

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

CONTEMPORARY CARS, INC. D/B/A)	
MERCEDES-BENZ OF ORLANDO AND)	
AUTONATION, INC., SINGLE AND JOINT)	
EMPLOYERS)	
and)	Charge Nos. 12-CA-26126
)	12-CA-26233
)	12-CA-26306
INTERNATIONAL ASSOCIATION OF)	12-CA-26354
MACHINISTS AND AEROSPACE)	12-CA-26386
WORKERS, AFL-CIO)	12-CA-26552

**RESPONDENTS CONTEMPORARY CARS, INC. D/B/A MERCEDES-BENZ OF
ORLANDO AND AUTONATION, INC.’S MOTION FOR RECONSIDERATION OF
THE BOARD’S DECISION AND ORDER DATED SEPTEMBER 28, 2012**

Come now Respondents CONTEMPORARY CARS, INC. D/B/A MERCEDES-BENZ OF ORLANDO (“MBO”) and AUTONATION, INC. (“AutoNation” or collectively “Respondents”), by and through undersigned Counsel, and pursuant to Section 102.48(d) of the Board’s Rules and Regulations, as amended, hereby move for reconsideration of the Board’s Decision and Order dated September 28, 2012, 358 NLRB No. 163 (“*Mercedes-Benz of Orlando II*”), particularly as to its findings with respect to Section 8(a)(5) of the Act and its imposition of a bargaining obligation preceding the date on which the Board issued its previous decision in *Mercedes-Benz of Orlando*, 355 NLRB No. 113 (“*Mercedes-Benz of Orlando I*”).

I. The Board’s Decision in *Mercedes-Benz of Orlando I*

On November 14, 2008, the Regional Director for Region 12 issued a Decision and Direction of Election in Case No. 12-RC-9344, upholding the petitioned-for unit as appropriate. On December 15, 2008, the Board (then consisting of Chairman Schaumber and Member Liebman) denied the Respondent’s Request for Review, leading to the resolution of challenges and the issuance of a tally of ballots in favor of the Union within a few weeks thereafter.

The Region certified the election results on February 11, 2009. In response to a technical challenge of that certification, the same two-member Board subsequently entered summary judgment against Respondent Mercedes Benz of Orlando (“MBO”), finding that it violated Sections 8(a)(1) and (5) by refusing to recognize and bargain. *Contemporary Cars, Inc.*, 354 NLRB No. 72 (2009).

On June 17, 2010, the U.S. Supreme Court issued its decision in *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010), invalidating all two-member decisions, on the basis that the Board lacked statutory authority to act. On August 17, 2010, the Board issued an Order setting aside its invalidated two-member decision in *Contemporary Cars, Inc.* Six days later, a reconstituted Board issued its Decision and Order in *Mercedes-Benz of Orlando I*. Noting that it had to “consider the question of whether the Board can rely on the results of the election[,]” the Board concluded that “the election was properly held and the tally of ballots is a reliable expression of the employee’s [sic] free choice.” 355 NLRB No. 113, slip op. at 1.

Recognizing that the ballots would have been cast regardless of its lawful status at that point in time, the Board concluded that, “it is clear that the decision of the two sitting Board Members to continue to issue decisions did not affect the outcome of the election.” *Id.* Thus, [w]ith or without a two-member decision on the original request for review, the election would have been conducted as scheduled.” *Id.*

The Board nonetheless recognized that the Region’s failure to impound ballots was a serious anomaly that was directly precipitated by the premature two-member decision. Quoting from Section 102.67(b) of the Board’s Rules and Regulations, the Board made clear that, “if a pending request for review has not been ruled upon or has been granted, ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.” Slip op. at 1.

To remedy the error imposed by prematurely tallying the ballots while simultaneously preserving the election results, the Board chose to adjust the effective date of the bargaining obligation, coextensive with the date of its decision. In so doing, the Board made clear that:

[A] majority of valid ballots was cast for the Union. To the extent that the date of the Certification of Representative may be significant in future proceedings, we will deem the Certification of Representative to have been issued as of the date of this decision.

Id., slip op. at 2, fn. 4 (emphasis added).

II. The Board in *Mercedes-Benz of Orlando I* Implicitly Recognized that MBO was Only Operating Under a Prospective Duty to Bargain

As the Board recognized back in August of 2010, the only proper application of Board procedures in this case compelled uninterrupted impoundment until the date of its decision. Indeed, only after a lawful quorum had addressed the Request for Review could a properly constituted Board “direct...the appropriate action to be taken on impounded ballots of [the] election already conducted....” NLRB Rules and Regulations, § 102.67(j).

Had the invalid two-member panel refrained from exerting *ultra vires* authority, all ballots would have remained impounded until the issuance of a valid Decision and Order, which in this case did not occur until August 23, 2010. Any interim attempt to negotiate with the incumbent union prior to obtaining legitimized notice of its majority status would not only have been premature, but unlawful pursuant to Section 8(a)(2) of the Act. Consequently, any attempt to impose a bargaining obligation prior to *Mercedes-Benz of Orlando I* cannot stand.

Respondents extensively argued this point as set forth within pages 31 to 38 of their underlying Brief in Support of Exceptions, and again within pages 5 to 10 of their Reply Brief in Support of Exceptions. Counsel for the General Counsel attempted to respond to these issues within his Answering Brief. Despite the advancement of extensive authority in support of this

argument, however, the Board failed to so much as acknowledge it except by vague, passing reference within a footnote articulating the position of Member Hayes as set forth below.

III. The Board's Contradictory Decision in *Mercedes-Benz of Orlando II*

On September 28, 2012, the Board rendered the instant Decision and Order, which was joined by Members Hayes, Griffin and Block. 358 NLRB No. 163. Within that Decision, the only reference to the refusal to bargain allegations lay within the following passage:

We agree with the judge, for the reasons he states, that the Respondents committed numerous violations of Section 8(a)(1) and (5) of the Act during the Union's campaign to organize the service technicians at the Respondents' car dealership and continuing after the Union's certification as the employees' bargaining representative.

Slip op. at p. 1. There was no dissenting opinion, but in a footnote to the provision excerpted above, the Board went on to state as follows:

Member Hayes agrees with his colleagues that, under *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), the Respondent unlawfully failed to bargain over the layoffs of the service technicians, among other postelection unilateral changes. He notes that the Respondent unpersuasively argues that the "at risk" doctrine of that case should not apply under the factual circumstances of this case, but does not directly seek to overrule or modify this doctrine. Accordingly, although Member Hayes expresses no view as to whether *Mike O'Connor Chevrolet* was correctly decided, he agrees to apply it here for institutional reasons.

Id. at Fn. 4.¹

Nowhere within the decision is there any reference to Respondent's argument against the premature imposition of a duty to bargain, as summarized above. Although the decision purports to agree with the rationale articulated by Judge Carson in the lower proceeding, it is worth noting that he himself failed to offer any support for the imposition of a precipitate bargaining order,

aside from a passing reference to the Board's prior decision in *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), which itself fails to acknowledge the unique factors (including the presence of an unlawfully premature tally of ballots and subsequent Board remedy in the form of an adjusted certification date), distinguishing that decision and its progeny from the facts at issue in the instant case.

To the contrary, the ALJ's decision goes so far as to suggest that when the Supreme Court issued its decision in *New Process Steel*, "no unique circumstances were created." Given the onslaught of litigation that has since flowed as a natural result of that decision, this statement strains all credulity. The rationale underlying the ALJ's decision is further called into question by its suggestion that it did not involve a "future proceeding" as that term is used within the context of Footnote 4 to *Mercedes-Benz of Orlando I*, belying the fact that it issued a full seven months *after* that case was decided.² Consequently, with this Motion Respondents respectfully continue to implore this agency to act upon its clear intentions as spelled out within Footnote 4.

IV. The Presence of "Compelling Economic Considerations" Satisfying the Board's Standard as Set Forth in *Mike O'Connor Chevrolet*

As set forth within the section above, MBO was not operating under a duty to bargain prior to August of 2010. Even had it been operating under such a duty at the time it was forced to implement layoffs sixteen months earlier, however, the incontrovertible evidence establishes that those layoffs were necessitated by compelling economic considerations. Such circumstances by definition qualify for the safe harbor that was established by the same decision on which the

¹ The decision is unclear as to the meaning of "institutional reasons" within the context of the last sentence of the excerpted footnote.

² This certainly begs the question, if this is not a "future proceeding," as that term is used within the ALJ's decision, then what is?

Board seemingly³ relies to affirm the premature imposition of a bargaining duty in this case (*Mike O'Connor Chevrolet*).

Indeed, the Board made clear in that case that an employer is relieved of any bargaining obligation during the period preceding “a final determination” on majority status, so long as “compelling economic considerations” justify unilateral action. 209 NLRB at 703. The ALJ himself recognized that “the reduction-in-force in April 2009 was dictated by economic circumstances” and that MBO had “established that a reduction-in-force was necessary.” (ALJD, pp. 24, 27). He also acknowledged that the Union in this case failed to initially request bargaining until two weeks after the April 2009 layoffs. (ALJD, p. 33).

It was at that point, however, that the ALJ erroneously departed from Board precedent, citing to an inapposite line of cases (none of which even refer to *Mike O'Connor Chevrolet*) that apply only to circumstances in which negotiations are already under way, and in the process applying an artificially severe “economic exigencies” standard to evaluate MBO’s proffered defense. Indeed, the cited authority, consisting of the Board’s decisions in *RBE Electronics of S.D.*, 320 NLRB 80 (1995) and *Bottom Line Enterprises*, 302 NLRB 373 (1991) stand only for the proposition that “*when...parties are engaged in negotiations*, an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole.” *RBE Electronics*, 320 NLRB at 81 (emphasis added).

From there, the Judge took another departure from extant Board precedent, imposing a “foreseeable” standard, and suggesting that the April 2009 layoffs must have been entirely

³ One must glean this from the reference to this case within Footnote 4 of the instant decision.

“unforeseen” to qualify for the safe harbor. In doing so, he relied upon yet another inapposite line of cases, consisting chiefly of the Board’s decision in *Angelica Healthcare Services Group*, 284 NLRB 844, 853 (1987), which itself relies on a decision *Van Dorn Plastic Machinery Co.*, 265 NLRB 864 (1982)) that was later denied enforcement and, on remand subsequent to *Angelica*, failed to impose the erroneous foreseeability requirement. See *Van Dorn Plastic Machinery Co.*, 286 NLRB 1233 (1987), *enf’d*, 881 F.2d 302 (6th Cir. 1989).

In short, the Judge applied an erroneously high standard, and then compounded the error by applying another erroneous standard atop it. On review, however, the Board failed to so much as mention the economic considerations underlying the decision at issue, let alone the erroneous application of inapposite case law. This was no small matter, given the fact that Respondents devoted no less than five pages (pages 39 to 44) of their post-hearing Brief to this very issue, quoting extensively from the record for purposes of establishing the compelling economic circumstances confronting them at the time of the layoffs at issue.

Nowhere within the instant decision, however, does the Board so much as acknowledge the compelling economic considerations argument, let alone reject it. It is worth noting that this substantive safe harbor defense exists independently from Respondent’s procedural contentions as reinforced in the section above. Consequently, the Board committed a material and prejudicial error in failing to address it.

V. The Board Erroneously Imposed the Reinstatement Remedy in Connection with the April 2009 layoffs

The Judge’s imposition of a reinstatement remedy in connection with the April, 2009 layoffs (and the Board’s affirmation of that decision) was also materially erroneous to the extent that he ignored established Board precedent, and was entirely inconsistent with his own finding that the layoffs themselves were non-discriminatory. See *Colonial Corp. of America*, 171 NLRB

1553, 1555, n.5 (1968) (in ordering reinstatement for employees terminated for discriminatory reasons, the Board noted that employees “who would have been terminated for nondiscriminatory reasons would, of course, not be entitled to reinstatement. Backpay for such employees would run only to the date that the employee would have been terminated for economic reasons”).

As the Judge made clear in his decision, the April 2009 layoffs were motivated by economic reasons, and would have occurred “even in the absence of their Union activities.” (ALJD, p. 27, line 48). It was for that reason that he dismissed all Section 8(a)(3) allegations associated with those layoffs – a decision that was left untouched by the instant case.

Accordingly, the proper remedy for any violation based on a failure to bargain should not include reinstatement. *Cf. Odebrecht Contractors*, 324 NLRB 396, 396, n.2 (1997) (where an economic layoff obligated the respondent to bargain over the effects of the layoff, the Board held that the ALJ erred in ordering reinstatement and instead ordered a make-whole remedy not including reinstatement).

VI. The Recess Appointments of Members Block and Griffin Were Invalid, and the Board Was Therefore Operating Without Legal Authority to Act at the Time it Rendered the Instant Decision

Judge Carson issued the underlying decision on March 18, 2011, and timely Exceptions were filed shortly thereafter. The instant decision issued on September 28, 2012, and was joined by Members Griffin and Block, both of whom assumed their positions through their unlawful “recess” appointments on January 4, 2012. Respondents do not use the term “unlawful” loosely, but instead point to the simple fact that on the date of their appointments, the Senate was in session. Because the President cannot exercise his Article II recess appointment power during

even a *pro forma* session of Congress, Members Griffin and Block were operating without lawful authority to act at the time they issued this decision, thereby rendering it null and void.

As made clear by the Act itself, “three members of the Board shall, at all times, constitute a quorum of the Board...”. 29 U.S.C. § 153(b). As the U.S. Supreme Court has noted, the Board may not exercise statutory authority during any period in which it lacks such a quorum. *New Process Steel v. NLRB*, 130 S.Ct. 2635, 2644-45 (2010).

Upon the expiration of then Member Becker’s recess appointment coextensive with the end of the First Session of the 112th Congress on January 3, 2012, the Board was left only with Chairman Pearce and Member Hayes. Consequently the Board was reduced to two lawfully appointed members, thereby lacking the statutorily required quorum required to operate pursuant to *New Process Steel*. On that same day, the Senate was in the midst of an established pattern (which had been initiated by unanimous consent on December 17, 2011) of convening *pro forma* sessions every three business days. 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011).

Acting in total disregard for the ongoing Congressional session, the President attempted to appoint Members Block and Griffin (along with then Member Flynn) to the Board, pursuant to the Recess Appointments Clause of the U.S. Constitution. U.S. Const., Art. II, §2, Cl. 3. Members Block and Griffin continue to comprise 50% of the Board’s compliment, despite the fact that their initial appointments were unlawful, a deficiency that has yet to be administratively cured, and therefore invalidates all Board decisions issued thereafter. They also constitute two-thirds of the Members joining in the instant decision that issued nine months later.

The Board continues to act in derogation of its statutory authority, rejecting all such challenges and steadfastly disregarding the tenuous legal foundation on which it proceeds. *See, e.g., Center for Social Change, Inc.*, 358 NLRB No. 24 at slip op. 1 (“[W]e reject the

Respondent's arguments that the Board lacks a quorum."'). The Board's stubborn insistence in proceeding without legal authority flies in the face of numerous challenges now pending before the Circuit Courts of Appeal. With this Motion, Respondents respectfully implore the Board to reconsider its position in this regard and to withdraw the instant decision, at least until such time as its authority to act has been ratified by the same Court that previously rebuked it for proceeding without statutory authority.

VII. Conclusion

Respondents respectfully request that the Board reconsider its decision in Mercedes-Benz of Orlando II, and modify and/or rescind that decision in its entirety, consistent with the arguments adduced in this Motion and for those reasons set forth herein.

Respectfully submitted this 17th day of October, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2012 I e-filed the foregoing **RESPONDENTS CONTEMPORARY CARS, INC. D/B/A MERCEDES-BENZ OF ORLANDO AND AUTONATION, INC.'S MOTION FOR RECONSIDERATION OF THE BOARD'S DECISION AND ORDER DATED SEPTEMBER 28, 2012** using the Board's e-filing system and that it was served by electronic mail on the following:

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