Labor Law: US Court Looks At Nurses' Rights, Obligations In Private Sector.

In a recent decision the US Court of Appeals for the District of Columbia Circuit had to look at and rule upon a number of difficult issues that came up in a labor dispute between a nurses' union and a major corporation that owns and operates nursing homes across the country.

National Labor Relations Act
National Labor Relations Board

As employees of a private corporation in the private sector, the rights and obligations of the nurses in this case came under the US National Labor Relations Act (NLRA).

Under the NLRA the core issues of wages, benefits, work rules, etc., are resolved by collective bargaining between management and representatives of the employees' union.

The integrity of the collective-bargaining process itself is maintained by the National Labor Relations Board (NLRB) through its local field offices and the Board itself in Washington.

When one side or the other believes the rules of the collective-bargaining process are being violated, it files a complaint of unfair labor practices with the NLRB through the appropriate local field office.

The nurses' union did not give proper ten-days notice of its intent to strike the nursing homes as required by the National Labor Relations Act.

That made it an illegal strike. When a strike is illegal the company has no obligation to rehire the striking nurses who were replaced with non-striking nurses.

The union gave fifteen days notice of a strike on March 29, then on March 27 unilaterally extended the deadline to April 1.

The three-day strike did not begin on the date and time indicated in the first notice which was more than ten days before the fact, while the second notice accurately stated the date and time of the strike, but was less than ten days before the fact.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
January 31, 2003

The NLRB as an agency allows internal administrative appeals up to the Board itself. Then the process goes to the US Circuit Courts of Appeal to interpret and apply the accepted rules for the collective-bargaining process by ordering or declining to order enforcement of the NLRB's decision.

State Labor Law

Employees of state and local government as a general rule are not covered by the NLRA and must work with state and local agencies under the rules set down by state labor laws.

Often the process runs parallel to the process under the Federal NLRA, but strictly speaking the NLRA does not apply and the NLRB has no jurisdiction over labor disputes in the public sector.

Strikes At Healthcare Facilities
Ten-Day Notice Requirement

The NLRA allows private-sector healthcare employees to go on strike against their employers.

However, the NLRA has special language that applies only to strikes at healthcare facilities, requiring a labor organization representing employees at a healthcare institution to give at least ten-days notice prior to a strike, picketing or other concerted refusal to work.

The union's notice must state the exact date and time that the strike, picketing or other concerted refusal to work will begin at a healthcare facility. The court followed the strict letter of the law on this issue, to the ultimate detriment of the nurses who went out on strike.

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In other industries outside the healthcare field the union must give thirty-days notice if it may be calling a strike at the expiration of the term of the existing collective-bargaining agreement. However, once having given thirty-days notice, there is a lot of flexibility in other industries whether and when the union may call a strike as a bargaining tactic in eleventh-hour brinkmanship.

Not so in the healthcare field, as the US Circuit Court of Appeals pointed out in this case. The courts strictly enforce the ten-days notice of the exact time and date of a labor stoppage at a healthcare facility.

The union in this case at first gave fifteen days notice. Then the union sent a letter unilaterally extending the strike deadline seventy-one hours longer, which itself was invalid and rendered the first notice invalid, the court ruled.

A new strike deadline requires a full new ten-day period unless management agrees to accept short notice.

Unlike abruptly shutting down the assembly line in a factory or canceling scheduled airline flights at the last moment, a healthcare facility has to take into consideration the health and safety of vulnerable patients.

A healthcare facility must be able to move, reschedule or discharge patients, decline non-emergency admissions, hire replacement or agency employees, etc.

Illegal Strike
No Right To Reinstatement

The upshot for the nurses in this case was that their strike on short notice was ruled illegal. To make the right to strike have any meaning, the NLRA normally gives employees the right to be reinstated in favor of temporary replacement workers hired to work during a strike, assuming the strike was not an illegal strike.

The nurses in this case had no right to reinstatement. The Circuit Court of Appeals overturned the NLRB and gave management the discretion whether to rehire the nurses who had gone on strike.

The company was under no obligation to rehire the workers who participated in the unlawful strike.

Section 8(g) of the National Labor Relations Act provides for notification of intention to strike or picket at any health care institution:

"A labor organization before engaging in any strike, picketing or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention ... The notice shall state the date and time that such action shall commence. The notice, once given, may be extended by the written agreement of both parties."

The meaning of this mandatory language could not be plainer or the Congress's intent in enacting it clearer.

The three-day strike-deadline extension accurately identified the time and the date of the strike, but it did not afford the company the requisite ten-days notice.

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Advertising For Replacement Workers Above Union Scale
Unfair Labor Practice

When the strike appeared likely, the company began to advertise for replacement workers, which normally is the company's prerogative.

However, citing a notice posted at one of the company's nursing home facilities, the NLRB found the company guilty of an unfair labor practice for promising wages to replacements above the union wages being paid under the expiring collective bargaining agreement.

The Circuit Court of Appeals agreed with the NLRB that an employer cannot use its right to advertise for and to hire replacements as a tactic to undermine the union's standing with employees in the bargaining unit, and upheld the charge of an unfair labor practice by the company.

Videotaping Of Picketers
No Unfair Labor Practice

The Circuit Court of Appeals pointed out that photographing or videotaping of picketers by management agents is usually seen as an intimidation tactic and as such is usually ruled an unfair labor practice.

However, in this case there was a legitimate dispute whether union employees were picketing on public or private property. While the question was being resolved with the local authorities where the public right of way easement actually began and ended, a security guard videotaped the union picketers in anticipation of filing trespass charges against them if it proved true they were still on company property after being told to move off.

However, when local authorities confirmed the picketers were on public rather than private property, the security guard promptly stopped it at the direction of the administrator of the nursing home facility in question.

That was not an unfair labor practice by the company, the court ruled. **Beverly Health & Rehabilitation Services, Inc. v. National Labor Relations Board, __ F. 3d. __, 2003 WL 203139 (D.C. Cir., January 31, 2003).**