The National Law Journal

Employers Rush to Embrace 'Noel Canning'

By Frederick L. Warren
April 15, 2013

In *Noel Canning v. NLRB*, the U.S. Court of Appeals for the D.C. Circuit ruled that President Obama's three January 2012 recess appointments to the National Labor Relations Board were invalid, resulting in an absence of a quorum for the NLRB to conduct business. The case, arising in a period of heightened political and legal battles concerning the NLRB, elevated a labor dispute to a constitutional issue headed for the U.S. Supreme Court with potentially far-reaching repercussions.

Putting the more than 600 decisions issued by the board since the January 2012 recess appointments subject to question, *Noel Canning* has already had substantial effects. Employers are filing petitions for review of board decisions in the D.C. Circuit, which has held board cases before it in abeyance pending further order of the court. Employers have also raised the *Noel Canning* defense as challenges to decisions of the board in other circuit courts. Employers have argued that *Noel Canning*'s rationale applies to Craig Becker's recess appointment, which expired in January 2012. If his appointment were invalid, that means board decisions were made without a quorum back to August 2011, when the term of Wilma Liebman expired, and also are in question.

To put *Noel Canning* in context, it helps to understand the controversy concerning the NLRB, the regulatory agency administering the National Labor Relations Act. It has five board members, serving terms of five years, who are nominated by the president subject to confirmation by the Senate. The board protects employees' rights to organize and acts to prevent and remedy unfair labor practices. Additionally, the board acts as a quasijudicial body in deciding cases on the basis of records in administrative proceedings.

Board decisions are not self-enforcing. The NLRA allows the board to petition a federal court of appeals for enforcement. A party aggrieved by a final board order may petition for review in applicable circuit courts, including the D.C. Circuit.

Largely for political reasons, the Senate has not voted on some nominations made by both Democratic and Republican presidents. Consequently, the board regularly has operated with fewer than five members. Presidents have made recess appointments when the Senate has failed to act on nominations.

In 2010's *New Process Steel v. NLRB*, the Supreme Court ruled that the NLRB must have a quorum of a least three members to conduct business. The board had operated from January 2008 to March 2010 with only two members due to the Senate's failure to confirm nominees. During that time, approximately 550 cases were decided by the board but, ultimately, only about 100 two-member decisions were returned to the board for new decisions to be issued.

There is a widespread perception in the business community that Obama's board has been particularly pro-labor in its actions and decisions. One of his recess appointments was Becker, whose appointment expired on January 3, 2012, which would have resulted in the board being reduced to two members again. But on January 4, 2012, Obama made three recess appointments to the board: Sharon Block to fill Becker's seat, Terence Flynn to fill a seat that became vacant in August 2010 and Richard Griffin to fill a seat that became vacant in August 2011. At the same time, Obama made a recess appointment of Richard Cordray as the first director of the Consumer Financial Protection Bureau.

In a political maneuver to prevent Obama from making recess appointments after Congress started a holiday break in December 2011, the Senate held pro forma sessions every three business days through January 23, 2012. During the Senate's January 3 pro forma session, the Senate acted to convene the second session of the 112th Congress.

The facts in *Noel Canning* are straightforward. Teamsters Local 760, which represents workers at the Yakima, Wash., plant owned by Noel Canning Corp., a bottler and distributor of Pepsi products, filed an unfair labor practice charge with the NLRB. The board issued a decision on February 8, 2012, finding that the company had unlawfully refused to execute a written collective-bargaining agreement incorporating the terms agreed upon during negotiations. The company filed a petition for review in the D.C. Circuit. The court found that substantial evidence supported the board's conclusion that an agreement was reached and the company unlawfully refused to execute it.

However, Noel Canning's constitutional challenge set the stage for the NLRB's upheaval. The company raised an argument that the board lacked authority to issue a decision for want of a quorum, as three members were not validly appointed because the recess appointments were made when the Senate was not in recess. The company also argued that the vacancies these three members filled did not become vacant, or "happen during the Recess of the Senate," as required by the recess-appointments clause of the Constitution.

As a threshold matter, the court questioned whether it had jurisdiction because the company had made no attempt to raise the issues related to the recess appointments before the board. The section of the NLRA governing judicial review of board decisions says: "No objection that has not been urged before the Board…shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The court held that the company's failure to raise the objection before the board fell within the exception because a constitutional challenge to the board's composition was an extraordinary circumstance.

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 company argued that the term "the Recess" refers only to the intersession recess of the Senate, which is the period between sessions of the Senate. The board countered that the recess appointment procedure is available during intrasession recesses or breaks in the Senate's business when it is otherwise in session.

The court agreed with the company that the term "the Recess" refers only to the intersession recess of the Senate and not to adjournments during a session. The court also said that the history and interpretation of the clause at the time of the adoption of the Constitution and the years immediately following the Constitution's ratification supported its conclusion.

Second, the court held that the meaning of the word "happen" in the clause requires that the vacancy actually arises or occurs during the recess between sessions. The court rejected the board's arguments that "happen" means happens to exist during the recess, regardless of when the vacancy began.

In reaching its decision, the D.C. Circuit considered and rejected an earlier decision of the Eleventh Circuit reaching opposite conclusions. In *Evans v. Stephens*, the Eleventh Circuit ruled on constitutional challenges to the recess appointment of William Pryor to that court by President Bush in February 2004 while the Senate took a break in its session.

In *Evans*, the Eleventh Circuit started its analysis by saying that when a president is acting under color of express authority of the Constitution, the court starts with a presumption that his acts are constitutional. The presumption is rebuttable. However, the challengers must overcome it and persuade the court to the contrary. Simply showing that there are plausible interpretations of the Constitution different from the president's is not enough.

Looking at the language of the Constitution, the nation's history, and the purpose of the recess-appointments clause — to keep important offices filled and government functioning when the Senate is not in session — the court ruled that "recess" in the clause can refer to intrasession as well as intersession recesses of the Senate. Similarly, the court concluded that "happen" is open to more than one interpretation. It could mean happen to be or exists. The court found that to be the more acceptable interpretation. Two other circuit courts similarly have interpreted "happen" to mean "exists" rather than "arises": *U.S. v. Woodley (9th Cir. 1985)* and *U.S. v. Allocco* (2d Cir. 1962).

Board Chairman Mark Pearce announced after the *Noel Canning* ruling that the board disagreed with it and would continue business as usual. In February, Obama renominated Sharon Block and Richard Griffin to the board. The board comprises Block, Griffin and Pearce, whose term expires in August. Last week, Obama renominated Pearce to another term and nominated Harry Johnson III and Philip Miscimarra to round out the board.

The NLRB decided not to seek en banc rehearing by the D.C. Circuit in *Noel Canning* and has announced that it intends to file a petition for certiorari with the Supreme Court. The

petition for certiorari is due April 25. If the Supreme Court accepts the case, it may not agree with the D.C. Circuit's conclusion that the extraordinary-circumstances exception applies, which would allow the court to reach the constitutional issues not raised with the board. It is also unclear whether the court would adopt the Eleventh Circuit's presumption of constitutionality regarding the president's actions.

A challenge to Richard Cordray's recess appointment to the Consumer Financial Protection Bureau, *State National Bank of Big Spring v. Jacob J. Lew*, is pending in the U.S. District Court for the District of Columbia, where *Noel Canning* is binding.

A Supreme Court decision could affect the balance of power between the president and the Senate regarding presidential appointments and, at least from a historical perspective, the composition of the court itself. Almost a dozen justices were initially placed on the court through recess appointments, including Oliver Wendell Holmes Jr., Earl Warren, William Brennan and Potter Stewart. The last president to make such recess appointments was Dwight Eisenhower.

Frederick L. Warren is a partner in the Atlanta office of FordHarrison, where he practices labor and employment law representing management. He can be contacted at rwarren@fordharrison.com.