UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CREATIVE VISION RESOURCES, LLC

and CASE NO. 15-CA-020067

LOCAL 100, UNITED LABOR UNIONS

RESPONDENT'S CROSS EXCEPTIONS AND BRIEF IN SUPPORT OF CROSS EXCEPTIONS

CROSS EXCEPTION NO. 1

The NLRB is not authorized to decide this case and issue an order since the current NLRB membership lacks the constitutionally required quorum.

CROSS EXCEPTION NO. 2

The Administrative Law Judge's crediting the testimony of Eldridge Flagge, a hopper, that he did not communicate the new terms and conditions to hoppers when handing out applications and federal and state tax withholding forms to them. ALJD, p. 17, lines 44-45.[1]

[1] Reference to the exhibits of General Counsel and Respondent will be designated as "GCX" and "RX" respectively, with the appropriate number(s) for those exhibits. The joint exhibits of General Counsel and Respondent will be designated as "JX." Reference to the hearing transcript and the Administrative Law Judge's Decision will be designated as "TR" and "ALJD" respectively.

BRIEF IN SUPPORT OF CROSS EXCEPTIONS

I. INTRODUCTION

This case involves a labor supply company, Creative Vision Resources, L.L.C. ("CVR"), which began operations on June 2, 2011. Its founder and owner is Alvin Richard III ("Richard"). The employees in the matter are called "hoppers." Hoppers ride on the back of garbage trucks and at each stop load garbage from receptacles into the rear of the truck. The union in the case is Local 100, United Labor Unions ("ULU"), and its State Director is Rosa Hines ("Hines"). The predecessor employer was, for purposes of the case, named "Berry III."

The case has two issues – whether CVR is a successor employer and whether CVR as a successor appropriately set its initial terms and conditions as it is entitled to do. CVR has accepted Judge Locke's decision on its successor status; so, that issue is moot. The Counsel for Acting General Counsel has filed exceptions on CVR's setting its initial terms and conditions, which Judge Locke found to have been done appropriately.

II. FACTS

A. Berry III's Operations

For purposes of this case, the "predecessor" employer has been named "Berry III." This is to reflect the different corporate entities under which Berry III operated from the time it had an established collective bargaining relationship with the SEIU, Local 100. Local 100 disaffiliated from the SEIU establishing a new union, Local 100 United Labor Unions.

Berry III treated the hoppers as independent contractors – not employees, paying them $103/day with no overtime pay. Berry III did not give any holiday pay to the hoppers, except on one occasion, even though the collective bargaining agreement provided for it. No taxes or required federal and state withholdings were deducted from the paychecks. Booker Sanders, Tr. 298; Harold Jefferson, Tr. 707-08; Shawn Lewis, Tr. 703; James Bertrand, Tr. 713; Kumasi Nicholas, Tr. 696; Eldridge Flagge, Tr. 95; GCX-27.

B. The Beginnings of CVR

For about a year, Alvin Richard III ("Richard"), who was working for Richard's Disposal, Inc., planned to begin a new labor supply company – Creative Vision Resources, LLC ("CVR"). Tr. 458. It would supply general labor to business and industry, including hoppers to Richard's Disposal, Inc. Tr. 458. At some point in May, 2011, Richard asked Deidra Jones ("Jones"), the marketing manager of Richard's Disposal, to assist him with the development of an application, handbook, and safety manual for CVR. Tr. 458-59, 492. Jones developed these documents for CVR, and she was paid by Richard for this work for CVR. Tr. 492. She also learned about CVR's planned wages and terms and conditions of employment. Tr. 493-94.

Richard planned to begin CVR operations on May 20, 2011. Tr. 437, 466, 494, 499. He discussed his plans with one of Berry III's hoppers, Eldridge Flagge, and Flagge offered to assist him with soliciting and receiving applications from potential applicants, including hoppers working for Berry III. Tr. 97, 429-30. Potential hoppers included Flagge's son, who at the time was in jail and could only be released with

assurance to the Court of an employment opportunity, which Flagge gave. Tr. 98, 127. Both Richard and Flagge passed out applications and the required federal and state withholding forms to potential hoppers, and Richard passed out about 20. Tr. 437, 459, 467. Richard informed Flagge and the hopper applicants of the new terms and conditions of CVR, including $11.00 an hour pay, a guaranteed eight hour work day, overtime after 40 hours in a week, four paid holidays, and the appropriate federal and state withholdings from their pay. Tr. 459-60, 475-76; RX-8, p.5. Richard recalled an instance in which Flagge was receiving questions about the new terms from a hopper applicant and came to Richard to confirm them. Tr. 476; RX-8, p. 4.

CVR, however, was not able to begin operations in May as planned because of the lack of a sufficient number of applicants. Tr. 437, 494, 499. Richard and Flagge continued to solicit applicants, and by the end of May, there were more applications than needed to supply hoppers to Richard's Disposal, since Richard was unsure that enough would show up to work. Tr. 428, 438, 466. There were 70, 80, or more at the time of the decision to start, though only about 42 would be required. Tr. 466-67; GCX-55. Richard also needed a supervisor to be immediately responsible for the hoppers. Richard asked Flagge if he would take the position, but Flagge did not want the job. Tr. 461, 474. Flagge recommended hiring Karen Jackson ("Jackson"), the current hopper supervisor for Berry III. Tr. 461, 473-74.

On June 1, Richard drafted a letter to Milton Berry of Berry III cancelling the agreement between Berry III and Richard's Disposal, Inc. for the provision of hoppers.

GCX-20. Richard asked Jackson to deliver the letter to Milton Berry, which she did that day. Tr. 399, 434; GCX-20.

C. CVR's Start of Operations – June 2, 2011

CVR began its operations on Thursday, June 2, 2011. Tr. 359, 428, 438, 462. This start date had been discussed in advance between Jones and Richard. Tr. 499-500. A June 2 start with a Thursday–Wednesday pay period was favored by the payroll contractor in Dallas, Texas – Paychex. The hours worked for the week are tabulated on Thursday, submitted to Paychex, and the paychecks returned for a Saturday payday. Tr. 499-500. Hopper Flagge testified about CVR's start on June 2. Tr. 136-37.

D. Karen Jackson's Meeting With Hoppers

Before work began on June 2, Karen Jackson held a meeting of the hoppers. At that meeting she discussed the new pay program of $11/hour, a guaranteed 8 hour work day, paid overtime after 40 hours, 4 paid holidays, workplace standards and safety, and she passed out an employee handbook and safety manual. Tr. 462, 469; RX-8, pp. 5-6; Taylor, Tr. 446-48; Lewis, Tr. 703-04; Sanders, Tr. 303; Nicholas, Tr. 696-98.

The remembrance by the hoppers of the meeting led by Jackson supports similar testimony by Richard and Jackson. Tr. 462, 603-04. Richard listened to the meeting, and Jackson stated that she had the meeting with the hoppers in both of her affidavits and at trial. GCX-15; GCX-21. Sanders also confirms that Jackson not only had the meeting, but that she only had one such meeting. Sanders, Tr. 303.

Following the meeting, some hoppers were not satisfied with CVR's announced new wages and terms; so, they did not go to work for CVR. Tr. 466, 472, 485.

E. The ULU's Demand for Recognition and Bargaining

Throughout the latter part of May, Rosa Hines, the Union's State Director, received telephone calls from hoppers about a new company forming to supply hoppers with $11/hour pay. Tr. 254-55. On Monday, June 6, 2011, Hines hand delivered a letter to CVR demanding recognition and bargaining on behalf of the ULU from CVR. GCX-34.

III. LAW

A. The NLRB Lacks Jurisdiction to Decide the Case and Issue an Order Since the NLRB Currently Lacks a Constitutionally Proscribed Quorum

The recent case of *Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir. Jan. 25, 2013) found that a majority of the current NLRB members had not been properly appointed. The current NLRB is constitutionally unable to decide this case and issue an order.

B. An Administrative Law Judge's Credibility Resolutions

The Board's established policy is not to overrule an Administrative Law Judge's credibility resolutions. They can be overruled only when the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3rd Cir. 1951).

IV. ARGUMENT

A. Cross Exception No. 1

The current NLRB, with its membership, is constitutionally precluded from deciding this case and issuing an order since the membership lacks the required quorum.

B. Cross Exception No. 2

All parties agree that CVR began operations on June 2, 2011. The record firmly establishes that prior to and on that date there were communications to the hopper applicants of the new terms and conditions of CVR.

The ULU's business agent, Rosa Hines, testified at the hearing and in her NLRB affidavit that during May she received calls from hoppers about a new labor supply company that would be replacing Berry III and of the change to $11 an hour from a day rate. Anthony Taylor, a hopper subpoenaed by Counsel for Acting General Counsel, testified that the hoppers had known for some time about the new terms ("meeting" refers to the June 2 meeting with hoppers about the terms): He stated:

> Q. Now, you mentioned $11 an hour. What, if any, conversations were the hoppers having before this meeting about $11 an hour?
>
> A. We all congregate in the morning out there. They been knowing about the $11 an hour.
>
> Q. So the hoppers before this meeting, in May, knew about the $11 an hour?
>
> A. Sure, man. The application was passed out before. I think Flagge was passing out those applications.

Q. Did Flagge know about the $11?

A. I told you, we all congregate out there in the morning. We been knowing that.

Tr. 449.

Another hopper, Kumasi Nicholas, confirmed knowledge of the new terms and conditions in May. ALJD, p. 16-17.

At trial and in his post trial brief, Counsel for Acting General Counsel took the position that Eldridge Flagge, a hopper, and Richard did not communicate initial terms and conditions during May. Respondent, however, asked in its post trial brief that if this were so, how could Hines and hoppers have learned of the new terms during the May solicitations?

Judge Locke found that Richard did communicate the terms in May to hoppers to whom he distributed applications, and Counsel for Acting General Counsel now acknowledges that he did. Judge Locke, however, also credited Flagge's testimony that he did not communicate the terms to the hopper applicants to whom he spoke and distributed applications and tax withholding forms. ALJD, p. 17, lines 44-45.

Flagge specifically testified that Richard never communicated the initial terms to him and he did not look at what he was passing out or read the application. Tr. 98, 104. Since it is now firmly established that Richard did communicate the new terms to hoppers, as he testified, it is incongruent that he neglected to tell Flagge. Tr. 463. Flagge was the one hopper he asked to assist him with the applications. If Richard was telling the other hopper applicants the initial terms, he had to have told Flagge. Flagge's

testimony that Richard never told him is not credible. It supports the lack of credibility of his statement that he did not communicate the new terms to hopper applicants to whom he solicited and passed out applications. Flagge's testimony of not communicating the initial terms should not have been credited by Judge Locke.

What cannot be disputed is that since it is established that Richard communicated the initial terms to hoppers, he has to have communicated them to hopper Flagge, just as he testified. Tr. 463. Armed with such dramatically new information about a change from a day rate to $11 an hour, overtime, a guaranteed 8 hour day, federal and state tax withholding, and four holidays, and human nature being what it is, Flagge did communicate the new terms he was told of. How could Flagge or any human in this position hold back such significant, new information from his fellow hoppers? In fact, he did not, as evidenced by his discussion with Richard about the terms after receiving a question about them from a hopper applicant he solicited and by the testimony of Taylor:

> Q. Did Flagge know about the $11?
>
> A. I told you, we all congregate out there in the morning. We been knowing that.

Tr. 449.

CONCLUSION

As a consequence of the ruling of the U.S. Court of Appeals for the District of Columbia Circuit, the current membership of the NLRB does not constitute a constitutionally appointed quorum. Any decision and order would be ultra vires, and if this is not the case, Judge Locke's crediting the testimony of hopper Eldridge Flagge that he did not communicate CVR's terms and conditions is not sustained by a preponderance of all the evidence and is incorrect. The terms were clearly communicated to him by Richard, and there was such general knowledge among the hoppers of the terms that even the ULU learned of it. Flagge was able to obtain the release of his son from jail and could not have done so without explaining the facts of the employment opportunity.

Judge Locke's crediting Flagge's testimony that he did not communicate the initial terms is not supported by the evidence.

Respectfully submitted this 28th day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 28th day of February, 2013 served a copy of the above and foregoing by email to the following:

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