

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

McLaren Macomb

Respondent

Cases 7-CA-254640

and

**Local 40, RN Staff Council, Office and Professional
Employees International Union (OPEIU), AFL-CIO**

Charging Party

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**RESPONDENT MCLAREN MACOMB'S
RESPONSE TO BOARD NOTICE TO SHOW CAUSE**

Now comes counsel for the Respondent, McLaren Macomb, to respond to the Notice to Show Cause issued by the Board on August 20, 2020, which requested any party seeking to show cause as to why the General Counsel's Motion for Summary Judgment should not be granted. In that regard, the General Counsel filed a Motion for Summary Judgment with the Board on August 17, 2020, which sought summary judgment on the basis that Respondent is merely attempting to relitigate the issues in Case No. 07-RC-243228. While there is no question the Respondent disputes the validity of the underlying certification proceedings, summary judgment is not appropriate in this instance as the current dispute goes beyond those issues originally litigated in the representation proceeding(s). In particular, the factual issues involved in the Respondent's affirmative defenses involve questions of fact warranting a hearing, which should prevent the grant of summary judgment in this instance. Accordingly, the Respondent hereby requests the Board deny the General Counsel's motion due to the questions of fact presented in this instance.

Specifically, the Respondent raised several affirmative defenses in its Answer to the Amended Complaint the Respondent that raise factually issues ignored in the General Counsel's

motion and outside those issues litigated in the previous representation proceedings involved in Case No. 07-RC-243228. Amongst its affirmative defenses, Respondent asserts the following:

6. That unfair labor practices of the Charging Party excuse any conduct on the part of the Respondent;
7. The Charging Party waived any right to bargain;

10. The remedies requested in the Complaint are over broad, impermissibly punitive, inapplicable to the alleged violations and not calculated to effectuate the purposes of the Act in this situation;

At a minimum, these affirmative defenses establish significant factual issues in the case at hand that more than justify denial of the General Counsel's Motion for Summary Judgment in this instance.

In this regard, the Region's effort to seek extension of the initial certification year, pursuant to *Mar-Jac Poultry Co.*, 136 NLRB 785 (1963), alone involves factual issues requiring a hearing in this instance. There is no dispute that the Board has utilized *Mar-Jac Poultry Co* to extend the certification year for one year from the date the company begins to bargain in good faith. See, e.g., *Overnite Transportation Co.*, 333 NLRB 472 (2001); *Doren, Inc.*, 333 NLRB 1 (2001); *National Cargo Bureau*, 333 NLRB No. 39. However, a *Mar-Jac Poultry Co* remedy is not appropriate in all instances. For example, *Mar-Jac Poultry Co* remedies have been rejected when the case does not involve an allegation of refusal to bargain concerning an initial term of agreement (See, e.g., *Ebenezer Rail Car Services*, 333 NLRB 167, 173 n. 9 (2001)) or where voluntary recognition, rather than certification, was extended (See, e.g., *Stamford Taxi, Inc*, 332 NLRB 1372 (2000)). Similarly, the Board has modified the period involved in a *Mar-Jac Poultry Co* remedy depending on the circumstances at hand. See, e.g., *Jasco Industries, Inc.*, 328 NLRB 201 (1999). Needless to say, given the Board's history regarding the application of *Mar-Jac*

Poultry Co remedies based on the circumstances at hand, there should be no doubt that such a remedy involves questions of fact requiring a hearing.

Indeed, this is especially true in this instance where the Respondent has alleged that “unfair labor practices of the Charging Party excuse any conduct on the part of the Respondent”. See Affirmative Defense No. 6. Facing similar questions, the Board has confirmed that manifestations of bad faith on the part of the union, including inexcusable procrastination, can justify equating the start of a certification year with something other than the date of the parties initial bargaining session. See *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 n. 4 (1990) and *Dominquez Valley Hospital*, 287 NLRB 149, 150 (1987). Thus, given the Respondent’s asserted affirmative defense, the Respondent is entitled to the opportunity to present evidence confirming manifestations of bad faith on the part of the union in the case at hand which might equate the start of the certification year with another dates.

Similarly, circumstances surrounding the Employer’s request for review and those present in the state of Michigan during the pendency of its requests for review are facts that should also likely impact the application of a *Mar-Jac Poultry Co* remedy in this instance. For example, except for the almost 5 years between April 15, 2015 and March 30, 2020¹, the Board’s rules would not have allowed for the issuance of a certification for representative while an employer’s request for review of a regional director’s decision in a representation case was pending. In the vast majority of the Board’s history, a *Mar-Jac Poultry Co* remedy was limited to certifications that were truly “final” in that they were not subject to appeals that may or may not invalidate the finality of the certification at issue. However, in this instance, the Respondent faced a certification that remained questionable until the Board rules on its last request for review on July 2, 2020 (See NLRB Order,

¹ When the prior version of Rule 102.67(c) was in place.

Case No. 243228 (July 2, 2020). As such, prior to that time, the Respondent was presented with a certification which was deemed both final by the rules yet potentially invalid due to the pendency of its requests for review.

In fact, the quandry facing employer's in this instance were a significant part of the Board's rationale in reinstating to its rules the longstanding practice of limiting the issuance of a certification of representative until the resolution of a request for review. 84 Fed Reg. 69554-69555 (Dec. 18, 2019). In doing so, the Board noted as follows:

the issuance of a certification despite the (potential) pendency of a request for review places an employer in the difficult position of either (1) refusing to bargain while awaiting the Board's ruling on a request for review, or (2) devoting resources to bargaining while awaiting the Board's ruling. In the former scenario, the employer risks committing unfair labor practices should the Board uphold the certification; in the latter scenario, the employer risks wasting resources should the Board invalidate the bargaining obligation. In all of these situations, the parties and employees are left to wonder whether the legal rights and obligations that supposedly attach to the certification actually exist.

Id. Needless to say, it is this very quandry that mitigates the application of a *Mar-Jac Poultry Co* remedy in this instance. That is, a *Mar-Jac Poultry Co* remedy simply should not be applied where the Board's own rules contributed to the delay at hand. Rather, at a minimum, any *Mar-Jac Poultry Co* remedy should be applied from the date upon which the Board ruled upon a pending request for review.² Such a finding would be especially justified where an employer can provide evidence that it satisfied its bargaining obligations within a reasonable period following such an order, as occurred in this instance.

In addition, it should not be lost that a *Mar-Jac Poultry Co* remedy would extend the certification year for 12 months despite the fact that the parties could not have engaged in negotiations for several months of the period following the December 9, 2019 certification of

² Granted . . . such a finding will only likely be applicable to very few decisions as the Board has addressed this inherent ambiguity by returning to its prior practice in its most recently revised rules.

representative that issued in this instance. Rather, the State of Michigan has been under a state of emergency related to the COVID-19 pandemic since March 10, 2020. Since that time, the Governor for the State of Michigan has issued orders that directly denied the Respondent from satisfying any bargaining obligations due to the prohibitions against face-to-face meetings. See, e.g. Michigan 2020 Executive Order 21 (directing all Michigan businesses and operations to temporarily suspend in-person operations that are not necessary to sustain or protect life). As such, there are additional circumstances present in case at hand that would likely impact the application of a *Mar-Jac Poultry Co* remedy in this instance.

Indeed, the circumstances surrounding the present dispute should provide ample rationale denying the application of a *Mar-Jac Poultry Co* remedy in this instance. At a minimum, a hearing would likely demonstrate rationale for modifying the application of a *Mar-Jac Poultry Co* remedy. Either way, there are sufficient questions of facts related to the application of a *Mar-Jac Poultry Co* remedy in this instance that the General Counsel's motion for summary judgment must be denied.

WHEREFORE, the Respondent hereby requests that the General Counsel's Motion for Summary Judgment be denied or, at a minimum, that the Board deny (or limit) the application of any *Mar-Jac Poultry Co* remedy in this instance.

Respectfully submitted,
BARNES & THORNBURG LLP
Attorneys for Employer

Dated: September 17, 2020

By: _____



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