



Higher Court Calls Bush NLRB Out on a Bad Decision

A federal appeals court recently joined the growing chorus of critics of the National Labor Relations Board's Republican majority. The Seventh Circuit Court issued a harsh assessment of the Board last month when they ruled to overturn its finding that an employer's partial lockout of pro-union workers was legal. The decision wasn't handed down by "liberal activist judges," as you might have expected. **Rather, a trio of Republican-appointed judges denounced the Bush Board.**

In 2001, Midwest Generation, a power company operating throughout Illinois, failed to reach an agreement for a new contract with its employees. So as a last resort, all but eight of the 1,150 employees and members of the International Brotherhood of Electrical Workers (IBEW) went on strike on June 28, 2001. During the course of the summer, 47 employees made offers to return to work, which the company accepted. Then on August 31, the entire workforce offered to end the strike and return to work, but Midwest Generation refused. The company wouldn't let them back until they ratified their contract proposal, and instituted a lockout on all employees with the exception of the eight "non-strikers" and 47 "crossovers." On October 16, 2001, the employees ratified Midwest Generation's proposal and the company ended the lockout.

Before the workers ratified the agreement, the IBEW filed an unfair labor practice charge against Midwest Generation. The union argued that through the partial lockout, the company illegally discriminated against those who honored the strike until it ended, thus coercing employees to vote to accept its contract proposal. The NLRB General Counsel found merit in the charge and issued a complaint against the company on March 7, 2002. The case was subsequently sent to the Board for review.

On September 30, 2004, the Board majority found the company's partial lockout was legal.¹ The majority argued that the company was not acting discriminatorily, but was merely placing economic pressure on employees to get them to agree to its proposal. Yet when a company institutes a partial lockout, it must offer a legitimate operational justification for locking out some employees and not others. Midwest Generation offered no such explanation, and even admitted that it did not need the non-strikers and crossovers to maintain operations during the lockout.

Workers Seek Alternative to NLRB Elections

Less than 20% of workers are forming unions through the NLRB election process.²

The IBEW appealed this decision to the Seventh Circuit Court. On October 31, 2005, the appeals court reversed the Board's ruling, arguing that the majority used reasoning "in derogation of nearly four decades of employee protection."³ The court asserted that by accepting the company's defense without a substantial business justification, **the Board's approach "would allow employers acting under the guise of maintaining business operations to engage in exactly the type of action Midwest undertook: punishing those who stood with the union and rewarding those who crossed picket lines."**

The court ordered the Board to rule that Midwest Generation violated the law by instituting a partial lockout. They also ordered the Board to consider whether this violation warrants voiding the contract, as the coercive lockout may have led employees to more willingly accept the employer's proposal.

Public scrutiny over the policies of the Bush administration is at an all-time high, but the extreme decisions and willingness of the Board to undermine workers' basic legal protections are still under the radar. Now that Republican-appointed federal judges have sharply rebuked the views of the Bush Board, will more eyes be on the NLRB?

Additional Resources

1. **Sign-up** to receive an alert via email when the next monthly edition of *Workers' Rights Watch: Eye on the NLRB* is published.
 2. **Read past editions** of *Workers' Rights Watch: Eye on the NLRB*.
 3. If you know of a case that we should highlight in a future edition of *Workers' Rights Watch: Eye on the NLRB*, please let us know. **Send these stories**, along with your contact information, case details and related information to nrbstories@americanrightsatwork.org.
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Endnotes

1. *Midwest Generation, EME, LLC*, 343 NLRB 12 (2004).
2. Brudney, James, "Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms," 90 Iowa L. Rev. 819 (2005). Less than one-fifth of the 3 million workers who organized with affiliated unions from 1998 to 2003 did so through the NLRB election process, according to the AFL-CIO.
3. *Electrical Workers Local 15 v. NLRB*, No. 05-1058 (7th Cir. 2005).