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LEGISLATIVE ACTION ALERT

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Cemex Under Attack: Sixth Circuit Sides with Employers, While Standards Remain Unchanged in Pennsylvania, NJ, DE, MD and WV

>>>>>>This article supplied by the PA Confence of Teamsters legal advisor Tom Kohn, Esq.<<<<<<<<

One of the more controversial decisions rendered by the Biden NLRB was its decision in *Cemex Construction Materials Pacific*, in which it announced a new framework for determining when employers are required to bargain with a union without a representation election. Under that doctrine, when a union requests recognition on the basis of a card majority, an employer must either recognize and bargain with the union or promptly file a representation petition for an election. However, if that employer commits any unfair labor practices that would require setting aside the election, the petition will be dismissed and the Board will order the employer to recognize and bargain with the union. Thus, unlike the test that was applied for 50 years under *NLRB v. Gissel Packing Company*, that warranted the issuance of a bargaining order only where an employer's unfair labor practices precluded the conduct of a fair future election, *Cemex* defaulted to a bargaining order after a determination that an initial election should be set aside, with no consideration of the impact on a possible future election.

Last Friday, the U.S. Court of Appeals for the Sixth Circuit, in *Brown-Forman Corporation v. NLRB*, held that the Board had overstepped its authority by issuing a change in policy through adjudication rather than the more tedious process of rule-making. Adjudication, it held, was intended to be limited to the specific case before the agency, whereas rule-making was the proper vehicle for enacting broader policy changes. The Court held that since the Board had announced a change in policy in *Cemex*, rather than merely deciding that case on the basis of existing law, it had improperly engaged in adjudication rather than utilizing rule-making, which would have required publishing the intended new rule and allowing for public comment. Accordingly, it denied enforcement of the Board's bargaining order. Ironically, the Administrative Law Judge who heard the *Brown-Forman* case held that a bargaining order was appropriate under both the *Gissel* and *Cemex* doctrines, but the Board limited its determination to the *Cemex* rule.

In that the Court remanded the case to the Board, it is possible that a bargaining order will still be issued, only this time applying the *Gissel* standards. It is also possible that the Board will seek Supreme Court review; however, given that Court's apparent disdain for the Board, along with other administrative agencies, a favorable outcome in that forum is doubtful. In the meantime, since this decision only applies to states within the 6th Circuit, and Pennsylvania is in the Third Circuit, Region 4, which is in the 3rd Circuit, is likely to continue to apply the existing *Cemex* doctrine.



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