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## 3rd Cir.: NLRB Directed to Examine Employer's Motives

By Gregory J. Kamer and Nicole A. Young 5/28/2015

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The 3rd U.S. Circuit Court of Appeals remanded a finding of the National Labor Relations Board (NLRB) because the board failed to examine an employer's motives when it determined that the employer improperly withheld benefits from employees who were eligible to vote in an upcoming union election.

The National Labor Relations Act (NLRA) establishes that it is an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of organization rights. Further, it is illegal for an employer to discriminate in regard to hire or tenure of employment, or to encourage or discourage membership in any labor organization by any term or condition of employment.



Woodcrest Health Care Center operates a rehabilitation and nursing facility in New Jersey. In January 2012, Local 1199 of the Service Employees International Union Healthcare Workers East New Jersey Region filed a petition for election to unionize certain employees. In March 2012, the employees voted to unionize, triggering an objection by Woodcrest and allegations of unfair labor practice by the union. The union alleged that the employer withheld health care benefits from election-eligible employees. The union claimed that prior to the election, Woodcrest informed nonunion employees about improvements to their health care benefits. It told election-eligible employees that their benefits could not be renegotiated since the parties were in a "critical period" with the union. The union also alleged that Woodcrest engaged in coercive interrogations of employees. The union specifically detailed three interactions, including a conversation between a company attorney and a known union supporter. Further, the union alleged that Woodcrest created an unlawful impression of surveillance after a union supporter was warned by a company official to "watch your back" and to "tone it down a little bit."

The administrative law judge (ALJ) ruled against Woodcrest as to the benefits and interrogation allegations, but found that it did not create an unlawful impression of surveillance. On appeal, the board affirmed the ALJ's decision but found that Woodcrest had indeed created the impression of surveillance. Woodcrest appealed and the union cross-appealed to enforce the order.

Most significantly, the court remanded to the board for further consideration its determination on the employee benefits issue. Specifically, the court noted that the board failed to examine Woodcrest's motives when it determined that Woodcrest improperly withheld benefits from election-eligible employees. The court noted that the board did not consider "that a violation of [labor laws] normally turns on an employer's anti-union purpose or motive." The court explained that the U.S. Supreme Court, through case law, has previously instructed the board to look at the nature of the employee rights affected by the employer's conduct and the employer's reason for withholding the benefits, instead of merely asking whether the employees would have received the benefits but-for the union's presence.

The court agreed with the board's determination of coercive interrogation in an interaction where a union supporter who worked as a certified nursing assistant was told to report to his director but instead was questioned by Woodcrest's attorney. The other two instances alleged were "less clear" said the court, but "it takes just a single coercive interrogation to support the remedy ordered by the board—namely, a cease and desist order and the posting of a notice that Woodcrest will not coercively interrogate its employees." The court also affirmed the board's finding that the company gave an unlawful impression that employees were under surveillance for their union activities. The court specifically noted that the statement "watch your back" implies that someone else is watching. Therefore, it created the impression that Woodcrest had sources of information about the employees' union activity.

*800 River Rd. Operating Co. LLC v. NLRB*, 3rd Cir., No. 14-2036 (Apr. 29, 2015).

**Professional Pointer:** It is critical for employers to establish evidentiary objective support for legitimate business justifications if there is to be any differential treatment among union-represented and nonunion-represented employees with respect to benefits or other terms and conditions of employment. This is particularly critical where the parties are in the NLRB pre-election period.

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