

Labor Board's Power Facing Questions Without Quorum

By **Braden Campbell**

Law360 (February 13, 2025, 8:14 PM EST) -- The lack of a quorum on the National Labor Relations Board following member Gwynne Wilcox's removal last month has cast a specter on the agency as parties challenge its power to conduct union elections and the legitimacy of its actions even if the president taps new appointees.



The National Labor Relations Board's lack of quorum after the recent ouster of its Democratic member by President Donald Trump has left it without the ability to issue decisions and leaves in limbo disputes such as unfair firings and contract negotiations. (Photo by Andrew Harrer/Bloomberg via Getty Images)

Whole Foods has argued that Wilcox's removal stripped the agency's regional offices of their power — delegated by the board — to process union elections, and a union has asserted that the board can't process a case against it until the former union attorney is reinstated. These arguments call into question whether certain agency actions now will hold up in court later.

"We're in a little bit of uncharted territory here," said Dan Altchek, a partner at management-side Saul Ewing LLP. "There are a lot of balls in the hopper when it comes to the board, its composition, its existence and what it can do."

President Donald Trump **fired Wilcox** on Jan. 28, defying National Labor Relations Act language allowing for board member removals only for wrongdoing or neglect of duty. That unprecedented move has left the board with just two of its five seats filled. Without a three-member quorum, the board can't issue the decisions that culminate its process, leaving in limbo disputes over unfair firings, strikes and contract

negotiations. The agency has otherwise continued to operate as normal, though some parties to board proceedings have argued Wilcox's removal gums up other processes as well.

In Feb. 3 objections to the legitimacy of a recent representation election, Whole Foods argued that the director of the board's Philadelphia office may not certify one store's recent vote to unionize with a United Food and Commercial Workers local.

While the NLRA authorizes the board to run and certify elections, it allows the members to delegate that duty to regional directors subject to the board's review. Because the board doesn't have a quorum, that delegation is not valid, Whole Foods argued in the recent brief.

In another filing two days later, a Laborers International Union of North America local called on the board to **stay an unfair labor practice case** until Wilcox "is reinstated to her rightful place," suggesting that any action even a fully constituted board takes would be invalid without her.

The NLRB operated without a quorum for chunks of the Obama administration, and there's precedent tied to that period holding that the regions may continue to process elections without an operational board. Its validity is in doubt after the U.S. Supreme Court scaled back courts' deference to federal agencies, however.

In a split September 2015 decision, the D.C. Circuit held that a regional director **could process a union vote** at a Cincinnati hospital called UC Health during a period that the board was without a quorum. The majority applied the agency review doctrine the Supreme Court set out in [Chevron v. Natural Resources Defense Council](#) , which directed courts to defer to agencies' interpretations of murky provisions in statutes they administer.

Under this framework, the majority endorsed the board's view that regional directors "remain vested with the authority to conduct elections and certify their results" even without a quorum, rejecting the hospital's argument that the board's statutory delegation power clearly ends with its power to act. The dissenting judge disagreed, calling it "quite unreasonable" to think Congress "implicitly bestowed" on regional directors the permanent power to process elections without a board quorum.

A fresh challenge to the board's view may fare better now in light of the Supreme Court's decision last summer in [Loper Bright Enterprises v. Raimondo](#) , which did away with Chevron and instructed courts to construe ambiguous laws themselves.

"Given what happened to Chevron, the Whole Foods argument has legs," Altchek said.

This question may take a while to play out. If it follows the usual course, it would only reach a court once a reconstituted board majority finds an employer ducked its obligation to bargain with a union that won an election during this period. But an employer could get this question into court more quickly by seeking an injunction to stop an imminent election.

Taft Stettinius & Hollister LLP attorney Kerry Hastings, who represented UC Health in the 2015 case, said the demise of Chevron strengthened objectors' argument by directing courts to make their own "best reading" of ambiguous laws rather than deferring to agencies.

"It's hard to say it's the best reading of the statute to say that when you have no quorum, that the delegation of that power can still exist," Hastings said. The argument also calls into question the validity of a board rule delegating to prosecutors the power to seek court injunctions to stop serious labor violations, he said.


Union attorney David Rosenfeld of Weinberg Roger & Rosenfeld said challenges to the delegation could go either way. That Congress structured the agency with regional directors below the board is a strong indication that it intended them to function without a quorum, he said.

Some judges may take a different view, but it's unlikely many employers will opt to test this issue because they would risk incurring bargaining charges for the period of their challenge, and if they win, would just face another election, Rosenfeld said.

"Unless they end up being right, it's a big risk," Rosenfeld said.

The impact of Wilcox's firing on the legitimacy of future actions is untested because no president has

previously removed a board member mid-term.

Rosenfeld, who represents the laborers union that sought the stay, said the argument that the board can't act aligns with the Supreme Court's ruling in [New Process Steel](#) . In that case, the court addressed whether a three-member quorum validly delegated its power in 2007 to a two-person panel before one member's term expired. The court held that they could not, invalidating numerous decisions the board made during its months without a quorum.

The board could find itself in the same position if the courts hold its decisions were invalid without Wilcox. It muted the last crisis by reissuing these decisions once it had a quorum. That could be an option again, but "you can't do that until her removal is resolved," Rosenfeld said.

"So if it takes two years, then everything that the board does is under a cloud," Rosenfeld said.

Hastings said parties may have viable challenges to decisions a reconstituted board makes without Wilcox, at least in certain circumstances. In appeals of cases that it decides 3-0, the board would have a strong argument that Wilcox's absence did not make a difference. But its defenses of split decisions would be weaker, Hastings said.

"Obviously, if it turns out she was removed properly that would pretermit that argument, but we won't know that for ... a year or so," Hastings said.

--Editing by Bruce Goldman and Nick Petruncio.