



Insight

Obama's Unionization Push

SAM BATKINS | MARCH 2, 2011

As private-sector unions struggle, the NLRB proposes to lay a large thumb on the scale.

Could 2011 be the year of the protest and the beginning of the end for the excessive political power of Big Labor? President Obama appears ready to do everything in his power to prevent that from happening. In addition to turning on his political machine, Organizing for America, by urging attendance at rallies in Wisconsin “with our labor friends [at] AFSCME,” the president is pushing a back-door unionization effort on a nationwide scale. The administration has successfully nationalized a local debate over the role of unions, and the president’s new regulatory agenda reveals that he isn’t satisfied with a few skirmishes in the Midwest.

Last week the comment period closed on a proposed National Labor Relations Board (NLRB) rule that would seek to increase private-sector unionization. After losing the “card check” battle in the 111th Congress, the president is attempting to implement through regulatory fiat what he couldn’t get from Congress.

Three days before Christmas, the NLRB and its de facto head, Craig Becker, announced that all employers subject to federal labor law (the National Labor Relations Act) would be forced to post notices of unionization rights at their workplace. Becker bemoaned the lagging rate of private-sector unionization (6.9 percent of workers, compared to 36.2 percent for public-sector workers) and claimed that the NLRB already had authority to force employers to advertise for Big Labor. With private-sector unionization rates in some right-to-work states as low as 3.2 percent, the administration needed a regulatory response to failed efforts in Congress.

Those familiar with the extra-legislative pushes on “net neutrality” and greenhouse-gas emissions know that regulatory overreach is this administration’s modus operandi. It might be easy to ignore Congress and legislate from atop a regulatory board, but it’s generally not legal, and this NLRB action rests on dubious legal grounds.

Workers are accustomed to seeing notices concerning the Family Medical Leave Act or the Civil Rights Act posted in an office kitchen or near a water cooler. These notices have something in common: Congress enacted legislation requiring employers to post them. Congress took the affirmative step to enact the language, and it delegated power to the NLRB to carry out the rules. The proposed posting of unionization rights has no such approval from Congress. But lack of authority, whether congressional or constitutional, doesn't seem to deter the president. (Indeed, Becker's appointment to the NLRB is dubious. After the Senate blocked the nomination of the former counsel to the AFL-CIO and the SEIU, President Obama made a recess appointment.)

As G. Roger King, a labor lawyer and partner at Jones Day, recently testified, *"t is questionable whether the Board has the authority to engage in rulemaking to require notice posting, particularly where Congress has explicitly required notice posting in other statutes."* If it is permitted to act without the necessary legislative authorization, who knows what the NLRB, an unelected and unaccountable body, could push in the way of politically convenient notice and posting requirements for employers?

Not to give the administration any ideas, but the president's health-care overhaul included requirements that most employers provide their employees with health insurance (the employer mandate). The legislation contained no posting requirement for employers, but this wouldn't necessarily stop the NLRB from imposing new standards. The board, operating with only two confirmed members and just one Republican appointee, is starting to push the outer boundaries of direct political activism on behalf of Big Labor.

After the defeats at the ballot box last November, the president must have recognized that amending labor law in an attempt to bolster private-sector unions would go nowhere in Congress. The more convenient approach is to task the NLRB and Mr. Becker, who also bypassed congressional approval, with implementing a nationwide unionization push.

This push is even more politically transparent if one examines the details of the proposed posting. Instead of a full listing of federal labor rights, the proposed rule omits right-to-work provisions and special protections that allow workers to file union-decertification petitions. The NLRB was happy to include only pro-union language in a naked attempt to help its "friends." The board even admits that it got the idea for the new rule from the writings of two liberal law professors, Peter DeChiara and Robert Morris, in the 1990s.

Almost 90 percent of the nation's workers aren't in a union, a figure that continues to rise, gradually eroding the president's political base. To combat this trend, thwarting legislative majorities in the Midwest and circumventing legal procedures in D.C. are simply matters of political convenience for the president and his Democratic allies.

The president is attempting to prove that he and his allies can out-regulate, out-shout, and out-demonstrate the voters in Wisconsin, Indiana, and Ohio. If the last two years have proven anything, it is that attempting to return the government to the size and roles that taxpayers desire is worth the fight.

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