

NLRB Chooses Form Over Function

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In a 2 to 1 decision issued on August 15, 2014, the National Labor Relations Board (NLRB) refused to count 23 challenged ballots of employees not on the eligibility list in an election that the union won 21 to 20. The 23 employees were not on the eligibility list because each of those employees was hired during the 8-month period between the initially agreed upon eligibility date of March 8, 2013 (for an agreed-upon election date of April 16, 2013), and the date the election was actually held November 19, 2013. The delay in the election was due to charges filed by the union and ultimately settled with the employer. Importantly, the employer in the case failed to raise questions or concerns about the eligibility list prior to the election or to file timely file objections after the election, instead waiting until after the deadline to file objections to complain about voter disenfranchisement. The dissenting Board member argued that the unusual circumstances caused by the delayed election (more challenged ballots than the votes cast either for or against the union) should result in either the challenged ballots being counted or, preferably in his view, a new eligibility date being agreed to and a new election being run. The majority, however, found that “that countervailing factors, which protect the overall process, will sometimes outweigh the value of enfranchising each and every employee.” While the outcome of this case can be seen as just another mark in the current NLRB’s pro-union ledger, it serves as a stark reminder that employers must strictly comply with the NLRB’s case handling rules and regulations if they do not wish to give the unions another leg-up.

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