



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

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November 17, 2016

Hon. Gary Shinnars, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Re: Local 340, New York New Jersey Regional
Joint Board (Brooks Brothers, A Division of Retail
Brand Alliance),
Case No. 02-CB-069460

Dear Mr. Shinnars,

Pursuant to the Office of the Executive Secretary's November 14, 2016 letter, Counsel for the General Counsel submits this limited response to Respondent's Opposition to Petition for Summary Judgment and Request for Reconsideration of the Board's Denial of Respondent's Request for Review, hereafter the Opposition, filed on November 4, 2016 pursuant to the Board's Order to Show Cause, issued September 29, 2016. In submitting this response, Counsel for the General Counsel addresses arguments made by Respondent in its Opposition only to the extent those arguments may be intended to oppose Counsel for the General Counsel's Motion for Summary Judgment in the instant matter, hereafter General Counsel's Motion. Counsel for the General Counsel takes no position regarding Respondent's Request for Reconsideration of the Board's denial of its request for review of the Regional Director's unit clarification decision in a related unit clarification case (02-UC-062745).

In the Opposition, Respondent's Counsel asserts that "[s]pecial circumstances exist requiring the Board to reconsider its decision in the underlying unit clarification decision [in 02-UC-062745] inasmuch as the Region failed to entered [sic] twenty-one [sic] 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." As discussed below, that assertion is in error. Moreover, to the extent Respondent takes the position that this argument raises a genuine issue of material fact as to whether its attempt to enforce an Arbitration Award contrary to the Regional Director's unit clarification decision was in contravention of a final Board Order, as alleged in the Complaint in the instant matter, that argument must fail. See General Counsel's Motion, Exhibit C (Complaint).

As correctly described in Respondent Counsel Thomas Murray's Declaration attached to the Opposition, herein the Declaration, Board Agent Rachel Feinberg initially informed Mr. Murray via email that certain documents referenced in a position statement submitted by Local 340, New York New Jersey Regional Joint Board (the Union) in a related matter, which were exhibits in the underlying unit clarification proceeding in 02-UC-062745, could not be located in the Agency's internal database. However, after further internal inquiry, Ms. Feinberg discovered that the exhibits referenced were part of a collection of exhibits (Union Exhibits 40-60) that were in fact entered into the record in the unit clarification case by Order of the Hearing Officer issued on October 25, 2013 (see the Declaration, Exhibit A (Hearing Officer's Order)), many months after the last day of the hearing. The documents had not been located in Ms. Feinberg's initial search of the electronic case file because they were mislabeled. That the documents were considered is self-evident from the findings contained in the Regional Director's unit clarification decision which necessarily relied on those documents. See General Counsel's Motion, Exhibit F (Clarification Decision).¹ As noted by Mr. Murray, Board Agent Feinberg assured him that Exhibits 40 through 60 has been located in the electronic file and considered in the preparation of the Regional Director's decision.

Respondent Counsel Murray's subsequent communications with the Agency's FOIA Office are not to the contrary. Thus, the FOIA Office's October 25, 2016 response to Mr. Murray's inquiry stated that "Union Exhibits 40-60 are not located in NxGen." (See the Declaration, Exhibit B (October 25, 2016 email from FOIA Office).) Presumably, the FOIA Office encountered the same difficulty faced by Board Agent Feinberg in its search for Union Exhibits 40 through 60.

Whether the Board in fact located Union Exhibits 40 through 60 in the electronic case file when it denied Respondent's Request for Review of the Regional Director's unit clarification decision on September 21, 2015 cannot undermine the finality of the Board's decision. Thus, under Section 102.67(d) of the Board's Rules and Regulations, "[t]he Board will grant a request for review only where compelling reasons exist therefor." Here, the Board denied Respondent's Request for Review of the unit clarification decision on the grounds that "it raises no substantial issues warranting review." (See General Counsel's Motion, Exhibit G (Board Order).) While Section 102.67(d)(3) recognizes, as a grounds on which review may be granted, "[t]hat the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party," the Board's denial of Respondent's Request for Review makes clear that Respondent failed to persuade the Board that any such prejudicially erroneous finding of fact occurred.² Respondent's Opposition is likewise unavailing in this

¹Specifically, footnote 3 of the Regional Director's decision states that "[a]s reviewed further below, payroll record show that Local 340 unit members made up a majority of employees at the store only during one or two days of the first week of 1180 Madison's operations." *Id.* at 4-5 & fn. 3. Union Exhibit 40, as described in the Hearing Officer's Order admitting it into evidence, is a printout containing the date of hire for all employees hired for the date the store opened and their weekly paid hours. See the Declaration, Exhibit A (Hearing Officer's Order) at 2-3 & fn. 3. Thus, the Regional Director necessarily relied on it in finding that Union members working at the store constituted a majority of all employees employed at the store only in the first week of operations.

²Counsel for the General Counsel notes that Respondent's Request for Review cited only four of the twenty one exhibits at issue here (Union Exhibits 40, 41, 49 and 52). Had the Board deemed it necessary, based on Respondent's arguments in that regard, to review them *de novo*, the Board presumably either would have found them in the Agency's electronic database or, failing to do so, would have contacted the Region for assistance in locating them.

regard, not least because the Board's affirmance of the Regional Director's unit clarification decision precludes relitigation of issues decided therein in any related subsequent unfair labor practice proceeding. See Board's Rules and Regulations, Section 102.67(g).

As Respondent Counsel cannot disturb the finality of the Regional Director's unit clarification decision adopted by the Board on September 21, 2015, Respondent's admitted pursuit of enforcement of an Arbitrator's Award inconsistent with the unit clarification decision after it became final is unlawful as a matter of law. Respondent has failed to raise any genuine issue of material fact that would warrant a denial of Counsel for the General Counsel's Motion for Summary Judgment.

Very truly yours,



Rachel F. Feinberg
Counsel for the General Counsel

Cc:

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

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

Respondent,

And

Cases 02-CB-069460

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

Charging Party.

**AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S LIMITED
REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR SUMMARY JUDGEMENT**

I, the undersigned employee of the National Labor Relations Board, being duly sworn and deposed, say that on the date indicated below, I served the above-entitled document by **electronic mail** upon the following persons, addressed to them at the following addresses:

By E-File

Hon. Gary Shinnars, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington DC 20570

By Electronic Mail

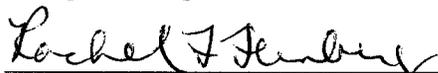
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Subscribed and Sworn to this:
17th day of November, 2016

Designated Agent:


National Labor Relations Board