

Obama Labor Board Shows New Signs of Life

by Paul H. Derrick

The National Labor Relations Board has long been accused by some critics of being a union pawn, while others have taken it to task for not doing enough to protect organized labor. Whatever one's perspective, several seemingly pro-union actions by the agency in recent weeks may signal a shift in the course of federal labor relations policy.

The NLRB is the agency charged with, among other things, safeguarding employees' right to determine whether to have unions as their bargaining representative.

Most recently, the NLRB filed a legal action against an ambulance service that terminated a union-represented employee who posted negative remarks about her supervisor on Facebook. The NLRB's investigation found that the employee's Facebook postings constituted protected concerted activity and that the company's blogging and Internet posting policy unlawfully prohibited employees from making negative remarks about the business or its supervisors. In the Board's view, such restrictions might interfere with the right of employees to engage in pro-union activity. A hearing before an administrative law judge is scheduled for early 2011.

The Student-Employee Debate

Other recent developments suggest that the NLRB's pro-labor stance in the Facebook case may not be an isolated matter. For example, students working on graduate degrees historically have received academic credit and modest income for teaching undergraduate courses. And for decades, unions have insisted that these graduate students are actually "employees" who have a right to unionize. The issue has been a thorny one for the NLRB and is rooted as much in the basic economics of union survival as anything else. If, as the unions claim, graduate teaching assistants are employees, they are entitled to choose union representation and to demand collective bargaining over the terms and conditions of their teaching duties. That, in turn, could be a rich source of new members – who will pay monthly dues and assessments – for the ailing union movement.

The Board's most reasoned decision on the issue came in 2004, when it decided by a 3-2 vote that graduate teaching assistants were not employees. The NLRB's current chairman, formerly an attorney for the Teamsters union, was one of the two members who believed the students should have the same right to unionize as traditional employees. It appears that her belief may soon carry the day.

Graduate students at a major university in the Northeast recently attempted to organize under the auspices of the United Auto Workers. Their petition for an election was dismissed by the labor board's regional office on the ground that current law does not allow students to be treated as employees. The union appealed to the Board, which reversed the dismissal on October 25, stating that "there are compelling reasons" to reconsider whether graduate teaching assistants should be not be allowed to unionize and collectively bargain as employees. The NLRB went on

to say that, in its current view, the earlier decision was “inconsistent with the broad definition of employee contained in the [labor statutes] and prior Board” precedent.

The clear implication of this development is that the new NLRB is ready to reverse decades of guidance and policy and find graduate students to be employees under the law. With all of the colleges and universities located in the Triangle and throughout North Carolina, the local impact of such a policy shift could be particularly acute.

Looking Ahead

With a majority of the Obama Board’s members having strong union backgrounds, the NLRB may be poised to do the one thing that a Democrat-controlled Congress could not do: help unions get more members. From the recent examples cited above and several others, one could conclude that the process is well underway.

Effecting change through regulatory agencies such as the NLRB often is just as effective as legislative overhaul, and it usually attracts less notice. With the Employee Free Choice Act all but dead, Big Labor no doubt was pleased by NLRB-member Mark Pearce’s announcement on October 21 that he favors Canadian-style “quickie” elections, in which voting takes place within 5-10 days after a representation petition is filed. Because management’s ability to campaign against unionization would be greatly reduced under such a system, some watchers suggest that unions could achieve a 75-90% success rate.

Time will tell whether the new NLRB succeeds in revising longstanding labor policy in order to promote unionization. For now, employers are conducting supervisor training, reviewing their policies, and bracing themselves for what could be a bumpy ride.

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