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Launching into New Territory: SpaceX Claims NLRB Unconstitutionally Structured

Labor Relations Update on **January 8, 2024**

Shortly after the New Year, on January 4, 2024, Space Exploration Technologies Corp.—or "SpaceX"—filed a complaint in the District Court for the Southern District of Texas alleging that an administrative complaint filed by the NLRB against the company is illegal because the NLRB is unconstitutionally structured and the new expanded remedies sought by the NLRB violate employers' constitutional right to trial-by-jury. *Space Exploration Technologies Corp. v. NLRB et al.*, Case No. 1:24-00001 (S.D. Tex. 2024).

SpaceX's complaint follows quickly on the heels of an administrative complaint filed by NLRB Regional Office 31 alleging the company unlawfully fired eight employees after they circulated an open letter to all employees critical of the company and the company's CEO. In response to this administrative complaint, SpaceX is asking the federal court to stay or enjoin the NLRB's complaint and to declare that (1) the NLRB's structure is unconstitutional in that it limits the removal of NLRB ALJs and Board Members and permits Board Members to exercise executive, legislative, and judicial power in the same administrative proceeding; and (2) the Board's new expanded remedies violate employers' constitutional right to a trial-by-jury.

NLRB's Unconstitutional Structure

First, the federal court suit claims that NLRB administrative law judges ("ALJs"), who adjudicate complaints alleging unfair labor practices in the first instance, are unconstitutionally shielded from removal and therefore insulated from oversight and accountability to the President of the United States. The Constitution vests all executive power in the President, requiring that the President have sufficient control over the performance of executive functions and the individuals performing these functions. As such, according to the complaint, the President must have the power to remove executive officers who assist in carrying out the President's executive duties. Under the National Labor Relations Act, NLRB ALJs are insulated from presidential oversight by two layers of removal protections whereby ALJs can only be removed by the Board for cause and Board Members can only be removed under the Act "for neglect of duty or malfeasance in office, but for no other cause."

The complaint relies heavily on a recent decision by the Fifth Circuit, *Jarkesy v. SEC* (2022), which is currently on review before the Supreme Court. In *Jarkesy*, the Fifth Circuit held that the President's constitutional removal power extends to ALJs for the U.S. Securities and Exchange Commission ("SEC"), and that the statutory restrictions on removing SEC ALJs are therefore unconstitutional. SpaceX's complaint argues that NLRB ALJs are similar in that they have substantial authority and are therefore subject to the President's removal authority. Like the restrictions on the removal of SEC ALJs, the two layers of removal protection for NLRB ALJs insulate them from oversight by the President in contravention of the Constitution.

Second, the complaint alleges that the NLRB is an unconstitutionally-structured agency because it consolidates all three constitutional powers—legislative, executive, and judicial—in the same administrative body in violation of the Constitution's separation of powers. The complaint alleges that this structural deficiency is clearly illustrated in the case at hand where the NLRB Regional Office issuing the complaint against the company is seeking approval from the Board to seek injunctive relief in federal court against the company under Section 10(j) of the Act. The same Members of the Board determining whether to approve this 10(j) injunction will "later preside in a quasi-legislative, quasi-judicial capacity in the unfair labor practice proceeding involving the same alleged violations of the NLRA." Thus, the Board Members are positioned to serve as both prosecutor, bringing charges against the company before an administrative tribunal, and as adjudicator, making determinations of fact as well as federal labor policy.

The complaint argues that, in order to avoid violating the constitutional separation of power, the Board Members who participate in the decision to approve a 10(j) injunction against the company must recuse themselves from subsequent proceedings on the same unfair labor practice allegations.

NLRB's new Remedies Violate the Right to a Jury Trial

SpaceX also claims that the new remedies announced by the NLRB (as discussed previously here and here) and sought in this case are in contravention of the constitutional right to a jury trial. The complaint alleges that the Board's new expanded remedies constitute compensatory damages and are therefore a form of legal relief that goes beyond the equitable backpay remedy permitted under the Act. The Constitution entitles the company to a jury trial to hear such legal claims. The complaint argues that the Fifth Circuit in *Jarkesy* held that the Constitution prohibits an administrative agency from substituting an ALJ hearing for a jury trial where it seeks legal relief for an alleged statutory violation.

Takeaways

SpaceX's complaint goes to the very heart of the NLRB's statutory structure and operations. As evidenced by the *Jarkesy v. SEC* case, similar arguments concerning administrative law judges and the ability to remove members of administrative bodies have been validated by the federal courts, although it is unclear how the Supreme Court will rule on the issue.

With respect to the Board's new expanded remedies, SpaceX's complaint directly challenges the Board's authority to impose such significant relief through its ordinary processes and without the additional due process protections afforded and protected by jury trials.

Given the significance of the claims and potential ramifications if SpaceX is successful, we will continue to closely monitor this case and report any updates as they become available.

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- **Joshua S. Fox**
  Partner