Insight

NLRB Likes Losing in Court

SAM BATKINS, BEN GITIS | NOVEMBER 18, 2014

The National Labor Relations Board (NLRB) probably does not actually enjoy losing in federal court, but judging by their recent quasi-regulatory actions, they are destined for yet another legal defeat. NLRB General Counsel Richard Griffin now seeks to destroy decades of legal precedent by obliterating the current franchisor-franchisee relationship and expose countless businesses to increased litigation and regulation. There are an estimated 8.3 million Americans who are employed by franchises, some 800,000 businesses, and the General Counsel believes that increased regulation will somehow grow what had been a successful business model.

As the American Action Forum (AAF) has documented in the past, the Board's record in the courts is far from successful. Below is just a sampling of their recent legal defeats:

- Judges appointed from both political parties struck down a $386 million rule that would have imposed union notification posters in all workplaces. As the Court noted, "By promulgating a rule that proactively imposes an obligation on employers … the Board has contravened the statutory scheme established by Congress."
- Courts also struck down a rule that would have sped up union elections in the workplace.
- In NLRB v. Canning, a unanimous Supreme Court struck down dozens of the Board's actions because it did not have a quorum to operate.

As for the current debate, since 1984 U.S. businesses have operated under a relationship that held any firm as a joint-employer only if it exercised direct control of employees in another business. For example, hiring, firing, and supervision constituted direct control. Even before the 1980s, the NLRB has long established that franchisors are not joint employers because all interactions with franchisees are aimed to preserve the franchise brand, not tell franchisees how to manage their workers.

Now, regulators at NLRB want to determine the definition of franchise on an amorphous "totality of the circumstances" test or whatever the Board feels like on a particular day. The NLRB General Counsel is blunt in its purpose for the rule change: "The current joint-employer standard inhibits meaningful collective bargaining [unionization]." The administration has noted the declining rates of private-sector unions and now seeks to boost union rolls by whatever means possible, legal or illegal. A brief review of union rates shows why the NLRB is so aggressive.

NLRB based this radical change in law on "current technological advances," but the same could have been said 10 or 15 years ago. The only circumstance that has changed is the political calculus that falling union rates must be boosted by an aggressive NLRB. After failed attempts to speed up union elections and force employers to advertise for unions, the Board is simply working down its to-do list.

NLRB has not acted as a body adjudicating labor disputes, but rather an active regulatory agency seeking to boost union rates and deliver on the administration's failed legislative agenda. The Board itself acknowledges that it has two sole purposes: "to conduct representative elections and certify the results, and to prevent employers and unions from engaging in unfair labor practices." This description would appear to indicate NLRB is a passive quasi-judicial agency that hears complaints. Instead, the Board has devolved into a hyperactive regulatory body working, sometimes without a quorum, to increase union rolls at whatever the price.

For Congress, there are few oversight tools available to check the Board's regulatory excess. They can easily call oversight hearings, but attaching appropriations riders limiting NLRB or developing formal legislation faces a higher hurdle. The future of U.S. small business isn't set in stone yet, but NLRB is on the path to rewrite a generation of law to help a few union bosses fill their coffers.