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March 22 2013

VIA FEDERAL EXPRESS

Gary Shinnars,
Acting Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

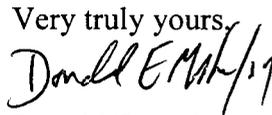
Re: **Request for Review**

Fordham Hill Owners Corp
Case No 2-RC-098861

Dear Mr. Shinnars:

As counsel for the Employer in the above matter, I am enclosing eight (8) copies of our "Request for Review." This cover letter also provides proof of service that this was also served via Federal Express on both the Regional Director and the Petitioner. Copies of their respective Federal Express slips are attached.

If need be, please call me on my cell at 610 763-0594. Thank you for your time and attention to this matter.

Very truly yours,

Donald E. Maher

Encs.

cc: Christopher S. Roach, Petitioner
Karen P. Fernabach, Regional Director

2013 MAR 26 PM 3:44
ORDER SECTION

NATIONAL LABOR RELATIONS BOARD

-----X
**UNITED FEDERATION OF SPECIAL POLICE
& SECURITY OFFICERS, INC.**

Petitioner,

REQUEST FOR REVIEW

-and-

Case No. 02-RC-098661

FORDHAM HILL OWNERS CORPORATION

Employer.

-----X

This **REQUEST FOR REVIEW** is submitted in behalf of the Employer, by and through its attorneys, the law offices of **MAHER & BROWN**, following the **DECISION AND DIRECTION OF ELECTION** (herein the “Regional Decision”) issued by the Regional Director of Region 2 on March 12, 2013 in this matter.

SUMMARY OF REQUEST FOR REVIEW

It is the Employer’s view that this Request for Review should be granted as compelling reasons exist in this matter based upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of the absence of officially reported Board precedent.
- (2) That the Regional Decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That there are compelling reasons for reconsideration of an important Board rule or policy.

(1) Absence of Board Precedent

At the outset, the Employer notes the decisions in *Noel Canning* and *New Process Steel* which will be discussed more fully below. The Employer also notes the complete absence in the Regional Decision on any Board precedent, standing for the proposition that following the Supreme Court’s decision in *New Process Steel*, that the NLRB is lawfully allowed to issue a

decision or otherwise act at a time when it lacks a proper quorum of three people. Similarly there is also the complete absence of any Board precedent in the Regional Decision, standing for the proposition that following the Supreme Court's pronouncement in *New Process Steel*, that the NLRB could continue to lawfully delegate its authority under Section 3(b) to the Regional Director in this proceeding at a time when it lacks a proper quorum to do so.

(2) Regional Decision is clearly erroneous

Further warranting this Request for Review is the fact that the Regional Decision is clearly erroneous on at least three factual issues and such errors prejudicially affect the rights of this Employer. As will be more fully discussed below, the Regional Decision makes a factual finding that the Employer makes a "claim" that the Board is not acting with a valid quorum, and/or those Presidential appointments to the Board are not valid. This finding is clearly erroneous as the Employer's position in this matter is not based on a mere "claim." Rather the Employer's position is based on an "adjudicated" determination of both the D.C. Circuit in *Noel Canning* and the Supreme Court in *New Process Steel*.

The second clearly erroneous factual finding in the Regional Decision is the statement "that in *Noel Canning*, the D.C. Circuit court itself noted that its conclusions concerning the disputed Presidential appointments have been rejected by the other circuit courts that have addressed the issues." This fact finding is clearly erroneous in that a careful review of *Noel Canning* reveals the court made no such broad pronouncement.

The third clearly erroneous factual finding occurs at the outset of the Regional Decision, where the Regional Director finds that "pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2." As will be discussed more fully below, this factual finding is clearly erroneous as the Board is currently without a proper quorum and is not able to delegate its authority to the Regional Director in this proceeding at this time and hence the resulting decision is invalid on that basis alone.

It is the Employer's views that each, any, and all these clearly erroneous factual findings prejudicially affects its rights to a decision from a government agency constitutionally empowered to act.

(3) Compelling Reasons for reconsideration of Board policy

There can be no doubt as to the compelling reasons for reconsideration of the Board policies at issue here. How can the Board act in any way during times when it lacks a proper quorum? There is also no doubt as to the challenge for the Board and its resulting impact on employees, unions, business, and litigants as a result of this situation. As will be discussed more fully below, even the Supreme Court in *New Process Steel* expressed sympathy for the Board when it completely rejected the "efficiency" type arguments relied on in the Regional Decision to justify the Board's actions in continuing to operate at the time it lacked a properly appointed quorum.

Nonetheless, it is the Employer's position in this regard that until Congress acts or the Supreme Court decides otherwise, the Board must reconsider its policies of how or whether it can continue to act in any way when it lacks a quorum of three. The compelling reasons justifying this Request for Review is further amply demonstrated by the NLRB's own recent announcement that it was seeking review of the *Noel Canning* decision by the Supreme Court. Certainly if the Board found it compelling enough to seek review of *Noel Canning* before the High Court than there is also compelling reason to freeze this petition until there is a ruling. Lastly the compelling reasons justifying this Request for Review is the fact that according to published reports, so far over 80 companies have cited the *Noel Canning* decision in their opposition to Board action.

DISCUSSION

The decisions in *Noel Canning* and *New Process Steel*

In the recent decision of *Noel Canning*, a panel of the United States Court of Appeals, District of Columbia Circuit invalidated the recess appointments of three members of the National Labor Relations Board, because the Court found that the U. S. Senate was not in recess

at the time the President made the appointments. *Id.* at No. 12-1115, slip. op. (D.C. Cir. Jan. 25, 2010). In *New Process Steel*, 130 S. Ct. 2635 (2010), the Supreme Court held that the NLRB could not legally render decisions or otherwise act without a quorum of at least three members.

The Employer's Positions

Based on both *Noel Canning* and *New Process Steel*, it is the Employer's view that as the NLRB does not currently have a properly appointed quorum it cannot render a decision or otherwise act in this matter and hence the Regional Decision must be rescinded or dismissed along with the dismissal of the instant underlying petition. It is also the Employer's view that unless and until the Supreme Court reverses the D.C. Circuit panel's decision or overturns *New Process Steel*, any case decided now would be invalid and could only be lawfully decided by the NLRB when a quorum is properly appointed.

Given that the Board cannot lawfully act in any way at this time in this matter, it is alternatively requested that the matter be held in complete abeyance with no election held at this time, or if held, that the ballots be impounded pending a decision by the Supreme Court in *Noel Canning*.

The Regional Decision cannot stand

Despite *Noel Canning* and *New Process Steel*, the Regional Decision concludes that the petition in this matter should be processed. It is the Employer's position that a number of the fact findings or arguments set forth in the Regional Decision to support the processing of the petition are either completely erroneous or without sufficient merit and should be rejected.

The Regional Decision first makes a factual finding that it is not appropriate for the Board or the Board's appointed agents, to suspend its activities in response to the Employer's "claim" that the Board is not acting with a valid quorum, and/or that Presidential appointments to the Board are not valid. This factual finding is clearly erroneous.

The Employer's position in this matter is not based on a mere "claim" that the NLRB is currently without a properly appointed quorum. Rather is an "adjudicated"

determination of both the D.C. Circuit in *Noel Canning* and the United States Supreme Court in *New Process Steel*. Unless and until the Supreme Court reverses the D.C. Circuit panel's decision or it overturns *New Process Steel*; any case decided now would be invalid and could only be lawfully decided by the NLRB when a quorum is properly appointed.

The Regional Decision then makes a factual finding that in *Noel Canning*, the D.C. Circuit court itself noted that its conclusions concerning the disputed Presidential appointments have been rejected by the other circuit courts that have addressed the issues. This fact finding is clearly erroneous. First the *Noel Canning* court made no such broad pronouncement.

Second this is not your more typical circuit court conflict with a different employer within the same circuit or an employer located in one circuit relying on a different circuit decision involving an employer located in that different circuit. *Noel Canning* is not an Employer located in the DC Circuit. The reason *Noel Canning* was decided in the DC Circuit had everything to do with the seat of the United States government including the Board being located there. Hence its adjudicated ruling that the NLRB was without lawful constitutional authority, as it was without a properly appointed quorum, applies to the Board across the United States including to matters involving Employers located in Region 2.

The Regional Decision opines that even in the absence of a circuit conflict, the Board's "longstanding practice" is not to acquiesce in adverse decisions by individual courts of appeals in subsequent proceedings involving different parties. It is the Employer's view that unless and until *Noel Canning* is reversed or *New Process Steel* is overturned, or unless and until there is an NLRB with a properly appointed quorum, the Board cannot "act", "decide" "delegate" or "engage in any longstanding practice" including the practice claimed in the Regional Decision.

In support of this "longstanding practice" argument, the Regional Decision cites the *Letter of Acting Solicitor, National Labor Relations Board, Industrial Turnaround Corp. v. NLRB*, 118 F.3d 248 (4th Cir. 1997) (Nos. 96-1783 & 96-1926) for the claim that "the Board, for more than 50 years, has taken the position that it is not obliged to follow decisions of a particular court of appeals in subsequent proceedings not involving the same parties, and

discussing the grounds for that position”. As noted above, it is the Employer’s view that regardless of the more typical circuit court conflicts involved with the *Letter of the Acting Solicitor* or the 50 year claimed practice claimed within, the *Noel Canning* decision is a horse of a much different color. As noted above and unlike the more typical circuit court conflict cases or disputes before ALJ’s in different circuits, the type of circuit court conflict referred to in the *Letter of Acting Solicitor* cited in the Regional Decision, the reason *Noel Canning* was decided in the DC Circuit had everything to do with the seat of the United States government including the Board being located there. Hence its adjudicated ruling that the NLRB was without lawful constitutional authority, as it was without a properly appointed quorum, applies to the Board across the United States including to matters involving Employers located in Region 2.

The Regional Decision finally relies on an “efficiency” type public policy argument, stating that a strong public interest favors addressing representation disputes in an expeditious manner and claiming that most disputes have long been resolved administratively without the necessity of court litigation. In doing so, the Regional Decision then points to the claimed experience of continuing to process cases during the analogous dispute leading to *New Process Steel*. On this point the Regional Decision alleges that most of the cases decided during that time helped finally resolve labor disputes because the parties either “accepted” the Board's decision or “settled” the dispute.

The Employer would counter this “efficiency” type public policy argument in a number of ways. First, with the observation that while most representation disputes might be resolved administratively, that employees and employers should not be forced to do so by a government agency “adjudicated” to be without constitutional authority. As to the desirability of resolution without the necessity of court litigation, it is the right of the people including employees and employers to seek court relief from a government agency acting outside of constitutional authority. It is then the duty of that government agency to respect the adjudicated rulings of that court too, unless and until those court decisions are reversed, overturned or a proper quorum is in place.

The Employer would also point to two other public policy arguments favoring the rescission or dismissal of the Regional Decision or dismissal of the underlying petition or holding the petition in abeyance or not holding the election at this time or if held at this time, to impound those ballots pending a decision by the Supreme Court in *Noel Canning*. First is the public policy of the respect for the rule of law. Second is the public policy of judicial economy. The courts in *Noel Canning* and *New Process Steel* have spoken. Unless and until the Supreme Court reverses the D.C. Circuit panel's decision or it overturns *New Process Steel*, any case decided now would be invalid and could only be lawfully decided by the NLRB when a quorum is properly appointed.

Finally, the Employer would point out the Regional Decision's questionable and indeed erroneous reliance on *New Process Steel* to support the continuing processing of cases including this one during this period. What the Regional Decision fails to mention about *New Process Steel* is three salient points which fully supports the Employer's positions in this matter.

The first point is that in *New Process Steel*, the Supreme Court tossed out 600 NLRB decisions from across the circuits and not just from the DC Circuit from which the appeal was taken. Second is that while some Employers chose to "accept" Board decisions or "settle" disputes before the Supreme Court's ruling, this Employer has chosen not to settle nor accept this Board's decision making or delegation authority in light of both *Noel Canning* and *New Process Steel*. This Employer's right to do so should be respected unless or until *Noel Canning* is reversed or *New Process Steel* is overturned or unless and until such time that a quorum is properly appointed.

The third and perhaps most important point is the concluding point the Supreme Court itself made when it completely rejected the "efficiency" type arguments relied on in the Regional Decision to justify the Board's actions in continuing to operate at a time it lacked a properly appointed quorum. The court stated that it was "not insensitive to the Board's understandable desire to keep its doors open despite vacancies." *Id.* at 13. Nor was the court "unaware of the costs that delay imposes on the litigants" *Id.* at 14. On these observations, the court

concluded:

If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances. Section 3(b), as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died. *Id.*

This Employer would suggest that following the pronouncement in *Noel Canning*, that without a properly appointed quorum the dog has died again. In light of the Supreme Court pronouncement in *New Process Steel*, Section 3(b) of the Act as it currently exists does not authorize the Board to create a tail to wag the dog after the dog has died. As that dog is again now dead, the Board is not authorized to act, decide or to delegate its authority to others pursuant to the provision of Section 3 (b) of the Act.

On the issue of the delegation of the Board's authority, it is noted that at the outset of the Regional Decision, the Regional Director states that "pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2." As noted above and as stated by the Supreme Court in *New Process Steel*, Section 3(b) of the Act as it currently exists does not authorize the Board to create a tail to wag the dog after the dog has died. Accordingly this Employer is also of the view that without a proper quorum the Board was not able to properly delegate its authority to the Regional Director in this proceeding at this time and hence the resulting decision is invalid on that basis alone.

Conclusion

For all the above, this Employer's Request for Review must be granted. Also and for all the above the Regional Decision must be rescinded or dismissed and the instant underlying petition must be dismissed or held in abeyance. Moreover and for all the above given that the Board cannot lawfully act at this time in this matter, it is alternatively requested that no election be held at this time, or if held, that the ballots be impounded pending a decision by the Supreme

Court in *Noel Canning*.

Dated: March 22, 2013

New York, New York

Yours, etc.

MAHER & BROWN

By: Donald E. Maher/13

Donald E. Maher

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Karen P. Fernbach
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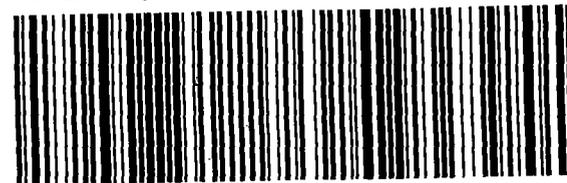
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Emp# 828967 22MAR13 MTCA 519C2/OCF8/93AB

FedEx Express NEW Package US Airbill

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1 From Date 3/22/13
 Sender's Name J.L. BROWN Phone 212-618-1250
 Company Make & Brown
 Address 14 Wall St 20th FL.
 City NY State NY ZIP 10005

2 Your Internal Billing Reference

3 To Recipient's Name Gary Skinner Phone
 Company National Labor Relations Board
 Address 1099 14th St. N.W.
 City Washington State DC ZIP 20570

HOLD Weekday
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- FedEx Priority Overnight
Next business morning.* Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- FedEx Standard Overnight
Next business afternoon.* Saturday Delivery NOT available.

2 or 3 Business Days

- FedEx 2Day A.M.
Second business morning.* Saturday Delivery NOT available.
- FedEx 2Day
Second business afternoon.* Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- FedEx Express Saver
Third business day.* Saturday Delivery NOT available.

5 Packaging*

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- FedEx Pak*
- FedEx Box
- FedEx Tube
- Other

6 Special Handling and Delivery Signature Options

- SATURDAY Delivery
NOT available for FedEx Standard Overnight, FedEx 2Day A.M., or FedEx Express Saver.
- No Signature Required
Package may be left without obtaining a signature for delivery.
- Direct Signature
Someone at recipient's address must sign for delivery. Fee applies.
- Indirect Signature
If no one is available at recipient's address, someone at a neighboring address may sign for delivery. Fee applies. Residential deliveries only.

Does this shipment contain dangerous goods?

- No
- Yes As per attached Shipper's Declaration
- Yes Shipper's Declaration not required.
- Dry Ice Dry Ice, 3, UN 1845
- Cargo Aircraft Only

7 Payment Bill to:

- Sender
Acct. No. in Section 7 will be billed.
- Recipient
- Third Party
- Credit Card
- Cash/Check

Total Packages Total Weight

Credit Card Auth.

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FEDEX NEW Package
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Please print and press hard.

Date 3/22/13 Sender's FedEx Account Number 471955620

Sender's Name J. L. BROWN 212 618-1250 Phone

Company MAHA + BROWN

Address 14 Wall St. 20th FL.

City NY State NY ZIP 10005

Internal Billing Reference

Recipient's Name Christopher Roach 518-727 5041 Phone

Company United Fed of Special P & S. On Inc

Address 69 Colehamer Ave

City Troy State NY ZIP 12180

Special Handling: HOLD Weekday, HOLD Saturday

Form ID No. 0200

4 Express Package Service *To most locations. Packages up to 150 lbs. NOTE: Service order has changed. Please select carefully.

Next Business Day

- FedEx First Overnight
- FedEx Priority Overnight
- FedEx Standard Overnight

2 or 3 Business Days

- FedEx 2Day A.M.
- FedEx 2Day
- FedEx Express Saver

5 Packaging *Declared value limit \$500.

- FedEx Envelope*
- FedEx Pak*
- FedEx Box
- FedEx Tube
- Other

6 Special Handling and Delivery Signature Options

- SATURDAY Delivery
- No Signature Required
- Direct Signature
- Indirect Signature

Does this shipment contain dangerous goods? One box must be checked. No Yes

7 Payment Bill to:

- Sender
- Recipient
- Third Party
- Credit Card
- Cash/Check

Total Packages Total Weight Total Declared Value

1 Our liability is limited to US\$100 unless you declare a higher value. See back for details.

Easy new Peel-and-Stick airbill. No pouch needed. Apply airbill directly to your package. See directions on back.

FEDEX NEW Package
Express US Airbill

FedEx Tracking Number 8023 0630 3513

Please print and press hard.

Date 3/22/13 Sender's FedEx Account Number 471955620

Sender's Name J. L. BROWN 212 618-1250 Phone

Company MAHA + BROWN

Address 14 Wall St. 20th FL.

City NY State NY ZIP 10005

Internal Billing Reference

Recipient's Name Karen P. Fernback Phone

Company National Labor Relations Board

Address 26 Federal Plaza

City Room 3614 State NY ZIP 07728

Special Handling: HOLD Weekday, HOLD Saturday

Form ID No. 0200

4 Express Package Service *To most locations. Packages up to 150 lbs. NOTE: Service order has changed. Please select carefully.

Next Business Day

- FedEx First Overnight
- FedEx Priority Overnight
- FedEx Standard Overnight

2 or 3 Business Days

- FedEx 2Day A.M.
- FedEx 2Day
- FedEx Express Saver

5 Packaging *Declared value limit \$500.

- FedEx Envelope*
- FedEx Pak*
- FedEx Box
- FedEx Tube
- Other

6 Special Handling and Delivery Signature Options

- SATURDAY Delivery
- No Signature Required
- Direct Signature
- Indirect Signature

Does this shipment contain dangerous goods? One box must be checked. No Yes

7 Payment Bill to:

- Sender
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- Third Party
- Credit Card
- Cash/Check

Total Packages Total Weight Total Declared Value

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