UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OZBURN-HESSEY LOGISTICS, INC.,	)	Case No. 13-1170
Petitioner,	)	
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

RESPONSE OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO EMERGENCY MOTION FOR STAY

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Ozburn-Hessey Logistics, LLC ("the Company") has filed a petition for review of the Board's decision, order and direction in *Ozburn-Hessey Logistics*, 359 NLRB No. 109 (May 2, 2013), and in addition has filed a petition for a writ of mandamus, and the instant motion seeking to stay the Board's order, including a Board direction that certain ballots cast in a Board-conducted election be opened and counted, until the petition for mandamus can be decided. The National Labor Relations Board ("the Board"), by its Acting Assistant General Counsel, hereby opposes the Company's motion to stay. As shown below, this Court lacks jurisdiction to review—or stay—an interlocutory order issued in, and affecting only, a Board representation proceeding. Indeed, no emergency exists based on the Region's scheduled opening and counting of the ballots on May 14 at 11:00 a.m. (EST) as directed by the Board's May 2, 2013, Decision, Order and Direction in this case.

STATEMENT OF FACTS

In its May 2, 2013 Decision, Order and Direction, the Board stated that "this is the third in a series of cases involving [Ozburn-Hessey Logistics, LLC's (OHL or the Company)] unlawful attempts to thwart its employees' efforts to secure union representation." (Motion, Exhibit 1, p. 1).

In approximately May 2009, the Steelworkers Union ("the Union") began working with a number of OHL employees who were interested in organizing a union. That organizing drive led to a representation election on March 16, 2010, which the Union lost. OHL's anti-union campaign resulted in two Board

decisions finding that the Company committed numerous violations of Sections 8(a)(1) and (3) of the National Labor Relations Act (29 U.S.C. § 158(a) (1) and (3)). 357 NLRB No. 125 (November 30, 2011) (petition for review filed in this Court, case no. 11-1482); 357 NLRB No. 136 (December 9, 2011) (petition for review filed in the Court, case no. 11-1481). (Motion, Exhibit 1, p. 1).

A second election was held in July 27, 2011, which the Union won by a vote of 165 to 164, with a number of challenged ballots that had a determinative effect on the election. In its third decision, 359 NLRB No. 109 (May 2, 2013), the Board found that the Company had engaged in similar misconduct violating the NLRA preceding the July election. *Id*. As part of its Order, the Board directed the Regional Director toopen and count the challenged ballots of four unlawfully discharged discriminatees -- Gloria Kurtycz, Jerry Smith, Renal Dotson and Carolyn Jones.[1] The Board then directed the Regional Director to certify the Union as the employee representative, if the revised tally of ballots showed that the Union received a majority of the vote. If the Union did not receive a majority of the votes, the Regional Director was ordered to conduct a rerun election when a free and fair election could be held. (Motion, Exhibit 1, p. 4).[2]

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[1] A total of six challenged ballots will be opened including those of two team leads—Brenda Stewart and Tammy Stewart--whose ballots were not excepted to by OHL. (Motion Exhibit 1, page 2, n. 12)

[2] The Company filed its Petition for Review of the Board's May 2 Order in the Court on May 9, 2013 (Case No. 13-1173).

Subsequent to the Board's May 2 Order, OHL filed an Emergency Motion with the Board to stay the Region's opening and counting of the ballots. On May 13, 2013, the Board issued an Order denying that request, finding that OHL "provided no compelling reason to depart from Board's longstanding practice of continuing to process representation matters, notwithstanding that review of the final Board Order in the companion unfair labor practice case is pending in a court of appeals." Moreover, the Board found that OHL "failed to demonstrate that it will suffer irreparable harm if the Region proceeds with the opening and counting of the ballots scheduled for May 14, 2013."

ARGUMENT

THE COURT LACKS JURISDICTION TO STAY ANY ASPECT OF THE BOARD'S ORDER INVOLVING ONGOING REPRESENTATION PROCEEDINGS

The Court's jurisdiction to review final Board orders arises under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Those Board orders are issued at the culmination of unfair labor practice proceedings conducted pursuant to Section 10 of the Act (29 U.S.C. § 160). The Board also has authority to conduct representation proceedings and issue certifications in representation proceedings, authority that arises under Section 9 of the Act (29 U.S.C. § 159). *A.F.L. v. NLRB*, 308 U.S. 401, 409 (1940). Board determinations in representation proceedings are not directly reviewable. *See Boire v. Greyhound, Corp.*, 376 U.S. 473, 476-79 (1964); *accord Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 24-25 (D.C. Cir. 2001); *Gold Coast Rest. v.*

NLRB, 995 F.2d 257, 267 (D.C. Cir. 1993)(citing *A.F.L.*, 308 U.S. at 409). Rather, review of representation matters is permitted "only in those cases in which the Board makes an order relating to labor practices found to be unfair as a result of a prior certification of a selected bargaining agent." *NLRB v. Falk Corp.*, 308 U.S. 453, 459 (1940) (citing *A.F.L.*, 308 U.S. at 409)). Thus, to obtain review of the Board's findings in a representation proceeding, an employer must refuse to bargain with a certified representative and then, in the unfair labor practice proceeding that follows, raise its challenges as a defense to the certification. *See Boire v. Greyhound, Corp.*, 376 U.S. at 477; *accord Goethe House New York, German Cultural Ctr. v. NLRB*, 869 F.2d 75, 77 (2d Cir. 1989).

This established principle that a court of appeals lacks jurisdiction to directly review representation case rulings remains unchanged even where, as here, the Board consolidates for hearing a representation proceeding with an unfair labor practice case predicated upon the same conduct. *See A.F.L.*, 308 U.S. at 402, 409; *NLRB v. Monroe Tube Co.*, 545 F.2d 1320, 1329 (2d Cir. 1976). Indeed, courts acknowledge the absence of jurisdiction even where resolution of an unfair labor practice finding subject to review under Section 10(f) may have an impact on a representation issue resolved in the consolidated proceeding. No fewer than seven different circuit courts of appeals have rejected the Company's theory that a factual relationship between an unfair labor practice case and a representation case grants the reviewing court

appellate jurisdiction over the representation case. *See Raley's, Inc. v. NLRB*, 725 F.2d 1204, 1205 -1206 (9th Cir. 1984) (en banc); *Graham Architectural Prods. Corp. v. NLRB*, 697 F.2d 534, 543 & n. 12 (3d Cir.1983); *Custom Recovery, Division of Keystone Resources, Inc. v. NLRB*, 597 F.2d 1041, 1046 (5th Cir.1979); *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 278 (8th Cir.1979); *NLRB v. Monroe Tube Co.*, 545 F.2d 1320, 1329 (2nd Cir.1976); *American Bread Co. v. NLRB*, 411 F.2d 147, 156 (6th Cir.1969); *NLRB v. Lifetime Door Co.*, 390 F.2d 272, 274 n. 3 (4th Cir.1968).

Under these well settled principles, this Court lacks jurisdiction to review any aspect of the Board's representation proceeding, including its determination that the ballots of the four unlawfully discharged employees should be counted. And, under those same principles, the Court lacks jurisdiction to stay the Board's direction in the ongoing representation proceeding that the Regional Director open and count the ballots of four employees whose discharges the Board found unlawful, and thereafter take further actions in the representation proceeding as warranted. Such actions could include immediate certification of the Union as the employees' representative, or conducting a new election that could lead to certification of the Union. Neither of those actions constitutes a final order.[3] However, if those actions ultimately result in the certification of the

[3] *See Monroe Tube Co.*, 545 F.2d at 1329 (Board order setting aside election that union has lost and directing a new election not a final order subject to review); *Gold Coast Rest.*, 995 F.2d at 267; *Graham Architectural Prods. Corp. v. NLRB*, 697 F.2d at 543.

Union as the employees' collective-bargaining representative, the Company will be able to obtain judicial review of any Board decision leading to such certification by refusing to bargain with the certified union and obtaining a final Board order requiring the Company to bargain with the Union. If the Union ultimately does not obtain a majority of votes in a valid election, the Union will not be certified as the collective-bargaining representative, the Company will be under no order to bargain with the certified union, and no judicial review of the representation proceeding will be necessary.[4]

Denial of the Company's emergency motion for stay will have no impact on this Court's review of the final unfair labor practice orders, described above, that are properly before the court. Moreover, in the event the Court finds that substantial evidence does not support the Board's finding that the Company unlawfully discharged the four employees, the Company can bring that to the Board's attention, for example, by petitioning the Regional Director to revoke any certification of the Union, or the Regional Director could revoke any certification on her own initiative.[5] *See Graham Architectural Prods. Corp.*,

[4] In this case, based on the Company's extensive unfair labor practices, the Board has directed a rerun election if the Union does not receive a majority of the votes. (Motion, Exhibit 1 at p.4.) Judicial review would still be available, as set out above, after any rerun election.

[5] The Board's internal Casehandling Manual governing representation proceedings provides that "[a] Regional Director has authority to revoke a certification on a motion by one of the parties or on his/her own initiative, if he/she feels that revocation is appropriate in a given situation. *See* NLRB

697 F.2d at 543 (finding that court lacks jurisdiction to review order of new election is without prejudice to employer's right to challenge that order in future proceedings relating to the new election). Contrary to the Company's assertions, therefore, the opening of the ballots cannot possibly "deprive the Court of its jurisdiction to resolve the underlying unfair labor practice allegations that are before it." (Motion p. 1-2,3.) That jurisdiction is wholly unrelated to the representation case and the appropriate review procedures that the Company is attempting to short circuit by its emergency motion here.

The NLRB's putative lack of a quorum under *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), is of no significance. As was the case in *Noel Canning* itself, *id*. at 493, the Company may obtain review of its constitutional claims when and if the Board issues a final order that is reviewable under 29 U.S.C. § 160(e) and (f). At that time, "[a]ll 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 [reviewing] court." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937) (emphasis added).

Moreover, and again contrary to the Company's representations, there is no "emergency" in this case. No irreparable harm will result from the counting of the ballots. As this Court has previously explained:

Casehandling Manual (Part Two) Representation Proceedings, Compliance Section, 11478.3.

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation *weighs heavily* against a claim of irreparable harm.

Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006)(quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C.Cir.1958))(internal quotation marks omitted)(emphasis added).

In an ideal world, it would be possible for the Board to resolve the representation case and unfair labor practice cases through simultaneous circuit court review proceedings. But, where, as here, that ideal scenario is not possible, the Board's continuing to process the representation case in accordance with its prior decisions advances the statutory policy of resolving representation disputes as rapidly as possible. [6] Counting the ballots and determining whether the current election stands or a re-run election is necessary reduces the time required to determine (1) whether the union has been selected and, assuming that the employer refuses to bargain until the Court decides the discharge issue, (2) whether to commence refusal to bargain proceedings that will eventually bring that refusal to bargain charge before the Board and the reviewing courts. The employer suffers no irreparable harm from the Board's so

[6] Whether the commingling of the ballots will have any adverse consequences, as the employer claims, is entirely uncertain at this time. What is at risk, in any event, is the possibility that the election results will have to be set aside and further proceedings conducted in accordance with this Court's decision. See *Graham Architectural*, 697 F.2d at 543. That possibility is counterbalanced by the advantages of continuing to bring the representation dispute to a conclusion and does not subject the employer to any irreparable harm.

proceeding for the employer is not compelled to bargain unless and until a court orders it to. *See Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41, 48 (1938) ("No power to enforce an order is conferred upon the Board . . . . [a]nd until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it."); *NLRB v. P*I*E Nationwide*, 894 F.2d 887, 890 (7th Cir. 1990). Mere litigation expense attendant to opposing the agency's position on disputed issues of law and fact does not constitute irreparable harm. *Renegotation Bd. v. Bannercraft Clothing Co*., 415 U.S. 1, 24 (1974).

And it is most certainly not the case, as the Employer erroneously represents in its emergency motion for stay (Motion, at 1-2), that the Board's continuing to process the representation case and following its usual procedures for determining the outcome of a secret ballot election somehow impairs this Court's jurisdiction to decide the merits of the discharges. The Court's jurisdiction is unaffected, and the Court's ultimate decision on the unfair labor practice issues pending before it will have the collateral consequence of ultimately resolving the voting eligibility of the four challenged voters.

In sum, there is no threat to this Court's jurisdiction and no emergency warranting its intervention prior to the issuance of a final order within the meaning of Section 10 of the NLRA. The employer's motion is unsupported by any showing of irreparable harm and unwarrantedly seeks delay in the resolution of a representation dispute over which this Court presently does not

have jurisdiction. Accordingly, the Board respectfully requests that the Court deny the Company's motion to stay the Board's Order.

Respectfully submitted,

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May 13, 2013

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2013, a true and correct copy of the foregoing Response of the National Labor Relations Board in Opposition to Petition for Writ of Mandamus or Writ of Prohibition was filed using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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