THE EMERGING AGENDA OF THE OBAMA BOARD

The National Labor Relations Board Lurches to the Left

By Peter C. Schaumber, former Chairman and Board Member, National Labor Relations Board.

AND SO IT BEGINS. THE NEARLY 100 DECISIONS ISSUED BY THE NATIONAL LABOR RELATIONS BOARD ON AUGUST 27, 2010 REVEAL THE NEW DEMOCRATIC MAJORITY'S AGGRESSIVE ADGENDA TO AUGMENT UNION POWER, ENHANCE THE CARD-CHECK PROCESS LONG-FAVORED BY ORGANIZED LABOR, LIMIT THE ABILITY OF MANAGEMENT TO NON-COERCIVELY EXPRESS OPPOSITION TO UNIONIZIATION, AND DIMINISH THE FREE CHOICE OF THE AMERICAN WORKER, IN PARTICULAR WORKERS' RIGHTS TO REFRAIN FROM SUPPORTING UNION POLITICAL AND SOCIAL ACTIVITIES WITH WHICH THEY DISAGREE.

THE FEAR OF MANY THAT THE BOARD WILL ADMINISTRATIVELY SEEK TO ADOPT THE SINGULARLY MISNAMED EMPLOYEE FREE CHOICE ACT (EFCA) IS NO LONGER IDLE SPECULATION. WHILE THE BOARD CANNOT THROUGH RULE-MAKING OR DECISIONS ADOPT THE SPECIFIC PROVISIONS OF THE ACT, IT CAN RADICALLY ALTER AMERICAN LABOR LAW IN A WAY THAT ACCOMPLISHES MANY OF EFCA'S UNDERLYING OBJECTIVES.

FOR EXAMPLE, IN *UNITED BROTHERHOOD OF CARPENTERS & JOINERS V. ELIASON & KNUTH OF ARIZONA, INC)*, THE BOARD MAJORITY GAVE A GREEN LIGHT TO ORGANIZED LABOR TO ENGAGE IN INCREASED SECONDARY BOYCOTT ACTIVITY AGAINST NEUTRAL COMPANIES IN ORDER TO PRESSURE THEM TO CEASE DOING BUSINESS WITH UNION TARGETED EMPLOYERS. THIS DECISION THREATENS TO SPREAD LABOR DISCORD AND DISRUPT COMMERCE BY ENMESHING NEUTRAL EMPLOYERS IN LABOR DISPUTES TO WHICH THEY ARE STRANGERS. THE DECISION ALSO STRENGTHENS THE ABILITY OF UNIONS TO STRONG ARM EMPLOYERS INTO SIGNING NEUTRALITY AND CARD-CHECK AGREEMENTS THROUGH CORPORATE CAMPAIGNS AND OTHER FORMS OF ECONOMIC COERCION. THE *ELIASON* DECISION JETTISONS DECADES OF BOARD LAW AND NARROWLY DEFINES THE SCOPE OF PROHIBITED SECONDARY PICKETING IN A MANNER PLAINLY CONTRARY TO CONGRESSIONAL INTENT.

IN ANOTHER CASE, *INDEPENDENCE RESIDENCES*, THE BOARD'S NEW MAJORITY GAVE EFFECT TO AN OBVIOUSLY PRE-EMPTED NEW YORK STATE STATUTE THAT ESSENTIALLY REQUIRES STATE GOVERNMENT CONTRACTORS TO REMAIN NEUTRAL DURING UNION ORGANIZING CAMPAIGNS. THE BOARD MAJORITY FOUND THAT DESPITE THE

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RESTRICTIONS THE NEW YORK LAW IMPOSED ON EMPLOYER CAMPAIGN ACTIVITY, THE EMPLOYER WAS NOT, IN THE MAJORITY'S VIEW, "SUFFICIENTLY" RESTRAINED IN ITS OPPOSITION TO THE UNION TO WARRANT SETTING THE ELECTION ASIDE. [THE SAME BOARD MAJORITY, HOWEVER, WHEN CONFRONTED WITH AN EMPLOYER'S WORKPLACE RULE THAT COULD REASONABLY BE INTERPRETED TO RESTRAIN OR INTERFERE WITH ANY PRO-UNION ACTIVITY, WILL HAVE NO DIFFICULTY SETTING THE ELECTION ASIDE.?]

IN A THIRD CASE, *L-3 COMMUNICATIONS*, THE DEMOCRATIC MAJORITY REINFORCED THE IMPEDIMENTS PLACED ON WORKERS' RIGHTS TO OBJECT TO SPENDING THEIR DUES MONEY ON NON-REPRESENTATIONAL ACTIVITIES, SUCH AS UNION POLITICAL CONTRIBUTIONS. THE BOARD FOUND THAT UNIONS COULD LAWFULLY TREAT EMPLOYEES WHO OPPOSE SUCH EXPENDITURES LESS FAVORABLY THAN THOSE WHO DO NOT. SPECIFICALLY, THE MAJORITY HELD THAT IT IS NOT DISCRIMINATORY FOR UNIONS TO REQUIRE OBJECTORS TO REASSERT THEIR OPPOSITION DURING NARROW ANNUAL WINDOW PERIODS, WHILE IMPOSING NO SIMILAR REQUIREMENTS ON NON-OBJECTING UNIT EMPLOYEES. AS A CONSEQUENCE, THOSE EMPLOYEES WHO EITHER FORGET TO RENEW THEIR OBJECTION OR FAIL TO COMPLY WITH THE COMPLEX RULES FOR REGISTERING THEIR DISSENT, MAY BE SADDLED WITH PAYING FULL DUES FOR THE YEAR TO SUPPORT POLITICIANS AND OTHER ACTIVITIES THEY ACTUALLY OPPOSE.

TO BE SURE, THE NEW MAJORITY APPEARS TO BE FULFILLING THE EXPECTATIONS ANNOUNCED THIS PAST SUMMER BY JUDITH SCOTT, GENERAL COUNSEL OF THE SERVICE EMPLOYEES INTENATIONAL UNION, AT A SEMINAR ON LABOR LAW HELD AT FLORIDA INTERNATIONAL UNIVERSITY SCHOOL OF LAW. MS. SCOTT PROMISED [PREDICTED] THAT THE NEW MAJORITY "WILL DYNAMINCALLY INTERPRET" THE STATUTE, MEANING THAT THE NEW BOARD WILL INVOKE BROAD GENERAL PRINCIPLES SET FORTH IN THE ACT -- SUCH AS THE PREAMBLE'S STATEMENT OF PURPOSE "TO PROMOTE COLLECTIVE BARGAINING" -- TO ACCOMPLISH DRAMATIC CHANGES IN BOARD LAW.

IN A MISGUIDED EFFORT TO RESPOND TO ORGANIZED LABOR'S LOSS OF UNION DENSITY IN THE PRIVATE SECTOR, THE NEW OBAMA BOARD'S RECENT DECISIONS REFLECT A DESIRE TO RECALIBRATE THE CAREFUL BALANCE CONGRESS SOUGHT TO ACHIEVE IN THE NATIONAL LABOR RELATIONS ACT AND TO ELEVATE THE INTERESTS OF UNIONS OVER THOSE OF EMPLOYERS AND INDIVIDUAL EMPLOYEES. WHILE IT REMAINS TO BE SEEN HOW FAR THE NEW MAJORITY WILL PUSH THE ENVELOPE, THEIR FIRST ROUND OF DECISIONS DEMONSTRATES A DISTURBING WILLINGNESS TO IGNORE OR REVERSE SETTLED PRECEDENT AND TO OVERTURN THE DECISIONS OF ADMINISTRATIVE LAW JUDGES

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FAVORABLE TO EMPLOYERS. FOR ENTITIES SUBJECT TO THE BOARD'S JURISDICTION, HANG ON, IT'S LIKELY TO BE A WILD RIDE.

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