UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ALL AMERICAN SCHOOL BUS CORP., ANJ SERVICE, INC., ATLANTIC QUEENS BUS CORP., BOBBY'S BUS CO., INC., BORO TRANSIT, INC., B-ALERT INC., ATLANTIC ESCORTS INC., CITY WIDE TRANSIT, INC., CANAL ESCORTS, INC., CIFRA ESCORTS, INC., EMPIRE STATE ESCORTS, INC., GOTHAM BUS CO., INC., GRANDPA'S BUS CO., INC., HOYT TRANSPORTATION CORP., IC ESCORTS INC., KINGS MATRON CORP., LOGAN TRANSPORTATION SYSTEMS, INC., LONERO TRANSIT, INC., LORISSA BUS SERVICE, INC., MOUNTAINSIDE TRANSPORTATION CO., INC., PIONEER SCHOOL BUS RENTAL, INC., PIONEER TRANSPORTATION CORP., RAINBOW TRANSIT INC., AMBOY BUS CO., INC., RELIANT TRANSPORTATION, INC., RPM SYSTEMS, INC., SCHOOL DAYS INC. and TUFARO TRANSIT CO. INC.

Respondents/Cross-Plaintiffs,

v.

JAMES PAULSEN, SHARON BLOCK, RICHARD GRIFFIN, JR., and LAFE SOLOMON,

Petitioners/Cross-Defendants.

No. 1:13-cv-3762
Judge Kiyo A. Matsumoto

CROSS-DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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SUMMARY

Cross-Defendants James Paulsen, Sharon Block, Richard Griffin, Jr. and Lafe Solomon ("Defendants") submit this Opposition to Cross-Plaintiffs' ("The Companies") Motion for a Temporary Restraining Order (TRO) And Preliminary Injunction enjoining Defendants from conducting a hearing on unfair labor practices, currently scheduled to begin on July 22, 2013 at 9:30 a.m. Plaintiffs cannot shoulder the heavy burden of proving that injunctive relief is appropriate. First, the Companies' claim is exceptionally unlikely to succeed on the merits, because this Court lacks subject matter jurisdiction to enjoin Board proceedings under the long-settled Supreme Court precedent of *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and *Leedom v. Kyne*, 358 U.S. 184 (1958). Second, the Companies will not suffer irreparable harm if a restraining order does not issue. Again, settled law demonstrates that the mere cost of litigating an unfair labor practice case before the NLRB cannot be deemed irreparable harm. Finally, the Companies' inexcusable and prejudicial delay in bringing this proceeding, along with considerations of the public interest, would independently warrant denial of this Motion even if the other requirements for injunctive relief were met.

FACTS

In March 2013, the Companies were engaged in collective bargaining for a successor contract with the representative of their employees, Local 1181-1061, Amalgamated Transit Union, AFL-CIO (the Union). Dkt. No. 1-6, Pet. Exh. B2 ¶¶ 23, 26; Dkt No. 1-6, Exh. C ¶¶ 12-13. On March 19, despite the fact that negotiations were continuing and productive, the Companies declared an impasse in bargaining and proceeded to unilaterally implement changes in terms and conditions of employment. Dkt. No. 1-6, Pet. Exh. C ¶¶ 20, 22, 24. On March 20 and 21, the Union filed a series of unfair labor practice charges with the NLRB alleging that the

Companies had violated Section 8(a)(1) and (5) of the National Labor Relations Act by this conduct. Dkt. No. 1-5, Pet. Exh. A2. Following an investigation of these charges on behalf of Acting General Counsel Lafe Solomon, Region 29 Director James Paulsen (the Regional Director) found merit and on June 10 issued a Consolidated Complaint and Notice of Hearing ("the Complaint"), Dkt. No. 1-6, Pet. Exh. A3, setting the cases for hearing before an administrative law judge on July 9 (*id.*).

The Companies filed a Motion and Request For Postponement of Hearing on June 21, seeking to delay the hearing until July 29. Board Exh 1. Counsel for the Acting General Counsel opposed this request, but the Board's Office of Administrative Law Judges continued the hearing until July 22. Board Exhs. 2, 3. Next, on July 8, 2013, the Companies wrote to the Acting General Counsel and the Regional Director, demanding that the Complaint be withdrawn, allegedly because the Board lacks a quorum of members and, in the Companies' view, the Board's quorum status affects the General Counsel's ability to prosecute unfair labor practice cases as well as administrative law judges' ability to hear those cases and issue recommended decisions. Board Exh. 4. On July 12, 2013, the Acting General Counsel denied this request based on, among other things, his statutory independence to prosecute unfair labor practice cases, the ongoing litigation over the Board's quorum status, and the rejection by three courts of appeals of the Companies' theory linking the Board's quorum status to the ability of non-member delegees to exercise delegated authority. In addition, the Acting General Counsel and expressly ratified the issuance and prosecution of the Complaint issued by the Regional Director. Board Exh. 5.

In addition to issuing the Complaint, the Regional Director also sought authorization from the Acting General Counsel and the Board to obtain preliminary injunctive relief against the Respondents pending the Board's final adjudication of the case. On June 28, 2013, the Acting

General Counsel authorized this proceeding, and on the same date, the Board did likewise. Board Exh. 6. Accordingly, on July 3, the Regional Director filed the Petition for Relief which initiated this case. Dkt. No. 1. On that date, this Court ordered the Companies to show cause why the petition should not be granted, setting July 10 as the date for their answer, July 15 as the date for the Board's reply, and July 16 as the hearing date. Dkt. No. 2.

The Companies filed a Motion to Adjourn Conference on July 8, seeking to delay their obligation to respond until after the administrative trial (by now scheduled for July 22) had concluded. Dkt No. 6. Counsel for the Acting General Counsel did not consent to this request. On the same day, this Court granted that Motion and ordered the Companies to answer the Petition on July 12. Order on Motion to Adjourn Conference, no docket number, dated 7/8/13. The next day, the Court ordered the parties to file briefs based on the administrative record on August 5, and response briefs on August 12, and set the case for hearing on August 16. Minute Entry, no docket number, dated 7/9/13.

On July 12, the Companies filed their Answer to the Petition. Dkt. No. 18. In that Answer, they denied in pertinent part the factual allegations of the Petition, asserted affirmative defenses, and also asserted three "Counterclaims and Third-Party Complaints" addressed to Regional Director Paulsen, Acting General Counsel Solomon, and Board Members Sharon Block and Richard Griffin, Jr. The Answer did not request a temporary restraining order. Despite their ability to request injunctive relief from this Court much earlier than five days before the scheduled start date of the administrative hearing, the Companies filed the instant Motion for Temporary Restraining Order and Preliminary Injunction on July 17, seeking to enjoin the unfair labor practice hearing scheduled for July 22. Dkt. No. 25.

In addition to all of the above, on July 15, the Companies filed a Petition for Writ of Mandamus in the D.C. Circuit seeking the same relief, for the same reasons as the asserted counterclaims. D.C. Circuit Case No. 13-1221.

ARGUMENT

The Court should deny the Companies' eleventh-hour request for an injunction of the scheduled July 22 administrative hearing. It is legally meritless under longstanding precedent, and in any event, the Companies' inequitable delay in bringing this proceeding renders them unfit for extraordinary relief.

Before granting a motion for a temporary restraining order, the Court looks to four factors, all of which must be satisfied: "(1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of substantial harm to other parties if relief is granted; and (4) the public interest." *Litwin v. OceanFreight, Inc.*, 865 F. Supp. 2d 385, 391-92 (S.D.N.Y. 2012); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20, 22 (2008). In *Nken v. Holder*, the Supreme Court explained that when the government is the opposing party, the third and fourth factors merge. 556 U.S. 418, 435 (2009). Accordingly, in Part C we will address those factors together. As we now show, *none* of these factors favors the granting of the Companies' motion.

A. The Companies' Counterclaim Has No Prospect Of Success on the Merits

For preliminary relief to be granted, the party seeking relief must be able to show that it is likely, not merely plausible, that it will succeed on the merits of the underlying case. *Winter*, 555 U.S. at 20. Here, however, the Companies cannot prevail on the merits. They simply do not meet the prerequisites for the extraordinary remedy of District Court jurisdiction to review National Labor Relations Board proceedings.

1. The Statutory Scheme of the National Labor Relations Act Does Not Provide for District Court Review of NLRB Actions

The National Labor Relations Act (the NLRA or the Act) guarantees employees certain rights in Section 7 (29 U.S.C. § 157) and enforces those rights by making certain employer and union activity unfair labor practices in Section 8 (29 U.S.C. § 158). It also empowers the National Labor Relations Board to enforce the foregoing provisions and to prevent "any person" from engaging in unfair labor practices (29 U.S.C. § 160). As such, the Board is statutorily vested with the responsibility for administering the Act. 29 U.S.C. § 153(a). *See In re John S. Irving*, 600 F.2d 1027, 1032 (2d Cir.), *cert. denied*, 444 U.S. 866 (1979). To that end, the NLRA establishes a unique statutory scheme of review in which federal district courts handle only certain defined matters.[1]

The Board's administrative adjudication of unfair labor practice cases is subject to review only upon the issuance of a final Board order at the conclusion of an unfair labor practice proceeding, and then only in the United States Courts of Appeals. Sections 10(e) and (f) of the Act (29 U.S.C. §§ 160(e) and (f)). *See also NLRB v. UFCW, Local 23*, 484 U.S. 112, 118-122 (1987); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 51 (1938). Review of final Board orders in Circuit Courts affords "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Myers*, 303 U.S. at 48. In the words of the Supreme Court (*Id.* at 49): "all questions of the jurisdiction of the Board and the regularity of

[1] Section 10(j) relief, 29 U.S.C. § 160(j), is one of two places where federal district courts participate in the NLRA process, the other being subpoena enforcement proceedings. 29 U.S.C. § 161 (2). Congress specifically authorizes in Section 10(j) of the Act that District Courts of the United States will have jurisdiction to review a Board injunction petition and grant the Board such relief as the court "deems just and proper." If any party feels aggrieved by the district court's final order, an appeal may be taken to the United States Court of Appeals pursuant to 28 U.S.C. §§ 1291 and 1292. See, e.g., Minnesota Mining and Manufacturing v. Meter, 385 F.2d 265 (8th Cir. 1967).

its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court [of appeals].” It is further settled that where, as here, Congress has provided specific statutory procedures for review of agency law enforcement actions, "those procedures are to be exclusive." *Whitney National Bank v. Bank of New Orleans & Trust Co., et al.*, 379 U.S. 411, 420 (1965). *Accord: Myers, supra*, 303 U.S. at 48; *United Aircraft v. McCulloch*, 365 F.2d 960, 961 (D.C. Cir. 1966).

Where a party objects to the regularity of any aspect of the Board’s administrative unfair labor practice proceedings, that party has one recourse only: It must wait until a final Board order issues, and then appeal such matters to the United States Court of Appeals and seek to have the objected-to findings or remedies modified or rejected in that forum. Such relief is not within the jurisdiction of the district courts. *See, e.g.*, *Lineback v. Printpack*, 979 F. Supp. 831, 853-58 (S.D. Ind. 1997) (dismissing for lack of jurisdiction various counterclaims raised in a 10(j) proceeding).[2]

2. The *Leedom v. Kyne* Exception to the Rule of No Jurisdiction is Narrowly Construed and Requires Showing of Clear Statutory Violation and Absence of Alternative Judicial Remedies

The general rule that district courts do not have jurisdiction to enjoin Board proceedings, contains at most two very narrow relevant exceptions: plain violations of explicit mandatory requirements in the Act, *where no alternative judicial remedy exists*; and plain constitutional

[2] The Mandamus Act, 28 U.S.C. § 1361, relied upon by the Companies (Dkt. No. 18, at 4) provides no basis for any exception to these long settled limitations on judicial authority over Board proceedings. Mandamus is an extraordinary remedy that is only available when there are no other avenues of review, and is unavailable here where, as discussed above, the appellate courts exercise exclusive jurisdiction over review of NLRB cases. *See e.g.*, *City of New York v. Heckler*, 742 F.2d 729, 739 (2d. Cir. 1984) (recognizing that the availability of jurisdiction for traditional appellate review would normally preclude mandamus jurisdiction); *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 77-79 (D.C. Cir. 1984) (“where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals”).

violations, *where no alternative judicial remedy exists*. *Leedom v. Kyne*, 358 U.S. 184, 188-190 (1958); *River Pines Community Health Center (Adventist Living Center) v. NLRB*, 119 L.R.R.M. (BNA) 2407, 2408-09 (N.D. Ill. 1984), and cases cited therein.[3]

Under *Leedom*, federal district courts have jurisdiction to intervene in Board proceedings only in extremely unusual circumstances. Those circumstances can exist only when the Board has acted contrary to an explicit, mandatory provision of the NLRA, <u>and</u> when the normal means of securing judicial review are unavailable. *See Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1312 (D.C. Cir. 1984). Petitioners must satisfy <u>both</u> prerequisites before the district court has jurisdiction to review the Board's action under *Leedom*. *See Modern Plastics Corp. v. McCulloch*, 400 F.2d 14, 17 (6th Cir. 1968); *Grutka v. Barbour*, 549 F.2d 5, 7-10 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977).

The Supreme Court emphasized in *Boire v. Greyhound* (376 U.S. 473, 481 (1964)) that the *Leedom* exception to the general rule of no review is characterized by painstakingly delineated procedural boundaries which may be resorted to only in "extraordinary circumstances." Further, the *Boire* Court stated (*Id*. at 481):

> The [*Leedom v.] Kyne* exception is a narrow one, not to be extended to permit plenary District Court review of the Board orders. . . whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion

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[3] Remarkably, although the Companies are certainly aware of the existence of *Leedom*, having cited it generally in their Answer (Dkt. No. 18, at 4), they do not even mention (much less analyze) it in their brief in support of this Motion. That is likely because *Leedom* and *Fay v. Douds*, 172 F.2d 720, 723 (2d Cir. 1949) involved Board actions brought under §9 of the NLRA, for which there is no judicial review. But this matter involves Board action under §10 of the Act, for which judicial review is always available, *see* 29 U.S.C. §160(e), (f), so *Leedom* and <u>Fay</u> do not apply in this case. *See, e.g., AMERCO v. NLRB*, 458 F.3d 883, 888-90 (9th Cir. 2006) (rejecting application of *Leedom* and *Fay* to §10 proceedings); *Semi-Alloys, Inc. v. Morio*, 490 F. Supp. 422, 424-25 (S.D.N.Y. 1980) (same).

which does not comport with the law. Judicial review in such a situation has been limited by Congress to the Courts of Appeals . . .

Likewise, jurisdiction is not conferred on the district courts to consider the wisdom of a particular Board policy for "[*Leedom v.] Kyne* and [*Boire v.] Greyhound* teach us that disagreement with the Board on a matter of policy or statutory interpretation is not a sufficient basis for assertion of jurisdiction. . . " *National Maritime Union v. NLRB*, 375 F.Supp. 421, 434 (E.D. Pa.), *aff'd*, 506 F.2d 1052 (3d Cir.), *cert. denied*, 421 U.S. 963 (1975).

Given the narrowness of the exception, the party seeking to invoke it must make a "strong and clear" showing that the Board disregarded a "clear, specific and mandatory provision of the [Labor] Act." *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir.), *cert. denied*, 393 U.S. 1016 (1969). In fact, the party must show that the agency's action is "blatantly lawless." *Abercrombie v. Office of Comptroller of Chicago*, 833 F.2d 672, 675 (7th Cir. 1987). The Companies cannot satisfy this heavy burden.

3. The Companies Have Adequate Alternative Means To Obtain Review Of Their Arguments

To obtain *Leedom* relief, a plaintiff must also show that it cannot obtain review by ordinary means. Here, however, the Companies have access to judicial review. [4] The Companies can obtain "full, expeditious, and exclusive" review of the unfair labor practice proceedings in either the Second Circuit or the D.C. Circuit following issuance of a final Board order. *Myers*, 303 U.S. at 48 n.5 (quotation omitted). The Supreme Court long ago concluded that "the judicial review . . . provided [by the NLRA] is adequate." *Myers*, 303 U.S. at 50. The Court gave two principal reasons for its conclusion. First, the Board does not have the power to enforce its own

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[4] The 10(j) case itself will be litigated in this Court and subject to further review in the Second Circuit. The Companies have already asserted their claims as affirmative defenses to the Board's petition.

orders. *Id.* at 48. Instead, that power resides exclusively with the courts of appeals. *Id.* And second, when reviewing a Board order, "all questions of the jurisdiction of the Board and the regularity of its proceedings and all questions of constitutional right or statutory authority are open to examination by the court." *Id.* at 49 (emphasis added) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937)). Thus, if a court of appeals finds reversible error in the Board's order, "the Board's petition to enforce it will be dismissed, or the [opposing party's] petition to have it set aside will be granted." *Id.* at 50. Together, these features provide "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Id.* at 48; see also *E.I. DuPont De Nemours & Co. v. Boland*, 85 F.2d 12, 15 (2d Cir. 1936) ("The provisions of the act for the enforcement and review of the cease and desist orders afforded the appellants an adequate, complete, and exclusive remedy."). This principle continues to guide reviewing courts to this day, *cf. Amerijet Int'l, Inc. v. NLRB*, No. 11-22919-CIV, 2012 WL 3526620 (S.D. Fla. Aug. 8, 2012), *aff'd*, No. 12-14657, 2013 WL 2321401, *1-2 (11th Cir. May 29, 2013) (per curiam) (rejecting suggestion that company attacking the Acting General Counsel's authority lacks the ability to obtain later judicial review), *pet. for reh'g en banc filed* (July 12, 2013), and is the precise reason this Court should refuse the Companies' invitation to consider their counterclaims. *See Lineback*, 979 F. Supp. at 853-58.

4. The Companies Cannot Show That The Board Has Plainly Violated The Act Or The Constitution

The Companies do not come close to meeting *Leedom*'s extraordinary burden. They challenge the agency's ability to "prosecute" the unfair labor practice case when the Board putatively lacks a quorum. Far from being expressly prohibited when the Board lacks a quorum, the "prosecution" of unfair labor practices by the General Counsel of the NLRB is expressly authorized by Section 3(d) of the Act. The General Counsel holds "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." 29 U.S.C. § 153(d). Courts understand section 3(d) to be a firm limitation on the jurisdiction of federal courts to examine the General Counsel's exercise of those functions. "Both [the D.C. Circuit] and the Supreme Court have declared . . . that decisions of the General Counsel of the National Labor Relations Board whether to issue complaints are not subject to review by this court." *Patent Office Prof'l Ass'n v. FLRA*, 128 F.3d 751, 753 (D.C. Cir. 1997) (citing *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 117-33 (1987) (*UFCW*), and *Beverly Health & Rehab. Servs., Inc. v. Feinstein*, 103 F.3d 151, 155 (D.C. Cir. 1996)).[5] As early as 1940, a District Court judge could say that a request to enjoin the prosecution of an unfair labor practice case was "contrary to a host of decisions which have construed the National Labor Relations Act." *Sanco Piece Dye Works v. Herrick*, 33 F. Supp. 80, 81 (S.D.N.Y. 1940). 73 additional years of history have not altered this basic truth about the NLRA's statutory scheme.

Further, there is no merit to Petitioners' attempt to link the General Counsel's ability to exercise the statutory authority conferred by section 3(d) to the existence of a Board quorum. The General Counsel of the NLRB is an independent officer appointed by the President and confirmed by the Senate to whom staffs engaged in prosecution and enforcement are directly accountable. *See UFCW*, 484 U.S. at 127-28; *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010). As stated, section 3(d) vests the General Counsel with "final authority" over the

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[5] *See also Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 396 (6th Cir. 2002) (reversing district court for "enjoining the Board from prosecuting [a] complaint"); *Mayer v. Ordman*, 391 F.2d 889, 889 (6th Cir. 1968) (per curiam) (declaring it "well settled that the National Labor Relations Act precludes District Court review of the manner in which the General Counsel of the Board investigates unfair labor practice charges and determines whether to issue a complaint thereon"); *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 669 (5th Cir. 1966) (rejecting the proposition that courts should "police the procedural purity of the NLRB's proceedings long before the administrative process is over").

investigation and prosecution of unfair labor practice cases. 29 U.S.C. § 153(d). Thus, the General Counsel's final and unreviewable authority to investigate unfair labor practice charges and prosecute complaints does not derive from any "agency" or "delegate" status. (Dkt. No. 25, at 4.) Instead, it flows directly from the words of section 3(d).

Likewise, Regional Directors, who are members of the General Counsel's staffs engaged in prosecution of unfair labor practices, derive their authority to issue and prosecute complaints from the General Counsel. *See United Elec. Contractors Ass'n v. Ordman*, 258 F. Supp. 758, 760 (S.D.N.Y. 1965), *aff'd*, 366 F.2d 776 (2d Cir. 1966); *Dunn v. Retail Clerks Int'l Ass'n*, 307 F.2d 285, 288 (6th Cir. 1962). Moreover, any conceivable defect in Petitioner Paulsen's authority to prosecute the complaint was remedied when the Acting General Counsel expressly ratified the issuance of the complaint. Bd. Exh. 5. *See Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 212-14 (D.C. Cir. 1998); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996).

For slightly different but related reasons, the Board's Administrative Law Judge holds authority to take evidence and conduct the unfair labor practice trial regardless of whether the Board has a quorum or not. Section 10(b) provides for a hearing "before the Board or a member thereof, or before a designated agent or agency," and section 10(c) provides that testimony taken in such a hearing shall be reduced to writing and that the judge taking testimony shall issue a proposed report and recommended order which automatically becomes the order of the Board if no exceptions are timely filed. 29 U.S.C. § 160(b)(c). This power is indeed assigned to the

Board's cadre of administrative law judges by a delegation – but the delegation in question dates back to 1936. *See* General Rules and Regulations, 1 Fed. Reg. 207, 209 (Apr. 18, 1936).[6]

The Companies' only argument to the contrary rests on a strained reading of the D.C. Circuit's decision in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009). That court held that "delegated power to act . . . ceases when the Board's membership dips below the Board quorum." 564 F.3d at 475. But in addressing the same delegation question considered in *Laurel Baye*, the Supreme Court in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), pointedly declined to follow the agency theory invoked by *Laurel Baye*. The Supreme Court explained that, in vacating a decision issued by a Board panel with only two members, it reached the same result as *Laurel Baye* but expressly held that "we do not adopt the District of Columbia Circuit's equation of a quorum requirement with a membership requirement that must be satisfied or else the power of any entity to which the Board has delegated authority is suspended." *Id.* at 2643 n.4. Specifically, with respect to the questions at issue here, the Court stated, "Our conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel." *Id.*[7]

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[6] Moreover, it is well settled that interlocutory rulings of the NLRB—including but not limited to administrative law judges' decisions on trial motions—cannot be reviewed by district courts. *See Fugazy Continental Corp. of Connecticut v. NLRB*, 514 F. Supp. 718, 720 (E.D.N.Y. 1981).

[7] Since *New Process*, three courts of appeals have rejected *Laurel Baye*'s reasoning and held that Board delegations of authority to the General Counsel to commence 10(j) cases like this one did not cease when the Board dipped below a quorum. *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1821 (2012); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 853 (5th Cir. 2010); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011). Recent district court decisions are also in accord in disputing that *Laurel Baye*'s agency theory invalidates the prior delegations of the Board. *See Overstreet v. SFTC, LLC*, No. 13-CV-0165 RB/LFG, 2013 WL 1909154, at *5-*6 (D.N.M. May 9, 2013); *Calatrello v. JAG Healthcare, Inc.*, No. 1:12-CV-726, 2012 WL 4919808, at *3-*4 (N.D. Ohio Oct. 16, 2012), *appeal*

Even if *Laurel Baye* remains possible authority for the broad propositions the Companies assert, that is all it is. *Laurel Baye* did not amend the text of the statute; it merely offered a single contested interpretation of it. No other court has adopted that interpretation. In fact, that interpretation has been consistently rejected. *See above,* note 6. This is a far cry indeed from a "strong and clear showing" that the Board has disregarded a "specific and mandatory" provision of the Act. *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir. 1969).

Similarly, the Companies do not meet their burden of showing a plain Constitutional violation, even as to actions of the Board itself. Circuit Courts of Appeal are divided on the validity of the principles underlying the D.C. Circuit's opinion in *Noel Canning v. NLRB*. As the D.C. Circuit candidly acknowledged, *Noel Canning*'s conclusions concerning the President's recess appointment authority conflict with those reached by the Second Circuit and two other circuit courts that have addressed the issues. *Noel Canning*, 705 F.3d at 505-06, 509-10 (discussing *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc), *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (limited en banc), and *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962)). Since *Noel Canning*, divided panels of two other Circuit Courts have concurred with part of its holding. *See NLRB v. New Vista Nursing & Rehab.*, --- F.3d ---, Nos. 11-3440, 12-1027, 12-1936, 2013 WL 2099742 (3d Cir. May 16, 2013); *NLRB v. Enterprise Leasing Co.*, Nos. 12-1514, 12-2000 (4th Cir. July 17, 2013). And the Supreme Court has granted the Board's petition for a writ of certiorari to review *Noel Canning*. *NLRB v. Noel Canning*, 81 U.S.L.W. 3629 (June 24, 2013).

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dismissed, No. 12-4258 (6th Cir. July 2, 2013); *Gottschalk v. Piggly Wiggly Midwest, LLC*, 861 F. Supp. 2d 962, 964-65 (E.D. Wis. 2012); *Paulsen v. Renaissance Equity Holdings, LLC*, 849 F. Supp. 2d 335, 345-50 (E.D.N.Y. 2012).

Necessarily, therefore, there is no clear Constitutional violation. *Leedom* jurisdiction is inappropriate in any case where the Board's position has even "colorable support." *Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1313 (D.C. Cir. 1984). A circuit split constitutes "colorable support" even where the circuit in which the *Leedom* case is brought has previously rejected the Board's position. *Armco Steel Corp. v. Ordman*, 414 F.2d 259 (6th Cir. 1969) (per curiam). Here, far from rejecting the Board's position, the Second Circuit has already partially agreed with it. *Allocco*, 305 F.2d at 709-15.

And even if the Board's "constitutional disability" were firmly established (which it is not), there would still be no plain constitutional violation in processing the case through the steps *prior to* the Board's involvement. To our knowledge, no court has ever invalidated a Board decision because the complaint issued or the trial was held during a period when the Board lacked a quorum; indeed, such decisions have been routinely enforced without comment.[8]

B. The Companies Will Not Suffer Irreparable Harm If The Present Motion Is Not Granted

Irreparable harm to the petitioners must be *likely*, not merely possible, in the absence of extraordinary relief before such relief may be granted.[9] The sole harm from which the Companies seek immediate relief in their motion is the cost of litigating the Board case before the Administrative Law Judge. (Dkt. No. 25, at 7.) It is settled law, however, that mere litigation expense, even where it is substantial and unrecoverable, does not rise to the level of "irreparable

[8] *See, e.g.*, *S. Power Co. v. NLRB*, 664 F.3d 946 (D.C. Cir. 2012) (unfair labor practices commenced in January 2008, during period from end of December 2007 through March 2010 when Board had only two members; Administrative Law Judge decision issued November 3, 2008); *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22 (D.C. Cir. 2011) (unfair labor practice occurred May 20, 2008; Administrative Law Judge decision issued December 31, 2008).

[9] *See Winter*, 555 U.S. at 22 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)).

injury." *Renegotiation Bd. v. Bannercraft Clothing Co.,* 415 U.S. 1, 24 (1974), citing *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41, 51-52 (1938). As the *Myers* Court aptly observed, "lawsuits . . . often prove to have been groundless, but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." *Id.* "The attendance of officers and employees at hearings, the employment of counsel, and like matters" are simply "annoying incidents" and are "not enough of themselves to establish a case for equitable relief." *Heller Brothers Co. v. Lind*, 86 F.2d 862, 863 (D.C. Cir. 1936) (per curiam). In accord with these holdings, both the Supreme Court and the D.C. Circuit have recently denied similar motions for emergency relief based upon *Noel Canning,* for failure to meet the stringent requirements for such relief.[10]

Even if such harm were "irreparable," it is not "likely." The Companies will be "injured" only if the unfair labor practice case has to be retried before an Administrative Law Judge a second time, which would require not only that the Board lose before the Supreme Court in *Noel Canning*, but that some form of prejudicial error occur as a consequence. The Companies do not provide a shred of evidence that retrial would be necessary, and with good reason; a retrial would be pointless. The existence or nonexistence of a Board quorum has no bearing on the labor-law issues at stake in the case. The Companies' unsubstantiated speculation can hardly establish irreparable harm under the *Winter* standard.

C. The Equities and the Public Interest Weigh Strongly Against Granting a Stay.

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[10] The D.C. Circuit denied emergency motions to stay Agency action in *Ozburn-Hessey Logistics, Inc. v. NLRB*, No. 13-1170 (D.C. Cir. May 14, 2013), *In re SFTC, LLC*, No. 13-1048 (D.C. Cir. June 28, 2013), and *In re CSC Holdings, LLC*, No. 13-1191 (D.C. Cir. June 28, 2013). Furthermore, the Supreme Court or individual Justices denied similar motions in *HealthBridge Management, LLC v. Kreisberg*, No. 12A769 (denial by Justice Ginsburg Feb. 4, 2013; denial by the Court Feb. 6, 2013), and *CSC Holdings, LLC v. NLRB*, No. 13A20 (July 2, 2013) (Roberts, C.J., in chambers).

It is a maxim that "he who seeks equity must do equity." Joseph Story, *Equity Jurisprudence* § 59 (1st ed. 1836).The Companies' behavior in this case, however, falls far short of this principle. Principles of laches should bar the courthouse door to any extraordinary relief on their behalf.

The Companies' representations in this Motion cannot be squared with assertions that they made in prior filings, both with the Board and with this Court. To review, the hearing in the Board case, first noticed on June 10 and originally scheduled for July 9, was postponed until July 22 at the Companies' request, allegedly because attorney Peter Kirsanow had been recently engaged in the case and other attorneys had preexisting commitments. Bd. Exh. 1. Following the Board's filing of this 10(j) action, the companies moved this Court to delay the hearing from July 16 until after the conclusion of the unfair labor practice trial concluded, allegedly because "the fully developed factual record sure to be established before an Administrative Law Judge would aid, if not be necessary to, this Court in ruling on the Petition." Dkt. No. 6, at 6. This request was accommodated by this Court, which postponed the hearing to August 16 (later August 20). Minute Entry, no docket number, dated 7/9/13. Only after these delays were granted did the Companies bring the instant motion, seeking to enjoin *the very case upon whose progress their prior stay requests were conditioned*. Moreover, the Companies misrepresented to this Court in its July 17 letter that they provided advance notice to the Board of this TRO filing; no such notice was given. Throughout this case, the Companies have acted with but a single purpose—to delay proceedings by any means possible.

"In order to prevail on the affirmative defense of laches, a defendant must prove that it has been prejudiced by the plaintiff's unreasonable delay in bringing the action." *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 192 (2d Cir. 1996) (citations omitted). The Companies have

been aware of the scheduling of an unfair labor practice case since June 10, and the 10(j) case was filed July 3. Despite the fact that the arguments they proffer are pure questions of law which could have been raised in an immediate action to enjoin the NLRB complaint, the Companies chose to wait over a month from the time that they received notice of hearing, two weeks from the time that they received notice of the 10(j) case, and five days from the time that they filed their own answer in the 10(j) case before bringing this motion for a restraining order. This motion appears to be strategically timed to provide the NLRB with hardly any time to draft a fully developed response. And while the Board is confident in the merits of its own position, the Companies' delay necessarily required Board counsel to develop these arguments in a prejudicially tight timeframe.

Even setting aside the Companies' questionable litigation tactics, the public interest strongly favors permitting the unfair labor practice case to move ahead. The Companies belittle the injury to the public interest if the Board case is delayed. (Dkt. No. 25, at 7.) However, delay of this case may irreparably prejudice the rights of employees that the Board protects. Indeed, the reason the Regional Director brought this 10(j) action in the first place was because the Board and General Counsel determined that ordinary Board processes may prove too slow to vindicate employee rights and the public interest. Record evidence demonstrates that the Companies' conduct is seriously eroding support for the Union. (Dkt. No. 1, Exhibits F through I (affidavits of Martine Paoli, Frederick Sinclair, Joseph Micciuli, and Mario Jean).) Moreover, a significant delay in the unfair labor practice hearing may cause the case to be heard "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." *Machinists Local 1424 v. NLRB*, 362 U.S. 411, 419 (1960), quoting H. R. Rep. No. 80-245, at 40 (1947).To halt the Board's process would effectively deny charging

parties and the public at large of rights and protections under the NLRA, which Congress did not lightly bestow. Compared to the minimal and wholly speculative harm to the Companies from permitting the Board case to proceed, the harm to the public interest is substantial.

CONCLUSION

This motion is without merit and should be denied forthwith. The Companies do not meet any, much less all, of the requirements for a temporary restraining order. Their counterclaim has no chance of succeeding on the merits; this Court simply has no jurisdiction to entertain it under the statutory scheme of the NLRA. Their claim of "irreparable harm" is barred as a matter of law, and in any event is speculation that is not even borne out by current events. Finally, the equities heavily favor the Board; this motion is part and parcel of a strategy by the Companies to delay litigation for as long as possible, and the Companies have advanced no justification for their failure to bring it at such time as would permit a fully developed response by the Board.

For the foregoing reasons, the Motion for a Temporary Restraining Order should be denied.

Respectfully submitted,

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Regional Director, Region 29

David Pollack
Erin E. Schaefer
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Brooklyn, NY 11201

Attorneys for Defendants James Paulsen, Lafe Solomon, Richard Griffin Jr., and Sharon Block, in their official capacities

Dated: July 18, 2013

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

ALL AMERICAN SCHOOL BUS CORP. ANJ SERVICE, INC., ATLANTIC QUEENS BUS CORP., B&M ESCORTS INC., BOBBY'S BUS CO. INC., BORO TRANSIT, INC., B-ALERT TRANSIT, INC., CANAL ESCORTS, INC. CIFRA ESCORTS, INC., EMPIRE STATE ESCORTS, INC., GOTHAM BUS CO. INC., GRANDPA'S BUS CO., INC., HOYT TRANSPORTATION SYSTEMS, INC., LONERO TRANSIT INC., LORISSA BUS SERVICE IN., MOUNTAINSIDE TRANSPORTATION CO., INC., PIONEER TRANSPORTATION CORP., RAINBOW TRANSIT INCL., AMBOY BS CO., INC., RELIANT TRANSPORTATION, INC., R&C TRANSPORTATION CORP., RPM SYSTEMS INC., SCHOOL DAYS INC., AND TUFARO TRANSIT CO. INC.,

AND

LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO

Cases:

29-CA-100827 29-CA-100967
29-CA-100830 29-CA-100969
29-CA-100833 29-CA-101009
29-CA-100858 29-CA-101013
29-CA-100862 29-CA-101014
29-CA-100863 29-CA-101019
29-CA-100864 29-CA-101027
29-CA-100865 29-CA-101030
29-CA-100874 29-CA-101033
29-CA-100876 29-CA-101036
29-CA-100879 29-CA-101069
29-CA-100885 29-CA-101072
29-CA-100887 29-CA-101073
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29-CA-100914 29-CA-101089
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29-CA-100961 29-CA-101146
29-CA-100962 29-CA-101153
29-CA-100963 29-CA-101155
29-CA-100966 29-CA-101158
29-CA-101161

MOTION AND REQUEST FOR POSTPONEMENT OF HEARING

Respondents respectfully request that the hearing in the captioned matter presently scheduled for July 9, 2013 be continued until July 29, 2013, or a suitable date thereafter.

Good cause exists for postponement of the July 9 hearing as:

1. The undersigned counsel was engaged by Respondents only in the last week and has entered an appearance on behalf of all Respondent this June 21, 2013. The barely two week period between now and the hearing date alone presents a challenge to adequately prepare and responsibly represent the interests of Respondents, but in addition, Kirsanow is scheduled for surgery on June 25, 2013, which procedure and recovery therefrom will prevent him from adequately preparing the case on behalf of the Respondents in this truncated period;

2. There is a meeting of welfare fund trustees of Charging Party Local 1181, Amalgamated Transit Union ("Union") on July 9, which meeting involves some of the same principals and attorneys as are involved in the present case;

3. Counsel for Respondents, Jeffery Pollack, will be engaged in an arbitration on July 11, 2013, in which he is representing the Union welfare and pension funds in a collection matter.

A continuance until July 29 will prejudice none of the parties to the proceeding and will ensure a thorough and efficient administration of justice and adjudication of the case, whereas a hearing on July 9 will demonstrably prejudice Respondents. Attorneys for the Union have been contacted and have not consented to a joint requested continuance.

This motion is not interposed for purposes of delay.

Respectfully submitted,

/s/Peter N. Kirsanow

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Attorneys for All Respondents

CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing Motion for Continuance of Hearing was sent via overnight and/or email delivery this 21st day of June, 2013, to:

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Local 1181-1061, Amalgamated Transit
Union, AFO-CIO
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Meyer Suozzi English & Klein P.C.
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Counsel for Charging Party

/s/Peter N. Kirsanow
Peter N. Kirsanow

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 29
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June 24, 2013

VIA ELECTRONIC MAIL

Honorable Joel P. Biblowitz
Associate Chief Administrative Law Judge
National Labor Relations Board
Division of Judges
120 West 45th Street, 11th Floor
New York, New York 10036
Joel.biblowitz@nlrb.gov

RE: All American School Bus Corp., et al.
Cases 29-CA-100827, et al.

Dear Judge Biblowitz:

Counsel for the Acting General Counsel submits this letter in response to the June 24, 2013 second supplement to the hearing postponement request submitted by All American School Bus Corp., et al. **(the Respondents)**. Respondents seek to postpone the hearing from July 9 to July 29, 2013. Counsel for the Acting General Counsel strongly opposes this request.

In their second supplement, Respondents stated that Neil Strahl, President of Pioneer Transportation Corp., has a previously scheduled vacation from July 14 through July 26, 2013. Respondents' request should be denied since the record can be adjourned until Mr. Strahl is available to testify after all other evidence is presented. For this reason, and for the other reasons previously articulated, Counsel for the Acting General Counsel respectfully requests that no more than a one-week postponement be granted, and that no further postponement requests be granted thereafter absent extraordinary circumstances.

Very truly yours,

/s/ Annie Hsu
Counsel for the Acting General Counsel

/s/ Erin Schaefer
Counsel for the Acting General Counsel

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

NEW YORK BRANCH OFFICE

ALL AMERICAN SCHOOL BUS CORP., ANJ SERVICE, INC., ATLANTIC QUEENS BUS CORP., B & M ESCORTS INC., BOBBY'S BUS CO. INC., BORO TRANSIT, INC., B-ALERT INC., ATLANTIC ESCORTS INC., CITY WIDE TRANSIT, INC., CANAL ESCORTS, INC., CIFRA ESCORTS, INC., EMPIRE STATE ESCORTS, INC., GOTHAM BUS CO. INC., GRANDPA'S BUS CO., INC., HOYT TRANSPORTATION CORP., IC ESCORTS, INC., KINGS MATRON CORP., LOGAN TRANSPORTATION SYSTEMS, INC., LONERO TRANSIT INC., LORISSA BUS SERVICE INC., MOUNTAINSIDE TRANSPORTATION CO., INC., PIONEER SCHOOL BUS RENTAL, INC., PIONEER TRANSPORTATION CORP., RAINBOW TRANSIT INC., AMBOY BUS CO., INC., RELIANT TRANSPORTATION, INC., R & C TRANSPORTATION CORP., RPM SYSTEMS INC., SCHOOL DAYS INC. and TUFARO TRANSIT CO. INC.

and

LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO

Cases: 29-CA-100827
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29-CA-101139
29-CA-101146
29-CA-101153
29-CA-101155
29-CA-101158
29-CA-101161

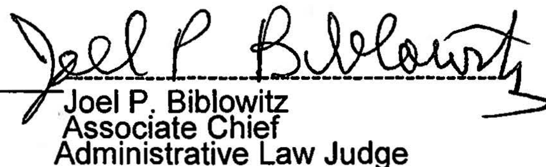
ORDER

Counsel for the Respondent, by Motion dated June 21, 2013 and by Supplemental Motion dated June 24, 2013, requests that the hearing herein presently scheduled to begin on July 9, 2013, be postponed to July 29, 2013. The stated reasons for this request is that Peter Kirsanow, Esq., was engaged by the Respondent only last week and would have only two weeks in which to prepare for the hearing, some of the principals and attorneys involved herein will be attending a meeting of Welfare Fund Trustees of the Charging Party, and Jeffrey Pollack, Esq., another counsel for the Respondents will be engaged in an arbitration on July 11, 2013. Counsel concludes that a postponement to July 29, 2013 will not prejudice any of the parties.

Counsel for the General Counsel, in opposing this request, states that the allegations herein are serious and that the region is seeking authorization for injunctive relief under Section 10(j) of the Act. However, Counsel for the General Counsel states that the region is agreeable to a one week postponement, but no more.

As I see no prejudice resulting from a two week postponement of this matter, the hearing herein is postponed to Monday, July 22, 2013, at the time and place previously scheduled. Therefore, if the hearing takes more time than anticipated, it will not be affected by attorney Pollack's vacation schedule from August 5 through August 16, 2013.

Dated: June 24, 2013
New York, NY



Joel P. Biblowitz
Associate Chief
Administrative Law Judge

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July 8, 2013

BY OVERNIGHT AND EMAIL

Lafe Solomon, Acting General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570

James G. Paulsen, Regional Director
National Labor Relations Board, Region 29
2 MetroTech Centre
Brooklyn, NY 11201

Re: All American School Bus Corp., et al. and Local 1181-1061, Amalgamated Transit Union AFL-CIO 29-CA-100827, et seq.; Paulsen v. All American School Bus Corp., et al., Case No. CV13-3762, U.S. District Court, Eastern District of New York

Dear Messrs. Solomon and Paulsen:

Respondents in the captioned matters respectfully request that prosecution of the captioned Consolidated Complaint as well as the Petition for Preliminary Injunction under Section 10(j) be suspended until such time as the National Labor Relations Board ("Board") regains a quorum of three lawfully appointed members.

As you know, the Board cannot exercise any authority under the National Labor Relations Act unless it has a quorum of three lawfully appointed members. *New Process Steel, L.P. vs. National Labor Relations Board*, 130 S.Ct. 2635 (2010). Furthermore, absent a quorum no agents or delegees of the Board may exercise authority that such Board has previously delegated to them. *Laurel Baye Health Care of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009, *cert. denied* 130 S.Ct. 3498 (2010)). The Board has not had a quorum since at least January 3, 2012. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2010), petition for cert. filed, No. 12-1281 (April 25, 2013). See also, *NLRB v. New Vista Nursing & Rehab.*, _____ F.3d _____, 2013 WL 2099742, at *11-30 – (3rd Cir. May 16, 2013).

The issuance of the Consolidated Complaint and prosecution thereof are plainly unlawful. The prosecution of the Section 10(j) petition is similarly unlawful. Quite simply, neither the Board, the Region, the Administrative Law Judges or any of their respective agents has the authority to litigate or decide the Consolidated Complaint or to prosecute the Section 10(j) action.

In the present case, not only does the Board lack a lawful quorum under *New Process Steel* and *Noel Canning*, but any purported delegation of authority to either the Acting General Counsel or to the Regional Director are unlawful. Among other things, when the Board purported to delegate authority to the Acting General Counsel (to, for example, seek Section 10(j) relief) such delegation was made in November, 2011, at a time when the Board was without

a quorum due to the invalid recess appointment of Member Craig Becker. See *New Vista, supra.* Moreover, Regional Director Paulsen's purported appointment was invalidly approved by the putative Board on January 6, 2012, three days *after* the recess appointments held unlawful by the D.C. Circuit Court in *Noel Canning*.

Continued prosecution of Consolidated Complaint and the Petition for 10(j) Relief will cause Respondents to expend significant time, money, and other resources defending matters that were void *ab initio* and the outcomes of which will be a nullity. Worse, any determinations resulting from the Consolidated Complaint and/or Petition for 10(j) Relief cannot be undone; the bell cannot be un-rung. In other words, Respondents will be egregiously and irreparably harmed. Given the fact that seeking Section 10(j) relief is a *discretionary* act by the Board, further prosecution is unconscionable.

Respondents' answer to the Section 10(j) petition is due July 10. The hearing on the petition is scheduled for July 16 and the hearing on the Consolidated Complaint is scheduled for July 22. Accordingly, Respondents respectfully but urgently request that both the Consolidated Complaint and the Petition for 10(j) Relief be withdrawn at least until such time as the Board is properly constituted.

Sincerely,

BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP

Peter N. Kirsanow
Counsel for Respondents
ALL AMERICAN SCHOOL BUS CORP., ANJ SERVICE, INC., ATLANTIC QUEENS BUS CORP., B&M ESCORTS INC., BOBBY'S BUS CO. INC., BORO TRANSIT, INC., B-ALERT TRANSIT, INC., CANAL ESCORTS, INC., CIFRA ESCORTS, INC., EMPIRE STATE ESCORTS, INC., GOTHAM BUS CO. INC., GRANDPA'S BUS CO., INC., HOYT TRANSPORTATION SYSTEMS, INC., LONERO TRANSIT INC., LORISSA BUS SERVICE INC., MOUNTAINSIDE TRANSPORTATION CO., INC., PIONEER TRANSPORTATION CORP., RAINBOW TRANSIT INC., AMBOY BS CO., INC., RELIANT TRANSPORTATION, INC., R&C TRANSPORTATION CORP., RPM SYSTEMS INC., SCHOOL DAYS INC., AND TUFARO TRANSIT CO. INC.

PNK/ipc

United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570
www.nlrb.gov

July 12, 2013

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Re: All American School Bus Corp., et al.
Cases 29-CA-100827, et al.
Paulsen v. All American School Bus Corp., et al.,
Case No. CV13-3762 (E.D.N.Y.)

Dear Mr. Kirsanow:

I write in response to your July 8, 2013 letter requesting that I direct the suspension of proceedings in the above matter. For the reasons below, I am denying your request.

As an initial matter, the authority to issue complaint lies with the General Counsel—an independent officer appointed by the President to whom staffs engaged in prosecution and enforcement are directly accountable. *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987) ("*UFCW*"); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010). Thus, my authority as Acting General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any "power delegated" by the Board, but rather directly from the text of the NLRA. Section 3(d) of the NLRA states, among other things, that the General Counsel "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." 29 U.S.C. § 153(d) (2011). In enacting this provision, "Congress intended to create an officer independent of the Board to handle prosecutions, not merely the filing of complaints." *UFCW*, 484 U.S. at 127. It does not detract from the General Counsel's independence that Congress included in Section 3(d) language "on behalf of the Board" to make it clear that the General Counsel acts within the agency. As the Supreme Court has found, the legislative history of the NLRA shows that the acts of the General Counsel were not to be considered acts of the Board. *UFCW*, 484 U.S. at 128-129.

Moreover, Regional Directors, who are members of the General Counsel's staffs engaged in prosecution of unfair labor practices, derive their authority to issue complaints from the authority of the General Counsel. *See United Elec. Contractors Ass'n v. Ordman*, 258 F.Supp. 758, 760 (D.C.N.Y. 1965) ("[t]he General Counsel has delegated authority to the

Regional Directors for issuing [ ] complaints."). Thus, regardless of any issue regarding the composition of the Board, the Regional Director's authority to issue the complaint, derived from my independent authority as Acting General Counsel, is unaffected.

In any event, the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281), does not warrant suspending proceedings in this matter. It is correct that *Noel Canning* held that Members Griffin and Block, current Board Members serving alongside Chairman Pearce, were not validly appointed because they were appointed during an intrasession recess. However, the United States Supreme Court has granted the Board's petition for certiorari in *Noel Canning*. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1, n.1 (Mar. 13, 2013), *cited with approval in Garcia v. Fallbrook Hospital*, ___ F.Supp.2d ___, 2013 WL 3368979 (S.D.Cal. June 7, 2013)(granting Section 10(j) injunction), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by other circuit courts. Compare *Noel Canning*, 705 F.3d at 505, 509-510 with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus, in *Belgrove*, the Board concluded that because the "question [of the validity of the recess appointments] remains in litigation," until such time as it is ultimately resolved, "the Board is charged to fulfill its responsibilities under the Act."[1] The Board's conclusion in *Belgrove* is equally applicable to my fulfilling my responsibilities under the Act.[2]

Furthermore, your assertion that "no agents or delegees of the Board may exercise authority that such Board has previously delegated to them" (citing *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 475 (D.C. Cir. 2009)) fails to account for the Supreme Court's decision in *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010). In *New Process*, the Supreme Court declined to rely on *Laurel Baye*, stating that its "conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel." 130 S.Ct. at 2643 n.4. Since that time, three Courts of Appeals have rejected *Laurel Baye*'s reasoning and have held that Board delegations of the authority to seek preliminary injunctions under Section 10(j) of the NLRA, 29 U.S.C. § 160(j), did not cease when the Board dipped below a

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[1] The Third Circuit's decision in *NLRB v. New Vista Nursing & Rehabilitation*, ___ F.3d ___, 2013 WL 2099742 (3d Cir. May 16, 2013), should not change this result. As noted above, there still remains a split in the circuits regarding the validity of intrasession recess appointments.

[2] The Board's appointment of Regional Director Paulsen is also in accord with this conclusion. *See Bloomingdale's, Inc.*, 359 NLRB No. 113 (2013).

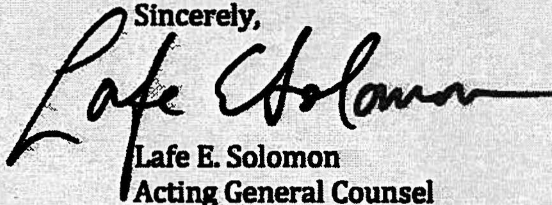
quorum.[3] *See Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011), *cert. denied* 132 S.Ct. 1821 (2012); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011).

The Board's most recent experience in continuing to process cases during the analogous dispute leading to *New Process Steel*, 130 S. Ct. 2635 (2010) (holding that a two-member Board lacks the authority to decide cases), provides support for the Board's judgment that continuing to adjudicate pending cases while the challenges to its authority are being adjudicated contributes to the resolution of industrial disputes. Of some 550 decisions issued by the two-member Board prior to *New Process*, only about 100 were impacted by that decision. Nearly all of the remaining matters decided by the two-member Board have been closed under the Board's processes with no review required. *See* Background Materials on Two-Member Board Decisions, http://www.nlrb.gov/news-outreach/backgrounders/background-materials-two-member-board-decisions (last visited July 8, 2013). This experience supports the Board's present determination to continue to decide cases until the Supreme Court resolves the recess appointments issue.

Finally, although Regional Director Paulsen has at all relevant times held the authority to issue the challenged complaint on my behalf, I also now expressly ratify the issuance of the complaint. *See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212-13 (D.C. Cir. 1998); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 706-08 (D.C. Cir. 1996).

Accordingly, I deny your request to suspend proceedings in this matter.

Sincerely,



Lafe E. Solomon
Acting General Counsel

[3] Moreover, the Board's 2011 delegation of authority consolidates and reaffirms similar extant delegations made in 2001 and 2002.

UNITED STATES GOVERNMENT
memorandum

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

DATE: June 28, 2013

TO: James G. Paulsen, Regional Director
Region 29

FROM: Lafe Solomon, Acting General Counsel

SUBJECT: All American School Bus Corp., et al.
Cases 29-CA-100827, et al.

Pursuant to the Board's delegation of court authority to me, I authorize the Regional Office to initiate Section 10(j) proceedings.

L.S.

cc: Board Members
Executive Secretary
Solicitor

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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

Date: June 28, 2013

To: Lafe Solomon
Acting General Counsel

From: Susan Leverone
Associate Solicitor

SUBJECT: All American School Bus Corp., et al.
Cases 29-CA-100827, et al.

The Board (Chairman Pearce and Members Griffin and Block) authorizes you to institute 10(j) proceedings in this case, as requested.

S. L.

cc: Mr. Kearney
Ms. Sophir
Ms. Merberg
Mr. Omberg
Mr. Lussier

BOARD MEMBERS
Executive Secretary