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EXECUTIVE LABOR SUMMARY

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November / December 2010

IN THIS ISSUE

NEWS & ANALYSIS

Pre-recognition card check deal was lawful, NLRB says. – In a 2-1 decision, the National Labor Relations Board recently **ruled** that auto parts manufacturer Dana Corporation and the United Auto Workers did not violate federal labor law by agreeing that Dana would recognize the union if a card check showed that the union had the support of a majority of the employees in the relevant bargaining unit. Member Craig Becker recused himself because he co-wrote the AFL-CIO brief in the case.

The agreement included a company pledge to tell employees that it was "totally neutral" on the question of UAW representation and that both the company and the union were committed to the success and growth of the company. The parties also agreed to no strikes or lockouts from the time that the union began its organizing activity through the time the parties reached a first contract. Dana agreed to recognize the union and bargain with the UAW once the union obtained proof of majority status by a check of authorization cards by a neutral third party. In rejecting the argument that the agreement precluded a free choice concerning union representation by the employees, the Board majority (consisting of Chair Wilma Liebman and Member Mark Pearce) said nothing in the agreement would have reasonably led employees to believe that company recognition of the UAW was a foregone conclusion, or that the employees lacked the option of rejecting UAW representation.

Member Brian Hayes dissented, citing the Board's 1964 decision in ***Majestic Weaving Co.*** In that case, the Board found that an employer violated Section 8(a)(2) of the Act when it negotiated a collective bargaining agreement with a minority union, and that the union violated Section 8(b)(1)(A) by accepting such recognition. According to Hayes, the new Board approach may bring about self-serving agreements between employers and unions that preempt employee free choice. Hayes

concluded that the decision will encourage "top-down" organizing, giving employee rights a back seat to the self-interest of companies and unions.

Solicitation of *amicus* briefs signals pro-union changes by NLRB. – The Obama Board is soliciting amicus briefs in cases involving card check recognition, access to employer premises by non-employee union representatives, and successor employers' obligations to recognize incumbent unions. This means that we can expect to see Board decisions that will restrict employee choice on union representation and employers' control over access to their premises.

In August, the Board granted a request for review in two cases involving its 2007 decision in **another case** in which Dana Corporation was the employer. The 2007 Dana Corporation decision established safeguards for employees during card check drives that employers did not oppose, including giving employees 45 days after card check certification to challenge the results with a supervised secret ballot election. The decision was based on a finding that employees are often coerced or intimidated into signing union cards and that secret ballots are therefore a more reliable indicator of employees' desires. Employees have voted to reject employers' initial card check recognition in 25 percent of the "Dana" elections held since the decision was issued.

In the *amicus* briefs submitted recently on this issue, business groups and Republican lawmakers argue that *Dana* should stand because it protects employees' rights to secret ballot elections, which are the best way to ensure employee free choice. Unions, on the other hand, have urged the Board to overrule *Dana*, contending the decision has undermined unions' ability to organize, frustrated collective bargaining efforts, and interfered with workers' rights. According to the AFL-CIO, requiring employers to post a Dana notice about the employees' right to file a decertification petition, "encourages rear-guard attacks on a majority-supported union by a minority of employees who are opposed to union representation even if that minority has no realistic possibility of achieving majority support for its position."

The Board has also received *amicus* briefs on whether it should modify or overrule ***MV Transportation***, a 2002 case involving the successor bar doctrine. The successor bar doctrine holds that an incumbent union maintains its status for a "reasonable period" after a successor employer takes over. During that "reasonable period," the Board cannot process a decertification petition or a petition for a new election by either the successor or a rival union. The Board rejected the successor bar doctrine in *MV Transportation*, saying that the presumption of majority status is rebuttable and does not bar an otherwise valid petition for decertification or new election.

Business groups obviously favor the *MV Transportation* ruling, arguing that it establishes an appropriate balance between NLRA policies and stability in bargaining relationships, on the one hand, and those protecting employee choice, on the other. Organized labor argues that *MV Transportation* should be overruled and the successor bar doctrine reinstated.

Finally, in ***Roundy's, Inc.***, the Board has invited *amicus* briefs addressing whether an employer violates the NLRA by refusing to grant non-employee union representatives access to its premises while permitting access to other individuals or groups. In ***Sandusky Mall Co.***, the Board held in 1999 that an employer violated Section 8(a)(1) by denying union access to property while permitting others to use the premises. However, the U.S. Court of Appeals for the Sixth Circuit **overturned** the Board's ruling.

Given the current composition of the Board, it is nearly certain that the Board will adopt the views of the unions in all of these cases.

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Casual employees get to petition and vote on union. – An NLRB majority consisting of Members Craig Becker and Mark Price has **ruled** that casual musicians may form an appropriate bargaining unit with the right to petition for and vote in an election. The casual employees at issue worked only on an "as-needed" basis in theater productions, the number needed varied from show to show, and the employer did not give preference or maintain a hiring list of musicians it had employed for previous productions. The employer unsuccessfully argued that the musicians did not form an appropriate bargaining unit because they did not have any established pattern of regular employment, or any reasonable or substantial expectations of continued or future employment. Member Brian Hayes, dissenting, agreed with the employer, but the majority said, "the logical consequence of the employer's argument is that temporary or intermittent employees cannot exercise the rights vested in employees by Section 9 of the Act. However, no such exclusion appears in the definition of employees or elsewhere in the Act."

A warning to employers who use temporary or casual employees: Member Hayes noted that the status of the *Kansas City* musicians was no different from that of temporary employees in many other industries.

Number of union wins is down, but number of union workers is up. – Unions participated in more representation elections in the first half of 2010, but the percentage of elections won by unions decreased. According to NLRB data, unions won 69.2 percent of the 812 private sector elections held in the first six months of 2010, compared with 72.8 percent of 591 elections held in the corresponding period of 2009.

Unions affiliated with the AFL-CIO won 71.2 percent of the elections they participated in, while unions affiliated with Change To Win won 60.5 percent of theirs. However, the CTW affiliates organized more workers. Both AFL-CIO and CTW affiliates organized more workers during the first half of 2010 than they did during the corresponding period in 2009.

The Teamsters were the most active, participating in 217 elections, but they won fewer elections in the first half of 2010 than during the first half of 2009. The Service Employees International Union organized the most workers – 5,833 – winning more than 68 percent of the 69 elections in which it participated.

Although most elections were held in the service sector, for only the third time since 1990, unions won more than 50 percent of the manufacturing-sector elections in which they participated.

THE GOOD, THE BAD AND THE UGLY

Volkswagen to remain neutral at new Chattanooga plant. – To the dismay of many suppliers and other area employers, Volkswagen recently announced that the company would take a neutral position in any efforts, including efforts by the United Auto Workers union, to organize employees at Volkswagen's new plant in Chattanooga, Tennessee.

The position of Volkswagen is at odds with other foreign automakers who have built facilities in the southern United States to take advantage of the lower cost of doing business and the right-to-work laws. Of the foreign automakers currently building vehicles in the United States, none are currently organized. The position of Volkswagen came as a surprise because it had serious issues with the UAW at an assembly plant that it previously operated in Pennsylvania.

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Bob King, president of the UAW, has made it clear that the union is interested in organizing the Chattanooga plant, which is expected to employ approximately 2,500 workers. Meanwhile, Sen. Bob Corker, R-Tenn., has warned Volkswagen to "steer clear" of the UAW.

Despite big spending, unions lose big in mid-term elections. – As mentioned **in our previous issue**, organized labor spent millions during mid-term election campaigns – $90 million by the American Federation of State, County and Municipal Employees, $40 million by the National Education Association, $44 million by the SEIU . . . and the list goes on. By any rational analysis, however, big labor's efforts amounted to pouring money down a dark hole. Forty-one members of Congress who supported the Employee Free Choice Act were defeated. In the Senate, eight candidates who supported card check also lost. Only seven of the 29 House candidates endorsed by the SEIU won. Candidates endorsed by the AFL-CIO lost 15 Senate races and 59 House races. AFL-CIO President Richard Trumka rationalized that, although the results were a big disappointment for "working families," things would have been even worse without the votes of union members. Trumka claims that union members' votes provided a "firewall" in the Nevada and California Senate campaigns, and the West Virginia gubernatorial campaign, keeping Democrats Harry Reid, Barbara Boxer, and Joe Manchin in office.

Voters in four states approve secret ballot union elections. – In addition to rejecting many of the candidates supported by organized labor, voters in four states – Arizona, South Carolina, South Dakota and Utah – voted to approve amendments to their states' constitutions that preserve workers' rights to vote for or against union representation in secret ballot elections. The so-called "Secret Ballot Amendments" were viewed as preemptive strikes against the EFCA. The four amendments have similar language that "guarantees" the right to vote by secret ballot in elections for public office or authorizations of employee representation. According to unions, the four ballot measures showed "just how far corporate interests will go to maintain a *status quo* that protects exploitative employers, no matter the cost to ordinary Americans."

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