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EXECUTIVE LABOR SUMMARY

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IN THIS ISSUE

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NEWS & ANALYSIS

No surprises as *Noel Canning* heads to Supreme Court – The National Labor Relations Board announced on March 12 that it would petition for the U.S. Supreme Court to review **the** *Noel Canning* **decision**, issued this past January by the U.S. Court of Appeals for the District of Columbia Circuit.

The AFL-CIO Executive Council at its recent annual meeting called the court decision radical and sweeping in its potential reach, asserting that the situation is "intolerable" and claimed that it was all just a "sustained and vicious campaign" to derail the NLRB. The AFL-CIO has called for Democratic leaders in the Senate to use all available means to get the **nominations** of the current Board members (Sharon Block and Richard Griffin, whose "recess" appointments are in question as a result of *Noel Canning*, as well as Chairman Mark Gaston Pearce and two new Republican nominees) confirmed in the Senate and past any Republican filibuster attempt, threatening those who do not with unspecified political accountability.

Meanwhile, in the House of Representatives, Republicans introduced and passed

legislation – with a largely partisan majority – to de-fund any activity by the Board taken without a quorum of valid Members on the Board. The legislation is unlikely to get through the Senate.

All this comes as the NLRB has finished up a "lack of quorum" clean-up that was the consequence of **an earlier U.S. Supreme Court ruling** that declared two-Member rulings invalid. Just this past January, the Board had "rubber stamped" the last two of hundreds of decisions that had to be re-decided by three Members. Then *Noel Canning* declared that two of the Board's three Members were invalidly appointed, effectively making it a one-man Board consisting of Pearce and with no authority to do much of anything.

Among the issues that are up in the air as a result of *Noel Canning* are the constitutional questions surrounding the President's use of the recess appointment power and its relationship to the power of the Senate to give advice and consent on nominations. For better or worse, the outcome will also affect a number of controversial Board positions: (1) **the "quickie" or "ambush" elections rule**; (2) **witness statement disclosure** (scroll down to American Baptist Homes of the West); (3) **required continuation of dues check of as part of a status quo**; and (4) **expansion of the employer's duty to bargain in disciplinary situations** (scroll down to Alan Ritchey, Inc.); and much more.

NLRB Advice Memorandum ~~strikes down~~ upholds Boeing code of conduct (wow!) – As our readers know, employer policies and work rules have been under intense attack by the Board in the past few years. Just about any provision that could even possibly be read to interfere with employee rights has been found to be overly broad and unlawful.

Well, here is a bit of good news: The Division of Advice has **upheld** Boeing's Code of Conduct, finding that it did not violate Section 8(a)(1) of the National Labor Relations Act. Even though the Code of Conduct had language that was potentially overbroad, the Division of Advice found that it was lawful in the context of the almost 40 pages of explanations and examples that followed the Code.

Relying on past NLRB decisions, the Division of Advice noted that the Board has cautioned against reading "particular phrases in isolation" and urged a view of rules in context. For example, the Division pointed out that the Code's guidelines described numerous activities that would undermine the employer's "honesty, impartiality, reputation or otherwise cause embarrassment," but also that the activities given as examples did not implicate activities protected by Section 7 of the NLRA. Similarly, the conflict of interest provision included two pages of examples, and consequently was found to be "neither overbroad nor ambiguous." The Division also upheld provisions restricting certain uses of company information because "the . . . language does not specifically reference and restrict information concerning [employees'] jobs." In the past, as noted above, the Board might have viewed the language as reasonably interpreted to restrict Section 7 activities because it did not specifically say that information concerning their jobs was *excluded*.

"So much common sense," one might think. "How can this be?" Here is a clue: Boeing included the employees' union representatives when it presented the Code of Conduct at employee orientations. The Division of Advice found that to be worthy of note:

> Additionally, the fact that the Union is present at new employee orientations where the policy is presented would also lead employees to believe that the restrictions on new use of Employer assets and information would not extend to employee communications

with their Union representatives.

It's an open question whether the Board would take the same position with respect to a policy that applies to a non-union workforce, or one that was introduced to employees without union involvement. Employers should continue to be cautious about any case involving a challenged rule of conduct (including social media policies), given the Board's aggressive effort at expanding its influence in the non-union sphere and aiding union organizing efforts. Even Boeing's Code survived only because it had more than 40 pages of policy, examples, and "Q and A"; and an express statement that the policy did "not apply to employees' constitutional, statutory, or other protected rights." And, of course, the union was involved in the presentation to employees. So employers should not be overly optimistic as a result of the Division opinion, but it's a slim ray of hope.

Court rejects NLRB effort to expand union leverage through request for corporate financial information – The U.S. Court of Appeals for the Second Circuit has refused to enforce an NLRB decision in a case involving an employer's failure to provide financial information in bargaining. In ***SDBC Holdings, Inc. v. NLRB***, the court refused to enforce an NLRB holding that Stella D'Oro bakeries had violated its duty to bargain in good faith.

The importance of this case probably cannot be overstated.

As background, the National Labor Relations Act imposes a general duty on employers to bargain in good faith about wages, hours, and other terms and conditions of employment for represented employees. As the NLRB has interpreted the NLRA, this duty to bargain includes responses to union requests for information relevant to bargaining. Generally, if an employer claims that it cannot afford terms proposed by the union, the employer has to prove it upon request – by providing the relevant financial information to the union. This has been the law for many years and has been relatively non-controversial.

With the extremely pro-union current Board, unions have realized that litigation at the Board is a source of bargaining leverage. One way to get leverage (and a Board case) is to use repeated, intrusive, ambiguous, or burdensome information requests that the employer will not want to respond to. The *SDBC Holdings* case is an apparent example of a union's effort to do that, even when the employer allowed the union to have access to the information. It took the intervention of a federal Court of Appeals, and no telling how much disruption and how many dollars in legal fees, to stop it.

Here, Stella D'Oro was bargaining over a new contract with a local of the Bakery, Confectionary & Tobacco Workers Union after the company was acquired by a private equity group. During bargaining, the company noted operating losses and a need to reduce financial costs, but it never said that it could not afford to agree to the union's proposals. In response, the union requested a financial statement. The company provided the information from a financial statement and offered to make it available throughout negotiations, but refused to provide a photocopy of the statement itself because of the fear that it might fall into the hands of a competitor. The union insisted on a photocopy and filed an unfair labor practice charge. Eventually, the negotiations broke down, the union went on strike, and the company implemented its final offer as if impasse had occurred. Later, the union informed the company that the strikers were ready to return to work, but the company refused to take them back, taking the position that this was an economic strike and apparently having already replaced the strikers.

(As one more item of background, economic strikers can be permanently replaced, but employees striking over unfair labor practices must be reinstated when they are ready to return to work.)

The Board found that the company had violated the NLRA by refusing to provide the union with requested information for bargaining. Therefore, the Board found, the strike was an unfair labor practice strike. Therefore, the Board found, the strikers who had offered to return to work had been unlawfully refused their old jobs.

Regarding the failure to provide information, the Board found that, by raising its financial condition in any way, Stella D'Oro at least implied an inability to pay and gave rise to the obligation to back it up. The employer sought review at the Second Circuit.

The Second Circuit found that the company's position was based on *unwillingness* to pay, not inability. Thus, the company had no obligation to turn over the financial information in the absence of a showing by the union of a specific need. Then the court said that, even if the union had had the right to the information, the company complied with its obligation. In other words, the union didn't have the right to a photocopy – just to the information. The court noted that the company had legitimate confidentiality concerns and had informed the union of that. Although the NLRB has sometimes required employers to provide photocopies when inspection and note-taking would be insufficient for review of a lengthy document, the court found that a photocopy was not required in this case because the company had offered to make the information available through all negotiations.

In sum, the court's finding on the unfair labor practice charge resulted in complete (albeit lengthy and expensive) vindication for the company. With no ULP, there was (1) an impasse in bargaining, (2) no unlawful unilateral implementation of the company's last bargaining proposal, and (3) no unlawful permanent replacement of the striking employees. Press reports indicate that the back pay sought here by the NLRB and union was more than $2 million – and it all hinged on a response to a union information request for a photocopy of financial records.

A cautionary note -- Judges Jose Cabranes and Denny Chin, concurring, wrote that the Board's position on this issue could be upheld in the future. According to these judges, the Board needs to do a better job of specifying its reasons for finding that a company statement that operations are unprofitable is tantamount to a claim of "inability to pay." Now that the NLRB has this road map, you can bet that it will do exactly that to keep pushing the law to places it has never been. Accordingly, employers in bargaining may find it prudent to expressly disclaim *inability* to pay and expressly assert that they are claiming only *unwillingness* to pay.

Impact of NLRB ruling on micro bargaining units expands – In March, **the NLRB approved** a petitioned-for bargaining unit of 26 employees of a mechanical contractor, Fraser Engineering, by applying the Board's ***Specialty Healthcare*** ruling on "micro-bargaining" units*. Previously Fraser, the union, and the Board had agreed that the appropriate unit consisted of 39 employees consisting of the 26, plus 13 employees performing similar work at a wholly-owned subsidiary. Based on this prior agreement, the company argued that the unit of 39 employees was still the appropriate unit. However, the NLRB now disagreed, saying that the Board was not "bound by prior unit stipulations" and that the prior agreement didn't matter any more. According to the Board, the petitioned-for unit of 26 employees was appropriate because the employees shared a community of interest and "tracked" the employer's own "dividing line" among its employees. Meanwhile, the Board said, Fraser had failed to show that the other 13 employees shared an overwhelming community of interest such their exclusion would be inappropriate.

As this case shows, in just two years since *Specialty Healthcare*, the Board has changed the "playing field" for representation elections. In Fraser's case, the union lost when the 39-employee group voted, but now it will have another shot with a smaller unit. And even though the 13 are no longer in the unit, will not the election affect them

anyway, given that they had a community of interest with the larger group just two years ago, with no indication of intervening changes? Labor law gerrymandering!

**Constangy attorneys are representing Specialty Healthcare in its challenge to the NLRB decision before the U.S. Court of Appeals for the Sixth Circuit.*

Perez nominated to Labor; conflict broils. – On March 18, President Obama nominated Thomas E. Perez to become Secretary of the U.S. Department of Labor. Perez is currently the Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice. Like many recent nominees, Mr. Perez has impressive academic and political credentials but essentially little or no private sector experience. Among numerous positions, he was a prosecutor in the Civil Rights Division and was Maryland's Secretary of Labor, with wage and hour enforcement being one of his responsibilities. He was special counsel and advisor to the late Sen. Edward M. Kennedy (D-Mass.) on civil rights, criminal justice and constitutional issues, and served under former Attorney General Janet Reno during the Clinton Administration. His published quotes indicate that he will be a reliable friend of organized labor.

Republicans in the Senate may make the confirmation process difficult for Perez due to vocal and growing concerns about his past dealings in the Civil Rights Division that involve alleged brokering of special inside deals to avoid some litigation that the Division feared losing. Here's the **Republican view**; here's a **Democrat view**. (We link, you decide.) Even more recently, the Republicans have **attacked** Perez for using his personal email for government business.

If confirmed, Perez could have a significant impact on important regulatory and enforcement matters, including programs regarding employees misclassified as "independent contractors," worker safety, and **new proposed "persuader" regulations** under the Labor-Management Reporting and Disclosure Act. There is no doubt that Perez knows the field and comes with a perspective more closely aligned with the interests of organized labor than with the interests of private-sector employers.

Attorney Gary Shinners named Executive Secretary of NLRB – On April 12, NLRB Chairman Mark Gaston Pearce announced the appointment of Acting Executive Secretary Gary Shinners as Executive Secretary of the Board. Mr. Shinners is an attorney who has served in various staff positions as well as counsel to Board Members of both of the major political parties. Mr. Shinners was appointed Deputy Executive Secretary in 2010 and, since January 2013, was Acting Executive Secretary after the retirement of the former Executive Secretary Les Heltzer. Whether this appointment, to a position that primarily involves case-handling and processing, is subject to challenge for potential lack of a Board quorum is uncertain. Historically, these appointments have not generated much political fuss, but the position has been a stepping stone for future Board nominations and recess appointments.

Union membership update – Drilling down into the LM-2 Forms that unions filed with the Department of Labor for 2012, the numbers indicate that membership in eight of the largest 10 labor unions fell in 2012. Membership was down for the National Education Association, the American Federation of Teachers, the Teamsters, the Service Employees International Union, the United Food and Commercial Workers Union, the Laborers International Union of North America, and the International Association of Machinists. Membership increased for the International Brotherhood of Electrical Workers, the United Steelworkers, and the United Auto Workers. Published reports indicate that growth came largely from increased membership from previously represented non-members, better training opportunities for members, and industry growth because of economic improvement resulting in

recalls of employee-members. Declines reportedly were due largely to government budget cuts, layoffs, and facility closings.

THE GOOD, THE BAD AND THE UGLY

AFL-CIO's Trumka making news about union blues – In the face of declining union membership statistics, AFL-CIO President Richard Trumka thinks it is time to make some changes, according to reports from the union group's Executive Council winter meetings in Florida. According to press reports, Trumka told reporters that it was time for the union to admit immediate change was needed if it was going to remain solvent and relevant: "We've been talking about the crisis that we're in and the fact that we need to change and … be honest with ourselves … It is going to take structural changes. It's also going to take us trying new stuff." This could mean new creative approaches to organizing, in addition to increased use of the non-traditional tactics of corporate campaigns and attacks on executive compensation and more reliance on political coalition-building with political action committees and special interest groups.

Disgruntled employees at the SEIU . Heh. – It's been a tough spring for San Francisco Local 1021 of the Service Employees International Union. The Local's office staff, represented by Communications Workers Union Local 9404, voted to authorize a strike against the SEIU for its conduct in contract bargaining. Ouch! The staff are apparently upset that the SEIU local has been bargaining for concessions and that there has been no contract since last September. No report on an actual walkout, but the unhappy staff have a Facebook page asking the SEIU local to "Walk the Talk." This SEIU local made national news last summer by shutting down the Superior Court in San Francisco in a one-day strike over the court's failure to provide it with financial information the SEIU local claimed was needed for bargaining.

Two unions get SMART - On March 12, the AFL-CIO granted a charter for a new union called SMART (International Association of Sheet Metal, Air, Rail and Transportation Workers). The union is a merger of the Sheet Metal Workers International Association and the United Transportation Union. The combined membership of SMART, which has offices in Washington, D.C., and Exeter, Ontario, is typically found in the rail transportation, shipyard and construction industries. With industry declines affecting membership numbers and union finances, consolidation among other unions may be in the cards.

We hope this union isn't guarding the Treasury Building – The founder and president of the National Association of Special Police and Security Officers, which represents private security guards protecting federal buildings, was recently convicted of multiple counts of mail fraud, theft from a labor organization, obstruction of justice and union recordkeeping offenses. He used union and pension funds for his personal expenses, stealing more than $252,000. He also falsified and destroyed financial records during a grand jury investigation and failed to file union reports. As this conviction shows, when "the fox is guarding the hen house," and in this case federal buildings and union funds, bad and very ugly things can happen.

Head of local teachers' union gets award for playing hooky – and making thousands of kids play, too – The American Federation of Teachers-Michigan recently gave an award to the president of a local for organizing a sickout that put 7,500 kids out of school for a day so their teachers could protest the state's **new right-to-work law**. The sickout, in the city of Taylor (about 18 miles from Detroit), forced the schools to close for the day, and the kids either stayed home or were sent home. Although the Taylor school district has a $6 million deficit, the

local managed to get a 10-year collective bargaining agreement with a union security clause shortly before the right-to-work law went into effect. Because the law "grandfathers" union security clauses in collective bargaining agreements that existed on the effective date of the law, teachers in Taylor will get a few more years of union security. An A+ for these teachers! But too bad for the kids.

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