A Timely Analysis of Legal Developments

ASAP®

January 28, 2013

D.C. Circuit Invalidates NLRB Recess Appointments, Creating Period of Uncertainty for Employers

By Alan Model

For the past year, unionized and nonunionized employers across the United States have been alarmed by the National Labor Relations Board's expansive interpretation of the National Labor Relations Act and the resulting potential impact on their businesses. On January 25, 2013, the U.S. Court of Appeals for the D.C. Circuit, in *Noel Canning, a Division of the Noel Corporation v. National Labor Relations Board*, Nos. 12-1115 & 12-1153 (D.C. Cir. Jan 25, 2013), dealt a significant blow to the NLRB's expansive actions. The D.C. Circuit held that President Obama's recess appointments of Members Sharon Block, Terence Flynn, and Richard Griffin to the NLRB on January 4, 2012 were invalid and, thus, the NLRB lacked a legitimate quorum of members to act since such appointments were made.

This decision could potentially invalidate hundreds of NLRB decisions issued since January 4, 2012. The true impact of the *Noel Canning* decision will not be known for months, as this same issue – the validity of the recess appointments – is being litigated before other federal appellate courts, with the great likelihood the issue will ultimately be resolved by the U.S. Supreme Court. Below is a discussion about the potential impact of the *Noel Canning* decision in light of the U.S. Supreme Court's 2010 decision in *New Process Steel, LLP* and in light of the current political climate in Washington, D.C.

The *Noel Canning* Decision

In *Noel Canning*, a three-judge panel of the D.C. Circuit held that President Obama's January 4, 2012 recess appointments to the NLRB of Members Block, Flynn, and Griffin were unconstitutional because the appointments did not "happen during the Recess of the Senate," as required under the "Recess Appointments Clause" of the United States Constitution.

On February 8, 2012, a three-member panel of the Board, comprised of Members Hayes, Flynn, and Block found that Noel Canning, a bottler and distributor of Pepsi-Cola products, violated the Act by refusing to reduce to writing and execute a collective bargaining agreement. The employer appealed the Board's decision to the D.C. Circuit Court of Appeals.

The D.C. Circuit affirmed the Board's substantive findings in the case but then turned to the two constitutional arguments asserted by the employer – that the Recess Appointments Clause is inapplicable to the appointments made by the President because: (1) the Senate was not in "the Recess" at the time of the putative appointments; and (2) the vacancies being filled did not "happen during the Recess" of the Senate.

The "Recess Appointments Clause" provides that: "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." The employer argued that at the time of the January 4, 2012 recess appointments, the Senate was not in "the Recess" between sessions. The Board argued that the clause permits appointments during intrasession (as opposed to intersession) "recesses" or breaks in the Senate's business without limitation. The D.C. Circuit Court agreed with the employer's position:

An interpretation of "the Recess" that permits the President to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the President free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction. This cannot be the law. The intersession interpretation of "the Recess" is the only one faithful to the Constitution's text, structure, and history. . . . Considering the text, history, and structure of the Constitution, these appointments were invalid from their inception.

According to the D.C. Circuit opinion, the president's recess appointment authority is limited to the intersession recess of the Senate, which "refers to the time period between [Senate] sessions that would end with the ensuring session of the Senate."

Although it was not necessary for the court to reach the employer's second argument, it chose to address the issue of whether the vacancies must "happen during the Recess" in order for the president to utilize the Recess Appointments Clause. The court found the phrase "that may happen during the Recess" meant the president could only exercise his Recess Appointment power during the same recess in which the vacancy arose. The court stated in support of its decision, "There is no reason the Framers would have permitted the President to wait until some future intersession recess to make a recess appointment, for the Senate would have been sitting in session during the intervening period and available to consider nominations." Thus, the D.C. Circuit held that the vacancies must "happen during the Recess," not merely exist during the Recess, under the Recess Appointments Clause.

As to the dispute at issue, the D.C. Circuit held that the vacancies purportedly filled by President Obama's January 4, 2012 recess appointments did not arise during the intersession recess of the Senate. The court further held that at the time of the January 4, 2012 recess appointments, the Senate was not in intersession recess because it never adjourned the First Session of the 112th Congress on December 30, 2011, and the First Session "expired simultaneously with the beginning of the Second Session" on January 3, 2012. At the time of President Obama's purported recess appointments on January 4, 2012, the Senate was operating in *pro forma* sessions, which had the effect of preventing a formal adjournment of the First Session. For these reasons, the court found that the president could not have validly used his Recess Appointment power. The court ultimately vacated the Board's order, holding the Board did not have a quorum when it issued the February 8, 2012 order because the president's appointments were invalid.

While the impact of the D.C. Circuit's decision will not likely be resolved for some time and probably not until the Supreme Court weighs in, employers need to determine how to proceed in light of the uncertainty created by this decision.

The *New Process Steel, LLP* Decision of 2010

Review of the aftermath of the Supreme Court's 2010 decision in *New Process Steel, LLP* may help direct employers in the wake of *Noel Canning*.

On June 17, 2010, a divided U.S. Supreme Court held that the NLRB did not have the authority to render approximately 600 decisions during the period between January 1, 2008 and March 27, 2010, when three of the five seats on the Board were vacant. In a 5 to 4 decision, the Court held that Section 3(b) of the Act requires that when the Board delegates its authority to a three-member group the group must maintain a membership of three in order to exercise the delegated authority of the Board. When the membership of the group falls below three, the Court held, two members do not constitute a proper quorum and may not continue to exercise the delegated authority of the Board.[1]

While the *New Process Steel* case was pending before the Supreme Court, the Board added three new members – Brian Hayes and Mark Gaston Pearce through Senate confirmation, and Craig Becker though a recess appointment – to have a full Board of five members (as Wilma Liebman and Peter Schaumber had been previously confirmed). Therefore, once *New Process Steel* issued, the Board had a legitimate quorum

1 *See* Adam Wit, *U.S. Supreme Court Potentially Invalidates Hundreds of NLRB Decisions*, Littler ASAP (June 19, 2010).

and authority to act. In response to *New Process Steel*, the Board sought remand of the 96 decisions pending before the federal appellate courts. These cases were reconsidered and new decisions were issued by the Board.

Notably, there was no statement by the Supreme Court as to the validity or precedential effect of the other 500-plus Board decisions that were not appealed to the federal courts. An argument exists that all such cases have no precedential value post-*New Process Steel*. In select cases that were not appealed, however, the Board's Office of the General Counsel moved for reconsideration where it saw value in doing so. For example, in *The Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital*, 359 NLRB No. 51 (Jan. 15, 2013), the Acting General Counsel, on October 2, 2012, moved before the Board to issue a new decision (*Fremont II*) to replace an August 29, 2009 decision (*Fremont I*) it deemed to be invalid, tentative, and unenforceable in light of *New Process Steel*. Tellingly, the Acting General Counsel's October 2, 2012 motion stated: "A valid determination by the Board that Respondent violated Section 8(a)(5) and (1), as tentatively found in the decision and order in *Fremont I*, would materially assist in establishing a history of Respondent's recidivism and would furnish a basis for broader remedies. In addition, enforcement of the Board's order in *Fremont I* would provide a basis for future contempt proceedings if warranted." This statement suggests that Board decisions issued by the unduly constituted Board are invalid and merely tentative findings.

There are significant differences between *New Process Steel* and *Noel Canning*, with the most obvious being that the U.S. Supreme Court decided the former and concluded the debate. Moreover, by the time the Supreme Court issued the *New Process Steel* decision, the NLRB had filled its vacancies and had a properly constituted quorum that was able to revisit upon remand its prior invalid decisions. Currently, the NLRB lacks a quorum and, given the political climate in Washington, D.C., the likelihood of nominations and Senate confirmation of new members in order to reach a proper quorum in the near future is questionable.

The Potential Impact of *Noel Canning* on Employers

For employers who received adverse Board decisions since January 4, 2012, and petitioned for review before the D.C. Circuit, such appeals have already been placed in abeyance by the D.C. Circuit. Petitions for review filed in other circuits will continue to be processed until each circuit decides the issue or the Supreme Court hears the *Noel Canning* decision on appeal. Aggrieved employers who received adverse Board decisions since January 4, 2012, but have not yet petitioned for review, should contact counsel about seeking appellate review. There are no time limits for petitioning for review in the federal appellate courts (other than potential *laches* arguments).

For employers who are currently involved in an unfair labor practice or representation matter, all indications are that the NLRB *will* continue to operate post-*Noel Canning* until the Supreme Court weighs in. Indeed, within hours of the decision's issuance, NLRB Chairman Mark Gaston Pearce stated: "The Board respectfully disagrees with today's decision and believes that the President's position in the matter will ultimately be upheld. It should be noted that this order applies to only one specific case, *Noel Canning*, and that similar questions have been raised in more than a dozen cases pending in other courts of appeals. . . . [W]e will continue to perform our statutory duties and issue decisions."[2] Regardless of the Board's quorum and authority to act, the NLRB's Office of the General Counsel will continue to investigate and prosecute cases, the Board's administrative law judges will hear and decide cases, and the Regional Directors in the Board's regional offices will process representation cases.

Despite Chairman Pearce's decision to press forward in defiance of the D.C. Circuit's opinion, the effect of any future actions taken or decisions issued by the Board will be called into question. The five-member Board is down to one member who was confirmed by the Senate – Chairman Pearce. While Members Block and Griffin remain as sitting members, their appointments have been deemed invalid by the D.C. Circuit. Member Flynn resigned effective July 24, 2012. Another Republican member, Brian Hayes, stepped down when his term expired on December 16, 2012. Absent a legitimate quorum, the Board does not have the authority to act according to *New Process Steel*, and the chances of a quorum being constituted in the near future are questionable. Thus, it behooves any employer that receives an adverse Board decision to preserve its arguments for appeal to the D.C. Circuit under *Noel Canning*.

Indeed, aggrieved employers currently embroiled in NLRB matters should take steps to object to the Board's authority to act at any stage of the process when necessary. For example, an employer may choose to file a petition to revoke a subpoena (investigatory or hearing) authorized

2 Press Release, National Labor Relations Board, Statement by Chairman Pearce on recess appointment ruling (Jan. 25, 2013), available at http://www.nlrb.gov/news/statement-chairman-pearce-recess-appointment-ruling.

by a Board Member. As another example, if a regional office or an administrative law judge gives precedential weight to a post-January 4, 2012 Board decision, an employer may take the position (and should in writing) that such Board decision is invalid and non-precedential. Additionally, as a "belt and suspenders" approach, employers may include a footnote or argument in all pleadings to the Board that it lacks the authority to act under *Noel Canning* (and any subsequently issued decision reaching the same conclusion). Lastly, where procedurally appropriate, employers should preserve arguments concerning the lack of authority through the filing of exceptions in unfair labor practice matters, and through the filing of a request for review in representation matters. Of course, employers seeking to appeal final orders of the Board under Section 10(f) of the Act should petition for review in the D.C. Circuit.

Employers who are not currently involved in NLRB matters should act cautiously after the *Noel Canning* decision. While the rationale in *Noel Canning* may invalidate all 200-plus decisions issued since January 4, 2012, the D.C. Circuit is only one voice on the appointment issue. Another appellate court may hold the recess appointments were valid. The likely reality is that uncertainty will likely exist until the Supreme Court resolves the issue.

Some of the eye-opening, precedent-departing NLRB decisions now called into question include: *Piedmont Gardens*, 359 NLRB No. 46 (Dec. 15, 2012) (unionized employer's obligations to disclose employee witness statements to a union); *Alan Ritchey, Inc.*, 359 NLRB No. 40 (Dec. 14, 2012) (newly unionized employer has a duty to bargain with a union before imposing discretionary discipline on an employee even though a first collective bargaining agreement has not been negotiated); *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (Dec. 14, 2012) (nonunion employer's termination of employees for Facebook postings were unlawful); *Supply Technologies*, LLC, 359 NLRB No. 38 (Dec. 14, 2012) (nonunion employer's mandatory arbitration policy was invalid because it interfered with employees' Section 7 rights); *WKYC-TV, Inc.*, 359 NLRB No. 30 (Dec. 12, 2012) (employer prohibited from unilaterally ceasing the deduction of union dues from members paychecks after labor agreement expired); *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (Sept. 28, 2012) (work rule that requires employees to be courteous to co-workers and not use disrespectful language which injures the image or reputation of the employer invalidated); *Finley Hospital*, 359 NLRB No. 59 (Sept. 28, 2012) (employer required to continue pay increases after its labor agreement expired); *Ambassador Services, Inc.*, 358 NLRB No. 130 (Sept. 14, 2012) (work rule that prohibits employees from "walking off the job and/or leaving the premises during working hours without permission" invalidated); *Banner Health System*, 358 NLRB No. 93 (July 30, 2012) (employer's blanket rule prohibiting employees from discussing ongoing investigations of employee misconduct deemed unlawful); *Sodexo America LLC*, 358 NLRB No. 78 (July 3, 2012) (work rule that prohibited off-duty employees access invalidated because management retained the discretion to allow visits for "hospital-related business"). In a very busy 2012 at the NLRB, the list of significant cases goes on and on.

Employers who opt to disregard the above Board precedent act at their own peril, as *Noel Canning* is not yet the law of the land. It is possible (although unlikely) that while the issue makes its way to the Supreme Court a Board of three or more members could be properly reconstituted through political compromise, and the Board could revisit these decisions as occurred post-*New Process Steel*. In that unlikely scenario, the Board members may be more conservative in their interpretation of the law and reach different conclusions.

If upheld, the D.C. Circuit's opinion in *Noel Canning* could lead to other scenarios. One possibility is a legal challenge to the prior recess appointment of Board Member Craig Becker, who was involved in the December 21, 2011 implementation of the "quickie election" final rule amending election case procedures[3] and the Employee Rights Notice posting obligation.[4] Another possible outcome of *Noel Canning* is pressure being placed on Members Block and Griffin to resign, which has already commenced.

Given the uncertainty concerning the authority of the NLRB, employers should discuss their options with experienced labor counsel before acting on matters involving recent NLRB decisions.

Alan Model is a Shareholder in Littler Mendelson's Newark office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Model at amodel@littler.com.

3 *See* Tom Dowd, *Pick Up the Pace: New NLRB Regulations Force Employers to Respond More Quickly to Election Petitions*, Littler ASAP (May 1, 2012); *see* also David Kadela, *Two-Member NLRB Majority Adopts Unprecedented Resolution to Move Forward with Subset of Election Rule Amendments*, Littler ASAP (Dec. 5, 2011).

4 *See* Stefan Marculewicz and Gavin Appleby, *Federal Court Partially Invalidates NLRB Notice Posting Rule, Rejects First Judicial Attempt to Contest Board Recess Appointments*, Littler ASAP (Mar. 5, 2012); *see* also Gavin Appleby and Tracy Stott Pyles, *NLRB Issues Final Rule Requiring Employers to Post a Notice Informing Employees of Their Rights Under the NLRA*, Littler ASAP (Aug. 30, 2011)