

No. 08-70335

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

v.

**C&C ROOFING SUPPLY, INC.**

**Respondent**

---

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) for enforcement of a Board Order upon Stipulation of the Parties for Consent Judgment against C&C Roofing Supply, Inc. (“the Company”). The Board’s unpublished Decision and Order issued on December 20,

2007. (ER 1-10.)<sup>1</sup> The Board’s application for enforcement was filed on January 25, 2008, and is timely. The Act places no time limit on such filings.

The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices. This Court has jurisdiction over the proceeding under Section 10(e) of the Act (29 U.S.C. § 160(e)), the unfair labor practices having occurred in Phoenix, Arizona. The Board’s Order is a final order under Section 10(e) of the Act.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether the Board is entitled to summary enforcement of its Order that adopted the parties’ Formal Settlement Stipulation in which the Company voluntarily waived all further proceedings before the Board and agreed to the entry of a consent order by the Board and a consent judgment by the appropriate United States Court of Appeals.

### **STATEMENT OF THE CASE**

Acting on unfair labor practice charges filed by United Union of Roofers, Waterproofers and Allied Workers, Local 135, AFL-CIO (“the Union”), the

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<sup>1</sup> “ER” references are to the Excerpts of Record filed by the Company. “Add” references are to the Addendum at the back of this brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Board's General Counsel issued a complaint alleging, among other things, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158 (a)(5) and (1)) by unilaterally subcontracting bargaining unit work and altering its disciplinary rules, resulting in the unlawful layoff or discharge of approximately 21 employees. (ER 41-48, 62-69, 78.)

On October 17, 2007, the Company, Union, and Board General Counsel signed a Formal Settlement Stipulation authorizing the Board to enter an Order requiring the Company, in relevant part, to take the following action:

1. Place Melecio Chavez and Jose Corrales "on a preferential hiring list pursuant to which they will be offered reinstatement to their former . . . [or] substantially equivalent positions[.]" The Stipulation also provides for payment to Chavez of \$13,773.00 and to Corrales of \$9,621.00. (ER 32.)

2. Place foreman Nemesio Macario and non-foremen Porfirio Huinac and Gustavo Velasquez "on a preferential hiring list pursuant to which they will be offered reinstatement to their former . . . [or] substantially equivalent positions[.]" The Stipulation also provides for payment to Macario, Huinac, and Velazquez, each, of \$1,800.00. (ER 32-33.)

3. Place foreman Nelson Aguilar, Alejandro Galvan; Florencio Lopez; and Carlos Lopez de Leon, and non-foremen Ervin Donis, Hugo Ochoa, Maynor Lopez, Anibal Moran, Vidal Trigueros, Leivus Lopez, Anibal Gomez, Oswaldo

Iribe, Genaro Gomez, Jenaro Hernandez, and Mario Lopez de Leon “on a preferential hiring list pursuant to which they will be offered reinstatement to their former positions. . . [or] substantially equivalent positions[.]” The Stipulation also provides for payment of \$900.00 to each of these 15, as well as employee Eric Olivarez.<sup>2</sup> (ER 33-34.)

The Stipulation includes a waiver provision stating that “[a]ll parties waive the following: (a) filing of answers; (b) hearing; (c) administrative law judge’s decision; (d) filing of exceptions and briefs; (e) oral argument before the Board; (f) the making of findings of fact and conclusions of law by the Board; and (g) all other proceedings to which the parties may be entitled under the Act or the Board’s Rules and Regulations.” (ER 28-29.)

The Stipulation provides that it is subject to approval of the Board, and when such approval is granted, the Stipulation becomes effective and the Company “will immediately comply with” its provisions. (ER 29-30.) It further states that the parties to the proceeding - - the Company, Union, and Board General Counsel - - “agree that, upon approval of this stipulation by the Board, a Board Order in conformity with its terms will issue and a court judgment enforcing the Order will be entered.” (ER 27.)

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<sup>2</sup> Appendix A of the Stipulation states that the Company has already reinstated Olivarez to his former job. (ER 39.)

The Stipulation also contains a waiver of the Company's right to contest the entry of a consent judgment in a court proceeding. Under its "Enforcement of Order" Section, the Stipulation provides:

The United States Court of Appeals of any appropriate circuit may, on application by the Board, enter its judgment enforcing the order of the Board in the form set forth above. Respondent waives all defenses to the entry of the judgment, including compliance with the order of the Board and its right to receive notice of the filing of an application for the entry of such judgment, provided that the judgment is in the words and figures set forth above . . . . (ER 35.)

On December 20, 2007, the Board (Members Schaumber, Kirsanow, and Walsh) issued a Decision and Order adopting the Stipulation. (ER 1-23.) Based on the terms of the Stipulation, the Board's Order requires the Company to cease and desist from certain unlawful conduct. (ER 2-3; 30-31.) It also requires the Company to take certain affirmative action, including placing the terminated or laid-off employees named in the Stipulation on a preferential hiring list for reinstatement and making them whole for losses of earnings and benefits resulting from the termination of their employment. (ER 3-6; 31-35.)

### **SUMMARY OF ARGUMENT**

The Board is entitled to summary enforcement of its Order, which adopted a Formal Settlement Stipulation in which the Company waived all further proceedings before the Board and agreed to the entry of a consent judgment by the appropriate Court of Appeals. There is no merit to the Company's contention that

it should escape the obligation to offer reinstatement and pay agreed-upon liquidated amounts of back pay to certain employees because they allegedly are undocumented. There is also no merit to its contention that the application for enforcement of the Board's Order is defective because it was filed by the Board's General Counsel at a time when three of the Board's five seats were vacant.

## **ARGUMENT**

### **THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS ORDER THAT ADOPTED THE PARTIES' FORMAL SETTLEMENT STIPULATION IN WHICH THE COMPANY VOLUNTARILY WAIVED ALL FURTHER PROCEEDINGS BEFORE THE BOARD AND AGREED TO THE ENTRY OF A CONSENT ORDER BY THE BOARD AND A CONSENT JUDGMENT BY THE APPROPRIATE UNITED STATES COURT OF APPEALS**

#### **A. The Board's Decision Adopted the Parties' Formal Settlement Stipulation**

The Board provides respondents in unfair labor practice cases with opportunities for settlement at all stages of its proceedings. Board Statements of Procedures, 29 C.F.R. § 101.7, 101.9. *See, generally, International Ladies Garment Workers Union v. NLRB*, 501 F.2d 823, 827 (D.C. Cir. 1974). Such voluntary settlements have long been recognized as “the lifeblood of the administrative process.” *Jackman v. NLRB*, 784 F.2d 759, 764 (6th Cir. 1986) (quoting *Final Report, Attorney General's Commission on Administrative Procedure*, Sen. Doc. No. 8, 77th Cong., 1st Sess. p. 35). Accordingly, the Board

has long had the policy of encouraging settlements that effectuate the policies of the Act. *Wallace Corp. v. NLRB*, 323 U.S. 248, 253-54 (1944); *Farmers' Co-Operative Gin Assn.*, 168 NLRB 367, 367 (1967). Throughout the Act's administration, the vast majority of meritorious unfair labor practice charges (in recent years, some 90.9 percent of such charges) have resulted in formal or informal settlements, providing speedy and effective remedies for the unfair labor practices which have occurred at a minimum of cost to the Board, respondents, and charging parties. See National Labor Relations Board, Seventh Annual Report, 8 (2006); *Poole Foundry and Machine Co. v. NLRB*, 192 F.2d 740, 742 (4th Cir. 1951). Without such effective means of settling unfair labor practice charges, "the administration of the Act by the Board would be greatly impaired...." *W.B. Johnson Grain Co. v. NLRB*, 365 F.2d 582, 586 (10th Cir. 1966).

In the instant case, the Company, Union, and the Board's General Counsel entered into a Formal Settlement Stipulation. In such a stipulation, "the General Counsel exercises his statutory authority by agreeing not to litigate a charge, in return for the respondent's agreement to consent to a Board order, with judicial enforcement, requiring certain remedial action." *George Banta Co. Inc. v. NLRB*, 604 F.2d 830, 835 (4th Cir. 1979). See also *Jackman v. NLRB*, 784 F.2d 759, 762

(6th Cir. 1986).<sup>3</sup> Board Orders that adopt Formal Settlement Stipulations that provide for entry of a consent judgment by the appropriate U.S. Court of Appeals are normally entitled to, and receive, enforcement by the courts. *See NLRB v. Plaza Properties of Michigan, Inc.*, 191 F.3d 452 (6th Cir. 1999) (table); *NLRB v. Carpenters District Council of Miami*, 288 F.2d 455 (5th Cir. 1961).

Here, it is undisputed that the Formal Settlement Stipulation, executed by all parties and adopted by the Board in its Decision and Order, includes all the necessary elements of waiver and consent on the part of the Company. As shown above (pp. 4-5), the Stipulation, as adopted by the Board's Order, provides that the parties waive all Board proceedings; that the Stipulation becomes effective upon approval by the Board; that the Company will immediately comply with its provisions; that the Board Order, in conformity with its terms, will issue; and that court judgment enforcing that Order will be entered. Finally, the Stipulation

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<sup>3</sup> Section 101.9(b)(1) of the Board's Rules and Regulations (29 C.F.R § 101.9 (b)(1) provides: "After the issuance of a complaint, the Agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, DC. In such an agreement, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily, the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a judgment by the appropriate circuit court of appeals enforcing the Board's order."

specifically provides that the Company “waives all defenses to the entry of a judgment” enforcing the Board’s Order by the appropriate court of appeals.

The Company contends, however, that this Court should permit it to avoid its obligations under the Stipulation on two grounds: 1) the Board’s remedial order adopting the agreed-upon liquidated amounts in lieu of precise backpay amounts and adopting the parties’ agreement to reinstate these employees is invalid with respect to certain employees because of their allegedly undocumented status, and 2) the Board’s application for enforcement should be dismissed because it was filed at a time when the Board “lacked a three-member quorum to exercise its powers” and had improperly delegated its enforcement power to the General Counsel. As we show below, neither of these contentions provides a reason for this Court to deny the Board’s application for enforcement.

**B. The Company May Not Dishonor Its Stipulated Agreement to Pay to the Discriminatees the Liquidated Sums to Which It Agreed**

The Company claims (Br 2, 9-31) that it no longer has an obligation to pay the liquidated sums it agreed to in lieu of back pay, or honor its agreement to offer reinstatement, to 17 of the 20 employees included in the Formal Settlement Stipulation because they allegedly are undocumented. It therefore requests (Br 43-44) that the Court deny the Board’s application for enforcement of its Order “with respect to any backpay and reinstatement . . . and/or remand[ ] [it] to the

Board for further proceedings[.]” This contention has no merit and should be rejected by the Court.

The Company’s claim is, of course, in direct derogation of the Stipulated Settlement, which forms the basis of the Board’s Order and which the Company voluntarily entered into and executed. The Stipulation was of substantial benefit to the Company, saving it the time and expense of further litigation, tolling the Company’s backpay obligation, and using liquidated figures for the more precise backpay amounts that may have been owed each employee. As shown above (pp. 4-5), the Stipulation also includes strict and explicit language regarding waiver of further company rights and agreement to consent to a Board order enforced by a court judgment. The explicit waiver of “all further proceedings to which the parties may be entitled under the Act or the Board’s Rules and Regulations” clearly covers the “further proceedings” referred to in the Company’s remand request.

Moreover, the Company could have avoided the alleged undocumented-worker problem that it poses simply by including language in the Stipulation that would have provided it with relief, or entitled it to additional proceedings, in the event of such problems. But despite the fact that the Company (Br 10-12) was concededly aware of the possibility that documentation problems might arise, it chose to buy its peace and cut its losses by opting for the tolling of backpay liability with liquidated sums, thereby foregoing the possibility of avoiding *all*

liability with respect to employees subsequently found to be undocumented and therefore unentitled to back pay.<sup>4</sup>

Finally, there is no basis for the Company's contention (Br 27) that court enforcement of the Order's reinstatement provisions would require actions by the Company that are in violation of state and federal statutes prohibiting an employer from knowingly or intentionally employing unauthorized aliens.<sup>5</sup> Before the Company reinstates any employee, it can bring proof of the employee's undocumented status to the Board's Regional Office. And were the Board improperly to ignore that proof, the Company would be free to use that proof in defense of its refusal to reinstate the particular employee in any contempt proceeding that the Board may have brought on behalf of the Order. Moreover, the Company's successful defense would lawfully justify a continuing refusal of reinstatement, eliminating any exposure to liability under state or federal statutes prohibiting the employment of undocumented individuals.

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<sup>4</sup> The Company's reliance (Br 11, 14, 19-21, 26-27) on *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) is misplaced. There, the Court held that the Board could not order back pay for undocumented employees. 535 U.S. at 140, 151-52. In the instant case, however, the Company is not challenging a contested Board backpay order, but its own stipulated agreement to settle for lesser liquidated sums.

<sup>5</sup> The Company cites (Br 16-19) the Legal Arizona Workers Act (Ariz. Rev. Stat. § § 23-212(D), 3-14) and the federal Immigration Reform and Control Act (8 U.S. § 1324a(a)(1)) ("IRCA").

**C. The Filing of the Application for Enforcement was a Proper Exercise of the General Counsel's Authority**

The Company also contends (Br 2-3, 31-44) that the Board's application for enforcement was defective because it was filed by the Board's General Counsel in January 2008, when only two of the Board's five seats were filled, and that the Board's General Counsel is disempowered from initiating court-enforcement proceedings whenever a majority of the Board's seats are vacant. There is absolutely no merit to this contention.

First of all, it is important to note that the decision under review is a decision of a three-member Board panel and there is no question that a three-member Board decision is a valid Board decision. This is not to suggest that a decision by a two-member Board is any less valid under the two-member quorum provision of Section 3(b) of the Act (29 U.S.C. § 153(b)), but the validity of two-member Board decisions is not presented here. The only issue that is presented is whether the authority that the Board's regulations permanently delegate to the Board's General

Counsel to enforce and defend unquestionably-valid Board decisions is in any way affected by the number of members on the Board when court proceedings begin.<sup>6</sup>

Section 3(d) of the Act provides that the Board's General Counsel "shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members)[.]" 29 U.S.C. § 153(d). Section 3(d) of the Act also provides that the General Counsel shall not only have "final authority, on behalf of the Board," with respect to the investigation of charges and issuance and prosecution of complaints before the Board, but also "shall have such other duties as the Board may prescribe or as may be provided by law." Such language "must mean that the Board may confer upon the General Counsel functions other than those specifically committed to him by statute; otherwise, it would be superfluous and without meaning or purpose." *Muffley v. Massey Energy Co.*, 547 F. Supp. 2d 536, 540 (S.D. W. Va. 2008) (quoting *Evans v. Int. Typographical Union*, 76 F. Supp. 881 (S.D. Ind. 1948)) (internal quotation marks omitted).

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<sup>6</sup> Under Section 10(f) of the Act (29 U.S.C. § 160(f)), the court proceeding in this case could have been initiated just as easily by a petition for review filed by an aggrieved party yet, interestingly, the Company does not go so far as to suggest that the Board would have been disempowered from defending its decision in that circumstance.

Given the Act's restriction on any Board supervision of lawyers that enforce and defend its decisions in court, and given the Board's powers under Section 3(d) of the Act to assign to the General Counsel "such other duties as the Board may prescribe," the Board, by regulation, permanently authorized the General Counsel to seek and effect compliance with Board orders. 20 Fed. Reg. 2175 (1955). (Add 1-6, 7-8.) The regulation specifically provides: "The General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to seek and effect compliance with Board Orders." (Add 2, 7.)

The Company's brief never acknowledges this portion of the regulation. Yet, it is this portion that delegated to the General Counsel the court-enforcement authority that is at issue in this case. Under this authority, the General Counsel does not seek case-by-case approval from the Board before initiating court actions to enforce Board decisions. The Company has cited no statute, regulation or other authority requiring such authorization. The General Counsel has been permanently delegated the function of seeking enforcement of Board decisions and that function is not affected by how many members serve on the Board at the time the General Counsel initiates the court-enforcement proceeding.

Instead of acknowledging the portion of the regulation that permanently delegated court-enforcement authority to the General Counsel, the Company simply posits (Br 32-36) that court-enforcement authority is like the various other

functions that the regulation delegates to the General Counsel on a case-by-case basis. *See* 20 Fed. Reg. 2175 (1955). (Add 2, 7.) Thus, with respect to some delegated functions, Part I.B. of the regulation provides: “*Provided, however, That the General Counsel will initiate and conduct injunction proceedings under Section 10(j) or under Section 10(e) and (f) of the [A]ct and contempt proceedings pertaining to the enforcement of or compliance with any order of the Board only upon approval by the Board* (emphasis added), and will initiate and conduct appeals to the Supreme Court by writ of error or on petition for certiorari *when authorized by the Board* (emphasis added).” *Id.* The Company’s argument ignores the fact that even though “petition[ing] for enforcement or resist[ing] petitions for review of Board Orders as provided in section 10(e) and (f) of the Act” is listed in the regulation as one of the functions delegated to the General Counsel, it is omitted from this list of functions requiring case-by-case approval by the Board. *Id.*

But even if the petitioning for enforcement and resisting petitions for review had been one of those functions that the Board normally reserved for individualized approval, on December 20, 2007, the then-current four members of the Board, in anticipation that challenge might be made to the upcoming actions of the soon-to-be two-member Board, temporarily delegated to the General Counsel “full authority on all court litigation matters that would otherwise require Board

authorization.” (Add. 9-10.) That delegation has already been recognized as a valid continuing delegation in the face of the argument, advanced by the Company here (Br 36), that delegated authority is extinguished once the Board loses a majority of its members. *See Muffley v. Massey Energy Co.*, 547 F. Supp. 2d 536, 539-42 (S.D. W. Va. 2008) (“*Muffley*”). *See also Kentov v. Point Blank Body Armor, Inc.* 258 F. Supp. 2d 1325, 1329 (S.D. Fla. 2002); *Evans v. Int. Typographical Union*, 76 F. Supp. 881, 889-90 (S.D. Ind. 1948).<sup>7</sup>

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<sup>7</sup> *Muffley* also recognized that delegation to the General Counsel of the authority to seek court injunctions under 10(j) and 10(l) of the Act (29 U.S.C. § 160(j) and 160(l)) is not the delegation of a power that is judicial in nature. 546 F. Supp. 2d at 541-42. Therefore the validity of the delegation was not affected by the cases the Company relies on (Br 39-40, 42-43), namely, *KFC Nat’l Mgt. Corp. v. NLRB*, 497 F.2d 298 (2d Cir. 1974), and *Flav-O-Rich v. NLRB*, 531 F.2d 358 (6th Cir. 1976). Here, the authority to seek court enforcement under Section 10(e) of the Act also is not the delegation of a power that is judicial in nature because, just as when the General Counsel brings an injunction proceeding, the judicial function is performed by the court. *Muffley*, 546 F. Supp. 2d at 541-42.

## CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Board's Order should be enforced in full.

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National Labor Relations Board  
July 2008

h:C&CRoofing—brief—rewb

**STATEMENT OF RELATED CASES**

Board counsel are unaware of any related cases pending in this Court.

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LINDA DREEBEN  
Deputy Associate General Counsel  
National Labor Relations Board

July 2008

# ADDENDUM

20 F.R. 2175

**NATIONAL LABOR RELATIONS BOARD**

**Revocation of Assignment of Responsibilities to the Associate General  
Counsels of the Division of Operations and Division of Law,  
Respectively**

Pursuant to the provisions of section 3(a) of the Administrative Procedures Act (Pub. Law 404, 79th Cong., 2d Sess.), the National Labor Relations Board hereby separately states and currently publishes in the FEDERAL REGISTER notification that:

Assignment of Responsibilities to the Associate General Counsels of the Division of Operations and Division of Law, Respectively, effective December 21, 1954 (19 F.R. 8830, December 23, 1954) was revoked effective at close of business March 31, 1955.

Dated: Washington, D.C., April 1, 1955.

By direction of the Board.

FRANK M. KLEILER,  
*Executive Secretary*

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**Authority and Assigned Responsibilities of General Counsel of  
National Labor Relations Board**

Pursuant to the provisions of section 3(a) of the Administrative Procedures Act (Pub. Law 404, 79th Cong., 2d Sess.), the National Labor Relations Board hereby separately states and currently publishes in the FEDERAL REGISTER the following board memorandum describing the authority and assigned responsibilities of the general counsel of the National Labor Relations Board (effective April 1, 1955).

Dated: Washington, D.C., April 1, 1955.

By direction of the Board.

FRANK M. KLEILER,  
*Executive Secretary*

**Board Memorandum Describing the Authority and Assigned  
Responsibilities of the General Counsel of the National Labor Relations  
Board (Effective April 1, 1955)**

The statutory authority and responsibility of the General Counsel of the Board are defined in section 3(d) of the National Labor Relations Act as follows: "There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other

NATIONAL LABOR RELATIONS BOARD

than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."

This memorandum is intended to describe the statutory authority and to set forth the prescribed duties and authority of the General Counsel of the Board, effective April 1, 1955:

I. *Case handling*—A. *Complaint cases.* The General Counsel of the Board has full and final authority and responsibility, on behalf of the Board, to accept and investigate charges filed, to enter into and approve informal settlement of charges, to dismiss charges, to determine matters concerning consolidation and severance of cases before complaint issues, to issue complaints and notices of hearing, to appear before Trial Examiners in hearings on complaints and prosecute as provided in the Board's rules and regulations, and to initiate and prosecute injunction proceedings as provided for in section 10(l) of the act. After issuance of Intermediate Report by the Trial Examiner, the General Counsel may file exceptions and briefs and appear before the Board in oral argument, subject to the Board's rules and regulations.

B. *Court litigation.* The General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to seek and effect compliance with the Board's orders and make such compliance reports to the Board as it may from time to time require.

On behalf of the Board, the General Counsel of the Board will, in full accordance with the directions of the Board, petition for enforcement and resist petitions for review of Board Orders as provided in section 10(e) and (f) of the act, initiate and prosecute injunction proceedings as provided in section 10(j), seek temporary restraining orders as provided in section 10(e) and (f), and take appeals either by writ of error or on petition for certiorari to the Supreme Court: *Provided, however,* That the General Counsel will initiate and conduct injunction proceedings under section 10(j) or under section 10(e) and (f) of the act and contempt proceedings pertaining to the enforcement of or compliance with any order of the Board only upon approval of the Board, and will initiate and conduct appeals to the Supreme Court by writ of error or on petition for certiorari when authorized by the Board.

C. *Representation and other election cases.* The General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to receive and process, in accordance with the decisions of the Board and with such instructions and rules and regulations as may be issued by the Board from time to time, all petitions filed pursuant

NATIONAL LABOR RELATIONS BOARD

to section 9 of the National Labor Relations Act as amended. He is also authorized and has responsibility to conduct secret ballots pursuant to section 209(b) of the Labor Management Relations Act of 1947, whenever the Board is required to do so by law; and to enter into consent election agreements in accordance with section 9(c)(4) of the act.

The authority and responsibility of the General Counsel of the Board in representation cases shall extend, in accordance with the rules and regulations of the Board, to all phases of the investigation through the conclusion of the hearing provided for in section 9(c) and section 9(e) (if a hearing should be necessary to resolve disputed issues), but all matters involving decisional action after such hearing are reserved by the Board to itself.

In the event a direction of election should issue by the Board, the authority and responsibility of the General Counsel, as herein prescribed, shall attach to the conduct of the ordered election, the initial determination of the validity of challenges and objections to the conduct of the election and other similar matters; except that if appeals shall be taken from the General Counsel's action on the validity of challenges and objections, such appeals will be directed to and decided by the Board in accordance with such procedural requirements as it shall prescribe. If challenged ballots would not affect the election results and if no objections are filed within five days after the conduct of a Board-directed election under the provisions of section 9(c) of the act, the General Counsel is authorized and has responsibility, on behalf of the Board, to certify to the parties the results of the election in accordance with regulations prescribed by the Board.

Appeals from the refusal of the General Counsel of the Board to issue a notice of hearing on any petition, or from the dismissal by the General Counsel of any petition, will be directed to and decided by the Board, in accordance with such procedural requirements as it may prescribe.

In processing election petitions filed pursuant to section 9(e) of the act, the General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to conduct an appropriate investigation as to the authenticity of the 30 percent showing referred to and, upon making his determination to proceed, to conduct a secret ballot. If there are no challenges or objections which require a hearing by the Board, he shall certify the results thereof as provided for in such section, with appropriate copies lodged in the Washington files of the Board.

D. *Jurisdictional dispute cases.* The General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to perform all functions necessary to the accomplishment of the provisions of section 10(k) of the act, but in connection therewith the Board will, at the request of the General Counsel, assign to him for the purpose of conducting the hearing provided for therein, one of its staff Trial Examiners. This authority and responsibility and the assignment of the Trial Examiner to the General Counsel shall terminate with the close of the hearing. Thereafter the Board will assume

NATIONAL LABOR RELATIONS BOARD

full jurisdiction over the matter for the purpose of deciding the issues in such hearing on the record made and subsequent hearings or related proceedings and will also rule upon any appeals.

II. *Internal regulations.* Procedural and operational regulations for the conduct of the internal business of the Board within the area that is under the supervision and direction of the General Counsel of the Board may be prepared and promulgated by the General Counsel.

III. *State agreements.* When authorized by the Board, the General Counsel may initiate and conduct discussions and negotiations, on behalf of the Board, with appropriate authorities of any of the States or Territories looking to the consummation of agreements affecting any of the States or Territories as contemplated in section 10(a) of the act: Provided, however, That in no event shall the Board be committed in any respect with regard to such discussions or negotiations or the entry into of any such agreement unless and until the Board and the General Counsel have joined with the appropriate authorities of the State or Territory affected in the execution of such agreement.

IV. *Liaison with other governmental agencies.* The General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to maintain appropriate and adequate liaison and arrangements with the office of the Secretary of Labor, with reference to the reports required to be filed pursuant to section 9(f) and (g) of the act and availability to the Board and the General Counsel of the contents thereof.

The General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to maintain appropriate and adequate liaison with the Federal Mediation and Conciliation Service and any other appropriate Governmental Agency with respect to functions which may be performed in connection with the provisions of section 209(b) of the act. Any action taken pursuant to the authority and responsibility prescribed in this paragraph shall be promptly reported to the Board.

V. *Anti-communist affidavits.* The General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to receive the affidavits required under section 9(h) of the act, to maintain an appropriate and adequate file thereof, and to make available to the public, on such terms as he may prescribe, appropriate information concerning such affidavits, but not to make such files open to unsupervised inspection.

VI. *Miscellaneous litigation involving board and/or officials.* The General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to appear in any court to represent the Board or any of its Members or agents, unless directed otherwise by the Board.

VII. *Personnel.* In order better to ensure the effective exercise of the duties and responsibility described above, the General Counsel of the Board, subject to applicable laws and the rules and regulations of the Civil Service Commission, is authorized and has responsibility, on behalf of the Board, to select, appoint, retain, transfer, promote,

NATIONAL LABOR RELATIONS BOARD

demote, discipline, discharge, and take any other necessary and appropriate personnel action with regard to, all personnel engaged in the field offices and in the Washington office (other than Trial Examiners, Legal Assistants to Board Members, the personnel in the Information Division, the personnel in the Division of Administration, the Solicitor of the Board and personnel in his office, the Executive Secretary of the Board and personnel in his office, including the Docket, Order and Issuance Section, and secretarial, stenographic and clerical employees assigned exclusively to the work of trial examiners and the Board Members); provided, however, that no appointment, transfer, demotion or discharge of any Regional Director or Officer in Charge shall become effective except upon the approval of the Board.

In connection with and in order to effectuate the exercise of the powers herein delegated (but not with respect to those powers herein reserved to the Board), the General Counsel is authorized, using the services of the Division of Administration, to execute such necessary requests, certifications, and other related documents, on behalf of the Board, as may be needed from time to time to meet the requirements of the Civil Service Commission, the Bureau of the Budget, or any other governmental agency. The Board will at all times provide such of the "housekeeping" functions performed by the Division of Administration as are requested by the General Counsel for the conduct of his administrative business, so as to meet the stated requirements of the General Counsel within his statutory and prescribed functions.

The establishment, transfer or elimination of any Regional or Sub-Regional Office shall require the approval of the Board.

NATIONAL LABOR RELATIONS BOARD

VIII. To the extent that the above-described duties, powers and authority rest by statute with the Board, the foregoing statement constitutes a prescription and assignment of such duties, powers and authority, whether or not so specified.

GUY FARMER,  
*Chairman.*

ABE MURDOCK,  
*Member.*

IVAR H. PETERSON,  
*Member.*

PHILIP RAY RODGERS,  
*Member.*

April 1, 1955.

NATIONAL LABOR RELATIONS BOARD

(B) The application for rehearing in Docket No. G-8688 be and the same hereby is consolidated with the application for rehearing in Docket No. G-8689 for purpose of hearing.

Adopted: March 30, 1955.

Issued: March 31, 1955.

By the Commission.

[SEAL] LEON M. FUQUAY,  
Secretary.

[F. R. Doc. 55-2806; Filed, Apr. 5, 1955;  
8:48 a. m.]

**NATIONAL LABOR RELATIONS BOARD**

**REVOCATION OF ASSIGNMENT OF RESPONSIBILITIES TO THE ASSOCIATE GENERAL COUNSELS OF THE DIVISION OF OPERATIONS AND DIVISION OF LAW, RESPECTIVELY**

Pursuant to the provisions of section 3 (a) of the Administrative Procedures Act (Pub. Law 404, 79th Cong., 2d Sess.), the National Labor Relations Board hereby separately states and currently publishes in the FEDERAL REGISTER notification that:

Assignment of Responsibilities to the Associate General Counsels of the Division of Operations and Division of Law, Respectively, effective December 21, 1954 (19 F. R. 8830, December 23, 1954) was revoked effective at close of business March 31, 1955.

Dated: Washington, D. C., April 1, 1955.

By direction of the Board.

FRANK M. KLEILER,  
Executive Secretary.

[F. R. Doc. 55-2855; Filed, Apr. 5, 1955;  
8:51 a. m.]

**AUTHORITY AND ASSIGNED RESPONSIBILITIES OF GENERAL COUNSEL OF NATIONAL LABOR RELATIONS BOARD**

Pursuant to the provisions of section 3 (a) of the Administrative Procedures Act (Pub. Law 404, 79th Cong., 2d Sess.), the National Labor Relations Board hereby separately states and currently publishes in the FEDERAL REGISTER the following board memorandum describing the authority and assigned responsibilities of the general counsel of the National Labor Relations Board (effective April 1, 1955).

Dated: Washington, D. C., April 1, 1955.

By direction of the Board.

FRANK M. KLEILER,  
Executive Secretary.

**BOARD MEMORANDUM DESCRIBING THE AUTHORITY AND ASSIGNED RESPONSIBILITIES OF THE GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD (EFFECTIVE APRIL 1, 1955)**

The statutory authority and responsibility of the General Counsel of the Board are defined in section 3 (d) of the National Labor Relations Act as follows: "There shall be a General Counsel of the Board who shall be

appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."

This memorandum is intended to describe the statutory authority and to set forth the prescribed duties and authority of the General Counsel of the Board, effective April 1, 1955:

**I. Case handling—A. Complaint cases.** The General Counsel of the Board has full and final authority and responsibility, on behalf of the Board, to accept and investigate charges filed, to enter into and approve informal settlement of charges, to dismiss charges, to determine matters concerning consolidation and severance of cases before complaint issues, to issue complaints and notices of hearing, to appear before Trial Examiners in hearings on complaints and prosecute as provided in the Board's rules and regulations, and to initiate and prosecute injunction proceedings as provided for in section 10 (1) of the act. After issuance of Intermediate Report by the Trial Examiner, the General Counsel may file exceptions and briefs and appear before the Board in oral argument, subject to the Board's rules and regulations.

**B. Court litigation.** The General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to seek and effect compliance with the Board's orders and make such compliance reports to the Board as it may from time to time require.

On behalf of the Board, the General Counsel of the Board will, in full accordance with the directions of the Board, petition for enforcement and resist petitions for review of Board Orders as provided in section 10 (e) and (f) of the act, initiate and prosecute injunction proceedings as provided in section 10 (j), seek temporary restraining orders as provided in section 10 (e) and (f), and take appeals either by writ of error or on petition for certiorari to the Supreme Court; *Provided, however,* That the General Counsel will initiate and conduct injunction proceedings under section 10 (j) or under section 10 (e) and (f) of the act and contempt proceedings pertaining to the enforcement of or compliance with any order of the Board only upon approval of the Board, and will initiate and conduct appeals to the Supreme Court by writ of error or on petition for certiorari when authorized by the Board.

**C. Representation and other election cases.** The General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to receive and process, in accordance with the decisions of the Board and with such instructions and rules and regulations as may be issued by the Board from time to time, all petitions filed pursuant to section 9 of the National Labor Relations Act as amended. He is also authorized and has responsibility to conduct secret ballots pursuant to section 209 (b) of the Labor Management Relations Act of 1947, whenever the Board is required to do so by law, and to enter into consent election agreements in accordance with section 9 (c) (4) of the act.

The authority and responsibility of the General Counsel of the Board in representation cases shall extend, in accordance with the rules and regulations of the Board, to all phases of the investigation through the conclusion of the hearing provided for in section 9 (c) and section 9 (e) (if a hearing should be necessary to resolve disputed issues), but all

matters involving decisional action after such hearing are reserved by the Board to itself.

In the event a direction of election should issue by the Board, the authority and responsibility of the General Counsel, as herein prescribed, shall attach to the conduct of the ordered election, the initial determination of the validity of challenges and objections to the conduct of the election and other similar matters; except that if appeals shall be taken from the General Counsel's action on the validity of challenges and objections, such appeals will be directed to and decided by the Board in accordance with such procedural requirements as it shall prescribe. If challenged ballots would not affect the election results and if no objections are filed within five days after the conduct of a Board-directed election under the provisions of section 9 (c) of the act, the General Counsel is authorized and has responsibility, on behalf of the Board, to certify to the parties the results of the election in accordance with regulations prescribed by the Board.

Appeals from the refusal of the General Counsel of the Board to issue a notice of hearing on any petition, or from the dismissal by the General Counsel of any petition, will be directed to and decided by the Board, in accordance with such procedural requirements as it may prescribe.

In processing election petitions filed pursuant to section 9 (e) of the act, the General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to conduct an appropriate investigation as to the authenticity of the 30 percent showing referred to and, upon making his determination to proceed, to conduct a secret ballot. If there are no challenges or objections which require a hearing by the Board, he shall certify the results thereof as provided for in such section, with appropriate copies lodged in the Washington files of the Board.

**D. Jurisdictional dispute cases.** The General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to perform all functions necessary to the accomplishment of the provisions of section 10 (k) of the act, but in connection therewith the Board will, at the request of the General Counsel, assign to him for the purpose of conducting the hearing provided for therein, one of its staff Trial Examiners. This authority and responsibility and the assignment of the Trial Examiner to the General Counsel shall terminate with the close of the hearing. Thereafter the Board will assume full jurisdiction over the matter for the purpose of deciding the issues in such hearing on the record made and subsequent hearings or related proceedings and will also rule upon any appeals.

**II. Internal regulations.** Procedural and operational regulations for the conduct of the internal business of the Board within the area that is under the supervision and direction of the General Counsel of the Board may be prepared and promulgated by the General Counsel.

**III. State agreements.** When authorized by the Board, the General Counsel may initiate and conduct discussions and negotiations, on behalf of the Board, with appropriate authorities of any of the States or Territories looking to the consummation of agreements affecting any of the States or Territories as contemplated in section 10 (a) of the act; *Provided, however,* That in no event shall the Board be committed in any respect with regard to such discussions or negotiations or the entry into of any such agreement unless and until the Board and the General Counsel have joined with the appropriate authorities of the State or Territory affected in the execution of such agreement.

**IV. Liaison with other governmental agencies.** The General Counsel of the Board is authorized and has responsibility, on be-

half of the Board, to maintain appropriate and adequate liaison and arrangements with the office of the Secretary of Labor, with reference to the reports required to be filed pursuant to section 9 (f) and (g) of the act and availability to the Board and the General Counsel of the contents thereof.

The General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to maintain appropriate and adequate liaison with the Federal Mediation and Conciliation Service and any other appropriate Governmental Agency with respect to functions which may be performed in connection with the provisions of section 209 (b) of the act. Any action taken pursuant to the authority and responsibility prescribed in this paragraph shall be promptly reported to the Board.

V. *Anti-communist affidavits.* The General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to receive the affidavits required under section 9 (h) of the act, to maintain an appropriate and adequate file thereof, and to make available to the public, on such terms as he may prescribe, appropriate information concerning such affidavits, but not to make such files open to unsupervised inspection.

VI. *Miscellaneous litigation involving board and/or officials.* The General Counsel of the Board is authorized and has responsibility, on behalf of the Board, to appear in any court to represent the Board or any of its Members or agents, unless directed otherwise by the Board.

VII. *Personnel.* In order better to ensure the effective exercise of the duties and responsibilities described above, the General Counsel of the Board, subject to applicable laws and the rules and regulations of the Civil Service Commission, is authorized and has responsibility, on behalf of the Board, to select, appoint, retain, transfer, promote, demote, discipline, discharge, and take any other necessary and appropriate personnel action with regard to, all personnel engaged in the field offices and in the Washington office (other than Trial Examiners, Legal Assistants to Board Members, the personnel in the Information Division, the personnel in the Division of Administration, the Solicitor of the Board and personnel in his office, the Executive Secretary of the Board and personnel in his office, including the Docket, Order and Issuance Section, and secretarial, stenographic and clerical employees assigned exclusively to the work of trial examiners and the Board Members); provided, however, that no appointment, transfer, demotion or discharge of any Regional Director or Officer in Charge shall become effective except upon the approval of the Board.

In connection with and in order to effectuate the exercise of the powers herein delegated (but not with respect to those powers herein reserved to the Board), the General Counsel is authorized, using the services of the Division of Administration, to execute such necessary requests, certifications, and other related documents, on behalf of the Board, as may be needed from time to time to meet the requirements of the Civil Service Commission, the Bureau of the Budget, or any other governmental agency. The Board will at all times provide such of the "housekeeping" functions performed by the Division of Administration as are requested by the General Counsel for the conduct of his administrative business, so as to meet the stated requirements of the General Counsel within his statutory and prescribed functions.

The establishment, transfer or elimination of any Regional or Sub-Regional Office shall require the approval of the Board.

VIII. To the extent that the above-described duties, powers and authority rest by statute with the Board, the foregoing statement constitutes a prescription and assign-

ment of such duties, powers and authority, whether or not so specified.

GUY FARMER,  
Chairman.  
ABE MURDOCK,  
Member.  
IVAR H. PETERSON,  
Member.  
PHILIP RAY RODGERS,  
Member.  
NATIONAL LABOR RELATIONS  
BOARD.

APRIL 1, 1955.

[F. R. Doc. 55-2856; Filed, Apr. 5, 1955;  
8:51 a. m.]

## SECURITIES AND EXCHANGE COMMISSION

[File No. 70-3352]

CONSOLIDATED NATURAL GAS CO. AND  
EAST OHIO GAS CO.

ORDER WITH RESPECT TO PROPOSED ACQUISITION BY SUBSIDIARY OF ASSETS OF NON-AFFILIATE, ASSUMPTION OF LIABILITIES BY SUBSIDIARY, ISSUANCE AND SALE OF COMMON STOCK BY PARENT AND SUBSIDIARY, AND ACQUISITION OF COMMON STOCK OF SUBSIDIARY BY PARENT

MARCH 31, 1955.

Consolidated Natural Gas Company ("Consolidated"), a registered holding company, and its wholly owned public-utility subsidiary, the East Ohio Gas Company ("East Ohio"), have filed a joint application-declaration and an amendment thereto with this Commission pursuant to sections 6 (b), 7, 9 (a), 10, and 12 (f) of the Public Utility Holding Company Act of 1935 ("act") and Rule U-43 promulgated thereunder regarding the following proposed transactions:

Under the provisions of an Agreement and Plan of Reorganization dated February 25, 1955 among Consolidated, East Ohio and the Lake County Gas Company ("Lake County"), a non-affiliate, all of the assets of Lake County are to be acquired by East Ohio in consideration for shares of capital stock of Consolidated and the assumption by East Ohio of the liabilities of Lake County. The agreed value of such shares of Consolidated stock and the liabilities of Lake County as at December 31, 1954 aggregated \$1,266,988. East Ohio will issue additional shares of its capital stock to Consolidated. Upon the acquisition of the stock of Consolidated, Lake County will distribute the same to its shareholders and liquidate and dissolve.

Under said Agreement and Plan of Reorganization, Consolidated proposes to issue to Lake County 20,631 shares of capital stock. In arriving at this number of shares the parties to the Agreement agreed on a per-share value of \$34.5591 for the capital stock of Consolidated, the aggregate value of such shares being \$712,988. The assumed value of the shares of Consolidated is stated to be equal to the average price of such stock on the New York Stock Exchange for the month of January 1955. If the closing of the proposed purchase does not occur until after April 15, 1955, the number of shares of Consoli-

dated stock to be issued will be increased to 20,855.

East Ohio will assume Lake County's liabilities on the date of closing which at December 31, 1954, consisted of \$13,000 of net current liabilities and outstanding First Mortgage 5 percent Notes, in the principal amount of \$541,000, which notes are secured by a real estate and chattel mortgage dated April 1, 1953, as supplemented and amended. East Ohio states that it expects to pay the First Mortgage 5 percent Notes promptly after consummation of the proposed transactions. In addition, East Ohio will issue to Consolidated 7,129 shares of the former's \$100 par value common stock aggregating \$712,900 but if the closing does not occur until after April 15, 1955, then East Ohio will issue 7,207 shares having an aggregate value of \$720,700.

The Public Utilities Commission of Ohio has approved the proposed transactions by East Ohio and Lake County including the accounting therefor. According to the filing no other State Commission or Federal Commission other than this Commission has jurisdiction over the proposed transactions.

It is represented that the only fees, commissions and expenses to be incurred in connection with the proposed transactions will be the issue taxes on the stock to be issued by Consolidated and East Ohio which are estimated at \$227 and \$784, respectively, and a counsel fee to be paid by East Ohio not to exceed \$1,000.

Applicants-declarants request that this Commission's order become effective upon issuance.

Due notice of filing of said application-declaration having been given pursuant to the provisions of Rule U-23 promulgated under the act, and no hearing having been requested of, or ordered by, the Commission; the Commission finding that the applicable provisions of the act and the rules thereunder are satisfied; and that said application-declaration as amended, should be granted and permitted to become effective forthwith:

It is ordered, Pursuant to Rule U-23 and the applicable provisions of the act, that said application-declaration, as amended, be, and the same hereby is, granted and permitted to become effective forthwith.

By the Commission.

[SEAL] ORVAL L. DuBOIS,  
Secretary.

[F. R. Doc. 55-2804; Filed, Apr. 5, 1955;  
8:47 a. m.]

[File No. 70-3346]

ARKANSAS POWER & LIGHT CO.

SUPPLEMENTAL ORDER PURSUANT TO RULE  
U-50 REGARDING SALE OF 93,500 SHARES  
OF PREFERRED STOCK

MARCH 31, 1955.

The Commission by order dated March 23, 1955 (Holding Company Act Release No. 12829), having granted and permitted to become effective the applica-

## MINUTE OF BOARD ACTION

DECEMBER 20, 2007

The Board anticipates that in the near future it may for a temporary period have fewer than three Members of its statutorily-prescribed full complement of five Members.<sup>1</sup> The Board also recognizes that it has a continuing responsibility to fulfill its statutory obligations in the most effective and efficient manner possible. To assure that the Agency will be able to meet its obligations to the public, the four current Members of the Board (Members Liebman, Schaumber, Kirsanow and Walsh) unanimously decided to temporarily delegate to the General Counsel full authority on all court litigation matters that would otherwise require Board authorization. This delegation is made under the authority granted to the Board under Sections 3, 4, 6, and 10 of the National Labor Relations Act.

Accordingly, the Board delegates to the General Counsel full and final authority and responsibility on behalf of the Board to initiate and prosecute injunction proceedings under Section 10(j) or Section 10(e) and (f) of the Act, contempt proceedings pertaining to the enforcement of or compliance with any order of the Board, and any other court litigation that would otherwise require Board authorization; and to institute and conduct appeals to the Supreme Court by writ of error or on petition for certiorari.

The four current Members of the Board also unanimously decided to delegate to Members Liebman, Schaumber and Kirsanow, as a three-member group, all of the Board's powers, in anticipation of the adjournment of the 1<sup>st</sup> Session of the 110<sup>th</sup> Congress. The Board is of the view that this action will permit the remaining two Members to issue decisions and orders in unfair labor practice and representation cases after departure of Members Kirsanow and Walsh, because the remaining Members will constitute a quorum of the three-member group.

The Board acted pursuant to Section 3(b) of the Act, which provides that

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. ... A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

<sup>1</sup> The five-Member Board presently has four Members, Chairman Battista's term having expired on December 16, 2007. Two of the remaining Members, Member Kirsanow and Member Walsh, are in recess appointments which will expire at the sine die adjournment of the current session of Congress.

In addition to the statutory language, the Board relied on the legal analysis and U.S. Circuit Court precedent set forth in the March 4, 2003 opinion issued by the Office of Legal Counsel of the U.S. Department of Justice (OLC) in response to the Board's May 16, 2002 request for OLC's opinion whether the Board may issue decisions during periods when three or more of the five seats on the Board are vacant. OLC's opinion concluded that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." The Board noted that this is essentially the same theory that the Board has historically used in situations where one member of a three-member Board is disqualified or recused from participating on the merits of a case. The Board also noted that OLC's opinion does not distinguish between cases that were pending at the time of the delegation of authority by the three-member Board and cases that are submitted to the Board after the delegation and the departure of the third member.

The Board acknowledged that it is bound by OLC's opinion, but that the opinion does not require the Board to take the action taken today. Instead, OLC's opinion stands for the proposition that the Board has the authority to issue two-member decisions and orders, but that it is within the Board's discretion whether or not to exercise that authority. In the current circumstances, the Board has decided to exercise its discretion to continue to function with its full powers as a two-member quorum of a three-member group designated by the Board.

These delegations will be effective as of midnight December 28, 2007, and shall be revoked when the Board returns to at least three Members following the adjournment of the 1<sup>st</sup> Session of the 110<sup>th</sup> Congress. All existing delegations of authority to the General Counsel and to staff in effect prior to the date of this order remain in full force and effect.

WILMA B. LIEBMAN,

MEMBER

PETER C. SCHAUMBER,

MEMBER

PETER N. KIRSANOW,

MEMBER

DENNIS P. WALSH,

MEMBER

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD )  
 )  
 Petitioner ) No. 08-70335  
 )  
 )  
 v. ) Board Case No.  
 ) 28-CA-20803  
 C&C ROOFING SUPPLY, INC. )  
 )  
 Respondent )  
 )

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 3,693 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 25th day of July 2008

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD )  
 )  
 Petitioner ) No. 08-70335  
 )  
 v. )  
 )  
 C&C ROOFING SUPPLY, INC. )  
 ) Board Case No.  
 Respondent ) 28-CA-20803  
 )

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address[es] listed below:

Michael E. Avakian, Esq.  
Smetana & Avakian  
Suite 610  
5211 Port Royal Rd.  
Springfield, VA 22151-0000

Sharon Seidenstein, Esq.  
Law Offices of Ellyn Moscovitz  
Suite 201  
8400 Enterprise Way  
Oakland, CA 94621-0000

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Linda Dreeben  
Deputy Associate General Counsel  
NATIONAL LABOR RELATIONS BOARD  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 25th day of July, 2008