

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

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AFFILIATED COMPUTER SERVICES,

Respondent,

- and -

29-RC-11709

COMMUNICATIONS WORKERS OF  
AMERICA,

Petitioner.

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UNION’S RESPONSE TO EMPLOYER’S MOTION TO VACATE  
AND REQUEST FOR REAFFIRMATION OF  
THE BOARD’S JUNE 18, 2009 DETERMINATION

The Communications Workers of America (“CWA” or “Union”), Petitioner in the instant matter, requests that the National Labor Relations Board (“Board”) reaffirm its June 18, 2009 Order, reject the Employer’s Motion to Vacate in its entirety, and certify CWA as the collective bargaining representative for the employees of the Employer. In its June 28, 2010 filing, the Employer demanded that the Board (i) vacate the Order denying its Request for Review of Region 29’s Decision regarding whether the petitioned-for unit was appropriate; (ii) vacate all actions by the Regional Director of Region 29 that followed the denial of the Request for Review; and (iii) regardless of whether the Board reaffirms the June 18, 2010 Order, rerun the representation election. The Employer’s Motion must be denied.

The Employer seeks to vacate the Board’s Order based upon its reading of New Process Steel v. NLRB, 560 U.S. \_\_\_\_ (2010). The Supreme Court’s decision does not justify any of

actions the Employer demands of the Board. The Employer's request in the instant case improperly places procedure over substance. The Employer had no basis in 2009 to challenge the Region's determination of the appropriate unit, which is demonstrated by the fact that the two member Board easily rejected its request for review of the Decision and Direction of Election ("DDE"). The determination that CWA's petitioned-for unit was appropriate is as sound and consistent with Board law today as it was in 2009 and the denial of review should be reaffirmed.

The Employer is not entitled to any extraordinary remedy because the Board had two members for twenty-seven (27) months. Board law does not support the Employer's request that the 8(a)(5) allegations in the Third Consolidated Amended Complaint (Exhibit \*) be vacated. The Employer's obligation to bargain begins at the date of the election, regardless of what transpires after that point. That rule has not changed and the Employer has given no sound reason why the Supreme Court's decision in New Process Steel should change that rule.

Further, there is no basis for the Board to vacate the Region's August 6, 2009 Supplemental Decision on Objections ("SDO"). The Supreme Court explicitly refused to disturb any delegation of authority to the General Counsel's office. Regional Director Al Blyer acted under that authority in rendering the SDO.

Finally, the Supreme Court in New Process Steel did not endorse, nor does logic support, a new election or vacating the Tally of Ballots. The denial of the Employer's Request for Review did not change the vote of any worker. Had the Board not acted until it had its full complement, the ballots would have been exactly the same as they were when counted on June 26, 2009. Although the Employer argues that it ought to be (Motion at 3), it has no reason to be returned to the position it was in prior to the Board's June 18, 2009 Order because the Employer

did not change its position at all based on that Order. Instead, the Employer has ignored the Order, refused to bargain with the Union and has continued to unilaterally change the employees' terms and conditions of employment without regard to the fact that it is aware, from the results of the vote count, that majority of its employees have chosen to be represented by CWA. Thus, the Employer is in the position it would have been had no Order issued and needs no remedy whatsoever.

Therefore, the Board's June 18, 2009 Order should be reaffirmed, the actions of the Regional Director following that Order should be left intact, the Employer's August 2009 Request for Review should be denied and CWA certified as the collective bargaining agent for the employees employed by the Employer.

A. The Board's June 18, 2009 Denial of the Employer's Request for Review Should be Reaffirmed.

The Employer objected to only one aspect of the DDE: the Regional Director's determination that the single facility unit in Staten Island was an appropriate unit. The Employer now requests that the Board's denial of its Request for Review be overturned. The two member Board's rejection of the Employer's Request for Review was sound, consistent with well established Board law, and should be reaffirmed.

It is well established that "there is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit or the *most* appropriate unit; the Act only requires that the unit be 'appropriate.'" Morand Brother Beverage Co., 91 NLRB 409, 418 (1950) (emphasis in the original), enf'd on other grounds, 190 F.2d 576 (7<sup>th</sup> Cir. 1951). The Regional Director properly found that the employees working in Walk-In Centers outside Staten

Island<sup>1</sup> did not share a community of interests with the Staten Island employees. The evidence at the fact finding hearing was that there was no interchange or contact between employees at Staten Island and those in the other facilities. The upstate centers also had different pay rates and different dress requirements. Thus, the Regional Director properly found that the petitioned-for unit was appropriate to the extent that it excluded workers reporting to locations outside Staten Island.

There was no basis in law or fact to overturn the Regional Director's determination. Thus, the Board's June 18, 2009 Order should be reaffirmed.

B. The Region Acted Within its Authority in Issuing the Consolidated Complaint Against the Employer.

Without citation or logical basis, the Employer requested that the Board vacate the Third Consolidated Amended Complaint issued by Region 29 on May 20, 2010. The Region clearly had the authority to act against a malfeasing employer by issuing a complaint.<sup>2</sup> Further, the Employer had an obligation to bargain with CWA beginning no later than May 28, 2009, the date of the representation election. Having refused to do so, the Employer violated the Act in the manner alleged by the Region in the Third Consolidated Complaint.

Further, the Employer's unfair labor practices are not undone by New Process Steel. An employer's duty to bargain begins at the date of the representation election, not at the date that

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<sup>1</sup>No facility other than Staten Island had a Call Center or other departments which were the vast majority of the Staten Island bargaining unit.

<sup>2</sup>The Complaint currently pending against the Employer was issued after the Board was returned to four members (March 27, 2010) and therefore the Region's authority to issue a Complaint is not brought into question by New Process Steel.

the union is certified by either the Region or the Board. See, e.g., Hankins Lumber, 316 NLRB 837, 861 (1995). In fact, an employer is obligated under the Act to bargain with an uncertified union that has a clear majority. National Labor Relations Board v. Kobritz, 193 F.2d 8 (1st Cir. 1952) (“The right of employees to bargain collectively through an exclusive bargaining representative is not conditioned upon an antecedent certification by the Board where . . . the majority status of the union is clearly established otherwise, and the employer has no bona fide doubt of such majority status, but seeks to delay bargaining negotiations while resorting to various coercive tactics designed to dissipate the union majority support.”) See also, Idaho Pacific Steel Warehouse Co., 227 NLRB No. 50 (Board, 1976).

Here, the Employer’s obligation to bargain with CWA and to avoid unilateral changes in wages, hours, and working conditions attached on May 28, 2009: the date of the election and the date upon which the employees’ majority support was clearly established. The Employer’s Request for Review of the DDE was just the type of delay tactic foreseen by the courts and the NLRB that gives an Employer time to engage in unfair labor practices designed to dissipate union support. The Third Consolidated Complaint lists some of the methods this Employer is using to intimidate its workers and dissipate union support: interrogating employees, giving employees the impression of surveillance, changing their pay, dealing directly with them, and physically removing literature from employees’ hands. (See Exhibit A.)

New Process Steel did not remove the protection of the Act from employees for twenty-seven months. The Employer knew that a majority of employees supported CWA; a properly conducted Board election proved the fact. The Employer refused to bargain. The Employer violated the Act at its own risk and the fact that the Board had less than three members during that period does not change this obligation. The Employer has not been in any way prejudiced

because it has not even been forced to go to trial for its unfair labor practices. There is no basis in law or equity for the Employer's wrongful conduct to be forgiven. Therefore, there is no basis to vacate the Region's properly issued Complaint.

C. Region 29's Supplemental Decision on Objections Must Stand and CWA be Certified as the Collective Bargaining Agent.

The Employer asks that the SDO be vacated. In August 2009, the Employer filed a Request for Review of the SDO and the Board did not act on the Request. Based upon the paucity of evidence presented by the Employer in its Request for Review as well as the soundness of the Region's determination, the August 2009 Request must be denied and the Union certified.

The Employer's request for review is based on the fact that it was not given a hearing on the Employer's objections. The Regional Director fully investigated the Employer's objections and issued a determination reflecting that investigation. In order to be afforded a hearing, the Employer must show that its objections raise substantial and material factual issues. NLRB v. Bristol Spring Mfg. Co., 579 F.2d 704, 706-07 (2d Cir. 1978); 29 CFR §102.69(d). Further, a party is only entitled to a hearing if, by prima facie evidence, it demonstrates the existence of "substantial and material factual issues" which, if resolved in its favor, would require the setting aside of the representation election. *Id.*, citing NLRB v Newton-New Haven Co., 506 F.2d 1035 (2d Cir. 1974); Polymers, Inc v NLRB, 414 F.2d 999, 1004-1005 (2d Cir. 1969), cert denied, 396 U.S. 1010, 90 S.Ct. 570 (1970); NLRB v. Joclin Mfg. Co., 314 F.2d 627, 631-32 (2d Cir.1963).

The Employer failed to present evidence sufficient to establish substantial and material factual issues, much less such issues that would require the setting aside of the

election. Thus, the Regional Director was correct in his decision not to hold a hearing regarding the Objections.

The Employer also argued that the Regional Director's decision not to order a hearing denied it the right to a full opportunity to submit evidence. To accept this argument would effectively remove the Regional Director's discretion to grant or deny a hearing in accordance with Section 102.69(d) of the Board's Rules and Regulations. Here, the Employer was given more than a fair opportunity to present evidence within the constructs of the Rules. The Employer's inability to present prima facie evidence to support their Objections without a hearing is not equivalent to an abuse of discretion on the part of the Regional Director.

The Employer's further suggestion that the Regional Director was mistaken in his interpretation of Board precedent is without justification. The instant election was not close. The results were: 144 voted in favor of union representation, 126 against, with 2 ballots challenged. (Supplemental Decision on Objections at 2.) The Union's win was clear, 18 votes or a 6.4% margin. Thus, the need for a hearing was not acute.

New Process Steel does not change the validity of the Regional Director's SDO. The Regional Director's power to issue that decision came from the December 20, 2007 delegation of authority to the General Counsel to continue initiating and conducting litigation. The Supreme Court explicitly stated that "[o]ur conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel." New Process Steel at footnote 4. Thus, there is no question that Regional Director Blyer had the authority to issue the SDO.

That a two member Board rejected the Employer's May 2009 Request for Review made no difference to the Regional Director's determination. All of the alleged factual events complained of by the Employer in its Objections had either already occurred or were falsely alleged. The law governing whether what actually happened amounted to interference with the election was also established. Therefore, the Regional Director's decision on whether the allegations were proved and, if proved, were sufficient to require a new election would have been the same whether issued in August 2009 or at any later date.<sup>3</sup>

This logic applies equally to the allegations that the Region did not maintain a proper chain of custody procedures with regard to the impounded ballots. The ballots as they were on June 26, 2009 would be the same today if the count were to happen after a properly constituted Board rejected the Employer's frivolous Request for Review of the DDE. Nothing would change regardless of when the ballots were counted and, facts and law remaining the same, the Regional Director's determination must be as it was.

The Employer has not respected the SDO by accepting the certification of CWA and bargaining with the Union. Therefore, the Employer has not been prejudiced in any way by the SDO. The Employer's August 2009 Request for Review should be rejected for the reasons stated in the Union's Opposition thereto. New Process Steel has not given any additional reason to vacate the SDO.

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<sup>3</sup>Further, NLRB R&R Rule 102.69(b) explicitly states that "[t]he filing of [a Request for Review of the DDE] shall not, unless otherwise ordered by the Board, operate as a stay of election or any other action taken or directed by the Regional Director. . ." The Board ordered no stay and the SDO is another action taken by the Regional Director.

D. The May 28, 2009 Election and Tally of Ballots Must Stand.

The Employer argues that New Process Steel should grant it a new representation election regardless of whether the Board reaffirms its June 18, 2009 Order. Not law, facts, nor logic support this request. New Process Steel did not, explicitly or by implication, require all elections that occurred following the denials of requests for review ordered between January 1, 2008 and March 27, 2010 to be rerun. Such a ruling would place form over substance and deny workers the validation of their choice of representation, which is one of the central purposes of the Act. This Employer certainly has not been prejudiced by anything that has occurred. Therefore, should the Board reaffirm its June 18, 2009 ruling, all antecedents should stand.

The Supreme Court's ruling did no more than establish that orders by the two member Board were void. Nothing in New Process Steel suspended the protection of the Act for twenty-seven months. To void a representation election because of an unavoidable procedural misstep would do precisely that.

The Employer's argument that the instant election must be rerun because of the procedural order of the Board's actions is counter to the purpose of the Act. The purpose of the Act is to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." NLRA, § 1. The Supreme Court has emphasized the importance of respecting the choice employees made in a representation election:

In the political and business spheres, the choice of the voters in an election binds them for a fixed time. This promotes a sense of responsibility in the electorate and needed coherence in administration. These considerations are equally relevant to healthy labor relations.

Brooks v. NLRB, 348 U.S. 96 (1954).

Here, the employees voted in a secret ballot election monitored by the NLRB. The Employer having filed a Request for Review of the DDE did not effect one vote. If the box was counted in June 2009 or June 2010 or June 2011, the result, reflected by the Tally of Ballots, would not have changed one iota. The Employer has suffered absolutely no prejudice because it has, as set forth above, completely ignored the fact that its employees have chosen to be represented by CWA for the purpose of collective bargaining.

The only citation the Employer gives to justify its position that the election be rerun is R&R Rule 102.67(b) which states that “all ballots shall be impounded and remain unopened pending [the Board’s decision on a Request for Review of a DDE].” This rule does not require that an election be rerun if a denial of a Request for Review is later found to be void. While the NLRA provides that the Board have rulemaking power, that rulemaking power must be exercised “to carry out the provisions of the Act.” NLRA § 6. With a full Board, Rule 102.67(b) does accomplish a balance between the Employer or the Union’s right to have the Regional Director’s decision potentially reviewed with the employees’ right to government enforcement of their decision on a collective bargaining representative in a secret ballot election. Rerunning the election here, only because the Board had two instead of three members, would be to enforce Rule 102.67 over the statute itself. The employees selected CWA as their collective bargaining representative in a properly conducted NLRB election. Lacking a showing that the unit was not proper or that the election was somehow tainted, that decision must stand.

The Supreme Court in New Process Steel established that the language of the NLRA, not the Board’s rules about how the agency should function, is paramount. The NLRA is very clear that it is the employees’ choice of a representative that must be protected. The NLRA does not

mention an Employer's right to Request Review of an Regional Director's decision. The Supreme Court has explained how holding the Employer to the decision on a collective bargaining representative for a reasonable period of time supports the goals of the NLRA:

It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time . . .

Brooks v. NLRB, 348 U.S. 96, 100 (1954). This Employer has ignored the Union and has done everything in its power to undermine its employees' choice of a collective bargaining agent. To void the employees' choice, which is what the Employer requests, would be to completely disregard the Act during the relevant period.

The Employer has suffered no prejudice. The only attempt it made to even articulate a prejudice was to state that the ballots would need to be retallied and that would "cast a new cloud over the integrity of the ballots and the election." (Motion to Vacate at 3.) The Employer did not provide any reason why there would need to be a retally of the ballots. The ballots were counted before employer and union representatives, as well as some employees. The Employer objected to the election and challenged the Regional Director in court. The former objections await the Board's decision; nothing about the June 18, 2009 Order altered either the facts or the law that would impact a proper determination on that request for review. The Employer, in settling the lawsuit, explicitly agreed that no additional legal action was necessary because the Regional Director preserved certain materials relevant to the conduct of the election. (See Exhibit C.) Having so agreed before a federal judge, the Employer cannot now claim that it has been prejudiced on that point in any way. The Employer has filed a Request for Review on the Regional Director's SDO and that awaits determination. The Employer needs no further

protection from this agency than is already provided by its ability to contest the Regional Director's determination on its objections.

Further, had the Employer believed that the Region was without authority to count the ballots from the May 28, 2009 election, it could have petitioned the federal court with a writ of prohibition. See, e.g., Thompson Products v. NLRB, 133 F.2d 637, 639-640 (6<sup>th</sup> Cir. 1943) (Writ of Prohibition against an action of the Board appropriate if the Board is exceeding the limits of its authority.) The Employer chose not to do that. Therefore, the Employer has waived its right to ask that the ruling be undone and extraordinary remedies be given it at this juncture.<sup>4</sup>

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<sup>4</sup>This Employer did request intervention by the courts in July 2009, but did not request that the vote be rerun due to the Board acting without authority. Therefore, the Employer is collaterally estopped from asking for any such relief now. (Complaint, Affiliated Computer Services v. NLRB, 09 Civ. 2793, Exhibit B hereto.)

## CONCLUSION

Thus, New Process Steel, which philosophically supports the language of the Act over the rules of the Board (however reasonable), cannot be used as a basis for undermining the employees' secret ballot choice of CWA as their collective bargaining agent. The primary purpose of the Act is to protect and promote that choice. To that end, the Union respectfully requests that the Board (i) reaffirm its June 18, 2009 Order denying the Employer's Request for Review of the DDE; (ii) deny the Employer's August 2009 Request for Review of the SDO; and (iii) Order the Employer to bargain with CWA, its employees' collective bargaining representative.

Dated: New York, New York  
July 19, 2010

Respectfully submitted,

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