

Federal Judge Rules NLRB General Counsel's Appointment Invalid

August 22, 2013 | [National Labor Relations Board, Labor Relations](#)

Although all five NLRB members have been properly confirmed, there remains an issue with the status of the Acting General Counsel, Lafe Solomon. On Aug. 13, 2013, United States District Judge Benjamin H. Settle of the Western District of Washington dismissed the petition of Region 19, of the NLRB seeking injunctive relief pursuant to section 10(j) of the Act. In reaching that determination, Judge Settle reviewed whether the NLRB had the authority to issue the complaint underlying the request for injunction.

Finding recent case law in the 3rd and 4th Circuits persuasive, Judge Settle ruled that President Obama's recess appointments to the NLRB were improper because the Senate was not actually adjourned at the time the President made the appointments and that, accordingly, the Board, as constituted with the recess appointments, did not have authority to act. The NLRB argued that even if the recess appointments were improper, it had the authority to initiate legal actions pursuant to the General Counsel's authority to delegate such actions. Judge Settle disagreed, finding that the appointment of the NLRB's current Acting General Counsel, Lafe Solomon, also was improper and that he too lacked authority to the filing of the underlying complaint. In making that determination, Judge Settle ruled that President Obama's appointment of Solomon pursuant to the Federal Vacancies Reform Act (the FVRA), which permits the appointment of a person under specific circumstances, was not proper because none of the circumstances required by the FVRA were met.

Though the Board now has five confirmed members, this case shows that the issues we have discussed related to the *Noel Canning* line of cases challenging the President's recess appointments is not coming to an immediate end, and that any decision reached by the Board during the pendency of those appointments is potentially challengeable.

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