

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NESTLÉ DREYER'S GRAND ICE CREAM,

Employer,

and

Case No. 31-CA-74297

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 501, AFL-CIO,

Petitioner.

**RESPONDENT NESTLÉ DREYER'S GRAND ICE CREAM'S RESPONSE TO THE
NATIONAL LABOR RELATIONS BOARD'S NOTICE TO SHOW CAUSE WHY THE
ACTING GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT SHOULD
NOT BE GRANTED**

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INTRODUCTION

This Unfair Labor Practice charge arises from Nestlé Dreyer's Grand Ice Cream's ("Nestlé" or the "Company") technical refusal to bargain, which the Company engaged in solely to secure judicial review of a previous Board decision. Normally, technical-refusal cases are subject to expedited summary judgment, but this case presents an exception.

The National Labor Relations Board ("Board") lacks the authority to grant the Acting General Counsel's motion because the Board does not currently hold a Constitutionally sound quorum. As of January 3, 2012, when a Board member's term expired, the Board had only two members remaining, and the Supreme Court recently held that a two-member Board lacks a quorum and therefore lacks power to adjudicate cases. President Obama purported to restore the Board's quorum on January 4, by appointing three new members to the Board using his recess appointment power. Those appointments were *void ab initio*, however, because the Senate was not in recess at the time that they were made. As a result, the Board continues to lack a quorum, and it may not act on the present motion.

FACTS AND PROCEDURAL HISTORY

Nestlé has maintained a plant in Bakersfield for more than 20 years. In the facility, Nestlé manufactures ice cream products distributed for sale to individual consumers. Nestlé employs roughly 800 employees at the Bakersfield facility, including nearly 600 production employees and more than 100 maintenance employees.

On October 13, 2011, the International Union of Operating Engineers, Local 501, AFL-CIO (the "Union") filed a petition to represent a small portion of the workforce at Nestlé's facility in Bakersfield. Specifically, the Union sought to unionize only the "full-time and regular part-time maintenance employees" at Bakersfield. The Union explicitly sought to exclude from

its proposed unit, among others, the facility's production employees who work hand-in-hand in many respects with the maintenance employees.

At the subsequent representation hearing, held on October 27 and 28, Nestlé objected to the proposed segregation of production and maintenance employees on the grounds that the employees shared a strong community of interest. Nestlé introduced three witnesses who testified to the interests shared among the employees, while the Union introduced no witnesses. The parties exchanged post-hearing briefs on November 10.

On November 23, the Regional Director of Region 31 of the Board issued his Decision and Direction of Election, ruling that the petitioned-for unit was appropriate based on the Board's new *Specialty Healthcare* decision. Applying *Specialty Healthcare*, the Regional Director determined that Nestlé was required to "establish[] that maintenance employees share an overwhelming community of interest with production employees" and concluded that Nestlé did not meet this "heightened" burden.

On December 7, Nestlé sought review of the Regional Director's Decision and Direction of Election. The Board denied the request on December 28, finding that Nestlé's petition "raise[d] no substantial issues warranting review." On January 6, an election was held among the maintenance employees at Bakersfield. The employees voted 56-53 in favor of unionizing.

In order to secure judicial review of the Board's decision on the appropriateness of the Union's petitioned-for unit, Nestlé engaged in a technical refusal to bargain with the Union. The Union filed the present Unfair Labor Practice charge on February 9. The Acting General Counsel moved for summary judgment on April 17.

Meanwhile, between the Board's decision denying review in the representation case and the filing of the present case, the Board experienced significant turnover. The Board had been operating through the end of 2011 with three of its five seats filled, but the three-member Board lost one of its members on January 3, 2012, when the recess appointment of Craig Becker expired. As the Supreme Court held, a two-member Board lacks a quorum and cannot "exercise the . . . authority of the Board." *New Process Steel LP v. NLRB*, 130 S. Ct. 2635, 2644 (2010). Thus, with the end of Member Becker's term, the Board was poised to lose its ability to transact business on January 4. In response, President Obama purported to make three "recess" appointments to the Board on that day. However, as discussed further below, the Senate was not in recess at the time of the appointments, rendering the appointments Constitutionally ineffective.

ARGUMENT

The Board can act only when it has a three-member quorum. The Board currently does not have a quorum because the three "recess" appointments President Obama purported to make on January 4, 2012 were unconstitutionally made while the Senate was not in recess. Consequently, the Board lacks the authority to function and rule on motions such as the present one. This case must be stayed until the Board regains its quorum.

I. Legal Standard

It is true that issues litigated in a representation proceeding cannot be relitigated in a technical-refusal-to-bargain case.¹ 29 C.F.R. § 102.67(f). The purpose of the technical

¹ In this case, these issues include: (1) whether *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), applies to bargaining units with prior history; (2) whether, even if *Specialty Healthcare* applies, the rule adopted in that case is invalid; and (3) whether, even if *Specialty Healthcare* applies and was validly adopted, the production and

refusal is to have an appellate court examine the underlying issue from the representation proceeding, so expedited grants of summary judgment by the Board are common. This is the general rule unless the employer raises an issue that was not (and could not have been) raised in the initial proceeding.

The Board's loss of quorum is just such an issue. The Board denied Nestlé's request for review of the Regional Director's Decision and Direction of Election on December 28, while it still had a three-member quorum. Though Nestlé disagrees with the merits of that decision, there is no doubt that the Board maintained a constitutional quorum when the decision was issued. Consequently, Nestlé neither raised nor could have raised the quorum issue in the representation proceeding.

Moreover, not only should the Board address this issue, it is obligated to, as it addresses fundamental issues of the Board's competence to resolve this motion. If the January 4 "recess" appointments were unconstitutional, the Board lacks a quorum and may not rule on the case, regardless of the case's merits.

maintenance employees share an overwhelming community of interest. By not attempting to relitigate these issues before the Board at this juncture of this proceeding, Nestlé does not waive or abandon them, but merely seeks to avoid further burdening the record unnecessarily and engaging in an idle act. In fact, Nestlé continues to vigorously oppose the Regional Director's decision in the representation proceeding and the Board's decision denying review. If in the unlikely event the Board finds it appropriate somehow to also depart now from its well-settled rule against re-litigation of issues raised in a representation proceeding, Nestlé requests that the Board simply take administrative notice of the full record in the underlying representation proceeding and refer to Nestlé's briefs below, which are incorporated herein by reference. Should this case reach the federal courts, Nestlé intends to raise all the issues raised at the Board level. Nestlé simply acknowledges that the Board has already resolved these issues in the underlying representation proceeding against it in a manner that is final as to the Board, and that under Board precedent, previously litigated issues do not preclude the issuance of summary judgment in technical-refusal cases. See 29 C.F.R. § 102.67(f) ("Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.").

II. Because the January 4 “Recess” Appointments were Unconstitutional, the Board Lacks a Quorum.

The January 4 “recess” appointment of three Board members was unconstitutional because the Senate was not in a recess at the time the appointments were made. Because the Senate was not in recess, President Obama could not constitutionally use his recess appointment power to appoint the members. And because the appointments were unconstitutional, they are *void ab initio*. As a result, the Board currently has only two members and thus lacks a quorum. And as the Supreme Court recently held, the Board cannot function without a three-member quorum. As a result, this motion must be stayed until the Board once again has three Constitutionally appointed members.

The President’s power to appoint officers without the Senate’s consent is circumscribed. Article II of the Constitution provides that “The 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.” U.S. Const. art. II, § 2, cl. 3 (emphasis added). This power is the exception, rather than the rule. When Congress is not in recess, the President must obtain “the Advice and Consent of the Senate” when appointing public officials. U.S. Const. art. II, § 2, cl. 2.

When President Obama appointed Sharon Block, Terrence Flynn, and Richard Griffin to the Board on January 4, 2012, the Senate was not in a recess. The Senate convened the second session of the 112th Congress on January 3, 2012, as required by Section 2 of the Twentieth Amendment. Though no business was conducted that day, the Senate was “adjourned until 11 a.m. on Friday, January 6, 2012.” Importantly, the Senate did not go into “recess” on January 3. Indeed, the Senate apparently went out of its way to prevent itself from recessing in a manner that would have allowed the President to exercise his recess appointment powers

constitutionally. Between January 3 and January 23, the first full legislative day of the session, the Senate convened every Tuesday and Friday and adjourned, rather than recessed, at the conclusion of each day.

Because Congress was not in a recess when the President purported to make “recess” appointments, those appointments were *void ab initio*. The text and structure of the Constitution, fundamental principles of separation of powers, and 225 years of practice all compel this result.

Under the Constitution, each house of Congress is permitted to establish its own rules, and President Obama’s “recess” appointments trample on the Senate’s prerogatives in at least three respects. First, Article I, Section 5, Clause 2 provides that “Each House may determine the Rules of its Proceedings.” By ignoring the Senate’s determination that it was not in recess on January 4, the President tramples on the prerogatives of a co-equal branch of the federal government.

Second, even if this were considered a recess, a longstanding Senate rule provides that three-day recesses are too short to allow a “recess” appointment. Senate Rule XXXI(6) provides that nominations made by the President but not acted on by the Senate are returned to the President “if the Senate shall adjourn or take a recess for more than thirty days.” This provides a baseline for what recesses are substantial enough to justify use of the recess appointment power. The President’s use of the power during a three-day “recess” is flagrantly violative of the Senate’s determination.

Third, the appointments even trample on the prerogatives of the House of Representatives. “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two

Houses shall be sitting.” U.S. Const. art I., § 5, cl. 4. The House of Representatives had not consented to a three-day Senate adjournment as of January 4. Because the House did not consent, the Senate was obliged to hold sessions on both January 3 and January 6. The President’s determination that the Senate was in recess during this period is a direct affront to the rules and determinations of the houses of Congress themselves, explicitly granted by the Constitution.

Perhaps the President concluded that the “pro forma” sessions of Congress on January 3 and 6 did not interrupt what he considered to be a longer recess, but this view is unsupportable. The fact that no business was conducted on January 3 does not imply that no business at all could be conducted during these “pro forma” sessions of the Senate. Indeed, important legislation can be—and has been—passed during recent pro forma sessions. For example, during the pro forma session on December 23, 2011, the Senate passed by unanimous consent a payroll tax cut extension, which President Obama signed into law. Thus, an argument that the Senate was not really “in business” on January 3 and 6 due to the nature of the session is pure fiction. Likewise, there is no support for the argument that the January 3 and 6 sessions are Constitutionally insignificant.

Finally, the exercise of recess appointments throughout American history strongly suggests that the January 4 appointments are unconstitutional. Prior to January 4, 2012, the Senate has been the sole arbiter of whether it is in session or in recess. No President had ever disregarded the Senate’s determination that it was in session in order to force through a “recess” appointment. Indeed, for at least thirty years, it has been assumed that the Senate had the power to restrict the President’s authority to make recess appointments through the use of pro forma

sessions. That President Obama disapproves of the Senate’s tactics does not vest him with the right to ignore Constitutional principles.

Because the “recess” appointments were infirm, only two Board members—Chairman Mark Pearce and Member Brian Hayes—are currently qualified to hold their seats. With just two members, the Board lacks a quorum and cannot conduct business. *New Process Steel LP v. NLRB*, 130 S. Ct. at 2644. As a result, the Board must hold the Acting General Counsel’s motion in abeyance unless and until it regains a quorum.

CONCLUSION

For the reasons set forth above, the Board must stay this case and refrain from acting on the Acting General Counsel’s Motion for Summary Judgment until the Board reacquires a Constitutional quorum.

Dated: May 2, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Review was served on the following via electronic mail on this, the first day of May, 2012:

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I hereby certify that a copy of the foregoing Petition for Review was served on the following via Overnight Mail on this, the first day of May, 2012:

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