Insights: Alerts

Houston, We (May) Have a Constitutional Problem: Fifth Circuit Puts NLRB Structure in the Hot Seat

August 25, 2025

Written by **John W. Alden, Christopher M. Caiaccio** and **Drew Williamson**

In *Space Exploration Technologies Corp. v. National Labor Relations Board* (the "SpaceX Case"), the U.S. Court of Appeals for the Fifth Circuit upheld injunctions issued by federal district courts in Texas. The injunctions were issued in cases brought by three separate employers who challenged adverse Board rulings and asserted that the structure of the Board itself violated the U.S. Constitution. Although the Fifth Circuit's ruling does not render the Board itself unconstitutional, it provides employers with a blueprint for pausing ongoing Board proceedings or potentially barring them altogether.

Background

The SpaceX Case stems from unfair labor practice complaints issued by the Board's regional office against three employers, each of which filed a lawsuit in federal district court in Texas. The lawsuits sought to enjoin their respective administrative proceedings, arguing that the Board's structure is unconstitutional. Specifically, the employers challenged statutory protections against removing Board Members and administrative law judges ("ALJs"). Under the National Labor Relations Act, Board Members may only be removed by the President "for neglect of duty or malfeasance in office." ALJs, on the other hand, may only be removed "for good cause," as determined by a separate agency, whose members also enjoy removal protections.

The employers argued that where the Constitution vests all executive power in the President, he must therefore have sufficient control over the performance of executive functions and the individuals performing them. According to the employers, this meant that the President must also have the power to remove executive officers who assist in carrying out his executive duties. In making that argument, the employers relied on the Fifth Circuit's 2022 decision in *Jarkesy v. Securities and Exchange Commission*, which held that the statutory restrictions on removing the SEC's ALJs was unconstitutional. The Supreme Court affirmed the *Jarkesy* decision in 2024.

The federal district courts agreed with the employers and granted preliminary injunctions. The cases were consolidated for purposes of the appeal.

The Fifth Circuit's Ruling

First, the Fifth Circuit rejected the Board's argument that the federal Norris-LaGuardia Act's limitation on injunctions in labor disputes prohibited the district courts from issuing the underlying injunctions. In doing so, the court distinguished between substantive labor disputes and constitutional challenges.

Second, the Fifth Circuit relied on its precedent in *Jarkesy* and held that "[i]f SEC ALJs' removal protections are unconstitutional, the same must be true of NLRB ALJs – whose powers are, if anything more robust."

Finally, the court held that the Board member removal process was likely unconstitutional as well. In reaching its conclusion, the Fifth Circuit rejected the Board's reliance on precedent upholding removal protections for commissioners of the Federal Trade Commission ("FTC"), reasoning that unlike FTC commissioners, NLRB Board Members exercise substantial executive power, and lack partisan balance.

Key Takeaways

For now, the decision means that the Board cannot prosecute cases against SpaceX, Findhelp, and Energy Transfer until there is a final determination on the constitutionality of the ALJ and Board Member removal protections. The Board will almost certainly seek an *en banc* review by the Fifth Circuit, if not a direct appeal to the Supreme Court. If the decision is upheld, it could impact the Board's ability to proceed with enforcement actions unless and until Congress acted to amend the statutory removal protections. In the meantime, employers facing unfair labor practice complaints should consider their ability to file for injunctive relief based on the Fifth Circuit's reasoning.

We will continue to monitor this and other NLRB-related developments. Should you have any questions about this Alert or the effect of the Fifth Circuit's decision, please contact one of the authors or attorneys in our firm with whom you are regularly in contact.

Related People

John W. Alden

t 404.815.6058

jalden@ktslaw.com

Christopher M. Caiaccio

t 404.815.6203

ccaiaccio@ktslaw.com

Drew Williamson

t 404.815.6522

drew.williamson@ktslaw.com