

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

**LOCAL 340, NEW YORK NEW JERSEY REGIONAL
JOINT BOARD**

and

Case No. 02-CB-069460

**BROOKS BROTHERS, A DIVISION OF RETAIL
BRAND ALLIANCE, INC.**

**MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION FOR SUMMARY
JUDGMENT AND IN SUPPORT OF THE REQUEST FOR RECONSIDERATION OF
THE BOARD'S DENIAL OF RESPONDENT'S REQUEST FOR REVIEW**

Pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Relations Board, the New York New Jersey Regional Joint Board, (herein, the "Joint Board" or "Respondent"), submits this memorandum of law in support of its Opposition to the Petition for Summary Judgment and in support of its Request for Reconsideration of the Boards' denial of its Request for Review in Case No. 02-UC-062745. Special circumstances exist making it proper and just for the National Labor Relations Board, (herein, the "Board") to reconsider its denial of the Request for Review and to deny the General Counsel's petition.

FACTS

As of the last day of the hearing in Case No. 02-UC-062745, the Petitioner, Brooks Brothers, a Division of Retail Brand Alliance, Inc., (herein, "Brooks Bros."), had not completed production of documents the Joint Board subpoenaed for the hearing. The Region adjourned the hearing pending Brooks Bros' production of the subpoenaed documents. The Regional Director denied the Respondents' request for further hearing days closed the hearing, and ordered that twenty-one (21) documents marked as Union Exhibits 40 through 60 be entered in the record.

(Murray Dec. ¶ 3.) During Region 2’s investigation of the Joint Board’s unfair labor practices in Case No. 02-CA-063650, the investigating agent advised the Joint Board that one of the exhibits the Regional Director ordered entered into the record, Exhibit 52, was not in the record. (Murray Dec. ¶¶ 4-5.) After the Joint Board wrote to the Regional Director expressing his concern that the Region failed to enter Exhibits 40-60 in the record, the investigating agent advised it that she was mistaken and the document had been entered in the record. (Murray Dec. ¶¶ 6, 8.) Pursuant to a FOIA request, the Joint Board discovered, on October 25, 2016, that Union Exhibits 40-60 in Case No. 02-UC-062745 had never been entered into the record. (Murray Dec. ¶¶ 9-10.)

At the unit clarification hearing, the Joint Board subpoenaed various emails. Brooks Bros. averred that the emails for every person subpoenaed had been deleted. The hearing officer found that the emails for at least one of the individuals had been deleted after the subpoena issued. He stated:

With respect to paragraphs 3 and 6, by letter dated June 24, 2013, the Union asserts that the documents provided by the Employer are not sufficient inasmuch as it appears that emails from manager David Warren were deleted by him and were not produced. In support of this contention, the Union attached an email dated April 9, 2013,¹ from Warren to another employee at Brooks Brothers which stated, in part: “Unfortunately, I just cleaned out my store files because my mailbox was full.” . . .

. . .

The submission by the Union indicates that Subpoena Duces Tecum No. B-707258 was served upon the Employer on March 7, 2013, and that the Employer provided responsive documents, i.e. emails, to the Union on June 11, 2013. The earliest email produced from Warren is dated March 1, 2013. Email correspondence between the parties dated April 19, 2013, further show that similar emails were produced by the Employer for the period January and February 2013, as well as a few emails in 2011 and 2012, including an email from Warren, dated August 22, 2012. Thus, I would agree with the Union that it is likely that all the relevant emails that once existed prior to January 2013 were not produced and were probably deleted by the representatives of the Employer in the

¹ Warren’s email is in the record as Union Ex. 52.

normal course of business.

(RD Ruling 7-23-13, p. 5.) Despite this flagrant destruction of relevant evidence after it was subpoenaed, the hearing officer ruled “that the Employer made reasonable efforts to comply with the documents sought in paragraphs 3-6 in Subpoena Duces Tecum No. B-707258.

Before the Board’s denial of the Joint Board’s Request for Review, the Joint Board demanded recognition at the store at 1180 Madison Avenue based on it having obtained majority support, and it has pursued such recognition at all material times. (Answer, ¶ 14.)

ARGUMENT

A. **Special Circumstances Warrant the Board to Reconsider its Denial of the Joint Board’s Request for Review**

A party in an unfair labor practice proceeding is not barred from raising issues previously determined by the Board in prior representation case where there is newly discovered and previously unavailable evidence, or special circumstances that would require the Board to reexamine the decision made in the representation proceeding. See Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 161-62 (1941); Warren Unilube, Inc., 357 N.L.R.B. 44 (2011).

Special circumstances exist in this case that warrant the Board reconsidering its denial of the Joint Board’s Request for Review and for denying the General Counsel’s Petition for Summary Judgment. First, the Region failed to admit 21 exhibits into the record. Second, a decision of the Court of Appeals for the District of Columbia issued after the Joint Board filed its Request for Review that the Board failed to address.

1. **The Failure of the Region to Admit Evidence in the Record is a Special Circumstance Requiring the Board to Reconsider its Denial of the Request for Review**

Special circumstances exist requiring the Board to reconsider its decision in the

underlying unit clarification decision inasmuch as the Region failed to entered twenty-one exhibits into the record after the Regional Director issued an order denying the Joint Board's motion for further hearing days and ordering that the exhibits be entered in the record after the last hearing day. (Murray Dec. ¶¶ 9-10.) The failure of the Region to enter the 21 exhibits into the record is a particularly egregious error, especially where, as here, the Regional Director refused the Joint Board's motion for additional hearing days in which to question witnesses about the documents. "[T]here is a heavy burden on a party seeking to prove 'accretion' to show that the group sought to be added to an existing unit is an 'accretion' within the meaning of the Boards long-standing use of that term," Rice Food Markets, 255 N.L.R.B. 884, 887 (1981). Where, as here, the burden of proof fell on the Joint Board, but nearly all of the relevant evidence was in the possession of Brooks Bros, the Region's failure to enter evidence into the record and its failure to sanction Brooks Bros for its flagrant destruction of evidence, denied the Joint Board basic due process rights.

This case presents the special circumstances that warrant the Board reconsidering its Denial of the Request for Review. The Supreme Court described the circumstance under which it would not permit relitigation of issues in an unfair labor practice case that were decided in a representation case. It said:

[T]he Board ruled that in the unit proceeding the Company and the Crystal City Union were given full opportunity to present such evidence, and in the present proceeding neither of them had indicated that the proof sought to be admitted related to evidence unavailable at, discovered since, or not introduced in, the unit hearing. The full justification for this ruling by the Board becomes clear only after an examination of the record in the unit proceeding, which under § 9 (d) of the Act is part of the record here.

Pittsburgh Plate Glass Co., 313 U.S. at 161-62 (emphasis added). Here, not only was the Joint Board prevented from questioning witnesses about the documents that the Regional Director

ordered be entered into the record, the exhibits were never in fact entered into the record. Thus, the Joint Board was “not given a full opportunity to present [the] evidence” it wished to at the hearing. Id.

In addition, the Joint Board’s brief submitted at the close of hearing and in its Request for Review to the Board relied heavily on many of these exhibits, in the mistaken belief that the writer of the unit clarification decision and the Board on review would have access to these exhibits. A careful reading of the Regional Director’s decision, however, strongly suggests these documents were never considered because there is no discussion of them in the decision or any indication that the arguments were even considered. Because the exhibits were never entered into the NxGen, the Board also had no access to these documents, even though the Joint Board cited some of them in its Request for Review.

2. The Failure of the Board to Consider and Respond to a Court of Appeals Decision Issued After the Joint Board Submitted its Request for Review is a Special Circumstance Warranting the Board’s Reconsideration of its Denial of the Request for Review

The Board has found special circumstances exist where it has failed to consider and respond in circumstances where a party has presented arguments based on criticism of the Board’s decision from the courts of appeals. St. Francis Hosp., 271 N.L.R.B. 948, 948 (1984). There, the Board said “[w]e recognize that the arguments presented by the Respondent warrant a more complete response than we have given up to this point, particularly with regard to the criticisms directed at the Board from the courts of appeals.” Id.

In this case, after the Joint Board filed its Request for Review, the Court of Appeals for the District of Columbia issued a decision in Ozark Auto. Distribs. v. NLRB, 779 F.3d 576, 585 (D.C. Cir. 2015) that was highly critical of the Board’s decision revoking subpoenas for relevant

documents. There, the court vacated a Board order in a representation case because the Board's quashing of an employer's subpoena's was prejudicial error. By letter to the Executive Secretary, dated May 20, 2015, the Joint Board brought this case to the Board's attention. Nevertheless, the Board denied the Request to Review without discussing or mentioning this case at all. Therefore, special circumstances exist.

In this case, the Regional Director improperly denied Respondent's request for enforcement of subpoenas in the unit clarification proceeding, thus denying Respondent the opportunity to litigate all representation issues at the hearing, and failed to permit additional hearing days to permit the Joint Board to recall witnesses who had earlier testified before Brooks Bros produced the documents. The Regional Director had earlier denied Brooks Bros.' petition to revoke the Union's subpoenas of emails, finding that the emails were relevant. The Employer thereafter advised the hearing officer that all or nearly all emails from the relevant period were deleted. It produced one email from a witness, David Warren, whose emails the Union subpoenaed, in which Warren advised another employee that he deleted his emails. Warren wrote this email one month after the Union subpoenaed the emails. The Hearing Officer ruled that, despite the evidence that Warren destroyed evidence after it was subpoenaed, the Employer made a good faith effort to comply and that it was his "judgment that it is improbable that any deleted emails would yield probative evidence and therefore that any expense incurred by the Employer to hire a contractor to attempt restoration of such emails would not be justified." (RD Ruling 7-23-13, p. 6.)² Similarly improper was the Regional Director's failure, as described above, to permit the Joint Board to recall witnesses to question them regarding the documents

² This citation refers to the hearing officers 7-23-13 ruling concerning the Union's Request for Subpoena Enforcement.

produced after the last day of hearing.

The court in Ozark Auto forcefully rejected a similar argument by the Board in that case. It found that the failure to produce relevant documents was prejudicial because there could be no certainty “what the [subpoenaed] documents would have revealed if” they had been produced. 779 F.3d at 585. One of the ways the court identified that the employer in Ozark Auto was prejudiced was that it was deprived of the incentive of a hostile witness to testify truthfully. It said:

As experienced trial attorneys know, when a hostile witness realizes that examining counsel has information bearing on the answers to counsel's questions, the witness tends to be more candid. Here, the company was deprived of this incentive for truthful and complete testimony.

Id. Here, nearly all the witnesses the Union called were hostile witnesses as it was an accretion case and the evidence was almost entirely in the control and possession of Employer agents. Thus, the Union was prejudiced in that it was deprived of the incentive that the Employer’s agents would testify truthfully and completely.

Because the Union was severely prejudiced by the Regional Director’s rulings, and the DC Circuit forcefully rejected the Board’s rulings denying a party’s right to subpoenaed information, the Board here should grant the Request for Review and overrule the Order in the Unit Clarification.

B. Because the Joint Board has Lawfully Demanded Recognition at all Material Times, Summary Judgment is Improper

Respondent has been seeking recognition based on majority status since a time prior to the Board’s issuance of its decision denying Respondent’s Request for Review. Since at all material times Respondent has had a lawful basis to demand recognition from the Charging Party, it is not in violation of the Act. Wright Line, 251 N.L.R.B. 1083 (1980).

The Board applies a Wright Line analysis in Section 8(b)(1)(A) and (2) cases. See Teamsters Local 515, 259 N.L.R.B. 678, 683-684 (1981). There, the Board applied Wright Line in a case where a union filed a grievance that adversely affected an employee. Id. Here, the Joint Board secured majority support prior to the Board's denial of the Request for Review and filed a grievance and demand for arbitration seeking to have the arbitrator verify whether the Joint Board can establish majority support. The General Counsel wrongly argues that this is irrelevant because the Joint Board is incorrectly interpreting the collective bargaining agreement. The issue is not whether the arbitrator will agree with the Joint Board, but whether the Joint Board is lawfully pursuing arbitration of its claim of majority support. The General Counsel does not dispute that Joint Board's demand to arbitrate the issue of majority support is lawful. Therefore, summary judgment at this time is inappropriate.

C. Summary Judgment Should not be Granted Because the Board Departed From Established Precedent in its Unit Clarification Decision Without a Reasoned Justification for Doing So

As more fully described in the Joint Board's Request for Review, the Board failed to provide a reasoned justification for its decision to depart from established precedent. Courts of Appeals will vacate Board orders where the Board departs from established precedent without any reasoned justification. E.I. Du Pont De Nemours & Co. v. NLRB, 682 F.3d 65, 67 (D.C. Cir. 2012). The Board has recognized that Courts are unlikely to enforce Board orders where there is inconsistent precedent. See Harborside Healthcare, Inc., 343 N.L.R.B. 906 (2004)(Board clarified inconsistent Board precedent on remand from the Sixth Circuit). Indeed, the Board has harmonized inconsistent precedent where it has developed, not created new inconsistencies. See In Re Kolkka, 335 N.L.R.B. 844, 851, n. 9 (2001)("In these circumstances, it is entirely appropriate that we overrule these cases in the interest of consistency and coherence of Board

precedent.”); O.E. Butterfield, Inc., 319 N.L.R.B. 1004, 1006 (1995)(“We believe that the time has come to put an end to this inconsistency in our case law [between representation and unfair labor practice cases] and to adopt a single standard to be applied uniformly in all Board proceedings in which the question arises whether a replacement for an economic striker is temporary or permanent.”)

The Regional Director here departed from established Board precedent when she rejected the “Union’s argument that only conditions existing at the time of the Union’s demand for recognition should be relied upon in determining accretion,” and when she distinguished those cases because those cases arose in the ULP context and not a unit clarification. (RD Dec., p. 35, and fn. 11).³ This holding departed from Board precedent established in Gould, Inc., 263 N.L.R.B. 442, 446 (1982); Ready Mix USA, Inc., 340 N.L.R.B. 946, 954 (2003); Brooklyn Hospital Center, 309 N.L.R.B. 1163 (1992), GHR Energy Corp., 294 N.L.R.B. 1011, 1052 fn. 37 (1989); Progressive Serv. Die Co., Dist. No. 9, 323 N.L.R.B. 183, 187 (1997); Frontier Tel. of Rochester, Inc., 344 N.L.R.B. 1270, 1279, n.8 (2005), and therefore creates inconsistent precedent.

“The Board has continued to affirm a longstanding concept that ‘the issue of whether a group of employees constituted an accretion to an existing bargaining unit must be determined on the facts that existed on the date of the union’s demand.’” Ready Mix USA, Inc., 340 N.L.R.B. 946, 954 (2003); Brooklyn Hospital Center, 309 N.L.R.B. 1163 (1992), GHR Energy Corp., 294 N.L.R.B. 1011, 1052 fn. 37 (1989); Gould, Inc., 263 N.L.R.B. 442, 446 (1982).

³ References to the Regional Director’s decision shall be cited as “RD Dec.” followed by the relevant page number.

The Regional Director departed from established Board precedent when she found “that when temporary transfers occur in the context of a new store opening they are afforded little weight,” and “that the temporary assignment of unit employees on a part-time basis to 1180 Madison during the brief period around the opening of that store is insufficient to demonstrate employee interchange at a level which would weigh in favor of accretion.” (RD Dec. p. 33.) This finding departs from Gould, Inc., 263 N.L.R.B. 442 (1982), and its progeny, as well as Frontier Telephone, 344 N.L.R.B. 1270 (2005).

The Regional Director also departed from established Board precedent when she failed to grant the Unions’ motion to dismiss with respect to the Local 25 unit in the Employer’s Alterations Department. The Regional Director did not address the Unions’ arguments in her Decision that, with respect to functionally described units, accretion principals do not apply in unit clarification proceedings. (RD Dec. p. 37.) In failing to grant the motion to dismiss, the Regional Director departed from Board precedent in John P. Scripps Newspaper Corp., 329 N.L.R.B. 854, 859 (1999).

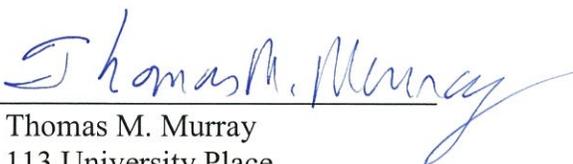
CONCLUSION

For all of the above reasons, the Board should deny the General Counsel's Petition for Summary Judgment and grant the Joint Board's Petition for Reconsideration of the Board's Denial of the Request for Review of the decision in Case No. 02-UC-062745. The Board should enter Union Exhibits 40 through 60 into the record. Finally, the Board should reverse the Regional Director and find that the store at 1180 Madison Avenue was accreted to the Local 340 and Local 25 bargaining units.

Dated: New York, New York
November 3, 2016

Respectfully submitted,

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