



# Third Circuit Upholds National Labor Relations Board Determinations Despite Lacking a Quorum of Members

Client Advisories

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On April 21, 2016, the United States Court of Appeal for the Third Circuit, the federal appeals court for the Delaware Valley, issued an important decision on whether the past actions of the National Labor Relations Board (NLRB) are valid, even though the NLRB for a period of time did not have enough Members to make decisions. While the Third Circuit did not create a blanket rule that all NLRB decisions are valid despite a lack of a quorum, it did hold - in *Advanced Disposal Services East, Inc. v. National Labor Relations Board*, Docket Nos. 15-2229 and 15-2321 - that where there is proper ratification of the previously unauthorized conduct, the decision and determinations will be upheld.

The tortured history of the *Advanced Disposal* case begins with the volatile political climate from January 2012 until August 2013. During that twenty-month period, the Obama Administration and the Republican-led Congress fought over whether the NLRB's five Members were all legally appointed. The Obama Administration had been unable to obtain United States Senate approval for three of the five Members, and decided to appoint the three other Members using so-called "recess appointments" where the seats were filled unilaterally by the President during a Senate recess. The Senate contended that no recess ever took place (by convening literally for minutes on certain days with virtually no one in attendance), thereby setting up the legal battle over whether the three Members were properly sitting on the NLRB. The United States Supreme Court ultimately ruled in favor of the Republican-led Senate, in the *Noel Canning* decision, issued in June 2014. However, in doing so, the Supreme Court left for another day the issue of whether every decision by the NLRB during the twenty-month span was invalid.

The Third Circuit finally weighed in on this issue in *Advanced Disposal*. That case involved whether a union was properly certified as a bargaining representative of employees, following an NLRB-run union election held in April 2014. The election was close, so close that the NLRB Regional Director had to weigh in as to whether the election was valid, because of supposedly chaotic events on the morning of the election. The *Noel Canning* impacted that result because the Regional Director - who made the legal decision - had been appointed by the

defective NLRB in March 2013. When the Regional Director ruled against the employer in *Advanced Disposal*, the employer claimed the election decision was invalid, under *Noel Canning*, because the Regional Director was improperly put in charge.

The Third Circuit first held that *Advanced Disposal* did not forfeit its rights to challenge the Regional Director's authority because a challenge to authority is an extraordinary circumstance, which can be raised for the first time on appeal. However, the Third Circuit ultimately agreed with the NLRB's decision, despite the presence of a Regional Director who had been appointed without a quorum. In doing so, the Third Circuit agreed that the Regional Director lacked legal authority, but upheld the decision because the NLRB subsequently "ratified" the decision.

Specifically, the Third Circuit looked at whether later actions by the NLRB ratified the decisions made when no quorum was present. The test used was whether the person/entity ratifying the conduct: (1) now has the authority to take the action it is ratifying, (2) has full knowledge of the material facts and decision it is ratifying, and (3) makes a detached and considerate affirmation. So, even though the Regional Director lacked authority pursuant to *Noel Canning*, the NLRB in July 2014, at a time when it was properly appointed, specifically approved and ratified all previous administrative and personnel decisions from January 2012 through August 2013, and expressly and separately did so regarding this Regional Director's appointment. During this same month, the Regional Director also generally affirmed and ratified all of his determinations and conduct. The Third Circuit found the NLRB's July 2014 ratification valid because it was specific and showed reconsideration of the material facts. So, although the court appeared to take issue with the Regional Director's blanket ratification of all prior decisions, the court found that the Regional Director met the specific requirement of reconsideration and affirmation of the prior decisions.

In summary, the *Advanced Disposal* case stands for the important proposition that *Noel Canning* does not invalidate actions taken by the NLRB or its appointees, even where a quorum was lacking, as long as the NLRB and/or the appointees have properly ratified the previously unauthorized conduct, after a quorum was established.

If you have questions about the Third Circuit's ruling in *Advanced Disposal*, please contact any member of Archer's **Labor & Employment Group** in Haddonfield, N.J., at (856) 795-2121, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, in Philadelphia, Pa., at (215) 963-3300, or in Wilmington, Del., at (302) 777-4350.

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