

Stamford Hospitality, LP d/b/a Stamford Plaza Hotel and Conference Center, LP and United Food and Commercial Workers Union, Local 371.
Cases 34–CA–092068 and 34–RC–080390

November 26, 2014

DECISION, CERTIFICATION OF
REPRESENTATIVE, AND NOTICE TO
SHOW CAUSE

BY MARK GASTON PEARCE AND MEMBERS HIROZAWA
AND SCHIFFER

On March 13, 2013, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB 630. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia 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 proceedings with this unfair labor practice proceeding and delegated its authority in these proceedings to a three-member panel.

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. The Board's March 13, 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 proceedings. The prior proceedings, 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 them 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 both its preelection argument that the Regional Director improperly directed an election instead of dismissing the petition or holding it in abeyance pending the resolution of pending unfair labor practice charges, and its postelection objection alleging that an altercation involving three housekeepers created an atmosphere

of intimidation and actually intimidated voters who wanted to vote against the Petitioner.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the Respondent's requests for review of the Regional Director's Decision and Direction of Election and of the Regional Director's Supplemental Decision on Objections and Certification of Representative, and we find the Respondent's arguments to be without merit. Accordingly, we deny the Requests for Review in the prior representation proceedings, as they raise no substantial issues warranting review.

We next consider the question whether the Board can rely on the results of the election. For the reasons stated below, we find that the election was properly held and the tally of ballots is a reliable expression of the employees' free choice.

As an initial matter, had the Board decided not to issue decisions during the time that the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm, the Regional Director would have conducted the election as scheduled and counted the ballots. In this regard, Section 102.67(b) of the Board's Rules and Regulations states, in relevant part:

The Regional Director shall schedule and conduct any election directed by the [Regional Director's] decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted[,] ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision. (Emphasis in original).

See also Casehandling Manual, Part 2, Representation Proceedings, Sections 11274, 11302.1(a) (same).

However, this vote and impound process does not apply when the Board lacks a quorum. In this regard, Section 102.182 of the Board's Rules and Regulations states:

Representation cases should be processed to certification.—During any period when the Board lacks a quorum, the second proviso of § 102.67(b) regarding the automatic impounding of ballots shall be suspended. To the extent practicable, all representation cases should continue to be processed and the appropriate certification should be issued by the Regional Director notwith-

standing the pendency of a request for review, subject to revision or revocation by the Board pursuant to a request for review filed in accordance with this subpart.

Thus, it is clear that the decision of the Board to continue to issue decisions did not affect the outcome of the election. With or without a decision on the original Request for Review, the election would have been conducted as scheduled. This result is required by Section 102.67(b) of the Board's rules, and, under *Noel Canning*, the sitting Board Members did not have the authority to issue an order directing otherwise. Thus, the timing of the election was not affected by the issuance of a decision on the Request for Review, and we find that the decision of the Regional Director to open and count the ballots was appropriate and in accordance with Section 102.182. In any event, the actions of the Regional Director did not affect the tally of ballots. Accordingly, we will rely on the results of the election and issue an appropriate certification.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots has been cast for United Food and Commercial Workers, Local 371, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time service and maintenance employees employed by the Employer at its Stamford, Connecticut facility; but excluding all other employees, banquet employees, clerical employees, and guards, professional employees, 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 December 8, 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 22, 2014.

3. NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before January 12, 2015 (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.