
The January 2012 Appointments to the National Labor Relations Board Deemed Unconstitutional

By James R. Stadler / Jan 25, 2013

On January 25, 2013, the United States Court of Appeals for the District of Columbia Circuit held in the case of *Noel Canning v. National Labor Relations Board* that the three "recess" appointments that President Obama made to the National Labor Relations Board (NLRB) which became effective when they were sworn in on January 9, 2012, were unconstitutional. As a result, the NLRB has lacked a quorum sufficient to conduct its business since that date. Consequently, all the decisions and orders issued by the NLRB since January 9, 2012, are void and unenforceable.

The impact of this decision is substantial. Since January 9, 2012, the Board has issued several controversial decisions which have changed long-standing precedence and aggressively expanded remedial powers and measures of the Board. Void for now are Board decisions which (1) expanded the scope of disclosure of witness statements to the union, (2) narrowed the scope of when employers can discharge employees for offensive postings on social media sites, (3) required employers to reimburse employees who pay higher taxes as a result of a back pay award, (4) permitted unions to charge lobbying expenses to *Beck* objectors who do not pay dues but who pay an agency fee, (5) required employers to continue dues check-off following the expiration of a collective bargaining agreement, (6) disregarded employers' arbitration provisions, (7) prohibited employers from requiring employees to not discuss on-going, internal investigations, and (8) added extraordinary and onerous language to board orders against employers. In addition, all of the other cases decided by the Board since January 9, 2012, are now back to where they were on January 9, 2012.

President Obama could appeal this decision to the United States Supreme Court. Alternatively, the Senate is considering changing the rules regarding votes for confirmation of Presidential appointees to require only a majority vote to end debate (in essence eliminating the filibuster) followed by a majority vote on confirmation. Since the Senate is controlled by the Democrats, and if the Senate's rules are changed, that would mean that President Obama would be able to get his appointees re-confirmed. Those appointees, if confirmed, could simply ratify the prior decisions and orders issued by the Board since January 9, 2012. So, the cat and mouse game is not over yet.

Within a few short hours after the publication of the *Noel Canning* decision, NLRB Chairman Gaston Pearce, who was not among the three recess appointments, issued a statement stating that the Board disagrees with the court's decision and that the Board is going to continue to conduct its statutory duties and to issue decisions. The Board, at least for now, seems undeterred by the *Noel Canning* decision.

For those of you who thirst for more constitutional analysis, read on. Under the National Labor Relations Act, the President of the United States is privileged to appoint five persons as Board Members of the National Labor Relations Board. The Board Members are responsible for, among other things, reviewing appealed decisions of Administrative Law Judges and for promulgating the administrative rules of the NLRB. For the Board Members to validly conduct its business, it needs a quorum of at least three Board Members.

Presidential appointments as a Board Member are subject to the advice and consent of the Senate. Presidential appointments to the Board have been controversial over the last several presidencies; and, Senate confirmation of many Presidential appointees (whether by Republican or Democratic presidents) have been held up by filibusters in the Senate. Under current Senate rules, a vote of 60 of the 100 senators is needed to stop a filibuster and end debate, and to lead to a simple majority vote on confirmation of Board nominees.

Prior to January 3, 2012, the NLRB had a proper quorum of three Board Members. On January 3, 2012, Board Member Becker's appointment expired, leaving the Board with only two members. The other two Board Member positions became vacant on August 27, 2010, and August 27, 2011. The President's two nominations for the 2010 and 2011 vacant Board positions had been hopelessly stalled in a filibuster in the Senate. The Senate normally has a formal recess from some date near the end of December until late in January. However, from December 20, 2011, through January 23, 2012, the Senate, by unanimous consent, was not in a formally-declared recess. Rather, it was holding *pro forma* sessions during which it met every few days and conducted some, but very little Senate business.

On January 4, 2012, in a move never done before, President Obama declared that the inactivity of the Senate meant that it was in recess; and, he made three "recess" appointments to bring the Board back up to its full complement of five members. Following those recess appointments, the Board issued a decision against an employer in an unfair labor practice case. That employer appealed to the DC Circuit Court of Appeals claiming that the President's "recess" appointments were unconstitutional and that the Board did not have a proper quorum to issue its ruling and order. The DC Circuit Court of Appeals agreed with the employer.

The Court of Appeals ruled that the President's privilege to make recess appointments is limited to situations when a vacancy arises during a recess between sessions of the Senate. The Court of Appeals ruled that the Senate was not in recess when President Obama made the three recess appointments because it was holding *pro forma* sessions; and, even if the Senate was in recess, none of the three vacancies arose during the recess. As a result, the Board's decision and award against the employer was declared void and unenforceable because the Board lacked a proper quorum.

If you have any questions about this advisory, please do not hesitate to contact any member of Clark Hill's labor and employment practice group.