



Controversial NLRB Representation Rules Reemerging: Union Organizing Promotion *Redux*—The Obama "Labor Board" Doing Everything It Can to Advance Union Representation Cases

by Bob Sebris

The National Labor Relations Board ("NLRB" or "Board") is once again racing down the road of major regulation changes regarding union organizing/representation election cases. Continuing political efforts to help the Labor movement slow the downslide of union representation in America, the Obama Board in February 2014 reissued its controversial 2011 regulation changes. Those regulations had been overturned by federal court decisions in 2012-2013 related to administrative procedure errors by the Board.

Not to be denied, the NLRB has returned to the same script. Like a bad case of *déjà vu*, it is proceeding with essentially the same rules changes again—and then some. The newly proposed regulations include provisions from the overturned final rules of 2011, as well as provisions from the earlier 2011 proposed draft regulations that the NLRB had not proceeded with in final form. The new draft regulations dramatically undercut employer rights to litigate many bargaining unit issues in a hearing, restrict appeal rights of parties, and significantly reduce the time between filing of a union representation petition and an election. Hearings just held in April 2014 will likely rubber stamp the rules for implementation soon.

In an effort to prop up labor union organizing and make it easier for unions to obtain Board certification as the exclusive representative, some key changes through the NLRB's pending rules are:

- **Pre-Election Fast Track Process.** Pre-election hearings to be set for 7 days (rather than 14) after hearing notice, with new mandatory detailed position statements on election related matters at start. (Issues not identified are waived.)
- **Employee Personal Information.** Preliminary employee voter list to be required at the start of the pre-election hearing (not after direction of election). Final voter list to be shared within 2 days (instead of 7 days) after direction of election, and to now include telephone numbers and email addresses, in addition to just providing home mailing addresses
- **Restrict Scope of NLRB Pre-Election Hearings in Local Regions.** Hearings to be restricted to whether question concerning representation exists and evidence limited to facts material to only that issue. Consequently, issues of individual voter eligibility or inclusion (*e.g.*, supervisor status) are to be deferred to post-election procedures, rather than litigation prior to the NLRB representation election. (There is a bright line exception if 20% of the potential voting unit is involved.)
- **Broaden Regional Hearing Officer Control.** Local Hearing Officer to have more authority to limit scope of unit hearings
- **Right to Post-Hearing Briefs Weakened.** Local Hearing Officer to have discretion to determine if briefs will be permitted and timing
- **"Review" Appeal Rights to NLRB Curtailed.** Party right to seek immediate review of Regional Office rulings to be deferred until after elections are held by NLRB Region at local level (no stays)

- **Elections Occur Faster.** NLRB rule requiring minimum 25 days between petition filing and date of election to be eliminated
- **Appeal Rights Reduced.** Board discretion to deny subsequent requests for review of a Regional Office decision (rather than compulsory review of appeals) on unit issues, challenged ballots, election objections

The pending rule revisions would promote elections occurring within just a couple weeks after a union petition is filed. Unit eligibility questions and appeal process rights for an employer would be sharply curtailed. The approach would basically be "vote now, hearings later". While these are technical changes of procedure on the surface, they greatly increase union representation election victory probability.

Thirty years ago a typical NLRB representation case might fairly lead to a fully informed worker vote 3 to 4 months after a petition was filed with the NLRB—after unit issues were resolved, an employer could counter campaign, and employees had an opportunity to learn and consider all the issues presented by a NLRB election ballot. In the late 1990's, this time frame was accelerated to about 1-1/2 months by NLRB General Counsel administrative action under the Clinton Administration. Now, the Obama Board is trying to shorten this to only a couple weeks.

Employer Considerations. Historically, the NLRB has often been referred to in shorthand fashion as the "Labor Board". Today in Washington, D.C. under President Obama, it really is the ***Labor*** Board. Expect that the pending draft representation rules will be issued in final form soon, and that union organizing will be easier for the Labor movement in the immediate future.

Therefore, today is opportunity time. Review your handbook policies and statements for appropriate "union avoidance" messages and proper solicitation, distribution, and communication policies and procedures. Assess potential bargaining unit structure, particularly with diverse production or service functions and multiple geographic locations. Confirm first level supervision status, and conduct preventive training to legally help prevent, spot and respond to early union organizing signs and signals. Offer market competitive wages and benefits. Provide effective human resources management systems for identifying and resolving employee grievances and concerns in a timely manner.

Conclusion. Unfortunately, if the pending draft NLRB representation rules are implemented as expected, fast track "quickie" NLRB representation elections will be the norm. Once union organizing starts, it will zoom through the new Board procedures. Employers will have little time to respond and react appropriately. Proceed with preventive programs sooner, rather than later.

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