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On the Issues

Obama Appointees with Strong Union Ties Could Push National Labor Relations Board in Wrong Direction

By Thomas P. Gies

How might recess appointments to the National Labor Relations Board (NLRB) affect federal labor law? Controversial appointee Craig Becker is known for advocating policies that fall outside the mainstream view of labor laws. Although the views of one member of the NLRB will not automatically translate into dramatic policy changes, concerns that members of the NLRB may rewrite important principles of federal labor laws through litigation are not unfounded. Whether President Barack Obama's NLRB would be able to enact key provisions of the Employee Free Choice Act through litigation rather than congressional action remains to be seen.

On March 27, President Barack Obama announced fifteen recess appointments to various positions in the administration. The most controversial may have been the appointment of Craig Becker as a member of the NLRB, which enforces the federal laws that regulate union organizing and collective bargaining for private-sector employees. Becker has been an associate general counsel for the Service Employees International Union (SEIU) since 1990 and a staff attorney for the American Federation of Labor–Congress of Industrial Organizations since 2004. His union ties have caused some concern; Becker's appointment has been criticized by Senate Republicans and some business groups. In a statement the day the appointment was announced, Senator John McCain (R-Ariz.) described Becker's appointment as "clear payback by the administration to organized labor."

The administration announced Becker's appointment after a cloture vote failed fifty-two to thirty-three in the Senate on February 9 (sixty votes were needed to invoke cloture, which would have led to a Senate vote on Becker's nomination). Becker's ascendancy in early April, along with that of union-side lawyer and fellow Democrat

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Key points in this *On the Issues*:

- Presidential recess appointments of two new members of the National Labor Relations Board (NLRB) have given the board a quorum for the first time since 2007.
- While one member's views may not translate into dramatic changes in federal labor law, appointee Craig Becker is known for advocating positions contrary to many of the principles that have governed labor relations for decades.
- The newly constituted NLRB may change several important labor-law rules through litigation, but whether it will be able to impose key provisions of the Employee Free Choice Act remains to be seen.

Mark Pierce, gives the NLRB a quorum for the first time since 2007, when Senate Democrats effectively prevented President George W. Bush from filling two vacancies that arose at that time.

Opponents of the Becker nomination argue that he will change the law governing union elections in ways similar to the principal provisions of the pending Employee Free Choice Act.

For several years, Becker was a faculty member at the University of California–Los Angeles School of Law. His scholarship has been criticized for advocating positions that would overturn many of the rules that have governed union-organizing campaigns for decades. In one article, he argued that employers have no cognizable legal interest in participating in union elections conducted by the NLRB. He suggested that, during an election campaign, employers should be stripped of their longstanding right to make factual presentations to employees about the consequences of unionization, including noncoercive explanations of why the employer prefers to remain nonunion. This technique—known as the captive-audience speech because the employer can require employees to attend such meetings if scheduled during working hours—is widely understood to be among the most valuable tactics available to employers wishing to combat union-organizing drives. Becker's work reflects the view that employers' use of this tactic is inherently coercive and should be banned. Not surprisingly, his views largely mirror those of the SEIU and other unions that seek to change the law to make it easier for unions to organize successfully.

Opponents of the Becker nomination argue that he will change the law governing union elections—through adjudication of selective cases—in ways similar to the principal provisions of the pending Employee Free Choice Act. That legislation, intended to make it easier for unions to organize private-sector workplaces, would bring about significant changes in federal labor law.[1]

There is nothing new about the claim that a change in the composition of the NLRB will change the law. After all, board members are appointed by the president, and a change in direction is one of the consequences of a presidential election. While tradition holds that two of the five members are of the opposing political party, the appointed members of the board tend to reflect the politics and policy choices of the current administration. The peculiar circumstances in which the board operates—interpreting the seventy-five-year-old National Labor Relations Act in light of as many years of interpretive agency and judicial decisions—provide ample opportunity for any results-oriented decision maker to try to move the law in a desired direction.

One frequently hears union advocates and Democrats complain that the board was "antiworker" during the Bush administration because it made dramatic changes in the law. This refrain is the latest in a decades-long tradition advanced by advocates from both political parties. Stanford University law professor William Gould IV, the chairman of the NLRB during the Clinton administration, was criticized for taking an activist approach to the law by trying to overturn a number of cases decided by predecessor members of the board. Democrats excoriated most of President Ronald Reagan's nominees to the board, and board members appointed by President John F. Kennedy during the first two years of what came to be known as the "Kennedy board" overruled thirty-one decisions reached during the Eisenhower administration on grounds that some viewed as unprincipled.

Nor are recess appointments a new phenomenon. President Jimmy Carter first used the recess appointment to fill a vacancy at the NLRB in 1977. Since then, more than half of the board's vacancies have been filled in this manner, with most members being approved by the Senate in a "package deal" in which the majority agrees to seat a nominee of the minority party as part of a package including approval of two members from the majority.

This phenomenon extends to the position of the board's general counsel, an important position that also requires Senate confirmation. The current general counsel, Ronald Meisburg, whose four-year term expires in August of this year, was first seated in a recess appointment. Since the Carter administration, twelve of the last thirteen individuals who have served as general counsel either have been appointed on an acting basis or were seated initially through a recess appointment.

The views of a particular member of the board do not automatically translate into dramatic changes in labor law, however. Many of the most important issues that reach the board are in response to cases that deal with complaints in unfair labor practice, issued by the general counsel, who has considerable discretion in deciding what kind of cases to litigate. Even the most activist

members of the board are limited by the docket of cases they encounter during their terms.

Becker joins the NLRB helm at an unusual and critical time. Contrary to reports circulated by union advocates, the NLRB's case backlog is not particularly high by historical standards. This is notable because the board has been functioning for many months with only two members, one from each political party. During this period, they agreed to postpone pending cases that raise important and novel issues for later decision. (The Supreme Court is currently considering the legality of this procedure in *New Process Steel v. NLRB*, for which oral arguments were heard in March.)

The new board quorum faces a docket of cases that includes a relatively large number of potential "game changers," thus providing the Obama board with the opportunity to make significant changes in the law. One of the cases could change the rules by which employers can control employee use of e-mail and the Internet at work. Another could narrow the definition of the term "supervisor" and make more employees subject to union-organizing overtures. A third case could make graduate students eligible to be unionized. Still another could change the rules by which employees are permitted to vote out a union that has been given official exclusive bargaining status through invitation by the employer rather than through a secret-ballot election. The board also faces the percolating issue of whether it should reverse precedent and extend to nonunion employees the right to be represented by a union steward in meetings that might lead to discipline. In each of these cases (and many others), the board has an opportunity to reverse prior decisions in whole or in part and to make it easier for union-organizing drives to succeed.

Less clear is whether an activist Obama board would be able to establish the key provisions of the Employee Free Choice Act through litigation. Some have speculated that Becker could marshal the intellectual support for a new majority of the board to decide that unions should be certified without secret-ballot elections in a variety of new circumstances. This is one issue in which a results-oriented board could attempt to make a significant change in the law. By contrast, a fifty-year-old (and well-reasoned) Supreme Court decision holding that the board has no authority to order parties to agree to any demands in collective bargaining makes it unlikely that the Obama board could succeed in requiring employers to submit to the regime of mandatory arbitration required by the Employee Free Choice Act.

If Craig Becker justifies his critics' fears, the Obama board could push labor law a long way in the wrong direction.

The tone and substance of Becker's decisions will determine his reputation. There is reason for concern that Becker will prove to be outside the historical mainstream. Organized labor is facing high stakes. Union representation of the private-sector workforce has fallen to approximately 7 percent. The Employee Free Choice Act appears stalled in Congress. Recent polling shows a dramatic decrease in the popularity of labor unions.[2] Globalization and the other economic realities that have combined to make unions increasingly irrelevant show no signs of abating. Becker is a full-fledged member of an academic circle that believes fundamental change in labor law is required. If he justifies his critics' fears, the Obama board could push labor law a long way in the wrong direction.

Notes

1. Thomas P. Gies, "Card Check: Changing the Rules for Collective Bargaining," AEI *On the Issues*, February 2009, available at www.aei.org/issue/100002.

2. Karlyn Bowman, "Labor Union Blues," Forbes.com, March 8, 2010, available at www.aei.org/article/101755.