



NLRB SHAKE-UP SIGNIFICANTLY CHANGES LABOR LANDSCAPE

BY ARTHUR ROSENFELD

January 20, 2009 ushered in both a new President and the potential for sweeping changes in federal labor law and labor policy. That potential is rapidly becoming reality. President Obama has issued a number of new Executive Orders. In March of this year, the President recess appointed three new commissioners, and the general counsel, at the Equal Employment Opportunity Commission (EEOC). The Department of Labor has signaled that enhanced enforcement, in a variety of programs such as OSHA, wage and hour regulations, and persuader activity, is the new order of the day.

Congress has been mulling over labor law reform ideas, in particular the Employee Free Choice Act (EFCA) proposal. And in April the President recessed two members to the National Labor Relations Board (NLRB), bringing the complement up to three Democratic appointees and one Republican.

These occurrences portend a possible sea of change in labor-management relations, and from that perspective the most significant may be the changing of the guard at the NLRB. The following may convince you of my assessment of its significance.

NLRB STRUCTURE

Congress intended the NLRB to be comprised of five members, appointed to staggered five-year terms. In an ideal world, this would result in the possible replacement of one of the members each year. And, by tradition, the Board is made up of two Republicans, two Democrats, and a fifth member of the President's political persuasion.

In the real world, this has resulted in a two member board for the past twenty-seven months, until the April 2010 recess appointments of two additional members. Chairman Wilma Leibman and Member Peter Schaumber deserve credit for churning out nearly 600 decisions in that 27-month period. Unfortunately, but understandably, the most difficult and significant issues remain before the Board.

In July of 2009, President Obama nominated three persons to fill vacant positions at the NLRB. Mark Pearce was a union side labor lawyer hailing from Buffalo, N.Y. Craig Becker was a professor, but also has served as associate general counsel to the Service Employees International Union since 1990, and as AFL-CIO counsel since 2004. Mr. Becker's nomination turned out to be very controversial, in part because of his employment history, but also due to his prolific writings.

The third nominee was Brian Hayes, who

spent most of his career as management side labor lawyer, and most recently as a Republican staff attorney on the Senate HELP committee.

Craig Becker's nomination has so far proven to be too controversial. In March of this year, the Senate defeated a cloture motion to cut off debate on the pending nominations by a vote of 52-33 (60 votes are needed to invoke cloture). In April, the President recessed Becker and Pearce, but not Hayes. Thus, the Board now has four members, two of whom - the recess appointees - can serve until the end of the 2011 Congressional session, one (Republican Schaumber) whose term expires on August 27 of this year, and Chairman Leibman, whose term runs until August 27, 2011. Thus, the current Board make-up is three Democrats and one Republican. And to further complicate matters, General Counsel Ron Meisburg is stepping down on June 20, a few weeks before the end of his term. So add a general counsel vacancy to the ongoing soap opera.

PREDICTING THE FUTURE

As noted above, there are a multitude of important issues pending at the Board. In addition, a Democratic majority will likely consider decisions issued by its predecessor eight year republican Board to be fair

game for reversal. A review of the dissents by either or both Democratic members (Leibman and Dennis Walsh) of that prior Board would present a good roadmap for predicting the direction of the Obama NLRB. And there will be a new general counsel prepared to tee up any issues not currently before the Board. Agency staff should be prepared for long days.

Predicting is an inexact undertaking, and it would be impossible to present an all-inclusive list of Board actions over the next few years. But a quick peek at the more significant issues awaiting decision by the newly constituted Board, as well as some precedent ripe for reversal, should give us an idea of what the future may hold.

An issue that may be of particular concern to the construction industry has been a thorn in the side of the NLRB and contractors for years. When and how does a Section 8(f) pre-hire relationship convert into a Section 9 full bargaining relationship? Section 8 (f) was added to the statutory scheme in 1959. Its purpose was to legitimize agreements between contractors and unions where the majority status of the union is undetermined, e.g., where no workers had yet been hired. However, prehire contracts do not carry with them a presumption of majority status, and either party, or employees covered by the agreement, can seek an election during the term of the agreement. The thorn in this issue revolves around a question of voluntary recognition, that is, what acts, or language contained in the 8(f) agreement, indicate that a contractor has entered into a 9(a) relationship through voluntary recognition of the union as exclusive bargaining representative, with all the protections that attach to the exclusive representative.

The Board, in the early part of this decade, adopted a three-part test to determine if and when a conversion took place. This approach reaffirmed that 8(f) contract language alone might establish a Section 9(a) relationship. It must be noted that not all federal circuit courts of appeals agree with the NLRB's formulation. In 2005, as general counsel, I proposed that the Board should refuse to enforce its approach to the extent that the application of that test would preclude the Board from reviewing whether a union had *actual* majority support. I argued that extrinsic evidence of majority support, or lack of that support, is at least as demonstrative as "magic words"

contained in an 8(f) agreement. The current Board will likely have many opportunities to clarify the 8(f) to 9(a) conundrum.

Two other issues affecting the construction industry are candidates for review, and perhaps reversal. Both involve union organizing activity referred to as "salting." The first issue has to do with who bears the burden of establishing, for back pay purposes, whether a salt should be presumed to be continuously employed after shut down of the project where the discrimination (most often refusal to hire the salt) occurred. In a 2007 decision, the Board held that the general counsel bears the burden of showing that the discriminatee would have been reassigned to another job site. An earlier decision, in which the Board created a presumption that that the salt would theoretically continue in the employ of the contractor, therefore entitling the discriminatee to back pay from the date of the discriminatory act until a valid offer of reinstatement was proffered, is no longer good law. Both Leibman and Walsh dissented in the 2007 decision. This, therefore, is strong case for reversal by the new Board.

A second salting issue involves the burden of showing that a salt, to qualify as a discriminatee, had a genuine interest in establishing an employment relationship with the contractor. Again, in a 2007 decision, the Board placed this burden on the general counsel, and again, Leibman and Walsh issued a dissent. And again, a likely case for reversal.

A myriad of other issues are candidates for reversal by the new Board. Given that most drew dissents from the democratic members, it is not only possible, but likely that consideration of these issues would lead to reversal or modification. The following is by no means an all-inclusive list.

- Recognition Bar Doctrine. In 2007, the Board decided that voluntary recognition of a union would no longer bar an election petition for a "reasonable time." Instead, employees now have the right to an election within a 45-day period following notice to unit employees of the voluntary recognition. Leibman and Walsh dissented.
- In 2006, the Board attempted to clarify who falls within the Section 2(11) definition of supervisor. Section 2(3) of the Act excludes supervisors from its definition of

"employee." A supervisor's loyalty is the employer. The 2006 decision took a broad view of the definition. Prior Board decisions had attempted to narrow who would be considered a supervisor, leading to a number of U.S. Supreme Court rulings instructing the NLRB to pay closer attention to the statutory language. Leibman and Walsh dissented in the 2006 Board decision, a decision that impacts on all industries, but is of particular interest in health care, touching on whether charge nurses are supervisors.

- The existence of Weingarten rights in a non-union setting--In 2000, the Board reversed itself and held that an employee in a non-union workplace has the right to have a coworker present at an investigatory interview that the employee reasonably feels may result in discipline.
- Leibman and Walsh dissented in the 2004 Board decision reverting to pre-2000 policy.

The Board also faces difficult problems in cases that have been pending but undecided for a number of years, in large part because the Agency had only two members for twenty seven months, and had less than a full complement of members for other extended periods of time.

- May an employer and a union bargain prior to recognition of the union as the exclusive representative of the bargaining unit? Board precedent suggests that pre-recognitional bargaining constitutes employer dominance violative of Section 8(a)(2) of the Act, as well as some other statutory prohibitions.
- The rights of off-duty employees, and non-employees, to distribute literature on an employer's property.
- Whether the use of large banners at a neutral's worksite constitutes signalpicketing in violation of the secondary boycott provisions of the Act.

Finally, one can speculate as to administrative, policy, and decisional changes that the Board might consider over the next few years. Much attention has been directed at the proposed Employee Free Choice Act, which, in its current form would give card check recognition the

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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.

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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.

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