UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

_____

Kyle B. Chilton,
Petitioner

and Case No. 09-RD-061754

Center City Int'l Trucking, Inc.,
Employer

and

International Ass'n of Machinists,
Union.

_____

PETITIONERS' REQUEST FOR REVIEW

On 20 January 2012, Region 9 dismissed without a hearing the Decertification Petition filed by Petitioner Kyle B. Chilton based on speculation that his petition was tainted by unsubstantiated unfair labor practices allegedly committed by his employer. Pursuant to NLRB Rules & Regulations §§ 102.67 and 102.71, Petitioner submits this Request for Review. Review should be granted because the Region erroneously deprived Petitioner and his co-workers of their right to decertify without first holding a hearing under *Saint-Gobain Abrasives*, 342 NLRB 434 (2004) to determine if a causal nexus actually exists between their employer's alleged misconduct and employee desire for decertification.

However, the Board should not rule upon this petition until it attains a lawful quorum under *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). The Board currently lacks a quorum because the ostensible "recess" appointments of Sharon Block, Richard Griffin

and Terence Flynn to the Board are unconstitutional.

ARGUMENT

I. The Region Erred in Dismissing the Petition. A *Saint Gobain* Hearing Must be Held to Determine if a Casual Nexus Exists Between the Alleged Unfair Labor Practices and Employee Support for Decertification

Employees enjoy a statutory right to refrain from union representation under § 7 of the NLRA. 29 U.S.C. § 157. To effectuate this right, the Act grants employees the right to a decertification election. 29 U.S.C. § 159(c)(1)(A)(ii). Secret-ballot elections are the preferred forum for employees to exercise their right to choose or reject union representation. *See Levitz Furniture Co.*, 333 NLRB 717, 725 (2001).

On 27 July 2011, Petitioner Kyle B. Chilton filed the instant petition to decertify the International Association of Machinists & Aerospace Workers ("IAM"). The petition was duly supported by a showing of interest signed by more than 30% of his co-workers between 13 and 19 July 2011. On 20 January 2012, the Region dismissed the petition based on three sets of unfair labor practice charges filed by the IAM.

The first set of union charges in *Center City Int'l Trucking*, Case No. 9-CA-45338 *et. seq*. (*Center City I*) involves allegations that the employer failed to bargain in good faith and wrongfully discharged an employee who was a member of the IAM's negotiating committee. An ALJ found merit to the allegations in JD-52-11 (2 Sept. 2011). The employer has filed exceptions and the case is currently pending before the Board.

The second set of charges in *Center City Int'l Trucking*, Case No. 9-CA-60153 *et. seq*. (*Center City II*) involves allegations that the employer failed to provide certain information to the union during bargaining. The ALJ recommended dismissal of some allegations, and found merit to others, in his decision at JD-31-11 (15 Nov. 2011). The employer has filed exceptions and the case is currently pending before the Board.

The third set of charges in *Center City Int'l Trucking*, Case No. 9-CA-062744 (*Center City III*) involves a number of miscellaneous allegations. These charges have yet to reach an ALJ, as the Complaint was recently issued on 12 December 2011.

Notwithstanding that the Board has yet to pass on the validity of any of these unfair labor practice allegations, the Region concluded that this unproven misconduct wrongfully caused employees to seek decertification of the IAM and fatally tainted their decertification petition. This conclusion warrants reversal under *Saint Gobain*.

In *Saint Gobain*, the Region dismissed a decertification petition based on a finding that an employer's alleged failure to bargain in good faith tainted the petition. 342 NLRB at 434. As here, the Region in *Saint Gobain* dismissed the petition before the Board passed on the validity of the charges and without holding a hearing to determine if a causal nexus actually existed between the employer's conduct and employee support for decertification. *Id.* The Board reversed the Region, and ordered that a hearing must be conducted to determine if a causal nexus actually exists. "[I]t is not appropriate to speculate, without facts established in a hearing, that there was a causal relationship

between the conduct and the disaffection. To so speculate is to deny employees their fundamental Section 7 rights. Surely, a hearing and findings are prerequisites to such a denial." *Id.*

As in *Saint Gobain*, the Region's dismissal of the petition here is based on speculation from unsubstantiated allegations. First, the Board has not substantiated any of the allegations made against the employer in the *Center City* cases. Indeed, the allegations in *Center City III* have yet to even be considered by an ALJ.

The Board obviously cannot determine if a causal connection exists between employer unfair labor practices and employee dissatisfaction before establishing if the employer even committed any unfair labor practices. Indeed, not one of the four factors identified in *Master Slack Corp*., 271 NLRB 78, 84 (1984) can be evaluated until it is established exactly which unfair labor practices the employer committed, if any. For this reason alone, the dismissal of the petition must be reversed.

Second, the Region's finding of a causal connection between is predicated on speculation, and not evidence and facts. A hearing was never held to determine if a connection actually exists between the employer's conduct and employee support for decertification.

The hearings conducted in *Center City* I and II did not investigate the causal connection issue, but rather only whether the employer engaged in certain conduct. Indeed, the hearing in *Center City I* took place on 19 May 2011, more than two months

before the decertification petition was filed. Among other things, the hearings did not address the following factors that bear directly on whether a causal connection exists:

> (1) whether employees were aware of the employer misconduct, *see Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1458 (D.C. Cir. 1997) (Board erred by presuming existence of casual relationship "regardless of whether the employees were aware of the employer's unlawful behavior");[1]
>
> (2) the tendency of the misconduct to cause employee dissatisfaction with the union, which is the third *Master Slack* factor;
>
> (3) the effect of the misconduct on employee moral, organizational efforts and union membership, which is the fourth *Master Slack*, factor; and
>
> (4) whether union conduct was the source of employee opposition to the union.

Moreover, the Petitioner was not entitled to participate or offer evidence to defend his decertification petition in the hearings conducted in *Center City* I and II. Accordingly, these hearings are not a substitute for the causation hearing required by *Saint Gobain*.

In short, the Region relied on speculation derived from unsubstantiated allegations in dismissing the decertification petition. The right of the Petitioner and his co-workers to a decertify election in which they can freely choose to retain or reject the IAM as their representative cannot be so flippantly discarded. At the very least, Petitioner and his co-workers are entitled to a *Saint Gobain* hearing in which it can be determined for the first time, with actual testimony and evidence, whether their employer wrongfully coerced them to support decertification and thus tainted their petition.

---

[1] Given that many of the allegations involve alleged employer conduct at closed-door bargaining sessions, it is likely that many employees are unaware of the conduct.

II. The Board Cannot Rule Upon This Petition for Review Until It Obtains a Lawful Quorum

The Board has no legal authority to function when it lacks a quorum of three members. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). Naturally, persons appointed to the Board in violation of the Appointments Clause of the U.S. Constitution do not count towards this necessary quorum. *Cf. Ryder v. United States,* 515 U.S. 177 (1995); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

The Board currently lacks a quorum because Sharon Block, Richard Griffin and Terence Flynn are not lawful members of the Board. On January 4, 2012, President Obama announced "recess" appointments for these individuals. However, the United States Senate was in session at the time of these purported appointments.[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. Consequently, the appointments of Block, Griffin and Flynn to the Board are invalid under Articles I and II of the U.S. Constitution.

The President's claim that these appointments were 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,*

---

[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.

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). Article I, Section 5, Clause 2 provides that each Congressional chamber is the master of its own rules. Because neither the House nor the Senate declared themselves in recess under their rules, the purported recess appointments are invalid.

Moreover, the longstanding view of the Attorneys General who issued opinions on this issue, before the current appointments, has been that the term "recess" includes only those intra-session breaks that are of "substantial length."[3] 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).

Similarly, the opinion of Attorney General Daugherty in 1921 opined that for recess appointments to be made, the recess must be of such duration that the Senate could "not receive communications from the President or participate as a body in making

---

[3] *See* Memorandum Opinion for the Deputy Counsel to the President (Jan. 14, 1992), available at http://www.justice.gov/olc/schmitz.10.htm (18-day recess).

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.[4]

Accordingly, the appointments of Block, Griffin and Flynn to the Board are invalid. As a result, the Board lacks a quorum under *New Process Steel* and cannot rule upon this

---

[4] 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.

request for review or adjudicate this case until such time as it attains a proper quorum.

CONCLUSION

The Board, upon attaining a lawful quorum, should grant the Request for Review and order the Region to reinstate the decertification petition, hold a "causation hearing" under *Saint-Gobain Abrasives*, 342 NLRB 434 (2004), and conduct an election based upon the results of that hearing.

Respectfully submitted,

/s/ William L. Messenger
William L. Messenger
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Ste. 600
Springfield, VA 22160
Telephone: (703) 321-8510
Fax: (703) 321-9319

Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to the Board's Rules and Regulations, I hereby certify that on 31 January 2012 a true and correct copy of the foregoing Petition for Review was E-filed with the NLRB Office of Executive Secretary, and was sent to the other parties as follows:

Gary W. Muffley
Regional Director
NLRB Region 9
3003 John Weld Peck Fed. Building
550 Main Street
Cincinnati, OH 45202
(*via Electronic Filing System)*

Ron Mason
Aaron Tulencik
Mason Law Firm LPA
425 Metro Place North, Suite 620
Dublin, Ohio 43017
rmason@maslawfirm.com
atulencik@maslawfirm.com
(*via Electronic Mail*)

William Rudis
International Association Of Machinists & Aerospace Workers
Po Box 628
Hebron, CT 06248-0628
wrudis@iamaw.org
(*via Electronic Mail*)

/s/ William L. Messenger
William L. Messenger

Counsel for Petitioner