

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CENTER FOR SOCIAL CHANGE, INC.

and

Case 5-CA-72211

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 500

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S RESPONSE TO
RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE AND OPPOSITION TO
ACTING GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT**

Counsel for the Acting General Counsel, pursuant to Sections 102.24 and 102.46 of the Board's Rules and Regulations and Statements of Standard Procedures, Series 8, as amended, and pursuant to the Board's practice of receiving such responses as is described in *Baker Electric*, 330 NLRB 521 fn. 4 (2000), respectfully submits this Response to Respondent's Response to Notice to Show Cause and Opposition to Acting General Counsel's Motion for Summary Judgment. As is set forth in the Motion for Summary Judgment and as will be explained in greater detail herein, the pleadings do not raise any genuine issues of material fact warranting a hearing, so the Board should grant summary judgment and issue an appropriate order.

Respondent's Response to Notice to Show Cause raises three objections to the entry of summary judgment: that Respondent's service copy of the complaint bore an inaccurate issuance date (Respondent's Response to Notice to Show Cause, herein "Response," p. 3, n. 1); that it should be allowed to relitigate matters that it did or could have litigated in the underlying representation case (Response, pp. 3-5); and that three Board members and the Acting General

Counsel are not properly installed in their respective positions (Response, pp. 5-9). Each contention will be addressed in turn.

ARGUMENT

I. THERE ARE NO MATERIAL FACTS AT ISSUE CONCERNING THE DATE OF THE COMPLAINT AND NOTICE OF HEARING AND RESPONDENT FAILED TO MAKE ANY CLAIMS OF PREJUDICE.

Respondent argues the Complaint should be dismissed because Respondent's service copy incorrectly bore a date of November 30, 2011. Response p. 3, n. 1. In the alternative, Respondent argues there is a material issue of fact concerning the issuance date of the complaint. Response p. 3, n. 1. The correct date of the Complaint and Notice of Hearing is January 18, 2012. Respondent's service copy of the Complaint bore the incorrect date based on a typographical error resulting from administrative oversight. All other aspects of Respondent's service copy were accurate and Respondent was able to, and did, file an answer within the specified deadline.

In cases where respondents deny service of a charge based on misnomer regarding the name of the charged party, the Board has refused to hold the statutory requirements of service have not been met where the proper respondent has notice of the charge and obvious misnomer. See *Peterson Construction Co.*, 106 NLRB 850, 851 (1953). In *Peterson*, the employer argued no charge was served upon it within six months of the alleged violations, as required by Section 10(b) of the Act, because the original charge was filed against "Ole Peterson, Inc." and subsequently amended to the correct name, "Peterson Construction Company, Inc." outside the Section 10(b) period. However, the employer made no contention it was in any way misled or otherwise prejudiced by the misnomer and the Board denied respondent's argument, stating it refused to, "project legalism to an unwarranted length." *Id.* Similarly in the case at hand, Respondent has not raised any claim it was prejudiced by the incorrect date. Thus, to deny the

entry of Summary Judgment based on the typographical error would be to “project legalism to an unwarranted length.”

There is no material fact in issue as to the date the Complaint was issued, as the original Complaint bearing the signature of the Regional Director of Region 5 is dated January 18, 2012. Motion for Summary Judgment Exhibit 1. Additionally, there is no dispute that Respondent has received a copy of the Complaint bearing the date January 18, 2012, as an attachment to Counsel for the Acting General Counsel’s Motion for Summary Judgment. Accordingly, the error in Respondent’s service copy of the Complaint should not prevent an entry of summary judgment.

II. RESPONDENT ATTEMPTS TO RELITIGATE ISSUES THAT WERE, OR COULD HAVE BEEN, LITIGATED IN THE PRIOR REPRESENTATION PROCEEDING.

Respondent makes several arguments regarding the results of the election held in Case 5-RC-65370 that could have been raised as objections to the election results. However, Respondent failed to file any objections to those election results. Respondent makes no contention that it was prevented from filing said objections. Where, as here, a party fails to meet and bargain following certification by the Board, it is the Board’s policy that absent newly discovered or previously unavailable evidence or special circumstances, the party is not allowed to relitigate, in a proceeding alleging unfair labor practices, issues that were, or could have been, litigated in a prior representation proceeding. *Westinghouse Broadcasting Company, Inc.*, 218 NLRB 693, 694 (1975); *Keco Industries, Inc.*, 191 NLRB 257, 258 (1971). Respondent does not assert there is any newly discovered or previously unavailable evidence or special circumstances in this case. Thus, Respondent’s arguments concerning the propriety of the certification are not a basis for denying entry of summary judgment.

III. IT IS NOT APPROPRIATE FOR THE BOARD TO DECIDE WHETHER PRESIDENTIAL APPOINTMENTS ARE VALID.

Respondent argues that three of the five Board members were not validly appointed under the Appointments Clause of the U.S. Constitution. In similar circumstances, the Board has found that it is not appropriate for it to decide whether Presidential appointments are valid. Instead, the Board applies the well-settled “presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary.” *Lutheran Home at Moorestown*, 334 NLRB 340, 341 (2001), citing *U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926). Respondent has not proffered sufficient evidence to overcome the presumption of regularity. Thus, Respondent’s argument should not prohibit the Board from granting Counsel for the Acting General Counsel’s Motion for Summary Judgment.

Respondent also argues the Acting General Counsel was not validly appointed. The Board has found that it is not appropriate for it to decide, in an unfair labor practice case, whether or not the President made a proper appointment of an Acting General Counsel under the Federal Vacancies Reform Act of 1998 (the “FVRA”), 5 U.S.C. §§ 3345-3349. *Lutheran Home at Moorestown*, 334 NLRB at 340. In deciding whether to proceed with the disposition of a case on the merits, notwithstanding a claim concerning the Acting General Counsel’s authority, the Board again applies the well-settled “presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary.” *Lutheran Home at Moorestown*, 334 NLRB at 341, citing *U.S. v. Chemical Foundation*, 272 U.S. at 14-15. See also *Anderson v. P.W. Madsen Inv. Co.*, 72 F.2d 768, 771 (10th Cir. 1934) (“There is a presumption of authority for official action rather than want of authority....”). Given this presumption, the Board will not adjudicate claims concerning the authority of an Acting General Counsel, so long as there is nothing to suggest that the Acting General Counsel’s appointment was “clearly improper.”

Lutheran Home at Moorestown, 334 NLRB at 340. Respondent has proffered nothing whatsoever to suggest that the appointment of the Acting General Counsel was clearly improper.

Accordingly, under established Board precedent, Respondent's arguments that three Board members and the Acting General Counsel are not properly seated in their respective offices, is not a basis for denying summary judgment.

CONCLUSION

Based on the foregoing, Counsel for the Acting General Counsel requests that the Board deem the allegations set forth in the Complaint to be true without receiving evidence, grant summary judgment and issue a Decision and Order. It is respectfully requested that the Board make its findings of fact based on the allegations in the Complaint and conclude that, as a matter of law, Respondent has violated Section 8(a)(1) and (5) of the Act as alleged in the Complaint and order an appropriate remedy, including an order that the initial certification year shall be deemed to begin on the date Respondent commences to bargain in good faith with the Union as the certified bargaining representative of the employees in the appropriate unit. *Campbell Soup Company*, 224 NLRB 13 (1976).

Dated at Baltimore, Maryland this 24th day of February 2012.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

This is to certify that on February 24, 2012, copies of Counsel for the Acting General Counsel's Response to Respondent's Response to Notice to Show Cause and Opposition to Acting General Counsel's Motion for Summary Judgment were served by e-mail on:

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