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## Two-Member NLRB Majority Adopts Unprecedented Resolution to Move Forward With Subset of Election Rule Amendments

By David Kadela

In an unprecedented development, and by a 2-1 vote, the National Labor Relations Board on November 30, 2011, approved a resolution to prepare a final rule adopting a subset of the controversial election rule amendments the Board published for comment in June 2011. The two-member majority was made up of Chairman Mark Pearce and Member Craig Becker, both of whom come from union backgrounds. The Board's lone Republican, Member Brian Hayes, voted against the resolution, criticizing the proposed amendments and the process by which they had been vetted as fundamentally flawed.

What makes this development unprecedented, and radical in the eyes of many, is that it defies a decades-old practice of the Board, regardless of the political party in the majority. That practice is not to take action that changes existing law without the affirmative votes of at least three Board members. The only justification offered by the majority for deviating from that process is that the historical practice has not been applied to rulemaking. The reason this is the case, however, is that in the past, when the Board has fallen to three members, no two-member majority appears to have considered rulemaking, let alone moved forward with it. The Board has rarely considered substantive rulemaking on a scale of this nature even with a full five-member Board. It last did so in the late 1980s, when it took over two years of hearings, testimony, and comments before the Board issued a final rule on appropriate units in the health care industry.

In explaining the resolution, Chairman Pearce offered little justification for two Board members, one of whom, Member Becker, is a controversial recess appointee never confirmed by the Senate, to reshape national labor policy with dramatic election rule changes affecting every employer, employee and labor organization subject to the Board's jurisdiction. He was, however, candid on why he felt a sense of urgency to move forward with his resolution, saying that he was proposing a scaled-back version of the amendments "because of the possibility that the Board will lose a quorum at the end of the current congressional session."

This is a reference to the expiration of Member Becker's recess appointment when the current Congress adjourns at the end of this month. In January, the Board will fall to a two-member level unless the Senate takes action to confirm current nominee Terrance Flynn, a Republican (which is unlikely to happen because it would result in a Republican majority), or Congress opens the door for the President to make recess appointments before then (which Republicans are equally unlikely to let happen). Under the Supreme Court's June 2010 decision in *New Process Steel v. NLRB*, 130

S. Ct. 2635 (2010), the Board must have three members to carry out its statutory functions under the National Labor Relations Act. If it falls to only two members, the Board would be powerless to act on the election rule amendments and will likewise have no authority to carry out any of its adjudicatory functions.

## The Resolution

The Notice of Proposed Rulemaking published by the Board last June contains sweeping amendments that touch most aspects of the Board's election procedures. To the relief of employers, the resolution passed on November 30 covers only six of the twelve proposed amendments. Casting them as encompassing only a small part of a far more comprehensive proposal, Chairman Pearce described the six amendments as designed simply to reduce unnecessary litigation. Here is what the amendments would do:

- Restrict pre-election hearings to resolving only whether a "question of representation" exists (*i.e.*, whether a petition has been filed in a unit appropriate for collective bargaining). In other words, with limited exceptions, disputes concerning voter eligibility (*e.g.*, whether an employee is an ineligible supervisor) would be resolved, if necessary, after an election.
- Give a hearing officer authority to limit evidence introduced at a pre-election hearing to evidence that is relevant to a genuine issue of material fact on whether a question of representation exists.
- Empower hearing officers to determine if and when a party may file a post-hearing brief.
- Eliminate the right of parties, prior to an election, to seek Board review of a regional director's pre-election rulings and require that such review be sought in a post-election request. With the elimination of that right of appeal, language would also be removed from the rules providing that regional directors normally should not schedule an election until at least 25 days after directing an election to provide the Board time to rule on a request for review.
- Clarify the standard for seeking special permission to appeal to the Board (*i.e.*, requiring a showing of extraordinary circumstances on an issue that would otherwise evade review).
- Make Board review of a regional director's or judge's resolution of post-election disputes discretionary after both stipulated and directed elections.

## Next Steps

The resolution directs that a final rule be prepared amending the Board's rules and regulations to reflect these changes. Once the final rule is completed, the Board will vote on it and, if approved, the rule will be published in the Federal Register. The changes will go into effect after the final rule is published for the requisite period. Meanwhile, the other amendments proposed in June have not been rescinded or rejected. According to Chairman Pearce, they will remain under consideration for possible future action.

Already knowing where Chairman Pearce and Member Becker stand, approval of the final rule is assured. That assumes that the final rule is drafted and voted on before the clock runs on Becker's term, which seems likely. There is a possibility, however, that either the courts will enjoin implementation of the changes or, less likely, Congress will thwart the Board's action.

A court challenge, like the ones challenging the Board's notice posting rule but on different grounds, is a virtual certainty. Congressional action is already underway. Indeed, coincidence or not, on the day the Board voted to approve the resolution, the House of Representatives voted 235-188 in favor of the Workforce Democracy and Fairness Act, which is designed to stifle the union election rule changes proposed by the Board. While the Act is highly unlikely to be enacted as long as Democrats control the Senate, changes in next year's national elections could clear the way for it.

## Foreseeable Effect of the Amendments

Without knowing yet what the final rule will look like, we cannot fully forecast precisely how the amendments will affect the election process. Assuming that the amendments track the ones proposed last June, however, we can make a few predictions.

When Chairman Pearce says that adoption of the amendments will reduce litigation, he is right. The reality is, however, that the reduction of litigation that would come about as a result of the amendments would by and large favor unions and would likely adversely affect the interests of employers. For example:

- Restricting pre-election hearings to the question of whether a petition has been filed in an appropriate unit and empowering hearing officers to decide whether proffered evidence is relevant to that question, when considered in light of the Board's recent decision in *Specialty Healthcare*, 357 NLRB No. 83 (2011), will stack the odds against an employer's demonstrating that a petitioned-for unit is inappropriate. Under *Specialty Healthcare*, so long as a union's petitioned-for unit consists of a clearly identifiable group of employees, the Board may presume the unit is appropriate. If an employer argues that the unit should include additional employees, the employer must demonstrate that employees in a larger unit share an "overwhelming" community of interest with those in the petitioned-for unit.
- Deferring to post-election proceedings disputes over the eligibility of certain employees to vote carries with it a risk that employees may be misled as to the scope of the voting unit, in particular whether the unit includes those who potentially may be supervisors. As a result, an unintended consequence of the amendments may have the effect of disenfranchising certain employees. And where employees vote subject to challenge but their votes are not determinative and the challenges are therefore never resolved, litigation the amendments seek to avoid will sometimes only be delayed. That would happen if the union were to win the election and the parties were unable to agree on whether the challenged voters should be part of the bargaining unit. In that event, the parties would often find themselves back at the Board litigating whether the employees belong in the unit in a unit clarification proceeding.
- Giving hearing officers the power to decide whether to accept post-hearing briefs and providing only for discretionary Board review of appeals from a regional director's resolution of election-related issues gives regional directors largely unreviewable power in representation cases. That may expose employers to varying interpretations of the law from region to region (and perhaps even case-to-case).

The most troubling aspect of the amendments is the synergistic effect they will have with the Board's decision in *Specialty Healthcare* – possibly fostering union gerrymandering of voting units and the proliferation and approval of micro- and disjointed units, derived not from traditional community-of-interest factors but perhaps from the extent employees support union representation. Thus, while the amendments have been portrayed as limited in number and intended to accomplish a salutary purpose, and may not result in the "quickie" elections that many predicted (and the Board's full June proposal would have created), they will nonetheless likely have the result at the heart of the amendments – increasing union membership.

The ability of a union to gain a foothold through a small unit that is difficult to challenge under the new rules is something employers need to appreciate. Proactive planning is now much more important for employers who are at risk of unionization. As a result, for employers in union-oriented geographies, or in union-heavy industries, or who are subject to corporate campaigns, planning is both more crucial and more specific. We encourage such employers to talk with experienced labor relations counsel about bargaining unit planning and other union avoidance concerns.

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