A Timely Analysis of Legal Developments

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The National Labor Relations Board set aside the results of a decertification election because the employer's handbook contained work rules that could potentially have chilled employee election activity, even though the employer did not enforce the rules during the election period and there was no evidence employees were actually deterred from engaging in campaign activity.

NLRB Decision Setting Aside Election Ups the Ante for Employers Maintaining Overbroad Employee Handbook Rules

By Tom Dowd and Allison Kheel

In a two-to-one majority decision, the National Labor Relations Board in *Jurys Boston Hotel*, 356 NLRB No. 114 (March 28, 2011) expanded its view regarding objectionable handbook rules and held that an employer's mere maintenance of an overbroad rule in its employee handbook was sufficient to warrant setting aside the election results in a decertification election. This decision makes it much easier for unions to overturn close elections by arguing that overbroad policies could have affected the outcome of the election. While this case arose in a decertification context, unsuccessful unions in representational campaigns also are likely to use this new analysis to try to overturn unfavorable results and get a second shot in re-run elections.

The employer had voluntarily recognized the union as its employees' bargaining representative pursuant to a neutrality agreement. Two years later, the employees filed an election petition seeking to decertify the union, and the Board scheduled the requested election. The employer maintained a 63-page handbook containing the standard range of rules and policies governing employee conduct. After the election petition was filed, the union filed an unfair labor practice charge challenging the lawfulness of three of the handbook's policies: (1) a "no solicitation or distribution" policy; (2) a "no loitering" policy; and (3) a "grooming" policy banning the wearing of buttons. The handbook rules had been in effect for the prior two years without any objection from the union. The employer responded to the union's charge by issuing a clarifying memorandum to all employees stating that the rules were not intended to infringe on employees' rights under the NLRA. The employer announced that it was amending two of its policies and deleting the prohibition on buttons and insignia altogether.

None of these facts saved the rules from being held objectionable. A two-member Board majority (Chairwoman Liebman and Member Pearce) overruled the hearing officer's decision – that the existence of the rules did not have any impact on the election results even though the rules were overly broad on their face – reasoning the three rules could be construed by employees in a manner that might discourage them from communicating about the union or about their terms and conditions of employment. The majority was undeterred by the employer's neutrality if not "positive" approach toward the union during the election campaign, the lack of evidence of enforcement of the rules, and the other factors relied upon by the hearing officer.

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The Board majority's finding was based on a series of prior decisions in which the Board had set aside elections based on the mere maintenance of objectionable rules. Dissenting Member Hayes pointed out that, in *Delta Brands, Inc.*, 344 NLRB 252 (2005), the Board explicitly held that the mere existence of the overbroad rule in the handbook, standing alone, was not sufficient to establish an impact on the election results, and that the Board should look at the totality of the factual circumstances in order to determine whether the atmosphere was so tainted by the objectionable rule that the election results must be set aside. The two-member majority, however, concluded that Delta Brands "should be limited to its precise facts" and should not be viewed as a departure from earlier decisions. The majority diminished the importance of *Delta Brands* by pointing out that it was simply a two-member majority decision and had not expressly overruled the inconsistent Board decisions that had preceded it. The majority in *Jurys Boston Hotel* also emphasized that this case involved a one-vote margin when 93 votes were cast, where *Delta Brands* had involved a two-vote margin when 18 votes were cast.

Furthermore, the employer's handbook in *Jurys Boston Hotel* contained some form of general disclaimer language (not directly quoted in the decision) telling employees that they had, as the hearing officer characterized it, "rights under the National Labor Relations Act which supercede [sic] any possible interpretation of the rules in this handbook." Nonetheless, the hearing officer concluded that these disclaimers were insufficient to cure an otherwise overbroad policy because employees could not be called upon to know which particular rules were overbroad and which need not be followed. The Board neither adopted nor rejected the hearing officer's finding in this regard, but by agreeing with the hearing officer that the handbook provisions were not saved by the disclaimer language, the majority has left open the possibility that they share the hearing officer's views. When read in conjunction with the positions taken by the Board in the recent Facebook firing case and other recent decisions, this decision raises doubt as to the effectiveness of general disclaimer language that simply mentions the NLRA without further explanation.

Jurys Boston Hotel has the potential to be a game-changing decision that will require all employers – whether union or non-union – to make important changes to their handbooks. This decision emphasizes the crucial need for employers to craft policy language *and* disclaimers carefully in their employee handbooks that are specifically tailored to prevent a rule from being interpreted in an overly broad manner. While this particular case arose in the context of a decertification election, its holding is applicable to all forms of elections. Employers often wait until an election petition is filed before they scour their handbooks to identify overbroad language or fail to undertake any such review at all, assuming that, as long as they do not act unlawfully, they will not be accused of unlawful conduct. After this decision, unions may increasingly review a targeted employer's handbook as soon as the union commences an organizing campaign and file charges challenging any potentially overbroad language. Then, if the union loses the election by a narrow margin, it can object that the employer maintained unlawfully overbroad policies during the campaign and seek a re-run election. This new decision adds to the growing list of cases in which the current Board's members and General Counsel have demonstrated a renewed focus on employer handbook policies and whether employees could reasonably be afraid that their protected conduct might violate one or more handbook policies. The danger for employers is that the current Board's approach permits speculation as to what employees might have done absent the disputed rule, rather than whether any employee actually changed behavior because of the allegedly overbroad rule. Thus, all employers, whether unionized or not, should review their employee handbooks for potentially overbroad rules that could be construed as limiting employees rights under Section 7 of the NLRA, and they should conduct this review *before* any election issues arise so as to eliminate this particular weapon from the arsenals of organizing unions.

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