CONSTANGY
BROOKS & SMITH, LLP
The Employers' Law Firm, Since 1946

EXECUTIVE LABOR SUMMARY

www.constangy.com
Toll free 866.843.9555

May / June 2011

IN THIS ISSUE

By Bob Lemert
Atlanta Office

NEWS & ANALYSIS

Boeing trial taxis down the runway. – The unfair labor practice hearing over **Boeing's decision to locate a second assembly line for Dreamliner production in South Carolina** began in Seattle on June 14. An administrative law judge will decide whether the company created the second assembly line at its non-union plant to retaliate against a union workforce at its Washington state facility that had a long history of strikes. At the first session of the hearing Boeing filed a motion to dismiss, and the parties spent hours trying to resolve 53 very broad document requests by the National Labor Relations Board. The ALJ also ruled that 16 right-to-work states can file *amicus* briefs on the issue of remedies should the allegations of the complaint be sustained.

To accommodate spectators, the hearing was moved to a grand old courtroom normally used by the U.S. Court of Appeals for the Ninth Circuit. Attorneys for both sides estimate that trial will take approximately six weeks. The ALJ has indicated that he will not schedule the six weeks consecutively.

NLRB sues Arizona over secret ballot law, and has South Dakota in its sights. – Last November, voters in Arizona, South Carolina, South Dakota, and Utah approved state constitutional amendments that would guarantee or require the use of secret ballots in union representation elections. In January of this year, NLRB Acting General Counsel Lafe Solomon told the attorneys general of the four states that Section 7 of the National Labor Relations Act preempts the amendments. Federal law provides two paths to

choosing a union representative: (1) certification based on a Board-conducted secret ballot election, or (2) voluntary recognition based on other convincing evidence of majority support. The state constitutional amendments require secret ballot elections but do not specifically address voluntary recognition where it is permitted under the NLRA.

The attorneys general responded in a joint letter, asserting that they were prepared to defend the state amendments in court. The NLRB took them up on the offer and **filed suit** against the state of Arizona on May 6. The Board is asking the district court to declare that, to the extent the Arizona provision applies to private sector employees, employers, and unions subject to the NLRA, the state measure is preempted by the NLRA under the Supremacy Clause of the U.S. Constitution. Arizona has filed a **motion to dismiss** the lawsuit.

According to an NLRB **press release**, a second complaint is expected to be filed in South Dakota in the coming weeks. Solomon has said he would not immediately try to litigate the South Carolina and Utah measures.

Dues checkoff may survive contract expiration. – When it terminated its interim labor agreement, the Hearst Corporation notified the union that both the arbitration and dues checkoff provisions of the collective bargaining agreement would be terminated. The union filed a grievance challenging the termination of checkoff, claiming that the contract compels it for any checkoff authorization that has not been revoked. When the grievance was not resolved, the union notified Hearst of its intention to take the matter to arbitration and, after the company refused to arbitrate, filed suit to compel arbitration. The court granted summary judgment to the union, which meant that Hearst was required to arbitrate the issue unless Hearst won on appeal.

The U.S. Court of Appeals for the Second Circuit **affirmed**, but went on to say that the written checkoff authorization by individual employees directing Hearst to deduct dues from their pay remains effective according to its terms, which state that "this assignment and authorization of dues-checkoff continues until revoked by the employee and is automatically renewed and irrevocable in certain instances." Moreover, according to the court, the labor agreement "does not provide Hearst the unilateral right to revoke any assignment. Nor is there any indication that Hearst's obligation to remit dues . . . terminates upon expiration of the CBA."

NLRB adds "rat balloon" to unions' secondary boycott arsenal. – The NLRB has **ruled** that a union did not violate the NLRA's prohibition against secondary boycotts by stationing a 16-foot rat balloon in front of a hospital in order to persuade the hospital to stop using non-union construction labor on a hospital addition. Predictably, Democrat Board Chair Wilma Liebman, and Members Craig Becker and Mark Pearce, found that the union did not violate Section 8(b)(4)(ii)(B) of the Act by displaying the rat or by stationing a union agent at a vehicle entrance with a leaflet in front of his chest that an ALJ said resembled a placard. The Board majority said the union's primary labor dispute was with two non-union subcontractors, not with the hospital. The rat balloon had an attached sign with the name of one of the subcontractors, and was mounted on a trailer located 145 feet, 170 feet, and 100 feet from various entrances to the hospital. Union members stood near the trailer and at the vehicle entrances, distributing leaflets proclaiming, "There's a rat at Brandon Regional Hospital." The leaflet described the subcontractor as a "rat employer" and claimed the hospital was undermining the wages, benefits, and other working conditions established by the local labor agreement. One union leafletter stood near the hospital's vehicle entrances for about two days and "held the leaflet out with two arms, directed at visitors entering and exiting the hospital parking lot."

The NLRB's general counsel under the Bush Administration had argued that the use of the rat display and use of the leaflet like a placard were similar to picketing and, therefore, violated the secondary boycott provisions of the Act because they were undertaken to pressure the hospital to stop doing business with the two subcon-

tractors. The Board majority disagreed, ruling, as it did with regarding to "bannering" in ***Eliason & Knuth of Arizona, Inc.***, that neither the rat display nor the leaflet display constituted picketing and "entailed no element of confrontation, as they were stationary and located sufficient distances" from all hospital entrances, and "that visitors were not confronted by an actual or symbolic barrier as they arrived at, or departed from, the hospital."

Dissenting Member Brian Hayes agreed with the General Counsel that the union's use of the rat balloon had been "tantamount to picketing." He argued that such displays constitute a signal to third parties that there is, in essence, an invisible picket line that should not be crossed. Hayes said he would also find that holding out a sign to be seen by passing motorists "plainly was picketing" and "no less confrontational than wearing a placard, which the Board has long recognized to be equivalent of carrying a picket." According to Hayes, by moving from giant banners in *Eliason* to giant rats mounted on trailers in this case, "my colleagues have quite literally expanded the physical mass that unions may erect to confront and deter customers from entering a neutral employer's premises in order to coerce that employer to cease doing business with the primary employer target of a labor dispute. Clearly, these means of protest owe more to intimidation than persuasion."

THE GOOD, THE BAD AND THE UGLY

NLRB "open to" requiring employers to provide information to unions about plant relocations. – Under the Board's ***Dubuque Packing Co.*** framework, an employer is not required to bargain over a plant relocation if union concessions on labor costs could not persuade the employer to change its decision. Because the relocation is not a mandatory subject of bargaining, under these circumstances the employer is not required to provide a union with requested information about the decision to relocate. (The employer is, however, required to bargain over the *effects* of the relocation, even if it does not have to bargain over the *decision*.)

In ***Embarq Corp.***, Liebman, Becker, and Hayes agreed that the company was not required to bargain about its decision to close a call center and relocate the work to Florida, but Liebman said she would be open to considering whether the Board should require employers to provide incumbent unions with requested information whenever there was a "reasonable likelihood" that labor-cost concessions might affect the decision. Liebman wrote that "in a future case, I would be open to modifying the *Dubuque* framework in connection with union requests for information."

Liebman's language is cautious, but the Board's actions seem to point toward another foregone conclusion that will be adverse to employers. The regional labor board offices have been notified that Acting General Counsel Solomon wants to examine the "concerns" raised by Liebman in *Embarq* and determine whether to propose a new standard in cases involving this kind of information request. The regions have been directed to submit to the NLRB's Division of Advice all cases presenting the issue of whether an employer violated the Act by refusing to provide information related to a relocation or other decision covered by *Dubuque Packing*.

It takes no imagination to see where all this is going.

Man bites dog, or dog bites man? NLRB rejects union suggestion to conduct new election at neutral site, but employer loses anyway. – As the cases discussed above make clear, the current NLRB is hardly employer-friendly, so it's remarkable when the Board actually refuses to side with a union. In ***Mental Health Ass'n, Inc.***, the Board did exactly that, rejecting a union's suggestion that voting in representation elections should be held at neutral locations away from the employer's premises. However, the Board

did so only after finding that a first election, which the SEIU Local 509 lost by 131-82, should be set aside.

Liebman, Pearce, and the usually-dissenting Hayes agreed with the recommendation of an NLRB hearing officer to set aside the results of the election. According to the Board, the employer changed the route and method by which employees could enter the facility by limiting access to the customary employee entrance and turning control of the entrance over to "openly antiunion" workers for part of the designated polling period. The employer also added security personnel, erected a fence around part of its parking lot, and posted "private property" signs, "all apparently without security justification," according to the Board. The panel found that "the totality of this conduct reasonably tended to interfere with employees' free and uncoerced choice in the election."

The union had urged the Board not only to order a second election, but also to order that the new election be conducted at a neutral location away from the employer's premises and outside the employer's control. Under current policy, the Board favors elections on the employer's premises. But the SEIU asked to file an *amicus* brief, arguing that "the Board should instead presume that balloting must occur at a neutral site, outside of either party's control, absent contrary agreement."

Liebman and Pearce wrote that the case "illustrates some of the shortcomings of the Board's current practices regarding the siting of elections," but that they were "not prepared at this time . . . to deviate from the Board's current practice of leaving determination of the location for initial and rerun elections to the discretion of the Regional Director."

Trumka threatens Democrat politicians. – It is obvious that AFL-CIO President Richard Trumka is frustrated by the failure of Congress to pass the Employee Free Choice Act despite the support of organized labor for Democrat candidates during the 2008 general election. Trumka has recently reiterated his warning that unions will hold elected officials accountable and decide on whether to support them for re-election in 2012 based on whether they help "improve the lives of working families and strengthen our country." In a recent speech before the 2011 Staff Nurse Assembly of National Nurses United, Trumka repeated many of the points he had made directly to politicians last month at the National Press Club. He says that organized labor will hold them to "a simple standard: are they helping or hurting working families." According to Trumka, it "doesn't matter if candidates and parties are controlling the wrecking ball or simply standing aside – the outcome is the same either way. If leaders aren't blocking the wrecking ball and advancing working families' interests, working people will not support them."

Bruce Raynor forced out! But is he a victim of politics? (Probably.) – Bruce Raynor, President of the Workers United affiliate of the Service Employees International Union and the SEIU's International Executive Vice President, resigned from both positions effective May 7. The union had charged Raynor with misappropriating union funds by submitting misleading expense reports. In a statement, Raynor said he "strongly believes that the challenged expenditures were appropriate union related expenses for which reimbursement to me was proper. Nevertheless, in order to resolve any doubt regarding those expenditures, I have repaid $2,316.03, the entire amount in dispute." According to the internal charges, which have been resolved, Raynor incorrectly designated who was present at 10 dinners for which he sought reimbursement, and the dinners may not have been for business purposes. Raynor contended that the charges were politically motivated because he had supported Anna Burger to replace Andy Stern as President of the SEIU.

Raynor has spent 38 years in organized labor, beginning his career in 1973 with the former Textile Workers Union of America, where he worked on a number of Southern organizing drives, most notably against J.P. Stevens and Cannon Mills. For eight years he was international president for UNITE and UNITE-HERE, until he resigned in 2009 to become president of Workers United.

CONSTANGY
BROOKS & SMITH, LLP
The Employers' Law Firm, Since 1946

EXECUTIVE LABOR SUMMARY

May / June 2011

About Constangy, Brooks & Smith, LLP

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.