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"The Future of the NLRB: What *Noel Canning v. NLRB*
Means for Workers, Employers, and Unions."

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Chairman Roe, Ranking Member Andrews and Members of the Subcommittee, thank you for your invitation to appear here today. My name is Elizabeth Reynolds and I am a shareholder in the law firm of Allison, Slutsky & Kennedy, P.C. in Chicago, Illinois. Our firm and its predecessor firm have been representing labor organizations and workers for over 50 years. Since joining the firm in 1998, I have represented a variety of labor organizations and workers in the private and public sectors, including among others hotel and gaming workers; truck drivers and package handlers; printing industry employees; postal service employees; and teachers. My work has included extensive proceedings before the National Labor Relations Board, as well as federal and state court litigation, arbitrations, and providing advice and guidance to our clients. I am active in the American Bar Association Section of Labor and Employment Law. I graduated from Yale University in 1990, earned my law degree in 1997 from the University of Texas School of Law where I served as Chief Articles Editor of the *Texas Law Review*, and clerked for Chief Justice Thomas R. Phillips of the Texas Supreme Court before joining Allison, Slutsky & Kennedy, P.C. as an associate.

Introduction

I am honored to be asked to talk to our elected representatives about the National Labor Relations Board ("Board" or "NLRB"). I am sorry that this opportunity comes in the context of a sustained series of attacks on the Board by special interests who do not have the well-being of American workers at heart. These attacks go well beyond the current dispute over President Obama's recess appointments.

Ever since President Obama made his first appointments to the NLRB in 2010, virtually every action taken by the Board to promote effective enforcement of the rights afforded to workers under the National Labor Relations Act has been loudly condemned by opponents of the Board. Even as modest a step as requiring employers to post notices of employee rights under the Act, as they are already required to do under OSHA, the Fair Labor Standards Act, and many other employment laws, has been greeted as a catastrophe in some circles. Now, an extreme decision by a three-judge panel of a single

court of appeals, which would invalidate not just the recess appointments of the three individuals appointed to serve on the Board in January of 2012, but literally hundreds of recess appointments made by Presidents going back to Andrew Johnson, has those who would like to turn back the clock to pre-NLRA days demanding that these members resign, leaving the Board unable to function. Voices that were silent when President George W. Bush made seven separate recess appointments to the NLRB—every one of which would be considered invalid under the reasoning of the court in *Noel Canning*[1]—are suddenly full of indignation at President Obama's exercise of the same constitutional power.

The hostility and rage that I hear in these attacks on the Board do not reflect what I hear from practitioners on all sides of the labor bar. In Chicago, we have two labor-management committees that meet a couple of times a year to discuss current issues of practice and procedure before the NLRB. One of those committees is under the auspices of the American Bar Association and the other is led by the Regional office of the NLRB. I have attended meetings of both of those committees within the past year. The employer community is well represented at those meetings – in fact, they tend to be the majority of those in attendance – and I have not heard any of this outrage from them. None of them appear to believe that the sky is falling on employers as a result of the Board's recent decisions. Instead, our discussions at these joint labor-management meetings focus on the everyday work of the Board. I remember one of those committee meetings a couple of years ago where a management attorney made a request for the NLRB Regional office to print ballots for union representation elections in other languages for non-English-speaking employees. All the practitioners in the room, regardless of whom we represented, agreed that ballots ought to be provided in the languages of the workers. We all encouraged the NLRB Regional Director to start doing so, which he did shortly after that meeting. This is an example of how, in the real world, the NLRB is not some rogue agency; it is an agency that employers, unions, and employees all turn to for resolution of their important workplace disputes and concerns.

The Work of the National Labor Relations Board

The NLRB is a small, independent agency tasked with protecting the rights of employees and employers under the National Labor Relations Act ("NLRA").[2] Its two principal functions are administering representation elections and investigating and prosecuting unfair labor practice charges. During fiscal year 2012, 21,629 unfair labor practice charges and 2,484 election petitions were filed with the Board. The Board obtained offers of reinstatement for 1,241 who were terminated in violation of the NLRA, and recovered $44,316,059 on behalf of employees as backpay or reimbursement of fees, dues and fines.[3] A party who is aggrieved with a decision of the Board may seek review in the federal courts of appeals.

[1] Noel Canning v. NLRB, Case Nos. 12-1115, 12-1153 (D.C. Cir. Jan. 25, 2013).
[2] 29 U.S.C. sec. 151 *et seq.*
[3] NLRB Performance and Accountability Report, FY 2012, at 34, 40. Available at http://www.nlrb.gov/sites/default/files/documents/189/nlrb_2012_par_508.pdf.

Congress vested the NLRB with exclusive jurisdiction to enforce the NLRA. As a result, the NLRB is the only place private-sector employers, employees, and unions can go for a government-supervised election to determine whether employees want to become represented by a union, or to stop being represented by a union. If a union or an employer commits certain unlawful acts that violate the National Labor Relations Act, the Board is the only place where the victim can file a charge. The Board investigates and prosecutes charges by employers against unions, charges by unions against employers, and charges by individual employees against both.

The NLRB, by statute, has five members who serve five-year terms.[4] The terms are staggered so that one Board member's term expires each year. There is no holdover provision allowing Board members to continue to serve until their successor is confirmed. Thus, vacancies are constantly occurring and need to be filled.

The Supreme Court ruled in 2010 that the NLRB does not have the authority to act without a quorum of three members.[5] As a result of that ruling, hundreds of non-controversial decisions that had been issued by a two-member Board consisting of one Democrat and one Republican from 2008 to 2010 were voided. When the Board reached a quorum again, it faced a huge backlog of unresolved cases, leaving the parties to endure years of uncertainty and delay.

Instead of responding to this lack of a quorum by confirming Presidential nominees so that the Board could get back to work, some in the Senate seized on it to advance the agenda of powerful special interests who would prefer not to have this nation's labor laws enforced at all. Less than a month before President Obama made the recess appointments involved in *Noel Canning*, Senator Graham publicly "reaffirmed … he will continue to place an indefinite Senate hold on nominations to the NLRB."[6] Noting that the Board was on the verge of losing its quorum, he stated, "the NLRB as inoperable could be considered progress."[7] On the day of the recess appointments, Senator Graham issued a press release repeating his pledge to block all nominees to the Board.[8] Partisan obstructionism made Senate confirmation of a full Board impossible.

Even though the National Labor Relations Act calls for a five-member Board, during the first three years of the Obama administration, there was only a two-month period when the NLRB had a full complement of five members (June 22-August 27, 2010).[10] Employers and employees faced the prospect of an NLRB without a quorum

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[4] 29 U.S.C. §153.
[5] New Process Steel, LLP v. NLRB, 130 S.Ct. 2635 (2010).
[6] Senator Lindsay Graham (R-SC), Press Release, "Graham Calls for Investigation into NLRB-Union Cooperation," December 9, 2011, available at http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=24553900-802a-23ad-4cfe-05130335b0a0.
[7] *Id.*
[8] Senator Lindsay Graham (R-SC), Press Release, "Graham on President Obama's Recess Appointments to the NLRB," January 4, 2012, available at http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=aac16239-802a-23ad-42d9-6c23be9a334b&Region_id=&Issue_id=.
[10] http://nlrb.gov/members-nlrb-1935

again when the third Board member's term expired on January 3, 2012, leaving only 2 members—Chairman Pearce (D) and Member Hayes (R). The next day, January 4, 2012, President Obama used his recess powers and appointed three new members to the Board, following the decades-long bipartisan tradition of filling the Board with three members of the President's party and two members of the other party:

1. **Sharon Block** (Democrat) – Deputy Assistant Secretary for Congressional Affairs at the U.S. Department of Labor, and a former NLRB and Senate HELP committee attorney, and former attorney with Steptoe & Johnson.
2. **Terence F. Flynn** (Republican) – Former management attorney, Chief Counsel to NLRB Member Brian Hayes and previously Chief Counsel to former NLRB Member Peter Schaumber.[11]
3. **Richard Griffin** (Democrat) – General Counsel for International Union of Operating Engineers and previously counsel to NLRB Members.

History of Recess Appointments to the NLRB, 1980-Present

President Obama was following a frequent practice of the last five Presidents when he made these recess appointments to the Board.

Since 1980, when Republicans first used the filibuster to block a nominee (career Board employee John Truesdale) from being confirmed as a member of the NLRB, the confirmation process for NLRB nominees has become increasingly polarized and contentious. As Professor Joan Flynn describes, "the Senate has not only frequently blocked the President's nominees or would-be nominees, but has insisted that the President acquiesce to certain of its choices—or more specifically, those of [the Senate leadership of the opposing party]—as the price of getting any of his Board nominees confirmed."[12]

As a result, every President since President Carter has made recess appointments to the NLRB. From 1980 to present, there have been a total of 29 recess appointments to the Board, only four of which would be considered valid under the reasoning of the D.C. Circuit in the Noel Canning case. Of the 25 others that the court would consider invalid—either because they were intrasession appointments or because, although they were made between sessions, they were to positions that became vacant prior to the recess in which the appointment was made—President Carter and President George H.W. Bush each made one, President Clinton and President Obama each made 5, President Reagan made 6 and President George W. Bush made 7. The breakdown, showing the date of each nominee's appointment, is shown in Table 1:

[11] Member Terrence Flynn resigned from the Board, effective Tuesday, July 24, 2012.

[12] Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 Ohio St. L. J. 1361, 1429 (2000), available at http://moritzlaw.osu.edu/students/groups/oslj/files/2012/03/61.4.flynn_.pdf

Table 1 [13]

Recess Appointments to the NLRB

Appointments that would be considered valid under the reasoning of the D.C. Circuit in *Noel Canning* ("qualifying" intersession appointments) are in italics. All non-italicized appointments would be invalid under the D.C. Circuit's view (intrasession and "non-qualifying" intersession appointments).

President Carter: 1 recess appointment (intrasession)

John C. Truesdale	10/23/80	(intrasession)

President Reagan: 6 recess appointments (4 intrasession, 2 non-qualifying intersession)

John R. Van de Water (chair)	08/13/81	(intrasession)
Robert P. Hunter	08/13/81	(intrasession)
Wilford W. Johansen	08/29/88	(intrasession)
John E. Higgins Jr.	08/29/88	(intrasession)
John C. Miller (chair)	12/23/82	(intersession but vacancy arose 12/16/82 while Congress in session)
Dennis R. Devaney	11/22/88	(intersession, vacancy arose 7/31/88)

President G H.W. Bush: 3 recess appointments (1 non-qualifying intersession, *2 qualifying intersession*)

Clifford R. Oviatt	12/14/89	(intersession, vacancy arose 8/28/88)
Dennis R. Devaney	*12/14/89*	*(intersession, vacancy arose same recess=valid under Noel Canning)*
John N. Raudabaugh	*12/22/92*	*(intersession, vacancy arose same recess=valid under Noel Canning)*

President Clinton: 7 recess appointments (2 intrasession, 3 non-qualifying intersession, *2 qualifying intersession*)

Sarah M. Fox	1/19/96	(intrasession)
John E. Higgins	08/30/96	(intrasession)
John C. Truesdale	01/24/94	(intersession, vacancy arose 12/16/92)
John C. Truesdale (chair)	12/04/98	(intersession, vacancy arose 8/27/98)
Dennis P. Walsh	12/29/00	(intersession, vacancy arose 8/27/00)
John C. Truesdale	*12/23/94*	*(intersession, vacancy arose same recess=valid under Noel Canning)*

[13] The dates of appointment listed are from the Congressional Research Service memorandum of Feb. 4, 2013 found here: http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/Recess%20Appointments%201981-2013.pdf. The dates on which the positions became vacant are from this chart on the NLRB's website: http://www.nlrb.gov/who-we-are/board/board-members-1935.

Sarah M. Fox	*12/17/99*	*(intersession, vacancy arose same recess=valid under Noel Canning)*
President G.W. Bush: 7 recess appointments (4 intrasession, 3 non-qualifying intersession)		
Peter C. Hurtgen (chair)	08/31/01	(intrasession)
Peter C. Schaumber	08/31/05	(intrasession)
Peter N. Kirsanow	01/04/06	(intrasession)
Dennis P. Walsh	01/17/06	(intrasession)
Michael J. Bartlett	01/22/02	(intersession, vacancy arose 8/27/00)
William B. Cowen	01/22/02	(intersession, vacancy arose 10/1/01)
Ronald E. Meisburg	12/23/03	(intersession, vacancy arose 8/21/03)
President Obama: 5 recess appointments (all intrasession)		
Mark G. Pearce	03/27/10	(intrasession)
Craig Becker	03/27/10	(intrasession)
Terence R. Flynn	01/04/12	(intrasession)
Richard Griffin	01/04/12	(intrasession)
Sharon Block	01/04/12	(intrasession)

Where was the outrage when Presidents Carter, Reagan, Bush, Clinton, and Bush made these recess appointments to the Board? The absence of any significant outcry or legal challenges shows that both the legislative and executive branches, as well as the parties who appear before the Board and the public at large, have shared an understanding for a long time of what the President's recess appointment power allows.

If the D.C. Circuit's restriction on the recess appointment power is applied to the 25 Republican and Democratic recess appointments that the D.C. Circuit would deem invalid under *Noel Canning* (Table 1), it would mean that there were large periods of time during each of the last five administrations when the Board operated without a quorum of what the D.C. Circuit would consider legally appointed Board members—that is, members who were either confirmed by the Senate or recess-appointed during an intersession recess to a seat that became vacant during that recess. This includes a period of some 5 months during the Reagan administration, 10 months in the George H.W. Bush administration, 21 months in the Clinton administration, 26 months in the George W. Bush administration, and 20 months so far in the Obama administration.

Table 2 shows the composition of the Board during those periods, with recess appointees serving under appointments that the *Noel Canning* court would consider to be invalid indicated in bold:

Table 2[14]

Periods in Which the NLRB Operated Without a Valid Quorum as Defined by the D.C. Circuit in *Noel Canning v. NLRB*

Board Members serving under recess appointments that would have been invalid under *Noel Canning* are shown in bold.

Reagan administration

1. 08/29/88 to 11/21/88, 2 of 4 (James Stephens, Mary Cracraft, **Wilford Johansen, John Higgins**)
2. 11/22/88 to 01/20/89, 3 of 5 (Stephens, Cracraft, **Johansen, Higgins, Dennis Devaney**)

Bush 1 administration

3. 01/20/89 to 06/15/89, 3 of 5 (Stephens, Cracraft, **Johansen, Higgins, Devaney**)
4. 06/16/89 to 11/22/89, 2 of 4 (Stephens, Cracraft, **Higgins, Devaney**)

Clinton administration5. 05/28/93 to 11/26/93, 1 of 3 (Stephens, Devaney, **John Raudabaugh**)

6. 01/24/94-03/03/94, 1/24/94 (Stephens, Devaney, **John Truesdale**)
7. 09/03/96 to 02/28/97, 2 of 4 (William Gould, Margaret Browning, **Sarah Fox, John Higgins**)
8. 03/01/97 to 11/13/97, 2 of 3 (Gould, **Fox, Higgins**)

Bush 2 administration

9. 08/31/01 to 10/01/01, 2 of 4 (John Truesdale, Wilma Liebman, **Peter Hurtgen**, **Dennis Walsh**)
10. 10/02/01 to 12/20/01, 2 of 3 (Liebman, **Hurtgen**, **Walsh**)
11. 01/22/02 to 08/01/02, 3 of 4 (Liebman, **Hurtgen, Michael Bartlett, William Cowen**)12. 08/02/02 to11/22/02, 2 of 3 (Liebman, **Bartlett, Cowen**)
14. 08/31/05 to 01/03/06, 1 of 3 (Liebman, Robert Battista, **Peter Schaumber**)
15. 01/04/06 to 01/16/06, 2 of 4 (Liebman, Battista, **Schaumber, Peter Kirsanow**)
16. 01/17/06 to 08/02/06, 3 of 5 (Liebman, Battista, **Schaumber, Kirsanow**, **Dennis Walsh**)
17. 12/17/07 to 12/31/07, 2 of 4 (Liebman, Schaumber, **Kirsanow, Walsh**)

Obama administration

18. 03/27/10 to 06/21/10, 2 of 4 (Liebman, Schaumber, **Mark Pearce, Craig Becker**)
19. 8/28/11 to 01/03/12, 1 of 3 (Pearce, Brian Hayes, **Becker**)
20. 01/09/12 to 07/24/12, 3 of 5 (Pearce, Brian Hayes, **Richard Griffin, Sharon Block, Terence Flynn)**

[14] Information is taken from this chart on the Board's website: http://nlrb.gov/members-nlrb-1935.

21. 07/25/12 to 12/16/12, 2 of 4 (Pearce, Hayes, **Griffin, Block**)
22. 12/17/12 to ____, 2 of 3 (Pearce, **Griffin, Block**)

The D.C. Circuit's Decision in *Noel Canning* Is an Outlier

The D.C. Circuit disregarded this history of NLRB appointments, and the history of recess appointments in general, when it made its decision in *Noel Canning*. The court invalidated the recess appointments of Members Block and Griffin on two grounds. It first held that the Recess Appointments Clause refers only to *intersession recess* (between two formal sessions of Congress) and does not include *intra-session* breaks or adjournments. The D.C. Circuit also held that the Recess Appointments Clause covers only vacancies that first arise during the same recess when the appointment is made (meaning that a seat vacant before recess begins cannot be filled during recess).

The D.C. Circuit's analysis went against the decisions of three other federal courts of appeals in the past fifty years that have held recess appointments under such circumstances valid. In 2004, the Eleventh Circuit upheld President Bush's *intra-session* recess appointment of Judge William H. Pryor. *Evans v. Stephens*, 387 F.3d 1220 (2004) (en banc). The Second and Ninth Circuits both refuse to limit the President's appointment powers to vacancies that *arise* during a recess. *United States v. Woodley*, 726 F.2d 1328 (9th Cir. 1982); *United States v. Allocco*, 305 F.2d 704 (2nd Cir. 1962).

The *Noel Canning* decision would virtually eliminate the recess appointment power as it has been used and accepted in practice by both parties and by all three branches of government. Recess appointments to the NLRB are only a tiny fraction of the total recess appointments made by the past five Presidents. From the Reagan administration through the current administration, there were a total of approximately 329 intrasession recess appointments to various offices – three-quarters of them by Republican Presidents.[15] Every one of those appointments would have been invalid according to the D.C. Circuit's analysis in *Noel Canning*, including President George H.W. Bush's appointment of Alan Greenspan to chair the Federal Reserve Board.[16] During the same period, there were another 323 intersession recess appointments – mostly by Republican Presidents – many or most of which would also have been invalid according to *Noel Canning*, if the vacancies did not arise during the particular recess when the appointments were made.[17]

[15] The *Noel Canning* Decision and Recess Appointments Made from 1981-2013, Congressional Research Service Memorandum (Feb. 4, 2013), at 4, Table 1.
[16] Id. at 13.
[17] Id. at 4, Table 1.

Consequences of the *Noel Canning* Decision

Some members of Congress contend that the D.C. Circuit's decision in *Noel Canning* means the Board should cease operation. That is like suggesting that the police should stop enforcing a law because one court holds it unconstitutional when three other courts have already upheld the law. The Board has a statutory responsibility to administer the National Labor Relations Act. The D.C. Circuit's new limitations on the recess appointment power are contrary to three other federal circuit courts. There is a split in the circuit courts, with the D.C. Circuit's radical decision in the minority. The Supreme Court has already rejected an effort to shut down injunction litigation by the Board based on the *Noel Canning* decision.[18]

While we are all waiting for the Supreme Court to rule, the Board must keep operating. The D.C. Circuit does not have sole authority to review decisions of the NLRB; the other eleven federal circuit courts also have jurisdiction to review and enforce Board decisions,[19] and to date, three of them disagree with the D.C. Circuit's view of the recess appointment power. In continuing to operate, the Board is following its longstanding policy of nonacquiescence with adverse court of appeals decisions where the Supreme Court has not yet spoken, for the sake of maintaining uniform national labor policy where the circuit courts disagree.[20] One panel of judges cannot shut down an agency created by Congress and leave employees and employers with no one to enforce the laws that protect them.

There is a grave concern, however, that parties will take advantage of forum shopping to file petitions for review in the D.C. Circuit and put their cases on indefinite hold. Every party who is found to violate the National Labor Relations Act – employer or union – could use this tactic to delay remedying its unlawful actions until the Supreme Court has resolved this case. Employers could potentially ignore every election of a union to represent their employees, no matter how clear the vote, by challenging the Board's certification of the results in the D.C. Circuit. The D.C. Circuit has already placed dozens of pending petitions for review on hold.[21] Even if the Supreme Court takes up this issue promptly and decides it during its next term, this could mean enforcement will stop for a year and a half in perhaps hundreds of cases *where the Board has found that the law was violated*, or where *the Board has certified the results of an employee election.* As a local labor lawyer, I am very concerned about the effects of this delay on real people.

The Board is a law enforcement agency. It has exclusive authority to enforce most provisions of the National Labor Relations Act. As part of enforcing the law, the Board has to interpret the law, and at times, those interpretations cause controversy. But

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[18] Healthbridge Management, LLC, *et al.* v. Kreisberg, 12A769 (S. Ct. Feb. 6, 2013), available at http://www.supremecourt.gov/orders/courtorders/020613zr_8ok0.pdf.
[19] 29 U.S.C. sec. 158(e), (f).
[20] See generally Baker Electric, 351 NLRB No. 35, n.42 (2007) (citing cases).
[21] Mike Scarcella, "After NLRB Decision, a Waiting Game for Employers, Workers," in *The BLT: The Blog of LegalTimes*, February 8, 2013, available at http://legaltimes.typepad.com/blt/2013/02/after-nlrb-decision-a-waiting-game-for-employers-workers.html

the vast majority of the Board's day-to-day work is simply enforcing the law as it already stands. In fact, over 90% of the meritorious unfair labor practice charges filed with the Board are resolved by settlement.[22] Of the cases that go to hearing, most do not involve any novel legal issues. The D.C. Circuit plunges even these routine cases into legal limbo.

One of the dozens of pending cases that the D.C. Circuit has already put on hold was handled by our firm.[23] The Board found unanimously, including Republican Board Member Brian Hayes, that the employer illegally discriminated against a long-time printing company employee for his Union activities and fired him on a pretext. Marcus Hedger was a union steward, which meant that he assisted his coworkers at the printing plant with their grievances and sat on the union's bargaining committee for contract negotiations. During some contentious negotiations, the employer's senior vice president told Mr. Hedger that he was tired of this "union circus" and that "we're watching you, we are going to catch you, and we are going to fire you." Shortly after that threat, he was fired. The Board unanimously found that the firing was illegal and ordered the Company to reinstate the employee and pay him his lost earnings. This is a straightforward case where the Board agreed across party lines that an employee was illegally fired. But now no one knows how long the Board's decision will sit on hold. In the meantime, Mr. Hedger is working an entry-level job at around one-third of the pay he used to earn, and he has lost his house.

The *Noel Canning* case itself is another example of a routine case. In *Noel Canning*, the Company and the Union had a longstanding collective bargaining relationship. After months of bargaining, the negotiators shook hands on a deal for a new contract, but subsequently a dispute arose over what had been said about a particular term, and the Company refused to sign a written agreement. The Board investigated and held a hearing. A panel of two Republicans and one Democratic Board member found unanimously that the evidence supported the Union's account of the negotiations and that the Company was bound by its oral agreement.[24] *The D.C. Circuit agreed the Board's decision was correct*[25] – but refused to enforce it because two of the three Board members were recess appointments. This is an example of the work the Board does every day, resolving disputes that the parties have tried and failed to resolve themselves. Until there is a final resolution to that case, the Noel Canning Company and the Union do not know whether they have a legally enforceable contract or not. The rights and duties of the employees and the Company are uncertain. What appears to have been a long-time, functioning relationship cannot function. This scenario will be repeated over and over around the country if the Board cannot issue enforceable orders.

[22] NLRB Performance and Accountability Report, FY 2012, at 40, 49. Available at http://www.nlrb.gov/sites/default/files/documents/189/nlrb_2012_par_508.pdf

[23] Fort Dearborn Co., 359 NLRB No. 11 (Sept. 28, 2012), *petition for review pending*, Case Nos. 12-1430, 12-1438 (D.C. Circuit).

[24] Noel Canning, 358 NLRB No. 4 (Feb. 8, 2012).

[25] Noel Canning v. NLRB, slip op. at 4-9 (D.C. Cir. Case Nos. 12–1115, 12–1153, January 25, 2013).

Recent Decisions of the NLRB

Some members of the management bar and anti-labor special interest groups have mischaracterized a number of recent decisions of the Board. Despite the posturing by some advocates, there is nothing remotely radical in these decisions. In *Kent Hospital (United Nurses)*, 359 NLRB No. 42 (2012), the Board has not even made a final decision in the case yet. The Board ruled that lobbying expenses should not be *categorically* excluded from the expenses that are chargeable to union dues objectors, and that instead, the Board will perform a case-by-case determination of whether the particular lobbying expenses are germane to collective bargaining, contract administration or grievance adjustment. The Board has requested additional briefing so that it can make that determination in the *Kent Hospital* case. In *Piedmont Gardens*, 359 NLRB No. 46 (2012), the Board applied the Supreme Court's standard for determining whether a union is entitled to potentially confidential information, specifically witness statements and names of witnesses. The Board ruled that the union's need for relevant information must be balanced against legitimate confidentiality interests and an appropriate accommodation reached to protect all parties' rights. That is the same approach that courts use every day in civil litigation. In *WKYC-TV*, 359 NLRB No. 30 (2012), the Board brought the treatment of dues checkoff (payroll deduction of union dues for employees who choose that method of payment) in line with the treatment of other terms and conditions of employment, including other types of payroll deductions, by holding that the employer must continue the status quo after contract expiration while the parties bargain. The Board's *Bethlehem Steel*[26] line of cases which previously carved out an exception for dues checkoff was rejected three times by the Ninth Circuit in ten years.[27] In *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), the Board determined that the duty to bargain before changing terms and conditions of employment for union-represented employees – a duty that the Supreme Court unanimously recognized over fifty years ago in *NLRB v. Katz*[28] – applies to employee terminations, suspensions and demotions in the limited (and indeed, fairly rare) situation where the parties have not negotiated a grievance procedure for discipline cases. In recognition of the practical realities of employee discipline, the Board held that bargaining *to impasse* is not required before the discipline is imposed, but instead, bargaining may be completed after the employee is disciplined.

Conclusion

As a citizen, I am troubled that our elected representatives are spending the public's time and resources on a hearing attacking the NLRB. I am even more troubled that this is the ninth such hearing by the full Committee or this Subcommittee in the past two years, when all the agency has done is its statutory duty. Employers and workers are worried about jobs, but this House has repeatedly taken actions that hurt workers – from

[26] 136 NLRB 1500 (1962), *remanded on other grounds*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).

[27] **Error! Main Document Only.**Local Joint Executive Board of Las Vegas v. NLRB (Hacienda Hotel), 657 F.2d 685 (9th Cir. 2011); 540 F.3d 1072 (9th Cir. 2008); 309 F.3d 578 (9th Cir. 2002).

[28] 369 U.S. 736 (1962).

playing politics with the debt ceiling, to opposing equal pay legislation, to trying to strip prevailing wage requirements from government public works contracts.[29]

The Board is not part of the problem. The Board is part of the solution. Congress created the National Labor Relations Board in 1935, in the middle of the Great Depression. In Section 1 of the NLRA, Congress made a finding that "[t]he inequality of bargaining power between employees … and employers … tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners."[30] Those words ring truer than ever today, with stagnant and falling wages a drag on the economy. History shows that when more workers are represented by unions, income inequality falls, and when more workers have to fend for themselves without union representation, income inequality spirals out of control.[31] After the National Labor Relations Act was first passed, our nation enjoyed decades of prosperity thanks to relatively harmonious, or at least functional, collective bargaining relationships that allowed workers to negotiate for good middle class jobs. Those who seek to shut down the Board are serving the narrow interests of the 1%. Without job security and fair pay for the 99%, our nation cannot prosper as a whole.

[29] Working Families Report Card: Grading the Republican House on Job Creation and Job Quality at 2, 6 (House Committee on Education and the Workforce Democrats, August 2012).
[30] 29 U.S.C. sec. 151.
[31] See graph in Working Families Report Card, ***supra***, at 8.