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LEGAL ALERT

Court Strikes Down NLRB "Quickie Election" Rule

On May 14, 2012, the U.S. Chamber of Commerce and the Coalition for a Democratic Workforce dealt yet another blow to the National Labor Relations Board, securing summary judgment in their challenge of the NLRB's expedited-election rule. In striking down the rule, the U.S. District Court for the District of Columbia declined to rule on the merits of the case, choosing instead to focus upon the absence of a lawful quorum at the time of the rule's passage.

This comes on the heels of a recent decision from the U.S. Circuit Court of Appeals for the District of Columbia enjoining the Board's notice-posting requirement, pending briefing scheduled over the summer and oral argument later this fall. We reported on that development in a prior Legal Alert, which you can view on our website.

The Basis Of The Ruling

The NLRB had previously established an implementation date of April 30th for its expedited-election rule, which is designed to streamline the representation process by postponing resolution of a number of voter-eligibility issues (including supervisory status) until *after* the tally of ballots. An 11th hour petition by the U.S. Chamber for a stay in that implementation date was denied by the D.C. District Court, on the theory that the Board would be unable to schedule any elections prior the anticipated date of the court's ruling. While this led some to speculate that the rule would proceed unscathed, the court made clear at that time that it intended to evaluate the merits of the Chamber's claim by mid-May.

The expedited-election rule has been controversial from the outset, due largely to the fact that it purports to overturn decades of precedent without so much as a single vote of Congress. The controversy intensified when the Board hastily attempted to finalize the rule in the midnight hour – just days before then-member Becker's recess appointment was set to expire, and only hours after it was put before lone Republican Member Hayes for his consideration. Shortly thereafter, on December 16 of last year, the Board voted to approve the final rule by a margin of 2-0, without any vote or formal participation from Member Hayes.

It was ultimately the mad rush to finalization that became the rule's undoing. In yesterday's decision, the district court chose to focus exclusively on this phase of the process, and specifically upon the lack of a quorum – at least three participating members – in striking down the rule on procedural grounds. As the court noted at the outset of its decision, "because no quorum ever existed at the pivotal [December 16th] vote in question, the Court must hold that the challenged rule is invalid.

The court was quick to point out that it saw no need to rule on the merits of the plaintiffs' contentions. Moreover, it suggested that, "it may well be that, had a quorum participated in its promulgation, the final rule would have been found perfectly lawful. As a result, nothing appears to prevent a properly constituted quorum of the Board from voting to adopt the rule if it has the desire to do so. In the meantime, though, representation elections will have to continue under the old procedures."

Many Questions Remain

While this decision does indeed deal yet another blow to the NLRB in its efforts to secure pro-labor reforms by way of administrative rule-making, it leaves a number of questions unanswered, such as: 1) Will the Board take heed of the decision (as expected) by suspending efforts to implement the expedited election rule in the short-term, pending its inevitable appeal? 2) If so, will it take interim steps to "rubber stamp" its previously invalid decision by virtue of a proper quorum of current Board

members? 3) Does the Board have the votes needed to secure its passage yet again? 4) Would this simply lead the parties back to the same court for a ruling on the merits of the case? 5) Would the current Board's ruling ultimately be upheld in the face of ongoing challenges as to its own authority, given the fact that a majority of its members assumed recess appointments during a *pro forma* session of Congress?

At the moment, the only thing that remains clear is that the status of the Board's quickie-election rule will remain in question over the days and weeks to come. Still, it would appear that employers have secured at least a temporary reprieve from ambush elections, during which time they remain well-advised to continue exploiting this window of opportunity to fine-tune their employee relations programs in an ongoing effort to render third party representation unnecessary.

For more information on this development, and how to help union-proof your company in light of these ongoing developments, contact your regular Fisher & Phillips attorney, or visit our website at www.laborlawyers.com.