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The Real Power of the NLRB's General Counsel

by Ronald Meisburg

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The general counsel of the National Labor Relations Board is imbued by statute with unreviewable "final authority" with respect to the investigation of unfair labor practice charges and the issuance of complaints. As I learned while serving as NLRB general counsel from January 2006 through June 2010, this powerful authority – used judiciously – can be a useful tool in guiding national labor policy and, perhaps as important, keeping the NLRB as an institution from wandering into legal and policy fights that undermine, rather than enhance, its stature and effectiveness as an enforcement agency.

Granting the general counsel with this power was one of the most controversial issues surrounding the creation of the modern general counsel's office under the Taft-Hartley Act in 1947. Many feared that the general counsel would become a "labor czar," because he or she would have the sole power to prosecute unfair labor practices – there is no private right of action under the National Labor Relations Act. But the good use to which this power can be put is illustrated by a recently issued advice memorandum issued by the general counsel's office in DynCorp International, Case 32-CA-157275.

DynCorp provides aircraft maintenance services for the United States Navy at Fallon Naval Air Station in Nevada. Disappointed with the progress of collective bargaining, in early June, 2015, DynCorp's union-represented employees started wearing green fluorescent stickers bearing slogans such as "We Want A Fair Contract" and "Honor Our Contract." The employees also posted the stickers on union bulletin boards. As the bargaining wore on, the members also stuck the stickers on doors, door frames and windows of the government-owned building. The following month the employees began displaying larger signs from the windows of their cars parked in the government-owned parking lot.

Navy officials indicated that Naval aviators had seen the stickers and posters, and were concerned that the workers were more interested in the labor dispute than they were performing their maintenance jobs. This raised safety concerns and had become a distraction. Armed with a legal opinion from its judge advocate's office, the Navy officials directed DynCorp to instruct its employees not to display any stickers or posters supporting the union.

Faced with this, DynCorp instructed the union's steward to tell the employees to remove the stickers and posters. The union met with the Navy officials but to no avail, and the stickers and posters were removed. The union then filed an unfair labor practice charge against DynCorp, alleging that the wearing and display of stickers was protected activity under the NLRA, and that the instruction to the union to remove the stickers and posters violated the employees' right to do so.

The NLRB region investigated the charge and sought guidance from the NLRB general counsel's division of advice, which issued an advice memorandum. The general counsel could have authorized a complaint,

and in doing so created a showdown between the NLRB and the Department of the Navy over whose rules would take precedence. But wisely, the general counsel declined to do so. Instead, in the memorandum, the general counsel's office stated that issuing a complaint "would not effectuate the purposes and policies of the Act."

While the phrase "would not effectuate the purposes and policies of the Act" is boilerplate, there is real meaning behind it. Effectuation of the purposes and policies of the NLRA requires, among other things, that the public have confidence in the integrity and good judgment of NLRB officials. Wasting time and effort on what look like petty, feckless undertakings undermines public confidence in the NLRB, and hence the purposes and policies of the Act.

What immediately comes to mind is the recent multitude of NLRB decisions going after every sort of employer rule, such as those meant to require civility in the workplace, maintenance of confidentiality in workplace investigations or the protection of other confidential business information. Employers view these attacks on common-sense workplace rules as evidence that the NLRB is making labor policy that is completely untethered from the realities of human nature and the necessities of running a business.

Almost everyone who has had any position of responsibility, be it in the family or in the workplace or elsewhere, understands the meaning of the expression "you need to pick your battles." The general counsel's "final authority" to issue or not issue complaints in unfair labor practice cases, and his use of it in the DynCorp case, shows that effectuating the purposes and policies of the NLRA does not require the agency to pick every battle and, in doing so, undermine its standing as a fair and impartial enforcement agency. One hopes that this will be recognized more often at the NLRB.

Ronald Meisburg is special counsel at Hunton & Williams. He was a member of the National Labor Relations Board under President George W. Bush and served as the board's general counsel under presidents George W. Bush and Barack Obama. His practice focuses on labor management relations law and policy. He may be reached at (202) 955-1539 or rmeisburg@hunton.com.