UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AFFILIATED COMPUTER SERVICES, INC., A XEROX COMPANY,	§	
	§	
Employer,	§	
	§	Case No. 29-RC-11709
and	§	
COMMUNICATION WORKERS OF AMERICA,	§	
	§	
Petitioner.	§	

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

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Introductory Statement

On June 28, 2010, Affiliated Computer Services, Inc., a Xerox Company (the "Employer" or "ACS") filed its Motion to Vacate the Board's Order of June 18, 2009[1] and the Resultant Invalid Determinations Pursuant to *New Process Steel, L.P. v. NLRB* [560 U.S. ___, 130 S. Ct. 2635, 2010 U.S. LEXIS 4973 (June 17, 2010)] ("Employer's Motion to Vacate"). The Employer's Motion to Vacate is pending.

On July 19, 2010, the Communications Workers of America ("CWA" or the "Union") filed its Response to Employer's Motion to Vacate and Request for Reaffirmation of the Board's June 18, 2009 Determination (the "Response" or the "Union Response").

The Employer now files its Reply to the Response.

[1] The two-Member Board's June 18, 2009 Order denied the Employer's May 15, 2009 Request for Review of the Regional Director's Decision and Direction of Election (the "Request for Review").

The Union's Arguments in its Response and the Employer's Reply

1. The Union Erroneously Argues that the Relief Requested by the Employer Is Not Justified

A. The June 18, 2009 Two-Member Order is Void and Must be Vacated

In its Response, the Union initially and incorrectly asserts that *New Process Steel* "does not justify any of the actions the Employer demands of the Board." Union Response at 1-2. The Union proffers no reason why but rather simply reasserts its arguments on the merits in opposition to the Request for Review. *Id.* at 3-4.

The Union, however, later admits that *New Process Steel* "establish[ed] that orders by the two member Board were void." *Id.* at 9. In fact, the Union requests, on its own behalf, "reaffirmation" of the two-Member Board's June 18, 2009 Order (the "Order") denying the Request for Review, thereby recognizing that the Order is voided by *New Process Steel* and does require further action by the Board. Union's Response to Employer's Motion to Vacate and *Request for Reaffirmation of the Board's June 18, 2009 Determination* (emphasis added); *Id.* at 1, 3, 9 and 13.

To the extent that the Union now assumes or urges rote reaffirmation of that voided Order, ACS notes that this approach to "compliance" was specifically rejected by the Board:

> Absent further direction from this Court, it is unclear whether the Board has the authority to 'ratify' the two-member decisions *en masse* without reconsidering each case individually. *In any event, prudential considerations in these circumstances would weigh against the Board's exercising such authority in view of the high-risk of potential challenges to a blanket ratification order.*

Letter Brief for Respondent National Labor Relations Board (Apr. 26, 2010) ("NLRB Letter Brief"), http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/08-1457_RespondentSuppLttr.pdf, at 2 (emphasis added) (Attachment A).

Nor is reaffirmation the course followed in any of the four remanded cases considered to date by newly constituted panels the Board. *Cf. Regal Health and Rehab Center, Inc. and Service Employees International Union Healthcare, Local 4*, 355 NLRB No. 63 (Aug. 5, 2010); *ADF, Inc., and its alter ego ADLA, LLC and International Brotherhood of Teamsters, Local Union No. 251*, 355 NLRB No. 62 (Aug. 5, 2010); *Chrysler, LLC and Local 412, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO*, 355 NLRB No. 61 (Aug. 5, 2010); *SPE Utility Contractors, LLC and Linda M. Leuch*, 355 NLRB No. 60 (Aug. 5, 2010).

The fact is that it is simply unknown how a newly and duly constituted panel of the Board will decide the Request for Review. Under at least one viable scenario, that panel would grant the Employer's Request for Review and reverse, revise or remand the Regional Director's May 1, 2009 Decision and Direction of Election. It is therefore quite possible that the bargaining unit will be changed and that the ballots cast on May 28, 2009 will never be opened, and no majority status achieved or demonstrated.

Another potential scenario is that this panel would deny the Request for Review. Even this alternative scenario has significant consequences as only if and after the Request for Review were denied by a properly constituted panel could the impounded ballots then be opened and counted and a majority status thereby determined. Section 102.67(b), Rules and Regulations of the NLRB (ballots must "be impounded *and remain unopened* pending" a final decision on a request for review. (emphasis added)). This new Tally of Ballots would then set — and thereby change — the date of any duty to bargain.

Even if, upon reconsideration, the full complement Board were again to deny the Employer's Request for Review, a new election in the same unit would still be necessary. Due to

the improper and void June 18, 2009 Order, the ballots have already been released and counted, and the subsequent improper actions by the Regional Director while the Employer's Request for Review should have remained pending — including the issuance of the SDO, certification of the Union and Complaints on alleged violations of Section 8(a)(5) — have already occurred and cannot be undone.

With either a new election or a denial of the Request for Review, there will be a new Tally of Ballots and, if the Union prevails, only then will the Employer's duty to bargain will arise from that date.

It is the Employer's position, for the reasons stated in its Motion to Vacate, that, on the basis of *New Process Steel*, the two-Member June 18 Order is void and therefore the full complement Board must now vacate that Order and (re)consider the Employer's May 15, 2009 Request for Review based on the briefing on file as of June 18, 2009 by the Employer and the Union. On (re)consideration, the Board can and should consider only that briefing and not any subsequent briefing or argument on the merits, including any arguments the Union is now attempting to interject through its Response.

Therefore, not only does *New Process Steel* justify the actions requested by the Employer but it also requires them.

B. The Actions Dependent on the Voided Order Must Also be Vacated

The Employer further requests that each of the Regional Director's actions dependent on that voided Order — including the Tally of Ballots,[2] the Supplemental Decision on Objections and Certification of Representative (the "Supplemental Decision" or "SDO") (Aug. 6, 2009) and

[2] *See* Attachment B.

the allegations in any Complaint of violation of any duty to bargain based on the premature Tally of Ballots — be vacated.

Because the Order is void under *New Process Steel*, the Regional Director had no authority to open the ballots on June 26, 2009. Section 102.67(b) of the Board's Rules and Regulations specifically requires that the ballots "be impounded *and remain unopened* pending" a final decision on a request for review. (Emphasis added).

It follows that the Regional Director also had no authority then to tally the ballots, certify the election results, rule on Objections or proceed with the issuance of any unfair labor practice Complaints against the Employer, including the Third Consolidated Amended Complaint (May 20, 2010; Attachment C), based on the Employer's alleged duty to bargain arising from the results of the election — results which would still not be known but for the improper opening of the ballots on June 26, 2009 and which are still in doubt due to the lack of any valid ruling on the Request for Review.

Contrary to the Union's claims, *New Process Steel* does change the validity of the Regional Director's SDO because, as noted above, the May 28, 2009 ballots should have remained unopened and uncounted on June 26, 2009, and any subsequent action by the Regional Director based on that improper opening and counting of ballots — including the issuing of the SDO — was invalid due to the requirement in Section 102.67(b) of the Board's Rules and Regulations that the ballots "be impounded *and remain unopened* pending" a final decision on a request for review. (Emphasis added); *cf.* Union Response at 7.

In support of its claim that the Regional Director had authority to proceed with the SDO, the Union cites the Board's Rules & Regulations Section 102.69(b) which states that the filing of

a Request for Review 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.

Rule 102.69(b) is distinguishable, however. The Employer is not contending that its filing of the Request for Review on May 15, 2009 should have stayed the election. The election did proceed on May 28, 2009 and was not stayed.

Rather, the Employer is contending that, because the Employer's May 15, 2009 Request for Review was not yet properly decided as of the date of the election but was rather improperly decided under *New Process Steel* on June 18, 2009 by a two-Member Board, the ballots should never have been opened or counted on June 26, 2009.

Likewise, the Third Consolidated Amended Complaint is fatally dependent on the improper opening of the ballots insofar as it alleges that the Employer made certain unilateral changes without notice and bargaining with the Union. Attachment C. The sole basis for the Employer's alleged duty to bargain, however, is the allegation in the Complaint that "on or about May 28, 2009, in a secret ballot held by Region 29 of the Board, a majority of the employees in the Unit selected the Union as their exclusive collective bargaining representative." Order Further Consolidating Cases, Third Consolidated Amended Complaint and Notice of Hearing at ¶ 8 (Attachment C).

In its Answer to the original Complaint (the "Answer"), the Employer both objected and raised an affirmative defense that the Regional Director's finding that the unit described was appropriate was not final because the Employer's May 15, 2009 Request for Review was decided by a two-Member Board and that the issue of whether the Board had authority to issue decisions

by two Members was then pending before the United States Supreme Court in *New Process Steel*. Answer at ¶ 7, p. 5 (Attachment D).[3]

The Union argues that the May 28, 2009 election and the tally of ballots of June 26, 2009 "must stand." Union Response at 6, 9. Throughout its Response, however, the Union completely and conveniently ignores the fact that if, upon reconsideration of the June 18, 2009 Order, the full complement Board were to grant the Employer's Request for Review, and the Board or the Regional Director were to expand the scope of the appropriate bargaining unit as requested by the Employer in its Request for Review, a new election would then be absolutely necessary since the bargaining unit and eligible voters would be different from those in the May 28, 2009 election. In addition, the improperly opened and tallied ballots must at a minimum be recounted, under any circumstances. Section 102.67(b), Rules and Regulations of the NLRB.

C. The Board Should Stay Consideration of The Request for Review & Stay

Unless and until these issues are resolved, the Employer requests that the Board stay its consideration of the pending Employer's Request for Review [of the SDO] and Request for Stay of the Certification of Representative (Aug. 20, 2009) (the "Request for Review & Stay"). Depending on the new panel's decision on the Request for Review and its impact on the eventual election results, the Employer may elect to withdraw its Objections and moot the Request for Review & Stay. Alternatively, a second opening and counting of the ballots may give rise to additional grounds for Objections. Therefore any ruling on the Request for Review & Stay would be premature.

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[3] ACS has raised this objection and affirmative defense in each Answer to each Consolidated Complaint issued by the Region. Although the Regional Director issued a Complaint on November 25, 2009, there has been no hearing set due to the pendency of the Employer's Request for Review & Stay (Aug. 20, 2009). *See* Notice of Hearing (Attachment C at 9).

In its Response, the Union has reasserted its argument in opposition to the Employer's pending Request for Review & Stay. Union Response at 6-7. The Employer, however, contends, based on the foregoing and for the reasons stated in its Motion to Vacate, that the Board should stay consideration of the Request for Review & Stay pending resolution by the Board of the issues raised in the Employer's Motion to Vacate and, upon consideration and assuming the Request for Review & Stay remains viable after the ruling on the Request for Review and the new Tally of Ballots, should limit its review to those pleadings filed within the appropriate timeframe rather than arguments now included in the Union's Response.

2. The Union Also Misstates the Commencement of the Duty to Bargain

In its Response, the Union also incorrectly argues that the Employer "had an obligation to bargain with CWA beginning no later than May 28, 2009, the date of the representation election." Union Response at 4-5. In support of this contention, the Union argues that "an employer's duty to bargain begins at the date of the representation election, not at the date that the union is certified." *Id.*

The Board has recognized that the election in question was "won" by the Union not on May 28, 2009, the date of the election, as the Union suggests, but rather on June 26, 2009, the date of the opening, counting and tally of ballots. *Affiliated Computer Services, Inc.*, Case 29-CA-30013, Advice Memorandum dated May 21, 2010 (the "ACS Advice Memorandum") at 1 ("... [T]he Union won an election *on June 26, 2009* ... .") (emphasis added).

The Union's position on the commencement of the date of the duty to bargain is not an accurate statement of Board law. Rather, it is established Board law that an employer violates Sections 8(a)(1) and (5) only if and when, without first consulting with the union, it makes changes in terms and conditions of employment during the pendency of objections to an election

following the conclusive results announced by the Board. *W.R. Grace & Co.*, 230 NLRB 617, 618 (1977), *enforced NLRB v. W.R. Grace & Co.*, 571 F.2d 279 (5th Cir. 1978), citing *Mike O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701 (1974).

Significantly, the touchstone of the Board's determination of when an employer's duty to bargain arises is not the date of the election but rather the date of the ballot count and announcement of a result. *W.R. Grace & Co., supra.* As both a practical and a legal matter, until the ballots are counted and a result announced, there is no way for an employer to know whether a union has established majority status and, absent proof of majority status, the employer has neither the duty under Section 8(a)(5) nor the right under Section 8(a)(2) to recognize or bargain with a specific union.

Accordingly, where, as here, no ballots were counted and no results were announced on the day of the election,[4] the date on which an employer's conditional duty to bargain arises is the date of the Tally of Ballots. As Board Member Oviatt stated in his concurring opinion in *W.A. Krueger Co.*,

> [T]he touchstone in these cases [citing *Mike O'Connor Chevrolet*] for determining the union's majority status and the employer's concomitant duty under Section 8(a)(5) is *the election tally*. If it is the result of the employees' free choice, *the Board's vote count* is dispositive of the employer's postelection obligation to bargain, even during the pendency of objections.

299 NLRB 914, 919 (1990) (emphasis added); *see also*, *General Electric Co. v. NLRB*, 400 F.2d 713, at n.4 (5th Cir. 1968) ("the Union's majority status was established on July 16, 1956, *when the tally of ballots was counted.*" (emphasis added)).

Significantly, the cases cited by the Union in its Response are consistent with this Board law, holding that it is the date when the ballots are *counted*, not cast, or the date majority status is

[4] In this instance, the ballots were properly impounded due to the pendency of the Request for Review. The ballots were not counted until June 26, 2009, *i.e., after* both the Board's now voided June 18, 2009 Order and the May 28, 2009 election. *See* ACS Advice Memorandum at 1. *See also* Attachment B (Tally of Ballots).

otherwise established and announced that triggers an employer's obligation to bargain. *Cf.* Union Response at 4-5.

For example, in *Hankins Lumber Co.*, 316 NLRB 837, 861 (1995), cited by the Union in its Response at 5, the Board held that

> [a]n employer's duty to avoid unilateral changes in wages, hours and working conditions attaches *when the Union wins the election*... . The certification date is when the employer's limited duty to bargain, following *the Union's election victory*, ripens into the employer's plenary statutory obligation.

(emphasis added). *See also* ACS Advice Memorandum at 1.

NLRB v. Kobritz, 193 F.2d 8 (1st Cir. 1951), also cited by the Union, Response at 5, did not involve an election but a demand for voluntary recognition after a union had informed the employer that a majority of his employees had "signed up" with the union. The Court noted that

> [t]he right of employees to bargain collectively through an exclusive bargaining representative is not conditioned upon an antecedent certification by the Board where, as here, *the majority status of the Union is clearly established* otherwise and the employer has no bona fide doubt of such majority status ... .

Id. at 14 (emphasis added).

Again in *Idaho Pacific Steel Warehouse Co.*, 227 NLRB 326, 329 (1976), also cited by the Union, Response at 5, there was no election. There, the Board held that

> [I]t is well settled that an employer's duty to bargain is not dependent upon an election and Board certification... . The Act, it should be emphasized, does not condition an employer's obligation to bargain upon an antecedent certification by the Board, where, as here, *a union's majority designation is clearly established* by authorization cards... .

Id. at 329 (emphasis added).

Despite recognizing and citing these cases, the Union nevertheless inexplicably argues that "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*." Union Response at 5

(emphasis added). These dates are not the same. The Union further argues that "the Employer knew that a majority of employees supported the CWA; a properly conducted Board election proved the fact." *Id.* Obviously, no one knew any election results on the date of the election.

It is undisputed, however, that the earliest date that the majority support was "clearly established" and that the Employer could possibly have "known" of the Union's alleged majority support was June 26, 2009, *i.e.,* the date of the premature counting and tally of ballots — *not* the date of the election. *See* ACS Advice Memorandum at 1.

In summary, the Board's recognition and relevant Board case law, including the Union's own cited authorities, establish that the earliest date the Employer's alleged obligation to bargain could attach will only be if and after the May 28 ballots, or the ballots from another ordered election, are properly opened, counted and tallied.

3. The Employer Has Been, and Continues To Be, Prejudiced by the Voided Order and Subsequent Dependent Actions by the Regional Director

Contrary to the Union's claims in its Response, the Employer has been, and continues to be, prejudiced by the Region's continual and virtually continuous investigation of the Union's various unfair labor practice charges alleging unilateral changes and by the Region's issuance of Complaints based on those Charges. The Employer has been required to expend considerable resources to investigate and respond to each Charge[5] and to answer each Complaint. In addition, the Union has generated considerable adverse publicity against the Company with its customers, legislative constituents and employees based on these "findings" by the Board of the Company's "unlawful conduct." *See, e.g.,* http://www.notsofastezpass.org/ and Attachment E.

[5] To date, the Union has filed seven Charges alleging violation of Section 8(a)(5), and the Union has publicized these allegations in the Complaints to ACS employees, customers, clients and constituents. *See, e.g.,* http://www.notsofastezpass.org/ and Attachment E.

Even if a new election is not ordered upon consideration of the Request for Review, the Employer has been and will remain prejudiced absent vacating the voided Order and the Section 8(a)(5) allegations in the Consolidated Complaint since it will presumably remain inappropriately charged with refusing to bargain with a union prior to the time any duty to do so arose because the results of the election, and the union's alleged majority status, were not (yet) lawfully established.

4. ACS Has Not Waived its Right to Seek Review of the June 18, 2009 Order

Finally, contrary to the Union's claims in its Response, the Employer has not waived its right to request that the June 18, 2009 Order be vacated. *See, e.g.*, NLRB Letter Brief at 2 ("An unusual feature of the NLRA is that no statutory provision or implementing regulations imposes a time limit for an aggrieved party to file a petition for review. *See* 29 U.S.C. §160(f) .... If an aggrieved party now petitions for review of a Board order or the Board seeks enforcement, the validity of the underlying order issued by the two-member Board is subject to challenge.") (Attachment A); *see also NLRB v. Talmadge Park*, 608 F.3d 9131 (2d Cir. 2010) (court *sua sponte* remanded case under *New Process Steel* although neither party had raised the issue); and NLRB Letter from R. Hardick to A. Young (Jul. 13, 2010) ("There is no deadline for filing of either motions to vacate or responses thereto.") (Attachment F).

As noted above, the Employer specifically asserted in its Answer to the Complaint that the Regional Director's finding that the unit described in the Complaint was appropriate was not yet final, that the Employer's Request for Review was decided by a two-Member Board and that the issue of whether the Board had authority to issue decisions by two Members was currently pending before the Supreme Court in *New Process Steel*. Reply at 5; Attachment D at ¶ 7, p. 5.

Contrary to the Union's contention, the Employer was not required to petition a federal district court with a writ of prohibition to prevent the Regional Director from counting the ballots on June 26, 2009 if the Employer believed that the Region was without authority to proceed. At the time of the ballot count, *New Process Steel* had not yet been decided.

Moreover, it is well settled that lack of jurisdiction can be asserted at any time. *NLRB v. Talmadge Park, supra*. In *New Process Steel*, the Supreme Court indisputably held that all two-Member decisions by the Board are void and thus provide no jurisdictional basis for any subsequent action.

Conclusion

In summary, for all of the reasons stated herein and in the Employer's Motion to Vacate, the Employer respectfully requests that the Board grant the Employer's Motion to Vacate and Request to Stay and issue an Order:

a. Staying consideration of the Request for Review & Stay pending resolution of these issues;

b. Vacating the voided June 18, 2009 Order;

c. Vacating the Regional Director's SDO and Certification of Representative issued on August 6, 2009;

d. Vacating the June 26, 2009 Tally of Ballots;

e. Dismissing any unfair labor practice allegations in any Complaint under Section 8(a)(5) based on any alleged duty to bargain arising from the May 28 election or the invalid June 26, 2009 Tally of Ballots and subsequent invalid SDO and Certification and

f. Ordering a new election be conducted at the appropriate time in whatever unit the Board, upon reconsideration, ultimately and finally determines is appropriate.

Dated: August 12, 2010

Respectfully submitted,

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Certificate of Service

I hereby certify that on this the 12th day of August, 2010, a true and correct copy of the foregoing Employer's Reply to Union's Response to Employer's Motion to Vacate and Request for Reaffirmation of the Board's June 18, 2009 Determination has been sent by facsimile and/or e-mail/efiling to the following:

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