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LABOR & EMPLOYMENT ISSUES
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SECOND CIRCUIT AFFIRMS PROTECTIONS FOR LABOR UNIONS AGAINST ANTI-TRUST AND TORT LIABILITIES

The federal anti-trust laws prohibiting combinations in restraint of trade, long the bane of organized labor, were amended by the Clayton Act in 1914 to exempt "legitimate objectives" of unions and "identified types of [protected] union activity" such as strikes and boycotts. In *Drabinsky v. Actors Equity Ass'n*, 2d Cir. No. 23-795-cv (July 2, 2024), the U.S. Court of Appeals for the Second Circuit placed the burden of challenging the statutory exemptions squarely on the challenger. The Court further reaffirmed the rule of *Martin v. Curan*, 303 N.Y. 276 (1961) making intentional tort claims against unions virtually impossible in New York.

The statutory anti-trust exemption does not apply in two cases: if the union is not acting in "the union's self interest in an area which is a proper subject of union concern" or "the union is acting in combination with a group of employers." Resolving a question of first impression in this Circuit, the Court of Appeals held that "because the statutory labor exemption presumptively protects union activity," a "plaintiff must plead at least one of the two limitations to the exemption as an *element*" of any union anti-trust claim. Put another way, the exemption is not an affirmative defense that the union must prove, but rather "plaintiff bears the burden of proving that the exemption does not apply."

Here, producer Drabinsky failed to adequately plead either limitation. The complaint alleged that Actors Equity ("Equity") boycotted him based on member allegations of unsafe conditions, racism and unpaid wages, core protected labor activities. The fact that Equity combined with other related labor unions to enforce its boycott "says nothing about Equities' motivations" which remain grounded in legitimate, labor concerns. Furthermore, the pleading that Drabinsky was not the formal employer of the actors failed since he exercised substantial control and because the labor exemption also applies to non-employer challenges "[a]s long as the union's action is intended to serve the interests of its members" and "promotes *legitimate* labor goals," regardless of the wisdom of those goals or the effectiveness of the means. Finally, the fact that some Equity members were also producers does not plead a combination with employers because "the producer-members," employed as actors or stage managers, form part of the same "labor group" as the rest of Equity's members.

The Court of Appeals also reaffirmed the New York State shield established by *Martin v. Curan* against most tort liability. The complaint fails the *Martin* standard because it "does not allege that all 50,000 plus Equity members participated in, authorized or ratified either Equity's boycott or its false statements about Drabinsky." Furthermore, "not even the delegated actions of committees and councils can be attributed to all of Equity's members under *Martin*." Accordingly, the Court of Appeals affirmed dismissal of both federal and state claims. However, Drabinsky has petitioned for full Court rehearing.

ACUTE CARE HOSPITAL MUST RECOGNIZE, BARGAIN WITH FOOD SERVICE EMPLOYEES' REPRESENTATIVE, LABOR BOARD RULES

An acute-care health facility in London, Kentucky argued that it did not have to recognize or bargain with the union representing its food service employees because the National Labor Relations Board's ("NLRB" or "Board") Rule and Regulations governing appropriate units in the health care industry. An Administrative Law Judge ("ALJ") for the Board disagreed, finding that the acute care facility was a *Burns* successor; accordingly, the unit was "an existing non-conforming unit" appropriate under the plain language of the relevant rule. In a decision issued July 26, 2024, the Board affirmed. *Saint Joseph Health System, Inc. D/B/A Chi Saint Joseph Health - Saint Joseph London*, 373 NLRB No. 78, 09–CA–297427 (July 26, 2024).

From 2014 to June 2022, food service employees at Saint Joseph London ("Hospital") were employees of Sodexo, and in July 2019, United Food and Commercial Workers, Local 227 ("Union") was certified as their bargaining representative. Food service employees perform various functions in the facility, including preparing and delivering meals to patients, preparing and serving meals in the cafeteria, and related duties. In early 2022, the Hospital informed the food service workers that it would not be renewing its contract with Sodexo and that the Hospital would be taking over food service operations. In June 2022, the Union contacted the Hospital claiming that it represented a majority of all full-time and regular part-time employees employed in food service at the Hospital and forwarded a copy of the relevant collective bargaining agreement. The Hospital responded that it was not a party to any agreement with the Union and had no intention of recognizing the unit. The Union subsequently filed an unfair labor practice charge.

While successor employers generally are not bound to the substantive terms of the collective bargaining agreements of their predecessors, under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), a successor employer must recognize and bargain with the representative of its predecessor's employers if three factors are true: (1) there is a "substantial community of operations," (2) the union timely demands bargaining, and (3) the employer has hired "a substantial and representative complement" of employees, and the majority of those employees were represented by the union when the predecessor was employer. Because the Hospital hired back a majority of Sodexo's workforce to its food service operation, which functioned similarly to the Sodexo operation, the ALJ rather easily determined that the Hospital was a *Burns* successor.

The Hospital argued that the unit was nonetheless inappropriate under Section 103.30(a) of the Board's Rules and Regulations, which designates eight (8) appropriate bargaining unit classifications in acute care hospitals, none of which include food service workers. However, Section 103.30(a) does not apply where a bargaining unit is called into

question in the context of an unfair labor practice charge as opposed to in the context of an election petition. The Rule also explicitly excludes "circumstances in which there are existing non-conforming units." Accordingly, the ALJ and the Board rejected the Hospital's arguments regarding the appropriateness of the unit and ordered it to recognize and bargain with the existing representative.

NLRB RETURNS TO PRE-2020 ELECTION RULES

On July 26, 2024, the National Labor Relations Board ("NLRB" or "Board") issued its Fair Choice-Employee Voice Rule (the "Rule") which rolls back changes made by the Board during the Trump Administration. The Rule restores three policies: the blocking charge policy, voluntary recognition of a union, and construction industry bargaining relationships.

The first change is a return to the pre-2020 practice on blocking chargers allows an NLRB Regional Director to delay a representation election if there are sufficiently series unfair labor practices that would interfere with employee free choice. A party that requests an election petition to be blocked must provide an offer of proof of misconduct and make witnesses available. The Regional direct handling the election can pause the vote to investigate whether misconduct tainted workers' choices. The Trump Board's "shoot first, ask questions later" approach which required Regional Directors to run elections even if the votes were tainted by unfair labor practices, and then determine what taint the unfair labor practices had on employees' choices.

Second, the Board reinstated its voluntary recognition bar, which allows unions voluntarily recognized by employers cannot be challenged for removal for a "reasonable time." The Trump Board's rule required that employers inform workers of their right to file a decertification petition or for an election for another union within 45 days before the protections kicked in.

And third, the Board returned to its pre-2020 practice for the construction industry. Under the new Rule, construction industry union gain voluntary recognition protections, like their sister unions in other industries. Under the old rule, a construction union's representative status did not survive a contract's expiration.

The Rule will take effect on September 30, 2024.

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