Labor Department Nominee's Opinions as National Labor Relations Board Member

By Philip B. Rosen, Howard M. Bloom and Linda R. Carlozzi

February 21, 2017

R. Alexander Acosta, President Donald Trump's nominee as the next Secretary of Labor, served on the National Labor Relations Board from December 17, 2002, to August 21, 2003. He was confirmed by the United States Senate on November 22, 2002, having been nominated by President George W. Bush. Acosta, a Republican, served with fellow Board members Wilma Liebman (Democrat), Peter Schaumber (Republican), Dennis Walsh (Democrat), and Chairman Robert Battista (Republican). During his term, Acosta participated in the issuance of more than 120 opinions.

It is difficult to determine Acosta's precise views on labor law topics. Probably because he was part of a Republican majority controlled Board, he dissented in only one of the opinions in which he participated, a case in which the Board decided a union had unlawfully operated its hiring hall; Acosta believed that a more extensive remedy was warranted. He concurred in only five decisions, the most significant of which is described below. Acosta appears to have taken a middle-of-the-road approach to labor relations during his time on the Board, finding for and against labor unions and employers. This is consistent with the views of former NLRB Chair Liebman, who served with Acosta. In a recent interview with *Law360,* she described him as "not knee-jerk anti-worker or anti-union." She continued, "He was interested in looking at the law and how [to] apply it."

The Board's record while Acosta was a member is almost devoid of significant cases. Only one can be described as groundbreaking. In *Alexandria Clinic,* 339 NLRB 1262 (2003), the NLRB decided that an employer did not violate the National Labor Relations Act when it terminated several employees who had gone out on strike. In that case, the union had given a strike notice to the employer-hospital setting the date and time for a strike. Thereafter, the union delayed the strike for four hours. The employer terminated the striking employees, and the Board found the terminations were lawful. Interpreting Section 8(g) of the Act, the Board decided that, once a 10-day notice is given to an employer, it may be extended only by the written agreement of both parties. Acosta concurred for the purpose of making clear that the language of Section 8(g) allows an extension of the 10-day period only by mutual agreement of the parties.

Although not groundbreaking, two other decisions are worth noting. In *USF Red Star, Inc.,* 339 NLRB 389 (2003), among other things, the employer gave warnings to employees who had worn a button on which was written "Overnite Contract in '99 Shut Overnight Management Down or 100,000 Teamsters will." Surprisingly, the Board panel, which consisted of two Republican members, including Acosta, found the employer's giving of the warnings violated the NLRA. In the other case, *1199, National Health & Human Services Employees Union, SEIU, AFL-CIO,* 339 NLRB 1059 (2003), the Board decided that the union violated the NLRA when an organizer engaged in a series of open confrontations with managers, supervisors, and security guards employed by the employer-hospital. Agreeing with the administrative law judge, the NLRB found that the organizer's actions violated the NLRA because "employees may be restrained or coerced in their protected activities by union misconduct directed not against them but again supervisors, managers and security guards. Union misconduct of this character coerces employees who witness it or learn of it because they may reasonably conclude that if they do not support the union's goals, like coercion will be inflicted upon them."

In a law review article, "Rebuilding the Board: An Argument for Structural Change, Over Policy Prescriptions, at the NLRB," Acosta advocated for more NLRB rulemaking because of what he calls the NLRB's "caselaw oscillation" and "flip-flops," most notably on the issue of non-union employees' right to representation at an investigatory interview from which discipline might result (*Weingarten* rights). *FIU Law Review,* Volume 5, Number 2 (Spring 2010).

Meet the Authors

Philip B. Rosen

Principal
New York Metro
New York City 212-545-4001
Email

Howard M. Bloom

Principal
Boston 617-367-0025
Email

Linda R. Carlozzi

Principal
New York Metro
New York City 212-545-4040
Email

Practices

Labor Relations

Industries

Energy and Utilities
Financial Services
Government Contractors
Healthcare
Higher Education

Finally, and perhaps most important as a window into his views on immigration, is Acosta's one concurring opinion. In *Double D Construction Group, Inc.,* 339 NLRB 303 (2003), the discharge of an undocumented worker was determined by the administrative law judge to be lawful, but was remanded by the NLRB. The ALJ had discredited the worker's testimony on the ground that he knowingly had used a false Social Security number to obtain employment. Acosta concurred in the remand, cautioning that the judge's reasoning was overly broad because it would deny undocumented workers their NLRA Section 8 protections. He wrote that, discrediting the testimony of any undocumented worker who used a false Social Security number to gain employment would make it "exceedingly difficult" for the NLRB's General Counsel to establish that a discharge or other unfair labor practice directed against an undocumented worker was unlawful.

For more on the nominee, see R. Alexander Acosta Picked to Head Department of Labor. Please contact a Jackson Lewis attorney if you have any questions.

Hospitality
Life Sciences
Manufacturing
Media
Professional Services
Real Estate
Retail
Technology
Transportation