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EXECUTIVE LABOR SUMMARY

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NEWS & ANALYSIS

NLRB May Be Totally Pro-Labor by September. – Former union attorneys Craig Becker and Mark Pearce have now been sworn into office at the National Labor Relations Board to begin their recess appointments, and meanwhile President Obama has renominated them. If the Senate fails to confirm the renominations, the recess appointments will be effective until Fall 2011. If confirmed, Becker's term will expire December 16, 2014, and Pearce's term will expire August 27, 2013. As we **previously reported**, President Obama had nominated Becker and Pearce earlier, along with Republican Brian Hayes, a former management attorney, but the Senate fell eight votes short of proceeding to a final vote on Becker. Undeterred, Obama made the recess appointments of Becker and Pearce shortly after the Senate adjourned for its spring recess, and declined to make a recess appointment of Republican Hayes. It appears that the failure to appoint Hayes was "payback" for the 41 Republican Senators who had openly opposed Becker's recess appointment. If another Republican is not nominated when Republican member Peter Schaumber's term expires on August 27, 2010, the Board will be composed entirely of attorneys who have formerly represented unions: Pearce and Becker, along with NLRB Chair Wilma Liebman. Those three members could issue decisions, without any dissenting view, favoring unions in such important issues as union access to employer e-mail systems, the definition of supervisory status, and the limits of employer free speech.

Liebman Expects New Board to "Reinvigorate" Collective Bargaining. – Speaking at a recent national conference on collective bargaining in higher education, Liebman tried to downplay suggestions of radical policy changes by the reconstituted Board. However, she predicted a "more dynamic" reading of the National Labor Relations Act "in a way that reinvigorates collective bargaining." According to Liebman, the Obama Board will begin to look at real-world impacts, needs and facts – "not just the words of the law." She added, "I would argue that an administrative agency has a duty to bring the statute to life." Liebman said the

"static approach by the Board during the Bush years had the effect of removing more and more employees from the protection of the law, especially vulnerable contingent workers." Clearly, Liebman's rhetoric did nothing to dispel the notion that radical policy changes are, indeed, on the horizon.

"Stealth" Replacements Cost Employer $2.55 Million. – The owner of a nursing home has agreed to pay 133 current and former employees $2.55 million in back pay, interest and pension credits to resolve a 10-year-old unfair labor practice case in which the company illegally concealed its hiring of permanent strike replacements.

During negotiations for a successor contract, the union began an economic strike, and virtually all of the 180 unit employees participated. About one month later, the employer began hiring permanent replacements but told the employment agency that the hiring of replacements was to be kept "hush-hush." Indeed, the company did not even inform the union of its plans to hire permanent replacements and told its board of directors, "if [the union] refuses to seriously negotiate in good faith, we plan to add one or more permanent replacements each day. We have [the union] in a real bind . . .." The union did not learn that permanent replacements had been hired until more than a month later, after 100 had been hired. After the union and strikers made an unconditional offer to return to work, the employer began recalling strikers, but only to the positions it had not yet filled with permanent replacements.

At the unfair labor practice hearing the employer's administrator testified that she kept secret the hiring of permanent replacements because she feared the union would engage in additional violence and other misconduct. However, there was no evidence to support her allegations. The Board also rejected other evidence presented by the employer, including the employer's bargaining in good faith, its freeze on hiring replacements, and its following the union's suggestions regarding recall of the strikers (the latter two occurring only after the company had been "caught").

In 2007, **the NLRB found** that the nursing home illegally failed to reinstate all of the strikers, and further found that the secrecy created a sufficient inference that the nursing home acted with unlawful motives. The U.S. Court of Appeals for **the Second Circuit affirmed**. Importantly, both the Second Circuit and the Board agreed that an employer had no duty to disclose to a union its intention to hire permanent replacements. However, the fact that the nursing home was willing to go to great lengths to conceal its intentions tended to show that it had an unlawful motive. In October 2009, the U.S. Supreme Court declined to review the case, and now the matter is resolved for $2.55 million. An expensive secret!

Validity of Two-Member NLRB Rulings Argued in Supreme Court. – Oral argument before the Supreme Court on March 23 brought the issue of the validity of the rulings by the two-member NLRB closer to final resolution. Operating with only two members since the start of 2008, the NLRB has issued more than 580 rulings. While in most cases the parties have complied with the rulings, about 80 have challenged the rulings in federal appeals courts. Those courts have now split 5-1 in favor of upholding the authority of the two-member Board. Only the Court of Appeals for the District of Columbia Circuit, in Constangy's ***Laurel Baye Healthcare*** case, has ruled that the two-member Board had no authority to act. (Constangy is not representing the parties to the cases that are before the Supreme Court.)

At oral argument, Justice Scalia asked whether the Board's general counsel and its regional offices become "inoperative" when the Board drops to two members, and whether a Board with fewer than three members can even

pay salaries. Noting that the delegation of power to the quorum was made knowing that one member of the three-member group was about to leave, Scalia said, "That seems to be a very strange procedure, when you have a statute that says the Board has to have three for a quorum." He questioned whether that was an "evasion" of the purpose of the quorum requirement. Shutting down the Board might be "the only way to put pressure" on the President and the Senate to fill Board vacancies, Scalia said.

Court observers were hesitant to speculate which way the Court would rule.

THE GOOD, THE BAD AND THE UGLY

Never say die on EFCA. – Vice President Joe Biden has assured labor leaders that the Obama Administration has not given up on the Employee Free Choice Act although the administration may have "tactical differences" with labor. At the recent annual winter meeting of the AFL-CIO Executive Council, Biden assured leaders that the Obama Administration respected organized labor and said, "We're staying in the game with you." Biden noted that the EFCA needs 60 votes in the Senate, so the Administration "needs to find a Republican who will vote for cloture." He added, "we need to figure out a strategy" on how to get it passed.

SEIU President Stern to Retire. – Andy Stern, the controversial president of the Service Employees International Union, has unexpectedly announced his retirement but refuses to say why. He claims he has never been healthier, noting that there is "never a perfect time for any long time leader to depart" and that "too many leaders stay on too long. I have no intention of being one of them." Some observers believe he will use his ties to the Obama Administration to take an active role in the creation of new jobs, and in legal and policy analysis. The *Daily Labor Report* of the Bureau of National Affairs reports that the head of a pro-labor, non-profit organization believes Stern is retiring because "the tide is running against him" now that "he has completely alienated the intellectual and civil liberties community" and "has been repudiated by many of his fellow top labor leaders." (*Quoted material is BNA's paraphrase.*)

Stern's retirement could set up a possible contest for his job between SEIU Secretary-Treasurer Anna Burger, who is also president of Change to Win, and SEIU Executive Vice President Mary Kay Henry.

During Stern's 14-year tenure as president, the SEIU has added 1.2 million new members. With 2.2 million members total, the SEIU is the nation's second-largest union, after the National Education Association. Stern has opened the union to immigrants, women, and all races and ethnic groups, and has expanded its coverage to include janitors for office buildings, home-care and child-care workers, and private security guards. Stern, whose union spent millions to help elect President Obama, was the most frequent visitor to the White House during Obama's first six months in office.

Stern has been a controversial leader, in the SEIU as well as the labor movement as a whole. He helped form Change to Win, but faced criticism from other union officials when he took sides in the fight that led to the breakup of UNITE HERE. Most former UNITE members left UNITE HERE and formed Workers United, which affiliated with the SEIU. UNITE HERE then left Change to Win and rejoined the AFL-CIO.

AFL-CIO Targets Big Banks. – The AFL-CIO has announced a campaign against banks to create momentum for a jobs program. On March 15 the union kicked off two weeks of rallies and demonstrations against the biggest Wall Street investment banks, demanding that the banks start paying their "fair share" to restore jobs they destroyed, stop fighting financial reform and start lending to communities, small businesses and others "starved

for credit." According to AFL-CIO President Richard Trumka, while "millions of Americans continue to lose their homes, their jobs and their retirement savings, it's been business as usual for Wall Street handing out record pay and bonuses."

According to SEIU Secretary-Treasurer Anna Burger, in the coming months workers, clergy, veterans and community activists will mobilize to conduct meetings with Treasury Department officials, with the purpose of holding banks accountable for making loan modifications. They also plan to protest outside the banks' major offices, attend the shareholder meetings of Wells Fargo and Bank of America, and march on Wall Street in New York City and K Street in Washington, D.C.

The **AFL-CIO Executive PayWatch website** includes case studies of the nation's six largest banks – all of which received bailout money under the Troubled Asset Relief Program. The website details the compensation paid to their CEOs as well as the amount the banks spend lobbying against financial regulations.

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