UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE SFTC, LLC, D/B/A SANTA FE TORTILLA COMPANY Petitioner.	)	Case No. 13-1048

RESPONSE OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR WRIT OF PROHIBITION

ABBY PROPIS SIMMS (D.C. Bar No. 913640)
Acting Assistant General Counsel for
Special Litigation
(202) 273-2934
Abby.Simms@nlrb.gov

PAUL THOMAS
KEVIN P. FLANAGAN
Attorneys
(202) 273-3788
Paul.Thomas@nlrb.gov
Kevin.Flanagan@NLRB.gov
NATIONAL LABOR RELATIONS BOARD
SPECIAL LITIGATION BRANCH
1099 14TH STREET, NW
WASHINGTON, DC 20570

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

MARGERY E. LIEBER
Associate General Counsel

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) **Parties and Amici.** All parties, intervenors, and amici appearing in this court are listed in the Brief for Petitioner.

(B) **Rulings Under Review.** This is an original action for mandamus, and there is no final lower court or agency ruling under review.

(C) **Related Cases.** Respondent is currently seeking injunctive relief against Petitioner pursuant to Section 10(j) of the National Labor Relations Act in the United States District Court for the District of New Mexico, in related case *NLRB v. SFTC, LLC*, Civil Action No. 1:13-cv-000165. Petitioner is also the charged party in related NLRB cases 28-CA-087842 and 28-CA-095332.

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GLOSSARY OF ABBREVIATIONS

"APA": The Administrative Procedure Act, 5 U.S.C. § 701 et seq.

"The District Court": The District Court for the District of New Mexico, which has jurisdiction of the lawsuit which SFTC seeks to enjoin.

"NLRA": The National Labor Relations Act, 29 U.S.C. § 151 et seq.

"NLRB": The National Labor Relations Board, Respondent in this proceeding.

"Pet.": The Petition for Writ of Mandamus or Writ of Prohibition filed by SFTC.

"The Regional Director": Cornele Overstreet, Regional Director of NLRB Region 28, the regional office which investigated the unfair labor practice charges underlying this case.

"SFTC": SFTC, LLC, doing business as Santa Fe Tortilla Company, Petitioner in this proceeding.

STATEMENT OF JURISDICTION

The National Labor Relations Board's position is that this Court lacks subject-matter jurisdiction over the instant petition under any of the authorities cited by the petitioner, namely: U.S. Const. art. II, § 2; 5 U.S.C. § 706; 28 U.S.C. § 1361; 28 U.S.C. § 1651; and 29 U.S.C. § 160(f).

SUMMARY OF ARGUMENT

Pursuant to this Court's Order dated March 11, 2013, the National Labor Relations Board ("NLRB" or "the Board") respectfully submits this opposition to the Petition for Writ of Mandamus or Writ of Prohibition filed by SFTC, LLC ("SFTC"). SFTC requests that this Court order the Board to withdraw a lawsuit filed in the United States District Court for the District of New Mexico seeking preliminary injunctive relief under Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j), and, in addition, to order the Board's Acting General Counsel to dismiss or withdraw and cease to prosecute an unfair labor practice complaint against SFTC (Pet. at 7), citing this Court's recent opinion in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), and *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

As discussed below, both of these extraordinary requests are wholly unprecedented, and SFTC's request that the Acting General Counsel be ordered to withdraw the unfair labor practice complaint is directly contrary to settled law. Accordingly, the Board requests that SFTC's petition should be dismissed for lack of subject-matter jurisdiction over either of SFTC's requests. In the

alternative, the petition should be denied because SFTC cannot show, as to either request, (a) that it lacks adequate means to obtain judicial review and will suffer irreparable harm as a consequence; (b) that it has a "clear and indisputable" right to relief; and, (c) that it is appropriate to issue a writ in these circumstances.

BACKGROUND AND RELEVANT FACTS

This case arises out of two unfair labor practice charges filed against SFTC in 2012. SFTC is a New Mexico corporation with its principal place of business in Santa Fe, New Mexico. (Pet., Exhibit A at 5.) SFTC employee Yolanda Galaviz filed the first of those charges (NLRB case 28-CA-087842) on August 20, 2012 with Region 28 of the NLRB, which investigates alleged unfair labor practices occurring in Arizona, southern Nevada, New Mexico, and western Texas. As amended, that charge alleges that SFTC committed numerous unfair labor practices, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1) and (3). (Pet., Exhibit A at 2.) A second charge (NLRB case 28-CA-095332), filed on December 20, 2012, by Comite de Trabajadores de Santa Fe Tortilla (a labor organization comprised of SFTC employees), as subsequently amended, alleges two additional violations of Section 8(a)(1) and (3) of the NLRA. (Id.)

On January 31, 2013, following an investigation, Cornele Overstreet, the Regional Director of Region 28 ("the Regional Director"), issued a Consolidated Complaint and Notice of Hearing on both of the above charges

against SFTC, setting the case for hearing on February 26, 2013. (Pet., Exhibit B at 10.) An administrative law judge held the hearing in Santa Fe, New Mexico, lasting from that date through March 5, 2013. (See Exhibit A, attached.) As subsequently amended at that hearing, the unfair labor practice complaint alleges approximately 42 unfair labor practices. The categories of allegations include: disciplining and discharging employees for engaging in protected activity, interrogation of employees who engaged in protected activity, promises of benefits to employees who refrained from protected activity, threats of reprisal to employees who engaged in protected activity, threats that selecting a bargaining representative would be futile, promulgating an overbroad and discriminatory rule which prohibited employees from assisting one another, and creating the impression of surveillance of protected activity.

Previously, on December 14, 2001, the Board had contingently delegated its authority to seek preliminary injunctive relief under Section 10(j) of the NLRA, 29 U.S.C. § 160(j), to the General Counsel whenever the Board has fewer than three sitting members. Order Delegating Authority to the General Counsel, 66 Fed. Reg. 65,998 (Dec. 14, 2001). The Board subsequently reaffirmed that delegation in both 2002 and 2011.[1]

[1] Another delegation of the Board's 10(j) authority was made on December 20, 2007, effective starting December 28, 2007. See Minute of Board Action (Dec. 20, 2007) (Exhibit B, attached). That delegation, however, expired by its terms when the Board regained a quorum in 2010.

On January 25, 2013, in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), this Court held that the recess appointments of two of the then-three sitting Members of the Board were deficient under the Recess Appointments Clause. Under this reasoning, the Board lacked a quorum, and this Court declined to enforce the Board's final order against the company in that case. The same day, the Chairman of the Board, noting that a number of cases raising the same constitutional issues were pending in other courts, announced that the Board respectfully disagreed with the D.C. Circuit's decision and would continue to issue rulings and decide cases.[2] More recently, the Board announced that, in consultation with the Department of Justice, it intends to file a petition for certiorari with the United States Supreme Court seeking review of *Noel Canning*.[3]

On January 29, 2013, acting pursuant to the authority delegated to him by the Board, the Acting General Counsel authorized the Regional Director to seek a preliminary injunction against SFTC under Section 10(j). (See Exhibit C, attached.) Also on January 29, 2013, the Board authorized the Region to commence 10(j) proceedings. (See Exhibit D, attached.) The separate authorizations were given to ensure that the 10(j) case could be validly

[2] NLRB News Release (January 25, 2013), http://www.nlrb.gov/news-outreach/news-releases/statement-chairman-pearce-recess-appointment-ruling.

[3] NLRB News Release (March 12, 2013), http://www.nlrb.gov/news-outreach/news-releases/nlrb-seek-supreme-court-review-noel-canning-v-nlrb.

commenced whether or not the President's recess appointments to the Board were ultimately upheld.

On February 21, 2013, the Regional Director filed suit in the United States District Court for the District of New Mexico ("the District Court"), requesting a preliminary injunction against SFTC ordering it to cease and desist from committing unfair labor practices, reinstate two discharged employees, and publicly read the court's order to SFTC employees. (Pet. at 1 n.1.) That case ("the 10(j) case") is currently set for hearing on May 13, 2013. (See Exhibit E, attached.)[4]

On March 1, 2013, SFTC filed this Petition for Writ of Mandamus or Writ of Prohibition.[5] SFTC seeks the extraordinary remedy of mandamus to compel the Acting General Counsel to withdraw both the 10(j) case and the underlying unfair labor practice complaint.

[4] On March 25, 2013, SFTC filed a Motion to Dismiss the Regional Director's 10(j) proceeding in District Court. (Exhibit F, attached.) In this motion, SFTC attacks the validity of the authorizations from the Board and Acting General Counsel to the Regional Director to file the 10(j) suit.

[5] The standards for the issuance of a writ of mandamus are indistinguishable from those which apply to a writ of prohibition, and this Court does not require a petitioner to specify whether he seeks one or the other. *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1063 (D.C. Cir. 1998). Thus, for brevity's sake, this Opposition will refer to "mandamus" rather than "mandamus or prohibition."

ARGUMENT

I. SFTC'S PETITION SHOULD BE DISMISSED BECAUSE THIS COURT LACKS SUBJECT-MATTER JURISDICTION OVER THIS CASE.

Federal courts are courts of limited jurisdiction. "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.' " *In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004), quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884). The party seeking to invoke federal subject-matter jurisdiction has the burden of proving that such jurisdiction exists. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). This Court does not have subject-matter jurisdiction over either of SFTC's requests. This Court lacks jurisdiction to order the Board to withdraw the 10(j) case because this Court has no prospective appellate jurisdiction over the 10(j) case, and further prosecution of the 10(j) case will not defeat this Court's power to review any final Board order which may issue in the administrative case. Separately, this Court lacks jurisdiction to order the Acting General Counsel to dismiss or withdraw the administrative complaint because initial decisions to prosecute complaints are not judicially reviewable.

A. This Court Lacks Subject-Matter Jurisdiction To Order The Board To Withdraw The 10(j) Case Because That Case Does Not Implicate This Court's Prospective Jurisdiction

Jurisdiction over the 10(j) case is vested in the district courts. 29 U.S.C. § 160(j) (district court "shall have jurisdiction to grant to the Board such

temporary relief or restraining order as it deems just and proper"). A court's grant or denial of 10(j) relief is immediately appealable. 28 U.S.C. § 1292(a)(1) (2011). The NLRA does not contain a special jurisdictional provision for appeals of 10(j) orders; accordingly, the appellate court with jurisdiction over an appeal of a 10(j) order is the court of appeals for the circuit embracing the district court's territory—which, in this case, is the Tenth Circuit. 28 U.S.C. § 1294 (2011).

By contrast, with respect to final Board orders in unfair labor practice cases, the process is governed by NLRA Sections 10(e) and 10(f). Any aggrieved party may petition for review of a final Board order directly "in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia[.]" 29 U.S.C. § 160(f) (2011) ("Section 10(f)"). Similarly, the Board may petition for enforcement of its orders in the circuit where the unfair labor practice occurred or where the respondent resides or transacts business. 29 U.S.C. § 160(e) (2011). Thus, the Tenth Circuit and the D.C. Circuit each have potential jurisdiction over review of a final Board order in this case.

The All Writs Act, 28 U.S.C. § 1651(a) (2011), permits federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," including writs of mandamus. An appellate court has jurisdiction to issue extraordinary writs

where it has already acquired jurisdiction over a case by appeal, or where the case is within its prospective appellate jurisdiction even though no appeal has yet been perfected. *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966); *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70, 76 (D.C. Cir. 1984) (subsequently, "*TRAC*").[6]

Initially, it is clear that this Court has no jurisdiction whatsoever, current or prospective, over the 10(j) case itself. The District Court is located in the Tenth Circuit. That Circuit has "prospective jurisdiction" over all appeals stemming from the District Court's grant or denial of injunctive relief to the Board. 28 U.S.C. § 1294; *TRAC*, 750 F.2d at 76. All the issues that SFTC seeks to raise here—including whether Section 10(j) relief is available during periods when the Board lacks a quorum and whether the Board delegations of authority to initiate10(j) proceedings remain in effect if the Board lacks a quorum—are issues that Section 10(j) courts are accustomed to deciding and that SFTC has placed before the District Court.[7] Thus, that court now and the Tenth Circuit on

[6] The All Writs Act is not, in and of itself, a grant of subject-matter jurisdiction, *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). Neither is the APA. *Califano v. Sanders*, 430 U.S. 99, 106 (1977).

[7] *See, e.g., Frankl v. HTH Corp.*, 650 F.3d 1335, 1342-54 (9th Cir. 2011); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 852 (5th Cir. 2010); *Kreisberg v. HealthBridge Mgmt. LLC*, No. 3:12-CV-1299, 2012 WL 6553103 at *5 n.9 (D. Conn. Dec. 14, 2012), *appeal docketed*, No. 12-4890 (2d Cir. Dec. 12, 2012); *Calatrello v. JAG Healthcare, Inc.*, No. 1:12-cv-726, 2012 WL 4919808, at *3-4 (N.D. Ohio Oct. 16, 2012); *Gottschalk v. Piggly Wiggly Midwest, LLC*, 861 F. Supp. 2d 962, 964 (E.D. Wis. May 17, 2012); *Garcia v. S & F Market St.*

appeal will hear and decide the validity of SFTC's challenge to the Board's (and Acting General Counsel's) authorization to initiate the 10(j) case. This Court simply has no jurisdiction to protect with respect to that proceeding.

Moreover, while Section 10(f) of the NLRA grants potential appellate jurisdiction over *final* Board orders to this Court, Section 10(f) does not provide jurisdiction for reviewing interlocutory agency actions and parties challenging the agency's regulatory authority may do so only if and when the agency issues a final order. *See Myers v. Bethlehem Shipbldg. Co.*, 303 U.S. 41, 48 n.5 (1938) (noting Congressional intent to make Section 10(f) the exclusive method of review of Board orders); *see also F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 239-43 (1980) (issuance of complaint is not a reviewable final action); *Federal Power Comm'n v. Metro. Edison Co.*, 304 U.S. 375, 383-86 (1938) (issuance of a notice of hearing and subpoena is unreviewable interlocutory order).

In *TRAC*, this Court carved out a narrow exception to the general rule that parties must wait for final agency action. *TRAC* holds that a writ of mandamus can be issued against administrative agencies in aid of appellate jurisdiction, even absent a reviewable final order, where such jurisdiction "might otherwise be defeated." *TRAC*, 750 F.2d at 76, quoting *McClellan v. Carland*, 217 U.S.

Healthcare, LLC, No. CV 12–1773, 2012 WL 1322888, at *2 n.1 (C.D. Cal. April 17, 2012); *Paulsen v. Renaissance Equity Holdings*, LLC, 849 F. Supp. 2d 335 (E.D.N.Y. 2012).

268, 280 (1910).[8] This Court's jurisdiction cannot be defeated by the Board's continued prosecution of the 10(j) case, however. No decision issued in that case, no matter how adverse to SFTC, can interfere with this Court's ability, should a final Board order be appealed to it, to review that order.[9]

In sum, this Court has no prospective jurisdiction over the 10(j) case. Moreover, *TRAC* does not apply, because the 10(j) case will not "defeat" a reviewing court's 10(f) jurisdiction to review final Board orders. Thus this

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[8] *TRAC* itself involved a claim that the agency had defeated appellate jurisdiction through unreasonable delay. SFTC does not, and obviously cannot, make any such claim here. Rather, its claims rest upon a different line of cases, which permit review of nonfinal agency action where irreparable harm would result if the decision was permitted to stand until final review. *See, e.g., In re The City of New York*, 607 F.3d 923, 951 (2d Cir. 2010) (mandamus issued against district court which had ordered New York officials to reveal confidential undercover police reports). As we show below, p. 17-19, no irreparable harm can result here.

[9] Injunctions entered under Section 10(j) are automatically vacated when a final Board order issues. *Kinney v. Federal Sec., Inc.*, 272 F.3d 924, 925 (7th Cir. 2001); *Levine v. Fry Foods, Inc.*, 596 F.2d 719, 720 (6th Cir. 1979); *Johansen v. Queen Mary Rest. Corp.*, 522 F.2d 6, 7 (9th Cir. 1975). SFTC may argue that the Board's seeking of a 10(j) order has some type of prejudicial effect on subsequent decisionmaking, but even assuming an order is issued, it is well settled that a district court's findings in 10(j) proceedings have no binding effect on later proceedings. *Coronet Foods, Inc. v. NLRB*, 981 F.2d 1284, 1288 (D.C.Cir.1993). *See generally NLRB v. Kentucky May Coal Co.*, 89 F.3d 1235, 1240 (collecting cases). Nor is the Board's mere authorization of 10(j) proceedings considered prejudicial to its final adjudication. *Kessel Food Mkts. v. NLRB*, 868 F.2d 881, 887 (6th Cir. 1989) (citing *NLRB v. Sanford Home for Adults*, 669 F.2d 35, 37 (2d Cir. 1981) (rejecting argument that 10(j) authorizations prejudice the ultimate outcome of unfair labor practice cases)); *Eisenberg v. Holland Rantos Co., Inc.*, 583 F.2d 100, 104 n.8 (3d Cir. 1978) (same).

Court lacks subject-matter jurisdiction to grant SFTC's request for a writ of mandamus ordering the Board to cease prosecuting the 10(j) case.[10]

B. This Court Lacks Subject-Matter Jurisdiction Over The Issuance of the Administrative Complaint Because Decisions To Issue Complaints Under the NLRA Are Not Judicially Reviewable.

SFTC requests that the Court declare the Acting General Counsel's prosecution of the unfair labor practice charges to be a "nullity" and order him to dismiss or withdraw the administrative complaint and hold the unfair labor practice charges in abeyance, claiming that he lacks the power to investigate charges and prosecute complaints in the absence of a Board quorum. (Pet. at 1, 7-8, 22, 26.) This argument is frivolous. The General Counsel 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 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). The authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any "power delegated" by the Board (Pet. at 21), but rather directly from the text of the NLRA. It is settled law that courts lack subject-matter jurisdiction to interfere with matters committed by

[10] *Porter v. Gardner*, 277 F. 556, 559 (D.C. Cir. 1922), cited by SFTC, is inapposite. In that case, the Court of Appeals of the District of Columbia issued a writ prohibiting a municipal court from enforcing a decision of the D.C. Rent Commission permitting eviction of the petitioner. Had it not done so, the municipal court would have rendered "futile" the jurisdiction of the Court of Appeals, which was required by statute to decide the propriety of the Commission decision *before* the municipal court enforced it. *Id*. at 558.

the NLRA to the discretion of the General Counsel. *UFCW*, 484 U.S. at 124; *Beverly Health & Rehab. Servs., Inc. v. Feinstein*, 103 F.3d 151, 153-54 (D.C. Cir. 1996).

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. Contrary to SFTC's contention (Pet. at 22), 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, the Supreme Court has repeatedly held that the intent of Congress was to preclude judicial review of the General Counsel's decisions to issue, or decline to issue, complaints.[11] The Courts of Appeals have gone further, holding that courts lack jurisdiction to interfere with the General

[11] *UFCW*, 484 U.S. at 124-26, 129, 131; *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979) (NLRA "cannot be read to provide for judicial review of the General Counsel's prosecutorial function"); *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39, 155 (1975); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

Counsel's entire "part of the [NLRA] process." *Beverly Health & Rehab. Servs., Inc.*, 103 F.3d at 153-54; *cf. Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 669 (5th Cir. 1966) (courts should not "police the procedural purity of the NLRB's proceedings long before the administrative process is over"). This Court plainly lacks subject-matter jurisdiction to order the General Counsel to "dismiss or withdraw the unfair labor practice complaint" or to "hold the unfair labor practice charges against SFTC in abeyance." (Pet. at 8.)

As this Court has no subject-matter jurisdiction to grant either of SFTC's requests, the petition for a writ of mandamus should be dismissed.

II. THE PETITION SHOULD BE DENIED BECAUSE SFTC HAS NOT SATISFIED THE THREE CONJUNCTIVE PREREQUISITES FOR ISSUANCE OF A WRIT OF MANDAMUS.

As previously noted, the All Writs Act provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Issuance of a writ of mandamus is a remedy "reserved for really extraordinary cases," *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (citation omitted), and "may not be appropriately used merely as a substitute for the appeal procedure prescribed by the statute." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). As the writ is one of "the most potent weapons in the judicial arsenal," the Supreme Court has admonished the courts of appeals to exercise the writ power with caution. *Cheney*, 542 U.S. at 380 (citation

omitted). Accordingly, the Supreme Court has determined that three conditions must be satisfied before a writ can issue:

> First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Id. at 380-81 (quotations and citations omitted). These "hurdles" are "demanding," as all "three conditions must be satisfied before [the writ] may issue." *Id.* Appellate courts are traditionally loath to make use of writ relief against operations of administrative agencies, because while appellate courts have direct supervisory power over district courts, they supervise agency action only indirectly. *Public Utility Com'r of Oregon v. Bonneville Power Admin.*, 767 F.2d 622, 630 (9th Cir. 1985).

Here, SFTC cannot meet its burden to satisfy each of the three conjunctive requirements for the extraordinary relief it seeks.

A. SFTC Has Other Adequate Means to Attain Its Desired Relief

A party seeking to obtain a writ of mandamus must show that it has no other adequate means to attain relief. The Court should deny SFTC's petition because SFTC has adequate means for review of both the 10(j) case, in the Tenth Circuit, and the final Board order in this case, in either this Court or the Tenth Circuit.

The 10(j) case will be reviewed through procedures familiar to any litigant in the federal courts. The case is currently being heard in the District Court for the District of New Mexico, where SFTC has *already raised* the argument that the NLRB lacked authority to file the 10(j) case, in a Rule 12(b)(1) Motion to Dismiss filed March 25, 2013. As noted above (p. 7), review of the District Court's decision will be available in the Tenth Circuit Court of Appeals. This process is certainly adequate.[12] Indeed, one of the cases cited by SFTC, *In re Chicago, R.I. & P. Ry. Co.*, 255 U.S. 273, 280 (1921) (Pet. at 14), demonstrates the presumptive adequacy of appellate review. In that case, the Supreme Court refused to grant mandamus against a district court's assertion of personal jurisdiction, because the district court's assertion of jurisdiction was at least colorable and because the petitioner could "have its remedy by appeal" if the district court's assessment of its jurisdiction was erroneous. *Id.*

As for the Acting General Counsel's issuance of the complaint, Section 10(f) of the NLRA, described above (p. 7), provides the exclusive procedure, following an administrative proceeding, which aggrieved parties must follow in order to obtain judicial review in unfair labor practice cases. The Supreme Court long ago concluded, in *Myers v. Bethlehem Shipbuilding*, that Section

[12] *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-383 (1953) (district court's transfer order to another district within same circuit could be reviewed on appeal, rendering mandamus inappropriate); *U.S. ex rel. Denholm & McKay v. United States Board of Tax Appeals*, 125 F.2d 557, 558 (D.C. Cir. 1942) (where the required mode of appeal is adequate, "there can be no reason whatsoever for entertaining the petition for a writ of prohibition").

10(f) review is adequate, because "'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.'" 303 U.S. 41, 49 (1938) (emphasis added) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937)).[13] The same means of review is available to SFTC as was successfully used by the aggrieved parties in *New Process Steel*, 130 S. Ct. 2635 (2010), and *Noel Canning*. Those parties also contended that the Board was without the necessary quorum to issue a valid decision. Here, as there, Section 10(f) enables SFTC to obtain the review it seeks if the Board issues a final order adverse to it. And at that time, SFTC may also argue that the Acting General Counsel did not have the power to issue the unfair labor practice complaint in the first place.

SFTC suggests that review of a final Board order is inadequate because it will suffer "irreparable harm" if the ongoing cases are not halted. SFTC claims two harms: first, that if an injunction was granted and the Board's decision later reversed, SFTC would suffer harm from complying with the injunction in the

[13] Arguments eventually found to be correct on the merits have nevertheless been rejected as premature when raised before completion of Board proceedings. *Compare Grutka v. Barbour*, 549 F.2d 5, 9 (7th Cir. 1977) (refusing to enjoin ongoing Board proceedings with respect to a church-operated parochial school on the ground that "statutory review procedures are fully adequate to protect the plaintiff's constitutional rights."); *cert. denied*, 431 U.S. 908 (1977), *with NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 494-95, 506 (1979) (granting petition for review and vacating Board's final order directing church-owned parochial school to bargain with faculty).

interim, and second, that SFTC will be harmed by having to spend money litigating the case. (Pet. at 5-6, 23.) Each of these claims is meritless.

SFTC initially claims that "[s]hould the 10(j) proceeding be permitted to continue and should the court grant the interim relief requested, in all or in part, SFTC will suffer irreparable harm." (Pet. at 6.) This claim fails because the temporary injunction process is already purposely designed to include safeguards against the type of "harm" that SFTC claims. At least two procedural safeguards are present here. First, Congress has already provided an ordinary remedy for the claimed "harm"—the ability for parties to take an appeal from a district court's grant or denial of temporary injunctive orders. 28 U.S.C. § 1292(a)(1) (2011). SFTC's argument is tantamount to saying that § 1292(a)(1) is *per se* inadequate because the District Court might make a mistaken ruling. Such a claim flies in the face of the Supreme Court's declaration in *Roche v. Evaporated Milk Ass'n* that mandamus is not to be deployed as a substitute for the statutory appeals process. 319 U.S. 21, 26 (1943). Second, the "normal" means by which a party can request extraordinary relief from a temporary injunctive order is by requesting a stay of the order pending appeal. *Reynolds Metals Co. v. F.E.R.C.*, 777 F.2d 760, 762 (D.C. Cir. 1985) (All Writs Act petition "will not lie where a stay pending appeal . . . will suffice to prevent the alleged harm"). SFTC's attempt to bypass this process is transparent forum-shopping in an effort to evade the Tenth Circuit's authority to grant or deny such a request.

Next, SFTC asserts that "should SFTC have to defend itself in either proceeding, it will unnecessarily expend monies that it will be unable to recover." (Pet. at 6.) It is settled law that mere litigation expense, even where it is substantial and unrecoverable, does not rise to the level of "irreparable 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."[14]

In sum, mandamus proceedings are not a permissible substitute for the appeals processes Congress prescribed in 28 U.S.C. § 1292(a)(1) and Section 10(f) of the NLRA. SFTC can obtain immediate review of any final order issued either by the District Court or by the Board, and denial of mandamus will not irreparably harm SFTC. The Court need look no further to deny mandamus.

B. SFTC's Right to Mandamus is Not "Clear and Indisputable."

SFTC cannot succeed for the further reason that it has no "clear and indisputable" entitlement to relief. Although it represents the current law of this

[14] *Id.*; *see also Sears, Roebuck & Co. v. NLRB*, 473 F.2d 91, 93 (D.C.Cir.1972) ("Irreparable harm cannot be established by a mere reliance on the burden of submitting to agency hearings. This is a risk of litigation that is inherent in society and not the type of injury to justify judicial intervention."); *Cities of Anaheim & Riverside, Cal. v. F.E.R.C.*, 692 F.2d 773, 779 (D.C. Cir. 1982) (same).

Circuit, *Noel Canning* is not "indisputable" proof that the Board or Acting General Counsel would act unjustifiably by further processing this case.

Initially, it is not clear that the case will even come to this Court. As earlier noted (p. 7), the 10(j) case will be reviewed by the Tenth Circuit, which has not passed on the recess appointment issue, and the administrative case may be reviewed by either the Tenth Circuit or this Court. Under multidistrict litigation procedures, if SFTC and one or both Charging Parties each file a petition for review within 10 days after the Board issues a final order, then pursuant to 28 U.S.C. § 2112(a)(3) (2011), the Tenth Circuit, not this Court, may be the circuit selected "random[ly]" by the Judicial Panel on Multidistrict Litigation to review the case.[15]

SFTC lacks a clear and indisputable right to relief for the further reason that, as this Court has acknowledged, *Noel Canning*'s conclusions concerning the President's recess appointment authority conflict with those of the other circuit courts that have addressed the issues.[16] Moreover, the questions resolved in *Noel Canning* are currently being litigated in a number of other circuits as

[15] *See, e.g., In re NLRB (California Saw and Knife Works)*, 936 F. Supp. 1091, 1092 (J.P.M.L. 1996) (selecting randomly the Seventh Circuit to review petitions filed in both this Court and the Seventh Circuit).

[16] *Noel Canning*, 705 F.3d at 505-06, 509-10. *Compare 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).

well.[17] In light of the circuit split, and the ongoing litigation over the issues, SFTC cannot establish that its entitlement to relief is "clear and indisputable."[18]

Citing the lead opinion in *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 382-83 (D.C. Cir. 1983) (Pet. at 5), SFTC contends that the Board has no right to disagree with this Court's ruling that two of its three current members are not validly appointed.[19] Because the question of the validity of the

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[17] *See, e.g., NLRB v. New Vista Nursing*, No. 11-3440, 12-1027 and 12-1936 (3d Cir.) (argument held March 19, 2013); *NLRB v. Enterprise Leasing Co., SE*, No. 12-1514 (4th Cir.) (argument held March 22, 2013); *Kreisberg v. Healthbridge Mgmt. LLC*, No. 12-4890 (2d Cir.); *Dresser Rand Co. v. NLRB*, No. 12-60638 (5th Cir.); *Big Ridge, Inc. v. NLRB*, No. 12-3120 (7th Cir.); *Hooks v. Int'l Longshore & Warehouse Union, Locals 8 & 40*, No. 12-36068 (9th Cir.).

[18] *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (Dec. 26, 2012) (Sotomayor, J., in chambers) (denying All Writs Act relief in part because applicants had not established "indisputably clear" entitlement to relief" where "lower courts have diverged on whether to grant" relief in similar cases); *Lux v. Rodrigues*, 131 S. Ct. 5, 7 (Sept. 30, 2010) (Roberts, C.J., in chambers) (finding a party's right to injunctive relief not "indisputably clear" in part because "the courts of appeals appear to be reaching divergent results in this area"); *United States v. Horak*, 833 F.2d 1235, 1250 (7th Cir. 1987) (denying relief under the All Writs Act where conflicting interpretations of a statute showed that the right to relief was not "indisputable" — even where one interpretation was found less plausible than the other). Additionally, Justice Ginsburg and the Supreme Court recently denied requests for an emergency stay in *HealthBridge Mgmt. LLC v. Kreisberg*, No. 12A769, 133 S. Ct. 1002 (Feb. 4, 2013 denial by Justice Ginsburg; Feb. 6, 2013 denial by full Court). The applicant there had based its reasoning for an emergency stay on the constitutional reasoning in *Noel Canning*.

[19] The portion of the opinion in *Yellow Taxi* cited by SFTC as the basis for accusing the Board of "insubordination" was not followed by the other two members of the appellate panel, and thus did not represent the opinion of the Court. *Yellow Taxi*, 721 F.2d at 384 (Wright, J., concurring) ("I cannot concur with the [lead opinion's] condemnation of Board behavior . . ."); *id.* at 385 (Bork, J., concurring) ("An agency with nationwide jurisdiction is not required to conform to every interpretation given a statute by a court of appeals.").

President's recess appointments remains in litigation, however, it is appropriate for the Board to continue to exercise its responsibilities in accordance with its legal position that the recess appointments are valid.[20] The Board's position is one of good faith, supported by rulings in three Courts of Appeals. In addition, as stated above (p. 4), in an effort to resolve the circuit split, the Board has announced that it intends to file a petition for certiorari with the United States Supreme Court seeking review of *Noel Canning*.

Accordingly, because there is a conflict in the circuits on the recess appointment issue that the Supreme Court will soon be asked to resolve, it cannot be said that SFTC has "clear and indisputable" grounds for the extraordinary relief sought here.

C. A Writ of Mandamus Is Not Appropriate In These Circumstances.

Even assuming SFTC could meet the first two requirements for mandamus under the Supreme Court's *Cheney* standard, 542 U.S. at 380-81, which it cannot, this Court should exercise its discretion to deny a writ in this case. *See Cheney*, 542 U.S. at 381 ("even if the first two prerequisites have been

[20] *See United States v. Mendoza*, 464 U.S. 154, 159-63 (1984) (explaining that the government is not bound to follow adverse judgments in future cases involving entities not party to that adverse judgment); *accord Atchison, Topeka and Santa Fe Railway Co v. Pena*, 44 F.3d 437, 446-47 (7th Cir. 1994) (en banc) ("We know from [*Mendoza*] that the executive branch need not follow a circuit's interpretation, even within that circuit's borders.") (Easterbrook, J., concurring).

met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances").

1. The Public Interest Strongly Favors Continuity of 10(j) Relief

As SFTC admits (Pet. at 16-17), Congress's purpose in enacting Section 10(j) was to bridge the gap in an unfair labor practice case between a Regional Director's finding of merit to a charge and the issuance of a final Board decision. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and could thereby render a final Board order ineffectual.[21] Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation.[22] The need for 10(j) relief is, if anything, heightened in the absence of a Board quorum. This is because, under such conditions, preliminary injunctive relief is the only method by which serious unfair labor practices can be restrained in a timely manner prior to the point at which labor disputes caused by such practices disrupt interstate commerce.

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[21] See S. Rep. No. 80-105, at pp. 8, 27 (1947), reprinted in I Legislative History of the Labor Management Relations Act of 1947 414, 433 (Government Printing Office 1985), cited in *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000) and *Angle v. Sacks*, 382 F.2d 655, 659-660 (10th Cir. 1967).

[22] *Angle*, 382 F.2d at 659; *Kobell v. United Paperworkers Intern. Union*, 965 F.2d 1401, 1406 (6th Cir. 1992).

The public interest in obtaining injunctive relief in this case is not diminished where there is a challenge to the authority of the Board to act. During the period prior to the issuance of *New Process Steel*, 130 S. Ct. 2635 (2010) (holding that a two-member Board lacks the authority to decide cases), there were only two serving Board Members for a period of 27 months.[23] As noted above (n.1), during that time, the Board delegated the power to authorize 10(j) suits to the General Counsel. The Board's experience during this period demonstrates that delegating the power to seek 10(j) relief to the General Counsel during interregnums in Board membership helps resolve high-profile industrial disputes which might otherwise significantly disrupt interstate commerce. According to a report by then-General Counsel Ronald Meisburg, during the period when he had authority to initiate 10(j) cases, which lasted from December 28, 2007 through April 5, 2010, he authorized the filing of 62 10(j) suits, 59 of which had been resolved by the time he submitted his report. 28 cases were settled and 3 were voluntarily withdrawn; 2 suits were never filed because of changed circumstances. The Agency prevailed on the merits in 18 cases, and lost on the merits in 8 cases. Memorandum GC 10-05, End-of-Term Report on Utilization of Section 10(j) Injunctive Proceedings January 4, 2006

[23] The terms of Members Peter Kirsanow and Dennis Walsh expired on December 31, 2007. The Board's membership was subsequently unchanged until the recess appointments of Members Craig Becker and Mark Gaston Pearce on April 5, 2010. *See* "Members of the NLRB since 1935", available at http://www.nlrb.gov/members-nlrb-1935.

through April 30, 2010, Attachment 2. (An edited version of this document, showing the cases where the General Counsel authorized 10(j) proceedings, with Board authorizations redacted, is attached as Exhibit G.[24]) Thus, in 86.4% of cases, the labor dispute was either resolved amicably or remedied by an injunctive order. These statistics show that continuity of 10(j) relief during periods of Board uncertainty has a significant positive effect on the resolution of labor disputes.

By contrast, if requests similar to SFTC's were to be granted, there would be no effective method of obtaining interim resolution of serious labor disputes during periods when the Board arguably lacks a quorum. The obligations imposed by the NLRA are not suspended when the Board lacks a quorum, and the distinct role of the Section 10(j) injunction is to prevent the kind of injuries to employee rights that could not be effectively remedied by an eventual Board decision and order. For example, where employees have been unlawfully discharged in retaliation for exercising their organizational rights, 10(j) interim relief is warranted where, without district court intervention, "the employer would have effectively gained all the desired benefits from its alleged wrongdoing because no other worker in his right mind would participate in a union campaign . . . after having observed that other workers who had

[24] The General Counsel's full report encompasses periods of time when a Board quorum was in place. The full version of the report is available at http://mynlrb.nlrb.gov/link/document.aspx/09031d458037524b

previously attempted to exercise rights protected by the Act have been discharged." *Fernbach v. Raz Dairy, Inc.*, 881 F. Supp. 2d 452, 467-68 (S.D.N.Y. 2012) (quotation omitted). Similarly, interim relief has been found warranted where bad faith bargaining and other serious unfair labor practices threaten irreparable injury to a newly established bargaining relationship. *See Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 373 (11th Cir. 1992). And Section 10(j) injunctions protect against the serious injury to employee rights that can flow from mass picketing and acts of violence and vandalism. *See Frye v. District 1199, Health Care and Social Services Union*, 996 F.2d 141, 144 (6th Cir. 1993). This Court should reject SFTC's attempt to create a lacuna in the law which will effectively enable it and similarly situated parties to reap substantial benefits from deliberate lawbreaking.

2. SFTC's Arguments As To Why A Writ Of Mandamus Is Appropriate In This Case Are Unmeritorious.

SFTC argues that mandamus relief is appropriate here because 10(j) relief was intended to allow the Board to "protect its remedial power" but, when it lacks a quorum, the Board has "no legally exercisable remedial power to protect." (Pet. at 17.) To our knowledge, no court has ever refused to grant an injunction under Section 10(j) on the theory that the Board temporarily lacks the power to issue a corresponding final order. And for good reason: As just discussed above, the obligations imposed by the statute are not suspended when the Board lacks a quorum. The purpose of Section 10(j) is to provide interim

relief where needed to ensure that, when the Board does eventually decide the case, its ability to provide meaningful relief for unfair labor practices will be assured.

SFTC unpersuasively claims that, in the absence of a Board quorum, a 10(j) order will become "de facto permanent relief." (Pet. at 19.) That is not a plausible claim, because as noted above, and as SFTC elsewhere complains (Pet. at 5), the current Board is continuing to decide cases during the period while the issues raised by *Noel Canning* are in litigation. Section 10(j) cases must be processed to final decision on a priority basis, 29 C.F.R. § 102.94 (2013). Thus, at all times during processing of this case, the Board is duty-bound to prioritize the issuance of a final order. Once that order issues, the 10(j) injunction will be vacated,[25] and SFTC will be able to seek Circuit Court review of the case. At that time SFTC will be able to obtain judicial review of all its constitutional and statutory arguments.

Finally, citing *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1033 (2d Cir. 1980), SFTC claims that extraordinary relief is justified because a decision of the Board "will not be enforced by this Court" and, thus, 10(j) relief would be futile (Pet. at 19-20). This statement is pure speculation on two levels. First, at the time a decision issues, the Board may have a different composition; the Senate could confirm new Board members at any time. *See Paulsen v.*

[25] See above, n.9.

Renaissance Equity Holdings, LLC, 849 F. Supp. 2d 335, 351-52 (E.D.N.Y. 2012) (noting that "the Board's membership could change between now and the Board's final adjudication of this case" and thus rejecting the argument that the Board case "necessarily will end without any valid adjudication"). Indeed, the President recently announced his intention to nominate two new Board members and to renominate the Chairman, making a total of five nominees awaiting Senate confirmation.[26] Second, as previously noted (p. 7), and regardless of the Board's composition, review of the Board's final decision can be had in either the Tenth or D.C. Circuits. For a request for 10(j) relief to be granted, there need only be reasonable cause to believe that a final Board decision "will be enforced by *a* Court of Appeals," *Kaynard*, 633 F.2d at 1033 (emphasis added), not *this* Court of Appeals. In any case, SFTC takes the above quote from *Kaynard* completely out of context. As one district court has persuasively observed, *Kaynard* is an instruction to district courts to follow the law of their own circuit when determining whether the Board has established "reasonable cause" to believe that unfair labor practices have been committed.[27] It is *not* an invitation for courts to decide cases by speculating as to the Board's

[26] Press Release, Office of the White House Press Secretary, President Obama Announces More Key Administration Posts (April 9, 2013), available at http://www.whitehouse.gov/the-press-office/2013/04/09/president-obama-announces-more-key-administration-posts.

[27] *Paulsen*, 849 F. Supp. 2d at 351-52.

future make-up or the venue where review proceedings may happen to be brought.

For these further reasons, SFTC has failed to establish that it can satisfy all three of the conditions necessary under *Cheney*, 542 U.S. at 380-8. Accordingly, SFTC is not entitled to the extraordinary relief it has requested.

CONCLUSION

SFTC's Petition should be dismissed for want of subject-matter jurisdiction. This Court has no current or prospective jurisdiction over the 10(j) case, that case will not defeat this Court's ability to review a final Board order in the administrative case even if review proceedings are brought in this Circuit, and the General Counsel's decision to prosecute the administrative complaint is not subject to judicial review. In the alternative, the Petition should be denied on the merits. SFTC has adequate means to appeal any adverse decisions and has not shown that it has a clear and indisputable right to the extraordinary relief it seeks. Nor has SFTC shown that either of the requested remedies is appropriate in all the circumstances.

Respectfully submitted,

/s/ABBY PROPIS SIMMS
ABBY PROPIS SIMMS
Acting Assistant General Counsel
For Special Litigation
(202) 273-2934
Abby.Simms@nlrb.gov
D.C. Bar No. 913640

PAUL THOMAS
KEVIN P. FLANAGAN
Attorneys
(202) 273-3788
Paul.Thomas@nlrb.gov
Kevin.Flanagan@nlrb.gov

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

MARGERY E. LIEBER
Associate General Counsel

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

April 10, 2013

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 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:

Harold R. Weinrich, Esq.
Danny W. Jarrett, Esq.
Jeffrey W. Toppel, Esq.
Cory E. Ridenour, Esq.

Jackson Lewis, LLP
10701 Parkridge Blvd., Suite 300
Reston, VA 20191
Telephone: (703) 483-8300
Facsimile: (703) 483-8301

Counsel for Petitioner SFTC, LLC, d/b/a Santa Fe Tortilla Company

/s/ Abby Propis Simms
ABBY PROPIS SIMMS

STATUTORY ADDENDUM

The Administrative Procedure Act, 5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

28 U.S.C. § 1292 (a) (1)

Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court. . . .

28 U.S.C. § 1294

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows: (1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . .

The Mandamus Act, 28 U.S.C. § 1361

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The All Writs Act, 28 U.S.C. § 1651(a)

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 3(d) of the National Labor Relations Act, 29 U.S.C. § 153(d)

(d) General Counsel; appointment and tenure; powers and duties; vacancy

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. . . .

Section 10(a), (e), (f), and (j) of the National Labor Relations Act, 29 U.S.C. § 160(a), (e), (f), and (j)

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . .

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of

the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.