

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

FORDHAM HILL OWNERS CORPORATION

Employer

Case No. 02-RC-098661

and

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

Petitioner

**SUPPLEMENTAL DECISION AND
CERTIFICATION OF REPRESENTATIVE**

This Supplemental Decision contains my findings regarding the Employer's objections to the election. The Employer objected to the following: In Objections 1 and 2, the Employer asserts that the Board Agent engaged in misconduct by conducting the election, and issuing a tally of ballots, at a time when the Board could not legally act without a constitutionally appointed quorum of at least three members. In Objection 3 through 6, the Employer asserts that the Board engaged in misconduct by failing to render a decision in connection with its Order Denying the Employer's Request for Review, failing and refusing to dismiss the petition or hold the election in abeyance until it could legally act with a constitutionally appointed quorum of at least three members, and by issuing that Order, and delegating this matter to me, at a time when the Board could not legally act, without a constitutionally appointed quorum of at least three members.¹ The Employer further alleges in Objection 6 that I engaged in misconduct by issuing a Decision and Direction of Election in this matter, at a time when the Board could not legally act without a constitutionally appointed quorum of at least three members.

¹ The employer's objections refer to the Order having been issued on April 8, 2013. The order was issued on April 9, 2013.

PROCEDURAL BACKGROUND

Pursuant to a Decision and Direction of Election, issued by the undersigned on March 12, 2013, an election in this matter was conducted on April 9, 2013, in the following unit of employees:

Included: all full-time and regular part-time Security Officers and Squad Leaders employed by the Employer at the Fordham Hill Owners Corporation located at One Fordham Hill Oval, Bronx, NY 10468

Excluded: all sergeants, office clerical employees, and professional employees and supervisors, as defined by the Act

The tally of ballots, which was made available to the parties at the conclusion of the election, showed the following results:

Approximate number of eligible voters.....	21
Void ballots	0
Votes cast for Petitioner	20
Votes cast against participating labor organization.....	0
Valid votes counted	20
Challenged ballots	0
Valid votes counted plus challenged ballots	20

Challenges are not sufficient in number to affect the results of the election.
A majority of the valid votes counted plus challenged ballots has been cast for Petitioner.

On April 15, 2013, the Employer filed timely objections to the election. The objections are attached to this Supplemental Decision.

Pursuant to Section 102.69 of the Board’s Rules and Regulations, an administrative investigation of the objections was conducted. During the investigation, the parties were afforded a full opportunity to submit evidence bearing upon the issues. The results of the investigation are discussed below.

OBJECTIONS 1, 2, 4, 5, and 6: The Board and Regional Director Were Without Legal Authority to Act in the Absence of a Constitutionally Appointed Quorum of at Least Three Members

With respect to Objections 1, 2, and 4 through 6, the Employer objects to the election based substantially on its contention that, in the absence of a constitutionally appointed quorum of at least three members, both the Board and I were without legal authority to act in the manner set forth in each objection. In support of the foregoing, the Employer cites *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), and the subsequent *Petition For a Writ of Certiorari* which the Board filed with the United States Supreme Court. The Employer notes that in its petition, the Board twice advised the Court that the decision in *Noel Canning* calls into question every order issued by the National Labor Relations Board since January 4, 2012. Further, with respect to the portion of Objection 6 relating to my alleged misconduct in issuing a Decision and Direction of Election, and conducting the election in this matter, the Employer asserts that the foregoing is misconduct or objectionable conduct, as it occurred at a time when the Board itself could not legally delegate decisional authority in representation cases to the Regional Directors or otherwise act, as it was without a constitutionally appointed quorum of at least three members.

The Employer bases its objections on *Noel Canning*, arguing that under that decision, the President's January 4, 2012, recess appointments to the Board were invalid. I recommend that Objections 1, 2 and 4 through 6 be overruled for the following reasons.

It is not appropriate for the Board, or the Board's appointed agents, to suspend its activities in response to a claim that Presidential appointments to the Board are not valid. The Board has publicly stated that it disagrees with the D.C. Circuit's *Noel Canning* decision, and, on March 12, 2013, the Board announced that it, in consultation with the Department of Justice, intended to file a petition for certiorari with the United States Supreme Court seeking review of the D. C. Circuit's decision. On April 25, 2013, the petition for certiorari was filed with the Supreme Court. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024, at *14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th

Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus in *Belgrove*, the Board concluded that because the “question [of the validity of the recess appointments] remains in litigation,” until such time as it is ultimately resolved, “the Board is charged to fulfill its responsibilities under the Act.”

Further, regarding the portion of Objection 6 relating to the alleged misconduct in having issued a Decision and Direction of Election, and by conducting an election in this matter, I find the Employer’s contention that the Board could not legally delegate these actions to the undersigned to be without merit for the reasons set forth by the Board in its April 29, 2013, Decision and Order in this matter. A copy of that Decision and Order is attached to this Supplemental Decision.

Based upon a consideration of all of the foregoing, I find Objection 1, 2, and 4 through 6, to be without merit, and they are hereby overruled.

OBJECTION 3: The Board Engaged in Misconduct by Failing to Render a Decision in Connection With Issuance of the April 9, 2013, Order Denying Employer’s Request for Review

In this objection, the Employer asserts that the Board engaged in misconduct by failing to render a Decision in connection with its issuance of the April 9, 2013, Order. However, other than noting that the Board’s Order denying its request for review stated that a related Decision would be issued, but that no such Decision had been issued as of the date of election, the Employer did not provide any evidence or argument in support of its contention that the absence of such a Decision interfered with the conduct of the election in this matter. Moreover, and as noted previously herein, the Board recently issued its Decision and Order.


Accordingly, I find Objection 3 to be without merit and it is hereby overruled.

CONCLUSION

All of the Employer's objections are without merit and they are hereby overruled.²

WHEREFORE, IT IS HEREBY CERTIFIED that a majority of the valid ballots has been cast for the Petitioner and that pursuant to Section 9(a) of the National Labor Relations Act, the Petition is the exclusive representative of the employees in the unit described above, for the purposes of collective bargaining with respect to the rates of pay, wages, hours of employment and other terms and conditions of employment.³

Signed at New York, New York
May 3, 2013



Karen P. Fernbach, Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10278

² No hearing is warranted with respect to the objections, inasmuch as no substantial or material factual issues have been raised thereby. Further, even assuming the evidence proffered by the Employer in support of its objections to be true, no hearing is warranted, in my opinion, and the election will not be set aside based thereupon.

³ Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision and Certification of Representative may be filed with the Board in Washington D.C. by no later than May 17, 2013. Under the provisions of Section 102.69(g) affidavits which a party has timely submitted to the Regional Director in support of its objections and that are not included in the Supplemental Decision, are not part of the record before the Board unless appended to the request for review or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

NATIONAL LABOR RELATIONS BOARD

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

Petitioner,

OBJECTIONS

-and-

Case NO. 02-RC-098661

FORDHAM HILL OWNERS CORPORATION

Employer.

-----X

These OBJECTIONS are submitted in behalf of the Employer, by and through its attorneys, the law offices of MAHER & BROWN, following the April 9, 2013 election in this matter. These OBJECTIONS are to the conduct of the election or to conduct effecting the results of the election. These OBJECTIONS are enumerated as follows:

1. The Board agent's misconduct in conducting an election at a time when the Board could not legally act without a constitutionally appointed quorum of at least three members;
2. The Board agent's misconduct in issuing a Tally of Ballots following the election at a time when the Board could not legally act without a constitutionally appointed quorum of at least three members;
3. The Board's misconduct in failing to render a decision as indicated in its April 8, 2013 ORDER;
4. The Board's failure and refusal to hold the election in abeyance or dismiss the underlying petition until it could legally act with a constitutionally appointed quorum of at least three members;
5. The Board's misconduct in issuing its April 8, 2013 ORDER denying the Employer's Request for Review, at a time when the NLRB could not legally act without a constitutionally appointed quorum of at least three members;

6. The Board's misconduct in delegating this matter to to the Regional Director and the Regional Director's misconduct in issuing a Decision and Direction of Election, both occurring at a time when the NLRB could not legally act without a constitutionally appointed quorum of at least three members;

Dated: April 15, 2013

New York, New York

Yours, etc.

MAHER & BROWN

By:

A handwritten signature in black ink that reads "Donald E. Maher". The signature is written in a cursive style and is positioned over a horizontal line.

Donald E. Maher

Attorneys for the Employer

14 Wall Street, 20th FL.

New York, New York, 10005

(212) 618- 1250 (office)

(480) 247-5359 (fax)

(610) 763-0594 (cell)

dmaher10@ptd.net

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FORDHAM HILL OWNERS CORPORATION
Employer

and

Case 02-RC-098661

UNITED FEDERATION OF SPECIAL POLICE
and SECURITY OFFICERS, INC.
Petitioner

DECISION AND ORDER

On April 9, 2013, we issued an Order denying the Employer's Request for Review of the Regional Director's Decision and Direction of Election and also denying the Employers' request to hold this proceeding in abeyance. We stated that a decision would follow.

In its Request for Review, the Employer contends that the Regional Director's Decision and Direction of Election should be rescinded and the petition dismissed, or held in abeyance, because the Board and the Regional Director lack the authority to act in this matter. We find no merit in these contentions and accordingly find that the Employer has raised no substantial issues warranting review.¹

¹ Specifically, the Employer contends that the Board lacks a quorum because the President's recess appointments are constitutionally invalid. We reject this argument. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). However, we agree with the Regional Director that, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. See *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn. 1 (2013).

We likewise reject the Employer's related contention that the Regional Director would lack authority to process representation petitions if the Board lacked a quorum. The Board's delegation of its decisional authority in representation cases to Regional Directors dates back to 1961 and has never been withdrawn. See 26 Fed. Reg. 3889 (May 4, 1961). Consistent with the 1961 Delegation, NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment. Furthermore, in *New Process Steel*, the Supreme Court expressly stated that such delegations were not affected by its decision, and, following that decision, no fewer than three courts of appeals have upheld the principle that Board delegations of authority to non-members remain valid during a loss of quorum by the Board. See *New Process Steel L.P. v. NLRB*, 130 S.Ct. 2635, 2643 n.4 (2010); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011); *Osthus*

MARK GASTON PEARCE,	CHAIRMAN
RICHARD F. GRIFFIN, JR.,	MEMBER
SHARON BLOCK,	MEMBER

Dated, Washington, D.C., April 29, 2013.