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Electronic Alert

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Ninth Circuit: The NLRB's "One Employee Doctrine" Does Not Apply to Contracts With Interest Arbitration Provision

By Trevor Caldwell and Sarah Hale

On May 24, 2019, in *Taylor Sheet Metal, Inc. v. Int'l Ass'n of Sheet Metal, Air, Rail and Transp. Workers Union, Local No. 16,* a three-judge panel of the Ninth Circuit Court of Appeals reversed the decision of a federal district court in Oregon and held that an employer may not repudiate a collective bargaining agreement (CBA) under the National Labor Relations Board's (NLRB) "One Employee Doctrine" if the CBA contains an interest arbitration provision. The case has been sent back to the district court for reconsideration in accordance with the Ninth Circuit's unpublished decision.

Background

Taylor Sheet Metal, Inc., an Oregon-based company, and the International Association of Sheet Metal, Air, Rail and Transportation Workers Union, Local No. 16 signed a "pre-hire CBA," when Taylor only employed one employee subject to the CBA. Pre-hire CBAs are common in the construction industry, and typically establish a relationship between an employer and union before a construction job gets underway. The "Pre-Hire" CBA also included an interest arbitration provision, which required the parties to submit disputes over new contract terms to arbitration.

Ten months after the Union notified Taylor that it was reopening the CBA, the Union declared impasse and submitted the dispute to interest arbitration. Taylor responded by repudiating the CBA under the One Employee Doctrine, and objected to the arbitrator's jurisdiction to resolve the dispute. Nevertheless, the arbitration went forward and Taylor was ordered to execute a new agreement but without the interest arbitration provision.

The One Employee Doctrine

The NLRB's One Employee Doctrine states that an employer does not violate its duty to bargain in good faith under the National Labor Relations Act (NLRA) by unilaterally repudiating a CBA that covers a bargaining unit containing one or no employees. *See Stack Elec., Inc.*, 290 N.L.R.B. 575 (1988).

Taylor filed suit in federal district court to have the arbitration decision vacated, arguing that it was free to repudiate the CBA under the One Employee Doctrine because at the time of repudiation it did not employ anyone subject to the CBA. The district court agreed, and vacated the arbitration award.

On appeal, the Ninth Circuit's panel reversed the district court's decision, holding that the right to repudiate under the One Employee Doctrine can be overridden by a CBA's interest arbitration provision. This is so, the panel explained, because Taylor's duty to bargain with the Union arose from the CBA—through the interest arbitration provision—not from any statutory obligation. The panel

also noted that acts of repudiation or termination must be submitted to arbitration, rather than a court, when a CBA contains a customary arbitration clause.

Considerations for Employers

This decision provides several important takeaways for employers who are party to a pre-hire CBA, especially those in the construction industry:

1. If a pre-hire CBA contains an auto-renewal or arbitration clause, the employer will likely be prohibited from repudiating or terminating the CBA under the One Employee Doctrine discussed above. The *Taylor* decision was unpublished – meaning it has no precedential value. Nonetheless, it is consistent with the Ninth Circuit's approach to these issues and employers are wise to take note.

2. When a CBA contains an arbitration provision, the proper forum for resolving disputes over repudiation or termination will usually be before an arbitrator, not the NLRB or a court.

3. Employers should review their existing CBAs to determine whether they specifically address repudiation or termination under the One Employee Doctrine, and if not, whether the CBAs contain arbitration provisions.

If you have questions about your collective bargaining agreement, please contact Trevor Caldwell at tcaldwell@barran.com or (503) 276-2117, or Sarah Hale at shale@barran.com or (503) 276-2111.