

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

GENERAL DIE CASTERS, INC.	:	
	:	Case Nos. 8-CA-37932, et al.
and	:	
	:	
TEAMSTERS LOCAL 24 a/w	:	
INTERNATIONAL BROTHERHOOD	:	
OF TEAMSTERS	:	
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**RESPONDENT GENERAL DIE CASTERS, INC.’S  
MOTION TO STAY APPEAL UNTIL THE BOARD REACHES A LAWFUL QUORUM**

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Now comes the Respondent, General Die Casters, Inc. (“GDC” or the “Company”), by and through Counsel and hereby requests that the Board refrain from issuing a ruling on the Company’s July 15, 2011 Exceptions to ALJ Carissimi’s Decision in the matter referenced above until the Board reaches a lawful quorum.. A Memorandum in Support of said Motion is attached hereto.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

### **I. BACKGROUND**

This consolidated case was tried before Administrative Law Judge (“ALJ”) Mark Carissimi in Cleveland, Ohio, on October 18-19, November 8-10, 15, 17-19 and December 15-16, 2010. The second amended consolidated Complaint alleged numerous violations of 8(a)(1), (3) and (5) of the Act spanning two and one half years.

ALJ Carissimi issued his Decision on May 2, 2011 and the Company filed its Exceptions and Brief in Support on July 15, 2011. All briefing with respect to the appeal was closed on September 8, 2011 after the Respondent filed its Reply Brief to General Counsel’s Answering Brief.

### **II. THE BOARD CANNOT RULE UPON RESPONDENT’S EXCEPTIONS UNTIL IT OBTAINS A LAWFUL QUORUM**

The Board has no legal authority to function when it lacks a quorum of three members. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). Naturally, persons appointed to the Board in violation of the Appointments Clause of the U.S. Constitution do not count towards this necessary quorum. *Cf. Ryder v. United States*, 515 U.S. 177 (1995); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

The Board currently lacks a quorum because Sharon Block and Richard Griffin are not lawful members of the Board. On January 4, 2012, President Obama announced “recess” appointments for these individuals. However, the United States Senate was in session at the time of these purported appointments.<sup>1</sup> The President did not obtain the advice and consent of the

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<sup>1</sup> 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.

Senate that Article II, Section 2, Clause 2 of the U.S. Constitution requires. Consequently, the appointments of Block and Griffin to the Board are invalid under Articles I and II of the U.S. Constitution.

The President's claim that these appointments were 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). Article I, Section 5, Clause 2 provides that each Congressional chamber is the master of its own rules. Because neither the House nor the Senate declared themselves in recess under their rules, the purported recess appointments are invalid.

Moreover, the longstanding view of the Attorneys General who issued opinions on this issue, before the current appointments, has been that the term "recess" includes only those intra-session breaks that are of "substantial length."<sup>2</sup> 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).

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<sup>2</sup> See, Memorandum Opinion for the Deputy Counsel to the President (Jan. 14, 1992), available at <http://www.justice.gov/olc/schmitz.10.htm> (18-day recess).

Similarly, the opinion of Attorney General Daugherty in 1921 opined that for recess appointments to be made, the recess must 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.<sup>3</sup>

Accordingly, the appointments of Block and Griffin to the Board are invalid. As a result, the Board lacks a quorum under *New Process Steel* and cannot rule upon the Company’s Exceptions and/ or adjudicate this case until such time as it attains a proper quorum.

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<sup>3</sup> 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-sessions-opinion.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 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.

### III. CONCLUSION

The Board should refrain from ruling on the Company's July 15, 2011 Exceptions to ALJ Carissimi's Decision until it has obtained a lawful quorum.

Dated at Dublin, Ohio this 7<sup>th</sup> day of August, 2012.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on August 7, 2012 an electronic original of Respondent General Die Casters, Inc.'s Motion to Stay Appeal was transmitted to the Board, Office of Executive Secretary, via the National Labor Relations Board electronic filing system, and further, that copies of the foregoing Motion was transmitted to the following individuals by electronic mail:

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