364 (1958) (no-solicitation rule is valid if opportunities for reaching EEs with pro-union message are at least as great as ER's ability to promote antiunion views); ***NLRB v. Babcock & Wilcox Co.***, 351 U.S. 105, 113-14 (1956) (NLRA does not require ER to permit use of its facilities for organization when other means are readily available).

NLRB v. Gissel Packing Co., 395 U.S. 575, 618-19 (1969). "[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree … that '[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.'" *See also* ***Intertape Polymer Corp. v. NLRB***, 801 F.3d 224, 231, 236 (4th Cir.2015) (questioning EEs about union sentiments or surveilling union activity on company property violates NLRA only if conduct has reasonable tendency to intimidate or coerce EEs); ***Brandeis Mach. & Sup. v. NLRB***, 412 F.3d 822, 831 (7th Cir.2005) (court should consider timing and words of ER's speech and whether speech targeted union supporters or was directed toward EEs who were being threatened); ***Dayton Newspapers, Inc. v. NLRB***, 402 F.3d 651, 660 (6th Cir.2005) (threatening EEs with loss of employment or other adverse consequences if they strike or promising EEs they would be better off without union are violations of §158(a)(1)).

Textile Workers Un. v. Darlington Mfg., 380 U.S. 263, 268-69 (1965). "[C]ertain business decisions will, to some degree, interfere with concerted activities by employees. But it is only when the interference with [NLRA] §7 [now 29 U.S.C. §157] rights outweighs the business justification for the employer's action that [NLRA] §8(a)(1) [now 29 U.S.C. §158(a)(1)] is violated. A violation of §8(a)(1) alone therefore presupposes an act which is unlawful even absent a discriminatory motive. Whatever may be the limits of §8(a)(1), some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of §8(a)(1), whether or not they involved sound business judgment, unless they also violated §8(a)(3) [now 29 U.S.C. §158(a)(3)]. [A]n employer has the right to terminate his business, whatever the impact of such action on concerted activities, if the decision to close is motivated by other than discriminatory reasons. But such action, if discriminatorily motivated, is encompassed within the literal language of §8(a)(3). *At 273-74:* We hold here only that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice." *See also* ***American Ship Bldg. Co. v. NLRB***, 380 U.S. 300, 318 (1965).

NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964). NLRA §8(a)(1), now 29 U.S.C. §158(a)(1), "prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect.

At 410: Insulating the right of collective organization from calculated good will of this sort deprives employees of little that has lasting value."

NLRB v. Rockaway News Sup. Co., 345 U.S. 71, 80 (1953). 29 U.S.C. §158(b)(4)(D) "clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree. And nothing in the [NLRA] prevents their agreeing upon contrary provisions if they consider them appropriate to the particular kind of business involved. An employee's breach of such an agreement may be made grounds for his discharge without violating [NLRA] §7 [now 29 U.S.C. §157]."

NLRB v. ImageFIRST Unif. Rental Serv., 910 F.3d 725, 734 (3d Cir.2018). "It is well established that there is no NLRA violation where an employer can show that its threat to call or its call to the police 'is motivated by some reasonable concern, such as public safety or interference with legally protected interests.' … The employer must possess a subjective concern about interference with legally protected interests, such as its private property rights. The employer's concern then must be objectively reasonable."

Tamosiunas v. NLRB, 892 F.3d 422, 429 (D.C.Cir.2018). NLRA §8's [now 29 U.S.C. §158's] "protective cloak sweeps … broadly, proscribing any action by an employer or union that 'has a reasonable tendency' to coerce or restrain employees in the exercise of their [NLRA] §7 [now 29 U.S.C. §157] rights. [¶] Accordingly, implied threats may run afoul of §§7 and 8."

T-Mobile USA, Inc. v. NLRB, 865 F.3d 265, 270-71 (5th Cir.2017). "[T]he 'appropriate inquiry' is whether [ER's] rules for workplace conduct violate [NLRA] §8(a)(1) [now 29 U.S.C. §158(a)(1)] by chilling a reasonable employee in the exercise of his or her [NLRA] §7 [now 29 U.S.C. §157] rights. [¶] In order to determine whether a workplace rule violates §8(a)(1), this Court applies [a] two-part … framework. First, the Court decides 'whether the rule *explicitly* restricts activities protected by §7.' Second, even if the restriction is not explicit, the rule may still violate §8(a)(1) where '(1) employees would reasonably construe the language to prohibit §7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of §7 rights.' … The appropriate, objective inquiry is not whether the rules '*could* conceivably be read to cover §7 activity, even though that reading is unreasonable,' but rather whether 'a reasonable employee reading the[ ] rules *would* … construe them to prohibit conduct protected by the Act.'" *See also* ***NLRB v. Northeastern Land Servs.***, 645 F.3d 475, 481-82 (1st Cir.2011).

Editor's note: In 2017, the NLRB announced that it will no longer use the "reasonably construe" standard to evaluate whether work rules, policies and employee-handbook provisions violate §158(a)(1), and it adopted a balancing test to evaluate (1) the nature and extent of a rule or policy's potential impact on NLRA rights, and (2) legitimate justifications associated with the rule or policy. See ***The Boeing Co.***, 365 NLRB No. 154 (12-14-17). NLRB decisions are available at www.nlrb.gov.

Consolidated Comms. v. NLRB, 837 F.3d 1, 7 (D.C.Cir.2016). "An employer's discipline of an employee for strike conduct constitutes an unfair labor practice if (i) the discharged employee was at the time of the alleged misconduct engaged in a protected activity, (ii) the employer knew the employee was engaged in a protected activity, (iii) the alleged misconduct during that protected activity provided the basis for discipline, and (iv) the employee was not, in fact, guilty of that misconduct. [¶] Striker misconduct justifies an employer's disciplinary action if, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the [NLRA], including the right to refrain from striking. *At 8:* The … standard is an objective one and does not call for an inquiry into whether any particular employee was actually coerced or intimidated. Rather, a serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker, and an employer need not countenance conduct that amounts to intimidation and threats of bodily harm." (Internal quotes omitted.)

Cellular Sales v. NLRB, 824 F.3d 772, 777 (8th Cir.2016). "[A]n arbitration agreement violates [NLRA] §8(a)(1) [now 29 U.S.C. §158(a)(1)] if it expressly prohibits employees from filing unfair labor practice charges with the [NLRB] or if it would be reasonably construed by employees to restrict or preclude such activity."

Editor's note: In 2017, the NLRB announced that it will no longer use the "reasonably construe" standard to evaluate whether work rules, policies and employee-handbook provisions violate §158(a)(1) and adopted a balancing test to evaluate (1) the nature and extent of a rule or policy's potential impact on NLRA rights, and (2) legitimate justifications associated with the rule or policy. See ***The Boeing Co.***, 365 NLRB No. 154 (12-14-17). NLRB decisions are available at www.nlrb.gov.

Exum v. NLRB, 546 F.3d 719, 725 (6th Cir.2008). "'[W]here … strike misconduct is clearly shown, condonation may not be lightly presumed from mere silence or equivocal statements, but must clearly appear from some positive act by an employer indicating forgiveness and an intention of treating the guilty employees as if their misconduct had not occurred.' [¶] [T]he employer's action expressing forgiveness cannot be vague or equivocal. *At 727:* [A]n employee who claims that an employer condoned his activities must present clear and convincing evidence of that condonation in order to succeed in his claims."

Lawful vs. Unlawful Recognition of Union

International Ladies' Garment Workers' Un. v. NLRB, 366 U.S. 731, 739-40 (1961). "If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate … he can readily ascertain their validity and obviate [an NLRB] election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or authorization cards. Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so. Moreover, no penalty is attached to the violation. Assuming that an employer in good faith accepts or rejects a union claim of majority status, the validity of his decision may be tested in an unfair labor practice proceeding. If he is found to have erred in extending or withholding recognition, he is subject only to a remedial order requiring him to conform his conduct to the norms set out in the [NLRA]. No further penalty results."

Lee Lumber & Bldg. Material Corp. v. NLRB, 310 F.3d 209, 214 (D.C.Cir.2002). "'[W]hen an employer has unlawfully refused to recognize or bargain with an incumbent union, a reasonable period of time for bargaining before the union's majority status can be challenged will be no less than 6 months, but no more than 1 year.' To determine whether the period will be longer than the mandatory six months, the [NLRB] said it would employ 'a multifactor analysis,' [including:] '(1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse.'"

IAMAW, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Grp., 387 F.3d 1046, 1053 (9th Cir.2004). "[T]he key linguistic signal in §158(a)(2) is the phrase 'without loss of time.' Such language seems to authorize grievance-related compensation only for employees whose primary work responsibilities would otherwise be displaced by time spent engaged with management. After all, if an employee's only responsibility is to represent union employees in the grievance process, no 'working hours' could be 'los[t]' by his doing just that. The company would have no reason to 'dock' the employee's pay; he would simply be doing what his contract provides. [¶] We are therefore inclined to believe that no-docking provisions--as authorized by NLRA--become relevant only where an employee's 'working hours' are devoted primarily to some productive work besides 'confer[ring] with [the employer]' or otherwise representing union interests in connection with the grievance process." *See also* ***Titan Tire Corp. v. USW***, 734 F.3d 708, 728-29 (7th Cir.2013).

Multiemployer Bargaining

Charles D. Bonanno Linen Serv. v. NLRB, 454 U.S. 404, 412 (1982). "[A]n impasse is not sufficiently destructive of group bargaining to justify unilateral withdrawal. As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.' Furthermore, an impasse may be 'brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process.' Hence, 'there is little warrant for regarding an impasse as a rupture of the

bargaining relation which leaves the parties free to go their own ways.' [P]ermitting withdrawal at impasse would as a practical matter undermine the utility of multiemployer bargaining."

Repudiation

Boch Imps., Inc. v. NLRB, 826 F.3d 558, 565 (1st Cir.2016). "Longstanding [NLRB] precedent requires that in order for an employer to be relieved of liability for a workplace policy that constitutes an unfair labor practice, an employer must repudiate that policy, even if the employer has since discontinued that policy or revised it in a manner that makes it compliant with the NLRA. The 'fundamental remedial purpose' served by this repudiation requirement is to protect employees from the potential lingering effects of an unfair labor practice, even though that practice has been halted."

Secondary Boycotts

Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147, 153-54 (1983). NLRA §8(b)(4), now 29 U.S.C. §158(b)(4), "applies to communications 'other than picketing,' that are 'truthful,' and that do not produce either an interference with deliveries or a work stoppage by employees of any person other than the firm engaged in the primary labor dispute. *At 155-56:* The only publicity exempted from the prohibition is publicity intended to inform the public that the primary employer's product is 'distributed by' the secondary employer. We are persuaded that Congress included that requirement to reflect the concern that motivates all of §8(b)(4): 'shielding unoffending employers and others from pressures in controversies not their own.'" *See also* ***NLRB v. Servette***, 377 U.S. 46, 54-55 (1964); ***Kentov v. Sheet Metal Workers' Int'l***, 418 F.3d 1259, 1265 (11th Cir.2005).

National Woodwork Mfrs. v. NLRB, 386 U.S. 612, 644-45 (1967). "The determination whether the 'will not handle' [or 'hot cargo' clause of the CBA] and its enforcement violated [NLRA] §8(e) and §8(b)(4)(B) [now 29 U.S.C. §158(e) and §158(b)(4)(B)] cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for [boycotting ER's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, [boycotting ER] would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer … for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees. This will not always be a simple test to apply. '[H]owever difficult the drawing of lines more nice than obvious, the statute compels the task.'" *See also* ***NLRB v. International Longshoremen's Ass'n***, 447 U.S. 490, 504-05 (1980); ***NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. & Gen. Pipefitters***, 429 U.S. 507, 510-11 (1977); ***NLRB v. Local 32B-32J SEIU***, 353 F.3d 197, 199-200 (2d Cir.2003).

NLRB v. Fruit & Veg. Packers & Warehousemen, 377 U.S. 58, 72 (1964). "When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer."

Local 761, IUE v. NLRB, 366 U.S. 667, 672 (1961). NLRA §8(b)(4), now 29 U.S.C. §158(b)(4), "was directed toward what is known as the secondary boycott whose sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Thus [§158(b)(4)] left a striking labor organization free to use persuasion, including picketing, not only on the primary employer and his employees but on numerous others. Among these were secondary employers who were customers or suppliers of the primary employer and persons dealing with them and even employees of secondary

employers so long as the labor organization did not induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment. *At 673:* Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person." (Internal quotes omitted.) *See also* ***NLRB v. Denver Bldg. & Constr. Trades Council***, 341 U.S. 675, 687 (1951).

520 S. Mich. Ave. Assocs. v. Unite Here, 760 F.3d 708, 719 (7th Cir.2014). "[T]o be unlawful, picketing must threaten neutral parties with substantial loss or ruin, beyond the costs from customers who are persuaded to side with the union and avoid a particular product of an employer involved in the strike. *At 722:* [W]e hold that a union may be liable under §158(b)(4)(ii)(B) for unlawfully coercing a secondary [target] to cease doing business with the struck employer if the union's conduct amounts to harassment or involves repeated trespass or both. [¶] Certainly, a single trespass or isolated instance of harassment likely would not threaten 'ruin or substantial loss,' in much the same way that a picket against one struck good would likely not coerce a store owner. But repeated, sustained trespass or harassment, when used as a labor tactic, seeks to compel a certain result instead of fostering persuasion or communication. The Supreme Court has clearly indicated that coercive, as opposed to persuasive, conduct is the hallmark of unlawful labor activity."

Shafer Redi-Mix, Inc. v. Chauffeurs, Teamsters & Helpers Local Un. No. 7, 643 F.3d 473, 477 (6th Cir.2011). "During … a 'secondary boycott,' a union brings economic pressure to bear on a primary employer to do something the union wants by inducing a secondary employer doing business with the primary employer to bring economic pressure on the primary employer. The statute does not mention primary object or purpose. If any object of the strike is forbidden by §158(b)(4), it is a secondary boycott. It is not necessary to find that it was the sole object. In this vein, a threat of labor trouble is sufficient to violate §158(b)(4). *At 478:* The statute does not prohibit a union from picketing a primary employer." (Internal quotes omitted.)

American Steel Erectors, Inc. v. Local Un. No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 536 F.3d 68, 82 (1st Cir.2008). "There is … a difference between a claim brought under [NLRA] §8(b)(4)(ii)(A) [now 29 U.S.C. §158(b)(4)(ii)(A)] and a claim brought under §8(b)(4)(ii)(B) [now 29 U.S.C. §158(b)(4)(ii)(B)], which is apparent from the plain language of the statute: a successful §8(b)(4)(ii)(A) claim requires proof that a union is acting to coerce employers into an unlawful *agreement* to cease doing business with another party, while a successful §8(b)(4)(ii)(B) claim requires proof that the union's coercive tactics are intended to force an employer to cease doing business with another party, regardless of any agreement."

NLRB v. Business Mach. & Office Appliance Mechs. Conf. Bd., 228 F.2d 553, 559 (2d Cir.1955). An independent employer doing work "farmed out" by a primary employer "is not within the protection of [NLRA] §8(b)(4)(A) [now 29 U.S.C. §158(b)(4)(ii)(A)] when he knowingly does work which would otherwise be done by the striking employees of the primary employer and where this work is paid for by the primary employer pursuant to an arrangement devised and originated by him to enable him to meet his contractual obligations. The result must be the same whether or not the primary employer makes any direct arrangement with the employers providing the services."

Footnotes

1 So in original. Probably should be "unenforceable".

29 U.S.C.A. § 158, 29 USCA § 158
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter II. National Labor Relations (Refs & Annos)

29 U.S.C.A. § 158

§ 158. Unfair labor practices [Notes of Decisions subdivisions VII to XI]

Currentness

<Notes of Decisions for 29 USCA § 158 are displayed in multiple documents. For text of section, historical notes, and references, see first document for 29 USCA § 158.>

Notes of Decisions (5718)

29 U.S.C.A. § 158, 29 USCA § 158
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter II. National Labor Relations (Refs & Annos)

29 U.S.C.A. § 158a

§ 158a. Providing facilities for operations of Federal Credit Unions

Currentness

Provision by an employer of facilities for the operations of a Federal Credit Union on the premises of such employer shall not be deemed to be intimidation, coercion, interference, restraint or discrimination within the provisions of sections 157 and 158 of this title, or acts amendatory thereof.

CREDIT(S)

(Dec. 6, 1937, c. 3, § 5, 51 Stat. 5.)

29 U.S.C.A. § 158a, 29 USCA § 158a
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter II. National Labor Relations (Refs & Annos)

29 U.S.C.A. § 159

§ 159. Representatives and elections [Statutory Text & Notes of Decisions subdivisions I, II]

Currentness

<Notes of Decisions for 29 USCA § 159 are displayed in multiple documents.>

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

CREDIT(S)

(July 5, 1935, c. 372, § 9, 49 Stat. 453; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 143; Oct. 22, 1951, c. 534, § 1(c), (d), 65 Stat. 601; Pub.L. 86-257, Title II, § 201(d), Title VII, § 702, Sept. 14, 1959, 73 Stat. 525, 542.)

Notes of Decisions (1702)

O'CONNOR'S CROSS REFERENCES

See also 29 C.F.R. §§103.1 to 103.3, pts. 101, 102.

O'CONNOR'S ANNOTATIONS

Generally

American Hosp. Ass'n v. NLRB, 499 U.S. 606, 610 (1991). NLRA §9(a), now 29 U.S.C. §159(a), "implies that the initiative in selecting an appropriate unit resides with the employees. Moreover, the language suggests that employees may seek to organize 'a unit' that is 'appropriate'--not necessarily *the* single most appropriate unit. Thus, one union might seek to represent all of the employees in a particular plant, those in a particular craft, or perhaps just a portion thereof. [¶] Given the obvious potential for disagreement concerning the appropriateness of the unit selected by the union seeking recognition by the employer--disagreements that might involve rival unions claiming jurisdiction over contested segments of the workforce, as well as disagreements between management and labor--§9(b) [now 29 U.S.C. §159(b)] authorizes the [NLRB] to decide whether the designated unit is appropriate. *At 614:* We … conclude that §9(b) does not limit the [NLRB's] rulemaking authority under [NLRA] §6 [now 29 U.S.C. §156]." *See also* ***International Transp. Serv. v. NLRB***, 449 F.3d 160, 164 (D.C.Cir.2006) (NLRB will not certify single-employee bargaining units because NLRA does not empower it to do so).

NLRB v. Wyman-Gordon Co., 394 U.S. 759, 761 (1969). "[ER] refused to obey [an NLRB] order to supply a list of employees, and the [NLRB] issued a subpoena ordering [ER] to provide the list or else produce its personnel and payroll records showing [EEs'] names and addresses. *At 767:* We have held … that Congress granted the [NLRB] a wide discretion to ensure the fair and free choice of bargaining representatives. The disclosure requirement furthers this objective by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses. It is for the [NLRB] and not for this Court to weigh against this interest the asserted interest of employees in avoiding the problems that union solicitation may present."

Leedom v. Kyne, 358 U.S. 184, 188 (1958). The District Court "suit is not one to 'review,' in the sense of that term as used in the [NLRA], a decision of the [NLRB] made within its jurisdiction. Rather it is one to strike down an order of the [NLRB] made in excess of its delegated powers and contrary to a specific prohibition in the Act. [NLRA] §9(b)(1) [now 29 U.S.C. §159(b)(1)] is clear and mandatory." *See also* ***Boire v. Greyhound Corp.***, 376 U.S. 473, 480 (1964).

DiPonio Constr. Co. v. International Un. of Bricklayers & Allied Craftworkers, Local 9, 687 F.3d 744, 749 (6th Cir.2012). "Under [NLRA] §9(a) [now 29 U.S.C. §159(a)], employers are required to bargain with a union that has been designated by a majority of the employees in a unit for the purposes of collective bargaining with the employer. [NLRA] §8(f) [now 29 U.S.C. §158(f)] allows unions and employers in the construction industry to enter into CBAs without requiring the union to establish that it has the support of a majority of the employees in the unit covered by the CBA. Along with creating an exception to §9(a)'s rule that unions must demonstrate a showing of majority support, §8(f) also is an exception to the NLRA's requirement that 'the employer is bound to bargain with the exclusive representative even after the contract has expired.' As a result, '[a] construction-industry employer may refuse to bargain after the expiration of an 8(f) agreement because the union never enjoyed the presumption of majority support.'" *See also* ***Strand Theatre v. NLRB***, 493 F.3d 515, 519 (5th Cir.2007).

Certification--Review

Transit Connection, Inc. v. NLRB, 887 F.3d 1097, 1102 n.4 (11th Cir.2018). "NLRB certifications of elections under [NLRA] §9(c)[,] 29 U.S.C. §159(c), are not reviewable as final orders. '[A]n employer can obtain review of the [NLRB]'s representation decision only by refusing to bargain.' 'The refusal triggers a ruling by the [NLRB] that the employer has engaged in an unfair labor practice,' which is a reviewable final order."

Community-of-Interest Test

NLRB v. Action Auto., Inc., 469 U.S. 490, 494 (1985). "[I]n defining bargaining units, [the NLRB's] focus is on whether the employees share a 'community of interest.' A cohesive unit--one relatively free of conflicts of interest--serves the [NLRA's] purpose of effective collective bargaining … and prevents a minority interest group from being submerged in an overly large unit…."

Kindred Nursing Ctrs. E., LLC v. NLRB, 727 F.3d 552, 560 (6th Cir.2013). "The community-of-interest test requires simply that groups of employees in the same bargaining unit share a community of interests sufficient to justify their mutual inclusion in a single bargaining unit. The test includes the following five factors: (1) similarity in skills, interests, duties and working conditions; (2) functional integration of the plant, including interchange and contact among the employees; (3) the employer's organization and supervisory structure; (4) the bargaining history; and (5) the extent of union organization among the employees." (Internal quotes omitted.) *See also* ***Constellation Brands, U.S. Opers., Inc. v. NLRB***, 842 F.3d 784, 792 (2d Cir.2016) (NLRB can apply heightened overwhelming community-of-interest test to determine whether excluded EEs must be added to unit that has already been deemed appropriate); ***Blue Man Vegas, LLC v. NLRB***, 529 F.3d 417, 421 (D.C.Cir.2008) (if EEs excluded from bargaining unit share overwhelming community of interest with included EEs, there is no legitimate basis for excluding them).

Editor's note: In 2017, the NLRB clarified that it will no longer use the heightened "overwhelming" community-of-interest test to determine whether a proposed bargaining unit constitutes an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees. *See* ***PCC Structurals, Inc.***, 365 NLRB No. 160 (12-15-17). NLRB decisions are available at www.nlrb.gov.

Duty of Fair Representation

Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1998). "When a labor organization has been selected as the exclusive representative of the employees in a bargaining unit, it has a duty, implied from its status under [NLRA] §9(a) [now 29 U.S.C. §159(a)] as the exclusive representative of the employees in the unit, to represent all members fairly."

Figueroa v. Foster, 864 F.3d 222, 224 (2d Cir.2017). "[W]e are asked to decide whether the duty of fair representation under the [NLRA] preempts the [state antidiscrimination law] for claims of discrimination filed by a union member against a labor organization when the labor organization is acting in its capacity as a collective bargaining representative (as distinguished from when it is acting in its capacity as an employer). *At 236:* [W]e hold that the NLRA's duty of fair representation does not

preempt the [state law] either on the basis of field preemption or as a general matter on the basis of conflict preemption." *See also* ***Markham v. Wertin***, 861 F.3d 748, 759 (8th Cir.2017). *But see* ***Adkins v. Mireles***, 526 F.3d 531, 539-40 (9th Cir.2008) (federal statutory duty of fair representation preempts state-law claim arising from union's status as workers' exclusive collective bargaining representative); ***Thomas v. National Ass'n of Letter Carriers***, 225 F.3d 1149, 1158 (10th Cir.2000) (federal labor law ordinarily preempts state-law claim within scope of duty of fair representation); ***BIW Deceived v. Local S6, IUMSWA***, 132 F.3d 824, 830 (1st Cir.1997) (state law is preempted when claim invokes rights derived from union's duty of fair representation); ***Richardson v. United Steelworkers***, 864 F.2d 1162, 1166-67 (5th Cir.1989) (federal statutory duty of fair representation preempts state-law claim arising from union's status as exclusive collective-bargaining representative).

29 U.S.C.A. § 159, 29 USCA § 159
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter II. National Labor Relations (Refs & Annos)

29 U.S.C.A. § 159

§ 159. Representatives and elections [Notes of Decisions subdivisions III to V]

Currentness

<Notes of Decisions for 29 USCA § 159 are displayed in multiple documents. For text of section, historical notes, and references, see first document for 29 USCA § 159.>

Notes of Decisions (1425)

29 U.S.C.A. § 159, 29 USCA § 159
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter II. National Labor Relations (Refs & Annos)

29 U.S.C.A. § 160

§ 160. Prevention of unfair labor practices [Statutory Text & Notes of Decisions subdivisions I to X]

Currentness

<Notes of Decisions for 29 USCA § 160 are displayed in multiple documents.>

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by

reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order

The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title

When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by chapter 6 of this title.

(i) Repealed. Pub.L. 98-620, Title IV, § 402(31), Nov. 8, 1984, 98 Stat. 3360

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

(m) Priority of cases

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l).

CREDIT(S)

(July 5, 1935, c. 372, § 10, 49 Stat. 453; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 146; June 25, 1948, c. 646, § 32(a), (b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Pub.L. 85-791, § 13, Aug. 28, 1958, 72 Stat. 945; Pub.L. 86-257, Title VII, §§ 704(d), 706, Sept. 14, 1959, 73 Stat. 544; Pub.L. 95-251, § 3, Mar. 27, 1978, 92 Stat. 184; Pub.L. 98-620, Title IV, § 402(31), Nov. 8, 1984, 98 Stat. 3360.)

Notes of Decisions (5892)

O'CONNOR'S CROSS REFERENCES

See also 29 U.S.C.A. §158; 29 C.F.R. §§103.1 to 103.3, pts. 101, 102; NLRB Forms 501, 502, 505, 508, 509, 601. NLRB decisions and forms are available at www.nlrb.gov.

O'CONNOR'S ANNOTATIONS

Generally

H.K. Porter Co. v. NLRB, 397 U.S. 99, 102 (1970). See annotation under 29 U.S.C. §158, *Duty to Bargain--Generally*.

NLRB v. Gissel Packing Co., 395 U.S. 575, 614-15 (1969). "The only effect of our holding … is to approve the [NLRB's] use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The [NLRB's] authority to issue such an order on a lesser showing of employer misconduct is appropriate … where there is also a showing that at one point the union had a majority; in such a case, … effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the [NLRB] can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the [NLRB] finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue…." *See also* ***NLRB v. Cheney Cal. Lumber Co.***, 327 U.S. 385, 388 (1946) (NLRB is entitled to enforcement of orders under §160(e) unless NLRB "has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce").

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 43 (1938). "The question for decision is whether a federal district court has equity jurisdiction to enjoin the [NLRB] from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices prohibited by [NLRA]. *At 49-50:* [T]he [NLRB] has jurisdiction only if the complaint concerns interstate or foreign commerce. Unless the [NLRB] finds that it does, the complaint must be dismissed. And if it finds that interstate or foreign commerce is involved, but the Circuit Court of Appeals concludes that such finding was without adequate evidence to support it, or otherwise contrary to law, the [NLRB's] petition to enforce it will be dismissed, or the employer's petition to have it set aside will be granted. Since the procedure before the [NLRB] is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the [NLRB] and the Circuit Court of Appeals." *See also* ***AMERCO v. NLRB***, 458 F.3d 883, 890-91 (9th Cir.2006) (***Myers*** requires that ERs exhaust constitutional claims with NLRB; courts of appeals have exclusive jurisdiction over these claims after NLRB has issued final order).

NLRB v. Haven Salon + Spa, Inc., 60 F.4th 1058, 1060 (7th Cir.2023). "Once we enforce [an NLRB] order, 'violations of it expose the violator to proceedings for contempt.' Contempt is warranted if the [NLRB] establishes by clear and convincing evidence that (1) a court order set forth an unambiguous command; (2) [ER] violated that command; (3) the violation was significant, which means that [ER] did not substantially comply with the order; and (4) [ER] failed to make a reasonable and diligent effort to comply."

Novelis Corp. v. NLRB, 885 F.3d 100, 108-09 (2d Cir.2018). "'[A] bargaining order is a rare remedy warranted only when it is clearly established that traditional remedies cannot eliminate the effects of the employer's past unfair labor practices.' [A]***Gissel*** bargaining order is appropriate only when traditional remedies, such as a secret ballot rerun of an election, do not suffice. [T]he [NLRB] carries a heavy burden to justify a bargaining order in lieu of a second election."

Local Joint Exec. Bd. of Las Vegas v. NLRB, 883 F.3d 1129, 1135 (9th Cir.2018). "Although the [NLRB] may exercise its broad discretion to deviate from a standard remedy, it must provide a rational explanation for doing so, … and the remedy that it does order must 'effectuate the policies of [the NLRA.]'"

Camelot Terrace, Inc. v. NLRB, 824 F.3d 1085, 1090 (D.C.Cir.2016). "[T]he [NLRB] claims the power to require [ER] to pay the [NLRB's] litigation costs and those of the Union solely on the basis of its 'inherent authority.' But …, the [NLRB] possesses *no* extra-statutory 'inherent authority.' [NLRA] §10(c) [now 29 U.S.C. §160(c)] neither explicitly nor by implication authorizes the [NLRB] to award litigation costs…. *At 1095:* [But] we have little trouble concluding that awarding bargaining costs in the appropriate case is within the [NLRB's] statutory remedial authority under §10(c) [when ER] engaged in 'unusually aggravated misconduct' that 'infected the core of a bargaining process….'"

Fallbrook Hosp. Corp. v. NLRB, 785 F.3d 729, 738 (D.C.Cir.2015). "'The [NLRB's] discretion in fashioning remedies under the [NLRA] is extremely broad and subject to very limited judicial review.'"

Carey Salt Co. v. NLRB, 736 F.3d 405, 409-10 (5th Cir.2013). NLRA §10(e), now 29 U.S.C. §160(e), "instructs us to accept the factual determinations of the [NLRB] that are supported by substantial evidence on the record considered as a whole. Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. It is more than a mere scintilla, and less than a preponderance. Furthermore, we must uphold the [NLRB's] credibility determinations unless they are inherently unreasonable or self-contradictory. In particular, an ALJ's credibility choice, adopted by the [NLRB], merits special deference, unless it is based on inadequate reasons, or no reasons. Additionally, we must have a compelling reason based in evidence to overturn a credibility choice, beyond merely a party's urging us to adopt its version of the facts. [¶] Our deference, however, has limits. We must consider the whole record, and the substantiality of evidence must take into account whatever in the record fairly detracts from its weight. Moreover, a decision by the [NLRB] that ignores a portion of the record cannot survive review under the substantial evidence standard." (Internal quotes omitted.) *See also* ***NLRB v. Southwest Reg'l Council of Carpenters***, 826 F.3d 460, 464 (D.C.Cir.2016) (decision that departs from established NLRB precedent without reasoned explanation is arbitrary and may be overturned).

Public Serv. Co. v. NLRB, 692 F.3d 1068, 1076-77 (10th Cir.2012). "In §160(e), … Congress didn't just enact a waivable affirmative defense. It imposed a jurisdictional limit on the authority of this court, a limit we must attend to…. [¶] [E]ven mustering the appropriate skepticism and eyeing §160(e) narrowly, it still appears to us a true jurisdictional limit. [B]earing well in mind the [Supreme] Court's recent cautionary notes, we are confident that §160(e) is a jurisdictional limit on this court's authority…." *See also* ***Chevron Mining, Inc. v. NLRB***, 684 F.3d 1318, 1329-30 (D.C.Cir.2012). *But see* ***Hudson Inst. of Process Research Inc. v. NLRB***, 117 F.4th 692, 699 (5th Cir.2024) (requirements of §160(e) and (f) go to venue, not subject-matter jurisdiction); ***Brentwood at Hobart v. NLRB***, 675 F.3d 999, 1002 (6th Cir.2012) (same).

NLRB v. Legacy Health Sys., 662 F.3d 1124, 1126 (9th Cir.2011). "In the absence of 'extraordinary circumstances,' this court does not have jurisdiction to hear arguments that were not urged before the [NLRB], pursuant to [NLRA] §10(e) …, [now] 29 U.S.C. §160(e). *At 1127:* While it is true that, once the [NLRB] applies for enforcement, this court obtains jurisdiction over the case, it is also true that the [NLRB] retains concurrent jurisdiction until the record is filed." *See also* ***Trump Plaza Assocs. v. NLRB***, 679 F.3d 822, 829 (D.C.Cir.2012) (in interpreting "extraordinary circumstances" for failure or neglect to urge objections, courts consider whether exceptions are sufficiently specific to put NLRB on notice that issue might be pursued on appeal). *Compare* ***Advanced Disposal Servs. E., Inc. v. NLRB***, 820 F.3d 592, 600 (3d Cir.2016) (challenge to composition of NLRB falls within "extraordinary circumstances" exception because it goes to NLRB's authority to act)*, and* ***UC Health v. NLRB***, 803 F.3d 669, 672-73 (D.C.Cir.2015) (same)*, with* ***NLRB v. RELCO Locomotives, Inc.***, 734 F.3d 764, 796-97 (8th Cir.2013) ("extraordinary circumstances" occur only if NLRB decision is "nakedly void under the statute" or if new development of fact or law occurs after NLRB hearing; challenge to composition does not fall under either category).

NLRB v. King Soopers, Inc., 476 F.3d 843, 845 (10th Cir.2007). "'We will grant enforcement of an NLRB order when the agency has correctly applied the law and its findings are supported by substantial evidence in the record as a whole.' [¶] We may decline to enforce an order of the [NLRB] if we determine it would be inequitable to do so. As such, enforcement is subject to some of the traditional defenses to requests for equitable relief. [¶] [T]his Court will not enforce the order if 'the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [NLRA].' On the other hand, if the [NLRB's] action is 'reasonably defensible, it should not be rejected merely because the courts might prefer another

view of the statute.' *At 846:* Courts have held enforcement is unnecessary or futile where, for example, the employer has gone out of business …; the employer has sold the business to a successor company who has independently taken action to correct each of the predecessor company's violations …; significant time has passed between the violation and enforcement such that the facts on which the order is based are questionable or of no use …; or personnel changes have eliminated any threat of a recurrent violation…. '[An NLRB] order imposes a continuing obligation; and the [NLRB] is entitled to have the resumption of the unfair practice barred by an enforcement decree.'"

Back Pay

NLRB v. St. George Whs., Inc., 645 F.3d 666, 672 (3d Cir.2011). "When the [NLRB] determines that an employee has been subjected to an unfair labor practice, it has broad discretion to fashion a back pay order that effectuates the policies underlying the NLRA [under 29 U.S.C. §160(c)]. Requiring an employer to make the employee whole through back pay serves a two-fold objective: (1) the back pay reimburses the innocent employee for the actual losses which he has suffered as a direct result of the employer's improper conduct, and (2) it furthers the public interest advanced by the deterrence of such illegal acts. [¶] [R]egistration with a state unemployment office is prima facie evidence of a reasonable search for employment. *At 673:* The demand for reasonable diligence does not necessarily oblige a discriminatee to undertake a daily search for employment; rather, the sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the back-pay period as a whole and not based on isolated portions of the back-pay period. *At 674:* [T]he conduct of a backpay proceeding and the application of the evidentiary rules lie within the discretion of the administrative judge, and … the party claiming injury from the alleged error must show that it suffered prejudice as a result of the ruling, in order for the [NLRB's] order to be reversed." (Internal quotes omitted.) *See also* ***NLRB v. Community Health Servs.***, 812 F.3d 768, 780 (10th Cir.2016) (NLRB may disregard interim earnings when calculating back-pay award for EE whose labor injury falls short of unlawful termination).

Defenses--After-Acquired Evidence

NLRB v. Starbucks Corp., 125 F.4th 78, 92-93 (3d Cir.2024). "When an employer would have discharged an employee on lawful grounds based on evidence acquired after an unlawful termination, reinstatement is not an appropriate remedy under the NLRA. 'Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.' In other words, to invoke the defense, the employer must demonstrate (1) the employee engaged in the misconduct, (2) it was unaware of the misconduct at the time of the employee's discharge, and (3) it would have discharged a similarly situated employee for that misconduct alone. If the employer makes such a showing, reinstatement is not appropriate and backpay is only available from the time of the unlawful termination to when the employer acquired knowledge of the misconduct. Any ambiguities are resolved against the employer."

Deferral to Arbitration Agreement

Hallmark-Phoenix 3, L.L.C. v. NLRB, 820 F.3d 696, 706 (5th Cir.2016). "Under its own precedent, the [NLRB] is expected to defer to arbitration if: '[t]he dispute arose within the confines of a long and productive collective-bargaining relationship; there was no claim of employer animosity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompassed the dispute at issue; the employer had asserted its willingness to utilize arbitration to resolve the dispute; and the dispute was eminently well suited to resolution by arbitration.'"

Deferral to Arbitration Decision

Verizon New England Inc. v. NLRB, 826 F.3d 480, 485 (D.C.Cir.2016). "Under [NLRA] §10 [now 29 U.S.C. §160], the [NLRB] possesses discretion over how much to defer to arbitration decisions. The standard the [NLRB] has long used to review arbitration decisions--the ***Spielberg-Olin*** standard--is highly deferential to the arbitrator. *At 486:* The ***Spielberg-Olin*** standard calls for [NLRB] deference to the arbitrator's decision so long as the following conditions are met: (1) the arbitration proceedings appear to have been fair and regular; (2) all parties agreed to be bound by the arbitration decision; (3) the arbitrator

has adequately considered the unfair labor practice at issue; and (4) the arbitrator's decision is not 'clearly repugnant' to the [NLRA]." *But see* ***Beneli v. NLRB***, 873 F.3d 1094, 1101-02 (9th Cir.2017) (NLRB has replaced Spielberg-Olin test with new arbitration-deferral standard but did not abuse its discretion in declining to apply new standard retroactively).

Injunctions--§10(j)

Starbucks Corp. v. McKinney, 602 U.S. 339, 342 (2024). "The [NLRB] can bring in-house enforcement proceedings against employers and labor unions for engaging in unfair labor practices. [NLRA] §10(j) [now 29 U.S.C. §160(j)] authorizes the Board to seek a preliminary injunction from a federal district court while these administrative enforcement proceedings take place. The question in this case is whether the traditional four-factor test for a preliminary injunction articulated in ***Winter v. Natural Res. Def. Council, Inc.***, 555 U.S. 7 … (2008), governs the Board's requests under §10(j). We conclude that it does…. *At 345:* That … standard requires a plaintiff to make a clear showing that 'he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.' *At 351:* [W]e hold that district courts must apply the traditional four factors articulated in ***Winter*** when considering the Board's requests for a preliminary injunction under §10(j)."

Muffley v. Spartan Mining Co., 570 F.3d 534, 540 (4th Cir.2009). "The [NLRB] may … lawfully delegate §10(j) authority to the General Counsel pursuant to [NLRA] §3(d) [now 29 U.S.C. §153(d)]." *See also* ***Frankl v. HTH Corp.***, 650 F.3d 1334, 1340 (9th Cir.2011); ***Osthus v. Whitesell Corp.***, 639 F.3d 841, 844 (8th Cir.2011).

Jurisdictional Disputes--§10(k)

Orrand v. Hunt Constr. Grp., 852 F.3d 592, 595 (6th Cir.2017). "Every court to consider conflicts between [NLRA] §10(k) [now 29 U.S.C. §160(k)] determinations and other labor laws has held that jurisdictional awards prevail, and may preclude inconsistent claims. *At 597:* [W]e hold that the NLRB's §10(k) award precludes a conflicting [ERISA] §515 [now 29 U.S.C. §1145] action." *See also* ***Advance Cast Stone Co. v. Bridge, Structural & Reinforcing Iron Workers, Local Un. No. 1***, 376 F.3d 734, 740 (7th Cir.2004) (courts cannot enforce arbitration award that conflicts with §10(k) determination).

Recon Refractory & Constr. Inc. v. NLRB, 424 F.3d 980, 988 (9th Cir.2005). NLRA §10(k), now 29 U.S.C. §160(k), "was enacted to provide a mechanism for resolving jurisdictional disputes between competing unions. … It was not, however, intended to authorize the [NLRB] to resolve disputes that are truly between an employer and a union. *At 990:* [E]mployers who create disputes by their own actions 'must use other means, such as arbitration, to resolve conflicting work claims.' *At 991:* In sum, §10(k) cannot be used as a tool to aid employers in avoiding their contractual obligations to employees when the terms of those contracts become inconvenient." *See also* ***Sheet Metal Workers Int'l v. E.P. Donnelly, Inc.***, 737 F.3d 879, 888 (3d Cir.2013).

Limitations

International Un. v. Cummins, Inc., 434 F.3d 478, 483 (6th Cir.2006). "[T]he six-month statute of limitations established by [NLRA] §10(b) [now 29 U.S.C. §160(b)] begins to run 'when the employer takes an unequivocal position that it will not arbitrate.' *At 484:* [D asserts] that '[p]ublic policy is better served by a rule that permits the declining party to at least listen to the other party's attempt to change its mind during the limitations period.' … The applicable standard requires that the refusal be unequivocal, which implies that any negotiation must occur *before* the company refuses to arbitrate and the statute of limitations begins to run. … Although the labor laws encourage the parties to 'listen' to each other, the unequivocal refusal to arbitrate required by the caselaw suggests that the employer must essentially determine that negotiation or persuasion is not feasible before the statute of limitations will begin to run." *See also* ***Gerhardson v. Gopher News Co.***, 698 F.3d 1052, 1056 (8th Cir.2012) (statute of limitations is tolled by successful motion to intervene; unsuccessful motion is treated as dismissal without prejudice and does not toll statute of limitations).

29 U.S.C.A. § 160, 29 USCA § 160

Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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29 U.S.C.A. § 160

§ 160. Prevention of unfair labor practices [Notes of Decisions subdivisions XI to XVI]

Currentness

<Notes of Decisions for 29 USCA § 160 are displayed in multiple documents. For text of section, historical notes, and references, see first document for 29 USCA § 160.>

Notes of Decisions (8772)

29 U.S.C.A. § 160, 29 USCA § 160
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29 U.S.C.A. § 161

§ 161. Investigatory powers of Board

Currentness

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title--

(1) Documentary evidence; summoning witnesses and taking testimony

The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) Court aid in compelling production of evidence and attendance of witnesses

In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) Repealed. Pub.L. 91-452, Title II, § 234, Oct. 15, 1970, 84 Stat. 930

(4) Process, service and return; fees of witnesses

Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of

the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered or certified and mailed or when telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) Process, where served

All process of any court to which application may be made under this subchapter may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) Information and assistance from departments

The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

CREDIT(S)

(July 5, 1935, c. 372, § 11, 49 Stat. 455; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 150; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Pub.L. 91-452, Title II, § 234, Oct. 15, 1970, 84 Stat. 930; Pub.L. 86-507, § 1(57), June 11, 1960, as added Pub.L. 96-245, May 21, 1980, 94 Stat. 347.)

Notes of Decisions (261)

O'CONNOR'S ANNOTATIONS

NLRB v. American Med. Response, Inc., 438 F.3d 188, 192-93 (2d Cir.2006). "Enforcement of the [NLRB's] subpoenas is left to the courts, … but the courts' role in a proceeding to enforce an administrative subpoena is extremely limited. An agency must show only (1) that the investigation will be conducted pursuant to a legitimate purpose, (2) that the inquiry *may be* relevant to the purpose, (3) that the information sought is not already within its possession, and (4) that the administrative steps required have been followed. A subpoena that satisfies these criteria will be enforced unless the party opposing enforcement demonstrates that the subpoena is unreasonable, or issued in bad faith or for other improper purposes, or that compliance would be *unnecessarily* burdensome." (Internal quotes omitted.)

29 U.S.C.A. § 161, 29 USCA § 161
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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29 U.S.C.A. § 162

§ 162. Offenses and penalties

Currentness

Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this subchapter shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

CREDIT(S)

(July 5, 1935, c. 372, § 12, 49 Stat. 456; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 151.)

Notes of Decisions (7)

29 U.S.C.A. § 162, 29 USCA § 162
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29 U.S.C.A. § 163

§ 163. Right to strike preserved

Currentness

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

CREDIT(S)

(July 5, 1935, c. 372, § 13, 49 Stat. 457; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 151.)

Notes of Decisions (49)

29 U.S.C.A. § 163, 29 USCA § 163
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29 U.S.C.A. § 164

§ 164. Construction of provisions

Currentness

(a) Supervisors as union members

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Agreements requiring union membership in violation of State law

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

(c) Power of Board to decline jurisdiction of labor disputes; assertion of jurisdiction by State and Territorial courts

(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

CREDIT(S)

(July 5, 1935, c. 372, § 14, 49 Stat. 457; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 151; Pub.L. 86-257, Title VII, § 701(a), Sept. 14, 1959, 73 Stat. 541.)

Notes of Decisions (124)

O'CONNOR'S ANNOTATIONS

UAW Local 3047 v. Hardin Cty., 842 F.3d 407, 417 (6th Cir.2016). "[W]e conclude that [NLRA] §14(b)'s [now 29 U.S.C. §164(b)'s] use of 'State' includes political subdivisions and that [county ordinance's] right-to-work protection is included in §14(b)'s exception from preemption. *At 420:* Because … County's right-to-work ordinance is 'State law,' it is not preempted. *At 422:* [But] provisions dealing with hiring-hall agreements and dues-checkoff requirements [are subject to regulation by LMRA] and are preempted and unenforceable. [¶] [T]o the extent [the] Ordinance … prohibits employers from requiring membership in a labor organization as a condition of employment, it is not preempted and invalidated by the NLRA."

29 U.S.C.A. § 164, 29 USCA § 164

Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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29 U.S.C.A. § 165

§ 165. Conflict of laws

Currentness

Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U.S.C., title 11, sec. 672), conflicts with the application of the provisions of this subchapter, this subchapter shall prevail: *Provided,* That in any situation where the provisions of this subchapter cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

CREDIT(S)

(July 5, 1935, c. 372, § 15, 49 Stat. 457; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 151.)

Notes of Decisions (1)

29 U.S.C.A. § 165, 29 USCA § 165
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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29 U.S.C.A. § 166

§ 166. Separability

Currentness

If any provision of this subchapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this subchapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

CREDIT(S)

(July 5, 1935, c. 372, § 16, 49 Stat. 457; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 151.)

Notes of Decisions (2)

29 U.S.C.A. § 166, 29 USCA § 166
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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29 U.S.C.A. § 167

§ 167. Short title of subchapter

Currentness

This subchapter may be cited as the “National Labor Relations Act”.

CREDIT(S)

(July 5, 1935, c. 372, § 17, as added June 23, 1947, c. 120, Title I, § 101, 61 Stat. 152.)

29 U.S.C.A. § 167, 29 USCA § 167
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29 U.S.C.A. § 168

§ 168. Validation of certificates and other Board actions

Currentness

No petition entertained, no investigation made, no election held, and no certification issued by the National Labor Relations Board, under any of the provisions of section 159 of this title, shall be invalid by reason of the failure of the Congress of Industrial Organizations to have complied with the requirements of section 159(f), (g), or (h) of this title prior to December 22, 1949, or by reason of the failure of the American Federation of Labor to have complied with the provisions of section 159(f), (g), or (h) of this title prior to November 7, 1947: *Provided*, That no liability shall be imposed under any provision of this chapter upon any person for failure to honor any election or certificate referred to above, prior to October 22, 1951: *Provided, however*, That this proviso shall not have the effect of setting aside or in any way affecting judgments or decrees heretofore entered under section 160(e) or (f) of this title and which have become final.

CREDIT(S)

(July 5, 1935, c. 372, § 18, as added Oct. 22, 1951, c. 534, § 1(a), 65 Stat. 601.)

29 U.S.C.A. § 168, 29 USCA § 168
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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29 U.S.C.A. § 169

§ 169. Employees with religious convictions; payment of dues and fees

Currentness

Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of Title 26, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

CREDIT(S)

(July 5, 1935, c. 372, § 19, as added Pub.L. 93-360, § 3, July 26, 1974, 88 Stat. 397; amended Pub.L. 96-593, Dec. 24, 1980, 94 Stat. 3452.)

Notes of Decisions (4)

29 U.S.C.A. § 169, 29 USCA § 169
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29 U.S.C.A. § 171

§ 171. Declaration of purpose and policy

Currentness

It is the policy of the United States that--

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

CREDIT(S)

(June 23, 1947, c. 120, Title II, § 201, 61 Stat. 152.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 11482

<Sept. 22, 1969, 34 F.R. 14723>

Ex. Ord. No. 11482, Sept. 22, 1969, 34 F.R. 14723, which related to the Construction Industry Collective Bargaining Commission, was revoked by Ex. Ord. No. 12110, Dec. 28, 1978, 44 F.R. 1069, set out as a note under section 14 of Title 5, Appendix 2, Government Organization and Employees.

EXECUTIVE ORDER NO. 11849

<Apr. 1, 1975, 40 F.R. 14887>

Ex. Ord. No. 11849, Apr. 1, 1975, 40 F.R. 14887, which related to the Collective Bargaining Committee in Construction, was revoked by Ex. Ord. No. 12110, Dec. 28, 1978, 44 F.R. 1069, set out as a note under section 14 of Title 5, Appendix 2, Government Organization and Employees.

Notes of Decisions (8)

O'CONNOR'S CROSS REFERENCES

See also 29 C.F.R. pts. 531, 1420.

29 U.S.C.A. § 171, 29 USCA § 171

Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter III. Conciliation of Labor Disputes; National Emergencies

29 U.S.C.A. § 172

§ 172. Federal Mediation and Conciliation Service

Currentness

(a) Creation; appointment of Director

There is created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service", except that for sixty days after June 23, 1947, such term shall refer to the Conciliation Service of the Department of Labor). The Service shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall not engage in any other business, vocation, or employment.

(b) Appointment of officers and employees; expenditures for supplies, facilities, and services

The Director is authorized, subject to the civil service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, and may, without regard to the provisions of the civil service laws, appoint such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefor approved by the Director or by any employee designated by him for that purpose.

(c) Principal and regional offices; delegation of authority by Director; annual report to Congress

The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this chapter to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) Transfer of all mediation and conciliation services to Service; effective date; pending proceedings unaffected

All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 51 of this title, and all functions of the United States Conciliation Service under any other law are transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day after June 23, 1947. Such transfer shall not affect any proceedings pending before the United

States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

CREDIT(S)

(June 23, 1947, c. 120, Title II, § 202, 61 Stat. 153; Oct. 28, 1949, c. 782, Title XI, § 1106(a), 63 Stat. 972.)

O'CONNOR'S CROSS REFERENCES

See also 29 C.F.R. §§1400.735-3, 1400.735-20, 1400.735-21, pts. 1401 to 1404, 1410, 1430.

29 U.S.C.A. § 172, 29 USCA § 172
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter III. Conciliation of Labor Disputes; National Emergencies

29 U.S.C.A. § 173

§ 173. Functions of Service

Currentness

(a) Settlement of disputes through conciliation and mediation

It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) Intervention on motion of Service or request of parties; avoidance of mediation of minor disputes

The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) Settlement of disputes by other means upon failure of conciliation

If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this chapter.

(d) Use of conciliation and mediation services as last resort

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

(e) Encouragement and support of establishment and operation of joint labor management activities conducted by committees

The Service is authorized and directed to encourage and support the establishment and operation of joint labor management activities conducted by plant, area, and industrywide committees designed to improve labor management relationships, job security and organizational effectiveness, in accordance with the provisions of section 175a of this title.

(f) Use of alternative means of dispute resolution procedures; assignment of neutrals and arbitrators

The Service may make its services available to Federal agencies to aid in the resolution of disputes under the provisions of subchapter IV of chapter 5 of Title 5. Functions performed by the Service may include assisting parties to disputes related to administrative programs, training persons in skills and procedures employed in alternative means of dispute resolution, and furnishing officers and employees of the Service to act as neutrals. Only officers and employees who are qualified in accordance with section 573 of Title 5 may be assigned to act as neutrals. The Service shall consult with the agency designated by, or the interagency committee designated or established by, the President under section 573 of Title 5 in maintaining rosters of neutrals and arbitrators, and to adopt such procedures and rules as are necessary to carry out the services authorized in this subsection.

CREDIT(S)

(June 23, 1947, c. 120, Title II, § 203, 61 Stat. 153; Pub.L. 95-524, § 6(c)(1), Oct. 27, 1978, 92 Stat. 2020; Pub.L. 101-552, § 7, Nov. 15, 1990, 104 Stat. 2746; Pub.L. 102-354, § 5(b)(5), Aug. 26, 1992, 106 Stat. 946; Pub.L. 104-320, § 4(c), Oct. 19, 1996, 110 Stat. 3871.)

Notes of Decisions (35)

O'CONNOR'S CROSS REFERENCES
See also 29 C.F.R. pts. 1401 to 1425.

29 U.S.C.A. § 173, 29 USCA § 173
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter III. Conciliation of Labor Disputes; National Emergencies

29 U.S.C.A. § 174

§ 174. Co-equal obligations of employees, their representatives, and management to minimize labor disputes

Currentness

(a) [1] In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall--

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this chapter for the purpose of aiding in a settlement of the dispute.

CREDIT(S)

(June 23, 1947, c. 120, Title II, § 204, 61 Stat. 154.)

Notes of Decisions (2)

O'CONNOR'S CROSS REFERENCES
See also 29 C.F.R. pts. 1403, 1404, 1420.

Footnotes

1 Section was enacted without a subsec. (b).

29 U.S.C.A. § 174, 29 USCA § 174
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter III. Conciliation of Labor Disputes; National Emergencies

29 U.S.C.A. § 175

§ 175. National Labor-Management Panel; creation and composition; appointment, tenure, and compensation; duties

Currentness

(a) There is created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be selected from among persons outstanding in the field of management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the President at the time of appointment, four at the end of the first year, four at the end of the second year, and four at the end of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate of $25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) It shall be the duty of the panel, at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country.

CREDIT(S)

(June 23, 1947, c. 120, Title II, § 205, 61 Stat. 154.)

29 U.S.C.A. § 175, 29 USCA § 175
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter III. Conciliation of Labor Disputes; National Emergencies

29 U.S.C.A. § 175a

§ 175a. Assistance to plant, area, and industrywide labor management committees

Currentness

(a) Establishment and operation of plant, area, and industrywide committees

(1) The Service is authorized and directed to provide assistance in the establishment and operation of plant, area and industrywide labor management committees which--

(A) have been organized jointly by employers and labor organizations representing employees in that plant, area, or industry; and

(B) are established for the purpose of improving labor management relationships, job security, organizational effectiveness, enhancing economic development or involving workers in decisions affecting their jobs including improving communication with respect to subjects of mutual interest and concern.

(2) The Service is authorized and directed to enter into contracts and to make grants, where necessary or appropriate, to fulfill its responsibilities under this section.

(b) Restrictions on grants, contracts, or other assistance

(1) No grant may be made, no contract may be entered into and no other assistance may be provided under the provisions of this section to a plant labor management committee unless the employees in that plant are represented by a labor organization and there is in effect at that plant a collective bargaining agreement.

(2) No grant may be made, no contract may be entered into and no other assistance may be provided under the provisions of this section to an area or industrywide labor management committee unless its participants include any labor organizations certified or recognized as the representative of the employees of an employer participating in such committee. Nothing in this clause shall prohibit participation in an area or industrywide committee by an employer whose employees are not represented by a labor organization.

(3) No grant may be made under the provisions of this section to any labor management committee which the Service finds to have as one of its purposes the discouragement of the exercise of rights contained in section 157 of this title, or the interference with collective bargaining in any plant, or industry.

(c) Establishment of office

The Service shall carry out the provisions of this section through an office established for that purpose.

(d) Authorization of appropriations

There are authorized to be appropriated to carry out the provisions of this section $10,000,000 for the fiscal year 1979, and such sums as may be necessary thereafter.

CREDIT(S)

(June 23, 1947, c. 120, Title II, § 205A, as added Pub.L. 95-524, § 6(c)(2), Oct. 27, 1978, 92 Stat. 2020.)

29 U.S.C.A. § 175a, 29 USCA § 175a
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter III. Conciliation of Labor Disputes; National Emergencies

29 U.S.C.A. § 176

§ 176. National emergencies; appointment of board of inquiry by President; report; contents; filing with Service

Currentness

Whenever in the opinion of the President of the United States, a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

CREDIT(S)

(June 23, 1947, c. 120, Title II, § 206, 61 Stat. 155.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 11621

<Oct. 4, 1971, 36 F.R. 19435>

Ex. Ord. No. 11621, Oct. 4, 1971, 36 F.R. 19435, as amended by Ex. Ord. No. 11622, Oct. 5, 1971, 36 F.R. 19491, which created a Board of Inquiry to report on labor disputes affecting the maritime industry, was revoked by Ex. Ord. No. 12553, Feb. 25, 1986, 51 F.R. 7237.

Notes of Decisions (6)

29 U.S.C.A. § 176, 29 USCA § 176
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter III. Conciliation of Labor Disputes; National Emergencies

29 U.S.C.A. § 177

§ 177. Board of inquiry

Currentness

(a) Composition

A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Compensation

Members of a board of inquiry shall receive compensation at the rate of $50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) Powers of discovery

For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents) are made applicable to the powers and duties of such board.

CREDIT(S)

(June 23, 1947, c. 120, Title II, § 207, 61 Stat. 155.)

Notes of Decisions (2)

29 U.S.C.A. § 177, 29 USCA § 177
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter III. Conciliation of Labor Disputes; National Emergencies

29 U.S.C.A. § 178

§ 178. Injunctions during national emergency

Currentness

(a) Petition to district court by Attorney General on direction of President

Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out--

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lockout, or the continuing thereof, and to make such other orders as may be appropriate.

(b) Inapplicability of chapter 6

In any case, the provisions of chapter 6 of this title shall not be applicable.

(c) Review of orders

The order or orders of the court shall be subject to review by the appropriate United States court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in section 1254 of Title 28.

CREDIT(S)

(June 23, 1947, c. 120, Title II, § 208, 61 Stat. 155; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.)

Notes of Decisions (99)

29 U.S.C.A. § 178, 29 USCA § 178
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 29. Labor
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Subchapter III. Conciliation of Labor Disputes; National Emergencies

29 U.S.C.A. § 179

§ 179. Injunctions during national emergency; adjustment efforts by parties during injunction period

Currentness

(a) Assistance of Service; acceptance of Service's proposed settlement

Whenever a district court has issued an order under section 178 of this title enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this chapter. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Reconvening of board of inquiry; report by board; contents; secret ballot of employees by National Labor Relations Board; certification of results to Attorney General

Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

CREDIT(S)

(June 23, 1947, c. 120, Title II, § 209, 61 Stat. 155.)

Notes of Decisions (1)

29 U.S.C.A. § 179, 29 USCA § 179
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter III. Conciliation of Labor Disputes; National Emergencies

29 U.S.C.A. § 180

§ 180. Discharge of injunction upon certification of results of election or settlement; report to Congress

Currentness

Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

CREDIT(S)

(June 23, 1947, c. 120, Title II, § 210, 61 Stat. 156.)

29 U.S.C.A. § 180, 29 USCA § 180
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter III. Conciliation of Labor Disputes; National Emergencies

29 U.S.C.A. § 181

§ 181. Compilation of collective bargaining agreements, etc.; use of data

Currentness

(a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.

CREDIT(S)

(June 23, 1947, c. 120, Title II, § 211, 61 Stat. 156.)

O'CONNOR'S CROSS REFERENCES

See also 29 C.F.R. pts. 70, 71.

29 U.S.C.A. § 181, 29 USCA § 181
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 29. Labor
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Subchapter III. Conciliation of Labor Disputes; National Emergencies

29 U.S.C.A. § 182

§ 182. Exemption of Railway Labor Act from subchapter

Currentness

The provisions of this subchapter shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

CREDIT(S)

(June 23, 1947, c. 120, Title II, § 212, 61 Stat. 156.)

29 U.S.C.A. § 182, 29 USCA § 182
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter III. Conciliation of Labor Disputes; National Emergencies

29 U.S.C.A. § 183

§ 183. Conciliation of labor disputes in the health care industry

Currentness

(a) Establishment of Boards of Inquiry; membership

If, in the opinion of the Director of the Federal Mediation and Conciliation Service, a threatened or actual strike or lockout affecting a health care institution will, if permitted to occur or to continue, substantially interrupt the delivery of health care in the locality concerned, the Director may further assist in the resolution of the impasse by establishing within 30 days after the notice to the Federal Mediation and Conciliation Service under clause (A) of the last sentence of section 158(d) of this title (which is required by clause (3) of such section 158(d) of this title), or within 10 days after the notice under clause (B), an impartial Board of Inquiry to investigate the issues involved in the dispute and to make a written report thereon to the parties within fifteen (15) days after the establishment of such a Board. The written report shall contain the findings of fact together with the Board's recommendations for settling the dispute, with the objective of achieving a prompt, peaceful and just settlement of the dispute. Each such Board shall be composed of such number of individuals as the Director may deem desirable. No member appointed under this section shall have any interest or involvement in the health care institutions or the employee organizations involved in the dispute.

(b) Compensation of members of Boards of Inquiry

(1) Members of any board established under this section who are otherwise employed by the Federal Government shall serve without compensation but shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in carrying out its duties under this section.

(2) Members of any board established under this section who are not subject to paragraph (1) shall receive compensation at a rate prescribed by the Director but not to exceed the daily rate prescribed for GS-18 of the General Schedule under section 5332 of Title 5, including travel for each day they are engaged in the performance of their duties under this section and shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out their duties under this section.

(c) Maintenance of status quo

After the establishment of a board under subsection (a) of this section and for 15 days after any such board has issued its report, no change in the status quo in effect prior to the expiration of the contract in the case of negotiations for a contract renewal,

or in effect prior to the time of the impasse in the case of an initial beginning negotiation, except by agreement, shall be made by the parties to the controversy.

(d) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

CREDIT(S)

(June 23, 1947, c. 120, Title II, § 213, as added Pub.L. 93-360, § 2, July 26, 1974, 88 Stat. 396.)

Notes of Decisions (9)

O'CONNOR'S CROSS REFERENCES
See also 29 C.F.R. pt. 1420.

29 U.S.C.A. § 183, 29 USCA § 183
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter IV. Liabilities of and Restrictions on Labor and Management

29 U.S.C.A. § 185

§ 185. Suits by and against labor organizations [Statutory Text & Notes of Decisions subdivisions I to XIV]

Currentness

<Notes of Decisions for 29 USCA § 185 are displayed in multiple documents.>

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

CREDIT(S)

(June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)

Notes of Decisions (6873)

O'CONNOR'S ANNOTATIONS

Generally

Granite Rock Co. v. International Bhd. of Teamsters, 561 U.S. 287, 311-12 (2010). Held: Federal common-law cause of action for tortious interference is not available under LMRA §301(a), now 29 U.S.C. §185(a).

Wooddell v. IBEW, Local 71, 502 U.S. 93, 101 (1991). "Congress expressly provided in [LMRA] §301(a) [now 29 U.S.C. §185(a)] for federal jurisdiction over contracts between an employer and a labor organization *or between labor organizations*. [CBAs] are the principal form of contract between an employer and a labor organization. Individual union members, who are often the beneficiaries of provisions of [CBAs], may bring suit on these contracts under §301. Likewise, union constitutions are an important form of contract between labor organizations. Members of a collective bargaining unit are often the beneficiaries of such inter-union contracts, and when they are, they likewise may bring suit on these contracts under §301. *At 103:* [T]he courts below erred in holding that federal jurisdiction under §301(a), based on the alleged violation of a contract between labor organizations, is unavailable when an individual union member brings suit against his or her union." *See also* ***International Un. of Painter & Allied Trades, Dist. 15, Local 159 v. J&R Flooring, Inc.***, 656 F.3d 860, 867-68 (9th Cir.2011).

Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 508-09 (1962). "To hold that [LMRA] §301(a) [now 29 U.S.C. §185(a)] operates to deprive the state courts of a substantial segment of their established jurisdiction over contract actions would thus be to disregard this consistent history of hospitable acceptance of concurrent jurisdiction. [¶] [T]he basic purpose of §301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that Congress expressly intended not to encroach upon the existing jurisdiction of the state courts." *See also* ***Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.***, 369 U.S. 95, 101-03 (1962).

Textile Workers Un. v. Lincoln Mills, 353 U.S. 448, 456 (1957). "We conclude that the substantive law to apply in suits under [LMRA] §301(a) [now 29 U.S.C. §185(a)] is federal law, which the courts must fashion from the policy of our national labor laws."

USW v. Cookson Am., Inc., 710 F.3d 470, 475 (2d Cir.2013). "As the Third Circuit has explained [in ***United Steelworkers v. Canron, Inc.***, 580 F.2d 77 (3d Cir.1978)], the mere fact that retirees are not a part of a union's bargaining unit does not prevent employers from contractually obligating themselves to pay retirement benefits. *At 476:* We note that several other Circuit Courts of Appeals have held that a union's standing to represent retirees may turn on whether it has obtained the retirees' consent to litigate on their behalf. [B]ecause the instant suit does not implicate the concerns that animated the decisions of the Fifth, Sixth, and Seventh Circuits, those concerns cannot support the conclusion that the Union here lacks standing to represent these particular retirees."

Arbitration Agreements & Awards

United Paperworkers Int'l Un. v. Misco, Inc., 484 U.S. 29, 36 (1987). "The courts are not authorized to reconsider the merits of an [arbitration] award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. 'The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under [CBAs]. … As long as the arbitrator's award 'draws its essence from the [CBA],' and is not merely 'his own brand of industrial justice,' the award is legitimate. *At 37-38:* The courts have jurisdiction to enforce collective-bargaining contracts; but where the contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute. … To resolve disputes about the application of a [CBA], an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *See also* ***United Steelworkers v. American Mfg.***, 363 U.S. 564, 569 (1960); ***Titan Tire Corp. v. United Steelworkers***, 656 F.3d 368, 372-73 (6th Cir.2011).

Nolde Bros. v. Local No. 358, Bakery & Confectionary Workers Un., 430 U.S. 243, 255 (1977). "[W]here the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication." *See also* ***Litton Fin. Printing Div. v. NLRB***, 501 U.S. 190, 203-08 (1991).

United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-83 (1960). "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *See also* ***United Steelworkers v. Enterprise Wheel & Car Corp.***, 363 U.S. 593, 596-98 (1960).

P&A Constr. Inc. v. International Un. of Oper. Eng'rs Local 825, 19 F.4th 217, 221 (3d Cir.2021). "Today we … weigh in on an open question in our Circuit: Does the LMRA authorize a district court to compel joint arbitration between an employer and two separate labor unions, each of which has its own CBA with the common employer, when those unions claim the same work under their respective CBAs? We conclude that joint arbitration is available under the LMRA as a general matter, either before or after the bipartite arbitration award at issue has become final."

Lippert Tile Co. v. International Un. of Bricklayers & Allied Craftsmen, Dist. Council of Wis. & Local 5, 724 F.3d 939, 948 (7th Cir.2013). "Review of labor arbitration awards under [LMRA §301, now 29 U.S.C. §185,] is different from the review of arbitration awards under the FAA, even if they resemble each other in some respects. Unlike in the FAA, … 'evident partiality' is not inherently built into the §301 review mechanism. We, of course, agree with the companies that labor arbitration awards are subject to §301 review…. The question is what that review *includes*, and §301 review simply does not include a free-floating procedural fairness standard absent a showing that some provision of the CBA was violated."

American Fed'n of TV & Radio Artists v. WJBK-TV, 164 F.3d 1004, 1009 (6th Cir.1999). "[U]nder [LMRA] §301 [now 29 U.S.C. §185] a labor arbitrator is authorized to issue a subpoena duces tecum to compel a third party to produce records he deems material to the case either before or at an arbitration hearing. We caution that this decision should not be read to mean that a party to the arbitration is entitled to any such discovery, only that a labor arbitrator may issue such a subpoena." *But see* ***Hay Grp. v. E.B.S. Acquisition Corp.***, 9 U.S.C. §7 (language of 9 U.S.C. §7 unambiguously restricts arbitrator's subpoena power to situations in which nonparty has been called to appear before arbitrator and to produce documents).

Breach of Duty of Fair Representation

Vaca v. Sipes, 386 U.S. 171, 197-98 (1967). "[M]ay an award against a union include … damages attributable solely to the employer's breach of contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is [ER's] unrelated breach of contract which triggered the controversy and which caused this portion of [EE's] damages. [EE] should have no difficulty recovering these damages from [ER], who cannot … hide behind the union's wrongful failure to act; in fact, [ER] may be (and probably should be) joined as a defendant in the fair representation suit…. [¶] The governing principle …

is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to [ER's] breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to [ER]." *See also* ***Bowen v. USPS***, 459 U.S. 212, 223-24 (1983) (union may be held primarily liable for part of member's damages caused by breach of duty of fair representation).

Jusino v. Federation of Catholic Teachers, Inc., 54 F.4th 95, 100 (2d Cir.2022). "In [***NLRB v.***] ***Catholic Bishop*** [***of Chi.***, 440 U.S. 490 (1979)], the Supreme Court held that the NLRA does not 'bring teachers in church-operated schools within' its 'cover[age].' … We must now decide, as a matter of first impression, whether ***Catholic Bishop*** likewise precludes a former parochial-school teacher's duty-of-fair-representation claim against his parochial-school teachers' union. We hold that it does. *At 101:* An employee's duty-of-fair-representation claim against his labor union is derivative of - that is, 'inextricably interdependent' with - his claim against his employer under [LMRA] §301 [now 29 U.S.C. §185]. Thus, [EE] can only assert a viable duty-of-fair-representation claim against [union] if he *also* has a viable §301 claim against [ER]. But the holding of ***Catholic Bishop*** - again, that 'teachers in church-operated schools' are not 'covered by the [NLRA as amended by the LMRA]' - squarely forecloses any §301 claim that [EE] might bring against [ER]. *At 102:* Unable to distinguish ***Catholic Bishop***, [EE] instead asserts that it is no longer good law. We disagree. *At 103:* ***Catholic Bishop*** was applicable here and required the dismissal of [EE's] duty-of-fair-representation claim against [union]."

Neal v. Newspaper Hldgs., Inc., 349 F.3d 363, 369 (7th Cir.2003). "A union breaches the duty of fair representation only if its actions are arbitrary, discriminatory, or in bad faith. Each of these possibilities must be considered separately in determining whether or not a breach has been established. [¶] Whether or not a union's actions are discriminatory or in bad faith calls for a subjective inquiry and requires proof that the union acted (or failed to act) due to an improper motive. [¶] Whether a union's actions are arbitrary calls for an objective inquiry. 'A union's actions are arbitrary only if the union's behavior is so far outside a wide range of reasonableness as to be irrational.' This is an 'extremely deferential standard' that precludes the courts from 'substitut[ing] their judgment for that of the union, even if, with the benefit of hindsight, it appears that the union could have made a better call.' Moreover, 'mere negligence, even in the enforcement of a [CBA], would not state a claim for breach of the duty of fair representation.'"

Contractual-Reinstatement Requirement

Eastern Associated Coal Corp. v. United Mine Workers, 531 U.S. 57, 62 (2000). "We must … decide whether a contractual reinstatement requirement [resulting in reinstatement of EE truck driver who twice tested positive for marijuana] would fall within the legal exception that makes unenforceable a [CBA] that is contrary to public policy. [A]ny such public policy must be explicit, well defined, and dominant. It must be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. *At 67:* Regarding drug use by persons in safety-sensitive positions, … Congress has enacted a detailed statute. And Congress has delegated to the Secretary of Transportation authority to issue further detailed regulations on that subject. … Neither Congress nor the Secretary has seen fit to mandate the discharge of a worker who twice tests positive for drugs. We hesitate to infer a public policy in this area that goes beyond the careful and detailed scheme Congress and the Secretary have created." (Internal quotes omitted.)

Enforcement by Individual

Chauffeurs, Teamsters & Helpers v. Terry, 494 U.S. 558, 561 (1990). "[A]n employee who seeks relief in the form of backpay for a union's alleged breach of its duty of fair representation has a [Seventh Amendment] right to trial by jury." *See also* ***Wooddell v. IBEW, Local 71***, 502 U.S. 93, 97-98 (1991).

Clayton v. UAW, 451 U.S. 679, 685 (1981). "We hold that where an internal union appeals procedure cannot result in reactivation of the employee's grievance or an award of the complete relief sought in his [LMRA] §301 [now 29 U.S.C. §185] suit, exhaustion will not be required with respect to either the suit against the employer or the suit against the union."

Vaca v. Sipes, 386 U.S. 171, 186-87 (1967). "[W]e think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance. … The employee's suit against the employer, however, remains [an LMRA] §301 [now 29 U.S.C. §185] suit, and the jurisdiction of the courts is no more destroyed by the fact that the employee, as part and parcel of his §301 action, finds it necessary to prove an unfair labor practice by the union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself. The court is free to determine whether the employee is barred by the actions of his union representative, and, if not, to proceed with the case. And if, to facilitate his case, the employee joins the union as a defendant, the situation is not substantially changed. The action is still a §301 suit, and the jurisdiction of the courts is not pre-empted…." *See also* ***Republic Steel Corp. v. Maddox***, 379 U.S. 650, 652-53 (1965) (EE must at least attempt to exhaust administrative remedies established by CBA).

Staudner v. Robinson Aviation, Inc., 910 F.3d 141, 145 (4th Cir.2018). "[T]he Supreme Court has established an exhaustion requirement under [LMRA] §301(a) [now 29 U.S.C. §185(a)], under which an 'employer cannot be held liable for breach of a [CBA] unless it can be shown that the employee unsuccessfully sought relief through the union grievance procedure.' *At 148:* [W]e conclude that the exhaustion requirement under §301(a) is a nonjurisdictional precondition to suit rather than a jurisdictional limit." *But see* ***National Football League Players Ass'n v. National Football League***, 874 F.3d 222, 226-27 (5th Cir.2017) (exhaustion of CBA grievance procedures is jurisdictional under LMRA).

Hybrid Actions

DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 169-70 (1983). Held: In hybrid claims under LMRA §301, now 29 U.S.C. §185, brought by employees against their employers for breach of contract and their unions for breach of the union duty of fair representation, the six-month limitations period prescribed by NLRA §10(b), now 29 U.S.C. §160, is applied instead of a state statute of limitations for actions on unwritten contracts or for vacating an arbitration award. *See also* ***West v. Conrail***, 481 U.S. 35, 38-39 (1987) (hybrid suit needs only to be filed, not served, within six-month limitations period); ***Becker v. International Bhd. of Teamsters***, 742 F.3d 330, 333 (8th Cir.2014) (limitations period begins to run when EE knows or reasonably should know that union breached duty of fair representation); ***Kalyanaram v. American Ass'n of Univ. Professors at the N.Y. Inst. of Tech.***, 742 F.3d 42, 46 (2d Cir.2014) (same).

Garrison v. Cassens Transp., 334 F.3d 528, 538 (6th Cir.2003). "A hybrid [LMRA] §301 [now 29 U.S.C. §185] action involves two constituent claims: breach of a [CBA] by the employer and breach of the duty of fair representation by the union. The two claims are inextricably interdependent. Unless a plaintiff demonstrates both violations, he cannot succeed against either party. In order to prove a breach of the duty of fair representation, an employee must demonstrate that the union's actions or omissions during the grievance process were arbitrary, discriminatory, or in bad faith. Each of these wrongs is mutually independent, meaning, that the three named factors are three separate and distinct possible routes by which a union may be found to have breached its duty. Actions for a union's breach of its duty of fair representation depend for their rationale on the union's otherwise-complete control over the handling of an employee's grievance. *At 539:* Once an employee successfully demonstrates that the union acted contrary to its legal duty, the employee must then show that the union's actions or omissions tainted the grievance procedure such that the outcome was more than likely affected by the Union's breach. The impact of the union's breach must be substantial such that the plaintiff must meet the onerous burden of proving that the grievance process was seriously flawed by the union's breach." (Internal quotes omitted.) *See also* ***Groves v. Communication Workers of Am.***, 815 F.3d 177, 181-82 (4th Cir.2016); ***Mulvihill v. Top-Flite Golf Co.***, 335 F.3d 15, 20 (1st Cir.2003).

No-Strike Agreements

Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702, 723-24 (1982). "[W]e hold that an employer's [LMRA] §301 [now 29 U.S.C. §185] action to enforce the provisions of a [CBA] allegedly violated by a union's work stoppage involves a 'labor dispute' within the meaning of the Norris-La Guardia Act, without regard to the motivation underlying the union's decision not to provide labor."

Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 382 (1974). "[A]n arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties. It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. … Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application."

Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 246 (1962). "[T]he no-strike clause in a [CBA] at the very least establishes a rule of conduct or condition of employment the violation of which by employees justifies discipline or discharge…. *At 247:* When a union breach of contract is alleged, that the plaintiff seeks to hold the agents liable instead of the principal does not bring the action outside the scope of [LMRA] §301 [now 29 U.S.C. §185]. *At 249:* [W]hen a union is liable for damages for violation of the no-strike clause, its officers and members are not liable for these damages." *See also* ***Boys Mkts., Inc. v. Retail Clerks Un., Local 770***, 398 U.S. 235, 252-54 (1970) (union could be enjoined from striking over dispute that it was bound to arbitrate at ER's behest).

State-Law Preemption

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985). "[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as [an LMRA] §301 [now 29 U.S.C. §185] claim … or dismissed as pre-empted by federal labor-contract law." *See also* ***Lingle v. Norge Div. of Magic Chef, Inc.***, 486 U.S. 399, 405-06 (1988); ***Caterpillar Inc. v. Williams***, 482 U.S. 386, 394-96 (1987); ***IBEW v. Hechler***, 481 U.S. 851, 859 n.3 (1987); ***CNH Am., LLC v. UAW***, 645 F.3d 785, 790-91 (6th Cir.2011).

Kobold v. Good Samaritan Reg'l Med. Ctr., 832 F.3d 1024, 1032-33 (9th Cir.2016). "Drawing on Supreme Court precedent, this court has articulated a two-step inquiry to analyze [LMRA] §301 [now 29 U.S.C. §185] preemption of state law claims. First, a court must determine whether the asserted cause of action involves a right conferred upon an employee by virtue of state law, not by a CBA. If the right exists solely as a result of the CBA, then the claim is preempted, and the analysis ends there. If the court determines that the right underlying the plaintiff's state law claims exists independently of the CBA, it moves to the second step, asking whether the right is nevertheless substantially dependent on analysis of a [CBA]. Where there is such substantial dependence, the state law claim is preempted by §301. If there is not, then the claim can proceed under state law." (Internal quotes omitted.) *See also* ***Boldt v. Northern States Power Co.***, 904 F.3d 586, 590 (8th Cir.2018); ***Brittingham v. General Motors Corp.***, 526 F.3d 272, 278 (6th Cir.2008).

Suits for Violation of Contract

Textron Lycoming Reciprocating Engine Div., AVCO Corp. v. UAW, 523 U.S. 653, 657 (1998). "[A] suit 'for violation of a contract' is not one filed 'with a view to' a future contract violation (much less to facilitate action that 'otherwise would be' a contract violation). It is one filed *because a contract has been violated*…. 'Suits for violation of contracts' under [LMRA] §301(a) [now 29 U.S.C. §185(a)] are not suits that claim a contract is invalid, but suits that claim a contract has been violated. *At 658:* [Section 301(a)] erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse. Thus if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid, the court may, consistent with §301(a), adjudicate that defense." *See also* ***Olson v. Bemis Co.***, 800 F.3d 296, 301 (7th Cir.2015) (breach-of-grievance settlement is violation of contract under §185(a)); ***International Un. v. ZF Boge Elastmetall LLC***, 649 F.3d 641, 646 (7th Cir.2011) (approach for interpreting CBAs in suits under NLRA §301, now 29 U.S.C. §185, is the same as for other contracts).

United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. v. Local 334, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., 452 U.S. 615, 626 (1981). "The question presented in this case is whether a suit brought by a local union against its parent international union, alleging a violation of the international's constitution, falls within [LMRA] §301(a) [now 29 U.S.C. §185(a)] jurisdiction of the federal district courts." Held: Yes. *See also* ***SEIU***

v. National Un. of Healthcare Workers, 598 F.3d 1061, 1070-72 (9th Cir.2010) (federal court has jurisdiction under LMRA §301(a), now 29 U.S.C. §185(a), when international union seeks injunctive relief against former union officers); ***International Un. of Electronic, Electrical, Salaried, Mach. & Furniture Workers v. Statham***, 97 F.3d 1416, 1421-22 (11th Cir.1996) (LMRA §301(a), now 29 U.S.C. §185(a), permits injunctive suits against individual Ds for violations of union constitution).

Houston Ref., L.P. v. USW, 765 F.3d 396, 403 (5th Cir.2014). "[A]n allegation of a labor contract violation is both necessary *and* sufficient to support subject-matter jurisdiction under [LMRA] §301(a) [now 29 U.S.C. §185(a)]. If the court later finds the allegedly violated contract to be non-existent or invalid, it must dismiss for failure to state a claim, not for lack of jurisdiction. *At 404:* [ER] urges us to reject the Third and Sixth Circuits' approach of treating the factual existence of a labor contract as an element of a plaintiff's claim and instead follow the Eighth Circuit, which recognizes the jurisdictional nature of §301(a). [¶] But neither the Third, Sixth, nor Eighth Circuits contemplated whether an alleged labor contract violation can support federal subject-matter jurisdiction under §301(a). The Third and Sixth Circuits are correct insofar as they hold that factual proof of a labor contract is *not* necessary for such jurisdiction, and that if a court finds that such a contract is invalid, it should dismiss for failure to state a claim. But those decisions did not recognize that under ***Textron,*** §301(a) jurisdiction requires an alleged labor contract violation. *At 406:* [But a] party need only *allege* the violation of a labor contract to invoke federal subject-matter jurisdiction under §301…." *See also* ***Nu Image, Inc. v. International Alliance of Theatrical Stage Emps.***, 893 F.3d 636, 641 (9th Cir.2018) (court has jurisdiction only if P alleges violation of CBA as element of claim); ***District No. 1, Pac. Coast Dist., Mar. Eng'rs' Beneficial Ass'n v. Liberty Maritime Corp.***, 815 F.3d 834, 840-41 (D.C.Cir.2016) (in many circuits, mere allegation of breach of contract is insufficient for §185(a) jurisdiction; if court decides that dispute is "primarily representational," even if framed as breach of contract, court defers to NLRB's exclusive jurisdiction); ***ABF Freight Sys. v. International Bhd. of Teamsters***, 645 F.3d 954, 962-63 (8th Cir.2011) (§301(a) is jurisdictional). *But see* ***Pittsburgh Mack Sales & Serv. v. IUOE, Local Un. No. 66***, 580 F.3d 185, 190 (3d Cir.2009) (factual proof of labor contract is not necessary for §301 jurisdiction); ***Winnett v. Caterpillar, Inc.***, 553 F.3d 1000, 1006-07 (6th Cir.2009) (same).

29 U.S.C.A. § 185, 29 USCA § 185
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter IV. Liabilities of and Restrictions on Labor and Management

29 U.S.C.A. § 185

§ 185. Suits by and against labor organizations [Notes of Decisions subdivisions XV to XXIII]

Currentness

<Notes of Decisions for 29 USCA § 185 are displayed in multiple documents. For text of section, historical notes, and references, see first document for 29 USCA § 185.>

Notes of Decisions (4996)

29 U.S.C.A. § 185, 29 USCA § 185
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter IV. Liabilities of and Restrictions on Labor and Management

29 U.S.C.A. § 186

§ 186. Restrictions on financial transactions

Currentness

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of

value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided,* That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further,* That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any

other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalties for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

CREDIT(S)

(June 23, 1947, c. 120, Title III, § 302, 61 Stat. 157; Pub.L. 86-257, Title V, § 505, Sept. 14, 1959, 73 Stat. 537; Pub.L. 91-86, Oct. 14, 1969, 83 Stat. 133; Pub.L. 93-95, Aug. 15, 1973, 87 Stat. 314; Pub.L. 95-524, § 6(d), Oct. 27, 1978, 92 Stat. 2021; Pub.L. 98-473, Title II, § 801, Oct. 12, 1984, 98 Stat. 2131; Pub.L. 101-273, § 1, Apr. 18, 1990, 104 Stat. 138; Pub.L. 104-88, Title III, § 337, Dec. 29, 1995, 109 Stat. 954.)

Notes of Decisions (1617)

O'CONNOR'S CHARTS REFERENCES

See chart, "Summary of Key ERISA Provisions."

O'CONNOR'S ANNOTATIONS

Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581, 587 (1993). LMRA §302(e), now 29 U.S.C. §186(e), "does not provide authority for a federal court to issue injunctions against a trust fund or its trustees requiring the trust funds to be administered in the manner described in [LMRA] §302(c)(5) [now 29 U.S.C. §186(c)(5)]."

NLRB v. Amax Coal Co., 453 U.S. 322, 334 (1981). "[T]he fiduciary provisions of ERISA were designed to prevent a trustee 'from being put into a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries.' [¶] The language and legislative history of [LMRA] §302(c)(5) [now 29 U.S.C. §186(c)(5)] and ERISA therefore demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him. Thus, the statutes defining the duties of a management-appointed trustee make it virtually self-evident that welfare fund trustees are not 'representatives for the purposes of collective bargaining or the adjustment of grievances' within the meaning of [NLRA] §8(b)(1)(B) [now 29 U.S.C. §158(b)(1)(B)]." *See also* ***Atrium of Princeton, LLC v. NLRB***, 684 F.3d 1310, 1316 (D.C.Cir.2012) (trustees act as union agents only if union exercised control of fund and trustees served union interests in breach of their duty to EE beneficiaries).

International Ass'n of Machs. Dist. Ten & Local Lodge 873 v. Allen, 904 F.3d 490, 503 (7th Cir.2018). 29 U.S.C. §186(c)(4) "leaves it to private actors--and not the State--to decide how long [a] dues-checkoff authorization should last, as long as the authorization is individual, in writing, and not irrevocable for longer than one year. The State's attempt to add additional regulatory requirements for dues-checkoffs, and thus to change the scope of permissible collective bargaining, is preempted. *At 507:* [Further, 29 U.S.C.] §164(b) does not authorize States to regulate other arrangements not covered by its terms, such as dues-checkoff authorizations."

Ohlendorf v. United Food & Commercial Workers Int'l Un., Local 876, 883 F.3d 636, 642-43 (6th Cir.2018). "[EEs] insist that [NLRA] §302(e) [now 29 U.S.C. §186(e)] confers an express cause of action. But that is not so. That provision grants *jurisdiction* to the federal courts 'to restrain violations of this section.' It says nothing about giving private parties the right to sue, and most assuredly says nothing about a right to sue for money damages. [¶] But what does §302(e) do if it does not create a private right of action[?] One: The statute creates jurisdiction for the courts to restrain violations of §302 at the request of the Attorney General. Having entrusted the Attorney General to protect the public from criminal violations of §302, Congress gave the federal courts authority to hear such actions and to permit federal courts … to enjoin violations of this criminal labor law. [¶] Two: Section 302(e) provides the courts with jurisdiction to enjoin violations of §302 in lawsuits brought under express private rights of action, as a needed exception to the Clayton Act and the Norris-LaGuardia Act's ban on labor-dispute injunctions."

Board of TRS. of the Plumbers, Pipe Fitters & Mech. Equip. Serv., Local Un. No. 392 Pension Fund v. B&B Mech. Servs., 813 F.3d 603, 609 (6th Cir.2015). "[T]he 'written agreement' required by LMRA §302(c)(5)(B) [now 29 U.S.C. §186(c)(5)(B)] does not have to be a CBA as long as the written agreement 'sets out the employer's obligation to contribute' to the employee

benefit funds." *See also* ***Cibao Meat Prods. v. NLRB***, 547 F.3d 336, 341 (2d Cir.2008) (expired CBA satisfies written-agreement requirement).

Titan Tire Corp. v. USW, 734 F.3d 708, 717-18 (7th Cir.2013). "The plain language of [LMRA] §302(a) [now 29 U.S.C. §186(a)] would bar [ER's] payment of the union's President's and Benefit Representative's salaries because they 'represent[ ] … employees who are employed in an industry affecting commerce.' The union contends that [ER's] payments are exempt from the general bar by [LMRA] §302(c) [now 29 U.S.C. §186(c)] because the payments are to a 'former employee' 'as compensation for, or by reason of, his service as an employee' of [ER]. *At 726-27:* [P]reventing bribery is not the sole purpose of §302. And prohibiting an employer from paying the full-time salaries of the union's President and Benefit Representative serves the statute's goal of preventing conflicts of interest. … It is this conflicted interest and diversion of employee wages to union leaders which §302(a) seeks to address." *See also* ***U.S. v. Browne***, 505 F.3d 1229, 1250 (11th Cir.2007). *But see* ***Caterpillar, Inc. v. UAW***, 107 F.3d 1052, 1054 (3d Cir.1997) (ER's paid leaves of absence to former EEs serving as union's full-time grievance chairmen were compensation by reason of their service as EEs and did not violate §185(c)).

Mulhall v. Unite Here, 667 F.3d 1211, 1215 (11th Cir.2012). "[O]rganizing assistance can be a thing of value, but an employer does not risk criminal sanctions simply because benefits extended to a labor union can be considered valuable. Violations of [LMRA] §302 [now 29 U.S.C. §186] only involve payments, loans, or deliveries, … and every benefit is not necessarily a payment, loan, or delivery. For example, intangible organizing assistance cannot be loaned or delivered because the actions 'lend' and 'deliver' contemplate the transfer of tangible items. [¶] Yet, a violation of §302 cannot be ruled out merely because intangible assistance cannot be loaned or delivered. Section 302 also prohibits payment of a thing of value, and intangible services, privileges, or concessions can be paid or operate as payment. Whether something qualifies as a payment depends not on whether it is tangible or has monetary value, but on whether its performance fulfills an obligation. If employers offer organizing assistance with the intention of improperly influencing a union, then the policy concerns in §302--curbing bribery and extortion--are implicated."

NLRB v. Oklahoma Fixture Co., 332 F.3d 1284, 1291 (10th Cir.2003). "[M]embership dues are defined to cover all members of the bargaining unit rather than just members of the union."

U.S. v. Ricciardi, 357 F.2d 91, 95 (2d Cir.1966). See annotation under 29 U.S.C. §152, *Jurisdiction--Affecting Commerce*.

29 U.S.C.A. § 186, 29 USCA § 186
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter IV. Liabilities of and Restrictions on Labor and Management

29 U.S.C.A. § 187

§ 187. Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

Currentness

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or [1] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

CREDIT(S)

(June 23, 1947, c. 120, Title III, § 303, 61 Stat. 158; Pub.L. 86-257, Title VII, § 704(e), Sept. 14, 1959, 73 Stat. 545.)

Notes of Decisions (715)

O'CONNOR'S ANNOTATIONS

American President Lines, Ltd. v. International Longshore & Whs. Un., Alaska Longshore Div., Unit 60, 721 F.3d 1147, 1153 (9th Cir.2013). LMRA §303, now 29 U.S.C. §187, "quite broadly confers standing to '[w]hoever shall be injured in his business or property by reason o[f]' any such unfair labor practice. [¶] We have held that §303's requirement that an injury occurs 'by reason of' [an NLRA] §8(b)(4) [now 29 U.S.C. §158(b)(4)] violation 'imposes standing limitations.' In ***Fulton*** [***v. Plumbers & Steamfitters***, 695 F.2d 402 (9th Cir.1982)], we held that a court must determine whether §303 standing exists by looking to: (1) the nexus between the injury and the statutory violation; and (2) the relationship between the injury alleged and the forms of injury that Congress sought to prevent or remedy by enacting the statute. To determine the relationship between the injury and the statutory violation, we examine whether the plaintiff 'was within the target area of the defendant's illegal practices and was not only hit, but also aimed at.'"

Ahearn v. International Longshore & Whs. Un., Locals 21 & 4, 721 F.3d 1122, 1128-29 (9th Cir.2013). "The Union … urges us to follow the Second Circuit's holding in [***NLRB v. Local 3, IBEW***, 471 F.3d 399 (2d Cir.2006)], where the Second Circuit declined to award civil contempt damages to third-party employers when the employers were not complainants in the underlying [LMRA] §303 [now 29 U.S.C. §187] action and had not brought their own §303 claims against the union. [¶] We reach a different conclusion, for several reasons. First, civil contempt proceedings serve two purposes: (1) coercing compliance with a court order; and (2) compensating the prevailing party. As the charging party, [ER] is a 'prevailing party' for purposes of the

NLRA and therefore is entitled to compensation for its actual damages. [¶] Second, we are not convinced that ***Local 3*** stands for the broad proposition that employers who are eligible to seek remedies under §303 are *never* entitled to civil contempt damages for injuries related to secondary protest activities. No case has ever cited ***Local 3*** for such a broad proposition and ***Local 3***'s reasoning does not suggest such an expansive holding. [¶] Third, §303 states only that private employers 'may sue' for damages caused by unfair labor practices, not that they must do so. Nothing in the LMRA or the NLRA suggests otherwise. … Finally, it is not clear that [ER]*could* seek relief under §303 in this case, as the district court did not award injunctive relief under [NLRA] §8(b)(4) [now 29 U.S.C. §158(b)(4)]."

Shafer Redi-Mix, Inc. v. Chauffeurs, Teamsters & Helpers Local Un. No. 7, 643 F.3d 473, 478 (6th Cir.2011). "[T]he standard of causation for a violation of §187 dictated by the phrase 'by reason [of]' is that the defendant's conduct must have materially contributed to plaintiff's injury or was a substantial factor in bringing it about…. *At 479:* [O]nce liability is established, the injured party is entitled to recover all damages directly and proximately caused by the defendant's violation." (Internal quotes omitted.)

Footnotes

1 So in original. Probably should read "of".

29 U.S.C.A. § 187, 29 USCA § 187
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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2023 WL 12051503
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

Daniel HAMEL, Todd Neumann, William Freeman, James O'Connell, & James Choquette, Plaintiffs,

v.

WESTERN MASSACHUSETTS ELECTRIC COMPANY d/b/a Eversource Energy, Respondent.

Civil Action No. 22-30097-MGM
|
Signed August 4, 2023

Attorneys and Law Firms

James A.W. Shaw, Paul F. Kelly, Ryan M. Quinn, Segal Roitman LLP, Boston, MA, for Plaintiffs.

Christopher M. Pardo, Elizabeth L. Sherwood, Hunton Andrews Kurth LLP, Boston, MA, for Respondent.

MEMORANDUM AND ORDER RE: PLAINTIFFS' MOTION TO REMAND AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Dkt. Nos. 6 & 11)

MASTROIANNI, United States District Judge

I. INTRODUCTION

***1** Plaintiffs in this action are employed by Defendant, Western Massachusetts Electric Company d/b/a Eversource Energy. [1] Plaintiffs filed this case in state court on December 29, 2020, asserting only statutory state law claims, and service of process was completed in March 2021. Additionally, the parties are not diverse. However, on July 21, 2022, Defendant removed the case to this court asserting subject matter jurisdiction pursuant to the doctrine of complete preemption under § 301 of the Labor Management Relations Act (LMRA), on the basis of deposition testimony of one of the Plaintiffs as well as a former Business Manager for Plaintiffs' union. Shortly thereafter, Defendant also filed a motion for summary judgment (Dkt. No. 6). Plaintiffs both opposed the summary judgment motion and filed a timely motion to remand this action to state court, contesting the applicability of complete preemption in this case. (Dkt. No. 11). For the reasons set forth below, this court concludes that remand is appropriate. Having concluded that remand is appropriate, this court does not reach Defendant's summary judgment arguments; these issues are best left to the state court.

II. BACKGROUND

As stated, Plaintiffs, a group of workers employed by Defendant, filed a complaint in Massachusetts state court on December 29, 2020. The complaint alleges that from on or about February 5, 2018 through the date the complaint was filed, Defendant required Plaintiffs and other similarly situated employees to work a schedule of 8 ½ hours with one half-hour unpaid meal break, but "failed and refused to relieve" them from "work duties during the one-half hour meal break." (Compl., Dkt. No. 1-1 at ¶¶ 14–15). That work allegedly required Plaintiffs to, among other things, "remain with the trucks, to safeguard [Defendant's] vehicles and equipment, ... to remain in radio and company phone contact with supervisors and coworkers, ... to discuss assignments with supervisors, ... to interact with members of the public who inquire about the work, and to respond to emergencies such as power outages." (*Id.* at ¶ 16). Plaintiffs allege Defendant's conduct violated Massachusetts wage and overtime laws, Mass. Gen. Laws ch. 149 §§ 148 and 150 and ch. 151 §§ 1A and 1B. Plaintiffs seek to recover their wages and overtime for all unpaid working lunches since February 5, 2018, plus treble damages and attorney's fees. The complaint makes no reference to a CBA or to any rights or benefits beyond those established by Massachusetts law.

Defendant removed the action to this court on July 21, 2022, asserting federal question jurisdiction arising from § 301 of the LMRA, 29 U.S.C. § 185. In its notice of removal, Defendant asserted "the well-pleaded complaint rule" does not prevent removal event even though Plaintiffs did not elect to plead any federal causes of action because the doctrine of complete preemption applies. Specifically, Defendant asserts resolution of Plaintiffs' claims will plausibly require interpretation of several CBA provisions relating to, among other things, overtime pay, on-call pay, Sunday pay, and holiday pay. In support, Defendant argues the deposition testimony of one of the Plaintiffs and a former Business Manager for the Plaintiffs' union reveal that the claims at issue are actually premised on violation of the CBA rather than state

law or, at the least, calculation of the applicable wages would be based on the CBA.

III. DISCUSSION

***2** As this court need not reach Defendant's summary judgment arguments if it grants Plaintiffs' motion to remand, the court begins with a discussion of remand and the doctrine of complete preemption. Generally, under the well-pleaded complaint rule, "the propriety of federal-question jurisdiction must be assayed based on 'what necessarily appears in the plaintiff's statement of [its] own claim' in [its] complaint, 'unaided by anything alleged in anticipation of avoidance of defenses which it is thought that a defendant may interpose.' " *Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 17 (1st Cir. 2018) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 10 (1983)). As Plaintiffs have not asserted any federal claims, remand would be appropriate were the court to apply the well-pleaded complaint rule. However, because there is a CBA governing aspects of the employment relationship between Defendant and Plaintiffs, Defendant asserts that the doctrine of complete preemption applies here.

Complete preemption "comprises a narrow exception to the well-pleaded complaint rule," clearing a path to federal court where "Congress intended that federal law provide the exclusive cause of action for the claims asserted by the plaintiff." *López-Muñoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 5 (1st Cir. 2014). It is well established that complete preemption applies to claims that fall within § 301 of the LMRA. *Lawless*, 894 F.3d at 17. "Section 301 of the LMRA, 29 U.S.C. § 185, confers federal jurisdiction over '[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce.' " *BIW Deceived v. Local S6, Indus. Union of Marine & Shipbuilding Workers of Am., IAMAW Dist. Lodge 4*, 132 F.3d 824, 829 (1st Cir. 1997). "[T]he Supreme Court has declared that 'the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization." *Id.* at 831.

However, the reach of § 301 complete preemption is not unlimited. *Lawless*, 894 F.3d at 18. "[S]ection 301 does not 'preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.' " *Id.* (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985)). Thus, preemption does not apply when the claim raises "purely factual questions about an employee's conduct or an employer's conduct and motives that do not require a court to interpret any term of a collective bargaining agreement." *Hamilton v. Partners Healthcare Sys.*, 209 F. Supp. 3d 397, 406 (D. Mass. 2016) (citation and quotations omitted). A state-law claim may also escape LMRA preemption "if it requires no more than a 'bare' consultation of a CBA, without dispute as to 'the meaning of any contract terms.' " *Rose v. RTN Fed. Credit Union*, 1 F.4th 56, 61 (1st Cir. 2021) (citation omitted; alteration adopted). If the court determines a state-law claim is not preempted by the LMRA, remand must follow.

At this juncture, it is appropriate to note the court previously remanded a substantially similar action asserting these claims, brought by Plaintiffs' union, which was later dismissed for lack of standing by the state court. Given the procedural history of this dispute, it is helpful to reproduce the court's discussion here. As the court explained:

> In *Rueli*, a group of nurses who worked at remote sites alleged their employer had violated the Massachusetts Wage Act by not paying them for time they had worked outside of their scheduled shifts. *Id.* at *1.[2] Plaintiffs filed their complaint in state court alleging violations of the same Massachusetts statutes at issue in this case. *Id.* The defendant removed the state case to this court, arguing the resolution of the claim would depend, "at least in part, upon the meaning" of the parties' CBA and, therefore, the doctrine of complete preemption provided this court with jurisdiction. *Id.*

***3** On appeal, the First Circuit focused on alleged violations of the Weekly Wage Act, Mass. Gen. Laws ch. 149, § 148, a statutory provision also invoked by Plaintiff here. *Rueli*, 835 F.3d at 60. The court explained that it only needed to consider whether any one of the plaintiff's claims is subject to complete preemption because all the other claims arose from the same facts. *Id.* The First Circuit observed that the Weekly Wage Act applies to wages "owed for all work the employer 'suffers or permits' to be done, regardless of whether it would be compensable under the CBA." *Id.* at 62. However, the "complaint [did] not allege a basis for actual knowledge [by the employer] of all of the unpaid hours" the plaintiffs had worked, and the plaintiffs acknowledged that the CBA included a provision requiring approval for any hours worked outside of an employee's scheduled shifts. *Id.* at 62-63. As a result, the First Circuit concluded that "resolution of [the] dispute [would] likely

involve a determination of whether [the employer] should have known about the [employees'] unpaid work" and this determination plausibly would have required interpretation of the CBA. *Id.* (emphasis in original). In reaching its decision, the First Circuit acknowledged that there would have been no "need to interpret the CBA" if the plaintiffs had been "able to vindicate their claims with proof of [the employer's] actual knowledge of their unpaid hours." *Id.*

Turning back to this case, Plaintiff does not allege that employees have a contractual right to pay for the unpaid breaks or for hours worked outside of their scheduled shifts. Plaintiff only seeks pay pursuant to state law for the small portion of an employee's regularly scheduled shifts designated as an unpaid break and does not assert a claim to any additional wages that might be due under §§ VI or VII of the CBA. Applying the First Circuit's analysis to these facts, it is clear that, if proven, they establish Defendant had actual knowledge of all the periods of unpaid work alleged by Plaintiff, distinguishing this case from *Rueli*. Without claims to compensation due pursuant to the CBA or questions about whether the employer was aware that employees were working the contested hours, there is no plausible reason that resolution of this claim would require interpretation of the CBA. Further, given the simplicity of the claim, even construction of the CBA is unlikely to be necessary to resolve the claims because the employees' paystubs would likely supply the necessary information to calculate damages. To find complete preemption on these factual allegations would require this court to disregard the Supreme Court's assertion "that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred ... as a matter of state law." *Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994).

The court next considers whether Plaintiff's other claim, for failure to pay required overtime pursuant to Mass. Gen. Laws ch. 151, §§ 1A and 1B, is completely preempted. Again, the question is whether resolution of the claim plausibly requires interpretation of the CBA. The relevant statute prohibits employers in Massachusetts from "employ[ing] any of [its] employees in an occupation ... for a work week longer than forty hours, unless such employee received compensation for his employment in excess of forty hours at a rate not less than one and one half times the regular rate at which he is employed." Mass. Gen. Laws ch. 151, § 1A. The word "employ," in the overtime statute, works similarly to the phrase "suffers or permits" in the Weekly Wage Act. Both condition an employer's liability on its knowledge that work was being performed. As with the Weekly Wage Act, some cases may require interpretation of a collective bargaining agreement to determine whether an employee was "employed" within the meaning of the statute. However, as explained above with respect to the Weekly Wage Act claim, here Plaintiff has alleged that Defendant knew it was employing employees represented by Plaintiff during that portion of their regular shifts designated by Defendant as an unpaid break. As a result, the sections of the CBA cited will not need to be interpreted in order to determine if an employee was employed during the unpaid break for purposes of assessing liability under the Massachusetts overtime statute.

***4** ... The allegation in the complaint is simply that employees were working regularly scheduled shifts that were longer than the shifts for which they were receiving compensation because Defendant was not paying them for a break during which they were actually working. Having reviewed the CBA provisions cited by Defendant, the court cannot envision, much less find plausible, a reason why the court would need to do anything more than consult the CBA to determine the amount of damages owed. Indeed, as mentioned above, Plaintiff's claim is so straightforward, that the amount owed can likely be determined solely with reference to employee pay stubs and Massachusetts law. For these reasons, the court determines that as with the Weekly Wage Act claim, resolution of Plaintiff's overtime claim will not plausibly require interpretation of the CBA. *Livadas*, 512 U.S. at 122-23.

Local 455, Int'l Bhd. of Elec. Workers, AFL-CIO v. W. Mass. Elec. Co., No. 18-cv-30188, Dkt. No. 29, Memorandum and Order, at 5–7 (D. Mass. Sept. 16, 2019). [3]

Defendant concedes that, given the court's prior order and the identical claims presented, this action was not preempted, and therefore not removable, unless some further development significantly altered the landscape of Plaintiffs' claims. (Dkt. No. 21 at 9). To that end, Defendant points to the deposition testimony of Daniel Hamel, one of the Plaintiffs, and Brian Kenney, a former Business Manager of the union who brought the first action on behalf of Plaintiffs. However, the select portions of the deposition transcripts Defendant relies upon neither indicate Plaintiffs' claims are actually disguised CBA claims nor suggest that resolution of their claims will require interpretation of the CBA's terms.

First and foremost, the court does not believe the testimony says what Defendant represents it says. Defendant insists

Hamel's testimony reveals Plaintiffs are seeking overtime for the unpaid lunch breaks at double rate as set forth by the CBA, rather than the time-and-a-half rate set by state law. This is, at best, an extremely generous characterization of Hamel's testimony. After extensive questioning about the terms of the CBA, Defendant's counsel asked him what rate he thought applied to the claims in this case. Hamel responded "[t]ime and a half" — the overtime rate set by Massachusetts law and sought in the complaint. Defendant's counsel then followed up by referring to what employees are entitled to under the CBA, to which Hamel replied that double time would apply to claims under the CBA. (Dkt. No. 1-5 at 135). He later clarified, consistent with the complaint, that Plaintiffs are not making any claims or seeking any premium pay under the provisions of the CBA. (*Id.* at 141). This testimony merely reflects faithful responses to questions posed and, at most, confusion about counsel's question, which was framed in terms of the rate employees "are entitled [to] under the CBA" and followed a lengthy colloquy regarding the CBA's terms. Contrary to Defendant's reading of the transcript, the testimony does not represent a "gotcha" revelation that Plaintiffs are seeking damages in excess of the state minima.

Though the court believes it is apparent from Hamel's testimony that Plaintiffs' claims are not premised on any provision of the CBA, even if such testimony were plausibly read to say what Defendant suggests, it would be of no consequence to the court's determination. It is axiomatic that a plaintiff cannot amend a complaint or supplement claims via deposition testimony. *See*, *e.g.*, *Hudson v. Am. Fed'n of Gov't Emps.*, No. 17-cv-2094, 2020 WL 1275685, at *4 (D.D.C. Mar. 17, 2020) (rejecting attempt to alter claim through deposition testimony); *Pines v. Davis*, No. 15-cv-204, 2020 WL 4345312, at *3 (D.N.J. July 28, 2020) (same); *Lee v. Holder*, No. 07-cv-2649, 2009 WL 10670933, at *3 (N.D. Ga. Feb. 23, 2009) ("a complaint cannot be amended by statements in a deposition"); *Brown v. Snow*, 440 F.3d 1259, 1266 (11th Cir. 2006) ("the discussion of a potential claim in a deposition does not satisfy the requirement of Rule 8(a)"), *overruled on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).[4] For the same reason, any opinion proffered by Hamel or Kenney that they believe, in the equitable sense, workers should be paid at the rate they are entitled to under the CBA, does not change the fact that it is not what Plaintiffs claim or seek in this case. (*See*, *e.g.*, Dkt. No. 22-1 at 155:3–15; Dkt. No. 1-5 at 128:20–129:3). Plaintiffs' complaint is clear: they do not seek premium payments based on the CBA or overtime compensation beyond what is required by state law, and absent an amended pleading, they are bound by what is sought in their complaint. The fact that Plaintiffs could have made claims under the CBA is irrelevant; it does not transform Plaintiffs' state-law wage claims into claims based on the CBA.[5] Likewise, the fact that Plaintiffs could have sought premium compensation is beside the point; by not doing so, Plaintiffs have effectively disclaimed any right they had under the CBA to overtime compensation above the state minima. Plainly, Plaintiffs are permitted to seek only what is required under state law, rather than any higher amount they may have been entitled to under the CBA, because they are the masters of their own complaint. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 395, 398 (1987).

***5** Nor does Kenney's testimony provide a basis for federal jurisdiction. The court discerns no reason why Kenney's acknowledgement that each employee's regular rate may vary and may require reference to the CBA to establish the applicable pay rate would require interpretation of the meaning of any provision the CBA, as opposed to mere consultation. As this court opined before, "[t]he allegation in the complaint is simply that employees were working regularly scheduled shifts that were longer than the shifts for which they were receiving compensation because Defendant was not paying them for a break during which they were actually working." *Local 455*, No. 18-cv-30188, Dkt. No. 29, at 7. Given these straightforward claims and because the deposition testimony does not expand what Plaintiffs seek in this case beyond the state minima, "the court cannot envision, much less find plausible, a reason why the court would need to do anything more than consult the CBA to determine the amount of damages owed." *Id.*

Because the court determines Plaintiff's claims are neither actually premised on the CBA nor will require interpretation of the CBA's terms, the claims are not preempted by § 301 of the LMRA and this court lacks subject matter jurisdiction. Accordingly, remand is required.

IV. CONCLUSION

For the reasons explained above, the court ALLOWS Plaintiffs' Motion to Remand (Dkt. No. 11) and DENIES as moot Defendant's Motion for Summary Judgment (Dkt. No. 6).

It is So Ordered.

All Citations

Not Reported in Fed. Supp., 2023 WL 12051503

Footnotes

1 Defendant clarified in its Notice of Removal that Western Massachusetts Electric Company merged with NSTAR Electric Company effective December 31, 2017. (Dkt. No. 1 at 1 n.1).

2 The court was referring to *Rueli v. Baystate Health Inc.*, Civ. Action No. 14-10319-MGM, 2015 WL 132662 (D. Mass. Jan. 9, 2015), *aff'd*, 835 F.3d 53 (1st Cir. 2016).

3 For the same reasons, the state court on remand likewise concluded "the employees' claims under Massachusetts law are not pre-empted by Section 301." (Dkt. No. 11-2 at 9).

4 In response, Defendant cites *Lawless*, but *Lawless* is not to the contrary. In that case, the plaintiff testified during her deposition to *facts* which effectively nullified one of her legal claims. *See* *Lawless*, 894 F.3d at 19. It is wholly unlike the situation Defendant propounds here: that a plaintiff's deposition testimony can expand the nature, scope, or legal basis of his claims beyond what is set forth in the complaint. To allow such a thing would be to disregard the text and purpose of Rule 8(a) and would directly contravene Rule 15 as well as years of unanimous legal precedent prohibiting amendment of complaints through improper procedural channels.

5 To avoid repetition, the court simply notes the same reasoning applies to Defendant's points regarding the prior grievance and unfair labor practice charge filed with the National Labor Relations Board (NLRB). The fact that Plaintiffs may have had recourse based on the CBA and perhaps once pursued it does not necessitate a finding that Plaintiffs' current claims are based on the CBA, particularly where Plaintiffs have limited their sought-after relief to only what is required under state law. It also does not necessarily mean that the claims cannot be resolved without interpretation of the CBA's terms. *See* *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409–10 (1988); *Constantino v. Shaw's Supermarkets Inc.*, No. 20-cv-00387, 2021 WL 1343509, at *5 n.5 (D. Me. Apr. 9, 2021) ("In *Livadas v. Bradshaw*, the Supreme Court explained that 'it is the legal character of a claim, as 'independent' of rights under the collective-bargaining agreement, *Lueck*, 471 U.S. at 213 (and not whether a grievance arising from 'precisely the same set of facts' could be pursued, *Lingle*, 486 U.S. at 410) that decides whether a state cause of action may go forward.' 512 U.S. 107, 123–24 (1994)"). Moreover, as Plaintiffs note, the grievance and NLRB charge existed at the time the court remanded the prior action. Defendant offers no reason why their existence should change the court's analysis now.

2011 WL 1143003
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Henry McLEAN and Edwin Rivera, Plaintiffs,
v.
GARAGE MANAGEMENT CORP., a New York corporation; Garage Management Associates LLLC, a Delaware limited liability company; Chapman Consulting Payroll LLC, a New York limited liability company; and Richard M. Chapman, individually, Defendants.

No. 10 Civ. 3950(DLC).
|
March 29, 2011.

Attorneys and Law Firms

Stephen H. Kahn, New York, NY, for plaintiffs.

A. Michael Weber, Elias J. Kahn, Littler Mendelson, P.C., New York, NY, for defendants.

OPINION AND ORDER

DENISE COTE, District Judge.

***1** Henry McLean and Edwin Rivera bring the above-captioned action on behalf of themselves and a putative class of similarly situated persons (the "plaintiffs") who are employed as parking attendants at parking garages in New York City owned and/or operated by Garage Management Corp., Garage Management Associates LLC, Chapman Consulting Payroll LLC, Chapman Consulting LLC, and Richard M. Chapman (the "defendants"). Plaintiffs claim that defendants failed to pay them overtime and failed to pay them for all hours worked, in violation of various provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 206 *et seq.;* the Portal to Portal Act, 29 U.S.C. 251 *et seq.;* New York Labor Law ("NYLL") §§ 652, 663; and, New York Codes, Rules and Regulations ("NYCRR") §§ 142–2.2, 142–2.4. Defendants have moved pursuant to Rule 12(b)(6), Fed.R.Civ.P., to dismiss plaintiffs' NYLL and NYCRR claims on the basis that they are pre-empted by § 301 of the Labor Management Relations Act ("LMRA"), 28 U.S.C. § 185. Defendants have also moved pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.,* to compel the plaintiffs to arbitrate their claims arising under the Fair Labor Standards Act ("FLSA"). Finally, to the extent that NYLL and NYRR claims survive the motion to dismiss, defendants argue that under the FAA these claims must also be arbitrated. For the following reasons, the motion is denied.

BACKGROUND

Unless otherwise specified, the following facts are drawn from the plaintiffs' amended complaint filed on January 21, 2011 (the "Complaint") and are assumed to be true for the purposes of this motion. At all times relevant to the Complaint, plaintiffs were employed as Garage Managers at parking garages owned and operated by the defendants in Manhattan. In this capacity, plaintiffs' primary duty was to park and retrieve cars and to process customer payments. Plaintiffs were regularly required to work in excess of forty hours a week without receiving statutorily required overtime. Additionally, the plaintiffs' pay stubs did not accurately reflect all hours worked. In particular, the plaintiffs were not compensated for the time spent bringing each day's receipts and records to the defendants' central office.

Defendants contend that plaintiffs' employment is governed by a collective bargaining agreement between the Garage Employees Union Local 272 International Brotherhood of Teamsters ("Local 272") and the Metropolitan Parking Association, to which the defendants are a party (the "CBA"). [1] Four provisions of the CBA are relevant. First, Article XIV (the "Wages provision") establishes a wage scale that is set out in Appendix A to the CBA and provides that

> [e]ach Employee shall be paid on each day in full for all regular time and overtime worked. All Employees will be paid on the Employer's time and on the Employer's property.

Second, Article XV (the "Hours and Overtime provision") defines what constitutes overtime and provides that overtime "shall be paid for at the rate of time and one half ... the Employee's regular hourly rate." Third, Article XX (the "Grievance and Arbitration Procedure provision") provides, in part that:

> ***2** If a dispute, claim, grievance, or difference shall arise between the Union and Employer about the interpretation or application of a particular clause of this Agreement or about an alleged violation of a particular provision of this Agreement ... such grievance shall be handled ... [by] submit [ting] the grievance to arbitration.

Finally, while the "Non–Discrimination Clause" refers to federal, state, and local anti-discrimination laws, the articles addressing wages, hours, and overtime do not refer to any statutes.

On May 12, 2010, Henry McLean and Edwin Rivera filed the original complaint in this action. The defendants filed an answer on June 4. On June 23, the case was reassigned to this Court. By Order dated August 11, the Court approved the parties' proposed form of notice to potential "opt-in" plaintiffs for this lawsuit's FLSA collective action claim. On September 13, the defendants filed an amended answer and following a stipulation between the parties, the defendants filed a second amended answer on September 22.

On November 22, defendants filed a motion to dismiss and to compel arbitration. That motion became fully submitted on December 13, but on January 1, 2011, the plaintiffs filed a motion to amend the complaint (the "January 1 motion"). By letter dated January 13, the defendants indicated that they did not oppose the plaintiffs' motion to amend the complaint and on January 14, the Court granted the January 1 motion.

On January 21, the defendants filed a motion to dismiss the amended complaint and to compel arbitration. The January 21 motion became fully submitted on February 18.

DISCUSSION

While the Complaint states four causes of action-two under federal law and two under state law-there are two substantive claims: (1) that the defendants failed to pay overtime to the plaintiffs as required by both the FLSA and NYLL; and, (2) that the defendants failed to pay the plaintiffs for all hours worked as required by the FLSA, the Portal to Portal Act, and NYCRR. As described below, the state law claims under the NYLL and the NYCRR are not preempted, and the defendants' motion to compel arbitration is denied.

I. Plaintiffs' State Law Claims Are Not Preempted by LMRA § 301

Defendants contend that the plaintiffs' state law claims should be dismissed as preempted by § 301 of the LMRA, since their resolution requires interpretation and application of the CBA. Section 301 of the LMRA states that

> [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties.

29 U.S.C. § 185(a). Section 301 preempts not only claims directly alleging that a party has violated a provision of a CBA, but also those state-law actions that require interpretation of the terms of a CBA. *See Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399, 413 (1988); *Vera v. Saks & Co.,* 335 F.3d 109, 114 (2d Cir.2003).

***3** Section 301, however, does not preempt actions to enforce "state prescribe[d] rules ... rights and obligations that are independent of a labor contract." *Vera,* 335 F.3d at 115 (citation omitted). Even if resolving a dispute under a state law claim and the CBA "would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." *Lingle,* 486 U.S. at 409–10.

The plaintiffs' state law claims are legally independent of the CBA and therefore the defendants' motion to dismiss these claims as preempted by § 301 is denied. Plaintiffs do not seek to enforce any provision of the CBA. Rather, plaintiffs' claims arise wholly under state law.

Plaintiffs' claim for failure to pay employees for all hours worked arises under § 652(1) of the NYLL, which specifies a minimum wage that "[e]very employer shall pay to each of its employees for *each hour worked."* NYLL § 652(1) (emphasis

supplied). Plaintiffs' overtime claim arises under § 142–2.2., which provides that "[a]n employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided" in the FLSA. NYRR § 142–2.2. *See also Alderman v. 21 Club Inc.,* 733 F.Supp.2d 461, 468 (S.D.N.Y.2010) (holding statutory claims to be independent of the CBA).

Defendants identify three ways in which the plaintiffs' state law claims will require interpretation of the CBA, but none of these examples has merit. First, defendants note that both the Hours and Overtime provision of the CBA and § 142–2.2 of the NYCRR require employers to pay overtime at a rate of one and one-half times the employee's regular wage. Despite the parallel language, compliance with § 142–2.2 can be enforced without reference to the CBA's overtime pay requirements. Second, the defendants point out that the CBA's Wages provision includes a detailed scheme for the payment of regular and overtime wages. It is unnecessary, however, to consider the *method* of payment to determine whether plaintiffs were paid for "each hour worked" as required by state law. Third, the defendants observe that the Court must refer to Appendix A of the CBA to determine the "regular rate" from which the overtime rate is derived. But, "mere referral to the CBA for information such as rate of pay" is insufficient to find that a state law claim is preempted by § 301. *Vera,* 335 F.3d at 115 (citation omitted). [2]

Next, defendants claim that the state law claims are preempted since defendants' employee "Gerrardo Rodriguez and his union, Local 32BJ, treated issues related to the payment of overtime to [ ] Garage Managers as requiring interpretation of the applicable CBA." This argument is unavailing. First, it rests on a presentation of facts that lie beyond the scope of this motion to dismiss. Moreover, as defendants themselves acknowledge, Local 32BJ and Local 272 operate under different collective bargaining agreements and in the instant case, the Local 272 CBA applies.

***4** Finally, the cases on which the defendants principally rely are distinguishable. In both *Ellis v. HarperCollins Publishers, Inc.,* 99 Civ. 12123(DLC), 2000 WL 802900 (S.D.N.Y. June 21, 2000), and *Garcia v. Allied Parking Systems,* 752 N.Y.S.2d 316 (App.Div. 1st Dept.2002), each plaintiff's claim hinged on an interpretation of a collective bargaining agreement. *Ellis,* 2000 WL 802900, at *2 (holding that where a "reported violation [was] based on a failure to pay union employees in *accordance with the terms of a CBA,"* the claim was preempted by § 301 (emphasis supplied)); *Garcia,* 752 N.Y.S.2d at 317–18 (holding that plaintiff's claim for "fail[ure] to pay him overtime at the rate provided *in his collective bargaining agreement"* was preempted since the dispute centered on how to interpret the wage schedule in the collective bargaining agreement). Plaintiffs in this case, however, may prevail on their state law claims regardless of whether the defendants' paid them in the manner provided in the CBA. Section 663 of the NYLL, which creates the private cause of action to enforce the rights established by NYLL § 652 and NYCRR § 142–2.2, states that "if any employee is paid ... less than the wage to which he is entitled under the provisions of this article ... any agreement between the employee, and the employer to work for less than such wage shall be no defense to such action." NYLL § 663.

II. The FAA Does Not Compel Arbitration of the Plaintiffs' Statutory Claims

Defendants next argue that pursuant to the FAA and the Grievance and Arbitration Procedure provision of the CBA, the plaintiffs should be compelled to arbitrate their federal and state law claims. When a party seeks to compel arbitration of a federal statutory claim, courts must "consider whether Congress intended those claims to be nonarbitrable." *JLM Industries, Inc. v. Stolt–Nielsen SA,* 387 F.3d 163, 169 (2d Cir.2004) (citation omitted). It is well-established that both FLSA and NYLL claims are susceptible to arbitration and plaintiff does not suggest otherwise. *See Reynolds v. de Silva,* 09 Civ. 9218(CM), 2010 WL 743510, at *5 (S.D .N.Y. Feb. 24, 2010) (collecting cases). *See also 14 Penn Plaza LLC v. Pyett,* 129 S.Ct. 1456, 1474 (2009) (ADEA claims are arbitrable).

Where statutory claims are susceptible to arbitration, the next inquiry is whether the parties intended to arbitrate such claims, as indicated by the terms of their agreement to arbitrate, in this case the CBA. In *Wright v. Universal Mar. Serv. Corp.,* 525 U.S. 70 (1998), the Supreme Court rejected any presumption of the arbitrability of federal statutory claims pursuant to a CBA, *id.* at 78–79, and required instead that "any CBA requirement to arbitrate [statutory claims] must be particularly clear." [3] *Id.* at 79. Since the CBA at issue in *Wright* did not "clear[ly] and unmistakab[ly] waive[ ] ... the covered employees' rights to a judicial forum for federal claims," the plaintiff was permitted to litigate his federal claim in court despite the CBA's broad arbitration clause. [4] *Id.* at 82. *See also Pyett,* 129 S.Ct. at 1474 (holding that a collective-bargaining agreement that "clearly and

unmistakably" requires union members to arbitrate ADEA claims is enforceable as a matter of federal law). [5]

***5** Although *Wright* addressed how CBA arbitration clauses should be interpreted with respect to federal statutory claims, *Wright,* 525 U.S. at 82, there is no basis to distinguish between claims arising under state and federal statutes. The Court emphasized the need to protect the right to the judicial forum provided by statute when there was a "less-than-explicit union waiver in a CBA." *Id.* at 80. Thus, when a dispute concerns the enforcement of a state or federal statute as opposed to the application or interpretation of a CBA, arbitration will only be compelled if "clearly and unmistakably" chosen by the parties. Indeed, New York courts have applied the "clear and unmistakable" standard to determine whether a CBA agreement compels arbitration of state statutory claims. *McClellan v. Majestic Tenants Corp.,* 889 N.Y.S.2d 846, 847 (App.Div. 1st Dept.2009) (city and state anti-discrimination statutes); *Torres v. Four Seasons Hotel of N.Y .,* 715 N.Y.S.2d 28, 29 (App.Div. 1st Dept.2000) (N.Y.LL § 196–d).

The arbitration clause in a CBA will clearly and unmistakably apply to statutory claims if either of two conditions is met:

> First, a waiver is sufficiently explicit if the arbitration clause contains a provision whereby employees *specifically agree to submit all federal causes of action* arising out of their employment to arbitration.... Second, a waiver may be sufficiently clear and unmistakable when the CBA contains an *explicit incorporation of the statutory .... requirements* in addition to a broad and general arbitration clause. Courts agree that *specific incorporation requires identifying the ... statutes by name or citation.*

Rogers v. N.Y. Univ., 220 F.3d 73, 76 (2d Cir.2000) (per curiam) (citation omitted) (emphasis supplied), *abrogated* on other grounds by *Pyett,* 129 S.Ct. at 1474.

Since the CBA's Grievance and Arbitration Procedure does not clearly and unmistakably apply to the plaintiffs' statutory claims, the defendants' motion to compel arbitration is denied. The Grievance and Arbitration Procedure requires arbitration of disputes regarding "the interpretation or application of a particular clause of [the CBA] or ... an alleged violation of a particular provision of [the CBA]." The CBA does *not* provide that "all federal causes of action arising" from the plaintiffs' employment will be subject to arbitration, nor does it "explicit[ly] incorporate[e]" the requirements of the FLSA or NYLL. *See Rogers,* 220 F.3d at 76. The CBA's arbitration clause is more akin to the "very general" provision in *Wright. Wright,* 525 U.S. at 73, 80. *See also Duraku v. Tishman Speyer Properties, Inc.,* 714 F.Supp.2d 470, 474 (S.D.N.Y.2010) (compelling arbitration where agreement between union and employer "expressly require[s] the resolution of the plaintiffs' statutory claims through mediation and/or arbitration").

Defendants cite three district court cases to support their argument that the CBA's arbitration clause "clearly and unmistakably" covers the plaintiffs' statutory claims. Two of these cases are inapposite since they concern employment agreements as opposed to collective bargaining agreements. *See Arrigo v. Blue Fish Commodities,* 704 F.Supp.2d 299, 301 (S.D.N.Y.2010); *Reynolds,* 2010 WL 743510, at *1. [6] Moreover, in *Arrigo,* the arbitration clause authorized "the [a]rbitrator ... to resolve all federal and state statutory claims," thereby meeting the first prong of the *Rogers* test for a "clear and unmistakable waiver." *Arrigo,* 704 F.Supp.2d at 301. Finally, in *Hammerslough v. Hipple,* 10 Civ. 3056(NRB), 2010 WL 4537020 (S . D.N.Y. Nov. 4, 2010), the plaintiff who opposed arbitration did not dispute that the FLSA and NYLL claims fell "within the scope of the arbitration clause or that the statutory rights at issue [were] arbitrable." *Id.* at *2.

CONCLUSION

***6** The defendant's January 21, 2011 motion to dismiss the complaint and to compel arbitration is denied.

SO ORDERED:

All Citations

Not Reported in F.Supp.2d, 2011 WL 1143003

Footnotes

1 The CBA is not referenced in or appended to the Complaint. “In determining the adequacy of the complaint,” however, “the court may consider ... any documents upon which the complaint relies and which are integral to the complaint.” *Subaru Distribs. v. Subaru of Am., Inc.,* 425 F.3d 119, 122 (2d Cir.2005); *see also Chapman v. N.Y. State Div. for Youth,* 546 F.3d 230, 234 (2d Cir.2008). Plaintiffs do not contest the existence of the CBA, but suggest that there may be disputes as to which employees it covers. It is not necessary to decide whether the CBA covers the plaintiffs since, even if it does, the plaintiffs' statutory claims should not be dismissed.

The parties attached affidavits and deposition transcripts to their motion papers. This motion is denied without consideration of these additional materials and therefore will not be converted to a motion for summary judgment. *See* Fed.R.Civ.P. 12(b); *Roth v. Jennings,* 489 F.3d 499, 509 (2d Cir.2007).

2 Defendants also contend that the overtime claim depends on how the CBA is interpreted since the defendants made “Extra Compensation payments” (“EC payments”) to the plaintiffs. EC payments are not mentioned in any provision of the CBA. In any event, as just described, even if the rate at which EC benefits were to be paid was described in the CBA and pertinent to the statutory claim, that would be insufficient to preempt the statutory claim.

3 The arbitration clause at issue in *Wright* is similar to the CBA's Grievance and Arbitration Procedure provision. It covered “[a]ny dispute concerning or arising out of the terms and/or conditions of this Agreement, or dispute involving the interpretation or application of this Agreement, or dispute arising out of any rule adopted for its implementation.” *Wright,* 525 U.S. at 73.

4 In their reply brief, defendants concede that under controlling precedent the arbitration agreement must “clearly and unmistakably require employees to arbitrate the claims at issue.”

5 *Wright* rejected the presumption of arbitrability provided by the LMRA and did not consider the applicability of the FAA. *Wright,* 525 U.S. at 77 n. 1.

6 In *Pyett,* the Supreme Court noted that when determining whether Congress intended to permit a federal statutory claim to be arbitrable, “[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representation.” *Pyett,* 129 S.Ct. at 1465. It reiterated, however, that any “agreement to arbitrate statutory antidiscrimination claims [must] be explicitly stated in the collective bargaining agreement.” *Id .* (citing *Wright,* 525 U.S. at 80).

1993 WL 767119
Only the Westlaw citation is currently available.
United States District Court, S.D. Ohio, Western Division.

NCR CORPORATION, Petitioner,
v.
CBS LIQUOR CONTROL, INC., dba
Acme Cash Register Co., Respondent.
SAC–CO, INC., dba Acme Cash
Register Co., Applicant/Movant,
v.
NCR CORPORATION, Respondent.

C–3–91–027, C–3–01–031.
|
Dec. 24, 1993.

DECISION AND ORDER GRANTING ACME'S MOTION FOR RECONSIDERATION AND MODIFYING IN PART THE COURT'S DECISION AND ORDER CONFIRMING IN PART AND VACATING IN PART ARBITRATION AWARDS

MERZ, United States Magistrate Judge.

***1** This case is before the Court upon Motion (Doc. # 30) of Sac-co, Inc., doing business as Acme Cash Register ("Acme") to alter or amend the judgment entered in this case on November 17, 1993 (Doc. # 29). Acme brings the Motion pursuant to Fed.R.Civ.P. 59(e) or, alternatively, pursuant to Fed.R.Civ.P. 60.

NCR Corporation ("NCR") objects that, to a very substantial degree, Acme's Motion merely seeks reconsideration of Court's Decision and Order Confirming in Part and Vacating in Part Arbitration Awards (Doc. # 28) and that a motion under Rule 59(e) is not an appropriate vehicle for such reconsideration which should instead take place in the Court of Appeals.

The Court disagrees with NCR's position. So long as a motion to amend is brought within the ten-day limit for such motions and not made with the purpose of delay, there is no good ground to forbid a trial court to correct its errors, if it has made errors, before the matter is presented to the Court of Appeals. An appeal is a costly proceeding for both the parties and the judicial system. If a trial judge can be persuaded that she or he has made a mistake, both the parties and the system are saved that cost. Indeed, a District Judge of this Court has recently confirmed that a motion under Rule 59(e) is usually denominated and properly treated as a motion for reconsideration. *Shivers v. Grubbs,* 747 F.Supp. 434, 436 (S.D.Ohio 1990) (Smith, J.) See also Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2817. Accordingly, Acme's Motion to Alter or Amend, construed in part as a motion for reconsideration, is GRANTED.

However, upon reconsideration, the Court is not persuaded that it erred in vacating the Arbitrator's award of punitive damages. Indeed, because Acme's argument on this part of its Motion is largely a restatement of arguments it made prior to judgment, little additional analysis is needed. As previously held, the Arbitrator exceeded his powers in fashioning an award of punitive damages to a class of NCR dealers, all but one of whom were non-parties. For this Court to "sever" that part of the award which made non-parties beneficiaries of the award would be so gross a modification of the substance of the award as to be an inappropriate judicial review of the substance of an arbitration award.

As an alternative, Acme seeks in its Motion a remand to the Arbitrator to clarify his intent as to what should happen if the non-party beneficiaries are separated from the award. In rejecting this alternative, the Court is persuaded by two considerations raised by NCR in opposition.

First of all, Acme did not seek remand as an alternative remedy prior to judgment. While a motion to amend under Rule 59(e) is an appropriate vehicle for a court to reconsider errors it made in directing judgment, it is not an appropriate vehicle for a party to seek a new, alternative, mode of relief.

Secondly, while remand to an arbitrator is appropriate when an award is ambiguous, see *Olympia & York Florida Equity Corp. v. Gould,* 776 F.2d 42 (2d Cir.1985), that is not the case here. The Arbitrator's award is crystal clear: $1.3 million in punitive damages are awarded to a class of NCR dealers. Moreover, both parties are agreed that this very clear award is ultra vires. The remand requested by Acme would essentially be to ask the Arbitrator to make a new award, now that his ultra vires award has been vacated. That result is not required under the Federal Arbitration Act.

***2** In accordance with the foregoing, the Court declines to modify that portion of the judgment vacating the Arbitrator's punitive damages award.

In the second branch of its Motion, Acme seeks amendment of the judgment to liquidate the Court's award of arbitration expenses in the amount of $6,287.12. NCR agrees this is proper and the judgment will be amended accordingly.

In the third branch of its Motion, Acme seeks an award of post-award, pre-judgment interest at the Ohio pre-judgment rate of 10%. NCR agrees Acme is entitled to such an award, but argues it should be at the New York pre-judgment rate of 9%. The arbitration clause pursuant to which this matter was referred to arbitration and pursuant to which the venue of this lawsuit is in this Court provides that any arbitration award made under the agreement should be deemed to have been made in Dayton, Ohio. In the Court's judgment, this makes the Ohio rate more appropriate.

The Clerk is hereby directed to enter an amended judgment as follows:

1. In favor of NCR and against Acme, confirming the compensatory award to NCR in the amount of $10,710.95;

2. In favor of Acme and against NCR, confirming the compensatory award to Acme in the amount of $58,896;

3. In favor of Acme and against NCR, confirming the award to Acme of its arbitration expenses in the amount of $6,287.12;

4. In favor of Acme and against NCR in the netted amount of $71,545.09, consisting of $54,472.17 plus interest at 10% per annum from November 8, 1990, to December 27, 1993, to wit, $17,072.92, plus interest after judgment at the rate prescribed by law;

5. In favor of NCR and against Acme, vacating the award of punitive damages.

All Citations

Not Reported in F.Supp., 1993 WL 767119