

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOOMIS ARMORED US, INC.

Case Nos. 32-CA-25316

And

32-CA-25708

TEAMSTERS LOCAL UNION NO. 439;
TEAMSTERS LOCAL UNION NO. 315;
TEAMSTERS LOCAL UNION NO. 853;
TEAMSTERS LOCAL 150; TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS, LOCAL NO. 542; and PACKAGE AND
GENERAL UTILITY DRIVERS, LOCAL 396

32-CA-25709

32-CA-25727

RESPONDENT LOOMIS ARMORED US, INC.'S ANSWERING BRIEF TO COUNSEL
FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

Respondent Loomis Armored US, Inc. (“Loomis,” “the Company,” or “the Employer”) hereby submits its Answering Brief to Counsel for the Acting General Counsel’s (“General Counsel”) Exceptions to the Decision and Recommended Order of the Administrative Law Judge (“Judge”).¹ In his Decision and Order, Judge Jay R. Pollack correctly found that Loomis did not violate Sections 8(a)(5) and (a)(1) of the Act by withdrawing recognition of the Charging Parties Teamsters Local 150 (“Local 150”); Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 542 (“Local 542”); Package and General Utility Drivers, Local 396 (“Local 396”); Teamsters Local Union No. 439 (“Local 439”); Teamsters Local Union No. 315 (“Local 315”); and Teamsters Local Union No. 853 (“Local 853”) (hereinafter referred to collectively as “the Unions” or “the Charging Parties”).

The General Counsel excepts to the Judge Pollack’s Decision to abide by Section 9(b)(3) of the National Labor Relations Act and follow well-established Board precedent that has remained unchanged for nearly thirty years.² The General Counsel’s exceptions are wholly without merit. Indeed, it is undisputed that the Company’s actions were permissible under Section 9(b)(3) of the Act and Board precedent that has remained effective and undisturbed for nearly thirty years.

¹ As explained in the Argument Section of this Answering Brief, Loomis respectfully contends that the Board lacks the necessary quorum to rule on this matter at this time because the three most recent “recess appointments” to the Board were not properly appointed.

² The Acting General Counsel’s exceptions 1 through 10 involve “housekeeping” matters where the ALJ’s Decision omits particular findings or conclusions or inadvertently misstates the record. The Employer does not take issue with these particular exceptions, although they are not relevant to the outcome of this case. Loomis was absolutely privileged to withdraw recognition pursuant to Section 9(b)(3) of the Act upon the expiration of each of the applicable collective bargaining agreements.

There is no dispute of fact in this case. Through the unfair labor practice charges at issue and these exceptions, the General Counsel seeks to rewrite Section 9(b)(3). In doing so, the General Counsel requests that the Board overturn its well-established precedent – that has remained unchanged for almost thirty years – holding that an employer that voluntarily recognizes a union that admits non-guards into its membership as a bargaining representative of a collective bargaining unit that includes guards may lawfully withdraw recognition of the union as the bargaining representative when the collective bargaining agreement expires, pursuant to Section 9(b)(3). *See, e.g., Wells Fargo Corp.*, 270 NLRB 787 (1984). Despite the fact that Section 9(b)(3) expressly and unequivocally prohibits the Board from certifying a labor organization as the representative of employees in a bargaining unit of “guards” if the labor organization admits to its membership employees other than guards, the General Counsel seeks to accomplish just that by virtue of these charges and the exceptions.

The Board’s bases for permitting withdrawal of recognition in circumstances such as those affecting the Employer and the Charging Parties in this case are sound. Section 9(b)(3) provides in relevant part that “no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership ... employees other than guards.” The law was written specifically to protect employers of guards from the potential conflict of loyalties arising from a “non-guard” union’s representation of guard employees. The fact that an employer lawfully opts to voluntarily recognize a non-guard union as the collective bargaining representative of its guard employees in no way eliminates the protections afforded to the employer by Section 9(b)(3). A contrary result would undermine Section 9(b)(3).

Over the past three decades, the Board has been presented multiple opportunities to reverse *Wells Fargo* and its progeny. Each time, the Board has wisely declined to do so. This case is no different.

II. STATEMENT OF THE MATERIAL FACTS

A. The Employer and Its Relationship with the Charging Parties.

Loomis provides nationwide cash handling services, including transportation of cash by armored vehicles, cash processing, and outsourced vault services. (Stipulation of Facts (“S.F.”) ¶ 2(a).) Towards that end, Loomis employs custodians, drivers, and guards across the United States to ensure the protection of its clients’ assets. (S.F. ¶¶ 2(a), 6(a), 7(a), 8(a), 17(a), 24(a), 31(a).)

Over the years, several Loomis sites have voluntarily recognized Teamsters locals as the collective bargaining representatives of the Employer’s custodians, drivers, and guards – all of whom are responsible for protecting the Company’s customers’ assets and are thus “guards” pursuant to Section 9(b)(3) of the National Labor Relations Act. (S.F. ¶¶ 6, 7, 8, 17, 24, 31.) The Employer entered into such bargaining relationships with Local 439 with respect to the Company’s guards based in Stockton, California (S.F. ¶ 6); Teamsters Local Union No. 490 (which subsequently became Local 315 in July 2008 after a merger of Teamsters locals) with respect to the Company’s guards based in Richmond, California (S.F. ¶ 7); Teamsters Local Union No. 78 (which subsequently became Local 853 in February 2008 after a merger of Teamsters locals) with respect to the Company’s guards based in Milpitas, California (S.F. ¶ 8); Local 150 with respect to the Company’s guards based in Sacramento, California (S.F. ¶ 17); Local 542 with respect to the Company’s guards based in San Diego, California (S.F. 24); and Local 396 with respect to the Company’s guards based in Los Angeles, California (S.F. 31.)

Each of the Charging Parties is a labor organization that admits both non-guards and guards into its membership. (S.F. ¶¶ 4, 5, 15, 16, 22, 23, 29, 30.) Loomis entered into collective bargaining agreements at each site with each applicable Teamsters local. (S.F. ¶¶ 6(b), 7(b), 8(b), 17(b), 24(b), 31(b).)

B. Charge No. 32-CA-25316.

1. The Company's Stockton Facility.

The Company's most recent collective bargaining agreement with Local 439 expired on March 31, 2010. (S.F. ¶ 6(b); Exhibit ("Exh.") 13.) On July 27, 2010, almost four months after the contract expired, Sandra Strong, the Company's Director of Human Resources/Labor sent a letter to Albert De La Cruz, Local 439's Business Agent, advising him that the Company was immediately withdrawing its voluntary recognition of Local 439 as the collective bargaining agent of the employees in the bargaining unit. (S.F. ¶ 9; Exh. 10.) As Ms. Strong explained in the letter, the Company's withdrawal of recognition was lawful under Section 9(b)(3) of the Act due to the fact that Local 439 admits non-guards to its membership. (Exh. 10.)

2. The Company's Richmond and Milpitas Facilities.

Loomis entered into a single collective bargaining agreement with Teamsters Local Union No. 490 (Local 315's predecessor) and Teamsters Local Union No. 78 (Local 853's predecessor); the most recent of which expired on September 30, 2010. (S.F. ¶¶ 7(b), 8(b); Exh. 14.) On July 26, 2010, Ms. Strong sent letters to John Bottali, Local 315's Bakery Division Chairman, and Rome Aloise, Local 853's Secretary-Treasurer, advising them that effective upon the expiration of the collective bargaining agreement, Loomis would withdraw its voluntarily recognition of Locals 315 and 853 as the collective bargaining representatives of the Employer's

employees in the Richmond and Milpitas facilities. (S.F. ¶¶ 10, 11; Exhs. 11, 12.) In the letters, Ms. Strong advised both Local 315 and Local 853 that Loomis would not bargain for a new CBA and the Company's decision to withdraw recognition upon the expiration of the CBA was lawful given that Locals 315 and 853 admitted guards to their membership and the bargaining units were comprised of guards. (Exhs. 11, 12.) Consistent with the letters, Loomis withdrew its voluntary recognition of Locals 315 and 853 upon the collective bargaining agreement's expiration. (S.F. ¶¶ 10, 11.)

C. Charge No. 32-CA-25708.

Loomis and Local 150's most recent collective bargaining agreement remained effective from December 1, 2006 through November 30, 2010. (S.F. ¶ 17(b); Exh. 8.) On September 27, 2010, Ms. Strong sent a letter to Perry Hogan, Local 150's Business Agent, advising him that effective upon the expiration of the CBA, Loomis would withdraw its voluntarily recognition of Local 150 as the collective bargaining representative of the Employer's employees in the Sacramento facility. (S.F. ¶ 18; Exh. 7.) In the letter, Ms. Strong advised Local 150 that Loomis would not bargain for a new collective bargaining agreement and the Company's decision to withdraw recognition after the contract's expiration was lawful given that the bargaining unit included guards and Local 150 admits non-guards into its membership. (Exh. 7.) In accordance with Ms. Strong's letter, Loomis withdrew recognition of Local 150 upon expiration of the collective bargaining agreement. (S.F. ¶ 18.)

D. Charge No. 32-CA-25709.

Loomis and Local 542's most recent collective bargaining agreement remained effective through February 28, 2011. (S.F. ¶ 24(b); Exh. 10.) On December 20, 2010, Ms. Strong sent a letter to Phillip Farias, Local 542's President, advising him that effective upon the

expiration of the CBA, Loomis would withdraw its voluntarily recognition of Local 542 as the collective bargaining representative of the Employer's employees in the San Diego facility. (S.F. ¶ 25; Exh. 9.) In the letter, Ms. Strong advised Local 542 that the Company's decision to withdraw recognition was lawful given that the bargaining unit included guards and Local 542 admits non-guards into its membership. (Exh. 9.) Accordingly, upon the expiration of the collective bargaining agreement, Loomis withdrew its voluntary recognition of Local 542. (S.F. ¶ 25.)

E. Charge No. 32-CA-25727

Loomis and Local 396's most recent collective bargaining agreement remained effective through January 31, 2011. (S.F. ¶ 31(b); Exh. 11.) On November 23, 2010, Ms. Strong sent a letter to Jim Smith, Local 396's Business Agent, advising him that effective upon the expiration of the CBA, Loomis would withdraw its voluntarily recognition of Local 396 as the collective bargaining representative of the Employer's employees in the Los Angeles branch. (S.F. ¶ 32; Exh. 10.) In the letter, Ms. Strong advised the Union that the Company's decision to withdraw recognition upon the expiration of the collective bargaining agreement was lawful given that the bargaining unit included guards and Local 396 admits non-guards into its membership. (Exh. 10.) Loomis proceeded to withdraw recognition of Local 396 immediately after the expiration of the collective bargaining agreement. (S.F. ¶ 32.)

III. LEGAL ARGUMENT

A. The Board, Lacking a Quorum, Does Not Have The Authority To Rule On The Exceptions.

As a preliminary matter, the current Board does not have jurisdiction to act on the General Counsel's Exceptions because the three recent "recess" appointees to the Board were improperly appointed, and thus, the Board lacks a quorum necessary to rule on this issue. *New*

Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010) (holding that the NLRB lacks authority to conduct business in the absence of a quorum of at least three members).

On January 4, 2012, Board members Block, Griffin, and Flynn were improperly appointed to the Board in a manner inconsistent with Article II, Section 2, Clause 2 of the United States Constitution (“the Appointments Clause”). Between December 17, 2011, and January 23, 2012, the United States Senate held a series of “pro forma” sessions intended to divide the holiday period into three-day adjournments in order to comply with its constitutional obligation not to adjourn for more than three days during a congressional session without the consent of the House of Representatives.³ U.S. CONST. Art. I, § 5, cl. 4. During this period, the Senate remained active. For example, at one of its pro forma sessions, the Senate passed by unanimous consent a two-month extension of the payroll tax cut requested by President Obama. 157 Cong. Rec. S 8789 (daily ed. Dec. 23, 2011). On January 3, 2012, the Senate met in pro forma session to comply with the Twentieth Amendment’s requirement that Congress meet on that date “in every year . . . unless they shall by law appoint a different day.” Nevertheless, the following day, the President made “recess appointments,” including the appointment of the three most recent Board members (Members Block, Griffin, and Flynn), even though the Senate had been conducting its pro forma sessions. By making such appointments while the Senate was in session, but without first seeking or obtaining the Senate’s “Advice and Consent,” the President exceeded his authority.

Article II, Section 2, Clause 3 of the Constitution requires that the Senate really be in recess when recess appointments are made. *See Evans v. Stephens*, 387 F. 3d 1220, 1224 (11th

³ By unanimous consent, the Senate voted to hold these pro forma sessions during the period of December 20, 2011 through January 23, 2012. 157 Cong. Rec. S 8783-84 (daily ed. Dec. 17, 2011).

Cir. 1994) (requiring a “legitimate Senate recess” to exist in order to uphold a recess appointment); *see also Wright v. United States*, 302 U.S. 583 (1938); and *Kennedy v. Sampson*, 511 F. 2d 430, 442 (D.C. Cir. 1974) (finding that intra-session adjournments do not qualify as Senate recesses sufficient to deny the President the authority to return a bill to which the President does not approve pursuant to Article I, section 7, paragraph 2 of the Constitution). The Constitution vests in each House of Congress the power to “determine the Rules of its Proceedings.” U.S. CONST. Article I, § 5, cl. 2. Such “Rules” must include rules governing how and when the Senate meets and adjourns. In this case, the Senate did not declare itself in recess between December 17, 2011 and January 23, 2012. In fact, the Senate was active during the purported “recess” as demonstrated by the Senate’s approval of the payroll tax bill. By declaring the Senate in “recess” during this timeframe, the President improperly usurped the Senate’s role and his January 4 “recess appointments” violated the Appointments Clause.

Given the impropriety of the President’s “recess appointments,” only two members of the Board (Members Pearce and Hayes) have been properly appointed. As such, the current Board lacks the quorum necessary to rule on this matter. *See New Process Steel*, 130 S. Ct. 2635.

B. Even Assuming, *Arguendo*, That The Board Has The Authority To Rule On The Present Matter, Judge Pollack Correctly Determined That Loomis Did Not Violate Sections 8(a)(5) and (a)(1) of the Act.

Even assuming, *arguendo*, that the Board has jurisdiction over this matter, the Board should adopt Judge Pollack’s Decision and recommended Order because it is entirely consistent with Section 9(b)(3) of the Act and Board precedent. The General Counsel’s exceptions rely on arguments that have been raised before the Board several times over the past

thirty years and have been rejected each time. The General Counsel has not established any compelling grounds for the Board to reverse itself and abandon its long-standing precedent.

1. The Employer Was Privileged To Withdraw Recognition Based On Section 9(b)(3) of the Act.

The resolution of this case depends exclusively on the meaning of Section 9(b)(3) as it is undisputed that all of the employees represented by the Charging Parties are guards within the meaning of Section 9(b)(3) and the Unions are all labor organizations that admit non-guards as members. (S.F. ¶¶ 5, 6(c), 7(e), 8(e), 16, 17(c), 23, 24(c), 30, 31(c)); *Armored Motor Service Co., Inc.*, 106 NLRB 1139 (1953) (holding that armored car drivers are guards within the meaning of Section 9(b)(3)). Section 9(b)(3) unequivocally prohibits the Board from certifying a labor organization that admits non-guards into its membership as the bargaining representative of a bargaining unit that includes guards. Indeed, Section 9(b)(3) provides:

The Board shall not... decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards. 29 U.S.C. § 160(b)(3) (emphasis added).

Even though the Board may not certify a mixed-guard union as the bargaining representative of a unit comprised of guards, an employer may voluntarily recognize a mixed-guard labor organization as a bargaining representative of guards and enter into a collective bargaining agreement applicable to those guards. *See, e.g., Northwest Protective Service, Inc.*, 342 NLRB 1201, 1202-03 (2004); *Wells Fargo*, 270 NLRB 787, 787, n. 5 (1984). In such cases, the Board has long recognized that an employer has the right to unilaterally end its voluntary recognition of

the mixed-guard union upon the expiration of the collective bargaining agreement. *See, e.g., Wells Fargo*, 270 NLRB at 787-90; *Temple Security, Inc.*, 328 NLRB 663, 665 (1999), *reversed by General Service Employees Union, Local No. 73 v. NLRB*, 230 F.3d 909 (7th Cir. 2000); *Northwest Protective Service, Inc.*, 342 NLRB at 1203.⁴

As the Board explained in *Wells Fargo*, Section 9(b)(3) prevents the Board from compelling an employer to recognize a mixed-guard union as the representative of the employer's guards in the absence of any binding collective bargaining agreement.⁵ It is undisputed that Section 9(b)(3) by its terms prohibits the NLRB from certifying a mixed guard union as the bargaining representative of guards. However, an employer has a choice as to whether to voluntarily recognize a mixed guard union at its sole discretion. Likewise, an employer should have the sole discretion to end its voluntary relationship with the mixed guard union absent a contractual obligation to continue recognition. An order prohibiting an employer from unilaterally ending the bargaining relationship under such circumstances would "give[] the [union] indirectly – by a bargaining order – what it could not obtain directly – by certification – i.e., it compels the [employer] to bargain with the [union]." *Wells Fargo*, 270 NLRB at 787.

As explained by the Board in *Wells Fargo*, the legislative history of Section 9(b)(3) confirms the intent of Congress to prohibit the NLRB from compelling an employer to recognize mixed guard labor organizations as the bargaining representative of guards. Section 9(b)(3) was enacted in significant part in response to the Supreme Court's decision in *NLRB v.*

⁴ While the General Counsel correctly notes that the facts of *Northwest Protective Services* are distinguishable on the basis that the employer in that case never voluntarily recognized the charging party union, the Board in *Northwest Protective Services* nevertheless expressly reiterated its adherence to *Wells Fargo* and applied *Wells Fargo* to the facts of the case. *Northwest Protective Services*, 342 NLRB at 1203.

⁵ Contrary to the General Counsel's representation, *Wells Fargo* was a 3-1 decision, not a 2-1 decision.

Jones & Laughlin Steel Corp., 331 U.S. 416 (1947). See *Legislative History of the Labor Management Relations Act 1947*, v. 2, pp. 1541, 1572. In *Jones & Laughlin*, the Board ordered an employer to bargain with a union that the NLRB certified as the representative of a unit comprised solely of the employer's deputized guards even though the union also represented another group of the company's production employees in a separate bargaining unit. The Court of Appeals for the Sixth Circuit denied enforcement of the NLRB's order. In doing so, the Sixth Circuit noted the conflict inherent with the same union representing both the guards and the production employees. Specifically, the court explained:

The [guards'] functions and obligations ... are of a dual character. They have a private obligation to their employer and an obligation to the community as sworn, bonded and commissioned police officers. In case of industrial unrest and strikes on the part of the production employees, the obligations of the plant guards to the municipality and the state would be incompatible with their obligations to the Union, which since it represents the production employees, authorizes and directs the strike. *NLRB v. Jones & Laughlin Steel Corp.*, 154 F.2d 932, 935 (6th Cir. 1946).

The Supreme Court reversed the court's decision and enforced the Board's earlier order. *Jones & Laughlin*, 331 U.S. at 431.

Subsequently, Congress considered changes to the Act to address issues relating to guards, including their status under the Act. The House-Senate Conference Committee crafted the language that is now Section 9(b)(3). In the process of enacting the statute, Congress decided to provide guards with the protection of the Act, but in separate bargaining units. *Legislative History of the Labor Management Relations Act 1947*, v. 2, p. 1541, 1572. Senator Robert Taft, a member of the House-Senate Conference Committee, noted that the Committee was impressed with the reasoning set forth by the Sixth Circuit in the *Jones & Laughlin* case and that the Sixth

Circuit's rationale inspired the Committee's specific language with respect to Section 9(b)(3).

Specifically, he stated:

As has been previously stated, the Senate rejected a provision in the House bill which would have excluded plant guards as employees protected by the act. The conferees on both sides, however, have been impressed with the reasoning of the Circuit Court of Appeals for the sixth circuit in the Jones and Laughlin case in which an order of the Board certifying as a bargaining representative of guards, the same union representing the production employees was set aside. Although the case was recently reversed by the Supreme Court on the ground that the Board had it within its powers to make such a holding, four of the Justices agreed with the Circuit Court of Appeals holding that this was an abuse of the discretion permitted to the Board under the act. One of the members of the Board has also expressed this view in a number of dissenting opinions. Under the language of [Section 9(b)(3)], guards still retain their rights as employees under the National Labor Relations Act, but the Board is instructed not to place them in the same bargaining unit with other employees, or to certify as bargaining representatives for the guards a union which admits other employees to membership or is affiliated directly or indirectly with labor organizations admitting employees other than guards to membership. *Id.* at p. 1541.

As the Board recognized, Senator Taft's remarks show that Congress' intent in enacting Section 9(b)(3) was "to shield employers of guards from the potential conflict of loyalties arising from the guard union's representation of nonguard employees." *Wells Fargo*, 270 NLRB at 789. The Board recognizes that "this potential conflict of loyalties exists whether a mixed guard union is certified or not." *Id.* Accordingly, as the Board has ruled consistently over the past three decades, there is no reason whatsoever to draw a distinction between initial certification and "the compulsory maintenance of a bargaining relationship through the use of a bargaining order." *Id.* As explained by the Board, "saddling the employer with an obligation to bargain presents it with the same set of difficulties and same conflict of loyalties that Section 9(b)(3) was designed to avoid." *Id.*

The rationale and holding of *Wells Fargo* remain sound to this day, and the Board has wisely resisted efforts to undercut Section 9(b)(3) by reversing *Wells Fargo*.⁶ See *Temple Security, Inc.*, 328 NLRB at 665; *Northwest Protective Service, Inc.*, 342 NLRB at 1203.⁷ There is simply no basis whatsoever for ordering Loomis to bargain with the Unions in the absence of a binding collective bargaining agreement when Section 9(b)(3) absolutely and unequivocally prohibits the certification of bargaining units such as those at issue in this case.

2. The Case Law And Arguments Relied Upon By The General Counsel Are Unavailing.

Aware that Board precedent is contrary to the General Counsel's position, the General Counsel relies exclusively on the dissenting opinion from Board Member Zimmerman in *Wells Fargo*, 270 NLRB at 791, that was rejected by the other three Board Members at the time; the dissenting opinion by a judge with the Second Circuit Court of Appeals regarding the appeal of *Wells Fargo (Truck Drivers, Local Union No. 807 v. NLRB)*, 755 F.2d 5, 13 (2nd Cir. 1985)) and an anomalous decision from the Seventh Circuit Court of Appeals that is entirely at odds with Section 9(b)(3) and NLRB authority (*General Service Employees Union, Local No. 73 v. NLRB*, 230 F.3d 909 (7th Cir. 2000) ("*Temple Security*"). The core argument set forth by the authors of the dissents (and the Second Circuit in the *Temple Security* case) is that, in their view, a distinction must be drawn between "certifying" a union as the agent for establishing a collective bargaining relationship and maintaining such a relationship after it has been created by

⁶ As noted by the General Counsel, the Court of Appeals for the Second Circuit affirmed the Board's conclusion in *Wells Fargo*. See *Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5, 10-11 (2nd Cir. 1985).

⁷ In the exceptions, the General Counsel incorrectly represents that in the remand of *Temple Security*, the Board "held in diametric opposition" to the holding in *Wells Fargo*. In fact, in the remand of *Temple Security*, the Board simply accepted the Seventh Circuit's ruling as "the law of the case." *Temple Security*, 337 NLRB 372, 373 (2001). Indeed, the Board has continued to follow *Wells Fargo*. *Northwest Protective Services*, 342 NLRB at 1203.

the parties through means other than certification. Relying on this premise, the dissenters argued that once the bargaining relationship between an employer and a mixed-guard union with respect to a guards-only bargaining unit is established, the employer may not withdraw recognition of the mixed-guard union because doing so would be contrary to the Act's purpose of promoting "stable bargaining relationships."

The General Counsel's argument should be rejected, as it has been repeatedly rejected over the past three decades. As the Board correctly decided in *Wells Fargo*, requiring an employer to continue to recognize a mixed-guard union as the bargaining representative of a guards-only bargaining unit is the equivalent of certifying the mixed-guard union as the bargaining representative – which is not permissible under Section 9(b)(3) of the Act. As explained above, Section 9(b)(3) was enacted to shield employers from the potential conflict of loyalties arising from a mixed guard union's representation of a guards-only bargaining unit. This potential conflict of interest – the basis for Section 9(b)(3) – exists regardless of whether a mixed guard unit is certified or not. *Wells Fargo*, 270 NLRB at 789 (noting that in either the case of initial certification or compulsory maintenance of a bargaining relationship through the use of bargaining order, "saddling the employer with an obligation to bargain presents it with the same potential conflict of loyalties that Section 9(b)(3) was designed to avoid").

Moreover, by attempting to define the term "certify" in such a literal manner, the dissenters ignore the fact that the NLRB has not strictly confined its interpretation of Section 9(b)(3) to the literal wording of the statute. For example, in *Armored Motor Service Co., Inc.*, 106 NLRB 1139 (1953), the Board held that armored car drivers are "guards" within the meaning of Section 9(b)(3). The Board reached this conclusion even though the literal wording of Section 9(b)(3) defines a "guard" as "any individual employed . . . to enforce against

employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." (Emphasis added.) One could argue that Section 9(b)(3), if read strictly and literally, should not apply to armored car drivers because such drivers are primarily charged with the responsibility of protecting customers' property away from the site of the drivers' employer's premises. However, the Board correctly ruled that armored car drivers are guards under Section 9(b)(3) because, as the Board explained, "These guards are obviously employed to protect property within the meaning of the statute, and, in view of the statutory language, we do not consider it controlling that the money and valuables which they protect belong not to their own employer but to a customer of their employer." *Armored Motor Service*, 106 NLRB at 1140. *Armored Motor Service* remains good law to this day. Indeed, it is worth nothing that the General Counsel does not challenge the validity of *Armored Motor Service* even though the putative bargaining units at issue are all comprised largely of armored car drivers. Such a position with regard to the guard status of these employees is inconsistent with the General Counsel's position that Section 9(b)(3) should be interpreted literally and narrowly. In any event, as illustrated by the *Armored Motor Service* decision, the Board has never strictly confined itself to the literal wording of Section 9(b)(3) in order to effectuate the purposes of Congress in creating Section 9(b)(3). Accordingly, it is inappropriate to interpret the term "certify" in the literal and narrow manner proposed by the General Counsel.

The Board should give no credence to the General Counsel's suggestion that the Act plainly on its face demands that Loomis continue any purported obligation to recognize the Unions as the exclusive bargaining representative of its employees. It is a fundamental canon of statutory construction that when the "plain meaning" of a statute leads to "absurd or futile results," the purpose of the statutory provision must be taken into consideration. *See, e.g.,*

United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1940). Construing the term “certification” in the strict matter proposed by the General Counsel leads to an absurd result. Consequently, it is critical to review the legislative history and purpose of Section 9(b)(3). As explained above, and as determined by the Board over the past three decades, the Act and the legislative history leading to Section 9(b)(3) establish the opposite – the Board may not compel an employer of guards to recognize a mixed guard union as the representative of the employer’s guard employees absent an otherwise binding collective bargaining agreement. The Board’s construction of Section 9(b)(3) in *Wells Fargo* and its progeny is warranted. See *Truck Drivers Local Union No. 807*, 755 F.2d at 10.⁸

The General Counsel has failed to provide any support for its supposition that the Board’s experience in administering *Wells Fargo* weighs in favor of the Board abandoning *Wells Fargo* after almost thirty years. Indeed, nothing has changed since the Board first decided *Wells Fargo* to indicate that *Wells Fargo* and its progeny were wrongly decided or otherwise demand that the Board to reverse its position after three decades.

Contrary to the General Counsel’s position, continued adherence to *Wells Fargo* and its progeny will not undermine the Act’s policy of promoting stable bargaining relationships. On the contrary, should *Wells Fargo* be overturned, guard employers could be dissuaded from entering into voluntary bargaining relationships with mixed-guard unions, regardless of whether

⁸ As explained above, the Board (on multiple occasions) and the Second Circuit Court of Appeals reached the conclusion that an employer is privileged to withdraw recognition in circumstances such as those applicable to *Loomis* in this matter. This fact completely belies the Seventh Circuit’s incorrect conclusion in *Temple Security* that the Act on its face clearly and unambiguously proscribes an employer’s withdrawal of recognition in such circumstances. At the very least, the Circuit split and the differences of opinion among some Board members demonstrate that the plain language of the Act does not clearly and unambiguously prevent an employer of guards from withdrawing recognition of a mixed guard union upon the expiration of a collective bargaining agreement applicable to a guards-only unit.

a majority of the employer's guards wish to be represented by a mixed-guard union. Without the ability to unilaterally withdraw recognition with a mixed-guard union when no collective bargaining agreement is in effect, guard employers, recognizing the potential conflict of loyalties inherent in such a relationship, may choose not to enter into a voluntary bargaining relationship with a mixed-guard union because entering into such a relationship would create a bargaining relationship in perpetuity, absent extraordinary circumstances justifying the refusal to recognize the mixed-guard union. Guard employers faced with such a prospect, and the potential conflict of loyalties described above, could be dissuaded from voluntarily recognizing a mixed-guard union regardless of the wishes of their guard employees.

C. Loomis Does Not Take Issue with the General Counsel's Exceptions 1 through 10.

The General Counsel's Exceptions 1 through 10 are essentially "housekeeping" matters. These particular Exceptions should have no impact on the Board's ultimate determination because, as demonstrated above, Loomis was privileged to withdraw recognition of the Charging Parties upon the expiration of the applicable collective bargaining agreements.⁹

IV. CONCLUSION

For the foregoing reasons, Loomis respectfully requests that the Board overrule the General Counsel's Exceptions 11 through 13 and adopt Judge Pollack's decision to dismiss cases 32-CA-25316, 32-CA-25708, 32-CA-25709, and 32-CA-25727 in their entirety.

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⁹ However, the Board should note that with respect to Exception 8, Loomis takes the position that the Charging Parties were exclusive representatives of the Employer's employees pursuant to Section 9(a) only during the terms of the applicable collective bargaining agreements. (S.F. 6(d), 7(f), 7(g), 8(f), 8(g), 17(d), 24(d), 31(d).) In any event, this issue is irrelevant because Loomis had the right to withdraw recognition pursuant to Section 9(b)(3).

Dated: February 21, 2012

LITTLER MENDELSON
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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 650 California Street, 20th Floor, San Francisco, California 94108.2693. On **February 21, 2012**, I served the within document(s):

- **RESPONDENT LOOMIS ARMORED US, INC.'S ANSWERING BRIEF TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

<input type="checkbox"/>	By United States mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses indicated below and (<i>specify one</i>):
<input type="checkbox"/>	deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
<input type="checkbox"/>	placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
<input type="checkbox"/>	By fax transmission. As a courtesy, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
<input checked="" type="checkbox"/>	By e-mail or electronic transmission to Andrew H. Baker, Esq.; Fern M. Steiner, Esq.; I caused the documents to be sent to the person(s) at the e-mail address(es) at <u>lester.heltzer@nlrb.gov</u> , <u>gabriela.alvaro@nlrb.gov</u> , <u>abaker@beesontayer.com</u> ; <u>fsteiner@tosdalsmith.com</u> and <u>alively@wkpyc.com</u> . I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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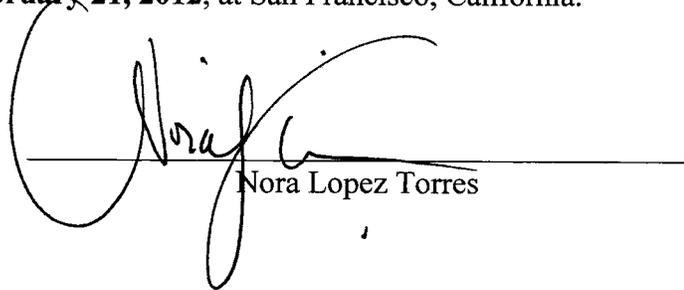
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **February 21, 2012**, at San Francisco, California.


Nora Lopez Torres