THE NATIONAL LABOR RELATIONS ACT AND NON-UNION EMPLOYERS: POLICY AND PRACTICE ISSUES IN A CHANGING ENVIRONMENT

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ABSTRACT

For most non-union employers, the National Labor Relations Act (NLRA) is probably not the federal statute that has drawn a great deal of attention in recent years. Given the steady decline in union membership, density, and the number of representation elections conducted over the last forty years, the lack of attention is understandable. Yet in spite of the steady decline in membership and organizing activity, the basic rights of workers to form and join unions guaranteed under the NLRA continue to be advanced by financially and politically powerful entities within the American economy. The purpose of this paper is to analyze recent US Court and NLRB decisions, examine recent union organizing initiatives, and to assess their impact on management policy and practice.

INTRODUCTION

Employers in the United States today have numerous federal and state laws and administrative agencies that impact their human resource management policies and practices. At the federal level Title VII of the 1964 Civil Rights Act as amended, enforced through the Equal Employment Opportunity Commission (EEOC), draws most of the attention of employers because of its prohibition of discrimination in virtually all human resource decision-making situations. Depending on the state where an employers' business is located, the presence of state law and state Fair Employment Practice Agencies (FEPA) can further complicate compliance with anti-discrimination regulations. Wage and Hour regulations under the Fair Labor Standards Act, also enforced through both state and federal departments of labor can also occupy a considerable amount of most employers' attention. For most non-union employers then, the National Labor Relations Act and the National Labor Relations Board (NLRB), are probably not the federal law and agency that draws a great deal of attention.

The NLRA applies to all "enterprises whose operations affect commerce" (NLRB, 1997). The NLRB's requirements for exercising its power or jurisdiction are called jurisdictional standards. The

standards are based on the yearly amount of business done by the enterprise, or on the yearly amount of its sales or of its purchases. They are stated in terms of total dollar volume of business and are different for different kinds of enterprises. For example, a retail enterprise with at least $500,000 total annual volume of business would be covered by the Act. A non-retail business with direct sales of goods to consumers in other States, or indirect sales through others (called outflow), of at least $50,000 a year; or direct purchases of goods from suppliers in other States, or indirect purchases through others (called inflow), of at least $50,000 a year would also be covered (NLRB, 1997).

The primary responsibility of the NLRB is the prevention and remedying of unfair labor practices under the National Labor Relations Act (NLRA) and the guaranteeing of the rights of employees to organize and bargain collectively with their employers. When you're a non-union employer without an open ongoing union organizing campaign underway, complacency with respect to the NLRA and the NLRB is understandable. Given the renewed interest and efforts on the part of organized labor to organize non-union employers and, NLRB and Federal Court decisions in the last decade, the mindset and perception as to the NLRA and the NLRB's impact on non-union employers should be changing. Organized labor has achieved some very large measures of success in organizing in recent years, and decisions by the NLRB, some already supported by court decisions, have impacted a number of issues important to all employers. The purpose of this paper is to examine recent US Court and NLRB decisions, recent union organizing initiatives, and to assess their impact on management policy and practice.

LEGAL BACKGROUND AND RECENT DECISIONS

Section 7 of the National Labor Relations Act (NLRA) provides employees with the right to…

> *form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection (NLRA, 7, 1935).*

To facilitate enforcement of employee Section 7 rights, Section 8(a)(1) of the NLRA prohibits employers from interfering with, restraining, or coercing employees in the exercise of their right to self-organization. Included among the prohibitions in this regard, are prohibitions against employers threatening, interrogating, or conducting unlawful surveillance of employees in an effort to dissuade employees from unionization. It is important to note, that these prohibitions apply to both union and non-union employers and many employers in non-union organizations find out the hard way about the protections granted to their employees by the NLRA. It is not necessary that the employees be members of a labor union nor that a union organizing drive be underway for the employees' Section 7 rights to exists. Over time, employee rights to engage in concerted activity under the NLRA have been broadly construed by the courts (Suflas, 2005), and a wide variety of efforts of employees to join

together for mutual aid or protection have qualified as protected concerted activity "even if those employees are not represented by or attempting to form a union" (Walsh, 2004, p. 363). Recent case examples include Quietflex Mfg. Co., Superior Travel Service, Inc., Trompler, Inc. v. NLRB, and Petrochem Insulation.

In Quietflex Mfg. Co. case, 83 Hispanic-surnamed employees gathered in their employer's parking lot to protest perceived preferential treatment of Vietnamese co-workers. While the NLRB determined that the activity was protected concerted activity, it ruled that the protesters' subsequent rejection of management's offer to meet with a smaller delegation and their refusal to vacate the premises after a reasonable period of time, justified the employer firing the group (Quietflex Mfg. Co., 2005). In Superior Travel Service, the NLRB concluded that an employee who was fired after she prepared, circulated, signed, and presented to her employer a written petition complaining about certain employment policies contained in the employer's handbook, was engaged in concerted and protected activity and that her activity was the cause of her discharge. The employer alleged that the discharge was related to five performance concerns. The NLRB did not find any of Superior's arguments credible, partially because the employee was never written up or disciplined for the alleged shortcomings (Superior Travel Service, Inc., 2004). In Trompler Inc., the NLRB determined that six employees were unlawfully fired after they walked off their jobs in protest of supervisory failures to address sexual harassment, employee drug use, and employee training issues (Trompler, Inc. v. NLRB, 2003). In Petrochem Insulation, the NLRB held that employees who petition governmental agencies with objections to their employer's compliance with environmental standards were also engaged in Section 7 protected concerted activity (Petrochem Insulation, 1999).

While the clear purpose of the NLRA as passed in 1935 was to promote collective bargaining as a means to help stabilize the American economy, subsequent amendments to the Act enhanced employers ability to communicate to employees their opinion on why employees should not support unionization. Section 8(c) of the NLRA provides:

> *The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit (Labor Management Relations Act, 8(c), 1947).*

Bottom line, employers are "entitled to exercise their freedom of speech to lawfully advise employees about unionization as long as they don't threaten employees with any consequences for unionizing or promise employees that the terms and conditions of employment will improve if they choose not to unionize"(Buttrick, 2003). Employers can utilize new employee orientation and employee handbooks to proactively convey their nonunion philosophy. Employers are cautioned however, that in communicating their nonunion philosophy to new employees the employer's presentation should be

more "advisory", and not "coercive". A nonunion handbook policy or orientation program that requires as a condition of employment that employees refrain from union membership will generally be viewed by the NLRB as a violation of the National Labor Relations Act (Buttrick, 2003).

Non-union employers must be aware of a number of other policy and practices that can lead to allegations of unfair-labor practices against them. Segal identified seven Section 7 rights that apply to both union and nonunion employees alike:

Discussion of employment terms
Bad-mouthing the employer
Engaging in work stoppages
Honoring picket lines
Soliciting and distribution
Access to company property
Be abusive *(Segal, 2004).*

For example, it is not uncommon for employers to attempt to prohibit employees from discussing their wages or other terms of employment. The NLRB has determined that such policies interfere with employees attempting to exercise their Section 7 rights. "A rule prohibiting discussions about pay is unlawful, even if the employer does not strictly enforce it" (Segal, 2004, 113). In Main Street Terrace Care Center, the NLRB Administrative Law Judge (ALJ) found that Main Street had promulgated a rule prohibiting employees from discussing their wages. The ALJ then explained that "the mere existence of the rule inhibiting protected conduct, even if not enforced, constitutes an unlawful interference in violation of Section 8(a)(1) of the Act"(NLRB v. Main Street Terrace Care Center, 2000). The ALJ's decision was affirmed by the NLRB and its petition for enforcement was supported by the Sixth Circuit Court of Appeals (NLRB v. Main Street Terrace Care Center, 2000). In a 2005 decision involving Cintas Corporation the NRLB reaffirmed it's position in a case involving the firm's confidentiality rule which read in part "We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners (employees), new business efforts, customers, accounting and financial information" (Cintas Corporation, 2005). The ALJ ruled and the NLRB agreed that the "rule's unqualified prohibition of the release of any information regarding its partners could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees" (Cintas Corporation, 2005).

One of the more controversial issues under the NLRA involves employer no-solicitation rules. Employers can "restrict" employee solicitations on working time but, "a general ban on employee solicitations or distributions will be overbroad and unlawful" under the NLRA (Segal, 2004, 116). Increased concern with security related issues since 9/11 have led employers to enact rules limiting access to employer premises (Suflas, 2005). A policy that bars the return of off-duty employees to the workplace may violate the NLRA. In Mediaone of Greater Florida, Inc., the NLRB found that the

handbook provision prohibiting employees from "entering company property after hours without authorization" violated Section 8(a)(1) of the NLRA because they could not prove some business justification for the restriction (Mediaone, 2003). The NLRB in the Mediaone case did uphold the organization's no solicitation rule. The rule in question stated:

> *The company firmly believes that to help employees do their jobs effectively, they shouldn't be disturbed or disrupted by solicitors as they perform their duties. You may not solicit another employee in work areas during work time (Mediaone, 2003).*

The NLRB was also called to examine a third provision in the Mediaone handbook dealing with its nondisclosure rule. In Mediaone, the company wanted to prevent its employees from disclosing "proprietary information" outside the company. The handbook described proprietary information to include information assets and intellectual property and listed business plans, technological research, trade secrets, copyrighted works, customer and employee information, including organizational charts and databases. The NLRB concluded that the phrase "employee information, including organizational charts and databases" because it "cannot reasonably be read to prohibit disclosure of employees' wages, hours or working conditions" did not violate the NLRA. The NLRB did reiterate that employers may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid (Mediaone, 2003).

Inconsistent enforcement of legitimate policies can also create problems for employers. In the Webco case, the NLRB found that while the company had a perfectly legitimate no-solicitation policy, the company inconsistently applied its policy. The company policy prohibited all activities of solicitation and distribution of literature on company property by non-employees. It also prohibited employees from soliciting and distributing literature during working time and in working areas and provided for discipline for violations. The NLRB found that the company commonly allowed employees to sell phone-service products and children's group sale items like sausages, candy, and cookies, and allowed employees to organize recreational activities like fantasy football and baseball leagues and sporting event pools but disciplined four employees engaged in union related activities (Webco v. NLRB, 2000).

Numerous other non-union employer work rules have been challenged as violating the NLRA. In Guardsmark, LLC, the NLRB found that a work rule requiring employees to bring complaints about workplace issues directly to their supervisors violated the act. The rule stated in part, "while on duty you must follow the chain of command and report only to your immediate supervisor...Do not register complaints with any representative of the client" (Guardsmark, LLC, 2005). Thus, employees can not be prohibited from complaining about their terms and conditions of employment to the employers customers (Clark, 2005). In Claremont Resort and Spa, the NLRB held that an employer violated the law by maintaining a work rule prohibiting employees from having negative conversations about their managers (Model, Alan, (2005). In Claremont Resort and Spa, the employer issued a rule that stated:

"Negative conversations about associates and/or managers are in violation of our Standards of Conduct that may result in disciplinary action." The Board ruled that the rule's prohibition of "negative conversations" about managers could reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities and is thus unlawful (Claremont Resort and Spa, 2005).

RECENT UNION ORGANIZING INITIATIVES

The U.S. Department of Labor's Bureau of Labor Statistics (BLS) reported that in 2005, 12.5 percent of wage and salary workers were union members. This was unchanged from 2004, and the BLS reported that the union membership rate has declined from a high of 20.1 percent in 1983, the first year for which comparable union data are available (Bureau of Labor Statistics, 2006). The most recent NLRB report reflected the steady decline in the number of elections held over the last two decades, with 2,234 total representation elections held in fiscal year 2005 compared to 4,247 in 1982. Unions won representation rights in 59 percent of the elections held in 2005 (NLRB, 2005).

A number of significant developments regarding union organizing in the United States in recent years have occurred. The most recent, involves the split in the American labor movement and the formation of the Change to Win Coalition. Another involves the increased use of "top-down organizing methods" like "corporate campaigns", the "card check" and "neutrality agreements" (Mix, 2005 and Babcock, 2005).

The Change to Win Coalition is an "umbrella organization" for a group of seven labor unions that split from the AFL-CIO in 2005. Member unions include the Teamsters, Service Employee International Union (SEIU), United Food and Commercial Workers, the Carpenters Union, Laborers' International Union of North America, UNITE Here, and the United Farm Workers. The formation of the new group was driven in large part by the group's dissatisfaction with AFL-CIO's efforts to organize new workers (Anderson, 2005).

This new coalition of financially strong members may present a powerful unified front in organized labor's efforts to stop the years of decline endured by the movement. The SEIU, described as one of the most vocal critics of AFL-CIO organizing efforts, has been one of the fastest growing unions in recent years, growing from 625,000 members in 1980 to more than 1.8 million members in 2005 (Schramm, 2005). In addition, members of the Change to Win Coalition filed almost half of all NLRB election petitions in 2004, winning nearly 60 percent of the elections they were involved in, with the SEIU earning a 75 percent win rate in elections it was involved in 2004 (Babcock, 2005).

Many believe that the formation of the Change to Win Coalition should lead to more "aggressive organizing", particularly in industries such as health care, facility maintenance services, warehousing, food processing, hotels, restaurants, textiles and construction. (Babcock, 2005, & Anderson, 2005). In addition, according to Anna Burger chair of the Change to Win Coalition, the organization wants

"industry wide organizing, coordinated bargaining and political action aligned with aggressive organizing campaigns":

> *We are going to walk our talk. We are going to get into the streets, together. Hotel maids and Wal-Mart clerks. Child care providers and waste haulers. Farm workers and carpenters. The workers who build the buildings and the workers who clean them* (Burger in Anderson, 2005).

It is also widely expected that the coalition will also make extensive use of top-down organizing methods. Corporate campaigns employ political, economic and legal pressure tactics utilizing the media, and are designed to put pressure on employers to induce neutrality agreements. In neutrality agreements, the employer agrees to remain neutral in the face of union organizing and in many cases, to forgo an NLRB supervised election and to "voluntarily" recognize the union based on the union's evidence that a majority of employees support it (Ross, 2005). It has been estimated that four-fifths of new union member have won recognition by circumventing the NLRB election process in recent years through the use of neutrality agreements and the card check process. In the card check process, the union persuades the employer to agree to check union authorization cards for majority support and voluntarily recognize the union. Unions generally win recognition about eighty percent of the time in these situations compared to approximately sixty percent of the time in recent NLRB supervised secret ballot elections (Moberg, 2006).

The American labor movement's corporate campaign strategy also includes an international component. Unions have had success in generating neutrality agreements with European parent companies that are binding on their American subsidiaries. The strategy was launched by the Service Employees International Union (SEIU) when Sweden based Securitas acquired three U.S. based firms Pinkerton, Burns International Services Corp. and Loomis Fargo & Co. (Marquez, 2006). Andy Stern, president of SEIU stated that "all of a sudden we found ourselves needing to talk more to CEOs in Europe than in the U.S." as they attempt to legitimize the slogan "workers of the world unite" (Marquez, 2006). The Union Network International, a group of 900 unions with 15 million members around the world was formed in 2000 to promote the signing of global agreements with multinational companies. These agreements are designed to cover labor standards, human rights issues, and the right to organize, including formal neutrality clauses (Marquez, 2006).

The Change to Win Coalition and the Union Network International are both targeting Wal-Mart. The Food and Commercial Workers launched a campaign to put pressure on Wal-Mart through lobbying state lawmakers to propose what they are calling "fair share health care" legislation. The group wants companies like Wal-Mart to provide health insurance to all their workers or reimburse the state when employees enroll in public assistance programs (Anderson, 2005). The state of Maryland was the first to pass a bill that would require employers with more than 10,000 workers in the state to spend at least 8% of its payroll on health benefits or pay the difference to a state fund that would expand

Medicaid coverage for low-income adults. The legislature overrode the governor's veto of the bill and it became law in January of 2006 (Wojcik, 2006).

POLICY AND PRACTICE ISSUES

The increasingly aggressive challenges to non-union employer work rules, the more frequent avoidance of NLRB election procedures and the use of top down organizing tactics coupled with the rise of the Change to 'Win Coalition should signal to employers that once again the death knoll of the American Labor Movement may be premature. Clifford H. Nelson, JR., a partner and head of the labor relations practice at Constangy, Brooks and Smith in Atlanta notes, "some employers have gotten complacent because they haven't felt exposed to this kind of threat in a long time" (Babcock, 2005). The member unions of the Change to Win Coalition will have an estimated $28 million in annual dues that it formally paid to the AFL-CIO to use in organizing campaigns (Marquez, 2005). These campaigns will be aggressive and employ pressure tactics that can come from both U.S. and international forces. The focus of these campaigns is largely aimed at industries and organizations that are among the fastest growing segments of the U.S. economy with labor components that are not easily off-shored or substituted with capital (See Table 1).

Table 1: Potential Targeted Occupations With Largest Expected Employment Growth Through 2012

Job	Current Employment	Projected Growth
	(Millions)	
Nursing Aide	1.3	25%
Customer Service	1.9	24%
Food Preparation	2.0	23%
Janitorial	2.2	18%
Waiter/Waitress	2.1	18%
Retail Sales	4.1	15%
Cashier	3.4	13%

Source: Bureau of Labor Statistics - Projections of job growth from 2002 to 2012 (Schramm, 2005).

Retail, health care, facility maintenance services, warehousing, food processing, hotels, restaurants, and construction are all being targeted. The Communications Workers of America (CWA) and the Service Employees International Union (SEIU) enjoyed a great deal of success as a result of top-down organizing in 2005. The CWA added 16,000 new Cingular workers in 2005 through a neutrality agreement and card check process. In Houston, the SEIU was able to use its corporate campaign to unionize the entire janitorial labor market. The SEIU did this by putting pressure on building owners

to accept unionization making neutrality agreements with cleaning contractors easier to secure. By the end of 2005, the SEIU had verified signatures on union membership cards from 5,300 of the 7,000 janitors in Houston (Moberg, 2006).

Unions have also not abandoned a traditional tactic to garner support for its organizing efforts. In April of 2005, Rep. George Miller, a California Democrat, introduce the Employee Free Choice Act. The act would require employers to recognize unions through a card-check process, in which a majority of workers sign union authorization cards (Schoeff, 2005). Two months earlier, Representative Charles Norwood a Georgia Republican, introduced the Secret Ballot Protection Act. That legislation would mandate a secret ballot election conducted by the NLRB to establish a union (Schoeff, 2005). While neither bill has much chance of becoming law at this point, the mostly partisan support for the bills shows that supporters and opponents of organized labor are still active at the national level.

SUMMARY AND CONCLUSIONS

What can employers do in light of these changes to more effectively manager their human resources? Those employers that have become some what complacent with respect to the threat of union organizing must become more active in reviewing and auditing their human resource policies and practices. Work rules in particular must be reviewed to assess whether they do or do not violate the NLRA. It is clear, that rules prohibiting employees from complaining about their terms and conditions of employment to the employee's customers are in violation of the act. In addition, an overly broad work rule, even if the work rule is not enforced is a violation of the NLRA (Claremont Resort & Spa, 2005). Rules that deny an employer's off-duty employees entry to the employer's parking lots, gates, and other outside non-work areas will be found invalid (Walker, 2005). Human resource programs, policies, and procedures that are infrequently utilized, complaint procedures, especially open-door procedures and policies that require employees to first bring complaints to their immediate supervisors should be thoroughly reviewed. Pay secrecy policies, still popular in many organizations should be abandoned. No-solicitation policies, confidentiality, and plant access policies should also be examined in light of the NLRB's recent decisions.

Another area that employers must be careful to not short change is supervisory training. In many organizations, supervisory training in recent years has focused on dealing with allegations of sexual harassment. In California, it is mandatory that every employer of fifty or more employees provide supervisors at least two hours of interactive training on sexual harassment (Law & the Workplace, 2005).

But, just as employers should train supervisors to respond properly to all types of allegations alleging discrimination, including race, religion, national origin, age, and disability in addition to sex, employers must also prepare supervisors to recognize and consistently respond to concerted activity. "The worst thing HR can do is ignore it, because it's not going to go away" (Babcock, 2005, quoting

Nelson). Employers should assess their vulnerabilities and take corrective action where needed, and according to Gary Glaser, a partner in the New York office of law firm Seyfarth Shaw:

> *"ultimately the best way to avoid becoming a target of a global corporate campaign is to make sure employees are getting benefits and wages that are competitive in the industry...This is not just about big business versus big unions...It's about what's best for the employees, and the unions still need employees to want them" (Marquez, 2006).*

In the "ever-changing landscape of union representation in the United States", it should be clear that all employers should engage in proactive efforts to assess their employee relations policies and practices (Model, 2005). At a minimum, annual audits of handbooks, work rules, supervisory training, and complaint procedures should become mandatory.

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