

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD WASHINGTON, D.C.**

MCLAREN MACOMB

Respondent

and

Case 07-CA-254640

**LOCAL 40, RN STAFF COUNCIL, OFFICE AND
PROFESSIONAL EMPLOYEES INTERNATIONAL
UNION (OPEIU), AFL-CIO**

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S
OPPOSITION TO RESPONDENT'S RESPONSE TO
THE BOARD'S NOTICE TO SHOW CAUSE**

Now comes Dynn Nick, Counsel for the General Counsel in this matter, and, pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations, Series 8 as amended, files this Motion In Opposition to Respondent's Response to the Board's Notice to Show Cause and in support of this Motion states as follows:

1. Respondent, in its Response to the Board's Notice to Show Cause,

while continuing to dispute the validity of the Board's Certification in Case 07-RC-243228, contends that three of its Affirmative Defenses in its Answer to the instant Amended Complaint and Notice of Hearing, numbers 6, 7 and 10, raise factual issues warranting a hearing and therefore should preclude summary judgement in this case.

2. In Affirmative Defense number 6, Respondent asserts that the unfair labor practices committed by the Charging Party excuse any of the alleged conduct on the part of Respondent. Respondent makes this argument despite the fact that that the only unfair labor practice charge it filed against the Charging Party with respect to the bargaining unit at issue, in Case 07-CG-261277, had nothing to do with the Charging Party's conduct concerning bargaining, was dismissed by the Region and Respondent's appeal of the dismissal was subsequently denied. It should also be noted that Respondent, during the investigation of the instant charge, did not suggest that any conduct by the Charging Party constituted an unfair labor practice. Given these facts, this defense must be considered merely a pretextual attempt by Respondent to make an end run around a Counsel for General Counsel's Motion for Summary Judgment.

3. Respondent, in its Affirmative Defense number 7, argues that the Charging Party waived its right to bargain. An examination Respondent's Answer to the instant Amended Complaint reveals that its argument is without merit. Respondent admits to paragraph 9(e) of the

Amended Complaint, which alleges that all times since December 9, 2019, the Charging Party has been the exclusive collective-bargaining representative of the bargaining unit. Respondent also admits to paragraph 9, alleging that on December 11, 2019, the Charging Party requested that Respondent recognize it as the exclusive bargaining representative of the bargaining unit and bargain collectively with it. Respondent further admits to paragraph 10, alleging that since December 11, 2019, Respondent has failed and refused to recognize and bargain with the Charging Party as the exclusive collective-bargaining representative of the bargaining unit. Respondent's apparent attempt to argue that the Charging Party waived its right to bargain with Respondent before Respondent even recognized it as the exclusive collective bargaining representative of the bargaining unit is completely absurd and not substantiated by any Board law that Counsel for General Counsel is aware of. As such, Respondent's waiver claim is simply a dubious bid to attack the Board's certification of the bargaining unit in Case 07-RC-243228.

4. In Affirmative Defense number 10, Respondent contends that the remedies in the instant Amended Complaint are over-broad, punitive, inapplicable to the alleged violations and do not effectuate the purposes of the Act. Respondent takes particular issue with the *Mar-Jac Poultry Co*¹., remedy,

¹ 136 NLRB 785 (1963).

claiming, among other things, that a *Mar-Jac* remedy is not appropriate in this instance but if found to be appropriate, the typical 12-month remedy is not required in this case, citing *Ebenezer Rail Car Services*, 333 NLRB 167, 173 n. 9 (2001), *Stamford Taxi, Inc.*, 332 NLRB 1372 (2000) and *Jasco Industries, Inc.*, 328 NLRB 201 (1999). All of these cited cases are inapposite to the instant facts. *Ebenezer Rail* was an 8(a)(1) and 8(a)(3) retaliation and an 8(a)(5) unilateral change case, not a failure to recognize and bargain case. *Stamford Taxi* dealt with the withdrawal of recognition and not, as here, an initial failure to recognize and bargain. As to *Jasco Industries*, the Board found that a one-year *Mar-Jac* remedy was not warranted because Respondent put forth evidence that it had bargained in good faith for approximately five months. In the instant case, Respondent in its Answer to the Amended Complaint admits that it has failed and refused to recognize and bargain with the Charging Party from the day the Charging Party first requested bargaining. In only what can be considered a circular argument, Respondent attempts to circumvent that fact by referring back to its Affirmative Defense 6, regarding asserted unfair labor practices committed by the Charging Party, of which there is no evidence of such conduct.

Respondent also argues, with respect to a *Mar-Jac* remedy, that bad faith on the part of a union “can justify equating the start of a certification year with something other than the date of the parties initial bargaining session.”

Respondent’s argument appears purely theoretical, as it does not even deign to

suggest that the Charging Party actually engaged in bad faith conduct. With respect to this argument, Respondent cites *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 n. 4 (1990) and *Dominiquez Valley Hospital*, 287 NLRB 149, 150 (1987). In *Van Dorn*, the Board found, with respect to determining the beginning of a certification year that “. . .it would be appropriate to consider whether a union has refused, without adequate explanation, requests by a ready and willing employer to commence bargaining negotiations.” *Van Dorn*, 300 NLRB 278 n. 4. Based on Respondent’s Answer to paragraph 10 of the Amended Complaint, in which it admits it failed and refused to recognize and bargain with the Charging Party, Respondent was anything but ready and willing to begin negotiations over a collective bargaining agreement. Moreover, the Board in *Dominiquez Valley Hospital* effectively extended a union’s certification year past the standard 12 months under *Mar-Jac*, reasoning that, after a lengthy judicial review of an underlying case, “some time can reasonably be allowed for the Union to reestablish contacts with the unit employees to facilitate bargaining on their behalf.” *Dominiquez Valley Hospital* at 150. If Respondent is suggesting that the *Mar-Jac* sought in the instant Amended Complaint be extended beyond 12 months, Counsel for General Counsel wholeheartedly agrees.

Respondent next contends that subsequent to the December 9, 2019, issuance of the Certification of Representative in 07-RC-243228, the Board changed its rules, limiting the issuance of a certification of representative until

the resolution of a request for review. Respondent contends that under the new rules, the December 9 certification would have never issued, as its Request for Review was not ruled upon until July 2, 2020. Respondent asserts that given these facts, a *Mar-Jac* remedy should not be applied in the instant case or should only be applied from the July 2 date.² Regardless of Respondent's protestations of the rules that resulted in the issuance of the December 9 Certification of Representative, the fact is that Respondent was well aware or should have been aware of the rules in effect governing such issues on December 9, the day the bargaining unit was certified and at its own peril, willingly declined to recognize and bargain with the Charging Party as of its December 11, 2019, request to bargain. See e.g., *Bally's Park Place, Inc.*, 356 NLRB 1147 (2011).

Finally, Respondent asserts that it was unable to bargain for an unspecified length of time due to the Covid-19 pandemic and the resulting State of Michigan Governor's emergency executive order on March 10, 2020. Irrespective of the wonderful modern technologies generally available for parties to communicate and conduct business—even during a pandemic—including, telephone, email, web conferencing and video conferencing, the fact remains that to this day, Respondent admits that since December 11, 2019, it has refused to recognize and bargain with the Charging Party. As such, Respondent's assertion is without merit.

² Despite its answers to the Amended Complaint to the contrary, Respondent implies that it has satisfied its bargaining obligations to the Charging Party since the July 2 denial of its Request for Review.

Based on the above, Counsel for General Counsel respectfully requests that Respondent's Response to the Board Notice to Show Cause, be denied.

Dated at Detroit, Michigan, this 23rd Day of September 2020.

/s/ Dynn Nick
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CERTIFICATE OF SERVICE

I hereby certify that **COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S RESPONSE TO THE BOARD'S NOTICE TO SHOW CAUSE** in Case 07-CA-254640 was filed with the Board and served to the legal representatives of record at the email addresses listed below on this 23rd day of September 2020

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