UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMALGAMATED TRANSIT UNION, LOCAL 1729 Plaintiff, v. FIRST GROUP AMERICA INC. and FIRST STUDENT, INC., Defendants.	))))))))))))	Case No. 2:15-cv-0806

INTERVENOR'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

Amalgamated Transit Union, Local 1729 ("ATU") is not entitled to judgment on the pleadings. ATU seeks to enforce an arbitration award that requires First Student, Inc. ("First Student") to recall laid-off ATU-represented employees and make them whole for lost wages, benefits, and seniority. To the extent that these actions conflict with the determination of the National Labor Relations Board ("Board")—that the International Brotherhood of Teamsters Local 205 ("Teamsters") represents the unit in question—the award cannot be enforced.

ARGUMENT

I. ATU's Motion for Judgment on the Pleadings Should Be Denied Because the Arbitration Award Conflicts with an NLRB Representation-Case Decision.

In *Carey v. Westinghouse Electric Corp*., 375 U.S. 261 (1964), the Supreme Court, in dicta, gave birth to the Supremacy Doctrine, which states that a Board decision supersedes a conflicting arbitration award. Specifically, the Supreme Court stated that "[s]hould the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course take

precedence." *Id*. at 272. Although application of the Supremacy Doctrine most commonly occurs when an arbitration award conflicts with the Board's resolution of a work assignment dispute under Section 10(k) of the National Labor Relations Act, *see e.g.*, *Sheet Metal Workers Int'l Ass'n Local Union No. 27 v. E.P. Donnelly, Inc.*, 737 F.3d 879, 898-99 (3d Cir. 2013), *Carey* itself makes clear that the Supremacy Doctrine also protects a Board decision concerning whether certain employees "are members of one bargaining unit or another"—that is, a classic question of representation.[1]

Since *Carey*, the Third Circuit has repeatedly found that the Supremacy Doctrine applies to cases in which an arbitration award conflicts with the Board's representation decision. *See Chauffeurs, Teamsters & Helpers Local 776 v. NLRB*, 973 F.2d 230, 233 (3d Cir. 1992); *Eichleay Corp. v. Int'l Ass'n of Bridge, Structural, & Ornamental Iron Workers*, 944 F.2d 1047, 1056 (3d Cir.1991) ("If an NLRB determination on the definition of the proper bargaining unit conflicts with an arbitration award, the NLRB decision will prevail."). Other circuits have also cited *Carey* for the proposition that "an NLRB decision on a representational issue overrides an arbitrator's decision on the same issue." *A. Dariano & Sons, Inc. v. Dist. Council of Painters No. 33*, 869 F.2d 514, 517 (9th Cir. 1989); *Gen. Warehousemen & Helpers Local 767 v. Standard Brands, Inc.*, 560 F.2d 700, 704 (5th Cir. 1977); *Local 7-210, Oil, Chemical & Atomic Workers Int'l Union v. Union Tank Car Co.*, 475 F.2d 194, 199 (7th Cir. 1973) [hereinafter "*OCAW*"]. As this Court recognized in its November 24, 2015 Memorandum Opinion (Doc. 27, at 13), the primacy of Board decisions "extends to factual determinations that are essential to its rulings on representational issues." *Bevona v. Field Bridge Associates*, No. 90 CIV. 5191 (RJW), 1993 WL

[1] The Board did not issue a 10(k) award in the instant case because no party has filed an unfair labor practice alleging conduct that violates Section 8(b)(4)(D) of the Act, which is the necessary antecedent to the Board's resolution of a jurisdictional dispute under Section 10(k). *See* 29 U.S.C. §160(k).

498042, at *4 (S.D.N.Y. Dec. 1, 1993) *aff'd*, 29 F.3d 622 (2d Cir. 1994); *see also Cent. Valley Typographical Union No. 46 v. McClatchy Newspapers*, 762 F.2d 741, 749 (9th Cir. 1985) ("[T]wo logically inconsistent judgments cannot both be enforced when a representational issue is at stake.").

Courts afford such deference to the Board's representation decisions because "the Board has primary jurisdiction over representational issues." *Chauffeurs, Teamsters & Helpers Local 776*, 973 F.2d at 233-34; *NLRB v. Paper Manufacturers Co.*, 786 F.2d 163, 167 (3d Cir. 1986) (recognizing that "under section 9 of the National Labor Relations Act, representation issues are matters relegated to the Board" and "may not be decided by contract, and thus may not be decided by an arbitrator"). While an arbitrator's role is limited to the singular dispute before him, "the Board occupies a superior position for consideration of the laws involved and the individual interests that will be affected by a decision." *Cannery Warehousemen, Food Processors, Drivers & Helpers for Teamsters Local Union No. 748 v. Haig Berberian, Inc.*, 623 F.2d 77, 81 (9th Cir. 1980).[2]

In the present case, the arbitration award ATU seeks to enforce directly conflicts with the Board's representation decision, and thus cannot stand.[3] Based in part on the factual determination that the additional routes from the Woodland Hills School District expanded the Teamsters' unit work, the Board found that the Teamsters is the appropriate bargaining representative of the employees performing that work. Yet ATU's arbitration award requires that

[2] In the arbitration award at issue here, the arbitrator noted that First Student "currently has two CBA's which recognize two different unions as the 'sole collective bargaining agent' at its Frankstown Terminal," but he based his decision solely on ATU's CBA because he "was selected to hear the grievance filed by the ATU #1729 and is bound by the provisions of the ATU Agreement." Doc. 1-4, p. 14.

[3] Because the Board denied ATU's request for review, the Regional Director's decision serves as the decision of the Board. 29 C.F.R. § 102.67.

"the laid off ATU employees shall be recalled in seniority order for the additional work at the Frankstown Terminal." In order to do that, First Student would have to replace Teamsters-represented drivers with ATU-represented drivers and, presumably, bargain with the ATU concerning the terms and conditions of work for those drivers, notwithstanding the Board's decision that the Teamsters rightfully represents the drivers who work those additional Woodland Hills routes. The Court should neither undermine the Board's representation decision nor bind First Student to "two logically inconsistent judgments" by enforcing the arbitration award. *See Cent. Valley Typographical Union No. 46*, 762 F.2d at 749. Therefore, ATU's Motion for Judgment on the Pleadings should be denied.

II. ATU's Motion for Judgment on the Pleadings Should Be Denied because First Student Is Not Liable for Actions Consistent with the Board's Decision.

A union cannot prevail in a Section 301 suit to enforce an arbitration award once the Board has issued a Section 10(k) decision awarding the disputed work to another union. *Sheet Metal Workers Int'l Ass'n Local Union No. 27*, 737 F.3d 879, 895 (3d Cir. 2013); *Eshbach Bros., LP v. Int'l Union of Operating Eng'rs, Local 542*, No. CIV.A.04-0089, 2006 WL 557683, at *3 (E.D. Pa. Mar. 2, 2006). Enforcement of a contrary arbitration award would undermine the Board's Section 10(k) determination. *Sheet Metal Workers Int'l Ass'n Local Union No. 27*, 737 F.3d at 895; *see also Local 30, United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n v. NLRB*, 1 F.3d 1419, 1427 (3d Cir. 1993) [hereinafter "*Roofers*"] ("The distinction . . . between seeking the work and seeking payment for the work is ephemeral" and "inconsistent with *Carey*").

The same principle applies in the representational context. In *Roofers*, the Third Circuit found that "a Board ruling on a representational issue would protect the employer from liability for damages for breach of a collective bargaining agreement as long as the employer's actions

were consistent with the Board's decision." 1 F.3d at 1426. *But see Eichleay Corp.*, 944 F.2d at 1058-60 (remanding with instructions to confirm portion of an arbitration award that did not implicate a representational issue or conflict with the Board's unit clarification decision). Other circuits are in accord. Thus, in *OCAW*, 475 F.2d 194, a case virtually identical to the instant case, the Seventh Circuit declined to enforce an arbitration award for contract damages that conflicted with the Board's representation decision. The arbitration award ordered the company to apply its agreement with OCAW to OCAW-represented employees who were transferred to a new facility. Deferring to the Board's determination that the Boilermakers were the appropriate bargaining representatives at that facility, the Court found that if the company could not have legally applied the OCAW contract at the facility, the company could not be liable for contract damages for refusing to do so because "contractual rights cannot exist separately and apart from the union's right to represent the unit." *Id.* at 199. The Seventh Circuit's language, like the Third Circuit's language in *Roofers*, tracks the reasoning of *Carey:* "[I]f the employer's action had been in accord with [the Board's] ruling, it would not be liable for damages under Section 301." *Carey*, 375 U.S. at 272.

In addition to the reinstatement remedy awarded by the arbitrator that would, as discussed above, undermine the Board's representation decision, ATU also seeks confirmation of the arbitration award's make-whole remedy of lost wages, benefits, and seniority for ATU-represented drivers. But First Student cannot be held liable for contractual damages inconsistent with the Board's representational decision. *See OCAW*, 475 F.2d at 199. Moreover, ATU bases its argument for damages on the fact that the arbitrator found First Student to be in violation of the recognition clause of its collective bargaining agreement ("CBA") with ATU that defines ATU as the sole bargaining representative of the drivers at the Frankstown Terminal. *See* Doc. 1,

p. 4; Doc. 1-4, pp. 15-16. But ATU's acknowledgment that the arbitration award is based on a violation of the recognition clause of its CBA is a near-fatal concession, for it strongly suggests that ATU seeks a representational award and not simple contract damages arising from some other enforceable provision of the CBA. *See Chauffeurs, Teamsters & Helpers Local 776*, 973 F.2d at 231-32 (noting that the district court had properly refused to enforce an arbitration award grounded in an employer's "violat[ion of] the union recognition clause" in the face of a conflicting Board decision).

ATU further argues that it is due breach of contract damages because First Student intentionally created conflicting duties by signing a CBA with the Teamsters that included the same recognition clause as did the CBA with ATU. Whatever the merits of this claim's premise, ATU's argument runs headlong into *Roofers* and like cases, which state that the Board's representational decision—here, that the Teamsters is the appropriate bargaining representative for the unit—absolves First Student of dual payment liability. *See Roofers*, 1 F.3d at 1428.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny Plaintiff's Motion for Judgment on the Pleadings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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