

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

SAGINAW CHIPPEWA INDIAN  
TRIBE OF MICHIGAN

## Petitioner/Cross-Respondent

V.

Nos. 13-1569, 13-1629

NATIONAL LABOR RELATIONS  
BOARD

Respondent/Cross-Petitioner

**THE NATIONAL LABOR RELATIONS BOARD'S OPPOSITION TO THE  
SAGINAW CHIPPEWA INDIAN TRIBE'S MOTION TO HOLD THE  
CASE IN ABEYANCE AND REPLY TO THE TRIBE'S OPPOSITION TO  
THE BOARD'S MOTION TO REMAND**

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

On July 7, 2014, the National Labor Relations Board (“the Board”) filed a motion to vacate and remand this case to the Board for further consideration in light of *NLRB v. Noel Canning*, 134 S. Ct. 2550 (June 26, 2014) (“*Noel Canning*”), which held that three Board members who received recess appointments in January 2012 were not validly appointed. The Saginaw Chippewa Tribe of Michigan (“the Tribe”) filed an opposition and a motion to hold the case in abeyance. In addition to seeking abeyance, the Tribe also requests that the Court return the record to the Board; order the Board to decide the case within 90 days; and, in the event the Board’s new decision is identical to the decision contested here, hear argument

without further briefing; or, in the event the new decision differs in any respect from the old, allow the parties to dismiss and refile new appellate proceedings. Contrary to the Tribe's Opposition, the most appropriate response to *Noel Canning* is for the Court to vacate the Board's Order, remand the case and return the record to the Board, and expeditiously issue mandate or other final disposition so that a properly constituted panel of the Board may promptly exercise jurisdiction over the matter.

1. The Tribe agrees (Opposition at 5) that the Board panel that issued the decision and order on review was not properly constituted under *Noel Canning*, and that further proceedings before a properly constituted Board panel are appropriate. In the circumstances, the most appropriate course is for the court to vacate and remand. As described in the Board's motion (at 2-3), this Court remanded pending cases following the Supreme Court's decision in *New Process Steel L.P. v. NLRB*, 560 U.S. 674 (2010), which, like *Noel Canning*, held that the issuing Board panel was not properly constituted. This and other circuits took that approach even in cases that had been briefed and argued.<sup>1</sup> And, similarly, seven

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<sup>1</sup> See, e.g., *Galicks, Inc. v. NLRB*, Case Nos. 09-1972, 09-2441 (6th Cir. June 24, 2010) (fully briefed and submitted to panel), *on remand*, 355 NLRB 366 (2010), *enforced*, 671 F.3d 602 (6th Cir. 2012); *Allied Mech. Servs. v. NLRB*, Case Nos. 08-1213, 08-1240 (D.C. Cir. Sept. 20, 2010) (fully briefed and argued; remand motion opposed), *on remand*, 356 NLRB No. 1 (2010), *enforced*, 668 F.3d 758 (D.C. Cir. 2012); *Ne. Land Servs., Ltd. v. NLRB*, Case No. 08-1878 (1st Cir. July 30, 2010) (fully briefed and argued), *on remand*, 355 NLRB 1154 (2010), *enforced*, 645 F.3d 475 (1st Cir. 2011); *County Waste of Ulster, LLC v. NLRB*,

circuits have already taken that approach since *Noel Canning* issued, including in fully briefed cases. *See, e.g., NLRB v. 833 Central Owners Corp.*, Case Nos. 13-684, 13-1240 (2d Cir. July 15, 2014) (fully briefed); *NLRB v. Salem Hosp.*, Case No. 12-3632 (3d Cir. July 3, 2014) (fully briefed); *Nestle Dreyer's Ice Cream Co. v. NLRB*, Case No. 12-1684 (4th Cir. July 29, 2014) (fully briefed); *Dresser-Rand Co. v. NLRB*, Case No. 12-60638 (5th Cir. July 23, 2014) (fully briefed); *Relco Locomotives, Inc. v. NLRB*, Case No. 13-2722 (8th Cir. July 1, 2014) (fully briefed); *DirectTV Holdings, LLC v. NLRB*, Case Nos. 12-72526, 12 72639 (9th Cir. July 2, 2014) (fully briefed); *Int'l Union of Operating Eng'rs, Local 627 v. NLRB*, Case Nos. 13-9547, 13-9564 (10th Cir. July 2, 2014) (fully briefed).<sup>2</sup>

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Case Nos. 09-1038, 09-1646 (2d Cir. July 1, 2010) (fully briefed and argued; rejecting request to impose conditions on remand), *on remand*, 355 NLRB 413 (2010), *enforced*, 665 F.3d 48 (2d Cir. 2012); *J.S. Carambola v. NLRB*, Case Nos. 08-4729, 09-1035 (3d Cir. July 1, 2010) (fully briefed), *on remand*, 356 NLRB No. 23 (2010), *enforced*, 457 F. App'x 145 (3d Cir. 2012); *Diversified Enters., Inc. v. NLRB*, Case Nos. 09-1464, 09-1537 (4th Cir. July 23, 2010) (fully briefed), ECF No. 66, *on remand*, 355 NLRB 492 (2010), *enforced*, 438 F. App'x 244 (4th Cir. 2011); *NLRB v. Coastal Cargo Co.*, Case No. 09-60156 (5th Cir. June 23, 2010) (fully briefed and argued), *on remand*, 355 NLRB 704 (2010) (briefed and argued before remand); *Leiferman Enters., LLC v. NLRB*, Case Nos. 09-3721, 09-3905 (8th Cir. July 8, 2010) (fully briefed), *on remand*, 355 NLRB 364 (2010), *enforced*, 649 F.3d 873 (8th Cir. 2011); *CSS Healthcare Servs., Inc. v. NLRB*, Case Nos. 10-10568, 10-10914 (11th Cir. July 16, 2010) (opening and responsive briefs and record excerpts filed), *on remand*, 355 NLRB 472 (2010), *enforced*, 419 F. App'x 963 (11th Cir. 2011).

<sup>2</sup> *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996), relied on by the Tribe (Opposition at 11-13), is inapposite. In that case, a properly constituted FEC had ratified an action of the prior, unconstitutionally constituted FEC, doing so while the case was pending in district court. In the circumstances, the D.C. Circuit



Those remands respect the longstanding practice, in this and other circuits, of remanding cases and relinquishing jurisdiction, even in situations where an agency must conduct further proceedings on remand and the case is likely to return to court. *See, e.g., NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953, 975 (6th Cir. 1998) (enforcing part of Board's order and remanding remainder of case for further determinations); *NLRB v. Hub Plastics, Inc.*, 52 F.3d 608, 611, 613 (6th Cir. 1995) (remanding case for reconsideration under proper standard); *Fortuna Enters., LP v. NLRB*, 665 F.3d 1295, 1303-04 & n.6 (D.C. Cir. 2011) (enforcing portion of Board order and remanding issue for reconsideration by Board). *Cf. Jays Foods, L.L.C. v. Chem. & Allied Prod. Workers Union, Local 20, AFL-CIO*, 208 F.3d 610, 613 (7th Cir. 2000) (explaining, in interpreting ambiguous remand order, that the "presumption . . . is in favor of relinquishment" of jurisdiction, and that courts will clearly indicate when they intend to "make[] a limited remand unlikely to resolve the case but intended rather to assist the court in making its decision . . ."). The Tribe's suggested procedure, that this Court retain jurisdiction while remanding, is the rare exception and typically limited to cases where the court has considered the

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rejected Legi-Tech's argument that the FEC's ratification was insufficient to cure the constitutional defect, and that dismissal was required because the FEC had to conduct the entire proceeding – from the pre-investigation stage through litigation – again. The fact that the FEC acted while the case was in district court does not support this Court maintaining jurisdiction while the Board acts. Rather, as in *Legi-Tech*, the Court should approve the procedure that the agency deems most appropriate to cure the constitutional defect – here, an unrestricted remand to the Board so it can consider the case anew.

merits and where remand is narrowly tailored to receiving evidence or making findings or conclusions with respect to a limited factual or legal question.<sup>3</sup> The Tribe has not cited any case where a court took the course it proposes, remanding an agency case for full consideration, but retaining jurisdiction to supervise the administrative proceedings.

2. Nor is the Tribe's assessment (Opposition at 10-15) of the equities accurate. Its proposed 90-day abeyance – actually a limited remand subject to court-imposed conditions – would unduly restrict the Board's discretion. The Board is entitled to manage its large docket of pending cases, which will now include cases remanded in light of *Noel Canning*, and to organize and prioritize them as it deems necessary to fulfill its statutory duty to effectuate the National Labor Relations Act. Any court-imposed supervision or deadlines would impair that critical discretion.

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<sup>3</sup> See, e.g., *NLRB v. Auciello Iron Works, Inc.*, 980 F.2d 804, 813 & n.4 (1st Cir. 1992) (resolving certain factual issues and retaining jurisdiction, but remanding to Board for limited purpose of hearing arguments and issuing supplemental decision clarifying and supporting applicable legal standard; citing other, similarly limited remands to Board); *Super X Drugs Corp. v. Fed. Deposit Ins. Corp.*, 862 F.2d 1252, 1256 (6th Cir. 1988) (retaining jurisdiction while remanding to district court for limited purpose of clarifying basis of particular, critical finding); *Aquabrom, Div. of Great Lakes Chem. Corp. v. NLRB*, 746 F.2d 334, 337 (6th Cir. 1984) (retaining jurisdiction while remanding to the Board “the sole question of whether [the employer] is a successor,” and urging – but not requiring – expeditious resolution of issue).

It is the Board's prerogative to determine how and when to consider this case anew, and, for example, whether to do so in conjunction with two other decisions issued by the same panel and applying the same Board standard for asserting jurisdiction over Indian tribes. One of those cases, *Little River Band of Ottawa Indians v. NLRB*, Case Nos. 13-1464, 13-1583, is currently pending before this Court, and the Board has also moved the Court to vacate and remand that case. The other, *The Chickasaw Nation v. NLRB*, Case Nos. 13-9578, 13-9599, was pending before the Tenth Circuit, which has granted the Board's motion to vacate and remand, specifically rejecting the Nation's request that it impose conditions on the remand. *See* Order Vacating, Remanding, and Issuing Mandate (July 22, 2014) (attached as Exh. A). Should the Tribe believe that the Board ought to prioritize resolution of its case above all others, that argument is properly made to the Board, which can also consider the issues and interests implicated in its many other cases.

The Tribe's disregard of the Board's legitimate interests, and its assertion that a court-imposed deadline for decision will not interfere with the Board's discretion, depend partly on its assumption (Opposition at 14 & n.41) that the Board will ratify all orders issued by improperly constituted panels "en masse," without further analysis or material change. The Tribe's conjecture about how the Board would proceed after remand is just that, and the Court should accord it no weight.



The Tribe unjustifiably impugns (Opposition at 2, 5-6, 9) the Board's actions in continuing to process this and other cases while the issue of the President's recess appointment authority was being litigated in multiple circuits and, eventually, in the Supreme Court. During the Board proceedings leading up to the decision at issue, and during the pendency of the case before this Court, the Board maintained that the Board panel that issued the decision was properly constituted, and proceeded to fulfill its statutory duties. As the Board panel explained in its decision in this case, the District of Columbia Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (2013), finding the January 2012 recess appointments invalid, acknowledged that its holding conflicted with decisions of at least three other courts of appeals. *Soaring Eagle Casino & Resort, an Enter. of the Saginaw Chippewa Indian Tribe of Mich.*, 359 NLRB No. 92, 2013 WL 1646049, at \*1 n.1 (Apr. 16, 2013). The Board reasonably determined that while the "question remains in litigation, and until such time as it is ultimately resolved, the Board is charged to fulfill its responsibilities under the Act." *Id.* Conversely, once the Supreme Court definitively declared the 2012 recess appointments unconstitutional in *Noel Canning*, the Board prudently and appropriately chose to move the circuit courts of appeal to return affected cases for decision by a constitutional, properly constituted panel, just as it did after *New Process Steel*.

Moreover, contrary to the Tribe's contention (Opposition at 15), remand to the Board would not inevitably "throw away" the Tribe's and this Court's

“already-significant investment in this case.” Only after a properly constituted panel of the Board issues a final decision and order on remand will it be possible to determine the relationship between the recess Board decision before the Court and the Board’s ultimate decision. At that point both the Board’s rationale and the parties who are aggrieved will be clear and the most efficient path for going forward will be clearer. As the Board’s *New Process Steel* experience demonstrates, where appropriate after a decision on remand, parties and courts can agree to various mechanisms to conserve resources already invested. For example, in several post-*New Process Steel* cases where, after remand, a properly constituted panel of the Board in fact adopted and incorporated by reference remanded decisions without significant alteration, the parties agreed to streamline their new appellate proceedings by, for example, resubmitting previously filed briefs.<sup>4</sup> It is impossible to foresee whether a similar outcome will eventuate here, but if appropriate in light of the new decision on remand in this case, the parties could reach a similar accommodation, as the Board has no less interest than the Tribe in preserving resources. Courts need not maintain cases on their dockets or monitor

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<sup>4</sup> See, e.g., *NLRB v. Galicks, Inc.*, 6th Cir. Case Nos. 10-2028, 10-2121 (October 27, 2010 Order adopting previously filed briefs and appendices in new appeal, pursuant to parties’ stipulation), ECF No. 39; *NLRB v. Domsey Trading Corp.*, 2d Cir. Case No. 10-3356 (September 9, 2010 Order submitting case to previous panel, based on briefs filed and oral argument held in pre-remand case, according to parties’ stipulation), ECF No. 23; *NLRB v. McElroy Coal Co.*, 4th Cir. Case No. 10-1989 (September 10, 2010 Order granting stipulated motion to resubmit briefs and appendix from earlier appeal), ECF No. 12.



proceedings as the Board processes remanded cases to ensure that result. *See The Chickasaw Nation v. NLRB*, Nos. 13-9578, 13-9588 (10th Cir. July 22, 2014) (unconditionally remanding case and noting that “[t]he parties may seek appropriate relief, including requesting expedited consideration in any new petition for review or application for enforcement filed following the completion of the remand proceedings”). In the event the Board materially changes either its conclusion or rationale on remand, the proper course, as the Tribe acknowledges (Opposition at 2-3, 14-16), would be for the aggrieved party to file a new petition for review, or for the Board to file a new application for enforcement.

3. Finally, the Tribe’s cursory request (Opposition at 9 n.22) for an injunction staying all Board proceedings must be rejected. The only Board proceeding before this Court, and over which it currently has jurisdiction, is the Board’s April 16, 2013 decision and order. The Tribe’s recourse in other proceedings is, as in this case, to file a petition for review if ultimately it is aggrieved by a final Board order.<sup>5</sup> To the extent the Tribe believes that unrelated proceedings currently pending before the Board should be delayed or streamlined, it should raise that issue to the Board or to the Board’s General Counsel.

WHEREFORE, the Board opposes the Tribe’s motion to place the case in

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<sup>5</sup> The Tribe’s sole challenge in the other proceedings is admittedly to the Board’s assertion of jurisdiction. As it concedes (Opposition at 7-8, & n.12), a federal district court has already confirmed that the jurisdictional determination is the

abeyance, and respectfully renews its requests that, in light of the Supreme Court's decision in *Noel Canning*, the Court vacate the Board's order, remand this case to the Board, and issue the mandate forthwith.

Respectfully submitted,

/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 30th of July 2014

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

SAGINAW CHIPPEWA INDIAN	)	
TRIBE OF MICHIGAN	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 13-1569, 13-1629
	)	Board Case No. 07-CA-53586
NATIONAL LABOR RELATIONS	)	
BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on July 30, 2014, I electronically filed the foregoing motion 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 those parties or their counsel of record through the CM/ECF system.

/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 30th day of July 2014



## **EXHIBIT A**

**FILED**

**United States Court of Appeals  
Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

**July 22, 2014**

**Elisabeth A. Shumaker  
Clerk of Court**

THE CHICKASAW NATION, further  
designation under review by the court,

Petitioner - Cross/Respondent,

v.

NATIONAL LABOR RELATIONS  
BOARD,

Respondent - Cross/Petitioner.

No. 13-9578 & 13-9588  
(D.C. No. 17-CA-025031)

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THE NATIONAL CONGRESS OF  
AMERICAN INDIANS; THE CHOCTAW  
NATION OF OKLAHOMA; NAVAJO  
NATION; OSAGE NATION;  
SOUTHERN UTE INDIAN TRIBE; UTE  
MOUNTAIN UTE TRIBE; LITTLE  
RIVER BAND OF OTTAWA INDIANS;  
SAGINAW CHIPPEWA INDIAN TRIBE  
OF MICHIGAN; AMERICAN INDIAN  
LAW SCHOLARS,

Amici Curiae.

**ORDER**

Before **GORSUCH, MATHESON, and BACHARACH**, Circuit Judges.

These matters are before us on the *Motion of the National Labor Relations Board to Vacate and Remand and for Expedited Issuance of Mandate in Light of NLRB v. Noel*

*Canning* and *Petitioner the Chickasaw Nation's Response to Motion of the National Labor Relations Board to Vacate and Remand.*

The Board asks us to vacate the Board's order, remand to the Board for further proceedings, and expeditiously issue the mandate and return the record to the Board so that the Board may promptly exercise jurisdiction over the matter.

The Chickasaw Nation does not oppose a remand but asks us to abate these appeals while the matter is remanded, so that upon returning to this court, the appeals can be promptly considered and scheduled for supplemental briefing, oral argument and disposition. The Nation also asks us to instruct the Board to expedite its consideration of the case, consistent with a 2012 agreement between the parties.

Upon consideration, the Board's motion is granted. In light of *NLRB v. Noel Canning*, No. 12-1281, 2014 WL 2882090 (June 26, 2014), we VACATE the Board's order and REMAND to the Board for further proceedings. To the extent the Nation's response contains a request for relief, it is denied. The parties may seek appropriate relief, including requesting expedited consideration, in any new petition for review or application for enforcement filed following completion of the remand proceedings.

All other pending motions are denied as moot. The clerk is directed to return the agency record to the Board forthwith.



A copy of this order shall stand as and for the mandate of the court.

Entered for the Court  
ELISABETH A. SHUMAKER, Clerk

A handwritten signature in cursive script, appearing to read "Jane K. Castro", with a horizontal line extending to the right.

by: Jane K. Castro  
Counsel to the Clerk

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT  
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Elisabeth A. Shumaker  
Clerk of Court

July 22, 2014

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**RE: 13-9578, 13-9588, Chickasaw Nation v. NLRB**  
Dist/Ag docket: 17-CA-025031, 17-CA-025121

Dear Counsel:

Enclosed please find a final order issued today by the court.

Please contact this office if you have questions.

Sincerely,



Elisabeth A. Shumaker  
Clerk of the Court

cc: Robert T. Anderson  
John Dossett  
Troy A. Eid  
Kevin Patrick Flanagan  
Matthew L.M. Fletcher  
Dan Himmelfarb  
Sarah Krakoff  
Vicki J. Limas  
George J. McCaffrey  
Harriet A. McConnell  
Kimberly G. McGrath  
Monte Tyler Mills  
Nancy Kessler Platt  
Sean Reed  
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Thomas H. Shipps  
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Paul Spruhan  
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EAS/kf