CONGRESSIONAL TESTIMONY

UNCHARTED TERRITORY: WHAT ARE THE CONSEQUENCES OF PRESIDENT OBAMA'S UNPRECEDENTED "RECESS" APPOINTMENTS?

Testimony before the

Committee on Oversight and Government Reform

Wednesday, February 1, 2012

Mark A. Carter, Esq.
Partner, Dinsmore & Shohl LLP
Huntington Square, 900 Lee Street, East
Charleston, WV 25301
304-357-0900

Thank you Chairman Issa, Ranking Member Cummings, and Members of the Committee for inviting me to testify on this important topic.

My name is Mark Carter. I am the labor practice group chair and a partner with the law firm of Dinsmore & Shohl. The views I express in this testimony are my own, and I am not appearing on behalf of any client or organization.

As a direct consequence of the appointments of Members Richard Griffin, Sharon Block and Terrence Flynn on January 4, 2012, every administrative decision and every administrative rule or regulation implemented by the National Labor Relations Board will be subject to appeal or attack. This vulnerability will necessarily impact the Agency's ability to accomplish its primary mission of promoting industrial peace and stability in labor relations and minimizing the likelihood that labor strife will negatively impact interstate commerce in the United States.[1]

As recently as January 26 of this year, the Chairman of the NLRB reportedly told the Associated Press that the NLRB would "push for new rules that give unions a boost in organizing members."[2] The Chairman is quoted as stating "(w)e presume the constitutionality of the president's appointments, and we go forward based on that understanding."[3]

The Chairman's reference to the constitutionality of these appointments is a critical issue. As you have heard, or will hear today, if the appointment of the three recess members is not constitutionally sound, the actions of the NLRB will be *ultra vires* and every decision, rule, regulation or official action the Agency takes will be subject to legal challenge on that basis.

In June of 2010 the United States Supreme Court issued its decision in New Process Steel, L.P. v. National Labor Relations Board.[4] In New Process Steel, the employer appealed from an adverse decision by the NLRB and the Seventh Circuit Court of Appeals.[5] The primary issue resolved by the court was whether the NLRB could issue an administrative decision with two Members resolving the case. The statute contemplates a full complement of five Board members, one of whom is designated chairman. Section 3(b) of the Act permits the Board to delegate its authority to a panel of three Members. When the administrative decision in New Process Steel was entered there were only two individuals in place at the Board, the Chairman and one Member. In its 5-4 decision authored by Justice Stevens, the Court held that in order for the NLRB to issue a viable decision, at least three individuals must compose the Board itself.

It is axiomatic that any decision, or official action taken, by an NLRB composed of two or fewer individuals is *ultra vires* and cannot be enforceable. The court rendered this decision

---

[1] See, 29 USC §151, and, Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 62 (1975).

[2] *Labor Board Chief to Push Organizing Rules*, Sam Hananel (January 26, 2012 Associated Press).

[3] *Id.*

[4] New Process Steel, L.P. v. NLRB, 130 S.Ct. 2635 (2010).

[5] New Process Steel, L.P. v. NLRB, 564 F.3d 840 (7th Cir. 2009).

despite the fact that the two-person Board had resolved almost 600 cases and fully appreciating the Board's argument that it had a desire to "keep its doors open."[6] The court concluded that the statute did not permit the Agency to "create a tail that would not only wag the dog, but would continue to wag after the dog had died."[7]

The federal courts will necessarily hear the argument that parties appearing before the NLRB have been adversely treated by the wagging tail of a deceased dog. If the courts ultimately conclude that the recent recess appointments at the NLRB were accomplished unconstitutionally, then the decisions and regulations the Agency issues that result in adverse impact to any party are vulnerable to an attack under the New Process Steel precedent. If the three recess appointees are not validly appointed then the decisions and regulations emanating from the NLRB as currently composed are actually only being issued by two individuals: Chairman Pearce and Member Hayes. If only two persons comprise the Board, their action is *ultra vires*.

With the Board actively pursuing an agenda involving rule-making and the resolution of administrative appeals, parties' rights will be impacted. In every administrative decision resolved by the Board there is a winner and a loser. Those parties who lose, whether they be a union, an employer or an employee, will be strongly incented to appeal the adverse decision to a reviewing circuit court of appeals on the basis that the NLRB was not composed of the minimum three individuals necessary to issue an enforceable order.

The uncertainty created by this state of affairs will impact labor stability and commerce. For example, if the NLRB issues an order that requires an employer to relocate work from one manufacturing plant to another, significant interests for all parties are at stake. If the parties presume the constitutionality of the NLRB appointments and comply with the order, the employer will lose its investment in the engineering of, and the use of, the new plant; the employees of the new plant will lose their jobs if the plant is not re-engineered; and the work will be relocated pursuant to the Board's direction. However, if the Board's decision is determined to be unenforceable, the work could be returned to the new facility, that plant's employees rehired and the employer would face the costs associated with the exercise. One is left to imagine the degree of labor strife that is predictable as a result of this scenario, particularly when it is recognized that the employees to whom the work was "returned" would face the loss of their jobs.

Similarly, if the Agency issues new regulations without statutory authority, those regulations would have impact on all employers, unions and employees within the NLRB's jurisdiction throughout the nation. If the NLRB were to issue a rule permitting representational election voting to be accomplished over the internet or through email, for example, and the rule was ultimately determined to be *ultra vires*, all such election certifications would be subject to

[6] New Process Steel, L.P., 130 S.Ct. at 2644-2645 (2010).
[7] New Process Steel, L.P., 130 S.Ct at 2645 (2010).

challenge, and that could precipitate dramatic labor strife between employers and unions. A certified union and the employer could be in the midst of collective bargaining only to learn that the representation status of the union was decertified because of an *ultra vires* regulation.

The obligations of the Agency to strive to accomplish its mission should not be taken lightly. The Agency, as created by Congress, does not and should not seek to enforce or advance any private rights. Rather, it is a public agency that was created to "protect the public welfare which is inextricably involved in labor disputes."[8] The Supreme Court of the United States has held that "(t)he Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce."[9]

While the Agency may presume the constitutionality of the appointments, it is not the province of the Board to make that determination. If the Agency is wrong in that presumption, significant debilitation to labor stability and interstate commerce is likely to follow. Even if the Agency is correct, other parties within the purview of the NLRB may, and are likely to, presume the unconstitutionality of the appointments and act accordingly. Their presumptions will invite the courts to resolve the issue but may also incent the parties to act as if their presumptions are inevitable and result in unnecessary labor strife or frustrate interstate commerce. For example, a union that presumes the unconstitutionality of the appointments may forego a petition to represent employees who desire collective bargaining because it has concluded that a certification under an *ultra vires* election procedure is counter-productive.

The consequences of the recess appointments of Members Griffin, Block and Flynn, through no fault of their own, are that in every litigation resolved by the Agency and with regard to every rule or regulation implemented by the Agency during their tenure, anyone who desires to challenge that action may under New Process Steel. Regardless of whether those challenges are successful or not, the Agency's mission to minimize labor strife and remove obstructions to interstate commerce will be frustrated. It is likely that increased labor strife and more challenges to commerce will result.

[8] Garner, et al. v. Teamsters, 346 U.S. 485, 493 (1953).
[9] Garner, et al. v. Teamsters, 346 U.S. 485, 493-494 (1953).

Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name:

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2009. Include the source and amount of each grant or contract.

None

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

None

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2008, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None

I certify that the above information is true and correct.

Signature:

Date: January 30, 2012

DINSMORE & SHOHL LLP

Attorneys at Law

CHARLESTON
Huntington Square
900 Lee Street, Suite 600
Charleston, WV 25301
Phone (304) 357-0900
www.dinsmore.com

MARK A. CARTER

Mark Carter is a partner with the law firm of Dinsmore & Shohl LLP's Charleston, West Virginia offices. Mr. Carter practices exclusively within the area of labor and employment law and is the Labor Practice Group Chair of the firm. He is a Fellow of the College of Labor and Employment Lawyers, is listed in the Best Lawyers of America and Chambers, America's Leading Lawyers for Business, and is rated one of the top ten attorneys in West Virginia by Super Lawyers Magazine. He is also an international speaker, author and past officer of the American Bar Association Section of Labor and Employment Law.

Mr. Carter is the Past Management Chair of the Annual Meetings subcommittee of the Section of Labor and Employment Law of the ABA. Prior to holding this office, Mr. Carter was the Management Chair of the National Institutes subcommittee of the Section and Management Chair of the Antitrust, RICO and Labor Law Committee of the ABA. Mr. Carter is established on the Board of Advisers of *The Civil RICO Report.* He has spoken numerous times at the ABA Annual Meeting as well as for the United States Chamber of Commerce, the Canadian Association of Counsel To Employers, the National Council of Agricultural Employers, the Labor Policy Association, and other national and international associations.

Mr. Carter is an accomplished author in the area of labor and employment law. He is a co-author of *Union Violence: The Record and the Response by Courts, Legislatures and the NLRB,* George Mason University (1999) (with Thieblot, Haggard and Northrup). Mr. Carter is a contributing editor of *The Developing Labor Law,* BNA Publications (2000). His publications also include: *The Criminal Element of Neutrality Agreements*, 25 Hofstra Labor & Empl. L.J. No. 1 (Fall 2007) (with Burton); *Using RICO To Take the Wind Out of a Corporate Campaign,* Labor Policy Association (1998); *The Case For Justice, Why Statutory Labor Preemption of RICO Actions Arising Out of Labor Disputes Should Not Be Enacted,* Program Paper, ABA Section of Labor and Employment Law (1995); and *Civil vs. Criminal Contempt-What Process is Due?,* Vol. 16 E.M.L.Inst. 85 (1995) (with Althen).

Mr. Carter enjoys a national law practice. He has practiced in the majority of the United States and the District of Columbia. Mr. Carter's practice focuses on the traditional labor practice before the NLRB, federal and state court litigation involving labor unions, and collective bargaining with labor unions. He also advises and litigates for clients in the area of employment law.

In April of 2002, Mr. Carter was appointed by President George W. Bush to the Federal Service Impasses Panel where he served until February of 2009. As a Member of the Panel, Mr. Carter worked with six colleagues to resolve collective bargaining impasses between unions representing federal employees and the Agencies of the United States.

Mr. Carter is a native of Berrien Springs, Michigan. He received his undergraduate degree in 1982 from The University of Michigan-Ann Arbor where he was a Burnett Scholar and graduated with high distinction. He received his *Juris Doctorate* from West Virginia University in 1986 where he graduated eighth in his class.