State of the Union: Developments With Organized Labor and the NLRB

Presented by:

Tom Davis

Pre-COVID: Workplace Unstable

Super Charged by COVID-19

Starbucks Workers United (286 Election Wins)

Election Petitions Up 53%, Board Continues to Reduce Case Processing Time in FY22

Office of Public Affairs
202-273-1991
publicinfo@nlrb.gov
www.nlrb.gov

October 06, 2022

In Fiscal Year 2022 (October 1, 2021-September 30, 2022), 2,510 union representation petitions were filed with NLRB's 48 Field Offices—a 53% increase from the 1,638 petitions field in FY2021. This is the highest number of union representation petitions filed since FY2016.

- Petitions 2022 – 2,510/1400 (76.6% union win rate)(955 in units of 1-49); SEIU – 386 (4 x 2021) (82% win) (2/3 Starbucks)
- Starbucks – 358 (3%) – 21% of RCs at NLRB – 2023 pace slowed but still continues
  - Focus 10(j) injunctions (successful with 2 of 3)
  - Massive ULP trials – impression of surveillance, bargaining order, CEO/VP required to record Video of Notice
  - Sen. Sanders – Obtained agreement Starbucks CEO to testify Senate/investigate labor law violations by major corporations (maintain profile for The PRO Act
- 1st half FY 2023 increase in petitions continues – 1200 up from 1174
- Number of ULP cases up too – 9,592 up from 8,275

Is this representative of a larger movement?

Gallup Data

- Perceptions about unions – 71% of Americans “approve of labor unions” (77% of those 34 and younger) (64% pre-COVID) (highest since 1965) (75% in 1950’s) (below 50% in 2009)
- Among non-union workers – 58% (65%) “not interested at all” in joining a union vs. 11% “extremely interested”
- Among union members, why do you support unions?
  - Better pay and benefits – 65%
  - Associate rights and representation – 57%
  - Job security – 42%
  - Pension and retirement – 34%
  - Improved work environment – 25%
  - Fairness and Equity at work – 23%
  - Safety and health – 9%

Other Observations

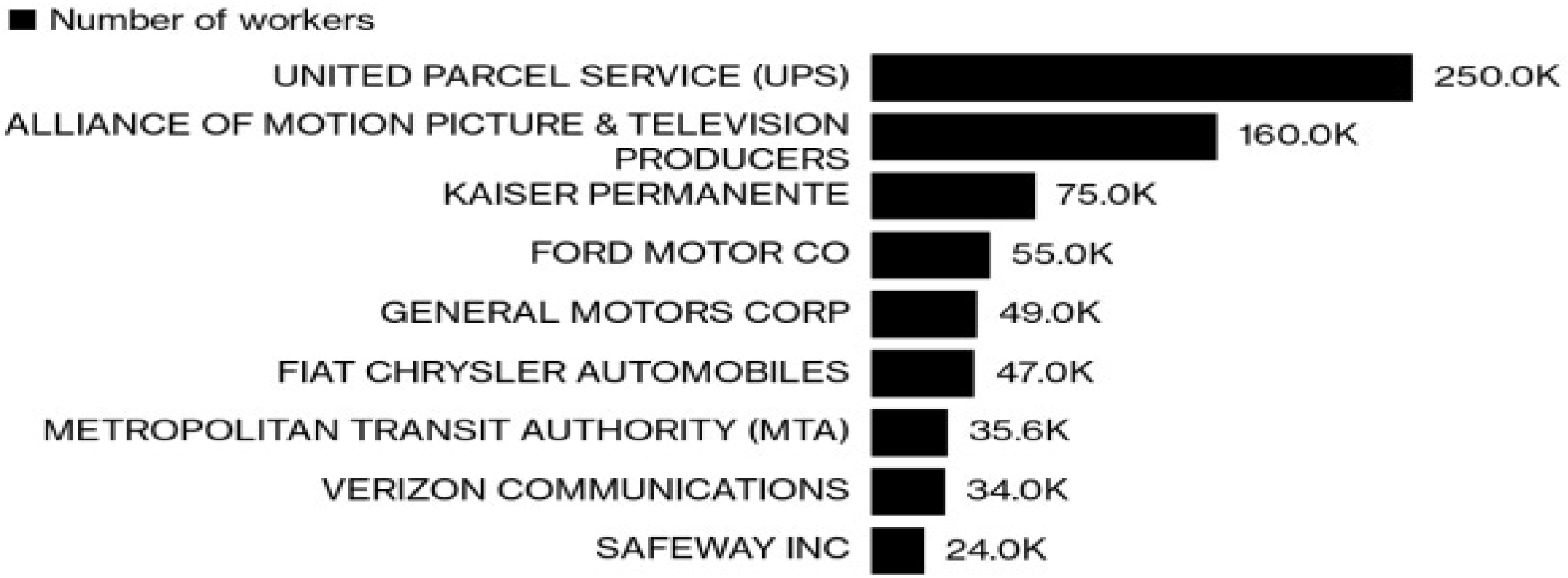
- 60% of workers under 30 – believe collective action would help solve work problems (49% overall)
  - Associates with management issues and concerns over work culture most supportive of collective action
  - Elevated after recent highly visible social activism campaigns
- Disconnect between what they see as employer's public messaging and their on the ground treatment by leaders
  - " I tried the open door and it is not working"
- Who Associates trust – seems to be flipped – blind trust for unions over management – don't know much about unions

Union Membership 2022

- Dropped to an ALL TIME LOW – “Lowest on record”
- All work settings: **10.3%** down from 10.6% in 2021
  - Private-sector workers: **6.0%** down from 6.1%.
  - Public-sector workers: 33.1%
- Statistics: Added 273,000 union jobs (1.9%) but economy added 5.3 million (3.9%)
- Union membership not likely to ever grow – product of pure statistics – far more jobs created than new union members

Large Contract Expirations in 2023

At least 1.6 million workers will face contract expirations



Source: Bloomberg Law

Note: 1.6 million figure not fully reflected in chart data. Expiration dates recorded at the time the existing contract was signed.

Bloomberg Law

The PRO Act

The Current Board

(R)
Marvin Kaplan
(8/10/17 to 8/27/25)

(D)
Lauren McFerran
(Chair)
(12/17/14 to 12/16/24)

(D)
David Prouty
(7/28/21 to 8/27/26)

(D)
Gwynne Wilcox
(7/28/21 to 8/27/23)

McLaren Macomb

- Confidentiality and non-disparagement in Severance Agreements
  - But likely applies in other contexts as well – employment, settlement, non-compete, etc.
  - *Stericycle* - preview to the standard for reviewing workplace policies
- Severance agreement unlawful if its terms "have a reasonable tendency to interfere with, restrain, or coerce employees in exercise of Section 7 rights"
- ***Proffer is the unlawful action***
- Employer animus against Section 7 activity irrelevant
- ***Section 7 rights extend to former employees***
- ***Savings clause option – but must mention "broad panoply of Section 7 rights"***

McLaren Macomb

- Confidentiality/non-disclosure – eliminate broad language and focus on trade secrets and possible non-public proprietary information (but for limited duration)
  - Possibility to require that financial terms of settlement be kept confidential (GC Memo 23-05 refers to OM 07-27 – Non-Board Settlement Agreements)
- Avoid reference to disparagement or defamation – "**Comments to others" protected unless "maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity"**

Thryv, Inc. – Consequential Damages

- NLRA is a remedial statute – make-whole relief
  - Cease and desist, post (and distribute electronically) a Notice to Employees and reinstate with back pay less interim earnings
- Now make-whole relief includes “the direct or foreseeable financial harms” caused by ULP – “consequential damages” – as creative as you want to be
- Items like – cost of job search, out of pocket health care expenses, credit card late fees, cost of lost car or home, reimbursement of organizing costs, increased access to facility/contact data, union selection of employee to “reinstate”
- For bargaining violation, what you would have paid if bargained in good faith
- GC must prove – amount of financial harm, that harm was direct or foreseeable and that harm was due to the ULP
- Rejected argument for emotional distress damages

American Steel Construction Inc.
Return of Micro-units

- Reversed *PCC Structurals* (are employees in requested unit "sufficiently distinct") and return to *Specialty Healthcare* standard "overwhelming community of interest"
- Initial issue – Do employees in requested unit (1) share "internal community of interest," are they (2) "readily identifiable as a group looking at job classification, departments, functions, work locations and skill and is that group (3) sufficiently distinct." – "Homogeneous, identifiable and separate or sufficiently distinct."
- If yes, to expand must show "overwhelming community of interest" between requested group and group to be added – more than just the existence of a community of interest
- With "heightened burden" on party seeking to expand

Tesla, Inc. - Dress Code - Uniform

- **Team Wear Policy** – required black shirt with logo – mutilation-free – visual key - some exceptions – evidence not consistently enforced prior to union activity
  - Facially neutral but implicitly (and as enforced) prohibited substitution of black UAW shirt
- **Presumptively unlawful** – "Any time an employer restricts the display of union insignia, that restriction is unlawful unless the employer can prove special circumstances"
- Maintenance of a uniform policy alone does not justify prohibition: even if consistently enforced in a nondiscriminatory fashion
- **Special circumstances**:
  - Jeopardize employee safety
  - Damage machinery or products
  - Exacerbate employee dissension
  - Unreasonably interfere with a public image employer established per business plan/appearance rules
- Narrowly tailored to serve legitimate interest that outweigh Section 7 right
- **Reversed Trump Board decision** – regulate (size) but don't prohibit display of union insignia – special circumstances did not apply – followed *Boeing* – balancing of employer interest against limitation on Section 7 rights
- Now back to special circumstances in all cases of prohibition

NLRB General Counsel

- 4-year term (7/21-11/25)
- August 2021 – Memorandum GC 21-04 - “Mandatory Submissions to Advice”
- Targeted 46 issues for review and reversal
- Has cases pending for all but 15
- Soliciting unions to bring those issues to her

The Right to Refrain from Captive Audience and other Mandatory Meetings

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 22-04 April 7, 2022

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: The Right to Refrain from Captive Audience and other Mandatory Meetings

In workplaces across America, employers routinely hold mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their statutory labor rights, especially during organizing campaigns. As I explain below, those meetings inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech. I believe that the NLRB case precedent, which has tolerated such meetings, is at odds with fundamental labor-law principles, our statutory language, and our congressional mandate. Based thereon, I plan to urge the Board to reconsider such precedent and find mandatory meetings of this sort unlawful.

The GC asked the Board to require safeguards when employers hold meetings to discuss workers' Section 7 rights:

1. The employer must explain the purpose of the meeting.

2. The meeting must occur in a context free from employer hostility to the exercise of Section 7 rights.

3. The employer must assure employees that:
   - attendance is voluntary,
   - if they attend, they are always free to leave,
   - not attending won't result in negative consequences (including loss of pay if the meeting is during employees' regularly scheduled working hours), and that attendance will not result in rewards or benefits.

NLRB General Counsel Seeks to Scrap 50 Years of Precedent and Require Card Check Recognition

Tri-cast Inc. (1985)
Limits on Campaign Communications

- Unionization can make work relationship "more onerous and acrimonious"
- No longer able to work informal, person-to-person basis
- Will have to run things by the book with a stranger
- Will not be able to handle personal requests as in the past
- *Midland National* – NLRB does not look into misrepresentations or the truth or falsity of what is said
- GC wants – "statements that explicitly misrepresent rights of employees … or impliedly threaten employees will no longer be able to have a direct relationship with management … with union" unlawful

Tri-cast Inc.

Limits on Campaign Communications

- “Union means giving up legal right to deal directly with me regarding working conditions”
- “Means giving union right to decide what is most important to raise with us”
- “With a union you can no longer bring issues to HR/me; means all your issues must go through the union”
- “You can no longer just come to me directly. You will have to go to the union.”
- “If you sign a union card, you will be giving up your right to speak for and represent yourself.”

Key Points

- Under NLRA Section 9(a) – Even represented employees have a right to adjust grievances directly with employers
  - As long as consistent with CBA
  - Union has opportunity to participate
- But cannot “deal directly” with employer over wages, benefits and working conditions – those conversations have to be with union
- Can bring issues to me
  - But cannot resolve them in the same way we can today
  - Duty to bargain with union
  - Limited by terms of CBA
  - May have to involve the union in discussion

GC Memo 23-02 - Electronic Monitoring and Algorithmic Management of Employees

- Institute new monitoring tech in response to Section 7 activity
- Use of existing technology to obtain information concerning union activity/PCA, (reviewing security tapes or monitoring social media (even if public) (Act in a way out of the ordinary to observe union activity)
    - Also be a violation to create an impression that one is doing so
- Spending money on surveillance technology to obtain information about the activities of employees or a union or otherwise spending money to interfere with employees' rights to organize without filing a Form LM-10
    - If you are working with a third party to monitor social media activity, and part of your monitoring involves looking at PCA, Abruzzo seems to be saying you'd have to file an LM-10
- Discipline for employee protests of surveillance technology or algorithmic management technology
- Attempting to block or content moderate employee conversations – "dismantle or preclude employee conversations or isolate union supporters or discontented employees to prevent Section 7 activity"
    - Likely targeting employers who disable or shutdown certain words or conversations on slack channels or other electronic communication platforms

PROTECTED CONCERTED ACTIVITY

Developments with PCA

- NLRA protects union activity
- But also "**concerted activity**" for "**mutual aid or protection**"
- "Engaged in with or on the behalf of other employees"
- Two or more associates talking or
  - ONE associate bringing a group concern to management
- Individual action "seeking to initiate group action" or "with a purpose of furthering group goals"
- Not individual gripe

Expanding “Mutual Aid or Protection”

- For mutual aid or protection
  - Effort to “improve lot as employees”
  - Issue employer able to control
- Associate advocacy may be found to have the goal of “mutual aid or protection” even when the associates have not explicitly connected their activity to workplace concerns.
- Political and social justice advocacy is for “mutual aid or protection” when it has a DIRECT NEXUS to associates’ interests as associates.

Inherently Concerted Activity

- Concerted
- Associate discussions of certain **“vital elements of employment”**
- Discussions of wages, changes to work schedules
- But possibly also
  - Job security
  - Workplace health and safety
  - Racial discrimination (BLM)(Societal but what if no connection to work place?)
  - Gender and pronouns

In the queue …

- New rule to evaluate legality of workplace policies (*Stericycle)*
  - Move away from balancing and toward potential to *chill*
- Independent Contractor
- Joint Employer test
- Confidentiality during workplace investigation*s*
- Non-competes and non-solicitation language
- *Weingarten* rights in non-represented work places


Questions?