Recent NLRB Actions Give Boost to Union Organizing

by John M. Husband and Bradford J. Williams

This article analyzes recent NLRB actions, including new "quickie" election rules and recent Board decisions addressing "micro" bargaining units and access to employers' e-mail systems that make it easier for unions to organize and win representation elections. It suggests how employers may respond.

On April 14, 2015, new National Labor Relations Board (NLRB or Board) rules go into effect that will significantly expedite union representation elections. Coupled with recent Board decisions permitting employees to access their employers' e-mail systems for purposes of organizing, and sanctioning the certification of "micro" bargaining units composed of just a few employees, these rules are expected to significantly boost union membership.

Supporters see a chance to lift union membership rates from historic lows. Just 11.1% of all wage and salary workers in the United States were union members in 2014, compared to 20.1% in 1983, the first year for which comparable data are available.[1] The union membership rate in Colorado in 2014 was even lower at just 9.5%.[2]

That trend may now reverse. Although union coffers have drained due to dwindling membership, the NLRB's recent actions will make union organizing easier. Each of the Board's controversial actions was passed on a strict party-line vote, and employers are gearing up to battle an expected organizing surge both in the courts and on the production floor.

Quickie Election Rules

On December 15, 2014, the NLRB published final rules to govern union representation elections.[3] These rules become effective on April 14, 2015.[4] Derided by critics as "quickie" or "ambush" election rules, the rules significantly shorten the period of time between a petition for a representation election and a vote. They may also deprive employers of their First Amendment and statutory rights to fully communicate with employees about the desirability of union representation before an election. Unions claim that the rules eliminate stalling tactics and frivolous challenges to election procedures.

Under the National Labor Relations Act (NLRA), a union generally does not become the exclusive bargaining representative for a group of employees unless it wins a secret ballot election. The Act provides that a petition for an election must be filed; a pre-election hearing must be held to determine whether a "question of representation" exists; an election by secret ballot must be conducted; and the election results must be certified.[5] Under previous case law, rules, and informal practices developed by the Board over decades, this process has generally taken five or more weeks. For instance, even after the pre-election hearing and direction of the election, the NLRB's regional director typically only schedules the election for twenty-five to thirty days after the decision to allow time for interlocutory appeals to the Board.[6] During this period, employers typically communicate with their employees about the desirability of union representation.

The NLRB first proposed its quickie election rules to expedite this process in June 2011.[7] Employer reaction was swift and severe. A watered-down version of the final rules was published in December 2011, but a federal court invalidated the rules in May 2012—just two weeks after they became effective—because the Board had lacked a statutorily mandated quorum in passing the rules.[8] The district court presciently noted that "nothing appears

Coordinating Editor

John M. Husband, Denver, of Holland & Hart LLP—(303) 295-8228, jhusband@hollandhart.com

About the Authors

John M. Husband is a partner in Holland & Hart, LLP's Labor & Employment practice group. He is a Fellow of the College of Labor and Employment Lawyers and has a nationally recognized labor and employment practice. Bradford J. Williams is an associate in Holland & Hart, LLP's Labor & Employment practice group. He was named a *Colorado Super Lawyers*® Rising Star in 2014 and 2015 and has extensive experience defending employers in labor and employment litigation.

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to prevent a properly constituted quorum of the Board from voting to adopt the rule if it has the desire to do so."[9]

The Board did so in February 2014. The re-proposed rules were identical to the rules originally proposed in June 2011, and the Board made the rules final in December 2014. Although the final rules are highly detailed—filling 183 pages of the Federal Register, including comments—highlights include multiple changes that shorten the representation election process:

1. The pre-election hearing will generally be scheduled to open within eight days from the notice of hearing; hearings will generally not be continued.
2. Employers are required to submit a written position statement one day before the pre-election hearing; issues not raised are waived; and the hearing is limited to determining whether a "question of representation" exists.
3. Most questions involving voter eligibility will not be addressed at the pre-election hearing; they will be resolved later.
4. Post-hearing briefs will generally not be permitted.
5. Elections will no longer be automatically stayed for twenty-five to thirty days after the direction of the election to allow for interlocutory appeals to the Board.
6. Employers must provide a list of employees within two days of the direction of election (rather than the previous seven).
7. Requests for Board review of the regional director's actions will not stay the counting of ballots.[10]

The new rules also require employers to give employees' personal e-mail addresses and phone numbers to the union before an election.[11] The rules will expedite most representation elections—perhaps to fifteen or fewer days between petition and voting—but they will still permit unions to unilaterally delay elections by filing "blocking" charges alleging unfair labor practices.[12] The rules clarify only that unions must now make an offer of proof to support such charges.[13]

By shortening the period between petition and voting, the rules significantly limit employers' ability to effectively counter union organizing campaigns. They may also violate employers' First Amendment rights and other free speech protections codified in the Act.[14] The rules will restrict employers' ability to fully explain the pros and cons of union representation before an election, and will limit employees' ability to cast an informed vote. Small employers will be particularly disadvantaged by the rules because they must generally retain outside counsel, educate counsel on their operations, prepare a position statement within one day of the pre-election hearing (at risk of waiving omitted issues), and mount a counter-organizational campaign, all within days of learning of a petition.

The compelled disclosure of employees' personal e-mail addresses and phone numbers separately raises privacy concerns. The Board expressly rejected suggestions that employees be permitted to opt out of the rules' disclosure requirements.[15]

Although employers anticipate a surge of organizational activity after April 14—particularly in light of the recent Board decisions discussed below—business groups have already mounted legal challenges to the quickie election rules. Lawsuits filed by the U.S. Chamber of Commerce in the District of Columbia and by business groups in Texas seek to vacate the rules and enjoin their enforcement on a number of grounds, including alleged violation of the NLRA and Congressional intent, alleged violation of the First Amendment and due process protections, and arbitrary and capricious rulemaking under the Administrative Procedure Act.[16] Unlike previous procedural challenges to the Board's 2011 rules, these new lawsuits face longer odds by challenging the quickie election rules substantively.

Access to Employers' E-mail Systems

Union organizing campaigns will also be aided by compelled access to employers' e-mail systems. On December 11, 2014, the NLRB decided in *Purple Communications* that employees who have rightful access to their employers' e-mail systems in the course of their work have a presumptive right to use the systems to engage in organizational activity on nonworking time.[17] The decision greatly facilitates union organizing—particularly in early stages of a campaign, before employees' personal e-mail addresses are widely known—and represents a significant break with earlier Board law holding that employers have a right to control their own equipment.

Section 7 of the NLRA protects employees' right to engage in concerted activities for purposes of their mutual aid or protection, including the rights to self-organization; to form, join, or assist labor unions; and to bargain collectively through representatives of their own choosing.[18] This includes the right to communicate about such topics as wages, hours, and working conditions. However, before *Purple Communications*, the Board had protected employers' right to restrict access to their own equipment (including bulletin boards, telephones, and televisions) for purposes of Section 7 communications.[19] The Board had previously held—as recently as 2007—that an employer may lawfully bar employees' non-work-related use of an employer's e-mail system, at least assuming the employer did not discriminate against Section 7 communications.[20]

The Board overruled this precedent in *Purple Communications*. Effectively invalidating a policy that had prohibited the use of an employer's e-mail system for any activities on behalf of organizations that lacked a business affiliation with the employer, the Board held that Section 7 communications over an employer's e-mail system are presumptively permitted. Specifically, it held that employ-

ees who are given access to an employer's e-mail system in the course of their work may presumptively use the system to engage in Section 7 communications while on nonworking time, absent a showing of special circumstances justifying restrictions.[21] It further indicated that it would be a "rare case" in which special circumstances might justify a total ban on non-work e-mail use by employees.[22]

By emphasizing Section 7 rights over property rights, *Purple Communications* raises the possibility of employees eventually co-opting employers' auditoriums, audio-visual equipment, public announcement systems, and other means of communication to disseminate organizational messages. For now, however, only e-mail systems are implicated, and only current employees—as opposed to third-party organizers—may disseminate Section 7 communications over an employer's e-mail system. Employers are also not required to grant e-mail access to employees who lack it.

Given their obligation to disclose employees' e-mail addresses to unions under the new quickie election rules, some employers may respond to *Purple Communications* by rescinding employees' e-mail access altogether. Unions that lose representation elections may argue that overbroad e-mail polices prevented fair campaigning, and that adverse election results should be overturned.

Notably, Section 7 rights extend beyond organizational activities. As the Board's recent social media decisions illustrate, intemperate or even profane social media postings that impugn employers' or supervisors' reputations may be protected activity, regardless of whether the posters are union members.[23] *Purple Communications* suggests that such communications may now also be disseminated through an employer's own e-mail system. Although Section 7 communications may be sent only during nonworking time, employers will likely have difficulty monitoring all e-mail traffic and ensuring that protected communications are only read during nonworking time. Productivity will likely suffer.

Purple Communications is not yet ripe for circuit court review because the Board remanded to the administrative law judge for further proceedings. However, the decision applies retroactively, and circuit court review of a similar Board decision is likely forthcoming.[24] As Board Member Philip Miscimarra argued in a dissent to *Purple Communications*, compelled access to an employer's e-mail system may violate the First Amendment.[25] Specifically, the forced subsidization of speech is a First Amendment violation, particularly where the payer is forced to subsidize expressions with which it disagrees.[26]

Certification of "Micro-Units"

Union organizing efforts will also be aided by recent Board decisions sanctioning "micro" bargaining units. In contrast to "wall-to-wall" units covering all employees at a particular facility, micro-units cover only a subset of employees. They are cheaper and easier to organize. They can also be gerrymandered to ensure majority support where larger units would fail.

The Board has discretion under Section 9(b) of the Act to decide whether the appropriate bargaining unit in a representation case is an "employer unit, craft unit, plant unit, or subdivision thereof."[27] In 2011, the Board held in *Specialty Healthcare* that if a petitioned-for unit comprises a readily identifiable group, and if the group's employees share a community of interest, the unit is appropriate, unless the employer demonstrates that a larger unit shares an "overwhelming community of interest" with the petitioned-for unit.[28] However, because *Specialty Healthcare* was decided in the nonacute healthcare context, its application to other contexts was unclear.

On July 22, 2014, the Board expanded *Specialty Healthcare* to the retail industry, thus signaling its broader applicability. In *Macy's*, the Board approved a micro-unit of solely cosmetics and fragrance employees at a department store.[29] Applying the *Specialty Healthcare* standard, it held that the petitioned-for unit was appropriate because it comprised a readily identifiable group and its employees shared a community of interest.[30] The cosmetics and fragrance employees worked in the same selling department, had common supervision, and had little contact or interchange with other employees at the store.[31] The Board rejected Macy's argument that a "wall-to-wall" unit, or a unit of all selling employees, was instead the appropriate unit. It held that employees in two different groups

only share an "overwhelming community of interest" if the community of interest factors overlap "almost completely."[32]

On July 28, 2014, the Board again applied *Specialty Healthcare* in the retail context. In *Bergdorf Goodman*, it held that a micro-unit of shoe salespeople in two separate departments at a women's luxury store—salon shoe sales and contemporary shoe sales—was not an appropriate unit.[33] The petitioned-for unit's boundaries did not track "administrative or operational lines drawn by the Employer," and the salon shoe and contemporary shoe salespeople had different managers and lacked significant interchange among themselves.[34] Although the Board rejected the petitioned-for unit, its reasoning suggested that an even a smaller unit—for example, just the salon shoe salespeople—would have been appropriate.

By sanctioning micro-units, the Board's decisions offer unions a toehold in unorganized workplaces. Unions need to secure only the support of a small, readily identifiable group with a community of interest to gain recognition. Unions can also organize micro-units secretly, and then petition for—and win—quickie elections after majority support is already secured. The risk and expense of drawn-out organizational campaigns or get-out-the-vote efforts is minimized. Following certification, employers may have to bargain with multiple micro-units at a single facility, any one of which could potentially halt production. Increased labor strife is likely.

The Sixth Circuit affirmed *Specialty Healthcare* in 2013.[35] An appeal of the Board's decision in *Macy's* is currently pending before the Fifth Circuit. Other circuits are likely to weigh in on micro-units in the future. Although employers argue that the Board's micro-units decisions violate Section 9(c)(5) of the Act, which prevents the Board from considering the extent to which employees have organized to be "controlling" in unit determinations, micro-units appear here to stay.[36]

Employer Responses

Beyond legal challenges to the NLRB's recent actions, employers may take practical steps to counter the anticipated surge in union organizing, and to retain flexibility in dealing directly with their employees.

Because quickie election rules significantly shorten the time for a counter-organizational campaign, employers may take preemptive steps to avoid the filing of petitions in the first instance. These include using front-line supervisors to identify and monitor workplace dissatisfaction, and fixing problems in ways that minimize union appeal. Employers may also implement grievance procedures designed with the same objective.

Managers and supervisors can also be trained to identify nascent organizing efforts, and to respond with information on the desirability of union representation. Talking points for formal counter-organizational campaign can be prepared in advance. Managers and supervisors can also be trained to avoid illegal actions during organizational campaigns—including threatening, interrogating, promising benefits to, or spying on employees—which may invalidate favorable election results.

In the wake of *Purple Communications*, employers should revise their e-mail polices to eliminate blanket prohibitions on the use of

e-mail systems outside working time or for nonbusiness purposes. Overbroad e-mail policies may invalidate favorable election results. Although employers may still monitor employees' e-mails—notwithstanding the Section 7 communications therein—any surveillance that is "out of the ordinary" could lead to unfair labor practice charges.[37] Employers should thus refine their electronic surveillance policies to prevent undue scrutiny of protected communications.

Finally, *Specialty Healthcare*, *Macy's*, and *Bergdorf Goodman* suggest that micro-units are generally appropriate where they track an employer's own organizational or administrative structure. Employers may minimize the risk of unfavorable micro-unit determinations by combining like departments or job classifications; cross-training and cross-scheduling employees to work across different departments or classifications; increasing employee interchange between different departments or classifications (for example, through transfers, promotions, or temporary assignments); and revising managerial and supervisory structures to make employees in different departments or classifications report to the same managers or supervisors.

Conclusion

The NLRB's quickie election rules and recent decisions on micro-units and access to employers' e-mail systems will significantly boost union organizing efforts. Employers will have less time to respond to representation petitions, and must grant access to their e-mail systems for purposes of organizing. The availability of micro-units makes organizing cheaper and easier. Pending any successful legal challenges to the Board's actions, employers may take preemptive steps to counter the anticipated surge in union organizing, but the Board's recent actions may ultimately reverse the decline in union membership.

Notes

1. U.S. Department of Labor, Bureau of Labor Statistics, "Union Membership (Annual) News Release" (Jan. 23, 2015), www.bls.gov/news.release/union2.htm.
2. *Id.*
3. Representation–Case Procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014) (to be codified at CFR pts. 101-03).
4. 60 Fed. Reg. at 74308.
5. *See* 29 USC § 159.
6. *See* 29 CFR § 101.21(d).
7. Representation–Case Procedures, 76 Fed. Reg. 36812 (proposed June 22, 2011).
8. Representation–Case Procedures, 76 Fed. Reg. 80138 (Dec. 22, 2011); *Chamber of Commerce v. NLRB*, 879 F.Supp.2d 18 (D.D.C. 2012).
9. *Chamber of Commerce*, 879 F.Supp.2d at 30.
10. 60 Fed. Reg. at 74309-10 (summarizing amendments).
11. 60 Fed. Reg. at 74486 (to be codified at 29 CFR § 102.67 (l)).
12. 60 Fed. Reg. at 74490 (to be codified at 29 CFR § 103.20).
13. *Id.*
14. *See* 29 USC § 158(c).
15. *See* 60 Fed. Reg. at 74428.
16. *Chamber of Commerce v. NLRB*, No. 15-cv-9 (D.D.C. filed Jan. 5, 2015); *Associated Builders and Contractors of Tex. v. NLRB*, 15-cv-26 (W.D.Tex. filed Jan. 13, 2015).
17. *Purple Commc'ns, Inc.*, 361 NLRB No. 126, slip op. at 5 (Dec. 11, 2014).
18. 29 USC § 157.
19. *See, e.g., In re the Guard Publ'g Co.*, 351 NLRB 1110, 1114 (2007) (discussing equipment cases).
20. *Id.* at 1116.
21. *Purple Commc'ns, Inc.*, 361 NLRB No. 126, slip op. at 5.
22. *Id.* at slip op. at 14.
23. *See, e.g., Costco Wholesale Corp.*, 358 NLRB No. 106 (Sept. 7, 2012); *Three D, LLC*, 361 NLRB No. 31 (Aug. 22, 2014).
24. *See Purple Commc'ns, Inc.*, 361 NLRB No. 126 at 16-17 (discussing decision's retroactivity).
25. *See id.* at 56-58 (Miscimarra, dissenting).
26. *See id.* at 57 (Miscimarra, dissenting) (citing *Harris v. Quinn*, 134 S.Ct. 2618, 2639, 2644 (2014)).
27. 29 USC § 159(b).
28. *In re Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83, slip op. at 12-13 (Aug. 26, 2011).
29. *See Macy's & Local 1445*, 361 NLRB No. 4 (July 22, 2014).
30. *Id.* at slip op. at 8-9.
31. *Id.* at 8.
32. *Id.* at 9.
33. *The Neiman Marcus Grp., Inc.*, 361 NLRB No. 11 (July 28, 2014).
34. *Id.* at slip op. at 3-4.
35. *See Kindred Nursing Centers E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).
36. 29 USC § 159(c)(5).
37. *See Purple Commc'ns, Inc.*, 361 NLRB No. 126 at 16. ■