IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al.,*	)	Case No. 1:11-cv-01629-ABJ
	)	
	)	Judge Amy Berman Jackson
Plaintiffs,	)	
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO SUPPLEMENT COMPLAINTS AND
OBJECTION TO SUBSTITUTION OF DEFENDANTS

Co-Plaintiffs Coalition for a Democratic Workplace ("CDW"), National Right to Work Legal Defense and Education Foundation, Inc. ("NRTW"), National Federation of Independent Business ("NFIB"), Southeast Sealing, Inc. and Racquetball Centers, Inc. hereby submit this Memorandum in support of their Motion For Leave to Supplement their Complaints pursuant to F.R.Civ.P. 15.[1] The grounds for the Motion are that very significant events subsequent to the filing of the original Complaints, particularly within the last ten days, have caused the Defendant National Labor Relations Board to lose its authority to implement and enforce the challenged Rule. The Board has lost its quorum due to the expiration of Member Becker's term and the President's failure to appoint new Board members with the advice and consent of the U.S. Senate, as required by Article II of the Constitution. The three new purported appointees to the Board, who are identified in the Defendants' supplemental brief as "successors" to the vacant seats on the Board,

[1] Co-Plaintiff National Association of Manufacturers ("NAM") does not oppose this Motion.

do not in fact hold valid appointments to the agency. The President's purported appointment of the new Board members on January 4, 2012 was unconstitutional, null and void. As a result, there are at present only two validly serving members of the Board, Chairman Pearce and Member Hayes. The Supreme Court has declared that the Board lacks authority to act with only two members. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Therefore, the moving Co-Plaintiffs are entitled to an order from the Court declaring that the Board no longer has authority to implement or enforce the Notice Rule on its purported effective date of April 30, 2012. [2]

1. **Facts Supporting The Motion That Have Occurred Since The Filing Of The Complaints.**

As the Court is aware, on December 30, 2011, the Defendant NLRB (consisting at that time of Members Pearce, Becker and Hayes), published an order in the Federal Register delaying the effective date of the challenged Notice Posting Rule until April 30, 2012. (Docket #38, Status Report filed by Defendants). Member Becker's term subsequently expired on January 3, 2012, and he left the Board as of that date. http://www.nlrb.gov/news/white-house-announces-recess-appointments-three-fill-board-vacancies. On January 4, 2012, the President announced that he was appointing three new members to the Board, Members Block, Griffin, and Flynn. *Id*. Though the United States Senate was in session at the time of the President's appointments of the new Board members,[3] the President purported to appoint the new members without the advice and

[2] Because the new appointments are invalid, Co-Plaintiffs object to the substitution of Messrs. Block, Griffin and Flynn as Defendants in this action pursuant to F.R.Civ.P. 25, as Defendants' supplemental brief asserts should be done. Moreover, the invalidity of the appointments raises a question as to whether Defendants' counsel had valid authorization to file the supplemental brief itself, due to the absence of a quorum on the Board.

[3] By unanimous consent, the Senate voted to remain in session for the period of December 20, 2011 through January 23, 2012. Sen Ron Wyden, "Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012," remarks in the Senate, Congressional Record, vol. 157, part 195 (Dec. 17, 2011, pp. S8783-S8784.

consent of the Senate. Such advice and consent is required by Article II, Section 2, Clause 2 of the U.S. Constitution. The President improperly attempted to name the new Board members as "recess" appointments pursuant to Article II, Section 2, Clause 3, even though the Senate was not in recess at the time.

In its Supplemental Brief filed on January 10, 2012 (Docket #43), the Defendants asserted pursuant to F.R.Civ.P. 25(d) that the invalidly appointed new members of the Board are successors to the previously vacant offices of the Board and that they should be substituted as Defendants in their official capacities. The Co-Plaintiffs hereby contest that filing and seek leave to file Supplemental Complaints to incorporate each of the newly occurring events set forth above.

ARGUMENT

1. THE MOTION FOR LEAVE TO SUPPLEMENT AND/OR FURTHER AMEND THE COMPLAINTS SHOULD BE GRANTED PURSUANT TO F.R.CIV.P. 15(d) AND/OR 15(a).

F.R.Civ.P. 15(d) states that courts "may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." The D.C. Circuit has held that supplements under Rule 15(d) should be "freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action." *Hall v. CIA*, 437 F. 3d 94, 100 (D.C. Cir. 2006) (*citing United States v. Hicks*, 283 F. 3d 380, 385 (D.C. Cir. 2002) (granting motions for leave to supplement complaints). F.R.Civ.P. 15(a) further states that a party may amend its pleading with the court's leave before trial, and that "the court should freely give leave when justice so requires."

In the present case, very significant events have happened within the last ten days that create a new and substantial ground for enjoining the Defendants' challenged Rule, as set forth in the attached Supplemental Complaints. Specifically, as set forth above, the Board has lost its quorum to implement and enforce the challenged regulation due to the expiration of Member Becker's term and the failure of the President to lawfully appoint new Board members with the advice and consent of the Senate, as required by the U.S. Constitution. The Supplemental Complaints set forth the newly occurring events and state the additional grounds for declaratory and injunctive relief that arise from the new events.

The additional facts and grounds for relief presented by the proposed Supplemental Complaints are of great importance to this case, and granting the Co-Plaintiffs' Motion is the only way to dispose of the entire controversy between the parties. Granting the Motion will not cause undue delay or trial inconvenience, and will not prejudice any rights of the Defendants. The issue is also of great public interest as there is currently great doubt throughout the country as to the legitimacy of the current Board, and it is important to resolve this uncertainty as soon as possible, in the interests of Constitutional Due Process and the rule of law. As is further set forth below, the newly occurring events compel a finding by the Court that the Board does not have authority to implement or enforce the challenged Rule, thereby entitling the Co-Plaintiffs to declaratory and injunctive relief.[4]

[4] Co-Plaintiffs are filing their motion in a timely manner, *i.e.*, within ten days after the Board's loss of its quorum, within nine days after the President's invalid appointment of the new Board members, and within three days of receiving notice from the Board in the Defendants' Supplemental Brief that the invalidly appointed Board members seek to be substituted as Defendants in this case in their "official capacities."

2. THE NEW MEMBERS OF THE BOARD HAVE NOT BEEN VALIDLY APPOINTED, AND THE BOARD THEREFORE LACKS A QUORUM TO ACT.

As noted above, the Supreme Court has held that the Board lacks authority to conduct business in the absence of a quorum of at least three members. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Numerous other courts have held that an agency whose members have been improperly appointed in violation of the Appointments Clause of the U.S. Constitution or related provisions lacks authority to act, and that private parties who are adversely affected by such *ultra vires* agency action are entitled to injunctive relief. *See Ryder v. United States,* 515 U.S. 177 (1995) (individuals threatened with enforcement action by agency whose members have been appointed in violation of the Appointments Clause entitled to injunction); *see also Federal Election Commission v. NRA Political Victory Fund*, 6 F. 3d 821, 828 (D.C. Cir. 1993).

In the present case, all but two of the current putative members of the Board have been appointed in violation of the Appointments Clause of the U.S. Constitution. This is so because the President appointed Members Block, Griffin, and Flynn while the U.S. Senate was in session but without seeking or obtaining the Advice and Consent of the Senate, in violation of Article II, Section 2, Clause 2 of the Constitution. The President's claim that these appointments were somehow valid "recess" appointments is inconsistent with Article II, Section 2, Clause 3 of the Constitution, which requires that the Senate actually be in recess at the time when such appointments are made. S*ee Evans v. Stephens,* 387 F. 3d 1220, 1224 (11th Cir. 1994) (requiring a "legitimate Senate recess" to exist in order to uphold a recess appointment). *See also Wright v. United States, 302 U.S. 583 (1938);* and *Kennedy v. Sampson, 511 F. 2d 430 (D.C. Cir. 1974)* (finding that intra-session adjournments do not qualify as recesses of the Senate sufficient to deny the President the authority to veto bills, provided that arrangements are made to receive presidential messages).

The longstanding view of the Attorneys General who have issued opinions on this issue, prior to the current appointments, has been that the term "recess" as applied to intra-session appointments, includes only those intra-session breaks that are of "substantial length." *See* Memorandum Opinion for the Deputy Counsel to the President (Jan. 14, 1992), available at http://www.justice.gov/olc/schmitz.10.htm (involving an 18-day recess).[5] The "seminal" opinion of Attorney General Daugherty in 1921 established the consistently followed rule that the recess should be of such duration that the Senate could "not receive communications from the President or participate as a body in making appointments." 33 Op. Att'y Gen. 20, 24 (1921). No such break has occurred in the present case. Indeed, the Senate was in session during the period when the appointments were made and was certainly able to receive communications and participate in the appointment process.[6]

On January 6, 2012, the Office of the Attorney General issued a Memorandum Opinion purporting to justify the President's actions of January 4. The Opinion was not made public until January 12, 2012. *See* Memorandum Opinion For The Counsel To The President (Jan. 6, 2012), available at http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf. In this Opinion, the Attorney General has declared for the first time that the Senate's convening of periodic *pro forma* sessions does not have the legal effect of interrupting an intra-session recess otherwise long enough to qualify as a recess of the Senate under the Recess Appointments Clause. This Opinion is contrary to the Constitutional power vested in the Senate to "determine the Rules of

[5] The Solicitor for the Obama Administration stated on the record during the oral argument of the *New Process Steel* case at the U.S. Supreme Court that a recess must be longer than three days in order for a recess appointment to occur. Transcript of Oral Argument in *New Process Steel, L.P. v. NLRB*, Case No. 08-1457 (Mar. 23, 2010).

[6] Only days before the appointments were made, during its ongoing *pro forma* sessions, the Senate passed the payroll tax bill and communicated with the President and the House with regard to that important legislation. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011).

its Proceedings." U.S. Const. Article I, Section 5, Clause 2. The new Attorney General Opinion, by declaring the Senate sessions to be ineffective to prevent a recess, also causes the Senate to be in violation of the Constitutional requirement that neither House shall adjourn without the consent of the other for more than three days. U.S. Const. Article I, Section 5, Clause 4. The Opinion is also contradicted by the actual experience of *pro forma* sessions of the Senate, as noted above, which demonstrate that the Senate was in fact available to fulfill its constitutional duties to consider any appointments that the President wished to put forward for advice and consent. For these and other reasons, the unprecedented Opinion of the Attorney General fails to justify the President's appointments to the Board and should not be adopted by any court.

Given the invalid nature of the new appointments to the Board, the agency now lacks a quorum, and the moving Co-Plaintiffs are entitled to an injunction against any action by the Board to implement or enforce the challenged Rule. Although the previously constituted Board purported to set the effective date of the Rule as of April 30, 2012, that Board lacked the power to order implementation of the Rule as of a date when the Board's authority has expired. *New Process Steel, supra*. In any event, the currently constituted Board, lacking a quorum of validly appointed members, does not have authority to implement or enforce the Rule now or in the future. For the same reasons, the moving Co-Plaintiffs object to Defendants' assertion in Docket #43 that the new "appointees" to the Board should be substituted as Defendants in the current action.[7]

[7] Indeed, in light of the Board's lack of a quorum, some question exists as to the authorization for Defendants' counsel to take positions in this matter on behalf of the Board.

CONCLUSION

For each of the reasons set forth above, the Motion by Co-Plaintiffs CDW, NRTW and NFIB and NFIB's members for leave to supplement or further amend their complaints should be granted, and the Court should not grant the substitution of the improperly appointed putative members of the Board as Defendants in this action.

Respectfully submitted,

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