

Look Close At NLRB Changes

Issues In Article On Page 12 Should Catch Attention Of Contractors

STEVEN H. ADELMAN
Locke Lord Bissell & Liddell LLP

Mr. Rosenfeld's article raises many interesting points for construction industry contractors. Following are some observations regarding the "real world" effects of some of Arthur Rosenfeld's predictions.

It should first be noted that Mr. Rosenfeld is correct that changes in membership on the five member National Labor Relations Board ("the Board") can result in significant changes in the law. Unlike the courts, where most judges are reluctant to overturn long established law, the Board has a history of making sweeping changes in established law. For example, President George W. Bush's appointees overturned a number of precedents that had been the law for decades.

Dramatic changes in the other direction from President Obama's appointees should be expected.

The first specific construction industry issue that Mr. Rosenfeld raises is the conversion of a Section 8(f) relationship into a Section 9 bargaining relationship. A Section 8(f) relationship refers to the section of the National Labor Relations Act that allows an employer to recognize a union as the representative of its employees even before he hires the employees—i.e., a "pre-hire agreement."

This exception was created for the construction industry because of the long history of using union hiring halls to obtain employees. The advantage of having a Section 8(f) relationship is that the employer can withdraw recognition from the union at the end of the collective bargaining agreement, without having a decertification election or other proof that the union no longer represents a majority of its employees. In contrast, a Section 9(a) relationship means that the union has proven that it represents a majority of the employees, and the employer must continue to recognize the union unless there is objective proof that the union no longer represents a majority of its employees—which is virtually impossible in the construction industry, since union employees almost never resign their union membership.

In recent years, construction industry unions have been trying to get employers to change their recognition from Section 8(f) to Section 9(a) in order to prevent employers from unilaterally deciding to go non-union when the CBA expires. As Mr. Rosenfeld notes, the question of what it will take to convert from a Section 8(f) to a Section 9(a) relationship is an issue that could come before the "Obama Board", and the answer could be very different than in past years.

A second set of construction industry cases referenced involve "salting," which refers to the practice where the union has one or more of its members apply for work at a construction site so that they can work from the inside to get employees to sign union cards.

The Board has held that employers cannot refuse to hire an

applicant just because his reason for applying is to get his co-workers to sign union cards. If an employer does "unlawfully discriminate" against a salt, however, what should be the remedy?

In a 2007 decision, the Board held that it would not presume that a salt who worked on a job that was completed would automatically be assigned to the employer's next job. Rather, by a 3-2 margin, the Board held it was the burden of the NLRB's General Counsel to prove that the salt would have been sent to another job if not for his relationship with the union.

All three of the Board members who made this decision, however, are now off the Board.

The second salting case referenced by Mr. Rosenfeld dealt with whether a salt was even entitled to the protections of the National Labor Relations Act as an "employee", or whether the fact that he applied for the job to work for the union meant that the employer could refuse to hire him.

In another 3-2 decision issued in 2007, the Board placed the burden on the NLRB General Counsel to prove that the salt had a genuine interest in establishing an employment relationship with the contractor before the salt could claim protection under federal labor law.

Two key cases in the construction industry that have been awaiting consideration by the full Board involve the use of large banners at a jobsite. A 2004 decision by an NLRB Administrative Law Judge ("ALJ") held that the use of a banner that was 20 feet long and four feet high and required at least two or three people to handle it did not constitute "picketing."

In that ALJ's opinion, the banner was more like a billboard. Therefore, it qualified as "freedom of speech" and could not be the basis for finding that there was an unlawful secondary boycott at the jobsite. In 2006, however, a different ALJ found that the same type of large banner was the equivalent of picketing. Because the banner failed to explain exactly which company was the object of the union's dispute, the ALJ held that use of the banner constituted an unlawful secondary boycott. On August 27, 2010, the Board finally addressed the 2004 case. In *United Brotherhood of Carpenters and Joiners of America (Eliason and Knuth of Arizona, Inc.)*, a 3-2 majority of the Board held that it was not an unlawful secondary boycott for the Carpenters to hold 15-20 foot long banners in front of three businesses at which non-union construction work was being done.

The banners said "SHAME ON _____", naming the business—not the construction contractor with whom the Union had its dispute. In the majority's view, the banners were not "confrontational" and therefore were not the equivalent of picketing. In a lengthy dissent, Members Schaumber (whose term has now expired) and Hayes concluded:

Today, the majority puts [a] neutral party right back into the fray. Ignoring decades of precedent establishing that bannering is coercive, our colleagues hold that it is mere persuasion and thus lawful. In the process, the majority reaches out to narrow the protection established by Section 8(B)(4) through a new and narrow definition of picketing and a startling new

standard. . . . Our dissent is compelled by a serious concern that their standard will assuredly foster precisely the evil of secondary boycott activity and expanded industrial conflict that Congress intended to restrict by enacting 8(b)(4)(ii)(B). We will not be alone in finding this decision

to be most troubling and ill-advised.

As Mr. Rosenfeld concludes, “change is coming.” At this point, construction industry contractors need to hope that any change in federal labor law is minimal—because it is not likely to be helpful to them.

Steven Adelman is a Partner at Locke Lord Bissell & Liddell and a labor counsel for the Builders Association. Contact him by phone (312-443-0405) or email (sadelman@lockelord.com).

CONTINUED FROM PAGE 13

same status as that of Board certification following a secret ballot election. The bill also calls for interest arbitration, where a third party imposes the terms of a collective bargaining agreement on the parties. Additionally, some members of congress have stirred the pot with mention of increased fines and penalties, enhanced access by a union to an employer’s property, more prompt elections, and a number of other ideas seemingly pulled from the labor law reform battles of the late 1970’s, or from the 1994 Dunlop Commission Report. Legislative action, however, may prove to be largely unnecessary. The Board may have the inherent power to change the landscape by administrative actions. The scope of the authority to make changes would not go unchallenged, but courts have often shown deference towards agency actions. And the Board already has invited amicus briefing on two topics; compound interest on remedial awards, and requiring employers to post Board notices electronically.

The Board could, for example, shorten the length of time between the filing of a petition for a representation election, and the conduct of the election. The Dunlop Report suggested two weeks. It has also been proposed that the Regional Director’s Decision and Direction of Election be made final. The election would be held, and ballots impounded, until objections and challenges were decided post election.

The Board might also emphasize mail and/or electronic balloting. Of course, neither process is as secure and coercion free as the secret ballot election, which is the gold standard.

There has been discussion regarding the use of rulemaking as a partial substitute for case-by-case decisions. Rulemaking has the advantage of stability, given the difficulty of undoing a rule. Of course, the flip side of that are the difficulties encountered in promulgating a rule. The Board may not have sufficient resources to engage in multiple rulemakings, and past experience has shown the political difficulties in proceeding in that process. A number of years ago, the Board attempted to issue a rule relating to the presumptive preference for single site units, but Congress utilized the power of the purse to derail the proposed regulation.

The potential administrative and policy changes are too numerous to mention: Union access to employer premises; Enhanced remedies; Delegation of Section 10(j) injunction authority to regional directors; Restrictions on the use of permanent replacements during an economic strike; And the list goes on and on.

What is certain is that change is coming. It may be exciting, but will be painful. It is becoming increasingly important that affected parties gets their concerns heard, both at the agency level, and on Capitol Hill. And remember, Election day is just around the corner.

Arthur Rosenfeld is Former Director of Mediation & Conciliation & General Council of the National Labor Relations Board. This article originally appeared in the Summer Issue of InsideMBI, a publication of the Master Builders of Iowa.

