



What Happens If There's No One Policing the Workplace? Senate Action Required to Maintain the NLRB

*By Erin Johansson, American Rights at Work
May 2013*

The National Labor Relations Board (NLRB) is an independent federal agency charged with protecting employees' rights to collectively improve their job standards. In January 2013, the U.S. Court of Appeals for the D.C. Circuit ruled that the Obama Administration's January 2012 recess appointments to the NLRB were unconstitutional – a ruling at odds with other circuit court decisions, but one that put the status of the current NLRB recess appointees in legal doubt.

On April 9, 2013, President Obama nominated two Republicans and a Democrat to serve on the NLRB, joining two Democrats he nominated in February. The Senate now has the opportunity to approve the nominations and ensure the NLRB will be able to operate, protecting the vital rights of employees to collectively improve their job standards.

Circuit Court ruling undermines the NLRB and vital workplace rights

In January 2012, the NLRB fell below three members and thus lacked a quorum to take action and issue decisions. In order to keep the NLRB operational, President Obama made recess appointments of three individuals to the NLRB. But in the *Noel Canning* decision issued January 25, 2013, a panel of three judges adopted an extremely narrow view of presidential recess appointment authority and ruled that Obama's recess appointments violated the Constitution.ⁱ By the court's logic, hundreds of recess appointments made by prior presidents would be invalid – including 141 appointments made by President George W. Bush.ⁱⁱ The decision called into question the Board's ability to operate, because without the recess appointees, the NLRB does not have a quorum of members. According to former Republican NLRB member Charles Cohen, "This is the most significant crisis that the Board has been in since the [National Labor Relations Act] was passed and found constitutional."ⁱⁱⁱ

Employers taking advantage of an NLRB in limbo

Noel Canning is undermining the ability of workers to freely form unions and improve job standards. Because of *Noel Canning*, the D.C. Circuit has put on hold an important rule issued by the NLRB to eliminate unnecessary delays that impede the election process.^{iv} Secondly, where workers are already moving forward with petitions to vote on unions, companies are trying to use *Noel Canning* to block those efforts. In New Jersey, nearly 300 LabCorp technicians were poised to vote on union representation when the company filed an injunction to stop the election from proceeding, citing the *Noel Canning* case and arguing the Regional NLRB had no authority to act.^v The D.C. Circuit court transferred the case to a federal court in New Jersey; meanwhile, workers still await an election.

Companies are also refusing to bargain with employees who have already voted to form a union, citing *Noel Canning*. This is the case for 80 MaxPak steelworkers and 208 Durham School Services school bus drivers in Florida – both groups organized last year, and their respective employers now refuse to bargain with them.^{vi} The nurses at Salem Memorial Hospital in New Jersey voted to form a union back in 2010, and the company has pursued several legal channels to avoid bargaining.^{vii} Though the NLRB finally ordered them to bargain in 2012, they were saved by the D.C. Circuit Court, which held that order in abeyance pending a Supreme Court review of *Noel Canning*. Mere weeks after the ruling, the *Wall Street Journal* found that at least 87 companies cited the decision to block agency actions against them – even in cases the Board has yet to rule on.^{viii}

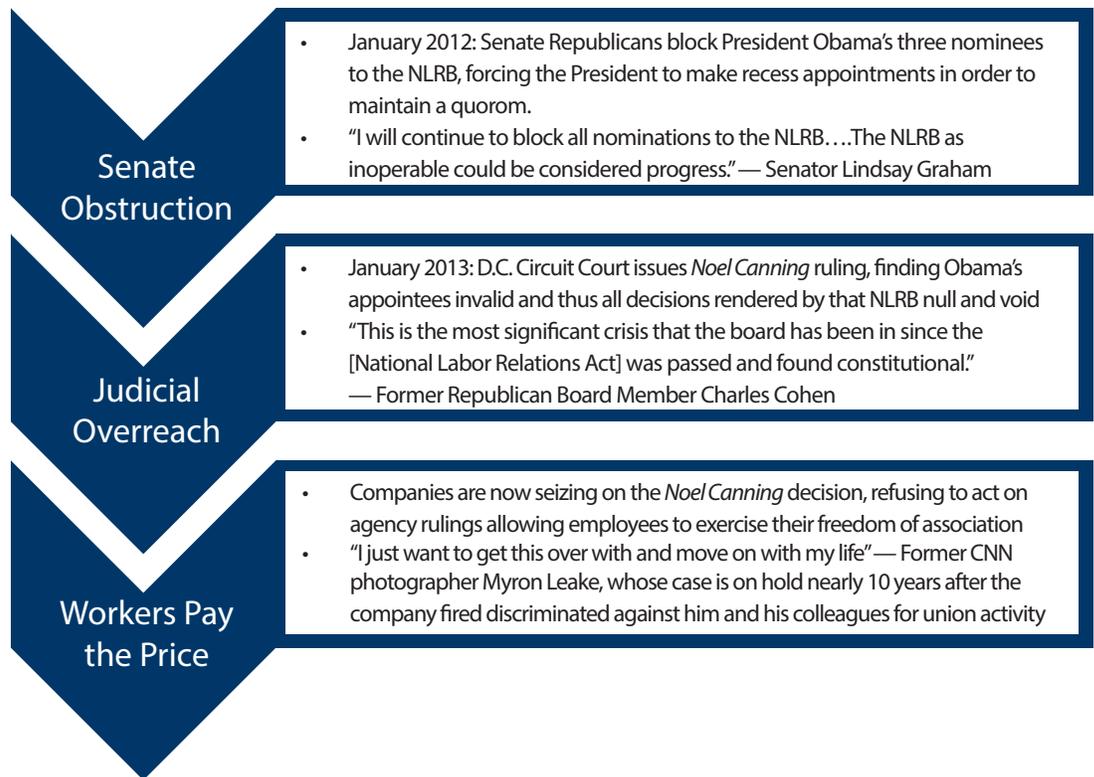
America's workers suffer the consequences when no one polices the workplace

Workers need the NLRB to enforce the law aimed at protecting workers' rights to form unions and bargain collectively with their employers. Without a functioning NLRB, employers may fire or retaliate against workers with impunity for what should be protected concerted activity. Workers who aren't necessarily in a union, but take collective action to stand up against serious workplace problems, for instance through a walk out or a strike, also need the NLRB operational to back them. Yet Americans are essentially working without federal protections for collective action on the job.

For those workers who have already suffered retaliation, their long wait for justice just got longer. Nearly 10 years ago, CNN America illegally fired and discriminated against 250 network employees in Washington, D.C., and New York for their union activity.^{ix} The company appealed the judge's 2008 order to offer employees reinstatement and back pay, and the NLRB was still considering the case when CNN America joined other companies in citing the Noel Canning decision to invalidate any further action out of the current NLRB.^x Among those CNN discriminated against is Myron Leake, who worked for the company as a news photographer from 1997–2003 and would have received back pay and a reinstatement offer through the 2008 ruling. Now his wait for justice will be even longer: "It's like a ball and chain around my feet. I just want to get this over with and move on with my life."

Time for the Senate to restore workplace protections

The Senate has a bipartisan package of NLRB nominees, which include lawyers who have represented the interests of companies, employees, and unions. The Senate must confirm the nominees as soon as possible. If the Senate fails to act, the legal havoc created by *Noel Canning* will continue, and by this August, the NLRB will lose its quorum. approve the nominations and put the NLRB back to work, protecting the freedom of association in American workplaces.



i. *Noel Canning, a Division of the Noel Corporation v. National Labor Relations Board*, No. 12-1115 (D.C. Cir. Jan. 25, 2013).

ii. Congressional Research Service. "The Noel Canning Decision and Recess Appointments Made from 1981–2013," Feb. 4, 2013.

iii. Trottman, Melanie. "Companies Challenge Labor Rulings," *Wall Street Journal*, March 8, 2013.

iv. For further information on these NLRB rules, please visit American Rights at Work's site, www.eyeonthenlr.org

v. *Laboratory Corporation of America v. NLRB*, complaint filed with the D.C. Circuit Court, March 1, 2013.

vi. *Schwarz Partners Packaging, LLC d/b/a Maxpak v. NLRB*, complaint filed with the DC Circuit Court, March 15, 2013; *Durham School Services*, (15-RC-096096), NLRB Region 15 decision, March 25, 2013.

vii. *Memorial Hospital of Salem County* (358 NLRB No. 95), July 31, 2012.

viii. Trottman, *Ibid*.

ix. *CNN America, Inc and Team Video Services*, NLRB Administrative Law Judge decision, cases 5-CA-31828 and 5-CA-33125, issued 19 November 2008.

x. Trottman, *Ibid*.