New Limits On Employers During Union Organizing Efforts

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Nelson Cary, a partner in the Vorys Columbus office and a member of the labor and employment group, authored an article for *Law360* titled "New Limits On Employers During Union Organizing Efforts." The article was about a recent National Labor Relations Board decision regarding how employers can communicate with employees during a union organizing campaign.

Allen Kinzer, Jackie Ford, and Christina Otero, a former summer associate, also contributed to this article.The full text of the article is included below.

New Limits On Employers During Union Organizing Efforts

Every employer confronting a union organizing effort asks the same question: How can I lawfully communicate with my employees during the campaign? A recent decision from the National Labor Relations Board suggests the answer lies not just in how the employer approaches the campaign, but in how it has communicated with its employees in the past.

Ruling on a dispute involving Intertape Polymer,[1] the NLRB considered whether the United Steelworkers would get a second chance to convince employees to vote in its favor in a union election. The United Steelworkers wanted a "do over" after it lost the first election by a large margin — 142-97 against the union. The union got its new election by convincing the NLRB that Intertape's managers engaged in surveillance of employees' union activities and confiscated union literature from the employees' break room.

Unlawful Surveillance

The NLRB majority held that Intertape violated the National Labor Relations Act because its supervisors engaged in unlawful surveillance of employees' union activities. Days before the election, and about a month after employees handed out literature at the gate, plant

supervisors and prounion employees simultaneously distributed campaign literature to arriving employees. The evidence established that at times, the employees arrived first, and at other times, the supervisors arrived first. Supervisors had not previously distributed literature at the gate.

The employer argued that its distribution of literature was merely an exercise of its right to communicate to employees under Section 8(c) of the NLRA. The NLRB disagreed, stating that such communication is unlawful if it is "out of the ordinary" and places employees under surveillance.

The NLRB majority cited three reasons for finding that the employer's conduct was "out of the ordinary" and thus unlawful. First, the fact that supervisors were present at the location at which employees arrived and left was unusual in itself. Second, the employer usually communicated to employees through meetings, and there was no evidence of any precampaign leafleting at the gate. Third, by standing near the gate, supervisors were able to watch who distributed and accepted leaflets, and any interactions among employees. Notably, the majority did not consider which group arrived first with leaflets to be relevant to its decision.

The majority distinguished a case cited by Intertape, Arrow-Hart, in which the NLRB dismissed surveillance claims where supervisors leafleted 15 feet inside the plant's entrance while the union supporters leafleted at the entrance.[2] The majority reasoned that in Arrow-Hart, it was common for the supervisors to be present at the leafleting location at the start of a shift, and thus the employer's conduct was not out of the ordinary. With Intertape, however, it was not common for the supervisors to stand at the plant gate. Thus, Arrow-Hart did not apply.

Confiscating Union Literature

The NLRB also held that Intertape violated the NLRA when it removed union literature from the employees' break room. Intertape had a policy prohibiting employees from soliciting and distributing during working time and in working areas. This prohibition did not extend to break time, or any time before or after employees' shifts. Before the union filed its representation petition, plant supervisors typically removed any literature from the break room at the end of the day. After the union filed the petition and employees started leaving union fliers in the break room, however, supervisors began removing the fliers immediately after the break.

The employer changed the way it enforced its distribution and solicitation policy only after the union filed its petition. This change in policy prevented employees from receiving union communications in the break room. Therefore, the NLRB majority held that removing the union literature was an unlawful "reaction to and countermeasure against the union campaign."

Employee Interrogation

The NLRB majority also held that the employer violated the NLRA when a supervisor coercively questioned his direct subordinate about the employee's view of the union. In determining the conversation's legality, the NLRB considered factors such as who questioned the employee, the type of information sought, where the questioning took place, the method of questioning and the employee's answer. The NLRB also considered any history of employer hostility against union activity and the relationship between the supervisor and employee.

Although the questioning took place during an informal conversation at the employee's workspace, and Intertape had no history of hostility toward union activity, the NLRB majority still found unlawful interrogation. The questioning was more threatening because it involved the employee's direct supervisor posing the questions. Moreover, the supervisor offered no justification for the questioning and the employee refused to answer questions. Both of these factors weighed in favor of finding a violation, according to the NLRB.

While the NLRB majority acknowledged that there was no "hostility" toward the union, the NLRB nonetheless found there was "hostility" between the supervisor involved in the questioning and the employee himself. As evidence of this hostility, the NLRB pointed to prior disciplinary actions the supervisor had taken against the employee.

Finally, during the conversation, the supervisor told the employee that "it," apparently in reference to the union, "can hurt you." The majority found that this provided further support for the conclusion that the conversation was coercive. The NLRB did not consider the unlawful interrogation in determining to set aside the election, however, because it occurred before the union filed its representation petition.

Dissent

NLRB Member Philip Miscimarra dissented. Not only did he think that the employer's leafleting was lawful, he believed that even if it was unlawful, it would not justify invalidating the election. He also disagreed with the majority's holding regarding the unlawful interrogation.

With respect to the employer's leafleting and alleged surveillance, he agreed with the employer that it had a right under Section 8(c) to campaign against the union. He found no indication that supervisors knew of the employees' plan to leaflet at the gate the days the employer passed out its own leaflets. Indeed, on at least one occasion, the employer started distributing leaflets before any union supporters even arrived to do the same thing. Miscimarra believed that any observation of employees by the supervisors was incidental to their lawful activities.

Significantly, Miscimarra also disagreed with the majority's interpretation of Arrow-Hart. He argued that the NLRB did not dismiss the surveillance claims in that case because of the employer's past practice. There was no evidence in that case that the supervisors had a past practice of distributing literature to employees at the entrance. Rather, Miscimarra, quoting Arrow-Hart, found that it was decided on the principle that "[a]n employer has the right to distribute campaign literature of its own. … And it has the right to do [it] at the very moment the union is trying to persuade the employees to a contrary view — certainly anywhere on its premises, in the inner reaches of the plant or at the front door, even if the door is made of looking-through glass."[3]

As to the unlawful interrogation, Member Miscimarra believed that the allegation should have been dismissed because the questioning took place during an informal conversation at the employee's workplace, Intertape had no previous instances of hostility toward union activity and there was no evidence the supervisor was trying to elicit information on which to retaliate. Further, he concluded that the supervisor's statement "it can hurt you," when placed in context, did not render the discussion coercive, but rather was a lawful statement of opinion about the consequences of unionization.

Miscimarra further stated that none of the employer's conduct, unlawful or not, justified setting aside the election results. Noting the wide vote margin, he argued that it was "implausible" to suggest that employees would change their votes merely because the employer saw them engaging in the open activity of distributing or accepting campaign fliers. He also argued that employees had many other opportunities to view union literature and removing the fliers from the break room a few hours earlier could not have affected the lopsided result.

Future Implications

The NLRB's decision carries significant implications for the parties in future union organizing efforts. The surveillance issue is the most significant aspect of the decision. Arrow-Hart, as shown in the portion Miscimarra quoted in dissent, laid out a clear standard for an employer's efforts to persuade employees not to vote in favor of union representation. That standard protected not only the employer's free speech rights, but also its property rights. The Intertape Polymer decision, by its focus on what is "ordinary," necessarily restricts an employer's communication choices.

Discounting evidence about who began distributing leaflets first underscores the breadth of the NLRB's decision. There was no evidence that supervisors knew that employees would later show up to distribute leaflets on the days when the supervisors were there first. So, merely by showing up after employer distribution had begun, employees were able to turn what was apparently lawful distribution by the employer into unlawful distribution.

Suppose, for example, that the employer distributed leaflets during a union campaign in its parking lot as employees arrived. It had never done so before. But, unlike in Intertape Polymers, no employees turned out to distribute leaflets (or engage in other organizing activity) at the same time. The NLRB holds that the distribution must be both "out of the ordinary" and place employees' union activities under surveillance. Thus, this hypothetical employer's conduct would apparently be lawful.

Another significant implication for the future is that the NLRB set the election aside based on the employer's activity. The majority and the dissent, citing the same case,[4] reach different conclusions on this question. Clearly, whether the misconduct interfered with employee free choice is in the eye of the beholder. About the only issue that the NLRB agreed upon was that conduct that occurred before an election petition is filed would not justify setting aside the election. Practitioners will need to keep this in mind when evaluating the likelihood that an election will be rerun as a result of employer misconduct.

Conclusion

The NLRB's decision highlights the increasing need for employers to think about how they will respond to union organizing activity well before it begins. This case focuses on how an employer communicates with its employees in the ordinary course of its business. Following Intertape Polymer, an employer's practice regarding employee communication will clearly limit its communication options when union activity arises.