A Rogue NLRB

The NLRB's Anti-worker and Anti-business Rampage Threatens Job Creation

The National Labor Relations Board (NLRB) has grabbed headlines in the last year for its outrageous attempt to mandate where and how one company—Boeing—can operate and expand its business. As the *Washington Post* noted, the NLRB's attack on Boeing "substitutes the government's judgment for that of the company and this is neither good law nor good business." Although the complaint against Boeing has been withdrawn, the NLRB's actions toward the company and its employees are indicative of the Board's continued efforts to upset the labor relations balance in favor of its big labor allies. The Department of Labor (DOL) and the NLRB both have released proposed rules that are designed to work in concert to deny employees crucial information about union representation, limit employers' free speech and create legal pitfalls for small business owners facing union organizing drives. At the same time, the NLRB recently issued decisions stripping employees of the right to secret ballots and allowing micro-unions, which would permit union organizers to gerrymander elections. When radical NLRB Member Craig Becker's term expired, we hoped the White House would work with the Senate to install a less extreme NLRB. The White House instead took the unprecedented step of making recess appointments while the Senate was still in session. Not only was this unconstitutional, but it guarantees the NLRB will continue with its extreme anti-worker and anti-business agenda. At a time of chronically high unemployment, the NLRB's actions will cause greater economic uncertainty and effectively deprive workers of the information they need to make an informed choice about union membership.

STRIPPING WORKER RIGHTS TO SECRET BALLOTS

On August 27, the Board issued its decision in *Lamons Gasket*. The *Lamons* case reversed an earlier ruling that essentially guaranteed employees voting rights by allowing them to obtain a secret ballot election within 45 days of their employer's recognition of a union based on card check. The Obama NLRB has stripped employees of this right and ruled workers may not petition for a secret ballot election following recognition based on card check for as long as a year. If the employer and union sign a contract within that year, *employees may be effectively denied the right to a secret ballot for years*.

MICRO-UNIONS

The much-anticipated decision in *Specialty Healthcare,* which was issued the same day as *Lamons Gasket*, is even worse. The ruling paves the way for unions to gerrymander representation elections and organize micro-units. In essence, union organizers can now cherry-pick those employees most likely to support the unionization and separate them from similarly situated co-workers that may not support the union. Employees who do not want the union are effectively disenfranchised and employers are forced to negotiate with "fractured" units. The impact on employers, employees and the economy will be devastating with a potential explosion of "micro-unions" within an entire workforce or across multiple locations. For example, a union may choose to organize poker dealers at a casino, rather than all dealers, because it knows the poker dealers support the union, while the blackjack, craps, roulette and other dealers may not. Similarly, a union may organize a small group of employees working on one machine rather than all machinists in a manufacturing facility, because the majority of machinists do not want union representation. These fractured

units also would greatly limit an employer's ability to cross train and meet customer and client demands via lean, flexible, staffing as employees cannot perform work assigned to another unit. The impact on business productivity and competitiveness will be significant. Employees also will suffer from reduced job opportunities as promotions and transfers would be hindered by organization-unit barriers.

The decision to allow the formation of micro-unions is currently the law of the land, and NLRB Regional Offices have been applying the holding in various cases across the country. The effects have been as predicted, as unions have been able to choose the unit to be organized, regardless of whether additional employees may share a community of interests with those in the chosen unit. The House passed the Workforce Democracy and Fairness Act (H.R. 3094) in 2011, which would reverse the *Specialty Healthcare* decision. The Senate has not acted on the bill yet.

AMBUSH ELECTIONS

A. The Ambush Election Rule Raises Free Speech and Due Process Concerns

Issued in June 2011, the NLRB's proposed Ambush Election rule would have shortened the time for union elections to as little as 10 days. The proposed rule would also allow employers only seven days to locate counsel, draft a position brief statement, and prepare for a pre-election hearing before the NLRB. Finally, the proposal imposed a new requirement where employers would have to turn over employee telephone numbers and email addresses to union organizers.

On December 20, 2011 – just days before the expiration of Member Becker's term – the Board issued the final rule. The rule does not contain some of the more onerous aspects of the proposed rule, such as the requirement that employers provide union officials with employee phone numbers and email addresses, but the regulation still raises important free speech and due process concerns for employers. For example, the final ambush rule limits the issues and evidence that can be presented at a pre-election hearing, which may leave important questions unresolved prior to a union election. The rule also eliminates the current 25-day "grace period," which will allow elections to occur in roughly 20 days. The effective date of the rule is April 30, 2012.

B. Practical Effects of the Final Ambush Rule

- The shortened election time frame will effectively deprive employees of the ability to hear from their employer before making a decision about union representation. Union organizers, however, meet with employees and campaign for months in advance before an election petition is filed. As a result, employees will only hear one side of the story—the union's—before having to cast their vote for or against representation.

- There is no need to change the current election time frames as they are reasonable and permit employees time to make an informed decision, which would not be possible under the NLRB's new proposal. The NLRB's own statistics reveal that in 2010, the average election timeframe was 31 days, with over 95% of elections occurring within 56 days.

- Legislative history supports the need for at least a 30-day election period, with former President and then Senator John F. Kennedy stating "there should be at least a 30-day interval between the request for an election and the holding of the election." Kennedy opposed an amendment that failed to provide "at least 30 days in which both parties can present their viewpoints."

- The number of NLRB elections held in 2010 increased over 20% from 2009 levels, with 1,666 elections in 2010 versus 1,321 in 2009. The union win rate decreased slightly in 2010, to 67.6% versus 68.7% the

previous year. 2010 is the 14th year in a row that unions have won more than half of all NLRB elections. With unions winning the majority of secret ballot elections, the system is clearing working, thus illuminating the real reason for the proposal of the rule: big labor payback for EFCA's failure.

- An employer's right of free speech and opportunity to express its views—under Section 8(c) of the NLRA—on the subject of unionization is severely undermined by the proposed regulations.

C. RESPONSES TO AMBUSH ELECTION RULE

- On November 30, 2011, the House passed the Workforce Democracy and Fairness Act (H.R. 3094), which addresses some of the major issues resulting from the Board's regulation. More specifically, the bill prohibits ambush elections by requiring a campaign period of at least 35 days prior to an election. Unfortunately, the bill has become stalled in the Senate.

- CDW, in conjunction with the U.S. Chamber of Commerce, filed a lawsuit in the Federal District Court for the District of Columbia challenging the ambush election rule. The lawsuit seeks to enjoin the rule, and alleges, in part, that the final rule violates the National Labor Relations Act, the Administrative Procedure Act, and the Regulatory Flexibility Act.

- The Board has threatened to enact the remaining provisions of the proposed ambush election rule. In a January 11 interview with Bloomberg BNA, NLRB Chairman Mark Pearce stated that the Board "would continue to evaluate the notice of proposed rulemaking to see what else in the proposed rule could be pursued."

GAG ORDER ON EMPLOYERS

- DOL's proposed rulemaking on persuader activity would change the public disclosure requirements for employers, law firms, consultants, and trade associations that provide services regarding labor relations and union organizing.

- Current law requires reporting for employers, consultants and law firms, where the law firm or consultant directly "persuades" or interacts with employees. The law provides an exemption, however, when a law firm or consultant simply provides advice without directly interacting with employees.

- The proposed change virtually eliminates the "advice exemption," so that businesses would have to provide detailed and confidential information, including possibly proprietary information about business operations and details about contracts for services, including legal services. Activities that would trigger the reporting requirement are expansive and include training for management and supervisors, employee handbooks and documents prepared by attorneys, and materials provided by at conferences or by trade associations.

- Failure to report or filing false or incomplete reports subjects the employer, consultant or law firm, or trade association to civil and criminal penalties.

- The proposed rule will severely limit an employer's access to legal advice and counsel, and "chill" employer free speech, which will have the effect of preventing employees from hearing both sides of the unionization debate.

- DOL has said it plans to release the final rule in August of 2012.