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**Rochelle Waste Disposal, LLC and International Union of Operating Engineers, Local 150, AFL-CIO.** Cases 33-CA-15298, 33-CA-15765, and 33-RC-5002

August 23, 2010

DECISION, CERTIFICATION OF REPRESENTATIVE, AND NOTICE TO SHOW CAUSE

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND PEARCE

On April 30, 2009, the two sitting members of the Board issued a Decision and Order in Case 33-CA-15765, reported at 354 NLRB No. 18.<sup>1</sup> Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Seventh Circuit, and the General Counsel filed a cross-application for enforcement. The court of appeals, on its own motion, consolidated Case 33-CA-15765 with Cases 33-CA-15298 and 33-RC-5002, which were pending before the court pursuant to an earlier petition for review and cross-application for enforcement in those matters.<sup>2</sup> On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the court of appeals remanded these cases for further proceedings consistent with the Supreme Court's decision.

<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

<sup>2</sup> On October 20, 2008, the two sitting members of the Board issued a Decision, Order, and Direction in Cases 33-RC-5002 and 33-CA-15298, reported at 353 NLRB 416 (2008). That decision adopted the judge's finding *inter alia* that the Respondent violated Sec. 8(a)(3), (4), and (1) by discharging employee Jeff Jarvis, and directed the Regional Director to open and count Jarvis's ballot, prepare and serve a revised tally of ballots, and issue an appropriate certification. Following the October 20, 2008 Decision, Order, and Direction, the parties entered a settlement agreement that satisfied the backpay and reinstatement obligations of the Order.

The National Labor Relations Board has consolidated these proceedings and delegated its authority in both proceedings to a three-member panel.<sup>3</sup>

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. The Board's April 30, 2009 decision (354 NLRB No. 18) states that the Respondent is precluded from litigating any representation issues because, in relevant part, they were or could have been litigated in the prior representation proceedings. The preelection representation issues raised by the Respondent were considered by a three-member panel which denied the Respondent's request for review. Accordingly, we give that decision preclusive effect.<sup>4</sup> However, the postelection representation issues raised by the Respondent were resolved in a two-member decision and we do not give that decision preclusive effect.

We have considered the postelection representation and unfair labor practice issues raised by the Respondent. The Board has considered the judge's decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order to the extent and for the reasons stated in the October 20, 2008 Decision, Order, and Direction, reported at 353 NLRB 416, which is incorporated herein by reference.<sup>5</sup>

Accordingly, we find that the election was properly held and the tally of ballots is a reliable expression of the employee's free choice, and we will issue an appropriate certification.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Union of Operating Engineers,

<sup>3</sup> Consistent with the Board's general practice in cases remanded from the courts of appeals, and for reasons of administrative economy, the panel includes the members who participated in the original decision. Furthermore, under the Board's standard procedures applicable to all cases assigned to a panel, the Board members not assigned to the panel had the opportunity to participate in the adjudication of this case prior to the issuance of this decision.

<sup>4</sup> On August 16, 2010, the Respondent filed a Motion for Leave to File Supplemental Brief in Opposition to the General Counsel's Motion for Summary Judgment. This motion, however, seeks reconsideration of a supervisory issue resolved by a three-member panel, which issue the Respondent did not preserve in the consolidated postelection representation and unfair labor practice proceeding. In these circumstances, we deny the Respondent's motion.

<sup>5</sup> During the course of the litigation in Cases 33-RC-5002 and 33-CA-15298 the two sitting members of the Board issued a decision denying the Respondent's motion for reconsideration of a procedural ruling made by a three-member panel. The Respondent did not thereafter file exceptions regarding the ruling or the denial of its motion for reconsideration. Thus, those matters are not before us and may not be raised on review.

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Local 150, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time heavy equipment operators including the scale operator and the landfill supervisor employed by the Employer at the Rochelle Municipal #2 landfill in Rochelle, Illinois, EXCLUDING temporary employees employed through a temporary agency, office clerical and professional employees, guards and supervisors as defined in the Act.

Notice to Show Cause

As noted above, the Respondent has refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. courts of appeals. Although the Respondent's legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining at this time. It is also possible that other events may have occurred during the pendency of this litigation that the parties may wish to bring to our attention.

Having duly considered the matter,

1. The General Counsel is granted leave to amend the complaint on or before September 2, 2010 to conform with the current state of the evidence;

2. The Respondent's answer to the amended complaint is due on or before September 6, 2010 and

3. NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before October 7, 2010 (with affidavit of service on the parties to this proceeding), as to why the Board should not grant the General Counsel's Motion for Summary Judgment. Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C. August 23, 2010

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Wilma B. Liebman, Chairman

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Peter C. Schaumber, Member

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Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD