Newark Portfolio JV, LLC *and* Residential Laborers Local 55, Laborers International Union of North America. Cases 22–RC–081108 and 22–CA–100534

November 12, 2014

DECISION, CERTIFICATION OF REPRESENTATIVE, AND NOTICE TO SHOW CAUSE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND SCHIFFER

On May 31, 2013, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 124 (not reported in Board volumes.). Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Third Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has consolidated the underlying representation proceeding with this unfair labor practice proceeding and delegated its authority in both proceedings to a three-member panel.

This is a refusal-to-bargain case in which the Respondent is contesting the certification of Laborers International Union of North America Local 55 (the Union) as bargaining representative in the underlying representation proceeding. The Board's May 31, 2013 decision states that the Respondent is precluded from litigating any representation issues because, in relevant part, they were or could have been litigated in the prior representation proceeding. The prior proceeding, however, also occurred at a time when the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm, and we do not give it preclusive effect. Accordingly, we consider below the representation issues that the Respondent has raised in this proceeding.

In its response to the Notice to Show Cause, the Respondent reiterates its objections to the election alleging that the Union's conduct during the voting period constituted unlawful electioneering and involved an objectionable appeal to racial prejudice.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the Respondent's objections to the election held June 27, 2012, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 6 for and 4 against the Petitioner, with no challenged ballots.

The Board has reviewed the hearing officer's report and record in light of the exceptions and briefs. We have also considered the Board's February 27, 2013 Decision and Certification of Representative, and we agree with the rationale stated therein. Accordingly, we adopt the hearing officer's findings and recommendations to the extent and for the reasons stated in the February 27, 2013 Decision and Certification of Representative, which is incorporated herein by reference, and find that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Laborers International Union of North America Local 55 and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time on site superintendents, porters, and maintenance employees employed by the Employer at its Newark, New Jersey facility; excluding all managerial employees, office and clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

NOTICE TO SHOW CAUSE

As noted above, the Respondent has refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Courts of Appeals. Although Respondent's legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining at this time. It is also possible that other events may have occurred during the pendency of this litigation that the parties may wish to bring to our attention.

Having duly considered the matter,

1. The General Counsel is granted leave to amend the complaint on or before November 24, 2014, to conform with the current state of the evidence.

2. The Respondent's answer to the amended complaint is due on or before December 8, 2014.

3. NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before December 29, 2014 (with affidavit of service on the parties to this proceeding), as to why the Board should not grant the General Counsel's motion

for summary judgment. Any briefs or statements in support of the motion shall be filed by the same date.