

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

In the Matter of

THE ARDIT COMPANY

and

Case 9-CA-106395

INTERNATIONAL UNION OF BRICKLAYERS  
AND ALLIED CRAFTWORKERS,  
OHIO KENTUCKY ADMINISTRATIVE  
DISTRICT COUNCIL, LOCAL UNION NO. 18

**MOTION TO TRANSFER PROCEEDINGS TO THE BOARD**  
**AND**  
**MOTION FOR SUMMARY JUDGMENT**

Counsel for the Acting General Counsel, pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations and Statements of Standard Procedures, Series 8, as amended, respectfully moves that the National Labor Relations Board, herein called the Board: (1) transfer this case and continue proceedings before the Board; (2) deem the allegations set forth in the Complaint and Notice of Hearing issued on June 20, 2013, to be true as alleged, without receiving evidence; and (3) grant summary judgment and issue a Decision and Order based on the following:

1. On June 26, 2012<sup>1/</sup>, the International Union of Bricklayers and Allied Craftworkers, Ohio Kentucky Administrative District Council, Local Union No. 18, herein called the Union, filed a Petition in Case 9-RC-083978. (A copy is attached hereto as Exhibit A.) Thereafter, a representation hearing was conducted on July 5. The Regional Director for Region 9 issued a Decision and Direction of Election (Decision) on July 13. (A copy is attached hereto with proof of service as Exhibit B.) On July 13, The Ardit Company, herein called Respondent, filed a Motion for Extension of Time to file its post-hearing brief and submitted its post-hearing brief.

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<sup>1/</sup> Hereinafter, all dates refer to the year 2012, unless otherwise stated.

(A copy is attached hereto as Exhibit C.) On July 16, the Acting Regional Director for Region 9 issued an order denying Respondent's Motion for Extension of Time and rejecting Respondent's post-hearing brief. (A copy is attached hereto with proof of service as Exhibit D). On July 20, the Acting Regional Director for Region 9 issued a Letter Setting Forth Election Arrangements ordering the election be conducted on August 10, at Respondent's facility. (A copy is attached hereto as Exhibit E.) On August 6, Respondent filed a Motion to Move the Election Date. (A copy is attached hereto as Exhibit F.) On August 7, the Regional Director for Region 9 issued an order denying Respondent's Motion to Move the Election Date. (A copy is attached hereto with proof of service as Exhibit G.)

2. On July 27, Respondent filed a Request for Review of the Regional Director's July 13 Decision and the orders rejecting its post-hearing brief and denying its Motion for Extension of Time. (A copy is attached hereto as Exhibit H.) On August 7, Respondent filed a Motion to Stay its Request for Review. (A copy is attached hereto as Exhibit I.) On August 9, the Board issued an Order denying both Respondent's Request for Review and its Motion to Stay. (A copy is attached hereto as Exhibit J.)

3. An election was held pursuant to the Decision on August 10. On conclusion of the election, a tally of ballots was made available to the parties in conformity with the Rules and Regulations of the Board, showing that, of approximately 12 eligible voters, 0 cast a valid ballot for the Union and 1 cast a valid ballot against the Union. There were 8 determinative challenged ballots. (A copy of the tally is attached hereto as Exhibit K.) On August 13, the Regional Director for Region 9 issued a Supplemental Decision and Order (Supplemental Decision), overruling the challenges to the ballots of 6 of the employees and finding that their ballots should be opened and counted. (A copy is attached hereto with proof of service as Exhibit L.) On August 27, Respondent filed a Request for Review of the August 13 Supplemental Decision. (A

copy is attached hereto as Exhibit M.) On October 18, the Board issued an Order Denying both Respondent's Request for Review of the August 13 Supplemental Decision and Order and its Motion to Stay. (A copy is attached hereto as Exhibit N.)

4. On August 17, Respondent timely filed post-election objections to the Union's conduct affecting the outcome of the election. (A copy is attached hereto as Exhibit O.) On the same date, Respondent also filed its position with respect to the supervisory status of two employees whose votes had been challenged, Keith Barnes and Thomas McAllister. (A copy is attached hereto as Exhibit P.) In addition, on the same date, the Union filed its position maintaining that Barnes and McAllister were not supervisors within the meaning of the Act. (A copy is attached hereto as Exhibit Q.)

5. On September 6, the Regional Director for Region 9 issued a Supplemental Decision on Objections overruling Respondent's Objections in their entirety. (A copy is attached hereto with proof of service as Exhibit R.) On September 20, Respondent filed a Request for Review of the Regional Director's September 6 Supplemental Decision on Objections. (A copy is attached hereto as Exhibit S.) Thereafter, Respondent filed a Motion to Stay its Request for Review on September 20. (A copy is attached hereto as Exhibit T.) On October 18, the Board issued an Order Denying both Respondent's Request for Review of the September 6 Supplemental Decision on Objections and its Motion to Stay. (A copy is attached hereto as Exhibit U.)

6. On October 25, the ballots of the 6 challenged individuals found to be eligible voters in the Regional Director's August 13 Supplemental Decision and Order were counted and added to the original tally of ballots. The revised tally of ballots was made available to the parties in conformity with the Rules and Regulations of the Board, showing that, of approximately 12 eligible voters, 4 cast a valid ballot for the Union and 3 cast a valid ballot against the Union,

leaving 2 determinative challenged ballots. (A copy of the revised tally is attached hereto with proof of service as Exhibit V.)

7. On November 5, the Regional Director for Region 9 issued a Supplemental Report, Order Directing Hearing, and Notice of Hearing to determine whether the challenges were valid. (A copy is attached hereto with proof of service as Exhibit W.) A hearing was subsequently held on November 13, and on December 17, a hearing officer in Region 9 issued a report recommending that Respondent's challenges be overruled and that the ballots be opened and counted. (A copy is attached hereto with proof of service as Exhibit X.) Respondent timely filed exceptions to the Hearing Officer's Report, accompanied by a supporting brief, and the Union filed a reply brief. (Copies are attached hereto as Exhibits Y and Z.) On February 4, 2013<sup>2/</sup>, the Regional Director for Region 9 issued a Second Supplemental Decision and Order, adopting the recommendations of the report, overruling the challenges to the ballots and finding that the ballots should be opened and counted. (A copy is attached hereto with proof of service as Exhibit AA.)

8. On March 1, Respondent filed a Request for Review of the Regional Director's Second Supplemental Decision and Order. (A copy is attached hereto as Exhibit BB) On April 24, the Board denied Respondent's Request for Review. (A copy is attached hereto as Exhibit CC.)

9. A second revised tally of ballots issued on May 3, showing that, of approximately 12 eligible voters, 6 cast a valid ballot for the Union and 3 cast a valid ballot against the Union, leaving no challenged ballots. (A copy is attached hereto with proof of service as Exhibit DD.)

10. On May 13, the Regional Director for Region 9 issued a Certification of Representative certifying the Union as the exclusive collective-bargaining representative of the

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<sup>2/</sup> Hereinafter, all dates refer to the year 2013, unless otherwise stated.

following unit. (A copy of the certification is attached hereto with proof of service as Exhibit EE.):

All tile, marble, and terrazzo installers and helpers employed by [Respondent] at or out of its facility in Columbus, Ohio, excluding office clerical employees and all professional employees, and guards and supervisors as defined in the Act.

11. By letter dated May 17, the Union requested that Respondent bargain collectively with the Union about the terms and conditions of employment of the Unit described in paragraph 10.

12. Respondent, by failing to respond to the Union's May 17 letter, refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit described in paragraph 10.

13. On June 3, the Union filed the instant charge alleging that Respondent violated Section 8(a)(1) and (5) of the Act. The charge was served on Respondent by regular mail on June 4. (A copy of the charge with proof of service is attached hereto as Exhibit FF.)

14. On June 20, the Regional Director for Region 9 issued a Complaint and Notice of Hearing in this matter alleging, in pertinent part, that since on or about May 17, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit for which the Union was certified. The Complaint and Notice of Hearing was served on Respondent on June 20. (A copy of the complaint with proof of service is attached hereto as Exhibit GG.)

15. On July 3, Respondent filed an Answer to the Complaint, in which it admitted the following: (a) that it is a corporation with an office and place of business in Columbus, Ohio, engaged as a contractor in the construction industry; (b) during the past 12 months, in conducting these operations, it purchased and received at its Ohio facilities goods valued in excess of \$50,000 directly from points outside the State of Ohio; (c) it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act; (d) the Unit, as described

above in paragraph 10 herein, since the date of certification, May 13, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act; (e) on May 13, the Board certified the Union as the exclusive collective-bargaining representative; (f) the Union has been the exclusive collective-bargaining representative of the Unit at all times since May 13; (g) the Union requested bargaining on May 17; and (h) Respondent has failed and refused to bargain with the Union. Respondent denied the following: (a) service of the charge; (b) that its conduct violated the Act; and (c) that its labor conduct affected commerce within the meaning of Section 2(6) and (7) of the Act. (A copy is attached hereto as Exhibit HH.)

16. Respondent's Answer fails to raise any material issues of fact, as Respondent admits it has failed and refused to recognize and bargain with the Union as the exclusive, collective-bargaining representative of the Unit. Proof of service of the charge in Case 9-CA-106395 is attached hereto as Exhibit FF. Respondent's denial of service does not raise any issues of material fact because Respondent admits in its answer that it has refused to recognize and bargain with the Union.

17. Respondent's defense number three, presumably based on *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted, 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281), asserts that the complaint was *ultra vires* should be stricken or disregarded by the Board. As the Board recently explained, Section 3(d) provides one avenue to fill Board General Counsel vacancies, and the subsequently-enacted Federal Vacancies Reform Act ("FVRA") clearly provides another. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1, n.1 (Mar. 13, 2013) (FVRA is valid alternative procedure to Section 3(d) of the Act). Accordingly, the President had the option of appointing an Acting General Counsel under either Section 3(d) of the Act or the FVRA. Here, he chose to appoint Mr. Solomon under the FVRA, and that

appointment was lawful. See, *Belgrove*, 359 NLRB No. 77, slip op. at 1, n.1 (citing *Muffley v. Spartan Mining Co.*, 570 F.3d 534, 540 n.1 (4th Cir. 2009) (upholding authorization of 10(j) injunction proceeding by Acting General Counsel designated pursuant to the Vacancies Act), *aff'g Muffley v. Massey Energy Co.*, 547 F. Supp. 2d 536, 542 (S.D.W.Va. 2008)). Moreover, regardless of any issue concerning the composition of the Board, the Acting General Counsel's authority to issue and prosecute the complaint is derived from his independent authority to issue and prosecute complaints. *Bloomington's, Inc.*, 359 NLRB No. 113, slip op. at 1 (Apr. 30, 2013), (“[u]nder the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel” (citing 29 U.S.C. § 153(d); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-128 (1987); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010))). Thus, “[t]he authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any ‘power delegated’ by the Board, but rather directly from the language of the NLRA.” *Id.* Accordingly, contrary to Respondent, the Acting General Counsel's authority to issue and prosecute the complaint, and, in turn, the Regional Director's authority to do so, are unaffected by any issue concerning the composition of the Board. <sup>3/</sup>

18. Further, presumably based on *Noel Canning v. NLRB*, *supra*, Respondent challenges the Board's authority to act in this matter. *Noel Canning* does not preclude the Board from the continued processing of this case. It is correct that *Noel Canning* held that Members Griffin and Block, current Board Members serving alongside Chairman Pearce, were not validly appointed because they were appointed during an intrasession recess. However, the Supreme Court has granted the Board's petition for certiorari of *Noel Canning*. Furthermore, in *Belgrove*, 359

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<sup>3/</sup> The General Counsel has delegated the authority to the Regional Directors for issuing complaints. See, *United Elec. Contractors Ass'n v. Ordman*, 258 F. Supp. 758, 760 (D.C.N.Y. 1965), *aff'd*. 366 F.3d 776 (2d Cir. 1966).

NLRB No. 77, slip op. at 1, n.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*, 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, 1012-1013 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-715 (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.”<sup>4/</sup> *Belgrove*, 359 NLRB No. 77, slip op. at 1, n.1.

19. The additional defenses raised by Respondent are legal arguments that do not raise any material issues of fact. Respondent’s first and second affirmative defenses merely make legal arguments that the pleadings are insufficient and barred in whole or in part by the statute of limitations. Respondent’s fifth affirmative defense merely reserves the right to assert additional defense at a later date. These defenses do not raise any material issues of fact.

20. Respondent’s answer fails to present any evidence or assert any issues, if any exist, in support of its defense to the complaint.

21. Where, as here, a party fails to meet and bargain following certification by the Board, it is the Board’s policy that absent newly discovered or previously unavailable evidence or special circumstances, the party is not allowed to relitigate, in a proceeding alleging unfair labor practices, issues that were, or could have been, litigated in a prior representation proceeding. *Westinghouse Broadcasting Company, Inc.*, 218 NLRB 693, 694 (1975); *Keco Industries, Inc.*,

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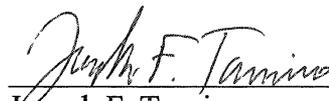
<sup>4/</sup> The Third Circuit’s decision in *NLRB v. New Vista Nursing & Rehabilitation*, \_\_\_ F.3d \_\_\_, 2013 WL 2099742 (3d Cir. May 16, 2013), should not change this result. As noted above, there still remains a split in the circuits regarding the validity of intrasession recess appointments.

191 NLRB 257, 258 (1971). Here, Respondent does not argue that there is newly discovered or previously unavailable evidence or special circumstances.

22. Because a genuine issue of fact does not exist in this case and Respondent has not shown that newly discovered, relevant evidence is now available, the Board should transfer this case and continue the proceedings before it, deem the allegations set forth in the complaint to be true without receiving evidence, grant summary judgment and issue a Decision and Order. It is respectfully requested that the Board make its findings of fact based on the allegations in the complaint and conclude that, as a matter of law, Respondent has violated Section 8(a)(1) and (5) of the Act as alleged in the complaint and order an appropriate remedy, including an order that the initial certification year shall be deemed to begin on the date Respondent commences to bargain in good faith with the Union as the certified bargaining representative of the employees in the appropriate unit. *Campbell Soup Company*, 224 NLRB 13 (1976).

Dated at Cincinnati, Ohio this 11<sup>th</sup> day of July 2013.

Respectfully Submitted,



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