

Departed NLRB Chair Talks Nominees, Cuts And Fresh Eyes

By **Braden Campbell**

Law360 (September 12, 2025, 10:09 PM EDT) -- Marvin Kaplan has left the National Labor Relations Board after nine years, some spent as part of a busy Republican majority and others as the lone dissenting voice among Democrats. Here, the former chairman sits down with Law360 to discuss his tenure and the board's future under a very different administration than the last.

This interview has been edited for length and clarity.

How is the move to Jackson Lewis going? What will be your areas of focus?



Marvin Kaplan

They brought me in here as a labor expert. I expect to continue my experience as a labor expert and work with the companies that the firm represents to ensure that they comply with labor law, and I'm looking forward to it. I issued [rulings in] more than 900 cases when I was on the board, ranging from the most complicated to the most mundane. And I'm excited to do something new. But one of the things that was clear to me when I was on the board is, everyone benefits from employers staying within the confines of the [National Labor Relations] Act. I'm excited to bring that expertise to the employer community and help them achieve their goals, but stay within the law, so you don't have rerun elections or unlawful discharges, or any of that stuff.

So will you be primarily giving advice, as opposed to representing employers in negotiations or litigation?

I think that we're going to be doing all of it. There are restrictions [as a former NLRB member] on my ability to participate in cases that were before us, but since I was chairman, I have an additional limitation with regard to cases that were even before the board that I never worked on. Anyone you talk to from [the NLRB's ethics office] will tell you I'm a pretty big stickler for those rules, so I'll be working within the confines of those rules. It would be hard to work on anything appellate, because anything that's before the court right now is probably a case that is appealing something I said, or appealing something my colleagues said that I dissented in. That [litigation work] will probably develop later.

You were part of the majority in the first Trump term, and a member of the minority under Biden. Are there any cases you're particularly proud of, or anything that stands out to you as particularly misguided?

Have you spent any time with my dissents? I think there's the obvious ones. I think [the decisions to ease bargaining orders and ban captive-audience meetings] were particularly problematic, but with regard to areas I'm proud of, I'm a huge fan of rulemaking. You've probably heard me speak about it before, the advantages of rulemaking and the opportunities that rulemaking provides. I was one of the few members, even before coming to the board, who had participated substantively in rulemaking from start to finish. The fact that you have to respond to all substantive comments forces the agency to address things that it might otherwise ignore. And the ability to bring so many people into it — I think expanding that pool is essential, and really an important part of writing things that are going to work. Not every union is the same. Not every employer is the same. Not every employee is the same. And each has its own part in this process to try and come up with a rule that works for all.

The flip side of it, and I think you've probably heard [NLRB member David] Prouty say this a few times, is it's a lot of work. It takes a lot of time. But sometimes, expediency isn't what you're looking for, particularly in these very important issues. I think that joint employer was a great example of one. I also think the election rules are a great example. When you're covering so many things, getting those additional thoughts is a really important part of it.

Are there some areas that are a better fit for the board's rulemaking process than others?

The board will never be able to get away from its adjudicatory function. I would say the board would do itself a great favor if it started revisiting some of its past rulemakings, because the other part of rulemaking that is complicated is you can't update your rules without rulemaking. If you codified it through rulemaking, that is the rule until such time as you take it up again. Reviewing those rules is an essential part of any regulatory environment. It benefits everyone to go back and be like 'Oh, you know, we haven't looked at these provisions in a long time. Maybe we should?'

The NLRB has operated without a quorum for several months now. You've mentioned doing groundwork to expedite decision-making when it has a quorum again. How well is the board set up to resume function if and when nominees Scott Mayer and James Murphy are confirmed?

The best way for the board to function is with a full five-member board. It allows for three-member panels that allow a lot more cases to get out the door, to spread the work around, et cetera.

Where this gets tricky is, whatever work I did before I left, it depends on whether Jim or Scott agree with me, or agree with David Prouty, or whether David Prouty agrees with me. So ultimately all of that work could be for naught.

We have a lot of staff over there. If we're not working on cases, they're just sitting around, and that's not a good use of the staff. So the idea [behind our preparation] is when the new members come in, they will have as much in front of them as they can, and then will make their own decisions on whether they agree or disagree, or think I'm completely off my rocker.

At the end of the day, the idea is to give them as many tools as possible to look at these cases in a thoughtful and hopefully expeditious manner, and get it out the door. Eighty percent of our cases, somewhere in that range, are noncontroversial, they have no dissent. We focused on those. But at the end of the day, each member is independent. Knowing Scott and Jim — Jim, in particular, used to be my chief [counsel] — incredibly well, they are both very independent individuals. When they approach these cases, they will approach them with an open mind, without any preconceived notion about what is the right answer. David and I did our best to provide whatever we could, when they come, to help

them get through [the backlog of cases].

What are your relationships with the pending nominees like? What do you think they would bring to the board if confirmed?

I think very highly of them both. I think they bring an interesting experience to the board. I'm not aware of anyone in recent history, and maybe ever, that came from an employer onto the board, rather than from a law firm or a union or something like that. So I think Scott [as an in-house corporate counsel] adds a very interesting perspective as an individual who is on the ground, at an employer, working with unions.

I think Jim [as a longtime counsel to NLRB members] — there's no one who knows the law better than him. He brings that institutional, incredible knowledge, historical context. No one on the outside could have the level of context he has with these rules, because he was in the room when these cases were being decided, these seminal cases. There were moments when Jim and I disagreed, but there was never a moment with him that he was not thoughtful, intelligent and very reasonable in all of his positions.

And it's a bit of a joke at the board: [Jim] is singularly focused on getting cases out the door efficiently, and he's a true believer in "justice delayed is justice denied." So there is no better advocate for the expeditious treatment of cases than him. In this period where we will have gone so long without a quorum, and the backlog is growing, he will be a voice of logic and understanding, and with his knowledge of how the board works, [a voice] to allow the board to move on those cases as quickly as possible.

The NLRB can be slow to resolve cases. Staffing has decreased and workloads are up. In the last administration, general counsel Jennifer Abruzzo and NLRB chair Lauren McFerran were outspoken about needing more money. The latest budget proposal would cut its funding. Does the board need more money than it has, and can it be an effective agency with the money it has?

I hesitate to comment too much on the GC side. I think on the board side, when we [Republicans] were in the majority [during Trump's first term], we got the backlog down to the lowest numbers, I think, in decades. [Chairman] John Ring and I worked tirelessly to ensure that we met deadlines, and worked closely to make sure cases were dealt with quickly and efficiently.

During the last administration, those timelines were not followed so religiously. And the problem with that is delays in one case lead to delays in other cases. And if you can't commit to those timelines, then things can slow down. Now, I think in some of those cases, that resulted in them coming out with better decisions, or us coming with good dissents, because you spend the time you need. But there's this other part of it which is, some Saturday nights are going to be on the computer. I'm lucky because my wife is a doctor, because it's often she spends nights working anyway, working on her notes or working on her research. So us sitting side by side on the couch, working late into the night, was not that bad. But I think [being an NLRB member] requires that level of commitment where you just accept, yes, I'm working for the government, and I'm not asking my staff to work on weekends, but I just need to commit my Saturday to the fact that I need to turn around that draft. And be willing, as chairman, to harass whatever member needs to get that done.

I think that's the kind of devotion you can expect from these three members, Dave, Jim and Scott. I'm hoping that they can deal with this all quickly.

The board doesn't have a Senate-confirmed general counsel. It seems Crystal Carey's nomination is stalled in the Senate. Do you expect her to get through, and how do you think it will affect the board if acting general counsel William Cowen is in that position for a while?

I have a lot of respect for Bill, I think he's distinguished himself in a number of roles at the board. But I also have a lot of respect for Crystal. I think she was a very good choice. I know that there's controversy regarding her testimony. I think she's honest and believes in doing the best she can as the general counsel in protecting employees, employers and unions alike. I think she'd do a good job in that role. I hope she gets through.

Bill has done a great job in a difficult situation with a difficult transition, trying to make sure that the agency continues to run. So much of the responsibility has been delegated to him, rather than having the board to go to. I don't envy him his position, but I feel comfortable with him in that role until such time as Crystal can be confirmed.

Some commentators have speculated that Gwynne Wilcox's removal will set a new precedent of presidents cleaning house and more quickly installing their people, and that this will increase the board's "policy oscillation." Do you see this as carrying any implications? Does greater politicization risk coarsening collegial relations among board members?

It's hard to guess. In my experience, working over two administrations with multiple different members, everyone that comes onto the board believes in the act and is there to get work done, and to address issues. I go back to, 80% of our decisions are unanimous. It's more on the periphery that we strongly disagree. I think the first people that have been nominated are great choices and are going to continue that collegiality. I think all three of them will work well together.

With regards to Gwynne, that's a question for the courts. If that part of the NLRA is unconstitutional, and Humphrey's Executor is wrong and [NLRB members] should be removed at the discretion of the president, that's a question for the court. If it does create more partisanship, it's the nature of the Constitution as we wrote it, and whether that's good or bad, time will tell.

Gwynne is a friend. Even after her discharge, we continue to be friends, because we were colleagues. We worked well together and we respect each other, so I expect that to continue.

The president issued an executive order in February calling for increased oversight of independent agencies. Can you say how that was implemented and what kind of impact it might have?

We had no quorum, we really couldn't implement [the part that calls for greater oversight of rulemaking]. There was a lot of discussion regarding how it should be implemented, but until such time as there's a working board, there's really not much you can do.

[Regarding a provision requiring agency heads to coordinate policy with the White House] we had no White House liaison at the NLRB when I left. So now, what that looks like, I just don't know. It's been a while since I last talked to [U.S. Equal Employment Opportunity Commission acting Chair] Andrea Lucas, but last time I don't think they had the White House liaison at the EEOC either. I just don't know how involved they would be. It's sort of a black box.

The president has called for cutting the size of the federal government through various initiatives. Can the board handle more personnel losses? To the extent there was back-and-forth between the White House and the agency, can you speak to those conversations?

I don't know that I can. The only thing I will say is that reassessment of the deployment of personnel is always essential. A number of years ago there was an [inspector general's] report about the board that indicated that the board was very top-heavy with management and was critical of that structure.

That sort of reevaluation of the structure is essential for us to be the best stewards of taxpayers' funds. So whether that means shrinking the agency, or moving people around, or growing the agency, this is something that the next board, when they have their quorum and are actually able to do it in an effective manner, I hope that is something they will reassess as well.

We didn't do any of the [reductions in force] or anything like that at the board. Most of our attrition was voluntary. We lost some good people, so that was unfortunate. But that was their choice.

I do think there's going to have to be some substantive thought put into what the board looks like with its current [personnel] and budget. There are ways to save other than personnel cuts. When we [Republicans] were in the majority we looked very closely at office costs as well. All that office space has a real monetary cost. Do you need an office in the middle of L.A. in the most expensive building? Yeah, probably not. In general, operations is an area that everyone should be thoughtful about.

Is there anything else you'd like to add?

When I left the board, I spent a lot of time with what my wife likes to call "my mistress" – my Excel spreadsheets. And I spent a lot of time looking at cases I've worked on in the past, and Jackson Lewis really stood out as a law firm that had distinguished itself not only in their work but in getting the case right. So I'm honored to join this team and work with these talented individuals.

I was equally honored to work with the individuals at the board and saddened to leave them. It's hard to go nine years at one place and then walk out the door, because there's a lot of really great people at the board, and the amount of work that they put out to protect the rights of everyone protected by the act should not be underestimated.

But a lot of these issues that are going to come up to the next board are pretty well-baked, regarding my opinion. And I'm a strong believer in, there should be some turnover in government, especially at the top, at the policy level, because it doesn't make sense having the same person making the same decision every single time. It should be someone else coming in there and thinking about, yeah, does that make sense or is that right. Or should we look at this from a different perspective and should we apply it in a different way. I'm confident that that's going to happen in the future, and I wish them all the luck in the world, as I also wish myself all the luck in the world.

--Editing by Bruce Goldman and Nick Petruncio.