

EXECUTIVE
EDITOR
Bob Lemert
Atlanta, GA

CHAIR, LABOR RELATIONS
PRACTICE GROUP
Cliff Nelson, *Atlanta, GA*
Steve Schuster, *Kansas City, MO*

PUBLICATIONS EDITOR
Robin Shea
Winston-Salem, NC

CHIEF MARKETING
OFFICER
Victoria Whitaker
Atlanta, GA

Atlanta



Asheville



Austin



Birmingham



Boston



Chicago



Columbia



Fairfax



Greenville



Jacksonville



Kansas City



Lakeland



Los Angeles County



Macon



Milwaukee



Nashville



Tampa



Ventura County



Winston-Salem

March / April 2009

IN THIS ISSUE

News and Analysis

EFCA update

It takes only two to tango, First Circuit says

Solis confirmed – “wealthy CEOs,” beware!

The Good, the Bad and the Ugly

NLRB permanently adopts ADR program

UAW’s membership continues to plummet

Health care unions bury the hatchet – to focus on Florida

UNITE HERE divorce gets messier

“Reunited, and it feels so good . . .”

NEWS & ANALYSIS

EFCA update. – On March 24, Sen. Arlen Specter, R-Pa., who had been viewed as a potential vote for the Employee Free Choice Act, announced he would not support the bill. Since that date, seven Democratic senators have voiced varying degrees of opposition to the bill or to specific provisions of the bill. The main reason for these senators’ opposition is the bill’s elimination of secret ballot union elections, which many believe is the “cornerstone of how contests are decided in a democratic society.” It now appears to most observers that compromise legislation may emerge later this year. Possible revisions could include the following: establishing timetables to require a union election within 21 days of a petition; making it an unfair labor practice for an employer to hold a captive audience meeting with employees unless the union is given equal time; authorizing civil penalties of up to \$20,000 per violation if the NLRB finds an employer or union willfully and repeatedly violated employees’ rights during an organizing drive; and requiring first contract negotiations to begin within 21 days after union certification with either party able to call for mediation if there is no agreement after 120 days. Meanwhile, union leaders continue to claim that “grassroots” support for EFCA is only growing and plan for numerous rallies in support of it.

It takes only two to tango, First Circuit says. – The NLRB has been in operation with only two of five members since January 2008. During that time it has issued more than 350 two-member decisions. Now, the U.S. Court of Appeals for the First Circuit has **held** that a Board decision is not invalid simply because it was issued by only two members. The employer, challenging a two-member Board decision that it had used an overly broad confidentiality rule and thus could not terminate

March/April 2009

an employee for violating the rule, argued that the Board lacked a quorum to issue the decision and that it could not delegate all of its powers to a two-member panel. In support of its position, the employer cited Section 3(b) of the National Labor Relations Act, which authorizes the Board to delegate its powers to “any group of *three or more* members.” (Emphasis added.) The panel found, however, that because Section 3(b) plainly allows the Board to delegate its powers to a three-member group, a later vacancy in the three-member group “may not, under the terms of Section 3(b), impair the right of the two-member quorum to exercise all powers of the Board.” **As previously reported, the District of Columbia Circuit is poised to decide this same issue in a case filed by Constangy.**

Solis confirmed – “wealthy CEOs,” beware! – After being delayed by the Senate amid concerns about tax liens on a business owned by her husband and her failure to report her service as a board member of the pro-labor advocacy group American Rights at Work, the Senate approved the nomination of Hilda L. Solis as Secretary of Labor. Secretary Solis was sworn in on March 13. An elated AFL-CIO president, John Sweeney, proclaimed, “Finally Americans will have a secretary of labor who represents working people, not wealthy CEO’s.”

THE GOOD, THE BAD AND THE UGLY

NLRB permanently adopts ADR program. – The NLRB has decided to make permanent the alternative dispute resolution program for unfair labor practice cases it launched back in December 2005. Participation in the program is voluntary, and parties may withdraw at any time. Usually, the Board will assign an NLRB administrative law judge to facilitate confidential settlement discussions. The Board will stay the unfair labor practice case for 30 days from the first meeting with the facilitator or until the parties reach a settlement, whichever occurs first. Although an extension in the stay can be approved for good cause, a case can remain in the program for only 60 days.

UAW’s membership continues to plummet. – The UAW lost almost 34,000 members in 2008, bringing its membership to its lowest level since 1940. UAW membership peaked in 1979 with more than 1.5 million members. With only 430,000 members at the end of 2008, the UAW has now lost members every year since 2004. Clearly, the union’s efforts to organize workers in the aerospace and gaming industries, as well as in technical, office and professional services, has not made up for an auto industry that continues to shed thousands of hourly paid jobs as the companies downsize to cope with reduced market demand.

Health care unions bury the hatchet – to focus on Florida. – The Service Employees’ International Union and California Nurses Association/National Nurses Organizing Committee have agreed to stop fighting each other and work together on organizing health care workers around the country. According to Andy Stern, SEIU President, with the health care system set to begin a transformation under the Obama administration, the two unions have decided to work together to launch an intensive national organizing campaign against the nation’s largest hospital systems. In Florida the unions will create a joint organization to represent current registered nurses of both unions and to organize other unrepresented nurses. The unions decided to work together because in Florida nurses employed by major hospital chains are largely unorganized. CNA Executive Director Rose Ann DeMoro said Florida will be “ground zero of this new relationship.”

UNITE HERE divorce gets messier. – As reported in our last edition, the merger of UNITE and HERE has unraveled. Now, a faction of UNITE has found a new love, and HERE isn’t happy about it.

March/April 2009

The breakup began when former UNITE officials, and a faction consisting of 14 joint boards and two local unions, filed separate lawsuits seeking to end the merger. Not long afterward, the faction, which claims to represent some 150,000 workers, voted to secede and then formed a new union, Workers United. A day later, the executive board of Workers United voted to affiliate with the SEIU.

Adding insult to injury, the faction wants most of the "marital assets." They seek a declaration from the court that the joint boards were free to disaffiliate from UNITE HERE with their property and assets intact in an equitable distribution proportional to assets brought into the merger. Such a ruling would benefit the UNITE faction, which brought most of the assets into the merger. A hearing on the case is scheduled for this month.

Meanwhile, John Wilhelm, president of UNITE HERE's hospitality division and the "jilted spouse," filed a formal complaint, under the constitution of Change to Win, against the SEIU. The suit claims that the SEIU has interfered in the affairs of UNITE HERE and intruded on its jurisdiction by encouraging factions within UNITE HERE to secede. . . . Kind of like alienation of affection?

"Reunited, and it feels so goood . . ." – While UNITE and HERE are duking it out, the AFL-CIO and Change to Win have decided that the grass isn't always greener on the other side of the fence. Four years ago, issues over the structure, governance, financing and programs of the AFL-CIO led to the disaffiliation of several unions and the formation of the separate Change to Win federation. The failure of the labor movement to grow, in contrast to the success of its unified effort to elect President Obama and the probable success of its effort to pass EFCA legislation, have spurred informal meetings to discuss reconciliation. At a meeting outside Washington, D.C., on April 6, union leaders created a National Labor Coordinating Committee whose purpose will be to bring labor unions together under a single organization. The Committee consists of AFL-CIO President John Sweeney, Change to Win Chair Anna Burger and NEA President Dennis Van Roekel, along with the presidents of six AFL-CIO affiliates and five Change to Win affiliates. These groups represent more than 16 million workers in more than 60 unions. It is likely that the participants will have a unification agreement in place by the end of the summer, in time for the quadrennial AFL-CIO convention at which time AFL-CIO President Sweeney plans to retire.

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by publications such as Chambers USA, Super Lawyers, and Top One Hundred Labor Attorneys in the United States. More than 100 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Georgia, Florida, South Carolina, North Carolina, Tennessee, Alabama, Virginia, Missouri, Illinois, Wisconsin, Texas and California. For more information, visit www.constangy.com.