

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

RHINO NORTHWEST, LLC,	)
	)
Petitioner,	)
	)
v.	)
	)
NATIONAL LABOR	)
RELATIONS BOARD,	)
	)
Respondent.	)

**PETITION FOR REVIEW**

Rhino Northwest, LLC (“Petitioner”) hereby petitions the Court for review of the Order of the National Labor Relations Board, named Responded herein, entered on December 17, 2015, Case 19-CA-160205, and attached as Exhibit A. In support of this Petition for Review, Petitioner states:

1. The Board’s “Decision and Order” is a final order within the meaning of Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f), and Petitioner is a party aggrieved by said order.
2. Petitioner transacts business within this judicial circuit in accordance with the meaning of Section 10(f), and this Court has jurisdiction over this cause.
3. The Board’s “Decision and Order” against Petitioner is not supported by substantial evidence and is contrary to law.

WHEREFORE, Petitioner Rhino Northwest, LLC respectfully prays that this Court review and set aside the Board's order, and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,  
SMOAK & STEWART, P.C.

/s/ Mark N. Mallery

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Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I certify that a copy of the above and foregoing Petition for Review was served on the following counsel of record via first class mail, properly addressed and postage prepaid:

Anne P. Pomerantz, Esq.  
Counsel for the General Counsel  
National Labor Relations Board  
Region 19  
2948 Jackson Federal Building  
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Attorney for Respondent

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Seattle, WA 98119

Attorney for IATSE Local 15

This 30<sup>th</sup> day of December, 2015

/s/ Mark N. Mallery

# **EXHIBIT**

**A**

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.

**Rhino Northwest, LLC and Local No. 15, International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO, CLC.** Case 19-CA-160205

December 17, 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 on September 17, 2015, by Local No. 15, International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC (the Union), the General Counsel issued the complaint on October 1, 2015, alleging that Rhino Northwest, LLC (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain following the Union's certification in Case 19-RC-152947. (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 October 21, 2015, the General Counsel filed a Motion for Summary Judgment. On October 23, 2015, 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.

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 certification of representative on the basis of its contention, raised and rejected in the underlying representation proceeding, that the certified bargaining unit is inappropriate. In addition, as an affirmative defense in its answer to the complaint, the Respondent raises for the first time the argument that *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enfd. sub. nom. *Kindred Nursing*

*Center East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), which was relied on by the Regional Director in making the unit determination, was decided at a time when the Board did not have a constitutional majority.<sup>1</sup>

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.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a State of Arizona limited liability corporation with an office and place of business in Fife, Washington (the facility), is engaged in the business of providing event labor staffing services.

In conducting its business operations during the 12-month period preceding issuance of the complaint, a representative period, the Respondent derived gross revenues in excess of \$500,000 and provided services valued in excess of \$50,000 to customers located in states other than the State of Washington.

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 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the representation election held by mail ballot, in which the ballots were mailed to voters on June 26, 2015, and counted on July 17, 2015, the Union was certified on August 3, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time riggers, including boom lift riggers, ballroom riggers, decorating riggers, down riggers, ETCP high riggers, fly operators, head

<sup>1</sup> Contrary to the Respondent's argument, *Specialty Healthcare* was decided at a time when the Board had a valid quorum. See *Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812 (D.C. Cir. 2014) ("[T]he President's recess appointment of Member Becker . . . was constitutionally valid."); *Gestamp South Carolina, L.L.C. v. NLRB*, 769 F.3d 254, 257-258 (4th Cir. 2014) (same).



riggers, head fly operators, high riggers, high rigger trainees, high rigger welders, installation riggers, roof operators, roof supervisors, and rigging trainees, employed by the Employer out of its Fife, Washington, facility, excluding all other employees, guards and supervisors as defined in the National Labor Relations 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 emails dated August 5, 7, and 13, 2015, the Union requested that the Respondent meet and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit employees.

Since August 17, 2015, the Respondent has failed and refused to recognize and bargain with the Union.

We find that the Respondent's conduct 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 August 17, 2015, 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. 1964), cert. denied 379 U.S. 817 (1964).

#### ORDER

The National Labor Relations Board orders that the Respondent, Rhino Northwest, LLC, Fife, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local No. 15, International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC 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 on 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 riggers, including boom lift riggers, ballroom riggers, decorating riggers, down riggers, ETCP high riggers, fly operators, head riggers, head fly operators, high riggers, high rigger trainees, high rigger welders, installation riggers, roof operators, roof supervisors, and rigging trainees, employed by the Employer out of its Fife, Washington, facility, excluding all other employees, guards and supervisors as defined in the National Labor Relations Act.

(b) Within 14 days after service by the Region, post at its facility in Fife, Washington, copies of the attached notice marked "Appendix."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 19, 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. If 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 em-

<sup>2</sup> 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."

RHINO NORTHWEST, LLC

employees and former employees employed by the Respondent at any time since August 17, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 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. December 17, 2015

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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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 Local No. 15, International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC 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 riggers, including boom lift riggers, ballroom riggers, decorating riggers, down riggers, ETCP high riggers, fly operators, head riggers, head fly operators, high riggers, high rigger trainees, high rigger welders, installation riggers, roof operators, roof supervisors, and rigging trainees, employed by the Employer out of its Fife, Washington, facility, excluding all other employees, guards and supervisors as defined in the National Labor Relations Act.

RHINO NORTHWEST, LLC

The Board's decision can be found at [www.nlr.gov/case/19-CA-160205](http://www.nlr.gov/case/19-CA-160205) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

