

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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SCHWARZ PARTNERS PACKAGING, LLC)	
d/b/a MAXPAK)	
)	Case Nos.
Petitioner/Cross-Respondent)	15-1203 & 15-1235
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION AFL-CIO-CLC)	
)	
Intervenor)	
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**MOTION OF THE NATIONAL LABOR RELATIONS BOARD
REQUESTING REMAND**

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, respectfully requests that the Court vacate the Board’s Order and remand the above-captioned case to the Board for further consideration. The Board’s motion is based on the Supreme Court’s decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (June 26, 2014), which held the President made invalid

recess appointments to the National Labor Relations Board and on this Court's decisions in *Noel Canning* and subsequent cases holding that objections to the Board's composition can be raised at any time. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *affirmed on other grounds*, 134 S. Ct. 2550 (June 26, 2014), *UC Health v. NLRB*, 803 F.3d 669 (D.C. Cir. 2015); *SSC Mystic Operating Co. v. NLRB*, 801 F.3d 302 (D.C. Cir. 2015); and *Hospital of Barstow, Inc., d/b/a Barstow Community Hospital v. NLRB*, __F.3d__, 2016 WL 1720366 (D.C. Cir. Apr. 29, 2016). In support, the Board shows as follows:

1. Pursuant to a stipulated election agreement between United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union AFL-CIO-CLC ("the Union") and Schwarz Partners Packaging, LLC, d/b/a MaxPak ("the Company"), the Board's Regional Director for Region 12 held a representation election on March 15, 2012, among a unit of the Company's employees. Reviewing a hearing officer's report on post-election objections and challenged ballots, the Board (Chairman Pearce; Members Griffin and Block) issued a Decision and Direction on August 29, 2012, ordering the opening of the challenged ballots, and directing a second election if the tally showed the Union lost the election. Members Griffin and Block had received recess appointments from the President in January 2012.

In accordance with that order, the Regional Director set aside the election and ordered another, which the Union won. On November 6, 2012, the Regional Director issued a certification of representative.

2. The Union subsequently requested that the Company recognize and bargain with it. The parties met and bargained with respect to the terms of an initial collective-bargaining agreement in January 2013. On January 25, 2013, the Court issued its decision in *Noel Canning*, 705 F.3d at 490, which held that the recess appointments of two members of the Board panel that had issued the Decision and Direction were invalid. The Company thereafter refused to recognize and bargain with the Union.

3. Based on a charge filed by the Union, the Board's Acting General Counsel issued a complaint alleging that the Company had violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and by failing and refusing to recognize and bargain with, the Union as its employees' representative. The Company filed an answer that asserted, as a special defense, that the Board's August 29, 2012 Decision and Direction was void because the Board lacked a quorum due to invalid recess appointments, and that therefore the subsequent certification of the Union was void.

4. On June 26, 2015, the Board (Chairman Pearce; Members Hirozawa and McFerran) found the violation alleged. 362 NLRB No. 138, 2015 WL

4179686, at *4. Based on the admitted fact that the Company had bargained with the Union, and in accordance with established case law, the Board found “no merit in [the Company’s] belated contention that it has no bargaining obligation because the Board lacked a quorum at the time that the August 29, 2012 Decision and Direction issued and when the Regional Director issued the underlying certification of representative. . . . In this regard, we find that the [Company] waived its right to challenge the validity of the certification when it entered into negotiations with the Union.” *Id.* at *2.

5. The Company filed a petition for review of the Board’s Order on July 2, 2015, the Board cross-applied for enforcement on July 22, 2015, and the Union subsequently intervened on behalf of the Board. Briefing concluded on February 25, 2016, and the Court has not yet scheduled oral argument.

6. In *Noel Canning* and subsequent cases, the Court has consistently held that challenges to the composition of an agency can be raised on appeal even if the objecting party failed to raise the objection at the appropriate time before the agency. *See Noel Canning*, 705 F.3d at 497; *UC Health*, 803 F.3d at 672-73; *SSC Mystic*, 801 F.3d at 308; *Hosp. of Barstow*, 2016 WL 1720366, at *2-*3. Here, the Company challenges the Union’s certification on the ground that a threshold decision leading to the certification was issued by a Board panel that included two members whose recess appointments were invalid. The Board rejected that

challenge to the Board's composition solely on the ground that Company failed to timely raise it. Therefore, circuit law precludes enforcement of the Board's Order on the grounds advanced by the Board. The Board thus seeks remand to set aside the August 29, 2012 Decision and Direction issued by the improperly constituted Board panel and to consider that decision anew.

7. Counsel for the Union does not oppose the granting of this motion. Counsel for the Company will file a response after reviewing the Board's motion.

WHEREFORE, the Board respectfully requests that the Court vacate the Board's Order and remand the case to the Board for further consideration.

Respectfully submitted,

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half St., SE
Washington, D.C. 20570

Dated at Washington, DC
this 17th day of June, 2016

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

I hereby certify that on June 17, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Linda Dreeben
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Dated at Washington, DC
this 17th day of June, 2016