

Obama's Recess Appointment Fight Destined For High Court

By **Ben James**

Law360, New York (January 25, 2013, 7:15 PM ET) -- The D.C. Circuit's Friday ruling that President Barack Obama's January 2012 appointments to the National Labor Relations Board were invalid called a slew of NLRB decisions into question, cast doubt on the labor board's authority to rule going forward and set the stage for a battle at the U.S. Supreme Court, lawyers say.

The decision has potentially enormous implications for the five-seat NLRB, which can't function without at least three members pursuant to the Supreme Court's 2010 ruling in *New Process Steel*. The board currently has three members, two of whom have their posts through the challenged recess appointments.

"Basically, the board is powerless to act, according to the D.C. Circuit and under *New Process Steel*," said Littler Mendelson PC shareholder Michael Lotito. "The NLRB is now under an enormous credibility cloud only the Supreme Court can remove."

NLRB member Brian Hayes' term expired Dec. 16, and Hayes' fellow Republican Board member Terence Flynn decided to step down in May following allegations that he leaked confidential information during a stint as a staff lawyer at the agency.

That leaves Chairman Mark Gaston Pearce and members Sharon Block and Richard F. Griffin Jr. on the NLRB, but Friday, the D.C. Circuit said the Jan. 4 appointments of Block and Griffin, as well as Flynn, were invalid.

However, Pearce issued a statement Friday that said the NLRB would continue to operate and strongly implied that a challenge to the D.C. Circuit's ruling was in the works.

"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," Pearce said.

In addition to raising doubts about the current NLRB's ability to rule going forward, the D.C. Circuit's opinion also gives parties who want to overturn NLRB rulings issued since January 2012 a powerful piece of ammunition to use in legal challenges.

“It is a hugely important decision, and the decision, if upheld, calls into question virtually everything that the NLRB did in 2012, and continuing into 2013,” said Morgan Lewis & Bockius LLP attorney and former NLRB member Charles Cohen.

Attorneys following the case told Law360 that an NLRB appeal of the ruling was a virtual certainty and that the case has above-average prospects of being taken up by the Supreme Court.

“This issue's going to go to the Supreme Court. I don't think there's any question about that,” said Ronald Meisburg, a Proskauer Rose LLP partner and former NLRB member and general counsel.

And even if no circuit split emerges, the case has the potential to win review by the nation's highest court because it touches on the balance of power between the president and the Senate, which means it has ramifications that go way beyond the NLRB, lawyers said.

The NLRB said the Senate was closed for business when the Jan. 4 appointments were made, even though the Senate was holding “pro forma” sessions at the time, but soft drink bottler Noel Canning argued that it was not actually in recess.

Noel Canning's appeal, which argued that the invalidity of the challenged appointments meant the NLRB lacked the quorum it needed to rule in a dispute between the company and a union, drew an amicus brief from Senate Republican Leader Mitch McConnell and 41 other senators that backed the company.

The amicus brief said the president had stripped the Senate of its right to review and reject its nominations, and that the Constitution does not allow the president to bypass the Senate whenever he deems it uncooperative.

“As the court recognized, and as we argued, allowing these appointments to stand would eviscerate the constitutional structure by enabling the president to sidestep the Senate at his pleasure,” said Gibson Dunn & Crutcher LLP partner Miguel Estrada, who represented the Senate amici.

The Obama administration will likely see the D.C. Circuit's ruling as an infringement on presidential authority, according to Littler Mendelson's Lotito.

“This is an issue which transcends labor law. It goes to constitutional issues of authority between the legislative and executive branches,” Lotito said. “I just can't understand how the administration could let this decision sit.”

The combination of the constitutional questions, the implications for the NLRB and the political elements makes the Noel Canning case one of extraordinary import, according to Seyfarth Shaw LLP partner and former NLRB member Marshall Babson.

“It's hard to imagine a case with more significance constitutionally, for the board's jurisprudence, and politically. Those are the three things that this case has that most cases do not,” Babson said.

Noel Canning is represented by Gary Lofland of Lofland and Associates. Jones Day's Noel Francisco argued for the company, and Gibson Dunn & Crutcher LLP's Miguel Estrada argued in support of Noel Canning for a group of Senators who filed an amicus brief in the case.

The case is Noel Canning v. NLRB, case number 12-1115, in the U.S. Court of Appeals for the D.C. Circuit.

--Editing by John Quinn and Lindsay Naylor.

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