

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

|                                     |   |                |
|-------------------------------------|---|----------------|
| LITTLE RIVER BAND OF OTTAWA INDIANS | ) |                |
|                                     | ) |                |
| Petitioner/Cross-Respondent         | ) | Nos. 13-1464   |
|                                     | ) | 13-1583        |
| v.                                  | ) |                |
|                                     | ) | Board Case No. |
| NATIONAL LABOR RELATIONS BOARD      | ) | 07-CA-051156   |
|                                     | ) |                |
| Respondent/Cross-Petitioner         | ) |                |

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD  
TO VACATE AND REMAND AND FOR EXPEDITED ISSUANCE  
OF MANDATE IN LIGHT OF *NLRB v. NOEL CANNING***

To the Honorable, the Judges of the United States  
Court of Appeals for the Sixth Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, respectfully requests that the Court vacate the Board’s order and remand this case to the Board for further consideration in light of the Supreme Court’s decision in *NLRB v. Noel Canning*, No. 12-1281, \_\_ S.Ct. \_\_, 2014 WL 2882090 (June 26, 2014) (“*Noel Canning*”). The Board further requests that the Court act expeditiously in returning the record to the Board and issuing mandate or other final disposition, so that the Board may promptly exercise jurisdiction over the matter.

In support of this motion, the Board shows as follows:

1. On May 24, 2013, the Board filed the certified list in this case.

Subsequently, the parties completed briefing and the Court heard argument on October 8, 2013.

2. On June 26, 2014, the Supreme Court issued its decision in *Noel Canning*, which held that three Board members who received recess appointments in January 2012 were not validly appointed. Thus, under *Noel Canning*, the Board recognizes that the Board panel was not properly constituted.

3. The Board now has a full complement of five Senate-confirmed members, all of whose appointments are indisputably valid. Accordingly, the Board moves for a remand to enable the full Board, or a properly constituted Board panel, to take appropriate action on the case.

4. Remand for consideration by a properly constituted tribunal is the appropriate course when it is established that the initial panel was improperly constituted. *See Nguyen v. United States*, 539 U.S. 69, 83 (2003) (remanding case to court of appeals where panel was improperly constituted; “it is appropriate to return these cases to the Ninth Circuit for fresh consideration . . . by a properly constituted panel”). *See generally Ford Motor Co. v. NLRB*, 305 U.S. 364, 374 (1939) (reviewing court may remand case for the Board to “take further action in accordance with the applicable law”).

5. Consistent with *Nguyen v. United States*, this Court has previously remanded pending Board cases following a determination that they were decided

by an improperly constituted panel. In *New Process Steel L.P. v. NLRB*, 560 U.S. 674 (2010), the Supreme Court held that a two-member quorum of a three-member group delegated all the Board's powers did not have authority to issue decisions once the group's (and the Board's) membership fell to two. Following that decision, this Court remanded pending two-member Board decisions for further proceedings consistent with the Supreme Court's decision. See *Galicks, Inc. v. NLRB*, Case Nos. 09-1972, 09-2141 (6th Cir., June 24, 2010), ECF No. 80, on remand 355 NLRB 366 (Aug. 6, 2010), *enforced*, 671 F.3d 602 (6th Cir. 2012); *SPE Utility Contractors, LLC v. NLRB*, Case Nos. 09-1692, 09-1730 (6th Cir., June 29, 2010), ECF No. 50, on remand 355 NLRB 349 (2010), *enforced by default judgment*, Case No. 10-2033 (6th Cir., December 21, 2010), ECF No.30.

6. The Board requests that the Court exercise its discretion to issue the mandate forthwith and return the record, so that the Board may give prompt consideration to the case. See Fed. R. App. P. 41(b) (court has discretion to "shorten or extend the time" for issuing mandate); *Johnson v. Bechtel Assocs. Prof. Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986) (court of appeals may issue mandate immediately after judgment when it is satisfied that neither rehearing nor rehearing in banc nor Supreme Court review is likely or appropriate); *Galicks, Inc.*, Case Nos. 09-1972, 09-2141 (6th Cir., June 24, 2010), ECF No. 83 (order granting expedited mandate); *SPE Utility Contractors*, Case Nos. 09-1692, 09-1730 (6th Cir., June 29, 2010), ECF No. 55 (same).

9. Counsel for Petitioner/Cross-Respondent, Kaighn Smith, has indicated that the Band is not in a position to take a position on the Board's motion at this time.

WHEREFORE, the Board respectfully requests that, in light of the Supreme Court's decision in *Noel Canning*, this Court vacate the Board's order, remand the case, and act expeditiously to return the record to the Board and issue mandate or other final disposition.

Respectfully submitted,

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1099 14th Street, N.W.

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC

This 7th day of July 2014

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 7, 2014, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF.

/s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
This 7th day of July 2014