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NLRB UPDATE

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The NLRB Takes Controversial Steps in 2011

It has been an active year for the National Labor Relations Board. The number of cases decided by the NLRB increased in the last two years. Thus far this year, the Board has heard 368 cases; experiencing a 16% increase over the number of cases heard in 2010, which was a 23% increase over the number of cases heard in 2009. The number of complaints filed by the Board also increased by 7% in 2010 over the number of complaints filed in 2009 (2011 data has not yet been released). Some believe the board is aggressively trying to decide as many cases as possible before December 31, 2011, which is when recess appointee Craig Becker's term expires. After that, absent another recess appointment or Senate confirmation, the Board will be unauthorized to render decisions as a two-member panel. *New Process Steel, L.P. v. N.L.R.B.*, 130 S. Ct. 2635 (2010).

In the Board's recent efforts to further define what actions employers can take regarding their employees without violating the National Labor Relations Act, the NLRB has taken several controversial actions. The NLRB's complaint against the Boeing Company and its recent steps in rulemaking are two actions that have garnered the most attention from labor lawyers, unions, and the legislature. In both, critics have alleged that the NLRB overstepped its authority in dictating how employers operate their businesses. Each of these is discussed in more detail below.

The Boeing Company v. International Association of Machinists & Aerospace Workers District Lodge 751, Affiliated With International Association of Machinists & Aerospace Workers, Case # 19-CA-32431

On March 26, 2010, the International Association of Machinists and Aerospace Workers, District Lodge 751, filed a charge with the NLRB alleging that the Boeing Company decided to place a second production line for the 787 Dreamliner airplane in a non-union facility in North Charleston, South Carolina as retaliation for the union's strikes at the company's Seattle, Washington facility. After the parties failed to reach a settlement, the NLRB filed a complaint on April 20, 2011, encompassing the union's allegations.

The airplanes were originally to be completed by the union plant in Washington, however, Boeing stated the new plant was necessary due to a backlog of orders. The union cites numerous company media and employee communications as evidence of Boeing's retaliatory intent, which

include documents relating to Boeing's 2009 decision to open the second production line in South Carolina. Boeing stated the documents prove that the decision to locate the second production line in South Carolina was a legitimate business decision.

The complaint and the Acting General Counsel's suggested remedy of moving the second production line back to Washington have sparked much controversy. Shortly after the complaint was filed, the Congressional Committee on Health, Education, Labor, and Pensions wrote to the AGC expressing concern about the chilling effects the Board's complaint could have on legitimate business decisions. It also condemned the Board for its timing in filing the complaint: Boeing announced it would open the second production line in South Carolina in October 2009, but the Board did not file its complaint until April 2011, only three months before the plant was to begin production in July. The Committee expressed concern about the impending loss of newly created jobs at the South Carolina plant, in comparison to no loss of jobs or work at the Washington plant. The letter pointed out that the Washington plant had actually experienced a workforce increase, despite the relocation of the second production line.

In June 2011, the Board granted several intervenors the right to file a post-hearing motion with respect to their rights as employees of the South Carolina plant. The Board also granted the Attorney Generals of sixteen states the right to file amicus briefs on "the issue of the appropriate remedy, should the allegations of the complaint be sustained in whole or in part." This was in response to uproar regarding the proposed remedy of moving the new production line from South Carolina to Washington. Administrative Law Judge Clifford H. Anderson decided several pre-trial issues; including denying a motion to strike several incidences of hearsay in the complaint and denying a defense that the AGC was not properly appointed when the case was filed.

On June 30, Administrative Law Judge Clifford H. Anderson denied Boeing's motion to dismiss the complaint or strike the injunctive relief sought. Judge Anderson found that even though no union employees had been harmed by Boeing's relocation of work the union had never done, the GC could state a claim under §8(a) because the move could have reasonably resulted in a diversion of work away from unionized employees. Boeing's reservation of rights in the collective bargaining agreement to place a second production line in another state was irrelevant if Boeing used its contractual rights to punish employees for protected activity. Finally, the ALJ rejected Boeing's assertion that the GC's proposed remedy of relocating the second production line from South Carolina to Washington was unduly burdensome and overstepped the standard remedial remedies of §8(a)(3) cases, which is limited to reinstating affected employees with back pay. The GC argued that the Board has broad discretion to craft an appropriate remedy and this issue was inappropriate for summary judgment because additional fact finding would be necessary to determine whether the proposed remedy was unduly burdensome. Judge Anderson found that the motion to dismiss had to be denied at this stage because the arguments required facts that were not available prior to trial.

Since the ruling on the motion to dismiss, the ALJ has heard several motions for protective orders. These were in response to the trial being moved to a larger facility to accommodate the expected media and public attention. The case is still pending before the ALJ.

Outside of Boeing's NLRB case, several members of Congress have advocated Boeing's case in the legislature. Throughout the summer, the House Committee on Oversight and Government Reform corresponded with Acting General Counsel Lafe Solomon regarding the Committee's requests for information on the Boeing case and Solomon's hesitance to grant the request due to his belief that he could not release numerous records regarding strategy and legal theories, particularly since this information was not discoverable by the defendant, the case was ongoing, and disclosure could interfere with the rights of the parties. On August 5, 2011, the Oversight Committee subpoenaed Lafe Solomon to discuss his authority to issue the complaint against Boeing and to present various documents related to the case. Solomon attended a hearing in response to that subpoena and reiterated his position that he should not release numerous records regarding strategy and legal theories due to possible interference with the rights of the parties. Despite his protests, throughout the summer and fall, the Office of the General Counsel provided documents related to the pending case to the Oversight Committee, and it continues to release documents as they become available to the parties. The Oversight Committee expressed additional concern that the Office of General Counsel was not acting with appropriate independence from the NLRB, an allegation that Solomon denied.

The House of Representatives considered H.R. 2587: Protecting Jobs From Government Interference Act, which would prohibit the NLRB from "ordering any employer to close, relocate, or transfer employment under any circumstances." The act passed the House on party lines on September 15, 2011, with almost unanimous Republican support and Democratic opposition. House Democrats feared the bill would spur the exportation of jobs overseas and that it was too closely linked to Boeing, "a potent lobbying force and prominent political donor." H.R. 2587 and related bills are still pending in the Senate.

Along the same lines, some critics urge that the NLRB overreached its rulemaking authority by unnecessarily interfering too closely in how employers run their businesses.

NLRB Rulemaking

Historical overview

Pursuant to 29 U.S.C.A. § 156 (NLRA § 6), "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5 (Administrative Procedure Act), such rules and regulations as may be necessary to carry out the provisions of this subchapter." However, the NLRB is constrained to act within the limitations set by the NLRA and other Congressional mandates.

While the NLRB has had rulemaking authority since the NLRA was enacted in 1935, it has limited its use of this power to make and amend procedural and jurisdictional rules. Besides the new posting rule, the Board has only implemented one substantive rule in its seventy-six year history.

That rule involved the determination of appropriate bargaining units in the health care industry. The rule was proposed after years of conflicting litigation decisions amongst Appeals Courts and regional NLRB divisions. Prior to drafting the rule, the Board met with various healthcare constituents to gather their input on the rule. After providing initial notice of the proposed rule

on July 2, 1987, the Board held four public hearings, the last of which lasted seven days, and allowed an extended comment period. A revised rule was proposed on September 1, 1988 and the Board allowed an additional 6-week period for written comments. The final rule was issued on April 21, 1989, nearly two years after its proposal. It was then subject to a court injunction for another two years.

The 1987 amendment was the NLRB's first proposed substantive rule in its history. The NLRB proposed two additional substantive rules, one in 1992 and the other in 1995, but these were subsequently withdrawn without being enacted, partially due to Congressional blocks preventing the NLRB from enacting the rules. The timeframe utilized to enact the 1987 rule is in stark contrast to the Board's most recently issued substantive rule, which was finalized less than nine months after its proposal.

In the last year alone, the NLRB has proposed two issues for rulemaking: 1) a requirement that private-sector employers post a notice informing employees of their NLRA rights and 2) an amendment to representation election procedures. Both of these proposals have garnered criticism that the NLRB has stepped outside of its rulemaking authority.

Posting Requirement

The National Labor Relations Board adopted a controversial regulation requiring private-sector employers under its jurisdiction to post a specific notice informing workers of their NLRA rights. 29 HRR 932, Sept. 5, 2011.

According to the NLRB, this regulation is necessary because most American workers do not know their rights. The regulation dictates that employers must display the mandated notice on at least an 11-by-16 inch posting. Employers are permitted to produce a combination notice of federal labor laws, provided this "does not alter the size, format, content, or size and style of type on the notice provided by the Board." In addition, if an employer posts personnel policies on an internet or internal website, it must also display an equally prominent NLRA notice or link to the NLRB web page that contains the notice. The notice must also be posted in another language if at least 20% of employees are not proficient in English and speak the other language.

The notice that union and non-union employers are required to post is available at www.nlrb.gov/poster and NLRB field offices. It details employees' right to organize, bargain collectively with their employers, and to engage in other protected concerted activity. It also summarizes employer and union activity that is illegal and the procedures for filing a complaint with the NLRB.

An employer's failure to post the notice may be treated as an unfair labor practice in and of itself. Further, a willful failure to post the notice may serve as evidence of unlawful motive in prosecuting other NLRA violations. While the NLRB will not inspect offices to ensure the notice is posted, it anticipates that employees and union representatives will report employer failures to post the notice.

Many criticize this regulation as being outside the scope of the NLRB's authority. The NLRA, unlike similar labor codes, does not contain a posting requirement. Board Member Brian Hayes,

who dissented against the new posting rule, believes that alerting employees of their NLRA rights is an admirable goal, but it does not necessarily follow that it is the employer's duty to inform employees of their rights to organize. Furthermore, Hayes thought that penalizing employers for not following the requirement overstepped the NLRB's grant of rulemaking authority. The remaining two members of the Board who voted in favor of the new rule defended themselves by claiming this regulation is permissible under the Board's authority to adopt "such rules and regulations as may be necessary to carry out the provisions of [the NLRA]" and as a government agency, it could fill any legislative gaps left open by Congress.

Legislation by Arizona Representative Ben Quayle is already in the works to repeal the regulation. H.R. 2833 (2011). The U.S Chamber of Commerce, the National Federation of Independent Business, and the National Association of Manufacturers have all filed lawsuits asserting that the regulation is arbitrary and capricious and violates the First Amendment. The congressional bill and lawsuits are still pending. The cases were consolidated before the federal district court for the District of Columbia and the critics of the new rule filed a motion for summary judgment on October 26, 2011. *National Ass'n. of Mfrs. v. NLRB*, D.D.C., No. 11-CV-1629. The NLRB is expected to file its own motion for summary judgment and a hearing is expected in December.

Meanwhile, shortly after the lawsuits were filed, the NLRB announced that the effective date of the rule would be postponed from November 14, 2011 to January 31, 2012, to allow for greater voluntary compliance and enhanced education and outreach to employers.

Amendments to Election Procedures

On June 22, 2011, the NLRB proposed changes to the NLRA's current election procedures which govern the rights of employees to establish a union in the workplace. The revisions seek to create a more streamlined process for establishing unions in the workplace. Under the current rules, an election may be delayed for several weeks after a petition for election is filed to handle various pre-election evidentiary hearings. In some rare cases, elections are delayed for years due to these pre-election issues. The proposed revisions would allow an election to take place 10-21 days after a petition because they remove the burden of resolving issues before an election that may not need to be resolved at all, such as eligibility issues affecting less than 20% of the proposed union or facts which are not in dispute. Instead, the changes shift these types of issues post-election.

The two-member majority cited removing "unnecessary barriers to the fair and expeditious resolution of questions concerning representation" as necessitating this rule. They sought to simplify and standardize representation-case procedures by eliminating unnecessary litigation and consolidating requests for Board review into a single post-election request. The amendments also seek to take advantage of new technology. As authority for its position, the majority cited the NLRA and Supreme Court cases indicating that it is within the NLRB's sole authority and broad discretion to establish the "procedure and safeguards necessary to insure fair and free choice of bargaining representatives by employees."

Critics peg the proposed revisions as providing for "quickie elections" which "minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its view about

collective bargaining," or address appropriate unit, voter eligibility, and election misconduct. Board Member Brian Hayes, who dissented from the proposed amendment, stated that the changes were unnecessary and not prompted by any conflicting litigation outcomes or requests for rulemaking. He also criticized the majority for failing to seek input from parties who would be affected by the rule change, both employers and employees, and instituting only the minimum permissible comment and reply period. Hayes further posited that unreasonable delays in election procedures are not the norm and the proposed amendments don't even attempt to identify or address the causes of the delays in the few cases that have them. He even surmised that NLRB vacancies, political shifts, and the Board's inability to deal with complex legal issues may have caused the delays in these rare cases, rather than some systemic issue in the way elections are conducted. Hayes opined that the Board overstepped its authority with these amendments, which fly in the face of Congress and the Supreme Court's "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word ... has been expressly fostered by Congress and approved by the NLRB." The shortened seven-day timeframe within which employer's must respond to a petition for election would inevitably deny some employers, particularly small business owners, the right to counsel and due process. Finally, because an employer's duty to bargain begins on the election date, shifting most contested issues to the post-election phase rather than the pre-election phase places employers at risk if they continue to operate their business as is, before an election result has been certified by the board.

The Board majority believes the proposed rule is procedural, and thus entirely within the Board's discretion and authority. Dissenting Member Brian Hayes believes the proposed changes are substantive, and thus required a longer comment period and greater industry input before the rule was proposed. The Board received numerous comments to these proposed revisions. A final rule has not yet been issued.

The NLRB Going Forward

We will have to wait to see how the courts and the legislature rule on the NLRB's recent controversial actions. However, if a resolution is not reached soon, the NLRB may have to take a timeout until its Board membership is replenished. Current Board Member Brian Hayes opined that Board politics have a great effect on NLRB decisions. Recess Appointee Craig Becker's nomination is still pending, but the Senate previously blocked a vote on his confirmation, and his recess appointment was seen as controversial because of this. With the Republican party championing against the NLRB's recent actions, it will be interesting to see how the Board rules on these controversial matters, since the only other pending nominee, Terence Flynn, a Republican, would create the first Republican majority on the NLRB since 2007.