Employers' summer of discontent: Obama labor board pushes anti-employer agenda

By Mark A. Spognardi

While employers have been increasingly worried about a double dip recession, the National Labor Relations Board has had a busy summer proposing and implementing rules and issuing decisions designed to promote the unionization of America's workforce. The Obama Labor Board has taken over where the President has failed, delivering victories to organized labor at a time when the public sentiment towards unions has become, at best, distrustful, and at the worst, disdainful.

Applicable to all employers falling under the Board's jurisdiction, the Board has issued a final regulatory rule requiring employers to notify employees of their rights under the National Labor Relations Act. The Notice informs employees that they have a right to act together to improve wages and working conditions, to form, join, and assist a union, to bargain collectively with their employer, and to refrain from these activities. Employers will be required to post the notice where other workplace notices are typically posted, by November 11, 2011. The rule also specifies when the notice must be posted in a foreign language. The notice, on an 11 by 17 inch poster, is now available from the Board's website at www.nlrb.gov, and in the future from the Board's regional offices. A failure to post the notice is an unfair labor practice.

Early in the administration, the President attempted to enact the Employee Free Choice Act, also known as "card check," as a payback for the enormous support organized labor provided during the election. The legislation would have provided for the certification of a union on the basis that a majority of the employer's workforce signed union authorization cards, and would have provided for binding interest arbitration for first contracts. For a number of reasons, that legislative effort failed.

Again, however, the Obama Labor Board came to the rescue. This summer the Board proposed regulatory amendments to representation election procedures to provide for "quickie elections. Officially, the proposed rules are intended to reduce unnecessary litigation, streamline pre- and post-election procedures, and facilitate the use of

electronic communications and document filing. In reality, the proposed rules will limit an employer's ability to respond to organizing campaigns and for employees to become educated about the advantages and disadvantages of union representation and collective bargaining.

Under current procedures, the Board strives to hold representation elections within 42 days after the representation petition is filed. However, the Board's proposed amendments will shorten that period by days, if not weeks, by deferring most eligibility and bargaining unit issues until after the election and eliminating the parties' ability to request review of a Regional Director's decision prior to the election.

Specifically, the proposed amendments will require the Regional Director to schedule the pre-election hearing to begin within seven days after a hearing notice is served. By the start of the hearing, the employer must state its position on the election issues that it intends to raise at the hearing, including, among other things, the appropriateness of the bargaining unit sought by the union, and the type, date, and location of the election. The union will then respond to the positions taken by the employer. After hearing the parties' positions, the hearing officer will identify their disagreements and accept evidence only on genuine issues of material fact affecting those issues. However, and most importantly, unless the issues affect 20 percent or more of the unit, the litigation of those disputes will be deferred until after the election by the challenged ballot procedure. Moreover, even if the unit issues are litigated prior to the election, the parties cannot request review from the Board prior to the election.

Once the Regional Director issues his or her direction of election, the employer will have only two days, rather than seven days, to provide the list of eligible voters to the union. The new rules will require the employer to provide phone numbers and email addresses when possible, rather than just names and addresses. In addition, the new rules will allow petitioners to file election petitions electronically and for the NLRB to provide notices directly to employees through email when addresses are available.

The Board received comments and replies through September 6, 2011, and had two full days of hearing testimony. Whether the proposed rules become law will depend on how quickly the Board acts and whether the President can successfully make recess appointments. The proposed rule can be found at 76 Fed. Reg. 36812 (2011) or on-line at http://federalregister.gov/a/2011-15307.

On August 26, 2011, the Board decided three cases of importance to organized labor, just prior to the expiration of Chairman Wilma B. Liebman's term at midnight, August 27.

In *Lamons Gasket Co.*, 357 N.L.R.B. No. 72 (Aug. 26, 2011), the NLRB expressly overruled the 2007 decision in *Dana Corp.*, 351 N.L.R.B. 424 (2007), and reestablished a recognition bar that blocks any challenge to a labor organizations majority status for a

"reasonable period of time" following the employer's voluntary recognition of the union following a "card check." *Dana Corp.* had changed the law regarding voluntary recognition after a card check, by providing for a 45-day window period during which employees, or another union, to challenge the recognized union's majority status. The window period commenced upon the employer's posting of an official NLRB notice informing employees of their newly created right to seek a secret ballot election.

Clarifying the phrase "reasonable period of time," the Board concluded that the recognition bar was no less than 6 months after the parties' first bargaining session and no more than 1 year. During this period, no employer, employee, or union may petition the Board for a secret ballot election and the employer may not withdraw recognition from the union. The specific length of this voluntary recognition bar depends on a multiple factors, including whether the parties are bargaining for an initial contract; the complexity of the issues being negotiated and the parties' bargaining processes; the amount of time elapsed since bargaining commenced and the number of bargaining sessions; the amount of progress made in negotiations and how near the parties are to concluding an agreement; and whether the parties are at impasse.

The Board also reversed current law to provide a union with more protection from being removed due to a lack of majority support after a new owner/successor employer buys the business. In *UGL-UNICCO Service Company*, 357 N.L.R.B. No. 76 (Aug. 26, 2011), the Board considered how long a union should have a presumption of majority status when the enterprise whose employees they represent is purchased by a new employer. Where the purchaser becomes a "successor" employer (i.e., hires at least 51% of the sellers employees), it must recognize and bargain with the union. However, the successor does not always have to adopt the existing labor agreement and, in many cases, has the right to establish its own initial terms and conditions of employment and then bargain with the union for a new collective bargaining agreement.

The Board reversed existing law which had that with a successor employer, the union only enjoys a rebuttable presumption of majority support, and that clear evidence that the union no longer had majority support justified the successor employer's refusal to recognize and bargain with the union. Rather, the Board resurrected the "successor bar" doctrine, providing the union with an irrebuttable presumption of majority support for a minimum of six months and a maximum of one year, measured from the date of the first bargaining meeting between the union and the successor employer. In situations where the successor employer chooses to continue the existing terms and conditions of employment as the starting point for bargaining, the presumed majority support will be for six months. In situations where the successor employer exercises its right to reject existing terms and conditions and implement its own initial terms and conditions while bargaining proceeds, the presumed period of majority support will be no less than six months and no more than one year. In determining when the presumption elapses, the Board will consider the complexity of the issues being negotiated; the time elapsed

since bargaining began and the number of bargaining sessions; the amount of progress made in the negotiations and how near the parties are to concluding an agreement; and whether the parties are at impasse.

The Obama National Labor Relations Board could be limited soon in its efforts to help labor, foster collective bargaining, promote organized labor. With Chairman Liebman's departure, the Board is now down to three members: Newly designated Chairman Mark Pearce, Member Craig Becker and Member Brian Hayes. Member Becker's recess appointment to the NLRB will end in December, 2011. The U.S. Supreme Court has held that the Board does not have the authority to issue decisions with less than three members. *New Process Steel, LP v. NLRB*, 130 S. Ct. 2635 (2010). Thus, employers should be hopeful that President Obama's pro-big labor efforts will stall.