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IGNORING LOPER, SECOND CIRCUIT ENFORCES NLRB ORDER FOR EMPLOYER TO PRODUCE FINANCIAL RECORDS TO UNION

In *National Labor Relations Board v. John Gore Theatrical Group, Inc*., No. 23-7087 (2d Cir. Oct. 28, 2024), a three judge panel of the U.S. Court of Appeals for the Second Circuit consisting of Circuit Judges Jacobs, Merriam and District Court Judge Cronan, issued a summary order enforcing the order of the National Labor Relations Board ("NLRB" or "Board") that John Gore Theatrical Group, Inc. ("Gore" or "Employer") provide Actors Equity Association ("Actors", "AEA" or "Union") with financial information that Gore resisted as confidential. Though a non-precedential decision, *Gore* is notable both for its deference to the Board even post *Loper* and its tight standards to establish a defense that information is truly "confidential."

Actors requested information from Gore regarding its relationship with a second company to which the Union suspected Gore was funneling bargaining unit work. After some delays, Gore rejected the Union's request in part on the grounds that the information requested was financial and therefore confidential, and that Actors refused to promise that it would not disclose such information. Actors filed unfair labor practice charges, and the Board agreed that Gore had violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA") by failing to provide information relevant to the parties' duty to bargain. Gore opposed enforcement in the Second Circuit, but the Court of Appeals found for the Board.

The Court first ruled that since the requested information was indisputably relevant to the duty to bargain over mandatory terms of employment, Gore bore the burden of establishing that the information was so confidential as to outweigh the Union's need. Gore failed this burden by merely asserting that by virtue of being "financial," the information was therefore "confidential." "Gore fails to explain *why* the information is inherently sensitive, proprietary, or of competitive significance," explained the Court. "Conclusory statements such as these are not enough to establish a legitimate and substantial confidentiality interest."

Next, the Court rejected Gore's arguments that the information was confidential based on third-party confidentiality agreements and that its refusal to provide the information was excused by the Union's refusal to treat the disclosures as confidential. "The third-party confidentiality agreements ... provide no support ... because the Board reasonably concluded that they do not cover the information sought," being outside the scope of the agreements. Moreover, the argument made bad policy, warned the Court. "Indeed, were a private confidentiality agreement with a third party sufficient to justify withholding relevant information, an employer could defeat a union's right to obtain relevant information simply by entering into such voluntary agreements as to all of its

matters." Nor was the Union's refusal to promise it would not disclose the provided information any defense to the Employer's refusal. "Because Gore failed to establish, in the first instance, a legitimate and substantial confidentiality interest in the information sought, AEA had no obligation to provide assurances to Gore that it would nevertheless keep the information confidential." Therefore, deferring to the Board's reasonable conclusions based on substantial evidence, the Second Circuit enforced the Board's order of production under Section 8(a)(1) and (5) of the NLRA.

Though a non-precedential "summary order" from a panel of only two Appeals Court judges, *Gore* may be significant as a window into Second Circuit thinking in the legal turmoil post *Loper*. Despite *Chevron's* demise, at least two Second Circuit judges continue the Court's traditional deference to the NLRB, or perhaps portending the Second Circuit's adaption of a "*Chevron* light" standard enunciated by Justice Jackson in her concurring *Loper* opinion. Second, the panel, which included one District Court Judge, put its finger on the fallacy of a District Court practice of pushing for confidentiality agreements as a compromise to competing union-employer claims for information. If the employer cannot first establish the confidential nature of the information, then there is no need for a confidentiality agreement as a compromise. Given its cogent reasoning and broad political authorship (Jacobs appointed by Bush, Merriam by Biden, Cronan by Trump), practitioners may do well not to ignore *Gore*.

THE STRENGTH OF THE WOLF IS THE PACK: HOUSTON RESTAURANT MUST REHIRE WORKERS WHO WALKED OUT OF STAFF MEETING IN PROTEST

A recent decision issued by the National Labor Relations Board ("NLRB" or "Board") illustrates the importance of working with, rather than against, those who put food on your tables, especially when you attempt to run a restaurant. The case is *Hiran Management, Inc.*, 371 N.L.R.B. No. 130, No. 16-CA-303914, November 4, 2024.

In July 2022, a Houston 1980s-themed restaurant called "Hungry Like the Wolf" came under new ownership and management. Shortly thereafter, the staff of about fifteen servers, bartenders, and bussers began to notice that their new manager had a number of shortcomings. He was incapable of operating the digital software used to take orders, invoice those orders, and calculate tips, and he refused to learn how to do so. Soon, employees began noticing that their tips received did not match those reported by the software. Also, beginning in mid-August, the new manager began giving staff additional responsibilities without any increase in pay or proper training. The restaurant also began having serious inventory problems. Despite employee complaints, the new manager repeatedly told employees that they could not contact the owner directly and had to communicate through him. The new manager also began calling employees into individual meetings, where he would try to increase employees' workloads without pay and speak badly about other employees. He also told certain female staff members that they should use their good looks to their advantage and wear pink miniskirts.

On September 18, 2022, the manager called a mandatory meeting with staff to discuss their issues and come to a mutual agreement moving forward. Although

attendance was required, the employees were not paid to attend the meeting. According to the Administrative Law Judge's ("ALJ") findings of fact, this meeting, attended by about eight employees, did not go well. The new manager quickly became visibly aggravated by the employees, who had a list of concerns including incorrect paychecks, scheduling issues, lacking inventory, and the mistreatment of female employees. The manager eventually told one of the female employees to "shut the f*** up," to which she responded she quit, and the manager said, "let me show you the door." At this point, "[t]he remaining employees looked at each other," one of them asked, "[a]re we really going to put up with this disrespect?" and "[t]he employees nodded to each other, got up and walked out together."

The employees regrouped and came up with a list of demands, and they sent the manager a message that they were striking "until fair labor and wage practices are put into place across the board . . . . We simply want to ensure that going forward, we are treated in an ethical and professional manner." These demands included pay raises to cover extra responsibilities, tips breakdowns, schedules in advance, better training, an open-door policy for grievances, and others. The following week, most of the employees refused to show up to work, and the manager informed them that they would be terminated.

The Board upheld the ALJ's findings that the restaurant fired the employees for engaging in protected concerted activity in violation of the National Labor Relations Act. The Board also upheld all of the ALJ's remedies, including rehiring the eight terminated employees with backpay. However, the Board also heightened one of the remedies, requiring managers to read aloud to staff members a notice of the ruling. The Board wrote, "Discharges are, of course, among the most serious unfair labor practices, as they are the industrial equivalent of capital punishment . . . . In these circumstances, we find that notice reading is necessary to dissipate the lingering effects of the Respondent's serious and widespread unlawful conduct."

NY STATE RELEASES GUIDANCE TO PROTECT OUTDOOR WORKERS FROM EXTREME WEATHER

On October 29, 2024, to coincide with the anniversary of Hurricane Sandy hitting New York, the New York State Department of Labor ("NYSDOL") announced the release of new guidance for employers to better protect outdoor workers during heavy precipitation and wildfire smoke.

For extreme precipitation, the guidance suggests that employers follow alerts by the National Weather Service before and during extreme rain. Before extreme precipitation, employers should reschedule work or tasks to avoid wet weather hazards, avoid equipment that uses electricity unless rated for wet weather, provide warm and dry indoor places for workers and provide breaks. Additionally, employers should provide personal protective equipment ("PPE") such as gloves, anti-fog goggles, waterproof boots, and ice cleats. During extreme precipitation, only employees who are trained to work during an extreme event should work outside and PPE should be used. After

extreme precipitation, workers should be given frequent breaks during clean up, clean water and soap.

Similarly, when there is wildfire smoke, employers should check the Air Quality Index available on AirNow.gov. Employers should provide PPE including filtering facepiece respirators and provide indoor spaces. Work should be rescheduled and/or moved indoors, and workers should be given as many breaks as necessary.

For both heavy precipitation and wildfire, employers should train employees on weather safety as well as make emergency plans. As New York State Department of Labor Commissioner Roberta Reardon stated: "Protecting workers from the dangers of extreme weather is more important than ever as we face the increasing impacts of climate change. These new guidelines will provide New York businesses with the tools they need to safeguard outdoor workers from dangerous conditions."

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