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EXECUTIVE LABOR SUMMARY

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IN THIS ISSUE

NEWS & ANALYSIS

NLRB to seek swift remedies during union organizing. – The National Labor Relations Board has announced new procedures and timelines aimed at expediting federal court injunctions under Section 10(j) of the Act in cases that involve unlawful discharges during union organizing efforts. In a September 30 memo, Acting NLRB General Counsel Lafe Solomon said that an employer's unlawful firing of an active union supporter during an organizing drive "means not only that the negative message from the unfair labor practices persists, but also that the remaining employees are deprived of the leadership of active and vocal union supporters." Solomon also observed that "with the passage of time, the discharged employees are likely to be unavailable for, or no longer desire, reinstatement when ordered by the Board." In such situations, a resumption of union activity is unlikely and the eventual Board order "is ineffective to protect rights guaranteed by the Act," he said.

The memo described the "optimal timeline" for processing these cases and the procedures to ensure timely processing. Within 14 days after the filing of a charge, where the evidence "points to a *prima facie* case on the merits," the respondent will be notified that the NLRB is considering a request for Section 10(j) injunctive relief for the employee's interim reinstatement and that a position statement on that issue should be submitted within seven days. The Regional Director is expected to make a determination on the merits of the case within 49 days from the filing of the charge. If the case has merit, a decision for Section 10(j) relief should be made at the same time. The Board's General Counsel will personally review and decide whether the 10(j) relief should be authorized in all such cases.

According to the Acting General Counsel, neither the disinterest of an employee in

reinstatement nor a union's abandonment of its organizing efforts is considered a ground for declining to seek Section 10(j) relief. "A union's abandonment of an organizing campaign is itself evidence of chill and does not remove the negative message that discharges have on employee statutory rights," Solomon said. "a court order offering interim reinstatement may cause the resumption of employee interest with a previous or new union, whether or not the offer is accepted."

The Board will keep statistics to see whether the new approach really works and, according to Solomon, the procedure could be expanded to other types of 10(j) cases.

Union vote within 10 days of petition? Could happen! – Given his background as an attorney representing organized labor, it was not surprising to hear that NLRB Member Mark Pearce favors making the time period between the filing of an election petition and the election vote "as brief as possible." At a recent labor law conference, Pearce related that over the past year the Board conducted 2,200 elections with an average of 38 days between the filing of the petition and the election. He said, "I think we can do better." According to Pearce, the longer the period before the vote, the greater the likelihood of unfair labor practices from both sides. He described as "intriguing" the Canadian process of holding elections within 5 to 10 days and postponing eligibility issues until after the vote.

NLRB plays catch-up . . . . – The Board resolved 315 cases in Fiscal Year 2010, which ended in September. This compares with the 256 decisions issued in Fiscal Year 2009, when the Board had only only two members. In June 2010, after the Supreme Court's decision in ***New Process Steel*** was issued and once the Board again had five members, it gave priority to "re-deciding" the two-member decisions. By the end of FY 2010 the Board had issued new decisions in 70 of the 96 two-member cases that were pending in the federal appeals courts, as well as 118 decisions in cases that were simply backlogged.

The actions of the newly constituted Board in two of those cases provides insight into how the pro-labor composition of the Board will affect Board precedent. In ***United Brotherhood of Carpenters & Joiners of America, Local 1506***, a Board majority of Liebman, Becker and Pearce found that the secondary boycott provisions of the National Labor Relations Act do not prohibit the "peaceful stationary display of a banner." In this case, union members held a 16-foot-long banner near two medical centers and a restaurant to protest work being performed by non-union construction contractors. Fliers handed out by the union explained that its dispute was with the construction companies but asserted that the employer contributed to the undermining of area labor standards by using the non-union contractors. According to the Board majority, stationary bannering is not equivalent to picketing. Picketing is coercive, said the majority, because of the combination of carrying picket signs and walking of the picketers in front of an entrance to a worksite so that a physical or symbolic confrontation exists. On the other hand, bannering was found to be more like handbilling, which **the Supreme Court has found to be lawful**.

The two dissenting Board members, Schaumber and Hayes, found the decision "most troubling and ill-advised." They argued that bannering has the same coercive impact as traditional picketing. "The size and placement of the banner, the stationing of union agents to hold them, and other direct similarities to picketing are all factors contributing to the confrontational impact of bannering, sharply distinguishing that conduct from handbilling's mere persuasion."

A **second case** involved a 2-2 deadlock, with Member Craig Becker abstaining, but the decision illustrates the sharp differences between the "sides" on the current Board. The deadlock resulted in dismissal of a 15-year-old

complaint alleging that a Las Vegas casino violated federal labor law by unilaterally discontinuing checkoff after the expiration of a collective bargaining agreement. Member Becker recused himself, but Chairman Wilma Liebman and Pearce questioned the NLRB precedent saying that dues checkoff is excluded from the terms or conditions of employment that are mandatory subjects of bargaining and, therefore, can be unilaterally discontinued after contract expiration. On the other hand, Members Ronald Schaumber and Hayes argued that checkoff agreements are "rooted in the employer-union relationship, function as a negotiated employer accommodation to a union, and do not substantially affect employees' terms and conditions of employment." No doubt the Liebman-Pearce view will eventually prevail, when the checkoff issue finds its way back to the Board and Member Becker does not have to recuse himself.

- - - And throws curveballs! – On October 22 the NLRB issued two decisions that radically changed its long-standing remedies of back pay and notice posting. In ***Jackson Hospital Corp. d/b/a Ky. River Med. Ctr.***, 356 NLRB No. 8, a unanimous Board adopted a new policy under which interest on back pay and other monetary awards will be compounded on a daily basis rather than simple interest on a quarterly basis. This new policy will be applied in all pending cases, in whatever stage, absent any "manifest injustice" in doing so. The Board rejected the employer's argument that this issue should be addressed through the rulemaking process rather than adjudication. **In the second case**, the Board ruled 3 to 1 in favor of electronic posting of notices to remedy unfair labor practices where that is the customary means of communicating with employees or members. Liebman, Becker, and Pearce observed that electronic communications are overtaking bulletin boards as a primary means of communicating messages to employees and union members. In his dissent, Hayes agreed but argued that the Board had transformed what has been an extraordinary remedy into a routine remedy that will impose more onerous posting requirements on respondents that have adopted electronic communications and will probably affect more employers than unions since more employers use the new electronic technology. Hayes also expressed concern that NLRB notices in cyberspace are at greater risk of alteration, as well as distribution to non-employees or, in the case of unions, rival unions.

THE GOOD, THE BAD AND THE UGLY

Government-employee union spends big on elections, and it's not for the Tea Party. – The American Federation of State, County and Municipal Employees is now the biggest outside spender on the coming elections. In an 11th-hour effort to boost Democratic candidates, the public-sector union has vaulted ahead of the U.S. Chamber of Commerce, the AFL-CIO, and Republican groups in campaign spending with a whopping $87.5 million in contributions. The AFSCME is fearful that newly elected conservatives will clip the wings of public-sector unions by restricting the way they collect and use dues.

Is your company in the union database? – The AFL-CIO has recently released a searchable database that provides detailed information on outsourcing numbers, safety violations and discrimination cases for more than 400,000 corporations and subsidiaries. The database, which allows searches by zip code, company name and industry, uses data from multiple public sources, including the Labor Department's Trade Adjustment Assistance records, WARN Act notices and OSHA records. AFL-CIO President Richard Trumka has pointed to the benefits of the database for workers, stating that "for the first time, working people have one place to see the real impact of the failed policies of the past that gave corporations the ability to ship American jobs overseas. With this new data as a benchmark, working people will have the ability to separate the economic patriots from the corporate traitors at the ballot box." Trumka did not name any specific "corporate traitors."

On August 6, the Board released decisions in four of the two-member cases. In each of the cases, the three-member panel simply "rubber stamped" the two-member decision. If this becomes a trend, that backlog may be gone before we know it.

Court stops union trial. – The constitutions of most unions contain broad rules governing the conduct of members. Rules prohibiting "dissension against the union" are common. When Andrew Price, a member of the Carpenters and Joiners of America, displayed a bumper sticker criticizing the union's effort to bring electrical workers into the union, the union ordered him to remove the sticker from his truck and warned that he would be brought up on charges if he did not comply. Price did nothing, so the union charged him with violating the union constitution and ordered him to stand trial.

Price then filed suit, alleging that the union's conduct violated the Labor-Management Reporting and Disclosure Act and **obtained a preliminary injunction** blocking the union from continuing the disciplinary proceeding while the court considered and resolved the lawsuit. The court found that federal law gives union members the right to express their opinions, and that subjecting a member to an adverse action for doing so is likely to deter future expression and is violation of a union's duty under the LMRDA. Although the law provides that a union member may be required to exhaust internal hearing procedures before filing suit, here the court found that First Amendment freedoms were at stake, and so Price did not have to exhaust.

"Can't get no satisfaction" – join a union? – According to a recent report, "Labor Unions and Life Satisfaction: Evidence From New Data," by three university professors, labor unions play a significant role in determining why citizens in some nations express greater "subjective satisfaction" with life than others. The writers of the report used data from 14 industrial democracies, including Australia, Canada, Finland, France, Germany, Great Britain, Italy, Japan, the Netherlands, Norway, Spain, Sweden, Switzerland and the United States. The work relied on a single, direct question asking respondents to comment on "how satisfied" or "how happy" they feel with their lives "in general." According to the report, work is perhaps the central focus of most people's lives and for a variety of reasons, including job security and a positive work environment, belonging to a labor union "may tend to increase job satisfaction." The report points out that unions may reduce alienation at work by giving members a collective say in how workplaces are run.

U.S. critics of the report claim that its conclusions do not explain why, in the United States, when people move to pursue the well-being and happiness of their families, they are moving in large numbers from "union" states to "right to work" states.

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