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In Potential Landmark Ruling, Court Holds NLRB Lacks Constitutional Authority to Act

By LerVal M. Elva

In a decision that could have far-reaching implications both on recent decisions by the National Labor Relations Board ("NLRB" or the "Board") and on other actions by recess appointees, the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") recently ruled that the President's 2012 recess appointments of three members to the Board were unconstitutional, thereby depriving the Board of a quorum necessary to make any decisions and possibly invalidating all decisions and rules issued by the Board within the last year. [Noel Canning v. National Labor Relations Board](#), 2013 WL 276024 (D.C. Cir. Jan. 25, 2013).

The Decision:

In *Noel Canning*, the employer sought review of the Board's finding that the employer had violated the National Labor Relations Act ("NLRA" or the "Act") when it refused to reduce to writing and execute a collective bargaining agreement. The employer argued, among other things, that the Board lacked the requisite three-member quorum to issue a decision because the Senate was not in recess when three recess appointments were made on January 4, 2012, to bring the Board from two members to its full complement of five members. A three-judge panel of the D.C. Circuit agreed with the employer and found that the Board lacked constitutional authority to make the finding at issue in the case.

In reaching its decision, the D.C. Circuit held that the Constitution's Recess Appointments Clause permits a President to make recess appointments only during a break between Senate sessions, *i.e.* an *intersession* recess, and not during a mere pause in the Senate's business, *i.e.*

an *intrasession* recess. The Court found that in late December 2011, the Senate had left Washington without formally adjourning, so that it had actually remained in session until Senators reconvened in early January 2012. As a result, according to the D.C. Circuit Court, the President's interim member appointments did not occur during a required "recess of the Senate."

The D.C. Circuit also held that presidential recess appointment authority was limited as to the type of vacancies that could be filled. The Board sought a broad interpretation, to include all vacancies that "happen to exist" during a recess, which is the type of vacancy that has been filled by all administrations in recent decades. The D.C. Circuit issued a more restrictive ruling, limiting this appointment authority "to fill vacancies that *arise during* the recess." Neither party disputed the fact that the vacancies did not arise during an intersession recess.

The Board has two options for appeal. It can request an *en banc* review of the decision, which would entail a re-hearing of the case before all the judges of the D.C. Circuit. The Board also may opt to appeal directly to the United States Supreme Court. The Supreme Court likely will take up the case because the *Noel Canning* decision conflicts with interpretations of the Recess Appointments Clause rendered by other federal appellate courts. Indeed, in *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005), the Eleventh Circuit held that the Recess Appointments Clause allowed both intersession and intrasession recess appointments and agreed with the Ninth and Second Circuits that presidential recess appointment authority extended to vacancies that existed before the recess.

Practical Impact for Employers:

If the Supreme Court affirms *Noel Canning*, it could have a far-reaching impact, including the potential invalidation of all decisions issued by the NLRB since the President's recess appointments on January 4, 2012. In *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010), the Supreme Court held that the Board could not legally render decisions or otherwise act without a quorum of at least three members. If the Supreme Court agrees with the D.C. Circuit that the President's recess appointments were unconstitutional, 200 or more decisions issued by the Board since January 4, 2012, could be rendered invalid, as they were issued when the Board did not have a quorum. High-profile Board decisions affecting arbitration, nonunion employers, off-duty access, social media, and workplace investigations may be nullified, including the following findings:

- An employer's off-duty access rule was invalid because it granted management "unfettered discretion" to allow off-duty employee visits for "hospital related business." *Sodexo America LLC*, 358 NLRB No. 78 (July 3, 2012);
- An employer's ban on employee discussions regarding ongoing employee misconduct investigations was unlawful. *Banner Health System*, 358 NLRB No. 93 (July 30, 2012);

- An employer's electronic communication policy prohibiting electronic postings that "damage the Company, defame any individual or damage any person's reputation" unlawfully restricted employees' protected rights. *Costco Wholesale Corp.*, 358 NLRB No. 106 (Sept. 7, 2012);
- A nonunion employer's work rule that employees be courteous to each other and not use disrespectful language that injures the image or reputation of the employer was invalid because it effectively chilled an employee's protected rights. *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (Sept. 28, 2012);
- An employer's policy prohibiting off-duty employees from accessing the employer's property without managerial approval was unlawful. *Marriott Int'l, Inc.*, 359 NLRB No. 8 (Sept. 28, 2012);
- A nonunion employer's termination of employees for Facebook posting was unlawful under Section 7 of the NLRA. *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (Dec. 14, 2012);
- A nonunion employer's mandatory arbitration policy was invalid because it interfered with the employees' Section 7 rights. *Supply Technologies, LLC*, 359 NLRB No. 38 (Dec. 14, 2012); and
- Requiring employers to provide unions with witness statements collected from employees during a disciplinary investigation. *Hawaii Tribune-Herald*, 359 NLRB No. 39 (Dec. 14, 2012).

Additionally, any Board decision issued from now until the Supreme Court makes a final determination may also be in jeopardy.

Moreover, although the appointment of the Board's Acting General Counsel Lafe Solomon is unaffected by the *Noel Canning* ruling, his future actions could be curtailed, particularly where he seeks Board enforcement. Mr. Solomon's significant memoranda regarding social media (Memorandum OM 12-31); deferral of unfair labor practice cases to arbitration (Memorandum OM 12-01); and restrictions on routine language in workplace policies, rules, and handbooks (Memorandum OM 12-59) could be altered if the Supreme Court affirms *Noel Canning*, forcing the composition of a new Board. Until the resolution of any potential appeal or rehearing, the Board can continue to issue decisions, and it has indicated its intent to do so.

Following the *Noel Canning* decision, the U.S. Chamber of Commerce issued a memo to its members urging them to appeal any Board decisions to the D.C. Circuit to take advantage of the decision. Under the NLRA, parties can appeal a final order from the Board to the D.C. Circuit, as well as other appropriate Courts of Appeals. Until the Supreme Court weighs in, employers likely will seek review from the D.C. Circuit, where *Noel Canning* is binding authority. Anticipating this move, the D.C. Circuit has issued orders staying all cases involving Board appeals.

A Connecticut employer, HealthBridge Management LLC, recently sought to bypass the D.C. Circuit and filed an emergency stay application with the Supreme Court to halt a Connecticut District Court's preliminary injunction that ordered HealthBridge to reinstate striking workers. HealthBridge argued

that, following *Noel Canning*, the Board's ability to act is in "profound doubt" and acknowledged "[t]his is an extraordinary request prompted by extraordinary circumstances." This is the first individual filing to reach the Supreme Court seeking to take advantage of *Noel Canning*. Justice Ruth Bader Ginsburg, who received the application because it arose from the circuit she oversees, denied the application and issued no comment on the rejection. HealthBridge then sought further review from Justice Scalia, who referred the application to the full Court. The Supreme Court denied the application without comment, all but ensuring *Noel Canning* will be the first opportunity for the Supreme Court to weigh in on this issue.

Regardless, because of its potential implications, *Noel Canning* may have an unprecedented impact on modern labor law if upheld by the Supreme Court. Because the Supreme Court's ruling will not be known for some time, employers should work closely in the interim with their labor counsel to ensure appropriate labor relations and litigation strategies are being pursued while federal labor law remains in flux.

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