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Recent Developments Under National Labor Relations Act

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I. CONTINUING IMPACT OF *NOEL CANNING* AND OTHER DEVELOPMENTS¹

A. Continuing Impact of *Noel Canning*

The National Labor Relations Board (“NLRB” or the “Board”) has mostly recovered from the effects of the Supreme Court’s decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), but some shockwaves from that case continued to be felt throughout 2015. In *Noel Canning*, the Supreme Court held that President Obama’s January 2012 recess appointments of three Board members were invalid because Congress was not in recess at the time of the appointments. *Id.* at 2578. The decision affected all Board decisions issued between January 2012 and August 2013, including ninety-eight (98) cases pending in federal court.

During an American Bar Association webinar in July 2014, NLRB General Counsel Richard Griffin explained how the Board planned to handle some of the administrative issues presented by the *Noel Canning* decision. Mr. Griffin explained that 43 cases were matters in which the Board had not yet filed a record, so pursuant to Section 10(d)² of the National Labor Relations Act (“NLRA” or the “Act”), the Board would decide whether to modify or set aside the orders in the cases. Mr. Griffin also explained that for the remaining 55 cases in which a record had been filed, the Board already filed motions in most of the cases asking courts to vacate and remand the cases back to the Board. Since that time, the Board has issued decisions in cases remanded back to its docket and simply ratified many of the decisions nullified by *Noel Canning*, including the *Noel Canning* decision itself.³

However, this ratification has not been universal. In *Fresenius USA Mfg., Inc.*, an employee who supported the union anonymously wrote offensive and threatening statements on union newsletters to try to convince his coworkers to support the union in an upcoming election. 362 NLRB No. 130 (June 24, 2015) (slip op. at 1). In response to employee complaints, the employer conducted an investigation and questioned the employee. The employee denied writing the comments; when he later unintentionally confessed to writing the comments during a phone conversation, he tried to conceal his identity. *Id.* The employer discharged the employee for both his written statements and his subsequent dishonesty. *Id.* Originally, in 2012, Board held that the written statements constituted protected activity, and since the employer had discharged him because of that activity, the employer violated the NLRA. 358 NLRB No. 138 (Sept. 19, 2012). After the D.C. Circuit Court of Appeals vacated that decision and remanded the case in accordance with *Noel Canning*, however, the Board changed its position and held that although “there is no dispute that [the employer] relied on those handwritten statements as one reason for suspending and discharging” [the employee],” his dishonesty was an unprotected activity that served as an independent basis for discharge. 362 NLRB No. 130 (slip op. at 3). This

¹ The authors gratefully acknowledge the research and writing contributions to this paper of Matt Pierce, Tanner and Associates, PC.

² 29 U.S.C. § 160(d), “[u]ntil the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.”

³ One such case that was set aside after *Noel Canning*, then subsequently reconsidered and reaffirmed, *American Baptist Homes of the West*, 362 NLRB No. 139 (June 26, 2015), is discussed in Section IX.C, *infra*.

independent reason superseded any potential violation of the Act. The Board reasoned that a respondent can meet its burden of showing such an “independent (if not sole) reason” by various means. *Id.* Thus, in that case, the new Board disagreed with the previous Board’s decision and dismissed the charges against the employer related to the employee’s discharge.

In addition to Board decisions, *Noel Canning* also affected administrative decisions made by the Board between January 2012 and August 2013. On July 18, 2014, the Board ratified all administrative, personnel, and procurement matters taken by the Board between January 4, 2012 and August 5, 2013.⁴ This action removed any doubt about administrative appointments made during the aforementioned period.

B. Partial Invalidation of Lafe Solomon’s Tenure as Acting General Counsel

On August 7, 2015, the D.C. Circuit Court found on a petition for review in *Southwest General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), that Lafe Solomon unlawfully served as Acting General Counsel of the NLRB while he was both the acting officer and the permanent General Counsel nominee in violation of the Federal Vacancies Reform Act (*FVRA*), 5 U.S.C. §§ 3345 *et seq.* The court therefore invalidated Solomon’s tenure from January 5, 2011 to November 4, 2013,⁵ and the Board order in that case was vacated because the complaint issued during Solomon’s invalidated tenure.

The court, however, noted that “this case is not Son of *Noel Canning*” and should not “retroactively undermine a host of NLRB decisions.” 796 F.3d 83. Indeed, the court held that Solomon’s actions during his invalidated tenure as Acting General Counsel are *voidable*, not void, under the *FVRA*. The court then announced that the decision is to be narrowly applied to only those cases where the parties have raised a timely *FVRA* objection to complaints issued between January 5, 2011 and November 4, 2013.

C. Current Board Members

The current Board members are: Chairman Mark Gaston Pearce and Members Kent Y. Hirozawa, Lauren McFerran, and Philip Miscimarra. Ms. McFerran is the most recently appointed Board member, as she replaced Nancy Schiffer, whose Board term expired on December 16, 2014.

The Board spent much of 2015 with a full five-member complement. However, Harry I. Johnson, III’s term ended in August 2015. This leaves just one Republican member, Mr. Miscimarra, and three Democratic members on the current Board.

⁴ *NLRB Officials Ratify Agency Actions Taken During Period When Supreme Court Held Board Members Were Not Validly Appointed*, National Labor Relations Board, <http://www.nlr.gov/news-outreach/news-story/nlr-officials-ratify-agency-actions-taken-during-period-when-supreme-court> (last visited February 17, 2016).

⁵ The court did not invalidate Solomon’s tenure from June 2010 to January 2011, when he was serving as Acting General Counsel but had not yet been nominated for the permanent position of General Counsel.

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