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Client Bulletin #455

OBAMA'S "RECESS" APPOINTMENTS TO NLRB:
WILL THEY STAND?

By David Phippen
Fairfax - Metro Washington D.C. Office

Last week President Barack Obama announced "recess" appointments to the National Labor Relations Board of his three currently-pending Board nominees, two Democrats and one Republican. With these appointments the Board again will be at full strength with five members: three Democrats and two Republicans. The two Board members before the appointments were Chairman Mark Pearce, a Democrat, and Brian Hayes, a Republican. (Member Craig Becker's recess appointment expired on December 31.)

With respect to the latest appointees, "recess" is in quotation marks because Congress was not technically in recess on January 5, when the President made these appointments. Normally, recess appointments take place when Congress is not in session in order to fill positions without any need for Senate confirmation. In this case, Republican representatives technically prevented a recess from occurring by holding *pro forma* sessions at least once every three days. The President apparently considers the break with *pro forma* sessions to be the equivalent of a recess, but it is not at all clear that he is right. Already the U.S. Chamber of Commerce has indicated that it is considering filing suit to block the appointments. How this and any other challenges to the appointments play out will definitely be worth watching.

The Appointees

Sharon Block. Sharon Block (D) was Deputy Assistant for Congressional Affairs at the U.S. Department of Labor. Press reports indicate that before her DOL position, she was an attorney in private practice, an attorney at the Board, Assistant General Counsel at the National Endowment for the Humanities, and Senior Labor and Employment Counsel for the Senate Health, Education, Labor, and Pensions Committee, working for now-deceased Sen. Edward M. Kennedy (D-Mass.). Separately from the "recess" appointment, she was nominated to the NLRB through the normal process on December 14, 2011, but she has yet to be confirmed by the Senate.

Richard Griffin. Richard Griffin (D) was most recently General Counsel of the International Union of Operating Engineers and a member of the AFL-CIO Lawyers Coordinating Committee. Before his lengthy career with the IUOE, he served two years as a lawyer at the Board. Like Block, Griffin's "normal" nomination to the Board is pending Senate confirmation.

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Terence Flynn. Terence Flynn (R) is a former management-side law firm attorney who most recently served as Senior Counsel to Member Brian Hayes (R). Flynn was nominated for a seat on January 5, 2011, but his nomination stalled in the confirmation process.

What's Next

Whether the appointees will be seated and for how long, and whether the nominations will get to a confirmation vote in the Senate are in question. We do expect legal challenges to the appointments, whether from the Chamber of Commerce or elsewhere. The challenges are expected to have a constitutional dimension, implicating the balance of powers between the Executive and Legislative branches of the federal government, particularly since Congress was still in session when the "recess" appointments were made.

With respect to Senate confirmation activity, Sen. Lindsey Graham (R-SC) has vowed expressly to block all nominations to the Board until he has a full accounting of what took place at the Board in connection with the recently withdrawn Boeing complaint, which drew much attention in the press. In a December 13 press release, Sen. Graham said, "Given its recent actions, the NLRB as inoperable could be considered progress." More recently, Sen. Graham has been quoted as saying that he "will continue to do everything in his power to put the brakes on the NLRB as currently constructed." Likewise, in the House of Representatives complaints were easy to find. House Education and Workforce Committee Chairman John Kline (R-MN) stated that "every decision issued by this board will be tainted."

As has become the norm with the breakneck-paced labor activity in Washington, stay tuned. Constangy will keep you posted about developments as they occur.

If you have any questions about these developments, please contact any member of Constangy's **Labor Relations Practice Group**, or the Constangy attorney of your choice.

About Constangy, Brooks & Smith, LLP

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