

NLRB Nominee Craig Becker Would Eviscerate the Role of Employers in Union Representation Elections

Legalization of “Quickie” Strikes, Other Significant Changes Viewed as “Achievable” Under Current Statute

On July 9, 2009, President Obama nominated three individuals to fill the current vacancies on the National Labor Relations Board (NLRB). Board seats fill staggered terms and the one Obama nominee who drew the longest term¹ is Craig Becker, a 27-year union-side attorney who has served most recently as associate general counsel to both the AFL-CIO and the SEIU. Throughout his career, Mr. Becker has been a prolific writer on labor law issues and, as outlined in this Policy Brief, many of his stated positions challenge the mainstream positions in many areas of U.S. labor laws. Most significantly, as described below, he would virtually eliminate the employer’s role in union representation elections. Moreover, he has made it clear that, in this and other areas, these changes can take place without Congress enacting amendments to the underlying statute. Indeed, as Congress continues to debate the sweeping labor law changes posed by the Employee Free Choice Act, Becker’s service on the NLRB could have a similar impact on the law, tilting it in organized labor’s favor.

Legalizing Disruptive “Quickie” Strikes Under the National Labor Relations Act, unions have broad powers to call strikes and employees are generally protected against discipline by the employer for engaging in the strike. However, the right to strike has never been unlimited and it has always been balanced with the need of employers to try to maintain operations during a strike. Thus, since 1949,² protection has been denied to so-called “intermittent” strikes—a series of short-term strikes with little or no notice to the employer. In such situations, employers are unable to predict when and where the strikes may occur and the ability to maintain operations with other non-striking employees such as supervisors or temporary employees is effectively eliminated. Not only is this problematic for employers, but also it could pose a threat to the public safety in certain industries, such as chemical and power plants where constant monitoring and supervision is necessary. Yet, in a 1994 law review article,³ Becker criticized the NLRB and the courts for “gutting” the right to strike.⁴ He called for a “reinterpretation” of the existing law that would allow intermittent strikes where the strike is motivated by “discrete grievances.”⁵ Whether the grievances themselves are legitimate would have no bearing on the matter as long as they were the motivating factor behind the strikes.⁶ If the Board were to adopt Becker’s approach, it could create chaos in the workplace as small groups of employees could repeatedly call short strikes at the most critical times and return to work without fear of replacement or discipline.

Eliminating the Employer Role in Union Representation Elections The NLRA is intended to protect the choice of employees of whether to be represented by a union. In making this decision, they are able to hear from both the union and the employer, who are provided some latitude with a “free speech” provision that generally allows them to express their side as long as they do not engage in “threat[s] of reprisal or force or promise of benefit.”⁷ As the Board has recently noted, the law “generally favors robust debate of union representation issues as a means of enhancing the opportunity for employees to make a free and informed choice.”⁸ Yet, in a

1993 law review article,⁹ Becker declares the employer's role in the election process to be "anomalous" and states that labor law changes should start "with the insight that employers should neither be parties to nor accorded the rights of candidates in union elections."¹⁰ Thus, he proposes eliminating any formal role by the employer in the election process and thereby "limit[ing] employers' influence on their employees' choice of whether to be represented." Significantly, he observes that this "could be achieved with almost no alteration of the statutory framework."¹¹

Denying the Employer's Ability to Challenge the Union's Definition of the Unit

One way of diminishing the employer's role in the election is to deny the employer any say in the "unit determination." This is the process whereby the NLRB decides whether the group of employees identified by the union as those it wishes to represent is "appropriate" and has a "community of interest." The union enjoys a presumption in its favor in this matter but the Board will examine a variety of factors—similarity of working conditions, job classifications, etc. Because of the employer's understanding of its own workplace, it plays a critical role in unit determinations. Yet, Becker would deny the employer any role in such determinations.¹²

Barring the Employer From Joining the Union in Observing the Election

Process Under current NLRB procedures, one of the most important protections ensuring that the actual balloting process is free of undue influence by either the employer or the union is the presence of an equal number of employer and union observers—along with an NLRB agent—at the polls.¹³ Such observers are prohibited from engaging in any campaigning. Despite that limitation, as part of his overall approach of eliminating employers from the election process, Becker would also remove employer, but not union, observers from the polling place and eliminate the ability of employers to challenge ballots being cast by individuals not qualified to vote.¹⁴ Moreover, as part of the same approach, he would also remove the elections from the worksite.¹⁵ Most elections are held at the worksite for convenience purposes to maximize participation in the election,¹⁶ particularly since it is not required that all employees—or even a majority of the employees—vote in order for the election to be valid. Indeed, one of the complaints Becker makes about holding the election at the worksite is that high voter turnout often means defeat for the union.¹⁷

Denying the Employer the Ability to Object to Union Misconduct Union representation elections are governed by a complex set of rules regulating the behavior of both the employer and the union to ensure that the employees exercise free choice. Improper action, even if it does not rise to the level of an unfair labor practice, can cause the election results to be set aside, with a new election held. While the NLRB is the ultimate arbiter as to whether the election should be set aside, it is generally the parties—rather than employees—that bring the matter to the Board's attention through unfair labor practice charges and election objections. But Becker would eliminate the ability of the employer to file objections to union misconduct, because employers lack "the formal status either of candidates vying to represent employees or of voters . . ."¹⁸ Meanwhile, unions would retain the ability to file objections to employer misconduct. Consistent with this position, Becker has also been highly critical of a line of cases¹⁹ that has generally imposed constraints on employers and unions during the pre-election campaign period. He takes issue with the cases because they have sought to impose restrictions on unions that are generally equivalent to those on employers.²⁰

Limiting Employer Access to Federal Courts to Challenge Key NLRB Rulings

Currently, if an employer believes that the NLRB has mishandled the election process, it may only obtain court review of the NLRB decision by “refusing” to bargain with the newly elected union, thereby drawing an unfair labor practice complaint under NLRA section 8(a)(5), which may then be contested on the basis that the union’s certification was improper. This so-called “technical 8(a)(5) violation” is quickly adjudicated by the NLRB, which then enables the employer to appeal the Board’s decision to a federal circuit court which then reviews the Board’s handling of the election.²¹ Becker, however, would curtail the employer’s ability to obtain this review. He would only provide one exception: to challenge a Board determination regarding the exempt status of an employee or employees who voted.²² All other determinations—including the unit determination, whether union misconduct should overturn the election results, *etc.*—could not be challenged by the employer in federal court.

Creating a “Body of New Campaign Rules” to Neutralize Employers in Union Representation Campaigns Unlike unions, employers are currently prohibited from visiting employees in their homes, which employees likely prefer as they may otherwise view it as unduly intrusive for “the boss” to show up at their doorway to discuss union representation. Thus, the only access the employer has for personal contact with the employees is in the workplace where the law permits the employer to make its views known, as long as there are no threats or benefits promised. Becker, however, would establish a “body of new campaign rules” to “prevent employers from exploiting their singular economic power to persuade employees to remain unrepresented.”²³ This new body of rules would require any employer who communicates with the employee at the workplace to open its door to union organizers to provide them the same access to the employees.²⁴ The only way the employer could avoid such intrusions would be by remaining neutral and expressing no views on the issue in the workplace. Becker would change the rules to allow employers to make visits to the employees’ homes,²⁵ yet employers would be generally averse to making such visits lest they be viewed by the employee as an extension of his or her workday.

Stretching the Statutory Framework As previously noted, Becker has indicated that many, if not all, of his proposals could be achieved with almost no alteration of the statutory framework. Throughout his writings, it is not always clear when he believes that a proposed change would need to be preceded by legislation or whether it could be changed by reversing Board precedent. Because he generally contends that his proposals would “simply give effect to existing guarantees,”²⁶ it would appear that, for the most part, he would view current law as amenable to his agenda. That agenda is perhaps best reflected in the final sentence of the 1993 law review article: “So long as the law construes employers and unions as equals in union elections, industrial democracy will remain as much a legal fiction as liberty of contract.”²⁷ In fact, the fundamental purpose of the law is to protect employees, not to establish an exalted position for either employers or unions. Yet, Becker’s implicit suggestion that unions should occupy a higher position under the law—*vis-à-vis* employers if not employees—clearly represents a departure from the well-established principles of our labor laws.

¹ Technically, Mr. Becker has been nominated to two terms, the first ending in December of this year, the second ending in December 2014. The other nominees are Democrat Mark Gaston Pearce, for a term expiring August 27, 2013, and Republican Brian Hayes, for a term expiring December 16, 2012.

² *International Union, U.A.W.A., A.F.L., Local 232 v Wisconsin Employment Relations Board (Briggs-Stratton)*, 336 US 245 (1949).

³ Becker, “‘Better Than a Strike’: Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act,” 61 U. Chi. L.Rev. 351 (Spring 1994).

⁴ *Id.* at 353.

⁵ *Id.* at 357. Becker distinguishes these from strikes called to pressure the employer to come to terms on a collective bargaining agreement. However, the motive behind the strike would be the determining factor. Thus, intermittent strikes called during the course of negotiations for a new contract could be permissible if the union could make the case that it was motivated by a “discrete grievance” rather than the bargaining.

⁶ Mr. Becker also notes that a “no-strike” clause in the collective bargaining agreement could still preclude intermittent strikes but not all agreements have such clauses, nor would they be in place during negotiations for a first contract or between contracts.

⁷ 29 U.S.C. §158(c). The constraint against making promises during a representation campaign, however, only applies to employers.

⁸ National Labor Relations Board *amicus curiae* brief in *Chamber v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006) at 14 (available at <http://www.nlr.gov/nlr/about/foia/Lockyer%20Brief.pdf>)

⁹ Becker, “Democracy in the Workplace: Union Representation Elections and Federal Labor Law,” 77 Minn. L. Rev. 495 (Feb. 1993).

¹⁰ *Id.* at 577.

¹¹ *Id.* at 585 (emphasis added).

¹² *Id.* at 587-8

¹³ Garren, Fox & Truesdale, *How to Take a Case Before the NLRB* 270-5 (BNA 2000).

¹⁴ Becker, *supra* note viii at 591-2.

¹⁵ *Id.* at 591.

¹⁶ Garren, Fox & Truesdale, *supra* note xii at 253.

¹⁷ Becker, *supra* note viii, at 567-8.

¹⁸ *Id.* at 587.

¹⁹ In Becker, *supra* note viii, at 547-77, Becker takes strong issue with the so-called *General Shoe* line of cases, named after *General Shoe*, 77 N.L.R.B. 124, 127 n.10 (1948), *enforced*, 192 F.2d 504 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952), which established that election results may be overturned if certain “laboratory conditions” are not present, even if those conditions are disrupted by actions by the employer or the union that are not unfair labor practices.

²⁰ *Id.* at 577 (“The insertion of the democratic device of the election into a workplace permeated by employer authority lies at the root of a jurisprudence that countenances employer coercion and bars harmless union conduct.”).

²¹ Garren, Fox & Truesdale, *supra* note xii at 351-3.

²² Becker, *supra* note viii, at 586. Supervisors, managers and confidential employees are exempt from the National Labor Relations Act.

²³ *Id.* at 592.

²⁴ *Id.* at 593.

²⁵ *Id.* at 594.

²⁶ *Id.* at 602.

²⁷ *Id.*