

## NLRB Law Memo 11/5/2014

# LawMemo

## First in Employment Law

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### **NLRB - Staff summarized the following decisions:**

Soaring Eagle Casino and Resort, an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan (07-CA-053586; 361 NLRB No. 73) Mount Pleasant, MI, October 27, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d458194a466>

On de novo review in light of *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the Board asserted jurisdiction over the Tribally-owned and operated, on-reservation casino and resort complex and affirmed the judge's finding the Respondent violated Section 8(a)(1) by maintaining an overly broad no-solicitation/no-distribution rule and prohibiting an employee from talking about the union in an employee hallway. The Board also affirmed the judge's finding the Respondent violated Section 8(a)(3) by suspending and discharging the employee because she distributed union wrist-bands in the employee hallway and spoke in favor of the union in a restroom. Member Miscimarra concurred. The Board's vacated decision is reported at 358 NLRB No. 63 (2012). Charges filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. Administrative Law Judge Michael A. Rosas issued his decision on March 26, 2012. Chairman Pearce, and Members Miscimarra and Hirozawa participated.

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Murphy Oil USA, Inc. (10-CA-038804; 361 NLRB No. 72) Calera, AL, October 28, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d4581946246>

Reaffirming *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), a majority of the Board consisting of Chairman Pearce and Members Hirozawa and Schiffer found that the Respondent violated Section 8(a)(1) of the Act by requiring its employees to agree to resolve all employment-related claims through individual arbitration. The Board found that mandatory arbitration agreements – that bar employees from bringing joint, class, or collective workplace claims in any forum – restrict employees' substantive right, established by Section 7 of the Act, to improve their working conditions through administrative and judicial forums. The Board majority also found that finding a mandatory arbitration agreement unlawful under the Act does not conflict with the Federal Arbitration Act (FAA) requirement that arbitration agreements must be enforced according to their terms. First, the majority found that mandatory arbitration agreements are unlawful under the FAA's savings clause because they extinguish rights guaranteed by Section 7. Second, the Board

majority found that Section 7 amounts to a “contrary congressional command” overriding the FAA. And, the Board majority found that the Norris-LaGuardia Act – which prevents enforcement of private agreements that prohibit individuals from participating in lawsuits arising out of labor disputes – indicates that the FAA should yield to accommodate Section 7 rights. For all these reasons, the Board majority held that the Fifth Circuit and other circuit courts have erred by rejecting D.R. Horton. The Board majority clarified that Section 7 does not guarantee a right to class certification or the equivalent, but simply creates a right to pursue joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint. Finally, the Board majority found that the Respondent further violated Section 8(a)(1) of the Act when, after several employees filed an FLSA claim in Federal district court, the Respondent moved to compel arbitration of the employees’ FLSA claim and dismiss their collective action, pursuant to arbitration agreements signed by the employees. In doing so, the Board majority rejected the Respondent’s argument that its motion (and related court efforts) is protected by the First Amendment. The Board found that under *Bill Johnson’s*, 461 U.S. 731 (1983), and *BE & K Construction*, 536 U.S. 516 (2002), the Respondent’s efforts were unlawful because they had the illegal objective of seeking to enforce an unlawful contract provision. The Board majority ordered that the Respondent reimburse the employees for all reasonable expenses and legal fees incurred in opposing the Respondent’s motion to dismiss the collective FLSA action and compel individual arbitration.

In dissent, Member Miscimarra disagreed with the majority’s finding that Section 8(a)(1) of the Act prohibits employees and employers from entering into agreements that waive class procedures in litigation or arbitration. First, he found that the Act does not vest the Board with the authority to dictate or prescribe any particular procedures governing non-NLRA claim adjudications. Second, he found that Section 9(a) of the Act – which protects the rights of employees and employers “at any time” to adjust grievances on an “individual” basis – protects the right of individual employees and employers to enter into arbitration agreements. Third, he found that the FAA precludes the Board from invalidating class waivers contained in individual employment agreements. Finally, he found that the Act and its legislative history render inappropriate the majority’s remedies, including the requirement that the Respondent pay attorneys’ fees incurred in opposition to the employer’s efforts to enforce the arbitration agreements.

In dissent, Member Johnson found that the majority interpreted Section 7 too broadly. He found that the Board cannot transform procedural class and collective action rules – established under other statutes – into substantive rights under the Act. In finding that the Respondent’s arbitration agreements do not violate Section 8(a)(1), he found that employers have a legitimate interest in avoiding aggregated, meritless suits. Disagreeing with the majority, he found that Supreme Court FAA jurisprudence makes clear that the Board cannot interpret Section 7 to override the FAA’s command that arbitration agreements be enforced according to their terms. He noted that the Supreme Court has consistently resolved conflicts between the

FAA and other Federal laws in favor of the FAA. Under this precedent, he found no reason to believe that the Act's generalized provision should prevail over the FAA.

Charge filed by an individual. Chairman Pearce, and Members Miscimarra, Hirozawa, Johnson, and Schiffer participated.

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Richmond District Neighborhood Center (20-CA-091748; 361 NLRB No. 74) San Francisco, CA, October 28, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d458194a215>

The Board found that the Respondent did not violate Section 8(a)(1) when, solely based on a Facebook conversation, it rescinded two teen-center employees' rehire letters for the next school year. The Board agreed with the judge that the Facebook posts lost the Act's protection, as they contained extensive, detailed advocacy of insubordination during the next school year that the Respondent reasonably feared would be acted upon. Charge filed by an individual. Administrative Law Judge Jay R. Pollack issued his decision on November 5, 2013. Members Miscimarra, Johnson, and Schiffer participated.

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Gaylord Chemical Co., LLC (10-CA-038782; 361 NLRB No. 67) Bogalusa, LA, and Tualoosa, AL, October 28, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d458192b48b>

Upon de novo review in light of NLRB v. Noel Canning, 134 S. Ct. 2550 (2014), the Board found that the Respondent violated the Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union following the Respondent's relocation from Bogalusa, Louisiana, to Tuscaloosa, Alabama, and by refusing to provide the Union with requested relevant information, and unilaterally creating a new unit position. The Board also found that the Respondent violated Section 8(a)(1) of the Act by coercively questioning an employee about his union sympathies. As in the vacated decision reported at 358 NLRB No. 63 (2012), the Board based its finding regarding the refusal to recognize and bargain with the Union on the fact that the new plant's operations and equipment were essentially identical to the old plant's and that a substantial number of unit employees moved with the plant to the new location. Member Johnson agreed with his colleagues and noted that the Respondent did not put on evidence to explain any key differences in operations or to refute the circumstances surrounding the interrogation. Charges filed by United Steelworkers International Union and Its Local 887. Administrative Law Judge Ira Sandron issued his decision on August 18, 2011. Chairman Pearce, and Members Hirozawa and Johnson participated.

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BCI Coca-Cola Bottling Company of Los Angeles (28-CA-022792; 361 NLRB No. 75) Tempe, AZ, October 29, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d4581949f83>

The Board affirmed the administrative law judge's finding that it was appropriate to defer to the non-Board settlement agreement between the Respondent and the Union, which settled a dispute concerning the layoff of eight employees. The Board found that the settlement met the requirements of Spielberg Mfg. Co., 112 NLRB 1080 (1955), and Olin Corp., 268 NLRB 573 (1984). The Board also found that additional allegations that the Respondent violated Section 8(a)(1) by making threats of futility, layoffs, and other unspecified reprisals, were inextricably bound with the layoff allegations and were resolved by the settlement agreement. Charge filed by an individual. Members Miscimarra, Hirozawa, and Schiffer participated.

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Farm Fresh Company, Target One, LLC (28-CA-100434; 361 NLRB No. 83) Phoenix, AZ, October 30, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d4581957ef8>

The Board adopted the judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging an employee for her protected concerted activities and violated Section 8(a)(3) and (1) for discharging three other employees for their protected union activities shortly after the Union began organizing efforts. The Board also adopted the judge's recommended dismissals of allegations that the Respondent unlawfully discharged a fifth employee, unlawfully instituted a requirement that employees reverify their work authorization, and unlawfully solicited grievances and promised benefits in a series of one-on-one meetings with employees. Further, the decision finds that the judge did not abuse his discretion by granting the General Counsel's motion in limine to prevent the Respondent from directly asking the alleged discriminatees about their immigration status during the hearing, as the judge did not prohibit the Respondent from asking the discharged employees questions specifically tailored to the Respondent's assertions that they quit because they would be unable to reverify their work authorization. The Board affirmed that the Respondent could raise the discriminatees' work authorization at the compliance stage of the proceedings.

The judge made other unfair labor practice findings that were not excepted to: specifically, that the Respondent violated Section 8(a)(1) of the Act by interrogating and threatening employees; giving employees the impression that their union activities were under surveillance; engaging in surveillance of employees' union activities; and threatening employees that they could be permanently replaced if they supported the Union and went on strike.

The Board affirmed the judge's order that the notice be read aloud to assembled employees. Member Schiffer additionally would have ordered the Respondent to provide employee names and contact information to the Union and to mail the notice to employees at their homes.

Charges filed by the United Food and Commercial Workers Union, Local No. 99, AFL-CIO. The complaint alleged violations of Section 8(a)(3) and (1). The hearing was held in Phoenix, Arizona on June 11–14, 2013. Administrative Law Judge Geoffrey Carter issued his decision on August 8, 2013. Members Miscimarra, Johnson, and Schiffer participated.

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Caterpillar, Inc. (30-CA-064314; 361 NLRB No. 77) Milwaukee, WI, October 30, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d458194b555>

In view of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board considered de novo the Administrative Law Judge's recommended Decision and Order. The Board affirmed the judge's rulings, findings, and conclusions, but modified the rationale; a panel majority adopted the judge's recommended Order, also modified, to the extent and for the reasons stated in the Board's vacated Decision and Order reported at 359 NLRB No. 97 (2013), which was incorporated by reference, as modified. In that decision, the Board found that the Respondent violated Section 8(a)(5) and (1) by denying access to the International Union's health and safety specialist to conduct a health and safety inspection after a fatal accident. The Board found that the judge properly applied *Holyoke Water Power Co.'s* (273 NLRB 1369) test to conclude that the Respondent's property rights must yield to the employees' right to responsible representation. However, the Board amended the remedy, finding that the Respondent did not demonstrate a compelling confidentiality interest that would support the judge's conditioning of access upon execution of a confidentiality agreement.

Member Miscimarra, dissenting in part, concurred in finding the violation but dissented from modifying the judge's recommended Order. He would have required bargaining regarding reasonable measures to protect the Respondent's interest in preserving the confidentiality of its manufacturing process.

The Board's decision also included a new notice to employees. Administrative Law Judge Robert A. Ringler issued his decision on September 5, 2012. Charges filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO. Members Miscimarra, Johnson, and Schiffer participated.

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Coastal Sunbelt Produce, Inc. (05-CA-036362; 361 NLRB No. 85) Savage, MD, October 30, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d4581958532>

In view of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board considered de novo the Administrative Law Judge's recommended Decision and Order. The Board adopted the administrative law judge's rulings, findings, and conclusions to the extent and for the reasons stated in the Board's vacated decision and order reported at 358 NLRB No. 135 (2012) that the Respondent violated Section 8(a)(1) of the Act by interrogating an employee about her and her husband's support for the Union, and violated Section 8(a)(3) and (1) by subsequently terminating her because of her husband's union activities and because she refused management's request that she ask her husband to cease and apologize for his union activities. Member Miscimarra, writing separately, concurred in the decision. The complaint alleged violations of Section 8(a)(3) and (1). The hearing was held in Baltimore, Maryland from July 18 to July 22, 2011. Administrative Law Judge Eric M. Fine issued his decision on February 17, 2012. Chairman Pearce, and Members Miscimarra and Schiffer participated.

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833 Central Owners Corp. (29-CA-070910; 361 NLRB No. 86) Far Rockaway, NY, October 30, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d458195cc16>

In view of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board considered de novo the Administrative Law Judge's recommended Decision and Order. Chairman Pearce and Member Schiffer affirmed the judge's rulings, findings, and conclusions and adopted the judge's recommended Order to the extent and for the reasons stated in the Board's vacated Decision and Order reported at 359 NLRB No. 66 (2013), which was incorporated by reference. In that Decision, the Board adopted the Administrative Law Judge's findings that the Respondent violated the Section 8(a)(1) of the Act by threatening an employee with discharge and unspecified reprisals in order to coerce him into refraining from union activity and by impliedly promising benefits for the same purpose. The Board also adopted the judge's findings that the Respondent violated Section 8(a)(3) of the Act by warning, suspending, and discharging the employee when he did not comply.

Chairman Pearce and Member Schiffer modified the judge's recommended order to require the Respondent to make whole the employee for any adverse tax consequences of receiving his backpay in a lump sum, and to file a report with the Social Security Administration allocating the backpay award to the appropriate

calendar quarters, relying on *Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

Member Miscimarra, concurring, agreed that the Respondent violated Sections 8(a)(3) and (1) of the Act as found by the judge, for the reasons stated in the judge's decision, and joined in issuing the Order.

Administrative Law Judge William Nelson Cates issued his decision on September 14, 2012. Charge filed by Local 621, United Workers of America. Chairman Pearce, and Members Miscimarra and Schiffer participated.

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*Bud Antle, Inc.* (32-CA-078166; 361 NLRB No. 87) State of California, October 30, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d458195dec3>

In view of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board considered de novo the Administrative Law Judge's recommended Decision and Order. The Board affirmed the judge's rulings, findings, and conclusions and adopted the judge's recommended Order to the extent and for the reasons stated in the Board's vacated Decision and Order reported at 359 NLRB No. 100 (2013), which was incorporated by reference. In that Decision, the Board adopted the judge's finding that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish information requested by the Union regarding subcontracting. Concurring, Member Miscimarra agreed with his colleagues in finding that the Respondent violated the Act, and rejecting the Respondent's privilege claims because it failed to engage in the Union in reasonable discussions regarding these issues or provide alternate ways to convey the relevant information. Member Miscimarra also agreed with the enhanced remedial provisions in the narrow, unique circumstances of this case: that the workforce was migratory and that the Respondent had a preexisting practice of communicating with employees at the reading of the seniority list.

Administrative Law Judge Mary Miller Cracraft issued her decision on January 16, 2013. Charge filed by Teamsters Local Union No. 890, International Brotherhood of Teamsters. Chairman Pearce, and Members Miscimarra and Schiffer participated.

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*HTH Corporation, Pacific Beach Corporation and KOA Management, LLC*, a single employer, d/b/a Pacific Beach Hotel (37-CA-007965, et al.; 361 NLRB No. 65) Honolulu, HI, October 31, 2014.

Correction to October 24, 2014 decision:

<http://mynlrb.nlr.gov/link/document.aspx/09031d45819667ed>

Amended decision: <http://mynlrb.nlr.gov/link/document.aspx/09031d458191fb14>

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Hotel Bel-Air (31-CA-029841; 361 NLRB No. 91) Los Angeles, CA, October 31, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d45819649d1>

Given the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the Board considered de novo the Administrative Law Judge's rulings, findings, and conclusions and adopted his recommended Order to the extent and for the reasons stated in the Board's vacated Decision and Order reported at 358 NLRB No. 152 (2012), which was incorporated by reference. In that decision, the Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing, in the absence of impasse, its April 9, 2010 final offer on severance pay, waiver and release terms, and by dealing directly with individual unit employees on such terms. Member Miscimarra filed a separate opinion that concurred with the majority's decision.

The charge was filed by UNITE HERE Local 11. Administrative Law Judge Jay R. Pollock issued his decision on August 12, 2011. Chairman Pearce, and Members Miscimarra and Schiffer participated.

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Modesto Radiology Imaging, Inc. (32-RC-098291; 361 NLRB No. 84) Modesto, CA, October 31, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d4581958307>

The Board rejected the hearing officer's recommendation to sustain the Union's challenges to ballots cast by five team leaders in a representation election held at a radiology imaging facility. The Board found, contrary to the hearing officer, that the five team leaders were not supervisors, because there was no evidence that they used independent judgment in creating and adjusting schedules, or that their role in the evaluation process directly affected employees' wage increases. In considering additional facts specific to several individual team leaders, the Board also found that they were not supervisors because there was no evidence that they used independent judgment in granting overtime and reassigning employees. The Board overruled the Union's challenges, included the five team leaders in the bargaining unit, and directed the Regional Director to open and count the five ballots, serve the parties with a revised tally, and issue the appropriate certification. Hearing Officer Olivia Vargas issued her report and recommendation on July 5, 2013. Petitioner -- General Teamsters Union Local No. 386. Members Miscimarra, Hirozawa, and Schiffer participated.



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Oak Harbor Freight Lines, Inc. (19-CA-031797, et al.; 361 NLRB No. 82) States of WA, OR, ID and CA, October 31, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d4581957da1>

In view of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board considered de novo the Administrative Law Judge's recommended Decision and Order. The Board affirmed the judge's rulings, findings, and conclusions and adopted the judge's recommended Order to the extent and for the reasons stated in the Board's vacated Decision and Order reported at 358 NLRB No. 41, which was incorporated by reference. The Board found, in agreement with the administrative law judge, that the Respondent did not violate the Act by unilaterally ceasing its payments into the Washington Teamsters Welfare Trust, the Western Conference of Teamsters Pension Trust Fund, and the Retirees Welfare Trust. The Board agreed with the judge that the signed cancellation language in the Subscription Agreements for the Washington Teamsters Welfare Trust and the Retirees Welfare Trust, and in the employer union pension certifications for the Western Conference of Teamsters Pension Trust Fund, constituted a waiver of the Unions' right to bargain with the Respondent concerning its cancellation of contributions into the funds upon the expiration of the parties' collective-bargaining agreement. Contrary to the judge, the Board also found, however, that because no signed termination or cancellation language existed for the Oregon Warehouseman Trust, the Unions did not waive their right to bargain about the Respondent's unilateral stoppage of payments into that Trust. Accordingly, the Board found that the Respondent violated the Act by stopping its payments into the Oregon Warehouseman Trust without providing the Unions with notice and the opportunity to bargain over its decision to take that action.

The Board further found that the Respondent also violated the Act by unilaterally implementing its company health care plan for bargaining unit employees and thereafter refusing to bargain in good faith with regard to health care benefits.

The Board denied Teamsters 206 Employers Trust's motion to intervene in this proceeding as untimely. The Board also modified the remedy, Order, and notice to provide that, upon the Union's request, the Respondent shall rescind the health care plan that it unilaterally implemented on February 26, 2009. The Board also substituted a new notice to employees.

Member Johnson included a personal footnote stating that in rejecting the Respondent's equitable estoppel argument, he noted that the Respondent did not contend that either a Subscription Agreement or an employer union pension certification has ever existed for the Oregon Trust, nor did it contend that it did not have the opportunity to bargain about it. Member Johnson also agreed that the judge did not abuse his discretion in denying the Respondent's motion to amend its

answer to allege the additional affirmative defense that the parties had reached impasse on the issue of benefits for returning strikers. He further found that, even if the Respondent's defense had been properly raised, the defense fails on its merits because the Respondent did not establish the requisite "economic exigency."

Administrative Law Judge John J. McCarrick issued his decision on January 5, 2011. The charges were filed by Teamsters Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962. Chairman Pearce, and Members Hirozawa and Johnson participated.

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Entergy Mississippi, Inc. (15-CA-017213, et al.; 361 NLRB No. 89) Jackson, MS, October 31, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d458195d65b>

Test of Certification: The Board granted the General Counsel's motion for summary judgment in this unfair labor practice case on the ground that the Respondent did not raise any issues that were not, or could not have been, litigated in the underlying representation case in which the union was certified as the bargaining representative.

The Board noted that at the time it issued its original Decision and Order in this proceeding, the composition of the Board included two persons whose appointments had been challenged as constitutionally infirm. That Decision and Order was pending before the Fifth Circuit Court of Appeals on a petition for review and a cross-application for enforcement at the time that the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals remanded this case to the Board for further proceedings consistent with the Supreme Court's decision.

In granting the General Counsel's motion, the Board rejected the Respondent's argument that summary judgment was not appropriate because the Board lacked a quorum when it issued the decision in the underlying representation proceeding on December 30, 2011. The Respondent argued that Member Becker's recess appointment to the Board expired on December 17, 2011, leaving the Board with only two members. However, the Board found that Member Becker's term ended on January 3, 2012, and that he lawfully participated in the resolution of the underlying proceeding.

The Board further rejected the Respondent's assertion that its refusal to bargain was not unlawful because it was in response to the Fifth Circuit's decision in *Entergy Gulf States v. NLRB*, 253 F.3d 203 (5th Cir. 2001), finding that the Respondent was not entitled to make unilateral changes based on the Fifth

Circuit's opinion in a different case.

The Board also rejected the Respondent's arguments that pursuant to the doctrine of laches and other equitable principles, the Respondent should not be penalized with additional damages because of the Board's delay in ruling on the Respondent's unit clarification petition. The Board noted that the Supreme Court and the Board have long held that the defense of laches does not lie against the Board as an agency of the United States government, and further noted that the delay in this case, while regrettable, was largely due to the evolving state of the law respecting the standard for evaluating supervisory status under Sec. 2(11) of the Act.

Member Johnson noted that he did not participate in the underlying unit clarification proceeding and expressed no opinion whether it was correctly decided. He agreed that the Respondent did not present any new matters that were properly litigable in the unfair labor practice case.

Charges filed by International Brotherhood of Electrical Workers, Local 605, AFL-CIO-CLC and International Brotherhood of Electrical Workers, Local 985, AFL-CIO-CLC. Chairman Pearce, and Members Hirozawa and Johnson participated.

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Champlin Shores Assisted Living (18-RC-087228 and 093766; 361 NLRB No. 92) Champlin, MN, October 31, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d45819693fe>

The National Labor Relations Board issued a Decision, Certification of Representative, and Notice to Show Cause in this consolidated representation and unfair labor practice proceeding. Previously, on February 14, 2013, the Board issued a Decision and Order granting the General Counsel's motion for summary judgment in the unfair labor practice matter, on the ground that the Respondent had not raised any issues regarding its refusal to bargain with the Union that were not, or could not have been, litigated in the underlying representation case in which the Union was certified as the bargaining representative (Case 18-RC-087228). At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained the case on its docket for further action as appropriate.

In the instant proceeding, the Board noted that the underlying representation case also occurred at a time when the composition of the Board included two persons

whose appointments to the Board had been challenged as constitutionally infirm. The Board stated that the representation decision would not be given preclusive effect, and the Board would consider the representation issues that the Respondent raised in this proceeding. The Board indicated that in Case 18-RC-087228, the Union petitioned to represent a unit including resident assistants and medication technicians but excluding all other employees, and that the Respondent argued that the unit must also include all wait staff, kitchen helpers, and the life enrichment assistant. The Board noted that the Regional Director, applying Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB No. 83 (2011), enfd. Kindred Nursing Center East, LLC v. NLRB, 727 F.3d 552 (6th Cir. 2013), found that the petitioned-for unit was appropriate, and that the Respondent filed a request for review with the Board, arguing that Specialty Healthcare was wrongly decided and that, in any event, the petitioned-for unit was not appropriate. The Board then stated that it had considered the representation issues de novo, and found that the request for review should be denied, as it raised no substantial issues warranting review.

The Board next considered the question of whether the Board could rely on the results of the election, and found that the election was properly held and the tally of ballots was a reliable expression of the employees' free choice. In this regard, the Board reasoned that had the Board decided not to issue decisions during the time that the appointments to the Board had been challenged, the Regional Director would have conducted the election as scheduled and counted the ballots. The Board found that accordingly, it was clear that the decision of the Board to continue to issue decisions during this time did not affect the outcome of the election. The Board then issued a certification of representative, certifying that the Union is the exclusive collective-bargaining representative of the unit employees.

Finally, the Board noted that the Respondent had refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Courts of Appeals. The Board stated that although the Respondent's legal position may remain unchanged, it was possible that the Respondent had or intended to commence bargaining at this time, or that other events may have occurred during the pendency of this litigation that the parties may wish to bring to the Board's attention. Therefore, the Board issued a Notice to Show Cause as to why it should not grant the General Counsel's motion for summary judgment.

Charge filed by SEIU Healthcare Minnesota. Chairman Pearce, and Members Hirozawa and Schiffer participated.

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Design Technology Group, LLC d/b/a Bettie Page Clothing and DTG California Management, LLC d/b/a Bettie Page Clothing, a Single Employer (20-CA-035511; 361 NLRB No. 79) San Francisco, CA, October 31, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d4581956fa3>

In view of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board considered de novo the Administrative Law Judge's recommended Decision and Order. The Board affirmed the judge's rulings, findings, and conclusions and adopted the judge's recommended Order to the extent and for the reasons stated in the Board's vacated Decision and Order reported at 359 NLRB No. 96, which was incorporated by reference. The Board found that the Respondent violated the Act by maintaining a Wage and Salary Disclosure rule in its handbook prohibiting the disclosure of wages or compensation to any third party or other employee. The Board found that the maintenance of a "Confidential Information Security" rule in the handbook did not constitute a separate violation because it was neither alleged nor litigated. The Board observed, however, that any rule maintained by the Respondent that forbids employees from disclosing wage and compensation to each other or to any third party will be prohibited by par. 1(b) of its Order. In addition, the Board found that the Respondent violated the Act by discharging three employees for engaging in protected concerted activity related to a Facebook posting. The Board also granted tax compensation and Social Security reporting remedies, and ordered a company-wide notice posting for the handbook rule violation. The Board included a new notice to employees.

Administrative Law Judge William G. Kocol issued his decision on April 27, 2012. The charges were filed by an individual employee. Chairman Pearce, and Members Hirozawa and Schiffer participated.

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Aggregate Industries (28-CA-023220 and 023250; 361 NLRB No. 80) Las Vegas, NV, October 31, 2014.

<http://mynlrb.nlr.gov/link/document.aspx/09031d4581956fa8>

In view of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board considered de novo the Administrative Law Judge's recommended Decision and Order. The Board affirmed the judge's rulings, findings, and conclusions and adopted the judge's recommended Order to the extent and for the reasons stated in the Board's vacated Decision and Order reported at 359 NLRB No. 156, which was incorporated by reference. The Board found that the Respondent violated the Act by unilaterally moving a classification of drivers and the work they performed from coverage under the Construction Agreement to coverage under the less-favorable Ready-Mix Agreement; by bypassing the drivers' exclusive collective-bargaining representative, Teamsters Local 631, and dealing directly with those drivers; and by denying employment opportunities to those drivers who refused to agree to work under the terms and conditions of the Ready-Mix Agreement. The Board found that the Respondent's movement of the drivers was a change in the scope of the bargaining units--a

permissive subject of bargaining--and therefore could not be implemented without first reaching agreement with the Union. The Board further found that even if the Respondent's action is properly characterized as a transfer of unit work, and therefore constituted a mandatory subject of bargaining, the Respondent violated the Act by acting without giving the Union sufficient notice and opportunity to bargain concerning the change.

The Board also found that the Respondent violated the Act by unilaterally reassigning mechanical sweeper truckdriving job duties to employees in the bargaining unit represented by Laborers' International Union of North America, Local 872 (Laborers) when the work had previously been performed by employees in the Teamsters-represented Construction Bargaining unit; by unilaterally changing the terms and conditions of employment of two mechanical sweeper driver employees by treating them as members of the Laborers' bargaining unit; and by dealing directly with the two mechanical sweeper drivers regarding their terms and conditions of employment.

In finding the violations, the Board did not rely on several cases that had been cited in the vacated Decision and Order. It also granted tax compensation and Social Security reporting remedies and included a new notice to employees.

Administrative Law Judge Burton Litvak issued his decision on June 6, 2011. The charges were filed by Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631, affiliated with International Brotherhood of Teamsters. Chairman Pearce, and Members Hirozawa and Schiffer participated.

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Instituto Socio Economico Comunitario, Inc. (24-CA-011762 and 011880; 361 NLRB No. 81) Hato Rey, Toa Baja, Comerio, Lomerio, Caguas, Humacao, Ponce, and Mayaguez, PR, October 31, 2014.  
<http://mynlrb.nlr.gov/link/document.aspx/09031d4581957aaa>

In view of the Supreme Court's decision in NLRB v. Noel Canning, 134 S. Ct. 2550 (2014), the Board considered de novo the Administrative Law Judge's recommended Decision and Order. The Board affirmed the judge's rulings, findings, and conclusions and adopted his recommended Order to the extent and for the reasons stated in the Board's vacated Decision and Order reported at 359 NLRB No. 28, which was incorporated by reference. In that Decision, the Board adopted the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally requiring unit employees to take vacation leave during periods not requested.

Charges were filed by Unidad Laboral de Enfermeras(os) y Empleados de la Salud. Administrative Law Judge William Nelson Cates issued his decision on August 1, 2012. Chairman Pearce, and Members Hirozawa and Schiffer

participated.

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