

Labor and Employment Corner

MICHAEL NEWMAN AND FAITH ISENHATH

Change at the National Labor Relations Board

In the past few years, as with many areas of the law, the field of labor and employment law has experienced significant change—for example, the enactment of the Americans With Disabilities Amendments Act, revision of regulations set forth in the Family Medical Leave Act, the passage of the Lily Ledbetter Fair Pay Act, and so forth—and this trend shows no sign of slowing down. In fact, the election of Barack Obama as President of the United States in November 2008, in combination with the Democratic Party's

control of both chambers of Congress, has prompted many practitioners in this area of the law to anticipate continued changes to the existing legal framework.¹ Such changes appear even more likely now that Congress has passed legislation to reform health care and President Obama has signed it into law; that legislative battle will no longer demand such a significant share of the administration's attention.

Even though most of the focus on change in the area of labor law has been tied to the potential enactment of the Employee Free Choice Act,² it is important to remember that passing new legislation is not the only avenue for change in the substantive legal landscape. Accordingly, many labor practitioners will remain intently focused on the potential impact of the card-check and mandatory arbitration provisions that could become law with the passage of the Employee Free Choice Act. However,

it is important to remain aware of the nonlegislative means by which change can be effected as well. In fact, President Obama's recent recess appointments of two new members to the National

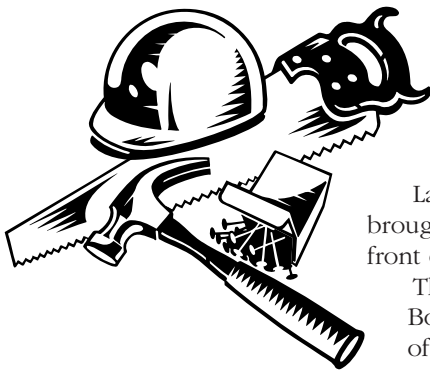
Labor Relations Board (NLRB) has brought these alternatives to the forefront of the discussion.³

The National Labor Relations Board, designed to be composed of five individuals, has been operating with just two members since the beginning of 2008,⁴ and, during his first year in office, President Obama nominated three individuals (one Republican and two Democrats) to fill those vacancies.⁵ However, because the Senate failed to confirm those nominees, on March 27, 2010, President

Obama exercised his constitutional authority to make recess appointments in various federal agencies and included his two Democratic nominees to the NLRB among those so appointed.⁶ Even though opinions over these appointments have varied drastically—with the U.S. Chamber of Commerce issuing a “red alert” about potential “radical changes” at the NLRB on the one hand, and some progressives applauding President Obama's decision to take action to promptly reconstitute the NLRB on the other hand—it is undisputed that a National Labor Relations Board with four members is likely to be more active than the previous two-member board, and the changed composition of the board could lead to a shift in the NLRB's philosophy, as is often the case.⁷

These changes in the board's size and composition have the potential to contribute to the continuing evolution of the substantive principles of labor law. Initially, there have been some rumblings that, rather than continue to promulgate substantive principles of law through the adjudication of specific disputes that are presented to the board for decision, the newly constituted NLRB might exercise its rulemaking authority instead.⁸ This action would allow the NLRB to disseminate broader and more comprehensive rules and principles and potentially avoid the piecemeal approach that accompanies case-by-case adjudication. However, with such rulemaking in the abstract, the board might miss the practicality of having a concrete situation with which to test the merits of a particular decision. Regardless, the NLRB has not officially announced its intent to engage in rulemaking, although legal practitioners should be aware that it is a possibility.

Of course, the NLRB does not need to engage in rulemaking to affect the current landscape of labor law; the board only needs to continue to decide the myriad cases that come before it each year. As with the federal court system, NLRB law is based on a system of established precedents, but these underlying principles are not set in stone and often evolve in accordance with current board members' philosophies and the particular facts of the cases that are presented. Accordingly, a number of cases have been decided in recent years—many in the face of strong dissenting opinions—and, under the right circumstances, the principles on which the decisions have been based could again become subject to the board's review. Some of these cases whose precedent could potentially be reversed or modified by the NLRB in the coming



years and which involve issues of wide-ranging applicability are set forth below. There is no guarantee that any of the issues that have arisen in these cases will come before the board in the near future, but, if they do, the field of labor law is likely to continue its ongoing evolution.

Dana Corp.

The NLRB's decision in *Dana Corp.* involved the application of the established "recognition bar" doctrine.⁹ Prior to this decision, an employer's voluntary recognition of a union—done in good faith and based on a demonstrated majority status (such as a card check)—immediately barred employees and rival unions from filing an election petition for a "reasonable period of time." However, in *Dana Corp.*, the board held that that interpretation of the recognition bar doctrine gave insufficient weight to the statutory rights of affected employees to make their will on collective bargaining representation known through an election conducted by the board. Accordingly, the board determined that the appropriate balance between employee choice and unit stability would be established if there was an exception to the recognition bar doctrine that allowed employees in the potential bargaining unit to receive notice of the pending voluntary recognition; parties would have 45 days to file a decertification petition or to support the filing of an election petition by a rival union. Once that 45-day period has lapsed, the recognition bar resumes its full force and effect. If this issue were to be presented to the current, newly reconstituted board, however, it is possible that the board could strike a different balance between stability and choice that has no need for any such a 45-day period.

Palms Hotel & Casino

In *Palms Hotel & Casino*, the NLRB was faced with the question of whether an employer's general work rule prohibiting "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees or customers is, in fact, unlawful because it prohibits conduct that could be protected under § 7 of the National Labor Relations Act (NLRA).¹⁰ Ultimately finding the employer's rule not to be unlawful per se, the NLRB held that such rules are to be given a "reasonable reading" by the board and should not be read in isolation or simply presumed to be improper. Because the rule in question was not promulgated in response to union organizing or activity and does not specifically address the conduct protected under § 7 in the *Palms Hotel & Casino* case, the NLRB held that the rule did not violate the NLRA. However, in a dissenting opinion, now Chairman Liebman concluded that the employer's rule was improper, because it is likely to have a chilling effect on the "robust and spirited" employee campaigning envisioned by the NLRA. Consequently, if this same issue is presented to the board in a new

case with a different set of facts, there is the potential that the board's decision might be one that would require employers to be more precise in defining the conduct that is prohibited by their work rules.

Shaw's Supermarkets

As with the *Dana Corp.* case, the issue presented to the NLRB in the *Shaw's Supermarkets* case pitted two core labor policies against each other: employee choice and contract stability.¹¹ In *Shaw's Supermarkets*, an employer was in the fourth year of its five-year collective bargaining agreement with a union when more than 50 percent of the union's membership filed a decertification petition and also signed a petition stating that members no longer wished to be represented by the union. Based on that evidence—that the union no longer enjoyed the support of a majority of employees—the employer unilaterally withdrew its recognition of the union as the their authorized representative. The NLRB ultimately upheld the employer's action, holding that the "contract bar" (similar to the "recognition bar") doctrine prohibits a union's majority status from being questioned only during the first three years of the life of a collective bargaining agreement. Thus, because the employer had verified information indicating actual loss of majority support, the NLRB did not require the employer to wait until the end of the five-year contract period—or even until the results of the decertification election—to withdraw its recognition of the union. Again, however, Liebman, who is the current chairman of the NLRB, dissented, asserting that the principles of contract stability and employee self-determination protected by the contract bar doctrine and the board election process should have outweighed the emphasis the majority placed on the employer's freedom of action. As with the previous cases, therefore, it would not be surprising for the balance between these various principles to be re-adjusted should a similar case be presented to the board in the future.

The Register Guard

Finally, in *The Register Guard*, the board addressed the lawfulness of an employer's general policy prohibiting the use of e-mail for all solicitations that were not job-related, because the policy applies to employees' use of e-mail for union-related business.¹² In that case, the union had claimed both that a general policy of that type was unlawful per se and that the employer had specifically used the policy to single out protected union activity. Ultimately, the NLRB held that employers have a general right to have and enforce legitimate nonsolicitation rules even with respect to e-mail, but that such policies must not be applied in a way that leads to disparate treatment of "communications of a similar character based on their union or other Section-7 protected status." In other words, as long as the

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