Lewis Foods of 42nd Street, LLC, a McDonald's franchisee, and McDonald's USA, LLC, joint employers, et al. *and* Fast Food Workers Committee and Service Employees International Union, CTW, CLC, et al. Cases 02–CA–093893, et al., 04–CA–125567, et al., 13–CA–106490, et al., 20–CA–132103, et al., 25–CA–114819, et al., and 31–CA–127447, et al.

June 26, 2015

ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND MCFERRAN

On April 28, 2015, Respondent McDonald's USA, LLC (McDonald's) filed an "Emergency Expedited Request for Special Permission to Appeal the Administrative Law Judge's April 27, 2015 Decision to Permit Off-The-Record Motion Practice." The General Counsel filed "General Counsel's Opposition to Respondent McDonald's USA, LLC's Request for Special Permission to Appeal the Administrative Law Judge's Refusal to Order Transcription of a Scheduling Conference." McDonald's filed a reply.

McDonald's request for special permission to appeal is granted. On the merits, the appeal is denied. Section 102.24(a) of the Board's Rules and Regulations requires that motions be submitted to the judge in writing, unless they are stated on the record at the hearing. The judge's letter scheduling the conference calls described the agenda for the calls as follows:

> During the conference call(s), all parties should be prepared to discuss and if possible agree upon a manner and time frame for the production [pursuant to subpoenas served by the General Counsel] of documents and electronically stored information. If the production of electronically stored information will be at issue during a particular conference call, the parties should have a representative present who is able to address such matters.

Especially in light of the relevant provision of the Board's Rules and Regulations, we do not think the judge's letter could reasonably be read as contemplating the submission of oral motions during the calls, regardless of how one might interpret the General Counsel's April 23 letter requesting the conference calls. We find that McDonald's has failed to establish that the judge abused her discretion in denying its request to have the conference calls transcribed.

MEMBER MISCIMARRA, concurring in part and dissenting in part.

It is unfortunate—and I fear it is a sign of things to come in these consolidated cases—that the parties and the Board cannot navigate an issue as straightforward as having a telephone conference transcribed. I concur with the decision to grant the special appeal, and I dissent from the majority's denial of Respondent's simple request to have a transcript of the parties' telephone conference. As Member Johnson points out, the conference obviously involved overlapping substantive and procedural issues.

Even if the judge or the General Counsel believes the procedural safeguard of a record is unnecessary, it fosters the appearance of unfairness to deny a party's request for a record. In this complicated case, the judge is well-advised to have a record made regarding all discussions involving potentially disputed matters and otherwise at the request of any party.

MEMBER JOHNSON, concurring in part and dissenting in part.

I concur with my colleagues to this extent. The motion, as it relates to the instant teleconference should be denied in that it is now moot.[1] The teleconference has

[1] I note that the Respondent McDonald's did not file its request for special permission to appeal (70+ pages long) until the day before the prehearing conference was ultimately scheduled, even though the original request by the General Counsel was apparently made on April 23, 5 days earlier. I understand, however, that the situation was precipitated by the apparently unforeseen request of the General Counsel, not Respondent, and do not exclusively fault Respondent in these time-sensitive circumstances.

What is important is to remind *all parties* of the following, especially in the context of a massive case like this one, with near daily filings at the time of this special appeal, which itself is only one of hundreds of cases pending before the Board in which there are also frequent filings. If parties need expedited consideration of issues, they should caption their filings accordingly, make the request clear in a motion, contact the Office of the Executive Secretary to inform the Board of the need for expedition, and make any other appropriate effort to indicate to the Board the time sensitive nature of the request. Blanket requests to consider all special appeals in this case to be emergencies are improper, in my view, considering that Sec. 102.26 of the Board's Rules and Regulations requires "special permission," which means a particularized showing of why the Board must decide a matter now.

Moreover, under Sec. 102.26, requests for special permission to appeal from a ruling of the judge, together with the appeal from such ruling, must be "promptly" filed. Although the term "promptly" is not specifically defined, common sense dictates that it be defined by the circumstances of each particular case. In this case, although I do not ultimately fault Respondent on the whole, it was not practicable for the Board to consider the voluminous pleadings and then act in a timely fashion before the conference occurred in this matter. One day is not enough. Two to 3 weeks may not be enough, depending on the circumstances and length of the pleadings. Unfortunately, here, 2 months was not enough, which is a shame, from my point of view. Regardless,

already occurred. The motion, as it relates to requesting an in-person proceeding for future subpoena-related matters, should also be denied in that Respondent has failed to establish that the judge abused her discretion. It was within the discretion of the judge, in these circumstances, to hold telephonic conferences on subpoena compliance matters, and to designate particular teleconferences to address particular matters, locations, or parties. I also concur with my colleagues' ruling insofar as it interprets Section 102.24(a) of the Board's Rules and Regulations to require written motions or that oral motions be transcribed on a record now that the hearing has opened.

However, the rub in this situation is what precisely is the definition of a "motion" in my colleagues' view and whether what the General Counsel did in this case was actually an attempt to make such a motion, albeit eschewing a formal motion[2] and without any record. I find that the General Counsel clearly did attempt to make a substantive motion via his request for a teleconference where the judge would set subpoena-related deadlines and change the upcoming date of the resumed hearing, *all of which occurred after* the judge had formally opened the hearing. In my view, this type of action requires a transcribed record. To quote counsel for the General Counsel in his letter to the judge:

> Given these [subpoena compliance] problems, the General Counsel asks your Honor to schedule an off-the-record teleconference for next week to discuss production and scheduling matters. *He also asks that you set deadlines* for Respondents to complete their compliance with the subpoenas. Finally, *he asks that you cancel resumption of the hearing in this matter* until Respondents have fully complied with their subpoena obligations.

April 23, 2015 letter (italics for emphasis). Regardless of the merits of the General Counsel's position, he is clearly requesting a telephonic hearing to obtain an order from the administrative law judge that would change the *status quo* in the case. That is what motions are for under our rules.

In my view, where a telephonic proceeding is limited to a status conference apprising the judge of the status of subpoena-production progress or some other type of communication from which no judicial order will issue, no transcript is required to be made, and whether one is made lies in the sound discretion of the administrative law judge. However, where a party wishes to make a *substantive* motion at a teleconference, i.e., a request to change the *status quo* condition of the case that would then necessarily require a ruling or order by the administrative law judge to do so, the Board's Rules and Regulations, Section 102.24(a), requires that these proceedings be transcribed, now that the hearing has been opened. In my view, this also should hold true if there are stipulations or agreements sought by the judge or a party. Here, the judge herself ordered for the teleconference that "all parties should be prepared to discuss and if possible agree upon a manner and time frame for the [subpoena] production . . ." and she further ordered that the parties "should have a representative" who was able to "address" any matters related to electronically stored information. April 27, 2015 letter from Judge Esposito to the Parties. Unlike the majority, I think the judge's letter "could reasonably be read as contemplating the submission of oral motions," given that the General Counsel's purpose for the teleconference was to make a de facto motion for judicial relief, and given that the judge did not respond by affirmatively stating that no motions or rulings would be made, or binding stipulations would be entertained.

Holding that a record need not be made in these circumstances—allowing important events to occur that affect the parties' procedural and substantive rights without any transcription of the same—eviscerates our ability to review these proceedings. This would make any "appeal" to us from these teleconference proceedings a review merely of untranscribed representations by the parties and judge of what they said, agreed to, or perhaps even what the judge actually ordered. Here, a series of "Party X claims they said this/Party Y claims they said that/Judge claims they said the other thing" submissions with no actual "record" for the Board in the future to base a ruling upon is a serious erosion of due process. In the almost certain special appeal litigation that will ensue in the future asking us to determine what teleconference matters should have been brought as a "motion," I hope that my colleagues will eventually appreciate this point.

There is a limit to an agency's discretion in interpreting its own statute and regulations, and an overbroad view of allowable discretion opens up these proceedings to judicial annulment or intervention, regardless of the soundness otherwise of the Board's ultimate determination here. See *Mach Mining, LLC v. Equal Employment Opportunity Commission*, 575 U. S. ____ (April 29, 2015); *Leedom v. Kyne*, 358 U.S. 184 (1958). Thus, in my view, where any party (i) intends to ask the judge for any form of relief or order as part of the teleconference proceedings, or actually asks or discusses the same at the teleconference, or (ii) a party or the judge intends to request or actually requests any form of binding agreement

parties should be advised of this practicality concern when considering special appeals.

[2] Formal motions are part of the record under Sec. 102.26.

or stipulation from another party during the proceedings, this falls within the ambit of a "motion" that triggers Rule 102.24(a). And thus, a transcript must be made to preserve a complete record of all parties' arguments, agreements, stipulations, representations and positions, and the judge's ruling, if any, and rationale for that ruling. At this stage in the case, especially now that a variety of significant disputes have erupted, and under these circumstances, I would hold that transcription would be appropriate for future teleconferences, as outlined above. Thus, I respectfully dissent from that part of my colleagues' order that does not grant the appeal on the merits for future teleconferences, in the circumstances outlined above.