Union Organizing and the NLRB Under President Obama

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Note from the Editor:

This paper analyzes union organizing and the NLRB under the Obama Administration. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the status of labor law and labor relations in the United States. To this end, we offer links below to various sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@fed-soc.org.

- National Labor Relations Board, Employee Rights Notice Posting: http://www.dol.gov/olms/regs/compliance/EmployeeRightsPoster11x17_Final.pdf
- National Labor Relations Board, Boeing Complaint Fact Sheet: http://www.nlrb.gov/boeing-complaint-fact-sheet
- Editorial, *Boeing and the N.L.R.B.*, N.Y. Times, April 25, 2011: http://www.nytimes.com/2011/04/26/opinion/26tue2.html
- James J. Brudney, *Neutrality Agreements and Card Check Recognition*, Advance: The Journal of the American Constitution Society (February 2007): http://www.acslaw.org/files/Brudney-Neutrality%20Agreements-Feb%202007-Advance%20Vol%201.pdf
- National Labor Relations Board, Board Decisions: http://www.nlrb.gov/cases-decisions/board-decisions

Introduction

After the 2008 election of President Barack Obama and Democrat majorities in both houses of Congress, labor organizations were confident that the "Employee Free Choice Act" (EFCA)—popularly called the "Card-Check Bill"—would be enacted. EFCA would have made union organizing easier, by among other things, requiring employers to recognize unions without a secret-ballot election supervised by the National Labor Relations Board (NLRB or Board) if a union obtained signatures on union-authorization cards or a petition of a majority of the employees in an appropriate bargaining unit. However, despite President Obama's support for EFCA, for a number of reasons organized labor was unable to overcome a threatened Senate filibuster in 2009 and 2010, and EFCA became a "dead letter" when Republicans took the House and made significant gains in the Senate in the 2010 elections.

Nonetheless, the Obama Administration has done much to try to ease union organizing through the President's appointments after the 2010 elections of majorities on the NLRB and an Acting General Counsel. From March 27, 2010 to August 27, 2011, the Obama-appointed majority consisted of three former union attorneys, then Chairman Wilma Liebman and Members Mark Pearce and Craig Becker, the latter a recess appointee. When Liebman's term expired on August 27, 2011, Pearce and Becker had a 2-1 majority until Becker's recess appointment expired on January 3, 2012, with the beginning of a new Congress. On January 4, 2012, President Obama announced controversial recess appointments of three new Board Members: Richard Griffin, former General Counsel of the Operating Engineers union; Sharon Block, former staffer for Senator Edward (Ted) Kennedy and assistant to Obama Secretary of Labor Hilda Solis; and former Republican Senate staffer Terrence Flynn, who has since resigned. These appointments have been challenged in court by, among others, workers represented by National Right to Work Legal Defense Foundation attorneys, because, they argue, the Senate was actually not in recess on January 4, but conducting pro forma sessions every three days.[1]

Lafe Solomon, a career NLRB attorney, was named Acting General Counsel by President Obama effective June 21, 2010.

The NLRB's attempted regulatory establishment of what opponents have labeled "EFCA-lite" has been accomplished by Board rulemaking, General Counsel actions, and Board case decisions.

I. NLRB Rulemaking

A. Notice-Posting Mandate

On August 30, 2011, with the then-one Republican Member dissenting, the Board promulgated a Final Rule entitled "Notification of Employee Rights under the National Labor Relations Act ['NLRA']."[2] This rule would have required for the first time that all private employers in the country post a notice advising employees in detail of their statutory rights to unionize and engage in union activities, with no detail about their rights to refrain from union activity. Employers who fail to post the notice would be guilty of a new, Board-created unfair labor practice, could lose the protection of the Act's six-month statute of limitations, and could have that failure be considered as evidence against them in cases involving other

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unfair labor practices.

The posting requirement was originally intended to have been effective November 14, 2011, but is not yet effective due to litigation brought against the Board by a few employers, including the National Right to Work Legal Defense Foundation, and several employer associations challenging the Board's authority to promulgate this rule.

In the cases brought by the National Association of Manufacturers, the Foundation, and others, the United States District Court for the District of Columbia effectively upheld the entire rule. It held that the Board has the authority to require all employers to post the notice. It struck down the unfair labor practice penalty for not posting only to the extent "that the Board cannot make a blanket advance determination that a failure to post will always constitute an unfair labor practice." The court specifically ruled that nothing in its "decision prevents the Board from finding that a failure to post constitutes an unfair labor practice in any individual case." It similarly held that the NLRB could consider an employer's failure to post the notice as stopping the running of the statute of limitations "in individual cases" and "as evidence of an employer's unlawful motive" in individual cases alleging an unfair labor practice other than failure to post.[3]

However, soon thereafter, in a case brought by the U.S. Chamber of Commerce, the United States District Court for the District of South Carolina held that the Board lacked statutory authority to promulgate the rule requiring all employers to post notices informing employees of their rights under the NLRA.[4] In the meantime, the plaintiffs in the *NAM* cases had filed notices of appeal to the U.S. Court of Appeals for D.C. Circuit and a motion for injunction against enforcement of the notice-posting rule pending appeal. The D.C. Circuit granted that injunction on April 17, 2012, and ordered expedited briefing and oral argument. On April 27, 2012, the Board filed notice of its appeal from the D.C. district court's ruling that the Board could not make failure to post the notice a per se unfair labor practice. Argument in the D.C. Circuit was heard on September 11, 2012. The Board also filed notice of its appeal to the Fourth Circuit from the South Carolina district court's decision on June 15, 2012. The Fourth Circuit will hear oral argument on March 19, 2013.

B. Expedited Representation Election Procedures

On December 22, 2011, the NLRB published a Final Rule amending its procedures for conducting elections to determine whether a majority of employees in a bargaining unit wish to be represented by a union for purposes of collective bargaining.[5] Under the amended rules, elections would be conducted in about ten to twenty-one days, as compared to the recent median time frame of thirty-eight days from the filing of a petition for an election. Those opposing unionization assert that the shortened time-frame for elections would ease union organizing by reducing the period within which employers could make the case against unionization, individual employees could fully consider any potential disadvantages of union representation, and employees opposed to union representation could organize themselves and campaign in opposition to unions. In addition, under the amended rules, decisions concerning who is eligible to vote in an election would be made by Regional Directors only after the election has taken place, with no appeal of right to the Board itself. Consequently, employees would be required to vote without knowing which of their fellow employees actually are in the bargaining unit.

The U.S. Chamber of Commerce and Coalition for a Democratic Workplace, an umbrella association of trade associations originally formed to lobby against EFCA, immediately sued the Board challenging the expedited election rules. Their complaint, filed in the U.S. District Court for the District of Columbia, asserted that the final rule violates the NLRA, exceeds the Board's statutory authority, and is contrary to the First and Fifth Amendments' guarantees of the rights to free speech and due process. In addition, the complaint alleged that by issuing a final rule on the signature of just two NLRB members, the Board's actions were "arbitrary, capricious, and an abuse of discretion," in violation of the Administrative Procedure Act. The complaint also alleged that the Board members violated the Regulatory Flexibility Act by failing to provide an "adequate factual basis" for concluding that the rule will not have a significant impact on a substantial number of small entities, and by failing to consider the economic impact on small businesses of speeding up the election process.

The amended election procedures briefly took effect on April 30, 2012. However, on May 14, 2012, the district court granted the Chamber and CDW summary judgment, deciding that, "because no quorum ever existed for the pivotal vote" on promulgating the final rule, "the Court must hold that the challenged rule is invalid."[6] The NLRA requires a quorum of three members for the NLRB to do business.[7] The court found that only two members "participated in the decision to adopt the final rule, and two is simply not enough"; that Member Brian Hayes had voted in opposition to "earlier decisions relating to the drafting of the rule does not suffice." The next day the Board suspended implementation of the amendments to the representation election rules. On June 11, 2012, the moved for reconsideration. The motion for reconsideration was denied by the district court on July 27, and the Board filed notice of its appeal to the D.C. Circuit on August 7, 2012. That court will hear oral argument on April 4, 2013.

II. Actions of the Acting General Counsel

A. Complaint Against Boeing for Locating New Plant in a Right-to-Work State

In October 2009, Boeing decided to open a new production line for its 787 Dreamliner at a plant in North Charleston, South Carolina, that it had earlier purchased from Vought Aircraft. This decision was made after extensive negotiations with the International Association of Machinists (IAM) and its District Lodge 751, which represent many of Boeing's workers at its Washington State facilities. The collective-bargaining agreement did not require Boeing to negotiate with the union over where work is placed. The new production line did not displace any existing work in Washington, where Boeing hired some 2000 new employees.

The public statements of Boeing officials indicated that one factor in deciding to open the second Dreamliner line in South Carolina, a right-to-work state, was repeated strikes the union had conducted in Washington, a non-right-to-work state, and the IAM's refusal to add a no-strike clause to the collective-bargaining agreement. Boeing officials also said that financial incentives from South Carolina, supply-chain considerations, and geographic diversity played critical roles in their decision.

When Boeing bought the North Charleston plant, Machinists Local Lodge 787 represented the workers there. However, in September 2009, before Boeing decided to put the second Dreamliner line in North Charleston, the employees there voted 199 to 68 to decertify the IAM. For many employees the prime motivation for decertifying the union was to make their facility more attractive to Boeing in deciding where to build Dreamliners.

In March 2010, Machinists District Lodge 751 filed an unfair-labor-practice charge against Boeing in the Seattle NLRB Regional Office (Case 19-CA-32431). The charge asserted that Boeing's decision to place the second production line in a nonunion facility constituted unlawful retaliation for past strikes, and was intended to "chill" future strike activity, by its unionized Washington employees. On April 20, 2011, Acting General Counsel Lafe Solomon issued a complaint against Boeing through the Washington Regional Director.

The complaint was called "unprecedented" by former NLRB Chairman Peter Schaumber and some other labor-law experts. Its thrust was that Boeing's decision to create new jobs in South Carolina was motivated by "anti-union animus" and, therefore, violated the NLRA. The complaint alleged that Boeing "transferred" work from Washington to South Carolina, though, as mentioned above, the new line did not displace any existing work. Among other relief, the complaint requested an order mandating that Boeing "operate" the second Dreamliner assembly line in Washington.

On June 20, 2011, the Board granted three nonunion South Carolina Boeing employees represented by National Right to Work Legal Defense Foundation attorneys "limited intervention solely for the purpose of filing a post-hearing brief with the administrative law judge" who was hearing the case. However, the opportunity to file that brief never occurred because, before the case went to trial, Boeing and Machinists District Lodge 751 entered into a new collective-bargaining agreement in which Boeing made several financial concessions to the union and agreed to build its new 737 MAX aircraft in the Seattle area.

The new agreement was ratified on December 7, 2011. Within days, with the ALJ's and General Counsel's blessings, the complaint against Boeing was dismissed, the union's charges against it were withdrawn, and the case was closed. The agreement removed the potential negative impact on the South Carolina workers' jobs because there no longer was a danger that the NLRB would order that the 787 Dreamliner production line be moved to Washington State. However, the Acting General Counsel's pursuit of the case against Boeing enabled the union to use the threat of continued costly litigation and a potentially adverse NLRB order to persuade Boeing to make financial concessions and agree that it would not locate other work in right-to-work states, which it had been considering, rather than in non-right-to-work states where organizing by the union would be easier.

B. Memoranda Instructing Regional Offices

One way to change an interpretation of the NLRA is through a General Counsel Memorandum instructing the Board's Regional Offices on how to apply the statute. Acting General Counsel Lafe Solomon has issued several GC Memoranda that have the effect of making it easier for unions to conduct organizing campaigns. The following two memoranda are the most significant of these:

1. Increased and Expedited 10(j) Injunctions in Organizing Campaigns

NLRA Section 10(j) authorizes the Board, when a complaint has been issued alleging that an employer or union has committed an unfair labor practice, to petition a United States district court "for appropriate temporary relief or restraining order."[8] GC Memo 10-07 (Sept. 30, 2010) instructs Regional Offices to consider filing Section 10(j) petitions in any case where employees are "unlawfully discharged or victims of other serious unfair labor practices because of union organizing at their workplace." When employees have been discharged in such cases, the relief sought from the court is immediate reinstatement of the discharged employees even though the employer has not yet been adjudicated by an Administrative Law Judge to have committed an unfair labor practice. GC Memo 10-07 directs the Regional Offices to expedite 10(j) proceedings.

2. Extreme Remedies to Be Sought in Organizing Campaigns

GC Memo 11-01 (Dec. 20, 2010) instructs Regional Offices regarding what remedies they should seek for "serious unfair labor practices" occurring during organizing campaigns, such as "threats, solicitation of grievances, promises or grants of benefits, interrogation and surveillance." Because these are essentially all of the possible unfair labor practices that can occur during an organizing campaign, employers may be concerned that Regional Directors who encounter what might be considered "routine" unfair labor practices to seek what in the past were extraordinary remedies utilized only for employers who flagrantly and repeatedly violate the Act.

The remedies that can be sought under GC Memo 11-01 and 10-07 include:

- interim reinstatement of any employee who claims that the discharge was unlawful;
- in addition to posting of a notice about the violations, a "public reading" of the notice by a responsible company official;
- union access to company bulletin boards to post organizing information; and,
- giving union organizers employees' names and addresses before the union has filed a representation petition.

In addition, if a Region concludes that those remedies would be insufficient to permit a fair election, under GC Memo 11-01 it can ask the Division of Advice in Washington, D.C. to authorize seeking these additional remedies for "hallmark violations":

- union organizers' access to the company's non-work areas during employees' non-work time;
- if the company speaks to employees about union representation, equal time and facilities for union organizers; and,
- even if the company does not address employees about unionization, time and facilities for the union to speak on company property before a Board election.

The Memo's list of "hallmark violations" includes not only threats of discharge and plant closure, but violations such as solicitation of grievances, surveillance or impression of surveillance, and certain interrogations of employees.

C. Amicus in Litigation Challenging "Neutrality and Card-Check" Agreements

Mardi Gras Gaming Corp. operates a racetrack in Florida. It entered into an organizing agreement with UNITE HERE Local 355 in exchange for the union's agreement to conduct a $100,000 political campaign in support of a ballot initiative legalizing casino gambling at racetracks. Among other things, Mardi Gras agreed to provide UNITE with personal information about Mardi Gras's nonunion employees, use of its property for organizing, and a gag-clause on any speech by Mardi Gras that states or implies opposition to the union. In addition, Mardi Gras agreed to recognize Local 355 as its employees' "exclusive representative" if the union collected authorization cards from a majority of employees and guaranteed Local 355 a collective-bargaining agreement after unionization.

On November 3, 2008, a National Right to Work Legal Defense Foundation staff attorney filed suit for Mardi Gras employee Martin Mulhall against Local 355 and Mardi Gras in the U.S. District Court for the Southern District of Florida, alleging violations of Section 302 of the Taft-Hartley Act.[9] That section prohibits employers from giving any "thing of value" to a union seeking to represent its employees and prohibits unions from demanding and accepting such things. The legal theory is that the organizing assistance that Local 355 demands from Mardi Gras's employees—personal information, use of Mardi Gras's property, and the gag-clause—are "thing[s] of value," the exchange of which is prohibited under Section 302.

On September 10, 2010, the U.S. Court of Appeals for the Eleventh Circuit, reversing the district court's dismissal of the case for lack of standing, held that Mulhall has standing because he has an interest in whether he is unionized by UNITE and that the harm to Mulhall's associational interests is not speculative under the organizing agreement.[10]

On remand, the district court again dismissed the case. This time it ruled that the organizing assistance that the union demanded from Mardi Gras was not a "thing of value" prohibited under Section 302, despite the allegations of the complaint—which must be considered true on a motion to dismiss—that the organizing assistance has monetary value and that the union claimed as much in arbitration proceedings to enforce the organizing agreement.

On January 18, 2012, the Eleventh Circuit issued its second decision favorable to the employee in the case, this time with one judge dissenting. The majority held "that organizing assistance can be a thing of value that, if demanded or given as payment, could constitute a violation of § 302." The majority reasoned that "ground rules for an organizing campaign . . . can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer."[11]

On February 8, Local 355 petitioned for panel rehearing and rehearing en banc, arguing that the "panel decision . . . calls into question the use of organizing agreements as a means of voluntary recognition of unions." An amicus curiae brief in support of the petition for rehearing was subsequently filed by Acting NLRB General Counsel Solomon and other Obama Administration officials. The court denied rehearing on April 25, with none of its regular active judges requesting a poll as to whether to grant rehearing en banc.

The union then filed a petition for certiorari with the U.S. Supreme Court on July 20. Mulhall's response argued that the Eleventh Circuit's judgment was correct, but agreed that the Supreme Court should grant review because of the importance of the issue. The employer did not file a response. Mulhall's attorney also filed a conditional cross-petition for certiorari questioning the narrowness of the Eleventh Circuit's reasoning, asking that the cross-petition be granted if the Court grants the union's petition.

In October, the Court asked both the union and employer to respond to the cross-petition; and the employer to respond to the union's petition. Mardi Gras's response opposed both petitions, arguing that the case is moot because the organizing agreement expired on December 31, 2011. The union's response to the cross-petition agreed that the cross-petition should be granted if its own petition is granted. Mulhall's and the union's replies to Mardi Gras's opposition both contend that the case is not moot, because the union is still trying to enforce the organizing agreement in a separate lawsuit in federal court against the employer. On January 14, 2013, the Court asked the U.S. Solicitor General to file a brief stating the government's position on the issues presented by the case..

III. NLRB Decisions

A. "Card Check" Recognition Protected from Employee Challenges

In two cases in which National Right to Work Legal Defense Foundation attorneys represented decertification petitioners, the NLRB in 2007 significantly increased the ability of workers to challenge union representation dictated by "card checks." A three-Member majority of the five-Member Board modified the "recognition-bar doctrine." The majority held that decertification elections would be conducted where an employer recognized a union by card check if thirty percent or more of the unit employees filed a valid petition requesting an election within forty-five days of the employer's posting in the

workplace of a notice prepared by a Regional Office that the union had been recognized and that the workers had a right to an election. Moreover, the majority modified "contract-bar" rules so that a collective-bargaining agreement executed on or after voluntary recognition did not bar a decertification petition "unless notice of recognition has been given and 45 days have passed without a valid petition being filed." The prior rule was that any agreement reached after voluntary recognition would bar decertification for up to three years of the contract's term.

The majority ruled as it did because "the immediate post-recognition imposition of an election bar does not give sufficient weight to the protection of the statutory rights of affected employees to exercise their choice on collective-bargaining representation," which "is better realized by a secret election than a card check." The majority noted that "card signings are public actions, susceptible to group pressure exerted at the moment of choice," and that "union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options."[12]

In the almost-four years that followed, 1333 *Dana* notices were requested, 102 election petitions were subsequently filed, and the Board conducted 62 *Dana* decertification elections. In 17 (or 25%) of those elections, the union that had been recognized by the employer based on union-authorization cards without a secret-ballot election was rejected by the employees.

One case in which a *Dana* notice was requested is *Lamons Gasket Co.*, in which a Foundation attorney represented worker Michael Lopez. Pursuant to a neutrality and card-check agreement, Lamons Gasket recognized the Steel Workers Union as monopoly-bargaining representative for approximately 165 production, warehouse, and maintenance employees at its Houston, Texas facility. Lopez filed a timely *Dana* decertification petition, and the election was held. However, the ballots were impounded and not counted because in the interim the union had requested that the Board review the Regional Director's decision ordering the election. The request for review argued that *Dana* was wrongly decided and should be overruled. After that request for review was filed, Regional Directors impounded the ballots in most if not all *Dana* elections conducted.

The Board, three to two, granted the request for review and solicited amicus briefs on the issue of whether *Dana* should be overruled.[13] The majority said that "we choose to review the briefs and consider the actual experiences of employees, unions, and employers under *Dana Corp*., before arriving at any conclusion." One of the majority was Member Craig Becker, who had earlier denied a motion that he recuse himself in another case involving the same issue because he had signed a brief in *Dana* arguing that the Board should not permit decertification elections after card-check recognitions.

Members Schaumber and Hayes charged in their dissenting opinion that the grant of review "is but a prelude to what will most likely result in the overruling of *Dana*, in derogation of employees' . . . free choice rights." They argued that *Dana* was based "on well-established legal principles" and "did no more than level the playing field by providing an electoral option similar to that already available to employees whose employer relied on a petition signed by a majority of unit employees to withdraw recognition from an incumbent union."

On August 26, 2011, the day before Chairman Wilma Liebman's term on the Board expired, the Board issued a three-to-one decision overruling *Dana*.[14] Member Becker again did not recuse himself. The majority argued that, although voluntarily recognized unions were rejected in 25% of the *Dana* elections, the statistics concerning *Dana*'s implementation "demonstrate that . . . the proof of majority support that underlay the voluntary recognition during the past 4 years was a highly reliable measure of employee sentiment." The majority also asserted that *Dana*'s ruling that employees should have a limited opportunity for secret-ballot elections "undermined employees' free choice by subjecting it to official question and by refusing to honor it for a significant period of time, without sound justification."

Although *Dana* had been applied only prospectively, the Board majority applied its new rule retroactively to all pending cases other than those in which *Dana* election ballots had already been counted. As a consequence, ballots that were impounded in several *Dana* elections were never counted, and several pending petitions for *Dana* elections were dismissed.

Member Hayes vigorously dissented in *Lamons Gasket*. He accused the majority of making "a purely ideological policy choice, lacking any real empirical support and uninformed by agency expertise," that, like its actions in other cases and rule making, "conveys a pronounced ideological agency bias disfavoring the statutory right of employees to refrain from supporting collective bargaining" and favoring unionization. Hayes suggested that the majority's "holdings are not entitled to deference and should be put to strict scrutiny upon judicial review." However, there is no judicial review of Board decisions in representation cases, so the *Lamons Gasket* case is now closed. The Board is unlikely to revisit the issue until its membership changes.

B. "Successor Bar" Strengthened

In *UGL-UNICCO Service Co.*,[15] the majority of Chairman Liebman and Members Becker and Pearce issued another decision that makes it more difficult for workers subject to an unwanted union to obtain a secret-ballot election. The issue is whether employees should have an opportunity to reject an incumbent union and choose either no union or another union when a "successor employer" purchases a unionized employer. The Board-created "successor bar" doctrine says "no," that the employer and incumbent union must bargain for "a reasonable period of time" before employees may challenge the incumbent's majority status.

In 2002, the Board had discarded what had become an automatic "successor bar," returning "to the previously well-established doctrine that an incumbent union in a successorship situation is entitled to—and only to—a rebuttable presumption of continuing majority status, which will not serve as a bar to an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status."[16] *UGL-UNICCO* overruled *MTV Transportation* and reinstated a "conclusive presumption" of continuing majority support.

Moreover, *UGL-UNICCO* established defined "reasonable periods of bargaining" during which the successor bar holds. If the successor employer adopts the existing contract as a starting point, the "successor bar" lasts only six months. A greater obstacle for employees opposed to a union is that if the successor recognizes the union, but unilaterally establishes initial terms and conditions of employment before beginning to bargain, the bar is effective for at least six months and up to one year.

The Board majority reasoned that strengthening the successor bar "promote[s] a primary goal of the National Labor Relations Act by stabilizing labor-management relationships and so promoting collective bargaining." Member Hayes, dissenting, accused the majority of again "protecting labor unions, not labor relations stability or employee free choice."

C. Pre-Recognition Bargaining by Minority Unions Permitted

NLRA Section 8(a)(2)[17] makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization." In *Majestic Weaving Co.*,[18] the Board held that bargaining future terms of a collective-bargaining agreement with a union that has not yet obtained majority support violates Section 8(a)(2) even if the agreement is conditioned on the union later obtaining majority support.

Dana Corporation signed a neutrality and card-check agreement with the United Auto Workers that gave the union access to company facilities, employees' home addresses, and "captive audience" speeches. It also included a confidentiality clause and substantive provisions favorable to Dana concerning health benefits and other matters to be incorporated in any future collective-bargaining agreement. The UAW had been attempting for years, unsuccessfully, to organize Dana's plant in St. Johns, Michigan. After the St. Johns employees learned about the neutrality agreement, a majority signed and delivered to Dana and the UAW a petition opposing the union and asking Dana to cease giving that agreement effect. Nonetheless, Dana and the union conducted captive-audience speeches, Dana gave the union the employees' home addresses and did not allow its supervisors to talk negatively about the union, and UAW organizers conducted home visits.

National Right to Work Legal Defense Foundation attorneys filed unfair-labor-practice charges for three Dana St. Johns employees against both Dana and the union. In 2004, the then-General Counsel issued complaints against both alleging that they violated the NLRA by entering into an agreement "that sets forth terms and conditions of employment to be negotiated in a collective bargaining agreement should Respondent Union obtain majority status," when the union did not represent a majority of the St. Johns employees. The complaints asked that the neutrality agreement be voided as applied to that facility and that the union be ordered to return to employees any authorization cards obtained after the agreement was executed.

Member Becker recused himself when the case reached the Board on exceptions from an administrative law judge's decision against the workers because he had co-authored a brief for the UAW and AFL-CIO opposing the exceptions. On December 6, 2010, a two-member Board majority (Members Liebman and Pearce) dismissed the complaints.[19] It held that, *Majestic Weaving* notwithstanding, finding pre-recognition bargaining unlawful would contravene the NLRA's fundamental purposes, which they asserted are to encourage voluntary recognition of unions and collective bargaining. Member Hayes' dissent argued that the majority decision will "facilitate the preemptive practice of top-down organizing of employers by unions, thereby subordinating the statutory rights of employees to the commercial self-interests of the contracting" unions and employers.

The U.S. Court of Appeals for the Sixth Circuit affirmed the Board's decision on August 23, 2012.[20] The court weighed what it described as the "thoughtful majority and dissenting opinions of the Board members." It affirmed the Board majority's ruling "not because we find one position more persuasive than the other," but because "reasonable minds could differ as to how the NLRA should be interpreted to further the underlying purposes of the NLRA in the context of employer negotiations with unions that do not have majority status," and because the courts must defer to the Board's interpretation of the Act if it is "reasonable."

D. Defenses to Charges of Unlawful Solicitation of Grievances Vitiated

One of the "serious violations" that GC Memo 11-01 states can justify extreme remedies is an employer's solicitation of employee grievances during an organizing campaign. The Board views such solicitation as impliedly promising to remedy grievances without union intervention. The current Board has expanded the standard of what constitutes such a violation. One employer defense to a charge of improper solicitation has been that the employer had a previous practice of similarly soliciting grievances before the organizing campaign began. However, in *Mandalay Bay Resort & Casino*,[21] the Board held that the employer had improperly solicited grievances, even though it had a previous practice of conducting "focus groups" and pre-shift meetings in which employee issues were discussed and employee complaints aired. The Board found that there was a change in practice, because during the campaign the "focus groups" were convened by higher-level managers than those who had previously conducted those meetings.

E. Definition of Unlawful Surveillance Expanded

In *DHL Express, Inc.*,[22] the Board extended the definition of "surveillance," ordering a second election where a union had lost a representation election by an eighty-two-vote margin. The employer's security guards had called the police to investigate the presence of non-employee union organizers among employees hand-billing for the union on or near the employer's property. The security guards stood among or near the organizers while the police investigated. The Board majority held that the guards' presence was unlawful surveillance of the employees' protected union activity because it was "unusual, out of the ordinary, and unconnected with the [employer's] concerns." Member Schaumber dissented, because the guards did nothing to interfere with the hand-billing, often patrolled the area in question for security purposes, and had called the police and left the area once the police concluded their investigation.

F. "Bannering" Held Not to Be Unlawful Secondary Pressure

Section 8(b)(4)(ii)(B) of the NLRA[23] makes it an unfair labor practice for unions or their agents "to threaten, coerce, or restrain" persons or industries engaged in commerce with an objective of "forcing or requiring any person to . . . cease doing business with any other person." Consequently, it has long been unlawful for a union to picket a "neutral" (secondary) employer to put pressure on it to stop doing business with a primary employer that the union is attempting to organize.

In recent years, unions have adopted the tactic of "bannering," in which a union displays very near to a neutral employer's property, but usually on public property, huge banners that typically say "SHAME ON [the neutral employer]" for dealing with the primary employer, which is generally accused of not providing "area standard" wages and benefits. To the general public, it thus appears that the union's dispute is with the neutral employer, which would be what section 8(b)(4)(ii)(B) prohibits.

However, in *Carpenters Local 1506 (Eliason & Knuth)*,[24] the Board majority ruled that such a display was not unlawful because it "constituted neither picketing nor otherwise coercive non-picketing conduct." Moreover, the majority reasoned that the Supreme Court's doctrine of avoiding constitutional questions through statutory construction supported that conclusion, because peaceful bannering raised "serious constitutional free speech issues." Members Hayes and Schaumber dissented, arguing that the display of banners is the "confrontational equivalent of picketing" and therefore constitutes coercive secondary activity.

In *Sheet Metal Workers Local 15 (Brandon Regional Hosp.)*,[25] the Board held three to one that, under *Carpenters Local 1506*, a union did not violate Section 8(b)(4)(ii)(B) by displaying a large inflatable rat on public property in front of a hospital to protest its hiring of nonunion contractors. And, in *Southwest Regional Council of Carpenters (New Star Gen. Contractors)*,[26] the Board majority also extended its "free speech" bannering logic to find lawful union banners displayed outside gates reserved for neutral contractors at a "common situs" construction project.

G. Union Organizers' Access to Company Premises

Roundy's Inc.[27] is the first of a series of cases in which the NLRB communicated that it intends to loosen restrictions on union organizers' ability to obtain access to employers' premises to solicit support for unionization. Roundy's is a grocer that has both leased and company-owned stores. It attempted to ban non-employee union agents from hand-billing in front of all of its stores. The Board held that Roundy's violated the law in denying union organizers access at the leased sites because it did not have a sufficient property interest there. The Board also reserved consideration, and invited amicus briefs, as to whether Roundy's ban is an unfair labor practice at the company-owned stores, where it has a sufficient property interest, because Roundy's allows charitable solicitations. That issue is still pending before the Board.

In *New York, New York Hotel & Casino*,[28] the Board again found in favor of greater union access. There the Board held that a Las Vegas casino violated the NLRA by prohibiting off-duty employees of two contractor-owned restaurants from distributing union-organizing hand-bills at the casino's main entrance and at the entrances of the target restaurants inside the casino. The Board majority found that the off-duty restaurant employees' rights were so closely aligned with those of the casino's own employees, rather than those of non-employee union organizers, that they should be accorded the same rights as off-duty casino employees. Member Hayes dissented from this part of the decision.

In *Simon DeBartelo Group*,[29] the Board held that DeBartelo unlawfully prohibited employees of its janitorial-maintenance contractor from hand-billing at two of its shopping centers. Citing *New York, New York*, the Board ruled that the janitorial employees who worked regularly at the malls had the same rights as DeBartelo's own employees, because the mall owner had not proved that the hand-billing significantly interfered with its own use of the property. Member Hayes dissented again.

The majority went further in *Reliant Energy*.[30] In *Reliant*, a contractor's employee, while on duty, solicited the primary employer's employees to join a union. The majority held that it was an unfair labor practice for the primary employer to demand that the contractor remove its employee from the job site. Member Hayes' dissent criticized the majority's balancing of private-property and union-organizing rights: "My colleagues once again ride a contractor's Trojan Horse to further breach the legal barrier of Supreme Court precedent that generally proscribes individuals who are not employed by a property owner from engaging in [union activities] on that property."

H. Harassment of Employees Opposed to Unionization

In *Boulder City Hospital, Inc.*,[31] employees had complained to their employer during an organizing campaign about harassment by union sympathizers. In response, the hospital posted a notice reminding employees about its policy prohibiting harassment and threats. The validity of the policy was not challenged, but the Board majority held that the notice was unlawful because it did not merely recite the policy, but stated zero tolerance for "harassment . . . in any degree," because persistent union solicitation is protected by the NLRA even if it is annoying. The majority also found fault with a sentence in the notice stating that employees who felt that they were "being harassed or threatened in any way . . . have the right to talk with Human Resources regarding [that] treatment." The majority reasoned that this sentence could be interpreted as an invitation to report on the union activities of others, an unlawful form of interrogation.

More recently, in *Fresenius USA Manufacturing, Inc.*,[32] an employee who supported retaining a union in an upcoming decertification election at a warehouse "anonymously scribbled vulgar, offensive, and . . . possibly threatening statements on several union newsletters left in an employee breakroom." Female employees complained. After an investigation, the employer discharged the perpetrator for making the statements and for falsely denying that he had done so. The NLRB, Member Hayes dissenting, found that the discharge was an unfair labor

practice, because the employee's "comments encourag[ing] warehouse employees to support the Union" were protected concerted activity and not "so egregious as to cause him to lose the protection of the Act." Moreover, the Board majority held that the perpetrator had a statutory "right not to respond truthfully" to the employer's questions.

I. "Micro" Units: Bargaining Units Based on the Extent of Union Organizing

NLRA Section 9(c)(5) provides that in "determining whether a unit is appropriate for the purposes [of collective bargaining] the extent to which the employees have organized *shall not be controlling*."[33] Consequently, the Board's longstanding practice has been to avoid the proliferation of bargaining units within a single facility or business by applying a "community of interest" test. However, in *Specialty Healthcare & Rehabilitation Center of Mobile*,[34] the Liebman, Becker, and Pearce majority revoked this traditional practice.

In *Specialty Healthcare*, the majority determined that the appropriate bargaining unit was a single job classification of fifty-three certified nonprofessional nursing assistants (CNAs) requested by a union at a non-acute nursing-home facility. They rejected the employer's argument that the appropriate unit should include numerous other non-professionals who worked closely with the CNAs and their patients and, thus, were within a single community of interest. The majority adopted a test stating that where an employer contends that a bargaining unit proposed by union organizers is inappropriate because it excludes certain employees, "the employer must show that the excluded employees share an 'overwhelming community of interest' with the petitioned-for employees."

The *Specialty Healthcare* majority claimed that their "decision adheres to well-established principles of bargaining-unit determination, reflected in the language of the Act and decades of Board and judicial precedent." However, the majority's test puts primary emphasis on the extent of union organizing. Consequently, employers argue that the scales of the traditional community of interest balancing test are tilted in favor of unions and will logically result in the proliferation of bargaining units at a single employer. Union organizers could "cherry pick" units in which they know that they have enough support to win an election, possibly imposing unwanted representation on a minority of workers in the "micro" unit who would be in a majority rejecting representation in a traditional "wall-to-wall" unit.

Micro units could allow union organizers to get inside an employer's doors to organize and seek recognition as the representative of its other employees. Union officials with monopoly bargaining powers over a micro-unit might also have an incentive to offer concessions of employees' interests in return for the company's organizing assistance in unionizing a larger unit. The possibility of expanding representation may create uncertainty for employees, who may be forced to make a decision about unionization without knowing the true make-up of the ultimate bargaining unit. Moreover, it is possible that multiple competing unions representing small units will create conflict between and among represented groups within a single company.

Although *Specialty Healthcare* concerned only a non-acute health-care facility, the majority's holding was not explicitly limited to health-care bargaining-unit determinations. Member Hayes consequently predicted in his dissent, "Today's decision fundamentally changes the standard for determining whether a petitioned for unit is appropriate in any industry subject to the Board's jurisdiction."

That prediction has proven true in several cases. For example:

In *DTG Operations, Inc.*,[35] a two-to-one Board majority, relying on *Speciality Healthcare*, reversed a Regional Director's decision that the 109 employees at a car-rental agency was the appropriate "wall-to-wall" unit. The Board ruled that a Teamster union-requested unit of thirty-one rental and lead-rental sales agents was appropriate, despite frequent interchange, interaction, common supervision, and shared terms and conditions of employment among the larger group.

In *Northrup Grumman Shipbuilding, Inc.*,[36] the Board, aain two-to-one and relying on *Specialty Healthcare*, certified the union's petitioned-for unit of a small subset of technicians working in a Radiological Control Department, excluding all other technical employees at the same facility. Member Hayes, in dissent, wrote that the majority's decision demonstrates that its "newly-fashioned *Specialty Healthcare* standard . . . gives the petitioner's views on unit scope nearly dispositive weight, thereby abnegating the role Congress envisioned for the Board in determining appropriate bargaining units."

The Board's determinations in these representation cases are not appealable. Judicial review of the Obama majority's *Specialty Healthcare* doctrine can occur only if and when the Board finds an employer guilty of an unfair labor practice for refusing to bargain with a union certified as monopoly-bargaining agent in a "micro-unit." That has happened in *Specialty Healthcare* itself,[37] *Northrup Grumman*,[38] and *Nestle Dreyer's Ice Cream Co.*[39]

J. Board Jurisdiction Extended to Previously Excluded Types of Workers

Independent contractors cannot be unionized under the NLRA because they are expressly excluded from its definition of "employees."[40] The Board majority in *Lancaster Symphony Orchestra*[41] ruled that orchestra musicians were "statutory employees," not "independent contractors," though the orchestra had no permanent musicians. The musicians were skilled artists who provided their own instruments and attire, could perform with other entities on- or off-season, and were paid per program or concert when they accepted an offer to perform. Nonetheless, the Board majority held that they were statutory employees because "the Orchestra possesses the right to control the manner and means by which the performances are accomplished," and the musicians' "service is part of the Orchestra's regular business; and they are paid on a modified hourly basis."

Supervisors and managerial employees also are expressly excluded from unionization under the NLRA.[42] In *NLRB v. Yeshiva University*,[43] the Supreme Court held that a private university's full-time faculty members exercised supervisory and

managerial functions and were, therefore, excluded from the category of employees entitled to engage in collective bargaining under the NLRA. The Court relied on the unique nature of a university, which it found does not fit neatly into the NLRA's industrial model, and the fact that faculty exercised absolute authority in academic matters.

Yeshiva notwithstanding, the Board appears to be poised to hold that the faculty members of a different university are statutory "employees," not managers. In *Point Park University v. NLRB*,[44] the Board had ruled that the university committed an unfair labor practice by not bargaining with the union certified as its faculty members' "exclusive representative." The D.C. Circuit reversed, finding that the Board had "failed to adequately explain why the faculty's role at the University is not managerial." On May 22, 2012, the Board, three to two, issued a notice inviting the parties and any interested amici to file briefs as to whether the Board should distinguish *Yeshiva*, suggesting that the majority is likely to expand the class of university faculty that it will treat as subject to union organizing and monopoly representation.[45]

Similar expansions of union organizing opportunities are possible in *New York University II*[46] and *Polytechnic Institute of New York University*.[47] For about fifty years after the NLRA's enactment, the Board did not recognize private-college teaching assistants as covered employees. However, the Board reversed course in 2000 in *New York University I*,[48] holding that graduate teaching assistants are "employees" under the Act. After a membership change, a new Board majority held in 2004 in *Brown University* that graduate teaching assistants are students and cannot be organized because "there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process."[49] On June 22, 2012, the current Board, Member Hayes dissenting, granted review of two Regional Directors' decisions denying representation elections based on *Brown University*. It also invited briefs from the parties and interested amici as to whether it should overrule *Brown University* and hold that graduate-student assistants, including those engaged in research funded by external grants, are statutory employees.

Endnotes

1 The United States Court of Appeals for the Seventh Circuit did not reach the merits of the appointment issue in the Foundation's direct challenge, dismissing that appeal on standing grounds. Richards v. NLRB, 194 L.R.R.M. (BNA) 2897, 2012 WL 6684764 (7th Cir. Dec. 26, 2012). However, in a second case, in which the Foundation filed an amicus brief, the D.C. Circuit held that the recess appointments were unconstitutional because they were not made during a recess between Congressional sessions. Noel Canning v. NLRB, No. 12-1115, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013).

2 76 Fed. Reg. 54,006 (Aug. 30, 2011).

3 National Ass'n of Mfrs. v. NLRB, 2012 WL 691535 (D.D.C. Mar. 2, 2012).

4 Chamber of Commerce of the U.S. v. NLRB, 856 F. Supp. 2d 778 (D.S.C. 2012), *petition for review docketed*, No. 12-1757 (4th Cir. June 18, 2012).

5 76 Fed. Reg. 80,138 (Dec. 22, 2011).

6 Chamber of Commerce of the U.S. v. NLRB, 2012 WL 1664028 (D.D.C. May 14, 2012).

7 29 U.S.C. § 152(b); *see* New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010) (Board may not decide cases without three members).

8 29 U.S.C. § 160(j).

9 29 U.S.C. § 186.

10 Mulhall v. UNITE HERE Local 355, 618 F.3d 1279 (11th Cir. 2010).

11 Mulhall v. UNITE HERE, 667 F.3d 1211 (11th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3066 (U.S. July 20, 2012) (No. 12-99), *cross-petition for cert. filed*, 81 U.S.L.W. 3128 (U.S. Aug. 22, 2012) (No. 12-312)..

12 Dana Corp., 351 N.L.R.B. No. 28 (Sept. 29, 2007).

13 Rite Aid Store #6473, 355 N.L.R.B. No. 157 (Aug. 27, 2010).

14 Lamons Gasket Co., 357 N.L.R.B. No. 72.

15 357 N.L.R.B. No. 76 (Aug. 26, 2011)

16 MTV Transp., 337 N.L.R.B. 770 (2002).

17 29 U.S.C. § 158(a)(2).

18 147 N.L.R.B. 859 (1964).

19 Dana Corp., 356 N.L.R.B. No. 49 (Dec. 6, 2010).

20 Montague v. NLRB, 698 F.3d 307 (6th Cir.2012).

21 355 N.L.R.B. No. 92 (Aug. 17, 2010).

22 355 N.L.R.B. No. 144 (Aug. 27, 2010).

23 29 U.S.C. § 158(b)(4)(ii)(B).

24 355 N.L.R.B. No. 159 (Aug. 27, 2010).

25 356 N.L.R.B. No. 162 (May 26, 2011).

26 356 N.L.R.B. No. 88 (Feb. 3, 2011).

27 356 N.L.R.B. No. 27 (Nov. 12, 2010).

28 356 N.L.R.B. No. 119 (Mar. 25, 2011), *petition for review denied*, 676 F.3d 193 (D.C. Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3220 (U.S. Oct. 4, 2012) (No. 12-451)..

29 357 N.L.R.B. No. 157 (Dec. 30, 2011).

30 357 N.L.R.B. No. 172 (Dec. 30, 2011).

31 355 N.L.R.B. No. 203 (Sept. 30, 2010).

32 358 N.L.R.B. No. 138 (Sept. 19, 2012), *petition for review filed*, No. 12-1387 (D.C. Cir. docketed Sept. 28, 2012).

33 29 U.S.C. § 159(c)(5) (emphasis added).

34 357 N.L.R.B. No. 83 (Aug. 26, 2011).

35 357 N.L.R.B. No. 175 (Dec. 30, 2011).

36 357 N.L.R.B. No. 163 (Dec. 30, 2011).

37 357 N.L.RB. No. 174 (Dec. 30, 2011), *petition for review filed sub nom.* Kindred Nursing Centers East, LLC, No. 12-1027 (6th Cir. docketed Jan. 11, 2012). The Sixth Circuit heard oral argument on January 23, 2013.

38 *Huntington Ingalls Inc.*, 358 N.L.R.B. No. 100 (Aug. 14, 2012), *petition for review filed*, No. 12-2000 (4th Cir. docketed Aug. 16, 2012).

39 358 N.L.R.B. No. 45 (May 18, 2012) (unit of maintenance employees only), *petition for review filed*, No. 12-1684 (4th Cir. docketed May 24, 2012). The employers in *Huntington Ingalls* and *Dreyer's Ice Cream* are also challenging President Obama's "recess appointments" of three NLRB members while the U.S. Senate was conducting pro forma sessions. That issue is outside the scope of this paper. However, if the appointments were unconstitutional, as the D.C. Circuit held in *Noel Canning*, *see supra* note 1, then the Board did not have a quorum of three validly appointed members and could not decide the *Huntington Ingalls* and *Dreyer's Ice Cream* unfair-labor-practice cases when it did. *See* New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010).

40 29 U.S.C. § 152(3).

41 357 N.L.R.B. No. 152 (Dec. 27, 2011).

42 29 U.S.C. § 152(3), (11).

43 444 U.S. 672 (1980).

44 457 F.3d 42 (D.C. Cir. 2006).

45 No. 6-RC-12276 (NLRB May 22, 2012).

46 No. 02-RC-023481 (NLRB June 22, 2012).

47 No. 29-RC-012054 (NLRB June 22, 2012).

48 332 N.L.R.B. 1205 (2000).

49 Brown University, 342 N.L.R.B. 483 (2004).