

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PROFESSIONAL TRANSPORTATION, INC.

and

Case 12-CA-101034

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 512

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING
BRIEF TO RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. Introduction and Statement of the Case

Counsel for the General Counsel hereby submits this Answering Brief to Respondent's exceptions to the Decision of Administrative Law Judge William Nelson Cates (the ALJ) in this case, issued on October 22, 2013.¹ Administrative Law Judge William N. Cates (the ALJ) issued the Decision in this case, finding that Respondent, Professional Transportation, Inc., has been violating Section 8(a)(1) and (5) of the Act by refusing to bargain in good faith with International Brotherhood of Teamsters, Local 512 (the Union).² The ALJ found that Respondent acted unlawfully by cancelling seven bargaining sessions between February 13, 2013, and March 22, 2013, and by its continuing refusal to bargain with the Union unless the Union agrees that the results of any negotiations, and the certification of the Union as the representative of Respondent's employees, will be null and void, and that Respondent will withdraw recognition of the Union, if the U.S. Supreme Court upholds *Noel Canning v. NLRB*, 705 F.3d. 490 (D.C. Cir. 2013), cert. granted 133 S. Ct. 2861 (No. 12-1281).

More specifically, the ALJ found that Respondent has been violating Section 8(a)(5) by, since on or about February 13, 2013, cancelling bargaining sessions with the Union scheduled for February 21 and 22, 2013, since on or about February 25, 2013, cancelling bargaining sessions scheduled for March 4, 5, and 6, 2013; by on or about

¹ Counsel for the General Counsel is concurrently filing cross-exceptions to the ALJ's Decision, limited to remedial issues. This is to further notify the Board that on November 22, 2013, a petition for injunctive relief pursuant to Section 10(j) of the Act, pending the issuance of a final Board Order in this matter, was filed in the United States District Court for the Middle District of Florida, Jacksonville Division, in *Diaz v. Professional Transportation, Inc.*, Case 3:13-cv-01447-UAMH-JRK. The Section 10(j) petition remains pending.

² On August 8, 2013, a hearing was held before Administrative Law Judge Cates in Jacksonville, Florida. The transcript from the administrative hearing is referred to as "Tr" followed by the page number of the transcript. The exhibits admitted in evidence during the administrative hearing are referred to as NLRB General Counsel Exhibits (GC Ex.), followed by their GC Ex. number (GC Exs. 1(a) through 1(l) and 2 through 18). The only exhibits introduced in the administrative hearing were General Counsel exhibits. The Decision by ALJ Cates is referred to as "JD" and cites thereto are "JD" followed by the page and line number. For example, JD 8:1-3 refers to page 8, lines 1-3.

March 19, 2013, cancelling bargaining sessions scheduled for March 21 and 22, 2013; and by on or about June 4, 2013, conditioning bargaining with the Union upon the Union's agreement that if the United States Supreme Court upholds the decision by the Court of Appeals for the District of Columbia in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 133 S. Ct. 2861 (No. 12-1281). (JD 10:8-18), the results of all negotiations, including any collective-bargaining agreement reached, and the Regional Director's certification of Union as the exclusive collective-bargaining representative of Respondent's employees, would be null and void, and the Respondent would withdraw its recognition of the Union.³

On November 19, 2013, Respondent filed exceptions to the Decision, and a Brief in Support of Exceptions (Brief).⁴ Respondent's exceptions raise issues as to whether the ALJ correctly conclude that Respondent violated Section 8(a)(5) and (1) of the Act by cancelling bargaining sessions with the Union and otherwise failing and refusing to meet and bargain with the Union; conditioning bargaining upon the Union's agreement

³ In *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), the Court held that the President's constitutional authority to make recess appointments extends only to appointments made during an intersession recess of the Senate to fill vacancies that first arise during such recess. The Court concluded that the President's January 4, 2012 appointments to the Board did not meet those criteria because those appointment were made during an intrasession recess to fill vacancies that did not arise during the recess. The D.C. Circuit recognized that its holding conflicted with existing precedent from three other circuits. *Id.* at 505, 509 (citing *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (*en banc*) (holding that the recess appointment power extends to intrasession recesses and to vacancies that arose before the recess); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (*en banc*) (holding that the power extends to vacancies that arose before the recess); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1961) (same)). The Supreme Court granted the Board's petition for certiorari, and oral argument is scheduled for January 13, 2014. *NLRB v. Noel Canning*, No. 12-1281, reviewing 705 F.3d 490 (D.C. Cir. 2013), cert. granted, 133 S. Ct. 2861 (Jun. 24, 2013). Since the *Noel Canning* decision issued, three other circuit courts of appeal have issued opinions that further demonstrate the split in views of the recess appointment issue. *Compare Ambassador Servs., Inc. v. NLRB*, No.12-15124, __ Fed. Appx. __, 2013 WL 6037134 (11th Cir. Nov. 15, 2013) (rejecting employer's argument that the Board lacked a quorum because three of its five members had received intrasession recess appointments) with *NLRB v. New Vista Nursing and Rehab.*, 719 F.3d 203 (3rd Cir. 2013) (holding that the Constitution only permits the President to make recess appointments during an intersession recess) and *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013) (same).

⁴ References to Respondent's exceptions will be designated as "Exception" followed by the applicable number.

that the results of all negotiations including any collective-bargaining agreement reached and the Regional Director's certification of representatives would be null and void, and Respondent's recognition of the Union would be withdrawn if the Supreme Court upheld the *Noel Canning* case; and, based on Respondent's overall conduct, failing and refusing to bargain in good faith with the Union. (JD 10:8-18).

These questions each must be answered affirmatively. Accordingly, the Board should adopt the ALJ's findings of fact and conclusions of law, and deny Respondent's exceptions in their entirety. In the following sections, I will set forth the facts, address Respondent's exceptions, and present the law and analysis demonstrating that the ALJ reached the correct conclusions of law.

II. Statement of the Facts

Respondent provides crew transportation services to CSX Corporation, Norfolk Southern Railway Company, Amtrak, and other railroad industry companies in various states including Florida. (JD 2:16-21; GC Exs. 1(i) and 1(k)). Pursuant to a petition filed by the Union with the Board's Tampa, Florida Regional Office (Region 12), on April 20, 2012, then Acting Regional Director Margaret J. Diaz approved a Stipulated Election Agreement entered into by Respondent and the Union, scheduling an election in the following unit appropriate for the purposes of collective bargaining:

All full time and regular part-time over the road and local drivers working from Respondent's Jacksonville, Florida facility; excluding all other employees, guards and supervisors as defined in the Act.

(JD 2:43 to 3:3; Tr. 30-31; GC Ex. 3). Pursuant to the Stipulated Election Agreement, a secret ballot representation election was conducted on May 16 and 17, 2012. Of approximately 76 eligible voters, 44 employees voted for the Union to represent them

for the purposes of collective bargaining, 23 employees voted against union representation, and there were no challenged ballots. (JD 3:5-7; GC Ex. 2). Respondent did not file any objections to conduct affecting the results of the election, and on June 5, 2012, the Union was certified as the exclusive collective-bargaining representative of the unit employees. (JD 3:5-7; JD 9:43 to 10:6; GC Ex. 4).

On June 5, 2012, the same day the Union was certified as the bargaining representative, Union President and Business Manager, Jim Shurling, wrote a letter to Respondent's Vice President, Steve McClellan. (JD 3:7-9; Tr. 31-32, 34; GC Ex. 5). Shurling asked McClellan to provide the dates that he was available to meet with the Union in July, 2012, for the purposes of collective-bargaining, and requested that Respondent provide the Union with certain information that the Union needed to prepare for bargaining. (JD 3:8-9; Tr. 31-32, 34; GC Ex. 5). One week later, on June 12, 2012, Respondent's representative Ron Pfeifer called Shurling, identified himself as Respondent's attorney, and said he would be assisting in the negotiations. (Tr. 34). Pfeifer also told Shurling that Respondent Vice-President Bob Tevault would be his contact. (JD 3:9-10; Tr. 34). Pfeifer sent an email to Shurling summarizing their phone conversation. (GC Ex. 6).

On July 3, 2012, Pfeifer wrote a letter to Shurling in which Pfeifer stated that Tevault was not available to bargain during the month of July. (JD 3:11-12; GC Ex. 8). Shurling responded to Pfeifer's July 3 letter with a letter dated July 10, 2012, stating that he was available to meet and bargain with Respondent on August 16, 17, 30 and 31, 2012. (GC Ex. 9). On July 26, 2012, Respondent finally provided the Union with the information that it had requested on June 5, 2012. (GC Ex. 10, p. 3).

Respondent Vice-President Tevault informed the Union that he was unable to meet on the August 2012 dates suggested by Union President Shurling, and on August 14, 2012, Respondent agreed that it would meet and bargain with the Union on September 25, 2012. (JD 3:13-14; GC Ex. 10, p. 1).

The September 25, 2012, bargaining session took place at the Springhill Hotel in Jacksonville, Florida. (Tr. 38). The Union was represented at the bargaining session by Shurling and unit employees Harvey Sherman, Roosevelt Torrence, Terry Weir, and Kathleen Smith. (Tr. 38; GC Ex. 11). Respondent was represented at the bargaining session by Ron Pfeifer, Bob Tevault, Mike Murphy, and Henry Scott.⁵ (Tr. 38). At the start of the session, the Union presented Respondent with 33 non-economic proposals. Respondent took a copy of the Union's proposals for review, but offered no proposals of its own. The parties agreed to meet again on November 15 and 16, 2012. (JD 3:14-19; Tr. 38-40).

On November 15 and 16, 2012, the parties met at the Wingate Hotel in Jacksonville, Florida as scheduled. (Tr. 40-41). Respondent's committee arrived for negotiations with no proposals of its own, and no responses to the 33 Union proposals. (JD 3:21-23; Tr. 40-41). By the end of the November 16 session, the parties had only reached tentative agreement on three minor provisions: union security, gender, and bulletin boards. (Tr. 71). Respondent promised to get back to the Union regarding scheduling the next meeting, and the parties subsequently agreed to bargain next on January 24, 2013.⁶ (JD 3:25-27; Tr. 41).

⁵The same representatives for each party attended the remaining bargaining sessions except that Union committee member Kathleen Smith did not attend further sessions. (Tr. 40).

⁶ All dates hereafter are in 2013 unless otherwise identified.

The parties met on January 24 at the Wingate Hotel in Jacksonville, Florida. (Tr. 41-42). Before this session closed, Union President Shurling said that bargaining was “dragging,” and that the parties needed to schedule several additional sessions, each for two or three days, rather than meeting one day at a time. Before leaving the January 24 meeting, the parties agreed to meet on February 21 and 22, and again on March 5, 6 and 7. (JD 3:28-32; Tr. 42).

On February 11, at 7:36 a.m., Shurling emailed Tevault to confirm that they were still meeting on February 21 and 22. Tevault replied by email on February 13, at 6:06 p.m., and cancelled the February 21 and 22 meetings, stating, “Next week isn’t going to work for us. Let’s look into March for some mutually agreeable dates.” (JD 3:34-39; Tr. 43-46; GC Ex. 12, p.1; GC Ex. 13, p. 1). Shurling replied to Tevault by email on February 25, at 2:15 p.m., reminding Tevault that the parties had already agreed to meet for bargaining on March 5 to 7, and asking Tevault to confirm those dates. (GC Ex. 12, p. 1).

Tevault then notified the Union that he had a conflict with the March 5, 6, and 7, dates on which he had previously agreed to meet and bargain, and he cancelled those bargaining sessions. (JD 3: 39-40). Tevault sent two successive emails to Shurling following Shurling’s reminder that Tevault had committed to meetings on March 5-7. Tevault first responded to Shurling at 3:31 p.m. on February 25, stating that he would travel to Jacksonville on the evening of March 5, and would be available for negotiations all day March 6 and at least half a day on March 7, thereby effectively canceling only the scheduled March 5 meeting. (GC Ex. 12, p. 1). However, seven minutes later, at 3:38 p.m. on February 25, Tevault also cancelled the March 6 and 7 meetings by

sending a second response to Shurling stating that he had a “major conflict as it turns out on the 6th that I missed earlier,” and suggesting that the parties meet for bargaining on either March 13-14, or March 14-15. (GC Ex. 12, p. 2). Shurling immediately replied by email and stated that he was available on March 20 through March 22. (GC Ex. 13).⁷ The parties then agreed to meet for bargaining on March 21 and 22. (JD 3:40-42; Tr. 47-48; GC Ex. 14).

On March 19, Shurling received a letter from Respondent’s counsel, Jon Goldman, via email and fax, stating:

Our firm represents Professional Transportation, Inc. (PTI). Recently, I learned that Local 512 is in labor contract negotiations with PTI.

In this regard, I mentioned the *Noel Canning* case, decided by the United States Court of Appeals for the District of Columbia, to Bob Tevault. I asked Bob to reschedule your March 21, 2013, bargaining session to allow me time to review the possible ramifications of *Noel Canning* with him.

Based on these circumstances, I am writing to notify you that Bob will not meet with you in Jacksonville on March 21st and either Bob or I will call you to discuss the course of negotiations. By this letter, PTI is not refusing to bargain at reasonable times and places with Local 512. PTI simply wishes to better understand the law in this complex situation as it moves forward in Jacksonville.

(JD 4:4-19; Tr. 50; GC Ex. 15).

This was the first time Respondent mentioned *Noel Canning* to the Union, almost two months after the January 25 *Noel Canning* decision of the D.C. Circuit. The Union showed up for the March 21 bargaining session. Respondent did not. (JD 4:21-23; Tr. 50). On March 25, the Union filed the original Board charge in the instant case, Case 12-CA-101034. (GC Ex. 1(a)).

⁷ The email from Shurling to Tevault in which Shurling states that he is available to meet on March 20 through March 21, that is included in GC Ex. 14, shows a time stamp of 2:44 p.m. Shurling explained that the time stamp reflects Central Time (Respondent’s headquarters where Tevault works is in Indiana, which is on Central Time) and that the email was sent by Shurling at 3:43 p.m. Eastern Time. (Tr. 48-49).

On April 22, Shurling and Tevault spoke by phone. (Tr. 51). Later that day, at 12:24 p.m., Tevault e-mailed Shurling confirming that the parties had agreed to meet for bargaining on June 4, 5, and 6. (JD 4:25-27; GC Ex. 16, p. 2).

On April 24, at 1:02 a.m., Tevault emailed Shurling as follows:

During our phone conversation on April 22nd we both said we were free to meet on June 4, 5 and 6 to bargain the contract. Because we have had difficulty setting dates and because we are both free on June 4, 5 and 6- I propose keeping these dates. I propose keeping these dates because while I understand your position on PTI raising the Noel Canning defense we are willing to reevaluate our position in a few weeks and, while I am making no promises, if this position changes we will have dates already agreed upon to meet. I think this makes sense for both parties. Let me know what you think.

(JD p. 4:31-39). Thus, Respondent made the June 4 to 6 meetings contingent on its reconsideration of its "*Noel Canning* defense."

On April 26 at 7:36 a.m., Shurling emailed the following response to Tevault:

I have these dates set and was under the impression that they were confirmed during our telephone conversation on Monday, 4/22/13. At any rate, I agree to keeping these dates and am looking forward to receiving your proposals/counter proposals in the interim.

As to your position on *Noel Canning*, I do not believe that any credible defense or objections to our certification and/or bargaining exists. I am therefore requesting any objections or positions you or your attorney has filed with the NLRB or any other jurisdictional authority in this matter. I further do not agree that any future action in this matter will nullify or decertify the bargaining unit....

(JD 5:1-9; GC Ex. 16, p. 1; Tr. 53-54).

On May 31, Tevault emailed Shurling, confirming that the parties were scheduled to bargain on June 4, 5, and 6, at the Wingate, and stating that Respondent "is bargaining subject to a reservation of rights based upon the reasoning expressed in the *Noel Canning* line of federal appeals court cases issued by the D.C. and 3rd Circuits,"

and that Respondent would meet on June 4 “to continue our contract negotiations subject to this reservation of rights.” (JD 5:13-18; GC Ex. 17).

On June 3, Respondent Vice-President Tevault sent another e-mail to Union President Shurling, asking if the Union agreed to continue negotiations under the terms set forth earlier. (JD 5:20-21; GC Ex. 17). On the same day, Shurling replied by email:

I am in agreement to negotiate and will see you at 9 a.m. tomorrow however my position remains as previously stated in my April 26, 2013, email concerning your reservation of rights and Noel Canning.

(JD 5:23-25; GC Ex. 17).

Later on June 3, Tevault emailed Shurling:

I want to be sure you understand what rights [Respondent] is preserving. They are as follows. If, prior to the time a [Collective-Bargaining Agreement] 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 – [Respondent] 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, [Respondent] 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. ...**

(JD 5:31-41; GC Ex. 17, emphasis added).

Shurling replied by e-mail early on the morning of June 4, as follows:

Local 512 stands ready to negotiate in good faith to reach an agreeable contract. There is a certified bargaining unit and election in place. I have requested from you any legal action you or your Company has taken challenging the certification or unit and have been provided none. I am not aware of any legal or NLRB rulings which have nullified the certification. I am not in agreement to your bargaining terms and do not agree that my appearance to bargain so stipulates such.

(JD 5:43 to 6:6; GC Ex. 17).

The parties met briefly on June 4. Tevault first stated that Respondent was reserving its rights under *Noel Canning*, and asserted that by bargaining, the Union was stipulating to conditional bargaining. Shurling told Tevault that the Union was willing to continue negotiations but not with the conditional bargaining Respondent wanted. Tevault then stated that he had to make a phone call and left the room. He returned after about 15 minutes, and again asked the Union to agree to the same conditions. Shurling again declined to agree to Respondent's conditions for bargaining, and repeated that the Union was there to bargain a contract in good faith. Tevault replied that there was no need in proceeding forward if the Union could not agree to Respondent's conditions. The Union negotiators left the June 4 session because Tevault said there was no need in proceeding forward. Respondent made no proposals at the June 4 meeting, nor did it seek clarification of any proposals the Union had made. The only item discussed at the June 4 bargaining session was whether the Union would agree to accept "conditional bargaining" as proposed by Respondent. (JD 6:16-29; Tr. 56-58, 74).

In sum, after some initial delays in meeting caused by Respondent's claimed lack of availability, the parties met and bargained on four dates from September 25, 2012 to January 24, 2013. On January 24, they agreed to five additional sessions in February and March, but Respondent later cancelled all of them.⁸ On February 25, the parties scheduled additional sessions for March 21 and 22, and Respondent cancelled those on March 19, just two days in advance, purportedly to consider the implications of the *Noel Canning* decision, which had issued almost two months earlier. Although three additional bargaining dates were scheduled for June, Respondent conditioned those

⁸ As noted above, these were the sessions scheduled for February 21 and 22, and March 5, 6, and 7.

meetings on the Union's agreement that if the Court of Appeals decision in *Noel Canning* was upheld, negotiations would cease, any collective-bargaining agreement would be void, and Respondent would withdraw recognition from the Union. The parties met briefly on June 4, but Respondent continued to condition substantive negotiations on the Union's agreement with its legal position regarding *Noel Canning*, and the Union refused to agree. (JD 8:20 to 9:11). No further bargaining has occurred.

III. The Board Should Deny Respondent's Exceptions 1 through 4 and 14.

Pursuant to Section 8(a)(5) of the Act, an employer has a duty to bargain in good faith with the exclusive collective-bargaining representative of its employees. The duty to bargain in good faith is defined in Section 8(d) of the Act, 29 U.S.C. Section 158(d), as the "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." The good-faith bargaining obligation begins when a union is certified by the Board or, through delegated authority, by the Regional Director, as the exclusive collective-bargaining representative of a unit of an employer's employees, or when an employer voluntarily recognizes a union that represents an uncoerced majority of the employees in an appropriate bargaining unit.⁹

The Board has long noted that the obligation to meet for bargaining is a core aspect of good faith. See e.g., *J.H. Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949) (good faith obligation includes affirmative duty to "expeditious and prompt" arrangements for meeting and conferring). An employer is not permitted to suspend or

⁹ See Section 9(c)(1) of the Act, 29 U.S.C. Section 159(c)(1) regarding certification of elections by the Board and Section 3(b) of the Act, 29 U.S.C. Section 153(b) regarding the statutory delegation of authority to regional directors of the Board. Regarding an employer's right to voluntarily recognize a union, see, *International Ladies' Garment Workers Union, AFL-CIO (Bernhard-Altman Texas Corp.) v. NLRB*, 280 F.2d 616 (D.C. Cir. 1960), *aff'd*, 366 U.S. 731 (1961).

conditionally delay its bargaining obligation. Rather, as the Board has held, an employer violates the duty to bargain in good faith when it repeatedly cancels scheduled bargaining sessions. *Camelot Terrace*, 357 NLRB No. 161 (2011) (employer's dilatory tactics, including repeatedly cancelling scheduled bargaining sessions, violated Section 8(a)(5) of the Act); see also *Calex Corp.*, 322 NLRB 977, 978 (1997), *enfd.* 144 F.3d 904 (6th Cir. 1998).

The evidence does not support Respondent's contention that the totality of its conduct does not prove that it acted in bad faith in relation to its cancellation, postponement, and rescheduling of bargaining sessions. As an initial matter, Respondent's reliance on the fact that its negotiators did not expressly tell the Union that Respondent intended to frustrate efforts to negotiate an agreement is unconvincing because the Board recognizes that parties seldom expressly state their intent to act in bad faith. See *Chevron Chemical Co.*, 261 NLRB 44, 45 (1982) (circumstantial evidence is usually required to determine whether duty to bargain in good faith has been breached since charged party is unlikely to admit overtly having acted with bad intent). Thus, the mere fact that Respondent did not explicitly tell the Union that it intended to frustrate agreement or that it would not bargain in good faith does not preclude a finding that Respondent violated Section 8(a)(5) of the Act. Rather, Respondent's entire pattern of conduct must be considered. *Id.*

As discussed above, the ALJ found that Respondent cancelled seven consecutive previously scheduled bargaining sessions (February 21 and 22, and March 5, 6, 7, 21 and 22) for a variety of unjustified reasons. (JD 7:10 to 8:13; JD 10:8-18). Based on these findings, the ALJ correctly concluded that Respondent demonstrated

that it considered negotiating with the Union an inconvenience, and this conduct constituted a “purposeful delay” in violation of Respondent’s duty to meet and bargain with the Union, in violation of Section 8(a)(1) and (5) of the Act. (JD 7:10 to 8:13; JD 10:8-18). *Camelot Terrace*, 357 NLRB No. 161, slip op. p. 2 (employer official showed he viewed bargaining with union as interference with his normal work where he canceled meetings the day before they were scheduled and his actions resulted in parties meeting only 12 times over 10 months). The ALJ further correctly concluded that Respondent’s cancellation of seven consecutive bargaining sessions in February and March, 2013, constituted dilatory conduct in violation of its duty to bargain. (JD 7:10-14). Respondent’s decision to cancel every bargaining session scheduled after January 24, establishes that Respondent was not acting in good faith and violated Section 8(a)(1) and (5) of the Act. *Enjoi Transportation, LLC*, 358 NLRB No. 158 (2012) (granting Acting General Counsel’s Motion for Default Judgment where, during bargaining for a first collective-bargaining agreement, the employer canceled three scheduled bargaining sessions during a three month period).

In further support of his conclusion that Respondent unlawfully refused to bargain in good faith based on Respondent’s conduct since February 2013, the ALJ properly considered background evidence regarding Respondent’s conduct between the certification of the Union and the alleged unlawful conduct . Thus, the ALJ determined that the Union requested bargaining dates from Respondent on June 5, 2012, the day the Union was certified, yet Respondent replied that its chief negotiator, Tevault, was not available until August, 2012. JD 7:14-17. The ALJ also properly considered the fact that when the parties finally met for the first bargaining session on September 25, 2012,

over three months after the Union first requested meeting dates, Respondent presented no proposals or counter-proposals to the Union's 33 proposals, and at the November 15, 2012 and January 24, 2013 meetings Respondent again made no proposals or counter-proposals; and at the J. (JD 7: 17-26).

Thus, as the ALJ correctly concluded, based on Respondent's overall conduct, including its unlawful conditions placed on bargaining discussed infra, Respondent refused to bargain in good faith with the Union. (JD 8:1-13; JD 10:8-18).

Based upon the foregoing, and the record as a whole, Exceptions 1 through 4 and 14 should be denied.

IV. The Board Should Deny Exceptions 5 through 14

As the ALJ found, on March 19, 2013, Respondent suspended bargaining, claiming that its decision to suspend bargaining was for the purpose of considering the impact of the *Noel Canning* decision of the United States Court of Appeals for the District of Columbia, and since May 31, 2013, Respondent has specifically conditioned all further bargaining on the Union's willingness to stipulate that such bargaining be based on the Union's agreement to nullify its certification and the validity of any collective-bargaining agreement, and to permit Respondent to withdraw recognition of the Union, if the Supreme Court upholds the Court of Appeals decision in *Noel Canning*. The ALJ correctly found, contrary to Respondent's contentions, that Respondent violated Section 8(a)(1) and (5) of the Act by placing these unlawful conditions on bargaining. (JD 8:15 to 9:28; JD 10:14-18). *Fred Meyer Stores, Inc.*, 355 NLRB 179, fn.1 (2010), *enfd* 466 Fed. Appx. 560, 2012 WL 35877 (9th Cir. 2012) (employer proposal to delay bargaining until Board's statutory authority to issue

decisions was resolved, along with other conduct, constituted bad faith) and *Specialized Living Center*, 286 NLRB 511 (1987), *enfd* 879 F.2d 1442 (7th Cir. 1989) (employer's offer to "meet and confer" was conditional and did not constitute offer to bargain in good faith; employer insisted it had no legal obligation to bargain with the union).

The ALJ's conclusion regarding Respondent's imposition of unlawful conditions on bargaining is further supported by the fact that Respondent did not test the Regional Director's certification of the Union as the exclusive collective-bargaining representative of Respondent's employees in the unit, and instead voluntarily recognized the Union and began bargaining.¹⁰ (JD 9:27-34). Thus, Respondent agreed to an election during the representation case, did not challenge the appropriateness of the unit or the ballots cast by any employees in the election, did not file objections to the election results, and, following issuance of the Certification of Representative by the Regional Director, Respondent recognized and met and bargained with the Union on four occasions before it engaged in dilatory tactics by cancelling sessions and then refusing to bargain further unless the Union agreed to its unlawful conditions. (JD 8:15-18; JD 9:29-34). In addition, Respondent did not take any action in court or before the Board to seek to stay or remove its obligation to bargain in good faith with its employees' recently elected representative. Respondent has therefore waived its right to challenge the validity of the Certification of Representative issued by the Regional Director. (JD 9:29-33).

Technicolor Government Services, 739 F.2d 323 (8th Cir. 1984), enforcing 268 NLRB

¹⁰ An employer "tests" a union's certification by refusing to recognize and bargain with the union immediately following certification of the union as the employees' exclusive-collective bargaining representative. In such cases, an administrative complaint alleging the unlawful refusal to recognize and bargain is issued and summary judgment is typically sought by the General Counsel of the Board. If the Board agrees with the General Counsel and issues an order directing the employer to recognize and bargain with the union, the employer can seek review of the Board's order in an appropriate United States Circuit Court of Appeals, thereby "testing" the certification of the union.

258 (1983); *King Radio Corp.*, 166 NLRB 649 (1968), enf'd 398 F.2d 14, 20-21 (10th Cir. 1968); *Michael Konig*, 318 NLRB 901, 904 (1995), enf'd. No. 95-3507 (3d.Cir. 1995). As the ALJ correctly pointed out, there is no support for the argument that a party's responsibilities under the Act are suspended or relieved, or that a party may insist on conditional bargaining, while awaiting the outcome of litigation pending in the courts of appeals. *Bob's Big Boy Family Restaurants*, 264 NLRB 432, 434 (1982). The same applies to cases pending before the United States Supreme Court. (JD 9:19-24).

In effect, more than six months after recognizing the Union, by providing it with information requested for bargaining and scheduling and holding bargaining meetings, Respondent is belatedly seeking to test the Union's certification while at the same time attempting to maintain the appearance of being willing to bargain. Respondent's tactics are tantamount to an unlawful withdrawal of recognition from the Union, after initially voluntarily recognizing the Union. The evidence establishes that Respondent violated Section 8(a)(1) and (5) of the Act as found by the ALJ. (JD 10:8-18). Accordingly, the Board should deny Respondent's Exceptions 5 through 14, and affirm the ALJ's findings of fact and adopt his conclusions of law.

V. Conclusion

Based upon the foregoing, and the record a whole, Counsel for the General Counsel respectfully urges the Board to find that Respondent's Exceptions to the ALJ's Decision are without merit and deny them in their entirety.

DATED at Tampa, Florida, this 3rd day of December, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that **Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision** in the matter of Professional Transportation, Inc., Case 12-CA-101034, was electronically filed and served by electronic mail on 3rd day of December, 2013, as set forth below:

By Electronic Filing:

National Labor Relations Board
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