UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

A.W. FARRELL & SON, INC.

and **Case 28-CA-023502**
28-CA-060627
28-CA-062301

UNITED UNION OF ROOFERS, WATERPROOFERS, AND ALLIED WORKERS, LOCAL 162

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO, LOCAL UNION NO. 88
Party in Interest

RESPONDENT'S OPPOSITION TO MOTION FOR RECONSIDERATION AND CROSS-MOTION FOR RECONSIDERATION

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I. OVERVIEW.

Respondent A.W. Farrell & Son, Inc. ("AWF") hereby submits its Opposition to the Motion for Reconsideration filed by Charging Party United Union of Roofers, Waterproofers, and Allied Workers Local 162 ("Roofers Local 162" or "Local 162"). We note for the Board that Roofers Local 162 originally filed its Motion for Reconsideration under the caption "A.W. Farrell & Son, Inc. Respondent, and Sheet Metal Workers Local 88, Charging Party." Counsel for Roofers Local 162, David Rosenfeld, signed the document as attorney for "Sheet Metal Workers Local 88." The Board should not become confused or misled by this filing. Sheet Metal Workers International Association Local 88 was named as a party in interest in this matter, but was NOT the Charging Party in the matter.

Further, although it filed its Motion in the name of the Sheet Metal Workers Local 88, Roofers Local 162 failed to serve SMART Local 88 (formerly known as the Sheet Metal Workers International Association, Local 88). This alone is sufficient grounds to deny the Motion under NLRB Rule 102.114 (e). Therefore, the Board should deny the Motion for Reconsideration for lack of service.

The National Labor Relations Board ("NLRB") issued a Decision and Order in this case on July 11, 2013. *A.W. Farrell & Son, Inc.*, 359 NLRB No. 154 (2013). The Board's Decision upheld the decision of Administrative Law Judge Lana Parke that AWF and the Roofers Local 162 have a 9(a) relationship. It reversed the Administrative Law Judge's finding that AWF and Roofers Local 162 had NOT reached agreement on a collective bargaining agreement for August 2010 through July 2012. The Board ordered that AWF execute and retroactively apply the 2010-2012 Agreement and post notices to its employees for 60 days in places where notices to employees are customarily posted.

NLRB Rules Section 102.48(d)(1) allows a party to file a Motion for Reconsideration "because of extraordinary circumstances." Local 162's Request for Reconsideration focuses entirely on what it asserts is the inadequate remedy in the Board Decision and Order. The request to reconsider is unnecessary and not appropriate, as it is not based on any record evidence. The Motion for Reconsideration is also inappropriate because it requests much of the relief that Local 162 already requested in its Exceptions to Decision of the Administrative Law Judge, filed on January 25, 2012. The Motion for Reconsideration fails to provide "extraordinary circumstances" or new information justifying reconsideration of the Board's Decision.

II. THE MOTION FOR RECONSIDERATION MUST BE DISMISSED FOR LACK OF PROPER SERVICE.

Roofers Local 162 failed to serve SMART Local 88. The Board should deny Local 162's Motion for Reconsideration because the Motion is procedurally deficient. NLRB Rule 102.114(e) requires written statement of stating the names of the parties served and the date and manner of service. The Proof of Service statement on Local 162's Motion for Reconsideration demonstrates that it was served on AWF only and was not served on SMART Local 88. The Motion requests that the Board order AWF to rescind its agreements with SMART Local 88, but was not served on Local 88 to provide them an opportunity to respond. Pursuant to NLRB Rule 102.114(c), failure to serve a party is grounds for rejecting the document that was filed without proper service. Therefore, the Board should deny the Motion for Reconsideration for lack of service.

III. A MOTION FOR RECONSIDERATION REQUIRES A SHOWING OF EXTRAORDINARY CIRCUMSTANCES, WHICH ROOFERS LOCAL 162 HAS NOT DEMONSTRATED.

Section 102.48(d)(1) of the NLRB Rules and Regulations provides that a party to a proceeding before the Board may move for reconsideration "because of extraordinary circumstances." The party requesting reconsideration must "state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on." The Board will not reconsider a case absent "extraordinary circumstances" that warrant reconsideration. *See, e.g., Toering Electric Company*, 352 NLRB No. 102 (2008) (denying reconsideration because Charging Party' "failed to present any 'extraordinary circumstances' warranting reconsideration.").

A. Motions for Reconsideration Are Disfavored.

"In the interests of finality and administrative economy, motions for reconsideration are disfavored." *KSM Industries, Inc.*, 337 NLRB 156 (2002) (Member Liebman, concurring). These interests are even stronger when the Board composition has changed substantially between the time a decision is issued and the time a motion for reconsideration is filed. *Id.* Reconsidering cases in circumstances where there is a Board change will encourage parties to file motions for reconsideration if they believe the new Board will be more sympathetic to their position. *Id.* In the present case, the Board composition is significantly different than when the Board issued its Decision on July 11, 2013. In the interests of finality and administrative economy and to avoid encouraging parties to file a motion for reconsideration just to try to obtain a more favorable panel, Local 162's Motion for Reconsideration should be denied.

B. The Passage of Time is Not an Extraordinary Circumstance Justifying Reconsideration.

Roofers Local 162 asserts that reconsideration is supported by the length of time that the case has been pending and because of "new Board law." [Motion for Reconsideration, 1:17-19]. If the passage of time were justification for a Motion for Reconsideration, the Board would be reconsidering a large percentage of the cases on its docket. The mere passage of time between an ALJ decision and a Board decision is not an extraordinary circumstance warranting the reconsideration of the Board's decision. Local 162 makes no showing the passage of time here was unusually long, nor offers any evidentiary showing of prejudice from delay.

C. The Only "New" Board Law Cited by Roofers Local 162 to Support Reconsideration Relates to Only One of the Dozen Requested Remedies.

1. The ONE Request for Which Roofers Local 162 Cited New Board Law Does Not Warrant Reconsideration.

Only one of the roughly one dozen modifications that Roofers Local 162 requests in its Motion for Reconsideration relate to a claim of "new Board law" as the reason for requesting reconsideration. Charging Party requested that based on *Bud Antle, Inc.*, 359 NLRB No. 140 (2013), that the Board require the Notice to be mailed to current and former employees. [Motion for Reconsideration, 1:20-27]. *Bud Antle* was decided approximately two weeks before the present case, and thus is not actually "new" Board law. Nor does its reasoning support reconsideration in this case.

In its Exceptions filed in the present case, Roofers Local 162 excepted to the fact that the ALJ did not require the Notice to be mailed to all employees. [Roofers Local 162 Exceptions to Decision of ALJ, Exception 24]. Therefore, the Board had before it the request that the Notice be mailed to employees when it decided this case and determined the remedy. The same panel that decided *Bud Antle* decided the present case two weeks later, and had the opportunity to order

the remedy requested by Roofers Local 162 in its Exceptions and chose not to do so. Because the request to reconsider the remedy and posting notice does not provide new information and the request was already considered by the Board, the Motion for Reconsideration does not present extraordinary circumstances and should be denied. *See, e.g., Florida Steel Corp.*, 224 NLRB 1033 (1976) (denying Motion for Reconsideration because the Union did not present new matters not previously considered by the Board); *Sunbeam Corp.*, 94 NLRB 844 (1951) (denying Motion for Reconsideration because it did not raise issues not already considered and rejected by the Board).

The reasoning applied in *Bud Antle* to justify the extraordinary remedy of mailing the notices to employees does not apply in the present case. In *Bud Antle*, the employees were moving around from place to place harvesting crops and there was no facility to which the employee reported. 359 NLRB No. 140. The Board reasoned that because the employees did not have a facility to which they all reported, notice posting was insufficient. *Id.* In stark contrast to *Bud Antle*, the employees of AWF have a central yard and office where they will be able to view the notice posting. They are not moving from place to place, but working projects in Las Vegas, Nevada. Therefore, the reasoning of *Bud Antle* does not apply and mailing the notices to employees is not a required remedy.

2. Roofers Local 162 States that the Reconsideration is Justified by New Board Law Not Discussed in the Exceptions, But Does Not Cite New Board Law for the Majority of the Issues in Its Motion.

As referenced above, *Bud Antle*, 359 NLRB No 140, is the only "new" Board law that Roofers Local 162 cites, and it applies only to paragraph 1 of its Motion for Reconsideration. The majority of remedies that Local 162 has requested in its Motion for Reconsideration were also requested originally in Local 162's Exceptions, filed on January 25, 2012. Local 162 is not

providing any new information, and therefore the Request for Consideration must be denied. *Sunbeam Corp.*, 94 NLRB 844 (1951).

For example, in its Exceptions, Local 162 requested that the Employer be required to post the Board Notice for the length of time between the violation and when the Notice posting begins. [Exceptions to Decision of ALJ, Exception 28]. This is exactly the request made at paragraph 6 in the Motion for Reconsideration. The remedies requested in Paragraph 7 of the Motion for Reconsideration (which were cut and pasted from Exceptions in another case currently pending before the Board), largely correspond with the Exceptions filed in this case. *See,* Exceptions to Decision of ALJ, Exceptions 22-29. The Board had before it Local 162's Exceptions and the information and remedies requested in the Exceptions. It considered these requests and formulated an appropriate remedy. Local 162 has not presented any new or extraordinary information—and has not cited new case law relating to Paragraphs 2-7 of the Motion for Reconsideration—and therefore the Motion for Reconsideration must be denied.

D. The New ULP Matter Between the Parties is Not New Board Law and Does Not Justify Reconsideration.

Although it is unclear whether Local 162 is arguing that the newer ULP case between AWF and Local 162 (28-CB-080496, 28-CB-085690, and 28-CA-085434) decided by ALJ ringer and that is currently pending before the Board on the parties' exceptions is "new law," a subsequent unfair labor practice charge does not justify reconsideration of the Board's decision. The exceptions to the decision of ALJ Ringler were already pending before the Board (and perhaps even known to the Board) at the time that it issued its Decision in the present case. ALJ Ringler's Decision is not "new" since the Board's decision in the present case.

Further, there is no inconsistency in the remedies ordered in the present case and those that might be ordered in the case heard by Judge Ringler. The two cases involve different unfair

labor practice charges. There is no requirement that the remedies be coordinated on different charges.

IV. THE REMEDIES REQUESTED GO BEYOND WHAT THE BOARD ACTUALLY FOUND.

Roofers Local 162's Motion for Reconsideration suggests that the Board should add an explanatory phrase to the proposed Notice stating, "The Employer has been found to have unlawfully recognized Sheet Metal Workers International Association, Local 88. The Board has furthermore found that the Employer unlawfully applied the conditions of the Local 88 agreement to the employees." [Motion for Reconsideration, 2:20-28]. Neither ALJ Parke nor the Board, however, made this broad finding and therefore it is inappropriate to include such finding in any Notice to employees.

Local 162 has requested that AWF be required to terminate its agreements with SMART Local 88, but have failed to inform the Board that SMART Local 88 claims a greater scope of work than Local 162 and claims and performs work not covered by Local 162, including but not limited to metal siding. There is a 10(k) case currently pending before the Board between AWF, Roofers Local 162, and SMART Local 88 over the jurisdictional disputes between the Roofers and SMART Local 88 (Case No. 28-CD-096857), and Local 162 is attempting to nullify that process through the inappropriate remedies it is requesting in its Motion for Reconsideration. Local 162's Motion for Reconsideration must be denied.

V. THE BOARD'S REMEDIES ARE ADEQUATE AND CONSISTENT WITH BOARD PRECEDENT.

The remedies requested by Roofers Local 162 are extraordinary remedies. Such remedies are not justified by any bad faith by AWF, and would be an undue burden on the Company. The remedies ordered by the Board in the Decision in this case are adequate, correct, and consistent with Board precedent. Going further to read the notice to the employees, mail the

decision to all employees who have worked at AWF, and provide them the Board's decision, are all extraordinary remedies that are not warranted in this case. The Posting ordered by the Board adequately notifies employees of the violations and the remedy, and Local 162 has not established that anything further is required in this case.

There is a risk of confusion among the employees based on the requested remedies. For example, having the remedies read by a manager who is not knowledgeable in labor law and not able to answer employee's questions is a prescription for employee confusion and misinformation. Removing the notification that an employee has the right to refrain from union activity from the Notice also will likely cause employees to be confused about their Section 7 rights. There is no benefit to the employees from having remedies that confuse and obfuscate their rights and the remedies ordered by the Board.

Local 162 also requested that AWF be required to post the proposed NLRB rights poster for a period of five years. Two Federal Courts have suggested that the posting requirement is not lawful. *National Ass'n of Mfr. V. NLRB*, ___ F.3d ___, 2013 WL 1876234 (D.C. Cir. May 17, 2013); *Chamber of Commerce v. NLRB*, 856 F.Supp.2d 778 (D.S.C. 2012). Therefore, the Board may not order AWF to post it for a period of five years. This is supported by *National Association of Manufacturers v. NLRB*, in which the Court held that the Board did not have authority to mandate that employer's post a notice unrelated to specific unfair labor practices. 2013 WL 1876234 (D.C. Cir. May 7, 2013). The NLRB rights poster involves multiple rights and issues that do not relate to the alleged violations in this case. A specific posting relating to the alleged unfair labor practices provides adequate notice to the employees of their rights and responsibilities, and additional postings are not required.

We also find it ironic that Local 162 wants AWF to post the proposed NLRB poster, which notifies employees of their rights not to join a union as well as the right to join a union, when at the same time Roofers Local 162 has requested that the "right to refrain" language be removed from the notice posted by the Company. The Board should not modify the language in the Notice to remove the language notifying an employee of their right to refrain from union activity. The right to refrain from union activity is a fundamental right protected by the National Labor Relations Act Section 7. 29 U.S.C. § 157. An employee who reads the Notice that does not include the notice to employees of their right to refrain from union activity may erroneously lead employees to believe that they are required to participate in the union activities listed on the Notice. The right to refrain from union activity is equally as important as the right to engage in union activity, and the Board should not take actions that would suggest otherwise.

VI. IF THE BOARD GRANTS RECONSIDERATION, THEN IT SHOULD RECONSIDER THE REVERSAL OF THE ALJ'S DECISION BASED ON THE FAILURE IN THE RECORD TO HAVE ANY EVIDENCE OF APPARENT AUTHORITY BY WADE LANDRUM AND THAT THE ROOFERS FAILED TO SET FORTH ANY EVIDENCE OF ANY BELIEF THAT WADE LANDRUM HAD AUTHORITY .

If the Board accepts Local 162's ill-supported invitation to reconsider various aspects of the decision, then there is no good reason not to also reconsider the merits decision that a CBA was reached via "apparent authority" of the Las Vegas Branch Manager, Wade Landrum. This conclusion was clearly-erroneous—and due to the very passage of time of which Roofers Local 162's Motion for Reconsideration complains, might well impose an unfair economic burden on the Company for retroactive payments with interest into Roofers Trust Funds (for work performed by members of SMART Local 88 and for which contributions were paid into the SMART Trust Funds).

The Board's decision regarding the 2010-2012 Agreement is clearly erroneous because there was unrebutted testimony that prior to the 2010 negotiating sessions, Roofers Local 162 had been made aware of Mr. Landrum's lack of authority to conclude an agreement, which instead lay with the Company owner from New York (who was too ill to travel so had to use Mr. Landrum to collect information).

Mr. Landrum testified without rebuttal that in 2007 he advised Roofers' representatives and repeated as to his lack of authority: "the discussions I had with Gabbie [from Roofers] and the guy, the business manager, they wanted us, Progressive, anyone affiliated with A.W. Farrell to go union. I would say I'm not the guy to talk to. It's Bill Farrell in New York. You know, you can want that all you want, but you know, I'm just the branch manager here. Those aren't my calls." [Tr. 65:3-9].

Mr. Landrum later testified about the 2007 negotiations: "They [Roofers' representatives] were wondering why they didn't have it [signature on agreement] and I had to keep telling them I don't sign, that's New York." [Tr. 74:18-24]. He further explained: "at those meetings I always said I don't make any decisions here, I just communicate to Mr. Farrell, he owns the company." [Tr. 99:7-18].

Thus when the Board majority focused on the fact the August 2010 memo from Landrum explaining his lack of authority came after the 2010 bargaining sessions, the Board ignored all the evidence that prior to 2010 that Roofers Local 162 had indeed received notice of Mr. Landrum's lack of authority. There was no change in the Company structure between 2007 and 2010.

Further, there is no evidence in the record that Roofers Local 162 believed that Mr. Landrum had final authority to agree to a collective bargaining agreement. For AWF to be

bound by the actions of Mr. Landrum, Roofers Local 162 must actually have believed that Mr. Landrum had bargaining authority. *See e.g. Townsend v. Daniel, Mann, Johnson & Mendenhall*, 196 F.3d 1140, 1146 (10th Cir. 1999) ("Apparent authority does not exist unless the third party actually believes the agent is authorized."); *Master Consolidated Corp. v. BancOhio Natl. Bank* (1991), 61 Ohio St.3d 570, 574, 575 N.E.2d 817 ("in order for a principal to be bound by the acts of his agent under the theory of apparent agency, evidence must affirmatively show: 'that the person dealing with the agent knew of the facts and acting in good faith had reason to believe *and did believe* that the agent possessed the necessary authority.' *Logsdon v. ABCO Constr. Co.* (1956), 103 Ohio App. 233, 241–242, 3 O.O.2d 289, 293, 141 N.E.2d 216, 223)."); *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 724, 744, 680 N.E.2d 161 ("The doctrines of agency by estoppel and apparent authority are equivalent and are based upon the same elements").

There is no evidentiary basis for a finding of apparent authority on Landrum's part. If the Board decides to reconsider this matter, it should reconsider the merits and request full briefing on the matter.

VII. CONCLUSION.

Roofers Local 162 has failed to present extraordinary circumstances warranting reconsideration under NLRB Rules and Regulations Section 102.48(d)(1). Roofers Local 162 suggests that new Board law and the passage of time support reconsideration, but then cite "new" Board law in support of only one of the items on which it requests reconsideration – and that case was actually decided before this one, and does not announce a new rule that the Board ignored here. Roofers Local 162 did not provide any new information not previously considered by the Board. For the foregoing reasons, the Board should deny Roofers Local 162's Motion for Reconsideration.

If the Board does accept reconsideration, it should reconsider the reversal of the ALJ's decision on the substantive merits of the case.

Respectfully submitted this 15th day of August, 2013.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Respondent's Response to Motion for Reconsideration in Case No. 28-CA-023502 *et al.* was filed electronically through the NLRB E-Filing System with the National Labor Relations Board Office of the Executive Secretary on August 15, 2013, with copy by electronic mail to:

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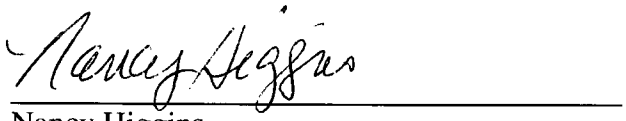

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