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Employer Cannot Have Its Cake and Eat It Too in Terminating Illegal Striking Employees

By Aaron J. Graf, Esq.

A recent decision by the National Labor Relations Board ("Board") demonstrates that in law, as in life, sometimes you cannot change your mind without consequences. In *Douglas Autotech Corp.*, 357 N.L.R.B. No. 111 (Nov. 18, 2011), the Board affirmed the administrative law judge's ("ALJ") decision that, even though employees participated in an illegal strike, their employer illegally fired them.

The governing collective bargaining agreement ("CBA") between the employer, an auto parts manufacturer, and the union was set to expire. The union, pursuant to §8(d)(1) of the National Labor Relations Act ("NLRA"), served the company with notice of its intent to terminate the CBA. However, the union failed to timely file the notice with the Federal Mediation and Conciliation Service ("FMCS") as required by §8(d)(3).

Subsequently, after negotiations failed to yield a new CBA, the employees went on strike, and the company continued to operate through the use of temporary replacement workers. The

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union soon realized that the required notice had not been filed and, therefore, the strike currently taking place was illegal. The union made an immediate and unconditional offer to return to work. The employer, sensing something was amiss, then discovered that the union had failed to timely file the FMCS notice. The employer decided to lock out the employees without reserving the right to terminate their employment. By being locked out without any reservation of rights, the strikers regained their protected status under the NLRA. The parties engaged in extensive bargaining over the course of several months. During that time, the employer assured the union that the locked out employees would be reinstated once a new CBA was established.

The protracted bargaining sessions eventually broke down, and the employer declared it would no longer waive its rights to discharge the employees. The employer then terminated all bargaining unit employees, regardless of whether they participated in the strike.

The Board found that it was undisputed that the employees had participated in an illegal strike and that they had lost their status as employees in doing so. However, the key moment was when the employer decided to lock out the employees after they made an offer to return to work immediately. Because the employer locked out the employees, and did not also reserve its rights to discharge them at that time, the Board affirmed the ALJ's decision that the employer had "re-employed" the employees when it imposed the lockout.

Interestingly, the Board declared that the employees did not actually have to return to work to be considered re-employed and to receive the protection of the NLRA. The Board found it dispositive that the employer had not reserved its rights under §8(d), that it had assured the union the strikers would be reinstated, and that it constantly referred to the strikers as "employees" during the bargaining sessions. In other words, the employer had made a "knowing and reasoned determination," based on the employer's own interests, to not immediately discharge the strikers after learning of the illegal strike.

Aside from the striking employees, the Board also held that the employer violated the NLRA by refusing to negotiate with the remaining unit. The employer had improperly terminated all bargaining unit employees, including those who had been on otherwise approved leave at the time of the strike. These employees remained part of the bargaining unit, and the employer was required to continue bargaining with these employees.

Several lessons can be learned from the *Douglas Autotech* decision. First, an employer should always check to see whether a union has followed all necessary procedures and requirements and determine whether a strike is, in fact, permitted. Second, an employer should decide, at the moment it learns a strike is illegal, whether or not to discharge the strikers. The Board's decision does not allow an employer to have its cake and eat it too: an employer cannot learn of an illegal strike, opt not to fire the strikers, make overtures it will reinstate the employees, and

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then fire the illegal strikers when discussions break down. While the Board appeared to leave some wiggle room in focusing on the employer's failure to reserve its rights under §8(d), it would be wise for an employer to make the decision whether to terminate illegal strikers at the time the illegal strike is discovered.

As an aside, it should be noted that in January 2012, President Obama appointed three members to the Board to return it to its five member maximum. The appointees are: Sharon Block, Department of Labor's (DOL) deputy assistant secretary for congressional affairs and a Democrat; Richard Griffin, general counsel for the International Union of Operating Engineers and a Democrat; and Terence Flynn, staff attorney for NLRB member Brian Hayes and a Republican. The board is now comprised of three Democrats and two Republicans. Stay tuned, however, because these recent appointments are being challenged by various interest groups.

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