Strike Three For The NLRB

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It has been a rough couple of years for the National Labor Relations Board. First, the high priority union agenda of the Employee Free Choice Act could not get through Congress. Strike one. Next, the NLRB adopts through rulemaking a requirement that all employers post a notice to employees of their union rights. Last month, however, the United States Circuit Court for the District of Columbia ruled that the National Labor Relations Board exceeded its power in issuing such a rule and enjoined its enforcement. Strike two.

Now, hot on the heels of the D.C. Circuit?s opinion comes an opinion from the United States District Court for the District of Columbia ruling that the Board?s rulemaking in December 2011 -- implementing faster election procedures -- is invalid. According to the court, the Board did not have the authority to issue the rule because it lacked a quorum at the time the rule was issued. Strike three.

In an opinion that is often humorous, United States District Judge James Boasberg found that member Brian Hayes? failure to participate in the adoption of the final rule left the Board without a quorum. As the United States Supreme Court held in 2010 in the *Process Steel* case, the Board, unless it has an acting quorum of three members, cannot issue opinions or adopt rules.

To quote Judge Boasberg:

> According to Woody Allen, 80 percent of life is just showing up. When it comes to satisfying a quorum requirement, though, showing up is even more important than that. Indeed, it is the only thing that matters ? even when the quorum is constituted electronically. In this case because no quorum ever existed for the pivotal voting question, the Court must hold that the challenge rule is invalid.

The rule at issue went into effect on April 30, 2012, and Regional Offices of the NLRB already had begun holding training sessions for practitioners discussing the new rule. At this point, the NLRB will have no choice but to abandon the new practice; presumably the traditional rules concerning elections, which have been in place for over 60 years, will continue to apply.

We expect that, because the Board arguably now has a quorum, the rule will be re-published, and the lawsuits will once more begin concerning the adoption of this rule. The plaintiffs in the case, the US Chamber of Commerce and the Coalition for a Democratic Workplace also raised several substantive issues about the Board?s authority to adopt the

rule. Judge Rosenblatt did not reach those issues because, as he wrote, he could reach a decision on the threshold procedural issue.

Certainly, if the rule is re-promulgated with the proper quorum, the US Chamber and the Coalition for a Democratic Workplace will refile their substantive challenges including a claim that President Obama?s ?recess? Board Member appointments at the end of December were unlawful because Congress was not in recess at the time of the appointments.

For now, it is unclear how the NLRB is likely to react, but all employers should remain diligent in preparing themselves for increased union activity and the chance that someday the Board?s batting average will improve.

For more information about this topic, please contact the author or any member of the Williams Mullen Labor & Employment Team.

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