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June 18, 2018

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Mr. Gary Shinnars
Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570-0001

Re: Inwood Material Terminal, LLC, Employer; and Carlos Castellon,
Petitioner, and United Plant & Production Workers, Local 175P
Case No. 29 RD 206581

Dear Mr. Shinnars:

This firm represents Inwood Material Terminal (“Employer” or “Inwood Material”). Inwood Material submits this response to the Brief of *Amicus Curiae* filed by the National Right to Work Legal Defense Foundation’s (“NRTW Foundation”) in the referenced matter. Inwood Material joins in the NRTW Foundation with respect to its argument that the contract bar doctrine should be abandoned.

In addition to the arguments set forth by the NRTW Foundation in its Brief, the contract bar doctrine should be overturned because the National Labor Relations Act (“Act”) speaks directly to the issue of the period of time, one year, during which an election should be barred following an election. The National Labor Relations Board (“Board”), therefore, exceeded its authority when it established the contract bar doctrine.

Under the standard established by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778 (1984), in reviewing “an agency’s construction of the statute it administers,” a court must first look at “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43. “The traditional deference courts pay to agency interpretation is not applied to alter the clearly expressed intent of Congress.” *NY v. United States Dep’t of Transp.*, 700 F. Supp. 1294, 1300 (S.D.N.Y. December 8, 1988).

June 18, 2018

Page 2

In Article 9, Section (c) (3) of the Act, Congress spoke directly and unambiguously about the time period following an election during which a subsequent election may not be directed: “[n]o election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.” Congress contemplated the appropriate time period for barring elections following an election and clearly addressed the issue. Indeed, in one of the first cases to consider the issue, the Board held that although the Company and Union had entered into a 3 1/2 year contract on June 28, 1937, a petition filed less than a year later, on April 18, 1938, was valid. The Board stated that: “We do not pass here upon the question whether the Board will, during the first year of a contract . . . investigate and certify representatives. However, we are of the opinion that it would be contrary to the policies and purposes of the Act to refuse to order an election or certify representatives on the basis of a contract which has already been in effect for a period of more than a year.”

The Board exceeded the scope of its authority without any justification when it ruled that a collective bargaining agreement can serve as a bar to an otherwise petition for election. In *Nat’l Sugar Refining Co. of New Jersey and Local 1476*, 10 N.L.R.B. 1410 (1939), the Board without reference to Section 9 (c) (3) and without precedent, determined that it “would not proceed with an investigation of the representative until such time as the contract is about to expire and a question exists as to the proper representative for collective bargaining with respect to the negotiation of a new agreement.” This *sua sponte* determination failed to consider both the clear language of the Act, which squarely addresses this issue, as well as the rights of the employees under Section 7 to choose whether to be represented and by whom.

Congress’ policy judgment as to the correct balance between employees’ rights to accept or reject union representation does not leave room for interpretation or for an extension of that time period from one to three years, or any other term beyond 12 months. The Board should not presume the authority to contradict Congressional judgment that one year is a sufficient period of time before a further election may be held.

Regardless of the Board’s determination regarding the contract-bar doctrine, however, the Regional Director’s decision and certification of results should be affirmed because as stated in the Employer’s May 21, 2018 brief in opposition to United Plant & Production Workers Local 175 P’s (“Union”) Request for Review, the parties contemplated a fully executed collective bargaining agreement in this matter and there was not a fully executed collective bargaining agreement in place when the Petitioner filed the petition. There was, therefore, no contract to bar the election within the meaning of the current contract-bar doctrine. Accordingly, it is not necessary to overturn the contract-bar doctrine to affirm the results of the employees’ rejection of the Union in this case.

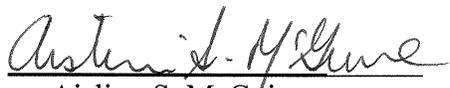
June 18, 2018

Page 3

Dated: June 18, 2018, at New York, New York.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing letter brief in support of the National Right to Work Legal Defense Foundation's Brief of *Amicus Curiae* in this matter was filed electronically with the Executive Secretary through the NLRB's e-filing system, and copies were sent to the following via e-mail or first-class mail, deposited in an official depository under the exclusive care and custody of the United States Postal Service within the state of New York, enclosed and sealed in a properly-addressed, postpaid envelope, as follows:

cc: Eric Chaikin, Esq. (via e-mail: chaikinlaw@aol.com), Attorney for Intervenor, Local 175 P
Mr. Carlos Castellon (via first class mail), Petitioner, 1231 Burlington Place, Valley Stream, NY 11580
Brent Childerhose, Esq. (via e-mail: brent.childerhos@nlrb.gov), Board Attorney, Region 2
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Kathy Drew-King, Esq., Regional Director, Region 29 (via NLRB E-Filing)

June 18, 2018


Aislinn S. McGuire, Esq.