Louisiana Employment Law Letter

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Highlights

LABOR LAW

You can apply, but we're nonunion and we'll stay that way

That's what a contractor that successfully bid on a contract told the previous employer's union employees. Needless to say, the National Labor Relations Board (NLRB) wasn't pleased. So when the case went to the U.S. Fifth Circuit Court of Appeals in New Orleans, the employer had to convince the court that its statement didn't violate the National Labor Relations Act (NLRA).

What the employer said

A contractor successfully bid on a contract previously held by a unionized employer. The successful contractor had held other contracts at the same facility for many years and had remained union-free. It held meetings to inform the unionized employees that they were being discharged by the prior contractor but could apply for employment with the new contractor along with other applicants. The new contractor's representative said the unionized employees would be treated the same as any other applicant. The atmosphere at one meeting turned heated when the attendees weren't satisfied with the contractor's response to questions about vacation and insurance. Matters got worse when employees asked what would happen to their union. The response — you guessed it: We're nonunion and we'll stay that way, and if you come and work for us, you'll be nonunion, too.

After the meetings, things cooled down, and almost all the union employees applied for jobs with the new contractor, along with more than four times as many other applicants. The applicants were given an arithmetic test followed by a "structured" interview consisting of questions and answers and finally an interview with either the project manager or project superintendent.

Generally, the applicants needed to pass the math test to move on to the "structured" interview, but the union employees advanced regardless of their score in recognition of their skills associated with their former duties on the contract the company was assuming. When the hiring process was complete, one quarter of the former union employees had been hired. As you might expect, that heated things back up, and the union filed a charge against the employer for allegedly threatening the union employees, refusing to hire them, and failing to recognize and bargain with the union as their representative.

What the NLRB said

The NLRB found the employer's statement to be coercive and that it showed the employer's illegal motive not to hire union employees or bargain with the union. As a result, the Board found that the employer threatened the union employees and failed to hire them because of their union affiliation. It ordered the employer to reinstate all the unsuccessful union applicants with back pay, recognize and bargain with the incumbent union without an election, and retroactively adopt the terms and conditions that had been in place under the previous union contract until new terms and conditions were negotiated!

What the Fifth Circuit said

The Fifth Circuit explained that the NLRB's decision must be supported by "substantial evidence," meaning evidence that a reasonable individual would accept to support a conclusion as valid. The court observed that in this case, the Board relied on its finding that the contractor's statements were coercive and thus violated the NLRA as the foundation for all the other alleged violations (*i.e.*, refusal to hire and refusal to recognize and bargain with the union).

In analyzing the statements at issue, the court explained that the First Amendment to the U.S. Constitution gives all citizens, individuals, and corporations alike the right to free speech but that an employer's right to speak to employees about union matters is tempered by the NLRA. Under the Act, an employer is still free to express its views or opinions about a union as long as they don't contain a threat of reprisal or force for the employees' lawful union activities or promise benefits to avoid or cease such activities. An employer is also allowed to predict the effect a union will have on the workplace as long as the prediction is based on objectively verifiable facts. But a statement will be prohibited by the NLRA if it *tends* to be coercive — that is, based on the totality of circumstances, the employees could reasonably conclude that the employer is threatening economic reprisal if they support a union.

In this case, the Fifth Circuit found that when all the surrounding circumstances were considered, the employer's statements didn't tend to be coercive. In reaching its conclusion, the court noted that the company representative addressed the employees, whom he knew to be union members, to inform them of their job opportunities and the application process and didn't volunteer any unsolicited comments about the union or its future. Thus, the purpose of the meeting — to tell the employees about the hiring opportunity — contradicted the finding that the comments could be viewed as an antiunion threat.

Rather, the court noted that the statements were made only in response to specific questions from applicants. The court concluded that in the totality of the circumstances, the statements are the protected opinion of the contractor's lawful preference to remain union-free and to lawfully oppose unionization and are objectively verifiable statements of the then-current state of affairs — the contractor's union-free status. The court also observed that even if the contractor had hired all the union applicants and there was only one bargaining unit, its nonunion status wouldn't have changed. The court further pointed out that the participation of nearly all the union employees in the application process tended to show that they didn't feel coerced or threatened. Finally, there was no other evidence of coercive statements or action by the contractor.

Because the statements at issue were the foundation of the NLRB's decision that the company illegally failed to hire union employees and bargain with the union, the court's conclusion that the statements were legally protected rendered the entire decision invalid. Therefore, once the court concluded that the employer didn't threaten the union employees, it also had to find that it didn't unlawfully refuse to hire them or fail to recognize and bargain with the union. *Brown &*

Root, Inc. v. National Labor Relations Board, 333 F.3d 628 (5th Cir. 2003).

What should you say?

This case highlights many important issues for employers dealing with union applicants or union organizing. First, the law doesn't force you to sit back and do nothing in the face of attempts to unionize your workforce. You have a free-speech right that allows you to speak up against unionization as long as the statements aren't coercive. Second, the case shows that whether a statement is "coercive" may be difficult for employers to determine, as shown by the Fifth Circuit's disagreement with the NLRB about how to interpret the statement at issue. Additionally, supervisors should be prepared to answer questions about your company's union status and views or to defer those questions to another representative who's prepared to do so.

You can avoid most problems in this area by telling your supervisors what not to do:

- Don't threaten employees.
- Don't interrogate employees about their union activities or sympathies.
- Don't promise employees an increase in pay, a promotion, or other special favors if they oppose the union.
- Don't spy on or engage in surveillance of employees' union activities.

Supervisors can tell employees:

- facts about the union that the union doesn't want them to know, such as the truth about union dues, initiation fees, assessments, fines, strikes, and corruption;
- opinions about the union that are objective and fact-based; and
- examples about the union that the union would rather your employees not know, such as a contract negotiated by the union that pays employees lower wages or provides less favorable benefits than your company does.

Looking at the costs of managing a unionized workforce, many employers choose to lawfully oppose unionization. But considering how difficult it can be to draw the line between protected speech/activity and illegal coercion and the harsh remedies that can be imposed on employers that cross the line, those of you faced with any type of potential organization efforts are well advised to meet with labor counsel to plan the campaign and teach supervisors how to campaign without coercing.

You can catch up on the latest court cases involving unions and the NLRB in the subscribers' area of HRhero.com, which is the website for Louisiana Employment Law Letter. Simply log in and use the HR Answer Engine to search for articles from 51 Employment Law Letters. If you need help or lost your password, call customer service at (800) 274-6774.

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