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NLRB Elevates Union Authorization Cards Over Secret-Ballot Elections To Compel Employers To Recognize Unions

By Al Latham & Carlos Torrejon

For more than 50 years, the National Labor Relations Board had held — with Supreme Court approval — that when a union claimed to represent an employer's workforce, the employer could refuse to recognize the union, leaving the union to petition the Board for a secret-ballot election. That has now changed. Under the Board's decision in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (Aug. 25, 2023), when a union demands recognition, the employer must:

1. recognize the union based on a check of union authorization cards ("card-check"); *or*

2. "promptly" (generally within two weeks) petition the Board for an election.

The employer's failure either to recognize the union based on a card-check or to petition for an election will be deemed unlawful, resulting in the Board's issuance of a bargaining order against the employer.

At first glance, it might appear that *Cemex* simply reverses the burden of seeking an NLRB-conducted election: the burden was on the union, now it's on the employer. But there's much more to *Cemex* than that. With *Cemex*, the labor movement effectively achieves a key objective that it had long sought, but failed to achieve legislatively. That is, to make employers extend recognition based on union authorization cards, rather than NLRB-conducted secret-ballot elections.

Cemex makes the union's card majority determinative *unless* the employer not only petitions for an election, but also conducts a *spotless* campaign for the employees' vote. Even *a single unfair labor practice* can result in the Board's dismissing the employer's election petition and issuing a bargaining order based on the union's card majority. While disavowing any *per se* rule for automatically overturning election results, the *Cemex* majority adds, "However, to be clear, the new standard does *not* give employers a free pass to commit *even a single violation of the Act* if that single violation is one that interferes with employee free choice and undermines the reliability of an election as an indicator of employees' true preferences." (Slip op. at 35-36, n.188; first emphasis in original, second emphasis added.) As both the majority opinion and the dissent observe, under existing Board law an election will be set aside based upon the commission of unfair labor practice(s) unless it is "virtually impossible" to conclude that the violation(s) could have affected the results. But the difference when an election is set aside under *Cemex* is that a rerun election will not be ordered. Instead, the employer will be ordered to bargain with the union based upon the union's card majority.

Cemex thus elevates authorization cards above NLRB-conducted secret-ballot elections as the preferred test of employee sentiment. To trump the authorization cards, the employer's election campaign must be perfect in the Board's eyes. Meanwhile, unions remain free to solicit cards with promises ("You want a raise? Sign here!"), peer pressure ("All of us are signing. What's wrong with you?"), and — best of all from the union's perspective — no opportunity for the employer to respond.

As Member Kaplan stresses in his *Cemex* dissent, citing several circuit court decisions, authorization cards are less reliable indicators of employees' true sentiments than secret-ballot elections. The *Cemex* majority replies that the Supreme Court in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), approved authorization cards as sufficient evidence of a union's majority status to sustain a bargaining order. But *Gissel* and the circuit decisions following *Gissel* approved bargaining orders only where an employer's "pervasive" unfair labor practices dissipated the union's majority and left little chance for a free and fair election. Elections remained the *preferred* test of employee sentiment — until now.

How likely is it that an employer who petitions for an election can avoid *even a single unfair labor practice*, as determined by *this* Board? Not very likely, says dissenting Member Kaplan. He cites as an example the Board's recent decision in *Stericycle, Inc.*, 372 NLRB No. 113 (2023), which so broadened the definition of presumptively unlawful work rules as to make it "virtually impossible for employers *not* to maintain at least one unlawful rule under this standard." (Slip op. at 48; emphasis in original.) Although the *Cemex* majority accuses Member Kaplan of unwarranted speculation, we think his argument well-founded. In our own client alert on *Stericycle* (Aug. 8, 2023), we noted that it would make "benign, commonplace rules of all kinds" presumptively unlawful. The current Board's readiness to find employer unfair labor practices where none existed before — particularly as regards employer speech — will likely serve to reinforce this Board's preference for card-checks over secret-ballot elections.

Needless to say, the *Cemex* doctrine will be challenged in the courts on substantial legal grounds. Meanwhile, employers are well-advised to review with counsel their options for lawfully maintaining their non-union status.

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