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MARCIA M. WALDRON

CLERK



UNITED STATES COURT OF APPEALS

21400 UNITED STATES COURTHOUSE
601 MARKET STREET

PHILADELPHIA, PA 19106-1790

Website: www.ca3.uscourts.gov

TELEPHONE

215-597-2995

June 25, 2015

James J. La Rocca, Esq.
Gibbons
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Newark, NJ 07102

John C. Romeo, Esq.
Gibbons
18th & Arch Streets 1700 Two Logan Square
Philadelphia, PA 19103

RE: Newark Portfolio JV, LLC v. NLRB
Case Number: 15-2565
Agency Case Number: 22-CA100534

Effective December 15, 2008, the Court implemented the Electronic Case Files System. Accordingly, attorneys are required to file all documents electronically. See 3d Cir. L.A.R. 113 (2008) and the Court's CM/ECF website at www.ca3.uscourts.gov/ecfwebsite.

To All Parties:

Enclosed is the case opening information regarding the above-captioned petition for review filed by **Newark Portfolio JV, LLC**, docketed at No. **15-2565**. All inquiries should be directed to your Case Manager in writing or by calling the Clerk's Office at 215-597-2995. This Court's rules, forms and case information are available on our website at <http://www.ca3.uscourts.gov>. The petition was received on **06/25/2015**.

Counsel for Petitioner

The docketing fee of \$500.00 was received on **06/25/2015**. A receipt for the docketing fee is enclosed.

As Counsel for Petitioner(s), you must file: 1. Application for Admission (if applicable); 2. Appearance Form 3. Disclosure Statement (except governmental entities); and 4. Docketing Statement these forms must be filed **within 14 days of the date of this letter.**

Failure of Petitioner(s) to comply with any of these requirements by the deadline will result in the DISMISSAL of the case without further notice. 3rd Cir. LAR Misc. 107.2.

Counsel for Respondent(s)

As Counsel for Respondent(s), you must file: 1. Application for Admission (if applicable); 2. Appearance Form 3. Disclosure Statement (except governmental entities) These forms must be filed **within 14 days of the date of this letter.**

Pursuant to Fed. R. App. P. 17 (a), the agency must file the record with this Court within 40 days after being served with the petition for review, unless the statute authorizing review provides otherwise.

Attached is a copy of the full caption as taken from the petition for review. Please review the caption carefully and promptly advise this office in writing of any discrepancies.

Very truly yours,

Marcia M. Waldron

Marcia M. Waldron,
Clerk

By: Caitlyn
Case Manager
267-299-4956

cc: Linda Dreeben, Esq.
J. Michael Lightner

STANDING ORDER REGARDING MOTIONS TO EXCEED THE PAGE LIMITATIONS OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Effective Immediately

PRESENT· McKEE, **Chief Judge**, and SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR, VANASKIE, ALDISERT, WEIS, GARTH, STAPLETON, GREENBERG, COWEN, NYGAARD, ROTH, BARRY, and VAN ANTWERPEN, **Circuit Judges**

AND NOW, it being noted that motions to exceed the page/word limitations for briefs are filed in approximately twenty-five percent of cases on appeal, and that seventy-one percent of those motions seek to exceed the page/word limitations by more than twenty percent;

Notice is hereby given that motions to exceed the page or word limitations for briefs are strongly disfavored and will be granted only upon demonstration of extraordinary circumstances. Such circumstances may include multi-appellant consolidated appeals in which the appellee seeks to file a single responsive brief or complex/consolidated proceedings in which the parties are seeking to file jointly or the subject matter clearly requires expansion of the page or word limitations.

Accordingly, it is **ORDERED** that a three-judge Standing Motions Panel is hereby appointed to rule on all motions to exceed the page/word limitations for briefs since the page/word limitations, prescribed by Fed. R. App. P. 32(a)(7), should be sufficient to address all issues in an appeal.

It is further **ORDERED** that Counsel are advised to seek advance approval of requests to exceed the page/word limitations whenever possible or run the risk of rewriting and refile a compliant brief. Any request to exceed page/word limitations submitted in the absence of such an advance request shall include an explanation of why counsel could not have foreseen any difficulty in complying with the limitations in time to seek advance approval from the panel.

This order shall not apply to capital habeas cases.



Date: January 9, 2012

Per Curiam,

/s/ Theodore A. McKee
Chief Judge

Marcia M. Waldron

Marcia M. Waldron, Clerk

NEWARK PORTFOLIO JV, LLC,

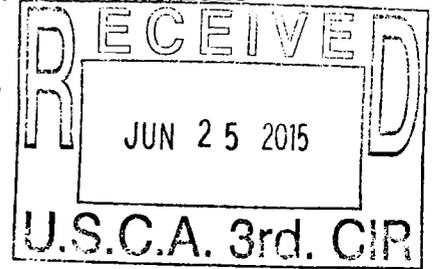
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT



NEWARK PORTFOLIO JV, LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

Case No. 15-2565

NLRB Case No. 22-CA-100534

PETITION FOR REVIEW

The petitioner, Newark Portfolio JV, LLC, hereby petitions this Court for review of the decision and order entered by the National Labor Relations Board on June 5, 2015 in NLRB Case No. 22-CA-100534, which makes final the Board's underlying decision in the representation case in NLRB Case No. 22-RC-081108. These decisions are attached along with two other decisions issued by the Board in NLRB Case No. 22-CA-100534 dated May 31, 2013 and November 12, 2014.

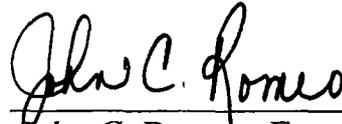
This Court has jurisdiction and venue pursuant to 29 U.S.C. § 160(f). The matter concerns issues arising in the State of New Jersey.

This Petition is timely. The National Labor Relations Act does not have a time limit for this filing. *See Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001).

The petitioner requests this Court set aside the Board's June 5, 2015 decision and order, and the Board's certification of the Laborers International Union of North America Local 55 as the exclusive representative of the unit employees at

issue because: (1) a union representative made an anti-Semitic statement about the petitioner's owners to a voter moments before he cast a ballot; (2) the union failed to abide by instructions from the Board agent conducting the election, which prohibited electioneering in front of the building where the voting took place; (3) the union engaged in a host of improper conduct during the election, which included, among other things, the anti-Semitic statement; and (4) the Board misapplied the facts and law.

Respectfully submitted,



John C. Romeo, Esq.

GIBBONS P.C.

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Fax: (973) 596-4545

Attorneys for Petitioner

DATED: June 25, 2015

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Newark Portfolio JV, LLC and Residential Laborers
Local 55, Laborers International Union of North
America. Case 22-CA-100534**

June 5, 2015

DECISION AND ORDER

**BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN**

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. Pursuant to a charge filed by Residential Laborers Local 55, Laborers International Union of North America (the Union) on March 15, 2013, and an amended charge filed March 19, 2013, the Acting General Counsel issued the complaint on March 28, 2013, alleging that Newark Portfolio JV, LLC (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 22-RC-081108. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On April 17, 2013, the Acting General Counsel filed a Motion for Summary Judgment. On April 18, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

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. 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.

On November 12, 2014, the Board issued a further Decision, Certification of Representative, and Notice to

Show Cause in Cases 22-CA-100534 and 22-RC-081108, which is reported at 361 NLRB No. 98. That Decision provided leave to the General Counsel to amend the complaint on or before November 24, 2014, to conform with the current state of the evidence, including whether the Respondent had agreed to recognize and bargain with the Union after the November 12, 2014 certification of representative issued. Thereafter, the Respondent and the General Counsel filed responses to the Notice to Show Cause.

On February 6, 2015, the General Counsel filed a motion to amend the complaint, under Section 102.17 of the Board's Rules and Regulations. Thereafter, the Board issued an Order Granting Motion to Amend Complaint and Further Notice to Show Cause in which it accepted the amended complaint, and directed that the Respondent file an answer to the amended complaint on or before February 27, 2015, and that cause be shown, in writing, on or before March 6, 2015, as to why the General Counsel's Motion for Summary Judgment should not be granted by the Board.

On February 24, 2015, the Respondent filed an answer to the amended complaint. On March 3, 2015, the General Counsel filed a statement in support of summary judgment and, on March 6, 2015, the Respondent filed a response.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the basis of its objections to conduct that allegedly affected the results of the election in the underlying representation proceeding.

¹ The amended complaint adds November 12, 2014, as the date the Board certified the Union as the exclusive collective-bargaining representative of the unit employees and alleges that about March 5, 2013, and January 15, 2015, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees, and that on March 15, 2013, and January 15, 2015, the Respondent refused in writing to do so, and continues to refuse to do so.

The amended answer admits the factual allegations of the complaint, and reiterates the arguments made in the underlying representation proceeding that the Union engaged in conduct that interfered with the results of the election. The amended answer also argues that because the Board lacked a quorum from January 4, 2012, until August 7, 2013, see *NLRB v. Noel Canning*, supra, the Board and its agents could not have certified the Union prior to August 7, 2013. However, the Board certified the Union on November 12, 2014. Further, to the extent the Respondent's answer asserts that the Regional Director lacked authority to process the case prior to August 7, 2013, that argument lacks merit. See *Mission Produce, Inc.*, 362 NLRB No. 15, slip op. at 1-2 (2015).

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation, has been engaged in the management of residential houses and apartments at its Newark and Irvington, New Jersey facilities.

During the 12-month period preceding the issuance of the complaint, the Respondent has derived gross revenues in excess of \$500,000, and purchased and received at its Newark and Irvington, New Jersey facilities, goods and supplies valued in excess of \$5000 directly from suppliers located within the State of New Jersey, which suppliers are directly engaged in interstate commerce.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, Residential Laborers Local 55, Laborers International Union of North America, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following a representation election held on June 27, 2012, the Union was certified on November 12, 2014, as 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.

² The Respondent's demand that the complaint be dismissed is, therefore, denied.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About March 5, 2013, and January 15, 2015, the Union requested in writing that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. Since about March 15, 2013, and continuing to date, the Respondent has declined to recognize and bargain collectively with the Union. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.³

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229

³ In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which the Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

NEWARK PORTFOLIO JV, LLC

(1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Newark Portfolio JV, LLC, Newark and Irvington, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Residential Laborers Local 55, Laborers International Union of North America as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

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.

(b) Within 14 days after service by the Region, post at its facility in Newark, New Jersey, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or cov-

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since about March 15, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 5, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Residential Laborers Local 55, Laborers International Union of North America as the exclusive collective-bargaining representative of the employees in the bargaining unit.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

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

NEWARK PORTFOLIO JV, LLC

The Board's decision can be found at www.nlr.gov/case/22-CA-100534 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

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

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. 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 consti-

tuted 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

2

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

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.

Dated, Washington, D.C. November 12, 2014

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

Mark Gaston Pearce, Chairman

(SEAL) NATIONAL LABOR RELATIONS BOARD

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**Newark Portfolio JV, LLC and Residential Laborers
Local 55, Laborers International Union of North
America. Case 22-CA-100534**

May 31, 2013

DECISION AND ORDER

**BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK**

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. Pursuant to a charge filed by the Union on March 15, 2013, and an amended charge filed March 19, 2013, the Acting General Counsel issued the complaint on March 28, 2013, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 22-RC-081108. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On April 17, 2013, the Acting General Counsel filed a Motion for Summary Judgment. On April 18, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the basis of its objections to conduct that allegedly affected the results of the election in the underlying representation proceeding. In addition, the Respondent, citing *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), and *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), denies that the Union is the certified exclusive collective-bargaining representative of the unit, alleging that the Board could not have certified the Union on February 27, 2013, because it lacked, and continues to lack, the constitutional power to act.¹

¹ For the reasons stated in *Bloomington's, Inc.*, 359 NLRB No. 113, slip op. at 1 (2013), we reject this argument.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation, has been engaged in the management of residential houses and apartments at its Newark and Irvington, New Jersey facilities.

During the 12-month period preceding the issuance of the complaint, the Respondent has derived gross revenues in excess of \$500,000, and purchased and received at its Newark and Irvington, New Jersey facilities, goods and supplies valued in excess of \$5000 directly from suppliers located within the State of New Jersey, which suppliers are directly engaged in interstate commerce.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, Residential Laborers Local 55, Laborers International Union of North America, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following a representation election held on June 27, 2012, the Union was certified on February 27, 2013, as 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

² The Respondent's demand that the complaint be dismissed is, therefore, denied.

employees, sales employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated March 5, 2013, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. By letter dated March 15, 2013, the Respondent declined to recognize and bargain collectively with the Union. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about March 15, 2013, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir.), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Newark Portfolio JV, LLC, Newark and Irvington, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Residential Laborers Local 55, Laborers International Union of North America as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

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.

(b) Within 14 days after service by the Region, post at its facility in Newark, New Jersey, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since about March 15, 2013.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NEWARK PORTFOLIO JV, LLC

3

(c) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 31, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Residential Laborers Local 55, Laborers International Union of North America as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

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

NEWARK PORTFOLIO JV, LLC

NOT INCLUDED IN
BOUND VOLUMES

PGB
Newark, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEWARK PORTFOLIO JV, LLC

Employer

and

Case 22-RC-081108

LABORERS INTERNATIONAL UNION
OF NORTH AMERICA LOCAL 55

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board has considered objections to an 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 record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations as modified below, and finds that a certification of representative should be issued.

In excepting to the hearing officer's recommendation to overrule its objections, the Employer argues that the hearing officer's report failed to address certain evidence regarding the Union's electioneering on the day of the election. We have carefully considered the record and conclude that the evidence, whether considered in isolation or cumulatively, does not support a finding that the Petitioner engaged in objectionable conduct requiring a new election.

As the Employer points out, the credited testimony indicates that the Petitioner's representatives stood on the front steps leading to the building in which the polling site was located, as well as on the public sidewalk. But this evidence does not refute the hearing officer's finding that the electioneering did not take place at or near the polling area, and that it was not directed at employees who were waiting in line to vote. The conduct at issue occurred outside of the building, away from the interior room that served as the polling place and from any voters who may have been in line to vote.¹ See *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), *enfd.* 703 F.2d 876 (5th Cir. 1983).

The Employer also points out that the Petitioner acted contrary to the Board agent's pre-election instructions against electioneering. We conclude, however, that this is insufficient to render the electioneering objectionable. The evidence indicates that before opening the polls, the Board agent stated generally that electioneering would not be permitted, but the agent did not designate a specific "no electioneering" area. In these circumstances, the Board applies its rules against electioneering only to the customarily proscribed area, i.e., "at or near the polls." See *Bally's Park Place, Inc.*, 265 NLRB 703, 703 (1982). Contrary to the cases cited by the Employer,² the Petitioner's representatives did not electioneer in the vicinity of the polling place. Nor did they act in defiance of directives aimed at specific conduct. Finally, we note that the Employer did not protest the Petitioner's conduct during the polling period, when the Board agent

¹ This was not the only entrance to the building; some voters used a rear door to access and exit the polling area.

² *Brinks, Inc.*, 331 NLRB 46 (2000); *Star Expansion Industries Corp.*, 170 NLRB 364 (1968); *Claussen Baking Co.*, 134 NLRB 111 (1961).

might have addressed it. For all these reasons, we find that the Petitioner's conduct was not objectionable.

We further agree with the hearing officer that there is insufficient evidence to conclude that one alleged anti-Semitic remark concerning the Employer's owners might reasonably have affected the election.³ Even assuming that the remark was made, and further assuming that it was made by a representative of the Petitioner, there is nothing in the record to suggest that the remark would reasonably have had an impact on the employees' free choice. For example, the Employer adduced no evidence suggesting that any religious tensions existed in the workplace or that the Petitioner sought to engender conflict through a broader inflammatory campaign theme. On this record, we find it highly unlikely that the single employee to whom the fleeting remark was apparently directed would have been influenced to vote for the Petitioner. Accordingly, we decline to set aside the election on this basis.⁴

CERTIFICATION OF REPRESENTATIVE

³ Given the two-vote margin in the election, we do not rely on the hearing officer's reliance on the facts that the remark was heard by, at most, one employee and was not disseminated to other eligible voters.

⁴ In contrast to *NLRB v. Silverman's Men's Wear, Inc.*, 656 F.2d 53 (3d Cir. 1981), the Region here conducted a formal evidentiary hearing on the Employer's election objections. The evidence adduced at the hearing easily distinguishes this case from *Silverman's*. There, the Board had assumed, without a hearing, that an alleged anti-Semitic reference to a company official, made by a union officer at a campaign meeting of approximately 20 employees, could not warrant setting aside the election, even if proven. The remark here occurred in circumstances far less likely to produce an "effective appeal to racial or religious prejudice." 656 F.2d at 58.

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.

Dated, Washington, D.C., February 27, 2013.

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NEWARK PORTFOLIO JV, LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

Case No. _____

NLRB Case No. 22-CA-100534

CERTIFICATE OF SERVICE

I certify that, on Thursday, June 25, 2015, I caused the petition for review in the above matter and this certificate of service to be filed with the Court by hand delivery. I further certify that I caused a copy of the documents to be served on the same day by hand delivery upon the following:

Raymond G. Heineman, Esq.
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Attorneys for Laborers International Union of North America Local 55


James J. La Rocca

DATED: June 25, 2015

HAND DELIVERY

FIRST CLASS MAIL

GIBBONS

GIBBONS P.C.
1700 TWO LOGAN SQUARE
18TH & ARCH STREETS
PHILADELPHIA, PA 19103-2769

TO:

Ms. Marcia M. Waldron
Office of the Clerk
United States Court of Appeals for the
Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

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Case: 15-00000 Document: 00-1

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