United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

August 26, 2013

Lyle W. Cayce, Clerk
United States Court of Appeals
For the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *D.R. Horton, Inc. v. National Labor Relations Board*
Case No. 12-60031

Dear Mr. Cayce:

Pursuant to Fed. R. App. P. 28(j), we attach the Eighth Circuit's recent decision in *NLRB v. Relco Locomotives, Inc.*, __ F.3d __, 2013 WL 4420775 (8th Cir. Aug. 20, 2013).

In *Relco*, the Eighth Circuit unanimously held that the NLRB's quorum requirement is not jurisdictional, and thus appellate courts are not required to address untimely objections to various members' recess appointments. *Relco*, 2013 WL at *26-28; *see also id.* at *31 (Smith, J., dissenting) (agreeing with this portion of the majority opinion). The Eighth Circuit relied, among other things, on the Supreme Court's decision in *Freytag v. Commissioner*, 501 U.S. 868 (1990), and the D.C. Circuit's opinion in *Intercollegiate Broadcasting System v. Copyright Royalty Bd.*, 574 F.3d 748 (D.C. Cir. 2009). *Relco*, 2013 WL at *26-28. The Eighth Circuit acknowledged the Third Circuit's contrary decision in *NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203 (3d Cir. 2013), *pet. for rehearing filed* (July 1, 2013), but expressly rejected *New Vista*'s analysis, finding it unpersuasive and inconsistent with Supreme Court case law. *See Relco*, 2013 WL at *27-28.

Relco provides further support for the Board's position, expressed in its supplemental brief, that the employer's untimely recess appointment challenges are not jurisdictional, and should not be entertained.[1]

Respectfully submitted,

/s/ Linda Dreeben
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cc: all counsel (via CM/ECF)

[1] The *Relco* panel majority further held that no "extraordinary circumstances" were present within the meaning of 29 U.S.C. 160(e), and thus the court could not consider a recess appointment challenge that the employer had failed to raise before the Board itself. 2013 WL at *28-31. The Board does not urge that 29 U.S.C. 160(e) bars a recess appointment challenge in this case. At the time the Board issued its decision here, it was unable to provide a three-member panel in which every member could resolve the employer's objections in its favor without simultaneously invalidating his or her own appointment.