A Littler Mendelson Report

InSight

An Analysis of Recent Developments & Trends

In This Issue:

July 2009

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The Obama Board Takes Shape: Dramatic Changes May Be on the Horizon for Employers

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President Barack Obama's designation of Wilma Liebman as Chairman of the National Labor Relations Board ("the Board" or NLRB), as well as the likely confirmation of nominees Craig Becker, Mark Pearce and Brian Hayes as a "package," will result in the Board being at full strength with five members for the first time in years. The backgrounds of the current and future Members of the Board, as well as their writings, indicate that the current state of labor law may change significantly during the new "Obama Board," affecting both unionized and non-union employers. Proponents of organized labor have argued that the pendulum swung too far in favor of management during the years of the "Bush Board," and will likely ask the Obama Board to move federal labor law in the opposite direction. A review of recent dissenting opinions in noteworthy decisions issued by the Bush Board may therefore provide some insight into policy shifts that may occur under the Obama Board in the coming months and years, especially in the areas of human resources policies and procedures, *Weingarten* rights of non-union employees, voluntary recognition, supervisory status, corporate campaigns, the ability of unions to engage in secondary activity through the use of banners, and the ability of employers to limit non-employee access to their premises.

The Composition of the New Obama Board

On January 20, 2009, Wilma B. Liebman became the Chairman of the NLRB. She was first appointed to the Board in 1997 by President Clinton and was reappointed twice by President Bush. At the end of her current term in August 2011, Chairman Liebman will be the third longest-serving member in the history of the Board. Prior to her first appointment to the Board, Liebman served at the Federal Mediation and Conciliation Service in a variety of roles. She began her legal career as a staff attorney with the Board before moving on to eventually become labor counsel for the Bricklayers and Allied Craftsmen and then legal counsel to the International Brotherhood of Teamsters.

On April 24, 2009, Obama announced the nomination of two union-side labor attorneys to the Board. The first nominee, Craig Becker, is currently the Associate General

Counsel of the Service Employees International Union and of the American Federation of Labor & Congress of Industrial Organizations. He has also served as a labor and employment law professor at several law schools, including University of California, Los Angeles, the University of Chicago, and Georgetown. Mr. Becker also served on the Presidential transition's agency review team for the Department of Labor.

The second nominee with a union-side background, Mark Pearce, has represented unions for his entire legal career, and is currently a partner in the Buffalo, New York labor-side law firm of Creighton, Pearce, Johnsen & Giroux. Mr. Pearce also serves on the New York State Industrial Board of Appeals, an independent quasi-judicial agency responsible for review of certain rulings and compliance orders of the New York State Department of Labor. Mr. Pearce has also served as a labor law professor at Cornell University's School of Industrial Labor Relations. He began his career as an attorney and trial specialist with the NLRB Regional Office in Buffalo, New York.

While the nominations of Mr. Becker and Mr. Pearce were announced, they were not actually nominated until the third member of the "package" had been determined. Most recently, President Obama nominated Brian Hayes, currently Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions, to be the fifth member of the Board. Mr. Hayes has also worked as a lawyer in private practice for more than 25 years, mainly representing management clients in labor and employment matters. Earlier in his career he also clerked for a Chief Judge of the National Labor Relations Board and served as counsel to the then Board Chairman Ed Miller.

If these nominees are confirmed by the Senate, the Obama Board will consist of three Democratic Members and two Republicans (Mr. Hayes and current Member Peter Schaumber, whose term expires in August 2010). The term of the NLRB's current General Counsel, Ronald Meisburg, also expires in August 2010. This is significant because the General Counsel acts as a gatekeeper for the cases heard by the Board – and could act to somewhat limit the agenda of those who seek to reverse the state of current Board law. However, his successor will also be appointed by President Obama, and once confirmed will be in a position to accelerate the process of changing Bush Board precedent. Therefore, the most significant changes to federal labor law may only occur after General Counsel Meisburg's successor is in place.

The Obama Board May Reconsider Recent Decisions Involving Employer Work Rules that Potentially Infringe on Workers' Section 7 Rights

The most recent Bush Board's decisions have allowed employers to institute or strengthen many of their workplace policies by, for example, approving employer policies that have the effect of prohibiting their employees from using the company's e-mail system for union organizing, and also allowing employers to maintain rules that do not on their face prohibit Section 7 activity but may have a chilling effect on those activities. The dissents in those decisions suggest that the Obama Board may revert to the stricter scrutiny that the Clinton Board had previously applied to such policies.

Employers May Lose the Ability Under Register-Guard to Ban Union-Related E-Mail Communications – and Be Limited in Their Ability to Allow Other Types of Communications

One of the Bush Board's decisions that received the most attention was *Register-Guard*,[1] in which the Board held that an employer may lawfully prohibit its employees from using their employer's e-mail system for organizing activities. The Board also dramatically changed the analysis to be applied when determining whether an employer is unlawfully discriminating against union and other communications and activities protected by Section 7.

In *Register-Guard*, the Board addressed for the first time the legality of an employer's e-mail policy that effectively banned union-related solicitations, holding that "employees have no statutory right to use an employer's equipment or media for Section 7 communications." The Board also unequivocally stated that an employer may not discriminate against union-related communications by prohibiting the sending of messages soliciting on behalf of a union while allowing similar messages that do not involve Section 7 rights. However, the Board dramatically altered the standard to be applied when determining what types of non-union related messaging would be considered "similar" to union-related solicitation.[2]

At the outset, the majority discussed the extent to which it should consider employee e-mails to be the equivalent of face-to-face solicitations that occur in the employees' break or lunch room, which the employer cannot restrict during nonworking time. Although the Board recognized that e-mail has "had a substantial impact on how people communicate, both at and away from the workplace," it rejected the analogy to face-to-face communications. Instead, the Board found that an employer's e-mail system is more comparable to other employer-owned communications equipment, such as bulletin boards and telephones, the use of which may be restricted. The Board reasoned that, like other communications equipment, the employer has a "basic property right" to regulate and restrict use of its e-mail system to protect its property interests by, for example, "preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees' inappropriate e-mails." The majority concluded that, "absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications."

The Board then analyzed whether the employer in the case before it had engaged in unlawful discrimination by prohibiting union-related e-mail solicitations while also allowing employees to use the e-mail system for personal messages involving such things as baby announcements, party invitations, and the occasional offer of sports tickets or request for services such as dog walking. In undertaking the discrimination analysis, the Board overturned its prior precedent, which held that if an employer allows employees to use its communications equipment for any nonwork-related reason, the employer cannot discriminate by prohibiting the use of its equipment for union-related purposes. The Board instead adopted the Seventh Circuit Court of Appeal's narrower definition of *discrimination*, which requires "unequal treatment of equals." Under this analysis, union-related communications must be compared to nonwork-related communications of a similar character, such as solicitations pertaining to other non-charitable groups or organizations or employees' anti-union communications, rather than to personal communications such as baby announcements. Under this narrower standard of discrimination, an employer is permitted to choose what categories of communications to allow and disallow provided the distinction is not motivated by animus against Section 7 communications. Thus, an employer is entitled to allow solicitation for charitable organizations while banning solicitation for noncharitable organizations, like unions. Similarly, an employer can lawfully draw the line between personal solicitations (*e.g.*, vacation rentals) and commercial solicitations (*e.g.*, Avon products). However, an employer may not use this line drawing as a subterfuge for suppressing union-related communications.[3]

The *Register-Guard* dissenters strongly disagreed with the Board majority on both issues discussed above. First, the dissenters stated that the Board's determination that an e-mail system should be treated similarly to communication devices like "bulletin boards, telephones, and pieces of scrap paper" confirmed that the Board "has become the 'Rip Van Winkle of administrative agencies.'" The dissenters stated that the banning of all nonwork-related solicitation through an employer's e-mail system should be presumptively unlawful and could only be enforced if the employer could show "special circumstances" justifying the ban. The dissenters also argued that the concept of "unequal treatment" is misplaced in the context of Section 7 rights, and that any analysis of whether the employer's conduct violates the Section 7 rights of employees should focus on interference with those rights, not on discrimination. The dissent argued that "unlike [federal employment] antidiscrimination statutes, the [NLRA] does not merely give employees the right to be free from discrimination based on union activity. It gives them the affirmative right to engage in concerted group action for mutual benefit and protection." If the dissent's viewpoint is adopted by the Obama Board, employers will likely be required to allow employees to use the employer's e-mail system to solicit on behalf of a union (or presumably against unionization) unless the employer can demonstrate "a legitimate business reason that outweighs the interference" placed on the exercise of Section 7 rights by a ban.[4]

The Bush Board's Approach to Reviewing Employers' Written Policies Articulated in Lutheran Heritage Village-Livonia May Be Modified by the Obama Board

In *Lutheran Heritage Village-Livonia*,[5] the Board concluded that the maintenance of work rules prohibiting "abusive and profane language," "verbal, mental and physical abuse," and "harassment ... in any way" did not violate the National Labor Relations Act (the "Act") because employees would not reasonably view these rules as applying to the exercise of their Section 7 rights to engage in union or protected concerted activities. The majority recognized that maintenance of a rule that does not expressly prohibit protected activity "can nonetheless be unlawful if employees would reasonably read it to prohibit Section 7 activity." However, the Board held that

the employees in *Lutheran Heritage Village-Livonia* could not reasonably read their employer's rule in that way. "That is, reasonable employees would infer that the [employer's] purpose in promulgating the challenged rules was to ensure a 'civil and decent' workplace, not to restrict Section 7 activity." The majority also stated that where, as in the case before it, the rule does not refer to Section 7 activity, was not adopted in response to organizational activity, and had never been enforced to restrict Section 7 activity, "we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way."[6]

The dissent in *Lutheran Heritage Village-Livonia* observed that "the ill-defined scope" of the "verbal abuse and abusive language" rules, as well as the "no harassment" rule, would reasonably tend to cause employees to "steer clear of the prohibited zone" and refrain from voicing disagreement with their terms and conditions of employment or vigorously attempting to organize skeptical workers, and would therefore chill employees' exercise of Section 7 rights. Although the dissenters recognized that employers have a legitimate interest in maintaining rules that discourage conduct that might result in employer liability, they reasoned that this interest was "appropriately subject to the requirement that employers articulate those rules with sufficient specificity that they do not impinge on employees' free exercise of Section 7 rights."

Non-Union Workers May (Once Again) Be Entitled to Weingarten Rights

The pendulum on the applicability of *Weingarten* rights to non-union employees has swung back and forth several times during past administrations, and may soon swing again under the Obama Board. In *NLRB v. Weingarten*,[7] the Supreme Court approved the Board's precedents holding that employees represented by a union have the right to request that a union representative accompany them to an investigatory interview if the employee reasonably believes that the interview could result in discipline. Since *Weingarten* was issued in 1975, the Board has reversed course a number of times on whether non-union employees should have the same right. For example, in 1982, the Carter Board held that non-union employees should have the right to have a coworker present during an investigatory interview.[8] Just a few years later, the Reagan Board reversed course and held that *Weingarten* rights were available only to union employees.[9] In 2000, the Clinton Board once again extended *Weingarten* rights to non-union employees.[10] In 2004, the Bush Board swung the pendulum back again in *IBM Corporation*,[11] and held that *Weingarten* rights applied only to unionized employees. Then-Member Liebman and Member Walsh strongly dissented with the majority opinion in *IBM Corporation*, stating that it was "hard to imagine" that "today, American workers without unions, the overwhelming majority of employees, are stripped of a right integral to workplace democracy." Given the fact that the applicability of *Weingarten* rights to non-union employees has shifted depending upon the makeup of the Board, it is anticipated that an Obama Board will likely shift back to the rule articulated by both the Carter Board and the Clinton Board.

The Obama Board Will Likely Narrow the Interpretation of Who Is a Statutory Supervisor

Individuals who are considered "statutory supervisors" within the meaning of Section 2(11) of the Act are not considered to be "employees" covered by the Act, and, therefore, are not entitled to exercise Section 7 rights and cannot be included in a Board-defined bargaining unit. Under Section 2(11), an individual will be considered a supervisor if: (1) he/she has at least one of the 12 indicia of supervisory authority listed in the statute (*i.e.*, the authority to hire, transfer, suspend, assign, responsibly to direct, etc.); (2) the exercise of that authority involves the exercise of independent judgment and discretion; and (3) the authority is held and exercised in the interest of the employer. Application of the Section 2(11) standard has been a source of frequent disagreement between the Board and the federal courts, including the U.S. Supreme Court, particularly as applied to the healthcare industry. Reacting to the U.S. Supreme Court's decision in *NLRB v. Kentucky River Community Care*,[12] the Bush Board issued a series of decisions in 2006 that articulated new standards for determining who should be considered a statutory supervisor.[13] In the lead case of *Oakwood Healthcare*, the Board held that the authority to "assign" involved the act of "designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, *i.e.* tasks, to an employee," and that the authority to "responsibly direct required that the supervisor be held accountable by the employer for the decision made." The Board also held that the "independent judgment" requirement is met if the supervisor has the ability to act free from detailed instructions or guidelines mandated by the employer.

In dissent, then Members Liebman and Walsh argued that the Board's new standard would deny the protections of the Act to "minor" supervisory employees who should be included as "employees" under the Act, arguing that the assigning of tasks to employees is a "quintessential function of the minor supervisors whom Congress clearly did not intend to cover in Section 2(11)." The dissent also disagreed with the majority's definition of "responsibly to direct," contending that the drafters of Section 2(11) only intended the phrase to include "persons who were effectively in charge of a department-level work unit, even if they did not engage in the other supervisory functions identified in Section 2(11)." The dissent concluded that the majority's approach to supervisory status had created a new class of workers: "workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees." Accordingly, if a majority of the Obama Board adopts the dissent's analysis, many workers who would be considered statutory supervisors by the Bush Board will become "employees" covered by the Act.

The Obama Board Will Decide Pending Cases Involving Non-employee Access Rights and Stationary Bannering

There are several pending cases presenting major issues the Bush Board was unable to resolve. The first group of cases involves non-employee access rights to an employer's property for organizational and non-organizational activities. The lead case in this group is *New York New York Hotel & Casino*,[14] which is currently before the Board on remand from the D.C. Circuit Court of Appeals. In that case, off-duty employees of an operator of several restaurants in the hotel-casino complex stationed themselves just outside the entrances to the hotel-casino, on the hotel-casino's private property, in order to distribute "area standards" handbills advertising their employer's non-union status to members of the public as they entered the hotel-casino. The hotel-casino removed them from its property, something it could not have done if the handbillers were employees of the hotel-casino itself. The issue currently before the Board is whether the operator's employees are entitled to the same level of access and distribution rights as the property owner's employees. It is possible that the Obama Board will conclude that employer-property owners must provide employees of vendors with operations on their premises with the same access and distribution rights as are enjoyed by the property owner's employees, *i.e.*, the employer-property owners must allow distribution in non-working areas during non-working times.

The second group of cases involves whether a union's stationary "bannering" constitutes unlawful secondary pressure on neutral employers. The lead cases in this area are *Carignan Construction Co.*,[15] *Associated General Contractors of America*,[16] and *Eliason & Knuth of Arizona.*[17] The typical fact pattern in these cases involves a primary dispute between a non-union construction employer (the "primary" employer) and a union that wishes to represent the employees of the employer. The union will display a stationary banner at the premises of an entity (the "neutral" employer) that has engaged the construction employer for a project, but where the construction work itself is being performed at a different location. The union's banner typically reads: "Shame on [neutral employer]" followed by the phrase "Labor Dispute." Several union representatives hold the banner and distribute handbills to passers-by, but do not engage in chanting, yelling, marching, or similar conduct. The banner will be located on public property at varying distances from the entranceway to the neutral employer's premises. In each of the pending cases, the neutral employer filed an unfair labor practice charge alleging that the unions' stationary bannering activity was unlawful secondary pressure on a neutral employer, either because the bannering was picketing, or its functional equivalent, or because the bannering amounted to "signal" picketing (*i.e.*, that it "signaled" other labor unions to engage in strike or boycott activity against the neutral employer). The decisions of the administrative law judges who have heard these cases have been split, with at least one finding that the unions' stationary bannering activity is not unlawful secondary pressure and others determining that it is. Additionally, several federal courts that have examined this issue have concluded that the bannering is protected by the First Amendment.[18] Given the backgrounds of Chairman Liebman and nominees Becker and Pearce, it is likely that the unfair labor practice charges against the unions will be dismissed.

The Obama Board May Change the Rules on Solicitation of Union Authorization Cards by Supervisors and Limit Employee Rights Following Voluntary Recognition of a Union

The Obama Board may also issue decisions that will make it easier for unions to win elections, as well as prosecute corporate campaigns against employers. Chairman Liebman stated in a recent law review article that "[l]ow union density is both a cause and consequence

of employer resistance to unionization."[19] The Obama Board will certainly have the opportunity to alter the law in a way that will result in an increase in "union density."

One method by which the Obama Board may accomplish this result is to revive pre-existing precedent that allowed pro-union supervisors to solicit union authorization cards. In *Harborside Healthcare Inc.*,[20] the Bush Board held that pro-union supervisory conduct may be grounds to set aside an election even in the absence of any coercion on the part of the supervisor. In doing so, the Board overruled a series of prior decisions that held that solicitation of union authorization cards by employees who are later determined to be statutory supervisors is not objectionable unless the supervisor's actions were threatening or intimidating. Some unions believe that this decision has had a chilling effect on organizing because union organizers, with access to limited information, often have difficulty ascertaining which employees are considered supervisors under Section 2(11) of the NLRA, particularly under the standard set out in *Oakwood Healthcare*, discussed above. At the very least, the Obama Board likely will roll back the *Harborside Healthcare* standard to the standard adopted by the Clinton Board, which required proof of actual coercive conduct by pro-union supervisors to sustain objections to a union election victory.

The Obama Board may also seek to reverse the Bush Board's holding in *Dana Corporation*.[21] In Dana Corporation, the Board overturned its prior precedent, established in *Keller Plastics Eastern, Inc.*,[22] which barred the processing of a representation petition for a "reasonable period" following voluntary recognition of a union. The *Dana Corporation* majority held that employees of an employer who has voluntarily recognized a union following a card check must be given notice of that recognition, and that a representation petition can be filed at any time during the 45 days after the notice has been given. In support of its conclusion, the majority reasoned that the "uncertainty" surrounding voluntary recognition based on an authorization card majority justifies delaying the election bar for a brief period during which unit employees can decide whether they prefer a Board-conducted election.[23] The dissenters strongly disagreed with the majority, arguing that voluntary recognition is a favored element of national labor policy, but the majority had relegated it to disfavored status by allowing a minority of employees to disrupt the bargaining process just as it was getting started. The dissenters also claimed that the Board's decision was enhancing an "already serious disenchantment with the Act's ability to protect the right of employees to engage in collective bargaining." It is almost certain that the Obama Board will re-visit *Dana Corporation* as soon as it has an appropriate case before it in which to do so.

Proactive Steps to Prepare for Obama Board Changes

In anticipation that the Obama Board may adopt the positions articulated by then-Members Liebman and Walsh in their dissents in the cases discussed above, employers should consider conducting an audit of their labor relations policies, preferably under the supervision of legal counsel, in an effort to maintain attorney-client privilege where feasible. In doing so, employers should consider the following:

- Review all personnel policies and handbooks and modify any ambiguous policies that may be interpreted as interfering with employees' exercise of Section 7 rights to clarify that the policies are not intended to do so and will not be applied in an unlawful manner. Consider including a "disclaimer" in employee handbooks that makes clear to employees that the handbook policies are not intended to interfere with employees' Section 7 rights. Employers whose policies are consistently enforced and do not infringe on employees' Section 7 rights remove a potential issue from a union's arsenal of campaign topics and also reduce the likelihood that the employer will be involved in a "test" case before the Board challenging the employer's policies.
- Review both written job descriptions and the actual duties performed by front-line supervisors to ensure that they have sufficient authority and responsibility to satisfy the Section 2(11) analysis set out by the dissent in *Oakwood Healthcare*. Develop a record-keeping system to document when and how these supervisors exercise their independent judgment in performing supervisory duties.
- Review your e-mail policies to ensure that they are state-of-the-art, as well as to ensure that they are consistently enforced. In the past, when the Board or a union has challenged an employer's e-mail policies, this issue has usually stemmed from an inconsistently

enforced policy. While the future of the *Register-Guard* decision is unclear, it is possible to ensure that your policies are ready for future developments.

- Consider whether adoption of a policy allowing non-union employees to be accompanied by another employee during an investigatory interview is preferable to potentially being retroactively subject to unfair labor practice charges should the Obama Board return to the rule adopted by the Clinton Board in *Epilepsy Foundation*. The Board often enforces new decisions regardless of the state of the Board law at the time the decision was made, and an employer could face liability under a Board decision that had not been written at the time of the original conduct.
- Monitor Littler ASAP® newsletters and subscribe to Littler's Washington D.C. Employment Law Update blog (www.dcemploymentlawupdate.com) to stay abreast of significant decisions issued by the Obama Board.
- Conduct periodic attorney-client privileged labor-relations audits to ensure compliance with new decisions issued by the Obama Board.

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[1] 351 NLRB 1110 (2007), *enforced in part, rev. granted in part sub nom. Guard Publishing Co. v. NLRB*, No. 07-1528 (D.C. Cir. July 7, 2009).

[2] For additional information about the Board's holding in Register-Guard, see Littler's analysis of the decision in *NLRB Rules That Employers May Implement a Corporate E-mail Policy That Has the Effect of Barring Union-Related Communications*, Dec. 2007.

[3] On review, the D. C. Circuit enforced the Board's order in most respects, but also found that the Board had misapplied the discrimination test in one instance. *Guard Publ'g Co. v. NLRB*, No. 07-1528, slip op. at 12-14 (July 7, 2009).

[4] In *Trustees of Columbia University*, 350 NLRB 574 (2005), then Member Walsh stated in his dissent that the Board should have required the employer to include employees' e-mail addresses on the *Excelsior* list provided to the union by the employer. *Id*. at 578. It can be anticipated that this issue, as well as issues involving the use of e-mail for communications involving Board orders, postings and even potentially internal union matters, will be presented to the Obama Board.

[5] 343 NLRB 646 (2004).

[6] For additional information on Lutheran Heritage Village and other cases involving overbroad employer policies, see Littler's ASAP, *Dangers of Overbroad Work Rules: Union Free and Unionized Employers Beware*, March 2007.

[7] 420 U.S. 251 (1975).

[8] *Materials Research Corp*., 262 NLRB 1010 (1982).

[9] *E.I. Du Pont de Nemours & Co*., 289 NLRB 627 (1988).

[10] *Epilepsy Foundation of Ne. Ohio*, 331 NLRB 676 (2000).

[11] 341 NLRB 1288 (2004). For additional analysis on the IBM decision, see Littler's ASAP, *NLRB Rules that Weingarten Rights No Longer Apply to Non-union Workers*, June 2004.

[12] 532 U.S. 706 (2001).

[13] *Oakwood Healthcare, Inc*., 348 NLRB 686 (2006), *Golden Crest Healthcare*, 348 NLRB 727 (2006), and *Croft Metals*, 348 NLRB 717 (2006). For additional information on these cases, also commonly known collectively as the Kentucky River cases, see Littler's ASAP, *NLRB Clarifies and Expands Key Aspects of Supervisory Status Test*, Oct. 2006.

[14] Case Nos. 28-CA-14519 and 28-CA-15148.

[15] Case No. 31-CC-2113.

[16] Case No. 28-CC-946.

[17] Case No. 28-CC-955.

[18] *Overstreet v. United Brotherhood of Carpenters and Joiners of America,* 409 F.3d 1199 (9th Cir. 2005); *Kohn v. S.W. Reg'l Council of Carpenters,* 289 F. Supp. 2d 1155 (C.D. Cal. 2003); *Benson v. United Bhd. of Carpenters & Joiners of Am., Locals 184 & 1498*, 337 F. Supp. 2d 1275 (D. Utah 2004).

[19] Wilma Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 Berkeley J. Employment & Labor L. 569, 576 (2007).

[20] 343 NLRB 906 (2004).

[21] 351 NLRB 434 (2007).

[22] 157 NLRB 583 (1966).

[23] As of April 6, 2009, the NLRB has received a total of 705 requests for *Dana* notices. There have been 57 election petitions filed following the posting of the notice, 33 elections have been held, and the voluntarily recognized union has won 24 of those elections. In two elections the employees chose representation by a rival union.