

Fused Solutions, LLC and United Food and Commercial Workers, District Union Local One. Cases 03–CA–098461 and 03–RC–083193

November 26, 2014

DECISION, CERTIFICATION OF REPRESENTATIVE, AND NOTICE TO SHOW CAUSE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND SCHIFFER

On May 6, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 118 (not reported in Board volumes). 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 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 Union's certification as bargaining representative in the underlying representation proceeding. The Board's May 6, 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.¹

¹ In addition to raising certain representation issues, the Respondent argues that the complaint was ultra vires because the Acting General Counsel of the NLRB did not lawfully hold the office of Acting General Counsel at the time he directed that the complaint be issued. We reject this argument for the reasons stated in *Benjamin H. Realty Corp.*, 361 NLRB 918 (2014).

The Respondent also argues that the complaint was ultra vires because the Regional Director did not lawfully hold the office of Regional Director for Region 3 at the time she directed that the complaint be

In its response to the Notice to Show Cause, the Respondent reiterates its objections to the election alleging that the Union's representatives (a) told employees that not voting would be counted as a "no" vote, and (b) gave new employees the impression that they were not eligible or that their votes would not be counted.

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 July 26, 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 19 for and 9 against the Petitioner, with 6 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions,² has adopted the hearing officer's findings and recommendations, and finds 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 United Food and Commercial Workers, District Union Local One and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time level 1, level 2, and level 3 customer service support technicians employed by the Employer at its Potsdam, New York location; excluding all office clerical employees, confidential employees, guards, and 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 un-

issued, and that she continues to not lawfully hold the office. We reject this argument as well. Under the Act, complaints are issued in the name of the General Counsel and with his authority. The Respondent does not suggest that the complaint in this matter was issued without the authority of the then-Acting General Counsel. Moreover, the Regional Director for Region 3 was initially appointed on February 27, 2009, and her appointment was ratified on July 10, 2010, at a time when the Board had a quorum. Finally, in the instant case the complaint was actually issued by Acting Regional Director Paul J. Murphy, and the Respondent does not challenge his authority to act.

² The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

changed, 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.