

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

CATERPILLAR INC.)	
)	
Respondent,)	
)	
and)	
)	
UNITED STEEL, PAPER AND FORESTRY,)	Case No. 30-CA-064314
RUBBER, MANUFACTURING, ENERGY,)	
ALLIED INDUSTRIAL AND SERVICE)	
WORKERS INTERNATIONAL UNION,)	
AFL-CIO/CLC,)	
)	
Charging Party.)	

**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR
RECONSIDERATION OF THE BOARD’S DECISION AND ORDER**

As explained in Caterpillar’s motion for reconsideration, the Board should reconsider and withdraw its April 23, 2013 decision and order in this case because it was issued by a three-member panel that the U.S. Court of Appeals for the District of Columbia Circuit found to be constitutionally infirm in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).¹ Counsel for the Acting General Counsel (“CAGC”) and Charging Party (“USW” or “Union”) both oppose reconsideration, but neither offers a legitimate basis upon which to square the Board’s actions in this case with the D.C. Circuit’s holding in *Noel Canning*.

¹ In a decision issued yesterday, the Third Circuit Court of Appeals adopted much of *Noel Canning*’s reasoning, invalidating the administration’s March, 2010 intrasession recess appointment of Craig Becker to the Board and overturning the Board’s ruling against New Vista Nursing and Rehabilitation because then Member Becker was part of the three-member panel that issued the decision. *NLRB v. New Vista Nursing and Rehabilitation*, __ F.3d __, Case No. 11-3440, 2013 WL 2099742 (3d Cir May 16, 2013). While the D.C. Circuit’s ruling in *Noel Canning* is the authority most relevant to Caterpillar’s motion for reconsideration, the Third Circuit’s decision undermines any argument that *Noel Canning* is an isolated outlier opinion.

ARGUMENT

I. The CAGC’s and USW’s Arguments Concerning the Purported Merits of the D.C. Circuit’s Decision in *Noel Canning* are Misplaced

Much of the USW’s opposition and the entirety of the CAGC’s opposition are spent criticizing the D.C. Circuit’s rationale and ultimate holding in *Noel Canning*. See CAGC Opp. at pp. 1-2; USW Opp. at ¶¶1-3. Both the Union and the CAGC insist that decades-old decisions from other federal courts of appeals—the Eleventh Circuit in 2004, the Ninth Circuit in 1985, and the Second Circuit in 1962—provide more favorable interpretations of the Constitution’s Recess Appointments Clause than does *Noel Canning*. *Id.*

But, the CAGC’s and USW’s attacks on *Noel Canning* are entirely misplaced in the context of this motion for reconsideration. Caterpillar acknowledges the Board has previously announced it will not honor the D.C. Circuit’s decision in *Noel Canning*, but will continue to “fulfill its responsibilities under the Act”—*i.e.*, decide cases, among other things—while the question of the validity of its recess appointees “remains in litigation.” *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, n.1 (Mar. 13, 2013). And the Board may certainly decide to continue to act at its peril² while the constitutionality of its current make-up is litigated.³ But the fact remains that the circuit court of appeals that will decide Caterpillar’s

² While the Supreme Court has not yet decided to review the issue, if the Court grants *certiorari* and upholds the D.C. Circuit’s decision in *Noel Canning*, all Board decisions issued by three-member panels including the challenged recess appointees will be invalid. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, 2644-45 (2010).

³ In addition to being irrelevant to the current motion, the CAGC’s and USW’s preference for these other circuit court rulings is, Caterpillar respectfully submits, wrong. Contrary to the authorities cited by the CAGC and the USW, the D.C. Circuit’s decision in *Noel Canning* stands alone (excepting the Third Circuit’s decision from yesterday) in its exhaustive analysis of the Recess Appointments Clause as it would have been understood when the Constitution was ratified. *Noel Canning*, 705 F.3d at 509; see also *New Vista Nursing*, 2013 WL 2099742 at *14. Significantly, the Supreme Court has expressly endorsed this methodology of constitutional

petition for review of the Board’s decision and order *has conclusively held* the Board lacked a required quorum of three members and thus possessed no authority to act. *Noel Canning*, 705 F.3d at 508-09; *New Process Steel*, 130 S.Ct. at 2644-45. It is this subsequent authority from the very court that will review the Board’s decision that warrants reconsideration.

II. *Noel Canning* Provides a Proper Basis for Caterpillar’s Motion for Reconsideration

Beyond its misdirected arguments concerning the merits of *Noel Canning*, the Union also urges that Caterpillar has not shown “extraordinary circumstances” or a “change in the controlling law,” justifying reconsideration. More specifically, the Union argues Caterpillar should have raised the issue of the Board’s authority to issue decisions in its exceptions briefs and in any event, the D.C. Circuit’s decision in *Noel Canning* “is not binding on the Board.” USW Opp. at ¶¶ 4-6. These arguments ignore the timing of this Board’s action and the D.C. Circuit’s decision in *Noel Canning*. They also fail to acknowledge that Caterpillar’s challenge is grounded in questions concerning the Board’s authority to act pursuant to its statutory mandate.

interpretation. *See Noel Canning*, 705 F.3d at 500 (citing *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008)). Moreover, in undertaking its analysis, the *Noel Canning* court properly credited early executive practice—under which no intersession recess appointments were made in the first 80 years of the Republic—rather than the recent presidential practice of making intersession recess appointments. 705 F.3d at 502 (citing *INS v. Chadha*, 462 U.S. 919, 944-45 (1983) (rejecting the one-house veto, in part, because it was employed only in recent history); *Myers v. United States*, 272 U.S. 52 (1926) (rejecting a statutory limitation on the President’s removal authority, in part, based on early historical interpretations over more recent congressional legislation)).

Indeed, the D.C. Circuit expressly considered and rejected the Eleventh Circuit’s reasoning in *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cited by the USW, because *Evans* relies on an “incomplete statement of the Recess Appointments Clause’s purpose” and defines the term “Recess” so broadly that it would encompass “all breaks” in Senate business. *Noel Canning*, 705 F.3d at 505. As the D.C. Circuit explained, the purpose of the Clause is not merely to enable the President to fill vacancies, as stated in *Evans*, but to fill vacancies “only when the Senate is unable to provide advice and consent,” as omitted by *Evans*. *Id.* (emphasis in original). And, the Senate is unavailable for advice and consent only when it is in “the Recess”; it is not unavailable simply because it takes a lunch break. *Id.* at 503.

On January 25, 2013, *after* the parties had already filed their exceptions and cross exceptions with the Board in this case, the D.C. Circuit issued its decision in *Noel Canning*, holding that the Board lacked a quorum of validly appointed Members and thus had no legal authority to act. *Thereafter*, the Board issued its April 23 decision through a panel consisting of Chairman Pearce and Members Griffin and Block.

Thus, the matter warranting reconsideration and withdrawal of the Board’s decision—namely, the D.C. Circuit’s determination that Members Griffin and Block were not properly serving on the Board when the panel issued its decision in this case—had not occurred when the parties briefed their exceptions and cross-exceptions. And, whether or not the Board considers the D.C. Circuit’s decision in this regard to be “binding,” the fact that this subsequent authority was issued by the federal court that will review the Board’s decision merits reconsideration.⁴

Moreover, Caterpillar’s challenge to the Board’s authority is jurisdictional and thus not subject to waiver. *See Noel Canning*, 705 F.3d at 498 (“[W]e hold that . . . the Board ‘had *no jurisdiction*’ to enter the order”) (emphasis added) (citation omitted); *New Vista Nursing*, 2013 WL 2099742 at *5 (“Because [the NLRA’s three-member-composition requirement] is jurisdictional, any reason for which the delegee group consists of fewer than three members—including whether one member is invalidly appointed under the Recess Appointments Clause—can be raised by a party or by this Court at any point in litigation as a jurisdictional defect.”); *Union Pacific R. Co. v. Brotherhood of Locomotive Engineers and Trainmen Gen. Comm. of*

⁴ The Union cites opinions from the Ninth Circuit and the Middle District of Pennsylvania for the proposition that a party may raise a new legal argument in a motion for reconsideration only if there is a change in controlling law. First, these cases are inapplicable because they do not address the Board’s authority to rule on a motion for reconsideration. Second, the D.C. Circuit’s decision in *Noel Canning* is “controlling” law in a petition for review or enforcement before the D.C. Circuit, because that court can be expected to apply *Noel Canning* and vacate any orders rendered by a Board that lacks a quorum without recess appointees.

Adjustment, Cent. Region, 558 U.S. 67, 69 (2009) (“Subject-matter jurisdiction properly comprehended refers to a tribunal's ‘power to hear a case,’ and ‘can *never* be *forfeited* or *waived*.’) (emphasis added) (citation omitted).

CONCLUSION

For the reasons stated in Caterpillar’s motion and herein, the Board should reconsider and withdraw its April 23, 2013 Decision and Order.

Dated: May 17, 2013

Respectfully submitted,

CATERPILLAR INC.

By: /s/ Derek G. Barella
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CERTIFICATE OF SERVICE

Derek G. Barella, one of the attorneys for Respondent, hereby certifies that he has caused a true and correct copy of the foregoing Reply Memorandum in Support of Motion for Reconsideration of the Board's Decision and Order to be served upon:

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_____/s/ Derek G. Barella_____