

Partisan Potshots At NLRB Par For The Course, Ex-Chair Says

By **Vin Gurrieri**

Law360 (June 12, 2018, 6:37 PM EDT) -- Although critics have accused the National Labor Relations Board of becoming overly politicized in recent years — and the board's stance on issues like the legality of class waivers has left businesses and worker advocates sharply divided — former NLRB Chair Philip Miscimarra told Law360 in an exclusive interview that the labor board isn't operating any differently than it has in the past.

Six months after the conclusion of his almost five-year term on the board, which saw him eventually named as chairman in January 2017, Miscimarra said in a May 24 interview at the Washington, D.C., offices of his current firm Morgan Lewis & Bockius LLP that it was "an enormous privilege" to serve on the board and expressed pride at how the board functioned in a collegial manner despite some occasional but significant disagreements among board members.

But while those disagreements sometimes left him in the minority on hot-button matters since the board was predominately under Democratic control during his tenure, Miscimarra says that any notion that the board has become overly politicized during recent administrations is off-base.

"The NLRB deals with important issues that often affect many people about which parties and their advocates have very strong opinions," he said. "So, I think that the current level of controversy that involves many things that the NLRB does is not very different from the controversial nature of many board decisions and actions that have occurred throughout the agency's history."

Criticism Inherent to NLRB's Nature

When it is at full capacity, the five-member NLRB has traditionally been composed of three members of the president's party and two members of the minority party. That breakdown, however, has often led to sharp reversals in board precedent, which has opened the agency up to critics from both sides of the aisle who believe particular decisions or actions taken by the board have too much of a political bent.

But when asked whether the NLRB has become too politicized in recent years, Miscimarra referenced an example from the nearly 83-year-old agency's early years to illustrate how such criticism against the board is nothing new.

"You can go back and look in 1947, [a] Senate report said that the NLRB 'had acquired a reputation for partisanship' — that's a quote," Miscimarra said.

When it comes to present-day issues, Miscimarra said he believes the board is considered to be controversial primarily due to the importance of the issues it addresses, as well as the difficulty of the agency's work resolving those issues. But the former chair noted that Congress intended for the board to have members of varying backgrounds and perspectives apply the National Labor Relations Act and interpret areas Congress didn't address.

"On the one hand, it's in the nature of what the board does — it will always be considered controversial," Miscimarra said. "But I also think that it's not possible for any party that appears before the board or any group that has interests affected by the board to get everything that they want. ... I think it's unfortunate to the extent that people take one or two particular issues they may not like and use that as a basis to try and undermine the agency as a whole."

Justices' Class Waiver Ruling Hits Mark

Although Miscimarra noted that the NLRB during his tenure decided about two-thirds of its cases by unanimous vote, one issue where such unanimity didn't materialize was over the legality of so-called class action waivers that businesses can implement to bar workers from pursuing class and collective claims for disputes that arise from their employment.

The NLRB had adopted and reaffirmed the position that such waivers were illegal in a pair of Obama-era cases called *D.R. Horton* and *Murphy Oil USA Inc.*, the latter of which featured a vociferous dissent from Miscimarra and then-NLRB member Harry Johnson.

Shortly after Miscimarra left the NLRB, the U.S. Supreme Court rejected the NLRB's view in its landmark *Epic Systems* ruling, issuing a 5-4 decision in late May that mandatory arbitration agreements must be enforced under the Federal Arbitration Act as written and that businesses aren't violating the NLRA if they include such waivers.

Miscimarra told Law360 he agreed with the majority ruling written by Justice Neil Gorsuch, noting that the opinion's legal reasoning largely "adopted the same analysis reflected in the *Murphy Oil* dissents" written by himself and Johnson.

Moreover, Miscimarra said he agreed with the high court's conclusion that Congress, when it enacted the NLRA in 1935, didn't vest the labor board with the "authority to invalidate agreements regarding procedures applicable to legal claims arising under statutes that have nothing to do with the NLRB and statutes over which the NLRB has no jurisdiction."

For employers in a post-*Epic* world trying to determine whether to adopt employment agreements with class waivers, Miscimarra said such agreements involve a broader range of issues than just the inclusion of class waivers and that there are trade-offs for both employers and employees when it comes to the scope of waiver agreements.

"For employers, the extent that you end up having agreements that waive class action treatment, there's the possibility that employers will have a large number of similar claims in separate proceedings that in certain respects may be as burdensome or more burdensome than class-type arbitration proceedings," Miscimarra said, but added that "this whole area tends to be more complex than just simply saying we should have agreements that waive class arbitration."

Room for Improvement

Another issue that has enveloped the agency after Miscimarra's departure has been rumors that newly installed NLRB General Counsel Peter Robb is considering plans to restructure its nationwide network of field offices and demote current regional directors to a lesser classification.

Although Robb and current NLRB Chair John Ring have acknowledged in recent public appearances that a restructuring is in the works, they have been careful to note that no final decisions on specific changes have been made.

The rumors surrounding a possible regional office reorganization drew letters expressing concern from a range of interested parties, including groups of current and former regional directors and others.

Miscimarra declined to address the field office reorganization rumors, saying he would reserve judgment until something definitive materializes.

But more generally, Miscimarra called the work the regional offices have done "very impressive," noting they resolve 95 percent of the approximately 21,000 unfair labor practices cases filed annually, and praised the work done by the agency's staff during his time at the agency.

"The regions, especially in recent years, have done a very impressive job in their case handling," Miscimarra said. "I found that the attorneys and others who worked at the board in Washington, D.C., and the regional directors and people that worked in the board's ... offices throughout the country really were very committed in their work, very dedicated to what the agency is all about [and] they made many sacrifices in their own service."

But one area where Miscimarra acknowledged the board could improve is the speed with which it issues decisions on cases that percolate up from the regional offices, saying it is a work in progress, even though the board attempted to meaningfully address it during his term.

"That's probably the biggest area where I think the board can improve," Miscimarra said. "The board has always done very high-quality work in disposing of cases. You might agree or disagree with the particular outcome of particular cases, but the [quality of] lawyering that is done is very high. The negative trade-off associated with that is that the time associated with decision-making by the board is more time than the parties can afford in terms of the process-related costs that delays end up imposing."

Did you miss the first article in this two-part series? Take a look back for the former NLRB chair's insights on joint employer regulations and the 2014 union election rule.

--Editing by Kelly Duncan and Katherine Rautenberg.