Insight

IN-DEPTH DISCUSSION

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NLRB Requires Specificity in Management-Rights Clauses

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When drafting a collective bargaining agreement, employers often insist on a management-rights clause. That clause reserves to the employer the right to take unilateral action, with respect to certain terms and conditions of employment without an obligation to bargain with the union about that action. In negotiating such clauses, employers try to find the right balance between specifically delineating the rights being retained, while keeping the language sufficiently broad to cover other (perhaps unanticipated) circumstances in which the employer might need to act unilaterally.

The National Labor Relations Board has made that task much more difficult. In *Graymont PA*, Inc. 364 NLRB No. 37 (June 29, 2016), the Board held that an employer must meet a very high level of specificity in a management-rights clause before the Board will find that the union unequivocally waived its right to bargain over the action in question.

In *Graymont*, a three-member Board majority held that the employer, a lime miner and producer of lime products, violated the Act by not giving the union the opportunity to bargain before it changed existing policies, despite a management-rights clause that arguably reserved to the employer the right to make those changes unilaterally. The Board held that the union had not "clearly and unmistakably" waived its right to bargain over those policies, and accordingly, that the employer was obligated to bargain with the union in advance of any changes being made.

The collective bargaining agreement contained a broad, but standard, management-rights clause, providing in part that the employer: "[R]etains the sole and exclusive right to manage; to direct its employees; to evaluate performance, . . . to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards of performance for employees."

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The company announced its intent to make changes to existing policies, specifically, its work rules, absenteeism policy, and progressive discipline policy, which were maintained outside of the collective bargaining agreement.

The union asked to meet and requested information regarding the proposed changes. The company agreed to the meeting, but made clear its position that there was no obligation to bargain over the proposed changes given the management-rights language reserving the right to adopt and enforce rules and regulations and policies and procedures, and to establish standards of performance for employees. Addressing the information request, the company denied that it had any obligation to provide the requested information given there was no duty to bargain. Nonetheless, the parties met and discussed the proposed changes, and the employer made some revisions requested by the union to the policies as a result. The company then implemented the modified policies.

The union filed a charge, alleging both the failure to bargain and violation of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, and failure to provide information.

The Board agreed with the union, finding that the management-rights clause did not constitute a clear and unmistakable waiver by the union to bargain over the changes at issue. The Board explained, "none of the contractual management-rights provisions specifically reference work rules, absenteeism, and progressive discipline. Further, there is no evidence that the parties discussed these subjects during negotiations. . ." In a footnote, the Board dismissed any claim that the "right to adopt and enforce rules," reserved by the employer in the management-rights clause, had the required specificity to establish a clear and unmistakable waiver.

Member Miscimarra dissented, noting that, in his estimation, the language granted to the employer exactly the rights it was exercising: "the management-rights clause. . . clearly and unmistakably granted Graymont the right to make the changes at issue here unilaterally, i.e., without giving the Union notice and an opportunity to bargain concerning the planned changes. . ." the "management-rights language demonstrates that the parties had already bargained and agreed that Graymont had the right to make those changes unilaterally."

The Board also held that Graymont violated the Act by failing to tell the union it did not have information responsive to its request, dismissing the employer's argument that because the Region's complaint did not include this allegation, that the Board was barred from finding such a violation. The Board overturned *Raley's Supermarkets*, 349 NLRB 26, and its progeny, to the extent such decisions held that "for issues involving a failure to timely disclose that requested information does not exist, a finding of a violation is necessarily precluded by the absence of a specific complaint allegation." Consistent with his dissent regarding the bargaining issue, Miscimarra argued that, because the employer had the right to make the changes without bargaining, there was no obligation to provide the information requested regarding those changes.

In one respect, the Board's decision in *Graymont* does not herald a change in the law: employers have always had to prove that the union clearly and unmistakably waived its right to bargain before acting unilaterally in changing a term and condition of employment. However, this case indicates that the Board will now require *a degree of specificity not previously required* in order to find a waiver in the language of a management-rights clause. Employers should consider negotiating management-rights provisions with as much specificity as possible as to the rights being retained, or engage in bargaining with the union before making any changes in terms and conditions of employment.

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