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## National Labor Relations Board (NLRB)

# The NLRB's Pro-Union Agenda Marches On: Recent Decisions Add Organization of Micro-Units and Other Union-Friendly Rules

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Just before the term of National Labor Relations Board (NLRB or Board) Chair Wilma Liebman expired at the end of August, the NLRB issued three significant, pro-union decisions impacting organizing rights. In two of the cases, the Board returned to standards that had been changed during the Bush Administration, reinstating both the "recognition bar"[1] and the "successor bar,"[2] which are designed to solidify a union's position. In the most significant of the decisions, the Board overturned a rule that had stood for 20 years to permit unions to organize sub-units of employees, or "micro-units."[3]

Through such case decisions and the rule-making process, the NLRB advanced a strong, pro-union agenda under Liebman's leadership, which included, among other measures, a new rule requiring employers to post a notice to all employees–whether represented by a union or not–of their bargaining rights, a proposed rule requiring so-called snap elections, and a case decision permitting pre-election bargaining. Not surprisingly, these actions by the NLRB have been met with strong objections from the business community, and now also from Congress.

### The NLRB's Recent Actions

#### – 1. Micro-Units

On August 26, 2011, in a 3 to 1 decision in *Specialty Healthcare*,[4] the Board ruled that unions may organize sub-units of employees working in non-acute health care facilities.[5] The ruling permits bargaining units that consist of only one department, or even just one job classification. While the case at issue was set in the health care industry, the rule established by the decision will apply across all industries and is expected to have far-reaching impact.

Pursuant to the new rule established by *Specialty Healthcare*, the NLRB may find any identifiable group of employees who hold common interests to be an appropriate bargaining unit, unless the employer (or another interested party, such as another union) can show that employees in a larger unit share an "**overwhelming** community of interest" with the employees in the proposed unit.[6] In short, the Board is prepared to recognize a union's proposed unit without further inquiry, unless that unit clearly is a "fractured" unit.[7]

In its opinion, the Board discussed hypothetical situations in which only some of a group of certified nursing assistants (CNAs) who work together petition for a union, saying that likely would constitute a fractured unit. However, the Board also stated that a unit consisting of only those CNAs assigned to a particular shift "might" be a fractured unit–thus inviting a union to propose such

a unit.[8] The burden of proof then would be on the employer (or competing union) to show that the proposed unit is fractured and therefore impermissible.[9]

The Board explained its reversal of established practice by stating that the Board's former approach, favoring "wall-to-wall" units in the health care setting,[10] "has become obsolete, is not consistent with our statutory charge, and has not provided clear guidance to interested parties or the Board."[11] Relying on statutory language requiring "an" appropriate unit, the Board stated that "it cannot be that the mere fact that [a proposed unit] also share[s] a community of interest with additional employees renders the smaller unit inappropriate."[12] Thus, the Board stated that it was adopting a "community-of-interest" standard in the health care industry that traditionally has applied in other workplaces.[13]

The lone dissenting Board member, however, strenuously disagreed. As member Brian Hayes explained, the Board previously applied the "community-of-interest test" by first determining whether the employees in the unit proposed had interests in common, and next determining whether the interests of that group were **sufficiently distinct** from those of other employees to warrant the establishment of a separate unit.[14] Now, the Board will conclude its analysis at the first step, unless the employer can meet the heightened standard of showing that other employees share an "overwhelming" interest with the employees in the proposed unit.[15]

As Hayes also noted, the *Specialty Healthcare* decision will apply in any industry subject to the Board's jurisdiction and, in his view, effectively overrules decades of prior Board practice—not just its practice in the health care industry.[16] As he explained, the *Specialty Healthcare* decision encourages unions to organize in units as small as possible, and the Board's combined steps[17] may "make it virtually impossible for an employer to oppose [a union's] organizing effort either by campaign persuasion or through Board litigation."[18]

Using the nursing home at issue as an example, Hayes noted that it would be possible to organize separate units composed of RNs, LPNs, CNAs, cooks, dietary aides, business clericals, and residential activity assistants.[19] In his view, "[t]his would represent an extraordinary fragmentation of the work force for collective-bargaining purposes, a situation that cannot lend itself to [] labor relations stability."[20] Such fragmentation may place an enormous burden on the employer, which may have to deal with multiple unions, multiple negotiations, and the application of different standards or policies for different groups of employees.

### – 2. "Snap" Elections

As member Hayes noted in his dissent in *Specialty Healthcare*, on June 21, 2011, the Board also proposed new regulations that will accelerate the timing of union elections and largely make pre-election review unavailable.[21] According to the Board's press release, the proposed rules are designed to ensure that stakeholders receive needed information sooner and to delay litigation over most voter-eligibility issues until after the vote regarding union representation has taken place.[22]

Currently, the median time for union elections is 38 days after a union files its representation petition.[23] Liebman has long believed that the election process is too lengthy and that the availability of pre-election litigation favors management. However, many employers may not even be aware of a union campaign until a representation petition is filed, or at least imminent. Shortening the time between the filing of a certification petition and the election would significantly reduce the employer's ability to share its position with employees prior to an election.

In its proposed rule, the Board did not set specific time deadlines or mandate that elections be conducted a set number of days after the filing of an election petition.[24] However, the overall scheme of the proposed rule clearly is intended to speed elections by limiting both pre-election challenges and by requiring the parties to complete all pre-election procedures in very short time periods.[25] According to the Board, the proposed amendments will "fix flaws" in the Board's current procedures that create "unnecessary delays, allow wasteful litigation, and fail to take advantage of modern communication technologies."[26] According to dissenting member Hayes and members of the business community, the proposed rules are a bald attempt to impose the "quickie elections" much sought after by organized labor, without the need for Congressional action.[27]

### – 3. Notice of Bargaining Rights to Employees

On August 30, 2011, the Board issued a final rule requiring employers to post notices regarding employees' bargaining rights, whether or not a union represents any employees in the workplace.[28] The notice must be posted where other workplace notices typically are posted. If a company communicates its personnel rules or other policies to employees through electronic means it must also post the notice electronically or provide a link to the notice on the NLRB's website.[29]

Perhaps the most significant aspect of the rule is the provision that an employer's failure to post the notice will be deemed an unfair labor practice.[30] As such, an employer's failure to post could toll the otherwise applicable statute of limitations for filing unfair labor practices charges.[31] Further, an employer's "knowing" failure to post the notice could be considered evidence of an unlawful motive if unfair labor practice charges are filed regarding other alleged violations of the National Labor Relations Act (Act).[32]

### – 4. Pre-Election Bargaining

In *Dana Corporation*,[33] another controversial case in which member Hayes filed a dissenting opinion, the Board approved an employer's pre-election agreement with a union that did not claim to represent the employees. In fact, the employer and the union entered into the agreement, which contained certain substantive terms, before any union organizing efforts took place.[34] The

parties entered into a letter agreement that included a neutrality clause and provided for union access, card check recognition, a no-strike/no-lockout clause and several other matters concerning terms and conditions of employment.[35] Both the majority[36] and dissenting member Hayes relied for their positions on *Majestic Weaving*,[37] in which the Board had rejected a contract negotiated by the employer with a minority union, that the employer nonetheless had recognized as the exclusive bargaining agent of its employees. The majority distinguished *Majestic Weaving* from the letter agreement at issue in *Dana Corp.*, stating the latter established only a "framework" for future collective bargaining and did not contain an exclusive-representation provision.[38]

Member Hayes, however, found it "clear that an employer violates [the Act] if it either recognizes a union or negotiates terms and conditions of employment with a union before a majority of unit employees . . . has designated the union as their bargaining representative."[39] Commentators note that the decision encourages "top down" organizing using neutrality and card check agreements, and permits unions to make substantive concessions prior to any employee involvement.[40] As the majority stated in its opinion, however, the opinion does not adopt a general standard regulating pre-recognition negotiations between unions and employers, and it remains unclear what level of employer cooperation with a union this Board would find to constitute unlawful support.[41]

## The Business Community and Congress React

Not surprisingly, the Board has come under fire for its pro-union decisions. Several groups already have challenged the final rule requiring employers to post notices informing employees of their rights under the Act. The National Association of Manufacturers (NAM) filed suit in the U.S. District Court for the District of Columbia on September 8, 2011, arguing that the Board did not have statutory authority to promulgate the rule and should suspend it.[42] The National Federation of Independent Business (NFIB) filed a similar suit on September 19, 2011, arguing that promulgating the rule was a "gross overreach" of the Board's statutory authority under the Act and will impact employers with no history of NLRA violations.[43] The National Right to Work Legal Defense and Education Foundation, an employee advocacy group, and two small business owners joined in the NFIB suit.[44] Most recently, the U.S. Chamber of Commerce and the South Carolina Chamber of Commerce filed suit against the Board in the U.S. District Court for the District of South Carolina, alleging that the regulation violates the NLRA, the Administrative Procedure Act, the Regulatory Flexibility Act, and the First Amendment.[45]

If issued as a final rule, the much criticized proposed rule requiring snap elections may be subject to similar challenges. Even prior to formal adoption of the regulation, Republicans in Congress identified the proposal as one of the ten most harmful regulations proposed by the Obama administration,[46] and introduced legislation in both the House and the Senate that would block the rule as part of a wide-ranging effort to reform procedures under the Act.[47] Another recently introduced bill would abolish the NLRB altogether and transfer its enforcement authority to the Department of Justice and its oversight of representation elections to the Department of Labor's Office of Labor-Management Standards.[48] Yet another bill would limit the scope of the Board's rulemaking authority, as well as its authority to issue complaints and process unfair labor practice charges.[49]

As a backdrop to these efforts, the House Committee on Education and the Workforce recently held a hearing to address perceived union favoritism on the part of the Board.[50] A number of witnesses and members of Congress criticized the Board's recent decisions and regulatory activity, focusing much of their attention on the Board's decision in Specialty Healthcare, its proposed expedited election rule, and the final rule requiring notification to employees of their bargaining rights.[51] One member of Congress, Trey Gowdy (R-SC), went so far as to call the NLRB a "shill" for organized labor during the hearing.

Despite Board members' statements to the contrary,[52] there is little doubt that the NLRB has moved aggressively forward and adopted a number of new standards that favor unions. The question becomes who or what will successfully challenge its actions.

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[1] *See Lamons Gasket Co.,* 357 N.L.R.B. 72 (2011). The "recognition bar" limits employee or other union challenges to a union that has been voluntarily recognized by the employer for a period of six months to a year, depending on the circumstances.

[2] *See UGL-UNICCO Service Co.,* 357 N.L.R.B. 76 (2011). The "successor bar" prohibits challenges to a union's status as bargaining representative for a "reasonable period" after the acquisition of a company with a unionized work force. If the employer agrees to follow the existing collective bargaining agreement, this period is six months. If the employer exercises its right to set new initial terms and conditions of employment, the bar to challenging the union's status can be extended to a year.

[3] *Specialty Healthcare & Rehab. Ctr. of Mobile,* 357 N.L.R.B. 83 (2011) ("*Specialty Healthcare*").

[4] *Id.*

[5] In so holding, the Board explicitly overruled *Park Manor Care Ctr.*, 305 N.L.R.B. 872 (1991). *See Specialty Healthcare,* 357 N.L.R.B. 83, at 4.

[6] *Id.* at 1, 13 (emphasis added).

[7] *Id.* at 13.

[8] *See id.*

[9] *Id.* at 10.

[10] The Board's decision explicitly affects only nursing homes, rehabilitation centers and other non-acute health care facilities. The organizing rules for acute-care hospitals are set forth at 29 C.F.R. § 103.30.

[11] 357 N.L.R.B. 83, at 19 (citing *Newton Wellesley Hosp.*, 250 N.L.R.B. 409, 411-412 (1980)).

[12] *Id.* at 10.

[13] *Id.*

[14] *Id.* at 11-12.

[15] *Id.* at 19.

[16] *Id.* at 15.

[17] Hayes also criticized the Board's efforts to expedite elections and limit the right to Board review and evidentiary hearings. *See id.*

[18] *Id.* at 19.

[19] *Id.*

[20] *Id.*

[21] *See id.* at 19 & n.20. Hayes also dissented to the proposed election rule. *See* Representation-Case Procedures, 76 Fed. Reg. 37291 (2011)(to be codified at 29 C.F.R pts. 101-103)(proposed June 22, 2011)(Hayes, dissenting), available at http://www.gpo.gov/fdsys/pkg/FR-2011-06-22/pdf/2011-15307.pdf.

[22] NLRB, *supra* note 21.

[23] *See* Labor Relations Today, No Joke: NLRB Chairman Giving "Active Consideration" to Rulemaking for Quicker Elections, http://www.laborrelationstoday.com/2011/04/articles/nlrb-administration/no-joke-nlrb-chairman-giving-active-consideration-to-rulemaking-for-quicker-elections/ (last visited Sept. 28, 2011) (summarizing remarks of Chairman Liebman during Apr. 6, 2011 hearing before the Subcommittee on Labor, Health & Human Services, Education & Related Agencies, House Committee on Appropriations).

[24] *See* NLRB, Statement by Chairman Wilma B. Liebman on Representation-Case Procedures Rulemaking, http://www.NLRB.gov/node/526 (last visited Sept. 28, 2011).

[25] *See* NLRB, Proposed amendments to NLRB election rules and regulations fact sheet, https://www.NLRB.gov/Proposed%20Amendments (last visited Sept. 28, 2011).

[26] *Id.*

[27] Representation-Case Procedures, 76 Fed. Reg. 37291.

[28] *See* 29 C.F.R. Part 104 (2011), *available at* http://www.federalregister.gov/articles/2011/08/30/2011-21724/notification-of-employee-rights-under-the-national-labor-relations-act.

[29] 29 C.F.R. § 104.202(f).

[30] 29 C.F.R. § 104.210.

[31] 29 C.F.R. § 104.214(a).

[32] 29 C.F.R. § 104.214(b).

[33] 356 N.L.R.B. 49 (2010).

[34] The union, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), AFL-CIO, represented approximately 2,000 Dana Corporation employees at various locations, but did not represent any of the 305 employees at the company's St. Johns, Michigan facility. *Id.* at 1-2. The company informed its employees that it had entered into a "neutrality agreement" with the UAW, but did not advise them of the terms of the letter agreement. Rather, it referred any employees with questions to the company's legal department. *Id.* at 2-3. Subsequent to the announcement, three St. Johns employees filed charges with the Board, alleging that the company and the union had violated Sections 8(a)(2) and 8(b)(1)(A) of the Act, which prohibit employers from rendering unlawful assistance to unions and unions from accepting such support. *Id.* at 3.

[35] The letter agreement provided that any collective bargaining agreement reached by the parties would be in effect for at least four years, would include cost-sharing for health insurance, would include terms the company deemed important to its success, including competitive health care benefits, minimum classifications, team-based approaches, the importance of productivity and quality, Dana's "idea program," continuous improvement, flexible compensation, and mandatory overtime when necessary. *Id.* at 2. The agreement also provided that if the parties ultimately were unable to reach agreement, they would submit unresolved issues to an arbitrator who would establish the substantive terms of the collective bargaining agreement. *Id.*

[36] Chairman Liebman and member Pearce formed the majority. Member Becker recused himself. *Id.* at 1 n.2.

[37] 147 N.L.R.B. 859 (1964), *enforcement denied*, 355 F.2d 854 (2d Cir. 1966).

[38] 356 N.L.R.B. 49, at 2.

[39] *Id.* at 11.

[40] The majority rejected the General Counsel's arguments that negotiation of the letter agreement precluded true free choice for the employees and that *Majestic Weaving* precluded negotiation over substantive terms and conditions of employment if it occurred before a union demonstrates majority status.

[41] *Id.* at 4.

[42] TheHill.com, Manufacturers sue NLRB over Union Poster Rule, http://thehill.com/business-a-lobbying/180745-manufacturers-sue-nlrb-over-union-poster-rule (last visited Sept. 26, 2011); Jay Timmons, The NLRB's anti-jobs plan, http://www.washingtontimes.com/news/2011/sep/9/the-nlrbs-anti-jobs-plan/ (last visited Sept. 26, 2011).

[43] NFIB, NFIB Files Lawsuit to Protect Employer Rights, http://www.nfib.com/press-media/press-media-item?cmsid=58262 (last visited Sept. 26, 2011).

[44] NFIB, NFIB Sues NLRB over Union Poster Rule, http://www.nfib.com/nfib-in-my-state/nfib-in-my-state-content?cmsid=58271 (last visited Sept. 26, 2011).

[45] Labor Relations Today, NFIB and U.S. Chamber Also File Suits Against NLRB Over Notice-Posting Rule, http://www.laborrelationstoday.com/2011/09/articles/nlra/nfib-and-us-chamber-also-file-suits-against-nlrb-over-noticeposting-rule/ (last visited Sept. 26, 2011); Workforce Freedom Initiative, NLRB Rogue Actions Trigger U.S. Chamber Lawsuit, http://www.workforcefreedom.com/blog/nlrb-rogue-actions-trigger-us-chamber-lawsuit (last visited Sept. 26, 2011).

[46] TheHill.com, House Republicans paint target on NLRB's proposed union election rules, http://thehill.com/business-a-lobbying/179509-house-gop-paints-target-on-proposed-union-election-rules (last visited September 26, 2011).

[47] Employee Rights Act, S. 1507, 112th Cong. (2011), H.R. 2810, 112th Cong. (2011). The act focuses on seven issues: 1) guaranteeing secret ballot elections; 2) requiring union recertification elections every three years; 3) prohibiting union from expending funds for activities other than collective bargaining without union members' approval; 4) establishing standardized election times that would not occur earlier than 40 days after a union petition is filed; 5) creating penalties against unions that use coercion or other undue methods to oppose decertification efforts; 6) requiring a majority vote by all union members prior to any strike; and 7) criminalizing union threats and violence. *See* National Legal and Policy Center, Sen. Hatch Unveils Employee Rights Act to Reform Labor Law, http://nlpc.org/stories/2011/09/08/sen-hatch-unveils-employee-rights-act-reform-labor-law (last visited Sept. 28, 2011).

[48] National Labor Relations Reorganization Act of 2011, H.R. 2926 112th Cong. (2011).

[49] Protecting American Jobs Act, H.R. 2978, 112th Cong. (2011).

[50] *Culture of Union Favoritism: Recent Actions of the National Labor Relations Board*, Hearing Before the H. Comm. on Educ. & the Workforce, 112th Cong. (2011), available at http://www.edworkforce.house.gov/Calendar/EventSingle.aspx?EventID=260180.

[51] Participants in the hearing also criticized the Board's decision in *Lamons Gasket Co.* reinstating the "recognition bar."

[52] *See, e.g.*, NLRB, NLRB Chairman Pearce issues statement on Congressional hearing about Board actions, http://nlrb.gov/news/nlrb-chairman-pearce-issues-statement-congressional-hearing-about-board-actions (last visited Sept. 29, 2011).