

MODERN MANAGEMENT

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UNION ELECTIONS RULE ISSUED BY DEPLETED NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board released a final rule amending its representation election procedures on December 21 (published in the Dec. 22 *Federal Register*) by reducing drastically the amount of time between union election petitions and the elections themselves. In anticipation of this move, business groups had filed a lawsuit on December 20, seeking to enjoin the agency from enforcing the rule. The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace filed a lawsuit in federal district court (D.D.C., No. 1:11-cv- 02262) alleging that the final rule violates the National Labor Relations Act, exceeds the Board's statutory authority and is unconstitutional in that it violates the rights to free speech and due process. Further, the complaint states that the Board's actions are "arbitrary, capricious, and an abuse of discretion" due to the fact that the rule was signed by only two members of the NLRB. The U.S. Supreme Court held in *New Process Steel LP v NLRB* that the authority of the five-seat board to issue final decisions cannot be delegated to a panel with fewer than three members.

The final rule makes seven changes to NLRB procedures in representation cases, including:

- Amending regulations to state that the purpose of pre-election hearings is to determine whether a question concerning union representation exists that should be resolved in a secret ballot election.
- NLRB hearing officers' authority to limit the evidence presented in such a hearing, to genuine issues of fact material to the existence of question concerning representation.
- Making post hearing briefs provisional on permission of a hearing officer, not as a matter of right.
- Amending Section 102.67 and section 102.69 of the Board's rules to eliminate parties' right to seek Board review of regional directors' pre-election rulings, while allowing parties to seek post-election review of such rulings.
- Eliminating language in NLRB's current statement of procedure that recommends a regional director not schedule balloting within 25 days of directing an election.
- Amending Section 102.65 of the Board's rules to provide that requests for special permission to appeal a regional director's pre-election ruling will be granted only in extraordinary circumstances.
- Amending Board rules to make NLRB review of post-election disputes discretionary.

Mark Pearce and Craig Becker, the two Board members to sign the final rule, defend it as being fair and necessary, but admit that many organizations opposed the original rulemaking proposal because it would unreasonably shorten the time between the filing of an election petition and the date of actual balloting. They contend that the "final rule simply removes unnecessary barriers to prompt resolution of questions of representation by reducing needless legislation."

House Education and the Workforce Committee Chairman John Kline (R-Minn.) said the board ignored the "will of Congress" and "objections raised by countless organizations representing workers and employers" in delivering its final "ambush election rule to its Big Labor allies." Sen. Mike Enzi (R-Wyo.) will challenge the rule via the Congressional Review Act (CRA). He said, "the rule issued today by the NLRB will allow union bosses to ambush employers with union elections before employers have a fair chance to learn their rights and explain their views to employees, as required by law."

To complicate things further, Board member Becker was a recess appointment whose term will expire with the end of the Senate session this month. President Obama has raised the ire of all 47 Senate Republicans by attempting to repeat the prior action and give recess appointments to Democrats Sharon Block and Richard Griffin. They warned President Obama that giving these appointments without Senate review could "set a dangerous precedent" and "provoke a constitutional conflict between the Senate and the White House."

CONTROVERSIAL BOEING UNFAIR LABOR PRACTICES CASE SETTLED

The controversial case that highlighted the schism between organized labor and management has settled, but the spotlight on the NLRB does not seem to be dimming. Apparently the NLRB did not anticipate the maelstrom of criticism and attention it received when it pursued the charges alleging that Boeing unlawfully established a second assembly line at a non-union plant in South Carolina. The union asked the Board to drop the charge as part of the settlement with Boeing, so the merits of the case will not go before the NLRB members. Boeing had been vigorously contesting the illegal conduct allegations.

While the case was bogged down in discovery disputes before the administrative law judge, legislators took action to curb NLRB authority. Voting along party lines, the U.S. House of Representatives passed the Protecting Jobs From Government Interference Act (H.R. 2587) depriving the NLRB of power to order any employer to “restore or reinstate, any work, product, production line, or equipment, to rescind any relocation, transfer, subcontracting, outsourcing, or other change regarding the location, entity, or employer who shall be engaged in production or other business operations, or to require any employer to make an initial or additional investment at a particular plant, facility, or location.” The Oversight and Governmental Reform Committee Chair, Darrell Issa (R-Calif.) said “NLRB’s decision to end its action against Boeing does not end the Oversight Committee’s Investigation into the agency.”

The NLRB’s Acting General Counsel Solomon said that “this case was always about jobs” while House Education and the Workforce Committee Chair John Kline (R-Minn) characterizes the settlement as a confirmation that “the NLRB’s action against Boeing was nothing more than a shameless campaign to bully an American employer.”

NLRB NOTICE POSTING DEADLINE IS NOW SET TO TAKE EFFECT APRIL 30

The NLRB regulation requiring employers to post an 11 X 17 inch notice describing employee rights under the National Labor Relations Act (NLRA), and to publish same on intranet or internet site if the employer customarily uses such media to communicate with employees about rules and policies, was to have gone into effect in November. The rule has been challenged in various courts by several business organizations, including the U.S. Chamber of Commerce. USDC for the District of Columbia Judge Amy Berman Jackson told NLRB lawyers that the legal issues “deserve more time” and should be delayed beyond the current January 31 date. The NLRB announced that it would delay the effective date of this new requirement until April 30 stating the additional time “would facilitate the resolution of the legal challenges that have been filed with respect to the rule.” The poster is available for free download and printing in over 20 languages (<https://www.nlr.gov/poster>).

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The labor and employment attorneys in our firm have a national and international practice representing union and non-union companies in almost every industry. Our labor attorneys have developed strong experience and hands-on knowledge of how business really works.

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