

Universal Lubricants, LLC and United Steel Workers, AFL-CIO-CLC. Case 14-RC-105696

July 16, 2013

ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

The Employer's Request for Review of the Officer-in-Charge's Decision and Direction of Election raises substantial issues solely with respect to the supervisory status of the lead operators. We conclude, however, that these issues may best be resolved through the use of the Board's challenge procedure. Accordingly, the Decision is amended to permit the lead operators to vote under challenge, and the request for review is denied.¹

¹ In its request for review, the Employer contends that the Regional Director was without authority to process the petition because the invalidity of the recess appointments of two of the Board's three members deprived the Board of a quorum. We reject this argument. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that these appointments were not valid, see *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (U.S. June 24, 2013) (No. 12-1281), and that the Third Circuit has concluded that the Constitution's Recess Appointments Clause permits only intersession appointments, albeit using a different analysis than the District of Columbia Circuit, see *NLRB v. New Vista Nursing & Rehabilitation*, 2013 WL 2099742, __ F.3d __ (3d Cir. May 16, 2013). However, as the D.C. Circuit 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) (en banc), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962), and the subsequent Third Circuit decision is in conflict with *Evans*, supra. This question remains in litigation and the Supreme Court has granted the Board's petition for certiorari in *Noel Canning*. Pending a definitive

resolution, the Board is charged to fulfill its responsibilities under the Act. See *Belgrove Post Acute Care Center*, 359 NLRB 621, 621 fn. 1 (2013). For the same reason, we also reject the Employer's contention that the Board's appointment of the Regional Director for Region 14 was invalid.

We observe that even if the Board lacked a quorum, that circumstance would not impair the Regional Director's authority to process the instant petition. The Board's delegation of decisional authority in representation cases to Regional Directors, 26 Fed. Reg. 3911 (May 4, 1961), pursuant to the 1959 amendment of Sec. 3(b) of the National Labor Relations Act expressly authorizing the delegation, Pub. L. No. 86-257, 86th Cong., 1st Sess., § 701(b), 73 Stat. 519, 542; see *Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971), long predates any purported loss of quorum and has remained in effect continuously, including during periods when the Board was without a quorum. Pursuant to this delegation, NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment. Furthermore, in *New Process Steel*, the Supreme Court expressly stated that such delegations were not affected by its decision, *New Process Steel L.P. v. NLRB*, 130 S.Ct. 2635, 2643 fn. 4 (2010), and following that decision, no fewer than three courts of appeals have upheld the principle that Board delegations of authority to nonmembers remain valid during a loss of quorum by the Board. See *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010).

The Employer also contends that the petition should be dismissed because the Acting General Counsel could not properly be appointed under the Federal Vacancies Reform Act (Vacancies Act) and therefore the Region lacked the authority to proceed on this petition. We reject this argument, since as noted above the Regional Director acts on behalf of the Board pursuant to the 1961 delegation. And, in any event, the argument lacks merit. See generally *Belgrove Post Acute Care Center*, supra, at 621 fn. 1 (2013).

The Employer has filed a Motion to Stay Election which largely reiterates these arguments. We deny this motion for the reasons stated above.