



Inside The Beltway

Keeping You Informed

A publication of Nixon Peabody LLP's Washington, DC, office

October 6, 2010

Critical developments in labor and employment law

By John N. Raudabaugh, former Member, National Labor Relations Board

Executive Branch/Administration—
National Labor Relations Board 2010 fiscal year-end review—decidedly pro-union results, more coming; be prepared

The National Labor Relations Board (NLRB) issued 265 publicly reported decisions for the 2010 fiscal year ending September 30. Of the cases issued, 77 were two-member decisions issued before the recess appointment of members Becker and Pearce on March 27, 2010, and 78 cases were reconsiderations of two member cases remanded from the appellate courts following the U.S. Supreme Court's June 17, 2010, decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that decisions must be issued by at least three members. On June 22, 2010, Pearce and Hayes were confirmed by the Senate. Schaumber's term ended on August 27, 2010, leaving the board one member short of a full, five-member agency.

The following discussion highlights cases of particular interest impacting employers generally, union-free companies, and companies with union contracts and/or union recognition obligations. The reported cases signal strategic issues of interest to the newly reconstituted NLRB and pose serious constraints to employer operating flexibility, investment in employee engagement, and conducting business under collectively bargained agreements. Our assessment of the reported decisions suggests the following **Action Plan**:

1. For non-union workplaces, assess whether your assumed "appropriate units" can withstand Board scrutiny should a union organizing campaign occur. **Do NOT assume** that a "wall-to-wall" unit will be found appropriate. Given the current Board membership, **expect unions to target ANY employee grouping**, particularly smaller, easier-to-organize subgroups. You must consider how you would prefer to deal with a union should it succeed. Do you want one union representing a large or wall-to-wall group, preventing other, potential unions and union groupings, resulting in multiple bargaining agreements and/or do you want to insulate, protect, and prevent at all costs the organizing of smaller, operationally critical subgroups, e.g., technicians, skilled maintenance, etc. Consult your Nixon Peabody

labor counsel regarding these issues and the benefits of Nixon Peabody's **Unit Analysis Program**.

2. **Train and retrain managers and supervisors.** Given the Obama Board's propensity to view facts most favorable to union objectives, more sophisticated training is necessary. The typical "TIPS" training is no longer sufficient. Investment in employee engagement is critical to union avoidance, but, in doing so, do not undermine the effort with errant comments and unintentional actions by supervisors or managers that will be leveraged to find unfair labor practices and/or employer objectionable conduct. Confer with your Nixon Peabody labor counsel regarding the Firm's extensive and current training programs and related materials.
3. All employers must **periodically review in detail** their policy language/choice of words contained in **employee handbooks**. Overly broad or vague language serves as one of the most frequently litigated issues before the Board. Unions file unfair labor charges knowing that the Board almost always finds such language to violate employees' protected rights to engage in protected activities, and then use the Board's unfair labor practice charge to then initiate or advance union organizing. Contact your Nixon Peabody labor counsel if your employee handbook and/or employee policies have not been reviewed within the past year.
4. For employers with union recognition and collective bargaining obligations, evaluate carefully and consult with your Nixon Peabody labor counsel regarding **union requests for information**. The issue of information requests is one of the most frequently litigated issues before the Obama Board. Employers should also consider using information requests as a **tactical counterpoint** in collective negotiations.
5. In advance of collective bargaining negotiations, review in detail **all contract language** to prioritize subject matter relative to both direct and indirect economic costs, as well as potential limitations on operating flexibility. Then, consult with your Nixon Peabody labor counsel to discuss the most critical issue in current labor-management relations—the Obama Board's **"clear and unmistakable waiver" doctrine, a potential attack undermining management's ability to factor and control operating costs and operating flexibility**. To preserve management's rights and operating flexibility, specific language and/or evidence from negotiations is necessary to substantiate any claim of authority for subsequent, unilateral, management action.

Critical issues scheduled for NLRB review

The Obama Board will revisit the practice of employer voluntary recognition of unions. The Board announced its request for briefing in *Rite Aid Store #6473*, 355 NLRB No. 157 (August 27, 2010). At issue is the Bush Board decision in *Dana Corp.*, 351 NLRB 4334 (2007), which allowed employees 45 days following notice by the employer that it voluntarily recognized a union based on card-check to petition the NLRB for an election. Under that decision, if 45 days pass without the filing of a petition, the voluntary recognition bar attaches to protect the union from decertification or rival union petitions for a reasonable period, to facilitate first contract negotiations. Chairman Liebman notes that the *Dana* decision, in her view, undermines employees' choice by permitting an immediate challenge. Former member Schaumber objected to the request for briefing and its clear intention to overrule *Dana*, noting that authorization cards are inferior to the election process, the

Board invites an election to challenge an employer's withdrawal of recognition and, in experience to date, *voluntary recognition was voted down in nearly 25 percent of the Dana elections conducted by the NLRB*. Amicus briefs are due not later than November 1, 2010. **Nixon Peabody LLP will be filing a brief on behalf of interested employers and employer associations. If interested in participating, please contact your Nixon Peabody counsel.**

The overruling by the Bush Board of the “successor bar” doctrine in *MV Transportation*, 337 NLRB 770 (2002) is scheduled for review and likely reversal. On August 27, 2010, the Board announced its intention to decide whether to return to the Clinton Board's decision in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). *UGL-UNICCO Service Company*, 355 NLRB No. 155 (August 27, 2010). The “successor bar” would require an employer that assumes a predecessor's business, maintains substantial continuity of operations, and hires a majority of its employee complement from the predecessor's workforce to recognize and bargain with the predecessor employer's union representative for a reasonable period of time without challenge. The Bush Board's *MV Transportation* decision rejected the irrebuttable presumption of majority status for a reasonable period and held that an incumbent union in a successorship situation is entitled only to a rebuttable presumption of majority status allowing for a valid decertification, rival union, or employer petition. As in *Rite Aid Store #6473*, the Obama Board is clearly signaling its interest in revisiting whether employees should have free choice when considering union representation at their workplace or when the employer changes.

NLRB notable decisions impacting employers generally

Employer responses to a union “salting” campaign were at issue in *KenMor Electric Company, Inc.*, 355 NLRB No. 173 (August 27, 2010). Union electricians would apply to targeted contractors indicating on their applications their union membership and that, if hired, they would engage in organizing. In response, area employers used a referral service. The Board majority noted that salting is protected activity even if it intentionally provokes an employer to commit an unfair labor practice by refusing to consider or hire the union identified applicant. The Board found the employers' reliance on the referral system unlawful. The dissent argued that the majority was effectively imposing a disparate impact theory of liability and noted that the Board previously found unlawful applications filed with no intention of accepting a job if offered, but only to generate meritless unfair labor practice charges.

A full Board majority found a **union's display of a large, stationary banner** held at either end without patrolling at a neutral, secondary employer's premises to be **lawful, expressive activity similar to peaceful handbilling and not coercive, ambulatory picketing** subjecting the union to unfair labor practice liability and monetary damages. *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (August 27, 2010). The Board majority rejected the notion that the display of a banner by union agents, communicating only the existence of a “labor dispute” without naming the employer or identifying an employer as primary or secondary, operates as a signal not to patronize or to cease work. In dissent, former member Schaumber and member Hayes noted that “the majority will now require a showing that the union's conduct ‘directly caused, or could reasonably be expected to directly cause, disruption of a secondary's operations ... substantially augment[ing] **union power** ... and invites a **dramatic increase in secondary boycott activity.**” The dissent rejected any notion that movement is required to define picketing; rather, the essential feature of illegal secondary activity is the posting of individuals at entrances to a place of work.

In *Independence Residences, Inc.*, 355 NLRB No. 153 (August 27, 2010), a 3–2 full board majority upheld a union election victory and deferred to a New York state statute imposing restrictions on employers from using state funds to express non-coercive information opposing unionization, despite the U.S. Supreme Court’s ruling in *Chamber of Commerce v. Brown*, 128 S.Ct. 2408 (2008) that a similar California statute was preempted by the National Labor Relations Act (NLRA or Act). The Board majority reasoned that, in a case where employees overwhelmingly voted for the union in a secret-ballot election, in which both the union and employer participated, employees’ exercise of free choice was not “substantially impaired.” **The Board majority avoided the preemption issue**, noting that the state law did not “create a serious obstacle” to the employer’s ability to communicate with employees. The dissenters noted that “the majority’s analysis invites states and localities to test the limits of federal supremacy by enacting laws and ordinances restricting the role of employers in union organizational campaigns.”

An employer’s discharge of employees for making physical threats while engaged in a protest of working conditions was found unlawful in *Kiewit Power Constructors Co.*, 355 NLRB No. 150 (August 27, 2010). The Board majority embraced the *Atlantic Steel Co.*, 245 NLRB 814 (1979) four-factor test: (1) place of the discussion, (2) subject matter of discussion, (3) nature of employee’s outburst, and (4) whether the outburst was provoked by the employer’s unfair labor practice. How the test was applied by the Board majority is revealing. Although the Administrative Law Judge found the employees’ threats unprotected, the Board reversed reasoning that, because the employer issued warnings in a work area during working time, it was reasonable to expect that employees would protest on the spot. Second, even though the subject of discussion—workplace safety—was previously announced and subject to the employer’s unilateral control, it related to the union protest of the employer’s use of discipline to enforce the policy. Third, although the employee’s outburst was deemed “an outright threat,” the Board majority considered that the employee’s conduct, although exceeding the bounds of lawful conduct, occurred in a moment of “animal exuberance” not motivated by improper motives— “[a]lthough intemperate, they were not unambiguous or ‘outright’ threats of physical violence.” Regarding the fourth factor, the Board did not find the employee’s threat provoked by any unfair labor practice by the employer. The Board’s remedy directs the employer to reinstate the employees with backpay and to remove the record of discharge from their personnel files.

Given member Becker’s dissent in *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127 (August 27, 2010), **“appropriate unit” design is undoubtedly subject to future litigation.** The union petitioned for a unit limited to poker dealers only. The acting regional Director found the requested unit not appropriate, because poker dealers did not have a community of interest separate and distinct from craps, roulette, and blackjack dealers. In response to the union’s request for review, Chairman Liebman and former member Schaumber agreed that the separate unit was not appropriate because poker dealers’ interests were not sufficiently distinct from those of other employees. Member Becker recounted the union’s evidence and underscored that “the only question . . . is whether the proposed unit is *an* appropriate unit, not whether it is the most appropriate unit.” Becker’s view empowers unions to seek *any* unit—small or large—where they have a majority or potential majority. To counter a union’s requested unit, employers must be prepared to defend their position on each community of interest factor, including degree of functional integration, common supervision, nature of employee skills and functions, interchangeability and contact among employees, work situs, general working conditions, and fringe benefits. In *ADT Security Services, Inc.*, 355 NLRB No. 223

(September 30, 2010), Chairman Liebman and member Becker, member Hayes dissenting, held the employer's withdrawal of recognition of a union unlawful despite the closure of the facility, reassignment of employees and merger with a different, pre-existing facility. The majority reasoned that, "when the issue is whether an existing unit remains appropriate in light of changed circumstances, the Board gives significant weight to the parties' history of bargaining", in this case, 29 years. ADT is an example of how the multiple, appropriate unit factors may be "weighed" by the Board to achieve a particular result. Related to "appropriate unit" design is the issue of "unit placement" and whether an individual is an "employee" to be included or a "supervisor" to be excluded from voting and any resulting bargaining unit. In *Pacific Coast M.S. Industries*, 355 NLRB No. 226 (September 30, 2010), the Board found "team leaders" to be statutory employees, not exempt supervisors, and directed their challenged ballots be opened and counted in the secret ballot election. The Board found their claimed "authority" to assign, discipline, and recommend hiring to be "dictated or controlled by detailed instructions" and without the exercise of "independent judgment." Employers frequently miscalculate and misapply the 12 factor definition of "supervisor," resulting in a variety of election challenges, election objections, unfair labor practice litigation, and rerun elections.

NLRB notable decisions impacting non-union employers

In *Affiliated Computer Services, Inc.*, 355 NLRB No. 163 (August 27, 2010), a Board majority held that letters circulated to employees during a union organizing campaign from a U.S. Congressman and State Senator, expressing concern about the employer's relations with its employees, was not objectionable conduct requiring a second election. The dissent objected to the **interjection of government officials** into the ongoing organizing campaign and implying that the exercise of their political power would impact the employer's ongoing business depending on the election outcome.

The Board majority's decision in *TCB Systems, Inc.*, 355 NLRB No. 162 (August 27, 2010), is noteworthy in reminding employers that **comments by lower-level supervisors bind the company.** After hiring many employees from a predecessor service contractor's workforce, a supervisor responded to an employee's question about why the new company did not hire all of the predecessor's workforce by noting that the employee "was lucky for being chosen to work." The Board majority noted that the supervisor made the comment during an official meeting in his office, phrased the message as a definitive statement of fact, and added that he knew of the employee's union activity. Key to the unfair labor practice finding was that the **supervisor failed to make clear that he was offering his personal opinion.**

At issue in *Mandalay Bay Resort & Casino*, 355 NLRB No. 92 (August 17, 2010), was whether an employer's **solicitation of grievances during the critical period** preceding a union election was objectionable, requiring a rerun or second election. During the union campaign, supervisors conducted meetings with employees, and solicited and responded to their concerns about the campaign. The Board majority held that, although supervisors held employee meetings prior to the campaign to deliver work-related news and instructions, the **employer failed to prove** that it had a **past practice** of soliciting employee grievances and implicitly promising to remedy them. Therefore, in the absence of proof of past practice, the campaign meetings with supervisors' implied promises to remedy employee concerns about the union campaign were objectionable. The dissent contended that the majority mischaracterized the past practice of pre-shift meetings as limited only to making daily assignments without listening to employee complaints.

NLRB notable decisions impacting unionized employers

The issue in *E.I. DuPont De Nemours, Louisville Works*, 355 NLRB No. 176 (August 27, 2010), concerned the employer's unilateral change to the employees' benefit plan during ongoing negotiations for a successor collective bargaining agreement without reaching impasse. The employer contended that the change was consistent with past practice and was implemented pursuant to the contract's management-rights provision. Moreover, the employer's benefit plan included a **reservation of rights** provision, granting the employer the authority to modify benefits under the Beneflex Plan on an annual basis, which the employer did annually during the bargaining agreement's term. The Board majority held that **unilateral changes cannot be made during ongoing contract negotiations absent impasse unless** there was a **past practice** of making changes during both a contract's term and hiatus periods. According to the Board majority, a management-rights clause is a union's waiver of its right to bargain; a contractual reservation of managerial discretion does not survive contract expiration absent **evidence that the parties intended it to survive**. The majority then advised employers that, if the parties consider it worthwhile to continue the operation of reservation of rights clauses in benefit plans post-contract expiration, they "can easily agree to such continued operation" or show that was the intent of the parties when they included the language in the now-expired contract. The dissent argued that the reservation of rights clause, unlike a management-rights provision, was part of the benefits plan to which the parties agreed. The dissent noted that the union should not be able to take plan benefits while ignoring provisions it finds distasteful.

A full five-member Board majority held in *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174 (August 27, 2010), that a union's requirement that a non-member file **annual objections** to supporting activities unrelated to collective bargaining and contract administration under *Communications Workers of America v. Beck* is **arbitrary and unlawful**. Because the employee had informed the union in writing of his continuing objection, an annual requirement was deemed unjustified. The majority noted that it was not announcing a per se rule and would proceed on a case-by-case basis.

The critical issue of contract waiver was again reviewed by the Board in *Springfield Terrace LTD*, 355 NLRB No. 169 (August 27, 2010). The parties' contract specifically excluded Licensed Practical Nurses (LPNs) from the represented unit. When the union later sought to represent LPNs in a separate unit, the employer objected, noting the existing contract exclusion. The Board majority held that **waivers are enforceable "only when they are clear, knowing, and unmistakable**, whether predicated on a contractual provision or by conduct." In this case, the majority reasoned that the contractual language did not address a separate bargaining unit, but opposed the addition of LPNs to the unit from which they were excluded. The employer attempted to defend its position based on its neutrality agreement with the union as a *quid pro quo* for the union's waiver of any attempt to organize the LPNs. The Board majority noted that the employer failed to provide any contract language or other express agreements to prove its claim.

The issue of an employer's obligation to respond to a **union information request for financial information** was addressed in *Stella D'oro Biscuit Company, Inc.*, 355 NLRB No. 158 (August 27, 2010). The Board majority found that, during negotiations for a successor agreement, the employer claimed that it was unable to pay the costs of the expiring contract. Consequently, under *NLRB v. Truitt Mfg.*

Co., 351 U.S. 149 (1956), the company was obligated to provide the union with a copy of its audited financial statement or allow the union to examine the document. The company objected to turning over the confidential financial information, but offered to allow inspection of the document. The Board majority held that the company failed to meet its obligations to provide the information, given the union's offer to sign a confidentiality agreement. By failing to provide the requested information, the subsequent impasse in negotiations and unilateral implementation of terms were invalid, and the union's subsequent strike in response to the employer's unfair labor practices preserved the striking employees' rights to reinstatement upon their unconditional offer to return to work. The dissent rejected the finding that the employer made any statement suggesting an inability to pay, but communicated only its unwillingness to pay. As to the failure to provide the information to the union, the dissent noted that the company offered to allow the union to inspect the documents at the company's office without providing copies.

A recurring issue before the Board is an employer's obligation to provide a union with requested information. In *Kraft Foods North America, Inc.*, 355 NLRB No. 156 (August 27, 2010), a union representing employees at one plant requested copies of benefit plans in effect at other plants some 15 months in advance of contract renewal negotiations. The Board majority held the company's refusal unlawful. The Board noted that, although a union must show that its request for information about terms and conditions of employment outside the bargaining unit is relevant to its representational duties, the showing is subject to a liberal, discovery-type standard *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). As to the timeliness of the union's request, the Board majority noted that, in the past, the employer had refused to provide requested information requiring the union to file a charge with the Board. Consequently, the majority found that it was not unreasonable for the union to request the information well in advance of negotiations, to allow time for enforcement, should it be necessary. The dissent argued that, because the request was premature, the requested information was not relevant.

The issue in *Caterpillar, Inc.*, 355 NLRB No. 91 (August 17, 2010), concerned the company's announcement and implementation of a prescription drug program as part of the negotiated Group Insurance Plan, without providing the union notice and an opportunity to bargain. The Board (Chairman Liebman and members Becker and Pearce) rejected the company's **past practice** defense regarding periodic, **unilateral changes** to the Group Insurance Plan's "step therapy" drug program because the company failed to show that such changes occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB 240 (2007). Moreover, according to the Board, the company failed to demonstrate a *practice*, because the types of past change are dissimilar—a prescription drug program is not the same or similar to, a step-therapy program and is not the same, or similar to, any other claimed employer past practice. Consequently, the Board reasoned that "making a series of disparate changes without bargaining does not establish a 'past practice' excusing bargaining over future changes. Rather, it shows merely that, on several past occasions, the union waived its right to bargain." The Board then admonished that "**a union's acquiescence in previous unilateral changes does not operate as a waiver** of its right to bargain over such changes for all time." *Owens-Corning Fiberglass*, 282 NLRB 609 (1987). Finally, the Board rejected the argument that the subject matter of the unilateral change was not material, substantial, or significant because the program change affected employee choice and/or the costs to employees of such benefits.

NLRB remedies for unlawful discharges in organizing campaigns

On September 30, 2010, the Acting NLRB General Counsel announced new procedures to stop employee unfair labor practices that “nip in the bud” employee efforts to organize. Going forward, unlawful discharges in organizing cases will get priority action and speedy remedies. The General Counsel ordered all regions to speed charge processing, complaint issuance, seek Section 10(j) injunctive relief and reinstatement of discharged employees, expedited hearings, and oppose requests for extension of time.

For further information on the content of this Alert, please contact your Nixon Peabody attorney or:

- John N. Raudabaugh at 202-585-8100 or jraudabaugh@nixonpeabody.com