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

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| **HOWARD INDUSTRIES, INC.,** | ) | |
| **Respondent,** | ) | **Case Numbers:** |
| **and** | ) | **15-CA-070830** |
| | ) | **15-CA-081543** |
| **INTERNATIONAL BROTHERHOOD** | ) | **15-CA-085642** |
| **OF ELECTRICAL WORKERS,** | ) | |
| **LOCAL UNION 1317,** | ) | |
| **Union.** | ) | |

**RESPONDENT'S REPLY BRIEF TO ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**NOW COMES** the Respondent, Howard Industries, Inc. ("Howard"), through undersigned counsel, who files this Reply Brief to Acting General Counsel's Answering Brief.

## INTRODUCTION

It is undisputed that the requested documents, the "Bills of Labor," contain Howard's process to build hundreds of thousands different Howard coils, information that currently is not publically available in the marketplace and is the reason for Howard's successes in the transformer business. In the Answering Brief, the General Counsel very clearly confirms that Howard's manufacturing process is precisely the information sought by the Union.

Despite this, ALJ Locke still ordered Respondent to produce hundreds of thousands Bills of Labor that contain step-by-step instructions on how to build Howard coils. As explained by Jack Delk ("Delk"), an engineer and Vice-President at Howard, disclosure of this information would eviscerate Howard's competitive advantage in the marketplace. Delk explained:

> Q. By Mr. White: Is that a Bill of Labor, Mr. Delk?
> A. Well, the first page is the ***engineering information***.
> Q. All right. And by that, you meant that's the coil design. Correct?

> A. ***That is the coil design for this particular coil.*** It's a – and some description's in there, too, because this particular one is a hundred KVA, 7,200/2,400 volts. It has, you know, two series multiples in it. …
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> * * * * *
>
> Q. So the second and third page, are those step by step the procedures used to build the coil?
> A. ***That's right. They're the elements to build a coil.***
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> * * * * *
>
> Q. Now, as an experienced engineer in this field, if you were handed this document, could you replicate this design?
> A. Uh-huh. Yes. It'd be pretty easy. You'd work backwards and build this coil just – if you was a transformer design engineer.
> Q. And so if one of your competitors were to get this document, they could do the same thing. Is that correct?
> A. ***Yes. Basically they could.***

(Tr. p. 208, ln. 18-25; 218, ln. 12-p. 220, ln. 8.) Delk's testimony very clearly explains that the Bills of Labor contain the engineering information to build a Howard coil and that if one of Howard's competitors obtained a Bill of Labor, they could build the same exact coil as Howard. (Tr. p. 209, ln. 15-p. 211, ln. 21; p. 217, ln. 14-p. 220, ln. 8; p. 230, ln. 7-p. 231, ln. 6; see also Tr. p. 152, ln. 24-p. 154, ln. 18.) Delk's testimony further explains that Howard derives its competitive advantage in the market place by building more diverse series of coils (over 100,000 thousand ***different*** coils) while their competitors can only produce a limited type of coil. (See id.) By virtue of ALJ Locke's order, ALJ Locke has substantially increased the likelihood that a competitor will obtain these confidential records and unfairly obtain the fruits of Howard's research and study without the necessary labor (indeed, the Union steward, Clarence Larkin, admitted during trial he intended to share the Bills of Labor with third parties so that he could understand them (See Tr. 43, ln. 5-p.44, ln. 2)). ALJ Locke's Order is not only severely damaging to Howard, but rests upon an erroneous application of Detroit Edison. Accordingly, the Board should refuse to adopt the ALJ's recommended remedy and order with respect to it, and instead dismiss the Consolidated Complaint in its entirety.

**Exception 1: The Bill of Labor Indisputably Is A Trade Secret.**

According to ALJ Locke, a typical "trade secret" is "something a competitor would need to know to duplicate the product or make its manufacture more efficient." (Dec. p. 13, ln. 8-10.) Based on the General Counsel's Answering Brief, ALJ Locke's decision, and Delk's testimony, Howard's Bill of Labor fits squarely within ALJ Locke's definition of a trade secret. The General Counsel described the Bill of Labor as containing "the times associated with different elements ***that make up a particular coil manufactured by Respondent***." (Answering Brief, p. 3.) ALJ Locke said the Bill of Labor "show[s] the sequence of steps in ***assembling*** a particular transformer." (Dec. p. 4, ln. 31-32.) Delk confirmed that the Bill of Labor contains "the elements to build a coil." (Tr. 219, ln. 14-26.) Delk further explained that Howard's competitors could duplicate Howard's coil design and make its manufacturing process more efficient. (Tr. 220, ln. 1-5.) Accordingly, it is ***undisputed*** that the Bill of Labor contains the process – or the sequence of steps – to build a Howard coil, and pursuant to ALJ Locke's definition of a trade secret, Howard's Bill of Labor should be considered a trade secret.

Despite meeting ALJ Locke's definition of a trade secret, ALJ Locke still ordered production of the confidential records. ALJ Locke first shifted his focus from the undisputed fact that the Bill of Labor contains the process to build the coil to testimony regarding the ability of Howard's machines to wind more than one coil at a time. However, during trial, Delk specifically testified that Howard's machines or the number of coils Howard's machines could wind at one time is not a trade secret; rather, the trade secret at issue is the process documented in the Bills of Labor. (Tr. p. 223, ln. 10-16.) Accordingly, to the extent ALJ Locke based his decision on whether Howard's machines are a trade secret, he erred. Indeed, even if Howard asserted that the machines were a protected trade secret, whether the machines are a trade secret

have no bearing on whether the Bills of Labor are a trade secret. Notably, other than asserting ALJ Locke is correct, the General Counsel provides no argument, analysis, or evidence supporting ALJ Locke's conclusion on this issue.

Second, ALJ Locke somehow concluded that Howard's coil design and process did not depart from general standards in the industry. First and foremost, Howard produces hundreds of thousands of ***different*** coil designs each year which alone sets it apart from the general standards in the industry because Howard's competitors ***cannot*** develop or design hundreds, much less hundreds of thousands, different coil designs. In addition to this fact, an abundance of testimony in the record demonstrates that Howard departs from the standards in the industry.

- *Howard* developed a software package that calculates the method to build different types of coils based upon demand. (Tr. p. 228, ln. 12-p. 229, ln. 4; p. 237, ln. 13-22.)
- Because of the flexibility of *Howard's* software package, Howard manufactures between 200,000 and 300,000 *different* types of coils each year. (Tr. p. 211, ln. 5-21.)
- Based on the Bill of Labor created by Howard's software package, a competitor could learn what Howard is doing *differently* than the competitors which results in Howard providing a similar transformer for less costs. (Tr. 230, ln. 16-24.)[1]
- Howard manufactures its own machinery and designs its own coil winding process. (Tr. p. 152, ln. 21-154:18.)
- Based on Howard's machinery and process, competitors cannot compete with Howard's coil winding production. (Tr. p. 152, ln. 21-154:18.)
- Because of Howard's process, Howard has 40% of the United States market. (Tr. p. 152, ln. 21-154:18.)

The General Counsel, like ALJ Locke, does not provide any analysis, reasoning, or explanation supporting the conclusion that Howard does not depart from the general practices in the industry. Accordingly, Respondent's Exception No. 1 should be affirmed.

**Exceptions 2 and 4: The ALJ Mischaracterized Delk and Koski's Testimony.**

The General Counsel, like ALJ Locke, mischaracterizes Delk's testimony and instead focused almost entirely on Koski's testimony. Indeed, ALJ Locke concluded that Delk failed to

[1] This testimony fits squarely within ALJ Locke's definition of a trade secret: "[S]omething a competitor would need to know to duplicate the product or make its manufacture more efficient."

explain "how a competitor could infer the manufacturing process" from the Bills of Labor despite Delk's testimony:

> Q. All right. And by that, you mean that's the coil design, correct?
> A. That is the coil design for the particular coil …
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> *****
>
> Q. Now, as an experienced engineer in this field, if you were handed this document, you replicate this design?
> **A. Uh-huh. Yes. It'd be pretty easy. You'd work backwards and build this coil – if you was a transformer design engineer.**

(Tr. 218, ln. 19-22; 220, ln. 1-5.) In an effort to shore up ALJ Locke's erroneous factual findings, the General Counsel argues that ALJ Locke properly relied upon Koski's testimony as authority on the confidentiality issue because (1) Koski told the Union the information was confidential, and (2) Koski signed Howard's response to the Union's request for information. (Answering Brief, p. 4-5.) Koski, however, very clearly explained that he is not an engineer and the determination that the Bills of Labor were confidential was made by others, not Koski. (See Tr. p. 150, ln. 22-24; Tr. p. 170, ln. 21-p. 171, ln. 10; Tr. 197, ln. 18-20.) Moreover, the fact that Koski signed Howard's response to the Union's request for information is immaterial to whether Koski is the authority on the issue of confidentiality. Indeed, Koski, as the V.P. of H.R., did not even have ***permission*** to view the Bills of Labor. The fact that Koski relayed to the Union Howard's position on the confidential nature of the Bills of Labor does not cause Koski to be the authority on the subject. This is particular true when Howard produced at trial Delk, an engineer with permission to view the Bills of Labor, specifically to testify regarding their confidential nature. Accordingly, Respondent's Exceptions Nos. 2 and 5 should be affirmed.

**Exception 3: The Requested Information Includes Howard's Manufacturing Process.**

The General Counsel's Answering Brief confirms that ALJ Locke erred in concluding that the "Union did not request information about the manufacturing process." (Dec. p. 13, ln.

17-18.) The General Counsel defines the Bill of Labor as "a document that shows the times associated with different elements ***that make up a particular coil*** manufactured by Respondent." (Answering Brief, p. 3.) The General Counsel's definition of the Bill of Labor is substantially similar to ALJ Locke's description: "It is true that the records in question also show the sequence of steps in assembling a particular transformer." Then, on page 6 of the Answering Brief, the General Counsel submits that "the Bill of Labor was merely a part of the Union's overall request …." Accordingly, even the General Counsel agrees that ALJ Locke's conclusion that the Union "did not request information about the manufacturing process" is incorrect.

Moreover, in an effort to broaden the Union's request, the General Counsel cites to portions of the joint exhibits and Larkin's testimony. But as very clearly explained by Joint Exhibits 18 and 20 as well as by the Union's testimony during trial, the only requested information was the time studies, which is explained by Delk in the Bills of Labor. (See Tr. 218, ln. 12-22.) Larkin testified:

> Q. Let's start with Joint Exhibit 18. If I understood your testimony yesterday, this was another way of requesting the coil winder time studies. Is that correct?
> A. Yes.
> Q. And that's why in Joint Exhibit 20, after Mr. Larkin [sic] asked for clarification, you referenced the Board charge that involved the coil-winding time studies.
> A. Correct.
> Q. Correct?
> A. Correct.

(Tr. 89, ln. 14-21.) As clearly detailed in the Joint Exhibits and by Larkin's testimony, the only requested documents were the Bills of Labor. (See id.) Accordingly, Respondent's Exception 3 should be affirmed.

**Exception 4: ALJ Locke Grossly Misapplies Detroit Edison.**

After ALJ Locke found that "it is ***true*** that the records in question also show the sequence of steps in assembling a particular transformer[,]" ALJ Locke concluded that Howard's confidentiality interest is not particularly high because "bargaining unit employees already are aware of these steps because they perform them." (Dec. p. 4, ln. 32-34.) This conclusion is unbelievable. As noted in Howard's Memorandum, ALJ Locke's conclusion relies upon the miraculous assumption that Howard's coil winders can memorize hundreds of thousands different coil designs merely be winding the coil. Even the General Counsel in its Answering Brief fails to provide any reason or support for ALJ Locke's conclusion.

ALJ Locke's conclusion not only misapplies Detroit Edison, but also effectively guts the Supreme Court's holding. Based on ALJ Locke's reasoning, providing employees access to a process, no matter how complex or how many permutations, imputes knowledge to the employees of the process rendering any confidentiality concerns meaningless. This rule not only defies logic but renders it impossible for an employer to both create a product based on a confidential process and maintain that confidentiality of the process if unionized. Thus, the rule essentially precludes the application of Detroit Edison to an employer that asserts a confidentiality interest in a confidential, trade secret process.

Further, as explained in Howard's Memorandum, ALJ Locke also deviates from Detroit Edison by requiring Howard to prove that the disclosure of the Bill of Labors would cause a ***significant*** competitive disadvantage. However, nothing in Detroit Edison requires Howard to produce evidence that the disclosure of the confidential information would cause a ***significant*** competitive disadvantage. The General Counsel fails to address whether ALJ Locke's new rule requiring a ***significant*** competitive disadvantage is an appropriate application of Detroit Edison.

Moreover, ALJ Locke's description of the issue as whether Howard would be placed at a ***significant*** competitive disadvantage further confirms that he either does not understand Delk's testimony or wholly ignores it. Delk very clearly testified that Howard holds the competitive advantage in the marketplace. The issue in this litigation is that the reason Howard holds the competitive advantage is its ability to efficiently manufacture multiple ***different*** types of coils to cater to customers' needs. As explained by Delk, if a competitor obtained the Bills of Labor, they could work backwards and develop the very same process that Howard now implements and obtain equal footing to Howard. Accordingly, ALJ Locke failed to properly apply Detroit Edison. Instead, ALJ Locke applied a heighten standard of Detroit Edison, which not only requires more from Howard than required under Detroit Edison, but as a practical matter makes it almost impossible for an employer to protect its trade secrets.

**Exception 6: The Union's Need for the Material is Minimal.**

ALJ Locke incorrectly concluded that the Union's need for the Bills of Labor "weighs heavy." (Dec. p. 4, ln. 36-38.) As explained in Howard's Memorandum, the Bills of Labor contain the "raw" time to complete a certain task in winding a coil. The raw time is substantially adjusted to accommodate "real-life" manufacturing issues, such as machine breakdowns, down-time, supply issues, etc. Howard has repeatedly and regularly provided the Coil Winding Reports and Efficiency Reports that document these adjustments and measure the coil winders performance vis a vis other Howard coil winders.

ALJ Locke and the General Counsel overstate that the Union is entitled to not only the Coil Winding Reports and Efficiency Reports but also the raw data contained in the Bills of Labor. A proper application of the Detroit Edison balancing test would recognize that Howard's confidentiality interest in the Bills of Labor outweighs the Union's need for the information.

Indeed, the Union concedes that it does not understand the sample Bill of Labor. The Union further concedes that it has processed grievances without the Bills of Labor, using as its key evidence the Coil Winding Reports and Efficiency Reports. Lastly, the General Counsel and ALJ Locke seem to believe that Howard applies productivity quota to a single bargaining unit employee in isolation. They ignore the fact that the raw times – although substantially adjusted – apply to all bargaining unit employees and the vast majority of the bargaining unit employees ***exceed*** quota. Accordingly, it is illogical to conclude that Howard is developing an unattainable production quota when nearly every single coil winder greatly exceeds the quota standard.

**Exceptions 7 and 8: Howard Offered The Union Accommodations, but the Union Refused to Engage in any Discussions with Howard.**

Almost immediately after the Union's request for the Bills of Labor, Koski began discussing accommodations. ALJ Locke and the General Counsel list a number of other potential accommodations that Koski did not offer, but the Board rejected similar arguments in Northern Indiana Public Service Co., 347 NLRB 210 (2006). The Board explained:

> We find irrelevant our dissenting colleague's observation, in hindsight, that the parties could have negotiated a mediation program exempt from information-sharing obligations. As noted, the Respondent offered accommodations. If the Union wanted more, it could have counterproposed same.

Here, Koski's first offer was essentially unrestrained access to the production floor to see what the Union required to effectively process grievances. It is important to note the context of this offer in that neither Koski nor Larkin had ever seen the Bills of Labor and neither knew if the Bills of Labor would be helpful in processing grievances. (Tr. 168, l. 25; Tr. 169, l. 1-2.) Instead, all Koski knew was that his superiors, the executives of the company, made the determination that the Bills of Labor were confidential, proprietary, and a trade secret that could not be disclosed. Instead of working with Koski, Larkin refused even the initial offer to meet with

Koski, review the production standards, and determine what Larkin needed. Based on Larkin's refusal and failure to make any counterproposals, Koski's offer was entirely reasonable and sufficient under Detroit Edison.

Lastly, the Consolidated Complaint should be dismissed because the Acting General Counsel Lafe Solomon is without authority to bring the underlying complaints because his appointment is invalid. See Hooks v. Kitsap Tenant Support Serv's, Inc., No. c13-5470-BHS (W.D. Wa. Aug. 13, 2013).

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 28th day of August, 2013, caused a copy of the above and foregoing pleading to be served upon the following:

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