

IF YOU CAN'T BEAT THEM, APPOINT YOUR WAY AROUND THEM

21. June 2010 By Steve Palazzolo

Well, that didn't take long. In the first week of April this year, President Obama made two recess appointments to the National Labor Relations Board. Craig Becker is the former general counsel of the SEIU, the nation's biggest union, and Mark Pearce is a former founding partner of a prominent Buffalo New York union side labor and employment law firm. The final opening on the Board remains unfilled, so that means with Chairperson Wilma Liebman there are three Democratic appointees on the Board with Peter Schaumber the only Republican appointee left. So what you say? There is a Democrat in the White House, there is going to be a Democratic Board. That's right, there is, that's the way it works. And we can expect many of the decisions handed down by the Board during the Bush Administration to be reversed and that is not even considering the literally hundreds of rulings that have been voided by the Supreme Court with its decision in *New Process Steel v. NLRB*, which held that the Board had no authority to act when it had only two sitting members.

So what am I talking about? Well my friends, let me tell you what I am talking about. Not about some new case that reverses a decision from the Bush Board, that reversed a case from the Clinton Board, that reversed a decision from the first Bush Board, and so on and so on . . . I'm talking about the Board trying to do what Congress has been unable to do. Give unions the benefits of the EMPLOYEE FREE CHOICE ACT without Congress having to do the dirty work and actually pass the act.

How can this be? The Board does not have that kind of authority, right? Well, sort of, you see, the Board can't just go ahead and put say . . . card check or say . . . mandatory arbitration of the first contract into place, the law as it is currently written does not allow that. But it can . . . through rule making . . . give unions a much better shot at winning elections. How? Well, by shortening the time between a petition and an election. Or maybe by prohibiting certain kinds of communication by employers in campaigns. Or maybe by letting unions exert pressure on voters at the polling places. And Thursday last, the Board may just have taken the first step.

According to the Wall Street Journal at WJ.com, "The National Labor Relations Board is exploring electronic-voting methods for unionization elections, which employer advocates fear could be used to circumvent the current secret-ballot process and favor unions."

You can see the Journal article at

http://online.wsj.com/article/SB10001424052748703685404575306992906763792.html?mod=googlenews_wsj

So what, you say again, how does this help unions? A couple of ways if you ask me. Of course you asked, me, you are reading this blog! First, it allows the Board to shorten the time between the petition and the election. This helps unions in one very big way, it lets them talk to your employees for as long as they want about how great unions are before they file the petition, but limits the time you can talk back. The union controls when it wants to file the petition, not the employer. Shortening the time between the petition and the election puts the communications cards in the unions' hands in an unfair way.

Second, and more importantly, electronic voting, which is a precursor to internet voting, could allow the election site to be contaminated by union electioneering. Under the current system, the union and the employer can't continue to campaign at the election site. They have to let the employees vote without having one last person get in their ears. Despite Chairperson Liebman's request that proposals for electronic voting ensure that "that votes cast remotely were free from distractions or other interferences, including undue intimidation or coercion" nothing is going to prevent the union from "helping" the employees to vote. One lawyer in the WSJ article even suggests unions might vote as a group to show their "solidarity."

So, is this going to happen? Don't know, but I'm not surprised.