



February 13, 2013

The Honorable Phil Roe
Chairman
Subcommittee on Health, Employment,
Labor and Pensions
Committee on Education and the Workforce
2181 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20515

The Honorable Robert Andrews
Ranking Member
Subcommittee on Health, Employment,
Labor and Pensions
Committee on Education and the Workforce
2181 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Roe and Ranking Member Andrews:

On behalf of Associated Builders and Contractors (ABC), a national association of 72 chapters representing 22,000 merit shop construction and construction-related firms, I am writing in regard to today's subcommittee hearing, "The Future of the National Labor Relations Board (NLRB): What *Noel Canning v. NLRB* Means for Workers, Employers, and Unions."

On Jan. 4, 2012, President Obama ignored constitutionally established separation of powers and the rules of the U.S. Senate by appointing three individuals to the NLRB during a pro forma session. Several legal challenges were filed against the appointments, including *Noel Canning v. NLRB*, in which the ABC-led Coalition for a Democratic Workplace (CDW) was involved. On Jan. 25, 2013, a three member panel of the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) unanimously ruled that the president's recess appointments were, in fact, unconstitutional. ABC supports the D.C. Circuit's decision, which affirms the Senate's role in providing advice and consent on presidential appointments.

Uncertainty surrounding the president's unlawful intrasession recess appointments continues to raise questions regarding the NLRB's authority as it applies to recently decided cases, as well as pending and future enforcement actions and adjudications. While a handful of specific D.C. Circuit cases have been suspended awaiting further appeals in the *Noel Canning* case, the fates of most cases issued in the past year remain undetermined. This uncertainty imposes real costs on employers and other parties involved in pending NLRB actions, some of which must continue to spend thousands of dollars to resolve pending Board disputes, while others have to continue to comply with potentially invalid decisions and enforcement orders.

Neither the administration nor the NLRB has done anything to address this uncertainty in the wake of the *Noel Canning* decision. In fact, the Board has already announced that it will continue to issue decisions and carry out its statutory responsibilities. In the meantime, the NLRB, working in coordination with the U.S. Department of Justice, has yet to announce its next step in the *Noel Canning* case. Some reports have suggested that the administration is slow-walking its inevitable appeal to the U.S. Supreme Court to await a favorable outcome in another circuit court.

It is clear that the Board is unwilling to impose any kind of restraint on itself in the wake of the *Noel Canning* decision; therefore, it is now up to Congress to intervene to ensure that the NLRB does not make an already bad situation even worse. Action should be taken immediately to limit the Board's power to issue new decisions, to prevent it from enforcing decisions dating back to the president's unlawful intrasession recess appointments, and to guarantee that such restrictions stay in place until a quorum can be confirmed by the Senate.

ABC commends the subcommittee for directing its attention to this important issue, and urges swift legislative action to provide greater certainty to employers and employees in the construction industry while they await a definitive Supreme Court ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "G. G. Burr", followed by a long horizontal flourish line extending to the right.

Geoffrey G. Burr
Vice President, Federal Affairs