

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

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

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**RESPONDENT, RELCO LOCOMOTIVES, INC.'S SUPPLEMENTAL PLEADING**

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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, in addition to the D.C. Circuit Court of Appeals in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) decision, which 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 (and which was the subject of RELCO's Supplemental Pleading filed with the Board on May 2, 2013), the Third Circuit in *NLRB v. New Vista Nursing & Rehab.*, 2013 U.S. App. LEXIS 9860 (3d Cir. May 16, 2013) has joined the D.C. Circuit and held "that the NLRA's three-member-composition requirement is jurisdictional and...can be raised by a party or by this Court at any point in litigation as a jurisdictional defect." *Id.* at 17. In *New Vista*, the Third Circuit held that the appointment of Craig Becker, purportedly made by President Obama on April 5, 2010, was invalid from inception because it was not in accordance with the

Recess Appointments Clause of the Constitution, U.S. CONST. art II, § 2, cl. 3. Among other deficiencies in the April 5, 2010 appointment to the Board, the Third Circuit held that 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. *Id.* art. II, § 2, cl. 3; *See New Vista*, 2013 U.S. App. LEXIS 9860 at \*2 (holding that "the Recess of the Senate" in the Recess Appointments Clause refers *only* to intersession breaks). Because the appointment of Mr. Becker was invalid, the Board lacked a three member composition on the day it issued its *New Vista* decision, and the Board's decision was therefore void. *Id.* Therefore, according to *New Vista*, the Board has been operating without a constitutionally valid quorum since at least August 26, 2011. *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 Third Circuit's decision in *New Vista*, the D.C. Circuit's 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 22, 2013

Respectfully submitted,  
RELCO LOCOMOTIVES, INC.

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

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