

## **AFSCME Council 32**

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### **NLRB Composition and What That Means for You**

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and

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## NLRB COMPOSITION AND WHAT THAT MEANS FOR YOU

- I. The National Labor Relations Board (NLRB)
  - a. The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions. The NLRB's field agents and attorneys investigate and prosecute violations of federal labor law, oversee union elections, and enforce the provisions of the National Labor Relations Act (NLRA).
  - b. "NLRB" also refers to the five-member Board (often just called "the Board") that primarily acts as a quasi-judicial body in deciding cases on the basis of formal records in administrative proceedings. Board Members are appointed by the President to 5-year terms, with Senate consent, the term of one Member expiring each year.
  - c. The General Counsel, appointed by the President to a 4-year term, is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases. The GC directs litigation and sets priorities for Regional Offices and field attorneys in enforcement of the NLRA.
- II. Legacy of the Trump I Board and the Supreme Court
  - a. *Janus v. AFSCME*, 585 U.S. 878 (2018): Supreme Court ruling that held that requiring public sector workers to pay fair share fees is a violation of the First Amendment. Made public sector employment "Right to Work for Less" nationwide.
  - b. *Glacier Northwest, Inc. v. Teamsters Local 174*, 598 U.S. 771 (2023): Teamsters employed by a concrete delivery company in WA walked off the job in a strike, leaving wet concrete to harden in company trucks. Employer sued the union for damages in state court. The U.S. Supreme Court ruled 8-1 for the Employer, imposing an obligation on unions to "take reasonable precautions to protect" employer property against "foreseeable and imminent danger" posed by strikes and picketing. Failure to take

reasonable precautions to mitigate the risk of harm to employer property renders a union's conduct unprotected by the NLRA and exposes the union to potential liability in a state court tort lawsuit.

- c. *Care One at New Milford*, 369 NLRB No. 109 (2020): Held that employers are not required to bargain over discretionary discipline of individual employees prior to reaching a first collective bargaining agreement.
- d. *Caesars Entertainment*, 368 NLRB No. 143 (2019): Overturned a prior ruling from the Obama Board and returned to the rule allowing employers to prohibit employees from using company email systems for worker organizing and other NLRA-protected activity.
- e. *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019): Announced a new test for determining independent contractor status, making it easier for employers to classify employees as independent contractors. Independent contractors are not covered or protected by the NLRA.
- f. *Velox Express, Inc.*, 368 NLRB No. 61 (2019): Held that worker misclassification—however intentional or however motivated to defeat union organizing efforts—is not a violation of the Act.

### III. Goals and Threats of the Trump II Board

- a. Trump filled the NLRB with management lawyers. Current Board composition:
  - i. David Prouty
    - 1. Biden appointee; former union lawyer (term expires August 2026) (renominated 4/13).
  - ii. Scott Mayer
    - 1. Trump appointee; was most recently Chief Labor Counsel for The Boeing Company, and previously worked for Morgan Lewis, a notorious union busting law firm (term expires December 2029).
  - iii. James Murphy
    - 1. Trump appointee and current Chairman of the Board; worked as Chief Counsel for former Chairman Marvin Kaplan (term expires December 2027).
  - iv. James Macy (nominated on 4/13)

1. Trump nominated Macy on April 13, 2026; Macy is currently the Principal Deputy Administrator at the Wage & Hour Division of the Department of Labor. Prior to joining the DOL in September 2025, Macy worked for 40 years at several major Milwaukee law firms (including Godfrey & Kahn and von Briesen), representing private sector companies as well as municipal employers in employment matters and collective bargaining.
  2. If confirmed, Macy would give the Board the three-member majority it has traditionally required to overrule precedent.
- b. General Counsel Crystal Carey
- i. Trump appointed anti-union lawyer Crystal Carey as the NLRB General Counsel. She will likely issue a memo soon laying out her enforcement and litigation priorities, which will be a Chamber of Commerce wish-list and contain efforts to weaken unions, restrict organizing, and undermine worker rights and protections.
  - ii. Crystal Carey is a former partner at the union-busting law firm Morgan Lewis.
- c. Joint Employer Rule
- i. In 2020, the Trump I NLRB issued a rule implementing a higher threshold for determining “joint employer” status. Joint employer status is important because it imposes a bargaining obligation on a company that controls terms and conditions of employment and allows a union to bargain with the entity that actually controls employees’ workplaces, rather than, for instance, just a subcontractor or intermediary.
  - ii. The Biden NLRB issued a rule in 2023 which would have superseded that rule. The rule was challenged in court, vacated, and the NLRB gave up defending it.
  - iii. The Trump II NLRB reinstated the 2020 rule this year, and it went into effect on Feb. 27, 2026.
- d. Blocking Charge Rule
- e. *Thryv, Inc.*, 372 NLRB No. 22 (2022): Requires compensation for “direct and foreseeable” pecuniary harms resulting from unfair labor practices.
- i. Rejected by the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> Circuits, and upheld by the 9<sup>th</sup> Circuit.

- f. *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023): Established a framework under which an employer violates the NLRA by refusing to recognize a union with majority support, but may avoid liability by promptly filing an RM petition, normally within two weeks of a recognition demand. If the employer fails to file an RM petition and subsequently commits unfair labor practices, the Board will issue an affirmative bargaining order as a remedy.
  - i. Rejected by the 6<sup>th</sup> Circuit.
  
- g. *Amazon.com Services LLC*, 373 NLRB No. 136 (2024): Banned captive audience meetings.
  
- h. A number of anti-union NLRB decisions that have since been overturned by the pro-worker Biden Board, but may soon be returned to prior bad precedent:
  - i. *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024) (overturned *MV Transportation, Inc.*, 368 NLRB No. 66 (2019)) (standard for unilateral change by management.)
  - ii. *Lion Elastomers, LLC*, 372 NLRB No. 83 (2023) (overturned *General Motors LLC*, 369 NLRB No. 127 (2020)) (limits employer discipline for use of profane or offensive language when engaged in protected activity.)
  - iii. *Valley Hospital Medical Center*, 371 NLRB No. 160 (2022) (overturned *Valley Hospital Medical Center*, 368 NLRB No. 139 (2019)) (dues checkoff clauses survive expiration of contracts.)
  - iv. *American Steel Construction*, 372 NLRB No. 23 (2022) (overturned *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017)) (standard for determining an appropriate bargaining unit.)

#### IV. Union Organizing in 2025

- a. In 2025, the NLRB oversaw and resolved 1,388 elections, where unions notched an 81% win rate. The election total represents a 28% decline from 2024, when the NLRB resolved 1,938 elections. Union wins (totals) in 2025 were down by 25% from 2024, which saw 1,518 elections result in a new bargaining unit for labor.
  - i. The NLRB's monthly election totals reveal that the decrease in organizing activity in 2025 can be partially attributed to the government shutdown that began Oct. 1 and remained in place until mid-November, which severely curbed the NLRB's ability to

process petitions and conduct elections. Had the shutdown not occurred, and if election activity had remained at the same pace that it had exhibited in the first nine months of the year, then 2025's final total would have been larger than the actual 2025 total, but still far below 2024's total.

- b. 2025 was the first year since 2020 to register a decline in union organizing activity (through the NLRB). In 2024, the total number of elections and union wins had reached their highest points in two decades, making 2025's drop all the more dramatic.
- c. As high as NLRB election totals climbed in 2021–2024, they were still far short of typical yearly outputs in the early 2000s and earlier. In 1989, for example, the NLRB oversaw nearly twice as many elections as in 2024.
- d. Union density in the U.S. is at 10%, according to BLS. That is a combination of a full one-third of public sector workers being unionized, and a paltry 5.9 percent of private sector workers. These numbers are relatively unchanged from last year (a 0.1% increase, to be exact), although there is some evidence that data collection failures by the current government may have affected the numbers by a small amount.

## V. Challenges to the Constitutionality of the NLRA and Potential Implications

- a. *Gwynne A. Wilcox v. Donald J. Trump*, 25-5057, (DC Circuit)
  - i. Trump fired Democratic Board Member and former union lawyer Gwynne Wilcox on Jan. 28, 2025. No president has removed a Board member from their seat before the expiration of their term.
  - ii. The D.C. Circuit ruled on Dec. 5, 2025 that statutory for-cause removal protections for members of the NLRB and Merit Systems Protection Board are unconstitutional, holding that these agencies wield substantial executive powers exceeding those deemed quasi-legislative or quasi-judicial under *Humphrey's Executor*.
  - iii. The Supreme Court strongly signaled (through its May 23, 2025 order granting the government's stay of the district court's order enjoining Wilcox's removal) that it will eventually rule that the removal protections for NLRB members are unconstitutional and heads of independent executive agencies like the NLRB can be fired at will. This is a standard part of the "unitary executive" theory

that the conservative legal movement has been pushing for a long time.

b. Main attacks put forward by employer attorneys:

- i. The NLRB's for-cause removal protections for Board members and ALJs violate Article II of the U.S. Constitution because they unduly restrict the president. (The issue in *Wilcox v. Trump*, above.)
  1. The legal argument:
    - a. Article II of the US constitution requires that the president "shall take Care that the Laws be faithfully executed."
    - b. The president cannot do so with respect to the NLRB because the NLRB members and administrative law judges (ALJs) are too difficult to fire.
    - c. Thus, the NLRB's current structure is likely unconstitutional and it would cause irreparable harm to these employers to be subject to NLRB administrative processes.
  2. The U.S. Supreme Court is likely to weigh in and rule that this structure is unconstitutional, permitting the president to remove NLRB members and ALJs at will.
- ii. The NLRB's adjudicatory system and enhanced remedies (*Thryv*) violate the Seventh Amendment because they deny employers the right to a jury trial.
  1. Enhanced *Thryv* remedies are intended to restore the status quo and are therefore equitable in nature. They are neither legal nor punitive damages and the Seventh Amendment is not implicated.
  2. The U.S. Supreme Court rejected this jury-trial challenge in 1937 in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937).
- iii. The NLRB's structure violates the Fifth Amendment's due process clause because it is inconsistent with the separation of powers by combining investigations and judicial functions.
  1. The legal argument: The NLRB (GC) exercises prosecutorial authority; the NLRB (Board) exercises legislative (creates law) and adjudicatory (through ALJs and the Board hearing cases) functions. This allegedly violates the separation of powers.

2. Federal appellate courts have repeatedly upheld the Board's structure, whereby the NLRB GC investigates while the Board adjudicates. The bifurcated structure reflects congressional intent to differentiate between the investigatory authority of the GC with the Board's final authority.

c. Status of Major Constitutional Challenges

- i. SpaceX filed two lawsuits in federal court in early 2024 to prevent the NLRB from enforcing federal labor law against it. The 5<sup>th</sup> Circuit has ruled in SpaceX's favor, issuing preliminary injunctions in enforcement proceedings. The NLRB effectively cannot enforce federal labor law in the 5<sup>th</sup> Circuit as of now.
  1. SpaceX is represented by Morgan Lewis (former law firm of Member Mayer, GC Carey. Partners include former anti-labor Chairman John Ring, Members Philip Miscimarra and Harry Johnson.)
- ii. In December 2025, the 3<sup>rd</sup> and 9<sup>th</sup> Circuits aligned against the 5<sup>th</sup> Circuit in holding that federal courts lack jurisdiction under the Norris-LaGuardia Act to enjoin NLRB proceedings, even when the employer raises constitutional challenges to the agency's structure.
- iii. SpaceX has been joined in these arguments by Amazon, Trader Joe's, and Starbucks (among others). Employers now routinely assert constitutional challenges when defending ULP charges and in representation hearings.

- d. The U.S. Supreme Court is likely to take up some of these challenges. Given that the Supreme Court is dominated by conservatives who are generally averse to the existence of administrative agencies, do not respect the rights of workers, and view unions with disdain, it is likely that these attacks will meet with some success. The extent and impact of an unfavorable decision is unclear at this time.

e. Responses by States

- i. California and New York have both passed "Little Wagner Acts" (S.8034A in NY and AB 288 in CA) in anticipation/preparation for a weakened NLRB. The NLRB has filed a lawsuit against the State of New York contesting the validity of that legislation.

- ii. Wisconsin Employment Peace Act (WEPA), § 111.02-111.19, Wis. Stats.
  - 1. Coverage/Jurisdiction: Private sector employers and employees not covered by the NLRA. §§ 111.02(6)-(7)

VI. NLRA's Relevance to Public Sector Unions

- a. Wisconsin Employment Relations Commission (WERC), which administers Wisconsin's MERA and SELRA, frequently looks to NLRB precedent and reasoning when issuing its rulings.
  - i. "the Commission has always found NLRB law to be worthy of consideration but has also always made its own determination as to how best to interpret the labor laws that it administers." *Kettle Moraine School District*, Dec. No. 38586-A (WERC, 4/14/21).
  - ii. "While we are not bound to follow precedent developed under the National Labor Relations Act, we find the balancing of interests referenced above to be a useful and persuasive analytical approach to considering the employe and employer interests presented here." *WAPCO*, Dec. Nos. 29448-C, 29495-C, 29496-C and 29497-C (WERC, 8/31/00).
- b. As an example, last year, a Commissioner requested supplemental briefing in a ULP case under SELRA in light of a recent decision from the NLRB, before issuing his decision.