UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PROFESSIONAL TRANSPORTATION, INC., Respondent, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 512, Charging Party.	Case 12-CA-101034

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

Jon Goldman
KAHN, DEES, DONOVAN & KAHN, LLP
501 Main Street, Suite 305
P.O. Box 3646
Evansville, IN 47735-3646
Telephone: (812) 423-3183
Facsimile: (812) 423-3841

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Comes now Respondent, Professional Transportation, Inc. ("PTI"), pursuant to Section 102.46 of the National Labor Relations Board's ("Board") Rules and Regulations and files this Brief in Support of Exceptions to the Decision and Order of Administrative Law Judge William Nelson Cates ("ALJ"), dated October 22, 2013. PTI's Exceptions are directed both generally to the entire Decision of the ALJ and specifically to the findings, conclusions and recommendations of the ALJ relating to the alleged violations by PTI of Section 8(a)(5) and (1) of the National Labor Relations Act ("Act").

I. INTRODUCTION

PTI provides ground transportation for railroad employees at various locations, including from its facility in Jacksonville, Florida. (Tr. p. 22, lines 19-21).[1] Local 512 won a representation election held on May 16 and 17, 2012 among drivers at PTI's Jacksonville facility. (Tr. P. 16, lines 9-11 and G.C. Ex. 2 and G.C. Ex. 3). On June 5, 2012, the Regional Director issued a Certification of Representative.

II. STATEMENT OF THE CASE

By letter dated June 5, 2012, Jim Shurling ("Shurling"), the president of Local 512, wrote PTI a letter requesting certain pre-bargaining information. (G.C. Ex. 5). On June 12, 2012, Shurling received a phone call from Ronald Pfeifer ("Pfeifer"), a lawyer for PTI. ("Tr. p. 34, lines 13-15). During this phone conversation, Pfeifer said he would be assisting in the negotiating process. (Tr.

[1] All references to the Hearing transcript are designated as "p. ___, l.(s) ___". The General Counsel's exhibits are designated as "G.C. Ex. __".

p. 34, lines 15-16). Pfeifer also told Shurling that Local 512's "point of contact" with PTI would be Bob Tevault ("Tevault"). (Tr. p. 34, lines 17-18).

On June 19, 2012, Shurling e-mailed Tevault requesting dates to begin negotiation. (G.C. Ex. 7). In response, on July 6, 2012, Shurling received a letter from Pfeiffer, dated July 3, 2012, advising Shurling that Tevault was unable to meet in July. (Tr. p. 35, lines 17-21; G.C. Ex. 8). In the same letter, Pfeiffer asked Shurling to identify some August, 2012, bargaining dates and also requested to have a conversation with Shurling about "how to proceed forward with the bargaining process." (Tr. p. 36, lines 5-9). Thereafter, on July 26, 2012, Tevault sent Shurling the information Local 512 requested. (Tr. p. 36, lines 18-25). Following an exchange between Shurling and Tevault, the parties scheduled their first bargaining session for September 25, 2012. (Tr. p. 37, lines 4-17; G.C. Ex. 10).

The first bargaining session was held in Jacksonville on September 25. (Tr. p. 38, lines 9-13). Among others, Pfeifer and Tevault attended this meeting during which the union offered a packet of non-economic bargaining proposals. (Tr. p. 38, lines 18-25). After the meeting concluded the parties agreed to meet again on November 15-16, 2012. (Tr. p. 39, lines 21-24; p. 40, lines 3-5).

The parties next met as scheduled on November 15, 2012, in Jacksonville. (Tr. p. 40, lines 3-9). At this session, PTI made no proposals and offered no response to Local 512's proposals. (Tr. p. 40, lines 15-19). The parties continued negotiating on November 16, 2012 from 9:00 a.m. until about 3:00 p.m. and during this meeting PTI offered some counter-proposals. (Tr. p.

41, lines 1-8). After this meeting concluded, Shurling and Tevault exchanged e-mail in which they agreed to meet again on January 25, 2013. (Tr. p. 41, lines 17-24; G.C. Ex. 10).

The parties met in Jacksonville on January 24, 2013. (Tr. p. 42, lines 1-3) Both Tevault and Shurling attended this meeting which lasted until approximately 4:45 p.m. (Tr. p. 42, lines 4-10). At this meeting, PTI once again offered counter-proposals in response to proposals made by Local 512. (Tr. p. 42, lines 11-13). During this meeting, and in response to Shurling's observation that "this thing was dragging," the parties agreed to schedule meetings for February 21 and 22 and March 5, 6 and 7. (Tr. p. 42, lines 16-22).

Approximately ten days before the February 21st meeting, Tevault told Shurling PTI could not make the February 21-22 dates. (Tr. p. 43, lines 14-20. At the same time, Tevault asked Shurling to identify additional meeting dates in March. (Tr. p. 43, lines 20-22). Because Shurling believed March 5, 6 and 7 were already scheduled, he followed up by e-mailing Tevault. (Tr. p. 46, lines 1-15). After an e-mail exchange, Tevault replied he was conflicted out of meeting on March 6th. (Tr. p. 47, lines 6-8; G.C. Ex. 12). However, in the same e-mail, Tevault asked Shurling about meeting on March 13, 14 and 15. (Tr. p. 47, lines 8-12; G.C. Ex. 12 – Tevault's e-mail of February 25, 2013 at 3:38 p.m.). Regrettably, Shurling was unable to meet any of these dates. (Tr. p. 47, lines 6-18). However, the parties did schedule to resume negotiations on March 21-22, 2013. (Tr. p. 49, lines 15-21; G.C. Ex. 14).

The March 21-22, bargaining sessions were not held. On March 19, 2013, Jon Goldman, a lawyer for PTI, wrote Shurling a letter setting-off these meetings to allow PTI to obtain legal advice about the possible ramifications of the D.C. Circuit's opinion in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). (Tr. p. 50, lines 2-7; G.C. Ex. 15). On March 25, 2013, Local 512 filed an unfair labor practice charge that resulted in the case now under consideration. (Tr. p. 50, lines 15-17). Nonetheless, Shurling and Tevault continued trying to communicate by telephone and e-mail. (Tr. p. 50, lines 16-25; p. 51, lines 1-2). This communication lead to a series of negotiating sessions scheduled for June 4, 5 and 6. (Tr. p. 52, lines 1-4).

Prior to the June 4, 2013, meeting, Shurling advised Tevault that he did not believe ". . . PTI had any credible defense or standing under *Noel Canning*. . . ." and that ". . . *Noel Canning* would not nullify any of our future bargaining or contract should we reach it." (Tr. p. 53, lines 11-12 and lines 18-20). PTI, on the other hand, while willing to continue negotiating – asserted a reservation of rights under *Noel Canning*. (G.C. Ex. 15). Specifically, Tevault advised Shurling:

> Jim, I just landed a short time ago after a flight delay out of Nashville. I will see you tomorrow. I want to be sure you understand what rights PTI is preserving. They are as follows. If, prior to the time a CBA is agreed to and ratified, a court of competent jurisdiction determines the NLRB lacked a proper quorum at the time the Regional Director certified the bargaining unit in Jacksonville – PTI will stop negotiating and not recognize the election result. If after a contract is agreed to and ratified a court of competent jurisdiction determines the NLRB lacked a proper quorum at the time the Regional Director certified the bargaining unit, PTI will consider the contract as void and not recognize the union. If you

> meet with me tomorrow, you will by your conduct have agreed to accept this reservation of rights. I will have a copy of this message to hand to you tomorrow unless you tell me you do not or cannot meet.
> (G.C. Ex. 17).

On June 3, 2013, Tevault arrived in Jacksonville for the parties' June 4 meeting. (Tr. p. 55, ones 18-20). While the parties met on June 4, the meeting soon broke up over a disagreement about *Noel Canning*. (Tr. p. 56, lines 19-25; Tr. p. 57, lines 20-25; Tr. p. 58, lines 1-10).

With this background it is important to note PTI's overall conduct during negotiations. Shurling admitted that Pfeifer never said anything to cause him to believe there was an effort to frustrate Local 512 from reaching agreement on a labor contract. (Tr. p. 62, lines 2-10). Shurling admitted he had a cordial business relationship with Tevault and he also admitted Tevault never said anything to cause Shurling to believe it was Tevault's intent to frustrate or prevent the parties from reaching a contract. (Tr. p. 62, lines 15-18). Shurling also testified he and senior PTI regional manager Mike Murphy ("Murphy"), had a cordial professional relationship. (Tr. p. 62, lines 20-21; Tr. p. 63, lines 3-5). Murphy, who attended some contract negotiations, met Shurling for lunch and the two met for discussions at their respective offices. (Tr. p. 62, lines 20-25; Tr. p. 63, lines 1-2). Shurling testified that Murphy never said it was his intent or purpose to frustrate Local 512's efforts to obtain a contract. (Tr. p. 63, lines 6-9).

Likewise, Shurling testified he and Henry Scott ("Scott"), PTI's Jacksonville location manager, had a cordial [but very minimal] business relationship and that Scott never said that his role at PTI was to frustrate Local

512's efforts or prevent it from obtaining a contract with PTI. (Tr. p. 63, lines 10-19). In fact, Shurling admits that no PTI manager or executive has ever told him any such thing. (Tr. p. 63, lines 20-25). Of equal importance, Shurling testified that no PTI manager or lawyer Pfeifer ever said anything:

> To lead [him] to believe it was their intention to prevent PTI and . . . Local 512 from reaching a collective bargaining agreement.

(Tr. p. 64, lines 4-10).

Shurling also testified he didn't write or e-mail Tevault to say that not holding the first bargaining session until September 25, 2012, was unacceptable [even though the bargaining unit was certified on June 5, 2012]. (Tr. p. 65, lines 7-25; Tr. p. 66, lines 1-14). Likewise, Shurling testified that once Local 512 won the election, he never heard Pfeifer, Tevault, Murphy or Scott say they didn't like unions. (Tr. p. 67, lines 5-24). Shurling also testified he knew PTI had labor contracts with other Teamster local unions. (Tr. p. 68, lines 6-16).

While Shurling testified PTI never offered Local 512 a company proposal (as opposed to a counter-proposal to a union proposal) he admitted that he never wrote or e-mailed Tevault to complain about this. (Tr. p. 70, lines 13-25; Tr. p. 71, lines 1-7). Shurling testified that during negotiations PTI and Local 512 reached tentative agreement on the union security article, the "gender" clause of the contract and the bulletin board clause. (Tr. p. 71, lines 12-23).

Shurling also admitted that PTI never told Local 512 it would not meet for the purpose of collective bargaining. (Tr. p. 75, lines 13-21). Finally, Shurling testified he believed that if Local 512 had accepted PTI's *Noel Canning* proviso,

the Company would continue to bargain with the union. (Tr. p. 76, lines 2-24). Likewise, Shurling agreed that as the certification year [June 5, 2013] approached, PTI engaged in no conduct that caused him to believe it was questioning Local 512's majority status. (Tr. p. 77, lines 7-24).

III. ISSUES PRESENTED

1. Did the Administrative Law Judge err in determining that the parties' bargaining schedule demonstrates that PTI failed to bargain in good faith. (*See*, Exceptions 1, 2, 3, 4, 14, 15, and 16).

2. Did the Administrative Law Judge err in determining that the proposals both exchanged and agreed upon by the parties demonstrates that PTI failed to bargain in good faith. (*See*, Exceptions 1, 2, 3, 4, 14, 15, and 16).

3. Did the Administrative Law Judge err in determining that PTI unlawfully conditioned bargaining by insisted on reserving rights under *Noel Canning.* (See Exceptions 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16).

IV. LEGAL ANALYSIS

A.

The Frequency and Nature of Bargaining

It is alleged that PTI violated Sections 8(a)(1) and (5) of the Act when it refused to meet and bargain with Local 512 in good-faith. This position lacks support in fact and law. Under Section 8(d) of the Act, the parties must meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. *Garden Ridge Mgmt., Inc*., 347 NLRB 13 (2006); *Michael Konig t/a Nursing Center at Vineland*, 318 NLRB 64

(1995). The Board considers the totality of the circumstances – or overall conduct of the parties – when determining whether a party has satisfied its duty to meet at reasonable times. *Id*.

In analyzing whether a party has met at reasonable times to confer in good faith, a wide range of circumstances have been considered relevant, including, but not limited to, the number of negotiating sessions in which the employer participated. *Renal Care of Buffalo, Inc*., 347 NLRB 112 (2006). On June 5, 2012, Local 512 was certified as the collective bargaining representative. On September 25, 2012 – nearly four months after Local 512's certification – Local 512 and PTI met to negotiate a collective bargaining agreement for the first time. PTI and Local 512 also attended bargaining meetings on November 15 and 16, 2012, January 24, 2013, and June 4, 2013.

Local 512 complains PTI cancelled meetings scheduled for February 21 and 22, 2013 and requested the parties move the meetings scheduled for March 5, 6, and 7, 2013 to March 21 and 22, 2013. Local 512 also complains that on March 19, 2013, PTI requested the March 21 meeting be rescheduled. The Amended Complaint fails to highlight, however, that PTI continued to propose meeting dates and times. In fact, PTI ultimately proposed meeting on June 4, 5, and 6, 2013, which resulted in a face-to-face meeting between Local 512 and PTI on June 4.

The Board considers the totality of the circumstances in analyzing a failure to bargain claim. *Eltec Corp*., 286 NLRB 890 (1987); *W.B. Mason Company, Inc*., 2004 NLRB LEXIS 674 (ALJ Nations, November 29, 2004). The totality of

the circumstances indicates Respondent bargained in good faith. The facts indicate that up until Jon Goldman, attorney for Respondent, sent Mr. Shurling correspondence indicating Respondent intended to analyze the impact of the *Noel Canning* decision on March 19, 2013, bargaining proceeded at a pace agreeable to both parties. (G.C. Ex. 15). Only after Goldman's March 19 correspondence was received by Mr. Shurling did Local 512 begin to find fault with how PTI was bargaining. An examination of the totality of the circumstances indicates Respondent engaged in good faith bargaining, at the least up until March 19, 2013.

The totality of the circumstances does not evidence bad faith in relation to PTI's cancellation, postponement, and rescheduling of a limited number of bargaining meetings. PTI attended at least five separate bargaining meetings. PTI initiated the scheduling of several of these meetings. PTI never refused to attend additional meetings and, on several occasions, initiated contact to reschedule meetings. Each time Local 512 communicated a desire to meet, PTI attempted to accommodate Local 512 as to date, time, and location. Shurling admitted that PTI never told Local 512 it would not meet for purposes of collective bargaining. (Tr. p. 75, lines 13-21).

As further evidence of PTI's efforts to meet to bargain, each meeting occurred in Jacksonville, Florida, the place of the employees' operations and the location of their bargaining representatives. PTI never insisted that bargaining meetings occur in Evansville, Indiana, where PTI's corporate office is located, or some other site less convenient for its employees' bargaining representatives.

Prior to the filing of an unfair labor practice charge, Local 512 never voiced a material concern that progress was moving too slowly, or otherwise expressed more frequent meetings were needed.

Local 512 does not argue it would have been futile to request additional meetings, nor does it point to facts to indicate the cancellations and postponed meetings were intended to impede the bargaining process. Indeed, Shurling admitted that Pfeifer never said anything to cause him to believe PTI wanted to frustrate progress on reaching an agreement on a labor contract. (Tr. p. 62, lines 2-10). The parties met on several occasions, and Shurling also admitted the parties reached tentative agreement on several issues. (Tr. p. 71, lines 12-23).

In the event a scheduled meeting created a conflict for PTI, PTI contacted Local 512 in advance of the scheduled meeting to advise of same. PTI also took the initiative to attempt to reschedule meetings on mutually agreeable dates and times thereafter. In short, counsel for the general counsel has failed to provide evidence demonstrating that PTI's intent in cancelling, postponing, and rescheduling a limited number of bargaining meetings was to impede bargaining. *See Inter-Polymer Industries*, 196 NLRB 729 (1972) ("[a]lthough the record establishes that meetings … were canceled … there is insufficient evidence of record from which it may be concluded that the cancellations were unjustified or were intended to impede bargaining progress."). The evidence also demonstrates Local 512 appeared to be in no hurry to bargain. Following certification of Local 512 on June 5, 2012, Local 512 did not schedule a bargaining meeting with PTI for nearly four months.

Similar indicia of bad faith is lacking in this case. Instead, the uncontroverted evidence indicates that PTI worked with Local 512 to arrange meeting dates and times at the Jacksonville location, followed through in meeting and negotiating with Local 512 and bargained in good faith in coming to tentative agreement on a number of issues.

B.

The Proviso and Conditional Bargaining

The D.C. Circuit's recent opinion in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013 *cert. granted*, 133 S.Ct. 2861 (2013)), supports PTI's belief that the National Labor Relations Board ("Board") exceeded its statutory authority when, on June 5, 2012, its Regional Director, Margaret J. Diaz, certified Local 512 as the exclusive collective bargaining representative of PTI's full time and regular part-time over the road and local drivers working from the Employer's Jacksonville, Florida facility.

On January 4, 2012, President Obama appointed Sharon Block, Terence Flynn, and Richard Griffin, Jr. to the Board, purportedly pursuant to the Recess *Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 3*. *Noel Canning v. NLRB*, 705 F.3d 490, 498 (D.C. Cir. 2013). These appointees were never confirmed by the Senate. At the time of these appointments, only two other members, Mark Pearce and Brian Hayes, were serving by appointment and confirmation.

On January 25, 2013, the U.S. Court of Appeals, for the District of Columbia Circuit, held that President Obama's three intra-session recess

appointments were unconstitutional and, as a result, the Board lacked quorum. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). Since the Board must have a quorum of three in order to take action, *Noel Canning* calls into question the Board's actions during the period in which Sharon Block, Terence Flynn, and Richard Griffin, Jr. served on the Board.

Subsequent to the *Noel Canning* decision but prior to the parties' next scheduled meeting, Mr. Tevault informed Mr. Shurling that PTI would not attend the bargaining meetings scheduled for February 21 and 22. On March 19, Jon Goldman, attorney for PTI, wrote Mr. Shurling to notify him that PTI intended to take additional time to analyze how the *Noel Canning* decision impacted the parties' going forward. On March 25, the Union filed an unfair labor practice charge. The Board filed a petition for *writ of certiorari* in *Noel Canning* on April 25, 2013.

On May 16, 2013, the U.S. Court of Appeals for the Third Circuit became the second federal appellate court to call into question the Board's authority to act due to lack of quorum, ruling that President Obama's recess appointment of Craig Becker in March 2010 was constitutionally invalid. *NLRB v. New vista Nursing and Rehabilitation, LLC*, 719 F.3d 203 (3rd Cir. 2013). This case calls into question the Board's actions during Mr. Becker's service on the Board.

The parties did not meet again after *Noel Canning* was issued other than on June 4. PTI attended this meeting subject to the conditional bargaining the ALJ found unlawful. This meeting ended after the parties disagreed over the

relevancy of *Noel Canning*. On June 24, 2013, the U.S. Supreme Court granted the Board's petition for *writ of certiorari* in *Noel Canning*.

On July 17, 2013, the U.S. Court of Appeals for the Fourth Circuit held that President Obama's recess appointments of Sharon Block, Terence Flynn, and Richard Griffin, Jr. to be invalid. *NLRB v. Enterprise Leasing Company Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013). This case calls into question the Board's actions during the period in which Sharon Block, Terence Flynn, and Richard Griffin, Jr. served on the Board.

PTI asserts the aforementioned federal appellate court cases call into question the Board's authority to act during a time it lacked quorum. PTI further asserts the Regional Director, Margaret Diaz, lacked authority to certify election results at the time she took such action on June 5, 2012. Margaret Diaz was appointed Regional Director of Region 12 in May 2012.[2]

When faced with challenges to a Regional Director's authority to certify election results based on the Board's lack of quorum, the Board has maintained that the "delegation of decisional authority in representation cases to *Regional Directors, 26 Fed. Reg. 3911 (May 4, 1961)*, pursuant to the 1959 amendment of *Sec. 3(b)* of the National Labor Relations Act expressly authorizing the delegation ... long predates any purported loss of quorum and has remained in

[2] In May 2012, NLRB Chairman Mark Pearce and Acting General Counsel Lafe Solomon announced the appointment of Margaret Diaz as Regional Director in the Tampa Regional Office (Region 12) through various forms of media, including the NLRB's website, www.NLRB.gov. This announcement is located at: http://www.nlrb.gov/news-outreach/news-story/margaret-diaz-appointed-regional-director-nlrbs-tampa-fl-regional-office. Additional information regarding the appointment of Ms. Diaz is available at: http://www.nlrb.gov/node/3385. The Board is requested to take administrative notice of its announcement in accordance with Sec. 102.39 of the Board's Rules and Regulations.

effect continuously, including during periods when the Board was without quorum." *Universal Lubricants, LLC*, 359 NLRB No. 157 (2013).

This position does not, however, account for the requirement that an appointment of a Regional Director be made by the General Counsel only upon the approval of the Board. *See, e.g.*, 77 Fed. Reg. 45,696 (Aug. 1, 2012); 26 Fed. Reg. 3912 (May 15, 1961). If the Board lacked quorum to act at the time Regional Director Diaz was appointed in 2012 – as three federal courts of appeals has held it did – then the Board lacked authority to approve the General Counsel's decision to appoint Regional Director Diaz. As a consequence of the defective appointment of Regional Director Diaz, PTI contends she lacked authority to issue the certification.

Accordingly, *Noel Canning* requires the conclusion that the Certification of Representative challenged by PTI in this case was void from its inception. 705 F.3d at 514 ("The Board had no quorum, and its order is void.") *See also NLRB v. J.S. Carambola, LLP*, 457 Fed. Appx. 145, 149 (3d Cir. 2012) (Board could not certify an election while it lacked a quorum under *New Process Steel*). As such, PTI's proviso was an appropriate condition of negotiations. For this and all the reasons stated above, PTI has not violated the National Labor Relations Act.

V. CONCLUSION

For the reasons set forth herein as well as the accompanying Exceptions, PTI requests that the Board reverse the Administrative Law Judge's Decision and Order.

Respectfully submitted,

KAHN, DEES, DONOVAN & KAHN, LLP

/s/ Jon Goldman
Jon Goldman

KAHN, DEES, DONOVAN & KAHN, LLP
501 Main Street, Suite 305
P.O. Box 3646
Evansville, IN 47735-3646
Telephone: (812) 423-3183
Facsimile: (812) 423-3841
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent's, Brief in Support of Exceptions to Administrative Law Judge's Decision and Order, Case No. 12-CA-101034 was served by E-Gov, E-Filing and by E-mail, on this 19th day of November, 2013, on the following:

***Via E-Gov, E-Filing*:**

Gary Shinners, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, NW, Room 11602
Washington, CD 20570-0001

Via Electronic Mail:

Thomas Brudney
Counsel for the General Counsel
National Labor Relations Board – Region 12
201 East Kennedy Boulevard
Tampa, Florida 33602
E-mail: Thomas.Brudney@nlrb.gov

James Q. Shurling, President
International Brotherhood of Teamsters
Local 512
1210 Lane Ave. N
Jacksonville, Florida 32254-2264
E-mail: jqsurely@aol.com

/s/Jon Goldman
Jon Goldman