

Decisions issued by National Labor Relations Board between January 4, 2012 and August 13, 2013 now void.

In the words of Yogi Berra, it's déjà vu all over again at the National Labor Relations Board (NLRB or Board).

Back in late 2007, due to congressional deadlock over then-President Bush's nominees to the NLRB, new NLRB members had not been confirmed before the terms of three of its members expired, leaving the Board with only two members. To deal with this situation, the NLRB contrived a strategy that attempted to delegate the Board's authority to issue decisions to only two members, even though Section 3(b) of the National Labor Relations Act (the Act) states that the Board cannot act without a quorum of three out of its five members. It was, therefore, little surprise that in 2010 the US Supreme Court, in *New Process Steel, L.P. v. NLRB*, ruled that the NLRB's end-run around the plain language of the Act was illegal. The consequence: more than 600 decisions issued by the two-member Board were deemed void and a new, properly constituted Board had to reconsider and issue new decisions in a substantial number of those cases.

Flash forward to early 2012. The same gridlock in Congress over now-President Obama's nominees to the NLRB persisted (imagine that?), and the NLRB was about to lose more members due to term expirations. Seeking to avoid a repeat of the *New Process Steel* problem where the Board would lose its quorum, the President saw an opportunity to avoid the need to obtain Congress' approval for his nominees (which didn't look promising at the time) and instead appoint them on a "recess" basis under a provision in the Constitution that was intended to address the need to maintain government operations during breaks between congressional sessions. (As an aside, and for you history buffs, the [Recess Appointments Clause](#) (Article II, Section 2, clause 3) specifically was intended to address the lengthy breaks between congressional sessions that occurred back in the final decades of the 1700s when, during adjournments between sessions, members of Congress would return to their home states by riding horseback, often resulting in months-long breaks between sessions. The Recess Appointments Clause allowed the President to make interim appointments during those lengthy hiatuses to maintain an orderly government. Today, however, Senators and Representatives do not ride horses back to their home states between sessions, and the obstacles that necessitated the Recess Appointments Clause no longer exist. Nonetheless, Presidents have continued to utilize the clause to varying degrees, many would say to accomplish political agendas or to bypass Congressional roadblocks at the expense of the intended advice-and-consent nomination and approval process required by the Constitution for certain government positions.)

Now this is where the issue gets a bit technical (and yes, we will admit, a little dry). In February 2012 the Board – then made up of five members, three of whom had been appointed by the President on a recess basis – issued a decision finding that the employer in that case, Noel Canning, a bottler and distributor of Pepsi products in Washington state, committed an unfair labor practice. Noel Canning appealed the Board's decision, arguing that the Board that had found it in violation lacked a quorum at the time it issued the decision, and thus its decision was void. More specifically, it argued that when the President appointed three new members to the NLRB in January 2012 on a recess basis, Congress was not in fact in a recess within the meaning of the Recess Appointments Clause, thereby making those appointments invalid. Because those appointments were invalid, Noel Canning argued that the Board actually only had two members when it issued its decision finding it to have violated the law, and thus, under *New Process Steel*, the Board lacked the authority to issue that decision.

We will spare you the nuts-and-bolts of the Supreme Court's highly technical decision, which examined the difference between "intrasession" and "intersession" recesses, the meaning of the words "the recess," whether Congress was in session during *pro forma* sessions, when the vacancy of the position to be filled by recess appointment occurred, and the duration of the recess. The bottom line is that the Supreme Court unanimously decided in *NLRB v. Noel Canning* that the President's January 2012 recess appointments to the NLRB during a three-day recess were unconstitutional under the Recess Appointments Clause. Because those appointments were unlawful, that meant that the NLRB had less than three validly appointed members between January 4, 2012 and August 12, 2013, when a new slate of Congressionally-approved, non-recess appointed members were approved. And because *New Process Steel* held that the Board cannot act without at least three members, the consequence of this decision is that *all* of the decisions issued by the NLRB between January 2012 and August 2013 are now void. (The Court's decision is a narrow one, and only impacts the NLRB appointments; the Court did not address the broader issue of other prior recess appointments.)

Having been through this once before in the recent past with *New Process Steel*, it is safe to presume that the NLRB has a plan in place to reconsider and reissue those decisions that have now been voided as a result of the *Noel Canning* decision, particularly those that announced significant changes in labor law and policy. But, with a new five-member Board, it is not a given that the decisions will come out exactly the same the second time through. We will keep you up-to-date on our [Employment Law Worldview Blog](#) (www.employmentlawworldview.com) with what are sure to be significant further developments in light of *Noel Canning*.

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