New Jersey Law Journal

VOL. 212 - NO 16 MONDAY, APRIL 22, 2013 ESTABLISHED 1878

EMPLOYMENT & IMMIGRATION LAW

A Cloud of Uncertainty Over NLRB Decisions

Recent rulings shield online "concerted activity" among co-workers

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In January 2013, one year after President Obama made three so-called recess appointments to the National Labor Relations Board (NLRB), the D.C. Circuit Court of Appeals held that those appointments were unconstitutional and that, therefore, the board lacked the required three-member quorum to issue an order finding that an employer committed an unfair labor practice.

In holding that President Obama's board appointments were constitutionally infirm, the Circuit Court's decision will likely have far-reaching effects on modern labor law and, if upheld, may invalidate over 200 NLRB decisions decided since the January 2012 recess appointments. Although the board has asserted that the decision only applies to the one specific case and that it intends to conduct business as usual, it has filed a notice of appeal to the United States Supreme Court. In all likelihood, until the Supreme Court resolves this issue, the legitimacy of the board's decisions shall remain under a cloud of uncertainty.

The NLRB is comprised of a five-member board, each of whom serves for a five-year term, with one member's term expiring each year. The board functions as an appellate judicial body, which reviews the decisions of administrative law judges. All NLRB board members are appointed by the president, with the "[a]dvice and [c]onsent of the Senate" pursuant to the Appointments Clause of the Constitution. U.S. Const., art. II, § 2, cl. 2.

For some time prior to January 2012, the NLRB had been functioning with a three-member board, the minimum number necessary to establish a quorum. When another seat became vacant on Jan. 3, 2012, with the expiration of one member's term, appointments were necessary in order for the board to maintain a quorum. Thus, on Jan. 4, 2012, while the Senate was on a 20-day holiday break and holding pro forma sessions every few days, President Obama appointed three members to the NLRB pursuant to the Recess Appointments Clause of the Constitution, which 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." *Id.* at art. II, §2, cl. 3 (emphasis added).

In *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), an employer challenged an NLRB decision, finding it had committed an unfair labor practice by refusing to reduce to writing and execute a collective bargaining agreement reached with the union. In addition to challenging the decision under applicable state contract law, the employer challenged the board's authority to issue the order on two constitutional grounds. First, the employer argued that the board lacked authority to act for want of a quorum, since three members of the five-member Board were never validly appointed as they took office under putative recess appointments that were made when the Senate was not in recess. Second, the employer asserted that the vacancies these three members filled did not "happen during the Recess of the Senate" as required by the Recess Appointments Clause.

Although the Circuit Court found that the board's reasoning was sound on

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the merits, it agreed with the employer's constitutional arguments that the board lacked authority to issue the order since it lacked the requisite quorum to act. Specifically, the court determined that Obama's recess appointments were invalid because the Senate was not in "the Recess" when those appointments were made. The Circuit Court reasoned that the Recess Appointments Clause refers to periods where the Senate is in "intersession recess," i.e., the period between senatorial sessions when the Senate is not in session and unavailable to receive and act upon nominations from the president. The court drew a distinction between "intersession recess" and "intrasession recess," where the Senate is merely on break during an active session. The Circuit Court also scrutinized the Constitution's word usage and determined that the use of the definite article in the term "the Recess" made it clear that the Recess Appointment Clause refers to a specific, definitive period.

Furthermore, the court reasoned that to adopt the board's proffered intrasession interpretation of "the Recess" would wholly defeat the framers' purpose in the separation of powers reflected in the Appointments Clause. In this regard, the court noted:

> 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 faithful to the Constitution's text, structure, and history.

Id. at 504-505.

Consequently, the Circuit Court held that the Senate was not in recess on Jan. 4, 2012, and thus the Recess Appointments Clause could not be invoked to support the appointments of the three board members.

Though the court's holding on the first constitutional challenge was sufficient to invalidate the board's decision, the Circuit Court also analyzed whether the vacancies filled by the president's so-called recess appointments "happen[ed]" during the Senate recess. Again, the Circuit Court examined the natural use of the term "happen" within the context of the Recess Appointments Clause and the Constitution, as a whole. The Circuit Court determined that the president may only make recess appointments to fill vacancies that happen or arise during the recess. Since the relevant vacancies did not arise during the intersession recess, the Circuit Court found the presidential appointments were invalid for that reason as well.

Thus, the Circuit Court vacated the NLRB order, which found that the employer committed an unfair labor practice, since it did not have the requisite quorum to issue that order.

On Jan. 25, 2013, the date the Circuit Court issued its decision, NLRB's chairman issued a statement disagreeing with the decision and claiming that the order only applied to the one specific case and that it would continue to conduct business as usual. On March 12, the board announced that it intends to file a petition for certiorari with the United States Supreme Court for review of that decision. That petition is due on April 25.

Not surprisingly, the *Canning* decision has created considerable turmoil within the NLRB, notwithstanding its pledge to carry on as usual. If upheld on appeal, all of the decisions made by the board over the past 14 months would be voided and would have to be revisited by a properly appointed board. Notably, during this period, the recess appointees have taken part in several controversial and decidedly pro-union decisions. For example, in *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (2012), the board found that the employer unlawfully fired five employees because of their Facebook posts and comments about a co-worker who intended to complain to management about their work performance. The Board determined that this Facebook conversation was concerted activity protected by the National Labor Relations Act. Similarly, in *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012), the board held that an employer's electronic communication policy that prohibited electronic postings that "damage the Company, defame any individual or damage any person's reputation" unlawfully infringed upon employees' protected rights. In another controversial decision, *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), the board found that where there is no collectively bargained grievance arbitration system in place, employers must generally give the union notice and an opportunity to bargain before imposing discipline. In light of *Canning*, the validity of these and dozens of other board decisions are of questionable validity for want of a legitimate quorum. Congress and business groups have taken note of this blockbuster decision: Almost immediately following its issuance, both houses of Congress introduced legislation in light of the decision. The "NLRB Freeze Act" would delay the enforcement of any board rulings until the issue is resolved. The "Advice and Consent Restoration Act" would prevent the recess appointees from receiving a salary and the board from taking any agency action until the appeal is resolved. Similarly, the "Restoring the Constitutional Balance of Power Act" would prohibit the use of federal funds to support some of the NLRB's activities, including those that require a quorum and occur after Jan. 4, 2012. That proposed bill would also prohibit federal funding of the Consumer Financial Protection Bureau (CFPB), as that agency's director was also appointed by "recess appointment" on Jan. 4, 2012, and the *Canning* decision, therefore, calls into question the validity of that agency's actions since that appointment. Likewise, the United States Chamber of Commerce has urged companies to appeal adverse decisions against them in the past year. Indeed, *Canning* has instigated numerous appeals that are being pursued in various circuit courts.

It is likely that the United States Supreme Court will have the ultimate say over the constitutionality of President Obama's recess appointments. Until then, a cloud of uncertainty hangs over the NLRB and its actions. ■