

LABOR & EMPLOYMENT

FEDERAL JUDGE INVALIDATES NLRB "HURRY UP" ELECTION RULES

by David J. Houston

On Monday, May 15, 2012, a Washington, D.C. federal judge invalidated the so-called "Hurry-Up" Election Rules of the National Labor Relations Board that previously became effective on April 30, 2012. The judge based his decision on the narrow procedural ground that in adopting the new rule, the Board did not have a quorum "present" when one of the three Members of the Board was informed of an email voting process on the rule, but did not vote for or against the rule, nor did he abstain from voting. In the short term, this ruling will require the NLRB to return to the prior election rules and procedures. The long term prospect of these rules effectively being adopted is questionable.

The importance of the issue is highlighted by a February *Bloomberg Government* report finding that unions win 89% of elections held within 15 days of the filing of an election petition, but only 58% of elections held within 36 to 40 days after an election request. The invalidated rules could have allowed union elections to occur within 15 days of a union filing, by significantly limiting procedural protections for workers and the employer which had been developed by the NLRB over decades. Under the prior, and now, reinstated rules, elections typically occur 38 to 43 days after a filing, or later. Unions supporting the "hurry up" rules contend that employers use the delay to engage in tactics such as informational or allegedly intimidation campaigns, to "unfairly" sway workers from supporting and voting for union representation.

The opinion by Judge James E. Boasberg, who was nominated by President Obama and confirmed by the Senate in 2011 on a 96-0 vote, discloses an interesting and ongoing schism at the NLRB. Existing precedent of the United States Supreme Court holds that an agency's interpretation of the statutes it administers is entitled to "deference" by a court that must review an agency decision. In reaching his conclusion, Judge Boasberg ruled that the National Labor Relations Act is "unambiguous" in its quorum requirement, thus rejecting the NLRB's statutory interpretation.

While the opinion suggests that the NLRB may permissibly re-vote, with a quorum present, to adopt the same election rules, the validity of such a vote is already in doubt. President Obama has been unable to obtain Senate confirmation of any recent nominee to the Board, and has instead resorted to recess appointments made in January of this year. A separate lawsuit challenging the validity of those recess appointments already has been filed. Another vote to adopt the new election rules would only be valid if the recess appointments are valid, otherwise, the required quorum of three members would not exist.

FOR MORE INFORMATION CONTACT:



Contact **David Houston** at 517.487.4777 or any Dickinson Wright employment lawyer if you have any questions about NLRB election procedures, the Board's efforts to encourage unionization, or lawful methods of communicating your company's desire to remain union free.