

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRUSCO TUG & BARGE, INC.)	Case 19-RC-013872
)	
and)	
)	
INTERNATIONAL ORGANIZATION OF)	
MASTERS, MATES & PILOTS, PACIFIC)	
MARITIME REGION, AFL-CIO)	

**EMPLOYER’S RESPONSE TO ACTING GENERAL COUNSEL’S
MOTION FOR RECONSIDERATION AND MODIFICATION OF
DECISION AND ORDER**

The employer in this representation case, Brusco Tug and Barge, Inc. (“the Employer”) opposes the Motion for Partial Reconsideration and Modification of Decision and Order (“Motion”) filed by the Acting General Counsel (“Acting GC”) because it is both procedurally improper and substantively baseless. The Acting GC purports to file the Motion “[p]ursuant to § 102.48(d) (1) of the National Labor Relations Board’s (“Board”) Rules and Regulations.” (Motion, p. 1.)

A. Reliance on § 102.48(d)(1) of the Board’s Rules Is Improper.

Reliance on this provision of the Board’s Rules is misplaced. First, § 102.48 sets forth procedures for cases under Section 10(a) through (i) of the Act “for the prevention of unfair labor practices.” *See* heading of Subpart B of Part 102 of the Board’s Rules.¹

¹ A different subsection of the Board’s Rules relates to proceedings before the Board in representation cases under Section 9 of the Act. *See* heading of Subpart C of Part 102 of the Board’s Rules. Section 102.67 of the Board’s Rules sets forth different procedures for litigating representation cases before the Board, with timelines that differ from those applicable to unfair labor practice proceedings. The Acting GC attempts to blur this distinction by adding the CA case number to the caption of its motion despite the fact that the decision it seeks to modify was a decision in a representation case, not an unfair labor practice case.

Section 102.48 deals with the process of filing exceptions to the Board from decisions of administrative law judges in unfair labor practice proceedings. Subsection (d)(1) of that section states that a party to such an unfair labor practice proceeding before the Board “may, because of extraordinary circumstances, move for reconsideration * * * after the Board decision or order.” The rule further states that a “motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on.”

Section 102.48(d)(1) was thus intended to permit a party to obtain reconsideration of a Board decision in an unfair labor practice proceeding based on material factual or legal error. But here the Acting GC is attempting to use § 102.48(d)(1) in a completely different and improper manner, to reinstate in a representation case a previously vacated decision in an unfair labor practice case. In doing so, the Acting GC fails to even contend that he argued in the current representation proceeding that the previously vacated ULP decision in Case No. 19-CA-026716 should be reinstated.²

Having failed to previously present to the Board the issue of the continued effect, if any, of the prior, vacated ULP decision, the Acting GC has waived any argument regarding this issue. Section 102.48(d)(1) was meant to provide a remedy, limited to extraordinary circumstances, for a material legal or factual error committed by the Board in a ULP case. The rule was not intended to allow a party to raise as an afterthought new issues that were not raised during the proceeding before the Board.

B. In Any Event, the Acting GC’s Motion Is Untimely.

However, even if the Board were to somehow conclude that § 102.48(d)(1)

² The Board’s decision of December 14, 2012, which the Acting GC wants reconsidered, was issued as a result of the Board’s grant on April 8, 2007 of the Employer’s timely Request for Review of the Regional Director’s Second Supplemental Decision in Case No. 19-RC-013782.

provides a proper procedural vehicle to obtain reconsideration concerning an issue that was not previously raised, this particular motion suffers from another important defect: it was not timely filed by the Acting GC. Section 102.48(d)(2) states that a motion for reconsideration “pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board’s decision or order * * *.” The Board’s decision in this case is dated December 14, 2012. The Acting GC’s motion for reconsideration is dated February 4, 2013, fifty-one days after the decision. Since no previous extension was granted by the Board, the Motion is untimely and should be summarily dismissed.

C. Aside from Being Procedurally Improper, the Motion is Substantively Meritless.

In addition to the procedural defects discussed above, the Motion is also meritless because it seeks to obtain the Board’s review and reversal of a prior decision to vacate the Board’s decision in Case No. 19-CA-026716, when the prior order to vacate is final and conclusive on the parties as a matter of law. Thus, on April 11, 2000, almost thirteen years ago, the Board issued its Decision and Order in Case No. 19-CA-026716. In this decision, the Board found that the Employer violated the Act by promulgating a rule prohibiting certain employees that the Employer contended were statutory supervisors from engaging in union activities. Motion, Ex. F.

The Employer petitioned for review of this decision and the NLRB petitioned for enforcement. On May 1, 2001, the D.C. Circuit Court of Appeals issued its decision in *Brusco Tug & Barge, Inc. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001), in which it declined to enforce the Board’s decision and instead remanded the matter to the Board for further consideration in light of the Supreme Court’s “forthcoming decision” in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). *Brusco Tug & Barge, Inc.*,

The General Counsel could have elected to petition the United States Supreme Court for review of the D.C. Circuit Court's opinion but elected not to do so. Instead, the General Counsel filed a motion with the Board "seeking to vacate the decision" in Case No. 19-CA-26716. A copy of this Motion, filed with the Board on August 28, 2001, is attached hereto as Exhibit A. Importantly, the General Counsel stated that, "[u]pon vacation of the Board's decision in Case No. 19-CA-26716, the complaint will be withdrawn." Ex. A. p. 3 (emphasis added). In reliance on this representation, the Board issued its Supplemental Decision and Order on October 24, 2001, in which it granted the General Counsel's motion and "decided to vacate the Board's Decision and Order in Case No. 19-CA-26716." (Motion, Ex. I, p. 3.)

This Order vacating the prior decision could itself have been appealed to either the Ninth Circuit Court of Appeals or the D.C. Circuit Court of Appeals. 29 U.S.C. § 160(f). However, no party, including the General Counsel, did so. The Board's decision to vacate the ULP finding in Case No. 19-CA-26716 thus became final as a matter of law. Under principles of *res judicata* and administrative finality, the decision cannot now be modified. Therefore, the Acting GC's current attempt, over eleven years later, to obtain reversal or modification of the Board's decision to vacate is barred.

In addition, the Acting GC should be estopped from now claiming that the decision in Case No. 19-CA-26716 should be reinstated. In August 2001, the General Counsel represented to all parties that the unfair labor practice complaint in Case No. 19-CA-26716 would be withdrawn upon the Board's vacation of its decision in that case. While the Employer has not located an actual withdrawal document filed by the General Counsel after the previous decision was vacated by the Board, the Acting GC should be

held to the clear and unequivocal representation of his predecessor that the complaint would be withdraw. The Employer relied on this representation and, as a result, it joined in the General Counsel's motion to vacate. *See* Motion, Ex. I, p. 3 (the Employer joined in the General Counsel's motion to vacate while other parties opposed said motion). The Acting GC should not now profit from the former General Counsel's failure to follow through on his promise to file withdrawal papers.

However, irrespective of whether the withdrawal papers were or were not filed, the General Counsel's course of conduct since October 2001 (when the Board vacated its decision in Case No. 19-CA-26716) indicates the clear intention to abandon the prior ULP allegations. Thus, since October 2001, all proceedings have been conducted in the representation arena under Case No. 19-RC-13872. No attempt was made to resuscitate the moribund unfair labor practice allegations in Case No. 19-CA-26716 until February 4, 2013 when the current Motion was filed. Under these circumstances, the Acting GC has waived any right to now rely on those ancient allegations.

Additionally, it would be inequitable to require the Employer to defend against these stale charges. Having sat on its rights for over eleven years during which time any reasonable person would conclude that the allegations in Case No. 19-CA-26716 were abandoned, the Acting GC's current attempt to re-litigate those allegations is barred by the doctrine of laches. Constitutional due process concerns are also raised.

Serious practical difficulties also emerge if the Board takes the unprecedented action of reinstating, under the caption of a representation case, an old decision in an unfair labor practice case that was vacated many years ago. Decisions of the Board in representation proceedings are not immediately appealable to the courts of appeals. However, if the previously vacated decision in 19-CA-26716 is reinstated, does that mean

that the Employer may now proceed to appeal that decision to the D.C. Circuit Court of Appeals? The answer appears to be that it would.³

In conclusion, the Acting General Counsel should not now be permitted to raise, like Lazarus from the dead, a prior decision of the Board that was vacated more than eleven years ago and which it did not ask the Board to resuscitate during the many years that this representation case has been pending before the Board. The Acting General Counsel's Motion should be denied.

Dated this 11th day of February 2013.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

By: 

Thomas M. Triplett, OSB#651256

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Attorneys for BRUSCO TUG & BARGE, INC.

³ In addition to the above contentions, the Employer contends that neither the Acting GC nor Board Member Griffin have been validly appointed to their positions. Thus, the Employer contends that the Acting GC possessed no authority to file this Motion. *See Noel Canning v. NLRB*, 2013 U.S. App. LEXIS 1659 (D.C. Cir. Jan. 25, 2013.) Similarly, since the Board was not properly constituted on December 14, 2012 when it issued the Decision and Order in this case because of the lack of a quorum, that decision is without legal force and effect. *Id.* Because the Board is similarly not properly constituted at present, it also possesses no authority to rule on this Motion. *Id.*

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRUSCO TUG & BARGE CO.

and

Cases 19-CA-26716
19-RC-13872

INTERNATIONAL ASSN. OF
MASTERS, MATES AND PILOTS,
PACIFIC MARITIME REGION, AFL-CIO

RECEIVED
AUG 29 2001
Schwabe, Williamson & Wyatt

**MOTION TO VACATE SUMMARY JUDGMENT
AND
WITHDRAW COMPLAINT
AND
SUGGESTION TO REVOKE CERTIFICATION, REMAND CASE 19-RC-13872
TO THE REGIONAL DIRECTOR FOR FURTHER CONSIDERATION AND TO
REOPEN THE RECORD**

In response to the Board's July 26, 2001, invitation to address what impact the Supreme Court's decision in Kentucky River, ___ U.S. ___, 121 S.Ct. 1861 (2001) might have on the D.C. Circuit's remand, 247 F.3d 273 (D.C. Cir. 2001), of the Board's decision reported at 330 NLRB No. 169, slip op. (April 11, 2000), Counsel for the General Counsel submits the following:

The Regional Director for Region 19 issued, and the Board denied review of, the Decision and Direction of Election in Case 19-RC-13872, finding, among other things, that the 9 or 10 mates employed by Respondent were not statutory supervisors. Accordingly, the mates were entitled to vote in an election, which the Union ultimately won by a margin of 16 - 14.

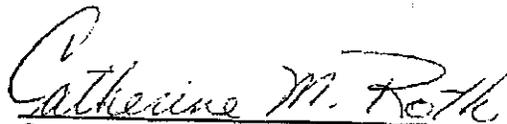
Meanwhile, in response to issuance of complaint on January 31, 2000, alleging that Respondent violated Section 8(a)(1) by promulgating and distributing the rule at issue in Case 19-CA-26716, and the General Counsel's Motion for Summary Judgment filed on February 24, 2000, Respondent's only defense was a reiteration of its argument raised and rejected in the representation proceeding that mates are not employees, but rather statutory supervisors. Respondent waived its right to relitigate this issue in the unfair labor practice proceeding and chose to rely solely on the representation case record to have the Board's finding in Case 19-RC-13872 on this issue "presented to the circuit court of appeals as quickly as possible." 330 NLRB 169, slip op. at 1. The parties are currently bargaining for an initial contract and apparently have tentatively agreed to a recognition clause including the disputed mates. However, counsel for Respondent has advised the Office of the General Counsel by telephone that if the mates are ultimately adjudicated to be statutory supervisors, Respondent, in light of the Union's narrow margin of victory, will refuse to bargain regarding any of the unit employees.

In Kentucky River Community Care, the Supreme Court rejected the Board's view that an individual does not exercise "independent judgment" if it is a particular kind of judgment, namely, "ordinary professional or technical judgment in directing less-skilled employees to deliver services." Kentucky River, 121 S.Ct. at 1867-68. Because the underlying Decision and Direction of Election in this matter finding employee status of the mates was based on that now rejected view, the underlying Complaint and Board decision finding that the Employer violated

Section 8(a)(1) are no longer sustainable. Further, revocation of the Certification of Representative and reopening of the representation case record is appropriate to ensure that all parties have an opportunity to address the issues raised by Kentucky River and, therefore, ensure that any decision on the employee status of the mates is based upon a complete record and the correct legal analysis.

Accordingly, Counsel for the General Counsel moves the Board to vacate the decision in Brusco Tug & Barge, Case 19-CA-26716, 330 NLRB No. 169 (2001). Upon vacation of the Board's decision in Case 19-CA-26716, the complaint will be withdrawn. The General Counsel further suggests that it is also appropriate to revoke the certification in Case 19-RC-13872, remand the case to the Regional Director for Region 19 for further consideration and to reopen the record regarding whether, in light of Kentucky River, the mates "responsibly direct" employees and, if so, what degree of independent judgment they exercise.

Respectfully submitted this 28th day of August 2001.



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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2001, I caused copies of Motion to Vacate Summary Judgment and Withdraw Complaint and Suggestion to Revoke Certification, Remand Case 19-RC-13872 to the Regional Director for Further Consideration and to Reopen the Record to be served upon the following by Federal Express Mail:

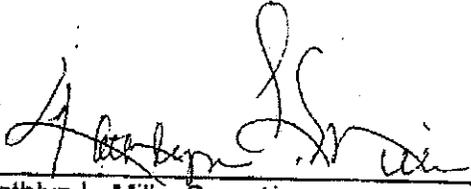
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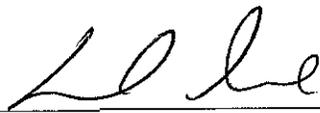
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