

Labor & Employment Inner Workings





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THE NEW NATIONAL LABOR RELATIONS BOARD (“NLRB”)



THE NEW NLRB

WILMA LIEBMAN	CHAIR
PETER SCHAUMBER	MEMBER
CRAIG BECKER	ASSOCIATE GC FOR SEIU
MARK GASTON PEARCE	FOUNDING PARTNER OF UNION SIDE LAW FIRM
BRIAN HAYES	EMPLOYER SIDE ATTORNEY

WHY THE NEW NLRB IS LIKELY TO MAKE CHANGES

- Consider the backgrounds and published statements of the new Board Chair and Craig Becker
- Not as much is known about Mark Pearce, but he has exclusively represented unions



NLRB CHAIR WILMA LIEBMAN

- Wilma Liebman is a former lawyer for the Teamsters and Bricklayers unions
- She is the author of some of the most potent dissents to majority Board decisions issued over the past ten years, particularly those issued by the Bush Board
- The Obama Board chaired by her with majority union side members likely will have the opportunity to reconsider and reverse many decisions issued by the Bush Board
- Liebman spoke before a Congressional committee in December of 2007
 - Expressed strong disagreement with decisions issued by the Board over the past several years
 - Expressed opinion that the decisions eroded rights of employees and labor unions
 - Expressed opinion that the decisions impede collective bargaining, create obstacles to union representation, or favor employer interests



NLRB CHAIR WILMA LIEBMAN

- Expressed opinion that the decisions she has criticized are inconsistent with NLRA's intended purpose
- Expressed opinion that there is need for the Board through decision making to eliminate obstacles to collective bargaining and union organizing and to enhance employee right
- In her dissents stated that the Act is not a neutral statute under which the rights of employees to join or not join a union are considered on an equal basis
- According to her, the Act requires the Board to decide cases in a manner that emphasizes union representation and promotes collective bargaining

LIEBMAN'S FOCUS

- Stronger remedies for employees and unions for employer violations of the NLRA
 - Increased use of bargaining orders
 - Electronic posting of Notices related to ULP's
 - Less burden on employees to demonstrate loss of back pay if victim of discrimination

LIEBMAN'S FOCUS (cont.)

- Subordination of employer rights if these limit employee Section 7 rights
 - Property rights
 - Free speech rights
 - Right to establish work rules

LIEBMAN'S FOCUS (cont.)

- Greater inclusion of individuals deemed protected by the Act
 - NLRA protection for contingent workers/temporary workers/workers provided by staffing agencies
 - Efforts to insure that NLRA protections are extended to unrepresented workers
 - Revisiting the definition of supervisor so that fewer individuals are excluded from the Act's protection based on alleged supervisory status

LIEBMAN'S FOCUS (cont.)

- Expand the definition of “concerted activity” protected by the NLRA

LIEBMAN'S FOCUS (cont.)

- More accommodation for means used by unions to organize and for employee union activities
 - Greater protection for union “salting” activities
 - Requiring that employers post notices describing employee Section 7 rights
 - Establish rights of employees to use employer emails for union solicitations
 - Validation of voluntary recognition agreements, neutrality agreements or other means of creating a collective bargaining relationship without a traditional Board conducted election
 - Perhaps more restrictions on what employers can say and do in response to known or suspected union activity

LIEBMAN'S FOCUS (cont.)

- Increased emphasis on maintaining collective bargaining relationships once formed
 - More obstacles for employers seeking to withdraw recognition from an incumbent union
 - Greater obligations on an employer to provide requested information to a union either during collective bargaining or otherwise
 - Less deferrals to “dubious” arbitration awards



CRAIG BECKER

- Appointment raises similar considerable concerns
- Seems to believe that statutory amendments are not necessary to radically change existing Board precedent and practice
- Close association with SEIU raises questions about ability to impartially judge cases that will come before the Board
- Becker's role at SEIU may prompt him to advocate with Board colleagues to implement portions of EFCA even if not enacted by Congress
- Board may then attempt to impose EFCA card check on its own
- Believes employers should be stripped of right to campaign against organizing and give captive audience speeches
- Believes unions should have equal access to workplace
- Critical of NLRB election process
- Believes that Gissel orders which require an employer to recognize and bargain with a union should be routinely issued if employer is found to have engaged in ULPs



REGISTER GUARD

- An employer may prohibit employees from using office e-mail to disseminate information about union activities
 - Policy prohibited employee use of Company email system for “non job related solicitations”
 - Employer was aware that employees used e-mail for personal reasons
 - No evidence that e-mail used to solicit support for outside causes or organizations other than United Way
 - Employer and Newspaper Guild had been in contract negotiations
 - Union president sent three e-mails through employer e-mail system



REGISTER GUARD

- Company proposed new rule during bargaining prohibiting use of e-mail for union business
- Union refused to bargain over the proposal and filed a ULP alleging 8(a)(5) violation
- Issue of first impression
 - Majority analogized issue to permissible restrictions on employer owned bulletin boards/telephone/televisions
 - Found that employees have no statutory rights to use employer property—including email systems—for union related solicitations or other Section 7 purposes

REGISTER GUARD

- Discrimination issue:
 - Although employer email was used by employees for lots of personal messages, including personal solicitations, but not for solicitations to support or participate in an outside cause or organization
 - The majority found no discrimination in denial of use of email for union related solicitations
 - Discrimination defined as “the unequal treatment of equals.”
 - Held that since other solicitations for third party organization membership had not been allowed, no discrimination because of Section 7—despite the fact that various other solicitations were allowed on the employer’s email system.

WHAT IS LIKELY OBAMA BOARD VIEW?

- Email not like TV, bulletin boards, etc.
- Where employees use email for business, banning non-work related email solicitation should be deemed unlawful absent extraordinary circumstances



DANA CORP.

- The Board’s “recognition bar doctrine”
 - Where an employer voluntarily recognizes a union based on a majority showing of interest, the Board will allow the parties a “reasonable period of time” to reach a contract
 - It will not hold decertification or other kinds of elections in that unit during that time frame

DANA CORP.

- Board developed a new rule:
 - Employees must be notified in writing of the voluntary recognition and informed of their right to file or support decertification or rival union petitions within 45 days thereafter
 - The Board also ruled that if such petitions are filed within that 45 day period, they will be processed

DANA CORP.

- This was a significant modification to the automatic election bar that came with voluntary recognition
- The decision also was quite remarkable for its clear commentary:
 - that elections are a much better way of determining employee choice than cards or other information which might be used to support voluntary recognition
 - that successful union card campaigns may be premised on misrepresentation of facts, etc.

WHAT IS LIKELY OBAMA BOARD VIEW?

- Liebman complained that the effect of the decision is to disrupt a new bargaining relationship before it can be firmly established

OAKWOOD HEALTHCARE, INC.

- Definition of supervisor within the meaning of this term in the NLRA
- “Assign”
 - Designate an employee to a place (department, unit), or
 - Appoint an employee to a time (shift or OT), or
 - Award significant overall duties or tasks



OAKWOOD HEALTHCARE, INC.

- “Responsibility to Direct”
 - What job should be undertaken and who should perform it, accountability for the tasks of others
- “Independent Judgment”
 - Degree of discretion exercised by a supervisor must be more than routine, clerical or perfunctory

WHAT IS OBAMA BOARD LIKELY VIEW?

- “Assign”: To make assignments does not make someone a supervisor
 - Only assignments of workers to shifts, departments or job classifications do
- “Responsibility to Direct”: Intended to cover only persons in charge of department level work

HARBORSIDE HEALTHCARE

Under prior law, solicitation of an authorization card by a supervisor was unlawful only where the supervisor's conduct was somehow threatening or coercive

- In this decision, the Board held that solicitation of an authorization card by a supervisor is inherently coercive regardless of what the supervisor actually said or did

WHAT IS OBAMA BOARD LIKELY VIEW?

- Based on this decision, more elections will be overturned, particularly given the expanded definition of “supervisor” contained in the Oakwood Healthcare decision
- Liebman opined that there should be specific showing of illegal coercion or harassment before election results are voided based on supervisory involvement

OAKWOOD CARE CENTER

- Union petitioned for a unit which was comprised of employees solely employed by Oakwood and employees jointly employed by Oakwood and a personnel staffing agency
- Majority held that these two groups of employees could be in a bargaining unit together only if all parties agreed
 - Overruled the 2000 decision in M. B. Sturgis
- Majority focused on bargaining complications which can result from having two groups of employees not necessarily similarly situated in the same bargaining unit
 - A practical decision dealing with the realities of collective bargaining

WHAT IS OBAMA BOARD LIKELY VIEW?

- The decision denies NLRA coverage to those who need it
- Encourages the use of low cost alternative labor
- These individuals can only have their voices heard through a Sturgis type unit

IBM CORP.

- Background
 - IBM interviewing non union employees about harassment allegations
 - Three employees to be interviewed requested the presence of a coworker
 - IBM denied the request
 - IBM later discharged the three employees
- Majority of Board held:
 - Non-union employers have no obligation to offer Weingarten protections to employees.
 - Overrules decision from 2000 in Epilepsy Foundation of Northeast Ohio



IBM CORP.

- Majority of Board held that:
 - Any request of employee to have a coworker present at an investigatory interview in absence of a union is outweighed by an employer's right to conduct an efficient, thorough and confidential investigation
- There is critical difference between employer's ability to deal with unrepresented employees on individual basis in contrast to represented employees

WHAT IS OBAMA BOARD LIKELY VIEW?

- Application of Weingarten in a non-union setting should be evaluated on a case by case basis

LUTHERAN HERITAGE VILLAGE- LIVONIA

- Employer maintained policies prohibiting “abusive and profane language,” “harassment” and “verbal mental or physical abuse”
- Employer suspended and then discharged an employee/union steward for violations of the policies
- Unfair labor practice charges were filed alleging that these were overbroad and could interfere with Section 7 activity
- Majority held that
 - Employer has the right to maintain a civil and decent workplace
 - Employees can be disciplined for violating such policies even if Employee claims that he or she engaged in Section 7 activities
 - Employees had every opportunity to engage in protected activities while still complying with the employer mandates



WHAT IS OBAMA BOARD LIKELY VIEW?

- An employee engaging in Section 7 activity while violating a policy should be protected
 - One example: a loud and boisterous disagreement with a supervisor over working conditions. Should an employee be allowed to use abusive language just because he/she is talking about working conditions which affect two or more employees?
- A lawful policy should expressly state that it does not cover Section 7 activities.

WATERS OF ORCHARD PARK

- Issue relating to definition of protected concerted activity, i.e. “mutual aid and protection”
- Employees were disciplined for complaining about heat conditions impacting patients
- Board has repeatedly held that employee concerns for the quality of care or welfare of their patients are not encompassed by mutual aid and protection clause because their concerns do not relate to their own working conditions

WHAT IS OBAMA BOARD LIKELY VIEW?

- Liebman was extremely critical of decision and we can expect these issues to be revisited

WURLAND NURSING & REHABILITATION CENTER

- “We, the employees of Wurtland, wish for a vote to remove the union”
- Employer withdrew recognition
- Board majority held that even though the word “election” was not used, employees said that they wanted to “remove” the union
- Thus, a clear statement of employee support for decertification and employer withdrawal or recognition was deemed lawful

WHAT IS OBAMA BOARD LIKELY VIEW?

- In comments before Congress Liebman noted what she saw as a real incongruity
 - That Board in Dana disregarded union authorization cards with clear statements of employee desire for union representation, but accepted what in her opinion was a more ambiguous statement to justify withdrawal of recognition

ROLE OF THE NLRB GENERAL COUNSEL

- The opportunity to reverse precedent is somewhat dependent upon the NLRB General Counsel
- The General Counsel has ultimate say over whether to prosecute ULPs
- The current General Counsel generally has not interfered with prosecutorial discretion exercised by Regional Directors
- However, he has not routinely authorized Regional Directors to seek 10(j) relief
- Moreover, he was appointed by President Bush
- His term expires in August 2010
- President Obama will likely appoint someone supporting expansion of union rights
- New general counsel may make greater use of 10(j) injunction and other enforcement remedies

NLRB PROCEDURAL CHANGES

- It is conceivable that the Obama Board will shorten the time for elections even without legislative changes
- Possible requirement that employers post notices about employee Section 7 rights, much as they do for other federal laws (FLSA, OSHA, etc.)

POTENTIAL LEGISLATIVE CHANGES

- Arlen Specter recently announced that a compromise may have been reached creating the prospect for passage of a modified EFCA
- EFCA as modified may include:
 - Expedited elections and certification of results
 - Limitation on time to achieve first contract through collective bargaining
 - Binding “best offer” arbitration of contract terms if negotiations do not result in first contract within time limits
 - Tougher penalties for employer ULPs

FINAL REMARKS

- Employers like unions should recognize that there likely will be significant changes in Board decision making and legislation changes which will affect the workplace
- Liebman and Becker have certainly expressed their preference for change and a desire to reverse existing precedent

FINAL REMARKS

- The political landscape also has changed dramatically
- Unions are actively lobbying Congress for legislative changes like the EFCA

FINAL REMARKS

- This also will influence Board decision making
- The Obama Board likely will seize the opportunity in appropriate cases to reverse NLRB precedent
- The number of reversed decisions could be comparable to the number reversed by the Bush Board

FINAL REMARKS

- Unions are adjusting litigation and organizing strategies in anticipation of more favorable Board decisions
- Employers likewise should adjust and evaluate policies and practices and contemplated employment related decisions in anticipation of changes likely to be made by the Board and Congress



QUESTIONS/COMMENTS

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