NATIONAL LABOR RELATIONS BOARD
REGION 5

In Re: **BERGMAN BROTHERS STAFFING, INC.** Respondent, and **CONSTRUCTION AND MASTER LABORERS' LOCAL UNION 11, LIUNA,** Petitioner.	Case No. **05-RC-105509**

RESPONDENT'S BRIEF IN OPPOSITION TO REQUEST FOR REVIEW

I. ISSUE

1. Should the Board overrule *Oakwood Care Center*, 343 NLRB 659 (2004), on the issue of whether the Board can conduct elections for bargaining units consisting of all employees of temporary staffing agencies, where the workers are assigned to multiple, different user employers?
2. Should the Board overrule *Oakwood Care Center*, 343 NLRB 659 (2004), on the issue of whether the Board can conduct elections for bargaining units including both jointly- and solely-employed employees from both the user employers and temporary staffing agencies?

II. PROCEDURAL HISTORY

On May 20, 2013, the Petitioner, Construction and Master Laborers' Local Union 11, a/w Laborers' International Union of North America, (hereinafter, the "Union" or "Petitioner"),

filed a petition seeking to represent a unit of all full-time and regular part-time licensed or certified asbestos abatement employees, including asbestos abatement of mechanical systems employed by the Respondent, Berman Brothers Staffing, Inc., (hereinafter, the "Employer" or "Respondent"), in Maryland, excluding office clerical employees, managerial employees, professional employees, guards, and supervisors as defined under Section 9(c) of the National Labor Relations Act, as amended.

On June 20, 2013, the Regional Director for Region 5 issued a Decision and Direction of Election ("DDOE") in which he found a unit of, "All full-time and regular part-time licensed or certified asbestos abatement employees, including employees performing asbestos abatement of mechanical systems, working in the State of Maryland of whom the Employer is an employer, excluding office clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act" appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

The Petitioner has filed a Request for Review of the DDOE for the sole purpose that "the Board overrule *Oakwood Care Center*, 343 NLRB 659 (2004)." (Pet. Brief pg. 6).

III. ARGUMENT

Petitioner asserts that *Oakwood Care Center*, 343 NLRB 659 (2004) should be overruled in its entirety and that the Board should return to the framework of *M.B. Sturgis*, 331 NLRB 1298 (2000). However, the issue is moot and the Board is unable to make such a ruling. Even if the case is not moot, overturning *Oakwood* would contravene sound public policy. As well, the Board should not overturn *Oakwood* while the constitutionality of President Obama's recess appointments is in question.

A. The Unit Issue in this Case is Moot

Petitioner's Request for Review of the DDOE should be denied as moot because it raises no substantial issues warranting review. A case is moot "when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Doctors Osteopathic Hosp.*, 242 NLRB 447, 450 (1979) (citing *Leonhart v. McCormick*, 395 F.Supp. 1073 (W.D. Pa. 1975)).

It is unconscionable to reason that overruling *Oakwood* would have any effect on the current issue. Contrary to Petitioner's assertion, *Oakwood* need not be overruled to approve this unit. In fact, the Regional Director *did* approve the unit, (Order at 13), and directed an election "among the employees in the unit found appropriate." *Id*. If the Board overrules *Oakwood*, the unit *still* would be approved. Logically, therefore, there would not be "any practical effect" pertaining to this case and hence, this case is moot.

B. Overturning *Oakwood* is Contrary to Sound Public Policy

Because the Board has stood behind the *Oakwood* decision since 2004, overturning it after such a substantial period of time would be contrary to the continuity of law. As an administrative agency, the Board must respect its own precedent and should not arbitrarily change well-established law from case to case. Hence, the Board "must adhere to its precedents in adjudicating cases before it." *Consolidated Edison Co. of New York, Inc. v. F.E.R.C.*, 315 F.3d 316, 323 (D.D.C. 2003). By overturning *Oakwood*, the Board would be arbitrarily ignoring precedent and undermining employer reliance on the continuity of law in place for almost a decade.

Furthermore, overturning *Oakwood* would negatively impact the economic investment by employers in reliance on the decision. Similarly situated employers would be forced to litigate

numerous claims and would have to divert significant financial resources to defend these new matters. The increased administrative and judicial burden on the Board would redirect resources to relitigate the viability of a series of cases decided under *Oakwood*. This cannot be the Board's desired result.

Finally, if the Board wishes to overturn *Oakwood*, it should invite a broader group of interested parties and allow them to file *amicus* briefs. Temporary staffing employers are increasing at a rate never experienced before. To determine whether to overturn long-standing precedent, it would be imprudent to ignore the input of the most interested parties.

C. The Board's Ability to Hear Cases Is In Question Because of the Possible Unconstitutionality of President Obama's Interim Board Recess Appointments

Finally, with the constitutionality of the current interim recess appointees in question, the Board would be unable to proceed with the necessary three members to constitute a quorum. *Noel Canning v. NLRB*, 705 F.3d 490, 513-14 (DC Cir. 2013), *cert. granted*, __ S.Ct. __, 2013 WL 1774240 (U.S. June 24, 2013) (No. 12-1281). The United States Supreme Court's opinion will not be decided until 2014. Until then, it would be inappropriate for the Board to make a decision regarding such an important topic.

IV. CONCLUSION

For the reasons stated above, Respondent respectfully requests that Petitioner's Request for Review of the DDOE be dismissed.

Dated: July 12, 2013 Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2013, a true and accurate copy of the foregoing Brief of the Employer in Opposition to Request for Review, which was electronically filed this date with the NLRB, and was sent by email to the following:

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