UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORQUAY CONSTRUCTION, INC.

and **Case 28-CA-023412**

THOMAS DeMOTT, an Individual

MOTION TO REMAND CASE TO THE REGIONAL DIRECTOR

This proceeding is currently pending before the National Labor Relations Board (Board) for reconsideration after the United States Court of Appeals for the District of Columbia granted the Board's motion for dismissal on August 19, 2014.[1] Counsel for the General Counsel moves that the Board remand the case to the Regional Director for further processing of a settlement resolution reached by the parties because the resolution meets the criteria for deferral under *Independent Stave*, 287 NLRB 740 (1987). The settlement resolution reached by the parties involves a non-Board monetary settlement and the mailing of a Notice to Employees since the compliance investigation revealed that Respondent ceased all business operations in 2012.

The recent history of this proceeding is set forth in the Board's Motion for Dismissal. Specifically:

[1] The Board's motion was captioned: Motion of the National Labor Relations Board for Dismissal of Case to the United States Court of Appeals for the District of Columbia Circuit (Motion for Dismiss). Said Motion for Dismissal was filed in response to the Supreme Court's decision in *NLRB v. Noel Canning*, No. 12-1281, ___ S. Ct. ____, 2014 WL 2882090 (June 26, 2014).

> 1. On April 16, 2013, the Board issued a Decision and Order in this case, which is reported at 359 NLRB No. 93.
>
> 2. Petitioner filed a petition for review of that Order on July 9, 2013. The Court put the case in abeyance on July 12, 2013, before the Board filed the record.
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> 3. . . . [T]he Board on June 27, 2014, issued an Order setting aside the Decision and Order currently pending review in this case. It did so in response to the Supreme Court's decision in *NLRB v. Noel Canning*, No. 12-1281, ___ S. Ct. ____, 2014 WL 2882090 (June 26, 2014).

The essential facts necessary for the Board to rule on this Motion to Remand to the Regional Director are undisputed and are briefly summarized below.

The events giving rise to this proceeding occurred on October 1, 2010, when Respondent, as found by the Administrative Law Judge (ALJ), and affirmed by the Board in its April 16, 2013 Decision and Order, unlawfully attempted to expel two union agents, one of whom was Charging Party Thomas DeMott, from the construction jobsite trailer. Contrary to the ALJ, the Board also found that the assault on Union representative DeMott when expelling him from Respondent's trailer violated the Act as it occurred while he was engaged in protected area standards activity. The Board issued a standard cease and desist order and notice posting order to remedy its finding that Respondent unlawfully ordered the two Union representatives to leave the property and unlawfully assaulted DeMott. Regarding the assault, the Board stated: "if it is shown in compliance proceedings that DeMott incurred medical expenses and suffered a loss of pay and benefits as a result of the unlawful assault, the Respondent shall

reimburse DeMott for his medical expenses and make him whole for his lost pay and benefits."[2]

After issuance of the ALJ's Decision on December 6, 2011, but prior to issuance of the Board's Decision and Order on April 16, 2013, Respondent ceased all business operations. While the exact date Respondent ceased operations is unknown, the Region's compliance investigation established that Respondent filed its last mandatory annual report in February 2012. The Arizona Registrar of Contractors' records indicate that Respondent's General Commercial Contractor License was suspended due to lack of a bond as of December 8, 2012, and its Arizona General Engineering License was suspended due to non-renewal as of December 13, 2012. There is no evidence that Respondent ceased doing business to evade its obligations under Board law following issuance of the ALJ's Decision, or that Respondent has commenced business operations under another name.

On September 13, 2012, DeMott filed a civil lawsuit against Respondent in Maricopa County [Arizona] Superior Court. That lawsuit (Case No. CV2012-011332) was resolved by a Mediation/Settlement Agreement, entered into by Respondent and legal counsel for DeMott, based on DeMott's express permission on September, 17, 2014. The entirety of the one-page settlement states:

> After attending a mediation/settlement conference before K. Thomas Slack on September 9, 2014, the parties and/or counsel undersigned agree that this case/dispute is being settled this date in accordance with the following terms and conditions:
>
> Defendants will pay to Plaintiff Thomas DeMott the sum of $250,000 in

[2] Following issuance of the Board's Decision and Order, the Acting General Counsel, by his Order dated August 12, 2013, transferred this case from Region 28 to Region 27 for the compliance phase of the proceeding.

> full and final settlement of any and all claims that were or could have been brought in this matter. Payment of this amount is intended to, and does in fact, include resolution of any NLRB award, no matter how defined. Plaintiff will be responsible for satisfying any and all worker's compensation, medical and other liens. Defendant will provide and Plaintiff's counsel will sign a Stipulation to Dismiss the case with prejudice, and Plaintiff will execute a Release of All Claims on standard terms. Each side will bear its own costs and attorneys (sic) fees. This Agreement may be signed in counterparts.

The monetary settlement amount reached by the parties in mediation exceeds the Region's current compliance calculations by approximately $28,000, before DeMott satisfies any legal requirements to reimburse the workman's compensation fund or other medical entities. After executing a Settlement Agreement and Release, as required by the terms of the Mediation/Settlement, DeMott received the insurance payout.[3] DeMott then submitted a conditional withdrawal request to the Region based on the terms of the Mediation/Settlement and Settlement Agreement and Release. DeMott's conditional request for withdrawal states in its entirety:

> Based on a non-Board private agreement between the parties, this is to request withdrawal of the charge in the above case conditioned on the performance of the undertakings in that private agreement and completion of the distribution of the Board's Notice to Employees and submission of a certification of compliance.

After the Mediation/Settlement and Settlement Agreement and Release were executed, Counsel for Respondent informed the Region that Respondent was willing to comply with the remainder of the Board's previous Order despite it having been set aside following the *Noel Canning* decision, and current pendency for reconsideration before the Board. The previous Order with which Respondent is willing to comply includes having a former official sign the Notice to Employees so the Region can mail

[3] The Settlement Agreement and Release provided, in pertinent part, that DeMott would not seek enforcement of any Board award in Case No. 28-CA-23412, should one issue, that was related to the same allegations settled in the Mediation/Settlement.

the Notices to all employees on Respondent's payroll as of the date the unfair labor practices occurred and who worked subsequently on Respondent's Central Avenue Project in Phoenix, Arizona. Notwithstanding the Mediation/Settlement covering the make whole remedy contained in the Board's Order, Respondent is willing to include the make whole provision from the Board's previous order in the Notice language; subject only to modifying the language to the effect that Respondent has already complied.

In *Independent Stave*, *Id. at 743*, the Board outlined the factors to be considered in determining whether to defer to a private non-Board settlement. The Board stated that it would examine all the surrounding circumstances including, but not limited to, whether:

> (1) the parties have agreed to be bound;
>
> (2) the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation;
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> (3) there has been any fraud, coercion, or duress by any party in reaching the settlement; and
>
> (4) the respondent has a history of violations of the Act or has breached past unfair labor practice settlement agreements.

It is undisputed that the parties, including Charging Party DeMott, who was represented by counsel at all times, agreed to be bound by the Mediation/Settlement cited above, which states that "Payment of this amount is intended to, and does in fact, include resolution of any NLRB award, no matter how defined" and that DeMott "will execute a Release of All Claims on standard terms." Both the Mediation/Settlement and Settlement Release entered into by DeMott clearly cover the instant charge that was pending before the Board for reconsideration when the parties executed the referenced settlement agreements.

The parties' settlement also meets the second *Independent Stave* factor, namely, whether the agreement is reasonable in light of the violations alleged and the risks inherent in litigation. In particular, the ALJ had dismissed the allegation that the assault on Union representative DeMott violated the Act. While the Board reversed the ALJ's dismissal, it has subsequently dismissed its own April 16, 2013 Decision and Order reversing the ALJ, and this matter is currently pending before the Board for reconsideration. Because there would be risks inherent in further litigation of this matter, the Mediation/Settlement requiring each party to forego its claims is reasonable and, Charging Party DeMott has indicated his agreement to be bound by submitting a conditional withdrawal request to the Region 27 office. Additionally, because the Respondent went out of business in 2012, should the Board reach the same determination it did in its vacated Order, the compliance phase would be identical to the current resolution under consideration in that DeMott has already received the $250,000 monetary settlement, and there is no basis to conclude that any additional backpay could be obtained in light of Respondent's defunct operations. Likewise, should the Board reach the same conclusions it did in its April 16, 2013 Decision and Order, the resulting Notice to Employees would likely contain similar language to the previous Board Order, and would still need to be mailed to the former employees.

Finally, the third and fourth factors set forth in *Independent Stave* clearly support deferral to the Mediation/Settlement and remand to the Regional Director for further processing. There is no allegation of fraud, coercion, or duress by any party in executing the mediation settlement, and the Respondent has no history of similar violations of the Act or breaches of past unfair labor practice settlement agreements.

Accordingly, Counsel for the General Counsel moves that the Board remand the case to the Regional Director for further processing, including mailing the Notice to Employees to the former employees. Upon completion of the Notice mailing and Respondent's submission of a certificate of compliance, the Regional Director will grant DeMott's partial withdrawal request to withdraw the assault charge allegations based on the fact that DeMott has already received the monetary payment he agreed to in the Mediation/Settlement.

Dated at Denver, Colorado, this 5th day of March, 2015.

Nancy S. Brandt

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