The Pendulum And the Pit

Insights
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In late April, less than 100 days after his term began, President Obama appointed a pair of union-side labor lawyers – both Democrats – to fill two of the three vacancies on the National Labor Relations Board (NLRB). Craig Becker currently serves as Associate General Counsel to the Service Employees International Union (SEIU); in addition, he advises the AFL-CIO in a similar capacity. He is a graduate of the Yale Law School, and except for a brief stint teaching at UCLA Law School, he has been a practicing labor lawyer most of his career.

Nominated at the same time was Mark Pearce, a practicing labor lawyer from Buffalo, New York; Pearce has also taught courses in the labor studies program at Cornell University, where he graduated prior to attending law school at SUNY/Buffalo.

A Little Context
The nominations come as no surprise, and both lawyers should be quickly confirmed once the Senate gets around to hearings on their nominations. When that happens, the Board will have a 3-1 Democratic majority.

When the National Labor Relations Act was passed in 1935, the NLRB was established as a quasi-judicial agency ultimately with five members, who serve staggered five-year terms; the Board was to act, in effect, as the "Supreme Court of Labor Law." For many decades there has been a political tradition (not legally binding) in which the occupant of the White House has been allowed to have three of the five Members from his own party. Presumably, when President Obama nominates someone for the remaining vacancy – and fifth seat – that someone will be a Republican, probably a management labor lawyer.

In the 74 years since the Act was passed, there have been a total of 60 individuals nominated to the Board; 34 have been Republicans, 25 have been Democrats and 1 (confirmed in the waning days of the Carter Administration) was an Independent. Some of these have been recess appointments – unconfirmed by the Senate – lasting as little as 5 weeks. Others have been confirmed appointments and re-appointments, with one individual serving on the Board for 20 years (through four different Administrations).

An interesting and predictable legal pattern has followed this political tradition: the so-called "pendulum effect." Along with the change of political flags at the White House, and consequent composition of the NLRB, has often come an overruling of precedents established by previous Board panels. Thus, certain controversial legal precedents established between 1993 and 2001 by the "Clinton Board" (many of which overturned earlier Republican-majority decisions), were overruled in subsequent decisions by the "Bush Board" between 2001 and the end of 2007.

So we can expect that at some point within the next four years, the "Obama Board" will overrule the 2004 decision in IBM Corp. (which overruled the 2000 decision in Epilepsy Foundation of Northeast Ohio, which overruled the Sears, Roebuck & Co decision of 1985). If (when) that should happen, non-union employees will again be allowed to have a "representative," should they desire, at a disciplinary/investigatory meeting.

That is the way the pendulum would normally swing. However, a political skirmish in late 2007 has given rise to a regulatory quagmire that will no doubt redirect the resources of any newly constituted Board to a more pressing task. In December 2007, the terms of three Board Members (two of them recess appointments) expired. Around that same time, the Democratic leadership of the Senate publicly warned the White House against sending any more nominations – regardless of political species – to Capitol Hill for confirmation; right after that admonishment, the Senate declined to go into recess, thus prohibiting any short-term appointments to the Board or other agencies.

These political decisions had the immediate effect of taking the Board from five members down to two for the foreseeable future. So on December 20, 2007, faced with a specter of adjudicatory paralysis, the then extant members unanimously voted to delegate the Board's powers to a triumvirate consisting of Members Liebman (D) and Schaumber (R), who still serve, and to Member Kirsanow (R), whose term expired on 12/28/07. Since three-member panels have been a statutory staple in the decision-making process, and since two concurring members can form a majority opinion, that appeared – in theory – to establish a short-term solution, allowing the Board to issue 'unanimous' two-member opinions on non-controversial decisions until at least one vacancy could be filled.

And so they did. From January 1, 2008 through the end of April, 2009, these two Members issued nearly 400 'unanimous' decisions. But not all of these decisions played well with the impacted parties. Some affected employers filed petitions for review with appropriate U. S. Courts of Appeals, seeking to set aside the decisions because they were authored by a non-quorum panel.

On May 1, one week after the nomination of Becker and Pearce, the U. S. Court of Appeals for the District of Columbia decided Laurel Baye Healthcare v. NLRB, in effect holding that the Board's decisions issued during the preceding 16 months were invalid under the National Labor Relations Act, because of "the lack of a quorum of the Board as a whole. . . ." Coincidentally, on the same day

that Laurel Baye was decided, the U. S. Court of Appeals for the 7th Circuit decided in favor of the Board in the procedurally identical case of New Process Steel v. NLRB.

Escaping The Pit

Because of this split in circuit authority, the likelihood of some Supreme Court review would be enhanced. That is normally a very time-consuming process, however. A far more likely scenario is that the new member-designees, once confirmed, would be assigned the task of quickly revisiting and reaffirming many of those decisions issued by the two-member "majority" in 2008 and early-2009. If that transpires then the pendulum will be temporarily slowed, if only until the pit is taken care of.

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