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NLRB Attys Won't Address Member Removal In 5th Circ. Row

By **Braden Campbell**

Law360 (February 4, 2025, 5:52 PM EST) -- National Labor Relations Board attorneys told the Fifth Circuit that they won't defend NLRB members' firing protections at a Feb. 5 hearing on the agency's constitutionality in the wake of the president's removal of a board member and appointment of a new acting prosecutor.

Attorneys representing the board in its consolidated challenge to injunctions won by SpaceX and two other employers told the court Monday they are "not in a position to address" this argument after the president's **removal of NLRB member Gwynne Wilcox** and **appointment of acting general counsel William Cowen**.

The attorneys referenced President Donald Trump's **letter to Wilcox** asserting that the president can fire board members "with or without statutory cause." But they did not explain why the personnel moves preclude them from addressing arguments, which they raised in their briefs, that National Labor Relations Act language limiting the president's power to fire NLRB members is constitutional.

The letter came two days before a panel is set to hear arguments on whether three Texas federal courts were right to block administrative suits **against SpaceX**, social service platform operator Aunt Bertha and gas transportation company Energy Transfer LP. These and several other employers have argued that the NLRA is unconstitutional in various ways, including that the language, which permits the president to remove NLRB members only for wrongdoing or neglect of duty, defies his right to direct the executive branch.

Trump teed up a test of this argument last week through his unprecedented move to fire Wilcox, a Democrat appointed to the board by former President Joe Biden. Wilcox has pledged to sue, claiming her firing violates U.S. Supreme Court precedent.

The attorneys noted Monday that Wilcox's removal has dropped the board's membership below the three required for a quorum, preventing the agency from reviewing orders an administrative law judge issues in the cases against SpaceX, Aunt Bertha and Energy Transfer. The president has also named Cowen, the director of one of the board's Los Angeles regional offices, as his acting general counsel, the attorneys said.

"In light of these executive actions, board counsel is not in a position to address the board-member-removability arguments raised in the government's briefs," the attorneys said. But they can discuss other arguments, including that the judges didn't have jurisdiction to enjoin the administrative suits and that the employers can't prove they would suffer harm without injunctions.

Among other things, board attorneys argued in **their October appeal brief** that the members' job protections are constitutional under the Supreme Court's 1935 ruling in **Humphrey's Executor v. U.S.**, which upheld similar protections for Federal Trade Commission members.

An NLRB representative declined to comment. Representatives of the companies did not immediately respond to requests for comment.

The NLRB is represented by Nancy Kessler Platt, Dawn Goldstein, Kevin Flanagan, Paul Thomas and David Boehm.

FindHelp, which sued the board under the corporate name Aunt Bertha, is represented by Talley Ray Parker of Jackson Lewis PC.

SpaceX is represented by Michael Kenneally, Catherine Eschbach and Harry Johnson III of Morgan Lewis & Bockius LLP.

Energy Transfer is represented by Amber Rogers of Hunton Andrews Kurth LLP.

The cases are SpaceX v. NLRB, case number 24-50627, Energy Transfer LP v. NLRB, case number 24-40533, and Aunt Bertha v. NLRB, case number 24-10855, in the U.S. Court of Appeals for the Fifth Circuit.

--Editing by Nick Petruncio.

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