UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CREATIVE VISION RESOURCES, LLC

and CASE NO. 15-CA-020067

LOCAL 100, UNITED LABOR UNIONS

RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR ACTING GENERAL COUNSEL'S EXCEPTIONS

I. INTRODUCTION

This case involves a labor supply company, Creative Vision Resources, L.L.C. ("CVR"), which began operations on June 2, 2011. Its founder and owner is Alvin Richard III ("Richard"). The employees in the matter are called "hoppers." Hoppers ride on the back of garbage trucks and at each stop load garbage from receptacles into the rear of the truck. The union in the case is Local 100, United Labor Unions ("ULU"), and its State Director is Rosa Hines ("Hines"). The predecessor employer was, for purposes of the case, named "Berry III."

The case has two issues – whether CVR is a successor employer and whether CVR as a successor appropriately set its initial terms and conditions as it is entitled to do. CVR has accepted Judge Locke's decision on its successor status; so, that issue is moot. The Counsel for Acting General Counsel has filed exceptions on CVR's setting its initial terms and conditions, which Judge Locke found to have been done appropriately.

II. FACTS

A. Berry III's Operations

For purposes of this case, the "predecessor" employer has been named "Berry III." This is to reflect the different corporate entities under which Berry III operated from the time it had an established collective bargaining relationship with the SEIU, Local 100. Local 100 disaffiliated from the SEIU establishing a new union, Local 100 United Labor Unions.

Berry III treated the hoppers as independent contractors – not employees, paying them $103/day with no overtime pay. Berry III did not give any holiday pay to the hoppers, except on one occasion, even though the collective bargaining agreement provided for it. No taxes or required federal and state withholdings were deducted from the paychecks. Booker Sanders, Tr. 298; Harold Jefferson, Tr. 707-08; Shawn Lewis, Tr. 703; James Bertrand, Tr. 713; Kumasi Nicholas, Tr. 696; Eldridge Flagge, Tr. 95; GCX-27.

B. The Beginnings of CVR

For about a year, Alvin Richard III ("Richard"), who was working for Richard's Disposal, Inc., planned to begin a new labor supply company – Creative Vision Resources, LLC ("CVR"). Tr. 458. It would supply general labor to business and industry, including hoppers to Richard's Disposal, Inc. Tr. 458. At some point in May, 2011, Richard asked Deidra Jones ("Jones"), the marketing manager of Richard's Disposal, to assist him with the development of an application, handbook, and safety manual for CVR. Tr. 458-59, 492. Jones developed these documents for CVR, and she

was paid by Richard for this work for CVR. Tr. 492. She also learned about CVR's planned wages and terms and conditions of employment. Tr. 493-94.

Richard planned to begin CVR operations on May 20, 2011. Tr. 437, 466, 494, 499. He discussed his plans with one of Berry III's hoppers, Eldridge Flagge, and Flagge offered to assist him with soliciting and receiving applications from potential applicants, including hoppers working for Berry III. Tr. 97, 429-30. Potential hoppers included Flagge's son, who at the time was in jail and could only be released with assurance to the Court of an employment opportunity, which Flagge gave. Tr. 98, 127. Both Richard and Flagge passed out applications and the required federal and state withholding forms to potential hoppers, and Richard passed out about 20. Tr. 437, 459, 467. Richard informed Flagge and the hopper applicants of the new terms and conditions of CVR, including $11.00 an hour pay, a guaranteed eight hour work day, overtime after 40 hours in a week, four paid holidays, and the appropriate federal and state withholdings from their pay. Tr. 459-60, 475-76; RX-8, p.5. Richard recalled an instance in which Flagge was receiving questions about the new terms from a hopper applicant and came to Richard to confirm them. Tr. 476; RX-8, p. 4.

CVR, however, was not able to begin operations in May as planned because of the lack of a sufficient number of applicants. Tr. 437, 494, 499. Richard and Flagge continued to solicit applicants, and by the end of May, there were more applications than needed to supply hoppers to Richard's Disposal, since Richard was unsure that enough would show up to work. Tr. 428, 438, 466. There were 70, 80, or more at the time of the decision to start, though only about 42 would be required. Tr. 466-67; GCX-55.

Richard also needed a supervisor to be immediately responsible for the hoppers. Richard asked Flagge if he would take the position, but Flagge did not want the job. Tr. 461, 474. Flagge recommended hiring Karen Jackson ("Jackson"), the current hopper supervisor for Berry III. Tr. 461, 473-74.

On June 1, Richard drafted a letter to Milton Berry of Berry III cancelling the agreement between Berry III and Richard's Disposal, Inc. for the provision of hoppers. GCX-20. Richard asked Jackson to deliver the letter to Milton Berry, which she did that day. Tr. 399, 434; GCX-20.

C. CVR's Start of Operations – June 2, 2011

CVR began its operations on Thursday, June 2, 2011. Tr. 359, 428, 438, 462. This start date had been discussed in advance between Jones and Richard. Tr. 499-500. A June 2 start with a Thursday–Wednesday pay period was favored by the payroll contractor in Dallas, Texas – Paychex. The hours worked for the week are tabulated on Thursday, submitted to Paychex, and the paychecks returned for a Saturday payday. Tr. 499-500. Hopper Flagge testified about CVR's start on June 2. Tr. 136-37.

D. Karen Jackson's Meeting With Hoppers

Before work began on June 2, Karen Jackson held a meeting of the hoppers. At that meeting she discussed the new pay program of $11/hour, a guaranteed 8 hour work day, paid overtime after 40 hours, 4 paid holidays, workplace standards and safety, and she passed out an employee handbook and safety manual. Tr. 462, 469; RX-8, pp. 5-6; Taylor, Tr. 446-48; Lewis, Tr. 703-04; Sanders, Tr. 303; Nicholas, Tr. 696-98.

The remembrance by the hoppers of the meeting led by Jackson supports similar testimony by Richard and Jackson. Tr. 462, 603-04. Richard listened to the meeting, and Jackson stated that she had the meeting with the hoppers in both of her affidavits and at trial. GCX-15; GCX-21. Sanders also confirms that Jackson not only had the meeting, but that she only had one such meeting. Sanders, Tr. 303.

Following the meeting, some hoppers were not satisfied with CVR's announced new wages and terms; so, they did not go to work for CVR. Tr. 466, 472, 485.

E. The ULU's Demand for Recognition and Bargaining

Throughout the latter part of May, Rosa Hines, the Union's State Director, received telephone calls from hoppers about a new company forming to supply hoppers with $11/hour pay. Tr. 254-55. On Monday, June 6, 2011, Hines hand delivered a letter to CVR demanding recognition and bargaining on behalf of the ULU from CVR. GCX-34.

III. LAW

A. The NLRB Lacks Jurisdiction to Decide the Case and Issue an Order Since the NLRB Currently Lacks a Constitutionally Proscribed Quorum

The recent case of *Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir. Jan. 25, 2013) found that a majority of the current NLRB members had not been properly appointed. The current NLRB is constitutionally unable to decide this case and issue an order.

B. An Administrative Law Judge's Credibility Resolutions

The Board's established policy is not to overrule an Administrative Law Judge's credibility resolutions. They can be overruled only when the clear preponderance of all

the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3rd Cir. 1951).

C. Right to Set Initial Terms and Conditions of Employment

It is settled law that a successor is ordinarily free to set initial terms on which it will hire the employees of a predecessor. *NLRB v. Burns International Security Services, Inc.*, 406 US 272, 294 (1972). More recently, the NLRB has said that the successor employer who makes unilateral changes has acted lawfully. *UGL – UNICCO Service Company,* 357 NLRB No. 76 (Aug. 26, 2011).

1. Perfectly Clear Plan to Retain

In *Burns*, *supra*, the Supreme Court said that although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there are instances, in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it is appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with the union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit. *Burns*, at 294-95.

For the bargaining obligation to attach to a successor in these circumstances, the Supreme Court has said:

> The successor's duty to bargain at the "substantial and representative complement" date is triggered only when the union has made a bargaining demand.

Fall River Dyeing & Finishing Corp. v. NLRB, 482 US 27, at 52 (1987). (Emphasis supplied.) See also, *Burns*, at 294 ("Although Burns had an obligation to bargain with the union concerning wages and other conditions of employment when the union requested it to do so, this case is not like a section 8(a)(5) violation where an employer unilaterally changes a condition of employment without consulting a bargaining representative."). (Emphasis supplied.)

The NLRB has consistently followed these requirements set forth by the Supreme Court. In *Grico Corp., Aircraft Magnesium Division*, the NLRB articulated the general standard:

> It is well settled that the significant time frame for determining what percentage of a purchaser's employees were former employees of a predecessor is when a demand for bargaining has been made and a representative complement of an employer's workforce is on the job.

265 NLRB 1344 (1982), enf'd 730 F.2d 767 (9th Cir. 1984); (Emphasis supplied.) *Professional Janitorial Serv. of Houston, Inc.*, 335 NLRB 595 (2008); *Cadillac Asphalt Bathing Co.*, 349 NLRB 6 (2007).

2. CVR's Timely Communication of Wages and Terms Before Beginning Operations

The NLRB has long held that it is sufficient that an employer announce in advance its intention to establish new terms before taking over. *Spruce Up Corp.*, 209 NLRB 194 (1974). In that case, the offers of employment were tentative or conditional upon the terms offered.

II. ARGUMENT

A. The NLRB Lacks a Constitutionally Required Quorum To Issue a Decision and Order on the Exceptions

Based upon the recent decision by the U.S. Court of Appeals for the District of Columbia Circuit, *Noel Canning v. NLRB*, *supra*, a majority of the current NLRB members have not been properly appointed and the NLRB lacks the constitutionally required quorum to decide this case and issue an order.

B. CVR Was Not A Perfectly Clear Successor

1. The legal requirements to establish CVR as a perfectly clear successor cannot be met since CVR's initial terms and conditions were announced prior to the ULU's demand for recognition on June 6, 2011.

The parties are in agreement that the ULU demanded recognition and bargaining of CVR on Monday, June 6, 2011. By this time, the evidence in the record is that CVR had communicated its initial terms and conditions of employment, including the employee handbook and safety manual, to its potential employees. This occurred throughout May and before beginning operations on June 2. Under the Supreme Court's decisions in *Burns, supra* and *Fall River Dyeing & Finishing Corp., supra,* a union demand for recognition and bargaining is a trigger, along with hiring a substantial and representative complement, for an employer to recognize and bargain with the union before setting its terms and conditions. A successor employer, however, who has set its initial terms and conditions prior to any such union demand, has acted lawfully. *Grico Corp., Aircraft Magnesium Division, supra.*

2. The evidence does not support a finding that CVR hired a majority of the predecessor's employees before it began operations on June 2, 2011.

Counsel for Acting General Counsel argues that CVR had hired a substantial and representative complement of Berry III's hoppers at the time it began operations on June 2. The record is clear that CVR had no assurance or certainty that it had hired anyone until the hopper applicants chose to board the trucks and thus, work for CVR on June 2.

It is undisputed that CVR tried to begin operations on May 20, 2011. It could not because it did not have enough applicants which could assure the start up. Applicants were sought beyond the hoppers that were working for Berry III, and on June 2, 2011, when CVR believed it could begin operations, it had 70 applicants there to ensure it could supply the required 42 hoppers. The reason that there was no definite hiring of hoppers until June 2 is that a number of the hopper applicants, after hearing the initial terms and conditions at the meeting, chose not to work. With this much uncertainty about which applicants would work and which would not, requiring a pool of 70 applicants, there was not a hiring of a substantial and representative complement before the communication of CVR's initial terms and conditions.

3. CVR communicated its initial terms and conditions to the applicants for hopper positions and did not mislead hopper applicants about the initial terms and conditions.

In an argument worthy of the "Artful Dodger" of Charles Dickens' *Oliver Twist*, Counsel for Acting General Counsel for the first time is arguing that a majority of Berry III's hopper applicants were not notified by CVR of the new terms and conditions of

employment before accepting employment with CVR. To understand the "sleight of hand" in this argument, Counsel for Acting General Counsel's original argument before Judge Locke should be reviewed.

At trial, and as Judge Locke sets forth in his Decision, Counsel for Acting General Counsel argued that Flagge was not told by Richard of the initial terms and conditions and therefore Flagge could not have communicated the initial terms and conditions to the hopper applicants he solicited. At the same time, Counsel for Acting General Counsel argued that Richard did not communicate the initial terms and conditions when he was soliciting applicants in May. In short, his argument was that from the middle of May up until the company began its operations on June 2, the only two individuals soliciting applicants never communicated the terms. Judge Locke in his decision pointed out, however, during May, the ULU representative received calls from hoppers about the new company that was forming and the new $11/hour pay rate. Hoppers could not have called the ULU representative about the new company and $11/hour pay rate unless Flagge, Richard, or a hopper to whom they had spoken had communicated it to them. ALJD, p. 16, lines 5-40.

Now, Counsel for Acting General Counsel pivots and agrees that Richard did communicate the initial terms and conditions, but did not do so to a majority of the hoppers. His new argument is that Flagge, whom he contended was not told by Richard of the new terms, solicited a majority of the hoppers, and therefore a majority of the hoppers who began work on June 2 did not know the initial terms and conditions.

In its Cross Exceptions, CVR contends that Flagge's testimony, that he was not told by Richard of the initial terms and therefore he did not communicate the initial terms, is not credible. It is not supported by a preponderance of the evidence, and it is incorrect.

Counsel for Acting General Counsel with his new argument, however, is "hoisted on his own petard." He now acknowledges that Richard was communicating the initial terms to hopper applicants. This undercuts, however, the credibility of Flagge. If it is accepted that Richard was openly communicating the initial terms to hoppers, though allegedly not a majority, it is not credible that he failed to do the same with the one hopper whom he tasked to assist him in soliciting applicants. Flagge's testimony that Richard never communicated the initial terms to him and then sent him out to solicit applicants is simply not credible. It is inconsistent with Richard's actions toward every other hopper with whom he communicated, and the record establishes that Richard solicited about 20 hopper applicants, communicating the new terms.

Flagge's credibility is further undercut by his testimony that one of the applicants he solicited was his own son who was incarcerated in the New Orleans jail. His son was released and Flagge could not have had his son released from jail without the certainty of a legitimate, valid job with an explanation about the job – the terms of which he knew from Richard.

The documents that Flagge and Richard were passing out to applicants included an application and the required federal and state tax withholding forms. The hoppers at Berry III were treated as independent contractors and were paid on a day rate with none

of the legally required deductions. These forms, likely a surprise to hoppers treated as independent contractors, would surely have triggered conversations between the hopper applicants and Flagge about the pay. Flagge would have answered based upon the information furnished him by Richard, and if he had any questions about the terms, he would have gone to Richard and asked – which he did.

Hoppers who testified at trial bore this out. Anthony Taylor, a hopper who had been working for Berry III, but went to work for CVR, was subpoenaed by Counsel for Acting General Counsel to testify; however, Counsel did not call him.

When called by CVR, Taylor stated:

> Q. Now, you mentioned $11 an hour. What, if any, conversations were the hoppers having before this meeting about $11 an hour?
>
> A. We all congregate in the morning out there. They been knowing about the $11 an hour.
>
> Q. So the hoppers before this meeting, in May, knew about the $11 an hour?
>
> A. Sure, man. The application was passed out before. I think Flagge was passing out those applications.
>
> Q. Did Flagge know about the $11?
>
> A. I told you, we all congregate out there in the morning. We been knowing that.

Tr. 449.

In addition, Kumasi Nicholas, a hopper of Berry III who went to work for CVR testified about learning of the initial terms a couple of weeks before CVR began operations on June 2.

CVR began operations on June 2, 2011. Before work began that morning, Karen Jackson, who had been a supervisor for Berry III and hired by CVR in the same capacity, held a meeting of the hopper applicants, numbering around 70. She explained the initial terms and conditions including pay of $11/hour, the guarantee of 8 hours per day, the payment of overtime after 40 hours, 4 paid holidays, and the required tax and social security deductions. She distributed an employee handbook and safety manual, and she discussed proper clothing and safety measures. The hoppers at trial confirmed this meeting, and by June 2, CVR had communicated its initial terms to the hoppers who chose to work for it.

Counsel for Acting General Counsel contends that because a group of hopper applicants decided not to work for CVR after Jackson's meeting on June 2, this is evidence that the new terms were not communicated to a majority of the predecessor's hoppers during May. This is not the only conclusion that can be drawn. For example, assuming the hopper applicants who would not work were Berry III's, they certainly could have been told the terms in May, but did not have to make a decision until, and if, CVR began operations. Also, there is no evidence that the hopper applicants who would not work for CVR were Berry III hopper applicants.

When the record evidence is reviewed, Judge Locke's finding that CVR did not violate the Act by failing to state its initial terms and conditions of employment is supported by a clear and substantial preponderance of all relevant evidence and is not incorrect. The argument that CVR misled hopper applicants is patently wrong. How could the ULU's representative and hoppers testify about knowing of the initial terms

from when solicitations began in May and be misled? There is no evidence that CVR sought to deceive hopper applicants of its new terms and conditions of employment, and this is what Judge Locke found. ALJD, p. 22, lines 7-9. In fact, since Berry III had been operating illegally in its treatment of the hoppers, it was incumbent upon CVR to explain how it would be operating legally. ALJD, p. 21, lines 6-7, 16-18. CVR is not a perfectly clear successor which was restricted from setting its initial terms and conditions of employment.

C. Respondent Distributed to Hopper Applicants CVR's Employee Handbook and Safety Manual on June 2 and Again on June 4, 2011

CVR developed two manuals for distribution to its hoppers. Richard gave Karen Jackson the manual for her to distribute at the hopper meeting on June 2. Tr. 469. Jackson handed out the safety manual and employee handbook during the meeting. Tr. 462, 469, 603-04, 696-98.

The next morning, June 3, Richard realized that a lot of the hoppers were not returning the acknowledgement forms from the two manuals; so, he decided to re-issue the manuals on Saturday, June 4. Tr. 472. He had a barbeque in the yard to make sure that the hoppers who still wanted to work with CVR were re-issued the handbook and safety manual, and he received acknowledgement forms at that time from the hoppers who had not yet returned them. Tr. 472-72, 500-501, 525; GCX-19A1-19A45; GCX-19B1-19B39.

There is no evidence in the record that the terms set forth in the two manuals were essentially different from the terms under which Berry III operated. More significantly,

the weight of the evidence, from the time that CVR initiated the beginnings of its business in May, show that CVR had intentions and plans about how the business was to be run, what the wages and terms would be, and what was needed to run the business. As part of this process, conversations about the development of the handbook and safety manual took place in May, between Richard and Jones. A preponderance of the evidence establishes that the handbook and safety manual were ready and distributed on June 2 and again on June 4.

CONCLUSION

For the instant case, the NLRB currently lacks the constitutionally required quorum to issue a decision and order. If, however, the Board does have a constitutional quorum to issue a decision and order, the decision and order of Judge Locke should be adopted as the Board's.

Since the ULU did not make its demand for recognition and bargaining until June 6, CVR properly established its initial terms and conditions before that date. Between the communications during May and the communications and distribution on June 2 and 4, the initial terms and conditions were announced and properly set. There was no violation of the Act in this instance.

Respectfully submitted this 28th day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 28th day of February, 2013 served a copy of the above and foregoing by email to the following:

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CREATIVE VISION RESOURCES, LLC

and CASE NO. 15-CA-020067

LOCAL 100, UNITED LABOR UNIONS

RESPONDENT'S MOTION FOR LEAVE TO
TO FILE EXCEPTION PURSUANT TO 29 C.F.R. §102.111(c)

Respondent moves for leave to file an exception in the instant case pursuant to §102.111(c). The specific facts relied upon to support the motion are set forth in the accompanying affidavit and exception and brief in support thereof.

Respectfully submitted this 18th day of April, 2016.

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RESPONDENT'S EXCEPTION AND
BRIEF IN SUPPORT OF EXCEPTION

EXCEPTION NO. 1

Former NLRB Acting General Counsel and General Counsel nominee, Lafe Solomon, at the time the complaint in this case was issued on March 30, 2012, was serving in violation of the Federal Vacancies Reform Act from January 5, 2011 to November 4, 2013. Thus, the unfair labor practice complaint issued by the NLRB against Creative Vision Resources, LLC on March 30, 2012 is invalid and must be dismissed.

BRIEF IN SUPPORT OF EXCEPTION

I. FACTS

This case is currently pending before the National Labor Relations Board on exceptions and cross exceptions filed by the parties. Respondent filed its exceptions and cross exceptions and brief in support thereof on February 28, 2013.

Since that time, there has been a significant, new principle of law established with the decision by the U.S. Court of Appeals, District of Columbia Circuit, issued on August 7, 2015. *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), *cert. pending* April 6, 2016.

II. ARGUMENT

A significant change in the law affecting this case occurred almost two and a half years after Respondent filed its exceptions and cross exceptions. The U.S. Court of Appeals for the District of Columbia held that former Acting General Counsel Lafe Solomon was serving in violation of the Federal Vacancies Reform Act ("FVRA") from January 5, 2011 to November 4, 2013, and thus the unfair labor practice complaint issued in this case on March 30, 2012 is invalid. Solomon, who was directed to serve as the Acting General Counsel in June 2010, became ineligible to serve as Acting General Counsel once the President nominated him to be General Counsel in January 2011 under a provision of the Federal Vacancies Reform Act which prohibits a person from being both the acting officer and the permanent nominee.

III. CONCLUSION

For the foregoing reasons, the complaint issued in this case is invalid and the case must be dismissed.

Respectfully submitted this 18TH day of April, 2016.

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