DON'T BE A NEWBIE: STAYING IN FRONT OF BIDEN'S NLRB

Presented by:

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Agenda

- Biden's National Labor Relations Board
- A Quick Review of NLRA/NLRB basics and why this matters to "employment" lawyers and non-union employers.
- "Back to the future" – the ~~Obama~~/Biden NLRB
- What is happening out in the trenches?

Setting the Table

Biden stakes claim to being America's most pro-union president ever

The Current Labor Board…

- NLRB consists of 5 members. Historically, President nominates 3/5 members aligned with their party subject to Senate confirmation.
  - However, he can do so only to fill a vacancy, or upon expiration of an existing Board member's term.
  - For most of 2021, the NLRB continued hearing cases with a Republican majority.
  - Currently 4 members (3 Dem, 1 Repub).
  - Chairman (McFerran) typically from White House's Party.
    - Wilcox previously served as Associate General Counsel of 1199 of the SEIU United Healthcare Workers East. Re-confirmed and re-sworn for 2nd term on 9/11/23 as part of a deal to expedite 2nd Republican member.
    - Prouty served as General Counsel for the SEIU Local 32BJ, (covers 150,000 members). Also served as General Counsel of the Major League Baseball Players Association (MLBPA) from 2013 – 2017 and as Chief Labor Counsel of the MLBPA from 2008 – 2013. Also previously served as General Counsel of UNITE HERE.

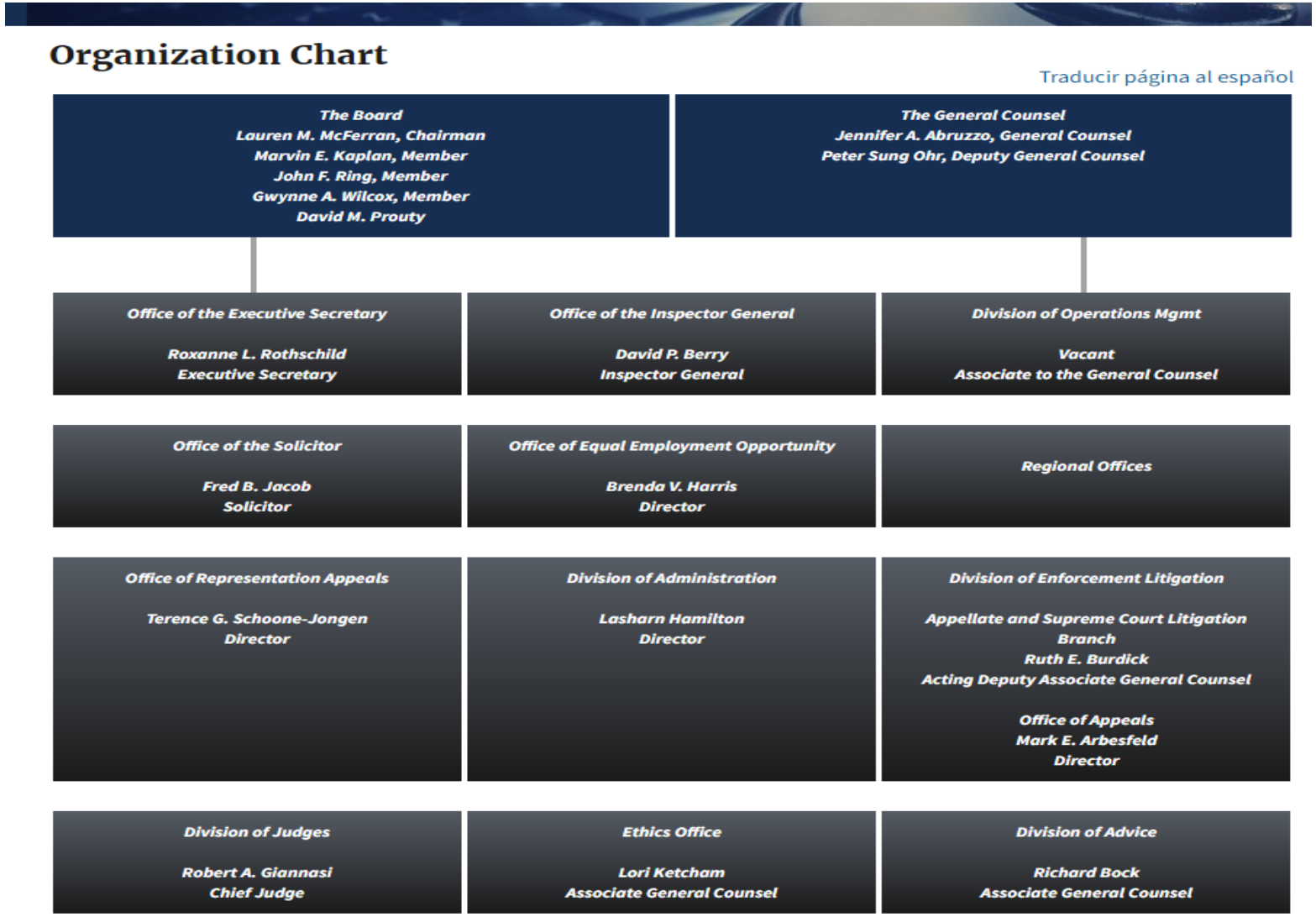
“Starting at left tackle, hailing from the GC office of the SEIU…”




- Names irrelevant
- Details irrelevant
- They don’t like you, they don’t care about legal precedent; they have an agenda and it ain’t management-friendly

NLRB STRUCTURE

- Federal executive agency
- Historically – changed policy via litigation as opposed to rule-making. Litigation is a time consuming process – NLRB issues decisions sometimes 2-3 years after incident.
- Some recent exceptions:
  - Quickie election rule; its reversal; and the reinstatement of quickie election rule
  - Joint Employer rule.



The General Counsel
– Jennifer Abruzzo (the one who can dream)

General Counsel

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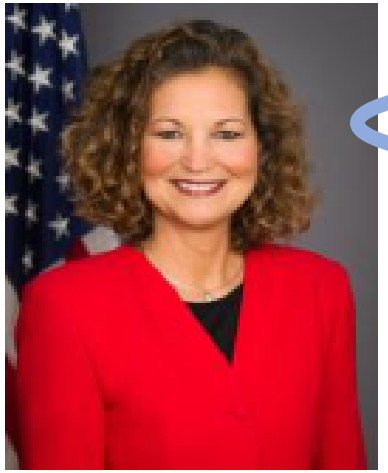


The General Counsel, appointed by the President to a 4-year term, is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases.

On July 22, 2021, Jennifer A. Abruzzo began serving as General Counsel for the National Labor Relations Board. Ms. Abruzzo had previously worked for the NLRB for over two decades, including as Field Attorney, Supervisory Field Attorney, Deputy Regional Attorney, Deputy Assistant General Counsel, Deputy General Counsel, and Acting General Counsel. Immediately prior to her appointment as General Counsel, Ms. Abruzzo served as Special Counsel for Strategic Initiatives for the Communications Workers of America.

Click here for a list of General Counsels since 1935.

For information on the operating status of Agency's offices and visitor requirements, click here.

- Think *<u>Legislative</u>* every bit as much as much as Judicial
- Activist, advancing WH agenda
- <u>NOT</u> THIS:

- MORE LIKE:

LET'S FOCUS ON WHAT IS THE LAW

"In the beginning…"

National Labor Relations Act

Why Start Here?

- *Aren't there all kinds of crazy new NLRB decisions we need to know about?*

Gotta start with NLRA so the cases then make sense (sorta)

The National Labor Relations Act applies to **all employers** (union and non-union) engaged in interstate commerce:

- Section 7 of the NLRA states the "core" series of rights given to ALL "employees"
  - Employees have the right…

    to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title."
- Very broad terms ("engage in other concerted activities") ("mutual aid or protection")
- Gives NLRB considerable discretion in how to interpret.
- Supervisors "no" (not "employees" under NLRA)
- Non-union employees: "yes" – Section 7 gives all employees these rights.

Section 8 contains "all the ways" employers can violate Section 7

Sec. 8(a)(1)	"Prohibits ER from interfering with, restraining, or coercing employees in exercising Section 7 rights…"	Catch-all for other ULPs TIPS
Sec. 8(a)(2)	"Prohibits ER from dominating or interfering with formation or administration of union…"	Company Unions Propping up weak unions
Sec. 8(a)(3)	"Prohibits ER from discriminating in order to encourage or discourage membership in union…"	Wright Line "same decision"
Sec. 8(a)(4)	"Prohibits ER from discriminating against an employee for resorting to, or cooperating with, the NLRB…"	
Sec. 8(a)(5)	"Prohibits employer from refusing to bargain in good faith with the union…"	During Bargaining Outside Bargaining (information requests, changing mandatory term without bargaining, direct-dealing)

Section 8(a)(1) [REMIX]

- *"Prohibits employer from interfering with … employees in exercising Section 7 rights…"*

- *§7 guarantees the right to "join, form, assist unions … and **engage in concerted activities for the purpose of … mutual aid or protection**."*

- **THIS IS THE BIG HOOK USED BY THE NLRB:**
  - Social Media cases
  - Handbook / policy cases: "respect," "confidentiality," "email policies," "civility"

- If we infringe on someone's right to engage in concerted activities aimed at mutual aid or protection, or assisting a union, beware…
  - More than 1 person / "mutual aid"
  - Must have some link to work or unions
  - Can't take action to discipline or "chill"
  - Threats still no-no (but ≠ harsh)
  - Applies to NON-UNION employees

2023 Accelerated the Unraveling of Trump NLRB Decisions

- *Baylor University Medical Center: u*pheld the legality of separation agreements that contain confidentiality and non-disparagement clauses

- *Reversed on February 21 – McLaren Macomb, 372 NLRB No. 58 (2023).*

  – *Now unlawful for employers to offer severance agreements that contain broad confidentiality and non-disparagement provisions.*

Accelerating the Unraveling of Trump NLRB Decisions

Behavior Policies – Conduct Towards Company & Supervisors

- *Lion Elastomers*, 372 NLRB No. 83 (May 1, 2023). Two heated arguments between employee and management during a grievance and safety meeting. Employee is disciplined for both – ultimately put on a last chance agreement and terminated. NLRB found that underlying disciplines were unlawful – hence LCA and termination became unlawful.
  - Reversed Trump era decision that held all discipline/discharge cases should be reviewed under NLRB's existing "dual motive" test. Now – discipline for abusive conduct towards management must be analyzed under "situation specific" test if employee is also engaged in protected concerted activity:
    - (1) the place of the discussion;
    - (2) the subject matter of the discussion;
    - (3) the nature of the employee's outburst; and
    - (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice
- Example: This termination was unlawful under Obama Board found:
  - Employee called owner of the Company a "f*cking mother f*cker," a "f*cking crook," an "a**hole," and "stupid"; telling him no one liked him and everyone talked about the owner behind his back; standing up while pushing a chair aside; and threatening that the owner would regret firing him – if he did).
  - Actions/words took place while employee was engaged in protected activity.

Principle(s) Underlying The Decision

- The NLRA is not a general civility code.
- "It imposes no obligation on employees to be 'civil' in exercising their statutory rights."
- The NLRA recognizes an employer's legitimate interest in maintaining order and respect in the workplace **BUT** that interest must be balanced against employees' Section 7 rights.
- "[t]he Board – not employers – referees the exercise of protected activity under the Act."

NLRB Celebrates Labor Day in August!

Reversing Trump NLRB decisions

- *The Boeing Company*: gave employers greater latitude in draft employee handbook language, including provisions such as no recording policies, confidentiality provisions, civility rules, social media rules and non-disparagement rules.
- Reversed on August 2 - *Stericycle Inc. 372 NLRB No. No. 113 (2023).*
  - New standard: Does a challenged work rule has a reasonable tendency to chill employees from exercising their Section 7 rights.
  - NLRB will now interpret a work rule from the perspective of the economically dependent employee who contemplates engaging in Section 7 activity to determine whether the rule/policy violates the NLRA. "This standard is consistent with workplace reality—employees ordinarily do not wish to risk their jobs by violating their employers' rules".
  - Employer can rebut this showing by establishing that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule

What Else?

- *Alstate Maintenance* (January 11, 2019):
  - Facts: 4 skycaps working at JFK. Supervisor tells one skycap that Lufthansa has requested assistance with a soccer team's equipment.
  - Skycap tells manager "**we** did a similar job last year and didn't get tipped."
  - When bus arrives with soccer team - - all four skycaps walk away
  - Manager finds other skycaps in terminal
  - All 4 skycaps are terminated
  - Trump NLRB Decision: terminations lawful – employees were not engaged in "protected concerted activity" because individual employees acted alone.

- Reversed on August 31, 2023: *Miller Plastic Products, Inc.* 372 NLRB No. 134 (2023).
  - At the all-hands meeting on March 16, 2020, Chief Operating Officer told employees that it was his belief that the Respondent would be classified as an essential business and outlined the health and safety measures taken by the company.
  - Employee spoke up and directly challenged COO, blurting out that "we shouldn't be working" and voicing concern over the Respondent's lack of proper precautions.
  - NLRB found employees COVID-related comments were concerted because they sought to bring "truly group complaints to the attention of management."
  - Was not only employee who raised concerns.
  - Discharge unlawful – Board will look at totality of the circumstances to determine whether employee is engaged in protected *concerted* activity.

Take Aways

- Not “beware”; just be aware

- Opportunity for HR/Org Health/Legal to help shape, guide, contribute more broadly
  - Policy development
  - Education, sensitizing

Confidentiality Policies

- Obama Board held the rules below were unlawful:
  - *Never publish or disclose the Employer's Confidential Information. Confidential Information means all information in which its loss, undue use, or unauthorized disclosure could adversely affect the Employer's interests.*
  - *Do not discuss customer or employee information outside of work, including phone numbers and addresses.*
  - *Sharing conversations overheard at the work site with your co-workers, the public, or anyone outside of your immediate work group is prohibited.*
  - *Discuss work matters only with other employees who have a specific business reason to know or have access to such information. Do not discuss work matters in public places.*
  - *Do not discuss your wage rate or other compensation information with others.*

- The above rules failed to state that they do not restrict Section 7 activity
  - For example – co-workers discussing salaries or working conditions is considered protected concerted activity – including discussing with a union organizer.
  - Above rules could be read as limiting those types of discussion ("never discuss work matters in public places").

Behavior Policies – Conduct Towards Company & Supervisors

- Following Behavior Policies previously were found to be unlawful under Obama NLRB:
  - *Be respectful to the **Company**, other employees, customers, partners, and competitors.*
  - *Employees shall not make defamatory, libelous, slanderous or discriminatory comments about the **Company**, its customers and/or competitors, its employees, or **management**.*
  - ***Disrespectful conduct** or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative, is prohibited.*
  - *Don't pick fights with coworkers online.*
  - *Do not make insulting, embarrassing, hurtful or abusive comments about other company employees online and avoid the use of offensive, derogatory, or prejudicial comments.*
  - *Do not send unwanted, offensive, or inappropriate emails*
- Employees reasonably would construe them to ban protected criticism or protests regarding their supervisors, management, or the employer in general.

Recent NLRB actions affecting organizing

American Steel Construction, 372 NLRB No. 23 (December 14, 2022)

- Return to "micro-units" under Obama era *Specialty Healthcare* decision which had been overruled by Trump NLRB.
- If a union petitions for an election among a particular group of employees, it merely needs to show the group represents a "readily identifiable" group based on job classifications, departments, functions, work locations, skills, or similar factors.
- Burden then shifts to the employer to demonstrate that additional employees "share an overwhelming community of interest" with the petitioned-for employees – challenging standard to meet.
- Impact of *Specialty Healthcare* was limited during Obama administration – but employers must be aware.

8/24/23: NLRB announces final rule "rescinding" 2019 election rules that survived court review – reinstates 2014 "quickie" election rules.

8/25/23: NLRB issues its *Cemex Construction Materials* decision

Quickie Election Timetable – Comparison

Event	Non-"Quickie"	Quickie Election Standard	Comments
Posting of Notice of Petition	5 business days after notice of hearing	2 business days after notice of hearing	
Statement of position and employee lists	8 business days after service of Notice of Hearing	7 calendar days after service of notice of hearing (noon the business day before the hearing)	RD's have limited discretion to postpone – "special circumstances" Must include full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing (alphabetized). If the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added (or excluded) to/from the proposed unit to make it an appropriate unit.
Pre-Election Hearing	14 business days from Notice of Hearing	8 calendar days from Notice of Hearing	Disputes over eligibility or inclusion generally not to be litigated; issues is "whether question of representation exists"

Event	Non-"Quickie"	Quickie Election Standard	Comments
Extensions of Hearing	Approved for Good Cause	2 business day extension for special circumstances Any additional days require showing of extraordinary circumstances	
Post Hearing Briefs	Permitted – due 5 business days after hearing. Hearing Officer has discretion to grant extension of 10 business days for good cause.	Only with special permission of RD	
Scheduling Election	20 business day waiting period (subject to court injunction)	"earliest practical day possible"	
Excelsior list (voter list)	2 business days after direction of election	Unchanged	***Voter list***: alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular "cell" telephone numbers) of all eligible voters.

Cemex Construction Materials

- Historically: if union obtains majority status (typically demonstrated simply by having a majority of employees sign union authorization cards) – union can demand recognition.

- If employer declined to recognize – union would file representation petition (RC petition) with NLRB seeking an election.

- Cemex: an employer violates Sections 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit…

  – unless the employer promptly files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A).

- Thus, an employer confronted with a demand for recognition based on union authorization cards signed by a majority of employees MUST **promptly (within 14 days)** file an RM petition to test the union's majority support and/or challenge the appropriateness of the unit or may await the processing of a petition previously filed by the union.

- If an RM petition is not filed (and assuming the union doesn't file and RC petition) and the union does have majority support (as reflected by signed authorization cards) – the Employer will violate Section 8(a)(5) if it fails to recognize and bargain with the Union.

Cemex Construction Materials

- If the employer commits an unfair labor practice that requires the setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order.
  - Major change – a re-run election will **NOT** be ordered – the employer will simply be ordered to bargain with the Union (assuming the union can demonstrate that it had majority support via signed authorization cards).
- Unilateral changes while the election is pending: if employer loses election the NLRB will find the employer violated Section 8(a)(5) by making those changes without bargaining with the union – because the employer failed to bargain with the union at the time it had majority status.
- Procedurally, an RM petition would follow a similar path to an RC election (representation petition filed by a union); the NLRB is just putting the onus on the employer to file the petition – not the union. The NLRB does not require the employer to have a "good faith doubt" as the union's majority status to file the RM petition.

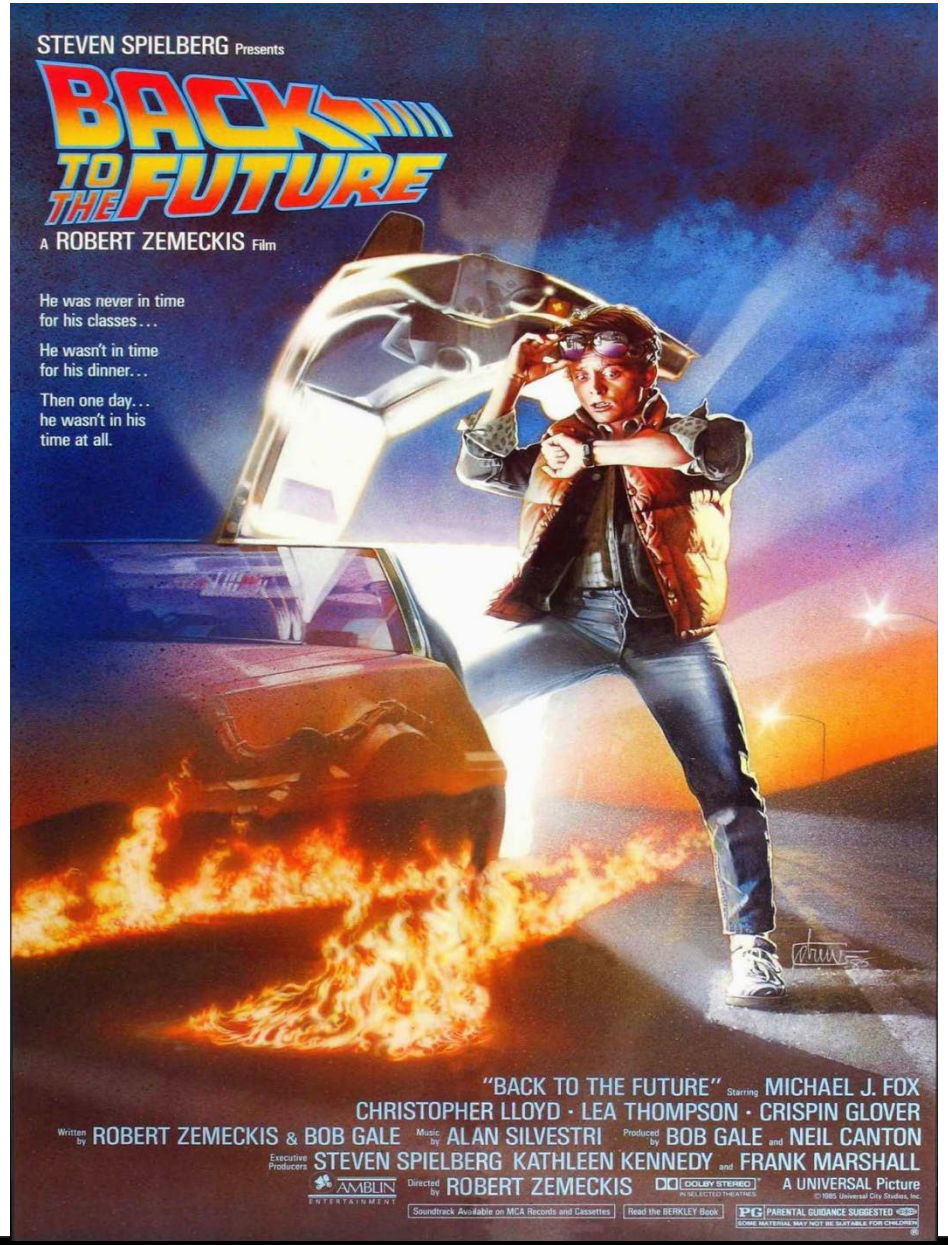
Cemex Construction Materials

- Cemex creates potential trap for smaller employers without significant HR or legal support:
  - Delay requesting an RM election (14 days),
  - Management team, perhaps unknowingly, violates the NLRA in communicating with employees about the union organizing efforts, or takes adverse action against employees.

- Two takeaways:
  - Early detection/response to rumors of union card signing
    - Consider “don’t sign the card” and other inoculation measures
  - More important than ever to make sure site management and front line supervisors know the “rules of the road” regarding what they can and cannot do and say during a union election campaign

So where are we?

- Return of micro units
- Return of quickie elections
- Cemex issues



Snapshot of The Landscape - 2023

Current Environment

- Tough economy, “grass greener”
- Some and not so over-hyped union gains
  - No Starbucks site has successfully negotiated a CBA; 3 sites have filed decertification petitions
- Worker militancy (COVID-19 backlash; bruised corp cred – re: profits)
  - UAW, SAG and Writers Guild strikes
  - UPS
  - Unions viewed as a “social” movement by millennials/Gen Z
- Less counter-balance / skepticism of “union” (cf AFL-CIO survey)

Shift In Tactics

- Good use of social media
- Compelling videos
- Independent unions
- More aggressive employees (recording meetings, sharing info between sites etc.)

Wages:

Our wage improvements reflect the hard work and dedication of Steelworkers though the pandemic and represent the most dramatic raise the steel industry has seen in at least two generations.

The tentative agreement provides general wage increases according to the following schedule.

Labor Grade	Current	09/04/22	09/3/23	09/01/24	09/07/25
Percent Increase		8%	4%	4%	4%
1	$23.47	$25.35	$26.36	$27.42	$28.51
2	$25.69	$27.75	$28.86	$30.01	$31.21
3	$28.25	$30.51	$31.73	$33.00	$34.32
4	$29.73	$32.11	$33.39	$34.73	$36.12
5	$31.58	$34.11	$35.47	$36.89	$38.37

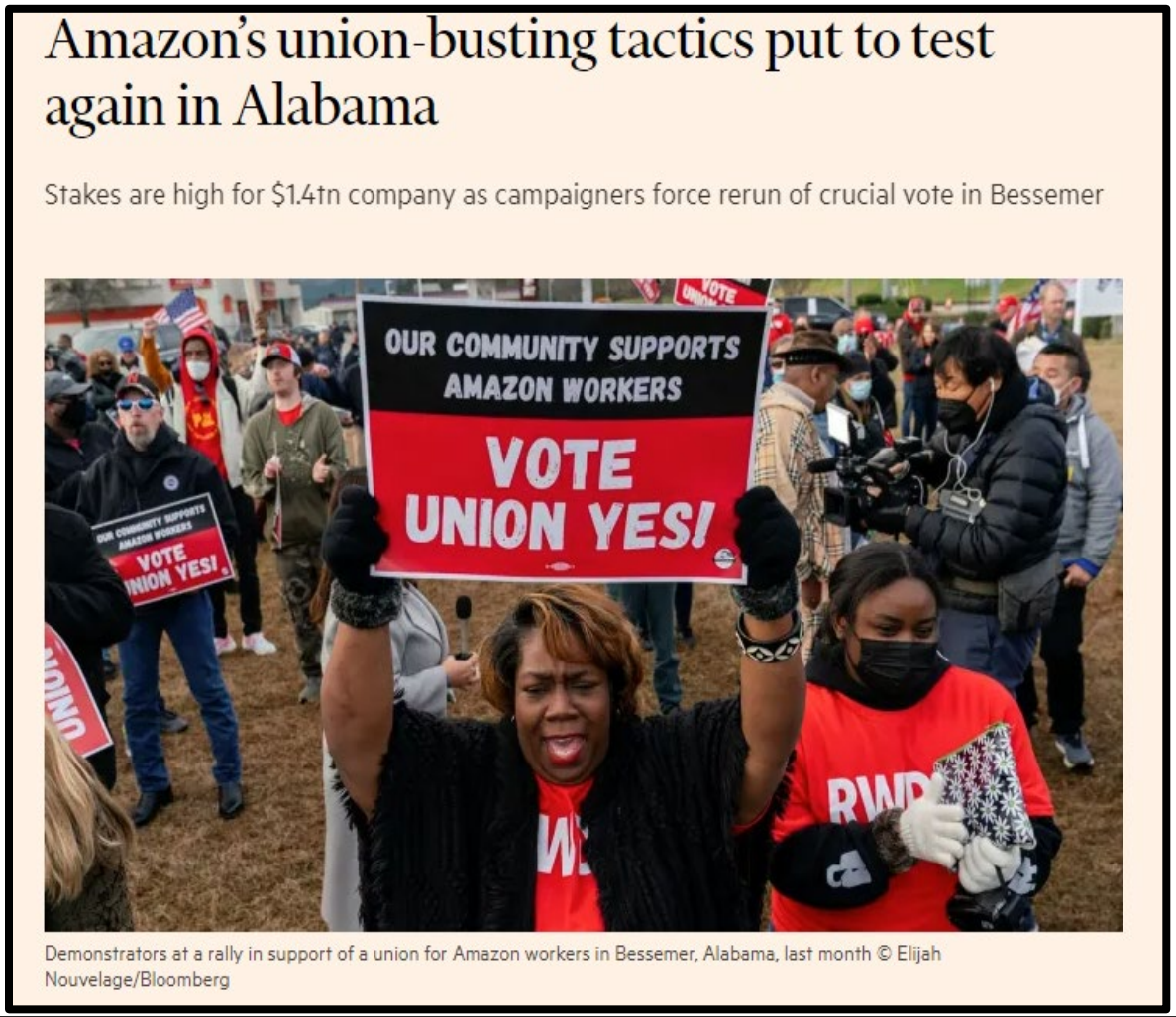
Note: *The Starter Rate of Pay (reduction in the base rate during probation) has been suspended for the term of the agreement.*

Vacation:

Our committee successfully bargained to improve vacation provisions for everyone from new employees who complete their probationary period to workers now eligible for a newly added sixth week of vacation with 30 years of service or more.

Snapshot of The Landscape - 2023

- Considerable “pro-union” sentiment out there:
  - Gallup poll (8/30/22): 71% of Americans approve of labor unions
  - Highest approval rating since 1965
  - 75,290 employees organized in 2022
    - Compares to 72,177 during 2020 AND 2021
  - 764 union election wins in 2021
  - 1,196 in 2022 (76% success rate in 1,573 elections held)
    - Statistical tie for highest success rate on record.



Amazon’s union-busting tactics put to test again in Alabama

Stakes are high for $1.4tn company as campaigners force rerun of crucial vote in Bessemer

Demonstrators at a rally in support of a union for Amazon workers in Bessemer, Alabama, last month © Elijah Nouvelage/Bloomberg

Starbucks lesson

Starbucks workers were originally drawn to the company because of its culture

Starbucks has long prided itself on being a standout employer. Indeed, the generous benefits and socially progressive culture are a big part of what drew Tim Swicord, Gailyn Berg, Megan Gaydos and Claire Picciano to find jobs with the company in Springfield, Virginia. Their Starbucks store is voting this week on whether to organize.

Starbucks was seen as:

- Progressive employer particularly re: hiring practices
- Outstanding benefits (college tuition, flexible scheduling, health benefits even for PT workers)
- Good treatment of employees
- Employee engagement

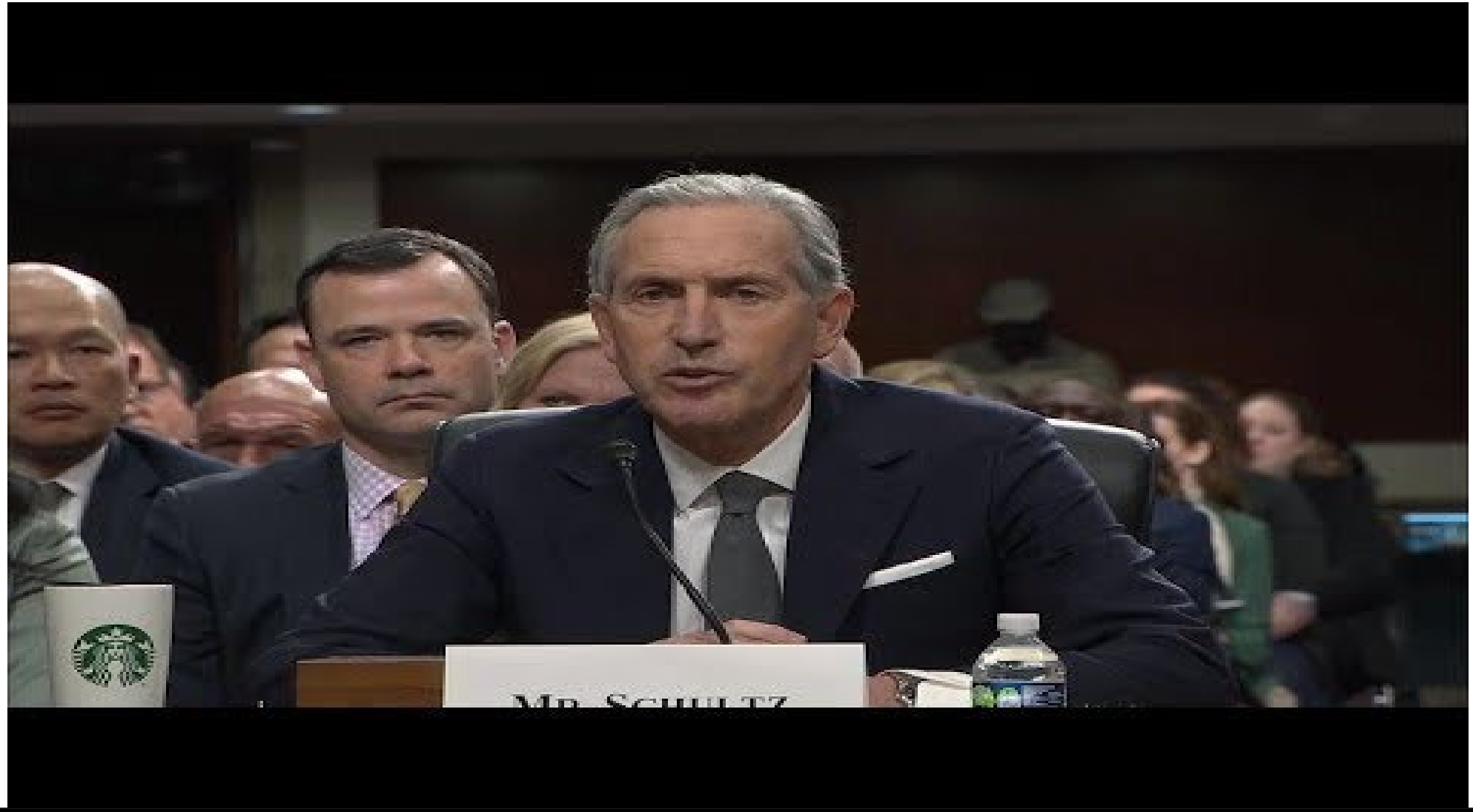
Starbucks Today

- 379 union elections since January 1, 2021.
- As of April 28, 305 union wins.
- One location at a time organizing approach.
- Workers cite:
  - “union busting” tactics
  - Arbitrary scheduling practices
  - Eliminating pandemic benefits while recording record breaking sales
  - Failure to protect employees from customers during pandemic backlash (masks/vaccines)
  - Desire for more pay/hours
  - Pandemic safety & health issues

Starbucks workers’ union drive, spreading across the U.S., has reached the company’s Seattle home

BY JOSH EIDELSON AND BLOOMBERG
February 21, 2022 5:23 AM EST

And you probably want to avoid this…



Grass Roots Organizing …one example

State Of Union Organizing - 2023

NLRB statistics as of 6/30/23:

- 1,126 RC petitions filed (86 involving Starbucks)
  - 1188 RC petitions same period 2022
  - 874 RC petitions same period 2019
- 811 NLRB RC elections conducted (73 involving Starbucks)
  - 804 RC elections same period 2022
  - 576 RC elections same period 2019
- 650 union election wins (80% win rate) (60 union wins at Starbucks)
  - 622 same period 2022 – 77.5% union win rate
  - 436 same period 2019 – 67% union win rate

Petitions by size of voting unit (2023)

1-10 employees:	342
11-25 employees:	328
26-50 employees:	195
51-100 employees:	148
>100 employees:	113

Average days to election:

2023: 60 days (skewed by 29 elections >200+ days including 7 elections >500 days)

2022: 71.3 days

Midpoint election days: 43 days

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Timeline – Union Campaign

- Employee discontent leads to contact with Union
- Union & employees develop message to begin card signing
- Union files NLRB petition requesting election (but….Cemex).

Union goals….

1. **Get authorization cards signed.**
2. **Win the election**
3. **Try to bargain a first contract**

Questions?

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