UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a ADVANCED MASONRY SYSTEMS,

Petitioner,

v. **Case No.:**

NATIONAL LABOR RELATIONS BOARD,

Respondent.
_____/

PETITION FOR REVIEW

ADVANCED MASONRY ASSOCIATES, LLC d/b/a ADVANCED MASONRY SYSTEMS ("Petitioner") hereby petitions the Court for review of, and respectfully requests that the Court set aside, the Decision and Order (the "Order") of the National Labor Relations Board ("NLRB" or the "Board") entered on August 17, 2018, in NLRB Case No. 12-CA-221114. In its Order, the Board granted summary judgment in favor of the Board's General Counsel that Petitioner violated Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. See Advanced Masonry Associates, LLC, 366 N.L.R.B. No. 164 (slip op) (attached as Exhibit A).

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, Petitioner hereby provides the following Certificate of Interested Persons and Corporate Disclosure Statement:

1. The name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action—including subsidiaries, conglomerates, affiliates, parent corporation(s), publicly traded entities that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case:

Advanced Holdings, LLC
5403 Ashton Court
Sarasota, Florida 34233
Parent corporation of Petitioner, not a publicly-traded entity

Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems
5403 Ashton Court
Sarasota, Florida 34233
Petitioner

Bricklayers and Allied Craftworkers, Local 8 Southeast
Post Office Box 4028
Atlanta, Georgia 30302

David Cohen, Esq.
Regional Director
NLRB Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, Florida 33602

Gregory A. Hearing, Esq.
Thompson, Sizemore, Gonzalez & Hearing, P.A.
201 N. Franklin Street, Suite 1600

Tampa, Florida 33602
Counsel for Petitioner

International Union of Bricklayers and Allied Craftworkers
620 F Street NW
Washington, D.C. 20004

Marvin E. Kaplan
NLRB Board Member
1015 Half Street SE
Washington, D.C. 20570

Caroline Leonard, Esq.
NLRB Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, Florida 33602
Counsel for the NLRB General Counsel

Lauren McFerran
NLRB Board Member
1015 Half Street SE
Washington, D.C. 20570

Mark Gaston Pearce
NLRB Board Member
1015 Half Street SE
Washington, D.C. 20570

The Hon. Gary Shinners
Executive Secretary, National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570

Charles J. Thomas, Esq.
Thompson, Sizemore, Gonzalez & Hearing, P.A.
201 N. Franklin Street, Suite 1600
Tampa, Florida 33602
Counsel for Petitioner

Thompson, Sizemore, Gonzalez & Hearing, P.A.

201 N. Franklin Street, Suite 1600
Tampa, Florida 33602
Counsel for Petitioner

Kimberly Walker, Esq.
Kimberly C. Walker, P.C.
14438 Scenic Highway 98
Fairhope, Alabama 36532

2. The name of every other entity whose publicly-traded stock, equity, or debt may be substantially affected by the outcome of the proceedings:

None.

Dated this 2nd day of October, 2018.

Respectfully submitted,

Gregory A. Hearing, Esq.
Florida Bar No. 817790
ghearing@tsghlaw.com
Charles J. Thomas, Esq.
Florida Bar No. 986860
cthomas@tsghlaw.com
Thompson, Sizemore, Gonzalez & Hearing, P.A.
201 N. Franklin Street, Suite 1600
Tampa, Florida 33602
Phone: (813) 273-0050
Fax: (813) 273-0072
Attorneys for Petitioner

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that, on October 2, 2018, I caused to be filed the foregoing Petition for Review of an Order of the National Labor Relations Board ("Petition") with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit. Further, I caused to be served by electronic and overnight mail the Petition on the parties participating in the underlying National Labor Relations Board proceeding:

Caroline Leonard, Esq.
Counsel for the General Counsel
Region 12
National Labor Relations Board
201 E. Kennedy Boulevard, Suite 530
Tampa, Florida 33602

Kimberly Walker, Esq.
Kimberly C. Walker, P.C.
14438 Scenic Highway 98
Fairhope, Alabama 36532
Counsel for Bricklayers and Allied Craftworkers, Local 8 Southeast

I also served the following persons by overnight mail with the Petition:

Gary Shinners
Executive Secretary
Linda J. Dreeben, Esq.
Deputy Associate General Counsel,
Appellate & Supreme Court Litigation
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570

David Cohen, Esq.
Regional Director
Region 12
National Labor Relations Board
201 E. Kennedy Boulevard, Suite 530
Tampa, Florida 33602

Attorney

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems *and* Bricklayers and Allied Craftworkers, Local 8 Southeast. Case 12–CA–221114

August 17, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on May 30, 2018, by Bricklayers and Allied Craft Workers, Local 8 Southeast (the Union), the General Counsel issued the complaint on June 13, 2018, alleging that Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 12-RC-175179. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On July 2, 2018, the General Counsel filed a Motion for Summary Judgment. On July 5, 2018, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the certification was issued in error because the Board counted votes of employees who were ineligible to vote, and the Union lacked majority status.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor has it shown any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a Florida limited liability company with its principal office and place of business located in Sarasota, Florida, and has been engaged in business as a masonry contractor in the construction industry performing commercial construction at jobsites throughout the State of Florida.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its operations described above, purchased and received at its jobsites in the State of Florida goods valued in excess of $50,000 directly from points located outside the State of Florida, and from other enterprises located inside the State of Florida, each of which had received the goods directly from points located outside the State of Florida.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[1]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held by mail ballot from May 25 through June 9, 2016, the Union was certified[2] on May 8, 2018, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

[1] The Respondent's answer states that it is "without knowledge as to whether the Union was a labor organization 'at all material times' and therefore denies this allegation." However, in the underlying representation proceeding, the Respondent stipulated, and the Board found, that the Union is a labor organization. Accordingly, the Respondent's denial does not raise any issue warranting a hearing. *All American Service & Supplies, Inc.*, 340 NLRB 239, 239 fn. 2 (2003).

[2] The determinative challenges in Case 12–RC–175179 were consolidated for hearing with related unfair labor practice allegations in Case 12–CA–176715. On April 13, 2018, the Board issued its decision in the consolidated proceeding finding, inter alia, that the Respondent's challenge to one ballot should be sustained, affirming the judge's overruling of the Respondent's challenges to the remaining ballots, and directing the Regional Director to open and count those ballots. 366 NLRB No. 57. The Respondent filed a petition for review of the Board's decision with the Eleventh Circuit, and the Board filed a cross-petition for enforcement. The petitions are still pending.

EXHIBIT

A

INCLUDED: All bricklayers and/or masons employed by the Employer.

EXCLUDED: All other employees, office and clerical employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About May 15, 2018, the Union, by letter, requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about May 18, 2018, the Respondent has failed and refused to do so.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since May 18, 2018, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems, Sarasota, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Bricklayers and Allied Craft Workers, Local 8 Southeast, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

INCLUDED: All bricklayers and/or masons employed by the Employer.

EXCLUDED: All other employees, office and clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Sarasota, Florida, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 18, 2018.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 17, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Bricklayers and Allied Craft Workers, Local 8 Southeast (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL , on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

INCLUDED: All bricklayers and/or masons employed by the Employer.

EXCLUDED: All other employees, office and clerical employees, professional employees, guards and supervisors as defined in the Act.

ADVANCED MASONRY ASSOCIATES, LLC D/B/A
ADVANCED MASONRY SYSTEMS

The Board's decision can be found at www.nlrb.gov/case/12-CA-221114 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.