CRC CAPITAL RESEARCH CENTER

Labor Watch

High-Stakes Board Games: What Obama's NLRB Might Do for Big Labor

By W. James Antle III

Summary: *The Employee Free Choice Act isn't the only controversial labor initiative being pushed by the White House this fall. There is also President Obama's bold slate of candidates to fill three vacancies on the National Labor Relations Board, the body charged with overseeing unionization elections and interpreting American labor law. If the Senate confirms these nominees, there will exist a 3-2 majority highly sympathetic to the concerns of organized labor. How sympathetic? Might they try to do through interpretation what Congress refuses to do through legislation? American Spectator Associate Editor W. James Antle III considers.*

A funny thing happened on the way to Big Labor's golden era in Washington. Labor unions contributed up to $450 million and untold man-hours helping to elect Barack Obama president and gave him solid Democratic majorities in both houses of Congress (see "A Piece of the Action" in the December 2008 issue of *Labor Watch*). Republicans were knocked back down to their pre-1994 levels in the House and below the 41-seat threshold to reliably sustain filibusters of legislation in the Senate.

Yet as Congress returned from its summer recess, there was still no definitive movement to enact organized labor's number one legislative priority—the Employee Free Choice Act, which effectively eliminates the secret ballot for workers deciding whether to unionize and replaces it with a controversial process known as card check. So unpopular is this labor-friendly legislation that not even a nearly 60-seat Democratic supermajority has proved sufficient to ram the bill through both houses. AFL-CIO secretary-treasurer Richard Trumka, the presumptive next president of the labor federation, once blustered "if you stab us in the back on the Employee Free Choice Act… don't you dare ask for our support next year or whenever you're running." He is now forced to concede that card check's future is uncertain. Trumka told ABC News the ballot-eroding provision "may, it may not be" in the final version of whatever legislation passes this year.

NLRB's Wilma Liebman, sworn in for a new term by the late Senator Ted Kennedy on September 27, 2006.

Elections still have consequences, however. What labor unions cannot get from the branches of government accountable to the people, they may secure through President Obama's appointments to the National Labor Relations Board. Obama stands poised to break a stalemate on the NLRB that frustrated organized labor during the years George W. Bush was in office. New NLRB appointees are likely to unleash a deluge of new rulings and regulations affecting how labor law is interpreted and applied to every workplace in this country. Some potential NLRB nominees don't believe employers should have any significant role in deciding how unions attempt to organize their employees, and this is raising fears that card check could be imposed by NLRB board action even if a law does not pass Congress.

Labor Gains

The people's elected representatives haven't entirely turned a deaf ear to organized labor's pleas, threats, and promises. This year, Congress passed and President Obama signed into law the Lilly Ledbetter Fair Pay Act, reversing a Supreme Court decision that found the bill's namesake had waited too long to file a discrimination lawsuit against the Goodyear Tire & Rubber Co. "We are upholding one of this nation's first principles," the president said at the signing ceremony, "that we are all created equal and each deserve a chance to pursue our own version of happiness."

One's version of happiness, it seems, should have no statute of limitations. The effect

October 2009

of LLFPA is to gut the existing statute of limitations for filing discrimination claims. It restarts the clock for initiating a lawsuit every time an allegedly discriminatory paycheck is issued even if the statute of limitations has run out on a complainant who was initially unaware of the discrimination. This opens up the door to suing companies for payments made during periods of time in which no intentional discrimination existed. This was true in Lilly Ledbetter's own case: The manager who allegedly discriminated against her was dead and she was claiming that her pay was lower than it would have been without that discrimination, not that her current management was deliberately shortchanging her.

Both the Democratic-controlled Congress and the Obama administration have worked swiftly to curtail the Office of Labor Management Standards' scrutiny of organized labor (see "The Anti-Chao" in the August 2009 *Labor Watch*). Congress has cut funding for OLMS and reduced its staffing despite approving increases for the Department of Labor virtually across the board. The Obama Labor Department, under the leadership of Secretary Hilda Solis, has frozen the Bush administration's union transparency regulations and sought to reverse recent revisions to union financial disclosure forms.

Finally, Democratic health care legislation—a debate whose outcome will have a major impact on unions—contains some provisions that certain unions desperately want. Section 164 of the Affordable Health Choice Act of 2009, for instance, allocates $10 billion from the federal government to pay 80 percent of the benefits for some corporate and union insurance plans for workers aged 55 to 64 with claims between $15,000 and $90,000.

This provision is a bailout for the United Auto Workers, according to Ivan Osorio of the Competitive Enterprise Institute and former Bush Labor Department official Vinnie Vernuccio. "This would be a major boon to the UAW's so-called voluntary employee benefit associations (VEBAs)," observed Osorio and Vernuccio, writing in the American Spectator, "which now own a 55 percent stake in Chrysler and a 17.5 percent stake in GM in exchange for taking on billions which the auto giants owed in health care benefits."

So there is a lot Big Labor has accomplished already without stacking the NLRB deck. But the labor unions have a vital long term political objective: They must find a way to stop and then reverse the decline in union membership. Only 12 percent of the U.S. work force, and just 7.5 percent of private sector workers, belong to unions. Card check is important because both its supporters and opponents agree that it will boost sagging union membership. Andy Stern, president of the Service Employees International Union has estimated that if card-check becomes law it will result in an annual increase of 1.5 million new union members, "not just for five years but for 10 to 15 straight years."

Under current law when companies "voluntarily" use the card check method to determine whether their employees want to join a union—typically after a union scorched-earth "corporate campaign"—it seems that more workers sign cards favoring unionization compared to companies where employees vote in secret-ballot elections. The 10 million-member, 55-union AFL-CIO estimates that it wins 75 percent of the time with card-check. The Senate Democratic Caucus reported that "more workers form unions via card check than via secret-ballot elections." The numbers they cited for 2004 showed that 375,000 workers used card check to signal their decision to join a union compared to 73,000 workers who voted by secret ballot to become union members.

The Weird Factor

Last spring the unions thought everything was set for passage of the Employee Free Choice Act (EFCA) enacting card-check. They failed, however, to take into account the weird factor in politics. Case in point: Pennsylvania Senator Arlen Specter. While still a Republican battling a conservative primary challenger, Specter allowed an announcement to be made at a Capital Research Center conference on labor issues last March that he would oppose card-check—even though he was the only member of the GOP to vote to allow the bill to be considered by the Senate in 2007. "The problems of the recession make this a particularly bad time to enact Employees Free Choice legislation," Specter said in a floor statement at the time. "Employers understandably complain that adding a burden would result in further job losses."

When he switched parties in late April, Specter said he would maintain this position as a Democrat. "Unlike Senator Jeffords' switch which changed party control, I will not be an automatic 60th vote for cloture [cutting off a filibuster or other extended debate]," Pennsylvania's senior senator remarked at the time. "For example, my position on Employees Free Choice (Card Check) will not change." Specter has since given himself some wiggle room, signaling support for a revised version of the bill and even telling a gathering of liberal bloggers that he might indeed vote for cloture.

In the meantime, however, many Democrats from right-to-work states began to balk at passing EFCA. Senator Blanche Lincoln (D-Ark.) became the first Democrat to publicly oppose the Employee Free Choice Act as written. "I cannot support that bill," the Politico quoted Lincoln as saying to the Little Rock Political Animals Club. "Cannot support that bill in its current form. Cannot support and will not support moving it forward in its current form." Senators Jim Webb and Mark Warner, both Democrats from Virginia, are seen as unreliable votes. "[Webb] doesn't believe this is the appropriate time to introduce this legislation or to be debating it," his spokesman said this spring. The senator's office was even noncommittal about allowing the bill to proceed to the Senate floor.

Editor: Jeremy Lott
Publisher: Terrence Scanlon
Address: 1513 16th Street, NW
Washington, DC 20036-1480
Phone: (202) 483-6900
Email: jlott@capitalresearch.org
Website: www.capitalresearch.org

Labor Watch is published by Capital Research Center, a non-partisan education and research organization classified by the IRS as a 501(c)(3) public charity. Reprints are available for $2.50 prepaid to Capital Research Center.

Factor in the death of Senator Edward Kennedy (D-Mass.) and the health problems of Senator Robert Byrd (D-W. Va.), which at least temporarily keep the Democrats from a reliable filibuster-proof majority, and card check's Senate prospects are cloudy at best. When the Republicans have leverage, they can stop the bill. When they don't, fissures appear in the Democratic support that once was assumed to be rock-solid.

Chairman Liebman

The unions haven't given up. They've simply gone back to the drawing board. Or more precisely, the National Labor Relations Board. If unions can't keep members of Congress in line, they at least should be able to have a supportive president stack the board of the most important federal agency that oversees unionization drives and resolves labor-management disputes. Created by the National Labor Relations Act of 1935—sometimes called the Wagner Act after its primary sponsor, New York Senator Robert Wagner—the NLRB plays a quasi-judicial role in settling labor law for private sector companies and union employees.

Federal courts frequently defer to NLRB precedents: For instance, when the Supreme Court decided in 1974 that employers did not have to recognize a union even when a majority of its workforce had signed union representation cards, it relied heavily on an NLRB interpretation of federal labor laws. However, some labor law experts have argued that the NLRB could decide to interpret current law in a diametrically different way: Even without EFCA the Board might mandate card check, or at least expand the number of situations where companies would be forced to recognize unions.

One such expert is William Gould, a professor of law at Stanford University who was NLRB chairman from 1994 to 1998 after being appointed by Bill Clinton. "The board could develop new expertise based on new evidence and new facts and come to a different conclusion," Gould told Workforce Management magazine. "In my judgment, yes, the board could issue such a ruling."

This might not only overturn past precedent, but it would also fly in the face of laws passed by Congress. In 1947, Congress passed the Taft-Hartley Act amending the National Labor Relations Act to make secret-ballot elections the standard way by which the NLRB resolved disputes over union organizing. "That's been a consistent philosophy of the NLRB through Democratic and Republican administrations," an employer-side attorney told Workforce Management. "It's a pretty fundamental point." But in practice the NLRB has been given wide latitude—and it is latitude future Obama nominees to the board are likely to exercise if given the chance.

The NLRB's new chairman, Wilma Liebman, is seen as an activist. Appointed to the board in 1997 by Bill Clinton, she was named chairman by President Obama on Inauguration Day, January 20. "She's very open to rule making to make significant changes to labor law," is how Target vice president and general counsel Jim Rowader put it to an interviewer. "It will result in a lot of conflict and litigation all the way up to the Supreme Court."

Liebman indisputably has a more pro-union tilt than some of her predecessors. Testifying before a House committee back when she was part of the NLRB's Democratic minority, she complained, "The Board has said for the first time that freedom of choice—which is to say the freedom to reject unionization—prevails in the statutory scheme over promoting collective bargaining." Where exactly the freedom of choice, even when it entails "the freedom to reject unionization," should fit in the statutory scheme, she did not say.

Liebman has consistently taken the pro-card check side. Liebman and another Democratic appointee were on the losing side of a 3-2 vote in October 2007 that found that dissenting workers have up to 45 days to file a decertification petition to void a successful union card check campaign agreed to by a company. If anti-union workers can get 30 percent of eligible employees to sign the petition within 45 days they can request that the NLRB conduct a secret ballot election instead. Liebman dissented: "Sadly, today's decision will surely enhance the already serious disenchantment with the [National Labor Relations] Act's ability to protect the right of employees to engage in collective bargaining," they wrote. "The majority's decision...subjects the will of the majority to that of a 30 percent minority."

But in the specific case, a large number of dissatisfied workers—in one petition drive, a majority—supported decertification. Those results strongly suggest that at least some of the affected workers may have signed authorization cards under duress resulting in the unionization of the workforce. The point of the NLRB ruling was to let the majority rule by means of a free, fair, and confidential process rather than to empower a "30 percent minority."

The Future NLRB

During Liebman's tenure, the NLRB has become a very politically polarized place. Between 2004 and 2007, President Bush's appointees held a narrow 3-to-2 majority on the board. Writing in the New York Law Journal, Paul Galligan described the NLRB as operating primarily "with [Republican-appointed] Chairman Robert Battista, Member Peter Schaumber and either Member Ronald Meisburg or Member Peter Kirsanow forming the majority and Democrat appointees Wilma Liebman and Dennis Walsh dissenting on practically every important decision." This state of affairs was deeply unpopular with the unions, whose leaders began to assail the "politicization" of what had once supposedly been a pristinely independent process.

In fact, union activists began referring to the NLRB as "the National Labor Ruination Board." After a particularly controversial decision, AFL-CIO President John Sweeney fulminated, "The NLRB has shown itself again to be little more than a political tool of right-wing Republicans in their continuing assault on America's working families." Change to Win coalition executive director Greg Tarpinian complained of "the Bush board" launching a "massive new assault on workers" as part of the administration's effort to use the NLRB to promote its "craven fealty to the most extreme interests of corporate America."

In 2008, the Democratic-controlled Senate retaliated against "the Bush board" by refusing to fill any vacancies that came up on the NLRB for the remainder of President Bush's term. The end result was that the NLRB now consists of only two members: the Democrat Liebman and the Republican Schaumber. The two of them have managed to agree on more than 480 cases, but nothing particularly controversial. "The only cases they are getting out are the pure vanilla cases, where it's abundantly clear the case should go one way," former chairman Battista told the Associated Press. That doesn't include any of the four dozen or so cases most closely watched by business and labor alike.

Both sides agree that the current setup is dysfunctional. "It would be nice if the process worked the way it's supposed to work, which is once a year someone is supposed to get renewed so you don't have these long vacancies," Liebman has allowed. "Every appointment is a battleground." But the process may be more than broken—it may be illegal. The U.S. Court of Appeals for the D.C. Circuit has ruled that the NLRB cannot act without a quorum of at least three members, potentially invalidating hundreds of Liebman-Schaumber decisions since January 2008.

The court understood that the two serving NLRB members are in something of a bind. "Nevertheless," the judges ruled, "we may not convolute a statutory scheme to avoid an inconvenient result. Our function as a court is to interpret the statutory scheme as it exists, not as we wish it." At least two other appeals courts have reached the opposite conclusion and it will ultimately fall to the Supreme Court to resolve the impasse.

Or perhaps the Democratic-controlled Senate will break the logjam first. President Obama has tried to send Wilma Liebman some reinforcements. Their stated mission is to retake the NLRB and reverse all those dreaded "Bush board" precedents, much the same way Hilda Solis's team at the Department of Labor is intended to expurgate the allegedly anti-union legacy of Elaine Chao. But the practical effect may be to use the board to do what the members of the president's party on both ends of Pennsylvania Avenue have so far been unable to do in promoting the union agenda.

Controversial Craig Becker

The most controversial Obama NRLB nominee is SEIU and AFL-CIO general counsel Craig Becker. In a 1993 Minnesota Law Review article written while he was on the UCLA faculty, Becker argued for tilting the playing field sharply toward unions and away from employers:

*He proposed barring companies from participating in NLRB hearings concerning union elections and from contesting the election results, even when there are genuine concerns about the legitimacy of the process or the outcome.

*Becker contended that elections should be removed from worksites and handled either by mail-in ballots or conducted on "neutral grounds."

*Any company meeting with a "captive audience" would be sufficient grounds for overturning an election result that went against the unions.

*Employers should be prohibited from "placing observers at the polls to challenge ballots," though unions would not necessarily be under the same restrictions.

*Unions should be given the same access to the worksite as employers, even though the site is the company's private property.

What Becker supports goes far beyond the Employee Free Choice Act. "Mr. Becker isn't clear about which of these rules can be implemented by NLRB fiat, and which would require an act of Congress, but his mindset is clear enough," the Wall Street Journal editorial page argued. "He's willing to push NLRB discretion as far as possible to tilt today's labor rules in favor of easier unionization." Years spent subsequently working for unions and labor-oriented causes suggest that his perspective hasn't changed much since he penned his law review article.

Nor are Becker's views, characterized as "out of the mainstream" by the Chamber of Commerce, confined to one law review article. He has described secret-ballot elections for unionizing as "profoundly undemocratic." "At first blush it might seem fair to give workers the choice to remain unrepresented," Becker opined in the fall/winter 1998 New Labor Forum. "But in providing workers this option, U.S. labor law grants employers a powerful incentive."

Even more outlandishly, Becker argued, "Just as U.S. citizens cannot opt against having a congressman, workers should not be able to choose against having a union as their monopoly-bargaining agent."

"Our Lawyer, Mark Pearce"

Fellow Obama NLRB nominee Mark Pearce isn't as widely known for his policy views. In fact, he has generated more attention for his avant garde taste in art than for his opinion of card check. One conservative group described him as being "more suited to an appointment to the National Endowment for the Arts than the National Labor Relations Board." But his background as a board member of the New York State Industrial Board of Appeals; member of the board of the AFL-CIO Lawyers Coordinating Committee; and member of an AFT local as a Cornell University adjunct faculty member suggests his overall inclinations.

There are additional causes of concern in Pearce's record. In 1995, as a labor lawyer he represented Frank Ervolino, a Buffalo-area health care workers' union leader who was indicted on corruption charges along with his wife Anna May. Pearce attempted to deny 500 disenchanted union members access to their labor organization's financial disclosure records. "In its present form," Pearce maintained in a filing, "this demand appears to be no more than a means of harassing the current administrations of the respective unions named therein, by engaging in a 'fishing expedition'." Ervolino vowed that he had "nothing to hide," assuring union members "our lawyer, Mark Pearce, is handling that." When the Clinton Labor Department's OLMS division investigated Ervolino's stewardship of his members' hard-earned dues money it founded evidence of embezzlement and conspiracy. Ervolino and his wife were indicted on multiple counts

on March 16, 2000 and, though Ervolino died before the case went to trial, his wife pleaded guilty on March 12, 2002. She made $144,470.79 in restitution payments to the union's benefit plans.

In other cases, Pearce has represented unions that wrongly suspended members, were found to violate members' free speech rights, and engaged in unfair labor practices. Some might say any lawyer will have clients who lose cases. Others are more scathing. "Pearce's representation of corrupt union leaders at the expense of workers makes him unsuitable for this position," says Americans for Limited Government President Bill Wilson. "The NLRB needs members who are committed to protecting workers and not the union thugs who steal from them."

The Republican: Brian Hayes

President Obama has attempted to sweeten the pot by also nominating to the NLRB Brian Hayes, the Republicans labor policy director on the Senate Health, Education, Labor and Pension (HELP) Committee. Hayes is well liked by conservatives and it is now customary for presidents to put forward nominees from the opposing party to facilitate the confirmation of their preferred nominees.

But so far Hayes hasn't been sufficient to overcome objections to the more liberal nominees. For good reason: Liebman, Becker, and Pearce would outnumber Schaumber and Hayes by a 3-to-2 margin, thus assuring Democratic control of the board. Opposition to Becker in particular has kept the nominees in limbo. Hearings are likely, though it is not clear when a final vote will take place.

Four Horsemen of the Bushocalypse

Even if a new NLRB majority doesn't impose card check or other union agenda items, they are sure to begin to overturn past rulings and precedents seen as either too business-friendly or as insufficiently useful for unions that seek to increase their membership and leverage. Writing in New York Law Journal, Paul Galligan ranked Bush NLRB rulings currently in effect based on "the reaction that they provoked from organized labor." Here is what the unions are most eager to overturn, according to Galligan, the rulings he has called the "Four Horsemen of the Apocalypse":

#1. The *Dana Corp.* decision, previously mentioned, which makes it easier for dissenting workers to file decertification petitions to negate successful union card check drives. Authorization card signatures acquired without a secret ballot do not necessarily reflect genuine majority sentiment for unionization. If a new NLRB ruling were to reverse this decision it would strengthen card check proponents even if the Senate does not take action to pass the Employee Free Choice Act.

#2. Harborside Healthcare Inc. is another 3-2 decision called by Liebman as the "most disturbing decision of 2004." It is likely to be reversed as soon as an Obama majority gains control of the NLRB. This Bush-era NLRB decision forbids workers from soliciting union authorization cards from employees they have supervisory authority over. Democratic NLRB members argued that the simple fact that one worker outranks another does not make the solicitation coercive. Some other act would have to take place for it to be an illegitimate practice. In this decision, the pro-employer majority held that the unequal power relationship made supervisor solicitation for union membership "inherently" intimidating for the worker being recruited to the union.

#3. A Democratic-dominated NLRB would also likely reverse the Bush-era *Oakwood Healthcare* decision clarifying who constitutes a "supervisor." By law, supervisors deemed part of the management cannot be represented by a union. But unions contend that the definition is too expansive**,** disqualifying from union membership senior workers with limited supervisory authority over others. They want a more restrictive definition limited the definition of supervisor to those who "hire, transfer, suspend, layoff, recall, promote, discharge, reward, or discipline other employees." If the NLRB does not change the definition, there is a bill pending in Congress—the Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT) Act—that seeks to achieve a similar result.

#4. The *Register Guard* decision upheld the right of employers to set "business-only" proprietary email policies, thereby prohibiting union solicitation on corporate email systems. One of the last rulings of the Bush-appointed NLRB majority, it treats corporate email similar to company bulletin boards. An Obama-appointed majority would let unions organize using their corporate targets' email infrastructure.

If labor unions can't get Congress to see things their way, they will be sure to seek help from the National Labor Relations Board. Congress is more open to scrutiny and susceptible to public opinion; the NLRB is governed by arcane laws and complex procedures understood only by labor law experts. The board's decisions could well make both the Employee Free Choice Act and the RESPECT Act superfluous, despite substantial public and employer opposition to both. And it could help accomplish the unions' number one goal of increased membership (and membership dues), secret ballot or no.

W. James Antle III is Associate Editor of the American Spectator and a frequent contributor to Labor Watch.

LW

Please consider contributing now to the Capital Research Center. Our address is 1513 16th Street, NW, Washington, D.C. 20036-1480.

We need your help in the current difficult economic climate to continue our important research.

Your contributions to advance our watchdog work is deeply appreciated.

Many thanks,

Terrence Scanlon
President

LaborNotes

File under: We couldn't make this stuff up. New York's Ninth District Council of the **International Union of Painters and Allied Trades** made headlines recently by setting up a giant 12-foot tall inflatable rat outside of a Catholic church in Manhattan and then a synagogue in the Bronx. The rat was there to protest the fact that both houses of worship had contracted maintenance by non-union painters. "I'm agnostic but that's not right," one observer told the **New York Post**.

The unemployment rate continues to climb. For the month of August, it rose from 9.4 to 9.7 percent. In a **Heritage Foundation** web memo, **Rea Hederman** and **James Sherk** wrote the labor market's "further deterioration…flatly contradicts" predictions "that the stimulus bill would halt unemployment and lead to a labor market recovery by the third quarter."

President **Barack Obama**'s nominee for Solicitor of Labor, **Patricia Smith**, has come under heavy fire from Senate Republicans. Georgia Senator **Johnny Isakson** wrote an open letter on September 10 calling on the president to withdraw Smith's nomination because "numerous statements" that Smith made to his Employment and Workplace Safety Subcommittee "contradict information that later came to light." Isakson's call for withdrawal joined an earlier one by Wyoming Senator **Mike Enzi**, ranking Republican on the committee that will take up Smith's nomination.

Teamsters President **James Hoffa Jr.** has weighed into the fight over health care reform, and not in the way you might expect. He told **Bloomberg Television**'s **Al Hunt** that it wouldn't be a "deal killer" if the Senate were to strip the so-called "public option" proposals from the final bill. "I think it's important to get something done this time and declare a victory," said Hoffa. One possible reason for Hoffa's change of heart: the healthcare debate is eating up oxygen that could be devoted to other labor legislative priorities.

Speaking of other labor priorities, **Washington Times** reporter **Amanda Carpenter** has this scoop for us: Management at the **Legal Services Corporation**, the federally chartered and funded nonprofit that often furthers liberal causes, "has declared the so-called 'card check' strategy [of unionizing] 'unreliable' and rejected an effort by some of its own workers to organize that way." The LSC "even hired a law firm to rebuff the efforts of workers in its oversight offices to gain union representation."

In September, the **Alliance for Worker Freedom** announced that it had obtained letters, printed on the letterhead of the state of Kansas, asking for healthcare "attendants' names, addresses and telephone numbers" so that said individuals could "receive important information regarding services offered by [the **Services Employees International Union**]."

Who said this in 1993? "The jury is still out on whether the traditional union is necessary for the new workplace." The answer, care of the latest **Claremont Review of Books**, is President **Bill Clinton**'s first Labor Secretary **Robert Reich**.