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The Future of the NLRB: What *Noel Canning vs. NLRB* Means for Workers, Employers, and Unions
U.S. House Committee on Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions

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Mr. Chairman, Members of the Subcommittee, I am delighted to appear before you today on this very important topic – The Future of the NLRB: What Noel Canning vs. NLRB Means for Workers, Employers, and Unions. I am Lawrence Lorber, currently a partner in the Proskauer law firm and co-chair of the firm's Washington Labor and Employment practice. During my career I have held several positions which have enabled me to deal with the interplay between these laws. I was a lawyer in the Solicitor's Office at the US Department of Labor and then Executive Assistant to the Solicitor. This was a time when there was a flurry of additions to the labor and employment law catalogue including the passage of OSHA, ERISA, the enhanced treatment of the affirmative action and other obligations for government contractors and the enactment of the Rehabilitation Act. In 1975 I was appointed Deputy Assistant Secretary of Labor and Director of the Office of Federal Compliance Programs. Since I have been in private practice, I have dealt with a variety of labor and employment issues, many of which dealt with enforcement and compliance with various statutes as well as investigating charges brought by employees or the government agencies. In 1991 I was counsel to the Business Roundtable in the discussions which lead to the passage of the Civil Rights Act of 1991. And in 1995, I was one of the five attorneys appointed by the Congressional Leadership to the first Board of the Office of Compliance, which was charged with the establishment of the Congressional Accountability Act. For the past five years I have served as the Chair of the EEO Subcommittee of the Labor

Committee of the US Chamber of Commerce. My testimony today is solely my own and I do not represent my firm, its clients or any organization with which I have affiliations.

My colleagues on this panel will discuss some of the specifics of *Noel Canning* in great detail. However, because of my background, it was thought that I could add to the dialogue by discussing some decisions of the January 4th Recess Board which suggest that this Board may have misunderstood the role the NLRB plays and the NLRA in the interface between the myriad labor and employment laws which employers must deal with. In particular, I will discuss the implications of *Banner Health System d/b/a Banner Estrela Medical Center and James A. Navarro* and *Fresenius USA Manufacturing and International Brotherhood of Teamsters, Local 445.* Both of these decisions show a surprising disregard of the necessity for the NLRB to interpret the NLRA in a manner consistent with its own purposes but at the same time consistent with the related employment, labor and governance laws which impact the employment relationship.

The National Labor Relations Act is but one of a multitude of federal, state and local statutes which regulate various aspects of the employment relationship. Indeed, the Supreme Court has made it clear on multiple occasions that the National Labor Relations Board must be cognizant of other employment and labor related statutes when it interprets the NLRA. In *Southern Steamship Co. v NLRB*, 316 US 31(1942), the Court stated that "… the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to

another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task. "(Emph. added) It is this holding, repeated in various cases following *Southern Steamship* such as *Boys Market v Retail Clerks, Local 770* (1970) and *Hoffman Plastic Compounds v NLRB*, 535 US 137 (2002) which should establish the framework for the NLRB to fulfill its statutory mandate. Too, the Supreme Court has refused to uphold a rote application of standard NLRA Board jurisprudence when it would interfere with legitimate concerns based upon professional standards or other statutory commands such as the requirement that professional standards for employment selection tests be respected, and confidentiality of tests and scores be honored, *see Detroit Edison Co. v NLRB 440* US 301 (1979).

Indeed, the multiplicity of statutory employment mandates was made clear to the Congress when it was faced with the implementation of the Congressional Accountability Act, 2 USC 1301, et. seq. The Accountability Act brought to Congress and Congressional Entities 12 civil rights, labor and workplace safety laws[1]. As an appointed member of the first Board of Directors of the Office of Compliance charged with implementing the Accountability Act, we were faced with the task of not only adopting implementing regulations but also assisting the Congress with understanding and complying with these laws, all at the same time. The frequent overlap between these laws, such as complaints under OSHA and the interface with the FLRA or the wage regulation found in the FLSA with the non-discrimination requirements of Title VII or the

[1] The twelve civil rights, labor, and workplace safety laws applied by the CAA include the Occupational Safety and Health Act of 1970; the Federal Labor Relations Act; Title VII of the Civil Rights Act of 1964; the Americans with Disabilities Act; the Rehabilitation Act of 1970; the Family and Medical Leave Act; the Fair Labor Standards Act; the Age Discrimination in Employment Act; the Worker Adjustment and Retraining Act; the Employee Polygraph Protection Act; and veterans' employment and reemployment rights at Chapter 43 of Title 38 of the U.S. Code. The Act was amended in 1998 to include the provisions of the Veterans Employment Opportunities Act.

interface between the FMLA and the ADA made it clear that a key task we faced in the implementation stage was to attempt to harmonize the statutes and bring the Congress into compliance. This was not an easy task since none of the laws were given primacy over the others.

I bring these cases and the experience of implementing the Accountability Act in the context of this hearing as prelude to the discussion of certain decisions reached by the January 4th NLRB and how that body, whether properly constituted or not nevertheless has clearly and perhaps arrogantly refused to acknowledge its basic task which is to administratively interpret the NLRA in a manner consistent with the other equally compelling workplace mandates while at the same time insuring that its prime task in interpreting the NLRA itself in a reasonable fashion is met. Indeed, a close review of two decisions in particular will illuminate the fact that this Board in particular has failed to adhere to the Supreme Court's admonition in 1942 that it not "ignore other and equally important Congressional objectives". *Southern Steamship Co.*

Banner Health System d/b/a Banner Estrella Medical Center and James A. Navarro 358 NLRB 93 (2012)

Banner Health was decided by the panel of Member Hayes[2], Member Griffin[3] and Member Block.[4] In that decision, the Board interpreted the Section 7 rights of employees to engage in

[2] Confirmed by Congress- June 29, 2010

[3] Recess Appointment January 4, 2012

[4] Recess Appointment January 4, 2012

concerted activity for their mutual aid and protection to prohibit an employer's policy of attempting to keep ongoing investigations confidential until the investigation is concluded. Member Hayes dissented in part noting that there was no hard rule prohibiting the discussion of the ongoing investigation and therefore that the Board's ruling was not supported by the facts. The Board however held that any policy which purported to require ongoing investigations be confidential even if such policy was intended to protect the integrity of the investigation as found by the Administrative Law Judge ran a foul of the dictates of Section 7. Instead, the Board suggested but did not enunciate several grounds for keeping an ongoing investigation confidential including whether any witness needed protection, whether evidence was in danger of being destroyed, or whether there was a need to prevent a cover-up. However, the Board further required that such individual determination be made at the onset of an investigation, before any evidence is adduced and before the full scope of the issue being investigated is clearly articulated.

The *Banner Health* decision is remarkable in several aspects. First, and perhaps most troubling is that the Board, including the two recess members cavalierly established new precedent and created new rights without any attempt to address the significant conflict this holding would have on sister employment, labor, corporate governance and related laws. Second, this decision was issued without reference to long standing Board precedence which seemingly recognized that employers had multiple obligations to conduct investigations and that those investigations required discretion and confidentiality. As articulated in *IBM Corp,* 341 NLRB 1288 (2004):

> "The possibility that information will not be kept confidential greatly reduces the chance that the employer will get the whole truth about a workplace event. It also

increases the likelihood that employees with information about sensitive subjects will not come forward." Id. at 1293.

There is no question that the *Banner* holding conflicts with policies promulgated by sister agencies to the NLRB. For example, the EEOC has long stated that confidentiality is a critical requirement in conducting investigations, particularly involving harassment. The potential for adverse consequences against an employee who raises harassment issues or who cooperates in an investigation are significant. Indeed, the EEOC's regulations make this clear:

An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non- supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. See Vinson, 106 S. Ct. at 2408. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation. 29 C.F.R. § 1604.11(f). (emph added)

The EEOC has issued similar guidance in its Q & A to Small employers on Harassment by Supervisors. The issue is not only relevant to harassment investigations under Title VII. The ADA requires that medical information gathered from employees for purposes of determining whether a reasonable accommodation is appropriate or in investigating an ADA complaint has validity must be kept confidential. 42 USC § 12112(d)(3)(B). Similarly information gathered in course of compliance with the FMLA which includes investigating harassment or retaliation

claims under that statute must be kept in separate confidential records and cannot be disclosed. 29 CFR § 825.500(g).

And outside of the employment context, the Sarbanes-Oxley Act requires that covered employers with audit committees establish clearly articulated procedures for "(the) receipt, retention, and treatment of complaints … and (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters." 15 USC § 78j-1(m)(4)(B) (emph. added).

Remarkably, these standard and heretofore unexceptional precepts for conducting investigations have been long followed by the NLRB itself. The NLRB Case Handling Manual provides: "In order to enhance the confidentiality of the affidavit, instruct the witness not to share the affidavit with anyone other than his or her attorney or designated representative." Case3 Handling Manual, Section 10060.9. And in *NLRB v Robbins Tire and Rubber Co.* 437 US 214 (1978), the NLRB argued that that " a particularized case-by-case showing is neither required not practical, and that witness statements in pending unfair labor practice proceedings are exempt as a matter of law from disclosure while a hearing is pending." Id. at 222.

There is nothing unique about these requirements regarding conducting investigations under these other statutes or the NLRB's own case handling procedures. What is unique is the decision in *Banner Health System* where the panel in that case decided to establish separate rules for the handling of complaints under the NLRB and establish that an employer will be deemed to violate the NLRA if it follows these other statutory mandates and good investigatory practice by asking that the investigation be treated as confidential until the process is completed. Too, the "lifeline" suggested by the panel that the employer must undertake a case by case analysis *before* starting

the investigation is completely without any logic. Until the investigation is under way, facts found and witnesses identified, it would be extremely difficult to determine what should or should not be kept confidential.

However what may be logical and self apparent is apparently not so to the NLRB. Member Griffin, a member of the *Banner Health* panel spoke recently at the ABA Labor Section meeting in Atlanta. The report of the meeting included the following:

"Griffin told the ABA audience *Banner Estrella* did not hold that an employer rule or requirement for confidentiality could never be enforced. He added, however, that an employer must provide some demonstration of a business necessity for confidentiality.

…Griffin said employers with similar rules (confidentiality of investigations) or policies that failed to identify a specific business need can expect that their requirements also "can be struck down as violative of Section 8(a)(1)" of the NLRA.

"I'm willing to listen to real justification" for a requirement of employee confidentiality, Griffin said, "but not empty rhetoric". Bloomberg BNA Daily Labor Report November 5, 2012.

Perhaps Member Griffin might reconsider calling the statutory or regulatory obligations imposed on employers by other laws "empty rhetoric."

Another decision issued by the same panel also deserves mention. In *Fresenius USA Manufacturing, Inc. and International Brotherhood of Teamsters, Local 445* 358 NLRB 138

(September 19, 2012, the NLRB was faced with the situation where an employee during a decertification campaign sent union Newspapers into an employee break room which contained admitted scurrilous, sexually demeaning language and also language which could have reasonably been construed as threatening. Upon receiving complaints from female employees, the company investigated the situation, as it was required to do under Title VII, to determine who sent the newspapers and what was the intent. During the investigation several female employees came forward and filed statements that they found the newsletter writings vulgar, offensive, and threatening. After first denying that he had anything to do with the distribution of the newsletter, the employee subsequently admitted that he sent the newsletter but that he did not intend the recipients to react in the manner they did. The Administrative Law Judge noted that while election campaigns can often engender harsh or heated language, anonymous and facially demeaning and threatening language does not rise to the level of protected activity. Therefore, the Administrative Law Judge found that the discharge of the employee did not violate the NLRA.

Incredibly, a majority of the panel, members Griffin and Block reversed the ALJ and found the language and activities of the employee sending anonymous improper language was protected activity. Again, this Board has elevated the rights conferred by § 7 to outweigh the other protections afforded employees and obligations placed upon employers. As Member Hayes stated in partial dissent:

"Taken as a whole, these pronouncements confer on employees engaged in Section 7 activity a degree of insulation from discipline for misconduct that the Act neither requires nor

warrants. …Notwithstanding their disavowals, my colleagues thereby impermissibly fetter the ability of employers to comply with the requirements of other labor laws and to maintain civility and order in their workplace by maintaining and enforcing rules nondiscriminatorily prohibiting abusive and profane language, sexual harassment, and verbal, mental, and physical abuse."

The issue raised in these two decisions, as well as others by the Board consisting of a majority of members appointed on January 4, 2012, seems to suggest a view that the NLRA is not part of a mosaic of labor and employment laws designed to deal with sophisticated employment issues but rather that it stands alone, not impacted by these other laws and unaffected by judicial precedent or frankly common reason.