

FILED

OCT 31 2011

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 4,  
AFFILIATED WITH UNITED FOOD  
AND COMMERCIAL WORKERS  
UNION,

Respondent.

No. 10-72655

NLRB No. 19-CB-9660

ORDER

The National Labor Relations Board (“Board”) petitioned this court, pursuant to 29 U.S.C. § 160(e), to enforce its August 26, 2010 Order, as subsequently amended, (“Order”). The parties, however, dispute whether the Order *affirms* or *reverses* the Administrative Law Judge’s (“ALJ”) decision dismissing the Board’s Complaint against the United Food and Commercial Workers Union, Local 4 (“Union”) for unfair labor practices.

In light of the parties’ dispute, the Court requested supplemental briefing regarding the applicability of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943),

(“*Chenery I*”) and its progeny to whether this Court has the power to review an unclear or inconsistent agency decision and if not, whether this court must deny the petition and remand this matter to the Board for the entry of a clear and unambiguous order. The Court has reviewed the parties’ supplemental briefs and, for the following reasons, finds the Union’s arguments persuasive.

In *Chenery I*, the U.S. Supreme Court emphasized that it is a fundamental rule of administrative law that a reviewing court must judge the propriety of an agency decision based on the grounds invoked by the agency. *Chenery I*, 318 U.S. at 88. An important corollary to this rule is that if “administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable.” *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (“*Chenery II*”). “In other words, [w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong.” *Id.* at 197 (internal quotations and citations omitted).

When reviewing a Board order that lacks clarity, a court should not adopt counsel’s *post hoc* rationalizations or interpretation of the order. *Louisiana-Pacific Corp. v. NLRB*, 52 F.3d 255, 260 (9th Cir. 1995). “Whatever merit there may be in an interpretation offered by counsel, [t]he integrity of the administrative process demands no less than that the Board, not its legal representative perform the

functions entrusted to the Board.” *Plumbers and Steamfitters Local 342 v. NLRB*, 598 F.2d 216, 220-21 (D.C. Cir. 1979) (internal quotations and citations omitted). In such cases, the court should remand the matter to the Board to issue a clear order. *See, e.g., id.; Louisiana-Pacific*, 52 F.3d at 260.

Here, the Order lacks sufficient clarity to support judicial review. As the Union points out, the Order is unclear as to which of the ALJ’s findings and conclusions are left undisturbed and which are displaced by the Board. The Order, for example, purports to affirm the ALJ’s Recommended Order, which consists of a single sentence stating “[t]he complaint is dismissed,” while at the same time incorporating the Board’s prior order reversing the ALJ’s decision dismissing the Complaint. Without a clear decision to review, this Court cannot fulfill its obligation of determining whether the Order is inadequate, irrational, or arbitrary. Moreover, to the extent the Order announces a new rule that departs from prior Board decisions, the Order does not provide a clear justification for the departure nor guidance to unions on how to apply the new rule.

The Board’s conclusory assertion that *Chenery I* and its progeny do not apply to the question the Court posed is not persuasive. The Board does not explain how, in light of this precedent, this Court can fulfill its obligations on review when the meaning of the Order is unclear. Rather, it relies on the

procedural history of this case and the plain language of the Order, both of which it discussed in its Answering Brief, to support its contention that the clear intention of the Order is to reverse the ALJ's decision dismissing the Complaint.

In light of the foregoing, the Court denies the petition for enforcement, vacates the Board's August 26, 2010 Order, as modified by the September 24, 2010 Order, and remands this matter to the Board so that it can issue an order that has a clear meaning and rationale. The Court vacates the December 7, 2011 oral argument and all pending deadlines. The Court denies all pending motions as moot. Given that the Order lacks a clear meaning and rationale, this Court has not considered the merits of, nor the applicable standard of review for, this case.

A copy of this order shall constitute the mandate of this Court.

FOR THE COURT

MOLLY C. DWYER  
CLERK OF COURT

By: Wendy Li  
Deputy Clerk