UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KEN-TRON MANUFACTURING CO.,

Employer

and 25-UD-085770

BRIAN HORTON

Petitioner

and

UNITED STEEL WORKERS OF
AMERICA LOCAL 9443-05,

Union

OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION

Comes now the Union, United Steel Workers of America, Local 9443-05 ("Local 9443"), opposing the Employer's Request for Review of the Decision and Direction of Election.

I. BACKGROUND FACTS

Local 9443 began an economic strike on or about September 10, 2011 after the Employer, Ken-Tron, and the Union could not come to terms on a successor collective bargaining agreement. The strike ended in 2011. At this time there are still a number of unrecalled strikers who have been replaced by the Employer. In July 2012 Ken-Tron employee and Union member Brian Horton filed this union deauthorization (UD) petition.

The Employer subsequently filed an unfair labor practice (ULP) charge, Case 25-CB-086447, against Local 9443, claiming the petition should be disregarded because some of the employees who signed the showing of support may not have intended to vote for deauthorization. As made clear by the Employer's Request for Review, the Employer does not wish to allow the unrecalled strikers to vote in a deauthorization election. As alluded to in its Request for Review, after it learned of the UD petition the

Employer apparently made an effort to find out how its employees would ultimately vote in the deauthorization election.

The Act expressly provides that such an election is by secret ballot. Despite that, the Employer solicits the Board's help, through its ULP charge, in determining how eligible voters will ultimately vote in an attempt to disenfranchise the unrecalled strikers. If the election is not held prior to September 10, 2012 the unrecalled employees will be barred from voting in any election.

II. ARGUMENT

A. The Board Does Not Entertain Requests To Review A Decision Ordering This Election.

The Employer petitions for review of the Acting Regional Director's August 10, 2012 order to conduct an election on the UD petition. While § 102.67 of the Board's Rules and Regulations generally allows a party to request review of a Regional Director's decision, the Employer's request for review of the decision at issue is expressly addressed in the NLRB Casehandling procedures, which states, "There is no provision for filing a request for review of a letter directing a UD election and none should be provided." NLRB Casehandling Manual Part II, Representation Proceedings, § 11508.2 (2007). Accordingly, the Employer's request should be denied.

B. The Regional Director properly rejected the Employer's proferred testimony about the showing of interest and directed an election within 12 months of the strike's commencement.

Petitions to deauthorize are to be promptly processed without delay. *E.g.,* NLRB Casehandling Manual Part II, Representation Proceedings, § 11508.1 (2007). Region Twenty-Five investigated and went through the additional step of reviewing the matter at a hearing on August 2, 2012, which is rare. NLRB Casehandling Manual Part II, Representation Proceedings, § 11506.1 (2007).

As noted at footnote 2 of the August 2, 2012 Decision, the Employer's allegations regarding petition legitimacy were not proper subjects of that hearing. A party is not permitted to litigate a showing of interest at the hearing as that is a purely administrative determination. NLRB Casehandling Manual Part II, Representation Proceedings, § 11184. (2007). Based on the hearing the Acting Regional Director issued her decision that an election should be promptly held. The election is proper and the unrecalled

strikers are eligible to vote in the election. *L.E.M., Inc., d/b/a Southwest Engraving Co. and Towell Printing Co.,* 198 NLRB 694 (1972); *see also, Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987).

The Employer has already had a much more exhaustive review of the UD petition than is normally provided. The Region investigated the charges and found that they should not block the election. Further delay and review is unwarranted.

An election after 12 months of the strike's commencement would exclude unrecalled strikers. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Due to the critical timing of this election, delay past the September 5, 2012 election date set by the Regional Director, would unfairly and permanently disenfranchise eligible voters contrary to "the congressional intent to enfranchise replaced strikers during the first 12 months of an economic strike." *Kingsport Press, Inc.,* 146 NLRB 260, 265, supplemented 146 NLRB 1111 (1964). In that case, the Board issued its decision and direction of elections on March 7, 1964, directing an election a mere three days later on March 10 without awaiting briefs to avoid disenfranchising unrecalled economic strikers who had been on strike since March 11, 1963.

C. The Employer's Request Fails to Comply With Section 102.67 of the Board Rules and Regulations.

The Employer argues that it was not allowed to present evidence of its allegations that pro-union employees signed the showing of support for the UD petition. The Employer's request must fail as its entire submission relies upon unsubstantiated references to facts and rulings at the hearing and provides no record for the parties or Board to rely upon. The Union neither agrees to nor concedes to the Employer's numerous assertions regarding the August 2, 2012 hearing and the underlying facts.

As mandated by § 102.67(d):

> Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity or recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

Here, the Employer relies upon nothing but its unfounded assertions and makes no attempt to comply with § 102.67. Not only does it fail to comply with the regulation, but also it unfairly prejudices Local 9443 by doing so.

D. The Employer Presents No Compelling Question of Law or Policy to Warrant Review.

Section 102.67(c) provides the following limited grounds for review:

> The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
>
> > (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
> >
> > (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
> >
> > (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
> >
> > (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

The Employer meets none of the requisite criteria. It is clear that it seeks to delay the election past the September 10, 2012 strike anniversary so that unrecalled strikers are permanently disenfranchised.

It argues it should be permitted to do so based on the allegation that pro-union employees signed the showing of support for the UD petition. However, no law supports the Employer's contention that the Board must investigate the intent of the signers. To the contrary, Board procedures make clear that the Board looks for evidence of coercion, forgery or that the signers were misled regarding the nature of what they were signing. *E.g.*, NLRB Casehandling Manual Part II, Representation Proceedings, §§ 11029 and 11730 (2007). Despite its efforts, the Employer has uncovered no such facts and presents none in support of its Request for Review.

Section 9(e)(1) of the Act requires a showing of support by 30 percent of the employees for a UD election. The Act protects the privacy of employees and their right to vote by secret ballot. *Id.* In

contrast, the Employer argues that the Board must now become involved in the business of directly undermining the privacy guaranteed by the Act.

The Board would have to discern how each signer intended to vote in the election at the exact time the eligible voter signed a showing of support. That would violate the secrecy of the vote and would positively chill the exercise of free choice. Signers would be much more reluctant to cast a vote in support of the Union. It would also have the likely impact of affecting the free will of the voter in that the voter would be far less inclined to listen to pre-vote arguments for and against deauthorization. Instead, he would likely feel some compulsion to vote consistent with his earlier disclosure to the Board.

Needless to say, such a system would open the door for litigation every time a UD petition is filed without actual evidence of forgery, coercion or misrepresentation. Such a process would directly affect the free will of the eligible voters and it would be an extremely difficult system to govern. Moreover, it would directly contravene the privacy guarantees of the Act.

CONCLUSION

The Request for Review should be denied. It does not comport with the requirements of § 102.67 and the Employer urges a departure from the Act that would directly violate an employee's right to a secret ballot.

Wherefore, the Union respectfully requests that the Employer's Request for Review be denied.

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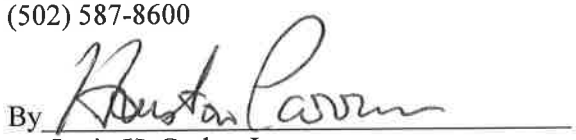
By 

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was served via electronic mail and U.S. first class mail, this 30th day of August, 2012, upon the following:

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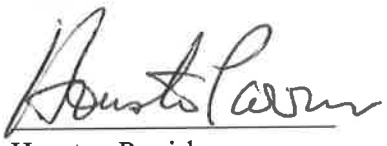

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