

Reproduced with permission from Daily Labor Report, 32 DLR A-18, 2/15/13, 02/15/2013. Copyright © 2013 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

NLRB

More Questions Than Answers on Impact Of Noel Canning Decision, Block Suggests

NEW YORK—A recent decision by the U.S. Court of Appeals for the District of Columbia Circuit finding President Obama's recess appointments to the National Labor Relations Board unconstitutional has raised more questions than can yet be answered, NLRB Member Sharon Block (D) suggested Feb. 15.

Speaking at a Cornell University labor and employment law program, Block was circumspect overall in her discussion of the decision's impact, given that hers is one of the recess appointments that the appeals court found was made without constitutional authority.

In its Jan. 25 decision in *Noel Canning Division of Noel Corp. v. NLRB*, 194 LRRM 3089 (D.C. Cir. 2013) (17 DLR AA-1, 1/25/13), the D.C. Circuit ruled against the validity of the recess appointments of three members: Block, Richard F. Griffin (D), and Terence F. Flynn (R). Block and Griffin remain on the board, while Flynn resigned in 2012.

Block pointed to the statement issued by Chairman Mark Gaston Pearce in the wake of the decision saying the board would continue to function. Two longstanding principles guide that stance, she said.

First is that the board members "presume the regularity of presidential appointments," Block said, adding that it is not their role to question it.

The second, she said, is the principle of administrative acquiescence. "We cannot change our entire approach based on the decision of one court of appeals," she said. "We have observed that same principle in other contexts."

DOJ to Decide on Litigation Route. What course the *Noel Canning* litigation will take is similarly out of the board's hands, she suggested, adding that it is for the Justice Department to decide whether to seek a rehearing of the case or seek Supreme Court review.

Petitions for rehearing are due March 11, and a petition for Supreme Court review would be due within 90 days of the Jan. 25 ruling or 90 days of the appellate court's ruling on a motion for rehearing, NLRB Region 2 Director Karen Fernbach said in a presentation on the case.

In other pending cases raising recess appointment issues, Fernbach reported, oral argument is expected in March in the U.S. Court of Appeals for the Third Circuit in *New Vista Nursing and Rehabilitation v. NLRB* (No. 12-1936). Recess issues have been briefed in at least four other circuits, she said.

In the closely watched D.R. Horton mandatory arbitration case, Fernbach added, the U.S. Court of Appeals for the Fifth Circuit has allowed the parties to file supplemental briefs on the impact of *Noel Canning* (25 DLR A-1, 2/6/13).

Meanwhile, Fernbach noted, the Supreme Court has denied an employer's application for a stay of a federal district court 10(j) injunction in light of *Noel Canning* (26 DLR A-1, 2/7/13).

In her presentation, Block said the board's work continues, with the general counsel's office still addressing issues "on the front lines."

Of her own role, she said: "The president sent me to do a job, and I'll continue to do it until I'm told otherwise."

Regions: 'Business as Usual.' Fernbach, backed by Region 29 Director James G. Paulsen, said NLRB regions "are operating business as usual." She added that regional offices have received "a lot of letters" from employers reserving their rights under *Noel Canning*.

Management attorney Eric P. Simon of Jackson Lewis in New York urged employers against ignoring controversial board decisions issued under the recess appointments. Even if *Noel Canning* is upheld by the Supreme Court, the regional offices will be enforcing the board rulings in the meantime, he said.

If in a political solution President Obama succeeds in gaining Senate confirmation of his appointees, Simon added, the result would be a Democratic-majority board that could end up reissuing any rulings invalidated on recess appointment grounds.

Simon joined in the panel discussion with Block, Fernbach, and union attorney Hanan B. Kolko of Meyer, Suozzi, English & Klein in New York.

The panel discussion was offered by the Cornell ILR School Labor and Employment Law program, in conjunction with Cornell Law School and co-sponsored by the two law firms.

BY JOHN HERZFELD