



IT'S THE LAW



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OWNERS LAWFULLY CONTACT POLICE IN REMOVAL OF PICKETS

Can an Employer lawfully interfere with a Union's right to picket by contacting the police to remove picketers from a public right-of-way along a highway? In CSX Hotels, Inc. v. NLRB, the Fourth Circuit Court of Appeals answered this question with an emphatic "YES."

In CSX Hotels, the Union believed a Contractor violated its agreement with the Union by hiring employees represented by a different union to work on the construction of a hotel. The Union set up pickets a

few feet from the hotel on the public right-of-way along a two-lane highway where traffic was heavy in the morning and afternoon. The speed limit on the highway was 55 m.p.h. and the Union was picketing without an assembly permit.

Hotel representatives went to the police station and told the police chief that they were worried about the traffic since it was heavy in the morning and that the Union was picketing without a permit. The Chief went to the hotel and concluded that the picketing posed concern for traffic and safety. As a result, the Chief told the picketers to leave because they did not have a permit.

The Union filed an Unfair Labor Practice Charge and claimed that the hotel wrongfully interfered with its right to picket. In the underlying proceedings at the National Labor Relations Board ("NLRB"), the Administrative Law Judge ("ALJ") held that the hotel interfered with the Union's right to picket by contacting the police to remove or arrest the picketers. The Board affirmed the ALJ's holding based upon the characterization of a general rule that exclusion of union representatives from public property violates the National Labor Relations Act ("NLRA") if the union is engaged in protected activity such as picketing or handbilling.

In reversing the Board, the Fourth Circuit Court of Appeals ("Court") agreed with the hotel that, under the circumstances, it did not violate the Union's rights by reporting its concern to the police about the traffic and safety. The Court expressly held that the pickets, at a minimum, posed a potentially dangerous traffic condition since the picketing did make that part of the highway prone to congestion and increased the possibility of traffic accidents.

At the hearing before the ALJ, the police Chief testified that the highway can be dangerous and that it was a major thoroughfare in the county which was congested in the mornings and afternoons. In the last ten years there were also numerous traffic fatalities and pictures of the picketers showed them standing just inches off the roadway and a few feet from the

construction entrance where construction vehicles entered and exited. The signs held by the picketers were also intended for motorists to read as they exited from and entered onto the highway. The Court emphasized that the police Chief's testimony summed up the potential for harm best when he said: "When you have picketers alongside the road ..., if [motorists are] gawking off and looking off to the side, someone stops in front of them . . . you have a bad accident there."

The Court concluded that the hotel was justified in contacting the police and having them address this potentially dangerous traffic condition.

In CSX Hotels, the Court found that the hotel was not required to show an actual traffic problem before contacting the police since this requirement would put the hotel in the untenable position of waiting for a traffic accident to occur before contacting the police. Rather, the Court held that the potential for physical injury which did exist justified the hotel's request for the police to address the situation.

The ruling issued by the Court in CSX Hotels demonstrates that a Union's right to picket is not absolute and that Courts do restrict those rights where picketers cause a *potentially* dangerous traffic condition. However, the ALJ and the Board had refused to restrict the Union's right to picket under these circumstances and would have required the hotel to wait for an accident to occur before reporting the potentially dangerous situation to the police which is illogical.

When faced with a situation as in CSX Hotels, where a Union's actions such as picketing may cause a potentially traffic condition, an Employer should consider all pertinent facts before contacting police and, if a Union seeks to prevent such contact by filing an Unfair Labor Practice Charge, vigorously defend your actions and do not let down if an ALJ declares otherwise since the appeal process is designed to correct erroneous decisions.

EMPLOYEE HANDBOOKS BEWARE!

Illinois is an "at will" employment state which means that an employer generally has the right to terminate the employment relationship at any time with or without notice and with or without cause. An employer cannot terminate an employee for discriminatory reasons or may be required to terminate an employee only for cause if there exists a collective bargaining agreement which requires just cause for termination. Since 1987, there have been many lawsuits filed against employers on the grounds that handbooks or personnel policies created contractual

relationships between the employer and employee. In 1987, the Illinois Supreme Court held that employee handbooks or personnel policies may be construed as creating a contract between the employer and employee; thereby destroying the "at will" relationship.

Before a Court will construe an employee handbook as creating contractual rights, certain factors must be present. First, the language of the handbook must contain a promise clear enough that an employee would reasonably believe that an offer was made. Second, the handbook must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Thirdly, the employee accepts the employer's offer by commencing or continuing to work after receiving or learning of the contents of the handbook.

One must recognize that the pitfalls of creating a contractual relationship with an employee may be avoided by adding a disclaimer to the handbook. Language which clearly informs the employee that the handbook is not intended to constitute an offer of employment or a contract for employment between the employer and employee will usually suffice. Courts have enforced disclaimers when an employee is given the handbook at the beginning of his or her employment. However, a problem arises when an existing handbook does not contain the disclaimer. The question then becomes what an employer must do to avoid remaining contractually obligated to all or some of its employees?

If an employer's handbook does not contain a disclaimer, one may be added if the employer is willing to give up something in return. For instance, in return for adding a disclaimer, the employer may promise to provide consideration to its current employees in the form of additional vacation or sick days.

Legal issues arise in this area since Illinois courts are not clear on how much an employer must offer in return for modifying an existing handbook. Due to this uncertainty it would be a wise decision to contact an attorney who can apprise employers of the legal developments in this area to ensure that their interests are protected against creating unknown contractual relationships with employees.

EMPLOYER DENIES CREDITS FOR MEALS AND LODGING UNDER THE DAVIS-BACON ACT

The U.S. Department of Labor Administrative Review Board overturned an Administrative Law Judge ("ALJ") and ruled that a contractor's payment for his employees' meals and lodging while working outside

their daily commuting area cannot be credited as either a bona fide Davis-Bacon Act fringe benefit or as a "cash" offset against the Act's prevailing wage requirements.

This case involved a land clearing contractor in Michigan who routinely worked on jobs which would require his crews to travel a considerable distance away from their home community of Gladwin County, Michigan. Due to the long commute, the contractor did not give his employees the option of returning home each night. Instead, he paid for his employees' lodging and paid for their meals. The contractor argued that it would be too expensive to hire and train local employees at each new location in the state where there was a job.

Because the employer paid for lodging and meals, the contractor took a credit against his prevailing wage obligation. A Wage and Hour Division Investigator examined the contractor's performance on six of these projects and concluded that the contractor had committed a Davis-Bacon Act fringe benefit violation by taking this credit.

The Davis-Bacon Act allows for the prevailing wage to be paid to an employee to consist of not only wages, but also for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying the costs of apprenticeship or other similar programs, or for other bona fide fringe benefits. The question in this case was whether or not the contractor could receive credit for the payments made for lodging and meals as a bona fide fringe benefit.

In answering this question, the Administrative Review Board resorted to the Federal Register, Title 29 Section 5.29. Here, the Department of Labor interpreted the "other bona fide fringe benefits" clause. In order for a non-listed fringe benefit to become bona fide it must be common in the construction industry. Additionally, the regulations state that "payments made for travel, subsistence ... are not normally payments for fringe benefits under the Act." The Administrative Review Board found that, as a general rule, the Field Operations Handbook disfavors claims for credits based on subsistence.

In the underlying proceedings, the contractor and the ALJ considered this case to fall within an exception based upon the "special job" provision. A "special job" is one where an employee must travel outside of his normal community in order to complete a job for his employer. The ALJ concluded that if an employer sent an employee out on a "special job" then the employer cannot use the payments of lodging and meals as a fringe benefit and offset his fringe benefit obligations under the Davis-Bacon Act. However, the

ALJ held that since these jobs were the *regular* business of the contractor, the "special job" sections of the Field Operators Handbook did not apply. The ALJ held that in order to apply the "special job" exception, the employer must have regular business which did not require such travel. Thus the ALJ allowed the contractor to claim fringe benefit credits based on these payments.

The Administrative Review Board soundly criticized the ALJ in reversing its ruling. The Board stated that the ALJ took a very narrow reading of the Handbook and created a huge exception to the rule. The Board reasoned that it does not matter whether these jobs are performed in the normal course of business of the contractor. The Board decided that the term "special" is misleading. The Board separated all jobs into two categories. The first being "regular" jobs, which are jobs within the employees' daily commuting range. The second type of jobs is the "special" job, which are jobs outside of the employees' daily commuting range. Under this categorization, it does not matter what percentage of the work is done beyond the employees' daily commuting range, since any work outside the employees' daily commuting range would be classified as "special". As all of the projects undertaken by the contractor could then be considered special, then the contractor could not get credit for the payments.

Finally, the Board also rejected the employer's argument that the payments are creditable against the Davis-Bacon Act's prevailing wage requirements. The Board found: 1) the expenses were clearly undertaken for the contractor's benefit; 2) the contractor could only perform distant contracts if its employees traveled in such a way; 3) the employees were required to travel as a condition of their employment.

What does this mean to you? First, if your employees are traveling for your benefit, then you cannot satisfy your Davis-Bacon fringe benefit and prevailing wage requirements by simply paying their lodging and meals. Second, if you provide transportation to a job site outside of your employees' daily commuting range, then any payments made for lodging and meals will be considered for your benefit. Third, the only way a non-listed fringe benefit will be allowed as a credit under the Davis-Bacon Act will be if that benefit is common in the construction industry.

HOW LATE IS TOO LATE IN WAGE ARBITRATION?

A long standing dispute over a grievance procedure contained in an expired collective bargaining agreement ("CBA") will once again be considered by the Seventh Circuit Court of Appeals.

This case involves a dispute over unpaid wages which came to light a year after the Employer had closed its particular shop and fired all of its employees.

The collective bargaining agreement in question was entered into by the Employer and the Union in 1997, and was set to expire in December 1999. In November 1999, the Union and Employer began to negotiate a successor agreement, however, the negotiations were ultimately unsuccessful. Yet after the CBA expired, the Employer and the Union continued to negotiate. The Employer continued to provide the Union with payroll information until February 2000. When the Union's business representative received these materials, he suspected the Employer was not complying with the wage provisions of the CBA. Eventually, in June of 2000, the Employer closed its facility and fired all of its employees.

While the CBA was in effect, it contained a four-step grievance procedure for bringing a grievance against the Employer. First, the aggrieved employee was required to notify his Union steward or supervisor of the grievance within ten working days. If the grievance was not resolved, the second step required the aggrieved employee to submit a signed written grievance to the Union's business representative and to the Employer. The employer would then have five working days to respond to the grievance. If the grievance was not resolved at this stage, the third step required the submission of the grievance to a grievance committee. The committee would then have ten days to resolve the grievance. And finally, if the committee was unable to iron out the issues, the aggrieved employee could submit a written demand for arbitration within forty-five days of its initial occurrence.

In July 2000, after the Employer closed its facility, the Union's pension and benefit funds filed an ERISA action to compel an audit of the Employer's records. The Union, after learning of this audit, sought to get a copy of the audit from the funds. The auditor's report stated that certain bargaining unit employees were underpaid.

The Union sent a letter to the Employer in September 2001, which the Union claimed fulfilled its obligation in the second step of the grievance process. The Union claimed that the CBA was in effect under a clause that stated the CBA would continue after its termination date from year to year unless either party to the CBA wished to change or terminate the agreement. The Employer responded that there was no CBA in effect between the parties and thus it was not obligated to respond to any grievance. Further, the Employer argued that the Union had failed to follow the grievance procedure. The Union, undeterred, demanded arbitration pursuant to step four of the grievance procedure. The Employer rejected this demand and filed suit in Federal Court for declaratory and injunctive relief.

The case moved between the District Court and the Court of Appeals for two years on various procedural issues. The Court of Appeals ordered the trial court judge to rule on the timeliness of the Union's grievance. The Employer claimed that the Union's bringing of the grievance almost two years from the alleged infraction is unreasonable. The Union responded by arguing that the salient question is whether the grievance arose under the CBA, regardless of whether the grievance was pursued before or after the expiration of the CBA. Additionally, the Union claimed that it needed the audit results to confirm its allegations and thus it was acting reasonably.

The trial court judge weighed the competing policies found in each parties' arguments. "On the one hand, there is a strong presumption in favor of arbitrability of labor disputes, especially where, as here, the parties' contract provides for such a remedy. On the other hand, the CBA envisions a swift grievance process that concludes with a demand for arbitration no more than forty-five days after the occurrence of the events giving rise to the grievance." The trial court judge held that a reasonable inquiry is appropriate. The judge found that the dispute could have, and should have, been brought earlier. The employees received pay information every two weeks with their pay stubs, and the Union suspected a CBA wage violation as early as February of 2000. The Union also failed to present any evidence from aggrieved employees who said that they could not discover the wage discrepancy at the time they were paid. The judge also noted that even if the Union's wait for the audit was reasonable, the Union failed to bring the grievance to the Employer pursuant to the time limits found in the CBA. The Union appealed the judge's ruling.

Before the Court of Appeals rules, it is difficult to surmise what this means to you, but a few things are clear. First, the more concrete the grievance provision of any contract the less likely that the court will forgive any delay. Second, the longer the delay, the less likely it will be found to be reasonable. Third, the better you know the grievance provisions of your contract the better off you will be at handling these matters.