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Amazon, SpaceX Must Navigate Procedural Roadblocks in Constitutional Challenge of NLRB

Labor Relations Update on **November 22, 2024**

On November 18, 2024, the U.S. Court of Appeals for the Fifth Circuit heard oral argument on cases involving Amazon.com Inc. and SpaceX, respectively, challenging the constitutionality of the National Labor Relations Board ("NLRB" or the "Board") in several respects. In both cases, the companies seek to halt underlying Board proceedings to allow a federal court to rule on their constitutional claims. The panel of judges tasked with evaluating these arguments include Judges Irma Carrillo Ramirez, James E. Graves, and Priscilla Richman, and the panel appeared skeptical of the validity of the procedural arguments advanced by the companies.

Background

SpaceX Case: As reported here, on January 4, 2024, SpaceX began the wave of companies asserting constitutional arguments against the NLRB's structure and expanded remedies. In response to an NLRB administrative complaint, SpaceX filed a lawsuit asking a Texas District Court to stay or enjoin the NLRB's complaint and to declare that:

- (i) The NLRB's structure is unconstitutional in that it limits the removal of NLRB Administrative Law Judges ("ALJs") and Board Members, and permits Board Members to exercise executive, legislative, and judicial power in the same administrative proceeding; and
- (ii) The Board's new expanded remedies violate employers' Seventh Amendment right to a trial-by-jury.

SpaceX's lengthy forum battle landed it on appeal before the Fifth Circuit, which is significant because SpaceX's constitutional arguments were derived in part from the Fifth Circuit's decision in *Jarkesy v. SEC*, 51 F.4th 644 (5th Cir. 2022), affirmed by the U.S. Supreme Court on Seventh Amendment grounds.

Amazon Case: On September 5, 2024, Amazon brought a complaint against the NLRB in the Western Texas District Court, alleging near-identical constitutional arguments as SpaceX. Amazon also brought its lawsuit in response to pending Board proceedings—arising out of ongoing disputes regarding union organizing—and similarly sought to enjoin those proceedings.

After obtaining stays pending the instant appeals, the companies now seek a Fifth Circuit ruling preliminarily enjoining the Board proceedings. Amazon and SpaceX claim that their requests for relief from the district court judges were "effectively denied", who allegedly failed to meet the deadlines set by the companies for ruling on their respective requests for injunctive relief.

Amazon Oral Argument

The Court heard Amazon's case first, but the majority of the oral argument was focused on procedural issues rather than constitutional arguments. Amazon's lawyer Trevor Cox briefly outlined the Seventh Amendment, nondelegation, and removal claims, but was quickly met with questions from Judge Graves—an Obama appointee—regarding whether there was an "effective denial" in the case. Cox responded in the affirmative, stating that Amazon had requested a ruling on the preliminary injunction request by a September 27, 2024, briefing deadline. However, Judge Graves highlighted the practical issues with seeking a ruling on a request the same day that the parties had filed supplemental briefing on that request. Judge Ramirez—a Biden appointee—was similarly skeptical of whether Amazon explicitly requested a ruling by that date.

NLRB attorney Tyler Wiese also spent most of his time discussing the effective denial issue, arguing that there was no clear deadline set by Amazon, and that there was no irreparable harm from the district court's failure to rule by September 27, as Amazon could have appealed the ruling to a Circuit Court.

Judge Richman inquired briefly into the merits of Amazon's Seventh Amendment claim, asking Wiese whether, under *Jarkesy*, the Court should focus on (i) the nature of the claim, or (ii) the remedy sought, to determine whether Amazon was entitled to a jury trial. Wiese indicated that both were relevant and argued that neither element favored Amazon's position. Regarding the nature of the claim, Wiese argued that labor disputes did not arise at common law, as union organizing had actually been unlawful under the common law in certain jurisdictions. Concerning the remedy, Wiese claimed that the new damages sought by the Board were not "fines" or "monetary remedies designed to punish wrongdoing," like those in *Jarkesy*, but rather "make-whole relief."

Cox spent some time on rebuttal discussing the constitutional claims, arguing that the "nature" of the proceedings is more important than the remedy under *Jarkesy* for the Seventh Amendment jury trial issue. Lastly, on the removal issue, Cox asserted that an "illegitimate proceeding" presided over by an "illegitimate decision-maker" would cause injury to Amazon that could not be undone under applicable law, requiring injunctive relief.

SpaceX Oral Argument

Similarly, in SpaceX, the majority of time was spent on the jurisdictional issue of effective denial. SpaceX attorney Michael Kenneally briefly discussed the constitutional issues at the outset, asserting that the "three layers of for-cause removal" for ALJs presiding over NLRB proceedings violated Article II of the Constitution by impermissibly insulating ALJs from the president's control. But once Kenneally began discussing the effective denial issue, he was quickly met with questions by the judges.

Judge Graves focused on SpaceX's filing of a notice of appeal on April 30, 2024. He seemed to view that filing as premature given that it occurred two days before the May 2 deadline set by SpaceX for a ruling on its preliminary injunction request. Judge Richman then focused on SpaceX's selection of May 2 as the operative deadline, which Kenneally explained was the date of a hearing before an NLRB ALJ on discovery issues. Judge Richman expressed some skepticism regarding whether a ruling from that conference would cause the requisite harm, hinting that SpaceX could have sought to stay discovery while pursuing its constitutional claims. Kenneally responded by indicating that SpaceX would still be required to follow the ALJ's discovery orders, absent proof that the president would have exercised their removal powers.

Wiese appeared again for the NLRB in the SpaceX case and spoke freely about the issues absent much questioning. While stating that there were “distinguishing factors” between SEC and NLRB ALJs, Wiese did not get into those differences and instead cited case law for the proposition that an ALJ can still act where there is a constitutional question regarding the president’s power to remove. In other words, a preliminary injunction would be improper because the ALJ would be empowered to decide the case even if the NLRB’s structure unconstitutionally insulated ALJs from removal.

Wiese also downplayed the discovery conference as a “routine conference call,” which he argued would not cause irreparable harm regardless of the ALJs rulings on discovery questions. Kenneally opposed that position on rebuttal by reiterating that irreparable injury exists because there would be no practical way “of having decisions of improperly insulated ALJ reversed.” Thus, through seeking injunctive relief, SpaceX is “trying to prevent a tainted unconstitutional proceeding in the first place,” which Kenneally indicated is grounds for a preliminary injunction.

Takeaways

Although it is difficult to predict how an appellate panel will rule on an issue simply based on the questions at oral argument, the Fifth Circuit’s focus on procedural issues and general skepticism of the companies’ arguments concerning whether an effective denial was issued by the district court judges casts some doubt as to whether the court will grant the request for relief.

Moreover, the focus of the questioning on procedure limits the insight on the constitutional issues that can be gleaned from the oral arguments. Among the panel members, Judge Richman seemed most concerned with the constitutional questions and could be sympathetic at least to the companies’ attempts to have these issues decided without being faced with potential adverse rulings that would be difficult to undo.

Should the Fifth Circuit panel deny Amazon’s or SpaceX’s preliminary injunction motions, they could seek to have the Fifth Circuit review the decision *en banc* and/or seek *certiorari* before the U.S. Supreme Court. Even if denied, given the procedural posture, this likely will not be the last word on the merits of the constitutional issues raised by Amazon and SpaceX.

As always, we will continue to update you on these developments.

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