

Morgan Lewis

C O U N S E L O R S A T L A W



LABOR AND EMPLOYMENT LAW SEMINAR

**The Year in Labor: A “Mid-Term”
Report on Regulatory Developments**

**Doreen S. Davis – Morgan Lewis
(Philadelphia)**

October 27, 2005

Introduction - Topics

- Current Agency Composition
- Important Decisions/Pending Cases/Important Settlements
- Recent Report of the General Counsel
- Alternative Procedure in Representation Elections
- Technological Updates at the NLRB
- Impact of Recent Presidential Election

Introduction (cont.)

- Role of Politics
 - Prior to last year: Lack of significant decisions by the NLRB
 - Inability to confirm a Republican majority on Board
 - Past year: Board operated with a Republican majority
 - Several significant rulings handed down

Current Agency Composition

- NLRB is composed of two bodies:
 - Board
 - General Counsel
- Board
 - Quasi-judicial body – decides cases on the basis of formal records in administrative proceedings
 - Up to five (5) members appointed by the President for a five-year term with Senate consent
 - Term of one member expires each year

Current Agency Composition (cont.)

- General Counsel
 - Appointed to a four-year term by the President with Senate consent
 - Functions independently of the Board
 - Investigates and prosecutes unfair labor practice cases
 - Supervises the NLRB field offices in processing cases

Current Agency Composition (cont.)

- Current Board Members
 - Chairman Robert J. Battista (R) – term expires in December 2007
 - Wilma B. Liebman (D) – term expires in August 2006
 - Peter C. Schaumber (R) – recess appointment ends in January 2007
 - On April 27, 2005, President Bush nominated Dennis P. Walsh (D) to serve the remainder of a five-year term ending December 16, 2009

Current Agency Composition (cont.)

- Current General Counsel
 - On June 30, 2005, President Bush announced the nomination of Ronald E. Meisburg to serve a four-year term as General Counsel
 - Former General Counsel - Arthur F. Rosenfeld
 - Will serve as Acting General Counsel
 - Until Senate confirmation or Senate adjourns its 2005 session, whichever comes first

Important Decisions

- *Oakwood Care Center*, 343 NLRB No. 76 (2004)
- *Crown Bolt, Inc.*, 343 NLRB No. 86 (2004)
- *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004)

Important Decisions: *Oakwood Care Center*

- *Oakwood Care Center*, 343 NLRB No. 76 (2004)
 - Held: Combined units of solely and jointly employed employees are multiemployer units permissible only with the parties' consent

Oakwood Care Center (cont.)

- Overrules its decision in *M.B. Sturgis, Inc.*, 331 NLRB No. 173 (2000)
 - Made it possible for unions to include temporary or contingent workers – supplied by another employer – in bargaining units without either employer’s consent
 - Problems with *Sturgis* decision
 - Bifurcated bargaining situations
 - Failure to protect employee rights
- *Oakwood* Board analyzed the text of the Act and accompanying legislative history
 - Neither authorized the Board to “direct elections in units encompassing the employees of more than one employer”

Important Decisions: *Crown Bolt*

- *Crown Bolt, Inc.*, 343 NLRB No. 86 (2004)
 - Held: Employer's threat to close its facility if employees voted for union representation will not be presumed to have been disseminated throughout the bargaining unit

Crown Bolt (cont.)

- Overruled numerous decisions that previously held that plant-closure threats or other coercive statements are presumed to be disseminated among employees to set aside an election absent evidence to the contrary
 - See e.g., *Springs Industries*, 332 NLRB 40 (2000); *Coach and Equipment Sales*, 228 NLRB 440 (1977); *General Stencils*, 195 NLRB 1109 (1972)

Crown Bolt (cont.)

- Board returns to evidentiary requirement of *Kokoma Tube Co.*, 280 NLRB 357 (1986)
 - Burden of proof rests on the party who seeks to have a Board-supervised election set aside

Important Decisions: *Harborside Healthcare*

- *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004)
 - Held: Pro-union activities of a supervisor constituted objectionable conduct that interfered with the holding of a fair election
 - Disavowed previous cases that required an express threat or promise by a pro-union supervisor
 - See.g., *Pacific Micronesia*, 326 NLRB 458 (1998); *Sutter Roseville Medical Center*, 324 NLRB 218 (1997); *Pacific Physician Services*, 313 NLRB 1176 (1994)

Harborside Healthcare (cont.)

- Proper inquiry:
 - (1) Whether supervisor's pro-union conduct reasonably tended to coerce or interfere with the employee's free choice
 - Nature and degree of supervisory authority
 - Nature, extent and context of conduct in question
 - (2) Whether the conduct interfered with the freedom of choice so that it materially affected the election outcome
 - Margin of victory
 - Widespread or isolated conduct
 - Timing of conduct
 - Extent to which conduct became known
 - Lingering effect of conduct

Harborside Healthcare (cont.)

- Also Overrules *Millsboro Nursing*, 327 NLRB 879 (1999)
 - Held: Solicitation of authorization cards by a supervisor is not objectionable where the supervisor's request could not be seen as threatening or intimidating

Pending Cases: Voluntary Recognition Bar

- Board to Consider Preservation of the Voluntary Recognition Bar
 - *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966)
 - Reasonable period of time = one year
 - Circuit Acceptance
 - Second, Sixth and Ninth Circuits – Federal courts can enforce neutrality agreements under Section 301 of the Labor-Management Relations Act
 - NLRB acceptance – *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)

Pending Cases: Voluntary Recognition Bar (cont.)



- *Dana Corp. and Metaldyne cases*
 - Board granted a request for review on June 7, 2004
 - Changing conditions in labor relations environment warranting change?
 - Difference in timing? Agreement reached before authorization cards evidencing majority status were obtained

Pending Cases: Voluntary Recognition Bar (cont.)



- *Dana Corp.* and *Metaldyne* cases
 - Amici briefs
 - House of Representatives
 - Senate
 - General Counsel

Pending Cases: Voluntary Recognition Bar (cont.)



- General Counsel's Case-Handling Instructions
 - Direct regions to consult with executive secretary
 - Submit to Office of Advice any unfair labor practices implicating recognition bar

Important Settlements



- Freightliner and UAW Settlement (March 10, 2004)
 - Worker challenged company's recognition of union through card check
 - Settlement put aside a December 2003 agreement where Freightliner said it would accept voluntary card check recognition in return for certain commitments (e.g., no strikes)

Freightliner and UAW Settlement (cont.)

- Other Settlement Terms
 - Withdraw recognition of UAW
 - Will not bargain until certification through NLRB-supervised election
 - Freightliner will not offer, nor will UAW accept, company assistance in soliciting authorization cards or by providing overly broad access to its premises

General Counsel Report - November 17, 2004



- Details case-handling developments
 - Use of neutrality agreements as an organizational tool
- Case Highlights
 - Valid neutrality agreement, uncoerced card check
 - Unlawful agreement
 - Unlawful recognition
 - Unlawful recognition and bargaining

General Counsel Report (cont.)

- Case Highlights: Valid Neutrality Agreement, Uncoerced Card Check
 - Agreement was valid
 - Parties established a procedure that included verification by impartial third party
 - Insufficient evidence to show union obtained card check through coercion
 - No witnesses testifying to unlawful harassment

General Counsel Report (cont.)

- Case Highlights: Unlawful Agreement
 - Facility was in the midst of an organizing campaign
 - Employer sent letter to union offering a wage increase
 - Union requested employer to postpone wage increase
 - Violation of Act because there was no showing that union represented a majority of the workers
 - Employer received petition signed by majority of the unit saying they did not want to be represented by the union
 - Union also violated Act because it did nothing to correct unlawful characterization


General Counsel Report (cont.)

- Case Highlights: Unlawful Recognition
 - Disaffection petition signed by determinative number of employees in bargaining unit
 - Risk in voluntary recognition
 - Fluctuating support
 - Multiple support for different unions
 - Signed petitions inconsistent with cards
 - General Counsel recommendation: reverse line of cases

General Counsel Report (cont.)


- Case Highlights: Unlawful Recognition and Bargaining
 - Procedural issues versus substantive concerns
 - Conduct supporting implicit recognition
 - Confidentiality provisions

Alternative Procedure in Representation Election Cases



- Effective March 1, 2005
- “Full Consent Election” Agreement
- Parties agree that disputed pre-election and post-election issues will be resolved with finality by Regional Director
 - No appeal to the Board

Alternative Procedure in Representation Election Cases (cont.)



- Three voluntary methods
 - “Stipulated Election” Agreement
 - “Consent Election” Agreement
 - “Full Consent Election” Agreement

Technological Updates at the NLRB

- Improved legal research capability on website
- Automated answers to online questions
- E-filing project expansion
 - Nearly all documents can now be filed electronically
 - Exceptions: Documents that need to be filed with the General Counsel, Division of Judges, Regional Director

Technological Updates at the NLRB (cont.)



- E-Filing Requirements
 - Meet applicable deadlines
 - Include statement of service
 - Must be complete – no attachments can be filed separately
 - 15-page limit
 - “Read only” mode

Conclusion



- Impact of Recent Presidential Election
 - Ending terms of Members Liebman (D) and Schaumber (R), Chairman Battista (R)
 - Two Current Vacancies
- Final Thoughts

Morgan Lewis

C O U N S E L O R S A T L A W



LABOR AND EMPLOYMENT LAW SEMINAR

**The Year in Labor: A “Mid-Term”
Report on Regulatory Developments**

**Doreen S. Davis – Morgan Lewis
(Philadelphia)**

October 27, 2005