

COALITION FOR A
DEMOCRATIC WORKPLACE

Obama NLRB Timeline
September 2011

2009

- Ongoing** President Obama invites Big Labor to the Whitehouse, with then SEIU President Andy Stern visiting 38 times during 2009.
- January 30-February 6** Obama issues pro-labor Executive Orders, including EO 13496, a requirement that all federal contractors post notices of employees' rights to organize and encouraging federal agencies to use project labor agreements for large-scale projects. The author of EO 13496 is then Obama Transition Team member and future recess appointee to the NLRB Craig Becker.
- March 3** Obama video tapes speech to AFL Executive Committee. He states: "[A]s we...work to...pass the Employee Free Choice Act...you will always have a seat at the table."
- March 5** Vice President Biden addresses the AFL Executive Committee in Miami: "[T]hat's why there's one thing we have to do. This is all going to be difficult, and one of the most difficult things will be to reinstitute that basic bargain. And I think the way to do that is the Employee Free Choice Act."
- July 9** Obama nominates Craig Becker (D), Mark Pearce (D) and Brian Hayes (R) as members of the NLRB.
- Becker, now serving as a recess appointee after failing to be confirmed by the Senate, is the most controversial. A former law school professor and long-time lawyer for the SEIU and AFL-CIO, Becker has advocated for excluding employers from the union election process and declared that the NLRB has the authority to drastically alter the election process without any Congressional action.
- Pearce is a long-time union-side labor lawyer from Buffalo, New York. He was confirmed by the Senate on June 22, 2010 for a term expiring August 27, 2013.
- Brian Hayes practiced as a management-side labor lawyer for twenty-five years before serving as a Senate staff attorney, most recently as Republican Labor Policy Director for the Committee on Health, Education,

Labor, and Pensions. He was confirmed by the Senate on June 22, 2010 for a term expiring December 16, 2012.

October 13 Department of Labor implements the AFL-CIO's recommendations to the Obama administration by relaxing union financial reporting requirements which had been designed to fight union corruption.

2010

Throughout 2010 Obama continues courting Big Labor, with AFL-CIO President Rich Trumka frequently visiting the White House throughout 2010.

February 9 Senate fails to confirm controversial Board nominee Craig Becker. Becker fails to secure the 60 votes needed to proceed to a confirmation vote with a vote of 52 to 33 - all Republicans and 2 Democrats opposed.

March 27 President Obama appoints Craig Becker and Mark Pearce to the Board as recess appointees. Pearce is eventually confirmed by the Senate on June 22.

June 10 NLRB requests information about the acquisition of electronic voting services to support "mail, telephone and web-based" ballots. Among other adverse impacts, using electronic means to permit off-site, or remote, voting during union organizing elections could subject employees to a level of intimidation and coercion that does not occur during an on-site, private ballot election that is directly supervised by the NLRB. In this manner, electronic voting bears a striking resemblance to the card-check scheme.

June 21 Obama appoints long-time NLRB lawyer Lafe Solomon Acting General Counsel.

September 2 NLRB requests amicus briefs in the *Rite Aid Store* case, revisiting the *Dana Corp.* decision which gave employees a 45-day window after a card check campaign to request a secret ballot election. A reverse of *Dana Corp.* would deny employees the limited right to secret ballots in the face of card check agreements.

September 14 Labor Secretary Solis tells AFL-CIO leaders that she and the White House will "make the strongest case possible for the Employee Free Choice Act."

September 30 Acting General Counsel Solomon issues a memo to all Board Regions directing more aggressive pursuit of 10(j) relief (actions in federal court seeking injunctions in unfair labor practice cases).

- November 17** NLRB requests amicus briefs in the *Roundy's Inc.* case. At issue is whether the government can force any employer that allows charitable, well-meaning groups onto the premises to also allow union organizers whose purpose in many cases is to turn away customers through boycotts and similar actions. Such activity is often part of a larger strategy to pressure employers to accede to demands such as the nationally unpopular "card check" scheme that bypasses federally supervised private ballot votes.
- December 1** DOL rescinds Form T-1, a union financial disclosure form, as recommended by the AFL-CIO to the Obama Administration.
- December 6** NLRB issues its decision in *Dana Corporation and UAW* (a separate case from the aforementioned *Dana* decision). In *Dana*, 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.
- Over Member Hayes's dissent, Chairman Leibman and Member Pearce distinguished established precedent and 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. In his dissent, 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...."
- December 20** NLRB Acting General Counsel Lafe Solomon issues a memo to regional offices directing new enforcement remedies against employers accused of unfair labor practices, including a requirement that unions be granted more worksite access and given employee home contact information
- December 21** NLRB issues its first notice of proposed rulemaking in many years, seeking to require employers to post a notice of employees' rights to organize under the National Labor Relations Act. The proposed notice fails to inform employees of: (1) their right to refrain from joining a union (2) the right to not pay the portion of union dues not attributable to bargaining (such as fund supporting political causes)
- December 22** DOL publishes its semi-annual regulatory agenda, which includes its intent to issue a proposed rule on "persuader activity" in the fall of 2011. This new rule could expand employers' duty to report the time and money that companies spend via both in-house personnel and outside legal

counsel in ensuring it complies with the laws during organizing campaigns. It is also likely to have a chilling effect on access to counsel during organizing campaigns.

December 22 NLRB requests amicus briefs in *Specialty Healthcare*, revisiting the *Park Manor Care Center* decision. In this case, the Board will revisit “the procedures and standards for determining whether proposed units are appropriate in *all* industries” 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. Employers unionized through several small units, would need to manage multiple small units of similarly situated employees, with potentially different pay scales, benefits, work rules and bargaining schedules.

2011

Ongoing AFL-CIO boss Trumka continues visiting the Whitehouse two to three times per week.

January 5 Terry Flynn (Republican Member) nominated by President Obama to serve on the NLRB. Lafe Solomon nominated to serve as General Counsel. President Obama again nominates Craig Becker for a full term on the Board.

January 11 DOL issues request for information on electronic voting in elections for union officers.

January 14 NLRB threatens to sue states over voter initiatives that guaranteed secret ballot elections for workers deciding whether or not to join a union. Board authorizes General Counsel to file suit in federal court to block enforcement of such state laws.

January 20 Acting General Counsel Solomon issues a memo to regional offices directing them not to defer to arbitrators’ decisions used to settled disputes under collective bargaining agreements as they have in the past. The change in direction give unions a “second bite at the apple,” allowing for resort to the now-labor-friendly NLRB after losing arbitration cases. The impact for employers is additional uncertainty, litigation and the likelihood of inconsistent results.

February 8 NLRB reaches settlement with a Connecticut ambulance company over employee discharged for Facebook comments disparaging the company. Company revises policy and settles privately with ex-employee. General Counsel’s position equates social media comments to a break-room discussion among co-workers about working conditions, as long as there are at least some co-workers among the complaining employee’s social network. Not only do employers need to be cautious in dealing with disparagement of management and the company, but the General Counsel’s stance could potentially hinder discipline of employees harassing coworkers.

March 11

Board issues its decision in *Mastec Direct TV*. The employer sought to have an election which the Communication Workers won 12-14 set aside as a result of multiple threats of violence made by pro-union employees against employees not supporting the union. The Board first found that the two employees making threats (there seems to have been no dispute that threats were made) 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.

Members Leibman and Becker, over the dissent of Member Hayes, concluded that the threats described 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.” In other words, repeated threats of violence by pro-union employees are just fine as long as they don’t exceed a certain non-defined level.

March 11

Acting GC Solomon issues two memos. One establishes more aggressive guidelines for back pay awards: daily compound interest on awards; pay for job search expenses; employers to pay any increased tax on lump sum awards. The second memo outlines a plan to seek the overturning of two 2007 Board rulings that (a) offset back pay awards if a former employee fails to look for work within two weeks and (b) place on the General Counsel the burden of showing reasonable job search efforts. Solomon directs all Regional offices to look for cases providing best fact platforms to bring before the Board to facilitate overturning the 2007 cases.

March 24

Board issues its decision in *Southern New England Telephone Company (AT&T) and Communication Workers of America*. The Board 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. AT&T, and 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.

April 20

NLRB issues complaint against Boeing, seeking to force the relocation of a 787 Dreamliner production line from a non-union facility in South Carolina to union facilities in Washington State and Oregon. The work in question was a second line of Dreamliner production; the first line remained in place at the union facilities which had actually seen an increase in union jobs despite locating the second line in South Carolina. This case represents an attack on the basic right of management to determine where to carry out newly-acquired business and an indication that the current Board has no trouble seeking an order that will waste an enormous investment in South Carolina and cause the loss of hundreds of non-union jobs for the sake of further augmenting an existing union workforce.

April 22

Acting General Counsel Solomon sends a letter to the Attorneys General of Arizona, South Carolina, South Dakota and Utah advising them that he has directed his staff to file suit against Arizona and South Dakota, seeking on grounds of federal preemption to invalidate provisions of those states’ laws requiring secret ballot elections. He states that in order to conserve scarce resources he has decided not to sue South Carolina and Utah, though he reserves the right to do so in the future.

April 27

NLRB reaches settlement with build.com over employee discharged for Facebook comments. The General Counsel continues to be aggressive with social media. This issue will only develop as cases make their way through the Board and into the courts.

May 6

General Counsel files suit in federal court in Arizona seeking a declaration that Arizona’s state constitutional amendment guaranteeing a secret ballot election is preempted by federal law.

May 9

NLRB’s Buffalo, NY Region issues a complaint against Hispanics United of Buffalo, a non-profit agency providing services to low-income clients. The complaint alleges that the agency fired five employees for comments posted on Facebook and that such comments amounted to protected concerted activity under the NLRA.

May 26

NLRB rules in *Sheetmetal Workers International Association and Brandon Regional Medical Center* that a union’s protest on public property in front of a hospital, including the display of a sixteen-foot-tall inflatable rat was not coercive and therefore did not constitute an unlawful secondary boycott. The giant inflatable rat was tethered to a tractor trailer with at least six leaflet-carrying union members milling around, and one union

member held leaflets out to vehicles entering and exiting the hospital's parking lot. When asked by a hospital representative what was going on, one of the union members stated that he was "targeting" the public and the hospital's patients and that he was "picketing" over the use of non-union contractors.

Much like the *AT&T* case in which the majority found wearing "prisoner's shirts" was unlikely to upset AT&T customers, this case has the majority viewing what most would see as an extreme set of facts and saying "what's the problem?" In his dissent, Member Hayes said he would have upheld the finding of the administrative law judge that the union's display was "unmistakably confrontational and coercive" and amounted to picketing designed to interfere with the neutral hospital's business.

The majority held that there was no evidence of coercion or intimidation, and that none of the union's conduct amounted to picketing. In its quest to expand unions' ability to inflict damage on employers, the Board has apparently thrown out the age-old legal concept of *res ipsa loquitur*, meaning "the thing speaks for itself." If a man stands on a sidewalk in front of a factory and an anvil falls on his head, the law presumes that someone was negligent without requiring additional facts. Not so with the Obama NLRB.

June 17

Acting General Counsel Solomon testifies in South Carolina before a House Oversight Committee and claims that in issuing his complaint against Boeing he did not intend to harm any South Carolina workers. He then explains that he is limited in his ability to comment by his pending lawsuit in which he seeks to move a Boeing manufacturing line out of South Carolina.

June 22

One day after the DOL issued a notice of proposed rulemaking that would severely restrict employers' free speech rights and due process rights, as well as their access to legal counsel, the NLRB issued a notice of proposed rulemaking that would radically overhaul union election procedures, stacking the deck in favor of union organizers at every step of the process. The Board wants to give unions detailed personal contact information about employees; force elections in as little as ten days; force elections even where the issue of which employees are eligible to vote is in dispute; and create new and burdensome filing requirements under which the slightest omission by an employer would result in irrevocable waiver of its legal rights.

The Board wants to change election rules only months after its Acting General Counsel's report on fiscal 2010 elections characterized their timeliness and resolution rates as "outstanding." Dissenting Republican Member Hayes termed the proposed changes "egregious," and stated plainly that the "problem" the majority is trying to fix is not with election procedures, it is that unions aren't winning enough of them.

Given the obvious behind-the-scenes collaboration between the Board and the DOL, and the Board's plainly activist pro-union rulings, it is plain

to see that the Obama administration is on a mission to enact EFCA administratively, despite the fact that Congress has clearly recognized the public's opposition and the threat to our economy that EFCA poses.

August 26

The NLRB issues its decision in *Lamons Gasket Company*, over-ruling its 2007 decision in *Dana Corp.* In *Dana*, when an employer voluntarily recognized a union to represent a group of employees without a secret ballot election, employees in the group or rival unions were allowed 45 days to file petitions of their own. Employees not wanting a union could seek decertification, and rival unions could seek an election to replace the original. Over the strong dissent of Member Brian Hayes, the majority threw out *Dana* and applied an election bar (new elections are barred for one year after certification by NLRB election and for the duration of a collective bargaining agreement) that would last from six months to four years after voluntary recognition. The decision represents another step toward an agency-created EFCA.

August 26

The NLRB issues its decision in *Specialty Healthcare* and sets the stage for unions to organize "micro-units." Once again, over the vehement dissent of Member Hayes, the majority overturned its 1991 decision in *Park Manor* in ruling on the appropriateness of a nursing home bargaining unit. In *Specialty Healthcare*, the union had filed a petition seeking to represent a group of certified nursing assistants (CNAs). The employer argued that a unit of CNAs alone was inappropriate, and that to be appropriate the group should include its other non-professional employees, such as clerks, maintenance and food service employees.

In *Park Manor* the Board had considered whether 1974 amendments to the NLRA and 1989 Board regulations addressing the appropriateness of bargaining units in hospitals should apply to nursing homes. The rules for hospital bargaining units are quite specific, in contrast to the more general "community of interest" requirements that apply outside the healthcare industry. Community of interest is a measure of whether employees' jobs are similar enough to justify grouping them together for purposes of union representation. The 1989 regulations were the product of approximately two years of study involving the issuing of multiple notices of proposed rule-making, numerous public hearings and the submission of extensive comments and information about the industry. (This process stands in stark contrast to the Obama NLRB's current rush to overhaul the entire election procedure with minimal public input.)

Park Manor did not strictly apply the hospital rules to nursing homes, but struck a middle ground by requiring bargaining unit appropriateness to be determined considering (a) the information obtained in the process of establishing the 1989 regulations about the healthcare industry; and (b) NLRB rulings issued prior to the 1989 regulations. The *Specialty Healthcare* ruling throws out *Park Manor* and, while claiming to revert to the same community of interest standards that apply generally, actually goes a step further and imposes a higher standard on employers challenging a proposed unit.

Under the new ruling, when a union files a petition, the Board will first consider whether members of the proposed group have a sufficient community of interest in relation to each other. If so, the unit will be found appropriate unless the employer “demonstrates that employees in the larger unit share an *overwhelming* community of interest with those in the petitioned-for unit.” (Emphasis added.) The “overwhelming” part of the equation represents a higher standard previously applied only in a very narrow and rarely encountered type of situation. It is most certainly *not* the general rule, as the majority contends in its opinion.

With this new ruling, unions will begin to target whatever small groups of employees are friendly to organizers, and it will be extremely difficult for employers to argue that broader groups are appropriate. If poker dealers in a casino, for example, lean toward the union while other dealers do not, *Specialty Healthcare* will make it easy for the union to get a unit of only poker dealers approved, and nearly impossible for the employer to argue that all dealers should be included in the unit. While the majority downplays the significance of *Specialty Healthcare*, Member Hayes rightly points out in his dissent that the decision is a game changer, another administrative step toward EFCA.

August 30

NLRB issues new regulation requiring, for the first time in the seventy-five year history of the NLRA, that employers post detailed notices outlining organizational rights and providing contact information for the NLRB. This unnecessary regulation comes out ironically four days after the *Lamons Gasket* decision. It is ironic in that one of the majority’s stated reasons for over-ruling *Dana* was that it had required the posting of a notice of the right to seek an election after a voluntary recognition. This, according to the majority, undercut the Board’s status as a neutral agency. For the Obama NLRB, any notice that tells employees how to contact the Board, or that a petition for election has been filed (required for decades under a case called *Excelsior*) is just fine, but any notice that tells employees who never got to vote how they can ask the Board for an election just sends the wrong message. As Member Brian Hayes has observed in numerous dissents, this NLRB upholds long-standing Board law when it is likely to increase union density, but anything not likely to do so has to go.