



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

February 12, 2016

Mark J. Langer
Clerk, United States Court of
Appeals for the D.C. Circuit
333 Constitution Ave., N.W., Room 5423
Washington, D.C. 20001-2866

Re: *Laura Sands v. NLRB*, No. 14-1185
Oral arg. scheduled for February 18, 2016
before Judges Tatel, Griffith and Kavanaugh

Dear Mr. Langer:

After the Board's brief was filed in this case, Intervenor raised, at pp. 4-6 of its brief, the question whether Petitioner Sands continues to have standing to seek review of the Board's decision. Petitioner Sands addressed that argument in its reply brief, at pp. 18-21. On January 27, 2016, this Court issued a per curiam order directing the parties, at oral argument, to "come prepared to focus their oral arguments on the question of mootness[.]"

In responding to the Court's order, counsel for the Board wishes to bring to the Court's attention several cases that were not previously cited by either the Intervenor or Petitioner Sands. In both *Gally v. NLRB*, No. 11-2262 (2d Cir. per curiam decision Sept. 10, 2012) (2012 WL 4902832) and *Orce v. NLRB*, No. 97-4038 (2d Cir. Dec. 9, 1997) (1997 WL 829268), the Second Circuit dismissed petitions for review as moot. A copy of each decision is attached.

The Board also calls the Court's attention to two recent cases that discuss mootness: *Campbell-Ewald v. Gomez*, 136 S. Ct. 663, 669-73 (Jan. 20, 2016), and *In re Idaho Conservation League*, ___ F.3d ___, 2016 WL 363297 *4 (D.C. Cir. Jan. 29, 2016). While neither case was dismissed as moot, the application of their reasoning to the facts set forth in Intervenor's brief, and unrefuted in Petitioner Sands' reply brief, also would suggest that Petitioner Sands' cause of action has become moot.

We would appreciate your bringing this letter and attachments to attention of the panel hearing oral argument on February 18, 2016.

Very truly yours,

Linda Dreeben
Deputy Associate General Counsel

By: _____

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2012 WL 4902832

United States Court of Appeals, Second Circuit.

GEORGE H. GALLY, and SOLO J.
DOWUONA-HAMMOND, Petitioners

NATIONAL LABOR RELATIONS BOARD,
Respondent, and INTERNATIONAL UNION,
UAW, Intervenor

No. 11-2262.

Sep. 10, 2012.

Attorneys and Law Firms

W. James Young (National Right to Work Legal Defense Foundation, Inc.); Springfield, Va., for petitioners.

Lafe E. Solomon, Acting General Counsel, John H. Ferguson, Associate General Counsel, Linda Dreeben, Deputy Associate General Counsel, Jill A. Griffin, Supervisory Attorney, and Elizabeth A. Heaney, for respondent.

Michael Nicholson and Blair K. Simmons, Detroit, Mich., and Laurence Gold and James B. Coppess, Washington, D.C., for intervenor.

Present: JACOBS, Chief Judge, and POOLER and CARNEY, Circuit Judges.

Opinion

PER CURIAM.

*1 George H. Gally and Solo J. Dowuona-Hammond petition for review of a decision and order of the National Labor Relations Board determining that the annual renewal requirement imposed on Beck objectors by the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (“UAW”) and UAW Local Union #376 did not violate the duty of fair representation. *See generally* *Comm’n Workers of Am. v. Beck*, 128 LRRM 2729 (1988) (“We conclude that § 8(a)(3) of the National Labor Relations Act authorizes the exaction of only those fees and dues necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.” (internal quotation marks omitted)). We assume the parties’

familiarity with the underlying facts, the procedural history, and the issues presented for review.

“It is commonplace that jurisdiction of federal courts is limited to cases and controversies.” *Cook v. Colgate Univ.*, *Id.* (quoting *United States Parole Comm’n v. Geraghty*, *Id.* (citations omitted)). “Accordingly, a case that is live at the outset may become moot when it becomes impossible for the courts, through the exercise of their remedial powers, to do anything to redress the injury.” *Id.* (internal quotation marks omitted).

Petitioners are no longer members of a UAW-represented bargaining unit and thus are not subject to the UAW’s annual renewal requirement. Dowuona-Hammond’s NLRB charge alleged that the requirement violated his rights “as well as the rights of all similarly-situated employees”—who continue to be subject to the requirement. But “in the ordinary case, a party is denied standing to assert the rights of third persons.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*,

“A viable claim for damages generally avoids mootness of the action,” *Cook*, 992 F.2d at 19, but it is undisputed that the UAW treated Gally as a Beck objector during all relevant times and has refunded Dowuona-Hammond the excess amount withheld from him plus interest (\$87.19). Petitioners argue that they have not been compensated for the costs they incurred filing objections, but Petitioners have no viable claim for these postage costs. In their exceptions to the decision of the administrative law judge—which found that the UAW and UAW Local Union #376 had committed unfair labor practices and ordered them to cease and desist—Petitioners requested a “‘make whole’ remedy to all ‘Beck objectors’ whose objections were treated as having expired during the six months prior to the filing of Gally’s charge, and whose objections were treated as having expired during the pendency of these proceedings.” If Petitioners sought a remedy that included the cost of filing, they would have requested compensation for *all* Beck objectors, even those whose objections had not expired. “No objection that has not been urged before the Board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e).

*2 Petitioners contend that *Knox v. Serv. Emps. Int’l Union, Local 1000*, 193 LRRM 2641 (2012), “casts a critical eye” on objection requirements such as the UAW’s. This is an issue best considered after full briefing. In any event, Petitioners’ claim is moot.

Gally v. NLRB, Not Reported in F.3d (2012)

2012 WL 4902832, 193 L.R.R.M. (BNA) 3558

“It is well established that, when a matter becomes moot on appeal, federal appellate courts will generally vacate the lower court’s judgment. ” Coll. Standard Magazine v. Student Ass’n of the State Univ. of N.Y. at Albany , A.L. Mechling Barge Lines v. United States ,

For the foregoing reasons, we **DISMISS**the petition for review and **VACATE**the order of the National Labor Relations Board.

All Citations

Not Reported in F.3d, 2012 WL 4902832, 193 L.R.R.M. (BNA) 3558

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133 F.3d 907

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See Federal Rule of Appellate Procedure 32.1 and this court's local Rule 32.1.1. for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Second Circuit.

Kevin ORCE, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

Local 74, Service Employees International Union,
AFL-CIO, Intervenor.

No. 97-4038.

Dec. 9, 1997.

Petition for review of order of the National Labor Relations Board.

Attorneys and Law Firms

Appearing for Petitioner: W. James Young, National Right To Work Legal Defense Foundation, Inc., Springfield, Va.

Appearing for Respondent: Daniel Michalski, National Labor Relations Board, Washington, D.C.

Appearing for Intervenor: James B. Coppess, Washington, D.C.

Present: OAKES, KEARSE, and FRIEDMAN, Circuit Judges.

Opinion

*1 This cause came on to be heard on the transcript of the record from the National Labor Relations Board and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the petition for review be and it hereby is dismissed as moot.

Petitioner Kevin Orce requests review of so much of a Decision and Order of the National Labor Relations

Board ("NLRB" or the "Board") as found that a clause in the collective bargaining agreement between Orce's former employer and intervenor Local 74, Service Employees International Union ("Local 74"), requiring "membership in good standing" in Local 74 as a condition of employment, was facially valid. The Board also ruled that Local 74, the collective bargaining representative for a unit of employees that included Orce, violated its duty of fair representation under § 8(b)(1)(A) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(b)(1)(A), by failing to inform unit employees that that clause imposed on them only certain limited obligations. In his petition for review, Orce contends that the clause is facially invalid and should be expunged from the agreement, and he requests that Local 74 be ordered to refund all dues and fees it received from employees in Orce's bargaining unit. For the reasons that follow, we dismiss the petition as moot.

Under Article III of the Constitution, federal courts may adjudicate only "Cases" or "Controversies." "When the parties lack a legally cognizable interest in the outcome of a case, it is moot." *Muhammad v. City of New York Department of Corrections*, 126 F.3d 119, 122-23 (2d Cir.1997) (internal quotation marks omitted); see *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980); *Powell v. McCormack*, 395 U.S. 486, 496 (1969). A matter that has become moot is no longer a case or controversy, and a federal court loses jurisdiction to entertain it. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam); *Cook v. Colgate University*, 992 F.2d 17, 19 (2d Cir.1993) (litigants must show a "personal stake" in the outcome "throughout the life of the lawsuit"). "[A] case that is 'live' at the outset may become moot when it becomes impossible for the courts, through the exercise of their remedial powers, to do anything to redress the injury." *Id.* at 19 (internal quotation marks omitted).

There is a narrow exception to the mootness doctrine for situations "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). "In the absence of a class action, however, that exception is unavailable unless (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." *Cook v. Colgate University*, 992 F.2d at 19 (internal quotation marks omitted); see *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam).

*2 In the present case, which is not a class action, Orce

seeks to have the “membership in good standing” clause expunged from the collective bargaining agreement and requests an order requiring a “refund” to unit employees of all money they have paid to Local 74. However, it is undisputed that Orce’s employer went out of business some years ago and that the collective bargaining agreement whose modification is sought is no longer in effect. Further, it is undisputed that Orce has never paid any money to Local 74. Accordingly, he has no “personal stake” in the requested refund.

This case does not satisfy the “capable of repetition, yet evading review” exception. The existence of several circuit court opinions addressing the very issue presented in this case demonstrates that collective bargaining agreements with “membership in good standing” clauses are not inherently ephemeral; many survive challenges

long enough to permit them to be fully litigated. We are unpersuaded by Orce’s argument that an exception should be made in the present case because the NLRB has delayed in resolving the case. Whatever the delay, there is now no relief that is properly awardable to Orce.

We have considered all of Orce’s arguments against mootness and have found them to be without merit. The petition for review is dismissed for mootness.

All Citations

133 F.3d 907 (Table), 1997 WL 829268

Footnotes

* Of the United States Court of Appeals for the Federal Circuit, sitting by designation.