VII. Labor and Capital Seeking Agreement for Mutual Benefit: Legal and Financial Issues

Bargaining Before Recognition in a Global Market: How Much Will It Cost?

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The world is a very different place for employers and unions today than it was in 1935 when the Wagner Act was enacted. It is not the purpose of this paper to catalog the many changes that have taken place, to explain the reasons for the changes, or to predict where the changes may lead. Labor law practitioners on both sides of the table are quite familiar with the realities of collective bargaining in 2005. World markets have increased competition and have diminished profits for U.S. firms. Rising health care costs and declining equity markets have created enormous pressures on health plans and pension plans in both the union and non-union sectors. Traditional methods of doing business are challenged by new, streamlined mechanisms designed to respond more quickly to consumer desires.

Many large, multinational firms have come to believe that it is not in their interests to foster traditional hierarchical or adversarial relationships with their employees, whether those employees are organized or not. Instead, these firms have resorted to team-based approaches to employee relations in which they work collaboratively with employees to understand better how work is being performed and to maximize efficiency and productivity. They may even have developed incentive pay schemes whereby workers participate in the success of the enterprise through stock ownership or pay for performance. To be sure, the "Old Order" is not gone. For

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better or worse, there are many companies still operating in the classical mode: firms that take a more traditional view of their employees and of unions. For companies who believe that they have found a better way to achieve their business objectives, however, and for companies who do not wish to expend limited resources on fighting with those very same individuals upon whom they are relying to succeed, the question quickly becomes does our present configuration of collective bargaining rules and mechanisms further their efforts or hinder them? And more pointedly, where a company's desires to work collaboratively with its employees and with a union selected by those employees turns on the firm's ability to calculate the costs of doing so, does the National Labor Relations Act (NLRA) allow it to do so? The answer, it appears, is it depends.

Prehire Agreements Under the NLRA

It is generally understood that prehire agreements under the NLRA are forbidden in all industries except the construction industry. It is also generally forgotten that the NLRB did not assert jurisdiction over the construction industry until the Taft-Hartley Amendments of 1947 because the NLRB viewed the construction industry as highly organized and relatively stable. After 1947 the Board acknowledged that Congress intended the Board to exercise jurisdiction over the construction industry.[1] Section 8(f) was not incorporated into the statute until 1959 when the Landrum-Griffin Act was enacted, however. So for some twelve years, the General Counsel of the NLRB simply refused to issue complaints against prehire agreements in the construction industry in recognition of industry practice.

Outside of the construction industry, it is clear that an employer and a union both violate the NLRA when the employer recognizes the union as the representative of its employees and then proceeds to negotiate the terms of a collective agreement with that union *before* the union has been selected as the exclusive representative by the employees.[2] Less clear, however, has been the Board's treatment of preliminary discussions between an employer and a union regarding potential terms and conditions where recognition has *not* been granted, and where such terms or understandings are subject to an important condition subsequently: the proper designation of the union as the exclusive representative.

In *Majestic Weaving Co., of New York* (147 NLRB 859 [1964]), a three-member panel of Chairman McCulloch and Members Fanning and Jenkins found that Majestic Weaving Co., *inter alia,* unlawfully assisted Teamsters Local 815 in the solicitation of union authorization cards and unlawfully engaged in bargaining with a minority union "following an oral recognition agreement," which, not incidentally, is not discussed by the Trial Examiner in

his rather detailed statement of the facts. In so doing, the Board panel analogized this unspecified "oral recognition agreement" in *Majestic Weaving* to the interim memorandum of understanding in which recognition was granted in *Bernhard-Altmann* and overruled *Julius Resnick, Inc.* (86 NLRB 38), a 1949 Board decision that had approved tentative discussions before recognition. It should be noted that the Trial Examiner in *Majestic Weaving* fully acknowledged the holding in *Bernhard-Altmann* but found the facts in *Majestic Weaving* to be quite different in that recognition was not granted and was contingent upon a proper showing of majority support. He also found that the agreement between the Teamsters and Majestic did not preclude Majestic from recognizing another union upon a proper showing. He simply found that by the time a second union had arrived on the scene at Majestic, the Teamsters already had perfected a majority showing.

This is not to say that the Board panel in *Majestic Weaving* fashioned a rule inconsistent with the language of the Act. I do think, however, it is fair to say that the rule in *Majestic Weaving* was not required by the Act and not required by the holding in *Bernhard-Altmann.* One may view preliminary discussions or tentative agreements regarding terms and conditions with a nonrepresentative that are subject to a proper showing of majority support as offensive to employee choice or not, but it is quite clear that after *Bernhard-Altmann,* these particular Board members would have none of it.

Nevertheless, as many commentators have noted, there have been, and continue to be, a number of situations very similar to *Majestic Weaving* in which the Board countenances or tolerates some form of consultation between an employer and a union prior to designation of the union as the exclusive representative. The most obvious is the "extension doctrine" approved in *Houston Division of the Kroger Co.* (219 NLRB 388 [1975]). In *Kroger* the employer's and the union's collective bargaining agreement contained an "after-acquired" clause, whereby the parties agreed that if the employer opened a like facility in the immediate geographic area, the terms of that contract would be applied. The Board "assumed" that the parties intended that the clause be lawful, and thus read into the provision a requirement that a proper showing of interest was required before the collective agreement could be extended to cover the new employees at the new site. Such clauses do not preclude other unions from seeking representation at the new location, and they certainly do not preclude the employees at the new site from rejecting representation. One supposes that the premises to card signing and possible recognition at such sites are not particularly different from the premises in *Majestic Weaving,* yet it seems clear that approval of such after-acquired clauses based upon a measure of protection for employee choice strikes a proper balance between employee desires on

the one hand, and stability in bargaining relationships on the other. Such an accommodation of arguably competing principles is precisely the kind of "fine tuning" entrusted to the administrative expertise of the NLRB.

There are other important, analogous situations in which a balance is struck between employee choice and stability in bargaining relationships. Relocations, accretions, and successorship come to mind. In *Harte & Co.* (278 NLRB 947 [1986]), a three-member panel of Chairman Dotson and Members Dennis and Johansen, hardly a liberal panel of the Board, approved the application of an existing collective bargaining agreement to a new plant where the relocation of existing represented employees was significantly delayed by business exigencies. The panel reversed the ALJ and found that the date "the transfer was completed" was the time to measure the employee complement, not the time "the plant was fully operational." The panel acknowledged the delicate balance that must be struck in such situations, but even this panel had no difficulty striking the balance: "the national labor policy favors industrial stability achieved through the collective bargaining process" (278 NLRB at 950). In *Eltra Corp.* (205 NLRB 1035,1040 [1973]), the Board found that it was not an unfair labor practice to extend an existing national agreement to a new unit that had voted for representation. And in *NLRB v. Burns International Security Services, Inc.* (406 U.S. 272 [1972]), the Court approved a regime in which a "perfectly clear" successor would meet with the incumbent collective representative prior to an offer being made to a single employee.[3] The Advice Memo is particularly instructive on the issue of prerecognition negotiation because in that case the deal that was struck was conditional on ratification of terms, one of which was the hiring of 100 percent of the potential successor's employees from the predecessor's unionized workforce. In other words, the offer to hire, and thus the basis for recognition itself, was contingent upon acceptance of the economic terms.

In 1986 General Counsel Rosemary Collyer declined to issue a complaint in the *Saturn* case. Though subject to criticism at the time and since, the Advice Memorandum in that case is a noteworthy synthesis of the cases seeking to balance "worker choice" and "stability through collective bargaining." Whether one agrees with the result or not, it is an impressive compendium of the competing principles at work under the NLRA and an important reminder that no single interest is paramount, particularly in the myriad of fact patterns that continue to be presented to the Board.[4]

It is against this background of competing principles, forty years after the Board's decision in *Majestic Weaving,* and in very different economic times, that we confront the rule in *Majestic Weaving* and perhaps ask what, if any-

thing, should we do about it if it is viewed as an obstacle or an impediment to collaborative or cooperative efforts by companies and unions who wish to compete more successfully in a global economy?

A Modest Proposal

I am not the first to observe that relaxation of the rule in *Majestic Weaving* may be in order. My friend and colleague, Sam Estreicher, advocated authorizing some form of prehire agreements outside of the construction industry as early as 1995.[5] The Dunlop Commission did so before him in 1994.[6] Others have done so since.[7] The arguments seem clear.

Might not the policies and purposes of the Act be advanced by allowing an employer and a union to reach some form of understanding regarding potential terms, conditioned upon the employees making an unfettered choice regarding representation? As we have seen, some form of prerecognition consultation is contemplated or condoned under *Burns, Kroger, Harte,* and *Eltra.* And if the General Counsel is correct, such consultation and conditional agreement passes muster in *St Louis Post Dispatch* and *Saturn.*

Imagine that a large, multinational corporation that already has large numbers of unionized employees in the United States is willing to waive its insistence on formal Board procedures in representation matters, provided some mechanism or procedure is put in place to protect employee choice, and provided the putative collective representative is willing to make a deal on terms that the employer can accept. Why should the corporation not have the ability to know what the deal is prior to making the commitment? Is not a fear of the unwillingness of the union to make a deal that is acceptable to the employer one of the barriers to obtaining representation rights in the first place? And as Estreicher and other commentators have noted, will not the employees themselves make a better, more informed choice regarding representation if they know whether this union has struck a good deal or a bad deal, or has the ability to make a deal at all?

Estreicher would require a secret ballot election within one year of the agreement going into effect. Others have proposed shorter time periods, but whatever the time period or the method of ascertaining employee desires, as long as employees have the opportunity to make an uncoerced choice, it would seem that all parties benefit. The company will know what its costs will be in the event the employees choose representation. The union will know that it will be able to obtain a collective agreement on terms that are acceptable to the company and to the union and know that it is not likely to win representation rights from the employees if "the deal" does not adequately address the needs and aspirations of employees in that industry. And the

employees themselves can select the union or not without guessing whether a deal can be struck or what its terms shall be.

Such a regime would be voluntary. Only those firms and unions who decided that it was in their best interests to engage in prerecognition agreements would have them. No party would have the right to compel such arrangements. In the absence of a prerecognition agreement, the traditional rules would apply.

I believe that the NLRB has the ability to adjust and "fine-tune" its rules and procedures to accommodate the changing realities of the workplace. Indeed, that is the Board's mandate. Of course, the Board must be faithful to the statute in balancing the competing interests of its constituents and may not strike out on its own where Congress has not tread. I believe, however, that a fair and complete understanding of the NLRB's jurisprudence provides an adequate basis for addressing the shifting demands of a global economy.

Notes

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1. See *Plumbing Contractors Association,* 93 NLRB 1081,1085 (1951); see also, *Employer-Union Cooperation During the Initial Stages of Plant Development: Legal Impediments and a Proposal for Change,* Daniel M. Young, 1995 Ann.Surv.Am.L. 121, 141 (1995).

2. See *International Ladies' Garment Workers' Union, AFL-CIO (Bernhard-Altmann Texas Corporation) v. NLRB,* 366 U.S. 731 (1961).

3. See also *Spruce Up Corporation,* 209 NLRB 194, 195 (1974); Advice Memorandum in *St. Louis Post Dispatch,* 1981 WL 25940 (N.L.R.B.G.C.).

4. Several cases now pending with the Board underscore this point. In *Dana Corporation* (JD-24–05 [April 8, 2005)], the ALJ dismissed complaints alleging an unlawful prehire agreement because of the failure of the General Counsel to plead "unlawful recognition." Alternatively, the ALJ found on the merits that the Dana/UAW letter of agreement was distinguishable from *Majestic Weaving* and more akin to *Kroger.* In *Heartland Industrial Partners, LLC* (JD-23–05 [June 15, 2005]), the ALJ dismissed a complaint alleging a Section 8(e) violation of the Act in Heartland's "Side Letter" agreement with the Steelworkers. Heartland is a private equity firm headed by David Stockman that seeks investment opportunities in primarily "old line industrial enterprises" in the Midwest. Heartland decided at the outset that it would seek good relationships with the large industrial union in the United States because of the nature of its business. A centerpiece of the Side Letter was a card-check and neutrality agreement that would be triggered no earlier than six months after Heartland's acquisition of a 50 percent or controlling position in any business. The General Counsel alleged that the imposition of the Side Letter by Heartland on an acquired business, in this case Trimas Corp., violated Section 8(e) because of what

he viewed as its “cease doing business” objective. The ALJ found Trimas and Heartland to be a single enterprise, and thus there could be no “cease doing business objective.” And in *Road and Rail Services, Inc.* (JD-11–05 [March 7, 2005]), the ALJ refused to find premature bargaining and recognition by employing a *Burns* “perfectly clear” successor analysis similar to that noted above.

5. Address of Professor Samuel Estreicher, May 11, 1995, 1995 DLR 95 d 25.

6. *The Dunlop Commission on the Future of Worker-Management Relations–Final Report,* December 1994.

7. “*Employer-Union Cooperation, supra* (1995); *Rethinking the NLRB’s Approach to Union Recognition Agreements,* Andrew Strom, 15 Berkeley J. Emp. & Lab. L. 50 (1994).