

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CATERPILLAR INC.,

Respondent,

and

Case No. 30-CA-064314

**UNITED STEEL, PAPER & FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO/CLC,**

Charging Party.

**CHARGING PARTY'S OPPOSITION TO RESPONDENT'S
MOTION FOR RECONSIDERATION**

Charging party, United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC, by its attorneys, for its response to the Respondent's motion for reconsideration states as follows:

1. In its motion for reconsideration, Respondent argues for the first time that the Board had no legal authority to act, because it lacked a quorum of validly appointed members. However, in decisions issued subsequent to the District of Columbia Circuit's decision in *Noel Canning v. NLRB*, 705 F. 3d 490, 499 (D.C. Cir. 2013), the Board has responded to the identical argument as follows:

We reject this argument. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid...However, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals, see *Evans v. Stephens*, 387 F. 3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942, 125 S.

Ct. 2244, 161 L. Ed. 2d 510 (2005); *U.S. v. Woodley*, 751 F. 2d 1008 (9th Cir. 1985); *U.S. v. Alocco*, 305 F. 2d 704 (2nd Cir. 1962). This question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act.

See for example *G4S Regulated Security Solutions*, 359 NLRB #101 n. 1 (2013).

2. Indeed, in *Evans*, an en banc Eleventh Circuit Court of Appeals held that the Recess Appointment Clause of the United States Constitution permitted intrasession, as opposed to intersession appointments by the President. The Supreme Court also refused to grant cert when Stephens, the losing party in the case, sought to appeal the en banc decision. *Evans'* interpretation of the Recess Appointment Clause is consistent with a history in which United States Presidents have made over 250 intrasession appointments. In contrast, the decision by a three judge panel in *Noel Canning* was based upon the panel's own unsupported interpretation of the phrase "the recess" as used in the Recess Appointment Clause; and that no intrasession appointments were made in early United States history (without considering whether there was any need to make intrasession appointments during the much shorter intrasession breaks during those years, see *Noel Canning*, 705 F. 3d at 502).

3. In *Evans*, the Eleventh Circuit Court of Appeals also held that the Recess Appointment Clause was applicable, even though the vacancy had existed prior to the break in the Senate Session. While three judge panel in *Noel Canning* disagreed with *Evans'* conclusion, in his concurrence Judge Griffith noted that the practice of filling positions that became vacant prior to a break of the Senate, as opposed to becoming vacant during the break, dates back to the 1820s; and that the District of Columbia Circuit should not be so quick to dismiss the Executive Branch's venerable interpretation of the Constitution. Moreover, *Evans'* interpretation of the recess

appointment clause would not subvert the senate confirmation process given that recess appointments are only until the end of the next Senate session, rather than for the full term of the position. The Board therefore should continue to follow *Evans* and its line of cases, until and if the reasoning of *Noel Canning* is adopted by the Supreme Court, and find that the Board had constitutional authority to issue a final decision in the case at bar.

4. In addition to being directly contrary to Board precedents, Caterpillar's motion for reconsideration is also procedurally infirm. The law is well established that a motion for reconsideration should only be brought in extraordinary circumstances, and does not present a party with a first opportunity to make an argument, which should have been made earlier in the proceeding. NLRB Rule 102.48(d)(1); *Detroit Paper Agency*, 327 NLRB 799 (1999). See also *Marilyn Pharmaceuticals Inc. v. Mucos Pharma GmbH & Co.*, 571 F. 3d 873, 880 (2009) (Motion for reconsideration should not be used to raise arguments, which could have been raised earlier in the proceeding).

5. A motion for reconsideration is permitted to present a new legal argument, which was not raised earlier in the proceeding, only when there is a change in the controlling law. *Nunes v. Ashcraft*, 375 F. 3d 805, 807-808 (9th Cir. 2003); *Brown v. Trueblue Inc.*, 2012 U.S. Dist. Lexis 52811 *30-31 (M.D. Pa. 2012) (A new decision by the NLRB does not constitute a change in the law controlling in the District Court proceeding). Similarly, a new decision by the D.C. Circuit is not binding upon the Board, so that no change in the controlling law has occurred to warrant permitting Caterpillar to raise a new argument in its motion for reconsideration.

6. Rather, at the time that exceptions and cross exceptions were filed with the Board in the case at bar, the *Noel Canning* case had already been fully briefed, and was scheduled for oral argument. If Caterpillar wished to raise its argument concerning the Board's authority to issue decisions, the issue should have been raised and preserved in its exceptions and cross exceptions. Given that no change in law controlling upon the Board has occurred, extraordinary circumstances are not present, and Caterpillar should not be permitted to raise its argument concerning the Board's authority for the first time in its motion for reconsideration.¹

CONCLUSION

For the above stated reasons, Caterpillar's motion for reconsideration should be denied in its entirety.

Respectfully submitted this 9th day of May, 2013.

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ATTORNEYS FOR CHARGING PARTY

¹ In *Noel Canning*, the panel of the D.C. Circuit held that the Board's lack of authority to issue decisions constituted extraordinary circumstances within the meaning of 29 U.S.C. 160(e). However, *Noel Canning's* interpretation of "extraordinary circumstances" is inconsistent with the traditional interpretation that extraordinary circumstances refer to a procedural defect associated with the presentation of an argument, rather than the type of error raised by the argument. See for example *NLRB v. Dominick's Finer Foods*, 28 F. 3d 678, 686 (7th Cir. 1994). *Noel Canning* indeed primarily relied upon *Carroll College v. NLRB*, 558 F. 3d 568, 574 (D. C. Cir. 2009), which held that the Court had inherent authority to invalidate Board action that was beyond its jurisdiction, though the jurisdictional challenge was not presented to the Board; without trying to tie the argument to the 'extraordinary circumstances' clause. Similarly, in *Noel Canning* the Court did not need to invoke the "extraordinary circumstances" clause to reach the jurisdictional issue before it; and in trying to fit a round peg into a square hole misconstrued the 'extraordinary circumstances' clause, for the first time, to refer to the type of error raised by an argument, rather than the procedural defect with raising the argument. The Board therefore should not adopt *Noel Canning's* interpretation of the extraordinary circumstances clause.

CERTIFICATE OF SERVICE

On May 9, 2013, the CHARGING PARTY'S OPPOSITION TO RESPONDENT CATERPILLAR'S MOTION FOR RECONSIDERATION was electronically filed by using the NLRB's website and copies were served via electronic mail and by U.S. First Class Mail, postage prepaid, upon the following:

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