

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

**In the Matter of:**

**MI PUEBLO FOODS**

Employer,

and

**UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 5,**

Charging Party.

**CASE NO. 32-CA-064836**

**RESPONDENT MI PUEBLO FOODS' OPPOSITION TO CHARGING PARTY'S**  
**EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE**

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## I. INTRODUCTION

Employer Mi Pueblo Foods opposes Charging Party's two exceptions filed July 10, 2012 to the June 21, 2012 Decision of the Administrative Law Judge, and files this answering brief pursuant to the Board's Rules and Regulations Section 102.46(d).

The Charging Party excepts<sup>1</sup> to the Decision's standard notice posting provision and to the Administrative Law Judge's failure to issue a "broad order" in this matter. Neither exception is warranted. The Charging Party cites no evidence or precedent justifying a deviation from the Board's standard notice posting language, and its perfunctory argument for a policy change to standard posting requirements is unpersuasive. Likewise, Charging Party offers no authority or substantial evidence justifying a broad order, and its invocation of other pending Board proceedings – involving the Respondent and another, unrelated union, arising from a certification challenge – as the supposed justification for a broad order is misleading.

The Board should accordingly overrule the Charging Party's exceptions.

## II. CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Charging Party's exceptions are reproduced here verbatim:

### **Charging Party's Exception 1:**

The Charging Party takes exception to the limited remedy in this matter. See in particular, the notice posting provision at page 8, line 35 through page 9, line 10.

The Board's posting remedy has only been made slightly more contemporary by the requirement of electronic notice posting.

The Board's notice posting provision is however antiquated and ineffectual. The remedy requires posting for only "60 consecutive days. .

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<sup>1</sup> Charging Party's exceptions do not comply with the Board's rules, as they lack any citation to supporting authority. See Rule 102.46 *et seq.*, NLRB Rules & Reg's, 29 C.F.R. Sec. 102.46(b)(1): "... If no supporting brief is filed the exceptions document shall also include the citation of authorities ..." (emphasis added).

.." This is hardly an appropriate notification particularly when the unfair labor practices in this matter occurred more than a year ago. If Mi Pueblo challenges the Board's decision, it will delay posting for likely another year or two. By the time posting occurs no one will remember.

The Board should modernize its notice posting provision to require that any notice by a respondent be posted for the length of time between the commission of the unfair labor practices and when the notice posting actually occurs. This will impose a disincentive on respondents to litigate because it will require the notice posting for the length of time between the unfair labor practices and when the litigation has been completed and compliance achieved.

Alternatively, the Board could adopt a rule that the notice posting occur from the date the complaint issues until the notice posting occurs. This would involve less administrative burdens and would serve the same purpose of dis-incentivizing delay.

It is also plain that posting notice for simply 60 days is often inadequate. This is a reason of course the Board went to both physical notice posting and electronic notice posting.

Furthermore the notice should be posted so that employees of other employers may see it. It should be posted in the front of the store where delivery people, vendors and so on can see it. They are employees also.

Finally the notice should be posted where the public can see it. There is no reason to hide an NLRB notice someplace where no one except employees will see it. Is there some shame in requiring notice posting? If there is some public interest in enforcing the Act, remedial notices should be posted where notice are posted to the public.

The Board should take this opportunity to modernize its notice posting rule to require the notices be posted as suggested above.

### **Exception 2:**

Charging Party takes exception to the failure of the ALJ to recommend a broad order. See Decision at p. 8:32-34. Mi Pueblo has violated the Act in other respects. See *Mi Pueblo*, 356 NLRB No. 107 (2011). In this case the Employer, without justification refused to bargain in a bargaining unit in an election conducted in 2010. It took again over a year for the Union to get the bargaining table. This is strong evidence of the Employer's proclivity to violate Act.

In addition, there is another case pending before the Board in which the ALJ has found a substantial number of additional violations. See Case 32-CA-25677, ALJD (SF) – 06-12 issued February 9, 2012. In that case, there were various serious violations including discharges of union supporters.

There is substantial evidence of continued, persistent and pervasive unfair labor practices by this Employer. A broad remedy is appropriate.

### III. RESPONDENT'S OBJECTIONS TO THE CHARGING PARTY'S EXCEPTIONS

#### A. Charging Party Has Presented No Evidence Justifying An Exception To The Provisions of the Board's Standard Notice Posting Order.

The Charging Party has requested posting remedies extraordinary in duration and posting location. It is well-settled that where a party requests extraordinary remedies, it is that party's responsibility to demonstrate why traditional remedies will not sufficiently ameliorate the effect of the unfair labor practices. See, e.g., *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (requested access remedies not required for all of respondent's plants); *First Legal Support Services*, 342 NLRB 350, fn. 6 (2004) (extraordinary remedies requested by General Counsel unwarranted).<sup>2</sup>

"The 60-day posting period ... is the traditional posting period provided by the Board." *Canter's Fairfax Restaurant, Inc.*, 309 NLRB 883, 309 NLRB No. 136 (1992). A sixty-day posting period has been recognized by the Board for more than six decades. See, e.g., NLRB Casehandling Manual, § 10518 ("Notice Posting": "Settlement agreements and Board orders almost always require that the respondent post a remedial notice for 60 days. ..."); *Semi-Steel Casting Co.*, 88 NLRB No. 128 (1950) (60-day posting period); see also *J. Greenebaum Tanning Co.*, 49 NLRB 787 (1943) (60 days was required period for employer to post notice disestablishing predecessor union).

Charging Party's exceptions make no reference to facts in the record at all, or to any legal standard, which would justify a posting period in excess of the standard 60 days in this matter. Indeed, the supposed circumstances said by the Charging Party to require an extraordinary posting period are not even present in this case. Here, there have been no interim delays by

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<sup>2</sup> Notwithstanding the fact that the unfair labor practices found by the Judge occurred in two isolated incidents in two of Mi Pueblo's 21 stores, the Decision requires Mi Pueblo to post the notice in all of the company's stores. The Board's more usual practice has been to limit the notice-posting requirement in its Order to the facility at which the violations were committed. See *Consolidated Edison Co. of New York*, 323 NLRB 910, 911-912 (1997). The extent of the posting being required here is thus already greater than often required.

administrative or court appeals, and the Decision and posting order was issued with fourteen months of the two incidents at issue, said to have occurred in April 2011. The lapse of time between the supposed incidents and the posting is thus well within the norm.

Likewise, Charging Party offers no authority or factual basis for expanding posting locations beyond those specified in the Decision, or in the Board's Casehandling Manual, Part Three, Compliance Proceedings, Section 10518.2 ("Location and Number of Notices": "General posting provisions require that notices be posted wherever employee or member notices are customarily posted.") (accessed July 30, 2012). Nothing, indeed, is offered in support of the Charging Party's demand for a longer and more pervasive posting than its counsel's opinion that this existing Board practice is inadequate. As such, the demand should be rejected.

**B. Charging Party Has Presented No Evidence Justifying A Broad Order In This Matter.**

It is the responsibility of the objecting party to specify both the Board or other legal authority which is the basis for its exceptions to an administrative law judge's decision, and the facts supporting the exception by specification to the record.<sup>3</sup> Here, the Charging Party has not done so, because no such authority or facts exist.

The Board may issue a "broad order" "when a respondent is shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB No. 177 (1979). Broad orders are designed to address extreme or recidivist behavior by a respondent.

The Charging Party cites two other proceedings, involving a different union, a different facility, different employees, different conduct, and completely different issues as the supposed

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<sup>3</sup> Board Rules and Regulations Sec. 102.46(b)(1) ("... If no supporting brief is filed the exceptions document shall also include the citation of authorities ....").

justification for the broad order it seeks here. The first proceeding arises from a certification challenge in which Mi Pueblo contested the certification of Teamsters Local 853 as the bargaining representative of a unit of drivers at the Respondent's Distribution Center warehouse. See, *Mi Pueblo Foods*, 356 NLRB No. 107 (2011), enf'd, 453 Fed. Appx. 1 (D.C. Cir. 2011) ("*Mi Pueblo I*"). There, Mi Pueblo disputed the scope of the unit in which the Regional Director directed an election. The second proceeding, still pending before the Board (Case 32-CA-25677, ALJD (SF); "*Mi Pueblo II*"), involves claims that the Respondent unlawfully failed to bargain with Teamsters Local 853 over various organizational and operational decisions during the pendency of its certification challenge, and is thus directly related to, and an outgrowth of, the first proceeding. Yet despite the technical nature of these two "refusal to bargain" disputes, and the fact that they are both related to the same basic challenge to the underlying certification – and indeed, despite the fact that the second matter remains unresolved by the Board – the Charging Party contends that these somehow evidence "continued, persistent, and pervasive unfair labor practices" by Mi Pueblo.

They do not.

**1. "*Mi Pueblo I*"**

In *Mi Pueblo I*, the alleged unfair labor practice arose from the Employer's routine challenge to the certification determination. Mi Pueblo disputed with the scope of the petitioned-for unit. The Regional Director of Region 32 disagreed, and conducted an election which Teamsters Local 853 won. The Respondent refused to bargain with the Union to test the certification in the Court of Appeal.

Such a certification challenge is routine, and of course the only way an employer can obtain court review of a Decision and Direction of election with which it disagrees. See, i.e.,

*Show Industries*, 326 NLRB 910, 912 (1998).

There was nothing unusual or untoward about this certification challenge: notably, there was no finding by the Regional Director, the ALJ, the Board itself, or the Court of Appeals for the District of Columbia Circuit that the Employer's challenge of the certification was either spurious or brought in bad faith. *Id.*

Hence, Charging Party seeks to present as an independent basis of alleged wrongdoing justifying a broad order what is, in fact, a normal and accepted procedural action by the Employer to preserve and exercise its right to challenge the certification determination. Notably, the Charging Party offers no support for viewing such "technical" unfair labor practices as evidence of "recidivist" behavior.

## 2. ***"Mi Pueblo II"***

*Mi Pueblo II* is an outgrowth of *Mi Pueblo I*. If an employer challenges a certification determination by refusing to bargain, under current Board law the employer risks drawing an unfair labor practice charge during the period of time it is testing certification if, as occurred here, the Employer makes organizational or operational changes affecting the bargaining unit. See, i.e., *Specialized Living Center*, 286 NLRB 511 (1987), *enfd.* 879 F.2d 1442 (7th Cir. 1989). The Board has thus created a dilemma for employers who seek judicial review of certification decisions: they may do so via the route of a "technical," "certification test" unfair labor practice charge, but run a risk if it becomes necessary to make operational or organizational changes that would otherwise call for bargaining during the pendency of the litigation. In many cases, the Board will not allow an employer to satisfy its obligation to bargain over the effects of such changes without abandoning its appeal of the underlying certification.<sup>4</sup>

Which is precisely what *Mi Pueblo II* is all about. During the pendency of the

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<sup>4</sup> But see, *Show Industries*, *supra*.

proceedings in *Mi Pueblo I*, the Respondent made several operational and organizational changes that affected its drivers. The General Counsel deemed its offer to bargain over the effects of these decisions with the Teamsters Union, without withdrawing its challenge to the Union's certification, inadequate.<sup>5</sup> Because the Administrative Law Judge in *Mi Pueblo II* agreed, finding in effect that Mi Pueblo could not simultaneously pursue its challenge to the Union's certification and satisfy its bargaining obligation to the Teamsters, she found it had violated its bargaining obligation under Section 8(a)(5).

But she did not find that Mi Pueblo otherwise violated the Act. There was neither an allegation or finding that Mi Pueblo had unlawfully interrogated employees, or retaliated against them, or discriminated against them, or in any other way violated their rights to "form, join and assist" labor organizations. The issues in *Mi Pueblo II* strictly revolve around the Respondent's bargaining obligation to the Teamsters over its drivers during the pendency of its certification challenge.

The Charging Party here is a complete stranger to those proceedings. The store employees involved in the "interrogations" here found by the Administrative Law Judge have little or no interchange with the warehouse drivers who are the subject of the *Mi Pueblo I* and *II* proceedings. They have no involvement in the certification dispute. As such, those proceedings provide no basis whatever for the broad order the Charging Party demands.

The Charging Party's exception amounts to no more than an obvious effort to "bootstrap" the technical certification challenge proceedings into something they are not. If its argument were accepted, it would effectively penalize respondents who seek to challenge unit

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<sup>5</sup> Indeed, the General Counsel argued, and the Administrative Law Judge in that matter concluded – controversially – that Mi Pueblo actually had a duty to bargain over the very organizational and operational *decisions* themselves, not simply the *effects* of those decisions. It is that ruling of the Administrative Law Judge that lies at the heart of the exceptions to her decision subsequently filed by Mi Pueblo, which are now pending before the Board.

determinations in the courts. There is no justification, let alone authority, for doing so. The Charging Party's exception should accordingly be rejected.

**IV. THE PURPORTED NEW MEMBERS OF THE NLRB WERE NOT VALIDLY APPOINTED AND, THEREFORE, THE AGENCY LACKS A QUORUM TO ACT IN THIS CASE**

On January 3, 2012, Board Member Craig Becker's term expired, leaving the Board with only two members out of five seats. In effect, the agency stopped functioning that day because the Supreme Court has held that the Board lacks authority to act with only two members. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, 2638 (2010). Numerous other courts have held that an agency whose members have been improperly appointed in violation of the Appointments Clause of the U.S. Constitution or related provisions lacks authority to act, and that private parties who are adversely affected by such ultra vires agency action are entitled to injunctive relief. *See Ryder v. United States*, 515 U.S. 177, 179, 188 (1995) (individuals threatened with enforcement action by agency whose members have been appointed in violation of the Appointments Clause entitled to hearing before properly appointed panel of court); *see also Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

Here, two of the current putative members of the Board were appointed in violation of the Appointments Clause of the U.S. Constitution. Indeed, the President attempted to appoint Members Block and Griffin without seeking or obtaining the Senate's Advice and Consent, in violation of Article II, Section 2, Clause 2 of the Constitution, even though the U.S. Senate was still in session at the time of the purported appointments.<sup>6</sup> The President's claim that these

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<sup>6</sup> The Senate voted unanimously 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-S8785). 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. Member Flynn was also appointed on January 4, 2012 along with Members Block and Griffin, but resigned from the Board effective July 24, 2012.

appointments were somehow 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*, 387 F.3d 1220, 1224 (11th Cir. 1994) (requiring a “legitimate Senate recess” to exist in order to uphold a recess appointment); *see also 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).

The longstanding view of the Attorneys General who issued opinions on this issue, before the current appointments, has been that the term “recess” as applied to intra-session appointments includes only those intra-session breaks that are of “substantial length.” *See* Memorandum Opinion for the Deputy Counsel to the President (Jan. 14, 1992)<sup>7</sup> (involving an 18-day recess). The Obama Administration’s Solicitor General stated on the record at the U.S. Supreme Court during 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).<sup>8</sup>

Attorney General Daugherty’s 1921 opinion established the consistently followed rule that for recess appointments to be made the recess should be of such duration that the Senate could “not receive communications from the President or participate as a body in making appointments.” 33 Op. Att’y Gen. 20, 24 (1921). No such break ever occurred when the President attempted, albeit improperly, to appoint Members Block and Griffin to the Board. Rather, 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. That the Senate

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<sup>7</sup> Available at <http://www.justice.gov/olc/schmitz.10.htm>.

<sup>8</sup> Available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts.aspx](http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx); p. 50, lines 4-5.

passed the payroll tax bill and communicated with the President and the House with regard to that important legislation a few days before the Obama recess appointments proves that the Senate was still in session. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). The President signed that legislation and never challenged its enactment due to a congressional recess.

In sum, because neither the House nor the Senate declared themselves in recess, the purported recess appointments to the NLRB are invalid. 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 and, therefore, the appointments of Members Block and Griffin violate Articles I and II of the U.S. Constitution. Lacking a quorum under *New Process Steel*, the Board should issue no decision in this case until the Board has a properly appointed lawful quorum.

**V. CONCLUSION**

For the reasons given herein, Respondent respectfully requests that the Board reject the Charging Party's exceptions.

Dated: August 2, 2012



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**PROOF OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 50 W. San Fernando, 15th Floor, San Jose, California 95113.2303. On August 2, 2012, I served the within document(s):

RESPONDENT MI PUEBLO FOODS' OPPOSITION TO  
CHARGING PARTY'S EXCEPTIONS TO DECISION OF  
ADMINSTRATIVE LAW JUDGE

- (BY E-Gov SYSTEM) I electronically served the above-described document on the following parties by electronically filing the foregoing with the NLRB on August 2, 2012.
  
- Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses on the attached service list on the dates and at the times stated thereon. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is [jgaeden@littler.com](mailto:jgaeden@littler.com).

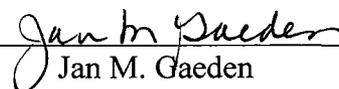
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 2, 2012, at San Jose, California.

  
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Jan M. Gaeden