



The NLRB's Quorum Quandary

Insights

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The ongoing saga over composition of the National Labor Relations Board took several twists last month, and uncertainty continues to swirl around the agency's authority to do business. As of today, the Board consists of Democrat Chairman Mark Pearce (whose term is set to expire in August), along with two recess appointees, Richard Griffin and Sharon Block, both also Democrats. The two other seats, which by tradition should be held by Republicans, have remained vacant for some time.

On April 9, President Obama submitted the nominations of a pair of Republican labor attorneys, Philip A. Miscimarra and Harry I. Johnson, III, along with the re-nomination of Chairman Pearce. These nominations round out the President's full slate of candidates for the five-member Board, which has been under fire on the heels of a decision by the U.S. Court of Appeals for the D.C. Circuit to invalidate its current three-member quorum.

The NLRB has elected to disregard that decision, declaring its intent to appeal to the U.S. Supreme Court by the end of the month. On April 12, the U.S. House of Representatives weighed in on the issue by passing a bill that would freeze NLRB funding until a legitimate quorum is obtained. While it remains to be seen how all of this will play out on the labor-relations landscape, it is becoming increasingly clear that lingering uncertainty surrounding the NLRB's current authority threatens to hover over the agency for some time to come.

New Nominations Up The Ante

The President initially submitted the nominations of Block and Griffin back in February, after the D.C. Circuit invalidated their 2012 recess appointments in *Noel Canning v. NLRB*. At the time that Block and Griffin were first appointed last year, the Board was operating without a lawful quorum. In an effort to remedy that, the President conferred their appointments during a Senate *pro forma* session. A year later, the *Noel Canning* decision invalidated the move on the basis that recess appointments can only be made during an intersession break of Congress.

This latest round of nominations may represent an attempt to circumvent Republican challenges to incumbent members through use of the filibuster. Indeed, several members of Congress have already called for the resignations of Block and Griffin in the wake of *Noel Canning*, with many suggesting that the agency should suspend operations pending resolution of the quorum dispute. Absent confirmation of the Administration's slate between now and close of the spring session, the

Board is confronting the prospect of losing its third member upon the expiration of Chairman Pearce's term in mid-August.

In the meantime, the next few months will likely involve a game of high-stakes poker between the parties. Republicans may choose to continue opposing any slate that includes the nominations of Block and Griffin, yet the Administration may be unwilling to relent by submitting alternatives while its Supreme Court appeal remains pending.

This would leave Republicans with the prospect of "take it or leave it" deal that could ultimately be deemed unacceptable by those Republicans on the Senate floor. This in turn could force the President to revisit the notion of additional recess appointments, a tactic that first gave rise to the dispute.

A Congressional fix is unlikely. It is almost certain that the newly-passed House bill entitled "Preventing Further Uncertainty in Labor-Management Relations Act" (H.R. 1120) will not become law. The bill would prevent the NLRB from using its adjudicatory powers and block enforcement of Board law retroactively to the disputed recess appointments back early 2012 until the Supreme Court upholds the validity of the recess appointments or the Senate confirms a valid quorum. H.R. 1120 passed the House on April 12 by the narrow margin of 219-209, which went strictly on party lines. It is extremely doubtful that this measure will survive the Democrat-controlled Senate, and President Obama has already vowed to veto it if it does.

Waiting On *Noel Canning*

A formal decision from the Supreme Court is unlikely to arrive before early 2014, as the NLRB has until April 25th to file its appeal, thereby ruling out any realistic prospects for oral argument (assuming the appeal is granted) before the fall. Although the Senate may be able to confirm a quorum before then, *Noel Canning* also calls into question the validity of approximately 600 decisions rendered since last year's recess appointments. Meanwhile, an estimated 35 cases remain on hold in the D.C. Circuit while the Board appeals the ruling.

The validation of *Noel Canning* could have even more far-reaching implications, as the President made similar recess appointments in 2010 in connection with the nomination of former member Craig Becker. If Becker's appointment were also deemed invalid, the Board would have been operating without a lawful quorum dating back to August of 2011. The Board has issued more than 1400 decisions since then, many of which would also be subject to challenge.

Nevertheless, the Board steadfastly maintains that it remains open for business while the quorum issue plays out in the judicial and political arenas, reasoning that application of the *Noel Canning* decision is confined to the case in question. As a result, employers and unions alike have turned to the courts to challenge unfavorable Board actions, even at the Regional level, relying on the quorum issue and arguing that the Board lacked authority to act. There are now at least 72 cases challenging the Board's authority pending in federal appeals courts, with a case pending in nearly every circuit.

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Our Advice – For Now

If you find yourself involved in a matter before the NLRB, you may want to consider preserving your right to challenge certain agency actions based upon the argument that it lacks a valid quorum. A range of options may be available depending upon procedural status, and counsel should be closely consulted before a particular option is pursued.

With that in mind, you may wish to consider petitioning the D.C. Circuit for review of any adverse decision issued by the Board while operating without a proper quorum. If you are involved in a Board-instituted matter currently pending at the appellate level, you may want to submit a Rule 28(j) supplemental authority letter challenging the court's jurisdiction to enforce Board orders. Under limited circumstances, aggrieved employers could conceivably raise the jurisdictional issue in a court proceeding, even if they failed to do so before the Board.

Parties may also choose to raise and preserve quorum challenges in cases currently on appeal before the Board via appellate briefs, exceptions or supplemental pleadings. At the regional level, a challenge can be preserved in position statements or briefs submitted to the Regional Director. Where a complaint has already issued, you may wish to preserve your rights by raising the quorum issue in an Answer or by filing a Supplemental Answer.

Finally, we encourage employers to continue monitoring further developments, as the situation remains fluid. It remains to be seen how this will play out in the political, legislative, and judicial arenas.

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