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Mark Hansen and Emily Perkins discuss a recent Illinois decision analyzing whether the replacement of union jobs with technology constitutes an unfair labor practice.

Illinois Appellate Court Considers Unfair Labor Practice Charge Where Union Jobs Are Replaced by Technology

ABOUT THE AUTHORS



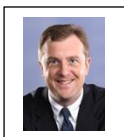
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There is no question that technology has become more prevalent and created a more efficient workplace. In fact, over the next several decades, it is anticipated that most workers will be replaced by intelligent technology. In *Amalgamated Transit Union, Local 241 v. Illinois Labor Relations Board*, 2017 IL App (1st) 160999, the court addressed this issue—namely, whether technology which replaced jobs that were previously held by traditional union members could constitute an unfair labor practice charge. While the court remanded several issues to be reexamined, the answer is clearly yes.

Amalgamated Transit Union (Union) brought an unfair labor practice charge against the Chicago Transit Authority (CTA) alleging that it failed to bargain with respect to the implementation of the open fare payment collection system in the City of Chicago, known as Ventra. *Amalgamated*, 2017 IL App (1st) 160999, ¶ 1. The Union also alleged that the CTA violated the collective bargaining agreement (Agreement), which contained a subcontracting provision providing that the CTA was prohibited from subcontracting or assigning other work which would normally be performed by union employees. *Id.* ¶ 6.

The CTA began exploring the idea of developing a single “smart card” for the use on the CTA in 2009. *Id.* ¶ 9. The smart card would cut costs with respect to the current fare payment and collection system. *Id.* By 2011, an ordinance was enacted, amending

the Regional Transportation Authority Act, 70 ILCS 3615/2.04 (West 2010), (Act) and requiring the CTA to develop and implement a regional fare payment system. *Id.* ¶ 14. The ordinance authorized the CTA to enter into a contract with Cubic Transportation Systems, which implemented the new Ventra system to allow customers to conveniently pay for train and bus rides by the use of a smart card. *Id.* ¶ 17. In furtherance of the project, the Chicago Transit Board (Board) approved the elimination of 24 bargaining unit positions. *Id.* ¶ 19.

The Union was not satisfied with the decision to implement the new payment system. *Id.* One reason was that they were allegedly not given the opportunity to bargain with the CTA. While the employees whose positions were eliminated did not ultimately lose employment, they were subjected to loss of pay, changes in work location and schedule, and a loss of seniority rights. *Id.* The Union filed an unfair labor charge, alleging that the CTA failed to provide an opportunity to bargain and that it unilaterally altered the terms and conditions of the bargaining unit employees. *Id.* ¶ 21. The Administrative Law Judge (ALJ) found that the Union’s allegation that the CTA violated the Act by eliminating bargaining unit positions without providing them notice and an opportunity to bargain was without merit. Rather, the ALJ determined that the CTA did not have an obligation because elimination of the positions was not a mandatory subject of bargaining. *Id.* ¶ 24. Therefore, the CTA was entitled to eliminate

the positions without providing such notice. *Id.* The Board adopted the ALJ's recommended decision and the Union filed a petition to appeal. *Id.* ¶ 25.

On appeal, the court noted the ALJ's application of the three-part test from *Central City Education Ass'n, IEA/NEA v. Illinois Educational Labor Relations Board*, 149 Ill. 2d 496, 509-10 (1992). *Amalgamated*, 2017 IL App (1st) 160999, ¶ 56. The first part of the test requires a determination of whether the matter is one of wages, hours, and terms and conditions of employment. If the answer to the first question was yes, then the second question is whether the matter is also one involving inherent managerial authority. The third part is a combination of the two questions. *Id.*

It was uncontested that the elimination of the Union's bargaining unit positions impacted wages, hours, and terms and conditions of their employment. *Id.* ¶ 57. However, the parties disagreed as to whether the CTA possessed inherent managerial authority. *Id.* ¶ 58. The Union argued that the CTA waived any right to claim that it had inherent managerial authority to subcontract because the subcontracting provision in the Agreement stated that the CTA would not subcontract out or assign the work to others. *Id.* ¶ 59. The court noted that the ALJ did not address this argument in the recommended decision. However, it also noted that the Board was better equipped than the appellate court to

address this wavier argument and remanded the case to decide this issue. *Id.*

The Union also challenged the Board's determination that the elimination of the positions was "a matter of inherent managerial authority because it was part of the CTA's broader decision to effect a legitimate reorganization." *Id.* ¶ 60. Instead of remanding this issue, the court addressed it, noting its likelihood to reoccur on remand. *Id.* The court first observed that to establish that an employer's action was a legitimate reorganization and a matter of inherent managerial authority, an employer must show:

- (1) that its organizational structure has been fundamentally altered;
- (2) that the nature or essence of the services provided has been substantially changed; or
- (3) that the nature and essence of a position has been substantively altered such that the occupants of that positions no longer have the same qualifications, perform the same functions, or have the same purpose or focus as had the previous employees. *American Federation of State, County & Municipal Employees, Council 31*, 17 PERI ¶ 2046 (ISLRB 2001); *Amalgamated*, 2017 IL App (1st) 160999, ¶ 61.

The ALJ determined that the CTA met neither the first nor third part of the inherent managerial authority test nor did it make any substantive alterations to any positions. *Id.* ¶ 62. Rather, the court focused

on the second part of the test to determine whether an employer's action was a legitimate reorganization. *Id.* ¶ 63. The ALJ held that the CTA did in fact substantially change the nature or essence of the services it provided and that the elimination of the 24 positions was part of that change, noting that an employer changes the nature of its services when it alters the manner in which it communicates with the public and changes the way it provides existing services. The new open fare payment system increased the convenience with which customers paid for their fares and entered its mass transit system by allowing customers to pay by card rather than relying on CTA issued tickets as it had previously done. Additionally, it permitted customers to use the "tap and go" entrance to the CTA mass transit. *Id.*

The court agreed with the ALJ, failing to find any conclusions or reasoning to be clearly erroneous. *Id.* ¶ 64. The court held that unless the Board determines on remand that the CTA waived any managerial authority of this issue, it must proceed to the third part of the *Central City* test, which balances the benefits that bargaining have on the decision-making process with the burdens that bargaining imposes on the employer's authority. *Id.* The ALJ's application of this part of the *Central City* test was based on the belief that the usual benefits of bargaining over the elimination of unit positions did not exist where the CTA's action is the final step of a broader change that the Union failed to timely protest. However, the court found that the protest was timely because the statutory limitations period for filing an

unfair labor practice charge is not triggered until an employer actually implements the decision to subcontract, rather than when it announces intent to do so. *Id.* ¶ 65. Therefore, the third part of the test would be re-analyzed on remand. *Id.*

This case gives employers a glimpse of the appellate court's analysis in determining whether the elimination of jobs traditionally held by Union employees could constitute an unfair labor practice in Illinois. Unfortunately, to cut costs and operate more efficiently, entities are sometimes forced to utilize technology which may result in the elimination of certain jobs. When such restructuring efforts impact bargaining unit positions, employers should exercise caution and consider whether elimination of such positions could result in unfair labor practice charges.

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