

Respondent 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center (“Respondent,” “Employer,” or “Somerset Valley”) moves for an indefinite stay of these proceedings. Respondent submits that the National Labor Relations Board (“NLRB” or “Board”) presently lacks a constitutionally valid quorum and, as such, does not have authority to take action in this matter. See *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). As grounds for this Motion, Respondent states:

I. Introduction

Between December 17, 2011, and January 23, 2012, the United States Senate held a series of “pro forma” sessions to break the intervening period into three-day adjournments so as to comply with its obligation under the Constitution, Art I, § 5, cl. 4, not to adjourn for more than three days during a congressional session without the consent of the United States House of Representatives. See Statement of Charles J. Cooper before the House Committee on Education and Workforce concerning “The NLRB Recess Appointments: Implications for America’s Workers and Employers,” § I (Feb. 7, 2012) (hereinafter “Cooper at ___”).¹ At one of these pro forma sessions, the Senate passed a two-month extension of the payroll tax cut, as requested by the President. 157 Cong. Rec. S8749 (daily ed. Dec. 17, 2011). Furthermore, on January 3, 2012, the Senate met in pro forma session to comply with the requirement of the Twentieth Amendment to the Constitution that “Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.” The Senate did not go into recess at the

¹ This Statement is available on the Committee’s website:
<http://edworkforce.house.gov/Calendar/EventSingle.aspx?EventID=277173>.

conclusion of that day's assembly. Rather, the Senate was scheduled to meet in pro forma session again on January 6, 2012. See Testimony of Sen. Michael S. Lee before the House Committee on Oversight and Government Reform concerning "Unchartered Territory: What are the Consequences of the President's Unprecedented 'Recess' Appointments" at 1 (Feb. 1, 2012) (hereafter "Lee at ____").² The following day, January 4, 2012, the President made four "recess" appointments, including Sharon Block, Terence F. Flynn, and Richard Griffin to fill three vacant seats on the Board. Without these three members, the Board would only have two members and lack the quorum needed to take action. See *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

II. Law and Argument

Respondent respectfully submits that these three "recess" appointments to the Board violated the Constitution and are void *ab initio*. These appointments were not confirmed by the Senate and were not made during a Senate recess. Accordingly, with only two validly appointed members, the Board presently lacks authority to act in this matter. The Appointments Clause gives the President power "by and with the Advice and Consent of the Senate to ... appoint ... Officers of the United States." U.S. Constitution, Art. II, § 2, cl. 2. As a supplement to this procedure, the Recess Appointments Clause authorizes the President to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Constitution, Art. II, § 2, cl. 3. See *The Federalist No. 67* (Alexander Hamilton). The Framers gave the President this "auxiliary" authority,

² This testimony is available on the Committee's webpage: http://oversight.house.gov/index.php?option=com_content&view=article&id=1574%3A2-1-12-qunchartered-territory-what-are-the-consequences-of-president-obamas-unprecedented-qrecessq-&catid=12%3Afull-committee-hearings&Itemid=1

which allows the President to bypass the Senate only in a limited circumstance, because “it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers,” and yet “vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay.” *See The Federalist* No. 67 (emphasis in original). The need for recess appointments, and consequently the power to make recess appointments, however, does not exist during periods when the Senate is not in recess.

With respect to the President’s three appointments to the NLRB on January 4, 2012, the Senate was not in recess. The President made these appointments the day after the Senate met and in the midst of a period when the Senate adjourned for no more than three days between pro forma sessions. As early as 1921, it has been recognized that “an adjournment of 5 or even 10 days [does not] constitute the recess intended by the Constitution.” Opinion of U.S. Attorney Harry M. Daugherty, 33 U.S. Op. Att’y Gen. 20, 24-25 (1921). Most recently, Deputy Solicitor General Neal Katyal, during oral argument before the Supreme Court in *New Process Steel, L.P.*, stated that the “recess appointment power can work in – in a recess. I think our office has opined the recess has to be longer than 3 days.” (*New Process Steel, L.P. v. NLRB*, Case No. 08-1457, Transcript of Oral Argument, Mar. 23, 2010, at 50, lines 3-5).

Nevertheless, an even more fundamental reason for asserting that the Senate was not in recess on January 4, 2012, exists – the Senate says that it was not in recess. *See Lee* at 1. The Constitution vests in each House of Congress the power to “determine the Rules of its Proceedings.” U.S. Constitution, Art. I, § 5, cl. 2. Rules “governing how and when the Senate meets and adjourns are quintessential rules of

proceedings.” Cooper at § IV. The Rulemaking Clause commits to the Senate judgments about the meaning of its own rules. Indeed, as the Supreme Court held in *United States v. Balin*, 144 U.S. 1 (1892):

Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. *The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.*

Id. at 5 (emphasis added).

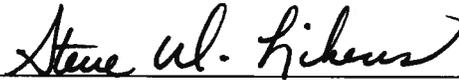
Pursuant to the separation of powers constitutionally engrafted into our system of government, therefore, it is not the province of the Executive Branch to dictate the Senate’s rules of proceedings or authoritatively determine the meaning of those rules. The Senate’s determination that it was repeatedly in session, and not in recess, between December 17, 2011, and January 23, 2012, therefore, should be determinative.

III. Conclusion

For the reasons set forth above, the Board should stay these proceedings until a constitutionally valid quorum has been appointed and the Board again has the requisite number of members to act.

Respectfully submitted,

LITTLER MENDELSON, P.C.

A handwritten signature in black ink, reading "Steven W. Likens", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 15th day of March, 2012, the foregoing pleading was filed via electronic filing with:

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