

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

HUNTINGTON INGALLS INCORPORATED

and

Case 5-CA-81306

INTERNATIONAL ASSOCIATION OF MACHINISTS AND  
AEROSPACE WORKERS, AFL-CIO

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S RESPONSE TO  
RESPONDENT'S OPPOSITION TO COUNSEL FOR THE ACTING  
GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT AND  
RESPONSE TO NOTICE TO SHOW CAUSE**

Counsel for the Acting General Counsel, pursuant to Sections 102.24 and 102.46 of the Board's Rules and Regulations and Statements of Standard Procedures, Series 8, as amended, and pursuant to the Board's practice of receiving such responses as is described in *Baker Electric*, 330 NLRB 521 fn. 4 (2000), respectfully submits this Response to Respondent's Opposition to Counsel for the Acting General Counsel's Motion for Summary Judgment and Response to Notice to Show Cause. As is set forth in the Motion for Summary Judgment and as will be explained in greater detail herein, the pleadings<sup>1</sup> do not raise any genuine issues of material fact warranting a hearing, so the Board should grant summary judgment and issue an appropriate order.

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<sup>1</sup> Counsel for the Acting General Counsel's June 19, 2012, Motion to Transfer Proceedings to the Board and Motion for Summary Judgment attached the pleadings as exhibits. On June 28, 2012, Respondent filed an Amended Answer, which raises additional affirmative defenses that Respondent argued in its Opposition to Counsel for the Acting General Counsel's Motion, and which this Response addresses. The Amended Answer is attached hereto as Exhibit 1.

Respondent's Opposition to Counsel for the General Counsel's Motion for Summary Judgment and Response to the Board's Notice to Show Cause raises four objections to the entry of summary judgment: that the Board and General Counsel are without statutory authority to act in this case; that the application of the *Specialty Healthcare*<sup>2</sup> standard in this case was an abuse of the Board's discretion; that the Board violated Respondent's basic right to due process by imposing the *Specialty Healthcare* standard after the fact; and that the Board did not correctly apply traditional unit principles applicable to technical employees. This Response will first address Respondent's contentions regarding the validity of the Board and Acting General Counsel exercising their respective authorities, then it will address the Respondent's arguments that the Board should not have applied *Specialty Healthcare* in this case, that it should be permitted to relitigate the unit issue in light of *Specialty Healthcare* in this decision, and that the Board did not correctly resolve the unit issue.

## ARGUMENT

### **I. THE BOARD HAS ALREADY CONSIDERED AND REJECTED THE RESPONDENT'S CONTENTIONS THAT THREE BOARD MEMBERS AND THE ACTING GENERAL COUNSEL ARE NOT PROPERLY SEATED.**

Respondent argues that three<sup>3</sup> of the five current Board members were not validly appointed under the Appointments Clause of the U.S. Constitution. The Board considered and rejected this argument in *Center for Social Change*, 358 NLRB No. 24, slip op. at p. 1 (2012). Respondent also argues the Acting General Counsel was not validly appointed and contends the complaint was therefore *ultra vires*. The Board similarly considered and rejected this argument in *Center for Social Change. Id.* Accordingly, under the Board's recent decision, Respondent's

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<sup>2</sup> 357 NLRB No. 83 (2011)

<sup>3</sup> Member Flynn, who is one of the three Board members Respondent contends is not properly appointed, has submitted a resignation which is effective July 24, 2012, and he has recused himself from all Agency business pending the effective date of his resignation.

arguments that three Board members and the Acting General Counsel are not properly seated in their respective offices are not a basis for denying summary judgment.

**II. RESPONDENT’S OTHER CONTENTIONS MERELY SEEK TO RELITIGATE ISSUES THAT WERE, OR COULD HAVE BEEN, LITIGATED IN THE PRIOR REPRESENTATION PROCEEDING.**

In arguing that the Board abused its discretion by applying *Specialty Healthcare* to the case at hand, that the Respondent has a due process right to relitigate the unit issue given the Board’s new analytical framework announced in *Specialty Healthcare*, and that the Board did not correctly apply traditional unit principles applicable to technical employees, Respondent is merely attempting to relitigate matters decided in the representation case. Where, as here, a party fails to meet and bargain following certification by the Board, it is the Board’s policy that absent newly discovered or previously unavailable evidence or special circumstances, the party is not allowed to relitigate, in a proceeding alleging unfair labor practices, issues that were, or could have been, litigated in a prior representation proceeding. *Westinghouse Broadcasting Co.*, 218 NLRB 693, 694 (1975); *Keco Industries, Inc.*, 191 NLRB 257, 258 (1971). Here, Respondent does not assert that there is any newly discovered or previously unavailable evidence or special circumstances. Thus, Respondent’s arguments concerning the propriety of the certification are not a basis for denying entry of summary judgment.

Respondent argues that the Board violated Respondent’s right to due process by applying the standard articulated in *Specialty Healthcare*, which was decided by the Board only after the record was closed in the representation case. While Respondent states that it should have been permitted the opportunity to argue against the application of the *Specialty Healthcare* standard to it in the representation case, it does not contend that it made any requests to the Board to allow it to rebrief or reargue the merits of the representation case in light of the Board’s decision in

*Specialty Healthcare*. Furthermore, the Board's usual practice is to apply new policies and standards "to all pending cases in whatever stage." *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958). This approach is often necessary to prevent "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

Respondent's arguments that the Board did not correctly resolve the unit issue regarding technical employees do not cite any newly discovered or previously unavailable evidence. *See Westinghouse Broadcasting Co.*, 218 NLRB at 694; *Keco Industries, Inc.*, 191 NLRB at 258. Therefore, the Board should not permit Respondent to relitigate the unit issue, which it previously resolved in *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011).

For the foregoing reasons, Respondent's arguments concerning the Board's application of the *Specialty Healthcare* standard in the present case are not a basis for denying entry of summary judgment.

### **CONCLUSION**

Based on the foregoing, Counsel for the Acting General Counsel requests that the Board deem the allegations set forth in the Complaint to be true without receiving evidence, grant summary judgment, and issue a Decision and Order. It is respectfully requested that the Board make its findings of fact based on the allegations in the Complaint and conclude that, as a matter of law, Respondent has violated Section 8(a)(1) and (5) of the Act as alleged in the Complaint, and order an appropriate remedy, including an order that the initial certification year shall be

deemed to begin on the date Respondent commences to bargain in good faith with the Union as the certified bargaining representative of the employees in the appropriate unit. *Campbell Soup Co.*, 224 NLRB 13 (1976).

Dated at Washington, D.C. this Eighteenth Day of July 2012.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that on July 18, 2012, copies of the Acting General Counsel's Motion to Transfer Case to the Board and for Summary Judgment were served by e-mail on:

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BEFORE THE NATIONAL LABOR RELATIONS BOARD  
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HUNTINGTON INGALLS INCORPORATED

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Case 5-CA-81306

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**AMENDED ANSWER**

Huntington Ingalls Industries Incorporated, pursuant to Section 102.23 of the Board's Rules and Regulations and Statements of Standard Procedures, Series 8, as amended, states as follows for its Amended Answer to the Complaint served on it in the above captioned matter:

On May 31, 2012 Region 5 issued a Complaint in the above numbered case erroneously identifying the employer as Huntington Ingalls Industries, Inc. The proper Respondent in this case is Huntington Ingalls Incorporated.

Huntington Ingalls Incorporated (hereinafter referred to as "Huntington Ingalls" or "Company") states as follows for its Answer to the Complaint and Notice of Hearing filed against it in this matter.

1. Admitted.
- 2(a). Huntington Ingalls denies that it is a Delaware Corporation. The Company is a Virginia corporation. The remainder of paragraph 2(a) is admitted.
- 2(b). Admitted.
- 2(c). Admitted.
- 2(d). Admitted.
3. Admitted.
4. Admitted.

5(a). Denied.

5(b). Huntington Ingalls denies that the International Association of Machinists and Aerospace Workers, AFL-CIO (the “Union”) was certified as the exclusive collective bargaining representative of a properly constituted bargaining unit at the Company’s facility in Newport News, Virginia.

5(c). Huntington Ingalls denies that the Union has been the exclusive collective bargaining representative of a properly constituted unit at its facility in Newport News, Virginia.

6. Admitted.

7. Huntington Ingalls denies that it has failed and refused to recognize and bargain with the Union as an exclusive collective bargaining representative of a properly constituted unit at the employer’s facility in Newport News, Virginia.

8. Denied.

9. Denied.

#### **AFFIRMATIVE DEFENSES**

1. The Complaint fails to state a cause of action upon which relief can be granted under the Act.

2. In its December 30, 2011 Decision on Review and Order in election case 5-RC-16292, about which the instant Complaint has issued, the National Labor Relations Board (the “Board”) erred in deciding to overrule some or all of the Company’s objections and in failing to set aside the direction of an election for some or all of the reasons stated in the Company’s written objections and supporting brief.

3. The Complaint should be dismissed because the Unit certified by the Board in its December 30, 2011 Decision on Review and Order was and is not an appropriate unit for

bargaining under the Act; as such, the Company has no legal duty to recognize or bargain with the Union.

4. The Complaint should be dismissed because the Board's December 30, 2011 Decision on Review and Order was incorrect as a matter of law and represents a gross departure from prior Board precedent.

5. The National Labor Relations Board as presently constituted lacks the quorum necessary to adjudicate the issues raised in the Complaint.

6. The Complaint is ultra-vires and should be dismissed because the Acting General Counsel of the Board lacks the authority to issue the Complaint in this case.

7. The Complaint should be dismissed because the Board, in its December 30, 2011 Decision on Review and Order, contravened its obligation under Section 9(b) of the National Labor Relations Act to "assure to employees the fullest freedom in exercising the rights guaranteed by [the Act]" when deciding the appropriateness of the petitioned-for unit, by applying a legal standard that fails to consider the right of employees to refrain from self-organization.

8. The Complaint should be dismissed because the Board, in its December 30, 2011 Decision on Review and Order, accorded controlling weight to the extent of union organization when deciding the appropriateness of the Union's petition, in violation of Section 9(c)(5) of the National Labor Relations Act.

9. The Complaint should be dismissed because the Board, in deciding and then applying as controlling law in this case, *Specialty Healthcare & Rehab. Ctr. of Mobile*, 356 NLRB No. 83 (2011), *appeal pending sub nom.*, abused its discretion and violated the

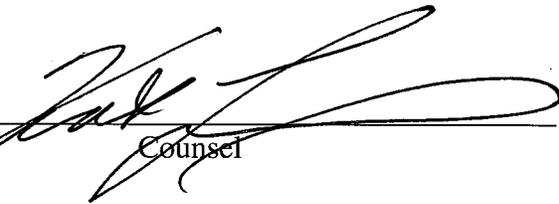
Administrative Procedure Act by using the adjudicative process to create a new, generally applicable standard for determining appropriate bargaining units.

10. The Complaint should be dismissed and the Board, in the interest of due process, should order a new hearing in the underlying representation case because the Company has been denied any opportunity to comply with the standard announced in *Specialty Healthcare & Rehab. Ctr. of Mobile*, 356 NLRB No. 83 (2011), *appeal pending sub nom* by presenting evidence that would demonstrate that the technical employees excluded by the Board from the petitioned-for unit share an overwhelming community of interest with the employees in the unit.

The Company reserves the right to assert additional defenses as they may become apparent during the course of this litigation.

Respectfully submitted,

HUNTINGTON INGALLS INCORPORATED

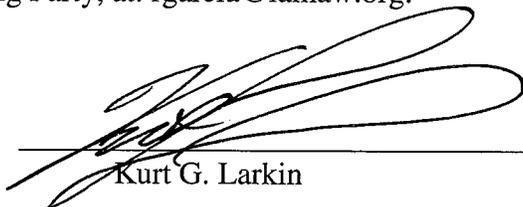
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**CERTIFICATE OF SERVICE**

I certify that on the 28<sup>th</sup> day of June, 2012, I served a copy of the foregoing Amended Answer by electronically filing the Amended Answer with the Board and by mailing an original and four copies of the Amended Answer to the Hon. Wayne R. Gold, Regional Director, Region 5, National Labor Relations Board, 100 S. Charles Street, Suite 600, Baltimore, MD 21201 via overnight delivery. I further certify that I will serve a copy of this Answer by Electronic Mail on Mr. Ramon A. Garcia, Grand Lodge Representative for the Int'l. Assoc. of Machinists and Aerospace Workers, AFL-CIO, the Charging Party, at: rgarcia@iamaw.org.

  
Kurt G. Larkin