

**UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD**

BRUNSWICK BOWLING PRODUCTS, LLC,

Employer,

and

SCOTT A. COOLEY,

Petitioner,

and

DISTRICT LODGE 60, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO,

Union.

Case 07-RD-169464

**REQUEST FOR REVIEW OF
REGIONAL DIRECTOR'S
DECISION AND ORDER**

I. INTRODUCTION & BACKGROUND

This Request for Review is submitted in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations. This is an Appeal from the Regional Director's Decision and Order dated March 4, 2016.

On February 11, 2016, the Petitioner filed a petition seeking to decertify the Union. The Employer and the Union have negotiated a series of collective bargaining agreements, including a Contract Extension Agreement that expired on January 8, 2016. (**Joint Exhibit 2**) Before the Union and the Employer executed a successor collective bargaining agreement on January 27 and 28, 2016, respectively, the Petitioner obtained a petition form from the NLRB's website, collected employee signatures, and mailed the Showing of Interest to the Employer and Region 7 on or about January 15, 2016. When the Petitioner subsequently learned that the Region did not receive the Showing of Interest, he contacted the NLRB and was advised of the proper method to file a decertification petition. He then filed the instant petition.

In its Statement of Position, the Union asserts that the instant petition is barred by the current collective bargaining agreement. Notably, however, the Union's Statement of Position was not timely and should have been precluded under Sections 102.63(b)(3) and 102.66(d), respectively, as the Union did not serve it upon the Employer and the Petitioner until 3:20 p.m. on the business day before the hearing (February 19, 2016).

Contrary to Section 102.66(d)'s clear preclusion of the Union's untimely Statement of Position, the Regional Director received it into evidence. Paradoxically, the Regional Director did not extend the same latitude to the Petitioner's good faith efforts to file a decertification petition before the current collective bargaining agreement was executed and instead concluded that the current agreement bars his petition. This inequitable treatment is particularly objectionable given that, unlike the pro se Petitioner, the Union is represented by legal counsel, should be familiar with the NLRB's Rules and Regulations and was specifically informed in the Notice of Representation Hearing of the very rule and deadline with which it failed to comply. Accordingly, the Employer respectfully requests that the Board: review and reverse the Regional Director's Decision and Order; find that Section 102.66(d) precludes the Union's untimely Statement of Position from consideration; and find that the current agreement does not bar the instant decertification petition in light of the Petitioner's good faith efforts to file the petition prior to the agreement's execution.

II. ARGUMENT

A. The Union Should Be Precluded from Raising the Issues Presented in Its Untimely Statement of Position

Because the Union did not serve its Statement of Position upon the Employer and the Petitioner until 3:20 p.m. on the business day before the hearing (February 19, 2016), the Regional Director should have precluded the statement and its assertions from consideration at

the hearing. The NLRB's Rules and Regulations require that "the employer and the certified or recognized representative of employees shall file with the regional director and serve on the parties named in the petition their respective Statements of Position such that they are received by the regional director and the parties named in the petition by the date and time specified in the notice of hearing, which shall be at noon on the business day before the opening of the hearing." 29 C.F.R. § 102.63(b)(3). The Notice of Representation Hearing in this matter specified that the parties were required to file and serve their Statements of Position by noon on February 19, 2016. Under the Rules, "[a] party *shall* be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its *timely* Statement of Position." 29 C.F.R. § 102.66(d) (emphasis added).

Other Regional Directors have concluded that these rules are unequivocal and binding. *See Oregon Shakespeare Festival Assoc'n and Int'l Alliance of Theatrical Stage Employees*, No. 19-RC-150979, 2015 NLRB Reg. Dir. Dec. LEXIS 98, *2-3 (May 29, 2015) (precluding petitioner's untimely argument because "I am bound by 29 C.F.R. 102.66(d)"); *Rock Solid Concepts, Inc. and Enrique Herrera and Laborers' Int'l Union of N. America Local 220*, No. 31-RD-152976, 2015 NLRB Reg. Dir. Dec. LEXIS 114, *2-3 (June 25, 2015) (affirming decision to preclude union from raising issues contained in its statements of position because it failed to timely serve them on petitioner); *see also Employer's Request for Special Permission to File An Emergency Appeal to the Board, Sysco Foods of Central PA and Teamsters Local 776*, at *1 (Nov. 27, 2015), *available at* <http://apps.nlr.gov/link/document.aspx/09031d4581eec78e> (requesting permission to appeal the acting Regional Director's determination that employer's statement of position was untimely because it was filed two minutes too late). As such, the

Union's untimely Statement of Position and its arguments should have been precluded from consideration at the hearing.

Contrary to Section 102.66(d)'s clear preclusion of the Union's untimely Statement of Position, the Regional Director received it into evidence, finding that the three hour and 20 minute delay "was not particularly significant given the Statement of Position by the Union was submitted on a Friday and the hearing was on a Monday." The Regional Director concluded that there was a "very low likelihood that the other parties were harmed by such delay or unfairly disadvantaged at the hearing," as "neither the Employer nor Petitioner indicated that they were unable to prepare a response to the Union's position as a result of the delay." According to the Regional Director, "receiving the Union's Statement of Position in this matter, which was filed enough in advance to provide notice to the other parties and to make clear before the hearing the issue at hand, would not frustrate the intent of this requirement under the Board's new Rules."

This conclusion indicates that one party's noncompliance with the NLRB's procedural rules is excused unless the other parties can demonstrate that they were harmed by the noncompliance. Notably, this "show-harm" standard was previously rejected with respect to the NLRB's rule that employers exercise reasonable diligence to provide a comprehensive list of all available contact information for employees, where "reasonable diligence" was interpreted to require searching all employee and applicant databases and separate departmental directories. *See Danbury Hosp. of the W. Conn. Health Network and AFT Conn.*, 2015 NLRB Reg. Dir. Dec. LEXIS 209, at*3-*5, *7-*8 (Oct. 16, 2015) ("[N]othing in *Excelsior* or the Final Rule requires a petitioner to show it was prejudiced by the Employer's failure to provide complete employee contact information.").

B. Leniency Should Be Extended to the Pro Se Petitioner's Good Faith Efforts to File the Instant Decertification Petition

Moreover, the Regional Director did not apply the same “show-harm” standard in considering the Petitioner’s efforts to file a decertification petition. Instead, the Regional Director summarily rejected the argument that the contract bar can be overcome by a Petitioner’s “claimed error or ignorance” with respect to the NLRB’s processes and procedures. In support of this conclusion, the Regional Director noted that the Petitioner had “some awareness of the Act and the NLRB’s website, which fully describes the procedures and requirements for filing decertification petitions.”

This hard line position with respect to the pro se Petitioner’s good faith efforts to file a decertification petition is inappropriate on multiple levels. First and foremost, it stands in marked contrast to the latitude extended to the Union in the very same Decision and Order. This disparate treatment between the parties is particularly objectionable given that the Union is represented by legal counsel, should be familiar with the NLRB’s Rules and Regulations, and was specifically informed in the Notice of Representation Hearing of the very rule and deadline with which it failed to comply.

A decertification petition may proceed to election despite some technical deficiencies under the rules. *See TGC, LLC d/b/a Golf Channel and John B. Galagher and Int’l Alliance of Theatrical Stage Employees*, No. 10-RD-154113, 2015 NLRB Reg. Dir. Dec. LEXIS 124, *6 (July 6, 2015). In *TGC*, the Regional Director opined as follows: “Given the newness of the rules, the confusing instructions and his inexperience in filing petitions, it is quite understandable as to the Petitioner’s failures. Accordingly, I find he made a good faith effort to comply with the rules.” *Id.* at *12. Despite this precedent, and the show-harm standard applied to the Union’s procedural noncompliance, the Regional Director declined to show any leniency to the pro se

Petitioner's good faith efforts to file the instant decertification petition. The purpose of the National Labor Relations Act is "to protect the rights of individual employees and their relations with labor organizations." 29 USC § 141(b). The purpose of the Act is not effected by this inequitable decision.

III. CONCLUSION

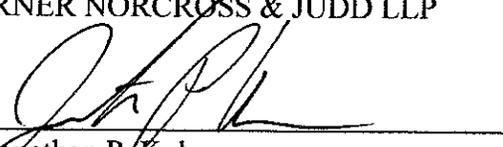
For the reasons set forth above, it is Employer's position that the Regional Director's Decision and Order departs from the NLRB's Rules and Regulations, as well as the precedent set by other Regional Director's decisions. Moreover, it inequitably holds the pro se Petitioner to a higher standard of procedural compliance than that required of the Union and its lawyers. Accordingly, the Employer respectfully requests that the Board: review and reverse the Regional Director's Decision and Order; find that Section 102.66(d) precludes the Union's untimely Statement of Position from consideration; and find that the current agreement does not bar the instant decertification petition in light of the Petitioner's good faith efforts to file the petition prior to the agreement's execution.

DATED: March 17, 2016

Respectfully submitted,

WARNER NORCROSS & JUDD LLP

By


Jonathan P. Kok

Business Address:
900 Fifth Third Center
111 Lyon St., NW
Grand Rapids, Michigan 49503
Attorneys for Employer