US HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

What Should Workers and Employers Expect Next from the National Labor Relations Board?

June 24, 2014

Testimony by G. Roger King[1]

Mr. Chairman and Members of the Subcommittee:

My name is Roger King. I am Of Counsel with the Jones Day law firm and a member of the Firm's Labor and Employment Practice Group. I also serve as Senior Labor and Employment Counsel for the Human Resource Policy Association. I appreciate the opportunity to again appear before the Subcommittee. The areas that I will discuss this morning in my testimony concern the unprecedented and ever-expanding policy-change oriented agenda of the present National Labor Relations Board ("NLRB," "Board," or "Agency") and its General Counsel and the practical

[1] Mr. King is a member of the Jones Day law firm's Labor & Employment Practice Group and also serves as Senior Labor & Employment Counsel for the Human Resource Policy Association. The statements and opinions contained in his testimony are those of Mr. King personally and are not being presented as views or positions of his Law Firm or the Human Resource Policy Association. Mr. King is one of the attorneys representing the Noel Canning Company in its Constitutional case challenge to President Obama's January 4, 2012 recess appointments to the National Labor Relations Board that is presently pending before the U.S. Supreme Court. Mr. King wishes to acknowledge the assistance of his associates, Bryan Leitch and Theresa Dean, also of the Jones Day law firm, in preparing his testimony.

and policy implications of such expanding agenda, particularly given the Board's current case backlog or inventory and the potentially considerable increased caseload it may face as a result of the Supreme Court's pending decision in the *Noel Canning* case.

SUMMARY OF TESTIMONY

Mr. Chairman and Members of the Subcommittee, the present Board and its General Counsel are pursuing one of the most activist agendas to change Board law and election procedures in the history of the Agency. Such initiatives, no matter how well intentioned, have significant policy and jurisprudence implications. Such initiatives over the last few months have included:

- The Board's recent Spring 2014 renewed rulemaking initiative to substantially change Board election representation procedures
- Its February 7, 2014 request for amicus briefs on the approach that should be taken for deferral of unfair labor practice charges to arbitration (*Babcock & Wilcox Constr., Inc.*, Case No. 28-CA-022625 (Feb. 7, 2014))
- Its February 10, 2014 request for amicus briefs on the question of Board jurisdiction over religiously-affiliated colleges and universities

(*Pacific Lutheran University*, Case No. 19-RC-102521 (Feb. 10, 2014))

- Its request also in the *Pacific Lutheran University* case for parties to submit briefs on the scope of the definition of employee "managerial" status under the NLRA (*Pacific Lutheran University*, Case No. 19-RC-102521 (Feb. 10, 2014))
- Its request last April for amicus briefs on the statutory right of employees to use employer-provided email communication systems in the workplace (*Purple Communications, Inc.*, Case No. 21-CA-095151, et al. (April 30, 2014))
- Its invitation again last month for stakeholder views regarding the scope and definition of "joint employer relationships" under the NLRA (*Browning-Ferris Indus.*, Case No. 32-RC-109684 (May 12, 2014))
- Its recent request for views with respect to whether individuals on athletic scholarships at private universities are "employees" or "students" (*Northwestern University*, Case No. 13-RC-121359 (May 12, 2014))

The agenda may also be expanded further based upon recent statements by NLRB General Counsel Richard Griffin. For example, General Counsel Griffin has indicated an interest in having the Board review the state of the law in the following areas: successorship, permanent replacement of economic strikers, employer duty to furnish financial information in bargaining, the applicability of *Weingarten* employee interview rights in non-union facilities, refusal of employers to furnish information related to business site and plant relocation, the validity of partial lockouts, at-will employment handbook provisions, and mandatory arbitration agreements which contain class-action prohibitions. *See* Memorandum GC 14-01, Mandatory Submissions to Advice (Feb. 25, 2014).

In addition to the above-stated policy agenda, and perhaps future additions to such agenda, the Board also has recently substantially changed the law in the representation area by applying a new "overwhelming community of interest" test. Such test, first articulated by the Board in its *Specialty Healthcare* decision, 357 NLRB No. 83 (2011), permits unions to petition for "fragmented units" and in certain cases very small "micro units." Additionally, in recent months, the Board has expanded the application of its protected concerted activity doctrine to the extent that it is now examining virtually every paragraph, sentence, and even punctuation mark in employer

policies and procedures.[2] This exceedingly expansive application of the NLRA has created substantial ambiguity, confusion, and a general lack of clarity in the jurisprudence in this area.

The Board and its General Counsel are pursuing such activist policy-change agenda on an extremely accelerated basis, perhaps desiring to conclude its agenda, to the extent possible, prior to the upcoming November 2014 federal elections and the subsequent term expiration of one of its Members in December of this year. This activist approach is being pursued notwithstanding the substantial inventory or backlog of cases awaiting Board decision and the unknown and potentially significant impact that the pending decision of the Supreme Court in the *Noel Canning* case may have on the Board's caseload and the enforcement obligations of its General Counsel. Indeed, an affirmance in whole or in part by the Supreme Court of the D.C. Circuit Court of Appeals decision in *Noel Canning* may cause up to 4,000 reported and unreported decisions of the Board over the last twenty years to be set aside. The potential impact of a *Noel Canning* decision affirming the D.C. Circuit also may

[2] The Board continues to issue highly controversial decisions such as its recent decision in *Plaza Auto Center, Inc.* in which it overturned the discharge of an employee who was found to have cursed at his manager. 360 NLRB No. 117 (2014). According to the Board's decision, the employee "lost his temper and in a raised voice started berating" his supervisor, including "calling him a 'f****** mother f******,' a 'f****** crook,' and an 'a**hole,'… [and] told [the supervisor] that he was stupid, nobody liked him, and everyone talked about him behind his back." The employee was subsequently terminated. Despite this outburst, the Board found that the employee's conduct did not cost him the protection of the NLRA.

bring into question numerous appointments to NLRB regional director positions and delegations from potentially quorumless Boards to its General Counsel.

Further, such unprecedented activist agenda again raises the question, from the perspective of particularly the employer community, of Board neutrality and independence in fulfilling its statutory obligations, including its substantial responsibilities in issuing case law decisions. It is submitted that this potential wholesale change in Board law and election procedures, in the long term, is not desirable for any of the Board's stakeholders and will make it exceedingly difficult for employers, unions, and employees to be able to understand the requirements of the National Labor Relations Act and to properly comply with such requirements.

The Board and its General Counsel should reconsider the scope and pace of its present policy change agenda and place a greater priority on deciding its current case law inventory or backlog. The Board should also be mindful of the potential consequences on its workload of the pending Supreme Court decision in the *Noel Canning* case.

Finally, the present Board and its General Counsel should give substantial thought to the type of precedent that they may be establishing by pursuing the current agenda. Indeed, if such agenda is not reconsidered and continues to be pursued,

the Board and its General Counsel may very well set both precedent and expectation for future Boards to also engage in similar extreme changes in Board law and election procedures, albeit with different policy outcomes. Such extreme "swinging of the pendulum" in Board law and election procedures would continue to call into question the credibility of the Agency including, most importantly, its statutory obligation to be a neutral in deciding workplace disputes.

THE BOARD AND ITS GENERAL COUNSEL'S ACTIVIST AGENDA—MORE THAN MERE "POLICY OSCILLATION"

The often-referenced phrase "elections have consequences" is quite accurate with respect to administrative law developments after presidential elections. Certainly, the president and his or her political party that prevails in such an election have a right to implement policy decisions at various levels of the executive branch. Independent regulatory agencies should in theory, however, be immune, at least in part, from political party influence and should operate within their statutory mandate and applicable jurisprudence.

Certain federal regulatory agencies, such as the Equal Employment Opportunity Commission are, for example, almost entirely policy oriented, subject only to the statutory structure creating the agency in question. The National Labor Relations Board, by contrast, is not only a statute-created

independent agency but it also is an entity with considerable quasi-judicial responsibilities including a mandate to issue case law decisions on a neutral and fair basis. Certainly it is well recognized that given the political makeup of the Board, which reflects on a majority-member basis the political party occupying the White House, there will be certain changes in Board law from one administration to another. Such changes have been labeled, according to one of my former colleagues, New York University School of Law Professor Sam Estreicher, as expected, "policy oscillation." Such policy oscillation on the whole, however, has historically been relatively moderate by both Democrat and Republican Boards and has not resulted in extreme changes in Board law and in Board election procedures.

The current Board and its General Counsel is engaged in an agenda that clearly goes considerably beyond moderate policy oscillation. Whatever the rationale may be to support the current activist and accelerated agenda of the Board and its General Counsel, no matter how well-intended, the end result clearly will be one of the most active pursuits of policy change in Board law in the history of the Agency.[3] A list of such initiatives, found in the Summary of Testimony on page 2 of this

[3] In a statement to the Associated Press in January 2012, Chairman Pearce announced, "[w]e want the agency to be known as the resource for people with workplace concerns that may have nothing to do with union activities." Such a sweeping aspirational role may indeed be one of the bases for the Board's current activist agenda.

Testiomny, represents examples of the Board's activist agenda, along with potential new initiatives from the General Counsel.

In addition to the above noted initiatives, the Board also has a substantial inventory or backlog of cases[4] that present important labor-management policy issues, including such issues as the access rights of third parties to employer private property (*see e.g.*, *Roundy's*, 356 NLRB No. 27 (Nov. 12, 2012)), supervisory status of various employment positions under the NLRA, off-duty access rights of employees to employer interior operational areas, successorship rights of unions and obligations of employers, and many other important issues. Finally, and perhaps most importantly, the Board may face a substantial increase in its work load, depending on the holding of the United States Supreme Court in the pending *Noel Canning v. NLRB* case – an area that I will review later in my testimony.

INCREASED BOARD SCRUTINY OF EMPLOYER HANDBOOKS AND RELATED POLICIES AND APPROVAL OF FRAGMENTED BARGAINING UNITS

The current NLRB, in addition to the initiatives noted above, has also recently issued numerous decisions expanding the rights of employees under the NLRA and the opportunities for unions to engage in organizational activity. For example, the Board has considerably expanded the application of its protected

[4] Based on available information, such inventory backlog includes approximately ___ number of cases dating back to ___.

concerted activity doctrine to virtually every paragraph and sentence of employer policies, including electronic communication policies.[5] Such expansive jurisprudence has resulted in a number of innocuous and neutral employer policies regarding such subjects as employer data confidentiality, customer service and satisfaction, and civility in the workplace to now be held by the Board to be a violation of the National Labor Relations Act. Even the most experienced labor and employment legal practitioners are having difficulty understanding this type of jurisprudence and the lack of clarity and consistency of decision making in this area. Such haphazard "checkerboard jurisprudence" is particularly negatively impacting small and medium-sized businesses that do not have the resources to attempt to understand the Board's expansive, and often changing, case law decisions in this area.

Additionally, the current Board and its Regional Directors have continued to apply a new "overwhelming community of interest" test to determine what groupings of employees are eligible to form voting and bargaining units and vote in Board-conducted elections. *Specialty Healthcare*, 357 NLRB No. 83 (2011). This "job description" oriented and extent of

[5] To date the Board has issued 124 decisions concerning employer handbook policies and the General Counsel has released 78 Advice Memoranda concerning the same. *See* John N. Raudabaugh, *Overbroad or Ambiguous Rules and Policies, Organized Labor's Toxic Tactic*, (monograph)(2014).

organization doctrinal approach to bargaining unit configuration has led to the approval of fragmented voting units and also in some cases the approval of exceedingly small or "micro units." For example, one Regional Director of the Board applied this test and recently found that women's shoe department sales representatives working on non-contiguous floors of a major retailer constituted an appropriate voting unit (*Bergdorf-Goodman* Case No. 02-RC-076954 (May 4, 2012).) The logical extension of such "reasoning", for example, in a major department store could result in the establishment of 20 to 30 separate voting or bargaining units (e.g., men's shoe department, women's formal wear department, boys sporting goods department. . .). Similar results could occur under such "reasoning" in any other employment settings.

THE *NOEL CANNING* CASE

The President's January 4, 2012 recess appointments to the National Labor Relations Board has generated considerable litigation beginning with the decision of the United States Court of Appeals for the District of Columbia on January 25, 2013 in the *Noel Canning* case, where the Court held that the President's appointments failed to comply with the requirements of the Constitution's Recess Appointment Clause. In its 3-0 decision, the D.C. Circuit found that the recess appointments of

Richard Griffin, Sharon Block, and Terrence Flynn to the NLRB occurred while the Senate still was in session, and therefore such appointments were not made during an inter-session recess of the Senate, nor were such appointments made to vacancies that happened during such a session. Other federal courts of appeal have agreed with the D.C. Circuit Court[6] and also found that decisions and actions by the challenged recess appointee Board are void given the President's failure to comply with Article II, Section 2, Clause 3 of the Constitution—the Recess Appointments Clause. The potential implications of a holding by the United States Supreme Court affirming, in whole or in part, the decision of the D.C. Circuit Court of Appeals would be considerable, even by the Government's own admission.[7] For example:

- There were more than 700 reported and unreported decisions issued by the challenged recess appointees during the time

[6] *See NLRB v. New Vista Nursing & Rehabilitation LLC*, 719 F.3d 203 (3d Cir. 2013); *NLRB v. Enterprise Leasing Co. Southeast LLC*, 722 F.3d 609 (4th Cir. 2013).

[7] The Government contended, "because many of the Board's members had been recess-appointed during the past decade, [the D.C. Circuit's decision] could also place earlier orders in jeopardy. The National Labor Relations Act places no time limit on petitions for review and allows such petitions to be brought in either a regional circuit or the D.C. Circuit.... Thus, the potential effects of the decision below are limited by neither time nor geography." Government petition for certiorari at 30. *See also* the Government's opening paragraph in its reply brief stating, "Respondent's contention that the President has no authority to make recess appointments during intra-session recesses of the Senate would repudiate the Constitutional legitimacy of thousands of appointments made by at least 14 presidents since the 1860s." Government Reply Brief at 1.

period from January 2012 until August 2013 – all of these decisions could be invalid depending on the holding of the Supreme Court.

- Enforcement actions by at least ten regional directors of the NLRB who were approved by the 2012-13 recess appointee Board also could be subject to being set aside – a list of such regional directors is attached to my testimony as Exhibit 1.
- Delegations of authority from the 2012-2013 challenged recess appointee Board to its acting General Counsel, especially in the injunction area, may also be subject to litigation attack.
- Approximately 4000 reported & unreported decisions of potentially quorumless Boards over the last 20 years, as well as actions of regional directors approved by such Boards, may be invalid.
- There are 144 challenges to decisions of the President's January 2012 challenged recess appointees pending in the various federal circuit courts of appeal with at least one case challenge pending in each federal circuit court. All of those cases may be returned to the Board for reconsideration, depending on the holding of the Supreme Court in the *Noel Canning* case. A list of such cases is attached to my testimony as Exhibit 2.

- To the extent that NLRB Decisions after August 2013 relied upon cases that overturned or modified precedent established by the challenged 2012-13 recess appointee Board such decisions may also be subject to collateral attack. Stated alternatively, such "precedent" established by an allegedly quorumless Board would be without legal authority and could not be relied upon by the present Board or its successors in reaching case law decisions.

THE *NEW PROCESS STEEL* COMPARISON

The amount of time that the present Board may have to devote to addressing *Noel Canning*-related litigation may take years and substantially burden the Board and its General Counsel. For example, by way of comparison, when the Supreme Court in the case of *New Process Steel L.P. v. the NLRB*, 560 U.S. 674 (2010) held that the Board could not legally function with only two members and must have, at a minimum, three properly qualified members to decide cases and conduct other business, approximately 100 of the approximate 550 *New Process Steel*-impacted decisions were returned to the Board for reconsideration.[8] Indeed, each of those returned decisions had been decided on a unanimous 2-0 basis by the two members who were properly serving on the Board at the time, and therefore

[8] http://www.nlrb.gov/news-outreach/fact-sheets/background-materials-two-member-board-decisions

these case holdings were without controversy. Such decisions also did not overturn precedent. Notwithstanding the non-controversial nature of such decisions and the relatively small number of such decisions, it took the Board approximately three years after the issuance of the *New Process Steel* decision to address all of the returned inventory of cases.[9]

If the Supreme Court upholds in whole or in part the D.C. Circuit Court's decision in the *Noel Canning* case, there could be, as noted above, as many as 4000 cases returned to the Board for reconsideration. While in all likelihood any such number of potentially returned cases will not be that high due to such legal doctrines and practical considerations like mootness and settlement, the number of returned cases undoubtedly will be far in excess of what the Board experienced after the Supreme Court's decision in *New Process Steel*. Indeed, many of the potential inventory of returned *Noel Canning*-type cases involve highly controversial decisions made by the challenged 2012-13 recess appointee Board including decisions that overturned years of NLRB precedent. For example, one of the important issues decided in such cases was the question of whether a dues check off clause in a collective bargaining agreement expires at the termination date of the labor contract. The challenged recess-

[9] *See* "The End of an Error" by former-NLRB Member and General Counsel Ronald Meisburg, Proskauer Labor Relations Update Blog, February 13, 2013, available at http://www.laborrelationsupdate.com/.

appointee Board in that case (*WKYC-TV*, 359 NLRB No. 30 (2012)) overturned 50 years of NLRB precedent set by both Democrat and Republican Boards and held that such clause continues to be in effect after contract expiration absent a specific provision in the collective bargaining agreement in question stating that the dues check off requirement expires with the termination date of the contract. The practical impact of such precedent-changing decision is that employers are now deprived of an important option in difficult collective bargaining negotiations—the option to cancel the automatic collection of union revenue—after the contract in question that provided for such a procedure has expired.

Another case that falls in this category is the Board's holding in *Fresenius USA Manufacturing,* 358 NLRB No. 138 (2012). The Board's decision in *Fresenius* involved a situation where an employee lied to an employer during an investigation. The Board Majority concluded, nevertheless, that this conduct may still be protected under the NLRA and an employer's discharge of the employee who supplied inaccurate information may be unlawful. The Board Majority goes to great length to try to justify its holding in this case, but its efforts fall far short of providing any valid explanation for its decision. Indeed, as a practical matter, it is hard to understand why an employee's

outright fabrication of facts or failure to properly cooperate in an investigation, should be protected by Section 7 of the Act.

A representative listing of such controversial decisions decided by the 2012-2013 challenged recess appointee Board is attached to my testimony as Exhibit 3.

CONCLUSION

Mr. Chairman and Members of the Subcommittee, clearly the current Board and its General Counsel are pursuing an unprecedented, activist, and employer-unfriendly agenda. The end product of such a course of action, however, may result in increased loss of Board credibility in the circuit courts and a related substantial increase in National Labor Relations Act litigation in the courts. Such litigation challenges to these initiatives, in addition to the potential ramifications of a holding by the U.S. Supreme Court affirming, in whole or in part, the decision of the D.C. Circuit Court of Appeals in the *Noel Canning* case, may result in an overwhelming litigation burden on the Board and its General Counsel, thereby delaying for years the resolution of many important labor law issues.

Given the above concerns and issues, the Board should establish, as its first priority, deciding its current considerable inventory or backlog of cases and certainly decide

such cases as expeditiously as possible before engaging in any type of activist agenda as described above. Further, the Board and its General Counsel should give considerable thought to the long-range policy implications on the Board before engaging in their current agenda. As noted above, the pursuit of such an agenda may create precedent for future Boards from other administrations to also engage in an extreme "makeover" of Board case law and election procedures. Such extreme policy change, it is submitted, is not sound public policy, and will result in the Agency's already strained credibility being questioned even further by the courts, the Board's numerous stakeholders, and the Congress. Finally, at a minimum, the Board, before embarking any further on its current aggressive policy-oriented agenda, should wait until the Supreme Court issues its decision in the *Noel Canning* case so it can then determine what additional caseload, if any, it may have to address in the future.