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NEWS & ANALYSIS

Posting of poster is postponed. – The National Labor Relations Board has postponed the implementation date for its new notice-posting rule until January 31, 2012. According to the Board, the decision to postpone followed questions from businesses and trade associations indicating uncertainty about which businesses fell under the Board's jurisdiction and, consequently, had to post the new notice.

In addition to these "questions," five organizations have sued the NLRB, seeking orders from federal courts to enjoin the rule. The suits, filed by the National Association of Manufacturers, the National Right to Work Legal Defense Foundation, the National Federation of Independent Businesses, and the South Carolina and U.S. Chambers of Commerce, allege that the rule is not authorized by the National Labor Relations Act and violates the First Amendment rights of employers.

Board's "August Onslaught" expands unions' power. – As we reported in **September 2009**, immediately before the Bush labor board was reduced to only two members upon the expiration of Chairman Batista's term, it issued more than 60 decisions, many in favor of business. Organized labor dubbed that period the "September Steamroll." Now, the Democrat-majority Board has done likewise, this time benefitting unions. This past August, immediately before the expiration of Democrat Chair Wilma Liebman's term, the Obama board unleashed its "August Onslaught" against business, including four noteworthy decisions:

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Union Organizing Made Easier. As Constangy has **previously reported**, in ***Specialty Healthcare and Rehabilitation Center***, the Board's three-member Democrat majority rejected more than 20 years of precedent to rule that a petition for an election in only one job classification was appropriate when the employees shared a community of interest. The Board majority called a 1991 Board decision in ***Park Manor Care Center***, an "obsolete" ruling that failed to provide clear guidance to employees and unions. The decision will have a significant effect on non-acute health care facilities, but the scope of the decision is much broader. According to the Board, in any case where a union petitions based on a group with a community of interest, an employer arguing for a larger unit will have to show that "employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit." Among the critics of the decision was John Kline (R-Minn.), chair of the U.S. House of Representatives Education and the Workforce Committee. The Board "discarded decades of precedent," Kline said, and the new standards "empower union leaders to manipulate workplaces for their own gain," leaving employers vulnerable to constant labor disputes.

Decertification Petition After Voluntary Recognition Now Barred for Reasonable Period of Time. The Bush Board's controversial decision in ***Dana Corp.***, part of its "September Steamroll," modified the Board's recognition-bar doctrine by allowing employees 45 days after voluntary recognition to challenge the action through a decertification vote. In the Obama Board's "August Onslaught" decision of ***Lamons Gasket Co.***, the Board overruled *Dana* and returned to the old rule that the filing of a representation election petition is barred for a reasonable period of time after voluntary recognition of a union designated by a majority of employees. The Board said the "reasonable" period of time would be no less than 6 months after the parties' first bargaining session and no more than one year after that first session.

Successor Bar Doctrine Restored. In a companion case to *Lamons Gasket*, the Obama board has restored the successor bar doctrine that was eliminated in 2002 by ***MV Transportation***. In ***UGL-UNICCO Serv. Co.***, the three Democrat board members said that *MV Transportation* "has its origins in a bygone era," and that restoring the successor bar doctrine "better achieves the overall purposes of the Act, in the context of today's economy." Under the restored rule, a union will be allowed a reasonable period of time to bargain with the successor employer before a representation election petition is allowed. As in *Lamons Gasket*, the Board established as "reasonable" no less than 6 months after the parties' first bargaining session and no more than one year after that first session.

"Core Purposes" Bargaining Exemption Narrowed. Almost 20 years ago in ***Peerless Publications***, the Board ruled that where an employer's decision served a "core purpose" of the employer, it was not considered a mandatory subject of bargaining. In *Peerless*, the publisher was excused for its failure to bargain over its new ethics code because the code served a "core purpose" that was protected by the First Amendment. In ***Virginia Mason Hospital***, Board Chair Liebman and then-Member Mark Pearce reversed the decision of the administrative law judge who had ruled that the hospital was not required to bargain over the implementation of a flu prevention policy because the policy went to a "core" purpose of the institution. Liebman and Pearce found that *Peerless* should be limited to the publishing context because the ethics code served a core purpose protected by the First Amendment. Republican Member Brian Hayes dissented, saying that *Peerless* should not be so restricted.

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Union can't finance employee lawsuit during critical period before election. – In ***Stericycle, Inc.***, Board members Craig Becker, Pearce and Hayes overruled a 1996 Board decision in ***Novotel New York***, and held that a union engaged in objectionable conduct by providing unit employees with free legal services to prepare and file a wage and hour lawsuit under the Fair Labor Standards Act during the critical period before an election. Liebman dissented. Members Becker and Pearce also laid out the scope of what would constitute unobjectionable conduct, saying that a union could educate employees about their rights under the labor laws and could even *refer* them to legal counsel who then filed suit on behalf of the employees – as long as the union did not fund the litigation itself. Member Hayes dissented from this part of the opinion, criticizing his colleagues for creating "what is essentially a road map for how unions can provide gratuitous benefits, in the form of legal services, to voting employees without engaging in objectionable conduct."

9th Circuit finally breaks NLRB deadlock on dues checkoff in right-to-work states. – The U.S. Court of Appeals for the Ninth Circuit has ended a 15-year dispute over an employer's unilateral termination of union dues checkoff in Nevada, a right-to-work state. The court commented that, during a 15-year period, the NLRB had ruled three times on charges that the employer violated the Act by unilaterally terminating dues deductions when the labor agreements expired in May 1994. The court found each ruling arbitrary, and said that the Board failed to provide a workable rule and that the parties could not be expected to wait any longer. In ***Local Joint Executive Board of Las Vegas v. NLRB***, the court wrote that in a right-to-work state, dues checkoff is not a benefit to the union forced upon employees, but rather is a benefit to those employees who choose to be a part of the union and also choose dues checkoff. Therefore, the termination of dues checkoff is a mandatory subject of bargaining and must be negotiated. The court distinguished the dues checkoff provisions in union contracts in non-right-to-work states where union-security agreements are permitted and dues checkoff arrangements are, effectively, forced upon employees.

Facebook posts about chintzy food at BMW event are protected concerted activity, but not snarky comments about auto accident, ALJ rules. – Employers must be cautious in handling employees' critical comments about work-related issues on Facebook or other social media sites, but it appears that they may have some recourse. In ***Karl Knauz Motors, Inc.***, the first ALJ decision on social media and protected concerted activity, the judge found in favor of a Chicago BMW dealership that terminated a salesman for posting on his Facebook wall embarrassing photos and "rude and sarcastic" comments about an auto accident. The accident occurred at a Land Rover lot next door, which was owned by the same company. After a Land Rover was driven into a pond during a test drive, the BMW salesman took photos of the accident and posted them, along with caustic comments, on his Facebook account. The ALJ found that this posting was neither protected nor concerted, "and had no connection to any of the employees' terms and conditions of employment." Because this was the basis of the dealership's decision to terminate the salesman, the ALJ upheld the termination.

However, the ALJ found that postings about a customer event were protected. When the dealership hosted a promotion to launch the redesigned BMW 5 Series automobile, the same salesman and several others complained that the menu of hot dogs, cookies and chips should have been replaced by fancier food and beverages. They complained that the modest tone of the event would negatively affect their ability to earn commissions. When management went ahead with the event as planned, the salesman took photos of the hot dog car and other food offerings and posted the photos on his Facebook wall, with comments ridiculing the event. In this instance, the ALJ found that the issue pertained, in part, to compensation and, although the Facebook posts clearly had a mocking and sarcastic tone, that, in itself, did not deprive the activity of the protection of the Act.

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THE GOOD, THE BAD AND THE UGLY

Sodexo, SEIU settle suit. – Sodexo and the Service Employees International Union have have reached an "amicable" settlement of a lawsuit brought by Sodexo alleging that the union violated the federal Racketeer Influenced and Corrupt Organizations Act. As part of the settlement, the SEIU has agreed to end the corporate campaign it has waged against Sodexo for nearly two years, and Sodexo will dismiss its lawsuit. The parties also agreed to a set of principles to guide organizing and bargaining at the company, which included a call for both sides to refrain from engaging in public campaigns or using third parties to do so in connection with organizing drives.

The settlement was reached after a federal district judge denied a motion by the SEIU to dismiss Sodexo's lawsuit. Sodexo alleged that the union and other defendants conducted a campaign of extortion in an attempt to force Sodexo to recognize the SEIU as the bargaining representative for many of its currently non-union workers. **As we previously reported**, Sodexo had uncovered an "intimidation" manual published by the SEIU. News reports about the manual have prompted Sen. Orrin Hatch (R-Utah) to send a letter to NLRB Member Becker, asking whether he had any role in drafting the controversial manual when he was an attorney for the SEIU. An NLRB spokesperson recently refused to comment on the letter but said that Becker would respond directly to Hatch.

Machinists go public with Boeing's "smoking gun" documents. – Boeing Corporation continues to duke it out with the International Association of Machinists over its production line in South Carolina, we **reported** in our last edition that the Machinists had what it called "smoking gun" documents based on a Power Point presentation in 2009. Since that time, **the union has released 15 pages of documents**, culled from presentations to the Boeing Board of Directors in 2009 when the company was deciding where to build its second production line for the 787 Dreamliner. In addition to alleged unlawful statements by numerous management officials, the union claims that the documents prove that Boeing moved production to South Carolina to punish union members for exercising their rights. Boeing contends the documents confirm that it made a legitimate business decision based upon a variety of factors, including the need to ensure its future competitiveness and provide delivery stability for its customers.

During three separate presentations, the Boeing board was shown pros and cons of locating the new assembly line in either Washington state or South Carolina. One stated risk of using the Washington location was "union dependence"; another was the ramifications of having all major production at a single site. Among the risks of putting the work in South Carolina were an "inexperienced" workforce; capability and capacity of dual source suppliers; short-term productivity hit; higher start-up costs; negative impact to the profitability of the 787 program; a cost of $1.5 billion in cash; reducing earnings on a third of backlog; additional supply chain complexity; and limited delivery management experience. Among the "pros" for putting the facility in South Carolina were creating a non-union, competitive labor force; lowering labor costs and avoiding the current "hostage" situation; creating a counterbalance to union leverage; and increasing options for future workplace decisions.

Given the NLRB's current pro-labor agenda, the Boeing dispute is expected to end up in the federal courts.

Longshoremen get civil contempt for uncivil, contemptible behavior. – A federal court in Washington state **recently fined** two union locals $250,000 for violating a temporary restraining order and preliminary injunction that the court had entered to halt violent protests at a Washington port facility. The judge fined the locals of the International Longshore and Warehouse Workers for damages caused during two days of demonstrations and violence that included overwhelming security guards at the port, van-

dalizing vehicles, smashing windows, and threatening law enforcement personnel with bodily harm. **Most Americans approve of unions, but . . . .** – 52 percent of Americans who responded to a recent Gallup poll approve of unions, but 55 percent believe unions will become weaker in the future. The poll also showed that 42 percent of respondents want unions to have less influence than they have today. Thirty percent want unions to have more influence, and 25 percent prefer no change.

About Constangy, Brooks & Smith, LLP

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 sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.

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