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Results Still A Ways Off As Amazon Union Vote Wraps

By **Braden Campbell**

Law360 (March 26, 2021, 9:05 PM EDT) -- Ballots are due Monday in a closely watched union drive at an Amazon warehouse in Alabama, but inevitable legal wrangling means the National Labor Relations Board may not declare a winner for days or weeks in the biggest labor election in years.

The act of counting potentially thousands of votes will take days in itself, and Amazon and the union alike are apt to lodge challenges tied to voter eligibility among transitory workers and other facets of the high-profile vote, which the labor board will need to resolve before it signs off on a result. And that may not be the end, either.

"Given the size of the election and the stakes, and the past history of the parties involved, I think that we're likely to see this go on for some time," said Daniel Altchek, a Saul Ewing Arnstein & Lehr LLP attorney who advises employers on labor relations.

The eyes of the labor world are on Bessemer, Alabama, where for the last six weeks close to 6,000 workers at an Amazon warehouse have been voting on whether to join the Retail, Wholesale and Department Store Union. If a majority of votes are cast for the union, the workers would **form the first-ever bargaining unit** at a U.S. Amazon facility, potentially spurring more organizing at one of the country's most prominent employers.

The NLRB's Atlanta office will accept ballots until the close of business Monday, with the count to begin Tuesday. But the result won't be known until after what may be a lengthy ballot-counting process.

Before the NLRB counts votes, it gives parties to elections a chance to challenge individual ballots. In an election as complex and hard-fought as this one, those challenges will be numerous, labor watchers say.

"Either side can challenge, or the board itself can challenge," said Julie Gutman Dickinson, an attorney with Bush Gottlieb LLP who represents unions. "There's a number of bases [on which] you can challenge."

A party could argue that certain workers were ineligible to vote because they are supervisors whom the **National Labor Relations Act** denies union rights. They could challenge a ballot as mismarked or improperly sealed. They could strike votes by workers whose names aren't on the NLRB's list of eligible voters, or by workers who no longer work at the facility.

That last challenge may come up often, given the transitory nature of work at Amazon, noted Roger King, senior labor and employment counsel for the business-side HR Policy Association. Distribution center work tends to be seasonal and workers come and go, especially at Amazon, which pays workers to leave after the busy holiday season ends. This year, Amazon made the buyout offer to Bessemer workers in the middle of the election.

"How many people left after they voted?" King said. "That's going to be a very interesting question."

The board officer overseeing the count will go through the challenge process for each ballot, setting it aside if a given dispute has merit. Depending on how many workers voted, this phase may take days. And only after it's done will the count begin in earnest.

If the margin is wide enough that counting the disputed ballots could not sway the outcome, the board agent overseeing the vote will sign off on the result. But if the tally is close and the challenges are numerous, the Atlanta office will hold a hearing to decide whether the challenged votes should be counted, stretching a dayslong process into weeks.

After these challenges are decided, the head of the Atlanta regional office will certify the result as a win or loss for the union. The losing party in the certified tally could accept the result and proceed accordingly: If the union wins, Amazon could come to the bargaining table. If Amazon wins, the RWDSU could accept defeat.

But it's more likely that the losing party files objections alleging the result should be overturned because of misconduct or some irregularity in the process, Dickinson said. Should the union lose, it has ample grounds to challenge the result, she added.

Dickinson pointed to numerous dispatches from Bessemer describing practices that she said may violate the NLRA, including news reports that Amazon intimidated workers in one-on-one meetings and that the company has tapped local police to keep union organizers away from its property. These and other tactics arguably disrupt the "laboratory conditions" that the NLRA prescribes in elections, she said.

"These are incredibly intimidating tactics," she said.

Such objections would ultimately be decided by the agency's titular board in Washington, D.C., which could dismiss the claims; order a rerun election; or, if it finds Amazon committed serious misconduct, order the company to negotiate with the union.

But even after all this, if the union wins, it may have a tough time forcing Amazon to the bargaining table.

"Any employer with the resources that wants to resist a union organizing drive can do so, and the easiest way in the world to do it is to simply refuse to bargain," said Michael Duff, a labor law professor at the University of Wyoming College of Law.

Should Amazon take this course, the union would have to file an unfair labor practice charge with the board. Prosecutors would bring a suit alleging the company violated its obligation to bargain, and the board would hear the case, likely many months after the vote is certified. The losing party could then appeal to a federal circuit court, tacking more months onto the timeline. In the meantime, workers will come and go from the Bessemer facility, eroding union support, Duff said.

The NLRA does not empower the board to seek penalties against intransigent employers, so Amazon could take this course with impunity. Its resistance could galvanize support for the Protecting the Right to Organize Act, **pending legislation** that would impose fines on businesses that flout the NLRA, Duff said.

But absent that power, the union may be at Amazon's mercy. The company isn't likely to be generous, Duff said.

"Not only do I find it improbable, I find it almost impossible," he said.

--Editing by Abbie Sarfo.