

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

TARGET CORPORATION,

Respondent,

and

UNITED FOOD & COMMERCIAL
WORKERS LOCAL 1500

Charging Party.

Case No: 29-CA-30804
 29-CA-30820
 29-CA-30880
 29-RC-12058

JD(NY) 16-12

**RESPONDENT'S ANSWERING BRIEF TO UNION'S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

On the Brief:
 Alan I. Model, Esq.

August 24, 2012

I. THE PURPORTED NEW MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD 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 National Labor Relations Board (“Board”) lacks authority to act with only two members. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (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 (1995) (individuals threatened with enforcement action by agency whose members have been appointed in violation of the Appointments Clause entitled to injunction); *see also Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

Here, three 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 and former Member Flynn 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.¹ The President’s claim that these appointments were somehow valid “recess” appointments is inconsistent with Article II, Section 2, Clause 3 of the Constitution, which requires that the

¹ 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.

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)² (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).

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 and former Member Flynn 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 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

² Available at <http://www.justice.gov/olc/schmitz.10.htm>.

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 and former Member Flynn 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.

II. THE UNION'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE MUST BE OVERRULED

A. A Nationwide Remedy Is Not Appropriate In This Case

The Union claims that the ALJ “erred by failing to require that the Employer post the Notice at all of its facilities nationwide, to cease and desist and take affirmative action regarding the Handbook rules he found to be unlawful.” (U. Br. 1). In support, the Union cites to a number of purported facts regarding the text of the 2009 Handbook and the method by which it is created. Nowhere, however, does the Union cite to any *record evidence* to prove that employees at other Target stores actually received the 2009 Handbook at issue in this case. Indeed, the record evidence shows that 137 of the 273 employees (50%) in Valley Stream eligible to vote in the June 17 election actually received the 2009 Handbook. (R. Ex. 41). The record evidence is clear that another 123 of the 273 employees (45%) eligible to vote in the June 17 election did not receive the 2009 Handbook. This evidence is unrefuted in the record and the Union failed to amend the record (even upon suggestion of the ALJ at Tr. 994) to dispute such

evidence. Given the Union's failure to prove that a true majority of employees in the single retail store at issue received the 2009 Handbook, the Board must reject the Union's unreliable speculation that all employees outside of the Valley Stream store received the 2009 Handbook.

Moreover, this case is markedly different than the situation in *Guardsmark, LLC*, 344 NLRB 809 (2005), predictably relied upon by the Union. In *Guardsmark*, the complaint was issued against Guardsmark as a nationwide entity, and, according to the Board, there was "no dispute . . . that the unlawful rules apply to *all* of the Respondent's employees nationwide." *Id.* at 812 (emphasis added). To the contrary, here, the General Counsel specifically alleged in the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing ("Complaint") that the Valley Stream facility was "the *only* location involved herein" Complaint at ¶ 2 (emphasis added). In addition, the Complaint also alleged that the handbook provisions at issue in the instant case infringed on Valley Stream employees' Section 7 rights – not the rights of those working at other Target stores. *Id.* Thus, having limited the theory of the case to the Valley Stream store, having failed to name Target as a Respondent in its capacity as a nationwide employer, and having failed to seek in the Complaint a nationwide posting as a remedy, the Union's belated request for a nationwide remedy must be rejected.

Even if the General Counsel had properly requested a nationwide remedy, which is not the case, the Union's after-the-fact request fails on the facts. For example, in *Albertsons, Inc.*, 300 NLRB 1013, 1013 n.2 (1990), the employer *admitted* that the overbroad rule that warranted the notice posting had in fact been posted at *all* of its facilities. Likewise, in *Longs Drug Stores California, Inc.*, 347 NLRB 500, 501 (2006), the employer's human resource manager testified that the handbooks had been distributed at all distribution centers and "assumed" that they were distributed at all retail stores.

The Union's reliance on *Marriot Corp.*, 313 NLRB 896 (1994), actually supports the Board's rejection of the Union's instant request for a nationwide posting. In rejecting the General Counsel's exceptions and request for a nationwide posting, the Board in *Marriot* stated:

In the proceeding before the judge, the General Counsel did not allege in the complaint that the Respondent promulgated and maintained an unlawful rule at other facilities or in any other manner seek an order applying to all facilities where the unlawful rule may have been promulgated and maintained. The record contains no evidence that the rule applied at any other locations. The General Counsel asserts in his brief that it "appears that the Handbook has wide application beyond those employed at the Los Angeles County Museum of Art." *While it is true that a reading of the handbook suggests that its application is not limited geographically in any way, its "appearance" to the General Counsel or the Board cannot substitute for proof.*

Id. at 896 (emphasis added).

Here, too, the Complaint allegations were limited to a single location (Valley Stream) and did not seek an order applying to any other locations other than Valley Stream. Also, as in *Marriot*, there is no record evidence that the rules at issue were maintained at other stores other than Valley Stream (and even the maintenance of such rules at Valley Stream is disputed). More specifically, there is no record evidence that the 2009 Handbook was distributed at all 1,755 stores under the Target umbrella or was given to any employee outside of Valley Stream. There is also no record evidence that the rules at issue in the 2009 Handbook were otherwise maintained or enforced against employees outside of the Valley Stream store. The Union's attempt at arguing otherwise is nothing more than speculation, which the Board rightly concluded in *Marriot* "cannot substitute for proof."

As set forth above, the narrow Complaint allegations and the lack of record evidence outside of the Valley Stream store support the ALJ's decision to limit a remedy to the single store in Valley Stream. It is significant that the General Counsel, who investigated, drafted and

prosecuted the Complaint allegations, agreed with the scope of the ALJ's remedy by not filing exceptions to seek an expansive, nationwide remedy. Had the General Counsel sought a nationwide remedy, it would have so drafted the Complaint, prosecuted the Complaint, and taken exceptions to the ALJ's single location remedy.

Accordingly, a nationwide remedy, whether posting or rescission, is not warranted in this case.

B. The ALJ Correctly Omitted Findings From The Conclusions of Law

As set forth in Target's Exceptions (#11 and #17) and Brief in Support of Exceptions, the ALJ erred in finding violations of the Act as pertains to Complaint Paragraphs 10(a) and 11. Thus, the ALJ correctly omitted findings that Respondent violated the Act by creating the impression of surveillance in Sonia Williams and making unspecified threats of reprisals to Tashawna Green. Accordingly, there is no basis for the Board to add these alleged violations to the Conclusions of Law.

C. The ALJ Correctly Omitted Findings That A Video Was Shown During The Critical Period Reinforcing The No Solicitation No Distribution Policy

The Union contends that the ALJ "had found that the video was shown during the critical period, as opposed to what he called the course of the campaign, but failed to explicitly articulate this finding." (U. Br. 9). There is no such finding as the record evidence does not support it. The evidence proffered by the Union's and General Counsel's witnesses was jumbled, at best, and showed their lack of credibility. The reason the ALJ failed to make a finding the video was shown during the critical period is self-evident – the evidence did not support the finding. It is telling that the Union's multiple references to the "record evidence" that a video was shown during the critical period are not supported by transcript citations.

D. The ALJ Correctly Omitted Reference To The Store Closing Leaflet And Other 8(a)(1) Allegations In Setting Aside The Election

As set forth in Target's Exceptions, the ALJ's decision to set aside the June 17, 2011 election is erroneous. Moreover, the ALJ's findings that Target violated the Act with regard to the leaflet and other 8(a)(1) allegations are not supported by the law and record evidence. Thus, Target has taken exception to such underlying findings. The Union's decision to file exceptions to the ALJ's failure to include these 8(a)(1) allegations in his rationale for setting aside the election shows that the Union acknowledges that the ALJ's decision to set aside the election on the basis of the 2009 Handbook is unsustainable.

E. The ALJ Correctly Permitted Target To Present Evidence And Testimony That Employees Engaged In Union Activities In Contravention Of The Alleged Overbroad Handbook Provisions

The Union claims that the ALJ improperly "permitted [Target] to elicit testimony regarding employees' alleged contravention of the Handbook rules and received all Union campaign literature into evidence." (U. Br. 16). The Union offers no legal authority for its argument that in considering whether an employer's handbook provisions are overbroad in violation of Section 8(a)(1) or whether to set aside an election on the basis of overbroad handbook provisions, an administrative law judge cannot consider evidence of non-enforcement. On the contrary, in *Lafayette Park Hotel*, 326 NLRB 824 (1998), the Board specifically considered facts relating to non-enforcement of a rule in determining whether the rule was overbroad in violation of Section 8(a)(1).

Moreover, the Union's argument is nonsensical insofar as it ignores that Board law requires an administrative law judge to consider whether employees would reasonably construe a rule's language to prohibit Section 7 activity. According to the Union, "the 'mere maintenance' of an overbroad and unlawful policy is sufficient to establish a violation." The problem with the

Union's argument is that a policy can only be found to be unlawful if the administrative law judge first concludes that a reasonable employee would view the policy as restricting Section 7 rights.³ To that end, according to the Board: "our task is to determine how a reasonable employee would interpret the action or statement of her employer and *such a determination appropriately takes account of the surrounding circumstances.*" *The Roomstore*, 357 NLRB No. 143, n. 3 (2011) (emphasis added).

The only way in which an administrative law judge, who effectively puts him or herself in the shoes of the "reasonable employees" at issue, can conclude that a work rule violates the Act is to consider the entire environment in which employee's work, which necessarily means considering evidence of lack of enforcement of the rules in question. In other words, if employees openly wear pro-union insignia or distribute pro-union fliers on an employer's property in direct contravention of a work rule and without suffering any consequences, then it would be *unreasonable* for any employee to view the rule as restricting Section 7 activity and, therefore, the rule would not violate Section 8(a)(1) of the Act. Thus, the ALJ correctly permitted Target to offer evidence of non-enforcement of the work rules at issue.

III. CONCLUSION

For the reasons set forth above, the Board should overrule the Union's exceptions to the decision of the Administrative Law Judge.

/s/ Alan I. Model
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³ Even if the Union's description of the law were correct, which it is not, one has to wonder why the Union was so concerned with evidence of non-enforcement being presented during the hearing. The reason is simple. Board law requires the administrative law judge to consider the surrounding circumstances and the record evidence proves that Valley Stream employees acted in direct contravention of the work rules at issue.

CERTIFICATION OF SERVICE

I, Alan I. Model, Esq., certify that on this date I caused a copy of the foregoing Respondent's Answering Brief To Union's Exceptions To The Decision Of The Administrative Law Judge be served via E-Filing, email and Fed Ex upon:

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