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DC Court of Appeals Finds NLRB Lacks Authority To Act

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The U.S. Court of Appeals for the District of Columbia declined to enforce an order by the National Labor Relations Board on the basis that it lacked a sufficient quorum to act. The case is *Noel Canning v. NLRB*.



The Facts Of The Case

Noel Canning is a bottler and distributor of Pepsi-Cola products based in Yakima, Washington.

Noel Canning and the Teamsters had cooperatively entered into collective bargaining agreements for years.

The parties began renewal negotiations in June 2010. When they arrived at an agreement as to all issues except wages, they agreed to put two alternative proposals to a vote by the union's members. Noel Canning's president agreed to this approach. The next day, Noel Canning sent an email to the union outlining the two proposals but materially altering one of them.

When the union's chief negotiator called Noel Canning's president to notify him of the discrepancy, the president responded that the negotiations were not in writing and therefore not binding. The union voted and ratified the union's proposed alternative anyway. Noel Canning refused to execute the collective bargaining agreement arguing that the members' ratification was a

counteroffer that the company refused.

Noel Canning declared the parties at an impasse. The union brought an unfair labor practice (ULP) charge under Section 8(a)(1) of the National Labor Relations Act. The ALJ found that the parties had entered into an agreement and the Board agreed.

Noel Canning promptly appealed the Board decision to the U.S. Court of Appeals for D.C.

What The Court Said

Noel Canning argued that the Board lacked the authority to act because it lacked a quorum of at least three properly appointed Board members on the grounds that: a.) the President improperly made recess appointments when the U.S. Senate was not in recess; and b.) the vacancies filled by the President did not arise when the U.S. Senate was in recess.

The powers appointed to a president by the U.S. Constitution stated that a president shall have the power to fill all vacancies that may happen during the recess of the Senate.

The Board argued that any break in Senate proceedings should suffice as a recess during which a president may make appointments.

The court agreed with Noel Canning, stating that "the Recess" only referred to the recess between the first and second session of the Senate. To interpret otherwise would allow a president to avoid the more complex appointment process by making all appointments when the Senate

adjourned in the evening or broke for lunch.

Noel Canning further argued that the vacancy must first arise during a recess. The Board argued that a vacancy must merely continue to exist at the time of a recess.

The court again agreed with Noel Canning, observing that "happen" must mean "first arise" or else a president could avoid the complex confirmation process by allowing all vacancies to continue until the next recess.

On both arguments, the court noted that the primary method for appointments must be the Senate confirmation process which, though more complex, preserves the separation of powers intended by the Constitution's framers.

What Employers Should Do

Recent administrations have made commonplace the practice of using recess appointment powers even when the Senate is in session or for vacancies that occur during a session. Other circuits have endorsed this practice on the basis that it is commonly done and that government would be rendered inefficient otherwise.

This decision is critical, not only for NLRB decisions, but for a host of agencies because it challenges and substantially limits a president's use of recess appointment powers. Employers should challenge agency actions on this basis when appropriate, specifically seeking to bring those challenges before the D.C. Circuit when appropriate.

Please contact us with questions. ♦