

CLIENT ALERT

Crowell & Moring Establishes that an Employer May Unilaterally Exercise Management Rights Implemented after Bargaining Impasse

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In a significant win for employers with organized employees, the United States Court of Appeals for the District of Columbia Circuit (“Court”) refused to enforce a decision of the National Labor Relations Board (“NLRB”) that would have dramatically expanded the narrow exception to the rule that employers may lawfully implement terms of a final offer, including terms that reserve discretion to the employer, following an impasse in bargaining. The right of Mail Contractors of America (“MCA”), the largest U.S. Postal Service depot to depot mail carrier, to unilaterally change its driver relay point was contained in the Management Rights provision of MCA’s final offer to the union. This right reflects MCA’s ability to change its truck routing so as to maximize routing efficiencies. MCA had lawfully implemented this final offer after the parties had reached a *bona fide* impasse in the negotiations following expiration of their collective bargaining agreement. In *Mail Contractors of America v. NLRB*, Nos. 06-1338, 06-1380, 2008 WL 220637 (D.C. Cir. Jan. 29, 2008), the Court of Appeals held that MCA’s exercise of that right was lawful. The case was argued before the Court by Jeffrey W. Pagano of the Firm’s New York office, and he was assisted in the appeal by Herb Meyer, Glenn Grant and Ira Saxe.

The NLRB had found a violation based on the principles of *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026 (D.C. Cir. 1997), which case carved out a narrow exception to the implementation after impasse doctrine, prohibiting implementation of a merit wage provision that gave the employer unlimited discretion regarding the amount and timing of merit wage increases. The NLRB’s decision against MCA was, for the first time, an extension of the *McClatchy* holding beyond the narrow subject of wholly discretionary merit wage (or health insurance) provisions. According to the NLRB, MCA’s change in the relay point directly impacted the employees’ wages in effectively the same manner as merit wage provisions. If not reversed, the NLRB’s decision would have eliminated an employer’s right to effectuate, after lawful impasse, those unilaterally implemented provisions related to discretionary operating subjects needed for the business to operate, such as changing a driver relay point, and in the process completely change the landscape of collective bargaining.

On January 29, 2008, the Court of Appeals issued its Opinion reversing the NLRB decision in its entirety. The Court refused to extend the *McClatchy* exception to a lawfully implemented Management Rights provision contained in an employer’s final offer that gave the employer the right to unilaterally make organizational changes necessary to operate its business. Specifically, the Court held, *inter alia*, that the Management Rights provision that MCA lawfully unilaterally implemented is “utterly unlike the provision in *McClatchy*”; that it is “inconceivable the provision will jeopardize collective bargaining in the affected unit - the stated concern underlying *McClatchy*”; and that the NLRB’s decision, if allowed to stand, “would impinge upon the employer’s ability to run its business more severely than did *McClatchy* itself or any of its sequellae.”

The Court’s MCA Opinion is, indeed, a landmark decision, and was featured as the lead article in the January 31, 2008 edition of the BNA Daily Labor Report, as it ensures employers’ ability to operate their business on a day-to-day basis without the time-consuming, costly, and restrictive bargaining with the union that would otherwise be required.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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