

April 15, 2013

LABOR UPDATE

NLRB IN CHAOS: PRESIDENT OBAMA NOMINATES THREE MORE TO THE BOARD; A TOTAL OF FIVE NOMINEES AWAIT SENATE ACTION

On April 9, 2013 President Obama announced that he had nominated three persons to serve on the National Labor Relations Board (NLRB). This brings to five the total number of Board nominations that are waiting for Senate action.

Three New NLRB Nominees

The three nominees announced by President Barack Obama last week include current NLRB Chair Mark Gaston Pearce, Philip A. Miscimarra and Harry I. Johnson, III. Mr. Pearce is a Democrat; Mr. Miscimarra and Mr. Johnson are Republicans. The NLRB released the following information about the three intended nominees.

Mark Gaston Pearce: Mr. Pearce, who holds a BA from Cornell University and a JD from State University of New York at Buffalo, “has served as NLRB Chairman since August 2011, and served as a Member of the NLRB since March 2010.” Immediately before coming to the Board, Mr. Pearce was in the private practice of law for approximately 16 years. Before that, he served for 15 years as a district trial specialist for the NLRB in Buffalo, NY. Additionally, Mr. Pearce has been a Board Member of the New York State Industrial Board of Appeals and he has taught labor studies courses at Cornell University’s School of Industrial Labor Relations Extension.

Harry I. Johnson, III: Mr. Johnson earned a BA from Johns Hopkins University, an MALD from Tufts University’s Fletcher School of Law and Diplomacy, and a JD from Harvard Law School. Since 2010 he has been a partner with Arent Fox; prior to that he was with Jones Day for 16 years. In 2011 The Daily Journal recognized Mr. Johnson “as one of the ‘Top Labor & Employment Attorneys in California’.”

Philip A. Miscimarra: Mr. Miscimarra holds degrees from Duquesne University (BA), the University of Pennsylvania Wharton School of Business (MBA), and the University of Pennsylvania Law School (JD). Since 2005 he has been a partner with Morgan Lewis & Bockius; for 18 years before that he was with Seyfarth Shaw. Also, since 1997 Mr. Miscimarra has been a senior fellow at the Wharton Business School.

Two Already Pending NLRB Nominees

The NLRB, and in particular the nomination process, tends to be politically charged. This was true prior to 2009 and has proven to be true since President Obama took office.

For positions requiring Senate confirmation, such as Members of the NLRB, the law permits the President to install nominees without Senate approval during Congressional recess; these recess appointees only serve through the end of the next Congressional session, unless subsequently confirmed by the Senate. In April 2010 President Obama used the recess appointment process to

install liberal-favorite Craig Becker on the Board; since then, Senate Republicans have used this as a rallying point to block future Board nominations, which has left the Board unfilled.

By the end of 2011 the Board had only two Members. In an effort to prevent President Obama from making any recess appointments during the normal end of the year recess, Senate Republicans kept the Senate in pro forma session by convening non-legislative sessions every few days.

Nevertheless, the Obama Administration concluded that the Senate was in fact in recess and on January 4, 2012 President Obama made three controversial recess appointments to the Board.

On January 25, 2013 a decision of the recess-appointee heavy Board was rejected by a three-member panel of the United States Court of Appeals for the District of Columbia. In rejecting the decision, the DC Circuit found, among other things, that the recess appointments were unconstitutional, that the Board had only two validly appointed Members, and that consequently the Board lacked the quorum necessary for Board action. (See [Noel Canning v. NLRB](#).) The NLRB has announced plans to seek United States Supreme Court review of this decision and is expected to argue, among other things, that Supreme Court action is needed to resolve a conflict between the Circuit Courts (see the Eleventh Circuit decision in [Evans v. Stephens](#)).

In the wake of the Noel Canning decision, President Obama on February 13, 2013 re-nominated to the Board two of his recess appointees: Sharon Block and Richard Griffin.

Sharon Block: President Obama used the recess appointment process to appoint Ms. Block to the NLRB on January 4, 2012. She has been a Member of the NLRB since that date. Immediately prior to her recess appointment, she was serving as the Deputy Assistant Secretary for Congressional Affairs at the United States Department of Labor. Ms. Block graduated in 1992 from Georgetown University Law Center where she received the John F. Kennedy Labor Law Award. After two years in private practice and two years at the National Endowment for the Humanities, in 1996 Ms. Block joined the NLRB; she was senior attorney to Chairman Robert Battista from 2003 to 2006. From 2006 and 2009, she was Senior Labor and Employment Counsel for the Senate HELP Committee (working for Senator Edward M. Kennedy).

Richard Griffin: President Obama used the recess appointment process to appoint Mr. Griffin to the NLRB on January 4, 2012. He has been a Member of the NLRB since that date. Immediately prior to his recess appointment he was the General Counsel for International Union of Operating Engineers (IUOE); he had been part of the IUOE leadership since 1983. Additionally, since 1994 Mr. Griffin also had served on the board of directors for the AFL-CIO Lawyers Coordinating Committee. Mr. Griffin earned a law degree from Northeastern University School of Law in 1981 and served as a Counsel to NLRB Board Members for two years (1981-1983).

Bullard Law will continue to monitor these nominations and other developments affecting the NLRB. Please also feel free to contact us anytime with any questions about these matters or any other labor, employment, or benefits issues.

~MICHAEL G. MCCLORY

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