

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**BCI COCA-COLA BOTTLING  
COMPANY OF LOS ANGELES**

**and**

**Case No.: 28-CA-022792**

**WAYNE ABRUE, An Individual**

**BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO RECONSIDER**

**I. INTRODUCTION**

Pursuant to Section 102.48(d)(1) of the Rules and Regulations of the National Labor Relations Board (the "Board" or "NLRB"), Respondent BCI Coca Cola Bottling Company of Los Angeles d/b/a Coca-Cola Bottling Company of Arizona ("Respondent"), by counsel, respectfully submits this Brief in Support of Respondent's Motion to Reconsider. For the reasons set forth below, Board should reconsider and vacate its Decision and Order Remanding issued by the Board on April 30, 2013 ("Decision").<sup>1</sup> Alternatively, the Board should reconsider the Decision and correct it as described below.

First, as outlined in *Noel Canning v. NLRB*, No. 12-1115, 2013 U.S. App. LEXIS 1659 (D.C. Cir. Jan. 25, 2013), and more recently in *NLRB v. New Vista Nursing and Rehabilitation*, No. 12-1936, (3rd Cir. May 16, 2013), the Board lacks a properly appointed complement of members to adjudicate disputes. The Board should reconsider its decision to remand this matter for further proceedings, vacate the Decision stay any further proceedings until either after the Supreme Court has had an opportunity to rule on the *Noel Canning* and *New Vista Nursing* decisions or after the Board regains a valid quorum of properly appointed members. Second, the

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<sup>1</sup> *BCI Coca-Cola Bottling Company of Los Angeles and Wayne Abrue*, 359 NLRB No. 110, Case 28-CA-02 2792, April 30, 2012

Board made an incorrect finding of fact that the global settlement agreement between the Respondent and the United Industrial, Service, Transportation, Professional and Government Workers of North America, Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Water District/NMU AFL-CIO (“the Union”) “does not purport to resolve any 8(a)(1) threat allegations.” Decision and Order Remanding, *sl. op.* at n.1. This statement is unsupported by the record of the case as all pending unfair labor practice allegations were addressed in the settlement agreement. Indeed, these allegations cannot survive if the charge is dismissed as properly deferred to a settlement agreement between the Respondent and the Union. Thus, and alternatively, the Decision should be amended to address this error and any Order remanding this matter should require dismissal of the entire matter should it be concluded that deferral was proper. For these and all the reasons set forth below, Respondent’s Motion should be granted.

## **II. PROCEDURAL HISTORY**

On September 28, 2012, Administrative Law Judge William G. Kocol issued a bench decision in this matter. The Counsel for the Acting General Counsel (“Acting General Counsel”) filed exceptions and a supporting brief. Respondent filed an answering brief and the Acting General Counsel replied. The National Labor Relations Board, by Chairman Mark Gaston Pearce and Members Richard F. Griffin Jr. and Sharon Block, issued the Decision on April 30, 2013 remanding the case back to Administrative Law Judge Kocol for further proceedings consistent with its contents. Pursuant to Section 102.48(d)(2) of the Rules and Regulations of the National Labor Relations Board, Respondent timely filed this Motion to Reconsider and Supporting Brief with the Board.

### III. ARGUMENT

#### **A. Extraordinary Circumstances Exist Such that the Board Should Grant this Motion to Reconsider its April 30, 2013 Decision.**

Section 102.48(d)(1) of the Board's Rules permits a party in "extraordinary circumstances" to move for reconsideration of a Board Order. In this case, "extraordinary circumstances" exist because now two Federal Circuit Courts of Appeal agree that the Board is without legal authority to issue the Decision. The Board has only one validly appointed member and is unable to continue to act without a quorum of the full Board. Moreover, and alternatively, the Decision should be reconsidered as it contains the material error that the global settlement agreement of a grievance between the Respondent and the Union to which this matter should be deferred "does not purport to resolve any 8(a)(1) threat allegations," Decision and Order Remanding, *sl. op.* at n.1, and it remands the case in an improper manner.

#### **B. The National Labor Relations Board Lacks a Proper Quorum to Act in this Matter and Lacks the Authority to Remand the Matter to the Administrative Law Judge for Further Proceedings.**

##### **a. The Board Lacks a Proper Quorum**

Because Members Block and Griffin were not validly appointed pursuant to the Recess Appointments Clause, the Board has not had a valid quorum under the *Noel Canning* requirements since the expiration of Wilma B. Liebman's term on August 27, 2011. As outlined in great detail in *Noel Canning v. NLRB*, No. 12-1115, 2013 U.S. App. LEXIS 1659 (D.C. Cir. Jan. 25, 2013), Members Block and Griffin were not appointed during an intersession recess of the Senate, nor were they appointed to fill vacancies that occurred during an intersession recess of the Senate. Accordingly they were appointed in violation of the United States Constitution.

The Third Circuit Court of Appeals has very recently agreed with the D.C. Circuit and held that the clear text of the Constitution limits the President's power to make recess

appointments during intersession recesses only. *NLRB v. New Vista Nursing and Rehabilitation*, No. 12-1936, (3rd Cir. May 16, 2013). Because Members Block and Griffin were not validly appointed pursuant to the Recess Appointments Clause, the only valid member of the Board since December 16, 2012 has been Chairman Mark Gaston Pearce.

Pursuant to the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), the Board must have a quorum of three validly appointed members in order to lawfully take action. Any orders issued by the Board without a quorum since August 27, 2011 are void. The Board was without such a quorum at the time it issued its Decision here. Remanding this matter to the Administrative Law Judge for further proceedings will unfairly prejudice Respondent in terms of time and expense as it will be forced to re-litigate the administrative law judge's decision in its entirety before a properly constituted Board, if the Supreme Court confirms the rulings of the D. C. Circuit and the Third Circuit Courts of Appeals.

**b. Without a Valid Quorum The Board Lacks Jurisdiction to Prosecute the Present Complaint**

In the present case, the Board issued its Decision for further proceedings in front of Administrative Law Judge Kocol despite the absence of a valid quorum of Board members. Accordingly, the Board should vacate that Decision and hold any ruling on Administrative Law Judge Kocol's decision in abeyance until either the Supreme Court has determined the validity of the Board's recess appointments or until such time when the Board has a properly appointed quorum.

**C. The National Labor Relations Board Lacked a Proper Three-Person Delegee Group When it Issued the Decision In This Matter and Therefore Lacks the Authority to Remand the Matter to the Administrative Law Judge for Further Proceedings.**

The Decision and Order Remanding this matter to the Administrative Law Judge was issued by a three-member "delegee group" of the Board. The National Labor Relations Act

establishes that the Board is composed of up to five members, appointed by the President and confirmed with the advice and consent of the Senate. 29 U.S.C. § 153(a). Section 153(b) authorizes the Board “to delegate to any group of three or more members any or all of the powers which it may itself exercise.” *Id.* § 153(b). These delegee groups must “maintain a membership of three in order to exercise the delegated authority of the Board.” *New Process Steel v. NLRB*, 130 S. Ct. 2635, 2644 (2010).

This three-member composition requirement is distinct from § 153(b)’s quorum requirements. The quorum requirements speak to the number of members who must be present to exercise the Board’s powers for either the Board itself or a properly constituted three-member delegee group. *See New Process Steel* at 2642-43. In contrast, the three-member composition requirement speaks to how many members are required for a delegee group to be a properly constituted body that can exercise the Board’s powers.

In *New Vista Nursing*, the Third Circuit held Member Becker was invalidly recess appointed to the Board during a March 2010 intrasession break. *New Vista Nursing*, No 12-1936 at 101. The recess appointments of Members Block and Griffin also occurred during, at best, an intrasession break.<sup>2</sup> As outlined in *New Vista Nursing*, “this means that the delegee group had fewer than three members when it issued the...Order. Consequently, the delegee group acted without power and lacked jurisdiction when it issued the order.” *Id.*

The three member delegee group that issued the Decision is not a properly constituted body that can exercise the Board’s powers. As outlined in both *Noel Canning* and *New Vista Nursing*, the recess appointment nominations of both Members Block and Griffin are unconstitutional. As most recently outlined in *New Vista Nursing*, the President’s recess

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<sup>2</sup> There never was any break/recess during December 2011-January 2012 period as the Senate convened in *pro forma* sessions regularly. Accordingly, no basis for any recess appointments exists in that instance.

appointment powers are limited to intersession recesses of the Senate. As Members Block and Griffin were not appointed during such a recess, they had have no power to act. Accordingly, the Board should vacate its Decision.

**D. The National Labor Relations Board Incorrectly Asserted that the Parties had Not Disposed of All Pending Issues and Improperly Remanded Alleged Section 8(a)(1) and 8(a)(3) Violations for Disposition Before the Administrative Law Judge.**

Even if the Board had the power to act, the Decision incorrectly states the facts of the record and improperly sent settled disputes back to Administrative Law Judge Kocol for resolution. Without any citation to the record, the Decision asserts that the settlement agreement between the Respondent and the Union “does not purport to resolve any 8(a)(1) threat allegations.” Decision and Order Remanding, (sl. op. at n.1.) This is a materially incorrect statement of the record.

As outlined in the official transcript, the settlement agreement (“Agreement”) was admitted into the record as (GC 6) at the September 13, 2012 hearing. (Tr. 31). The settlement agreement reflected and the general counsel admitted “...the parties’ express intent to resolve all unfair labor practice issues raised by the unfair labor practice charges.” (GC 6; A.G.C’s Br. In Supp. of Ex. p. 4). Moreover, the record reflects the coextensive scope of settled grievance and the unfair labor practice allegations as Administrative Law Judge Kocol found that, “the Regional Director noted that there was a grievance pending that covered the allegations of the charge.” (Decision and Order Remanding, sl. op. at 3.) Simply put, it is clear that the ancillary 8(a)(1) allegations were indeed encompassed with the terms of the settlement that was executed. Accordingly, the Board should amend its Decision to reflect that the Agreement of the parties, entered into on January 31, 2012, included the additional Section 8(a)(1) allegations discussed by the Board.

Moreover, to the extent the Board still orders a remand of this matter to Administrative Law Judge Kocol to determine whether the settlement agreement warrants deferral under the proper standard notwithstanding the holdings of *Noel Canning* or *New Vista Nursing*, the Order should bifurcate the issues of whether the charge can be deferred and what should be litigated at a hearing. There is no need to hold evidentiary hearings on the allegations concerning the ancillary 8(a)(1) allegations if the matter is deferred. In the case of a deferral, the charge will be dismissed in its entirety and this includes the ancillary 8(a)(1) claims that cannot stand on their own in the absence of the charge as to which they were later appended. *Cf. Titanium Metals Corp. NLRB*, 392 F.3d 439 (D.C. Cir. 2004) *rehearing en banc denied* (refusing to enforce order where NLRB declined to defer to a grievance settlement reached by employer and employee's union representatives and finding that 8(a)(1) violations should be dismissed in light of settlement).

#### IV. CONCLUSION

The current situation and legal complexity facing the Board is not its own doing. Nevertheless, the Constitutional and statutory realities of the applicable law require that the Board vacate its Decision in this matter and cease any further action on the Administrative Law Judge's findings until a properly constituted Board is in place. Thus, the Employer's Motion to Reconsider should be granted, the Board's April 30, 2013 Decision should be vacated and this matter should be held in abeyance until such time as the Board has legal quorum, and then the members of that legal quorum should reconsider the issues raised by the briefs of the parties.

Alternatively, should the Board conclude that it can act notwithstanding the holdings of *Noel Canning and New Vista Nursing*, it should amend its Decision to recognize that the parties resolved all pending unfair labor practices in the settlement agreement, consistent with the record evidence. The Board should also amend its Order to direct the administrative law judge to

bifurcate the proceedings to first determine if deferral is proper, before taking any evidence related to alleged Section 8(a)(1) violations. Upon a finding that deferral is proper, the Board should order that the entire matter be dismissed without any further proceedings.

Respectfully submitted this 24<sup>th</sup> day of May 2013,

/s/ Douglas M. Topolski

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this **RESPONDENT BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES' BRIEF IN SUPPORT OF ITS MOTION TO RECONSIDER** was filed electronically and that an original was sent on May 24, 2013 by Federal Express to the National Labor Relations Board, 1099 14<sup>th</sup> Street N.W., Washington, D.C., 20570-0001, and service copies were sent by E-Mail and Federal Express to:

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