UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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UNITED NURSES & ALLIED PROFESSIONALS
(KENT HOSPITAL),

Respondent,

Case No. 1-CB-11135

and

Jeanette Geary, an Individual,

Charging Party.

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CHARGING PARTY'S MOTION TO DISQUALIFY MEMBERS BLOCK, GRIFFIN AND FLYNN FROM RULING ON THIS CASE[1]

This case is pending before the Board from a March 30, 2011 decision. Charging Party hereby moves for the disqualification of Members Sharon Block, Richard Griffin and Terence Flynn from hearing this case or issuing any rulings in this case, because their "recess" appointments to the Board by President Obama were unconstitutional. Because the Board thus lacks a quorum under *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), no decision should issue in this case until the Board has a lawful quorum.

[1] Charging Party makes this Motion so that the Board can consider the issues raised herein in the first instance. However, Charging Party does not believe that she is obligated to bring this Motion to the Board in order to preserve for judicial review her challenge to the recess appointments and the Board's lack of a lawful quorum.

1. INTRODUCTION.

On January 3, 2012, the term of National Labor Relations Board Member Craig Becker expired, leaving the NLRB with only two members out of five seats. In effect, the agency ceased to function that day, because the Supreme Court has held that the Board lacks authority to act with only two members. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010).

On January 4, 2012, President Obama announced that he was "recess" appointing three new members to the NLRB, Members Block, Griffin, and Flynn. Although the United States Senate was in session at the time of the President's purported appointments of the new Board members,[2] the President did not obtain the advice and consent of the Senate that Article II, Section 2, Clause 2 of the U.S. Constitution requires. Thus, the President improperly attempted to name the new NLRB members as "recess" appointments pursuant to Article II, Section 2, Clause 3, even though the Senate was not in recess at the time. Consequently, the appointments of Members Block, Griffin and Flynn violate Articles I and II of the U.S. Constitution.

2. THE PURPORTED NEW MEMBERS OF THE NLRB HAVE NOT BEEN VALIDLY APPOINTED, AND THE AGENCY THEREFORE LACKS A QUORUM TO ACT IN THIS CASE.

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[2] 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.

As noted above, the Supreme Court has held that the NLRB lacks authority to conduct business in the absence of a quorum of at least three members. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Numerous other courts have held that an agency whose members have been improperly appointed in violation of the Appointments Clause of the U.S. Constitution or related provisions lacks authority to act, and that private parties who are adversely affected by such *ultra vires* agency action are entitled to injunctive relief. *See Ryder v. United States,* 515 U.S. 177 (1995) (individuals threatened with enforcement action by agency whose members have been appointed in violation of the Appointments Clause entitled to injunction); *see also Federal Election Commission v. NRA Political Victory Fund*, 6 F. 3d 821, 828 (D.C. Cir. 1993).

Here, all but two of the current putative members of the NLRB were appointed in violation of the Appointments Clause of the U.S. Constitution. This is so because the President attempted to appoint Members Block, Griffin, and Flynn while the U.S. Senate was in session but without seeking or obtaining the Senate's Advice and Consent, in violation of Article II, Section 2, Clause 2 of the Constitution. The President's claim that these appointments were somehow 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).

The longstanding view of the Attorneys General who issued opinions on this issue, before the current appointments, has been that the term "recess" as applied to intra-session appointments includes only those intra-session breaks that are of "substantial length." *See* Memorandum Opinion for the Deputy Counsel to the President (Jan. 14, 1992), available at http://www.justice.gov/olc/schmitz.10.htm (involving an 18-day recess). 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).

The seminal opinion of Attorney General Daugherty in 1921 established the consistently followed rule that for recess appointments to be made the recess should 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.[3]

Indeed, if the President has the power to determine for himself when the Senate is in recess, he can do so during any weekend, lunch break, or even when he believes that the Senators' debate has stalled and they are not working efficiently and effectively as a body. That position clearly violates Article I, Section 5, Clause 2, which makes each Congressional chamber the master of its own rules. Because neither the House nor the Senate declared themselves in recess, the purported recess appointments to the NLRB are invalid.

CONCLUSION

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[3] 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.

Charging Party hereby moves for the disqualification of Members Block, Griffin and Flynn from hearing this case or issuing any rulings in this case, because their "recess" appointments to the Board by President Obama were unconstitutional. Lacking a quorum under *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), the Board should issue no decision in this case until the Board has a properly appointed lawful quorum.

Dated this 30th day of January, 2012.

Respectfully submitted,
/s/

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Exceptions and Brief was electronically filed via the NLRB website. A copy of the foregoing was also electronically filed with Region 1, and was sent via e-mail to Don Firenze, Counsel for the Acting General Counsel (Don.Firenze@nlrb.gov) and to Chris Callaci, Counsel for the UNAP, (ccallaci@unap.org) and mailed by US mail, first-class, postage prepaid, to Jeanette Geary, P.O. Box 216, 479 Spring St, #1, Newport, RI 02840.

/s/ Matthew C. Muggeridge

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