

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

**E.W. HOWELL CO., LLC,  
Respondent**

**Case No. 29-CA-195626**

**and**

**NORTHWEST REGIONAL COUNCIL OF  
CARPENTERS AND JOINERS AMERICA,  
Charging Party**

**REPLY TO RESPONDENT'S OPPOSITION TO  
COUNSEL FOR GENERAL COUNSEL'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Counsel for the General Counsel files this Reply to Respondent's Opposition to Counsel for General Counsel's June 19, 2018 Motion for Partial Summary Judgment and submits that Respondent's Opposition should be rejected, as it fails to support any valid reason why General Counsel's Motion for Partial Summary Judgment is not appropriate and should not be granted.

Respondent argues that General Counsel's Motion for Partial Summary Judgment and severance of the unilateral change allegations pled in the underlying Complaint should be denied on three grounds: 1) Respondent asserts that partial summary judgment is not warranted because no employees exist in the unit of employees certified in Case No. 29-RC-177927 and therefore it has no obligation to bargain and also claims, that it had no employees at the time of the election and that the Board used the *Steiny/Daniels* formula to manufacture a bargaining unit that otherwise did not exist; 2) that only one employee voted in the representation election held in Case No. 29-RC-177927 and therefore the certification is not valid; and 3) that severance of the Section 8(a)(5) test of certification from the remaining Section 8(a)(5) unilateral change allegations would be inappropriate because the allegations are interrelated and should be

considered together. Respondent's arguments are without merit and should be rejected because Respondent had a full and fair opportunity to litigate issues regarding the bargaining unit in the earlier representation proceedings before the Board, the Board decided those issues in an objections proceeding, and Board law precludes Respondent from relitigating these issues in the instant proceeding. Further, Respondent cannot manufacture a triable issue of fact by relitigating the Certification of Representative.

As demonstrated below, Respondent's claims are frivolous and should be rejected.

## **A. Facts**

### *1. The Representation Proceeding*

On June 20, 2016, Respondent voluntarily entered into a Stipulated Election Agreement in Case No. 29-RC-177927 (attached as Exhibit A), in which Respondent agreed to an appropriate unit using the *Steiny/Daniel*<sup>1</sup> standard of voter eligibility. On July 22, 2016, following election results in favor of representation, Respondent filed timely objections to the results of the election, asserting that the number of votes cast in the election was insufficient for the Board to certify the election. In its objections (attached as Exhibit B), Respondent asserted that an election with only one cast vote was not legally sufficient to create a section 9(a) bargaining relationship, and Respondent objected to the election results. During the objections proceeding, Respondent did not claim that it had no employees. Following an investigation, the Regional Director issued a Report on Objections and Certification of Representative, in which he overruled Respondent's objections and certified the Union as the exclusive bargaining

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<sup>1</sup> Eligibility to vote in construction industry elections is determined by the use of the *Daniel* formula. *Daniel Construction Co.*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967). The *Daniel* formula has been modified several times and the current formula to be applied is set forth in *Steiny & Co.*, 308 NLRB 1323 (1992). Under this formula employees are eligible to vote in an election if they are employed thirty (30) days or more during the twelve (12) months period preceding the eligibility date for the election, or if they have had some employment in that twelve-month period and have been employed for forty-five (45) days or more with the twenty-four (24) month period immediately preceding the eligibility date.

representative of the employees employed in the unit. Respondent appealed the Regional Director's Certification of Representation to the Board. The Board rejected Respondent's request for review on November 3, 2016.

*2. Respondent's Admitted Failure to Bargain With the Union*

In November 2016, following Respondent's unsuccessful appeal of the Certification of Representative, Respondent refused multiple requests by the Charging Party Union to commence negotiations for an initial collective bargaining agreement. As the Complaint alleges, thereafter Respondent - with no deference to the Board's Certification of Representative and its bargaining obligation - unlawfully transferred bargaining unit work to non-unit employees, The General Counsel seeks an Order from the Board requiring Respondent to comply with the Board's Certification of Representative.

In its Opposition Motion, Respondent claims that the issue of whether its unilateral changes transferring bargaining unit work out of the unit following the issuance of the Certification was unlawful is "inextricably linked" to the issue regarding the validity of the certification and creates an issue of fact appropriate for hearing before an Administrative Law Judge. This argument should be rejected as the Respondent has waived its right to attack the Board's Certification.

**B. Argument**

*1. Partial Summary Judgment Is Appropriate In This Matter Because Respondent Waived Its Right To Challenge The Validity Of The Certification*

Partial Summary Judgment regarding Respondent's failure to bargain collectively in good faith with the Union is appropriate here because there is no triable issue of fact. Any question of fact regarding the Certification of Representative in Case No. 29-RC-177927 has been settled; there are no material issues of fact to be resolved.

In its Answer to the Complaint and subsequent Opposition to the General Counsel's Motion for Partial Summary Judgment, Respondent again denies the validity of the vote in favor of representation, contending that there were no employees in the unit at the time of the election and, alternatively, that the Board improperly certified the results of an election based on a vote of only one employee eligible to vote under the *Steiny/Daniel* formula. Respondent's argument fails. By entering into the stipulated election agreement in the underlying representation proceeding, the Respondent agreed to the use of the *Steiny/Daniel* formula for eligibility, agreed that the resulting unit was appropriate for the purpose of collective bargaining and agreed that it had employees employed in that appropriate Unit. Accordingly, the Respondent may not relitigate this issue in the instant proceeding. See *ITEG/LVI Environmental Services, Inc.*, 328 NLRB 483, 486, fn.3 (1999) citing *Biewer Wisconsin Sawmill*, 306 NLRB 732, fn.1 (1992) (holding that absent newly discovered evidence or special circumstances, the Board is warranted to uphold a certification and determine the unit to be appropriate on the basis of the parties stipulated election agreement).

Not only did Respondent voluntarily enter into the stipulated election agreement attesting to the existence of an appropriate bargaining unit — Respondent also submitted a voter list that identified two unit employees who were on its payroll at that time, with the understanding that these two employees were eligible to vote. Respondent now contends that there are “zero employees who would qualify as bargaining unit members” or that at most there was only a unit comprised of one person, and therefore it has no obligation to bargain with the Charging Party. Respondent therefore requests that this matter go before an Administrative Law Judge to determine its obligation to bargain. Respondent's request should be denied, as the issue of whether or not Respondent employed unit employees at that time could have been raised during

the representation proceeding. Respondent is now precluded from litigating the factual issue of whether it had employees at that time. *Pittsburg Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941)(where the Supreme Court upheld the Board’s determination that an employer could not relitigate an issue involving unit determination);see also *Salem Hospital Corp.*, 357 NLRB No. 119 (2011) (granting General Counsel’s motion for summary judgment because all representation issues raised by the respondent were or could have been litigated in the prior representation proceeding). Absent newly discovered evidence or special circumstances<sup>2</sup>, the Board must deny the Respondent’s attempt to revive issues involving the appropriateness of the bargaining unit and grant the General Counsel’s Motion for Partial Summary Judgment. See *Salem Hospital Corp.*, supra.

2. *Respondent Inappropriately Attempts To Attack the Certification of Representative by Attempting To Manufacture an Issue of Material Fact for Hearing*

Respondent asserts that the “issues presented in the General Counsel’s [C]omplaint are interrelated and should be considered together.” See *Respondent’s Opposition Motion*, at 7. The Respondent erroneously asserts that the existence of the bargaining unit is put into question by the General Counsel’s allegations of Respondent’s unlawful transfer of bargaining unit work and subcontracting. As shown by the facts above, there is no question regarding that Respondent agreed to the Unit composition and that it had unit employees; Respondent signed 2016 stipulated election agreement.

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<sup>2</sup> In 1984, the Board (Chairman Dotson) created case law permitting relitigation of preelection issues in limited circumstances where, unlike here, the employer availed itself of the representation hearing procedure and where new information was available and review was required to fix issues regarding unit determination. See *Sub-Zero Freezer Co.*, 271 NLRB 47 (1984) (holding that review of a certification may be appropriate where the vote is tainted); *St. Francis Hospital*, 271 NLRB 948 (1984) (where a certification was vacated on a test of certification 8(a)(5) because the units created were determined inappropriate for an acute care hospital). The instant set of facts does not fall within such limited exceptions to the Board’s application of *res judicata* principles.

Any attempt by Respondent to assert that it was allowed to sub-contract or transfer the bargaining units work because the certification is not valid should be rejected. Respondent is improperly attempting to manufacture a question of fact that has been settled and which Respondent it is precluded from relitigating (whether it had employees at the time that it signed the stipulated election agreement) and to bootstrap this purported issue of fact to the unfair labor practice allegations regarding its unlawful unilateral change in an effort to create the appearance that there are related factual issues. In so doing, Respondent in essence seeks to manufacture a means to have the representation hearing that it previously voluntarily waived by using its own subsequent unlawful actions to reach back and attack a Certification of Representative held valid by the Board.

Based on the facts and law presented in the previous Motion for Partial Summary Judgment and the argument above, Counsel for the General Counsel requests the Board grant its Motion for Partial Summary Judgment.

Respectfully Submitted,

*/s/ RyAnn M. Hooper*

Dated: July 13, 2018

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