

ORGANIZING TACTICS AND MANAGEMENT DEFENSE STRATEGIES

December 7, 2002

- I. Obstacles to Union organizing in the e-commerce era
 - A. Labor's declining numbers, caused by
 - 1. Disunity/lack of cohesiveness in labor movement, exemplified by:
 - a. Differences with traditional political allies over free trade issues
 - b. Failed efforts at union mergers, both in industrial and construction sectors
 - 2. Aging of Union leadership, inability to attract young people to trade union movement, early retirement of best and brightest union leaders
 - 3. Perception, fueled by propaganda from business interests that self-reliance rather than group efforts are the key to economic security
 - 4. Passage of employment law statutes (Title VII, ADA, ADEA, FMLA, OSHA, ERISA, WARN Act) has lulled workers into false sense of employment security
 - a. But job "protections" offered by employment law are illusory, and undermine exercise of collective rights by emphasizing individual rights
 - b. Employment law statutes have turned most labor lawyers into employment lawyers
 - B. Effect on organizing climate of globalization, technology, other changes
 - 1. Loss of trust and loyalty between employer and employee due to emphasis on profits and stock price, and increased worker dislocation
 - 2. Increasing disparity in income distribution despite increased worker productivity

3. Decline in value of worker 401(k) accounts due to stock market declines
4. Worker anxiety, longer hours, reduction in benefits, increased consumer debt, over-leveraged economy
5. Downturn in economy may change political climate and increase pressure for economic and political reforms

C. Problems with labor law

1. NLRA, which boldly declares federal policy of “encouraging...collective bargaining...by protecting the exercise by workers of full freedom of association” is weak, out-of-date

- a. Structure of the Act provides virtually endless opportunities for frustrating employees’ desire for collective bargaining

- (1) even more vigorous use of Section 10(j) by Clinton Board proved inadequate to deter union avoidance tactics
- (2) success of non-attorney management consultants and management attorneys reveals Act’s inherent weaknesses
- (3) decision to organize has become a management decision rather than a worker decision
- (4) in U.S. employers pay \$4 billion annually for consultants and lawyers to orchestrate sophisticated anti-union campaigns
- (5) Each year thousands of U.S. workers are fired or intimidated for trying to organize a union at work

- b. Hoffman Plastics v. NLRB (2002) (U.S. Sup. Ct.)

- (1) U.S. Supreme Court held that, due to federal immigration policy, the NLRB

could not award back pay to an undocumented worker who was illegally fired for supporting a union.

(2) Employee awarded \$67,000 in back pay and reinstatement 9 years after he was fired. In March 2002, 13 years after he was fired the Supreme Court reversed the NLRB.

(3) Only remedy allowed after Hoffman for discharge of undocumented alien is notice.

(4) General Counsel Memo issued on July 19, 2002 on procedures post-Hoffman (attached).

(a) Regions are not to independently raise or investigate an employee's immigration status.

(b) Burden on employer to raise substantial immigration issue that impacts remedy

(c) Employee can vote a NLRB election regardless of immigration status (they are still "employees" as defined in the Act).

(5) Will Hoffman holding be extended to limit legal remedies to undocumented workers who sue for wage/overtime violations or discrimination under Title VII?

(a) Employers will no doubt seek to expand Hoffman to these areas.

(b) Meanwhile, workers should continue seeking remedies for employer violations on issues such as minimum

wage, prevailing wage, discrimination based on race, sex, national origin, etc.

c. Act provides Union organizers with little access to non-union workers

(1) Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992), eliminated most of the access rights of non-employee organizers to most private property to distribute materials on employer's premises. But see Technology Service Solutions, 324 NLRB 298 (1997), remanding to ALJ for determination whether employer, which contracted with computer manufacturers and retailers to provide repair services under service contracts and which maintained no central reporting location for its customer service representatives (CSRs), was required to provide Union seeking to organize CSRs with list of names and addresses of unit employees because there was no reasonable alternative means for Union to communicate with employees; Excelsior Underwear, 156 NLRB 1236 (1966)(employers have no significant interest in the secrecy of employee names and addresses); and Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 205-06 n.41 (1978)(where workplace presents "unique obstacles" to communication among employees, union may be entitled to special access rights).

(2) In Leslie Homes, Inc., 316 NLRB 123 (1995), NLRB applied Lechmere to area-standards handbilling, extending Lechmere's concern for protecting private property rights at the expense of Section 7 rights

(3) In Oakland Mall, 316 NLRB 1160 (1995), the NLRB extended Leslie Homes even further by applying rule against non-employee concerted activity on private property to secondary consumer handbilling on employer's private property, and in Farm Fresh, Inc., 326 NLRB No. 81 (1998), the Board extended Lechmere to non-employee organizers seeking access to in-store public restaurant to solicit

off-duty employees. But see Sandusky Mall, 329 NLRB No. 62 (1999)(finding that owner of shopping mall violated Act by refusing to permit organizer to distribute handbills in mall, where employer permitted access for other civic, commercial and charitable purposes).

(4) Access problems exacerbated by the growth of contingent workforce, the “virtual workplace”, and electronic workplace surveillance

(5) Lechmere and its progeny has given birth to expanded use of “salting” tactics, particularly after Supreme Court’s ruling in NLRB v. Town & Country Electric, 116 S.Ct. 450 (1995) that paid Union organizers (“salts”) are protected under Section 8(a)(3) as “employees” within the meaning of Section 2(3)

(6) Board’s ruling on May 11, 2000 in Thermo Power, clarifies existing burdens of proof in refusal-to-hire and refusal-to-consider cases

d. The Act’s remedial provisions are hopelessly inadequate to deter violations

(1) Only remaining form of employment discrimination still blatantly practiced is discrimination based on union activity

(2) Discrimination based on union activity is also the only form of discrimination that carries no penalty

(3) The right to engage in union activities should be a civil right enforceable by a private right of action, with a right to punitive damages, as now exists under Title VII

2. NLRB remedial initiatives

a. Board had broad discretion in fashioning remedies. Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 539-540 (1943).

b. General Counsel on November 19, 1999 directed Regional Directors to seek as a standard remedy that a representative of the respondent read the Board's notice to employees on work time to:

- (1) Ensure that workers with reading deficiencies receive the information
- (2) Ensure that workers who don't consult the bulletin board will receive the information
- (3) Establish more effective means of confirming employee rights than a cold, written communication

c. Compensatory damages initiative

(1) Backpay doesn't always make employees whole because it does not include consequential losses, such as loss of a home or car because of inability to make monthly payments. The new General Counsel, Arthur Rosenfeld, announced on November 8, 2002 that he would not seek consequential damages, including home foreclosure charges, damage to credit, medical bills, finance charges and late fees for late loan payments, repossession costs and storage fees for a repossessed auto, for two employees discharged illegally for their union activities who suffered "collateral losses" resulting from credit problems after their illegal discharges

(2) General Counsel also authorized to seek front pay as a remedy for illegal discharges, as in Title VII cases

d. Remedies for organizing interference initiative

(1) Employer willingness to engage in unfair labor practices to counter organizational activity is widespread, and effective

(2) In Fieldcrest Cannon, Inc., 318 NLRB 470 (1995), enf'd 97 F.3d 65, 74 (4th Cir. 1996), the Board ordered that Fieldcrest (1) publish the Notice in its internal newsletter and mail copies to all employees, (2) have its vice president read the notice to employees, (3) publish the Notice in a local newspaper twice weekly for four weeks, (4) supply the union with the names and addresses of all unit employees, (5) allow the union reasonable access to bulletin boards, (6) grant union access to non-work areas in non-work time, (7) give the union notice of and equal opportunity to respond to company anti-union speeches, and (8) give the union the right to deliver a 30-minute speech not less than 48 hours before any Board conducted election

II. Organizing initiatives in the next decade

B. Recent organizing successes

1. Justice for Janitors massive strike and successful early resolution in Los Angeles by SEI
2. In Las Vegas, HERE's success in organizing nearly 80% of the hotel industry, and continued success in holding its market share despite huge increase in number of hotels being built
3. UNITE's successful organizing campaign at Fieldcrest in North Carolina
4. Organizing of 74,000 low wage health care workers in Los Angeles
5. In Indiana, the building and construction trades recruited more new members than ever and in 1999 had one of the largest membership

increases in the nation, as skilled worker shortage pushed wages higher in the entire construction industry

- C. Locally, organizing successes are more sporadic, isolated
 - 1. UAW has been unable to organize Japanese-owned automakers (Subaru, Toyota)
 - 2. Steelworkers have failed to break into the new mini-mills, such as Nucor in Crawfordsville and SDI north of Fort Wayne
 - 3. Teamsters strike against Overnite failed
 - 4. AFCSME continues its efforts to organize public workers but is hindered by lack of a public employee bargaining law
 - 5. Pipefitters Union has had success recruiting skilled fitters and welders from non-union companies and has at least 5 major ULP cases pending which it won before ALJ's, but it has only mixed success signing up new contractors
 - 6. Sheet Metal Workers Union continues with aggressive salting program and has several cases pending at Board. Recent efforts concentrated against Edwards Mechanical, a large non-union multi-trade contractor, were unsuccessful in organizing that large contractor!

- D. Importance to labor movement of 2002 and 2004 national elections
 - 1. Regaining control of House and Senate and electing Gore were essential to meaningful labor law reform
 - 2. Loss of White House and Congress in 2002 will mean years of unfriendly appointments to NLRB and federal judiciary, rollerbacks in worker-friendly legislation.

- D. Common employer countermeasures and current NLRB position regarding their legality
 - 1. Dual paychecks. Kalin Construction Co., 321 NLRB 649 (1996) (adopting strict rule against changes in paycheck process

prior to election, including changing the time, location, method of distribution, or amount).

2. Lotteries. Atlantic Limousine, 331 NLRB No. 134 (2000) (use of raffle as an inducement to vote held objectionable).
3. Captive audience meetings. Peerless Plywood, 107 NLRB 427 (1953) (banned within 24 hours of election). But see, General Fabrications Corp., 328 NLRB No. 166 (1999) (no interference when employer's president spoke with each employee individually at their work stations on day before election).
4. Provision of meals and other benefits. River Parish Maintenance, 325 NLRB No. 153 (1998) (employer's sponsorship of offsite dinner, where attendance was mandatory and employees were paid to attend, objectionable). But Cf. L.M. Berry & Co., 266 NLRB 47, 51 (1983) (absent "special circumstances", company parties are legitimate campaign devices); B&D Plastics, 302 NLRB 245 (1991) (Board examines the following factors in determining whether pre-election benefits would improperly tend to influence election results: (1) size of the benefit; (2) its timing; (3) number of employees receiving it; and (4) how employees reasonably would view its purpose.)

5. Confiscation of union literature. Venture Industries, 330 NLRB No. 159 (2000) (objectionable).

E. Common objections to union pre-election conduct.

1. Photographing during election. Compare NuSkin International, 307 NLRB 223 (1992) (not objectionable); Randall Warehouse of Arizona, 328 NLRB No. 153 (1999) (not objectionable); and Mike Yurosek & Sons, Inc., 292 NLRB 1074 (1989) (objectionable when accompanied by threats or other coercive conduct).

2. Offering free legal services. 52nd Street Hotel Assoc., 321 NLRB No. 93 (1996), enf't denied. 160 LRRM 2299 (D.C. Cir. 1999) (granting employer petition and finding that NLRB erred in finding that lawsuit concerning payment of overtime wages filed by

union against employer during election campaign interfered with fair and free election).

3. Distribution of “vote yes” T-shirts. Generally ok if little intrinsic value. But beware. Owens-Illinois, Inc., 271 NLRB 1235 (distribution of union jackets on election day found objectionable).

4. Racial appeals. Sewell Mfg. Co., 138 NLRB 66 (1962) (Board won’t set aside election on basis of racial appeals unless they had “no purpose except to inflame racial feelings.”)

F. Emerging organizing tactics

1. Changes in labor’s image by

- a. Forming alliances with religious, environmental, and minority-group organizations, and university student groups (e.g., university-based anti-sweatshop campaigns).
- b. Ending reflexive opposition to immigration.

2. Avoidance of NLRB election process and seeking voluntary recognition through:

- a. use of community-based pressure tactics, such as utilized by UNITE in campaign to organize Lane-Bryant workers
- b. use of corporate campaigns, i.e., applying secondary pressure on lending institutions, shareholders, etc.

G. Labor will continue to experiment with new organizing methods so long as the NLRA remains ineffective. The desire of workers for a greater voice and a fair share of economic rewards in their workplaces is a constant which will continue to find new forms of expression no matter what the prevailing economic or political climate are.

William R. Groth
FILLLENWARTH DENNERLINE
GROTH & TOWE
1213 North Arlington Avenue, Suite 204
Indianapolis, IN 46219

(317) 353-9363
wgroth@fdglaborlaw.com

p/177/sh