

In The  
**United States Court Of Appeals  
For The Fourth Circuit**

**NATIONAL LABOR RELATIONS BOARD,**

*Petitioner - Appellee,*

**NATIONAL NURSES ORGANIZING COMMITTEE,**

*Intervenor,*

v.

**BLUEFIELD HOSPITAL CO., LLC, d/b/a Bluefield Regional  
Medical Center; GREENBRIER VMC, LLC, d/b/a  
Greenbrier Valley Medical Center,**

*Respondents - Appellants.*

**ON APPEAL FROM THE  
NATIONAL LABOR RELATIONS BOARD**

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**APPELLANTS' PETITION FOR REHEARING WITH  
PETITION FOR REHEARING *EN BANC***

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## I. STATEMENT REGARDING NEED FOR REHEARING EN BANC

The Panel Decision enforcing the Decision and Order of the National Labor Relations Board (hereafter, the “Board”) is in conflict with the limitations on the Board’s authority set forth by § 3(b) of the National Labor Relations Act (hereafter, the “Act”), 29 U.S.C. § 153(b), and the United States Supreme Court in N.L.R.B. v. New Process Steel, 560 U.S. 674 (2010) and N.L.R.B. v. Noel Canning, 134 S. Ct. 2550 (2014). Consideration by the full Court is necessary because a material legal issue was overlooked, because the Panel’s Decision conflicts with the Act and the precedent of the United States Supreme Court, and because the case involves a question of exceptional importance – namely, whether the Board may continue to act when it lacks the statutorily-required quorum of Board Members.

## II. STATEMENT OF PROCEEDINGS

### A. **Proceedings Before the Board**

The instant case arises from union representation elections that took place in 2012 at Bluefield Regional Medical Center and Greenbrier Valley Medical Center (collectively, the “Hospitals”) pursuant to Consent Election Agreements entered into by the National Nurses Organizing Committee (the “Union”), the Hospitals, and the Board. JA 15-20. <sup>1</sup> After the tallies of ballots indicated that the Union had prevailed

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<sup>1</sup> The Consent Election Agreements specified that, “All rulings and determinations made by the Regional Director will be final, **with the same force and effect in that case as if issued by the Board.**” JA 17, 20. (emphasis added); See Also, 29 C.F.R. 101.28 (2015); Board Casehandling Manual § 11364.5.

in the elections at both Hospitals, the Hospitals challenged the elections, the election results, and the certifications of the Union by the Board at both Hospitals. See JA 23-27, 51-62, 95-105, 147-157, 295-307.

As part of the Hospitals' arguments concerning the validity of the elections and resulting certifications raised before the Board, the Hospitals argued that the Regional Director had exercised the Board's full force and authority during a period of time when the Board itself was without authority to act. JA 154, 301-302. During this same period of time, on June 26, 2014, while the Hospitals' challenges were still pending before the Board, the Supreme Court issued its decision in N.L.R.B. v. Noel Canning, holding that President Obama's recess appointments of certain Board Members were invalid. In combination with the Supreme Court's earlier decision in New Process Steel, the result of the Supreme Court's decision in Noel Canning was that the Board lacked the statutorily-required quorum of three Members necessary to exercise its authority at the time the Consent Election Agreements were signed, at the time the elections had taken place and at the time the Certifications of Representative were issued in the underlying case. 134 S. Ct. 2550 (2014).

Despite the Supreme Court's holding in Noel Canning, the Board rejected the Hospitals' arguments concerning quorum in the instant case in a single footnote to its December 16, 2014 Decision and Order concluding that the Hospitals had violated the Act by refusing to bargain with the Union. Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center and National Nurses Organizing Committee

(NNOC); Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center and National Nurses Organizing Committee (NNOC), 361 NLRB No. 154 (2014). The Board held that the Hospital's argument "was rejected for the reasons stated in Durham School Services, 361 NLRB No. 66, slip op. at 1-2 (2014)." Id. at FN 5. <sup>2</sup>

## **B. Proceedings Before this Court**

The Board then applied for enforcement of its Decision and Order before the Fourth Circuit Court of Appeals. As part of their opposition to the Board's application for enforcement of its Decision and Order, the Hospitals again raised their arguments concerning the validity of the Regional Director's actions. See Principal Brief, pp.13, 16-21; Reply Brief, pp. 7-14. On September 18, 2015, in the period between the issuance of the Board's Decision and Order on December 16, 2014 and oral argument in the instant case on January 26, 2016, the United States Court of Appeals for the District of Columbia Circuit (hereafter, the "D.C. Circuit") decided UC Health v. N.L.R.B., which addressed the authority of the Board's Regional Directors to act, in connection with a Stipulated Election Agreement, pursuant to which the Regional Director's determinations were **not** final, when the Board did not possess the statutorily-required quorum of three Board Members. 803 F.3d 669 (D.C. Cir. 2015).

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<sup>2</sup> In Durham School Services, the Board held that because the Board had delegated the Board's non-final authority over representation proceedings to the Board's Regional Directors in 1961, at a time when the Board was comprised of a proper quorum of Members, the Board's delegation of authority to Regional Directors survived the loss of quorum resulting from the Supreme Court's Decision in Noel Canning, 361 NLRB No. 66, slip op. at 1-2 (2014)

The Board filed a Notice of Supplemental Authority with the Fourth Circuit to bring to the Court's attention the D.C. Circuit's decision in UC Health. See Board Citation of Supplemental Authorities Pursuant to F.R.A.P. 28(j) and 4<sup>th</sup> Cir. R. 28(e), dated October 28, 2015. The Hospitals submitted a response to the Board's Notice of Supplemental Authorities, pointing out that the Consent Election Agreements in the instant case, in contrast to the Stipulated Election Agreement in UC Health, authorized the Regional Director to act **as though the Regional Director was the Board itself**, exercising the Board's **final, plenary authority** – a different factual scenario that the D.C. Circuit had stated in UC Health would violate the Act. See Letter in Response, dated November 16, 2015. See Also, 29 C.F.R. 101.28 (2015); Board Casehandling Manual § 11364.5.

During oral argument before the Panel on January 26, 2016, counsel for the Hospitals argued that the D.C. Circuit's decisions in UC Health and its companion case, SSC Mystic Operating Company, LLC v. N.L.R.B., 801 F.3d 302 (D.C. Cir. 2015), had drawn an important distinction between cases where the Regional Directors of the Board exercised delegated authority **subject to the eventual review of the Board** (i.e. a case arising from a Stipulation Election Agreement), and cases such as the case at bar, where the Regional Directors **acted in the stead of the Board**, and exercised the **final, plenary authority of the Board** (i.e., a case arising from a Consent Election Agreement). Counsel for the Hospitals contended that permitting the Regional Directors to act as if they were the Board during a time when

the Board itself lacked statutorily required quorum, violated the clear language of Section 3(b) of the Act and contradicted the Supreme Court's decision in New Process Steel.

The Panel issued its Decision in the underlying case on May 6, 2016 (hereafter, the "Panel Decision, granting enforcement of the Board's Decision and Order. Though the Panel rejected the Board Decision's reliance upon the defense of waiver (See Case No. 15-1203, slip op. at 12-13), the Panel held that the Board had interpreted the Act as permitting the Regional Directors to continue exercising the final authority of the Board, even when the Board was without statutorily-required quorum, and that the Board's reasoning was an interpretation of the Act entitled to deference pursuant to Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984). Id. at 20.

### **III. ARGUMENT AND ISSUE TO BE REVIEWED**

#### **A. Summary of Argument**

The Panel Decision fails to fully and properly address the central legal dispute set forth by the underlying case – namely, the vastly important issue of the Board's authority to issue final, binding decisions through its Regional Directors when the Board itself lacks a statutorily-required quorum of Members. With regard to this issue, the Panel Decision's reliance upon Chevron deference is misplaced. The Board Decision's solitary footnote and singular citation on the issue of quorum, Durham School Services, constitute an interpretation of the Act that is not entitled to

deference pursuant to either the first or second step of the Chevron analysis. First, the Board's interpretation is not supported by the clear language of the Act, for the same reasons set forth by the Supreme Court in New Process Steel and the D.C. Circuit in Laurel Baye Healthcare of Lake Lanier, Inc. v. N.L.R.B., 564 F.3d 469 (D.C. Cir. 2009). Second, even if the Act were unclear on the question of quorum, the Board's interpretation of the Act is rendered unreasonable due to the unaddressed distinction between a case arising from a Stipulated Election Agreement, such as Durham School Services, and the case at bar. Finally, the Panel's reliance upon contractual waiver as part of the basis for its Decision constitutes improper reliance upon a *post hoc* rationalization advanced by the Board, and fails to address and resolve the conflict between contract and federal law. For these reasons, the Hospitals respectfully request that this case be re-heard by the Panel, or heard by the Court *en banc*, so that the Fourth Circuit may fully consider the important legal issue of a federal agency's authority to act when the agency does not meet the statutory requirements for it to take action.

## **B. Standard of Review**

When reviewing the actions of the Board, the Court is "obligated to correct errors of law made by the Board." Media Gen. Operations, Inc. v. N.L.R.B., 394 F.3d 207, 211 (4<sup>th</sup> Cir. 2005). The Court, "as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). The Board's interpretations of the

Act are worthy of deference only to the extent the interpretations are “rational and consistent with the Act.” Sam’s Club v. N.L.R.B., 173 F.3d 233, 239 (4<sup>th</sup> Cir. 1999).

### C. Argument

#### 1. *The Board’s Interpretation Conflicts with the Act*

The Board’s interpretation of the Act in its Decision and Order consists only of reference to Durham School Services – a case in which the Board addressed representation proceedings arising from a Stipulated Election Agreement and held that because the Board had delegated the Board’s non-final authority to conduct representation proceedings to the Board’s Regional Directors in 1961, at a time when the Board was comprised of a proper quorum of Members, the delegation of the Board’s authority to Regional Directors survived the loss of quorum resulting from the Supreme Court’s Decision in Noel Canning. 361 NLRB No. 66, slip op. at 1-2 (2014). However, like the Board’s Decision and Order, the Panel Decision issued in this case does not ever discuss the material distinction between Durham School Services and the case at bar – namely, the exercise of delegated authority subject to Board review, versus the exercise of the Board’s final, plenary authority.<sup>3</sup> Because of

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<sup>3</sup> This marked distinction could arguably compel this Court to conclude that the Board has not provided the Court with an interpretation of the Act for the Court to analyze, as did the D.C. Circuit in connection with Hospital of Barstow, Inc. v. N.L.R.B., 2016 WL 1720366 (2016). (Remanding case to the Board where “the Board has not rendered any interpretation of the statute in the context of a consent election agreement [... and] We therefore have no decision of the Board setting out whether it believes that the quorum statute enables a Regional Director to conduct elections under consent election agreement when there is no Board quorum.”)

this elementary difference, which was not addressed by the Board's Decision or the Panel Decision affirming the Board's Decision, the Board's interpretation of the Act in this case should have failed at the first step of the Panel's Chevron analysis.

If Congress has spoken on the subject of the exercise of the Board's final, plenary authority when the Board is without quorum, "that is the end of the matter [ ] for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." See Chevron, USA, Inc. at 842-43. In New Process Steel, the Supreme Court never reached the second step of the Chevron analysis, and never addressed whether the Board's interpretation of § 3(b) the Act was reasonable. Rather, the Supreme Court held that the language of § 3(b) of the statute was clear, and that the Board was thus statutorily prohibited from exercising its authority when the Board was constituted of less than three Members. This interpretation of § 3(b) of the Act was acknowledged by the D.C. Circuit in UC Health, wherein the D.C. Circuit stated, "The third sentence [of § 3(b)] specifies that the Board can only exercise its plenary, final authority [...] if the Board has at least three validly appointed members." 803 F.3d at 5.

Thus, it is clear that the unambiguous language of the Act prevents the Board from exercising its plenary, final authority in the absence of at least three validly appointed members. The Panel Decision should therefore next have analyzed whether the actions taken by the Regional Director in the instant case constituted an exercise of the Board's final, plenary authority, as in New Process Steel and Laurel

Baye Healthcare.<sup>4</sup> This distinction was not recognized or addressed by the Board or the Panel – the Panel concluded only that the “distinction makes no difference” (Case No. 15-1203, slip op. at 19) - and thus, the Panel Decision never addressed this central issue.

2. *The Board's Interpretation is Not Reasonable*

However, the importance of this missed distinction by the Board and the Panel is further augmented by the Panel's analysis of the Board's interpretation at the second step of its Chevron analysis, wherein the Panel credits the Board's reliance upon the 1961 delegation as a “reasonable” interpretation of the Act. The Panel's deference is in direct contradiction to the Supreme Court's decision in New Process Steel, and further, conflicts with the D.C. Circuit's decisions in Laurel Baye Healthcare, UC Health, SSC Mystic and Hospital of Barstow, Inc.

As explained above, both the Board's Decision and the Panel failed to consider the key distinction between the case at bar, dealing with the exercise of the Board's final authority by the Regional Director, and other, prior decisions, such as UC Health, which dealt with the exercise of the Regional Directors' delegated, non-final

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<sup>4</sup> The Panel Decision's analysis of Laurel Baye Healthcare was limited to the Panel's adoption of the Board's incorrect argument that the D.C. Circuit's analysis in Laurel Baye Healthcare was rejected by dicta of the Supreme Court in New Process Steel. See Case No. 15-1203, slip op. at FN 6. To the contrary, the Supreme Court's mention of Laurel Baye Healthcare does not overrule the D.C. Circuit's decision in Laurel Baye Healthcare, nor does the footnote in any way address the Regional Directors' exercise of the final, plenary authority of the Board during a period during which the Board lacks statutorily-required quorum.

authority, subject to Board review. This distinction renders the Board's interpretation of the Act, relying upon the 1961 delegation, inapplicable to the facts of the instant case. The exercise of the authority in the case at bar was not undertaken pursuant to the 1961 delegation, which allows for plenary Board review of Regional Director actions, but rather, was undertaken pursuant to a Consent Election Agreement which empowered the Regional Director to exercise the final, plenary authority of the Board. Thus, the question of whether the 1961 delegation of non-final authority by the Board to Regional Directors survives the Board's loss of quorum is irrelevant to answering the question raised by the instant case – specifically, whether the Board can delegate its final authority to the Board's Regional Directors, so that the Regional Directors may exercise the authority of the Board when the Board itself is statutorily prohibited from acting.

The Panel Decision acknowledges that the 1961 delegation to Regional Directors dealt with the delegation of non-final authority, subject to Board review (See Case No. 15-1203, slip op. at p. 18), but nevertheless adopted the Board's interpretation, which relied upon the 1961 delegation, as “reasonable” in the instant case, without any acknowledgment of the inapposite nature of the Board's arguments in light of the differing facts of the underlying case, despite the Hospitals' citations to UC Health and SSC Mystic. In both cases, the D.C. Circuit stressed repeatedly that exercise of the Board's final, plenary authority would violate the Act, relying upon Laurel Baye Healthcare. See 803 F.3d at 8, 9 (“A delegee panel, wielding the Board's

plenary, final authority, speaks on the Board's behalf and in its place. [...] This delegation does not allow some other actor to stand in the Board's place and wield its authority when it is otherwise statutorily immobilized.”<sup>5</sup> The importance of this distinction was also echoed by the D.C. Circuit's more recent decision in Hospital of Barstow, Inc., wherein the D.C. Circuit acknowledged the separate issues concerning authority to act raised by a Regional Director's exercise of the Board's final, plenary authority as opposed to a Regional Director's exercise of delegated, non-final authority. See 2016 WL 1720366. Given this key distinction, the Board has offered no reasonable interpretation of the Act to support its actions in the underlying case, and therefore, the Fourth Circuit should rehear this case, in order to recognize the factual distinction, and then accordingly, to deny enforcement of the Board's Decision and Order as unsupported by the Act.

3. *The Board's Unlawful Reliance Upon Waiver by Contract*

Finally, when confronted with the difference in the facts underlying UC Health (which dealt with a Stipulated Election Agreement and exercise of non-final authority) versus the case at bar (which deals with Consent Election Agreements and exercise of final, plenary authority), and the D.C. Circuit's recognition of that distinction in

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<sup>5</sup> The Panel Decision's citations to UC Health and SSC Mystic constitute misplaced reliance upon the holdings of the cases, which as explained above, were based upon a different factual situation involving the Regional Directors' exercise of non-final authority arising from a Stipulated Election Agreement. The Panel Decision does not address the distinctions drawn by the D.C. Circuit's in UC Health and SSC Mystic concerning the unlawfulness of the Regional Directors' exercise of the Board's final, plenary authority when the Board itself is without quorum.

Hospital of Barstow, Inc., the Panel Decision distinguished Hospital of Barstow, Inc. on two grounds – first relying upon the fact that the instant case came before the Court on an application for enforcement rather than a petition for review, and second, based upon the interpretation advanced by the Board in the case at bar which the D.C. Circuit had found absent in Hospital of Barstow, Inc. Case No. 15-1203, slip op. at FN 7.<sup>6</sup> With regard to the second point, the Panel Decision’s reliance upon the Board’s *post hoc* arguments of contractual waiver is in direct contradiction to Supreme Court precedent.

The Panel held that, because the Hospitals were signatories to the Consent Election Agreements, they had waived their arguments with regard to the composition of the Board and the Board’s authority to act. Case No. 15-1203, slip op. at pp. 19-20. The Panel failed to recognize that the Board’s arguments concerning contractual waiver constituted improper *post hoc* rationalizations by the Board’s appellate attorneys, not included in the Board’s Decision, and advanced for the first time in the Board’s briefs and oral argument before this Court. See, North Carolina Wildlife Federation v. North Carolina Department of Transportation, 677 F.3d 596, 604 (4<sup>th</sup> Cir. 2012)(An agency’s appellate attorneys may not rely upon *post hoc* rationalization, but rather, must defend the agency’s actions on the basis articulated by

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<sup>6</sup>The Panel Decision provides no explanation, beyond the bare assertion, that the procedural posture of the case – an application for enforcement rather than a petition for review – creates any distinction between the case at bar and Hospital of Barstow, Inc., or carries any legal significance.

the agency as part of the challenged decision.) Furthermore, the Panel's holding is in direct conflict with the decision of the Supreme Court in Noel Canning. 134 S. Ct. 2550 (Challenges to the composition of an agency can be raised on review even when they are not raised before the agency). Finally, the holding is in conflict with the D.C. Circuit's holding to the contrary in UC Health, wherein the D.C. Circuit stated, "Because UC Health explicitly agreed to the terms of the election, the Board insists that the company cannot challenge one of those terms now. **We reject this argument.** [...] UC Health could not have known with any certainty that the Board had no quorum [...] we will not hold UC Health responsible for failing to see the future. And as we have already said, challenges that concern the very composition or 'constitution' of an agency can be raised for the first time on review [...]" 803 F.3d at 3 (emphasis added).<sup>7</sup>

Despite previously stating that the Panel agreed with the D.C. Circuit's holdings concerning waiver in UC Health, the Panel Decision adopted reasoning that directly contradicted UC Health on the question of waiver. Furthermore, the Panel itself, when discussing the concept of contractual waiver, recognized that a party cannot lawfully agree by contract to anything that is contrary to statute – in other

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<sup>7</sup> Though the Panel Decision makes no explicit reference to the document, the Panel seems to have adopted the Board's arguments, made in its Notice of Supplemental Authorities, that the D.C. Circuit had, in UC Health, held that a party could "acquiesce" to the Board's authority even in instances where the Board possessed no statutory authority to act. This argument by the Board wholly misconstrued the D.C. Circuit's decision in UC Health, as explained by the Hospital's Letter in Response. See Letter in Response, dated November 16, 2015.

words, contract cannot trump law. Case No. 15-1203, slip op. at p. 20. In this vein, while the Hospitals concede that, by signing the Consent Election Agreements, they agreed to have a **lawfully acting** Regional Director issue binding decisions in the cases, the Hospitals did not, and could not have, agreed to have an improperly constituted Board, or a Regional Director unlawfully imbued with the final, plenary authority of an improperly constituted Board, issue decisions when the agency was statutorily prohibited from acting. For all these reasons, the Panel's holdings concerning contractual waiver should be re-examined, by the Panel itself, or by the full Court, and the Board's Decision and Order should be denied enforcement.

#### IV. CONCLUSION

For these reasons, the Hospitals respectfully request that this Honorable Court grant its Petition for Panel Rehearing and Rehearing En Banc, and deny enforcement of the Board's Decision and Order.

Respectfully submitted,

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on June 20, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered users.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Melissa A. Dockery

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