UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF LABOR – CONGRESS OF INDUSTRIAL ORGANIZATIONS, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD, Defendant.	Case No. 20-cv-00675-KBJ

DEFENDANT NATIONAL LABOR RELATIONS BOARD'S MOTION FOR TRANSFER TO THE D.C. CIRCUIT TO CURE WANT OF JURISDICTION

Defendant National Labor Relations Board ("NLRB" or "the Board") hereby moves pursuant to 28 U.S.C. § 1631 to transfer the instant matter to the United States Court of Appeals for the District of Columbia Circuit because this Court lacks subject-matter jurisdiction to review the administrative action challenged by Plaintiff American Federation of Labor – Congress of Industrial Organizations ("AFL-CIO") in its Complaint. In support of this Motion, the Board states as follows:

1. This case involves AFL-CIO's March 6, 2020 facial challenge to a final rule issued by the Board on December 18, 2019. *See* Representation-Case Procedures, 84 Fed. Reg. 69,524 (Dec. 18, 2019) ("the Rule"). (Compl. ¶ 9, ECF No. 1).

2. One of the Board's primary duties under the National Labor Relations Act ("NLRA" or "the Act") is to determine, upon the filing of a petition, whether a question of union representation exists concerning an appropriate unit of employees. 29 U.S.C. § 159(b)-(c). If such a question does exist, the Board conducts a secret-ballot election and certifies the results. 29

U.S.C. § 159(c)(1). During this process, the parties to the election—generally, an employer and one or more unions—can litigate certain disputed issues before or after an election occurs.

3. The Rule modifies existing representation-case procedures to "permit parties additional time to comply with various pre-election requirements instituted in 2015, to clarify and reinstate some procedures that better ensure the opportunity for litigation and resolution of unit scope and voter eligibility issues prior to an election, and to make several other changes the Board deems to be appropriate policy choices that better balance the interest in the expeditious processing of questions of representation with the efficient, fair, and accurate resolution of questions of representation." 84 Fed. Reg. at 69,524.

4. The Rule has an effective date of April 16, 2020. *Id*.

5. In support of its Complaint, the AFL-CIO argues that this Court has jurisdiction under the general jurisdictional provisions of 28 U.S.C. § 1331 because, under the Administrative Procedure Act, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. (Compl. ¶ 2).

6. The AFL-CIO is incorrect about which court has jurisdiction over its claims.

7. While the "normal default rule" is that "persons seeking review of agency action go first to district court rather than to a court of appeals," *Int'l Bhd. of Teamsters v. Peña*, 17 F.3d 1478, 1481 (D.C. Cir. 1994), that "default rule" is overcome where a so-called "direct-review" statute places jurisdiction to review challenged forms of agency action in the courts of appeals. *Nat'l Auto. Dealers Ass'n v. FTC*, 670 F.3d 268, 270 (D.C. Cir. 2012).

8. The NLRA contains such a direct-review provision in Section 10(f), which states that "[a]ny person aggrieved by a final order of the Board . . . may obtain a review of such order in any [appropriate] United States court of appeals." 29 U.S.C. § 160(f).

9. While the Board acknowledges that applying a provision which mentions review of only the Board's adjudicatory orders to its separately governed rulemaking actions is perhaps counterintuitive,[1] binding precedent in this Circuit consistently upholds this mode of analysis for direct-review statutes.

10. As an initial matter, the D.C. Circuit's decision in *New York Republican State Committee v. SEC*, 799 F.3d 1126, 1130-34 (2015) ("*NYRSC*"), makes clear that a judicial review provision's mention of "orders" but not "rules" is not a basis for holding that rules are to be excluded from such review procedures.

11. Indeed, analyzing a statute that, like the NLRA, was "silent about challenges to rules," the D.C. Circuit in *NYRSC* reiterated that for purposes of direct-review statutes, it would interpret the term "order" to mean "any agency action capable of review on the basis of the administrative record." *Id.* at 1130 (quoting *Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1278 (D.C. Cir. 1977) (internal quotation mark omitted)).

12. Board rules are reviewed under the Administrative Procedure Act on the basis of the administrative record created during the rulemaking process.

13. Whenever a statute providing for direct review of an agency's "orders" is silent or ambiguous regarding which court has initial jurisdiction to review that agency's rules, the D.C. Circuit "will 'not presume' that 'Congress intended to locate initial APA review of agency action

[1] The Board's authority to engage in rulemaking is governed by Section 6 of the Act, 29 U.S.C. § 156, whereas its adjudicatory powers are set forth in Section 10, 29 U.S.C. § 160.

in the district courts' rather than the courts of appeals—'[a]bsent a firm indication that Congress [so] intended.'" *Nat'l Auto. Dealers Ass'n*, 670 F.3d at 270 (alterations in original) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985)); *accord Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 347 (1st Cir. 2004) ("[J]urisdictional statutes should be construed so that agency actions will always be subject to initial review in the same court, regardless of the procedural package in which they are wrapped.").

14. Here, the requisite "firm indication" that Congress intended review of Board rules to occur in district courts rather than the courts of appeals is absent.

15. Neither the text of Sections 6 or 10 of the NLRA nor their respective legislative histories bear any mention of Congress's intent to place review of Board rules in district courts. Indeed, they are altogether silent on the subject.

16. Rather, if anything is to be gleaned from the structure of the NLRA itself, it is that "[d]istrict [c]ourts . . . have a very very minor role to play." *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 673 (5th Cir. 1966). In fact, the NLRA limits district courts' involvement to ancillary matters such as subpoena enforcement, 29 U.S.C. § 161(2), and requests for emergency injunctive relief until such time as cases may be heard on their merits. 29 U.S.C. §§ 160(j), (l).

17. Although prior Board rules have been challenged in district courts in the first instance, none of those cases examined whether courts of appeals possess initial jurisdiction to

review Board rules.[2] The issue was simply never raised before any court.[3] No inferences can be drawn from those cases because the Supreme Court has specifically and repeatedly told courts and litigants not to treat these types of "drive-by jurisdictional rulings" as precedent. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (citing *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994); and *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)).

18. Consequently, the AFL-CIO's Complaint was filed in a court which lacks subject-matter jurisdiction to hear it.

19. Ordinarily, a motion to dismiss under Federal Rule of Procedure 12(b)(1) is the appropriate method to challenge a district court's lack of subject-matter jurisdiction. But Congress has supplied another option in cases like this one: a motion to transfer to another court to cure "a want of jurisdiction." 28 U.S.C. § 1631.

20. Although 28 U.S.C. § 1631 grants this Court wide discretion to transfer this case, "if it is in the interest of justice, to any other such court . . . in which the action or appeal could

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[2] *See Am. Hosp. Ass'n v. NLRB*, 718 F. Supp. 704 (N.D. Ill. 1989), *rev'd*, 899 F.2d 651 (7th Cir. 1990), *aff'd*, 499 U.S. 606 (1991) (upholding rule defining collective-bargaining units in the healthcare industry); *Nat'l Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34 (D.D.C. 2012), *aff'd in part, rev'd in part*, 717 F.3d 947 (D.C. Cir. 2013) (invalidating rule requiring employers to post notice of employee rights); *Chamber of Commerce of the U.S. v. NLRB*, 856 F. Supp. 2d 778 (D.S.C. 2012), *aff'd*, 721 F.3d 152 (4th Cir. 2013) (same), *Chamber of Commerce of the U.S. of Am. v. NLRB*, 879 F. Supp. 2d 18 (D.D.C. 2012) (invalidating 2011 rule amending election procedures for lack of Board quorum), *Chamber of Commerce of the U.S. of Am. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015) (upholding 2014 rule again amending representation-case procedures); *Associated Builders & Contractors of Tex., Inc. v. NLRB*, No. 1-15-CV-026 RP, 2015 WL 3609116 (W.D. Tex. Apr. 1, 2015), *aff'd*, 826 F.3d 215 (5th Cir. 2016) (same).

[3] In *American Hospital Ass'n*, 718 F. Supp. at 705 n.2, the Board unsuccessfully moved for dismissal of a pre-enforcement rulemaking challenge on the basis that *no court* had subject-matter jurisdiction to review a Board rule addressing representation-case matters. After that motion failed, there was no separate dispute about whether district courts or courts of appeals had jurisdiction to review Board rules in the first instance.

have been brought," the Board suggests that the most appropriate transferee court is the United States Court of Appeals for the District of Columbia Circuit.[4] Not only is the D.C. Circuit a court where the Complaint "could have been brought at the time it was filed," 28 U.S.C. § 1631, it is the court with appellate jurisdiction over this Court's orders and judgments, and it is also the only court with universal jurisdiction over any final Board order under 29 U.S.C. § 160(f).[5]

21. In addition, the Board contends that a transfer, rather than a dismissal for lack of subject-matter jurisdiction, would be "in the interest of justice." 28 U.S.C. § 1631.[6] As another judge of this Court has noted, "[t]he legislative history of § 1631 indicates that 'Congress contemplated that the provision would aid litigants who were confused about the proper forum for review.'" *Janvey v. Proskauer Rose, LLP*, 59 F. Supp. 3d 1, 7 (D.D.C. 2014) (quoting *Am. Beef Packers, Inc. v. ICC*, 711 F.2d 388, 390 (D.C. Cir. 1983) (per curiam)). And courts have found transfer to serve the "interest of justice" in instances where "a plaintiff, . . . in good faith, misinterpreted a complex or novel jurisdictional provision." *Id.*

22. In line with that precedent, the AFL-CIO no doubt relied in good faith on the history of previous Board rules being initially reviewed in district courts. *See* above note 2. But that reliance should be viewed as an excusable misinterpretation of the NLRA's direct-review

[4] When determining the AFL-CIO's position on this motion (see below), Board counsel explained that it intended to seek a transfer to the D.C. Circuit. Counsel for AFL-CIO did not indicate that it would prefer a different circuit court as forum. Accordingly, although AFL-CIO could presumably seek review of the Rule in any circuit court, as it is a national organization that "transacts business" in every circuit, 29 U.S.C. § 160(f), it appears that the D.C. Circuit is an acceptable forum. If this is not correct, we invite the AFL-CIO to clarify its wishes.

[5] Although the AFL-CIO brought this lawsuit by way of complaint, its pleading is functionally equivalent to a petition to review the Board's administrative action under 29 U.S.C. § 160(f) and Federal Rule of Appellate Procedure 15(a).

[6] Of course, should this Court disagree, then dismissal of the Complaint without prejudice is warranted.

provision because, as noted above, 1) no party has previously asserted that courts of appeals have initial jurisdiction to consider challenges to Board rules, and 2) no court has ever addressed the matter.

23. Pursuant to Local Civil Rule 7(m), on March 13, 2020, counsel for the Board, Helene Lerner, contacted counsel for AFL-CIO, Leon Dayan, to inform him of the Board's intent to file the instant Motion. On the same day, Mr. Dayan notified the undersigned that AFL-CIO will oppose the Motion.

24. WHEREFORE, the Board respectfully requests that the Court grant this Motion and transfer the instant matter to the U.S. Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Dated at Washington, D.C.
This 16th day of March 2020

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Transfer to the D.C. Circuit to Cure Want of Jurisdiction and proposed Order were electronically filed with the Clerk of Court for the United States District Court for the District of Columbia this 16th day of March, 2020 using the CM/ECF system, which will serve all case participants registered for the CM/ECF system, including counsel for Plaintiff American Federation of Labor and Congress of Industrial Organizations.

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