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EXECUTIVE LABOR SUMMARY

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IN THIS ISSUE

NEWS & ANALYSIS

Becker nomination: dead, or only sleeping? – Is news of the death of the nomination of Craig Becker, assistant general counsel of the Service Employees International Union and an extreme union advocate, greatly exaggerated? *Executive Labor Summary* has followed the nomination of Becker to the National Labor Relations Board since it was first announced by President Obama in July 2009. Management groups have strongly opposed Becker's nomination from the beginning, pointing to his academic writings and union ties. After the Senate Health, Education, Labor and Pension Committee approved his nomination last October, Sen. John McCain (R-Ariz.) placed a "hold" on the nomination, which was subsequently returned to the White House at the end of the 2009 session. The President re-nominated Becker, and the Senate committee approved him on a 13-10 party line on February 4.

During Senate debate on the nomination, McCain noted that Becker was the first NLRB nominee to come directly from working for a union and pointed out that, although Becker signed an ethics agreement to recuse himself for two years from cases in which the SEIU International is a party, he has not agreed to recuse himself in cases involving an SEIU local or cases in which SEIU is indirectly involved or affected. According to McCain, this would create an appearance of partiality. Saying he "reluctantly oppose[d]" Becker, Sen. Johnny Isakson (R-Ga.) acknowledged that Becker is a talented attorney, but said he was "not convinced" that Becker would not try to implement the Employee Free Choice Act through NLRB decisions. Isakson cited examples of two recently confirmed members of the National Mediation Board who had testified they had no preconceived notions, but then quickly acted to change 75 years of precedent regarding how a majority vote is determined for certifying union representation.

On February 9, the Senate defeated a cloture motion to end debate on Becker's nomination, falling eight votes short of the 60 needed to proceed to a final vote. However, President Obama can give Becker a short-term recess appointment, which would not require Senate approval. The President has warned that, if Republicans continue to block his nominees, he will consider making several appointments during the upcoming recess "because we can't afford to let politics stand in the way of a well functioning government." A recess appointment would send the wrong signal, according to a spokesman for the U.S. Chamber of Commerce, who urged the President to replace Becker with a nominee who, like the other two pending NLRB nominees, has bipartisan support. Looks like we haven't heard the last of the Becker nomination!

Partial lockout OK – if not unlawfully motivated. – An employer does not discriminate against strikers by the continued use of permanent replacements during a lockout, an ALJ has **held**. After 17 sessions between the union and the employer failed to produce a new collective bargaining agreement, the union began a strike on August 3, 2007. About one month into the strike the employer began to hire both temporary and "permanent" replacements to supplement "crossovers" who abandoned the strike and returned to work. On November 19, 2007, the union made an immediate, unconditional offer to return to work for all employees then on strike, but the employer said it needed time to consider the issues associated with responding to the offer. Four days later, on November 23, the employer rejected the union's offer and announced it was beginning a lockout of the strikers and crossovers, but not the permanent replacements. The employer explained that it was taking the action to support its contract proposals, and that to end the lockout and return to work the union needed only to agree to the employer's last offer. The employer continued to operate with temporary and permanent replacements and supervisors, saying that it retained the replacements out of fear that the union would either refuse to work or would go back out on strike. The employer contended that it was afraid the balance of power would strongly shift to the union.

The employer ended the lockout on November 29, and the union ended its picketing the same day. By mid-January 2008 most of the bargaining unit employees had returned to their jobs, but the union had filed a number of unfair labor practices alleging the employer threatened employees with job losses and discriminated against individual union supporters. When a complaint later issued, it also included an allegation that the employer violated Section 8(a)(3) of the Act by its discriminatory treatment of strikers and crossovers when it locked out strikers and crossovers, but not permanent replacements. The ALJ rejected that argument, finding that the continued use of replacements during a lockout was not discriminatory because it did not affect the status of employees who were already on strike.

On the other hand, the ALJ found that the lockout itself was unlawful because it was motivated by anti-union animus. The ALJ noted that the employer had committed other unfair labor practices, such as firing one employee, suspending another, and giving preferential treatment to crossovers after the lockout ended. The ALJ's recommended order required, among other things, that the employer provide back pay to all employees who were unlawfully locked out.

Union activity, "journalistic integrity" don't trump newspaper publisher's First Amendment rights – Over the last few years NLRB Regional Directors have frequently waited to pursue Section 10(j) injunctive relief against employers until after an ALJ has found that the employer committed the alleged unfair labor practices. This practice relieves a Regional Director from establishing that there is a strong likelihood of success on the merits of the case, one of the requirements for an injunction. However, that approach may not work where First Amendment rights are implicated.

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EXECUTIVE LABOR SUMMARY

January/February 2010

In ***McDermott v. Ampersand Publishing***, some employees of a newspaper sought union representation to prevent the owner and publisher from interfering in their "journalistic integrity." It all began in 2004, when the owner expressed concern that the news reporting was sometimes biased. A series of disputes over newspaper content ensued, resulting in the 2006 resignations of a reporter and six editors to protest alleged unethical interference in news reporting. A group of the remaining reporters then sought help from the union. Months of rhetoric followed, including a campaign asking customers to sign cards pledging to cancel their subscriptions if the newspaper refused to meet the reporters' demands for restoration of journalistic integrity, recognition of the union, and negotiation of a fair contract.

The union filed a representation petition and won an election in September 2006. As contract negotiations dragged on, the union filed unfair labor practice charges, and a complaint followed. In December 2007, an ALJ found that the newspaper, before and after the election, violated the NLRA by instructing employees not to wear or display pro-union buttons or signs, coercively interrogating employees about their union activity, suspending and giving lower evaluations to employees because of their union activity, and firing eight reporters because of their union activity. According to the ALJ, the employees were not trying to gain entrepreneurial control of the paper or prevent management from controlling content.

In March 2008, the Regional Director petitioned for a 10(j) injunction in the U.S. District Court for the Central District of California, and among other relief, requested reinstatement of the eight reporters. The court, however, denied the petition, finding that the requested relief would pose a "significant risk" of infringing on the paper's First Amendment rights by preventing it from disciplining reporters who seek through union activity to limit the paper's editorial discretion. On appeal to the U.S. Court of Appeals for the Ninth Circuit, a divided panel affirmed. Writing for the majority, Judge Richard Clifton found that the main thrust of the employees' campaign appeared to have been to block or limit the influence of the owner and publishers over the content of the news sections of the paper and to focus that authority in the employees themselves. The judge found that employees' rights to organize and collectively bargain "do not supersede the First Amendment" or the newspaper's right to publish what it pleases, no matter how laudable the goals of the fired reporters may have been.

Shift leaders are not supervisors, court says. – An employer's "shift leaders" were not "supervisors" within the meaning of the NLRA, and therefore it was unlawful for the employer to tell them that they were supervisors and thus prohibited from engaging in union activity. To prove that employees are supervisors under Section 2(11) of the Act, an employer must show the employees have the authority to engage in at least one of the 12 listed supervisory functions; that their exercise of such authority is not merely routine and requires the use of independent judgment; and that their authority is held in the interest of the employer. In ***Loparex, LLC v. NLRB***, the employer argued that the shift leaders had the authority to "responsibly" direct other employees and to assign them work. Each shift leader was part of a crew of five workers and reported to a team manager assigned to the same shift. The shift leaders operated the same machines as other workers but also assisted other team members by answering questions and providing supplies. They could also assign crew members to various machines to accomplish the tasks listed on a priority sheet provided by management, which listed the jobs to be run in order of importance and stated when each job was due. The ALJ and the NLRB had found that the shift leaders were not supervisors because they did not have authority to take corrective action, citing ***Oakwood Healthcare*** (requiring for "supervisor" status ability to issue corrective action and ability to suffer negative consequences for failure to take corrective action). The U.S. Court of Appeals for the Seventh Circuit agreed, and noted that "corrective action" was not equivalent to "disciplinary action." To the Court, "corrective action" could entail something as innocuous as requiring a co-worker to stay late to finish a job.

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THE GOOD, THE BAD AND THE UGLY

Solis, AFL-CIO say EFCA is needed to slow loss of union members . . . but Heritage Foundation says no. – Labor Secretary Hilda Solis reacted predictably to a January Bureau of Labor Standards report showing that unions lost more than 770,000 members in 2009. According to Solis, the report makes it clear why the Obama Administration supports the passage of the EFCA. Citing the report's figures showing that union-represented workers have higher earnings and citing other data showing union members have access to better health care, retirement, and leave benefits, Solis said it was "clear" that union jobs are good jobs. An AFL-CIO spokesman acknowledged that union jobs have been hardest hit by the recession and said that now, more than ever, workers need Congress to pass the EFCA so they will have the ability to bargain to make newly created jobs "good jobs" with decent wages and benefits.

"Not so," says the Heritage Foundation, which argues that union jobs were hardest-hit in part because their employers have done poorly in the marketplace compared with their non-union competitors. An analysis posted on the foundation's website shows that Toyota Motor Corporation and Honda Motor Company have added jobs, while General Motors and Chrysler have slashed their payrolls.

Young people need unions (like a fish needs a bicycle?) – That (without the fish-bicycle part) is the battle cry of new AFL-CIO secretary-treasurer Liz Schuler. According to Schuler, "today's young workers are blocked by the jobless economy," but "have a hope for the future and a vision of a savvy, diverse movement to bring about social change." Obviously, Schuler believes unions are that "diverse movement." Would our kids not be better off with jobs?

"Bypass the shop floor and go straight to the top floor": Employers can expect increase in corporate campaigns, panelists say. – The U.S. Chamber of Commerce recently hosted a panel discussion on the use of corporate campaigns by organized labor. A corporate campaign can be defined as a broad range of tactics used by unions to exert "top-down" pressure on an employer to facilitate union organizing, compel bargaining concessions, or attain other union goals. Such campaigns typically include coalition building with religious and other groups; public relations efforts; allegations of safety and health, or wage and hour violations; consumer boycotts; and shareholder actions. Panel participants made the following observations:

- The campaigns are not a battle for the hearts and minds of employees, but are about an attempt to get union dues and tarnish the employer's reputation.
- The unions are increasingly using shareholder activism as a tactic, including proposing resolutions to change corporate policies or personnel, threatening proxy voting attacks, and making public attacks on board members and senior management.
- Industries heavily reliant upon their public reputation, such as health care and hotels, are attractive targets.
- The health care industry is particularly vulnerable to the corporate campaign because it is heavily regulated in the areas of safety and health, and allegations of safety and health violations are easy for a union to make and costly for companies to combat.
- The best defense against a corporate campaign is likely to be a strong public relations offensive to preempt the campaign.
- Employers that are not prepared to make such an effort should consider settling with the union.

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January/February 2010

Union honchos arrested during picketing. – AFL-CIO President Richard Trumka and UNITE HERE President John Wilhelm were recently arrested during a protest, along with about 100 others, while blocking the main entrance to the Hilton San Francisco Union Square Hotel. The protesters sought to draw national attention to contract negotiations taking place around the country for more than 50,000 hotel workers. Contracts covering the 9,000 members of UNITE HERE Local 2, who work at San Francisco's top hotels, expired last August. Over the years, contracts negotiated by Local 2 have led the way in the hotel industry by providing employees with banks of paid time off, allowing members who were deported as illegal aliens to reclaim their jobs within a year, and requiring that any construction work at the covered hotels be performed by union workers or non-union workers receiving prevailing wages. Wilhelm called for Local 2 to lead the way in negotiations one more time. Too bad he could not stay on the sidewalk!

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