

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AMERICANOS USA, LLC	§	
	§	
and	§	Case No. 28-CA-23187
	§	
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO	§	
	§	
	§	

**RESPONDENT’S REQUEST FOR SPECIAL PERMISSION TO APPEAL AND
INTERIM APPEAL OF ALJ ORDER DENYING POSTPONEMENT TO PERMIT THE
BOARD TO RULE ON PENDING MOTIONS**

Pursuant to Rule 102.26, Respondent Americanos USA, LLC (“Americanos” or the “Respondent”) respectfully requests special permission of the National Labor Relations Board (“NLRB” or “Board”) to appeal from the February 22, 2011 Order of Administrative Law Judge Gerald M. Etchingham (“ALJ”) and would show the following:

Procedural Background

This case is set for trial on March 1, 2011. The case was reset from February 1, 2011 to resolve scheduling conflicts and to permit the filing and resolution of motions for summary judgment. The Complaint, issued on December 28, 2010, alleges various violations of Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act (the “Act”). Presently pending before the Board are Respondent’s five motions for partial summary judgment, timely filed between January 14 and 24, 2011, and Respondent’s motion to dismiss or defer, filed on January 31, 2011. These motions are fully briefed and ripe for decision. Given these unresolved motions, on February 17, 2011, Respondent moved to postpone the hearing until the Board ruled on these pending motions. On February 22, 2011, the ALJ ruled that the unresolved dispositive

motions do not warrant delaying the hearing. A true and correct copy of the ALJ's February 22, 2011 Order is attached as Exhibit A. It is from this Order that the Respondent requests special permission to appeal.

I. BASIS FOR THE APPEAL

A. The Complaint's Allegations Raise Issues That Are Ripe for Summary Judgment and/or Deferral to Arbitration.

The Complaint alleges violations of Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act. As reflected in the pending motions for partial summary judgment and to defer to arbitration, the material facts involved in many of the alleged violations are not in dispute and are appropriate for disposition through summary judgment. For example, the Section 8(a)(1) allegations are based largely on the contents of a written Return to Work Questionnaire and a letter dated June 3, 2010. The negotiations underlying the Section 8(a)(5) allegation about special pay items were conducted in writing and are not in dispute. Another Section 8(a)(5) allegation is, on the face of the Complaint, barred by limitations. Others assert unambiguous violations of the collective bargaining agreement that present legitimate issues for deferral. These claims arose after the parties entered into a collective bargaining agreement and involve disputes that require the interpretation and application of the collective bargaining agreement.

Presently pending before the Board are Respondent's five motions for partial summary judgment, filed between January 14 and 24, 2011 and Respondent's motion to dismiss or defer, filed on January 31, 2011. The Board has not yet ruled on these motions.

Each motion addresses a key aspect of the case:

- Whether summary judgment should be entered on the Section 8(a)(1) and (5) claim set forth in paragraphs 8(c) and (f) of the Complaint, alleging that the Company implemented terms and conditions relating to special pay without notice and an opportunity to bargain (First Motion for Partial Summary Judgment);

- Whether summary judgment should be entered on the Section 8(a)(1) claim set forth in paragraphs 6(a) and (b)(2) of the Complaint, alleging that the Company unlawfully polled and interrogated employees by asking employees to sign an alleged “no-strike pledge” document (Second Motion for Partial Summary Judgment);
- Whether summary judgment should be entered on the Section 8(a)(1) claim based on allegations in paragraphs 4 and 6(a) of the Complaint that Norma Ramirez (misnamed Norma Perez in the Complaint) and Ana Arevalo unlawfully polled and interrogated employees because neither is a supervisor or agent within the meaning of Sections 2(11) and 2(13) of the Act or was involved in the distribution of the report to work questionnaire (Third Motion for Partial Summary Judgment);
- Whether summary judgment should be entered on the Section 8(a)(1) claim asserted in paragraph 6(d) of the Complaint, alleging that Al Penedo mailed a letter to Company employees that threatened employees with loss of work and terminal shutdown if they engaged in a strike (Fourth Motion for Partial Summary Judgment)
- Whether summary judgment should be entered on the Section 8(a)(1) claims asserted in paragraphs 6(a), 6(b) and 6(e) of the Complaint, alleging that the Company unlawfully polled and interrogated employees by insisting they sign an alleged “no-strike pledge” document and that Al Penedo threatened and unlawfully polled and interrogated employees on May 28, 2010 (Fifth Motion for Partial Summary Judgment); and
- Whether the Section 8(a)(5) claims relating to the Company’s duty to bargain with respect to the driver scorecard policy, delay pay and assignment of bargaining unit work should be dismissed or deferred to arbitration (Motion to Dismiss or Defer).

It would be premature to hold this hearing on March 1, 2011 before the Board has ruled on these pending motions. They raise issues of significance that impact the very nature and scope of the dispute. If one or more of the motions are granted, in whole or in part, the issues to be resolved at the hearing will be narrowed substantially.

B. Postponement Will Not Prejudice Any Party.

A brief postponement will not prejudice any of the parties. The claims asserted by the Acting General Counsel relate to past events and do not involve ongoing violations. By contrast,

moving forward to hearing on matters that should be deferred to arbitration or summarily decided will substantially harm Respondent. Therefore, the benefits of awaiting a reasoned ruling by the Board on the pending motions outweigh any arguable harm that may result from a brief delay to permit the Board to rule.

The Acting General Counsel presented two grounds to oppose allowing adequate opportunity for the Board to act on the pending motions: (1) the Board normally resolves dispositive motions expeditiously, and (2) the matter is possibly being considered for Section 10(j) relief. The first justifies a brief delay to permit the Board to act expeditiously. The second does not justify depriving the Board of the opportunity to act.

Under the Board's Rules and Regulations, the Board has jurisdiction over pre-hearing motions for summary judgment and motions to dismiss. 29 C.F.R. § 102.24(b). Here, the ALJ's order directing the hearing to proceed on March 1, 2011 effectively denies all of the pending motions before the Board and usurps the Board's jurisdiction to rule upon them. Rule 102.24(b) of the Board's Rules and Regulations, however, contemplates that the hearing will not go forward until the motions have been resolved. Proceeding with a hearing before the Board has ruled on Respondent's motion to dismiss or defer would also run contrary to the principle announced in *Collyer Insulated Wire*, 192 NLRB 837 (1971), that contractual arbitration procedures should be exhausted before pursuit of unfair labor practice proceedings. The Board should have an opportunity to determine whether, as Respondent has argued, the allegations of a contract breach should be deferred.

Section 10(j) relief has never been sought in this case and the Acting General Counsel has not articulated any reason why Section 10(j) interim relief would be appropriate. The Acting General Counsel's opposition simply states that "the Complaint alleges that Respondent fired a

lead union supporter during a critical time frame, the period in which the Charging Party-Union was bargaining for a first contract.” It neglected, however, to mention that the driver at issue, Manuel Fragoso, was discharged on June 15, 2010, over eight months ago and that the first contract was ratified July 20, 2010, before a charge was ever filed. At this late date, Section 10(j) relief is stale.

II. CONCLUSION

For the reasons set forth above, Respondent respectfully requests that special permission of the Board be granted to appeal from the February 22, 2011 Order of ALJ and that the March 1, 2011 hearing be continued until after the Board rules on the pending dispositive and deferral motions.

Dated: February 22, 2011

Respectfully submitted,

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PROOF OF SERVICE

I, Dan Hartsfield, certify that on this 22nd day of February 2011, a true and accurate copy of the foregoing **RESPONDENT'S REQUEST FOR SPECIAL PERMISSION TO APPEAL AND INTERIM APPEAL OF ALJ ORDER DENYING POSTPONEMENT TO PERMIT THE BOARD TO RULE ON PENDING MOTIONS** was filed electronically through the E-Filing system and has been served electronically or by Federal Express on the following:

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/s/ Dan Hartsfield

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EXHIBIT A

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES**

AMERICANOS U.S.A., LLC

and

Case 28-CA-23187

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO**

ORDER DENYING MOTION FOR 2ND CONTINUANCE OF HEARING

On September 20, 2010, the first charge in this matter was filed by the Union. Additional charges were filed thereafter. On December 28, 2010, the Acting Regional Director for Region 28 issued a Complaint and Notice of Hearing in this case alleging various violations of Section 8(a)(1), (3), and (5) of the Act.¹

On January 20, 2011, I issued an order granting Respondent's first request for a continuance of hearing over Acting General Counsel's objections based primarily on the grounds that the interim holiday season and Respondent's counsel's representations that only a short trial continuance was needed warranted granting the motion. Trial was continued from February 1 and is currently set to commence on March 1, 2011 in El Paso, Texas.

On February 17, 2011, Respondent filed its second motion for a further 30-day continuance of the hearing ("2d Motion") again arguing that postponement of trial in this case is necessary to resolve "pending motions for partial summary judgment and to dismiss or defer" which "may significantly narrow the scope of the hearing and the preparations required for it." 2d Motion at 1-2.

This matter has been referred to me for adjudication by the Associate Chief Judge Mary M. Cracraft. On February 18, 2011, I issued an Order to Show Cause ("OSC") giving the parties until noon today, February 22, 2011, to file any opposition to the Motion.

On February 18, 2011, Counsel for the Acting General Counsel's opposition to the Motion ("Opposition") was filed. Counsel opposes the request for a second trial continuance and argues that: (1) this matter is being considered for relief under Section 10(j) of the Act; (2) the first trial continuance was granted as a result of Respondent's counsel's representations that he would be prepared for trial by February 14 and these representations were relied on by Acting General Counsel and the ALJ resulting in the March 1 trial date; (3) the Board acts expeditiously in handling motions for summary judgment so there is no cause for a second postponement; and (4) any settlement

¹ 29 U.S.C. §158(a)(1), (3), and (5).

considerations by Respondent and Acting General Counsel have been fully explored so further delay of trial is not an option.

No timely opposition has been filed by the Charging Party. However, Respondent filed a further reply arguing essentially that the Acting General Counsel's reasons for opposing the second postponement request lack merit.

Having fully considered the pleadings, I find that good cause has not been shown for a second postponement of hearing in this case. As a result, the 2nd Motion is **DENIED**. I note that should the parties fail to complete litigation the week of March 1, 2011, the administrative law judge assigned to hear the case will have discretion regarding further hearing dates.

Dated: February 22, 2011



Gerald M. Etchingham,
Administrative Law Judge

Served by facsimile:

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