

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

MISSION PRODUCE, INC.

Employer,

and

RETAIL, WHOSALE AND DEPARTMENT  
STORE UNION / UFCW,

Petitioner.

Case No. 10-RC-095843

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO REPORT ON  
OBJECTION AND RECOMMENDATIONS TO THE BOARD**

As shown below, the Regional Director erred in failing to find that the processing of the Petition is barred because the National Labor Relations Board ("Board") lacks a quorum. Because the Petition was improperly processed, the election was improperly held and the results should not be certified and should be dismissed. *See Noel Canning v. NLRB et. al.*, Nos. 112-1115 and 12-1153 (D.C. Cir. Jan. 25, 2013); *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2636 (2010); *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009).

**I. STATEMENT OF CASE**

A petition for an election was filed on January 4, 2013.<sup>1</sup> On February 13, an election was held to determine whether unit employees wished to be represented by the Petitioner. Upon conclusion of the election, a tally of ballots was issued reflecting five (5) votes cast for Petitioner, and one (1) against Petitioner. On February 19, the Employer timely filed an Objection to Election. On February 25, Claude T. Harrell, Regional Director, Region 10 ("RD"),

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<sup>1</sup> All dates are 2013 unless otherwise indicated.

issued a Report on Objection and Recommendations to the Board (“Report”). The Employer hereby Objects to the RD’s Report.

**II. THE EMPLOYER’S POSITION, ARGUMENT AND AUTHORITIES**

The Regional Director recognized that “on January 25, 2013, the D.C. Circuit, held that some of the President’s appointments to the Board were not legally made and that as a consequence the Board does not have a valid quorum.” Report at 3. However, the RD notes, “the Board disagrees with that decision.” *Id.* It is the Employer’s position that D.C. Circuit issued the correct ruling and, as a result, the Petition was improperly processed and the results of the election should be nullified.

**A. THE NATIONAL LABOR RELATIONS BOARD LACKS A PROPER QUORUM**

On January 25, the United States District Court for the District of Columbia Circuit issued its landmark decision in *Noel Canning v. NLRB*, No. 12-1115, 2013 U.S.App.LEXIS 1659 (D.C. Cir. Jan. 25, 2013). In this decision, the Court held that three members of the National Labor Relations Board—Sharon Block, Terence F. Flynn, and Richard F. Griffin, Jr.—appointed by the President on January 4, 2012 purportedly pursuant to the Recess Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 3, were not validly appointed.<sup>2</sup> According to the Court, these 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. Accordingly, they were appointed in violation of the Constitution. As stated by the Court: “Considering the text, history, and structure of the Constitution, these appointments were invalid from their inception.” *Noel Canning*, 2013 U.S.App.LEXIS 1659 at \*45. Moreover, while not

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<sup>2</sup> Art. II, § 2, cl. 3 provides: “The President shall have the 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.”

addressed directly in the *Noel Canning* decision, the logic of the decision makes clear that Member Craig Becker was also an invalid appointee, since he similarly was not appointed during an intersession recess of the Senate. In this regard, he was appointed *intraseession* by the President on March 27, 2010 (during the second session of the 111th Congress, see *Congressional Directory for the 112th Congress* 536-38 (Dec. 1, 2011)).

Because Members Becker, Block, Flynn, and Griffin were not validly appointed pursuant to the Recess Appointments Clause, the Board has not had a valid quorum under the *Noel Canning* requirements since the expiration of Member Wilma B. Liebman's term on August 27, 2011.<sup>3</sup> 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.

Under the United States Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), 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 since August 27, 2011 are void *ab initio*. As a result, all actions of the Board acting without a valid quorum, as well as its subordinate appointees and officials, are void.<sup>4</sup>

**B. THE RESULTS OF THE ELECTION ARE VOID BECAUSE THE BOARD COULD NOT PROPERLY DELEGATE THE PROCESSING OF THE PETITION TO THE REGIONAL DIRECTOR**

In the instant case, the Board delegated the power to supervise and hold the election to the Regional Director. This was done pursuant to section 3(b) of the Act, 29 U.S.C. Section

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<sup>3</sup> Member Flynn resigned from the Board on May 26, 2012. The effective date of his resignation was July 24, 2012.

<sup>4</sup> On February 19, 2013, the District of Columbia Circuit, citing its decision in *Noel Canning*, suspended the Board's appeal of a federal district court ruling invalidating the Board's rule on streamlining representation elections. *Chamber of Commerce of the United States v. NLRB*, No. 12-5250 (D.C. Cir. Feb. 19, 2013).

153(b), which provides “[t]he Board is authorized to delegate to its Regional Directors its power under section 9 to determine the unit appropriate for the purposes of collective bargaining, to investigate and provide for hearings ... and to direct an election or take a secret ballot ... and certify the results thereof ....”

This delegation, however, is improper without a valid quorum. The District of Columbia Circuit has held that (a) a Board delegation “cannot survive the loss of a quorum on the Board”; (b) “an agent’s delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended”; and (c) “an agent’s delegated authority is also deemed to cease upon the resignation or termination of the delegating authority.” *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472-73 (D.C. Cir. 2009). Under Section 102.5 of the Board’s Rules and Regulations, a regional director is defined to be an “agent” of the Board. Thus, the power of regional directors to act ceases “when the Board’s membership dips below the Board quorum of three members.” *Id.* at 475.

In sum, in the absence of a valid quorum of Board members the RD cannot properly process the petition, the election was improperly held, the results should be nullified and the petition dismissed.

**IV. CONCLUSION**

WHEREFORE, based on the foregoing facts, arguments and authorities, Respondent respectfully requests that the Report on Objection and Recommendations to the Board not be adopted, that the results of the election be nullified and the Petition dismissed.

This 4<sup>th</sup> day of March, 2013.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 4, 2013, I caused the foregoing *Respondent's Brief in Support of Exceptions to Report on Objection and Recommendations to the Board* to be filed with the National Labor Relations Board using the CM/ECF system.

I further certify that I caused a copy to be served via electronic mail upon the following:

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