

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

NATIONAL LABOR RELATIONS BOARD)

Petitioner)

v.)

ENTERPRISE LEASING COMPANY)
SOUTHEAST, LLC)

Respondent)

No. 12-1514

Board Case No.
11-CA-73779

HUNTINGTON INGALLS INCORPORATED)

Petitioner/Cross-Respondent)

v.)

NATIONAL LABOR RELATIONS BOARD)

Respondent/Cross-Petitioner)

and)

INTERNATIONAL ASSOCIATION OF)
MACHINISTS AND AEROSPACE WORKERS)

Intervenor)
_____)

Nos. 12-2000, 12-2065

Board Case No.
5-CA-81306

PETITION FOR REHEARING

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, hereby files this petition for rehearing for the limited purpose of requesting that the Court (Senior Circuit Judge Hamilton and Circuit Judges

Duncan and Diaz) modify its July 17, 2013 order and judgment in these two cases to explicitly provide that the cases are remanded to the Board for further proceedings consistent with the Court's opinion. This petition for rehearing raises the same matter raised by the petition for rehearing in *Huntington Ingalls Inc. v. NLRB* (Nos. 12-200 and 12-2065), filed, on August 16, 2013, by Intervenor International Association of Machinists and Aerospace Workers. The Board believes that the omission of this explicit language from the order and judgment was overlooked in the Court's decision, thus justifying this petition pursuant to Local Rule 40(b). Moreover, because this omission identically affects the order and judgment in *NLRB v. Enterprise Leasing Co.* (No. 12-1514), the Board, as a party in both cases, is filing this petition to ensure that any modification of the Court's order and judgment made in response to Intervenor's petition for rehearing in *Huntington* applies to both *Huntington* and *Enterprise*. Treating the two cases identically is also prudent given the likelihood of a petition for certiorari seeking review of this Court's consolidated decision, with the suggestion that the Supreme Court hold such petition pending disposition of *NLRB v. Noel Canning, et al* (No. 12-1281), cert. granted, June 24, 2013.

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

1. On July 17, 2013, the Court issued its decision in these two Board cases, which the Court had consolidated for purposes of argument and decision. Each

case presented a labor law issue as well as a constitutional challenge to the validity of the President's January 4, 2012 recess appointments of members to the Board. In an attempt to resolve each case on non-constitutional grounds, the Court first reviewed the merits of the labor law issues. In *Enterprise*, the Court concluded (slip op. 8-23) that substantial evidence supported the Board's decision not to set aside the results of the election in which the employees had chosen union representation. In *Huntington*, the Court upheld (slip op. 23-52) the Board's ruling concerning the contours of the bargaining unit.

Having so found, the Court stated that it was required to reach the constitutional issue in order to resolve the cases. The panel majority (slip op. 52-125) concluded that the recess appointments were invalid and, accordingly, "[b]ecause the Board lacked a quorum of three members when it issued its 2012 unfair labor practice decisions in both the *Enterprise* and *Huntington* cases, its decisions must be vacated. *New Process Steel*, 130 S. Ct. [2635,] 2644-45 [2010]." (slip op. 124). The Court's order then provided "ENFORCEMENT DENIED" (slip op. 125). The Court's judgment, issued the same day, denies enforcement.

2. The Board submits that the Court's decision clearly recognizes that these cases could be considered, and appropriate final orders entered, in further Board proceedings consistent with the Court's opinion. The Court's denial of enforcement is not based on the merits of the Board's unfair labor practice

determinations, but *solely* on the Court's determination that the recess appointments to the Board were unconstitutional, and that the Board orders, issued without a Board quorum, therefore "must be vacated." Accordingly, it follows that the Court's decision is to be read as anticipating the possibility of issuance of new Board orders.

The Court's citation (slip op. 124) to *New Process Steel, L. P. v. NLRB*, 130 S. Ct. 2635 (2010), confirms the Board's understanding. After the Supreme Court's decision in *New Process Steel*, holding that the Board did not have authority to issue decisions when its membership fell to two, this Court resolved pending two-member Board cases by "grant[ing] the petition for review, vacat[ing] the Board's order, and remand[ing] to the Board for further proceedings." *McElroy Coal Co. v. NLRB*, 392 F. App'x 137 (4th Cir. 2010); *see also FOLA Coal Co. v. NLRB*, 387 F. App'x 317 (4th Cir. 2010).

3. Notwithstanding that the meaning of the Court's decision is clear in the Board's view, experience after the Supreme Court's decision in *New Process* demonstrated that a judgment in the form "enforcement denied" can engender needless litigation. *See NLRB v. Whitesell Corp*, 638 F.3d 883, 888-89 (8th Cir. 2011) (discussing mandamus and other litigation challenging the Board's conducting further proceedings after enforcement had been denied without a

remand).¹ To avoid any possibility of similar issues arising in these two cases, depending on the outcome in the *Noel Canning* case before the Supreme Court, the Board respectfully requests that rehearing be granted for the limited purpose of clarifying the order and judgment to explicitly provide that the cases are remanded to permit further proceedings consistent with the Court's opinion.²

4. This Court's decision in *NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26 (4th Cir. 1996), which held that an order that denied enforcement to a Board decision without providing for a remand prevented the Board from further processing of the case, does not apply here. Significantly, in *Lundy*, this Court had denied enforcement based on its rejection of the Board's unfair labor practice findings entered by a Board of unchallenged validity. *See NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995). In contrast, here, the Court actually sustained the Board's unfair labor practice finding. It denied enforcement only because of its conclusion that the appointments to the Board were invalid and therefore the Board lacked a quorum. Thus, in the Court's view, a properly constituted Board has yet to enter an order resolving the unfair labor practice issues.

¹ In *NLRB v. Whitesell Corp.*, 638 F.3d at 889, the court held that its post-*New Process* order denying enforcement in a pending case was based solely on the invalidity of the two-member Board and did not preclude a validly constituted Board from deciding the unfair labor practice allegations originally decided by the invalid two-member Board.

² The Board now has five confirmed members.

WHEREFORE, the Board respectfully requests that this petition for rehearing be granted for the limited purpose of having the Court modify its July 17, 2013 order and judgment in these two cases to provide explicitly that the cases are remanded to the Board for further proceedings consistent with the Court's opinion.

Respectfully submitted,

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington DC 20570
(202) 273-2960

Dated at Washington, DC
this 29th day of August, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I hereby certify that the foregoing document was served on the counsel of record by using the CM/ECF system if he is a registered user or, if he is not, by serving a true and correct copy at the addresses listed below:

Daniel R. Begian
OGLETREE DEAKINS NASH
SMOAK & STEWART PC
7700 Bonhomme, Suite 650
St. Louis, MO 63105

John P. Hasman
ARMSTRONG TEASDALE LLP
7700 Forsyth Boulevard, Suite 1800
St. Louis, MO 63105

D. Michael Linihan
THE LOWENBAUM PARTNERSHIP, LLC
222 South Central Avenue, Suite 901
Clayton, MO 63105

/s/Linda Dreeben _____
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 29th day of August, 2013