COALITION FOR A
DEMOCRATIC WORKPLACE

Obama NLRB Timeline
February 2014

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, who served 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 that expired 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 admitting he visits the White House "two or three" times per week.

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 Then 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). This rule would eventually be found unlawful by several courts.

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

January 5 Terry Flynn (Republican Member) is nominated by President Obama to serve on the NLRB. Lafe Solomon is 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 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 hospitals 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 loquitor,* 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 "persuader" 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 rule became known as the "ambush" election rule. 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 voluntary 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 election. 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. Application of *Specialty Healthcare* in various industries occurs over the next several years, resulting in a rise in "micro units," including units consisting solely of employees in women's shoe department and a fragrance department in retails stores and a formation of a production unit separate from maintenance employees in manufacturing plant.

August 27 NLRB Chairman Wilma Liebman's term expires, leaving the Board with only three members – two Democrats and one Republican – the minimum number needed for a quorum. The White House designated Member Mark Gaston Pearce – a former union attorney – to be Board Chairman upon Chairman Liebman's departure.

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. The rule never went into effect as several courts have found it unlawful.

September 15 The House passes the Protecting Jobs from Government Interference Act (H.R. 2587). The "Boeing Bill" passed 238 to 186, with eight Democrats voting for the bill and seven Republicans voting against the bill. H.R. 2587 would prohibit the NLRB from ordering an employer to close, relocate, or transfer employment as a remedy for an unfair labor practice.

September 26 CDW joins a lawsuit filed by the National Association of Manufacturers to block the NLRB's disastrous notice posting regulation. The lawsuit alleges, in part, that the NLRB lacked the statutory authority to promulgate a rule requiring employers to display such a notice and the rule interferes with employer free speech rights. The suit eventually ends up in the U.S. Court of Appeals for the District of Columbia and the court strikes down the rule.

November 30 The House votes 235 to 188 in favor of H.R. 3094, the Workforce Democracy and Fairness Act. H.R. 3094 addresses the issues created by the Board's "ambush" election rule, as well as its decision in *Specialty Healthcare* (the micro union case). Specifically, the bill would restore the criteria used to determine an appropriate bargaining unit, thus preventing the proliferation of "micro unions." The bill would also prevent the Board from pursuing its "ambush" election regulation. Six Democrats voted in favor of the bill, while 8 Republicans voted against it.

November 30 The NLRB convenes a one-hour public meeting at Board headquarters to discuss its proposed ambush election regulation. The two Democrats decide they will proceed with a limited number of amendments to the NLRB election process, which are taken from the larger NPRM that was issued in June. Chairman Pearce indicates the Board may proceed with rule as originally proposed at later date. Member Hayes notes various failures of the Board to adhere to its own internal rules.

December 9 Following the ratification of a four-year collective bargaining agreement between its members and Boeing, the union requests that its ULP against Boeing be withdrawn and the Board approves. In the end, the union was able to use the NLRB to increase its leverage at the bargaining table by convincing the agency to mount an unprecedented prosecution. The NLRB's audacity in bringing the outrageous suit and the influence the suit had on negotiations make clear the agency has abandoned its role as a neutral arbiter of the law.

December 14 President Obama announces his intention to nominate attorneys Sharon Block and Richard Griffin as members of the NLRB. Block was DOL's deputy assistant secretary for congressional affairs, while Griffin was general counsel of the International Union of Operating Engineers.

December 20 In anticipation of the Board issuing its finalized rule on ambush elections, CDW, in conjunction with the U.S. Chamber of Commerce, files 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 Federal District court held Member Hayes did not participate in the rulemaking, so the Board failed to meet its quorum requirement. The NLRB appealed to the U.S. Court of Appeals for the DC Circuit. The case has been held in abeyance by the court awaiting possible Supreme Court review of D.C. Circuit's decision in *Noel Canning v. NLRB.* If the Supreme Court upholds the reasoning in *Canning,* Member Becker was not constitutionally appointed and the Board lacked authority to issue the ambush rule on those grounds, regardless of whether or not Members Hayes participated in the rulemaking.

December 21 As expected, the Board issues its final rule regarding amendments to its election procedures. The rule does not contain some of the more onerous aspects of the proposed rule, such as the 7 day period for a hearing, the required statement of position, and the requirement that employers provide union officials with employee phone numbers and email addresses. Nevertheless, the final rule would have effectively deprived employers of many due process and free speech rights and truncated the election time frames, making it more difficult for employees to hear from employers prior to the election.

December 27 The Board issues its decision in *Lancaster Symphony Orchestra*. The Board overrules longstanding precedent and rules that musicians playing for a symphony orchestra are employees, not independent contractors, and therefore are eligible to vote on whether they desire union representation. Applying the common-law agency test, the Board determined that the employer failed to carry its burden of demonstrating that the musicians were independent contractors. In dissent, Member Hayes found that the musicians' ability to take as many or as few jobs as desired and to work for various employers weighs in favor of independent contractor status.

December 30 The Board issues its decision in *DTG Operations*. In *DTG Operations*, the union petitioned for a unit of 31 rental service agents at a car rental facility. The Regional Director dismissed the petition, determining that the appropriate unit for bargaining was a wall-to-wall unit containing all 109 hourly employees because of the employees' functional integration. The Board applied *Specialty Healthcare* and reversed the dismissal, ruling that the other hourly workers did not share an overwhelming community of interest with the rental service agents.

In his dissent, Member Hayes notes that *DTG Operations* provides confirmation that *Specialty Healthcare* will lead to "balkanization" of the workforce: "As long as a union does not make the mistake of petitioning for a unit that consists of only a part of a group of employees in a particular classification, department, or function, *i.e.*, a so-called fractured unit, it will be impossible for a party to prove that an overwhelming community of interests exists with excluded employees. Board review of

the scope of the unit has now been rendered largely irrelevant. It is the union's choice, and the likelihood is that most unions will choose to organize incrementally, petitioning for units of the smallest scale possible."

December 30 The Board issues its decision in *Simon DeBartolo Group*, which applies the Board's rationale in *New York New York* to a situation involving a shopping mall and its maintenance contractor. Employees of Control Building Services (the contractor) sought to distribute union handbills within shopping malls during an organizing drive. Agents of the mall (the property owner) directed the individuals to stop distributing the flyer and to leave the premises. The Board ruled that the property owner violated the section 7 rights of the contractors' employees because under *New York New York*, the contractors' employees must be afforded the same rights as the owner's employees.

Member Hayes dissented, arguing that the Board failed to observe the distinction – noted by the Supreme Court – between access rights of a property owner's employees and those of nonemployees. Hayes also argued that the Board did not consider the owner's private property interest, which is supposed to be evaluated in a balancing test with workers' section 7 rights.

2012

January 4 President Obama announces his intention to nominate Sharon Block, Richard Griffin and Terence F. Flynn to fill the three empty seats on the NLRB, giving Democrats a 3-2 majority on the Board. Block, a Democrat, was Deputy Assistant Secretary of Labor for Congressional and Inter-Governmental Affairs. Griffin, also a Democrat, was General Counsel for the International Union of Operating Engineers. Flynn, a Republican, served as Chief Counsel to Member Hayes.

The recess appointments occurred when the Senate was still in session, so are not constitutional. While the Constitution certainly provides the President with the authority to make recess appointments, such action has traditionally required a recess of more than 3 days in order for the president to exercise this authority. The President's actions dramatically increased the labor relations temperature in Washington — a situation that is already highly partisan due to the appointment of Craig Becker (whose term expired January 3), the Boeing complaint, and other NLRB anti-business initiatives. Various law suits are eventually filed challenging the validity of the recess appointments, resulting in two U.S. Court of Appeals courts to find NLRB appointees unconstitutional.

January 6 The Board releases its decision in *D.R. Horton, Inc.* In *D.R. Horton*, the Board ruled that an employer's mandatory arbitration agreement, which precluded consolidation of claims or class actions, violated employees' rights to participate in concerted activity under Section 7 of the National Labor Relations Act. Member Brian Hayes recused himself from the case

and therefore did not author a dissent, raising the question of whether the case complies with the Supreme Court's decision in *New Process Steel*, which requires the Board to have a minimum quorum of three members. The decision is an unprecedented extension of labor law into class action litigation.

January 9 National Labor Relations Board Chairman Mark Gaston Pearce swears in "recess" appointees Sharon Block (D), Richard F. Griffin (D) and Terence F. Flynn (R) as board members, giving the agency a full complement for the first time since August 2010. Setting aside the issue of whether or not the Senate was in recess, the President never officially submitted all the required paperwork for Block and Griffin (e.g., tax data, biographic information, records of campaign contributions, or information about potential civil or criminal judgments or conflicts of interest). This means that the Senate never even had the opportunity to evaluate the nominees, belying the administration's notion that the Congress refused to act.

March 2 The U.S. District Court for the District of Columbia, in the case brought by CDW and the National Association of Manufacturers, issues an injunction preventing implementation of the NLRB's notice rule. The Court found that the Board exceeded its authority by declaring an employer's failure to post the notice to be an unfair labor practice, and by purporting to toll the NLRA's statute of limitations for filing a ULP.

March 15 CDW and the U.S. Chamber of Commerce move to intervene in *Noel Canning v. NLRB*, an appeal to the U.S. Court of Appeals for the D.C. Circuit challenging the validity of Obama's "recess" appointments to the Board during a *pro forma* session of congress. Noel Canning ultimately prevails in this case and the court finds the appointments unlawful.

April 17 Citing the D.C. District Court's March 2 ruling, as well as an April decision by the U.S. District Court for the District of South Carolina ruling that the Board lacked authority to issue the notice rule, the NLRB puts implementation of the rule on hold indefinitely.

May 14 The Federal District Court for the District of Columbia strikes down the Board's ambush election rule. The Court accepted the argument advanced by CDW and the U.S. Chamber of Commerce that the Board's purported approval of the final rule was invalid due to the lack of a quorum. With three sitting members at the time, the minimum required for the Board to act, Chairman Pearce and then-member Becker voted to approve the final rule and immediately submitted it for publication in the Federal Register without Member Hayes having cast a vote. Attempting to justify their actions without a vote by Member Hayes, the Board brazenly argued that previous statements by Hayes were the equivalent of a vote, and alternatively that a quorum existed for voting purposes simply because Member Hayes occupied a seat on the Board. Despite quoting Woody Allen for the proposition that 80% of life is just showing up, the Court was not amused. The following day the Board suspended its invalid rules. The NLRB eventually appealed the case to the U.S.

Court of Appeals for the DC Circuit. That court is holding the case in abeyance.

June 13 CDW files an amicus brief in retailer Bergdorf Goodman's appeal to the NLRB of a Regional Director's determination that sales employees in the women's shoe department—as opposed to all store sales employees—constituted an appropriate bargaining unit for purposes of a representation election. *Bergdorf Goodman* is the most high-profile of many representation cases affected by the Board's disastrous ruling in *Specialty Healthcare*, which sets the stage for unions to organize micro-unions. With the NLRB unlikely to overturn *Specialty Healthcare*, the case is likely to continue in the federal courts.

August 7 The NLRB appeals to the US Court of Appeals for the DC Circuit, challenging the May 14 District Court decision finding the lack of a quorum in approving its ambush election rules. The case has been held in abeyance by the court awaiting possible Supreme Court review of D.C. Circuit's decision in *Noel Canning v. NLRB.* If the Supreme Court upholds the reasoning in *Canning,* Member Becker was not constitutionally appointed and the Board lacked authority to issue the ambush rule on those grounds, regardless of whether or not Members Hayes participated in the rulemaking.

November 8 The Acting Regional Director ("ARD") of Region One of the NLRB, in Boston, issues a Decision and Direction of election in *Macy's, Inc.*, ordering an election for a proposed bargaining unit consisting of only full and part-time fragrance department employees in the Saugus, Massachusetts Macy's store. In yet another disastrous ruling perpetrated under *Specialty Healthcare*, the ARD allowed the petitioning union to cherry pick a small, isolated group of employees, declining to certify either a wall-to-wall unit, or a unit of all sales employees as proposed by the employer. The significance of the ruling, and the threat to business of *Specialty Healthcare*, are starkly apparent in light of the fact that the same union lost an election for a wall-to-wall unit in the Saugus store in March of 2011.

December 14 The Board issues its decision in *United Nurses and Allied Professionals (Kent Hospital)*. The Charging Party (the NLRB equivalent of a plaintiff) exercised her rights under the Supreme Court decision of *Communication Workers v. Beck* to resign her union membership and request an accounting of how the required union dues were being spent. Under *Beck*, bargaining unit members not wanting to join the union can only be charged dues to the extent that the funds pay for contract negotiation, administration and grievance adjustment. Over the dissent of Member Hayes, the Board threw out conventional wisdom and ruled that the union's lobbying activities were sufficiently beneficial to the bargaining unit to be chargeable to *Beck* objectors. While the Court in *Beck* balanced 1st Amendment free speech and association rights against the obligation to pay for expenses directly related to representation, the Obama NLRB is more concerned with putting money in union coffers than

the Constitutional problem of forcing employees to pay for union political speech.

December 16 The term of Republican Board Member Brian Hayes expires, leaving Chairman Mark Gaston Pearce and Members Sharon Block and Richard Griffin, all Democrats. Throughout his two-year term, Hayes, in a long line of dissenting opinions, often served as the only voice of reason in an agency seemingly bent on re-writing federal law in favor of unions.

2013

January 25 The U.S. Court of Appeals for the DC Circuit rules in *Noel Canning* that the appointments of Board Members Sharon Block and Richard Griffin (as well as Terence Flynn, who has since resigned) were illegal. Block and Griffin were appointed when the Senate was in *pro forma* session, meeting every three days. Ruling that recess appointments cannot be made during breaks in a session, the Court struck down a decision of the Board for lack of a quorum. The Court was blunt in concluding that Obama's appointments trampled the Constitution's principle of separation of powers. More importantly, the decision calls into question not only the validity of a great number of Board decisions, but also the validity of any Board actions going forward.

January 25 Board Chairman Pearce issues a statement reacting to *Noel Canning* criticizing the decision, and defiantly vowing that the Board would conduct business as usual despite the ruling that two of its three members were illegally appointed.

January 31 A California hospital chain cites *Noel Canning* in announcing its refusal to comply with an order recently issued against it by the tainted NLRB. Other employers will probably follow suit, likely prompting additional litigation.

February 13 Obama re-nominates illegally appointed Board "Members" Block and Griffin.

February 13 Representative Phil Roe (R-TN) introduces the Preventing Greater Uncertainty in Labor-Management Relations Act (H.R. 1120). This bill would provide some stability in the wake of *Noel Canning* by prohibiting the Board from taking any action requiring a three-member quorum until either:

The Senate confirms enough appointees to constitute a Board quorum;

The Supreme Court rules on the constitutionality of the appointees in question; or

The first session of the 113th Congress is adjourned properly, terminating the terms of the appointees in question and allowing for legitimate recess appointments to fill their positions.

February 27 CDW, along with the U.S. Chamber of Commerce and a group of industry associations, files an *amicus* brief with the NLRB in *Macy's, Inc.*, arguing forcefully for the Board to overturn *Specialty Healthcare*.

March 12 The NLRB announces that it will seek review of the *Noel Canning* decision in the Supreme Court.

May 7 A unanimous three-judge panel of the U.S. Court of Appeals for the D.C. Circuit strikes down the NLRB's notice posting rule in *National Association of Manufacturers v. NLRB*. In a thoughtfully-explained decision, the Circuit Court's reasoning differed slightly from that of the District Court, concluding that all three of the posting rule's enforcement mechanisms are invalid, and therefore that the entire rule must fall.

The Board's rule purported to enforce the posting requirement by: (1) declaring an employer's failure to post to be an unfair labor practice ("ULP"); (2) suspending the NLRA's six-month statute of limitations for ULP's unless a complaining employee had actual or constructive knowledge that the complained-of conduct was unlawful; and (3) allowing the Board to consider an employer's knowing failure to post to be evidence of unlawful motives. The circuit court, rather than starting with the question of the Board's basic statutory authority to promulgate such a rule, struck down all three enforcement mechanisms after concluding that they violated section 8(c) of the National Labor Relations Act. Section 8(c) confirms employers' First Amendment free speech rights by providing that no expression of views or opinions may constitute a ULP as long as there is no threat of reprisal or force or promise of benefit.

The Court reasoned that the posting requirement amounted to forcing employers to disseminate the Board's own characterization of the law, and cited a long line of Supreme Court cases holding that the First Amendment protects one's right NOT to speak just as it protects the right to speak freely. Having decided the case based on section 8(c), one member of the panel declined to rule on whether the Board would have had the authority to require employers to post a notice absent 8(c) violations.

A two-judge majority of the panel, however, also ruled in their concurrence that the Board lacked such authority. The Board's authority over employers, the concurring judges said, is purely reactive, depending on the existence of either a pending unfair labor practice charge, or an election petition. Further, the concurrence acknowledged that in attempting to declare a failure to post to be a ULP, the Board had "create[d] a new species of unfair labor practice unforeshadowed in the NLRA's text." In other words, rather than merely issuing regulations to carry out the provisions of the Act, the Board had attempted to re-write the law.

The Court noted that the Fourth Circuit Court of Appeals is currently considering an appeal from a ruling by the U.S. District Court for the

District of South Carolina, which held that the Board lacked authority to issue the posting requirement.

May 16

The U.S. Court of Appeals for the Third Circuit issues its opinion in *New Vista Nursing and Rehabilitation v. NLRB*, echoing *Noel Canning* by ruling that Board "Member" Craig Becker's supposed recess appointment was invalid.

New Vista, a Newark, NJ nursing home, refused to bargain with a union after losing an election that followed a Board ruling over whether the employees at issue were supervisors. The Board found New Vista guilty of a ULP in an August 26, 2011 ruling by a three-member panel that included Becker. Despite disagreeing with the *Noel Canning* decision on one highly technical jurisdictional issue, the Third Circuit's detailed analysis was very similar to the DC Circuit's, and its holding substantively identical: only during a true recess of the Senate (meaning actual conclusion of a session rather than an adjournment) may the President make a recess appointment. Becker's appointment during a *pro forma* senate session was therefore unconstitutional.

Current "Members" Block and Griffin were not involved in the challenged decision and therefore not mentioned in *New Vista*, but the opinion leaves no doubt that the Third Circuit would consider their appointments unconstitutional, and any actions taken by a Board relying on them to satisfy a quorum would be void.

June 14

The U.S. Court of Appeals for the Fourth Circuit issues its opinion in *United States Chamber of Commerce v. NLRB*, the parallel case referred to in *National Association of Manufacturers v. NLRB*, also striking down the Board's posting requirement, but reaching that conclusion under a more basic rationale. The Fourth Circuit concluded that the Board lacks authority to impose requirements on employers absent the filing of either an unfair labor practice charge, or a petition for election. Thus, both the D.C. and Fourth Circuit held that the Board cannot exercise its authority unless either a charge or election petition has been filed, creating a principle that would apply to any other potential action by the Board. As noted above, the D.C. Circuit also found the rule invalid on other grounds.

August 12

Four new Board members are sworn in after Senate confirmation, joining Chairman Pearce, who is to continue as Chairman for a new term ending in August of 2018. The swearing in effectively caps the period during which the Board had issued hundreds of decisions and taken numerous other actions, all of which have been rendered void under the *Noel Canning* decision.

November 4

Three months after the expiration of his unconstitutional "recess appointment" to the Board, longtime union lawyer Richard F. Griffin, Jr. is sworn in as the Board's General Counsel. Before his "appointment" to the Board, Griffin had been with the International Union of Operating Engineers since 1983, most recently as its General Counsel. He had also

been on the board of directors for the AFL-CIO lawyers coordinating committee since 1994. Griffin replaced Acting General Counsel Lafe Solomon, who most notably had sued Boeing to force diversion of new production work from a non-union facility in the South to a union facility in the Northwest.

November 18 The Board announces that Griffin has authorized the issuance of an unfair labor practice complaint against Walmart. Wasting no time in continuing Lafe Soloman's attack on business, Griffin finds that Walmart's enforcement of its attendance policies amounts to unlawful retaliation against striking workers in Walmart stores scattered across the country.

2014

January 6 The Board announces that it will not seek Supreme Court review of the two federal appeals court decisions striking down its posting requirement, leaving precedent in place that invalidates the posting requirement and requires either an election petition or an unfair labor practice charge to trigger the Board's authority to act with respect to employers.

January 13 The Supreme Court hears oral arguments in *Noel Canning*. Reporting on the session indicates that liberal and conservative justices alike seem inclined to rule that the President can't circumvent Senate confirmation by declaring himself that the Senate is in recess. The Washington Post noted that even Obama appointee Elena Kagan observed that it's up to the Senate to decide for themselves whether they are in recess. If the high court does in fact invalidate the appointments, the hundreds of decisions and other actions of the Board may be invalid. An analysis by the National Right to Work Foundation ("NRWF") shows that the Obama appointees in question participated in over 1,700 decisions going back to April of 2010. Even beyond the puzzle of sorting out the Board decisions, the Court will have to consider potential effects on many other purported recess appointments by Obama and other recent presidents. See the NRWF analysis here: **http://www.nrtw.org/en/nlrb-watch/what-noel-canning-decision-means.**

January 15 General Counsel Griffin follows through on the November announcement by issuing an unfair labor practice complaint not only against Walmart, but also against dozens of its managerial employees.

February 5 The NLRB resurrects its quest to establish "ambush" election rules, strip employers of free speech and procedural rights, and give unions free access to employees' personal information. The Board issued a Notice of Proposed Rulemaking ("NPRM") that, if put into effect, would change union election procedures in ways virtually identical to the rules proposed in 2011, a diluted version of which was later finalized only to be struck down for lack of a quorum of Board members approving them.

With four new members in December, two of which, like Chairman Pearce, lean strongly pro-union, the latest incarnation of the NLRB is echoing the point made by General Counsel Griffin in attacking the Nation's largest employer (Walmart) before his office chair had gotten warm: Any National Labor Relations Board appointed by Barrack Obama will aggressively and relentlessly attack the nation's employers, and will blatantly disregard sound policy, federal law and decades of its own precedent in order to cater to Big Labor.

The new NPRM, which is open for public comment through April 7, 2014, proposes among other things to do the following:

- Require pre-election hearings within seven days of the filing of a petition for election.
- Require that employers provide the union with the names, addresses, phone numbers, email addresses, work locations, shifts and job classifications of all employees who will be eligible to vote in the election.
- Require employers to file a Statement of Position by the hearing date, containing detailed employee information as well as the employer's legal position on all pertinent legal issues. Any issues not raised would be deemed waived.
- Severely limit issues that can be litigated pre-election, such as eligibility of individuals or groups to vote. Post-hearing briefs would not be permitted absent special permission from the hearing officer.
- Eliminate the employer's right to request pre-election review of a Regional Director's election decision.
- Permit electronic filing of election petitions, and potentially allow electronic showing of interest—that is, dispense with actual employee signatures on authorization cards.

As then-Member Brian Hayes did in the 2011 NPRM, new Board Members Philip Miscimarra and Harry Johnson have written a forceful dissent in the new NPRM. The dissent characterizes the "core concepts underlying the [new] NPRM" as "election now, hearing later," and "vote now, understand later." They analyze at length the problems that the new NPRM would create, which can be summarized as follows:

- Forcing elections so quickly as to deny voters adequate time to educate themselves about the issues.
- Interfering with the free speech rights of employees, unions and employers by allowing inadequate time for communication.
- Ironically restricting the Board's own authority to decide relevant issues by eliminating pre-election hearings and severely limiting employers' ability to raise legal issues.
- Potentially tainting elections by allowing employees such as statutory supervisors to vote, causing confusion and possible intimidation of eligible voters.

- Potentially causing additional post-election litigation and harming bargaining relationships by conducting elections and possibly creating bargaining obligations before any involved party can even be sure who is and who is not in the bargaining unit.
- Violating employee privacy rights by requiring disclosure of vastly more personal information, especially in light of the elimination of pre-hearing eligibility procedures.

The dissent analogized the proposed election changes to other statutory time frames—such as advance notice of mass layoffs; time to decide whether to waive age discrimination claims; or time to decide whether to opt into a class action lawsuit. Virtually all other legal structures encourage full and free discussion and consideration of all available information before making a decision of great legal and personal importance. The new NPRM, by speeding up the election process and restricting information available to voters, does the exact opposite, placing absolute importance on the speed of an election and none whatsoever on the integrity of the process or the ability to make informed decisions.

Finally, the dissent proposed an alternative means of examining and potentially improving the election process. Rather than moving forward with the proposed changes, the dissent advocates gathering and analyzing information about the small minority of elections that are significantly delayed, and soliciting input from the public *before* drafting sweeping changes to the existing process.

What the dissent did not confront as directly as was done in 2011, however, was the Board's true motive for the proposed changes. The Board is clearly bent on stacking the deck even further in favor of unions. In a climate where 95% of elections take place within eight weeks of the filing of a petition, the Board focuses on fixing a problem that exists only 5% of the time at best. With a proposed "solution" to a non-existent problem, the Board would impose draconian burdens on employers and sacrifice First Amendment and privacy rights for one obvious reason: to make sure unions win more elections.

February 10

The NLRB issues a statement inviting interested parties to file briefs in the case of *Babcock & Wilcox Construction*, on the issue of whether to change the Board's standard for deciding whether to defer to an arbitrator's award in cases where a pending Board charge involves issues already decided in arbitration. Under its 1955 ruling in *Spielberg Mfg. Co.*, the Board will defer to an arbitration award (in other words, not conduct proceedings of its own) if: (1) the arbitration proceedings were fair and regular; (2) all parties agree to be bound; and (3) the award is not repugnant to the purposes and policies of the NLRA.

In *Babcock & Wilcox*, the Board's General Counsel has asked the Board to revise the deferral standard to provide for deferral only where the party urging deferral shows that: (1) the collective bargaining agreement

incorporates the statutory right, or that the statutory issue was presented to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If such a showing is made, the Board would defer unless the arbitrator's conclusion was repugnant to the Act.

Once again, the General Counsel is continuing the Obama administration's radical anti-employer agenda, urging with no discernable rationale the evisceration of a legal standard established by the Board that has worked for nearly sixty years.

While the significance of this issue may not be readily apparent, the consequences would likely be enormous. Take, for example, the case of an employee terminated for misconduct. Under the current standard, a union will usually file a grievance and proceed to arbitration. The union might also file an unfair labor practice charge alleging that the termination was carried out in violation of some provision of the NLRA. If an arbitrator upholds the termination, the Board will generally not move forward with a ULP case unless the ruling was repugnant to the Act. Case closed. With the current standard so well settled, unions rarely pursue the Board process aggressively after losing an arbitration.

Under the General Counsel's proposed standard, in the same type of case a union would be certain to pursue Board action aggressively no matter what happens in arbitration, knowing they will likely have a second bite at the apple. Indeed, clever union lawyers would probably avoid explicitly raising statutory issues at arbitration in order to raise the likelihood of a Board hearing after an arbitration loss. Given the proposed requirement that an arbitration award enunciate the applicable statutory principles in order to justify deferral, an arbitrator's mere lack of statutory reference could lead the Board to refuse deferral, even if the statutory issuer were implicitly resolved.

The proposed changes would wreak havoc at every stage of the process—at arbitration, before the Board itself and in the courts. After nearly sixty years of resolving industrial disputes through arbitration under the *Spielberg* standard, employers would be forced to complicate arbitration proceedings by delving into statutory issues and attempting to convince arbitrators to address such issues in detail in their opinions in order to avoid being dragged through a subsequent Board proceeding. Further, regardless of the status of an arbitration case, unions would have no choice but to pursue every case before the board, since not having a live Board case to pursue after an arbitration loss would almost certainly be seen as a breach of the union's duty to the employee. Thus, whatever the end result, the Board's calendar would overflow, and legal fees all around would rise unnecessarily.

Even more significant is the very real risk of conflicting results. In other words, an employer might have a termination upheld at arbitration only to have the NLRB later order the employee back to work. In such a case,

the employer's choice, even after an impartial arbitrator had ruled a termination justified, would be either to cave in and return a properly-terminated employee to work, or to move forward with even more costly litigation to challenge the Board's ruling in the courts.

The deadline for filing briefs on the proposed changes to the deferral rules is March 25, 2014, leaving a relatively short window for interested parties to speak out against this latest attack on the Nation's employers.