UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

R & S WASTE SERVICES, LLC, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	Case No. 13-1042

REPLY OF THE NATIONAL LABOR RELATIONS BOARD TO PETITIONER'S RESPONSE TO MOTION TO DISMISS FOR LACK OF JURISDICTION

The National Labor Relations Board respectfully submits this Reply to Petitioner R&S Waste's Opposition to the Board's Motion to Dismiss. Nothing that R&S Waste raises in its Opposition supports its contention that this Court may review Board orders denying a motion to dismiss and a petition to revoke a Board subpoena, neither of which constitute appealable "final orders" within the meaning of Section 10(f) of the NLRA, 29 U.S.C. § 160(f).

1. R&S Waste contends that because this Court held that the Board as currently constituted lacks a valid quorum, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (Opp. at 6), the Court should "invalidate" the Board's decision denying its motion to dismiss and "stay the underlying litigation until a properly constituted NLRB panel reviews the motion" (Opp. at 8). *Noel Canning*, however, is not an exception to the requirement that appellate review is available only after the Board has

issued a final order (*see* Board's Motion at 10). Rather, *Noel Canning* is an illustration of that rule. *See Noel Canning*, 705 F.3d at 493 (basing jurisdiction on 29 U.S.C. §§ 160(e) and (f), and noting that petitioner had sought review after a final Board order issued). Here, as in *Noel Canning*, Section 10(f) enables R&S Waste to obtain the review it seeks if and when the Board issues a final order that causes it a concrete and particularized injury. *Id.* at 492-93.[1]

2. R&S Waste cites various other cases to support judicial review now, each of which go the question *whether* invalid agency action is judicially reviewable, not *when* judicial review is available (Opp. at 3-5, 7). Those cases stand for the well-established but inapposite principle that in creating administrative agencies, Congress intends to provide for judicial review of agency action taken in excess of statutory authority. There is no dispute that R&S Waste will be entitled to judicial review of its claim that the Board lacks the power to adjudicate the underlying dispute. But right now, that review is simply premature.

American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902), and its progeny, relied on by Petitioner (Opp. at 3-5), are wholly inapplicable here. The "non-statutory review" doctrine, which traces its origins to *McAnnulty*, provides

[1] Nor does *Ryder v. United States*, 515 U.S. 177 (1995) (Opp. at 5), provide support for R&S Waste. Like *Noel Canning*, the challenge in *Ryder* to the composition of the Coast Guard Court of Military Review was made in that court, then in the Court of Military Appeals, and finally in the Supreme Court. *Ryder*, 515 U.S. at 179-80. Nothing prevents R&S Waste from similarly proceeding in the course prescribed by statute.

plaintiffs with a cause of action to challenge unlawful agency action where review is *not* otherwise available by statute. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327-28 (D.C. Cir. 1996); *see also McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 496 (1991) (applying canon of construction presuming that, where a statute does not clearly provide judicial review of agency action, Congress intends to provide review); *Five Flags Pipe Line Co. v. DOT*, 854 F.2d 1438, 1439 (D.C. Cir. 1988) (where Congress "makes no specific choice" of which federal court reviews agency action, then an aggrieved person may sue the agency in federal district court); *Griffith v. FLRA*, 842 F.2d 487, 494-95, 501 (D.C. Cir. 1988) (interpreting the Civil Service Reform Act not to foreclose district court review of FLRA decisions concerning constitutional issues where, absent such interpretation, plaintiff would receive no review at all); *Dart v. United States*, 848 F.2d 217, 226 (D.C. Cir. 1988) (construing the Export Administration Act not to "cut off all judicial review" of the Commerce Secretary's decisions).

Here, however, the NLRA expressly permits R&S Waste to obtain judicial review of final Board orders in the courts of appeals after issuance of a final Board order (29 U.S.C. § 160(f)). *See* Board's Motion at 10. [2] It simply does not follow,

[2] As the Board has emphasized (Board's Motion at 10), *Myers v. Bethlehem Shipbuilding Co.* explicitly held that Section 10(f) appellate court review of a final Board unfair labor practice order provides ample and exclusive judicial review of "all questions of *constitutional right or statutory authority*." 303 U.S. 41, 49 (1938) (emphasis added).

therefore, that because R&S Waste must wait until a final order issues to obtain review, review of Board action is altogether "preclude[d]" such that the Court should assume jurisdiction under the non-statutory review doctrine (Opp. at 3).[3]

3. R&S Waste's further claim that review is proper now under 5 U.S.C. § 706(2)(C) (Opp. at 2), is irrelevant for the similar reason that this provision of the Administrative Procedure Act addresses only the standards for judicial review of agency action, not the timing of that review or the need for finality. Thus, Section 706(2)(C) does not provide this Court jurisdiction to review these non-final Board orders.

4. Finally, contrary to R&S Waste's assertion that litigating the underlying case will cause it "irreperable [*sic*] harm" (Opp. at 8), it is well-established that the burden of submitting to agency proceedings and incurring litigation expenses do not provide grounds for avoiding required review procedures. *See, e.g.*, *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.") (citing *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41, 51-52 (1938)).

[3] Equally inapplicable to R&S Waste's claims is *Leedom v. Kyne*, 358 U.S. 184 (1958) (Opp. at 7), which provides jurisdiction in *district courts* and even then, only where a party has no other means of obtaining review by statute. *Am. Fed'n of Gov't Employees v. FLRA*, 453 F.3d 500, 502, 506 (D.C. Cir. 2006).

In sum, because granting R&S Waste's requested relief here would be "at war with the long-settled rule . . . that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted," *Myers*, 303 U.S. at 50-51, this Court lacks subject matter jurisdiction to review the Board's non-final orders and the Court should dismiss the Petition for Review.

Respectfully submitted,

ABBY PROPIS SIMMS
Acting Assistant General Counsel

NANCY E. KESSLER PLATT
Supervisory Attorney

/s/ Mark G. Eskenazi
MARK G. ESKENAZI,
Attorney
Phone: (202) 273-1947
Fax: (202) 273-1799
Mark.Eskenazi@nlrb.gov

NATIONAL LABOR RELATIONS BOARD
SPECIAL LITIGATION BRANCH
1099 14TH STREET, N.W.
WASHINGTON, D.C. 20570

Dated: April 4, 2013

CERTIFICATE OF SERVICE

This is to certify that the foregoing was filed electronically on this 4th day of April, 2013 in accordance with the Court's Electronic Filing Guidelines. Notice of this filing will be sent to all parties by operation of the Court's Electronic Filing System. Parties may access this filing through the Court's Filing System.

/s/ Mark G. Eskenazi
MARK G. ESKENAZI