

Block on NLRB Nominees May Mean Trouble for Labor Lawyers



William E. Hannum III
Kevin Brusie Photography

By Kimberly Atkins

For the National Labor Relations Board, next year could be, as Yogi Berra put it, *déjà vu* all over again.

Just last year, the U.S. Supreme Court ruled in *New Process Steel v. NLRB* that the normally five-member board, which is responsible for enforcing federal labor laws, acted without authority when it handed down nearly 600 decisions with only two active members.

Today the NLRB has four members. But if members of the Senate, angered over recent NLRB actions, block President Barack Obama's attempts to fill those vacancies, the Board could again drop to two members, rendering it unable to issue decisions.

And labor attorneys on both sides are preparing for the fallout.

"Having a Board situation that is so unstable creates an enormous amount of uncertainty and makes it impossible to give clients timely and reliable advice," said Victor T. Geraci, a member in the Cleveland office of McDonald Hopkins, where he represents employers.

Political football

The terms of two of the four current members of the NLRB are set to expire soon: Board Chairman Wilma Liebman's term expires at the end of August, and member Craig Becker's term expires Dec. 16.

Recent NLRB actions have drawn vocal criticism from Republican lawmakers, making very real the possibility of a block on nominees for those vacancies.

In addition to delaying or blocking a confirmation vote on nominees, Senate Republicans could use a parliamentary procedure to prevent Obama from filling the vacancies through recess appointments.

Earlier this year, GOP senators prevented the Senate from adjourning for the Memorial Day break by refus-

ing to adjourn by unanimous consent, leaving the Senate in pro-forma session. That move prevented Obama from making appointments without Senate consent.

And given the recent political rancor over actions by the NLRB, an attempt to block Obama's nominees – and strip the agency of much of its power – is more than a remote possibility.

"What's happening now is the routine prosecution or administration of the [National Labor Relations] Act is being turned into this political football," said Laurence M. Goodman, a partner in the Philadelphia office of Willig, Williams & Davidson who represents unions. "These types of things haven't been attacked in the past in the way they have been recently."

The controversy flared after the NLRB's general counsel brought what could be the largest labor lawsuit this century against Boeing Co., alleging its decision to shift operations from a union plant to a non-union shop in another state constituted an unfair labor practice.

The Republican-controlled House Committee on Oversight and Government Relations

responded by calling a hearing in June titled "Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise."

The committee's chairman, Rep. Darrell E. Issa, R-Calif., called the NLRB's lawsuit "an unacceptable course of action" that "exceeded their statutory authority to pursue a politically driven agenda."

But in his testimony at the hearing, NLRB general counsel Lafe Solomon defended the Boeing suit, saying that "in the absence of a mutually acceptable settlement ... both Boeing and the Machinists Union have a legal right to present their evidence and arguments in a trial and to have those issues be decided by the Board and federal courts."

Soon after, the agency announced a proposed rule to speed up the timeframe for unionization elections and postpone litigation over voter eligibility until after the election, drawing more ire from congressional Republicans and business groups such as the U.S. Chamber of Commerce, which is considering seeking an injunction against the agency should the rule be finalized.

Given these controversies, labor lawyers say they are preparing for Senate Republicans to push back on NLRB nominees.

“I think that Republicans and certainly the far right would like nothing better than to shut the NLRB down by blocking any attempt at filling those vacancies,” said William Hannum, a partner at the management-side labor and employment firm Schwartz Hannum in Andover, Mass.

Uncertainty looms

The situation has created a headache for labor attorneys.

“The problem from the standpoint of practicing law is that we need to make judgment calls on a regular basis,” Geraci said. “We have to make those judgments for our clients, who are paying for that advice. The ability to predict future action in circumstances where you don’t even know the number of board members there will be makes the job that more much more difficult.”

If the NLRB’s membership falls below a quorum, it won’t halt most labor litigation. Agency hearing officers and regional directors at NLRB regional offices will still adjudicate disputes. But appeals of those rulings will sit in

limbo until the NLRB has the authority to rule on them, causing a bottleneck effect that can make the already lengthy labor litigation process even longer.

“The impact [on labor lawyers] really is the uncertainty that it brings to the process,” Goodman said. “From a union point of view, it gives employers the ability to delay what is already a long, drawn-out process in many situations.”

There are also some unanswered questions about just what the agency will be able to do.

“There is still an open question as to whether or not the general counsel will be able to pursue injunctive relief,” said Douglas Darch, a partner in the Chicago office of Baker & McKenzie.

Currently, the general counsel must seek authorization from the board to pursue injunctions. When the NLRB previously fell to two members, that authority was delegated to the general counsel, a move that was condoned by the 4th, 5th, 8th and 9th Circuits, but the Supreme Court has yet to consider that question.

“I don’t know if [those rulings] survive after New Process Steel,” Darch said.

Who would be harmed?

Lawyers are split on who would be hurt more by a potential NLRB shutdown – unions or management.

“I think the unions are probably going to come out ahead” in the event the Board loses its quorum, Hannum said. “[The agency] is leaning in union’s favor at the moment. ... To the extent that board agents can influence a case, they will be judge and jury until the Board resumes functioning. So if you file a case with a board agent or regional director who is coming down on the union side more often than not, you are going to be stuck with that decision for a while.”

But the union won’t always win, Hannum said, because in “a lot of cases, the employer might be happy to sit around and wait to see if the Board makes them post a notice.”

Goodman said any Board shutdown would be a win for management, not unions.

“It’s hard to imagine virtually any situation where a delay in the process wouldn’t benefit management,” Goodman said. “The board [proposed] rulemaking to speed up the election process that already exists [because] that process is too slow and has too many delays. To add delays and to add uncertainty over the ability of the parties to get a deci-

sion from the board benefits management because it maintains the status quo, where management is in control.”

Darch noted that the possibility of a loss of a quorum might spur a flurry of enforcement actions against employers before the Board falls below three members. But that also leads to more unanswered questions.

“Let’s say an enforcement action is filed properly before a three-member board,” Darch said. “A lot of enforcement actions end up settling. Can a two-member board properly accept a settlement in a properly filed enforcement action? I don’t know the answer to that question.”

At any rate, lawyers are not holding their breath for a compromise between the Obama administration and lawmakers to get the vacancies filled quickly, and without roadblocks.

“Think about the [Federal Aviation Administration] shut down,” Hannum said. “If they are willing to shut the FAA down and lose \$30 million a day [in taxes], then forget it. The Board doesn’t stand a chance.”

Questions or comments can be directed to the writer at: kimberly.atkins@lawyersusaonline.com