

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

**CASINO ONE CORPORATION d/b/a
LUMIÈRE PLACE CASINO & HOTELS
AND PNK (ES), LLC D/B/A
HOTELUMIERE, A SINGLE EMPLOYER**

and

**Cases 14-CA-090353
14-CA-093279
14-CA-095776
and 14-CA-099773**

UNITE HERE, LOCAL 74

RESPONDENTS' MOTION TO DISMISS CONSOLIDATED COMPLAINT

COME NOW Casino One Corporation d/b/a Lumière Place Casino & Hotels (“Lumiere”) and PNK (ES), LLC d/b/a HoteLumiere (“HoteLumiere”) [collectively “Respondents”], by and through their attorneys, and moves the National Labor Relations Board (“Board”) to dismiss the Consolidated Complaint (“Complaint”).

ARGUMENT

A. The Board Lacks A Lawful Quorum.

Under the United States Supreme Court’s decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), the National Labor Relations Board (“Board”) must have a quorum of three (3) validly appointed members in order to lawfully take action. The Court further stated in *New Process Steel* that any orders issued by the Board without a proper quorum are void. *Id.* In *Noel Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir. 2013), the United States Court of Appeals for the D.C. Circuit held that three members of the Board – Sharon Block, Terence F. Flynn, and Richard L. Griffin, Jr. – appointed by the President on January 4, 2012 were not validly appointed under the Recess Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl.

3. The Court in *Noel Canning* determined that those members were not appointed during an intersession recess of the Senate, nor were they appointed to fill vacancies that occurred during an intersession Recess of the Senate, contrary to the provisions of the Recess Appointments Clause. *Id.* at 507, 513. The Court concluded that the appointments “were invalid from their inception.” *Id.* at 507. It also concluded that, because the Board lacked a quorum of three members when it issued its decision in the case, its decision was invalid and must be vacated. *Id.*

While not addressed directly by the Court of Appeals in *Noel Canning*, its holding is also applicable to the appointment of Member Craig Becker because he similarly was not appointed during an intersession recess of the Senate, but while the Senate was still in session, on March 27, 2010. *See Congressional Directory for the 112th Congress*, 536-38 (Dec. 1, 2011). Additionally, the seat formerly held by Member Becker became vacant at the “End” of the Senate’s session on January 3, 2012, not during any recess. Consequently, the January 4, 2012 appointments by the President did not occur during a “recess” of the Senate and were invalid. *Noel Canning*, 705 F.3d at 513.

Because Members Becker, Block, Flynn and Griffin were not validly appointed pursuant to the Recess Appointments Clause, the Board has lacked a valid quorum under the *Noel Canning* requirements since the expiration of Member Wilma B. Liebman’s term on August 27, 2011. While Member Brian Hayes was confirmed by the Senate, his term concluded on December 16, 2012. Since that time, the only validly appointed member of the Board has been Chairman Mark Gaston Pearce, who was confirmed by the Senate on June 22, 2010.

The Supreme Court’s decision in *New Process Steel* makes clear that the Board cannot act without a lawful quorum. 130 S. Ct. 2635 (2010). The Board recognized this limitation in

Interstate Bakeries Corp., 357 NLRB No. 4 (2011), stating that, according to the Supreme Court, the Act, specifically 29 U.S.C. § 153(b), requires that for the Board to exercise its delegated authority, “a delegee group of at least three members must be maintained.” 357 NLRB No. 4, p.1. In this case, because the Board lacks a quorum, it may not exercise its delegated authority via Acting General Counsel to issue the Complaint.

B. The Acting General Counsel Lacked Authority To Issue The Complaint.

In addition to lacking a valid quorum, the Acting General Counsel lacked the authority to issue the Complaint. The Act provides states that “[i]n case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy.” 29 U.S.C. § 153(d). The Act limits the President’s authority in this regard by providing that “no person or persons so designated shall so act . . . for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate . . .” *Id.*

In this case, the President designated the current Acting General Counsel, Lafe Solomon, on an effective date of June 21, 2010. (National Labor Relations Board Press Release, June 20, 2010). No nomination to fill the General Counsel vacancy was submitted to the Senate, however, within forty (40) days of Mr. Solomon’s designation, even though the President had previously expressed concern about the length of time between the nomination of appointees and Senate confirmation of the appointments. (Office of the Press Secretary Press Release dated March 27, 2010). In fact, Mr. Solomon was not nominated by the President to the position of General Counsel until January 5, 2011, well beyond the statutorily-required forty days. (National Labor Relations Board Press Release, January 5, 2011; Office of the Press Secretary

Press Release dated January 5, 2011). When the President nominated Mr. Solomon on January 5, 2011, he did not cite the statutory authority under which Mr. Solomon was nominated.¹

Thus, pursuant to the actual express language of the NLRA, Mr. Solomon has had no authority to serve as Acting General Counsel beyond the forty-day time period beginning June 21, 2010 and ending July 31, 2010. Accordingly, the Acting General Counsel had no authority whatsoever to issue any orders or direct any complaints to be filed after July 31, 2010, which would include the Complaint at issue in this case, which was filed on May 10, 2013.

That the Acting General Counsel is without authority to so act was confirmed by Senator Orin Hatch (R-UT), Senior Member of the Senate Health, Education, Labor, and Pensions Committee – which oversees the Act — and the Senate Judiciary Committee. On May 5, 2011, before the Senate, regarding the Acting General Counsel’s pursuit of a Complaint against Boeing Company, Senator Hatch stated as follows:

Which brings me to the NLRB’s acting general counsel.

How did he even wind up in a position to cause this level of economic mayhem? Not under the established procedure for appointing an interim general counsel under section 3(d) of the National Labor Relations Act, which provides very clearly as follows:

“In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.”

¹ Mr. Solomon appeared before the House of Representatives’ Committee on Oversight and Government Reform on June 17, 2011, stating that he had been appointed “Acting General Counsel” of the NLRB “by President Obama on June 21, 2010.” (Statement of Lafe Solomon, Acting General Counsel, National Labor Relations Board before the Committee on Oversight and Government Reform, United States House of Representatives, North Charleston, South Carolina, June 17, 2011). His appearance as Acting General Counsel on June 15, 2011 was clearly outside the statutorily-mandated 40-day limit.

President Obama ignored the clearly established statutory procedure for appointing an acting general counsel under the National Labor Relations Act and instead made Mr. Solomon his personal acting general counsel under the more generous terms of the Federal Vacancies Act, which is intended to apply to government vacancies in general.

Even if he is technically authorized to do so, the President should not use the Vacancies Act to supplant or displace specific statutory procedures for appointing Federal employees to vacancies where, as here under the National Labor Relations Act, the organic law is perfectly clear as to the intended process.

Why did President Obama make the appointment under the Vacancies Act rather than follow the more preferred and traditional procedure provided under the National Labor Relations Act? The answer is pretty simple.

Under the Vacancies Act, Mr. Solomon is allowed to stay in the job in an acting capacity, without Senate approval, for an initial 210 days—rather than the 40 days provided under the National Labor Relations Act—and then be reappointed again for another 210 days, and a third time for yet another 210 days, until the end of President Obama's term.

This is yet another example of the President end running the law in order to ensconce in office individuals who would have a difficult time surviving the constitutionally required confirmation process—a process that ensures the people and their representatives have some meaningful oversight of the appointee.

So why did no one complain about this appointment before now? I suppose some should have. I suppose after the battle over the nomination of AFL-CIO and SEIU Associate Counsel Craig Becker to the NLRB, many were convinced they could do a lot worse than having a career NLRB civil servant serve as acting general counsel. I am not so sure anyone feels that way now. In fact, in light of his recent actions, including the Boeing complaint, it is hard to conceive of a worse choice for acting general counsel.

That decision should be revisited. That is why I am writing to President Obama to request that he withdraw the appointment of Mr. Solomon.

Congressional Record, S25203 (May 5, 2011).

Senator Hatch's reference to the "Federal Vacancies Act" is the Federal Vacancies Reform Act of 1998, 5 U.S.C. § 3345-3349 (hereinafter "FVRA"). This statute addresses the manner in which certain vacancies in presidentially appointed, Senate-confirmed offices *within* the Executive Branch may be filled on a temporary basis. Essentially, individuals who fill

positions under the FVRA can serve for 210 days or during the pendency of the President's nomination of them to the Senate. 5 U.S.C. § 3346(a). Notably, however, the FVRA *expressly excludes* certain Executive Branch positions from inclusion in its processes. Specifically, pursuant to § 3349c(1), the FVRA:

shall not apply to any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that (A) is composed of multiple members; and (B) governs an independent establishment or Government corporation.

5 U.S.C. § 3346(a) (emphasis added).

Furthermore, specific published guidance issued by the Department of Justice states that the FVRA “recognizes, however, the continued applicability of certain other mechanisms for filling ... positions on a temporary basis.” (United States Department of Justice, Guidance on Application of Federal Vacancies Reform Act of 1998 (March 22, 1999)). This Justice Department Guidance further references the Report of the Committee on Governmental Affairs, United States Senate, which identifies forty (40) statutes that continue to authorize the temporary filling of a vacant position. (Federal Vacancies Reform Act of 1998, Report of the Committee on Governmental Affairs, United States Senate to Accompany S. 2176 Guidance on Application of Federal Vacancies Reform Act of 1998 (July 15, 1998)). In this Report, the General Counsel of the National Labor Relations Board is specifically noted as a position that is covered by a **separate, independent statute governing the handling of a vacancy**. (Federal Vacancies Reform Act of 1998, Report of the Committee on Governmental Affairs, United States Senate to Accompany S. 2176 Guidance on Application of Federal Vacancies Reform Act of 1998 (July 15, 1998), p. 16, item No. 24).

Clearly, the general statute, the FVRA, cannot usurp the specific statute, the National Labor Relations Act. “[I]t is a commonplace of statutory construction that the specific governs

the general.” *UFCW Local 1996*, 336 NLRB 421 (2001), citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). In other words, because there is a *specific* federal statute on point which addresses the filling of a vacancy in the General Counsel position with the Board, no president should be permitted to apply a statute of general applicability to overtake or avoid the specific statute. This is particularly the case where the general statute does *not* repeal the specific statute, as it does not here. See *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (noting that “[i]t is a basic principle of statutory construction that a statute dealing with narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum”); *Traynor v. Turnage*, 485 U.S. 535, 548 (1988) (repeal of specific provisions of statute by implication not favored). Thus, because the Act specifically addresses the filling of the vacancy of the General Counsel, the Act’s specific statutory provisions and not the FVRA’s general provisions apply to this case.

In this case, given the foregoing, there is significant legal authority to support Respondent’s position that the Acting General Counsel had no authority to issue the Complaint in this matter. As the Board did in *New Process Steel*, the Acting General Counsel in this case is once again bypassing specific statutory requirements in the purported interests of its own administrative economy. As a result, Respondents are being forced to defend themselves against frivolous allegations and, in actuality, administrative economy is being cast aside, as well as the rule of law. The Complaint should, therefore, be dismissed on this basis.

C. The Complaint Was Void *Ab Initio*.

Pursuant to the Supreme Court’s holding in *New Process Steel*, the Board must have a quorum of three validly appointed members in order to lawfully take action, and any orders issued by the Board without a quorum are void *ab initio*. The District of Columbia’s decision in

Noel Canning viewed in light of the Supreme Court’s decision in *New Process Steel*, clearly demonstrates that because three of the five members of the Board were invalidly appointed, the Board lacks a proper quorum to act or lawfully take any action or issue any orders, including any actions related to the present matter. 705 F.3d at 5107. This includes not only Board decisions after that date, but also Board appointments of administrative law judges, regional directors, and other officials.

In the present case, the Acting General Counsel is prosecuting unfair labor practice proceedings against Respondents despite the absence of a valid quorum of Board members which meets the requirements of *Noel Canning*, and despite the fact that Acting General Counsel lacks the authority to issue the Complaint. This Region’s authority to prosecute an unfair labor practice case, which is delegated by the Board, is terminated and otherwise suspended because, “an agent’s delegated authority terminates when the powers belonging to the entity that bestowed the authority or suspended” *Laurel Bay Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472-73 (D.C. Cir. 2009). Because neither the Board nor the Acting General Counsel has authority to issue the Complaint or prosecute the claims contained in the Complaint, the Complaint is void *ab initio*.

In other words, because the Board cannot lawfully act given its lack of a quorum, it may not delegate its authority to act to either the Region or the Acting General Counsel. Given that the Regional Director and any subsequently assigned administrative law judges are defined as agents of the Board under the Board’s own Rules and Regulations, the power of regional directors and administrative law judges cease to exist when the Board does not have a properly established quorum of three members. Therefore, in the present matter, neither the Regional Director nor any subsequently assigned administrative law judge has authority to act. The

Regional Director could not lawfully have issued the Complaint inasmuch as the Board itself has no authority to issue the complaint and an agent may only exercise authority that lawfully resides in the agent's master. Consequently, neither the Board, Acting General Counsel or the Regional Director had lawful authority to issue the Complaint.

Additionally, the lack of valid quorum by the Board makes it impossible for the parties to obtain rulings from the Board on motions, petitions for review or other actions that necessitate the Board's authority. Because the Board does not have a proper quorum, the Region and any subsequently appointed administrative law judge lack the proper authority to act on behalf of the Board. Moreover, if an administrative law judge issues an opinion, there will not be a valid quorum of the Board to which this case can be transferred for a decision on any exceptions filed by the parties. The Complaint, therefore, must be dismissed.

CONCLUSION

The decisions in *New Process Steel* and *Noel Canning* make clear that the Board, as presently constituted, does not have a valid quorum. In the absence of a valid quorum, the Board lacks jurisdiction to prosecute the unfair labor practice claims contained in the Complaint against Respondents, and the Region and Acting General Counsel, as agents of the Board, similarly lack the ability to prosecute those claims. In addition, the Acting General Counsel lacks authority to prosecute the claims contained in the Complaint. For these reasons, the Complaint is void *ab initio* and should be dismissed.

Respectfully submitted,

McMAHON BERGER, P.C.

/s/ James N. Foster, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 2013, a true and correct copy of the above document was filed via electronically on the Board's website² with the following individuals:

Gary Shinnars, Executive Secretary
NLRB Office of the Executive Secretary
1099 14th St., N.W.
Room 11602
Washington, D.C. 20570

Daniel L. Hubbel, Regional Director
National Labor Relations Board
Region 14
1222 Spruce Street, Room 8.302
St. Louis, MO 63103-2829

/s/ James N. Foster, Jr.

I further certify that on the 28th day of May, 2013, a true and correct copy of the above document was served via e-mail and via United States first class mail, postage prepaid, upon:

Dave Morton, Director of Organization
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/s/ James N. Foster, Jr.

² Respondent inadvertently filed this Motion to Dismiss electronically with the Region on May 24, 2013. The present, identical Motion is being correctly filed with the Executive Secretary after receiving communication from the NLRB, Region 14.