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Deja Vu or Something New? Shrinking NLRB Delegates Its Authority to the General Counsel

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It's déjà vu for the National Labor Relations Board. With Member Craig Becker's recess appointment set to expire on December 31, the federal agency responsible for conducting union elections and processing unfair labor practice charges must again prepare for the loss of its required quorum. Upon the expiration of Becker's term, the Board's membership will be reduced to two. Given the Supreme Court's decision last year in ***New Process Steel v. NLRB*** – in which the Court held that the NLRB's grant of authority depends on a minimum of three members – the Board must again anticipate the loss of its powers under the National Labor Relations Act, and the resulting stagnation of the agency's highest authority.

This problem is not new, and neither is the Board's solution. On Wednesday, the Board published an **Order** in the *Federal Register*, delegating two broad areas of authority to the General Counsel. This is the third time the Board has undertaken such a delegation. Faced with a loss of membership in December 2001, the Board published a similar Order, providing the General Counsel with authority over legal proceedings, including the ability to prosecute injunction proceedings under section 10(j) of the Act (federal orders requiring an employer to bargain with a union). Finding itself short of members again the next year, in November 2002, the Board made an additional delegation, this time granting the General Counsel the authority to certify the results of certain secret ballot elections. Both orders specify that these powers come into effect whenever the Board's membership falls below the required three members, and will remain vested in the General Counsel until such time as the Board's minimum membership is again met.

Now, in issuing its latest delegation, the Board has simply combined the two previous orders – word for word – into one single grant of power to the General Counsel. As with the 2001 and 2002 orders, the 2011 notice gives the GC "full authority over court litigation matters that otherwise would require Board authorization," as well as "full authority to certify the results of any secret ballot election conducted under the National Emergency provisions of the Labor Management Relations Act[.]" Moreover, as with the previous Orders, the language of the notice limits the delegation to those times when the Board itself lacks the authority to perform its duties; once a quorum is again achieved, the delegation becomes void. Thus, at first glance, the Board's Order doesn't appear particularly groundbreaking – rather, it seems to be the same old solution to the same old problem.

Still, this old solution could lead to an entirely new result, in light of the objectives of this particular General Counsel, as well as the larger picture of the Board's actions over the past year. Since his appointment in 2010, current General Counsel Lafe Solomon has placed significant emphasis on obtaining 10(j) injunctions, characterizing the program as a "top priority." He has persuaded a number of federal courts, most recently the **U.S. Court of Appeals for the Ninth Circuit**, that his office has the authority to independently seek injunctive relief without prior Board approval. The Board's current delegation renders that question moot by granting the General Counsel specific authority to initiate 10(j) proceedings. Solomon will be able to pursue his injunction priority unhindered, and wholly independent of the Board.

Solomon's agenda aside, the delegation of Board authority may also be affected by the Board's essentially removing itself from the election process in qualifying emergency cases. Earlier this year, the Board proposed sweeping amendments to the NLRA, which, among other things, would eliminate an employer's automatic right to appeal any but a small subset of representation case findings. While these amendments have not yet been adopted, giving the General Counsel the authority to certify election results without Board approval further removes oversight of the election process from the Board's hands. And, as a two-member Board lacks the authority to issue appellate decisions in any event, an employer's options for review are limited even further.

It is still too early to determine what the result of the Board's newest Order will be, but it is clear that this "traditional" delegation could have effects that are significant and unprecedented. In the absence of appellate review, employers can expect increased authority in both the General Counsel and Regional Directors. And, given Solomon's agenda, they can also anticipate a significant surge in the use of 10(j) petitions. History may not be repeating itself, after all.