COALITION FOR A
DEMOCRATIC WORKPLACE

Pending NLRB Policy Initiatives

May 2011

Rulemaking

- The National Labor Relations Board (NLRB or Board) has rulemaking authority under the National Labor Relations Act (NLRA), but has successfully promulgated only one substantive rule in its 75 year history. In 1989, the Board promulgated a rule on appropriate bargaining units in acute-care hospitals.
- Over the years, the Board has failed to move forward with several proposed rules.
    - In the early 1990's, the Board issued a proposed rule to implement the *Communication Workers v. Beck* requirements but never followed through with a final rule. Under *Beck,* unionized workers are only required to pay the portion of union dues that are directly related to collective bargaining and contract administration.
    - Also, in the late 1990's a series of appropriations riders blocked the Board from moving forward with its proposed rulemaking on single site bargaining units.
- In 2009-10, the Board hired an outside consultant to provide advice on rulemaking, indicating a likely increase in rulemaking activity.
- December 22, 2010, the Board issued a Notice of Proposed Rulemaking (NPRM) that would require employers covered by the NLRA to post a notice outlining employees' right to organize and bargain collectively.
    - The NPRM would require that employers post the same notice the Department of Labor (DOL) currently requires government contractors to post pursuant to President Obama's 2009 Executive Order. The DOL poster can be viewed here.
    - The NPRM states that if an employer regularly communicates with employees through e-mail or by posting information on an intranet or Internet site, the information must be distributed electronically and that if a significant number of employees are not proficient in English, the employer must post the notice in the language the employees speak.
    - Businesses and other concerned parties have had several complaints with the poster, including its failure to inform employees of their rights under *Beck,* right to work laws and procedures for decertifying unions.
    - Under the NPRM, employers would face various sanctions for failing to post the notice, including (1) being charged with unfair labor practice; (2) having the time limits for filing of other unfair labor practice charges against the employer

extended; and (3) having the Board consider the failure to post the notice as evidence of unlawful motive in other unfair labor practice cases.

- Board Member Brian Hayes (R) filed a dissent to the rulemaking, asserting "the Board lacks the statutory authority to promulgate or enforce," the NPRM.
- The Board provided a 60 day comment period with comments due February 22.

Pending cases with broad policy implications:

- ***Card Check - Lamons Gasket Company***, 355 NLRB 157 (2010)
  - On August 21, 2010 the NLRB, in 3-to-2 decision *Lamons Gasket Co,* announced that it would reconsider its case in *Dana Corp, 351 NLRB 434 (*2007) and invite the public to submit amicus briefs by November 15. A decision is expected sometime thereafter.
  - In *Dana Corp,* the NLRB held that when an employer agrees to recognize a union based on a majority of signed authorization cards, employees must receive written notice of this recognition and of their right, within 45 days of the notice, to either file a decertification petition or support a representation petition by a rival union. This provided employees the immediate right to a secret ballot election in the face of unionization by card check.
  - Prior to the *Dana* case, employees were effectively denied the opportunity to file for an election following card-check recognition for as much as a year. Often during that one year period, parties sign a collective bargaining agreement, which bars employees from seeking an election challenging the union's status for up to an additional three years.
  - Since Dana was decided, the Board has held 54 secret ballot elections in the Dana 45 day periods. In 15 cases - 25% of those elections - the employees have rejected the card check recognition.
  - It is expected that the Board's majority will eliminate the 45 day window and return to the rule prohibiting employees from demanding an election when the employer agrees to card check.

- ***Property Rights - Roundy's Inc. and Milwaukee Building and Construction Trade Council,*** 356 NLRB No. 27 (2010)
  - On November 12, the NLRB invited interested parties to file amicus briefs, the deadline was January 7. A decision is expected sometime thereafter.
  - At issue is whether the NLRB will require employers that allow charitable, well-meaning organizations onto the work premises to provide the same access to union agents, even where the union's intent is not to organize, but simply to disrupt business operations by trying to turn away customers.
  - Such activity is often part of a larger strategy by the union to run non union companies out of business or to pressure them to accede to demands such as the nationally unpopular "card check" scheme that bypasses federally supervised private ballot votes.
  - The Board may be looking at both physical access and electronic access via email, intranet, etc.

- ***Micro Unions - Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9****,* 356 NLRB No. 56 (2010)
    - The NLRB invited interested parties to file amicus briefs by February 22, that deadline was extended into March. A decision is expected sometime thereafter.
    - While the case before the Board deals simply with whether nursing assistants may constitute a bargaining unit on their own or be combined with other nonprofessional staff, the Board is using the case to revisit bargaining units for all industries.
    - The key issue is whether employees performing the same job at a single facility presumptively constitute a bargaining unit for organizing purposes, regardless of any commonality those employees share with others outside the proposed unit.
    - The decision could make it easier for unions to organize by cherry picking a unit composed of the subset of employees most likely to organize regardless of whether those employees constitute a practical unit. For example, the union may choose to organize poker dealers at a casino, rather than all dealers, because it knows the poker dealers support the unions, while the blackjack and other dealers may not.
    - Employers who are organized would in many cases need to deal with several small units (fractured units). Fractured units could cause the following issues for employers and employees:
        - The employer could face separate wage schedules, benefit packages and other administrative demands for similarly situated employees (e.g., different collective bargaining agreements for poker and blackjack dealers, cashiers and stockers, manufacturing production employees with similar skills but working on different machines, etc.).
        - This could overwhelm businesses, particularly small businesses, with administrative requirements – imaging a small business franchise owner with 4 fast food restaurants managing 8 or more separate relationships with different unions; or a retailer with separate units of cashiers, stockers and floor associates; or a manufacturer with a different unit for each different piece of machinery in the facility.
        - This would greatly limit an employer's ability to cross train and meet customer and client demands via lean, flexible staffing as employees could not perform work assigned to another units.
        - Employees also would suffer from reduced job opportunities as promotions and transfers would be hindered by organization unit barriers.

- ***Card Check - Dana Corporation and UAW***, 356 NLRB No. 49 (2010)
    - Three employees brought unfair labor practice charges against both the Dana company and the UAW based on an agreement entered into between the company and the union prior to the union's achievement of majority status. The agreement provided for neutrality in the union's organizing campaign and also covered terms and conditions of employment, including attendance rules; classifications; compensation; health coverage; overtime rules; team-based work arrangements and incentives.

- The employee-charging parties, and the Board's General Counsel, alleged that the agreement provided unlawful support to the union in its organizing campaign, and amounted to an unlawful agreement with a minority union.
- The Board ruled the agreement lawful, essentially reasoning that all of the provisions agreed to between Dana and the UAW simply weren't enough to rise to the level required for a finding of unlawful support or agreement with a minority union.
- Member Hayes pointed out that the Board's decision effectively overruled long-established Board precedent and set the stage for "the establishment of collective-bargaining relationships based on self-interested union-employer agreements that preempt employee choice…."
- Appeal is pending.

- ***Union Threats - Mastec Direct TV and Communications Workers Local 3871***, 356 NLRB No. 110 (2011)
  - Employer sought to have election set aside based on threats made by pro-union employees against other employees and a supervisor.
  - The Board held that the two employees making threats were not agents of the union (which would have triggered a lower standard of misconduct required to set aside the election) despite their being on an "organizing committee" and being the main points of contact between the union organizers and their fellow employees.
  - The threats included a threat to "whip" a specific employee's "ass" and to sabotage his work; an anonymous call to another employee's home threatening to "get even" with him if he "back-stabbed" the pro-union employees; a threat made in front of three or four employees to "bitch slap" two other employees, or to "whip their f—n' ass" if they "cost us the election;" and to "whip [a supervisor named] Eddy's ass" if the union lost.
  - The Board concluded that the threats were not sufficient to meet the standard of being "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election possible."

- ***Elections - Mental Health Associates and SEIU Local 509***, Case 1-RC-22449
  - The NLRB has not requested *amicus* briefs in this case, but the SEIU International filed an *amicus* brief *without* an invitation.
  - The issue raised in the SEIU's *amicus* brief is whether or not the Board should maintain its presumption that the work site is the best place to hold a representation election. The work site is preferred as the election location, as it increases voter participation, is convenient for employees and minimizes workplace disruption. In addition, employees who opposed unionization may be hesitant to go to another location out of fear of union monitoring and reprisal, particularly those employees who refused to sign cards.
  - SEIU International argues in its brief that the Board should reverse its long standing presumption that the work site is the best setting for a representation election - and instead institute a presumption that the election should occur at a neutral site.
  - Member Becker has advocated for neutral sites for elections.

- CDW filed a motion on April 21 asking the Board (1) permission to file a brief (2) to allow us to May 31st to submit the brief and (3) to issue a general invitation to all interested parties to file briefs.
- The Board rejected CDW brief indicated it would not address the election presumption in this case, but may do so in the future.

- ***Customer Relations - <u>Southern New England Telephone Company (AT&T) and Communication Workers of America</u>***, 351 NLRB 118 Mar. 24, 2011.
  - Chairman Liebman and Member Becker, over the dissent of Member Hayes, ruled that Southern New England Telephone Company (a subsidiary of AT&T) violated the law by disciplining and threatening to discipline technicians who wore a "prisoner's shirt" to calls at customer residences.
  - The "prisoner's shirt" was a white T-shirt with "Prisoner Number XXXX" printed on the upper left chest area, and "Prisoner of AT$T," along with vertical black stripes on the back.
  - AT&T prohibited wearing the prisoner's shirts on the theory that a customer, on answering the door and finding an individual wearing a shirt with the described markings, would likely cause customers to be fearful and refuse service, thereby disrupting business and harming customer relationships. Member Hayes, believed that such harm constituted "special circumstances" that justified the restriction of free speech represented by banning the shirts. Chairman Leibman and Member Becker disagreed, finding the shirts unlikely to disrupt business.
  - Like many Board cases, this one turns on interpretation of the facts to determine whether the mischief associated with the "prisoner's shirts" rose to the level of "special circumstances." The ruling demonstrates the extent to which the current Board is willing to condone actions harmful to business to allow expression of union support.

- ***Government Control of Business Location - <u>Boeing Company and International Association of Aerospace Workers District Lodge 751</u>***, Case 19-CA-32431
  - On April 20, 2011, Acting General Counsel Lafe Solomon issued a complaint against Boeing. The complaint alleges that Boeing unlawfully transferred the production of a line of Boeing 787 Dreamliners from union facilities in Washington state and Oregon to a non-union facility in South Carolina. The complaint seeks an order requiring Boeing to transfer the work to the union facilities.
  - While the issuance of a complaint by the General Counsel does not constitute an action of the Board itself, the General Counsel and Board Majority seem of the same mind.
  - *Boeing* is significant and deeply disturbing for a number of reasons.
    - First, the General Counsel is attacking one of the most fundamental of decisions traditionally at management discretion: the right to decide where to perform newly-acquired work.
    - The work at issue in *Boeing* is the assembly of a *second* line of production, with the first line of production remaining at the union facilities.
    - There are no allegations of any lost union jobs in Washington State and Oregon; in fact, the company has added jobs to those facilities since its decision to assemble the second line in South Carolina.

- Boeing has clearly invested substantial funds to manufacture in South Carolina, and the relief sought by the General Counsel will mean the loss of hundreds of current and future jobs in that state.

General Counsel suits against South Dakota and Arizona

- On April 22, the General Counsel sent the Attorney General of South Dakota, South Carolina, Utah and Arizona a letter stating the NLRB would be filing suit seeking to invalidate state constitutional provisions in Arizona and South Dakota that require secret ballot elections when employee choose whether or not to be represented by a union.
- The provisions were enacted in all four states as part of ballot initiatives in the last election.
- The Board says in the letter the provisions are preempted.
- The Board also states it does not intend to sue Utah and South Carolina at this time because of limited resources.
- The Board notably has declined to challenge state and local laws that are likely preempted when those laws are supported by Big Labor.

Other General Counsel Actions

- The General Counsel also issued several memoranda instructing field attorneys to be more aggressive with penalties and injunctions, particularly in the case of alleged violations occurring during organizing campaigns.
- Another memorandum states the General Counsel will afford less deference to arbitration decisions that are part of a collectively bargained grievance process, if the underlying issues may also give rise to an unfair labor practice in violation of the National Labor Relations Act.
- The General Counsel also has pursued several cases where employees have criticized their employer or supervisor on social media platforms. The GC's position is that comments made through social media that criticize the employer or supervisors constitute protected concerted activity where co-workers of the complaining employee are among the employee's social network. Despite the potential widespread visibility of such comments, the GC essentially equates them to a break-room discussion about working conditions. The GC is clearly being aggressive in such cases, announcing a February 8, 2011 settlement with a Connecticut ambulance company and an April 27, 2011 settlement with build.com, both of which agreed to change their social media policies. The extent to which an employer may discipline employees for statements criticizing the company or individuals in the company on social media platforms is unclear at this point, since the first reported cases have settled. This issue is sure to give rise to additional cases and to be clarified only as decisions are issued by the Board and then the courts.