UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION,	)	
Petitioner,	)	
v.	)	**Case Nos. 12-1115 & 12-1153**
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

MOTION FOR LEAVE TO INTERVENE

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and Rule 15(b) of this Court, John Lugo, Douglas Richards, David Yost, Connie Gray, Karen Medley, Janette Fuentes and Tommy Fuentes ("Movants") move for leave to intervene in the above-captioned proceeding.

In this case, Petitioner Noel Canning is petitioning for review of a National Labor Relations Board's decision, dated February 8, 2012, that held that the company violated certain sections of the National Labor Relations Act, 29 U.S.C. §§151 et. seq. *See Noel Canning*, 358 NLRB No. 4 (February 8, 2012). Movants believe that the Board did not have statutory authority to issue the *Noel Canning* decision because it lacks the necessary three-member quorum required under § 3(b) of the Act. 29 U.S.C. §153(b); *see New Process Steel, L.P. v. Nat'l Labor Relations Bd.*, 130 S. Ct. 2635, 2644-45 (2010). By adjudicating the *Noel Canning* case, the Board set a precedent applicable in all future Board proceedings that it possesses a proper quorum.

Movants are charging parties or petitioners in cases currently pending before the Board and ripe for its decision. They include: John Lugo, NLRB Case Nos. 13-CB-18691 and 13-CB-18692; Douglas Richards, NLRB Case No. 25-CB-8891; David Yost, NLRB Case No. 25-CB-9254; Connie Gray, NLRB Case No. 25-RD-61324; Karen Medley, NLRB Case No. 28-CB-7048; Janette Fuentes, NLRB Case No. 28-CB-7062; and Tommy Fuentes, NLRB Case No. 28-CB-7063.

Movants seek to intervene in this case because the Court's decision herein will determine, within this Circuit, whether the Board has the lawful authority to rule on the Movants' cases. Movants have a direct and substantial interest in whether the Board can lawfully issue decisions in their cases. Accordingly, they request intervenor status.

BACKGROUND

Under the Act, the Board "shall consist of five . . . members, appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a). Board vacancies generally do "not impair the right of the remaining members to exercise all of the powers of the Board" provided that "three members of the Board shall, at all times, constitute a quorum of the Board…." 29 U.S.C. § 152(b). The United States Supreme Court held that the Board cannot exercise its statutory authority during any period in which it has less than three members. *New Process Steel*, 130 S. Ct. at 2644-45.

For the period August 28, 2011, to approximately noon on January 3, 2012, the Board operated with three lawfully appointed members and, therefore, maintained a lawful quorum. Board Chairman Pearce and Member Hayes were nominated by the President on July 9, 2009, and confirmed by the Senate on June 22, 2010. The third member, Craig Becker, was recess

appointed by the President on March 27, 2010, pursuant to the Recess Appointments Clause in the U.S. Constitution, Art. II, § 2, cl. 3 ("Recess Appointments Clause").

On December 17, 2011, the Senate voted by unanimous consent to remain in session for the period December 20, 2011, through January 23, 2012. *See* 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011). This was necessary because, under Article I, Section 5, Clause 4 of the Constitution, "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days[.]" Because the U.S. House of Representatives did not consent to a Senate adjournment exceeding three days, and because the Senate never sought such consent, the Senate issued a resolution convening pro forma sessions every three business days. 157 Cong. Rec. S8783-84.

During the December 17, 2011 to January 23, 2012, time period, the Senate conducted two important pieces of business during its *pro forma* sessions. First, on December 23, 2011, the Senate passed a temporary extension to the payroll tax cut. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). The bill as passed was signed into law by the President on the same day. Second, on January 3, 2012, the Senate met its obligation, under the Twentieth Amendment to the Constitution, to "meet[] . . . on the 3d day of January." *See* U.S. Const. amend. XX, § 2. Neither the President nor either house of Congress has called into question the validity of either the payroll tax cut extension or the Senate's constitutionally required January 3, 2012, meeting.

At approximately noon on January 3, 2012, the First Session of the 112th Congress ended and, consequently, Mr. Becker's term as a recess appointee expired. *See* 158 Cong. Rec. S1 (daily ed. January 3, 2012). Thereafter, the Board had only two members and, therefore, lacked the statutorily-required quorum to exercise its powers.

On January 4, 2012, just one day after the Senate began the second session of the 112th Congress and just two days before the Senate planned to reconvene, the President purported to recess appoint Sharon Block, Terence Flynn, and Richard Griffin to serve as Members of the Board. *See* Press Release, The White House, President Obama Announces Recess Appointments (Jan. 4, 2012). The President had nominated Mr. Flynn on January 5, 2011, and Ms. Block and Mr. Griffin on December 15, 2011, but none of them had been confirmed by the Senate. As of January 4, 2012, neither Ms. Block's nor Mr. Griffin's required committee application and background check had been submitted to the Senate, generally a prerequisite to any Senate action on a nomination. *See* Press Release, U.S. Senate Committee on Health, Education, Labor & Pensions, NLRB Recess Appointments Show Contempt for Small Businesses (Jan 4, 2012). The President nevertheless sought to invoke the Recess Appointments Clause and thereby circumvent the Senate's constitutional power to provide advice and consent to the appointment of Executive Branch officers.

On January 12, 2012, the Department of Justice's Office of Legal Counsel ("OLC") released a memorandum opinion, dated January 6, 2012, explaining the legal rationale underlying the President's ostensible recess appointments. *See* "Lawfulness of Recess Appointments during a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions," Memorandum Opinion For The Counsel To The President at 5 (Jan. 6, 2012)("OLC Memo"). The OLC Memo asserts that "the President is vested with . . . discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate." *Id*., quoting "Executive Power—Recess Appointments," 33 Op. Att'y Gen. 20, 25 (1921))]. The OLC Memo further asserts that the President can declare the Senate to be in recess whenever the President deems the Senate to be "unavailable . . . to 'receive

communications from the President or participate as a body in making appointments.'" *Id.*; *see also id.* At 1, 4, 9, 15. Movants believe these assertions to be legally erroneous because the Constitution expressly provides that "[e]ach House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Thus the Senate, and not the President, has the sole authority to determine when the Senate is or is not in recess. As explained above, the Senate did not deem itself to be in recess when Ms. Block and Messrs. Griffin and Flynn were appointed to the Board without the legislative body's advice and consent.

On February 8, 2012, the Board issued its decision in the above-captioned case against Noel Canning. This action necessarily required a quorum of the Board. *See New Process Steel*, 130 S. Ct. at 2644-45. Notably, both Ms. Block and Mr. Flynn participated in the decision as Board members. Thus, in issuing its decision, the Board implicitly decided that these appointments were legitimate and that the Board possesses a proper quorum.

The Movants in this matter have a strong interest in the resolution of this issue. Each is a charging party or petitioner in cases pending before the Board and ripe for its decision, as the Declarations of their attorneys filed herein show. The Movants have each filed motions to recuse Ms. Block and Messrs. Griffin and Flynn from participating in their cases because of their unconstitutional appointments to the Board, but the Board has not ruled on those motions.

ARGUMENT

Movants satisfy this Court's standard for intervention in petition-for-review proceedings. Each Movant has interests that relate directly to the subject of this litigation and that will be imperiled should the Board prevail. These interests cannot be adequately represented by the existing parties.

Federal Rule of Appellate Procedure 15(d) provides that a motion for leave to intervene "must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention." This Court has held that Rule 15(d) "simply requires the intervener to file a motion setting forth its interest and the grounds on which intervention is sought." *See Synovus Fin. Corp. v. Board of Governors*, 952 F.2d 426, 433 (D.C. Cir. 1991). Under the Federal Rules of Civil Procedure, "the 'interest' test [for intervention] is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *See Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967); *see also Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 133-35 (1967).

Federal Rule of Civil Procedure 24, which governs district court intervention, informs the intervention inquiry under Federal Rule of Appellate Procedure 15(d). *See, e.g., Int'1 Union v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *Amalgamated Transit Union v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985) (*per curiam*). Under Federal Rule of Civil Procedure 24(a)(2), the requirements for intervention as of right are: (1) the motion is timely; (2) the applicant claims an interest relating to the subject of the action; (3) disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) existing parties may not adequately represent the applicant's interest. *See, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). Movants satisfy each of these requirements, and *a fortiori* also satisfy the more lenient standard for permissive intervention under Rule 24(b)(1)(B).

I. Movants' Motion to Intervene is Timely

Movants' motion is timely because it was filed within 30 days of the petition for review filed by Noel Canning on February 24, 2012. *See* Fed. R. App. P. 15(d). Moreover, this motion is made before the Court has established a schedule and format for briefing. Thus, allowing Movants to intervene will not disrupt or delay the proceedings.

II. Movants Have Interests Relating to the Subject of This Proceeding That May be Impaired if Respondent Prevails

Movants have direct and immediate interests in this proceeding that will be adversely affected if the respondent Board prevails. By issuing its decision in this case, the Board has implicitly asserted that it currently possesses the necessary quorum to adjudicate Movants' cases. This Court's decision on whether the Board actually possesses a valid quorum in this case will determine, within this Circuit, if the Board can lawfully rule on Movants' cases.

The Board lacks the necessary three-member quorum required under *New Process Steel* because the President's purported appointments of Ms. Block and Messrs. Griffin and Flynn to the Board on January 4, 2012, contravened constitutionally mandated procedures. The President failed to obtain the advice and consent of the Senate required to make these appointments under U.S. Constitution Article II, § 2, cl. 2. The President's assertion that these were recess appointments permitted under U.S. Constitution Article II, § 2, cl. 3 fails because the Senate was not in recess on January 4, 2012, but conducted *pro forma* sessions twice weekly from December 20, 2011 until January 23, 2012. In fact, the Senate *could not* constitutionally go into recess during this time frame because the House of Representatives did not consent to adjournment. *See* U.S. Const., Article I, § 5, cl. 4.

Because the Senate was not in recess, the President lacked constitutional authority to issue appointments under the Recess Appointments Clause. The appointments of Ms. Block and Messrs. Flynn and Griffin were unconstitutional and are not legally effective.

By issuing its *Noel Canning* decision, the Board implicitly decided that these appointments were legally effective and that the Board has a proper quorum to adjudicate cases pending before it. Given that Movants have cases pending and ripe for decision by the Board, they clearly have a direct interest in this legal challenge to the Board's adjudicatory authority.

III. The Existing Parties Cannot Adequately Represent Movants' Interests

In considering whether Movants' interests are adequately represented by the parties, the burden of showing a difference in interests "should be treated as minimal." *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). Moreover, "[t]he applicant need only show that representation of his interests 'may be' inadequate, not that representation will in fact be inadequate." *See Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986); *see also, e.g., Fund for Animals*, 322 F.3d at 735 ("[W]e have described this requirement as 'not onerous.'" (quoting *Dimond*, 792 F.2d at 192)); *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1291-93 (D.C. Cir. 1980) (explaining that a movant "'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee'" (quoting 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1909 (1st ed. 1972)); *Nuesse*, 385 F.2d at 702 (noting "both the burden on those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention").

Noel Canning, a corporate employer, cannot adequately represent the disparate interests of the Movants, who are individual employees. The purpose of the Act is to protect employee

rights *from* employers and unions. The Act grants rights only to employees. *See* 29 U.S.C. § 157; *Lechmere v. NLRB*, 502 U.S. 527, 532 (1992). Sections 8(a) and 8(b) protect these employee rights from unfair labor practices committed by employers and unions. 29 U.S.C. §§ 158(a),(b). To find that an employer adequately represents the interests of employees in a Board case would turn the Act on its head.

Moreover, Movants are employed by disparate employers other than Noel Canning. Their legal actions before the Board involve issues unrelated to those at issue in the *Noel Canning* decision. Thus, Movants have diverse and substantial interests that are not shared by the current parties, and should be permitted to speak on their behalf. *See Nuesse*, 385 F.2d at 702.

CONCLUSION

Movants respectfully request that the Court enter an order granting them leave to intervene. In the alternative, if intervention is not granted, Movants hereby notify the Court pursuant to Local Rule of Appellate Procedure 29(b) that all parties have consented to Movants participation as amicus curiae and that they intend to file an amicus brief.

Dated: March 23, 2012

Respectfully submitted,

/s/ William L. Messenger
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DECLARATION OF MATTHEW C. MUGGERIDGE

1. I, Matthew Muggeridge, declare that I am the attorney for Charging Party John Lugo in the case *Lugo (International Brotherhood of Electrical Workers, Local Union No. 34, AFL-CIO and International Brotherhood of Electrical Workers)* 357 NLRB NO. 45 (April 10, 2011) (Case Nos. 13-CB-18961 and 13-CB-18962).
2. Although the case has been ruled on by the National Labor Relations Board, it is currently again before the Board on Charging Party Lugo's Motion for Reconsideration, filed August 24, 2011. This Motion is ripe for decision by the Board.
3. On 30 January, 2012, Charging Party filed with the Board a Motion to Disqualify recess-appointed Members Block, Griffin, and Flynn from

hearing his case or issuing any rulings in this case, because their "recess" appointments to the Board by President Obama were unconstitutional. The Board has not ruled on this Motion.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 23rd day of March, 2012.

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DECLARATION OF RAYMOND J. LaJEUNESSE, JR.

1. I am one of the attorneys who represent employee Connie Gray in the following case currently pending before the National Labor Relations Board: *Coupled Products LLC, UAW Local 2949 and Connie Gray*, NLRB Case No. 25-RD-061324.

2. Ms. Gray currently has a case pending before the Board on a request for review of a dismissal of her decertification petition by Regional Director Rik Lineback. That request is ripe for decision.

3. On 30 January 2012, Ms. Gray filed a motion with the Board to disqualify Sharon Block, Richard Griffin and Terence Flynn from ruling on her case, on the grounds that these individuals are not proper Board members because their ostensible "recess" appointments to the Board are unconstitutional. The Board has not ruled on that motion.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 23rd day of March, 2012.

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DECLARATION OF WILLIAM L. MESSENGER

1. I am an attorney and represent charging party Douglas Richards in the following case currently pending before the National Labor Relations Board: *USW Int'l Union (Trimas Corporation d/b/a Cequent Towing Products)*, NLRB Case 25-CB-8891.

2. Mr. Richards currently has pending before the Board a Motion for Reconsideration, filed on 29 August 2011, that moves the Board rule on certain of his exceptions and award certain relief to employees to remedy unfair labor practices committed by the respondent union. This motion is ripe for a decision.

3. On 30 January 2012, Mr. Richards filed a motion with the Board to disqualify Sharon Block, Richard Griffin and Terence Flynn from ruling on his motion for reconsideration, and his case generally, on the grounds that these individuals are not proper Board members because their ostensible "recess" appointments to the Board are unconstitutional. The Board has yet to rule on this motion.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 23rd day of March, 2012.

/s/ William L. Messenger
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DECLARATION OF RAYMOND J. LaJEUNESSE, JR.

1. I am a member of the bar of this Court and one of the attorneys representing charging parties Karen Medley, Janette Fuentes and Tommy Fuentes in the following cases currently pending before the National Labor Relations Board: Fry's Food Stores, UFCW Local 99 and Karen Medley, et al. Case nos. 28-CA-22836, 28-CA-22871, 28-CA-22872; and 28-CB-7049, 28-CB-7062 and 28-CB-7063.

2. These cases are before the Board on exceptions from a decision of an Administrative Law Judge and are ripe for the Board's decision.

3. On 30 January 2012, Charging Parties filed a motion with the Board to disqualify Sharon Block, Richard Griffin and Terence Flynn from ruling on the pending exceptions in their case on the grounds that these individuals are not proper Board members because their ostensible "recess" appointments to the Board are unconstitutional. The Board has not ruled on that motion.

I declare under penalty of perjury that the foregoing is true and correct.

Dated March 23, 2012.

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DECLARATION OF RAYMOND J. LaJEUNESSE, JR.

1. I am one of the attorneys who represent charging party David Yost in the following case currently pending before the National Labor Relations Board: *USW Int'l Union (Chemtura Corp)*, NLRB Case No. 25-CB-9254.

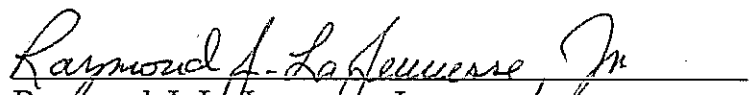
2. Mr. Yost currently has pending before the Board a Motion for Reconsideration, filed on 29 August 2012, that moves the Board to rule on certain of his exceptions and award certain relief to employees to remedy unfair labor practices committed against them by the respondent union. This motion is ripe for decision.

3. On 30 January 2012, Mr. Yost filed a motion with the Board to disqualify Sharon Block, Richard Griffin and Terence Flynn from ruling on his motion for reconsideration, and his case generally, on the grounds that these individuals are not proper Board members because their ostensible "recess"

appointments to the Board are unconstitutional. The Board has not ruled on that motion.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 23rd day of March, 2012.



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