

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

RELCO LOCOMOTIVES, INC.)
)
)
and) Case 18-CA-074960
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)
INTERNATIONAL BROTHERHOOD OF ELECTRICAL)
WORKERS, LOCAL UNION #347)

RESPONDENT, RELCO LOCOMOTIVES, INC.'S SUPPLEMENTAL PLEADING

With this filing, Respondent, RELCO Locomotives, Inc. ("RELCO"), respectfully submits this supplemental pleading to point out that the Board does not currently have a constitutionally valid quorum, and, therefore, under applicable U.S. Supreme Court precedent, lacks the authority to render a decision in this case. *See New Process Steel v. NLRB*, 130 S. Ct. 2635, 2645 (2010). In particular, the D.C. Circuit Court of Appeals in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) held that the Board, as presently constituted, does not have jurisdiction to render a decision in this case, because it lacks a duly appointed quorum. In *Noel Canning*, the D.C. Circuit held that the appointments of Sharon Block, Terence F. Flynn, and Richard F. Griffin to the Board, purportedly made by President Obama on January 4, 2012, were invalid from inception because they were not in accordance with of the Recess Appointments Clause of the Constitution, U.S. CONST. art II, § 2, cl. 3. Among other deficiencies in the January 4, 2012 appointments to the Board, the D.C. Circuit held that: (1) the Senate was not in an intersession recess, which was necessary to trigger the President's power to make recess appointments under the Recess Appointments Clause; and (2) even if the Senate had been in

recess, the vacancies filled by Ms. Block, Mr. Flynn, and Mr. Griffin did not arise in the same recess in which the recess appointments were made. *Id.* art. II, § 2, cl. 3. *Noel Canning*, 705 F.3d at 506 and 513-514 (holding that none of the three appointments at issue were made during an intersession recess that fell within the scope of the term "the Recess" as used in the Recess Appointments Clause and that none of the vacancies at issue "happen[ed]" or arose during the recess in which they were filled as is required by the Recess Appointments Clause). Because those appointments were invalid, the Board lacked a quorum on the day it issued its *Noel Canning* decision, and the Board's decision was therefore void. *Id.* Therefore, according to *Noel Canning*, the Board has been operating without a constitutionally valid quorum since at least January 4, 2012. *Id.*

Moreover, on April 25, 2013, the Board filed its Petition for a Writ of Certiorari to the United States Supreme Court, asking it to review the *Noel Canning* ruling. It is likely that the Petition will be granted, and the Supreme Court will uphold the *Noel Canning* decision, and rule that the Board does not have a constitutionally valid quorum. The previous time that the Supreme Court decided that the Board did not have a quorum in *New Process Steel*, the Supreme Court abrogated approximately 600 of the Board's cases. Thus, since the Board's decision will be abrogated by the Supreme Court once it reviews *Noel Canning*, it is prudent for the Board, in the interest of judicial economy, to withhold ruling on this matter until the Board has a constitutionally valid quorum.

In light of the D.C. Circuit decision in *Noel Canning* and the Supreme Court's decision in *New Process Steel*, it is RELCO's position that the Board is without authority to issue a decision in this case because it does not have a constitutionally valid quorum. This issue will likely be decided by the Supreme Court shortly. Therefore, the Board should suspend any further

proceeding in the instant case until either the Supreme Court decides the issue or a constitutionally valid quorum of the Board is duly appointed.

Dated: May 2, 2013

Respectfully submitted,
RELCO LOCOMOTIVES, INC.

By: /s/ Paul E. Starkman
One of Its Attorneys

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