

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Division of Judges  
San Francisco, California**

VERITAS HEALTH SERVICES, INC.  
d/b/a CHINO VALLEY MEDICAL  
CENTER,

Respondent,

and

UNITED NURSES ASSOCIATION OF  
CALIFORNIA/UNION OF HEALTH  
CARE PROFESSIONS, NUHHCE,  
AFSCME, AFL-CIO,

Charging Party.

Case No. 31-CA-091701

**MOTION TO STAY ALL PROCEEDINGS ON COMPLAINT**

In accordance with *Noel Canning v. NLRB*, 705 F.3d 490, 2013 U.S. App. LEXIS 1659 (D.C. Cir 2013), and *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), the Board has not been legally authorized to take any action on any matters since at least August 28, 2011, the last date on which the Board had a lawful quorum of Members. The Board most certainly has not been legally authorized to take any action since January 4, 2012, the first date following the expiration of the “recess” appointment of Craig Becker. Accordingly, the Board has had no authority to appoint any agents to act on behalf of the Board at any of the times relevant to this Motion, and the purported appointment of Mori Pam Rubin as Regional Director for Region 31 on or about May 23, 2012 was and is invalid. The Board also has had no authority during the relevant period to issue unfair labor practice complaints. For all of these reasons the complaint in this matter, issued on January 31, 2013 by Ms. Rubin, is and was invalid *ab initio*. The

complaint should therefore be immediately dismissed as is contended by Respondent in its motion filed with the Board in this matter on March 26, 2013. Moreover, and for the same reasons, all proceedings on the complaint should be stayed pending the lawful appointment of a quorum of Board Members and the issuance of a lawful complaint. Respondent therefore files this Motion with the Division of Judges pursuant to Section 102.24 of the Board's Rules and Regulations to request an order immediately staying all proceedings on the complaint.<sup>1</sup>

### ARGUMENT

#### **A. The Board As Currently Constituted May Not Act Because There Is No Lawful Quorum**

In *New Process Steel*, the U.S. Supreme Court determined that the Board may not lawfully act at any time there are not at least three Members who are serving on the Board. Respondent contends that the Board has not had a lawful quorum at any time since August 27, 2011, when Member Liebman's appointment expired, because none of the individuals purportedly serving as Members of the Board since that time who were the subject of "recess" appointments were validly appointed to the Board. Respondent further contends that, at the very least and as most relevant to the instant matter, the Board has not had a lawful quorum since at least January 3, 2012 because the recess appointments of Sharon Block and Richard Griffin were void *ab initio*.

Between December 17, 2011 and January 23, 2012, the U.S. Senate held a series of "pro forma" sessions to break the intervening period into three-day adjournments so that the Senate could comply with its obligation under the Constitution not to adjourn for more than three days during a congressional session without the consent of the U.S. House of Representatives. See, i.e., Statement of Charles J. Cooper before the House Committee on Education and

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<sup>1</sup> A copy of the complaint is attached hereto as Exhibit A.

Workforce concerning “The NLRB Recess Appointments: Implications for America’s Workers and Respondents (Feb. 7, 2012) (hereinafter “Cooper Statement”), § 1.<sup>2</sup> 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 convene the second session of the 112th Congress and 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 conclusion of that day’s assembly. Rather, the Senate was scheduled to meet in pro forma session again on January 6, 2012. See, i.e., 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” (Feb. 1, 2012) (“Lee Statement”), p. 1.<sup>3</sup> The following day, January 4, 2012, the President made three “recess” appointments (Sharon Block, Terence F. Flynn, and Richard Griffin) to fill three vacant seats on the Board (“January 4 Appointments”). Without the January 4 Appointments, the Board would only have had two members (Mark G. Pearce and Brian Hayes) on that date and thereafter, and would therefore have lacked the quorum needed to take action pursuant to *New Process Steel*.<sup>4</sup>

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<sup>2</sup> This Statement is available on the Committee’s website at <http://edworkforce.house.gov/Calendar/EventSingle.aspx?EventID=277173>.

<sup>3</sup> This testimony is available on the Committee’s webpage: <http://oversight.house.gov/hearing/uncharted-territory-what-are-the-consequences-of-president-obamas-unprecedented-recess-appointments/>.

<sup>4</sup> Terence F. Flynn resigned on July 24, 2012. He has not been replaced. Additionally, Member Hayes’s term expired on December 16, 2012, and he has not been replaced.

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, 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.

The Senate was not in recess when the January 4 Appointments were made. 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*, 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 50:3-5.

There is an even more fundamental reason for finding that the Senate was not in recess on January 4, 2012 – the Senate says that it was not in recess. 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 Statement at § IV. The Rulemaking Clause commits to the Senate judgments about the meaning of its own rules. 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). Accordingly, it is not the province of the Executive Branch to dictate the Senate’s rules of proceedings or 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 should be determinative.

In sum, then, the January 4 Appointments violated the Constitution because they did not occur during a recess, were therefore void *ab initio*, and the Board has lacked the necessary quorum to lawfully take action at all relevant times.

Alternatively, the January 4 Appointments were void *ab initio* because the vacancies at issue did not “happen” during a “Recess” within the meaning of the recess appointments clause of the Constitution (U.S. Constitution, Art. II, § 2, cl. 3). Instead, they arose during the session, at a time when the President lacked the authority to make recess appointments. The Board seats at issue here became vacant on August 27, 2010, August 27, 2011, and January 3, 2012. *Noel Canning*, 2013 U.S. App. LEXIS 1659, at \*20, 61, citing 158 Cong. Rec. S582-83 (daily ed. Feb. 13, 2012); 152 Cong. Rec. 17,077 (2006). On August 27, 2010 and August 27, 2011 the Senate was in an *intrasession* recess, not an *intersession* recess. *Id.* at \*61. Additionally, the seat formerly held by Member Becker became vacant at the “End” of the Senate’s session on January 3, 2012, not during any recess. *Id.* at \*61-68. Accordingly, for this alternative reason, the January 4 Appointments were unconstitutional. *Noel Canning*, 2013 U.S. App. LEXIS 1659, at \*45-68.

Further in the alternative, in the event that that the January 4 Appointments were valid at the time they were made, the January 4 Appointments expired on January 3, 2013, at the “End” of the Senate’s “next Session.” U.S. Constitution, Art. II, § 2, cl. 3; *The Federalist No. 67* (Alexander Hamilton).<sup>5</sup>

#### **B. The Complaint Was Void *Ab Initio***

Section 10(b) of the Act confers upon the Board the authority to issue unfair labor practice complaints, and also authorizes the Board to designate one or more agents to do so on behalf of the Board. However, and as shown, the Board has had no authority to take any actions since at least January 4, 2012. It therefore follows that the Board’s purported appointment of

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<sup>5</sup> See the Days in Session Calendar for 112th Congress second session for the days on which the Senate was in session for that session of Congress, available at <http://thomas.loc.gov/home/ds/s1122.html>.

Ms. Rubin to be the Regional Director for Region 31 on May 23, 2012 (see, i.e., <http://www.nlr.gov/news-outreach/announcements/mori-pam-rubin-appointed-regional-director-nlr-los-angeles-ca-regional->, last visited 03/20/2013) was invalid *ab initio*. And even if Ms. Rubin had been appointed to be Regional Director during a period when the Board had a valid quorum (i.e., the period from June 22, 2010 through August 28, 2011),<sup>6</sup> she still could not have lawfully issued the complaint inasmuch as the Board itself had no authority to issue the complaint and an agent can only exercise authority that lawfully resides in the agent's "master." For both of these reasons the complaint issued in this matter was void *ab initio*.

Respondent is aware of the Board's decision in *Center for Social Change, Inc.*, 358 NLRB No. 24 (2012), in which the Board essentially side-stepped the employer's challenge to the Board's authority to act based on *New Process Steel* and the asserted invalidity of the January 4 Appointments by relying on a presumption of regularity of the official acts of public officials. Respondent is also aware of Chairman Pearce's statements following the D.C. Circuit's *Noel Canning* decision questioning the outcome reached in that case and stating that the Board would continue to process cases pending before it notwithstanding the D.C. Circuit's decision. Respondent respectfully submits that the undisputable facts set forth above fully rebut the presumption relied on in *Center for Social Change* and that continued processing of this matter at this time will only result in an additional waste of time and resources for the Board, Respondent and the Charging Party.

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<sup>6</sup> See, i.e., <http://www.nlr.gov/members-nlr-1935>, last visited 03/20/2013 [four properly confirmed Board Members serving during the period from June 22, 2010 through August 27, 2010, three properly confirmed Board Members serving during the period from August 28, 2010 through August 27, 2011].

**CONCLUSION**

Wherefore, it is respectfully requested that all proceedings on the complaint be stayed until such time as the Board has a validly constituted quorum and a valid complaint has been issued on the underlying unfair labor practice charge.

Dated: March 26, 2013

Respectfully submitted,



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VERITAS HEALTH SERVICES, INC. d/b/a  
CHINO VALLEY MEDICAL CENTER

## **EXHIBIT A**

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31**

**VERITAS HEALTH SERVICES, INC. D/B/A  
CHINO VALLEY MEDICAL CENTER**

**Case 31-CA-091701**

**and**

**UNITED NURSES ASSOCIATION OF  
CALIFORNIA/UNION OF HEALTH CARE  
PROFESSIONALS, NUHHCE, AFSCME, AFL-CIO**

**COMPLAINT AND NOTICE OF HEARING**

This Complaint and Notice of Hearing is based on a charge filed by United Nurses Association of California/Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO (Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act), and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Veritas Health Services, Inc. d/b/a Chino Valley Medical Center (Respondent) has violated the Act as described below:

1. (a) The charge in this proceeding was filed by the Union on October 19, 2012, and a copy was served by regular mail on Respondent on October 22, 2012.

(b) The amended charge in this proceeding was filed by the Union on December 11, 2012, and a copy was served by regular mail on Respondent on December 13, 2012.

2. (a) At all material times, Respondent, a California corporation, has been engaged in the operation of an acute care hospital at its 5451 Walnut Avenue, Chino, California facility ("the Hospital").

(b) Respondent, in conducting its business operations described above in paragraph 2(a), annually derives gross revenues from the Hospital in excess of \$250,000.

(c) Respondent, in conducting its business operations described above in paragraph 2(a), annually purchases and receives at the Hospital goods or services valued in excess of \$5,000 directly from points outside the State of California.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

4. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. (a) The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time and regular per diem registered nurses employed by the Employer at its 5451 Walnut Avenue, Chino, California facility in the following departments: Emergency Services, Critical Care Services/Intensive Care Unit, Surgery, Post-Anesthesia Care Unit, Outpatient Services, Gastrointestinal Laboratory, Cardiovascular Catheterization Laboratory, Radiology, Telemetry/Direct Observation Unit and Medical/Surgical.

(b) On January 25, 2011, the Board certified the Union as the exclusive collective-bargaining representative of the Unit.

(c) At all times since January 25, 2011, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

6. About September 27, 2012, Respondent implemented a break-relief position and/or shift.

7. The subject set forth above in paragraph 6 relates to wages, hours, and other terms and conditions of employment of the Unit and is a mandatory subject for the purposes of collective bargaining.

8. Respondent engaged in the conduct described above in paragraph 6 without prior notice to the Union, without affording the Union an opportunity to bargain with Respondent with respect to this conduct, and without, at that point, having reached an impasse in negotiations for a successor collective-bargaining agreement.

9. Since about October 4, 2012, the Union has requested in writing that Respondent furnish the Union with the following information concerning the “Relief Meal break nurse position”:

- a. Provide any and all documents that have been developed, distributed, and utilized for this position, including but not limited to, position announcements to management; announcements to registered nurses, schedules, job description, job announcements; terms of compensation, scheduling documents.
- b. Provide a list of Registered Nurses who have already signed up to work one or more of the shifts.
- c. Provide a list of registered nurses who have already worked one or more of the shifts.

10. The information requested by the Union, as described above in paragraph 9 is necessary for, and relevant to, the Union’s performance of its duties as the exclusive collective-bargaining representative of the Unit.

11. Since about October 10, 2012, Respondent has failed and refused to furnish the Union with the information requested by it as described above in paragraph 9.

12. By the conduct described above in paragraphs 6, 8, and 11, Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

13. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

As part of the remedy for the unfair labor practices alleged above, the Acting General Counsel seeks an Order requiring that the Notice be read to employees during working time in English by Respondent.

As part of the remedy for Respondent's unfair labor practices alleged above in paragraphs 6, 8, and 11, the Acting General Counsel seeks an Order requiring Respondent to bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate unit.

The Acting General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

#### **ANSWER REQUIREMENT**

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before February 14, 2013, or postmarked on or before February 13, 2013.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

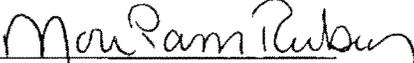
An answer may also be filed electronically through the Agency's website. To file electronically, go to [www.nlr.gov](http://www.nlr.gov), click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations

require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

#### **NOTICE OF HEARING**

PLEASE TAKE NOTICE THAT on April 8, 2013, at 1:00 p.m. at the National Labor Relations Board, Region 31, 11500 W. Olympic Blvd., Suite 600, Los Angeles, California, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Los Angeles, California, this 31<sup>st</sup> day of January 2013.

  
Mori Pam Rubin, Regional Director  
National Labor Relations Board, Region 31  
11150 W. Olympic Boulevard, Suite 700  
Los Angeles, CA 90064

**PROOF OF SERVICE BY E-MAIL**

I am employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 501 W. Broadway, Suite 900, San Diego, California 92101.3577. On March 26, 2013, I served a true and correct copy of the within document(s):

**MOTION TO STAY ALL PROCEEDINGS ON COMPLAINT**

by e-mailing the document(s) to the following person(s) at the e-mail address(es) listed below:

Ms. Mori Pam Rubin  
Regional Director  
National Labor Relations Board, Region 31  
11150 W. Olympic Boulevard, Room 700  
Los Angeles, CA 90064-1824

Email: nlrregion31@nlrb.gov  
Phone: (310) 235-7351  
Fax: (310) 235-7420

Richa Amar, Esq.  
United Nurses Associations of California/  
Union of Health Care Professionals  
955 Overland Court, Suite 150  
San Dimas, CA 91773-1718

Email: richa.amar@unac-ca.org  
Phone: (909) 451-0568  
Fax: (909) 599-8655

I declare under penalty of perjury that the above is true and correct.

Executed on March 26, 2013, at San Diego, California.



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Rosa Dyer