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Labor Law

Supreme Court Agrees to Review LMRA Case Involving Section 302, Neutrality Agreement

By Anna Kwidzinski

The U.S. Supreme Court June 24 agreed to consider whether a Florida greyhound track's neutrality agreement allowing UNITE HERE access to nonpublic work areas and providing the union with employees' names and addresses provided a "thing of value" in violation of Section 302 of the Labor-Management Relations Act (*UNITE HERE Local 355 v. Mulhall,* U.S., No. 12-99, *cert. granted* 6/24/13).

UNITE HERE Local 355 asked the justices to reverse a 2-1 ruling of the U.S. Court of Appeals for the Eleventh Circuit, which created a circuit split and reinstated a Section 302 lawsuit filed by Martin Mulhall, an employee of Hollywood Greyhound Track Inc., operating as Mardi Gras Gaming (667 F.3d 1211, 192 LRRM 2513 (11th Cir. 2012); 13 DLR A-1, 1/20/12). Mulhall claimed that the 2004 neutrality agreement between Local 355 and the greyhound track violated Section 302, which makes it unlawful for employers to deliver something of value to labor organizations.

Local 355 in July 2012 filed a petition for Supreme Court review. Mulhall filed a cross-petition for review (No. 12-312) last August, agreeing that the justices should hear the case but arguing that they should also decide whether intangible things can be "delivered" under Section 302. The Supreme Court then invited the solicitor general to file an amicus brief expressing the federal government's view (09 DLR AA-1, 1/14/13).

In its May 24 amicus brief, the solicitor general declined to directly address the substantive issues concerning Section 302 and instead urged the Supreme Court to refrain from reviewing this case. The solicitor general argued that the decision would be interlocutory, and the question presented may be moot already since the neutrality agreement is no longer in force.

"Given these uncertainties, the Court should permit the question of how Section 302 applies to voluntary recognition agreements to percolate in the circuits," the solicitor general wrote. "At this point, only three circuits have weighed in, and the decision below may be clarified as a result of the court's remand, which would bring into focus any differences in the court's approaches."

The Supreme Court disagreed, granting Local 355's petition. The justices did not yet take action on Mulhall's cross-petition.

Agreement Called for Sharing Employees' Addresses

The Eleventh Circuit found that under the 2004 neutrality pact, Mardi Gras Gaming agreed to give the union access to nonpublic work areas to organize employees during nonworking hours, provide the union a list of employees and their home addresses, and remain neutral during organization efforts.

In exchange, the union agreed to "lend financial support to a ballot initiative regarding casino gaming" and "refrain from picketing, boycotting, striking, or undertaking other economic activity against Mardi Gras" if a majority of the track's workers recognized the union as their exclusive bargaining representative, according to the Eleventh Circuit decision.

Local 355 ended up spending more than $100,000 in the ballot initiative campaign, the circuit court found.

Ruling on Issue of First Impression Created Circuit Split

In suing Local 355 and Mardi Gras, Mulhall asked the U.S. District Court for the Southern District of Florida to enjoin enforcement of the 2004 neutrality agreement.

Mulhall claimed the bargain violated Section 302 (29 U.S.C. § 186), which provides in part: "It shall be unlawful for any employer … to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value" to a labor organization except under circumstances permitted by the LMRA, such as remitting union dues or making contractually required contributions to benefit trust funds.

After the district court dismissed Mulhall's claim for lack of standing, the Eleventh Circuit reversed (618 F.3d 1279, 189 LRRM 1279 (11th Cir. 2010); 177 DLR A-14, 9/14/10). On remand, the district court again dismissed Mulhall's case, this time for failure to state a claim.

In a 2-1 decision, the Eleventh Circuit in January 2012 decided that an employer's organizing assistance to a union can be a thing of value "if demanded or given as payment," thereby violating Section 302. The majority explained that whether something qualifies as a payment depends on whether the employer intended to improperly influence a union, not on whether something is intangible or has monetary value.

"It is too broad to hold that all neutrality and cooperation agreements are exempt from the prohibitions in § 302. Employers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement. But innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt the union or to extort benefit from an employer," the Eleventh Circuit warned.

The appeals court acknowledged that the Third and Fourth circuits have found that allowing union access to an employer's private property in exchange for neutrality cannot be construed as a bribe or corrupt practice outlawed by Section 302 because it cannot be considered a "payment, loan, or delivery."

Solicitor General Dodges Substantive Questions

Responding to the Supreme Court's Jan. 14 invitation, the solicitor general opted against commenting directly on the substantive issues involving Section 302 decided by the Eleventh Circuit. Rather, the solicitor general argued that review by the highest court would be premature at this time.

"Because the case is in an interlocutory posture, further proceedings on remand may clarify the decision's effects," the solicitor general wrote. "[B]ecause the challenged agreement is no longer in force, a substantial question of mootness exists that could prevent this Court from reaching the merits."

Congress enacted Section 302, including its criminal sanctions, specifically to prevent corruption, bribery, and extortion, the solicitor general said. He asserted that federal courts and the National Labor Relations Board have routinely upheld and enforced voluntary recognition agreements setting ground rules for organization.

Recognizing this legislative intent and the NLRB as the proper arbiter of Section 302-related cases, the Third and Fourth circuits both ruled that complying with ground-rules agreements could not be construed as a prohibited payment or delivery of a "thing of value," the solicitor general wrote.

Only the Eleventh Circuit called for an evaluation of the parties' intent behind a neutrality agreement, the solicitor general said. He argued that the Eleventh Circuit "went astray," because its reading of the law infringes on NLRB's role.

"When Congress wants to make the legality of giving a thing of value contingent on an intent to influence the recipient, it knows how to do so, and Congress did not do so here," according to the amicus brief. "Indeed, Congress provided a different remedial scheme for addressing an employer-union agreement that may have an unlawful purpose or effect: an enforcement proceeding before the NLRB."

The solicitor general noted that the 2004 neutrality agreement was to remain in force for only four years after slot machines were installed in the casino, which occurred in 2006. Since the agreement should have expired in 2010, seeking to prevent enforcement of the bargain may very well be moot, the solicitor general said.

Parties Agree 'Important Question' Warrants Review

But Local 355 and Mulhall both argued in their June 3 replies to the solicitor general's amicus brief that the issue is far from moot.

Local 355 asserted that its "right to enforce the agreement through arbitration depends on" Supreme Court review. "In the labor-relations context, expiration of a collective-bargaining agreement does not terminate contractual rights and obligations that arose during the agreement's term," the union said.

More important, the union wrote, because Section 302 is a criminal provision, prompt resolution of its proper interpretation would prevent stalling employer-union negotiations in the rest of the circuits that have yet to decide the issue.

"The threat of criminal liability can be expected to severely curtail employers' and unions' willingness to enter into agreements that foster voluntary recognition," Local 355 wrote.

Mulhall asserted that Supreme Court review is warranted because the "case presents an important question of federal law" regarding the scope of the meaning of "thing of value" in Section 302, and repercussions for the "top-down" approach of organizing favored by unions.

Petitions Sought Clear, Final Reading of Section 302

In its July 2012 petition, Local 355 contended that the Eleventh Circuit was the only federal appeals court to find that a neutrality agreement may violate Section 302. This interpretation runs contrary to those of the two other circuits to consider such a claim since they "have rejected it soundly," the union argued. It warned that the Eleventh Circuit decision "threatens to wreak havoc on basic labor law tenets."

Asserting that Section 302 was enacted primarily to curb union use of welfare trusts as "slush funds," Local 355 said its neutrality agreement with Mardi Gras "does not corrupt the bargaining process in any way and hence is not contrary to § 302's purpose."

The union also asserted that its support for slot machine legislation was not a condition precedent of the neutrality agreement because lobbying for this legislation was in the union's self-interest, regardless of the bargain.

"If it is sound logic that a union's help for the employer's business can make a labor-management agreement criminal, then a new era of labor relations is ushered in," Local 355 wrote. "Unions try to help their employers all the time, and, of course, they expect benefits in return both in the form of more and better jobs for their members (or at least not losing them) and in a cooperative attitude in collective bargaining. When they do so by lobbying for mutually beneficial legislation, their conduct is not unlawful."

In his cross-petition, Mulhall said the union's arguments are invalid, but the case nevertheless merits review because of the circuit split.

Mulhall rejected the union's contention that neutrality agreements support federal policies favoring labor-management cooperation. Charging that agreements on union organizing "are specifically designed to replace the NLRA's preferred organizing procedures with a private process that favors the union," the Mardi Gras employee argued that "enforcing § 302 to prohibit employers from materially assisting unions with organizing employees will serve only to protect the NLRA's 'bottom-up' organizing process from being replaced with a private 'top-down' process."

In addition, Mulhall sought clarification of whether delivering a thing of value applies strictly to the transfer of tangible items, or if intangible items should also be included in the definition. He argued that the Fourth Circuit erred by requiring a "thing of value" to have an ascertainable monetary value.

"[T]he Sixth Circuit recently held that a 'thing of value' in § 302 is not limited to monetary value," Mulhall wrote. "This holding conforms with the general consensus among lower courts that the phrase 'thing of value is not limited in meaning to tangible things with an identifiable commercial price tag.' "

Richard G. McCracken, Andrew J. Kahn, and Paul L. More of Davis, Cowell & Bowe in San Francisco represented Local 355. William L. Messenger of National Right to Work Legal Defense Foundation Inc. in Springfield, Va., is counsel of record for Mulhall. Solicitor General Donald B. Verrilli Jr. is counsel of record on the government's amicus brief.

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