

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

<b>NESTLE DREYER’S ICE CREAM CO.</b>	)	
	)	
<b>Petitioner/Cross-Respondent</b>	)	
	)	
<b>v.</b>	)	<b>No. 12-1684</b>
	)	
<b>NATIONAL LABOR RELATIONS BOARD</b>	)	
	)	
<b>Respondent/Cross-Petitioner</b>	)	<b>Board Case No.</b>
	)	<b>31-CA-74297</b>

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD  
TO VACATE AND REMAND AND FOR EXPEDITED ISSUANCE  
OF MANDATE IN LIGHT OF *NLRB V. NOEL CANNING***

To the Honorable, the Judges of the United States  
Court of Appeals for the Fourth Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, respectfully requests that the Court vacate the Board’s order and remand this case to the Board for further consideration in light of the Supreme Court’s decision in *NLRB v. Noel Canning*, No. 12-1281, \_\_\_ S. Ct. \_\_\_, 2014 WL 2882090 (June 26, 2014) (“*Noel Canning*”). The Board further requests that the Court expedite issuance of the mandate and return the record to the Board, so that the Board may promptly exercise jurisdiction over the matter.

In support of this motion, the Board shows as follows:

1. On January 13, 2014, this Court placed this case in abeyance in light of *Noel Canning*. Prior to that time, the Board filed the certified list.

2. On June 26, 2014, the Supreme Court issued its decision in *Noel Canning*, which held that three Board members who received recess appointments in January 2012 were not validly appointed. Thus, under *Noel Canning*, the Board recognizes that the Board panel was not properly constituted.

3. The Board now has a full complement of five Senate-confirmed members, all of whose appointments are indisputably valid. Accordingly, the Board moves for a remand to enable the full Board, or a properly constituted Board panel, to take appropriate action on the case.

4. Remand for consideration by a properly constituted tribunal is an appropriate course when it is established that the initial panel was improperly constituted. *See Nguyen v. United States*, 539 U.S. 69, 83 (2003) (remanding case to court of appeals where panel was improperly constituted; “it is appropriate to return these cases to the Ninth Circuit for fresh consideration . . . by a properly constituted panel”). *See generally Ford Motor Co. v. NLRB*, 305 U.S. 364, 374 (1939) (reviewing court may remand case for the Board to “take further action in accordance with the applicable law”).

5. Consistent with *Nguyen v. United States*, this Court has previously remanded pending Board cases following a determination that they were decided by an improperly constituted panel. In *New Process Steel L.P. v. NLRB*, 560 U.S. 674 (2010), the Supreme Court held that a two-member quorum of a three-member

group delegated all the Board's powers did not have authority to issue decisions once the group's (and the Board's) membership fell to two. Following that decision, this Court remanded pending two-member Board decisions for further proceedings consistent with the Supreme Court's decision. *See Diversified Enters., Inc. v. NLRB*, Case Nos. 09-1464, 09-1537 (4th Cir., July 23, 2010), ECF No. 66, on remand 355 NLRB 492 (2010), *enforced*, 438 F. App'x 244 (4th Cir. 2011); *McElroy Coal Co. v. NLRB*, Case Nos. 09-1332, 09-1427 (4th Cir., August 20, 2010), ECF No. 50, on remand 355 NLRB 604 (2010), *enforced*, 411 F. App'x 670 (4th Cir. 2011).

6. Because the recess appointment question has significantly delayed final disposition of the parties' dispute, the Board requests that the Court exercise its discretion to issue the mandate forthwith and return the record, so that the Board may give prompt consideration to the case. *See Fed. R. App. P. 41(b)* (court has discretion to "shorten or extend the time" for issuing mandate); *Johnson v. Bechtel Assocs. Prof. Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986) (court of appeals may issue mandate immediately after judgment when it is satisfied that neither rehearing nor rehearing in banc nor Supreme Court review is likely or appropriate); *Diversified Enters., Inc. v. NLRB*, Case Nos. 09-1464, 09-1537 (4th Cir., July 23, 2010), ECF No. 67 (order issuing mandate upon entry of judgment); *McElroy*

*Coal Co. v. NLRB*, Case Nos. 09-1332, 09-1427 (4th Cir., August 20, 2010), ECF No. 51 (same).

7. On June 30, 2014, counsel for the Board conferred with Ryan Parsons, counsel for Nestle Dreyer's Ice Cream Co., and left a voice message with Adam Stern, counsel for Local 501, International Union of Operating Engineers. Board counsel was unable to determine the position of the Company or the Union on this motion prior to filing.

WHEREFORE, the Board respectfully requests that, in light of the Supreme Court's decision in *Noel Canning*, this Court vacate the Board's order and remand the case, and act expeditiously to return the record to the Board and issue mandate or other final disposition.

Respectfully submitted,

/s/ Linda Dreeben  
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Dated at Washington, DC  
this 1st day of July 2014

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 1, 2014, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC  
this 1st day of July 2014