



LABOR & EMPLOYMENT ISSUES

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FOR CLIENTS & FRIENDS

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FIFTH CIRCUIT HOLDS THAT COMPANIES' ARGUMENTS CHALLENGING CONSTITUTIONALITY OF NLRB HAVE ENOUGH MERIT TO JUSTIFY PAUSING PENDING BOARD COMPLAINTS WHILE SUITS PROGRESS

On August 19, 2025, the United States Court of Appeals for the Fifth Circuit published a decision holding that three employers' pending unfair labor practice ("ULP") complaints shall remain paused while the companies' suits alleging the structure of the National Labor Relations Board ("NLRB" or "Board") is unconstitutional make their way through the courts.

The three companies—SpaceX, Energy Transfer, and Findhelp—each filed separate suits in different federal district courts alleging that the removal protections for NLRB Board Members and Administrative Law Judges ("ALJs") render the structure of the entire agency unconstitutional. While removal barriers for the two positions differ, removing an individual from either role requires a finding of good cause.

The district courts in all three cases granted preliminary injunctions that prevent the Board from further investigating the existing ULP claims against each employer. The companies brought their cases jointly to the Fifth Circuit, where the Board argued to the Court that the district courts did not have the proper jurisdiction to enjoin ongoing Board proceedings. The Board also argued that by issuing these preliminary injunctions, the courts had abused their judicial discretion, as the employers were not likely to succeed on the merits of their argument that the Board is unconstitutional and that the companies had not sufficiently shown any irreparable harm. The Fifth Circuit was not swayed by the Board's argument. The Court found explicitly that "the removal restrictions [for ALJs] are unconstitutional" and "the Employers are likely to succeed on the merits of their challenge to the Board Members' removal protections."

This decision is another step in ongoing efforts to weaken the administrative state, a campaign that has taken a particularly harsh toll on the NLRB. The Board has already been significantly weakened during this presidential term. President Donald Trump's unprecedented firing of Board Member Gwynne Wilcox and the Supreme Court's ruling that she could not remain in her post while her own legal battle continues has left the Board without the quorum it needs to operate at full capacity. As of the end of the day on August 27, 2025, when Board Chair Marvin Kaplan's term ended, the

Board has only one member; this has only happened once before in the Board's history. The future of the agency remains uncertain as these various attacks on its legitimacy continue to move through the courts.

The cases, consolidated as *Space Exploration v. NLRB*, Docket No. 24-50627 (5th Cir. Aug 19, 2025), may be found [here](#).

DC CIRCUIT SETS "BUT-FOR" STANDARD IN UNION RETALIATION CASES

On August 19, 2025, the United States Court of Appeals for the District of Columbia Circuit ("Court") held that cases alleging retaliation under the Labor-Management Reporting and Disclosure Act ("LMRDA") require but-for causation. The case is *Hudson v. AFGE*, No. 24-7077 (D.C. Cir. Aug. 19, 2025).

The case arises out a conflict between Eugene Hudson, the former Secretary-Treasurer of the American Federation of Government Employees ("AFGE" or "Union"), and the Union. Hudson, in an effort to become Union President, used official Union mailing labels and emails to send communications to locals blasting Union leadership. Internal Union discipline procedures ended with Hudson's removal, which was enjoined when Hudson filed a lawsuit, but he was removed again in a second round of disciplinary proceedings. Hudson alleged his removal as Secretary-Treasurer constituted retaliation against his exercise of protected speech in violation of Section 101(a)(2) of the LMDRA. At trial, the Union argued that he was removed for violating the AFGE constitution by using Union resources in support of his campaign. The District Court Judge instructed the jury that Hudson "must prove that [AFGE] would not have removed him but for his [speech.]" The Jury found that AFGE violated the LMRDA when it removed Hudson the first time, but not the second. Hudson appealed, arguing that the LMRDA only requires a plaintiff to show that his protected conduct was a "substantial" or "motivating" factor in a union's decision to take adverse action.

The Court disagreed. LMRDA Section 101(a)(2) provides that union members "shall have the right ... to express any views, arguments, or opinions" subject to the union's "right ... to adopt and enforce reasonable rules as to the responsibility of every member toward the organization." "To establish a *prima facie* free speech claim under Section 101(a)(2), ... a plaintiff must show that (1) she engaged in speech protected by LMRDA; (2) she was subject to adverse action; and (3) that action is causally linked to the protected speech." Looking at the statute and precedent, the Court clarified that the standard requires but-for causation. But-for causation is the default rule which Congress is normally presumed to have legislated when creating a new cause of action. Absent contrary language, courts will read a but-for causation requirement.

Looking at LMRDA's prohibition against "infringing" on a union member's rights, the Court found that a member's rights are "infringed" when an adverse action is taken because of the exercise of those rights, not when the adverse action is taken for some unrelated reason. Title VII's allowance of "motivating factor" causation is an exception, not the default rule, and the Supreme Court had declined to import motivating factor causation into other statutes that do not contain such language. Additionally, but-for causation in LMRDA retaliation is harmonious with First Amendment retaliation cases, and both the LMRDA and First Amendment protect free speech.

NLRB ACTING GENERAL COUNSEL WEIGHS IN ON STATE MEASURES TO FILL AGENCY VOID

On August 15, 2025, Acting General Counsel for the National Labor Relations Board ("NLRB" or "Board") William Cowen made a statement chiming in on state legislatures' recent measures trying to fill the void of jurisdiction for private sector labor disputes left by the Board's lack of quorum. Cowen indicated his position that these various measures, including that advanced by the New York State legislature and previously reported on in the July 3, 2025 edition of In Focus, available [here](#), are preempted by the National Labor Relations Act ("NLRA" or "Act") and thus run afoul of the United States Constitution's Supremacy Clause. He also argued that state measures to fill any void left by the Board's lack of quorum are unnecessary.

These state measures have emerged due to the Board's lack of quorum, resulting in its inability to issue decisions. Cowen says concerns that the Board is unable to fulfill its statutory duties under the Act are "unfounded," and that the Board's work has not been substantially affected by the lack of quorum. On February 1, 2025, the Board issued a press release purporting to explain that Regional Offices can and do still process unfair labor cases and representation cases. Cowen also pointed out that he as Acting General Counsel has "full and final authority and responsibility on behalf of the Board to initiate and prosecute injunction proceedings under section 10(j) or section 10(e) and (f) of the Act, contempt proceedings pertaining to the enforcement of or compliance with any order of the Board, and any other court litigation that would otherwise require Board authorization; and to institute and conduct appeals to the Supreme Court by writ of error or on petition for certiorari" pursuant to the Board's 2011 "Order Contingently Delegating Authority to the General Counsel" contained at [76 Federal Register 69768](#).

In his statement, Cowen also noted that "[i]n a typical year, over 95% of all cases are processed without requiring a Board decision." This figure is based on numbers found in the Board's Fiscal Year 2024 Performance and Accountability Report, indicating, for example, that 96.3 percent of meritorious cases were settled. He also

touted the Board's ability to quickly resolve "oldest cases," defined as the cases pending at the Board for more than eighteen months, when it does eventually retain a quorum.

On July 17, 2025, President Trump nominated two Republicans—Scott Mayer and James Murphy—to serve on the Board. If confirmed by the Senate, the Board would regain its quorum.

HAPPY LABOR DAY
TO ALL OUR FRIENDS AND CLIENTS!!

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