NLRB Erodes Staffing Company Protection Against Union Organizing
By: William E. Pilchak

A political football that depends on which party is in office explains why so few staffing companies are unionized. It also explains why workforces made up of staffing company "temps" and customer employees, such as auto-industry designers, are so frequently union-free in a heavily unionized environment. For decades, the NLRB had held that a proposed bargaining unit where one employer controls wages (i.e., the staffing company) and another – possibly joint employer- controls other terms and conditions, such as the volume of work or required quality (i.e., the customer) was a multi-employer bargaining unit. Employers may not be compelled to be part of a multi-employer bargaining unit without their express consent. Of course, no employer in their right mind would consent to such a unit unless it welcomed dealing with a union.

As most know, each President has authority to appoint NLRB members. As the parties have grown apart in ideology over the past fifteen years, each side has increasingly appointed individuals that will uphold their values. In 2000, the Clinton-Board reversed the application of the multi-employer unit doctrine in a case known as *M.B. Sturgis*. Four years later, the Bush-Board reinstated the principle in *Oakwood Care Center*. Pilchak & Cohen has been waiting for the Obama Board to address the issue. It often takes years for the right case to arise.

That case, *Bergman Brothers Staffing,* is now unfolding at the NLRB. On June 20, 2013, the Regional Director for Region Five (Baltimore) issued a decision and directed an election holding that a unit of asbestos abatement employees assigned to customers and performing under the customer's direction on projects lasting 2-3 weeks were a proper unit. Other employers can and will argue that the Bergman Brothers company doesn't look much like a staffing company, because it employed only six individuals who were sent onto a constantly changing progression of projects. But for the lack of a Bergman supervisor, that company looks like an asbestos abatement company. Bergman's operation is hardly analogous to most staffing company scenarios where contractees sit side by side with individuals employed by the customer and other staffing companies for months on end. Moreover, the employer in *Bergman* chiefly argued that its employees were temporary employees (as to Bergman) which are not typically appropriate for a bargaining unit, because there were lapses in work between projects. However, the employer did make an *Oakwood* argument and the Regional Director made a point of saying that if *Oakwood* were to apply, the employees would effectively be denied of their right to organize, especially because the fleeting nature of the projects precluded a petition naming any supposed joint-employer directing the project. The Regional Director's decision will not be the final word on this issue. Expect the issue to be raised to the full Board.

In future cases, Unions will seize upon the language suggesting that *Oakwood* deprives employees of section 7 rights, while employers will argue that *Bergman Brothers* should be confined to cases where the same few employees are dispatched to customers for short term projects. Naturally, we will keep you advised of developments.

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