

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**MASTEC SERVICES COMPANY, INC.**

**Petitioner,**

**and**

**NATIONAL LABOR RELATIONS  
BOARD,**

**Respondent.**

**Case No. 16-60011**

**PETITIONER’S REPLY TO RESPONDENT’S OPPOSITION TO  
PETITIONER’S MOTION TO REMOVE CASE FROM ABEYANCE AND  
MOTION FOR SUMMARY REVERSAL**

TO: THE HONORABLE JUSTICES OF THE FIFTH CIRCUIT COURT OF APPEALS:

Petitioner, MasTec Services Company, Inc. (“Petitioner” or “MasTec”), files this Reply to Respondent’s Opposition (the “Response”) to Petitioner’s Motion to remove this case from abeyance and summarily reverse the National Labor Relations Board’s (the “Board”) December 24, 2015 Order (the “Order”) that the Petitioner violated Section 8(a)(1) of the National Labor Relations Act (the “Act”) by maintaining an arbitration agreement with a class and collective action waiver. The Board’s Order undisputedly contradicts binding Fifth Circuit precedent that

holds class and collective action waivers do not violate the Act and must be enforced under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*<sup>1</sup>

## I.

The Board's Response does not address the substance of MasTec's Motion for Summary Reversal. Nowhere does the Board contest that, under the law of this Circuit, *D.R. Horton* and *Murphy Oil* require reversal of the Board's order until there has been a change in law. *See e.g. Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court."). Because there has been no "intervening change in the law" since *D.R. Horton* and *Murphy Oil*, reversal of the Board's Order is inevitable and summary reversal is appropriate.

## II.

The Board argues that summary reversal is not warranted because *one day* there may be a change in the law. *See* Response at p. 3. The Board takes the

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<sup>1</sup> *See D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014) ("*DR Horton*"); *see also Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1015 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016) ("*Murphy Oil*"); *Chesapeake Energy Corp. v. N.L.R.B.*, 633 F. App'x 613, 2016 WL 573705 (5<sup>th</sup> Cir. Feb. 12, 2016) ("*Chesapeake*").

position that the Court should delay ruling on MasTec's pending Motion for Summary Reversal because: (1) the Board *may* file a petition for writ of certiorari with the U.S. Supreme Court in *another matter*; (2) the U.S. Supreme Court *may* accept certiorari; and (3) in the event certiorari is sought and accepted, the law effecting MasTec's pending Motion for Summary Reversal *may* change. *See* Response, p. 3. The Board's position is untenable.

A party should not—and more importantly, does not—have the luxury of delaying a matter in the hopes the party's legal position will strengthen in the interim. Especially here, where the law controlling MasTec's Petition for Review and its Motion for Summary Reversal is well-settled in this Circuit *and* the Board had the opportunity to seek certiorari in *D.R. Horton*, but chose not to.

The appropriate procedural mechanism here is not to delay ruling on MasTec's Motion for Summary Reversal based on the Board's hypothetical scenario coming to fruition; rather, the appropriate procedural course here is for the Board to file a petition for certiorari in *this matter*, once the Board's Order is reversed should it desire to do so.

Moreover, significantly, since MasTec filed its Motion for Summary Reversal, the Court has once again granted another party's request for summary disposition on the same issue. *See 24 Hour Fitness USA, Inc. v. NLRB*, Case No.

16-60005. MasTec is entitled to the redress it seeks from this Court in a speedy manner. *See, generally, Ayo v. Triplex, Inc.*, 457 Fed. Appx. 382, 385 (5th Cir. 2012) (“the ‘primary purpose’ of the Federal Rules of Appellate Procedure is ‘the securing of speedy and inexpensive justice in a uniform and well ordered manner’”). And for that reason, MasTec wishes to remove this case from abeyance and seeks summary reversal of the Order.

#### IV.

In accordance with this Circuit’s precedent, reversal of the Board’s Order is appropriate.

Dated: July 8, 2016

Respectfully submitted,

/s/ Sean M. McCrory

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**ATTORNEYS FOR PETITIONER  
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**CERTIFICATE OF SERVICE**

I certify that on July 8, 2016, the foregoing Reply to Respondent's Opposition to Petitioner's Motion to Remove Case from Abeyance and Motion for Summary Reversal was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

*/s/ Sean M. McCrory* \_\_\_\_\_  
Sean M. McCrory

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