APRIL 7, 2020 | TRADITIONAL LABOR RELATIONS

Bargaining in a Time of Crisis

The COVID-19 pandemic, and the unprecedented response thereto by various layers of government has caused many, if not most businesses to rearrange their hours or operations, lay off employees or even to cease doing business altogether. Given this seemingly unprecedented situation, many unionized employers may wonder what duty they have to bargain over specific changes to their ways of doing business.

General Counsel Peter Robb recently provided some helpful guidance summarizing prior NLRB case law on this timely topic. The first portion of Robb's memo (GC Memo 20-04) summarizes various Board decisions touching on an employer's duty to bargain during public emergency situations, such as hurricanes, 9/11 and other emergencies.

By way of background, because an employer's decision to lay off bargaining unit employees is a mandatory subject of bargaining, an employer is generally obligated to bargain with an incumbent union with respect to both the decision to lay off and the effects of that decision. However, an exception to that rule exists if an employer can demonstrate that economic exigencies compel prompt action. Although the Board has consistently maintained a narrow view of this exception, unforeseen extraordinary events which have a major economic effect may fit within it.

For example, in *Port Printing & Specialties*, 351 NLRB 1269 (2007), the Board ruled that a print shop in Louisiana forced to close due to a mandatory evacuation ordered in the face of the impending arrival of Hurricane Rita could lay off its employees without providing their union notice and an opportunity to bargain. Because the impending hurricane and the mandatory citywide evacuation were uniquely exigent circumstances, the employer did not violate the National Labor Relations Act ("Act") by laying off unit employees without bargaining. However, the employer's decision after the hurricane passed to utilize non-union workers to perform bargaining unit work was not privileged, and the Board held the employer had violated the Act in taking this action without bargaining.

In another emergency situation (the aftermath of 9/11), K-Mart ordered extensive layoffs when it lost 60 percent of its anticipated business, and within months was compelled to file for bankruptcy. In *K-Mart Corp.*, 341 NLRB 702 (2004), the Administrative Law Judge ("ALJ") held that 9/11 fit within the same "economic exigency" exception to the general rule requiring notice and bargaining, and held that the layoffs did not violate the Act.

General Counsel Robb's memorandum also summarizes other cases involving compensation changes in the face of emergency circumstances. For example, in *Dynatron*, 324 NLRB 572, 578-79 (1997), the employer changed its policy regarding employee pay during hurricanes without providing notice to, or bargaining with the union. The

Board held this unilateral change violated the Act.

Similarly, in *Gannett Rochester Newspapers*, 319 NLRB 215 (1995), the employer unilaterally decided not to pay employees for absences caused by an emergency no-travel order related to an ice storm. Because the change involved a mandatory subject of bargaining (wages for time lost due to weather emergencies), the Board held the employer had a duty to provide notice and an opportunity to bargain before making the change.

Robb's memorandum also addresses prior Board rulings dealing with bargaining duties during emergencies particular to an individual employer.

For example, in a pair of decisions involving lumber mills laying off employees claiming lumber shortages, the Board reached different conclusions as to the employer's duty to bargain.

In *Brooks-Scanlon, Inc.*, 247 NLRB 476 (1979), the Board determined a sawmill did not violate the Act when without bargaining it closed part of its plant after determining that a projected decline in the number of harvestable trees in the surrounding forests warranted such action. According to Robb's memo, the Board concluded that a variety of factors created a set of "economic factors so compelling that bargaining could not alter them." Of note, the employer had provided its employees two months' notice, and did bargain with their union of the effects of the shutdown.

However, in *Hankins Lumber Co.*, 316 NLRB 837 (1995), the Board found a sawmill violated the law by unilaterally laying off workers due to a log shortage that could have been foreseen.

These and other decision summarized in the new memorandum make it worth reviewing, whether your business has been economically impacted by the coronavirus itself, or by the various shutdowns ordered by governmental officials. In these unprecedented circumstances, impacted employers may be much more likely to fulfill the economic exigencies exception to the general rule to provide notice and an opportunity to bargain.