

NLRB Hits Unions with One-Two Punch the Week Before Labor Day

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The National Labor Relations Board (the Board) continues to modify the way employers, unions and employees view and relate to each other in the workplace. In two decisions right before Labor Day, the Board strengthened employer rights in their workplaces, while at the same time making life for their union counterparts more difficult.

On August 23, 2019, the Board revisited the issue of whether an employer must grant access to the off-duty employees of an onsite contractor so they can engage in Section 7 activities on the employer's property. In general, Section 7 activities consist of employees acting together to improve their pay and working conditions, which constitute fundamental rights under the National Labor Relations Act (the Act). In *Bexar County Performing Arts Center Foundation d/b/a Tobin Center*, the San Antonio-based performing arts center, the Tobin Center, owned the Center as well as grounds that abutted the famed San Antonio River Walk. The Tobin Center housed three resident companies, one of which was the Ballet San Antonio with whom it had a licensor-licensee agreement.

In addition to plays, movies and other productions, the Tobin Center hosted the San Antonio Symphony (the Symphony) to perform for 22 weeks of the year. The Ballet San Antonio also occasionally utilized the Symphony for live musical performances at its ballets. When, however, the Ballet San Antonio decided to use recorded music for a particular production, off-duty employees of the Symphony protested by leafletting the public on the Tobin Center property. The leaflets advised the public of this decision and urged that they "DEMAND LIVE MUSIC!" Their protests were not directed at the property owner, who denied them access to its property.

Overruling its precedent, the Board held that a property owner, *i.e.*, the Tobin Center, may exclude from its property off-duty employees of an onsite contractor or licensee for purposes of engaging in Section 7 activities unless (i) the contractor/licensee employees work both *regularly* and *exclusively* on the property and (ii) the property owner fails to show that the contractor/licensee employees have one or more reasonable non-trespassory alternative means to communicate their message. The Board determined that the Symphony failed to satisfy this standard and, therefore, dismissed its complaint against the Tobin Center. The Board determined that because the Symphony appears at the Tobin Center for less than half of the year and its employees work elsewhere, they did not work regularly or exclusively at the Tobin Center. The Board also determined that the Symphony employees were able to leaflet on adjacent public property. Further, their right to access the Tobin Center's property was weakened by the fact that they were targeting the general public as opposed to employees who work on the property. This case illustrates where an employer's property rights trump a union's Section 7 rights.

In *Velox Express*, the Board considered whether the improper classification of employees invoked the Act by interfering with Section 7 rights. The employer, Velox Express, Inc., was a medical courier service that was engaged in a dispute regarding its classification of certain workers as independent contractors or employees. Under Board precedent, the misclassification of workers as independent contractors was often considered a basis of an unfair labor practice against the employer because misclassifying workers negatively impacted their wages, hours or terms and conditions of employment. In other words, workers that were not protected by Section 7 could be punished if they attempted to form a union. Because independent contractors cannot organize a union, the characterization was often deemed coercive.

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The Board held that, standing alone, misclassification of workers as independent contractors does not violate the Act. The Board disagreed with the assertion that misclassification is necessarily coercive because it does not "in and of itself, contain any 'threat of reprisal or force or promise of benefit.'" The Board considered the fact that classification decisions are often difficult and complicated legal determinations. Nevertheless, the Board reaffirmed that misclassification decisions will violate the Act when they are in retaliation for protected activity.

In sum, employers are likely to applaud the Board's decisions in *Tobin Center* and *Velex Express*. Nevertheless, employers should remain cognizant of their responsibilities under the Act to avoid unfair labor practices. As reiterated by the Board in *Velex Express*, an employer can violate the Act even if it does not have an unlawful motive.

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