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NLRB Order Unenforceable Due to General Counsel's Unlawful Appointment

By Swerdlow Florence Sanchez Swerdlow & Wimmer 9/3/2015

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An unfair labor practice complaint prosecuted by Lafe Solomon, the then-acting general counsel of the National Labor Relations Board (NLRB), was determined to be unauthorized in light of a violation of the federal statute governing interim appointments to federal office, requiring that the subsequent order of the NLRB as to the complaint be vacated, the U.S. Circuit Court of Appeals for the District of Columbia held.

SW General (doing business under the name of Southwest), an ambulance provider, was party to a collective bargaining agreement with its emergency medical technicians, nurses and paramedics that guaranteed an annual bonus to long-term employees. Following the expiration of the collective bargaining agreement, the company discontinued paying the bonuses. The union immediately filed an unfair labor practice charge with the NLRB, alleging that the company had violated the National Labor Relations Act by discontinuing the payments; in turn, the NLRB's regional director for the region issued a formal complaint.

Following a hearing, an administrative law judge agreed that Southwest had committed an unfair labor practice. The company filed 15 objections to the ruling, including an argument that Solomon, the acting general counsel of the NLRB at the time the complaint was issued, was serving in violation of a federal statute known as the Federal Vacancies Reform Act of 1998 (FVRA). However, the board adopted the administrative law judge's ruling, without addressing the company's FVRA challenge.

On appeal to the Court of Appeals for the District of Columbia, the company argued that Solomon's appointment violated the FVRA, which, according to the reading of the statute advanced by the company, allows an individual to serve as both the acting officer and the permanent nominee to a position to which the president makes appointments subject to the "advice and consent of the Senate" in only very narrow circumstances—i.e., where either the individual served as first assistant to the office in question for at least 90 of the prior 365 days, or the individual was confirmed by the Senate to be the first assistant.

The board argued that this was not the proper construction of the statute and that the statutory limitations described above applied only to certain "acting" officers. However, relying on the plain language of the statute, the court of appeals agreed with the company and held that Solomon, who had been named acting general counsel as of June 2010, and who was named President Barack Obama's permanent nominee as of Jan. 5, 2011, had served in violation of the statute from Jan. 5, 2011, to Nov. 4, 2013 (when his nomination was withdrawn after Senate opposition).

In turn, the appellate court found that the FVRA violation required voiding the board's order in the case emanating from the complaint issued against Southwest. The court in so doing noted that, rather than making a generally applicable ruling as to the effect of Solomon's unlawful appointment on complaints issued during his tenure, it was making a narrow holding applicable only to the arguments presented by the parties in the case before it. The court held that the violation of the FVRA made actions taken during Solomon's unlawful tenure "voidable, not void" and stated expressly, "we do not expect [our decision] to retroactively undermine a host of NLRB decisions," distinguishing a 2014 case regarding Obama's appointments to the board itself (*Noel Canning v. NLRB*).

In an unusual step, the D.C. Circuit Court seemed to offer a prediction as to other cases that might come before it following the decision, noting that the panel "doubt[ed] that an employer that failed to timely raise an FVRA objection—regardless whether enforcement proceedings are ongoing or concluded—will enjoy the same success."

SW General Inc. v. NLRB, D.C. Cir., No. 14-1107 (Aug. 7, 2005).

Professional Pointer: In light of the series of cases involving fairly technical arguments as to the lawfulness of the president's NLRB appointments and the consequences that flow therefrom, employers are cautioned to obtain legal advice at the outset of any proceedings before the NLRB.

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