

NLRB grinds to a halt as U.S. Senate fails to confirm

By **DON MCINTOSH**
Associate Editor

Can managers let workers use office e-mail for personal stuff, but ban its use for union business? Can employers cancel a union contract if they merge with a nonunion operation? Do nurses lose the right to a union if they spend 15 percent of their time overseeing the work of others?

During the George W. Bush years, the National Labor Relations Board (NLRB) answered “yes” to those questions, never mind that the law the Board is supposed to interpret declares it official U.S. policy to encourage collective bargaining and protect workers’ freedom of association.

The NLRB, the little-known agency that administers that law (the National Labor Relations Act), has two parts: The Office of the General Counsel conducts workplace union elections and investigates and prosecutes unfair labor practice charges; and the five-member Board itself functions as a kind of “Supreme Court” of labor law.

In recent decades, the Board component has swung back and forth, expanding or restricting workers’ union rights depending on who’s in the White House. By tradition, the president fills three of the five Board seats with individuals from his political party. Democratic presidents have appointed pro-labor majorities, while Republicans have appointed pro-management majorities.

Now, U.S. Senate Republicans are trying to stop the pendulum from swinging back toward labor, using the chamber’s undemocratic procedures and the Constitutional requirement that the Senate provide advice and consent to the president’s appointments.

Board members serve five-year terms, with one term expiring each year. But the Board has now had three unfilled vacancies since Dec. 31, 2007. Senate Republicans have used a hold,

a hearing, and a filibuster to delay and halt President Barack Obama’s NLRB nominees.

The process began July 9, 2009, when Obama sent three nominees to the Senate for approval:

- Craig Becker, associate general counsel of the Service Employees International Union and the AFL-CIO, has 27 years experience in labor law as an union-side attorney and former professor at the UCLA School of Law.

Choice Act;

- Becker’s views on labor law are “extreme,” “radical,” and “outside the mainstream.” In a 1993 law journal article, he questioned whether employers ought to have any legal standing when workers decide whether to unionize.

To accommodate the Republicans, HELP Committee Chair Tom Harkin (D-Iowa) scheduled a Feb. 2, 2010, hearing. It was the first time since

1980 that a hearing had been held for a regular NLRB nominee.

At the hearing, Harkin described Becker as one of the pre-eminent labor law thinkers in the United States. Harkin

said Becker had made it very clear “that he understands and respects the distinction between his current role as an intellectual advocate, and the role he would play on the Board as an impartial adjudicator.”

Management-side attorneys who’d worked across from Becker wrote letters of praise. Sixty-six labor law professors from the nation’s top law schools attested to Becker’s integrity and fairness and urged his immediate confirmation.

Facing the senators, Becker testified that the reforms proposed in the Employee Free Choice Act — card check, binding arbitration for first contracts, and triple backpay for illegally fired workers — can’t be accomplished without Congress’ approval. And Becker pledged that if confirmed, he would “fairly, efficiently and faithfully apply the law,” and “always remain faithful to the will of Congress.”

All told, Becker answered more than 420 written questions from Senate Republicans — 200 more than were asked of Sonia Sotomayor before her confirmation to a lifetime appointment to the U.S. Supreme Court.

On Feb. 4, the HELP committee voted a second time to approve Becker’s nomination, this time 13-10, along party lines.

Then came the filibuster. A cloture motion on Becker’s nomination — to cut off debate and proceed to a vote — was set for Feb. 9. Cloture takes 60 votes, and Democrats had 60. But then Republicans demanded that newly-elected Massachusetts senator Scott Brown, scheduled to take office Feb. 11, be seated right away. Senate Majority Leader Harry Reid (D-Nevada) relented, and Brown, a Republican, was sworn in Feb. 4. When the cloture vote was taken, it didn’t matter: Two Democrats voted to uphold the filibuster: Ben Nelson of Nebraska, and Blanche Lincoln of Arkansas. The vote to cut off debate was 52 “yes,” 33 “no,” and 15 not voting. Becker’s nomination failed to proceed to an up-or-down vote.

In short, a supermajority of Democrats in the Senate found itself unable to confirm the NLRB nominees of a Democratic president. By contrast, the Senate confirmed all five of Bush’s NLRB nominees on Nov. 14, 2002 by unanimous consent — without a single objection — five weeks after they were nominated. That was in a Senate led by Democrats.

The Senate’s failure to confirm the NLRB appointments leaves the Board in limbo. The two Bush appointees whose terms have not yet expired — Republican Peter Schaumber and Democrat Wilma Liebman — deadlock on most controversial issues. Despite that, they have continued to issue decisions in cases where they agree — 538 cases over the last 27 months. But the validity of those decisions has been challenged in a number of federal court cases.

Five federal courts of appeals have upheld the NLRB’s authority to make decisions with just two members, but one court of appeals ruled that two-member decisions aren’t valid. The U.S. Supreme Court agreed Nov. 2 that it will decide the question, and is scheduled to hear arguments from both sides March 23.

Liebman, elevated to chair by Obama in January 2009, has begun to air her frustrations publicly, complaining in a Feb. 5 statement that the Board is “unable to move forward on

the most significant cases,” and on Feb. 17 telling an audience at Washington University Law School in St. Louis that “the NLRB has become emblematic of political paralysis.”

Obama hasn’t been able to fill existing vacancies, and more are coming. In August, Board member Schaumber’s term will expire, as will the four-year term of Bush-appointed NLRB General Counsel Ronald Meisburg.

Labor, especially the AFL-CIO, has begun to call loudly for Obama to fill the seats with recess appointments. When the Senate fails to confirm presidential appointments, presidents sometimes wait until the Senate is in recess and appoint them; they can then serve until the end of the year.

Union officials were very disappointed when Obama failed to make the appointments during the Presidents Day recess. But they now believe he will come through during the two-week Easter recess that starts March 30. Labor Secretary Hilda Solis told the AFL-CIO Executive Council March 3 there will soon be positive news on Becker’s nomination.

As the U.S. Chamber of Commerce is aware, there’s a lot at stake for labor. The chamber produced a report in September that listed more than 50 decisions by the Bush-appointed Board that are likely to be reversed when Obama appointees become the majority.

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- Mark Gaston Pearce, a Buffalo, New York attorney, has 31 years experience as a union-side lawyer and lecturer at Cornell University’s School of Industrial Labor Relations Extension.

- Brian Hayes, the Republican labor policy director for the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP), has 25 years of experience as an employer-side attorney, and taught labor law at Western New England Law School.

On Oct. 21, the Senate HELP Committee voted unanimously to approve Pearce and Hayes, and 15-8 to approve Becker. But the next day, Sen. John McCain (R-Arizona) announced he would block Becker’s nomination from getting a vote on the Senate floor, and called for the HELP committee to hold a hearing on Becker’s nomination.

Becker, by then, had been for months the target of a campaign led by business groups, particularly the U.S. Chamber of Commerce. The talking points of the campaign, endlessly repeated, were:

- Because Becker worked for unions, he could not be impartial and would unfairly side with labor;

- Becker might do an end-run around Congress, using his appointment to implement reforms like card-check union recognition that are part of the proposed Employee Free

Unionists will bowl for MDA on April 25

The 21st annual Labor Bowl Challenge to benefit the Muscular Dystrophy Association (MDA) will be held Sunday, April 25, from 1 to 4 p.m. at Hollywood Bowl, 4030 NE Halsey St., Portland. Registration starts at noon.

Portland area labor unions have collected \$301,328.75 for the charity since its inception. Money goes to buy wheelchairs and braces for children, as well as research and summer camps.

For more information, call Jim Cook, president of Letter Carriers Branch 82, at 503-493-5903, or MDA at 503-223-3177.

Candidates’ workshop slated April 3 in Salem

Political candidates and their campaign managers are invited to learn about Oregon’s labor movement, their political issues, and endorsement process at the Oregon AFL-CIO Campaign School Saturday, April 3, from 9 a.m. to 4 p.m. at AFSCME Council 75’s Salem office, 1400 Tandem Ave., NE.

Union members who might be considering running for the local school board or fire district also are encouraged to attend to get tips on putting together a successful campaign.

There is no charge, and lunch will be provided.

RSVP by March 24 by calling 503-585-6320 or by e-mail to graham@orafclcio.org.

IN MEMORIAM

KENN KENNEDY, a former business manager of Graphic Communications International Union (GCIU) Local 292 and retired Oregon School Employees Association (OSEA) union rep, died Feb. 27 after battling pancreatic cancer. He was 68.

Kenneth Earl Kennedy was born on May 12, 1941, in Crab Orchard, West Virginia. His father, James, was a coal miner and a member of the United Mine Workers of America. After Kenn graduated from high school in 1959, the family moved to Portland, where James joined the International Woodworkers of America and found work in a sawmill.

Kennedy enlisted and served four years in the U.S. Air Force. He was honorably discharged as a staff sergeant.

He returned to Portland and entered the bookbinding trade in 1966 as a member of Bookbinders Local 90B. He worked at several binderies for the next 19 years and was active in the union. He held every office in the local from reading clerk to president.

In 1985 he became business agent of Local 90B and a few years later helped merge that local and Lithographers Local 202 to form Local 292 of the GCIU.

Kennedy became executive vice president and later was elected secretary-treasurer of the Portland Allied Printing



Trades Council and represented it on the Executive Board of the Northwest Oregon Labor Council.

Kennedy always made sure that material handed out at any union function contained the GCIU

or Allied Printing Trades union “bug.” If not, it didn’t get distributed.

Kennedy lost the presidency of Local 292 in 1992 by 21 votes. He subsequently was hired as a business agent for the OSEA, working out of its Salem office. In 1995 he was transferred to Coos Bay, where he represented 1,000 members employed in schools on the South Coast in Coos, Curry, Douglas and Lane counties.

He retired in 2003 at age 62.

He and his wife, Betty, enjoyed traveling and were volunteer hosts for the state park system. Kenn served on the board of the Friends of Shore Acres Association. He enjoyed woodcarving, and did volunteer civil case mediation work for the Coos County court system. An avid bicyclist, Kennedy rode in Cycle Oregon bicycle treks from 1981-84.

Kennedy is survived by his wife; three stepdaughters, two daughters, a son; and 13 grandchildren.