

L’Hoist North America of Tennessee, Inc. and United Mine Workers of America, District 17. Case 10–CA–136608.

June 5, 2015

ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

On December 23, 2014, the General Counsel issued a complaint alleging that the Respondent, L’Hoist North America of Tennessee, made certain statements that violated Section 8(a)(1) of the Act. On February 23, 2015, the Respondent filed a Motion for Summary Judgment and a brief in support, and on April 9, 2015, the General Counsel filed an opposition to the motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having duly considered the matter, the Respondent’s motion is denied. The Respondent has failed to establish that there are no genuine issues of material fact warranting a hearing and that it is entitled to judgment as a matter of law.¹

MEMBER MISCIMARRA, concurring.

The Board’s Rules and Regulations (Rules) provide for the General Counsel to file a complaint in cases in which the General Counsel concludes there is probable merit; the respondent is required to file an answer; and these typically result in a hearing before an administrative law judge. However, Section 102.24 of the Board’s Rules also provides for the potential entry of summary judgment in favor of a party without a hearing. The Board will grant motions for summary judgment if there is “no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” *Security Walls, LLC*, 361 NLRB 348, 348 (2014) (quoting *Conoco Chemicals Co.*, 275 NLRB 39, 40 (1985)).

In this case, I agree with my colleagues that disputed issues of material fact warrant a hearing.¹ However, I also believe the General Counsel’s response to the Respondent’s motion is deficient because, in essence, the General Counsel contends that the Board should never grant *any* respondent’s motion for summary judgment

and that the General Counsel has no burden to identify genuine issues as to material facts that warrant a hearing. These contentions, in my view, are contrary to our Rules and common sense.

Section 10(b) of the Act provides that Board hearings “shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States.” And the Board’s summary judgment standard, recited above, is identical to the summary judgment standard applicable under the Federal rules. See Fed.R.Civ.P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”) Under our Rules, however, a party opposing summary judgment has a *somewhat* lesser burden than under the Federal rules. Section 102.24(b) of the Board’s Rules states in relevant part:

All motions for summary judgment or dismissal shall be filed with the Board. . . . Upon receipt of a motion for . . . summary judgment, . . . the Board may deny the motion or issue a notice to show cause why the motion should not be granted. If a notice to show cause is issued, the hearing, if scheduled, will normally be postponed indefinitely. If a party desires to file an opposition to the motion prior to issuance of the notice to show cause in order to prevent postponement of the hearing, it may do so; If a notice to show cause is issued, an opposing party may file a response thereto notwithstanding any opposition it may have filed prior to issuance of the notice. . . . *It is not required that either the opposition or the response be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing.* The Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party’s pleadings, opposition and/or response indicate on their face that a genuine issue may exist. If the opposing party files no opposition or response, the Board may treat the motion as conceded, and . . . summary judgment, . . . if appropriate, shall be entered.²

¹ Our concurring colleague agrees that this case involves genuine issues of material fact that require a hearing. Therefore, we need not address the other matters that he discusses.

¹ The complaint alleges that certain agents of the Respondent made statements in various conversations that constituted interference with or coercion or restraint of employees in the exercise of protected rights in violation of Sec. 8(a)(1) of the Act. The Respondent concedes there is a dispute as to the content of at least one such conversation and relies on the context in which the conversation occurred; and absent settlement, a hearing would be necessary to resolve the dispute.

² (Emphasis added.) In contrast to the approach reflected in Sec. 102.24 of the Board’s Rules, the Federal Rules of Civil Procedure require any party seeking *or opposing* summary judgment to support its position by “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials,” or by “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse

This case involves alleged violations of Section 8(a)(1). The Respondent has filed a motion for summary judgment, accompanied by a detailed affidavit that sets forth material facts as to which the Respondent believes there is no genuine dispute. The General Counsel's opposition appropriately indicates that the Respondent concedes that a dispute exists as to the content of one conversation at issue in the case. See fn. 2, *supra*. However, the remainder of the General Counsel's opposition essentially argues that respondents' motions for summary judgment should always be denied or should be denied merely because the General Counsel says so. For example, the General Counsel's opposition states:

Counsel for the General Counsel will not squander the Board's time replying to Respondent's many mischaracterizations of the underlying facts of this case as these matters are not properly before the Board at this time and are more appropriate for resolution by an administrative law judge. Suffice it to say the evidence to be adduced at trial will demonstrate that Respondent engaged in the alleged conduct. In addition, Respondent's pleadings and Motion for Summary Judgment establish that there are numerous material issues of facts to submit before an administrative law judge for ruling.³

The Opposition also states that the "simple denial of unlawful conduct in the pleadings is sufficient to raise a material question that would defeat a motion for summary judgment," and "[the] Respondent's denial of . . . material allegations in the Complaint raises genuine issues as to substantive facts *best determined by an administrative law judge*." Opposition at 3 (emphasis added; citations omitted). Finally, the Opposition states that "NLRB rules preclude pretrial discovery," "[the] Respondent's Motion and its supporting . . . Declaration . . . characterize the evidence it apparently intends to present at hearing," and "there is reason to believe that [the] Respondent's true purpose in filing its Motion is to elicit a response from [the] General Counsel that provides a preview of the evidence to be presented at trial." Opposition at 5 (emphasis added).

Although the General Counsel asserts that the Respondent's motion contains "many mischaracterizations" of "underlying facts," it does not "squander the Board's time" for the General Counsel to state with reasonable

specificity *what* "mischaracterizations" of "underlying facts" the Respondent's motion contains. It is the Board's job to decide whether a pending motion for summary judgment has merit, and it requires *more* of the Board's time, not less, to assess the merits of a respondent's summary judgment motion when the General Counsel contents himself with conclusory assertions that summary judgment should be denied and refuses to make any reasonable effort to identify what genuine disputes as to material facts, if any, warrant a hearing. For similar reasons, it is deficient to state that "these matters are not properly before the Board at this time and are more appropriate for resolution by an administrative law judge." These matters *are* "properly before the Board" because they were raised in a motion for summary judgment. And stating that the case is "more appropriate for resolution by an administrative law judge" is nothing more than asserting that summary judgment should be denied without explaining *why* it should be denied. Similarly unpersuasive is the General Counsel's further assurance: "Suffice it to say the evidence to be adduced at trial will demonstrate that [the] Respondent engaged in the alleged conduct." When opposing a motion for summary judgment, I believe it does *not* "suffice" to promise that "evidence to be adduced at trial" will "demonstrate" that the complaint's allegations have merit.⁴ Otherwise, the Board would never have occasion to grant a respondent's motion for summary judgment because in *every* case in which the General Counsel has decided to issue a complaint, he believes he ought to prevail.

The other Opposition arguments described above have no greater merit. If the "simple denial of unlawful conduct" in a respondent's answer to a complaint raises a "material question" that defeats summary judgment, the Board would *never* grant a motion for summary judgment because every disputed case involves one or more such denials. Moreover, if the filing of an answer denying the complaint's allegations were sufficient to defeat summary judgment, that would render pointless the Board's Rules permitting parties opposing a summary judgment motion to file an "opposition" or "response" (to a notice to show cause), and providing that the Board may "treat the motion as conceded" if the nonmoving party *fails* to file an "opposition" or "response." Although the Board's Rules do not provide for prehearing discovery, which the General Counsel suggests is the

party cannot produce admissible evidence to support the fact." Fed.R. Civ.P. 56(c)(1)(A), (B).

³ Counsel for the General Counsel's Opposition to Respondent's motion for summary judgment and Brief in Support at 2-3 (hereinafter "Opposition") (emphasis added).

⁴ Equally conclusory and unpersuasive is the Opposition's statement that the Respondent's denials raise "genuine issues as to substantive facts *best determined by an administrative law judge*." Opposition, p. 3 (emphasis added). Once again, this is just another way of merely stating that summary judgment should be denied without explaining *why* it should be denied.

Respondent's "true purpose" (Opposition at 3),⁵ Section 102.24 in our Rules specifically permits motions for summary judgment, which the Board must grant in the absence of genuine issues as to material facts. Consequently, regardless of what may or may not be the Respondent's "true purpose" here, *the Board* requires a response from the General Counsel, and I believe this necessarily requires some "preview of the evidence to be presented at trial" that conflicts with the material facts set forth in a sworn affidavit and relied upon by the party seeking summary judgment. I recognize that an opposition need not be "supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing."⁶ However, in response to a motion for summary judgment, I believe the General Counsel at least must explain in reasonably concrete terms why a hearing is required. Under the standard that governs

⁵ If anything, respondents should be able to rely on the absence of discovery in Board litigation when opposing summary judgment because the hearing provides the only opportunity for private parties to subpoena witnesses and documentary evidence. Cf. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (summary judgment appropriate when nonmoving party fails to make a sufficient showing "after adequate time for discovery"). I believe it is unreasonable for the General Counsel to argue that the absence of discovery means he should be able to defeat summary judgment without identifying disputed facts that warrant a hearing because the General Counsel is the *only* party that has subpoena power during the initial investigation, and the General Counsel is likely to have exclusive knowledge of disputed material facts.

⁶ Rules Sec. 102.24(b) (emphasis added).

summary judgment determinations, this will normally require the General Counsel to identify material facts that are genuinely in dispute.

Many Board cases involve factual issues that must be resolved in a hearing. However, parties bear significant burdens as a result of the delays associated with NLRB litigation, many of which result from hearings and post-hearing exceptions.⁷ The Board's Rules provide for summary judgment to permit a decision *without* a hearing in appropriate cases, which also makes it possible to more quickly resolve cases where a hearing is necessary. Therefore, summary judgment should be "properly regarded not as a disfavored procedural shortcut," but "as an integral part" of a process designed "to secure the just, speedy and inexpensive determination of *every* action." *Celotex*, supra, 477 U.S. at 327 (internal quotations omitted; emphasis added).

Accordingly, I respectfully concur in this matter.

⁷ See John C. Truesdale, *Battling Case Backlogs at the NLRB*, 16 *Lab. Law* 1, 2 (2000) ("The harmful consequences of . . . long delays are clear: representation elections and labor disputes left unresolved; unfair labor practices left without remedy; increased back pay liability for respondents; ineffective or unenforceable orders; and, generally, an erosion of judicial respect for, and public confidence in, the Board. *Lex dilationes semper exhorret*: The law abhors delays—and for good reason" (citations omitted).); Arlen Specter & Eric S. Nguyen, *Representation Without Intimidation: Securing Workers' Right to Choose Under the National Labor Relations Act*, 45 *Harv. J. on Legis.* 311, 322–324 (2008) (discussing burden of extended litigation on employees and employers).