

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 22**

COMPUCOM SYSTEMS, INC.

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§

and

Case No. 22-CA-28969

**COMMUNICATION WORKERS
OF AMERICA, LOCAL 1032**

**COMPUCOM SYSTEMS, INC.'S RESPONSE TO THE BOARD'S NOTICE TO
SHOW CAUSE**

Respondent CompuCom Systems, Inc. ("CompuCom" or "Respondent"), by undersigned counsel and pursuant to Section 102.24 of the Rules and Regulations of the National Labor Relations Board, submits this, its Response to the Board's Notice to Show Cause ("Cause Notice") and the General Counsel's Motion for Summary Judgment ("Motion"), and states as follows:

**I.
INTRODUCTION**

On June 27, 2008, after a representation election was conducted, the Communication Workers of America, Local 1032 (the "Union") challenged five of the ballots that were cast. The result of the election showed 14 votes for and 10 votes against the Union, which means the five challenged ballots could be outcome determinative.

The Recommended Decision on Objections and Challenges issued on December 30, 2008 by Administrative Law Judge Steven Fish ("ALJ Recommendation") (Ex. F to the Motion) and the Board's Decision and Certification of Representative that issued on April 27, 2009 ("Board Decision") (Ex. G to the Motion) in Case No. 22-RC-12925, denied the Union's challenges to three of the ballots, but sustained the Union's challenges

to the ballots of John Paynter (“Paynter”) and Robert Mikol (“Mikol”). Since the objections to the ballots of Paynter and Mikol were sustained, the other three unsuccessfully challenged ballots were also not counted in the election because they would not, in and of themselves, affect the certification results.

Because all five challenged ballots should have been counted in the representation election, Respondent contests the Board’s Decision certifying the Union as the bargaining representative. The record evidence developed in Case No. 22-RC-12925, as well as the applicable legal authorities, demonstrate that Paynter and Mikol are not "supervisors" as defined by Section 2(11) of the Act, and therefore, the five ballots which were challenged during the representation election should be opened and counted. Furthermore, the Board's Decision was issued by a two-member Board, and as a result, it was not properly constituted under Section 3(b) of the Act.

II. ARGUMENT & AUTHORITIES

A. Summary Judgment Should Be Denied Because Paynter And Mikol’s Ballots Should Be Counted In The June 27, 2009 Representation Election, As They Are Not “Supervisors” Under The Act.

The Board’s Decision adopted the ALJ Recommendation, which sustained the Union’s objections to the ballots of Paynter and Mikol and the determination that their ballots should not be counted in the representation election held on June 27, 2009. The Board’s Decision is erroneous as a matter of law and fact because Paynter and Mikol are not supervisors within the meaning of Section 2(11) of the Act, and as a result, their votes should have been counted. The ALJ Recommendation and the Board’s Decision are erroneous based on, among other things, the following exceptions, which were raised and

briefed in Respondent's Exceptions to the Administrative Law Judge's Recommended Decision on Objections and Challenges and Respondent's Brief in Support thereof:¹

1. To the conclusion that Paynter and Mikol have the authority to effectively make hiring recommendations, using independent judgment, and are therefore supervisors within the meaning of Section 2(11) of the Act.
2. To the finding that Paynter and Mikol possess the authority to effectively recommend hire even though they have not been involved in any regular employee interview for over two years.
3. To the conclusion that Aardvark Post, 331 NLRB 320 (2000), and its progeny are factually distinguishable and not dispositive cases.
4. To the finding that the technical assessment interviews conducted by Paynter and Mikol were not factually analogous to the administration of tests.
5. To the finding that the hiring recommendations made by Paynter and Mikol were based on more than their assessments of applicant's technical abilities.
6. To the finding that Respondent did not conduct independent investigations before following hiring recommendations made by Paynter and Mikol.
7. To the finding that the continued viability of Aardvark Post and its progeny is in "considerable doubt" after Oakwood Healthcare, Inc., 348 NLRB 686 (2006).
8. To the finding that Paynter and Mikol have substantially higher salaries than their team members, are considered to be supervisors by their team members, attend management meetings, and regularly perform different work from their subordinates, and that these secondary factors may be relied upon in support of the conclusion that Paynter and Mikol are supervisors under Section 2(11) of the Act.

In contending that the Board erred in overruling its exceptions and adopting the ALJ Recommendation, Respondent relies on the complete record that was developed during the proceedings in Case No. 22-RC-12925 (as defined by Sections 102.68 and

¹ All pleadings and briefing submitted by Respondent within Case No 22-RC-12925 are incorporated herein by this reference, including its Post-Hearing Brief submitted on October 17, 2008 ("Respondent's Post-Hearing Brief") and its Exceptions to the Administrative Law Judge's Recommended Decision On Objections and Challenges and Brief in Support thereof, which were both submitted on January 23, 2009 ("Respondent's Exceptions and Brief in Support thereof").

102.69(g)(1)(i) of the Rules and Regulations of the National Labor Relations Board), including without limitation all transcripts of any hearings in Case No. 22-RC-12925, Respondent's Post-Hearing Brief; Respondent's Exceptions and Brief in Support thereof; the ALJ Recommendation; and the Board's Decision.²

As a result, the General Counsel's Motion should be denied because Paynter and Mikol's ballots should have been counted in the representation election, as they are not "supervisors" as defined by Section 2(11) of the Act. If counted, their ballots, together with the other unsuccessfully challenged ballots, would have a determinative effect on the certification results and could result in no bargaining unit being certified.

B. Summary Judgment Should Be Denied Because the Board Did Not Have The Authority To Issue Its Decision.

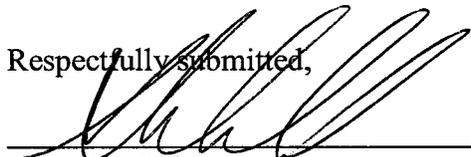
Additionally, the General Counsel's Motion should be denied because the Board's Decision was issued by a two member Board, which is contrary to the quorum provisions of Section 3(b) of the Act, and the Board's quorum requirement must be satisfied "*at all times.*" 29 U.S.C. § 153(b) (emphasis added). Accordingly, the Board was not properly constituted and did not have the authority to issue its April 27, 2009 Decision and Certification of Representative. See Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009).

III.
CONCLUSION

Based on the foregoing, Respondent respectfully submits that the General Counsel's Motion should be denied and the Board's Decision should be vacated.

² In evaluating motions for summary judgment involving Section 8(a)(5) allegations, the Board is required to take "[o]fficial notice . . . of the 'record' in the [underlying] representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g)." See e.g., Hartzheim Dodge Hayward, 354 NLRB No. 22 (2009).

Respectfully submitted,



Steven L. Rahhal

State Bar No. 16473990

Edward Berbarie

Texas Bar No. 24045483

LITTLER MENDELSON
A PROFESSIONAL CORPORATION
2001 Ross Avenue
Suite 1500, Lock Box 116
Dallas, Texas 75201-2931
(214) 880-8100 (Telephone)
(214) 880-0181 (Telecopier)
srahhall@littler.com
eberbarie@littler.com

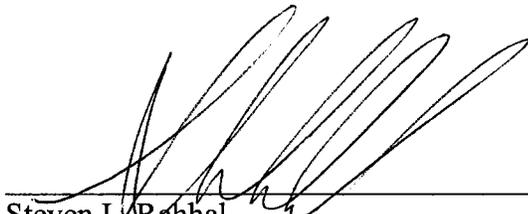
ATTORNEYS FOR RESPONDENT

STATEMENT OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served on the following parties via e-mail on this 28th day of August, 2009:

David A. Tango, Esq.
Weissman & Mintz
Counsel for Communication Workers of America
Local 1032
One Executive Drive, Suite 200
Somerset, NJ 08878
Via E-mail: dtango@weissmanmintz.com

Benjamin W. Green
Counsel for the General Counsel
National Labor Relations Board
Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102
Via E-mail: Benjamin.green@nlrb.gov


Steven L. Rahhal

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