

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

C.R. ENGLAND INC. Employer and TEAMSTERS, LOCAL 705 Petitioner	Case 13-RC-095967 Stipulated
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**PETITIONER TEAMSTERS LOCAL 705’S ANSWERING BRIEF IN
OPPOSITION TO EMPLOYER EXCEPTIONS**

Petitioner Teamsters Local 705 files this brief in opposition to Employer CR England Inc.’s “Response of Employer to Hearing Officer’s Report on Objections and Supplement to Employer’s Exceptions to Purported Regional Director Peter Orr’s [sic] Report on Objections” submitted on May 29, 2013. Pursuant to Section 102.69(c)(2) of the NLRB Rules and Regulations, a party opposing the exceptions may file an answering brief within seven days from the last date on which exceptions may be filed, which in this case is June 6, 2013.

After the issuance of the Hearing Officer’s report, the Employer abandoned its factual objections and claims that the election must be set aside and rerun because there was allegedly an atmosphere of violence or threats that impaired the free choice of the employees throughout the “critical period.” Because the Employer maintains its objection under *Noel Canning* only, and because the Board’s position on such objections is clear, the Union urges the Board to immediately issue a certification of the Union as the exclusive bargaining representative of the CR England employees in the unit to which the parties stipulated.

The Union submits a supplemental argument in response to the supplemental argument the Employer filed on May 30, 2013, and reiterates its “Brief in Opposition to Employer Exceptions to Regional Director Peter Ohr’s Report on Objections” that it filed on April 5, 2013.

Because the Employer's entered into a Stipulated Election Agreement, an executed contract, it waived its ability to object under *Noel Canning* to the appointment of Mr. Ohr.

Supplemental Argument

I. The appointment of Mr. Ohr as Regional Director was not improper

Pursuant to *New Process Steel*, 130 S. Ct. 2365 (2010), *Noel Canning v. NLRB*, No. 12-1115 (D.C. Circuit January 25, 2013), and *NLRB v. New Vista Nursing and Rehabilitation*, Nos. 11-3440, 12-1027, and 12-1936 (3d Circuit, 2013), the Employer disputes the validity of Peter Ohr's December 13, 2011, appointment to Regional Director of Region 13. The Employer further asserts that Mr. Ohr lacked the authority to conduct and supervise a valid election, and subsequently certify the results thereof. Based on its position, the Employer requests that this proceeding be held in abeyance.

This exception should be denied and the proceeding should progress because *Noel Canning* and *New Vista* were wrongly decided, for the reasons stated by the dissent in *New Vista*, in the Board's briefs in both cases, and in the Union's "Brief in Opposition to Employer Exceptions to Regional Director Peter Ohr's Report on Objections" that it filed on April 5, 2013.

II. The Employer waived its *Noel Canning* objection by entering into a Stipulated Election Agreement with Region 13 and the Union

As early as March 15, 2012, the validity of President Obama's appointments to the NLRB was challenged for the first time through *Noel Canning*. Press Release, National Chamber Litigation Center, U.S. Chamber Joins Challenge to NLRB Appointments (March 15, 2012) (available at <http://www.chamberlitigation.com/news/releases/us-chamber-joins-challenge-nlr-appointments>). See also, e.g. George F. Will, *Obama the Scofflaw*, The Washington Post, October 11, 2012, at A19; Ashley Southall, *Senate Republicans Challenge*

Obama's Recess Appointments, The New York Times Blogs (The Caucus), September 26, 2012.
Glenn Spencer, U.S. Chamber of Commerce, *Witnessing History: The State Of Labor Law In 2012*, Metropolitan Corporate Counsel, Northeast Edition, June 2012, at Pg. 34 Vol. 20 No. 6;
M. Lee Smith, *Future uncertain for NLRB membership*, California Employment Law Letter, January 14, 2013, at Volume 22, Issue 19.

On January 7, 2013, the Union filed an RC petition with Region 13. The Region subsequently issued a Notice of Hearing on January 8 that a representation hearing would be held on January 18 at its Chicago office. After conversations between the parties and the Region, the parties executed, and Mr. Ohr approved, a Stipulated Election Agreement on January 17. As part of the agreement, the parties agreed, among other items, that

- “The parties waive their right to a hearing.”
- “A secret-ballot election under the Board’s Rules and Regulations shall be held under the supervision of the Regional Director.”
- A specific unit of employee classifications is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Despite the fact that, at the latest, challenges to President Obama’s Board appointments through the *Noel Canning* litigation had started approximately ten months earlier, the Employer did not request that the Stipulated Election Agreement be conditioned in any way on the pending *Noel Canning* case. The Employer also neither raised any question concerning the validity of the Regional Director’s appointment nor reserved the right to litigate that issue.

The D.C. Circuit decided *Noel Canning* on January 25, 2013. Nevertheless, the Employer raised no issues concerning the *Noel Canning* decision prior to the election and made no effort to rescind the Stipulated Election Agreement.

On February 19, an election was held in accordance with the Stipulated Election Agreement. The Union prevailed with 43 votes in favor of, and 23 votes in opposition to, its representation of the unit employees. On February 26, the Employer filed two series of objections to the election, one of which was an objection under *Noel Canning*. Specifically, the Employer objected, for the first time, that the appointment of Mr. Ohr was invalid and that Mr. Ohr lacked the authority to, among other things, “conduct and supervise a valid election in this matter under Sections 9 and 3(b) of the National Labor Relations Act.”

On March 15, Mr. Ohr issued a Report on Objections and Notice of Hearing that overruled the Employer’s *Noel Canning* objection. The Employer excepted to this Report, and the Union subsequently filed a brief in opposition to the Employer’s exception. Upon the issuance of a Hearing Officer Report regarding the non-*Noel Canning* objections that was unfavorable to the Employer with respect to the other objections, the Employer abandoned those other objections and filed a brief reiterating only its *Noel Canning* exception.

Pursuant to Section 102.62(b) of the Board’s Rules and Regulations,

[w]here a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter into an agreement providing for a waiver of hearing and for an election . . . Such election shall be conducted under the direction and supervision of the Regional Director.

NLRB Rules and Regulations, 29 CFR 102.62 (2012). Section 102.62(b), therefore, grants Regional Directors the authority to approve and administer representation elections.

Upon the filing of an election petition, the Regional Director has the authority to direct a board agent to hold a hearing to “inquire fully into all matters in issue and necessary to obtain a

full and complete record upon which the Board or the Regional Director may discharge their duties under section 9(c) of the Act.” 29 CFR 102.63, 102.64 (underlining added). Such “matters in issue” are either determined and resolved by an election agreement or by a Decision and Direction of Election issued by the Region after a hearing is held. *See, e.g., I.O.O.F. Home of Ohio, Inc.*, 322 N.L.R.B. 922 n.6 (N.L.R.B. 1997) (Stipulated Election Agreement determined appropriate unit for election); *Concrete Technology, Inc.*, 224 N.L.R.B. 961 (N.L.R.B. 1976) (Decision and Direction of Election determined appropriate unit for election).

The Employer did not demand a hearing on the validity of Regional Director Ohr’s appointment and did not identify or preserve that issue in the Stipulated Election Agreement. Thus, the Employer failed to make the Regional Director’s appointment a “matter in issue.” Having waived that issue and agreed to the Regional Director’s supervision of the election, the Employer could not raise it after the election and cannot raise it at this stage.

A “Stipulated Election Agreement is a binding contract to which the parties will be held.” *Laidlaw Transit, Inc.*, 322 NLRB 895, 895 (1997) (“a). A Stipulated Election Agreement constitutes a full contract, not a series of individual parts with various levels of legal effect. It is settled that if a party enters into a Stipulated Election Agreement that includes a description of the appropriate bargaining unit, it is barred from objecting later to the appropriateness of the unit because this issue could have been litigated in the representation proceeding. *I.O.O.F. Home of Ohio*, 322 N.L.R.B. at 922. Just as the Employer stipulated to an appropriate unit for election and thus waived its ability to challenge the appropriateness of the unit at a later time, the Employer stipulated that it waived its right to a hearing and that the election would be held under the supervision of Mr. Ohr, and thus waived its ability to later challenge Mr. Ohr’s supervision of the election.

The Board has held that “[i]t is axiomatic in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding.” *I.O.O.F. Home of Ohio, Inc.*, 322 N.L.R.B. at 922. Such an absence of newly discovered and previously unavailable evidence or special circumstances exists here. Just as information that might influence the Employer’s decision whether to challenge the appropriateness of a unit was available to it prior to stipulating to the election agreement, information in the media regarding the possibility that the D.C. Circuit would hold that President Obama’s appointments to the NLRB were improper was also widely available as early as March 15, 2012, long before the Union filed a petition to represent the unit employees.

The fact that the D.C. Circuit issued the *Noel Canning* decision after the date of the stipulated election agreement is thus irrelevant and does not constitute newly discovered and previously unavailable evidence or special circumstances that would permit the Employer to litigate the matter of Mr. Ohr’s appointment, as this issue could have been litigated in a representation proceeding prior to the election. The Employer’s decision to object to Mr. Ohr’s appointment only after the vast majority of its employees declared their support for the Union in the election on February 19, therefore, was untimely and improper.

Conclusion

Because the Employer maintains its objection under *Noel Canning* only, and because the Board’s position on such objections is clear, the Union respectfully requests that the Board immediately issue a certification of the Union as the exclusive bargaining representative of the CR England employees in the unit to which the parties stipulated. The Union also urges the Board to overrule the Employer’s *Noel Canning* exception because it is without merit and

because the Employer waived its ability to object to Mr. Ohr's appointment since it signed a Stipulated Election Agreement.

Respectfully submitted,



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June 6, 2013

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CERTIFICATE OF SERVICE

I certify that on June 6, 2013, I electronically filed the foregoing Petitioner Teamsters Local 705's Answering Brief in Opposition to Employer Exceptions with the National Labor Relations Board, Washington, D.C., via the Board's E-Filing System. A copy of this document was also served on the following parties electronically on June 6, 2013:

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June 6, 2013