UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

NORTHSHORE SHEET METAL, INC.,	
and	Cases 19-CA-83657 19-CA-88465 19-CA-92102 19-CA-94575
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 66,	
and	
PACIFIC NORTHWEST REGIONAL COUNCIL OF CARPENTERS,	Cases 19-CB-83623 19-CB-94048
and	
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 66,	

UNION'S POST-HEARING BRIEF

Daniel Hutzenbiler
Attorney for Local 66
Robblee Detwiler & Black
2101 Fourth Ave, Suite 1000
Seattle, WA 98121
Telephone: (206) 467-6700
Fax: (206) 467-7589

TABLE OF CONTENTS

STATEMENT OF FACTS

Northshore Sheet Metal, Inc. ("Northshore") is a construction contractor and fabricator in the sheet metal industry.[1] TR 32. Sheet Metal Workers' International Association, Local 66 ("Local 66") represents sheet metal workers throughout Western Washington, from the Canadian border to the Longview/Kelso area. Since at least 1997, Northshore had recognized Local 66 as the collective bargaining representative of Northshore's sheet metal employees. TR 110.

The parties' most recent agreement expired June 1, 2012. TR 83. In the months preceding the expiration of that agreement, the parties engaged in negotiations. On or about June 12, 2012, Northshore brought in Ed Triezenberg of the Pacific Northwest Regional Council of Carpenters ("Carpenters") for a captive-audience meeting with its sheet metal employees. TR 65. Two of Local 66's strongest supporters, Yuriy Kosmin and Jason Johnston, were sent home by Northshore before the meeting began. TR 260; 565.

At that meeting, Triezenberg was introduced to the employees by Bryan Elbert, Jeff Meyers, and Erland Milliken, three of Northshore's owners. TR 68-69. Triezenberg told Northshore's employees of the alleged benefits that would accrue if they became represented by the Carpenters, and suggested that Local 66's members sign bargaining cards indicating their preference that they be represented by the Carpenters. TR 570.

Jeff Meyer encouraged employees to sign cards for the Carpenters. TR 342. He also requested that such cards be signed immediately, telling employees that "if we could get these cards signed, sooner the better...that we should have it signed within two days...[s]o that this deal would go through and it would benefit us with this package that they had offered us because the package might not be there in two days." TR 447-48; 484-85. Todd McBee, Northshore's

---

[1] Given the myriad issues involved in this matter, the General Counsel's briefing is certain to be extensive and thorough. Charging Party Local 66 has elected to write separately to address just several key points.

shop foreman, solicited cards for the Carpenters. TR 543, 545. The next day, Triezenberg was allowed to solicit authorization cards on Northshore's property. TR 543.

Several of Local 66's members left the meeting and went to the Local's office, which happens to be next door to Northshore's facility. TR 758. Local 66's Business Manager, Eric Martinson, and several Union Business Representatives walked over to Northshore's facility. *Id.* Martinson and the Business Representatives answered questions for a short time before Meyer, accompanied by Elbert and Milliken, stopped the meeting and asked the Local 66 representatives to leave. TR 70.

On June 13, Local 66 filed a valid petition for election. GC 21. The petition was faxed by the NLRB to Northshore at 6:12 p.m. that night. *Id.* Northshore's normal operating hours are from 6:00 a.m. to approximately 2:30 p.m.. TR 267. Sometime after 10 a.m. the following day, Northshore recognized the Carpenters as its employees' representative, and signed a contract containing a union security clause. TR 114. Thereafter, Local 66 timely filed the charges at issue.

ARGUMENT

I. NORTHSHORE UNLAWFULLY RECOGNIZED AND ASSISTED THE CARPENTERS.

A. Northshore Unlawfully Recognized The Carpenters While A Valid Petition Was Pending.

Northshore unlawfully recognized the Carpenters while Local 66's representation petition was pending. It is an unfair labor practice for an employer to recognize a union, in the course of a dual organizing campaign, while a valid petition for representation is pending. Bruckner Nursing Home, 262 NLRB 955, 957 (1982). Under Bruckner, an employer commits an unfair labor practice by "recogni[zing]...a union commanding otherwise-valid majority support where a

valid petition has been filed with the Board by a rival union." McLaren Health Care Group, 333 NLRB 256, 257 (2001).

On June 13, 2012, Local 66 filed a petition for representation to confirm its status as the collective bargaining representative for Northshore's employees. GC 21. That petition was faxed to Northshore that evening. *Id.* Despite that petition, and while it was pending, Northshore signed a contract with the Carpenters. TR 114. That is a blatant violation of the law under Bruckner.

Northshore will argue that no violation occurred because it was unaware of the fax from the NLRB outlining the petition. Assuming arguendo that such a claim is credible,[2] Northshore's recognition of the Carpenters remains unlawful. The Board has explicitly held that an employer is deemed to have constructive notice by virtue of a faxed transmission. Clow Water Systems Co., 317 NLRB 126, 127 (1995). Thus, an employer that operates a fax machine "bears the responsibility for maintaining adequate office procedures concerning fax transmissions." *Id.* Accordingly, "knowledge of the receipt of...communications during regular office hours may reasonably be imputed to it. Proof of actual knowledge...would render transmission by fax virtually useless by placing an unsustainable burden on the sender to insure that the fax has been seen by the person to whom it is addressed." *Id.*

Meyer testified that he receives faxes, which are normally placed in his inbox, and that all Local 66-related faxes were to go directly to him. TR 115-16. It is indisputable that Northshore possessed the fax during its regular working hours on June 14. Its regular hours are from 6 a.m. to 2:30 p.m. The fax was received the night before, after office hours, but was undoubtedly

---

[2] This would require believing that no manager from Northshore had learned, in the four hours from opening at 6 a.m. until 10 a.m. on June 14, that the petition had arrived the night before.

received during regular office hours on June 14. That is sufficient, under Clow Water, to constitute notice.[3]

Northshore will also argue that the petition itself was facially invalid because it allegedly did not provide the requisite showing-of-interest. However, "[t]he Board's showing-of-interest requirement is an administrative matter not subject to litigation. It is thus exclusively within the Board's discretion to determine whether a party's showing of interest is sufficient to warrant processing the petition." Stockton Roofing Co., 304 NLRB 699, 699 (1991) (internal citations omitted). The Region here determined that the petition was valid, and its validity cannot be litigated in these proceedings.[4]

Furthermore, even if it could be challenged, the petition is undoubtedly valid. The Board has long recognized the validity of a petition based on a recently-expired 8(f) agreement. Stockton Roofing Co., 304 NLRB at 699 (1991). There is no requirement in the Board's rules and regulations that the showing of interest directly accompany the petition. In fact, the Board's rules provide that "[i]n a RC or RD case, the petition should be accompanied by the petitioner's showing of interest or be supplied within 48 hours after filing." Board Rules and Regulations, 11003.1(a) (emphasis added). That is precisely what occurred here. Thus, Northshore's recognition of the Carpenters, while on notice of a valid petition filed by Local 66, is an unfair labor practice.

---

[3] Importantly, the Board in Clow Water found that the employer committed an unfair labor practice based on such constructive notice.

[4] Any argument that it lacked notice as to the unit sought is simply absurd. Given its long history with Local 66, it knew precisely the unit that the Local had historically represented and wished to continue to represent.

B. Northshore Unlawfully Assisted The Carpenters.

1. Northshore's owner actively pressured employees to sign cards for the Carpenters.

Even if Northshore's signing of the agreement with the Carpenters was not barred by Local 66's petition, Northshore unlawfully assisted the Carpenters in achieving their purported majority status. Section 8(a)(2) of the Act provides that it shall be an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it...." Thus, "[e]mployer conduct that actively benefits a preferred outside labor organization over an incumbent or prefers one of two rival outside labor organizations, violates the Act, and generally falls within the definition of unlawful assistance." Pratt Towers, Inc., 338 NLRB 61, 102-03 (2002). "In evaluating whether an employer's assistance to a union precludes the existence of an uncoerced majority, the Board 'examines the totality of the circumstances to determine whether the respondent's conduct tainted the union's majority status.'" Garner-Morrison, 356 NLRB No. 163, *23 (2011), *quoting* Clock Electric, Inc., 338 NLRB 806, 827 (2003).

Northshore invited the Carpenters – not Local 66 – to speak at a captive-audience meeting with its sheet metal employees on June 12, 2012, which it required its employees to attend. Two of the Union's strongest supporters were deliberately excluded from the meeting. At the meeting, Triezenberg was introduced to the employees by three of Northshore's owners, giving him their implicit approval. Triezenberg told Northshore's employees of the alleged benefits that would accrue if they became represented by the Carpenters, and suggested that the Union's members sign bargaining cards indicating their preference that they be represented by

the Carpenters. That is the very definition of unlawful assistance.[5] *See, e.g.* Duane Reade, Inc., 338 NLRB 943, 944 (2003) (employer provided unlawful assistance to a union by making meeting space available on company time and requiring employees to attend organizational union meetings).

Furthermore, Northshore made very clear precisely what it wanted. Jeff Meyer, Northshore's owner and vice-president, told employees that "if we sign the [Carpenters] cards, that, you know, they would be able to talk to us again about negotiations and such." TR 342. He further stated that "if we could get these cards signed, sooner the better...that we should have it signed within two days...[s]o that this deal would go through and it would benefit us with this package that they had offered us because the package might not be there in two days." TR 447-48; 484-85.

While Meyer denied making those statements, Northshore's own witness, Bruce Champeaux, testified he "knew that...with the Carpenters Union being there, that Northshore was possibly looking at going a different direction." TR 756. Thus, Champeaux understood that, by virtue of inviting the Carpenters to Northshore's facility, Northshore wanted its employees to go with the Carpenters. TR 770. Champeaux's testimony makes clear that the employees were made to understand precisely what Northshore's ownership wanted – to recognize the Carpenters.

---

[5] While Local 66 was asked *by the employees* to speak at Northshore's property, there is no evidence that Northshore similarly invited Martinson or any other Union representative to speak. In fact, Northshore's owners stopped the Union's meeting with the employees, and asked them to leave – treatment not accorded Triezenberg and the Carpenters. Such disparate treatment of the representatives for the respective unions could leave but one conclusion for the employees to draw – that Northshore, their employer, wanted the Carpenters to take over as the employees' representative.

2. At least one supervisor actively assisted the Carpenters in acquiring bargaining cards.

Northshore also unlawfully assisted the Carpenters by having Todd McBee, a Northshore supervisor, active assisted them in acquiring bargaining cards. A supervisor's assistance to a competing union's organizing efforts is unlawful. Dobbs International Services, 335 NLRB 972, 987 (2001). McBee testified unequivocally that he solicited bargaining cards on the Carpenters' behalf. TR 545-46. Other employees similarly recalled that cards were to be given to McBee. TR 190. Thus, the only disputed issue is whether McBee is a statutory supervisor. The facts plainly demonstrate that he is.

The term supervisor means:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. §152 (11). The test for determining supervisory status is: (1) whether the individual has the authority to engage in, or effectively recommend, any of the criteria listed in Section 2(11) of the Act; and (2) whether the exercise of such authority requires the use of true and meaningful independent judgment; and (3) whether the individual holds such authority in the interest of the employer. NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 573-74 (1994). Independent judgment is "judgment that is not effectively controlled by another authority and the exercise of which must rise above merely routine or clerical discretion." Regal Health & Rehab Center, 354 NLRB No. 71, slip op. at 7 (2009). One may be a supervisor without meeting all the criteria of Section 2(11). Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir., 1949).

McBee qualifies as a supervisor because he has the authority to engage in, or effectively recommend, the hiring of individual employees, uses independent judgment in exercising such authority, and holds such authority in the interest of Northshore. McBee testified that he deals freely and directly with the union hiring hall. He stated that he is authorized to independently contact the hiring hall and ask them to send additional workers to the shop when he needs more help. TR 520, 522. McBee's role in hiring workers from the hall is not merely a ministerial one. He has the authority to contact the hall, get a list of names, check the history those workers may have with Northshore and whether there have been problems, and reject or hire the candidates based on this evaluation. TR 522. In fact, McBee testified that he has received a list of candidates from Local 66 and determined "No, I don't want this guy." TR 522.

McBee also testified directly about a specific instance where he hired a driver, Chris Perry. TR 552. Jeff Meyers called a candidate in for an interview for the position; McBee then conducted the interview and exercised the final authority to hire the individual. TR 523 As McBee testified, "we hired Chris Perry to be our second driver." TR 552 (emphasis added).

McBee also "effectively recommends" hiring individuals on a regular basis. McBee acknowledged that he is on the interview team that interviewed candidates for Shipping Manager and Programmer positions as they became available. TR 520-21. During the interviews, McBee asks the candidates questions. TR 521. After the interviews, McBee and the other managers discuss the various candidates and McBee gives his input as to which candidate he thinks would be best. Based on this discussion, a candidate is selected. *Id.* Such involvement in the interview process is evidence of supervisory status. *See* Donaldson Bros. Ready Mix, 341 NLRB 958 (2004) (holding that an individual was a supervisor when he attended hiring interviews and upper

management followed the individual's hiring recommendation after a cursory review of applicants' applications).

In addition, McBee assigns work to Northshore shop employees. "Assign", as used in Section 2(11), is "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." Oakwood Health Care, Inc., 348 NLRB 686, 689 (2006).

McBee's testimony showed that he runs the shop. He attends the weekly management meetings with the other managers including Brian Elbert and Dino Johnston and five to six Project Managers. TR 517. He has a lead role at these meetings and runs the computer which displays a spreadsheet showing the progress on each job. *Id.*

Based on the information discussed at the meeting, McBee independently prioritizes the orders coming through the shop. TR 519. He first looks at the order and determines whether it can go straight to production, or whether it needs further programming. TR 515. If it can go straight to production, he assigns the work to the sheet metal workers on the shop floor. If he determines the order needs further programming, he assigns a Programmer to complete this task or he does it himself.

Once he gives them the direction, McBee monitors and inspects the work of the sheet metal workers on the floor and make sure they are completing the jobs according to specifications. TR 580. If a job is "out of spec," McBee calls the field foreman and asks if the piece is usable as is. If not, McBee orders the sheet metal workers to fabricate a new piece. McBee explained that he has the authority to pick which workers work overtime once it has been authorized for a specific job. TR 528-29.

McBee also assigns jobs to workers on the floor. McBee testified that while Brian and Dino are vaguely familiar with what McBee's crew is working on in the shop, "[t]hey're not involved with the specific, this person is working on this job on this machine day to day." TR 528. Thus, McBee is responsible for the "day-to-day" assignment of work, and uses his independent judgment in determining who is assigned what work for the day.

McBee also has authority to effectively recommend who is laid off in a company-wide slowdown. TR 524. Finally, McBee is directly involved in evaluating employees. Such evaluations lead directly to pay upgrades for employees.[6] TR 531; GC-24. Given the range of functions performed by McBee – hiring, interviewing, assigning, recommending layoff, and conducting evaluations that lead to pay upgrades – McBee's status as a supervisor is unquestionable. Given such status, his role in acquiring bargaining cards for the Carpenters was unlawful, tainting those cards and Northshore's grant of recognition.[7]

CONCLUSION

For the foregoing reasons, and those outlined in the brief of Counsel for the Acting General Counsel, Local 66 requests that the Administrative Law Judge find that Northshore violated §§ 8(a)(1), (2), and (3) of the Act, and that the Carpenters violated §8(b)(1)(A) and §8(b)(2) of the Act. Local 66 further requests that Northshore be ordered to withdraw its recognition from the Carpenters, that the Carpenters cease accepting and/or seeking such

---

[6] It is telling that, in the field, such apprentice evaluations are conducted by Dino Johnston, Northshore's General Superintendent. TR 536.

[7] The Carpenters' acceptance of the above-described assistance and recognition constitutes a violation of § 8(b)(1)(A) of the Act. Garner-Morrison, 356 NLRB No. 163, slip op at 7.

recognition from Northshore, that both Respondents post an appropriate Notice, and such other relief as is deemed necessary.

DATED this 25th day of April, 2013.

Daniel Hutzenbiler, WSBA No. 36938
Attorney for Local 66
Robblee Detwiler & Black
2101 Fourth Ave, Suite 1000
Seattle, WA 98121
Telephone: (206) 467-6700
Fax: (206) 467-7589
E-mail: dhutzenbiler@unionattorneysnw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2013, I caused the original of the foregoing **UNION'S POST-HEARING BRIEF** to be filed with the National Labor Relations Board via e-filing to:

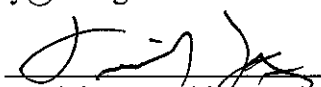
Administrative Law Judge Eleanor Laws
National Labor Relations Board
Division of Judges
901 Market Street, Suite 300
San Francisco, CA 94103

On this same date, I caused a true and correct copy of the same to be served via email, to:

Christopher L. Hilgenfeld
Joseph G. Marra
Selena C. Smith
Davis Grimm Payne & Marra
Email: jmarra@davisgrimmpayne.com
ssmith@davisgrimmpayne.com
chilgenfeld@davisgrimmpayne.com

Daniel M. Shanley
Judy Juang
Decarlo, Connor & Shanley
Email: dshanley@deconsel.com
jjuang@deconsel.com

Marie-Louise Anzalone
Carolyn McConnell
Counsel for the Acting General Counsel
National Labor Relations Board, Region 19
Email: Marie-Louise.Anzalone@nlrb.gov
Carolyn.McConnell@nlrb.gov
Jacqueline.Canty@nlrb.gov



Daniel Hutzenbiler, WSBA No. 36938
Attorney for Local 66
Robblee Detwiler & Black
2101 Fourth Ave, Suite 1000
Seattle, WA 98121
Telephone: (206) 467-6700, Fax: (206) 467-7589
E-mail: dhutzenbiler@unionattorneysnw.com