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September 7, 2010

Mr. Lester Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Regarding: County Waste of Ulster, LLC

Case No.: 2-CA-37437 and 2-RC-22858

Dear Mr. Heltzer:

Our firm represents County Waste of Ulster, LLP ("County Waste" or "Employer"). With only two members, the National Labor Relations Board ("Board") issued on February 11, 2009 a Decision, Order and Direction of Second Election, reported in 353 NLRB No. 89, finding that County Waste had violated Section 8(a)(2) by allowing Local 124, R.A.I.S.E., IUJAT ("Local 124") to distribute a bonus. The Board remanded to the Administrative Law Judge ("ALJ") the finding by the ALJ that the Employer violated Section 8(a)(1) by granting a bonus to determine whether he intended to find an un-alleged violation, whether this issue was litigated by the parties, and whether this issue was closely connected to the complaint. In this decision, the Board found also that County Waste had engaged in objectionable conduct by granting the bonus and by allowing Local 124 to distribute the bonus. The Board ordered that the R case, 2-RC-22858, be severed from the CA case.

County Waste petitioned for review in the Second Circuit. In accordance with the Supreme Court's decision in New Process Steel v. NLRB, 360 U.S.- (2010), on July 1, 2010, the Second Circuit vacated and remanded the decision to the Board. The Board requested an expedited mandate to remand the case to the Board. County Waste moved before the Second Circuit for the Court to reconsider its decision. The Second Circuit granted the Board's motion for an expedited mandate on July 21, 2010 and denied the Employer's motion for reconsideration on July 26, 2010. On August 6, 2010, the Second Circuit issued a mandate to remand the case to the Board. Before the case had even been remanded, by letter dated July 23, 2010, the Board had indicated that it was considering the case. On August 10, 2010, the Board issued a decision, reported at 355 NLRB No. 64, re-affirming its prior reported decision at 353 NLRB No. 89, which had been decided with only two Board members. For the reasons stated below, County

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Waste asserts that the Board must reconsider, re-hear and/or re-open its decision on August 10th, 355 NLRB No.64. This case presents the “extraordinary circumstances” warranting reconsideration, re-hearing and/or re-opening. (Board’s Rules and Regulations §148(d)(1))

The first reason that the Board must reconsider, re-hear and/or re-open its decision is that the Board’s decision on August 10th (355 NLRB No. 64) fails to take account or address that the ALJ’s finding of the alleged 8(a)(1) violation for granting the bonus was remanded to the ALJ and decided by the ALJ. After the remand, Laborers International Union of North America, Local 108 (“Local 108”), and General Counsel asked that the Section 8 (a)(1) claim not be litigated and that it be discontinued. The ALJ withdrew his finding that the Employer violated Section 8(a)(1) by granting the bonus. However, the ALJ did not include in the record the communications between the ALJ as well as the parties indicating that the 8(a)(1) violation had not been litigated. County Waste filed exceptions to the Board for the ALJ’s failure to include the correspondence. On July 24, 2009, with only two Board members, the Board denied the Employer’s exceptions. County Waste of Ulster, LLC, 354 NLRB No. 54 (2009). Clearly, based upon the Supreme Court’s decision in New Process Steel v. NLRB, the Board’s decision on July 24, 2009 (354 NLRB No. 54) must be reviewed again by the Board. The Board should review and grant the Employer’s exceptions for the reasons stated in its exceptions.

The Board stated in its decision on August 10, 2010 (355 NLRB No.64) that it was affirming the Board’s decision on February 11, 2009 (353 NLRB No. 89), which had provided for the remand to the ALJ on the Section 8(a)(1) violation. Presumably, the Board was not remanding to the ALJ the Section 8(a)(1) allegation. However, it is not clear whether the Board intended to remand or was aware of the other case when it issued its decision on August 10th. In this “extraordinary circumstance,” the Board must reconsider, re-hear and/or re-open its decision. (Board’s Rules and Regulations §148(d)(1))

The second reason that the Board must reconsider, re-hear and/or re-open its August 10th decision (355 NLRB No. 64) is that the remand from the Second Circuit was based solely on the Section 8(a)(2) allegation. The letter from the Board’s Associate Executive Secretary, dated July 23, 2010, stated that the Board was accepting the dismissal from the Second Circuit and would take appropriate action. Said letter listed the CA case number. However, despite that the remand from the Second Circuit involved only the Section 8(a)(2) claim and despite that the Board had split the RC case, the Board issued its Decision, Order and Direction of A Second Election with the RC case number included in the decision. It is unclear whether the Board meant to decide the RC case. If the Board meant to decide the RC case again, the Board failed to address that part of the reason for the direction of the second election was that County Waste allegedly unlawfully granted the bonus to influence the election even though that allegation may have never been litigated by the parties (which was the basis of the Board’s remand to the ALJ) and even though this finding contradicts applicable Board law because both unions would have been equally impacted by the granting of the bonus. Sewell Poultry Co., 105 NLRB 580 (1953). The Employer asserts that the Board must re-examine its decision that the granting of the bonus

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was objectionable conduct, particularly in light of the dismissal of the Section 8(a)(1) claim and in light of the Board's initial decision that the issue may not have been litigated.

The last reason for granting reconsideration, re-hearing and re-opening is that the Employer served on August 9, 2010 by overnight delivery and electronically filed on August 10, 2010 at about 915 A.M. a request that the matter be reviewed with a different panel other than the one that participated in the initial decision (353 NLRB No. 89) and that the Board review its finding that there was a Section 8(a)(2) violation because the alleged facts upon which it was based were objectively impossible. (Attached as Exhibit "A" is said papers as well as proof of service.) On August 10th, the Board decided the case, apparently without reviewing the Employer's papers served on August 9, 2010, which included arguments in support of its positions. The Board should have reviewed County Waste's papers. County Waste timely filed papers, particularly since the mandate from the Second Circuit to return the case to the Board was issued on August 6th and County Waste served its papers on August 9th. The papers were also served before the Board issued its decision on August 10th. Thus, the arguments raised by County Waste in its papers are important and should be addressed by the Board.

In sum, for the foregoing reasons, the Board must reconsider its decision issued on August 10, 2010. A copy of this letter has been served on the parties listed below.

Very truly yours,


Stuart Weinberger

cc: Alan Rose, Esq.
Tamir Rosenblum, Esq.
Steven Kern, Esq.

SW:CountyWaste.L9310final

Exhibit "A"

E. Heltzer on 8/10/10 - 9:10 am

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August 9, 2010

Filed Via Federal Express

Mr. Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Regarding: County Waste of Ulster, LLC

Case No.: 2-CA-37437

Dear Mr. Heltzer:

Our firm represents County Waste of Ulster, LLC ("Employer" or "County Waste"). In light of the United States Supreme Court decision in New Process Steel, L.P. v. NLRB, 360 U.S. ____ (June 17, 2010), the Second Circuit has remanded the above-referenced case to the National Labor Relations Board ("Board") for the Board's review. This case involves an allegation that County Waste unlawfully assisted Local 124, R.A.I.S.E., IUJAT ("Local 124") by allowing Local 124 to distribute bonuses to employees. County asserts that the Board must review this matter *de novo* with a different panel than the one that participated in the original decision. Even if the Board does not review the matter *de novo*, the Board must review carefully its finding that there was a violation. As indicated below, the initial finding of unlawful assistance is indefensible and unsupported.

Pursuant to a stipulated election agreement (2-RC-22858), on January 6, 2006, an election was held to determine whether the employees wished to be represented by Laborers International Union of North America ("Local 108"), Local 124 or no union. Local 124 overwhelming won the election.

Local 108 filed unfair labor practice charges (2-CA-37437) as well as objections to the election against County Waste. The Regional Director issued a complaint against County Waste alleging several violations of the Act, including that County Waste had violated the Act by allowing Local 124, which was the incumbent union, to distribute a bonus at the end of

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November 2005, for purposes of influencing the outcome of the election that was held on January 6, 2006. The Regional Director also issued an order directing a hearing on Local 108's objections and consolidating the objections with the unfair labor practice allegations. A hearing was held before Administrative Law Judge Raymond Green (the "ALJ").

On May 9, 2007, the ALJ issued a decision in this matter. The ALJ dismissed all the unfair labor practices against County Waste, except with respect to the issue of the bonus. The ALJ found that County Waste violated Section 8(a)(2) by allowing Local 124 to distribute the bonus in order to influence the employees to support Local 124 in the election. The ALJ further concluded, without it being alleged by General Counsel, that County Waste had violated Section 8(a)(1) of the Act by giving the bonus in order to influence employees to vote for Local 124. The ALJ also recommended that a new election be conducted.

County Waste and Local 124 filed exceptions to the ALJ's decision. In its exceptions regarding the distribution of the bonus, County Waste asserted that the Board must reverse the ALJ's decision for several reasons, including that it was physically impossible for the only employee who testified that he received the bonus check from Local 124 to have received the bonus from Local 124 because he had direct deposit, and that even if Local 124 distributed the bonus checks, Local 124 was lawfully entitled to distribute the bonus checks because it was the incumbent union at the time that the bonus was paid. County Waste further asserted that the ALJ's finding of the Section 8(a)(1) violation by County Waste granting the bonus should be overturned for numerous reasons, including that it had never been alleged by General Counsel.

On February 11, 2009, the Board issued a decision reported at 353 NLRB No. 89 (2007). The Board affirmed the ALJ's decision only to the extent consistent with the Board's decision. The Board upheld the finding of County Waste's unlawful assistance to Local 124 by allowing Local 124 to distribute the bonuses. The Board did not uphold the finding of the violation for granting the bonus. It remanded that issue to the ALJ to determine if the matter was closely connected to the allegations in the complaint and if this issue had been litigated. Further, the Board directed a new election and severed the R case¹ from the unfair labor practice case.

After the case was remanded to the ALJ, Local 108 asked that the allegation against County Waste involving the granting of the bonus be withdrawn. General Counsel agreed that the allegation should be withdrawn. The allegation was dismissed by the ALJ. The dismissal was affirmed by the Board.

County Waste filed a petition for review of the Respondent/Cross-Petitioner National Labor Relation's Board's ("Board") decision and order in County Waste of Ulster, LLC, 353 NLRB No. 89 (2008) finding that County Waste had unlawfully assisted Local 124 by allegedly allowing Local 124 to distribute the bonus. The case was briefed and argued by the parties

¹ This letter does not deal with the R case or the issues in the R case, which also eventually will have to be dealt by the Board under New Process Steel, L.P. v. NLRB, 360 U.S. ____ (June 17, 2010).

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before the Second Circuit. One of the issues before the Second Circuit was the Board's jurisdiction to issue a decision with only two Board members.

Based upon the Supreme Court's decision in New Process Steel, L.P., on July 1, 2010, the Court granted County Waste's petition for review and denied the Board's cross-application for enforcement. The Court also vacated the Board's decision and Order.

On July 1, 2010, the Board issued a press release. In the press release, the Board stated that all of the cases which are remanded back to the Board will be considered by panels which will include the same two Board members who had initially decided the cases and who were without authority to decide the case.

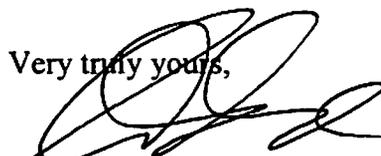
County Waste asserts that the Board should not and cannot follow the procedure that it indicated that it would follow in the press release. Rather, the Board must review the case at bar on remand by a *de novo* review by members who did not participate in the first decision. It is unlikely that the same two Board members can put out of their minds their previously expressed views. Moreover, for the appearance of justice, there must be a new panel of Board members, particularly since the Board's press release gives the appearance that the Board may just rubber stamp the prior decisions. Additionally, the Board's actions in having the same two members decide the case again with a third member violates the Supreme Court's decision in New Process Steel, L.P. v. NLRB that these two members did not have authority to act. Simply stated, since the remand by the Supreme Court is not based upon a change in the law but the lack of authority to act, the Board has created a method to ensure that there are no changes in the decisions because these two members, who acted without authority, have already determined the matter based upon what they perceived to be the law and the application of the law to the facts. The Board's claim that two other members can participate is merely an attempt to justify referring the matter to the two members who decided without the authority to make a decision.

No matter the type of review or which Board members review this case, County Waste further asserts that this case has to be carefully reviewed. A substantial amount of time, effort and money has been spent litigating this matter without any basis or justification. Before the Second Circuit, the Board did not even try to justify its claim that the bonuses were distributed by Local 124 based upon the testimony of the only employee who claimed that he received the bonus directly from Local 124. The reason is that this employee who claimed that Local 124 distributed the bonus had direct deposit. In fact, the Board's argument was largely unrecognizable from the initial claim by General Counsel. Thus, by and large, the whole case and finding is based upon testimony regarding events that could not have taken place. The Employer requests permission to submit a further brief on this matter, including what was argued to the Second Circuit.

Mr. Lester A. Heltzer, Executive Secretary
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In sum, Count Waste asserts that this case must be reviewed *de novo* review by a panel of Board members who did not participate in the initial decision. Further, this case also must be carefully reviewed again on the facts.

Very truly yours,



Stuart Weinberger

cc: Tamir Rosenblum, Esq.
Haluk Savci, Esq.
Steven Kern, Esq.
Alan Rose, Esq.

SW: L8.2.10

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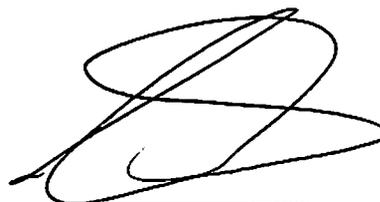
A true and complete copy of the foregoing has been served upon the following parties via Federal Express, Next Day Delivery on August 8, 2010 as well as via Electronic Transmission on August 10, 2010 to the following parties:

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A handwritten signature in black ink, appearing to read 'Lewis Goldberg', written over a horizontal line.

Lewis Goldberg

Dated: August 10, 2010

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Office: Office of Executive Secretary

Case Information

Case Number: 02-CA-037437

Case Name: County Waste of Ulster, LLC

Role: Charged Party

Contact Information

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Attached E-File(s)

Letter
County.Waste.NLRB.Corr.pdf

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Case Number: 02-CA-037437
Filing Party: Charged Party
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Email: lewgoldberg@aol.com
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Fax:
Attachments: Letter: County.Waste.NLRB.Corr.pdf

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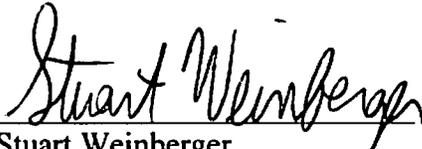
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Dated: September 7, 2010


Stuart Weinberger