

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

SCHWARZ PARTNERS PACKAGING, LLC d/b/a MAXPAK,  and,  UNITED STEELWORKERS INTERNATIONAL UNION.		Case No: 12-CA-109207  <b>MAXPAK'S RESPONSE TO REQUEST FOR STATEMENT OF POSITION</b>
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I. INTRODUCTION

Respondent Schwarz Partners Packaging, LLC d/b/a MaxPak ("MaxPak") did not unlawfully refuse to bargain with Charging Party United Steelworkers International Union ("Union"). The National Labor Relations Board's ("NLRB") initial decision against MaxPak was based solely on an alleged waiver. NLRB has now admitted that its waiver decision was incorrect, which resulted in this remand.

The Union was never lawfully certified. NLRB did not have a quorum at the relevant times in this case. Accordingly, NLRB could not set aside MaxPak's victory in the initial election or direct a second election as it improperly attempted to do on August 29, 2012. Nor could NLRB certify the Union on November 6, 2012 because that action necessarily required a lawful avoidance of MaxPak's victory in the first election. And NLRB did not have a quorum on November 6, 2012 to certify the Union in any event.<sup>1</sup>

The complaint in this case was unlawfully issued and should be dismissed for this reason as well. NLRB v. SW General, Inc. -- S. Ct. --, 2017 WL 1050977 (March 21, 2017).

The complaint should be dismissed.

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<sup>1</sup> MaxPak never withdrew recognition from the Union (unless refusing to bargain which is necessary to secure judicial review is itself a withdrawal of recognition).

## II. ARGUMENT

### A. The Complaint Should Be Dismissed.

#### 1. MaxPak did not waive the quorum issue.

In its initial finding that MaxPak violated the Act, NLRB relied entirely on waiver. MaxPak, 362 NLRB No. 168 at 1 (2015) (“[W]e find that the Respondent waived its right to challenge the validity of the certification when it entered into negotiations with the Union.”).

NLRB’s waiver ruling was incorrect. Hospital of Barstow v NLRB, 820 F.3d 440, 442 (D.C. Cir. 2016). After MaxPak appealed NLRB’s decision against it and brought Barstow to the court’s attention, NLRB abandoned its defense of the waiver ruling and filed a motion to remand which the court granted.

Accordingly, NLRB must find that MaxPak’s quorum argument has not been waived and consider it on the merits.

#### 2. NLRB’s lack of a quorum requires dismissal of the complaint.

Two NLRB actions are at issue here: (1) the August 29, 2012 decision which sustained certain objections and set aside MaxPak’s victory in the first election; and (2) the November 6, 2012 certification of the Union.

NLRB lacked a quorum because Sharon Block and Richard Griffin’s purported recess appointments were unconstitutional and void. NLRB v. Noel Canning, 134 S. Ct. 2550 (2014). When the illegally appointed individuals are removed, NLRB lacked a quorum on both August 29, 2012 and November 6, 2012.

As a result, NLRB could not vacate MaxPak's election victory or direct a second election on August 29, 2012. And without first removing MaxPak's election victory and directing a second election, NLRB could not certify the Union on November 6, 2012.

NLRB appeared to concede these facts in its reply brief to the D.C. Circuit, where NLRB stated that "on remand the Board will set aside the [August 2012] Decision and Direction and consider that decision anew." The General Counsel should not be permitted to take any different position now.

Even were that not so, NLRB did not have authority on November 6, 2012 to certify the Union due to its lack of a quorum. New Process Steel L.P. v. NLRB, 130 S. Ct. 2635 (2010); NLRB v. J.S. Carambola, LLP, 457 Fed. Appx. 145, 149 (3d Cir. 2012) (Board could not certify an election while it lacked a quorum under New Process Steel).

As MaxPak did not unlawfully refuse to bargain or commit any other violation of the Act, the complaint should be dismissed.<sup>2</sup>

### **3. The complaint was unlawfully issued.**

The complaint in this case issued on July 31, 2013, purportedly under the authority of Acting General Counsel Lafe Solomon. However, the Supreme Court recently held that the Federal Vacancies Reform Act prohibited Solomon from holding the office of Acting General Counsel at that time. NLRB v. SW General, Inc. -- S. Ct. --, 2017 WL 1050977 (March 21, 2017).

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<sup>2</sup> In its original decision in the unfair labor practice case, NLRB found that MaxPak unlawfully withdrew recognition based solely on MaxPak's refusal to bargain with the Union. MaxPak, 362 NLRB No. 168 at 2 (2015). As MaxPak lawfully refused to bargain and never recognized the Union (as NLRB implicitly recognized in its original decision), this allegation should also be dismissed. In addition, any purported "recognition" of the Union was based entirely on the void certification of the second election (itself void because it was never lawfully directed) which cannot support recognition under these circumstances.

Accordingly, the complaint against MaxPak was not lawfully issued and should be dismissed for this reason as well.<sup>3</sup>

**4. The notice reading remedy should be rejected.**

As the complaint should be dismissed, the notice reading remedy must necessarily be rejected. In any event, NLRB previously rejected the notice reading remedy in its original decision. MaxPak, 362 NLRB No. 168 at 3 n. 6 (2015). There is no reason to change NLRB's original decision.

**B. The Representation Case Is Not Before NLRB And Should Not Be Reopened.**

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The unfair labor practice case is the only case properly before NLRB. The unfair labor practice case was the only case: (1) before the D.C. Circuit; (2) remanded by the court; (3) referenced in NLRB's March 2, 2017 letter accepting the court's remand; and (4) that is open.

The representation case is closed and should not be reopened.<sup>4</sup> NLRB should dismiss the complaint and take no further action. The Union's showing of interest underlying the representation case is beyond stale at this point.

**C. If The Representation Case Is Reopened, MaxPak Requests Further Briefing.**

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If NLRB reopens the representation case (which it should not do), MaxPak respectfully requests that NLRB permit additional briefing on the objections. NLRB's original decision addressing the objections issued in August 2012. Given the passage of about four and a half years and legal developments since August 2012, MaxPak

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<sup>3</sup> As the Supreme Court's decision issued only nine days ago, MaxPak respectfully requests that its answer be amended to raise the defense of the illegality of the issuance of the complaint due to Solomon's unlawful service as Acting General Counsel.

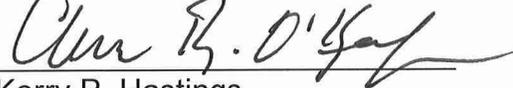
<sup>4</sup> As the representation case is closed and the Union's objections are not before NLRB, MaxPak is not addressing the objections in this filing. The Union's objections are without merit, as MaxPak will demonstrate in future briefing if necessary.

should be permitted to brief the issues raised by the objections if the representation case is reopened over MaxPak's objection.

### III. CONCLUSION

For each and all of the foregoing reasons, MaxPak respectfully requests that the unfair labor practice case be dismissed and that NLRB take no further action.

Respectfully submitted,



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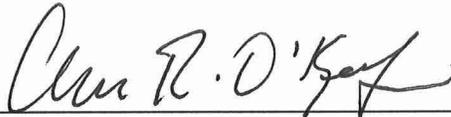
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing response to request for statement of position has been served upon the following by e-mail and regular mail this 30th day of March, 2017.

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