

Advancing the EFCA agenda

Obama appoints labor nominees to NLRB



In 2006, after a lost decade of stagnating wages and good jobs disappearing by the boatload, the AFL-CIO and the rest of the labor movement made it their mission to see a comprehensive package of reforms become law in this country, making it easier for workers to form unions and to give them more protection.

It's long been a fact that organized workers are paid better and have better benefits, enabling them to raise the quality of their own lives and lift the wages and benefits of employees around them. Unions helped America create its middle class.

That reforms package—the Employee Free Choice Act—seemed like it was on a solid course to passage when Barack Obama was elected president and the Democrats and like-minded independents won control of Congress, including the 60 votes necessary in the Senate to avoid a filibuster. Yet when a few erstwhile supporters of EFCA balked at moving forward, the package was put on the legislative back burner late last year as Congress focused its efforts instead on passing comprehensive health insurance reform (*see article on page XX for how the recently enacted law affects you*).

Since then, the Senate lost EFCA's greatest champion, Sen. Ted Kennedy, who was replaced by a stern opponent of organizing rights, making the outlook for EFCA's passage now much more bleak. But the labor movement and the Obama administration have devised a potential workaround to strengthen the National Labor Relations Board—appointing worker-friendly members who might be able to do with executive power what progressives hoped to accomplish legislatively with EFCA.

The NLRB is the independent government agency in charge of overseeing union representation elections and

investigating claims of unfair labor-relations practices. The president is charged with appointing members to its five-person board, with the Senate acting to confirm those appointments.

However, thanks to Senate obstruction, there are now only two sitting board members—one a Democrat and one a Republican—who have continued since 2008 to make rulings on cases that appeared before the board. Last July, President Obama nominated three highly qualified and respected labor attorneys, including former AFL-CIO and SEIU attorney Craig Becker, to fill the remaining empty slots, promising to tip the scales farther toward labor's favor. But conservatives in the Senate continued their trend of saying “no” by blocking all three, even after they received approval by the Senate's Judiciary Committee.

To illustrate how bad this obstructionist sentiment has become, the White House issued a statement pointing out, “At this time in 2002, President Bush had only 5 nominees pending on the floor. By contrast, President Obama has 77 nominees currently pending on the floor.”

“It's an outrage that a decision-making body so important to the basic rights of working people is crippled by vacancies,” AFL-CIO President Richard Trumka said. He called on Obama to use the time-honored practice of making recess appointments to fill the spots while the Senate was not in session, but for months Obama appealed to the Senate to allow his nominees to pass through the red tape and come to a vote.

If it isn't bad enough that Senate conservatives are trying to disable the NLRB, their business-interest allies are now hoping to exploit the board's weakness by attempting to invalidate all of

the recent rulings with which business leaders disagree. They charge, without a trace of irony or embarrassment, that all the rulings made by the two-person panel should be thrown out because there are not enough members on the board to make a quorum.

Despite five federal appeals court rulings that the two-person board's decisions are indeed valid, the Supreme Court heard arguments for one such case, *New Process Steel v. National Labor Relations Board*, on March 23. Even Supreme Court Chief Justice John Roberts—a George W. Bush appointee—seemed bothered by the obstructionist sentiment, and hinted during the arguments that Obama should go ahead and make the recess appointments to the NLRB.

Four days later, Obama announced he would do just that for two of his nominees, including Becker, over the loud and enraged opposition of Senate Republicans. Oddly enough, these Republicans somehow failed to note that seven of George W. Bush's selections for the NLRB were recess appointees, nor did they acknowledge that Bush's first nominee to the board was on the staff of the U.S. Chamber of Commerce—a fiercely partisan opponent of EFCA.

"The United States Senate has the responsibility to approve or disapprove of my nominees," the president said. "But if, in the interest of scoring political points, Republicans in the Senate refuse to exercise that responsibility, I must act in the interest of the American people and exercise my authority to fill these positions on an interim basis." A recess appointment expires either at the end of the next Senate session or when a candidate is nominated and confirmed to the position.

Meanwhile, the AFL-CIO has filed a friend-of-the-court brief, supporting the



decisions of the two-member panel. The federation's argument is based upon a 2003 memorandum filed by the Bush-era Justice Department's Office of Legal Counsel, which stated that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." In 2007, just as two board members' terms were set to expire, the NLRB did exactly that.

The AFL-CIO brief states: "The long and the short of the matter is that Congress has provided that once the full Board has delegated Board decision making powers to a designated group of three or more members [which the Board did in December of 2007], two members of that group may exercise the delegated powers...."

No matter what happens with the Supreme Court case, now that Obama has made the recess appointments, the shape of the board is vastly different and much more sympathetic to the plight of working men and women. Workers will now be able to form a union more easily for the first time in years, as well as receive fair rulings on investigations into unfair labor practices.

It may not be EFCA, but it is a step in the right direction. ✉



Top: The Supreme Court recently heard arguments in a case that threatens to invalidate 600 NLRB rulings.

Above: Former AFL-CIO and SEIU labor lawyer Craig Becker testifies before Congress during his stalled nomination process.

Supreme Court photo by D.B. King