Technological Developments, the Board and the NLRA

A PRESENTATION FOR

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Section of Labor & Employment Law
Panel: Developments under the Nat’l Labor Relations Act
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Note: This outline is prepared for general informational purposes and it is not intended to be legal advice.
Technology, the Board and the NLRA

I. Areas where Technology and Economic developments are “forcing” the Law and Procedures – The Issues
A. Organizing
   1. E-mail
      a. Impact of Register Guard (Dec. 16, 2007) Decision
      b. “It is important, therefore, that the Board take advantage of the opportunity to reevaluate its rules – particularly with regard to organizing – as these questions arise [as a result of the internet and modern economy].” (Hirsch 273)
      c. To what extent will the Board protect or inhibit the use of electronic communications, e.g. internet, PDA, twitter, blogs, etc., during organizing campaigns by employees, unions and employers?
         a. See generally, Hirsch, “The Silicon Bullet”
   2. A work force with no physical presence or shifting composition
      a. Contingent Workforce
      b. Day Laborers
      c. Agricultural laborers
         1. Is it time to end the agricultural worker exclusion?
      d. People who work from home in the virtual workplace
B. Conduct of Elections – Paper to Electronic?
C. Relevancy of the Act?
   1. Employee Free Choice Act (EFCA)
   2. Academic and Practitioner’s Literature

II. NLRB Mission under the NLRA
   A. Statutory Duties - §9: Secret Ballot Elections
      1. Regulations: NLRB, Statements of Procedure, Subpart C: R Cases
   B. Mission Statement
      Under the Act, the NLRB has two primary functions: (1) to conduct secret-ballot elections among employees to determine whether the employees wish to be represented by a union; and (2) to prevent and remedy statutorily defined unfair labor practices by employers and unions. The mission of the Agency is to carry out these statutory responsibilities as efficiently as possible, in a manner that gives full effect to the rights afforded to all parties under the Act. (Strategic Plan 3, emphasis added)
   C. Strategic Plan vis a vis Elections and Representation
      1. Goal #1: Resolve all questions concerning representation impartially and Promptly. (Strategic Plan 6)
         Strategies:
         1. . . . . A core objective of the Act is to conduct secret ballot Elections among employees to determine whether the employees
Wish to be represented by a union.

8. Provide an information technology environment that is mainstream with other federal agencies and the public, and will provide NLRB employees with technology tools and access to research and professional information comparable to that of their private sector counterparts. (Strategic Plan 6 – 7)

2. IT infrastructure Modernization (Strategic Plan 17 – 19)

III. Elections
   A. Current Practice: Generally on-site paper ballot elections with some use of mail ballots for workers who are “widely dispersed”
   B. Electronic Elections: Possibilities, Obstacles and Advantages
      1. Practical Considerations
         a. Availability of Computer Terminals for all Employees
            1. Ease of Use – Familiarity with Computers
            2. Whose Computer System
               Employer? Government? Third Party Public, e.g. Library?
         b. Language and Disability Access Barriers
         c. Cost
            1. Need for IT specialist staffing
            2. Need for hardware infrastructure
         d. Security – “secret” elections and employee concerns
      2. Legal Procedure to design an electronic voting procedure
      3. Possible Advantages
         a. Speed
         b. Greater participation
         c. Environmentally sound

IV. Policies and Statutes that Impact use of Technology in Labor Law
   A. Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in various sections of Title 18, USC)
      1. Provides sanctions for unauthorized use or access to electronic Communications stored within computer systems (Stored Communications Act)
   B. State Security Breach Notification Laws
      1. At least 44 states require notification of personal information breaches
   C. By Analogy: Privacy Oriented Electronic Regulation
      1. Payment Card Industry Data Security Standards
         a. Open Web Application Security Project (OWASP)
            See www.owasp.org
      2. HIPAA (health records) and FERPA (education – student records)
   D. State Common Law regarding Property Rights
   E. Growing public concern about privacy and the Internet
F. Computer Fraud and Abuse Act, 18 USC §1030 (1986): making it illegal to access Federal Computer systems -as amended by the U.S. Patriot Act, etc.

V. Current Practices – Other Organizations
   A. National Mediation Board
      1. Like NLRA, requirement of “secret ballot election.” 45 U.S.C. § 152, Ninth (Section 2, Ninth), Railway Labor Act
      2. Applications filed in paper; no electronic copies of authorization cards permitted (Manual, 3)
      3. The NMB assigns voters are assigned a Personal Identification Number (PIN) and a Voter Identification Number (VIN)
         a. Numbers known only to voter and NMB Personnel

         The confidential VIN and PIN are mailed directly to the employees’ homes. Requests for duplicate VINs and PINs must be made in writing and signed by the individual employee. Use of another voter’s VIN and/or PIN is prohibited by 18 U.S.C. § 1001. The NMB does not disclose the ballot choice of any voter. NMB. FAQ 22

         b. Conduct of Elections – Generally: “Most elections are conducted by Telephone Electronic Voting (TEV) and Internet Voting. Approximately three weeks prior to the tally, each voter is mailed Voting Instructions explaining how to vote if the voter wants to be represented. In a standard TEV and Internet Voting election, employees who want to vote for representation either call in to cast their vote or access the Board’s voting website. The votes are tallied electronically. The results of the tally are provided to the organization(s) and the carrier in writing.” NMB, FAQ 21

      3. Voting (from Sec. 13. 204 NMB Representation Manual)

         Voting with the PIN and VIN

         To vote, the voter can either call a toll-free telephone number or access a designated website as explained in the Instructions. Voters can only vote once with their assigned VINS and PINs through either the telephone or the Internet. As the systems are linked, voters are prevented from voting more than once.

         Telephone Voting. The voter follows the voice prompts. When the voter’s identity is confirmed, the voter will be prompted with voting instructions for the election. The Telephone Electronic Voting (TEV) voice prompt will list the incumbent, the applicant and the intervenor. If there is no incumbent and more than one applicant, the Investigator will determine the placement of the names on the voice prompt.
Internet Voting. After accessing the website, the voter enters his/her assigned VIN and PIN. When the voter's identity is confirmed, a ballot screen will appear for the election in which he/she is eligible to vote. The incumbent, applicant, and intervenor will be listed in descending order. If there is no incumbent and more than one applicant, the Investigator will determine the placement of the names on the ballot screen.

The PIN and VIN ensure the confidentiality and the integrity of the election by eliminating unauthorized votes.

B. University of Washington Faculty Senate Elections – Electronic
1. Shift from paper to electronic took about two years (≈2001-03)
2. Creation of Database
3. Ballots are mailed to each faculty member at their University e-mail address
   a. assurance of confidentiality required
   b. Paper ballots for faculty w/o an e-mail address (which becomes a smaller number each year)
4. Advantages
   a. Greater participation
   b. Elections and run-offs completed more quickly
   c. Environmental – Little wasted paper
   d. Paved the way for other forms of electronic participation and governance: newsletters, website, etc.

VI. How should the NLRB proceed?
A. Rulemaking or Adjudication?
   1. Argument for Rulemaking
B. Piecemeal or Comprehensive Change
   1. Argument for Comprehensive Change: Technology implicates solicitation, distribution, “free speech” and Excelsior List policies as well as method of voting
      See, e.g. Technology Service Solutions II, 334 NLRB 116 (2001) which approves mailing of C&D notice but declines to permit GC to send e-mail notices to individual employees
   2. Does it matter if election procedure is changed if there are still long delays between the onset of an organizing campaign and the actual election?
   3. Does it matter if election procedure is changed if there are no first contracts?
      a. the argument for comprehensive change in law and procedure
      b. EFCA
      c. opting out of the regulatory system: private agreements
C. Which System?
   1. Mail Balloting

2. Hybrid: Telephone and Electronic (and mail?)
3. Electronic Tabulation Machines at Polling Places
   a. Optical Scanning (creates paper record): Optical scan systems retain the paper ballot, which the voter marks with dots that are read electronically. Optical scan systems create a tangible record that can be used in recounts, and maintain consistency between ballots cast absentee and at the polls, but printing ballots is a complex and costly business. (Berkeley)
   b. Touch Screen (no paper record): Touch-screen voting systems, also known as direct recording electronic (DRE) voting systems, dispense with the paper ballot altogether and operate much like an ATM machine. Touch-screen systems easily accommodate multiple languages and even have audio capabilities, making them attractive for meeting accessibility goals, but require a parallel printing system of some kind in order to provide a tangible record of the vote. (Berkeley)
REFERENCES


Hirsch, Jeffrey M. and Barry T. The Rise and Fall of Private Sector Unionism: What Next for the NLRB? In 34 Florida State Univ. L. Rev. 1133 (Summer 2007) (Hirsch-Next)


Nat’l Labor Relations Board. Strategic Plan, FY 2007 – 2012 (June, 2007) (Strategic Plan)

_________ - General Counsel. Register Guard – General Counsel Memorandum GC 08-07 (May 15, 2008)
