

D.C. Circuit Calls Out NLRB in Ruling on Union Access to Employer Property

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As union membership continues to fall, unions have tried to heighten their levels of organizing activity at employers' workplaces. Because such activity tends to take place during employee working hours, and can be disruptive to working time, it is no surprise that some employers try to restrict the level of communication between union agents and its employees on its premises.

The National Labor Relations Board (NLRB) has not always signed off on employers' wishes here, though. The NLRB recently found that big-box retailer Fred Meyer Stores Inc. committed unfair labor practices when it excluded union agents from its worksite and allegedly caused the agents to be arrested. However, the U.S. Court of Appeals for the D.C. Circuit refused to enforce this decision, and sounded off the Board in its Aug. 1 ruling. The court's strongly worded rebuke is a welcome reinforcement of employer policies that restrict union visits at the workplace. The court has remanded the case back to the NLRB.

At issue in the case was Fred Meyer's agreement with a union representing its employees that allowed business agents to speak to employees on the floor "briefly," but that required such communications to be handled "so as not to interfere with service to customers[.]" Despite this agreement, the union in 2009 sent eight business agents to the employer's site to distribute fliers and communicate with employees about the status of contract negotiations.

Within a few minutes of the appearance of the business agents, a disagreement broke out, and Fred Meyer representatives called the police. Several of the agents refused to leave after the police asked them to and were then arrested. The NLRB found that Fred Meyer had unlawfully prevented union business agents from communicating with its employees at its premises.

Upon review, the D.C. Circuit disagreed. In a strongly worded opinion, the court found that the Board's ruling was "arbitrary and capricious." Although the court noted its review of NLRB decision is "limited," it stated it could not simply defer to or "rubberstamp" a decision that was both inconsistent and unclear. Specifically, the court found the Board mischaracterized the company's policy on union agent visits by saying it was not "clearly defined," and made findings of fact that were unsupported by the record. The court thus remanded the case to the NLRB for further consideration.

The court's ruling indicates that employers may be able to take back some control over their own

facilities, including potentially utilizing law enforcement against union agents who trespass, under certain circumstances. The D.C. Circuit Court's scolding of the Board comes at a time when a sea change is taking place at the Board itself, as the President has recently nominated two Republicans to serve as NLRB members.

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