

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

REMINGTON HOTEL CORPORATION,
d/b/a THE SHERATON ANCHORAGE

and

UNITE HERE!, LOCAL 878, AFL-CIO

Cases 19-CA-32148
19-CA-32188
19-CA-32222
19-CA-32238
19-CA-32301
19-CA-32334
19-CA-32337
19-CA-32349
19-CA-32367
19-CA-32414
19-CA-32420
19-CA-32438
19-CA-32487

**RESPONDENT’S MOTION TO DISQUALIFY
MEMBERS BLOCK, GRIFFIN AND FLYNN
FROM RULING ON THIS CASE¹**

This case is pending before the Board on exceptions from a ruling of ALJ Meyerson, dated August 25, 2011. Respondent hereby move for the disqualification of Members Sharon Block, Richard Griffin and Terence Flynn from hearing this case or issuing any rulings in this case, because their “recess” appointments to the Board by President Obama were unconstitutional. Because the Board thus lacks a quorum under *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), no decision should issue in this case until the Board has a lawful quorum.

¹ Respondent makes this Motion so that the Board can consider the issues raised herein in the first instance. However, Respondent do not believe that they are obligated to bring this Motion to the Board in order to preserve for judicial review their challenge to the recess appointments and the Board’s lack of a lawful quorum.

1. INTRODUCTION.

On January 3, 2012, the term of National Labor Relations Board Member Craig Becker expired, leaving the NLRB with only two members out of five seats. In effect, the agency ceased to function that day, because the Supreme Court has held that the Board lacks authority to act with only two members. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). On January 4, 2012, President Obama announced that he was “recess” appointing three new members to the NLRB, Members Block, Griffin, and Flynn. Although the United States Senate was in session at the time of the President’s purported appointments of the new Board members², the President did not obtain the advice and consent of the Senate that Article II, Section 2, Clause 2 of the U.S. Constitution requires. Thus, the President improperly attempted to name the new NLRB members as “recess” appointments pursuant to Article II, Section 2, Clause 3, even though the Senate was not in recess at the time. Consequently, the appointments of Members Block, Griffin and Flynn violate Articles I and II of the U.S. Constitution.

2. THE PURPORTED NEW MEMBERS OF THE NLRB HAVE NOT BEEN VALIDLY APPOINTED, AND THE AGENCY THEREFORE LACKS A QUORUM TO ACT IN THIS CASE.

As noted above, the Supreme Court has held that the NLRB lacks authority to conduct business in the absence of a quorum of at least three members. *New Process*

² By unanimous consent, the Senate voted to remain in session for the period of December 20, 2011 through January 23, 2012. Sen. Ron Wyden, “Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012,” remarks in the Senate, Congressional Record, vol. 157, part 195 (Dec. 17, 2011, pp. S8783-S8784). Moreover, the House of Representatives never gave its consent to a Senate recess of more than three days, as would have been required by Art. I, Section 5, Clause 4 of the Constitution.

Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010). Numerous other courts have held that an agency whose members have been improperly appointed in violation of the Appointments Clause of the U.S. Constitution or related provisions lacks authority to act, and that private parties who are adversely affected by such *ultra vires* agency action are entitled to injunctive relief. *See Ryder v. United States*, 515 U.S. 177 (1995) (individuals threatened with enforcement action by agency whose members have been appointed in violation of the Appointments Clause entitled to injunction); *see also Federal Election Commission v. NRA Political Victory Fund*, 6 F. 3d 821, 828 (D.C. Cir. 1993).

Here, all but two of the current putative members of the NLRB were appointed in violation of the Appointments Clause of the U.S. Constitution. This is so because the President attempted to appoint Members Block, Griffin, and Flynn while the U.S. Senate was in session but without seeking or obtaining the Senate's Advice and Consent, in violation of Article II, Section 2, Clause 2 of the Constitution. The President's claim that these appointments were somehow valid "recess" appointments is inconsistent with Article II, Section 2, Clause 3 of the Constitution, which requires that the Senate actually be in recess when such appointments are made. *See Evans v. Stephens*, 387 F. 3d 1220, 1224 (11th Cir. 1994) (requiring a "legitimate Senate recess" to exist in order to uphold a recess appointment); *see also Wright v. United States*, 302 U.S. 583 (1938); and *Kennedy v. Sampson*, 511 F. 2d 430 (D.C. Cir. 1974) (finding that intra-session adjournments do not qualify as Senate recesses sufficient to deny the President the authority to veto bills, provided that arrangements are made to receive presidential messages).

The longstanding view of the Attorneys General who issued opinions on this issue, before the current appointments, has been that the term "recess" as applied to intrasession appointments includes only those intra-session breaks that are of "substantial length." *See Memorandum*

Opinion for the Deputy Counsel to the President (Jan. 14, 1992), available at <http://www.justice.gov/olc/schmitz.10.htm> (involving an 18-day recess). The Obama Administration's Solicitor General stated on the record at the U.S. Supreme Court during the oral argument in *New Process Steel* that a recess must be longer than three days in order for a recess appointment to occur. Transcript of Oral Argument in *New Process Steel, L.P. v. NLRB*, Case No. 08-1457 (Mar. 23, 2010).

The seminal opinion of Attorney General Daugherty in 1921 established the consistently followed rule that for recess appointments to be made the recess should be of such duration that the Senate could “not receive communications from the President or participate as a body in making appointments.” 33 Op. Att’y Gen. 20, 24 (1921). No such break has occurred in the present circumstances. Indeed, the Senate was in session during the period when the appointments were made and was able to receive communications and participate in the appointment process. This is conclusively proven by the fact that only days before the Obama recess appointments were made, during its ongoing *pro forma* sessions, the Senate passed the payroll tax bill and communicated with the President and the House with regard to that important legislation. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). The President signed that legislation, never protesting that it was invalidly enacted due to a congressional recess.³

³ On January 6, 2012, a political appointee of the Attorney General's office issued a Memorandum Opinion purporting to justify the President's recess appointments. The Opinion was not made public until January 12, 2012. *See* Memorandum Opinion For The Counsel To The President (Jan. 6, 2012), available at <http://www.justice.gov/olc/2012/pro-forma-sessionsopinion.pdf>. In this Opinion, the Attorney General's Office declares for the first time that the Senate's convening of periodic *pro forma* sessions does not have the legal effect of interrupting an intra-session recess otherwise long enough to qualify as a recess of the Senate under the Recess Appointments Clause. This Opinion is contrary to the Constitutional power vested in the Senate to “determine the Rules of its Proceedings.” U.S. Const. Article I, Section 5, Clause 2. By declaring the Senate's on-going *pro forma* sessions to be ineffective to prevent a recess, the Opinion implicitly declares the Senate to be in violation of the Constitutional requirement that

Indeed, if the President has the power to determine for himself when the Senate is in recess, he can do so during any weekend, lunch break, or even when he believes that the Senators' debate has stalled and they are not working efficiently and effectively as a body. That position clearly violates Article I, Section 5, Clause 2, which makes each Congressional chamber the master of its own rules. Because neither the House nor the Senate declared themselves in recess, the purported recess appointments to the NLRB are invalid.

CONCLUSION

Respondent hereby move for the disqualification of Members Block, Griffin and Flynn from hearing this case or issuing any rulings in this case, because their "recess" appointments to the Board by President Obama were unconstitutional. Lacking a quorum under *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), the Board should issue no decision in this case until the Board has a properly appointed lawful quorum.

Respectfully submitted,

/s/ Peter G. Fischer

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neither House shall adjourn without the consent of the other for more than three days. U.S. Const. Article I, Section 5, Clause 4. In making this declaration, the Attorney General's Opinion for the Executive Branch grievously disrespects the proceedings of a co-equal branch of government. The Opinion is also contradicted by the actual experience of *pro forma* sessions of the Senate, as noted above, which demonstrate that the Senate was in fact available to fulfill its constitutional duties to consider any appointments that the President wished to put forward for advice and consent. Thus, the unprecedented Opinion of the Attorney General fails to justify the President's attempted recess appointments and should not be adopted by any court.

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PROOF OF SERVICE

I am employed in the County of Fulton, State of Georgia. I am over the age of eighteen years and not a party to the within action; my business address is 3593 Hemphill Street, Atlanta, Georgia 30337.

On February 14, 2012, I caused the following document(s) to be served:

**RESPONDENT'S MOTION TO DISQUALIFY
MEMBERS BLOCK, GRIFFIN AND FLYNN
FROM RULING ON THIS CASE**

— BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Atlanta, Georgia, in the ordinary course of business pursuant to Code of Civil Procedure Section 1013(a). I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

— BY FACSIMILE: I served said document(s) to be transmitted by facsimile pursuant to Board's Rules and Regulations, Series 8, as amended, Section 102.24. The telephone number of the sending facsimile machine was (404) 766-8823. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine issued a transmission report confirming that the transmission was complete and without error.

X BY THE NLRB'S ELECTRONIC FILING SYSTEM on its website: <http://www.nlr.gov> to Region 19 and the Office of Executive Secretary.

X BY ELECTRONIC MAIL to:

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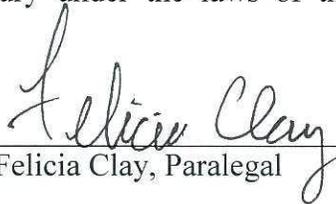
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Executed on February 14, 2012, at Atlanta, Georgia.

I declare under penalty of perjury under the laws of the State of Georgia that the foregoing is true and correct.



Felicia Clay, Paralegal

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