

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 12-60644

United States Court of Appeals
Fifth Circuit

FILED

August 1, 2014

Lyle W. Cayce
Clerk

ENTERGY MISSISSIPPI, INCORPORATED,

Petitioner–Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent–Cross Petitioner.

Petition for Review and Cross-Application for Enforcement
of an Order of the National Labor Relations Board
NLRB Nos. 15-CA-017213, 15-CA-018131, 15-CA-018136

Before DAVIS, SMITH, and ELROD, Circuit Judges.

PER CURIAM:*

We are petitioned to review an order of the National Labor Relations

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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Board (the “Board”) regarding a unit-clarification petition by petitioner cross-respondent Entergy Mississippi, Incorporated (Entergy”). The Board moves this court to vacate the order and remand for further consideration because, under *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board lacked a quorum. The Board also requests issuance of the mandate forthwith so that it “may promptly exercise jurisdiction over the matter.” Entergy opposes the motion “[a]nd, instead, . . . respectfully requests that the Court lift the stay of this case and consider the statutory arguments underlying this appeal, only considering the constitutional questions if necessary, in accordance with” *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

The Board’s request is consistent with our practice where the Board has acted without lawful authority. For example, in *Bentonite Performance Mineral LLC v. NLRB*, 382 F. App’x 402, 403 (5th Cir. 2010) (per curiam), citing *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), we vacated and remanded for further proceedings. Almost every circuit has vacated and remanded in light of *Noel Canning*,¹ and we see no reason to depart from that practice.

The motion to vacate and remand is GRANTED. The petition for review is GRANTED, the order is VACATED, and this matter is REMANDED for further proceedings as needed. The motion to issue the mandate forthwith is GRANTED.

¹ See *NLRB v. Salem Hosp.*, No. 12-3632 (3d Cir. July 3, 2014); *NLRB v. Dover Hospitality Servs., Inc.*, No. 13-2307 (2d Cir. July 2, 2014); *DirectTV Holdings, LLC v. NLRB*, Nos. 12-72526, 12-72639 (9th Cir. July 2, 2014); *Int’l Union of Operating Eng’rs, Local 627 v. NLRB*, Nos. 13-9547, 13-9564 (10th Cir. July 2, 2014); *Relco Locomotives, Inc. v. NLRB*, No. 13-2722 (8th Cir. July 1, 2014).