

Obama NLRB Deep Sixes Employer Defense On Procedural Grounds

January 20, 2017 | [National Labor Relations Board, Labor Relations](#)



Keith J. Brodie

Partner

A recent NLRB decision demonstrates again the Obama NLRB's willingness to entertain inconsistency when the outcome favors a union. Over the last eight years, some have noted that this has been a persistent theme at the NLRB. The most recent example of this phenomenon is found in the NLRB's Jan. 9 *Williams-Sonoma Direct, Inc.*, decision. In this union election case involving the NLRB's controversial *Specialty Healthcare* "micro unit" decision, the issue was the appropriateness of the union's petitioned-for unit of merchandise processors. Under the procedural requirements of the NLRB's new election rules effective since April 14, 2015, a party challenging the appropriateness of a petitioned-for unit procedurally must raise its defenses in its statement of position, which must be timely served on the NLRB and the other party. If the statement of position is not timely served, the party required to file the statement of position waives its defenses. On the basis that a statement of position was not filed timely, the NLRB majority held that under Section 102.66(d) of its new election rule the employer was precluded from litigating the unit composition issue. While NLRB member Philip Miscimarra agreed, he also took the time to point out how the NLRB has ruled differently when a similar issue confronted a union. Miscimarra's dissent highlights what many believe has been a disturbing trend over the last eight years, a tendency to treat issues differently when a union's right is involved. Miscimarra noted for example that in another recent case, *Brunswick Bowling Products, LLC*, 364 NLRB No. 96, Slip Op. at 3 (2016), the NLRB held that a decertification petition (a petition filed by employees to vote out a union) could not be pursued notwithstanding the fact that the union in that case did not timely file its position statement raising a "contract bar" defense. Rather, the NLRB refused to find a waiver of the union's defense. Chairman Mark Gaston Pearce and member Lauren McFerran sidestepped this "inconsistency" critique and sweeping away the alleged discrepancy by noting "peculiar circumstances" that they say justified the ruling in favor of allowing the union to present a tardy defense. It is these types of flip-flopping rationales many hope will become a thing of the past with a Trump NLRB. However, there is also quite a bit of uncertainty about what positions a Trump NLRB will tackle given that he also received significant support from union households.

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