

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

In the Matter of

THE ARDIT COMPANY

and

Cases 9-CA-089159  
9-CA-107434

INTERNATIONAL UNION OF BRICKLAYERS  
AND ALLIED CRAFTWORKERS,  
OHIO-KENTUCKY ADMINISTRATIVE  
DISTRICT COUNCIL, LOCAL UNION NO. 18

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF  
TO RESPONDENT'S BRIEF TO THE BOARD

**I. INTRODUCTION:**

The parties submitted briefs on March 17, 2014. <sup>1/</sup> Counsel for the General Counsel submits this brief in response to the brief filed by Respondent. As explained below, Respondent's arguments in defense of its alleged violations do not withstand legal scrutiny and should be rejected by the Board.

**II. RESPONSE TO RESPONDENT'S ARGUMENTS:**

**A. Respondent defends its unilateral changes by mistakenly relying on the Union's date of certification.**

Respondent erroneously argues that it did not have a bargaining obligation when it announced its unilateral changes on November 17, 2011, and when it implemented those changes on September 1, 2012. (R. Br. 13 - 14) <sup>2/</sup> Additionally, in defending its unilateral actions,

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<sup>1/</sup> Unless otherwise noted, all dates referenced herein occurred in 2013.

<sup>2/</sup> References to the Joint Motion and Stipulation of Facts will be designated as (Jt. M. p. \_\_\_\_); references to Joint Exhibits will be designated as (Jt. Ex. \_\_\_\_); and references to Respondent's brief will be designated as (R. Br. \_\_\_\_).

Respondent attempts to distinguish the instant matter from the Board's decisions in *Hargrove Electric*, 358 NLRB No. 147 (2012), and *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), by focusing its attention on the facts in those cases.<sup>3/</sup> While the facts of the aforementioned cases are not identical to the facts at hand, such is not required for the Board to find a violation here. *Hargrove Electric* stands for the proposition that an employer is not privileged to unilaterally change employees' terms and conditions of employment when that employer has a bargaining obligation at the time it announces future changes, as well as when those changes are implemented. *Hargrove Electric*, supra at fn. 1. Furthermore, in *Mike O'Connor*, the Board held that an employer acts at its own peril in making unilateral changes to employees' terms and conditions of employment during the pendency of objections to an election which ultimately results in the certification of the union. *Mike O'Connor*, supra at 703. Finally, the Board has held that an employer's bargaining obligation commences upon the date of an election, which precedes the certification of the union. See, *Ramada Plaza Hotel*, 341 NLRB 310, 315-316 (2004).

While Respondent attempts to attack the aforementioned cases individually, by doing so, it ignores the results reached by combining the holdings of each case cited above. Respondent clearly had a bargaining obligation at the time it announced its intended changes because it did so during the term of the 8(f) agreement. Because the Union was ultimately certified as the Section 9(a) representative of Respondent's employees, and inasmuch as the Union's certification dates back to the August 10, 2012 election for bargaining purposes, Respondent had

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<sup>3/</sup> With respect to *Hargrove*, Respondent places particular weight on the union's Section 9(a) certification during the terms of the 8(f) agreement, and distinguishes that from the instant matter where the Union was certified after the 8(f) agreement expired on August 31, 2012. *Hargrove Electric*, 358 NLRB No. 147 slip op. at fn. 1 (2012); (R. Br. 13). Respondent further contends that *Mike O'Connor* is factually inapposite because the employer in that case announced, and implemented, changes after the election took place. *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974); (R. Br. 14).

a bargaining obligation when it implemented said changes on September 1, 2012. Thus, Respondent, as noted in *Mike O'Connor*, acted at its peril when it unilaterally implemented changes to employees' terms and conditions of employment after its bargaining obligation attached.

Respondent further contends that the crucial fact in deciding this issue is whether its decision to implement a change predates the election. (R. Br. 14) However, that fact, standing alone, ignores Respondent's bargaining obligation at the time it announced its intention to make future changes to employees' terms and conditions of employment, by virtue of the parties' 8(f) bargaining status. Consequently, for the reasons stated above, Respondent's arguments lack merit and Respondent violated Section 8(a)(1) and (5) of the Act.

**B. Respondent was not privileged by the management rights clause in the expired 8(f) agreement, or by economic exigency, to unilaterally lay off its bargaining unit employees without first notifying the Union and affording the Union an opportunity to bargain about said layoffs.**

Respondent contends it was privileged to lay off its bargaining unit employees in February and March as a result of the management rights clause in the Local 55 8(f) agreement. (R. Br. 15) The agreement with Local 55 expired, by its terms, on May 31, 2011. (Jt. Ex. M) As mentioned above, Respondent laid off its bargaining unit employees after the above-mentioned agreement expired. It is well settled that a waiver of a union's bargaining rights pursuant to a contractual management-rights clause does not survive the expiration of the contract. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001). In responding to a dissenting colleague, the Board stated:

[F]or the essence of the management-rights clause is the union's waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls. If our colleague were correct, such a fluid status quo would vitiate an employer's bargaining obligation whenever a contract containing a broad management-rights clause expired. In that event, the

expiration of the management-rights clause would be meaningless wherever the employer had taken advantage of the waiver to make changes. Contrary to our dissenting colleague, we decline to depart from well-established precedent to adopt a policy that makes little sense and discourages, rather than promotes, collective bargaining. *Id.* at 636 – 637.

Respondent was not privileged by the expired management-rights clause in the Local 55 agreement to lay off bargaining unit employees without first notifying and affording the Union an opportunity to bargain about the layoffs of unit employees in February and March.

Additionally, in accordance with the Board’s decision in *Beverly* and earlier cases which stand for the same proposition, even if Respondent laid off employees during the effective dates of the Local 55 agreement without first notifying the Union, pursuant to the management-rights clause, that past practice does not excuse Respondent’s current actions. Consequently, Respondent was required to notify the Union and afford the Union an opportunity to bargain prior to unilaterally laying off bargaining unit employees, and in failing to do so, Respondent violated Section 8(a)(1) and (5) of the Act.

Also lacking merit is Respondent’s assertion that its conduct was privileged because of the economic exigency that precipitated the February and March layoffs. (R. Br. 16) Respondent questionably contends that the “stop-work order” it received necessitated Respondent’s unilateral actions. *Id.* However, Respondent, through cited case law, admits that economic exigencies are events which are both unforeseen *and* have a major economic effect requiring *immediate action*. *Id.* While Respondent places significant weight on the alleged unforeseen nature of the stop-work order, it fails to show that the stop-work order required immediate action. Indeed, Respondent is unable to do so because it did not undertake immediate action in response to the stop-work order. To that end, Respondent received the stop-work order on about February 5, 2014. (Jt. Ex. QQ) Respondent laid off one employee on about

February 2, 2014, and subsequently laid off eight employees from about March 4 through March 6, 2014. Undoubtedly, any assertion by Respondent that the stop-work order caused it to take immediate action is belied by the time frame in which it implemented the layoffs. Accordingly, Respondent's economic exigency argument is without merit, and Respondent violated the Act when it laid off bargaining unit employees without first notifying the Union and affording it an opportunity to bargain about the layoffs.

**C. Finding Respondent in violation of the Act as alleged does not require the Board to overturn *Starcraft Aerospace, Inc.*, 346 NLRB 1228 (2006).**

In *Starcraft*, the Board found the employer did not violate Section 8(a)(5) of the Act by laying off unit employees because the employer did not have a bargaining obligation at the time it made the decision to lay off unit employees, even though the layoff was conducted after the representation election. *Starcraft Aerospace, Inc.*, 346 NLRB 1228, 1230 (2006). The facts in *Starcraft* are simply inapposite to the facts in the instant matter. Here, by virtue of the 8(f) agreement which was in effect when Respondent announced its proposed changes to employees' terms and conditions of employment, a bargaining obligation was in existence when the announcement of future changes was made. Consequently, *Starcraft* is inapplicable to the matter at hand.

Respondent contends that it relied upon "long established Board precedent" in implementing its unilateral changes, specifically *Starcraft* and similar Board decisions. (R. Br. 18) Thus, even if the Board were to find Respondent in violation of the Act, Respondent maintains that the Board should not apply its decision retroactively. While Respondent may have relied upon *Starcraft* in making the aforementioned unilateral changes, unfortunately it did so in error. *Starcraft* simply does not apply here because Respondent had a bargaining obligation at the time it announced the proposed changes, and also at the time it implemented its

changes and layoffs. Therefore, Respondent's contention that a Board order should only be applied prospectively is unavailing and a Board order in the instant case should be applied retroactively.

**D. Respondent's arguments that the Board did not have a lawful quorum when it decided *Hargrove Electric* or when it issued Orders denying Respondent's Requests for Review and Motions to Stay, and that the Amended Complaint in this matter is *ultra vires*, are all without merit.**

Respondent contends that the Amended Complaint in this matter is *ultra vires* because the Acting General Counsel of the NLRB at the time this complaint was issued did not lawfully hold the office. Furthermore, Respondent contends the Board did not have a lawful quorum when it decided *Hargrove Electric*, supra, or when it issued several Orders denying Respondent's Requests for Review and Motions to Stay. Each assertion lacks merit.

As the Board recently explained, Section 3(d) provides one avenue to fill Board General Counsel vacancies, and the subsequently-enacted Federal Vacancies Reform Act ("FVRA") clearly provides another. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1, n.1 (Mar. 13, 2013) (FVRA is valid alternative procedure to Section 3(d) of the Act). Accordingly, the President had the option of appointing an Acting General Counsel under either Section 3(d) of the Act or the FVRA. Here, he chose to appoint Mr. Solomon under the FVRA, and that appointment was lawful. See, *Belgrove*, 359 NLRB No. 77, slip op. at 1, n.1 (citing *Muffley v. Spartan Mining Co.*, 570 F.3d 534, 540 n.1 (4th Cir. 2009) (upholding authorization of 10(j) injunction proceeding by Acting General Counsel designated pursuant to the Vacancies Act), *aff'g Muffley v. Massey Energy Co.*, 547 F. Supp. 2d 536, 542 (S.D.W.Va. 2008)). Moreover, regardless of any issue concerning the composition of the Board, the Acting General Counsel's authority to issue and prosecute the complaint is derived from his independent authority to issue and prosecute complaints. *Bloomington's, Inc.*, 359 NLRB No. 113, slip op. at 1 (Apr. 30,

2013), (“[u]nder the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel” (citing 29 U.S.C. § 153(d); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-128 (1987); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010)). Thus, “[t]he authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any ‘power delegated’ by the Board, but rather directly from the language of the NLRA.” *Id.* Accordingly, contrary to Respondent, the Acting General Counsel’s authority to issue and prosecute the consolidated complaint, and, in turn, the Regional Director’s authority to do so, are unaffected by any issue concerning the composition of the Board. <sup>4/</sup> In fact, the Board recently rejected a similar argument made by Respondent. See, *The Ardit Company*, 360 NLRB No. 15 (2013).

Furthermore, *Noel Canning* does not preclude the Board from the continued processing of this case, or the decision it made in *Hargrove Electric*, supra. It is correct that *Noel Canning* held that Members Griffin and Block, current Board Members serving alongside Chairman Pearce, were not validly appointed because they were appointed during an intrasession recess. However, the Supreme Court has granted the Board’s petition for certiorari of *Noel Canning*. In addition, in *Belgrove*, 359 NLRB No. 77, slip op. at 1, n.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, 2013 WL 276024, at \*14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v.*

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<sup>4/</sup> The General Counsel has delegated the authority to the Regional Directors for issuing complaints. See, *United Elec. Contractors Ass’n v. Ordman*, 258 F. Supp. 758, 760 (D.C.N.Y. 1965), *aff’d*. 366 F.3d 776 (2d Cir. 1966).

*Woodley*, 751 F.2d 1008, 1012-1013 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-715 (2d Cir. 1962). Thus, in *Belgrove*, the Board concluded that because the “question [of the validity of the recess appointments] remains in litigation,” until such time as it is ultimately resolved, “the Board is charged to fulfill its responsibilities under the Act.”<sup>5/</sup> *Belgrove*, 359 NLRB No. 77, slip op. at 1, n.1. Consequently, the Board acted within its power to issue the *Hargrove* decision as well as its Orders denying Respondent’s Requests for Review and Motions to Stay.

**III. CONCLUSION:**

Respondent’s defenses are wholly without merit. The record evidence and relevant case law overwhelmingly support General Counsel and the Union’s arguments that Respondent violated Section 8(a)(1) and (5) of the Act as alleged. Accordingly, the Board should find Respondent in violation of the Act, and fashion an appropriate remedy as prayed for in General Counsel’s Brief to the Board.

Dated at Cincinnati, Ohio this 31<sup>st</sup> day of March 2014.

Respectfully submitted,



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<sup>5/</sup> The Third Circuit’s decision in *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203, 2013 WL 2099742 (3d Cir. May 16, 2013), should not change this result. As noted above, there still remains a split in the circuits regarding the validity of intrasession recess appointments.