



For your information

Volume 35 | Issue 55 | August 3, 2012

## Court Won't Reinstate NLRB's Expedited Representation Election Rule

On May 14, 2012, a federal district court invalidated the NLRB's so-called "ambush" or "quickie" election rule, finding that the NLRB lacked the statutorily required quorum to promulgate the rule. On July 27, the same court denied the NLRB's motion to reconsider that decision. For now, the Board cannot implement the rule, which would dramatically change the representation election process for most private sector employers. While the Board ponders its next move, the election rules and pre-election procedures that were in place prior to April 30, 2012 continue to govern representation elections.

### Background

On December 16, 2011, two of the National Labor Relations Board's (NLRB's or Board's) three sitting members approved a final rule largely designed to speed up the election procedures it follows to determine if employees wish to be represented by a union for purposes of collective bargaining. The third sitting member, Member Hayes, did not cast a vote.

The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace promptly challenged the new election rule in federal court, alleging that the Board lacked the authority to promulgate the rule because only two members participated in the final vote to adopt it. On April 30, 2012, while the lawsuit was pending, the new rule took effect.

On May 14, 2012, U.S. District Judge James Boasberg struck down the NLRB's rule, [holding](#) that the lack of a three-member quorum rendered the rule invalid. In response, the Board suspended the rule and reverted to its prior election procedures. (See our May 21, 2012 [For Your Information](#).)

### NLRB's Attempt To Reinstate the Expedited Election Rule

A few weeks later, the NLRB filed a motion to alter or amend the court's May 14 ruling, asking Judge Boasberg to reinstate the expedited election rule. The motion tried to explain why a quorum existed when the Board voted to adopt the final rule on December 16, 2011. A supporting [affidavit](#) offered "new" evidence concerning the mechanics of the agency's electronic voting room and the pivotal vote. Although the information was available, it was not presented to Judge Boasberg before his May 14 ruling.

The NLRB argued that Member Hayes was present and participating in the Board's electronic voting room because he cast other votes on December 16 and his deputy electronically opened a "voting task" that asked Hayes to cast his vote on the final rule. The Board then argued that Member Hayes simply abstained from voting, and thus may be counted toward a quorum. The court reasoned that, even if Member Hayes's actions on December 16 could be viewed as participation and abstention, the NLRB still failed to show that the abstention occurred before the final rule was published or that Member Hayes had a reasonable amount of time to vote. In the end, Judge Boasberg **found** that the NLRB "offered too little too late" and refused to reinstate the election rule.

## Conclusion

As Judge Boasberg noted in both his rulings, nothing would prevent a properly constituted quorum of the Board from voting to adopt the rule if it wished to do so. In the meantime, the Board will continue to process election petitions under longstanding election rules and pre-election procedures that were in place prior to April 30, 2012.