

In for Long Haul as Fifth Circuit Upholds NLRB's "Quickie" Election Rule



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Thursday, June 16, 2016

Last April, the **National Labor Relations Board ("Board")** implemented its new expedited union representation procedures. On June 10, 2016, in ***Associated Builders and Contrs. Of Tex v. NLRB***, 15-cv-50487 2016 U.S. App. LEXIS 10552 (5th Cir. June 10, 2016) the Fifth Circuit upheld the new procedures, commonly called "quickie" election rules -- rejecting the Associated Builders and Contractors of Texas' ("ABC") arguments that the rule exceeded the Board's authority under the National Labor Relations Act ("NLRA") and that it violated the **Administrative Procedures Act ("APA")**.

Specifically, ABC alleged that the rule exceeded the Board's authority under Section 9 of the NLRA by allowing regional directors to preclude employers from contesting voter eligibility issues. The Court, however, found that ABC did not identify any statutory language or legislative history requiring litigation of *all* voter eligibility issues at the pre-election hearing. The Fifth Circuit agreed with the Board's position that *Inland Empire District Council, Lumber & Sawmill Workers Union v. Millis*, 325 U.S. 697, 706 (1945) granted the Board wide discretion to devise the procedures to determine whether a representation question exists and rejected ABC's argument that *Inland* was inapplicable because it was decided prior to the Taft-Hartley amendments.

ABC also challenged the rule on grounds that the rule's provisions requiring

disclosure of personal employee information both before and after the pre-election hearing conflicted with federal privacy law and that the requirements were 'arbitrary and capricious' under the APA. The court rejected the first argument on grounds that ABC failed to identify any federal law restricting disclosure of employee information to unions by employers. With regards to the second argument, the court found that the Board had properly considered privacy concerns, advancement in communication technology and the potential for union abuse in formulating rule. As a result, the court held that the Board's rule was not 'arbitrary and capricious'.

The Court also rejected ABC's claims that the new rule would violate the free speech provision of the NLRA. Rather, the court held that the discretion afforded regional directors in setting election dates, provided sufficient protection for employers and employees to engage in meaningful speech.

Given the Court's decision, employer's must continue to be prepared for operating under the "quickie" rules in the event of an organizing drive.

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