Rulemaking and Inflatable Rats: NLRB's Proposed Changes to Election Rules and Significant Board Decisions in 2010–2011

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Proposed Rules to Reform Procedures Used in Pre- and Post-Election Representation Cases

The National Labor Relations Board (NLRB) has periodically reviewed and revised the procedures used in representation cases (R-cases) in order to carry out its duties under the National Labor Relations Act (NLRA) efficiently. Since the NLRA was enacted in 1935, the NLRB has amended its rules related to representation cases at least three dozen times.[1] These proposed reforms of R-case procedures represent the board's latest effort to improve the service it provides to the public.

The NLRB's notice of the proposed reforms of the procedures it follows prior and subsequent to conducting a secret ballot election to determine if employees wish to be represented for purposes of collective bargaining was published in the Federal Register on June 22, 2011,[2] with Brian Hayes, a member of the NLRB, dissenting.[3] The proposed amendments are intended to reduce unnecessary litigation, streamline pre- and post-election procedures, and facilitate the use of electronic communications and document filing. The NLRB invited comments on the proposal in two ways: through a public hearing held at the board's headquarters in Washington, D.C., on July 18 and 19, where more than 60 speakers representing a wide range of perspectives participated, and through a 60-day period for written comments to be filed on or before Aug. 22.[4] Responses to the initial comments were to be filed during an additional 14-day period with a deadline of on or before Sept. 6.

The proposed amendments are designed to fix flaws in the NLRB's current procedures that build in unnecessary delays, allow wasteful litigation, and fail to take advantage of modern communication technologies. Table 1 provides a side-by-side comparison of current and proposed procedures.

The proposed amendments are not without controversy. Brian Hayes dissented in the 3-1 vote in favor of the proposed rulemaking. His dissent criticized both the procedure followed by the board in proposing and seeking public comment on the possible reforms set forth in the notice and the content of the proposed amendments. In his opinion—

> The Board and General Counsel are consistently meeting their publicly-stated performance goals under the current representation election process, providing an expeditious *and fair* resolution to parties in the vast majority of cases, less than 10 percent of which involve contested preelection issues. Without any attempt to identify particular problems in cases where the process has failed, the majority has announced its intent to provide a more expeditious preelection process and a more limited postelection process that tilts heavily against employers' rights to engage in legitimate free speech and to petition the government for redress. Disclaiming any statutory obligation to provide any preliminary notice and opportunity to comment, the majority deigns to permit a limited written comment period and a single hearing when the myriad issues raised by the proposed rules cry out for far greater public participation in the rulemaking process both before and after formal publication of the proposed rule. The majority acts in apparent furtherance of the interests of a narrow constituency, and at the great expense of undermining public trust in the fairness of Board elections.

Board's Request for Comment Regarding Blocking Charges

In addition to the proposed rulemaking discussed above, the NLRB also believes that no party should use the unfair labor practice procedures established under §§ 8 and 10 of the NLRA to delay holding an election unnecessarily. To address this issue, in the Notice of Proposed Rulemaking published on June 22, the NLRB specifically invited comment on whether any final amendments should include changes in the current blocking charge policy, as described in §§ 11730–11734 of the *Casehandling Manual*, or whether any changes in that policy should be made by the board through means other than amendment of the rules.

As set forth in § 11730 of the *Casehandling Manual*, "The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted." This "blocking charge" policy is not set forth or implemented in the current rules, but it has been

Table 1. NLRB's Current and Proposed Procedures for R-Cases	
Current Procedures	***Proposed Procedures***
Parties and the board cannot electronically file or transmit important representation case documents, including election petitions.	Election petitions, election notices, and voter lists could be transmitted electronically. NLRB regional offices could deliver notices and documents electronically rather than by mail and could directly notify employees by e-mail when addresses are available.
The parties receive little compliance assistance.	Along with a copy of the petition, parties would receive a description of NLRB representation case procedures, including a list of rights and obligations as well as a "statement of position form," which will help parties to identify the issues they may want to raise at the pre-election hearing. The regional director may permit parties to complete the form at the hearing with the assistance of the hearing officer.
The parties cannot predict when a pre- or post-election hearing will be held because practices vary by region.	The regional director would set a pre-election hearing to begin seven days after a hearing notice is served (absent special circumstances) and a post-election hearing 14 days after the ballots have been tallied (or as soon as practicable thereafter).
In contrast to federal court rules, the NLRB's current procedures do not have a mechanism for quickly identifying what issues are in dispute, which would avoid wasteful litigation and encourage agreements.	The parties would be required to state their positions no later than the start of the hearing, before any other evidence is accepted. The proposed amendments would ensure that hearings are limited to resolving genuine disputes.
Encourages pre-election litigation of voter eligibility issues that do not need to be resolved in order to determine if an election is necessary as well as issues that may not affect the outcome of the election and thus ultimately may not need to be resolved.	The parties could choose not to raise such issues at the pre-election hearing but to raise them via the challenge procedure during the election. Litigation of voter eligibility issues raised by the parties involving less than 20 percent of the bargaining unit would be deferred until after the election.
A list of voters is not provided until after an election has been directed, making it difficult to identify and resolve voter eligibility issues at the hearing and before the election.	The nonpetitioning party would produce a preliminary voter list, including names, work location, shift, and classification, by the opening of the pre-election hearing.
The parties may request the NLRB to review regional directors' pre-election rulings before the election, and they waive their right to seek a review if they do not do so.	The parties would be permitted to seek a review of all rulings made by regional directors through a single, post-election request.
Elections routinely are delayed 25–30 days to allow parties to seek board review of regional directors' rulings, even though such requests are rarely filed, are even more rarely granted, and almost never result in a stay of the election.	The pre-election request for review would be eliminated, along with the unnecessary delay.
The NLRB itself is required to decide most post-election disputes.	The NLRB would have discretion to deny review of post-election rulings—the same discretion now exercised concerning pre-election rulings—permitting career regional directors to make prompt and final decisions in most cases.
The final voter list available to all parties contains only names and home addresses, which does not permit all parties to use modern technology to communicate with voters.	Telephone numbers and e-mail addresses (when available) would be included on the final voter list.
Deadlines are based on outdated technology, for example, allowing seven days after the direction of election for the employer to prepare and file a paper list of eligible voters.	The final voter list would be produced in electronic form when possible, and the deadline would be shortened to two workdays.
Procedures used in representation cases are described in three different parts of the regulations, leading to redundancy and potential confusion.	Procedures used in R-cases are consolidated into a single section of the regulations.

applied by the board in the course of adjudication.[5]

The NLRB specifically invited interested parties to comment on whether the board should provide the following:

1. any party to a representation proceeding that files an unfair labor practice charge together with a request that it block the processing of the petition shall simultaneously file an offer of proof of the type described in relation to §§ 102.66(b) and 102.69(a);
2. if the regional director finds that the party's offer of proof does not describe evidence that, if introduced at a hearing, would require that the processing of the petition be held in abeyance, the regional director shall continue to process the petition;
3. the party seeking to block the processing of a petition shall immediately make the witnesses identified in its offer of proof available to the regional director so that the regional director can promptly investigate the charge as required by § 11740.2(c) of the *Casehandling Manual*;
4. unless the regional director finds that there is probable cause to believe that an unfair labor practice was committed that requires that the processing of the petition be held in abeyance, the regional director shall continue to process the petition;
5. if the regional director is unable to make such a determination prior to the date of the election, the election shall be conducted and the ballots impounded;
6. if the regional director finds that there is probable cause to believe that an unfair labor practice was committed that would require that the processing of the petition be held in abeyance under current policy, the regional director shall instead conduct the election and impound the ballots;
7. if the regional director finds that there is probable cause to believe that an unfair labor practice was committed that would require that the petition be dismissed under § 11730.3 of the *Casehandling Manual*, the regional director shall, instead, conduct the election and impound the ballots;
8. the blocking charge policy is eliminated, but the parties may continue to object to conduct that was previously grounds for holding the processing of a petition in abeyance and the objections may be grounds for both overturning the elections results and dismissing the petition when appropriate; or
9. the blocking charge policy should be altered in any other respect.

Inflatable Rats and Other Significant NLRB Decisions

***Display of Large Stationary Banners:* United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 (Eliason & Knuth of Arizona Inc.), 355 NLRB No. 159 (Aug. 27, 2010)**

In late 2003, Eliason & Knuth, Northwest Hospital, and RA Tempe Corp. filed unfair labor practice charges with the NLRB, contending that the union had violated the National Labor Relations Act by displaying banners at secondary employers' sites. In March 2004, the parties submitted the case directly to the NLRB by filing a joint motion to transfer the case without a prior hearing before an administrative law judge.

The general counsel and the charging parties argued that the union's banner displays violated § 8(b)(4)(ii)(B) of the National Labor Relations Act because they constituted coercive conduct designed to force the neutral employers to cease doing business with the primary employers. First, the parties contended that posting individuals at or near the entrances of the secondary employers' facilities to hold banners declaring a labor dispute constituted picketing and was therefore coercive. Second, they contended that the banners were coercive because they contained "fraudulent" wording that misled the public into believing that the union had a primary labor dispute with the secondary employers regarding the treatment of their employees and that the secondary employers should be boycotted. This alleged deception purportedly constituted "economic retaliation" against the secondary employers, which the general counsel asked the NLRB to deem coercive and proscribed.

Three members of the board (Liebman, Becker, and Pearce, with Schaumber and Hayes dissenting) found that the union's display of large stationary banners announcing a "labor dispute" did not violate § 8(b)(4)(ii)(B) of the act, part of which makes it an unfair labor practice for unions or their agents "to threaten, coerce, or restrain" persons or industries engaged in commerce with the objective of "forcing or requiring any person to … cease doing business with any other person." This case presented an issue of first impression for the NLRB: Does a union violate § 8(b)(4)(ii)(B) when, at a secondary employer's business, its agents display a large stationary banner announcing a "labor dispute" and seeking to elicit "shame on" the employer or persuade customers not to patronize the employer. Here, the union peaceably displayed banners bearing a message directed to the public. The banners were held stationary on a public sidewalk or right-of-way, no one patrolled the area or carried picket signs, and no one interfered with persons seeking to enter or exit from any workplace or business. On those undisputed facts, the NLRB found that the union's conduct did not violate the act.

The board explained that the language of the act and its legislative history do not suggest that Congress intended § 8(b)(4)(ii)(B) to prohibit the peaceful stationary display of a banner. Furthermore, the NLRB stated that a review of board and court precedents demonstrated that the nonconfrontational display of stationary banners at issue here was not comparable to the types of conduct found to "threaten, coerce, or restrain" a neutral employer under § 8(b)(4)(ii)(B)—picketing and disruptive or otherwise coercive nonpicketing conduct.

The NLRB observed that its conclusion about the reach of the prohibition contained in § 8(b)(4)(ii)(B) was strongly supported, if not compelled, by its obligation to seek to avoid construing the act in a manner that would create a serious constitutional question. Governmental regulation of nonviolent speech—such as the display of stationary banners—implicates the core protections of the First

Amendment. Therefore, according to the board, the crucial question here was whether the display of a stationary banner *must* be held to violate § 8(b)(4)(ii)(B) or, instead, "whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to" the statutory provision. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 577 (1988). The NLRB found that the answer to the question posed by the Supreme Court in *DeBartolo* was clear in this case. Nothing in the language of the act or its legislative history required the board to find a violation and thus present for judicial review the constitutionality of § 8(b)(4)(ii)(B) as applied to the peaceful display of a stationary banner. Rather, the display of a stationary banner, like distributing handbills and even certain types of picketing, was noncoercive conduct falling outside the proscription in § 8(b)(4)(ii)(B). Based on the Supreme Court's decision, the NLRB said the issue before it was whether the display of the stationary banners on public sidewalks was "intimidation or persuasion."

Even though the board has found some expressive conduct to constitute unlawful picketing, the displaying of banners does not fall in that category, the board concluded. "Under our jurisprudence, categorizing peaceful, expressive activity at a purely secondary site as picketing renders it unlawful without any showing of actual threats, coercion, or restraint, unless it falls into the narrow exception for consumer product picketing," the board said. The conduct that makes picketing coercive is the combination of carrying picket signs and persistent walking of the picketers back and forth in front of an entrance to a worksite, thereby giving rise to a physical or symbolic confrontation with workers entering the worksite. In the current cases, the banner displays did not constitute picketing because they did not create a confrontation, the board said: "Banners are not picket signs. Furthermore, the union representatives held the banners stationary, without any form of patrolling … . The banners were located at a sufficient distance from the entrances so that anyone wishing to enter or exit the sites could do so without confronting the banner holders in any way."

Schaumber and Hayes dissented from the board's decision, concluding that the display of banners was the "confrontational equivalent of picketing" and therefore constituted coercive secondary activity. The dissenters criticized the majority's decision, contending that their colleagues created a "startling new standard that exempts other types of secondary activity from the Act's reach unless it causes or can be expected to cause some unknown quantum of 'disruption of the secondary's operation.'" The dissent predicted that the new standard would result in a dramatic increase in boycotts at secondary employers' sites. "This new standard substantially augments union power, upsets the balance Congress sought to achieve, and, at a time of enormous economic distress and uncertainty, invites a dramatic increase in secondary boycott activity," the dissent asserted.

Schaumber and Hayes also said that they would not be alone in finding the decision to be "most troubling and ill-advised." Although they contended that the board's decision was "not compelled by any construction of Section 8(b)(4) and its legislative history, nor by any valid concerns about a conflict with First Amendment protections," they said their dissent was "compelled by a serious concern that [the board majority's] standard will assuredly foster precisely the evil of secondary boycott activity and expanded industrial conflict that Congress intended to restrict by enacting 8(b)(4)(ii)(B)." According to the dissent, the NLRB has long held that the use of picket signs and patrolling was not a prerequisite for finding a union's conduct to be the equivalent of traditional picketing. The coercion element existed when a union posted its agents outside a business to advance the cause of the union. In addition, the dissent said, posting union agents at the site of a neutral employer was coercive because it created a confrontation between the union members and those who were trying to enter the employer's premises.

Display of Inflatable Rats: **Sheet Metal Workers Local 15 (Brandon Regional Medical Center), 356 NLRB No. 162 (May 26, 2011)**

The NLRB ruled that a union's practice of displaying a large inflatable rat balloon at a secondary employer's premises to protest the labor practices of its nonunion contractor is not coercive and therefore does not violate the NLRA. The NLRB had originally decided the case in January 2006, finding that a mock funeral staged by the union in front of an acute care hospital was unlawfully coercive. Given that decision, the board found it unnecessary to rule on the union's display of the inflatable rat balloon.

The union, which had been protesting the hospital's use of nonunion contractors, appealed the 2006 decision to the U.S. Court of Appeals for the District of Columbia Circuit. In June 2007, the court reversed the NLRB's decision, finding that the use of a faux coffin and a costumed Grim Reaper outside the hospital was not "coercive." The case was remanded to the NLRB for review of other issues raised in the case, including the legality of the balloon display.

The NLRA prohibits conduct found to "threaten, coerce, or restrain" a secondary employer that is not directly involved in a primary labor dispute, if the object of that conduct is to cause the secondary employer to cease doing business with the primary employer. Under existing precedent, picketing that seeks a consumer boycott of a secondary employer is usually coercive and therefore unlawful, whereas stationary distribution of handbills with that same objective is not unlawful and is therefore protected speech. The question before the NLRB was where the use of a 16-foot-tall inflatable rat balloon falls on that continuum.

Following the reasoning laid out by the NLRB, as discussed above in *United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 (Eliason & Knuth of Arizona Inc.)*, the board found the display of a large inflatable rat balloon was not coercive. The majority of the board—Chairman Liebman and Members Craig and Pearce—found that, unlike picketing, the balloon display did not involve any confrontational conduct; the majority also found that the display was not coercive in other ways. The board observed that the union agents involved in the display did not move, shout, impede access, or otherwise

interfere with the hospital's operations. Rather, the "rat balloon itself was symbolic speech. It certainly drew attention to the Union's grievance and cast aspersions on [the contractor], but we perceive nothing in the location, size or features of the balloon that were likely to frighten those entering the hospital, disturb patients or their families, or otherwise interfere with the business of the hospital."

Brian Hayes dissented, finding that the display was coercive and therefore unlawful. "Considered in the abstract, or viewed from afar, the display of a gigantic inflated rat might seem more comical than coercive," Hayes wrote. "Viewed from nearby, the picture is altogether different and anything but amusing. For pedestrians or occupants of cars passing in the shadow of a rat balloon, which proclaims the presence of a "rat employer" and is surrounded by union agents, the message is unmistakably confrontational and coercive."

***Rights of Off-Duty Employees to Access Property Owner's Premises:* New York, New York, 356 NLRB No. 119 (Mar. 25, 2011)**

In a case returned by the U.S. Court of Appeals for the District of Columbia Circuit for further consideration, the National Labor Relations Board, in a 3-1 decision, found that a Las Vegas casino violated federal labor law by prohibiting off-duty employees of restaurants inside the casino from distributing handbills on casino property. The handbills sought public support for the organizing efforts of employees of the restaurants that were operated inside the New York, New York Casino and were distributed to customers at restaurant entrances as well as at the casino's main entrance.

In addressing questions posed by the court of appeals, the NLRB solicited statements from the parties and amicus curiae and held oral argument in November 2007. Based on this input, the board modified the standard used to determine the rights of a contractor's off-duty employees to access the property owner's premises.

The majority—consisting of Liebman, the board chairman, and Becker and Pearce—stated that they "strike an accommodation between the contractor employees' rights under federal labor law and the property owner's state-law property rights and legitimate managerial interests." They concluded that "the property owner may lawfully exclude such employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline … ."

Hayes dissented, writing that the majority's decision "artificially equates the Section 7 rights of a contractor's employees with those of the property owner's employees, pays only lip service to the owner's property interests, and gives no consideration to the critical factor of alternative means of communication." Hayes would have found only that the casino acted unlawfully in excluding the handbillers from the sidewalk area outside the casino's main entrance, but that it was within its rights to expel them from the interior of the casino.

***Statutory Duty to Follow Terms and Conditions of Employment of the Expired Contract Until Bargained to Agreement or to Impasse:* E.I. DuPont de Nemours, Louisville Works, 355 NLRB No. 176 (Aug. 27, 2010)**

The NLRB (Liebman and Becker; Schaumber dissenting), reversed the administrative law judge's decision and found that the employer violated § 8(a)(5) by unilaterally changing the terms of the employees' benefit plan while the parties were negotiating for a collective-bargaining agreement and had not yet reached an impasse. The benefit plan, which provided health care and other benefits to employees nationwide, unit and nonunit, included a reservation-of-rights provision permitting the employer to modify the benefits provided by the plan annually. At the plant located in Louisville, Ky., the parties had incorporated the plan into two successive collective-bargaining agreements. After the last agreement expired, the employer continued to make annual unilateral changes to the plan. The union objected, asserting that the employer had to bargain over the changes. The employer relied on the reservation-of-rights clause and on *Courier-Journal*, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004) to justify its refusal to bargain.

The board held that the employer had a statutory duty to follow the terms and conditions of employment as specified in the expired contract until an agreement was reached or an impasse was declared. By unilaterally implementing changes to the employees' benefit plan, the employer breached that duty. The NLRB found that the employer did not seek to have the union agree to extend the reservation-of-rights language, nor did the employer show that the parties had a past practice that allowed the employer to make such changes during a hiatus between collective-bargaining agreements.

Finding the *Courier-Journal* cases inapposite, the board held that the employer did not meet its burden of establishing the affirmative defense that its unilateral actions were consistent with the parties' past practice. In the *Courier-Journal* cases, an employer's unilateral changes to health care premiums during a hiatus between collective-bargaining agreements were lawful because those changes were part of the employer's established past practice making such changes during the term of, and during the hiatus between, collective-bargaining agreements. In this case, however, the employer did not show a past practice of making such changes during the hiatus periods. Thus, past unilateral changes that were made after the collective-bargaining agreement with the reservation-of-rights provision had expired did not justify the employer's unilateral changes during the hiatus.

The NLRB further reasoned that to read the *Courier-Journal* cases to apply to hiatus periods would undermine collective-bargaining principles. Under settled precedent, management-rights clauses expire with their contracts, absent clear and unmistakable waivers, and do not constitute terms and conditions of employment that continue after the contract has gone into effect. Because the contractual reservation-of-rights provision addressed the benefit plan and was part of the plan document that itself was incorporated in the collective-bargaining agreement, it expired with the contract. Thus, the union's waiver of its right to bargain over changes to the plan expired with the con-

tract. The NLRB stated that the employer had the benefit of its bargain during the term of the contract and could have made changes to the plan during the contract's term. But when the contract expired, the benefits, as previously unilaterally set by the employer while the contract was in effect, became fixed and were subject to the statutory duty to bargain. The NLRB noted that the *Courier-Journal* cases contravened precedent, holding that silence in the face of past unilateral changes does not constitute a waiver of the right to bargain, but because the *Courier-Journal* cases were inapposite, the NLRB did not reconsider those cases.

Contrary to the majority, Schaumber argued that the reservation-of-rights provision was not a management-rights clause, that it was merely integral to the employees' benefit plan and pertained solely to the plan, and that a contractual waiver analysis did not apply. He further argued that the employer's modifications of the plan were implemented in accordance with past practice and that the parties by their actions could create a past practice that becomes the status quo, thus authorizing an employer's unilateral action. Finally, he stated that policy reasons supported finding no violation because, otherwise, employers with large-scale plans applicable to employees nationwide would be forced to freeze plans for particular units as contracts expired and therefore would be motivated to refuse to agree to benefit plans for unit employees.

Union Violates Duty of Fair Representation to Require Objecting Nonmember to Restate His Objection Annually: **International Association of Machinists and Aerospace Workers, AFL-CIO, and International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge 2777 (L-3 Communications Vertex Aerospace LLC f/k/a L-3 Communications Aero Tech LLC f/k/a Vertex Aerospace LLC f/k/a Raytheon Aerospace LLC), 355 NLRB No. 174 (Aug. 27, 2010)**

In a case of first impression, the NLRB (Liebman and Becker; Schaumber, concurring in part and dissenting in part; Hayes, concurring in part and dissenting in part; Pearce, dissenting in part), ruled that a union violated its duty of fair representation by requiring an objecting nonmember, under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), to restate his objection annually even though he had informed the unions in writing that he wished to object on a continuing basis.

Under federal labor law, unions and employers may enter into agreements requiring employees represented by a union to pay dues or fees as a condition of employment. In *Beck*, the Supreme Court held that unions may charge members and nonmembers fees relating to the union's collective-bargaining and contract-administration activities but cannot require nonmembers to pay fees unrelated to collective bargaining (that is, fees related to the union's political and other nonrepresentational activities). Nonmembers have the right to object to paying any portion of dues that is not used for collective-bargaining purposes. Unions must provide notice of this option and calculate the share of dues used for collective-bargaining purposes.

In this case, the employee/nonmember, who was in a bargaining unit represented jointly by the International Association of Machinists and Aerospace Workers, AFL-CIO, and the International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge 2777, had objected to paying full dues. In November 2003, he informed the unions in writing that he was objecting for calendar year 2004 and that he wished his objection to continue, from year to year, unless and until he revoked it. The unions responded that all dues objections had to be restated annually. When the employee failed to do so, he was charged the full monthly dues for 2005.

Liebman and Becker found that the unions failed to present a legitimate justification for the annual renewal requirement sufficient to justify even the modest burden the requirement imposes on an objector. They found that the requirement was "arbitrary" under the duty of fair representation and violated § 8(b)(1)(A) of the NLRA. Before analyzing the unions' asserted rationales for the renewal requirement, Liebman and Becker noted that, even though the requirement to mail a statement to the unions each year during the one-month period specified in the unions' procedures poses a minimal burden, remembering to do so is also a burden, and the failure to remember results in the loss of the opportunity to object for 11 months.

Although Liebman and Becker found that the unions acted arbitrarily, they disagreed with the administrative law judge's conclusion that the unions' actions were discriminatory and therefore, for that reason as well, a breach of the duty of fair representation. First, they noted that there was no evidence of animus—no evidence that the unions were acting for any reason other than for what they perceived to be administrative purposes in carrying out their obligations under *Beck*. Second, Liebman and Becker explained that the NLRB has found discrimination against nonmembers unlawful only when a union treated members and nonmembers differently in regard to a matter in relation to which membership was irrelevant. Here, they continued, the question of what constituted a proper objection and under what circumstances a union could require nonmembers to renew their objection has no application to union members or to individuals who do not object.

Finally, Liebman and Becker declined to have their ruling apply retroactively. In light of consistent court approval of the requirement, the lack of any contrary indication by the NLRB, and the general counsel's previous advice approving the requirement, Liebman and Becker found that the unions could reasonably have believed that the requirement was lawful.

Concurring in part and dissenting in part, Schaumber agreed that the annual renewal requirement was arbitrary and a breach of the unions' duty to provide fair representation. However, he wrote separately because, in his view, current NLRB law does not give sufficient weight to workers' § 7 right to refrain from supporting nonrepresentational union activities, and the burdens on workers seeking to exercise that right are unnecessarily high. Board law, Schaumber said, should not require that a union's conduct toward *Beck* objectors be measured against a union's duty of fair representation. Instead, he suggested that a union's rule or policy regarding an employee's exercise of his or her rights under *Beck* must

be analyzed under §§ 8(a)(3) and 8(b)(1)(A).

Schaumber also found that the unions' annual renewal policy was discriminatory under the duty of fair representation. He explained that employees who join the union and pay full fees and dues remain members until they notify the union otherwise. Nonmembers who pay agency fees also remain nonmembers until they notify the union otherwise. In contrast, *Beck* objectors must announce their status during a 30-day period each year, and if they fail to do so, they must pay full agency fees for a year until the next window period. Once they choose objector status, they do not maintain that status until further notice. Thus, they are treated differently based on their § 7 right to refrain from assisting the union in nonrepresentational activities.

Hayes, concurring in part and dissenting in part, agreed with Liebman, Schaumber, and Becker that the annual renewal requirement was arbitrary and breached the duty of fair representation. Hayes also agreed with Schaumber that the requirement was discriminatory.

Pearce, dissenting in part, agreed with the majority that the appropriate framework to analyze the case was the duty of fair representation under § 8(b)(1)(A) and that the general counsel failed to prove that the unions' annual renewal requirement was discriminatory. However, he dismissed the § 8(b)(1)(A) allegation that the unions breached their duty of fair representation by requiring the employee to renew his *Beck* objection annually. In Pearce's view, the renewal requirement rationally served the unions' legitimate interests and was well supported by legal precedent at the time of the unions' actions.

Although Pearce agreed with the majority that a union's action is arbitrary under the duty of fair representation only if it can be fairly characterized as so far outside a wide range of reasonableness that it is wholly irrational or arbitrary, he disagreed with the majority's application of these principles to the annual renewal requirement. Instead, he found that the Unions' purposes for the renewal requirement reasonable. The union's purposes included providing valid addresses necessary to supply objectors with required financial information; promoting administrative efficiency by having all objections expire at the same time; and effectively prompting employees to reconsider their objections.

In finding that the unions' actions were not irrational or arbitrary, Pearce also relied on the legal landscape in place at the time the unions enforced the annual renewal requirement. He noted that the only court to rule on this issue in the context of the National Labor Relations Act held that an annual renewal requirement comports with the duty of fair representation (*Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995)), and that the agency's own general counsel's 1988 memorandum took the position that a union can require nonmembers to file new objections each year.

***Board Declines to Overrule Precedent: No Violation to Unilaterally Cease Checkoff After Contract Expiration:* Hacienda Hotel Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino, 355 NLRB No. 154 (Aug. 27, 2010)**

On remand from the Ninth Circuit with directions to overrule precedent or explain its rule that the termination of dues checkoff is not subject to the unilateral-change doctrine of *NLRB v. Katz*, 369 U.S. 736 (1962), the NLRB (Liebman, Schaumber, Pearce, and Hayes; Liebman and Pearce, concurring; and Schaumber and Hayes, concurring) followed precedent and affirmed its earlier 3-2 decision in *Hacienda I*, 331 NLRB 665 (2000), that the employers—two Las Vegas casinos—did not violate the National Labor Relations Act when they unilaterally ceased checkoff after expiration of the parties' collective-bargaining agreements. The four participating board members (Becker recused himself) were divided on the remanded issue, and NLRB tradition precludes overruling precedent without three votes to do so.

In *Hacienda I*, the NLRB (Truesdale, Hurtgen, and Brame; Fox and Liebman, dissenting) held that the unilateral termination of dues checkoff, after the expiration of the parties' collective-bargaining agreements, was not a violation of § 8(a)(5). The board reached this result based on its decisions in *Bethlehem Steel Co.,* 136 NLRB 1500 (1962) (holding that, when the contracts terminated, the respondent was free of its checkoff obligations to the union), *remanded on other grounds sub nom. Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), and *Tampa Sheet Metal Co.*, 288 NLRB 322 (1988).

The Ninth Circuit, however, held that the board failed to provide a reasoned explanation for why dues checkoff would be excepted from the prohibition on unilateral changes in a situation that does not involve a union security clause. *Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226 v. NLRB*, 309 F.3d 578 (9th Cir. 2002). The court directed the board to articulate a reasoned explanation for the new rule or adopt a different rule.

In *Hacienda II*, 351 NLRB 504 (2007), the NLRB (Battista, Schaumber, and Kirsanow; Liebman and Walsh, dissenting) dismissed the complaints again, relying on the specific durational language in the dues checkoff provisions, which limited the employers' obligation to check off dues to the duration of the agreements.

The case went back to the Ninth Circuit, which held that the board erred in finding that the contractual language expressed a waiver of the statutory right to bargain over ending dues collection upon expiration of the contracts. *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008). The court remanded the case again with instructions to explain the rule adopted in *Hacienda I* or adopt a different rule and present a reasoned explanation to support it.

In this latest board decision, the four participating members stated that they had carefully considered the court's remand and had reached opposing views, as reflected in their separate opinions. Accordingly, they followed existing precedent and affirmed the administrative law judge's recommended order dismissing the complaint.

In their separate concurrence, Liebman and Pearce expressed their doubts about the validity of the *Bethlehem Steel* ruling and its progeny, particularly as applied in right-to-work states where the collective-bargaining agreement does not contain a union security clause. Liebman and Pearce noted that the NLRB has never provided an

adequate statutory or policy justification for the holding in *Bethlehem Steel* excluding dues checkoff from the *Katz* unilateral-change doctrine. Even assuming that *Bethlehem Steel* was properly decided, they continued, the board has never provided a reasoned analysis for applying it in a right-to-work context, where checkoff cannot be lawfully linked with a union security arrangement.

In their separate concurrence, Schaumber and Hayes offered a number of legal, policy, and equitable reasons to adhere to the existing rule—including the fact that the exceptions to the *Katz* rule, including checkoff, are uniquely of a contractual nature. In this regard, they explained, the obligation to check off dues, refrain from strikes or lockouts, and submit grievances to arbitration cannot exist in a bargaining relationship until the parties affirmatively contract to be so bound, and each of these obligations entails a change in the ordinary scheme of statutory rights and limitations. Thus, they argued, it is reasonable to presume that, absent express language to the contrary, these obligations were coterminous with the contracts that gave rise to them. Schaumber and Hayes also argued the following:

- A presumption that checkoff be coterminous with union security is supported by the language of § 302(c)(4) of the Labor Management Relations Act.
- An employer's ability to cease dues checkoff upon the expiration of the contract has become a "recognized economic weapon in the context of bargaining for a successor agreement."
- Unlike terms and conditions of employment that automatically survive contract expiration, dues checkoff provisions do not mandate monetary payments by employees or otherwise affect the wages, hours, and conditions under which employees work.

Liebman and Pearce rejected the arguments offered by their colleagues, finding that none "finds support in law or logic."

***Interest on Back Pay Compounded on a Daily Basis:* Jackson Hospital Corporation d/b/a Kentucky River Medical Center, 356 NLRB No. 8 (Oct. 22, 2010)**

The NLRB (Liebman, Becker, Pearce, and Hayes) departed from its practice of computing simple interest on back pay awards and adopted a new policy, under which interest would be compounded on a daily basis, using established methods for computing back pay and for determining the applicable rate of interest. Compound interest better effectuates the NLRA's remedial purposes than does the board's traditional practice of ordering only simple interest, the NLRB explained, and for the same reasons, interest should be compounded on a daily basis, rather than annually or quarterly. Daily compounding comes closest to achieving the make-whole purpose of the back pay remedy, the board said, and also conforms to commercial practice and is used both under the Internal Revenue Code, which the board has treated as a standard, and under the Back Pay Act, which covers federal employees. The board also stated that, to the extent that enhanced monetary remedies serve to deter the commission of unfair labor practices and to encourage compliance with the board's orders, daily compounding is preferable.

The NLRB applied its new policy retroactively in this case as well as in all cases that were pending at the time. The board explained that it was deciding a remedial issue, rather than adopting a new standard concerning whether certain conduct is unlawful, and thus no respondent can fairly be said to have relied on the board's prior simple interest rule in deciding to take the unlawful action on which its liability is based. Nor were the respondents entitled to rely on pre-existing law in deciding to contest the case, the board said, noting that the general counsel's complaints put the respondents on notice that compound interest was sought as a remedy. Finally, the board held that retroactive application of the new approach significantly promotes the purposes of the act by improving a basic statutory remedy.

It should be noted, however, that, in *Rome Electrical Systems Inc.,* 356 NLRB No. 38 (2010), the NLRB (Liebman, Becker, and Hayes) clarified that the new policy of applying daily compounding of interest to back pay awards announced in *Kentucky River Medical Center* does not apply to cases that were already in the compliance stage on the date that the decision was handed down.

***E-Posting of Remedial Notices:* J & R Flooring Inc. d/b/a J. Picini Flooring, 356 NLRB No. 9 (Oct. 22, 2010)**

The board (Liebman, Becker, and Pearce; Hayes, dissenting) modified its notice-posting language, which requires posting in all places where notices to employees or members are customarily posted. The modified language would require respondents in board cases to distribute remedial notices electronically when that is a customary means of communicating with employees or members.

Given the increasing reliance on electronic communications and the attendant decrease in the prominence of paper notices and physical bulletin boards, the NLRB held that the continuing efficacy of the board's remedial notice is in jeopardy. According to the board, notices posted on traditional bulletin boards may be inadequate to reach employees and members who are used to receiving important information from their employer or union electronically and are not accustomed to looking for such information on traditional bulletin boards. Furthermore, the board continued, the growth of telecommuting and the decentralization of workspaces permitted by new technologies means that an increasing number of employees would never see a paper notice posted at an employer's facility. Thus, the board said, notices should be posted electronically on a respondent's Intranet or Internet site, if the respondent customarily uses such electronic posting to communicate with employees or members. Similarly, the board continued, notices should be distributed by e-mail and by any other electronic means of communication used by the respondent to communicate with employees and members.

Questions as to the appropriateness of a particular type of electronic notice should be resolved at the compliance stage, the board decided, with the relevant inquiry being whether a respondent employer customarily disseminates

information to employees via e-mail and/or electronic posting, or, if the respondent is a union, whether it customarily disseminates information to its members by e-mail and/or electronic posting.

The new notice remedy applies retroactively, the board held. Because this case involves a remedial policy, and not a substantive rule of conduct, reliance on pre-existing law is not an issue, the board explained. It also found that, to the extent that any injustice might be viewed as arising from application of the new policy, it is far outweighed by the need for the policy in order to maintain the efficacy of the board's notice remedy.

Hayes dissented from the decision, stating that he was opposed to broadening the board's traditional notice posting remedy and that, in his view, requiring electronic posting unfairly imposes additional obligations and sanctions on respondents that go far beyond what is required by the simple posting of a traditional paper notice. He further observed that electronic notices are at much greater risk than traditional paper notices of being anonymously altered and broadly distributed to nonemployees, customers, stockholders, or competitors, or, in the case of union respondents, to rival unions and potential members. Finally, Hayes found that the details of electronic posting should not be deferred to the compliance process for determination on a case-by-case basis.

***No Violation in Card Check Recognition:* Dana Corporation and International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO, 356 NLRB No. 49 (Dec. 6, 2010)**

The NLRB (Liebman and Pearce; Hayes dissenting) found that Dana Corporation and the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) did not engage in unfair labor practices by agreeing that Dana would recognize the UAW as the bargaining agent for a unit of Michigan employees if the UAW proved in a card check by a neutral third party that it had the support of a majority of the workers. The board rejected the general counsel's contentions that (1) Dana rendered unlawful support to the UAW, in violation of § 8(a)(2), by entering into and maintaining a letter of agreement (LOA) that set out ground rules for UAW organizing at Dana's plant in St. Johns, Mich., and required Dana to recognize the UAW as the bargaining agent for about 305 unrepresented employees, if the UAW succeeded in the card check procedure, and (2) the UAW accepted Dana's unlawful support in violation of § 8(b)(1)(A).

Dana and the UAW had a long bargaining relationship: the UAW represented Dana's employees in bargaining units at various locations covering 2,200 to 2,300 employees. In August 2003, the parties negotiated an LOA covering the plant in St. Johns, and agreed that, if a majority of employees wanted to be represented by the UAW, they should be allowed to make that decision in an atmosphere free of intimidation and coercion and "an expeditious procedure for determining majority status" should be established to facilitate their decision to do so. The LOA set ground rules for any organizing activity at the Michigan plant, which included Dana's pledge to inform employees that it was "totally neutral" on the question of UAW representation. The agreement also stated that Dana had "a constructive and positive relationship with the UAW and that a National Partnership Agreement with the UAW exists in which both parties are committed to the success and growth" of Dana. The parties agreed that there would be no strikes or lockouts at the plant once the UAW began organizing activity. The pledge was to continue until the parties agreed upon their first contract or until any contract-related dispute was resolved. Dana agreed to recognize the UAW and bargain with it once the union obtained proof of majority status, which was to be determined in a check of authorization cards by a third party. The agreement provided that Dana could not recognize the UAW in the absence of a showing of majority status. The LOA established principles that the NLRB said "would inform future bargaining on particular topics," including an advance agreement that any collective-bargaining pact they reached would be effective for four years and that they would discuss the possibility of contracts up to five years in duration. In the event that the parties were unable to arrive at a collective-bargaining agreement through negotiations, the LOA also committed them to submit unresolved issues to a joint UAW/Dana committee and to proceed, if necessary, to interest arbitration before a neutral arbitrator who would select either Dana's final offer or the UAW's offer as the new contract.

In August 2003, Dana informed employees it had entered into a "neutrality agreement" with the UAW. In December 2003, the UAW exercised its option under the LOA to request a list of employees working at the St. Johns location. Thereafter, three of the employees working at the plant filed charges of unfair labor practices. The administrative law judge dismissed the complaint on procedural grounds and, alternatively, on the merits. The general counsel and the charging parties filed exceptions, and the NLRB issued an invitation for the filing of briefs by amici curiae.

The board observed that it has held that an employer may not render unlawful support to a union that has not secured the support of a majority of employees, but it noted that "[t]he Board and courts have long recognized that various types of agreements and understandings between employers and unrecognized unions fall within the framework of permissible cooperation." Citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938), the NLRB said that "[n]otably, employers and unions may enter into 'members-only' agreements, which establish terms and conditions of employment only for those employees who are members of the union." Courts have rejected challenges to card-check/neutrality agreements, the board noted, and the board itself has held that a multiplant employer with a collective-bargaining agreement can agree with a union to recognize that union and apply the contract to employees at a facility the employer acquires in the future. "[A]n employer crosses the line between cooperation and support, and violates Section 8(a)(2), when it recognizes a minority union as the exclusive bargaining representative," the board said, rejecting the general counsel's position that *Majestic Weaving*, 147 NLRB 859 (1964), established a per se rule prohibit-

ing negotiations with a union over substantive terms and conditions of employment if the negotiations preceded the union's attaining majority status.

The NLRB noted the "obvious and significant distinctions" between the case at issue and the ruling in *Majestic Weaving*. The board explained that, in *Majestic Weaving*, the company gave a union an initial oral grant of recognition that was followed by negotiation of a complete collective-bargaining agreement. "The union's showing of majority support not only came after the complete agreement was reached, but it depended on the solicitation of authorization cards by a supervisor, as facilitated by the employer itself," the board noted. By contrast, in this case, the board observed that the letter of agreement did nothing more than create a "framework for future collective bargaining" if the union first secured majority support from the employees. The LOA did not contain an exclusive-representation provision; indeed, the LOA expressly prohibited Dana from recognizing the UAW without a showing of majority support. The board noted, however, that only the negotiation of the LOA, and no other conduct, was alleged to be an unfair labor practice that interfered with employee free choice.

The board asserted that the crux of the general counsel's position was that negotiating the LOA itself precluded the employees at the Michigan plant from having a free choice concerning union representation. According to the board, however, that position has no support in the *Majestic Weaving* decision. Neither the negotiation of the LOA nor the agreement itself can be equated with a grant of exclusive recognition, because that concept has been long understood, the board stated. The fact that the LOA set forth certain principles that would inform future bargaining on particular topics—bargaining contingent on a showing of majority support, as verified by a neutral third party—was not enough to constitute exclusive recognition. Thus, the UAW did not purport to speak for a majority of Dana's employees, nor was it treated as if it did. To the contrary, the board noted that the letter of agreement unmistakably disclaimed exclusive recognition by setting forth the process by which such status could be achieved. Indeed, nothing in the LOA affected employees' existing terms and conditions of employment or obligated Dana to alter them, and any potential effect on employees would have required substantial negotiations, following recognition pursuant to the terms of the LOA. Accordingly, nothing in the LOA would have reasonably led employees to believe that Dana's recognition of the UAW was a foregone conclusion, or that the employees lacked the option of rejecting UAW representation.

The NLRB stated that the parties stayed well within the boundaries of what the NLRA permits. The board noted that the "LOA was reached at arm's length, in a context free of unfair labor practices," and "it disclaimed any recognition of the union as exclusive bargaining representative, and it created, on its face, a lawful mechanism for determining if and when the union had achieved majority support." Thus, "[t]he LOA had no immediate effect on employees' terms and conditions of employment, and even its potential future effect was both limited and contingent on substantial future negotiations." According to the NLRB, "[A]s its statement of purpose made clear, the LOA was an attempt to directly address certain challenges of the contemporary workplace." Considering the LOA as a whole, the board found nothing that presented UAW representation as a fait accompli or that otherwise constituted unlawful support of the UAW. "Indeed," the board said, "according to the General Counsel, employees here had no difficulty in rejecting the UAW's representation."

Responding to the dissenting member's view that the letter of agreement could have compelled employees to believe they had no choice about the union question, the board maintained that the argument was insupportable. "Where, as in this case, an agreement expressly requires a showing of majority support, as determined by a neutral third party, before the union can be recognized, and where no unfair labor practices have been committed, it is hard to believe that a reasonable employee—a rational actor presumed by federal labor law to be capable of exercising free choice—would feel compelled to sign a union authorization card simply because the agreement prospectively addresses some substantive terms and conditions of employment."

The NLRB declined to adopt a rule that would categorically prohibit or permit pre-recognition negotiations between employers and unions over substantive terms and conditions of employment: "We leave for another day the adoption of a general standard for regulating pre-recognition negotiations between unions and employer," but the board concluded that Dana "did not cross the line from lawful cooperation with the UAW to unlawful support of it" and dismissed the unfair labor practice complaint against Dana and the UAW.

In his dissent, Hayes stated that he would reaffirm the "sound holding and underlying principles" of *Majestic Weaving*, wherein the board found that an employer violated § 8(a)(2) when it negotiated a collective-bargaining agreement with a minority union, and the union violated § 8(b)(1)(A) by accepting such recognition. Observing that Dana negotiated substantive contract provisions in a letter of agreement with UAW, the minority union, Hayes found no meaningful factual or legal distinctions between *Majestic Weaving* and the instant case. According to Hayes, the NLRB's "approach threatens to reinstate the very practice that those statutory provisions were meant to prohibit, i.e., the establishment of collective-bargaining relationships based on self-interested union-employer agreements that preempt employee choice and input as to their representation and desired terms and conditions of employment." **TFL**

Wanda Pate Jones is the regional director for the NLRB Region 27 in Denver. *She acknowledges the contribution of Barry Kearney, associate general counsel in the NLRB's Division of Advice, as well as the contribution of the Legal Research and Policy Planning Branch of the Division of Advice in the preparation of this paper.*

RULEMAKING *continued on page 56*

[3]42 U.S.C.A. § 12102(2)(A), (2)(B), (3)(A), (3)(B); (4)(A), (4)(C), (4)(D), and (4)(E).

[4]Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 29 C.F.R. § 1630.2(g)(3); § 1630.2(i)(1)(ii); *see also* Appendix to Part 1630: Interpretive Guidance) (Congress anticipated that "'[a]ny individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation ... —should be bringing a claim under the ["regarded as" prong] which will require no showing with regard to the severity of his or her impairment.'") (quoting Joint Hoyer–Sensenbrenner Statement on the Origins of the ADA Restoration Act of 2008, H.R. 3195 at 4).

[5]29 C.F.R. § 1630.2(j)(1)(i)–(ix); *see also* Appendix to Part 1630.2(j)(1)(viii–ix): Interpretive Guidance.

[6]Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48431, 48441–42 (proposed Sept. 23, 2009).

[7]29 C.F.R. § 1630.2(j)(3).

[8]697 F. Supp. 2d 234, 239–40 (D. Mass. 2010).

[9]656 F. Supp. 2d 252, 258–59 and n.4 (deciding case involving pre-ADAAA conduct under ADAAA as defendant did not question that the ADAAA's provisions applied).

[10]704 F. Supp. 2d 814, 818–19 (N.D. Ill. 2010) (citing the EEOC's proposed regulations that list HIV as an impairment that will consistently meet the definition of disability).

[11]No. 5:10-CV-08-BR, 2011 WL 891447, at *5–8 (E.D.N.C. March 10, 2011).

[12]Civil Action No. 10-05562, 2011 WL 1899198, at *1–6 (E.D. Pa. May 19, 2011).

[13]No. 1:10CV24-A-D, 2010 WL 5232523, at *6–9 (N.D. Miss. Dec. 16, 2010).

[14]Civil Action No. 10-2929, 2010 WL 5341846, at *9 (E.D. Pa. Dec. 28, 2010).

[15]Civil Action No. H-10-0311, 2011 WL 2118709, at *1–2, 6–7 (S.D. Tex. May 27, 2011).

[16]Civil Action No. 10-00514, 2011 WL 2713737, at *3 and 6–8 (E.D. Pa. July 13, 2011) (noting that the inability to walk more than 10 or 20 yards at a time "easily passes muster under the more inclusive standards of the ADAAA").

[17]765 F. Supp. 2d 622, 643–47 (D. Del. 2011) (noting, however, that summary judgment was nevertheless appropriate because she could not show that the defendant's legitimate, nondiscriminatory reason for her termination was pretextual).

[18]737 F. Supp. 2d 976, 985 (N.D. Ind. 2010); No. 1:09-CV-251, 2010 WL 3940638 (N.D. Ind. Oct. 6, 2010).

[19]No. 4:10-cv-00091, 2011 WL 1832952, at *7–9 (E.D. Tex. May 13, 2011).

[20]Civil Action No. 3:09-CV-828-H, 2011 WL 2119248, at *1–6 (W.D. Ky. May 26, 2011).

[21]No. 09-CV-3064C PJS/JJK, 2011 WL 2555365, at *1,d2a & 6 (D. Minn. June 28, 2011).

[22]No. 3:09CV498, 2010 WL 1495197, at *7 and n.5 (N.D. Ohio April 14, 2010).

[23]No. 5:07-CV-204-FL, 2009 WL 6690943, at *5 (E.D.N.C. March 31, 2009) (declining to decide whether the ADAAA applied retroactively because the plaintiff did not qualify as disabled under the revised standard).

[24]Civil Action No. 01:10-cv-359, 2011 WL 1597508, at *3 (E.D. Va. April 26, 2011). This holding was not necessary to the ruling as lifting up to 40 pounds was an essential function of plaintiff's job and the requested accommodation (which would have eliminated the essential job function) was not reasonable. *See id.* at *3-5.

[25]Civil No. 3:08cv983, 2011 WL 1085618, at *8-10 (D. Conn. March 21, 2011).

[26]Civil Action No. H-10-1847, 2011 WL 2313211, at *1-4 (S.D. Tex. June 9, 2011).

[27]Civil Action No. 10-05562, 2011 WL 1899198, at *1, 2, 4-7 (E.D. Pa. May 19, 2011).

RULEMAKING *continued from page 45*

Endnotes

[1]The most recent significant amendment to representation case rules was the 1987 notice regarding the determination of appropriate bargaining units in the health care industry. On Dec. 22, 2010, the NLRB published a Notice of Proposed Rulemaking in the *Federal Register* proposing a regulation requiring employers, including labor organizations in their capacity as employers, subject to the NLRA, to post notices informing their employees of their rights as employees under the NLRA. The comment period closed on Feb. 22, 2011. More than 7,000 comments were sorted and evaluated. On Aug. 25, 2011, the NLRB issued a Final Rule requiring private-sector employers (including labor organizations acting as employers) to post a notice informing employees of their rights under the NLRA, effective Nov. 14, 2011. On Oct. 5, 2011, the NLRB issued a press release postponing the effective date of the employee rights notice rule to Jan. 31, 2012. Copies of this notice may be downloaded from the agency website at www.nlrb.gov.

[2]All dates are for calendar year 2011 unless otherwise noted.

[3]76 Fed. Reg. 36812 (June 22, 2011).

[4]Transcripts and video of the NLRB's July 18–19, 2011, public meeting on proposed amendments to election rules and regulations are posted on the NLRB's public website at www.nlrb.gov.

[5]*See Bally's Atlantic City*, 338 NLRB 443 (2002). *See generally* Berton B. Subrin, *The NLRB's Blocking Charge Policy: Wisdom or Folly?* 39 LAB. L.J. 651 (1988).