

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31**

DAIRY FARMERS OF AMERICA

Employer

Case No. 31-RC-103359

and

TEAMSTERS LOCAL UNION NO. 186

Petitioner

**DECISION AND DIRECTION OF ELECTION**

**I. INTRODUCTION**

On April 22, 2013, Teamsters Local Union No. 186 (Petitioner) filed petition 31-RC-103359 under Section 9(c) of the National Labor Relations Act (Act), seeking to represent a unit of warehouse, production, manufacturing, sanitation, clerks, lab technicians and combo records employees employed by Dairy Farmers of America (Employer).

A hearing was held on May 7, 2013, on the petition referenced above before a hearing officer of the National Labor Relations Board (Board).

The sole issue presented at the hearing was whether the Petition should be dismissed or stayed because of the recent decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C.Cir. 2013). It is the Employer's position that the Board cannot act at this time because it lacks a proper quorum and therefore cannot properly delegate its Section 9(c) responsibilities to Regional Directors. Also, the

Employer asserts that I lack authority to issue a decision or direct an election because the Board lacked a quorum when it appointed me as Regional Director of Region 31 of the Board. The Petitioner contends that the Petition should be processed and should not be stayed or dismissed. As discussed more fully below, I have carefully considered the Employer's arguments and conclude, based on valid precedent, that the petition should be processed.

No other issues were litigated at the hearing. The parties stipulated to commerce, labor organization status, appropriate unit and the existence of a question concerning representation. No party raised any bar issues.

## **II. FINDINGS**

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Upon the entire record in this proceeding, I find:

**1. HEARING OFFICER'S RULINGS:** The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

**2. JURISDICTION:** The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of Section 2(6) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.<sup>1</sup>

**3. LABOR ORGANIZATION:** The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

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<sup>1</sup> The Employer is a Dairy Farmer Cooperative incorporated in the state of Kansas and is engaged in the operation of wholesale dairy production. It has offices and a place of business located at 4375 North Ventura Avenue, Los Angeles, California, 90031. Within the past 12 months, a representative period, the Employer provided, sold, and shipped goods and services valued in excess of \$50,000 directly to firms located outside the state of California. (I note that the parties stipulated that the place of business is in Los Angeles. However, the Employer informed the Region subsequently that the place of business is in Ventura, not Los Angeles.)

**4. QUESTION CONCERNING COMMERCE:** A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

**5. APPROPRIATE UNIT:** The parties stipulated, and I find, that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act (Unit):

Included:

All warehouse, production, maintenance, manufacturing, and sanitation employees, warehouse clerks, lab technicians, and leadmen.

Excluded:

All other employees, office clerical and confidential employees, document review specialist, and guards and supervisors as defined by the Act, as amended.

There are approximately 80 employees in the Unit stipulated and found to be appropriate.

**III. FACTS AND ANALYSIS**

On January 4, 2012, the President made intra-session recess appointments of Sharon Block, Terence Flynn, and Richard Griffin to the Board. In May 2012, the Board appointed me as Regional Director of Region 31 of the Board. The Employer contends that based on both *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. January 25, 2013), and the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), the Board does not currently have a properly appointed quorum and lacks authority to issue a decision or to delegate

its Section 9(c) responsibilities to Regional Directors. Further, the Employer contends that I was appointed Regional Director by the Board at a time that it lacked the authority to do so and that, therefore, I lack authority to issue a decision or direct an election.

While I have considered the Employer's arguments, I conclude that it is not appropriate for the Board, or the Board's appointed agents, such as Regional Directors, to suspend activities in response to a claim that the Board is not acting with a valid quorum, and/or that Presidential appointments to the Board are not valid.

Although the Employer correctly points out that on January 25, 2013, the D.C. Circuit, in *Noel Canning*, held that the President's recess appointments to the Board were not valid, I note 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. *Compare, Noel Canning v. NLRB, supra at, 505-506, 509-511, 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); and, United States v. Allocco, 305 F.2d 704, 709-15 (2d Cir. 1962).*

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. *See, 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) (explaining 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).

Moreover, I reject the Employer's contention that I lack authority to process representation petitions because the Board lacks a quorum and was therefore unable to delegate its Section 9(c) responsibilities to me. 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, the Board's 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 v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet v. El Paso Disposal LP*, 625 F.3d 844, 853 (5<sup>th</sup> Cir. 2010).

Finally, a strong public interest favors addressing representation disputes - of concern to both employees and employers alike- in an expeditious manner. Most representation disputes have long been resolved administratively without the necessity of court litigation. Even where, as here, there is a challenge to the authority of the Board and its appointees to act, our experience in continuing to

process cases during the analogous dispute leading to *New Process Steel, L.P. v. NLRB*, was that most of the cases decided during that time helped finally resolve labor disputes because the parties either accepted the Board's or Regional Director's decision or settled the dispute.

Based on the above considerations, I reject the Employer's argument that the petition in this matter must be dismissed or stayed and I direct an election as set forth below.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the Unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local Union No. 186. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Director will issue subsequent to this Decision.

#### ***Voting Eligibility***

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have

retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and (3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

***Employer to Submit List of Eligible Voters***

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the **full** names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by the Region to assist in

determining an adequate showing of interest. The Region shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the NLRB Region 31 Regional Office, 11500 W. Olympic Boulevard, Suite 600, Los Angeles, California 90064, on or before **May 23, 2013**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>2</sup> by mail, by hand or courier delivery, or by facsimile transmission at (310) 235-7420. The burden of establishing the timely filing and receipt of this list will continue to be placed on the sending party. Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile or E-Filing through the Agency website, in which case no copies need be submitted. You may not submit the list to the Region by email. If you have any questions, please contact the Regional Office.

### ***Notice of Posting Obligations***

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) working days prior to

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<sup>2</sup> To e-file, go to the agency's website at [www.nlr.gov](http://www.nlr.gov), click "e-file documents," and enter the 10-digit case number (found on the top right of the charge or petition form). Then simply follow the prompts. At the end, you will receive a confirmation number and an e-mail notification that the documents were successfully filed.

12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **May 30, 2013**. The request may be filed electronically through the Agency's web site, [www.nlr.gov](http://www.nlr.gov),<sup>3</sup> but may not be filed by facsimile.

**DATED** at Los Angeles, California this 16<sup>th</sup> day of May, 2013.



Mori Pam Rubin, Regional Director  
National Labor Relations Board  
Region 31

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