UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITEDHEALTH GROUP, INC. AND UNITEDHEALTH CARE SERVICES, INC.	)	
	)	Case No.
Petitioners/Cross-Respondents	)	16-60122
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent /Cross-Petitioner	)	
	)	

OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD TO UNITEDHEALTH GROUP, INC. AND UNITEDHEALTH CARE SERVICES, INC.'S MOTION FOR SUMMARY DISPOSITION

To the Honorable, the Judges of the United States
Court of Appeals for Fifth Circuit:

The National Labor Relations Board ("the Board"), by its Deputy Associate General Counsel, opposes the motion for summary disposition filed by UnitedHealth Group, Inc. and UnitedHealth Care Services, Inc. (collectively, "the Company"), and respectfully requests that this Court deny the motion. In support of its opposition, the Board shows as follows:

1. On February 25, 2016, the Board issued a Decision and Order finding that the Company violated Section 8(a)(1), 29 U.S.C. § 158(a)(1), of the National Labor Relations Act, as amended ("the Act"), 29 U.S.C. § 151, et seq. *UnitedHealth Group, Inc. and UnitedHealth Care Services, Inc.*, 363 NLRB No.

134. In reaching its decision, the Board relied on its prior decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F. 3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016). On March 1, 2016, the Company filed a petition with this Court seeking review of the Board's Order.

2. On March 15, the Board moved without opposition to have the case placed in abeyance pending the final resolution of *Murphy Oil*, because the case presents identical issues to those in *Murphy Oil*. On March 18, the Court granted the Board's motion. The Board subsequently filed a status report on April 20, advising that the Court had entered judgment in *Murphy Oil* and that the Board had filed a petition for rehearing on April 18. On May 13, the Court denied the Board's petition for rehearing in *Murphy Oil*, and on May 23 it issued mandate. Consequently, the Court removed this case from abeyance and, on June 24, set a briefing schedule.

3. On July 5, the Company filed a motion for summary reversal. In support of its motion, the Company argues that, absent an intervening Supreme Court decision, or change in statute, the outcome of this case is dictated by the

Court's decisions in *D.R. Horton* and *Murphy Oil*. (Motion p. 4 (citing *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (one panel of the Court may not overturn another panel's decision).) But in so arguing, the Company disregards the fact that judicial review of the Board's *Murphy Oil* decision has not yet been fully exhausted. (Motion pp. 3-4.)

The Court's denial of the Board's petition for rehearing en banc in *Murphy Oil* issued on May 13, 2016, and the Board has 90 days—until August 11—to file a petition for a writ of certiorari. The issue in this case is a significant one for the administration of the Act. As an agency of the federal government, the Board requires time to fully consider whether to seek certiorari in *Murphy Oil*, as well as consult with the Department of Justice. The Board's consideration will include analyzing the Seventh Circuit's decision in *Jacob Lewis v. Epic Systems Corp.*, ___ F.3d. ___, 2016 WL 3029464, which issued on May 26. That decision, in conflict with *Murphy Oil*, upholds the Board's determination that an arbitration provision requiring employees to waive class and collective claims in any forum violates the Act.[1]

[1] The Court of Appeals for the Eighth Circuit subsequently deepened the circuit split as to this issue in its June 2, 2016 decision in *Cellular Sales of Mo., LLC v. NLRB*, ___ F.3d. ___, 2016 WL 3093363, which reaffirmed that court's rejection of the Board's rule in an earlier, non-Board case. Cases raising the same issue are presently pending in several other courts of appeals.

The decision whether to seek Supreme Court review will affect not only *Murphy Oil*, but also approximately 70 Board decisions like this one, including nearly 60 decisions pending in various courts of appeals, of which more than 30 are before this Court. It will also ultimately affect thousands of employers and employees subject to the Act. In the Board's view, until the time for certiorari has passed, or certiorari is denied, summary reversal based on *Murphy Oil* is not appropriate. For that reason, the Board also maintains that, in the interests of judicial economy and conserving party resources, the best course of action remains holding the case in abeyance.

4. In further support of its motion, the Company notes (Motion pp. 4-5) the Court's granting of opposed motions for summary disposition on *Murphy Oil* issues in *24 Hour Fitness USA, Inc. v. NLRB*, No. 15-60005 (June 27, 2016), *PJ Cheese, Inc. v. NLRB*, No. 15-60610 (June 16, 2016), and *On Assignment Staffing Services, Inc. v. NLRB*, No. 15-60642 (June 6, 2016). *See also MasTech Servs. Co. v. NLRB*, No. 16-60011 (July 11, 2016) (granting opposed motion for summary reversal); *RGIS, LLC v. NLRB*, No. 16-60129 (July 7, 2016) (granting opposed motion for summary disposition). As the Company acknowledges (Motion p. 5 n.2), however, the Court denied a similar opposed motion for summary disposition

in *SF Markets, LLC d/b/a Sprouts Farmers Market v. NLRB*, No. 16-60186 (June 7, 2016).[2]

More generally, the Court has taken an individualized approach to the approximately 30 cases pending before it that implicate *Murphy Oil*. The Court has stayed numerous cases[3] and, after mandate issued in *Murphy Oil*, expressly clarified in some stayed cases that the stays would remain in effect until the period for seeking certiorari in *Murphy Oil* expires.[4] In several other cases, the Court

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[2] The employer subsequently filed a renewed motion for summary disposition, and the Board has filed an opposition.

[3] *See, e.g.*, *Acuity Specialty Prods., Inc. v. NLRB*, No. 16-60367 (July 1, 2016) (held in abeyance "until the time for petitioning for certiorari" in *Murphy Oil* has passed); *Lincoln E. Mgmt. Corp. v. NLRB*, No. 16-60401 (July 1, 2016) (held in abeyance "until the time for petitioning for certiorari in Murphy Oil" has passed, and, in the event a petition is filed, until the Supreme Court resolves the case"); *SolarCity Corp. v. NLRB*, No. 16-60001 (January 26, 2016) ("stay[ing] this case, pending resolution of . . . *Murphy Oil*").

[4] On May 23, 2016, after issuing mandate in *Murphy Oil*, the Court issued Letters of Advisement in approximately 10 cases, informing the parties that it had reactivated the cases. *See, e.g.*, *Multiband E.C., Inc. v. NLRB*, No. 16-60197 (May 23, 2016); *Kmart Corp. v. NLRB*, No. 15-60897 (May 23, 2016); *Domino's Pizza, LLC v. NLRB*, No. 15-60914 (May 23, 2016). The next day, the Court issued a Memorandum in many of those cases placing the case back into abeyance until the time for petitioning the Supreme Court has passed. Although the parties received those memoranda by ECF notification, they do not appear on PACER. A sample Memoranda from the Court is attached as Exhibit A. Thereafter, the Court denied a motion to lift the abeyance in one such case. *Domino's Pizza*, No. 15-60914 (July 13, 2016). The Court also subsequently withdrew some orders granting stays and denied the Board's motion instead. *See, e.g.*, *Citigroup*, No. 15-60856 (July 7, 2016) (withdrawing December 21, 2015 order granting motion to stay and denying motion). In another case, however, the Court granted *nunc pro tunc* the Board's

denied the Board's motions for stays.[5] In others, the Court has set briefing schedules. Employers have filed their opening briefs in two such cases and the Board has filed its responsive briefs.[6] In sum, the Court has taken different approaches to the many pending *Horton*/*Murphy Oil* cases, and the panels' decisions in *24 Hour Fitness*, *PJ* Cheese, and *On Assignment* need not control.

5. The Board maintains that the best approach would be to stay all related cases until the period for seeking certiorari expires, or the Supreme Court decides or denies certiorari in *Murphy Oil*. In similar circumstances, the Court of Appeals for the District of Columbia Circuit held dozens of Board cases in abeyance while the Board determined whether to seek certiorari of that court's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). *See, e.g.*, *Ozark Auto. Distributors, Inc. v. NLRB*, 779 F.3d 576, 577 (D.C. Cir. 2015); *Europa Auto Imports, Inc. v. NLRB*, 576 F. App'x 1 (D.C. Cir. 2014). To preserve

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motion to stay. *Brinker Int'l Payroll Co., L.P. v. NLRB*, No. 15-60859 (July 7, 2016) (granting stay "until the time has elapsed for petitioning for a writ of certiorari in" *Murphy Oil*).

[5] *See, e.g.*, *Securitas Sec. Serv. USA, Inc. v. NLRB*, No. 16-60304 (May 26, 2016); *RGIS, LLC v. NLRB*, No. 16-60129 (Mar. 28, 2016).

[6] *See, e.g.*, *Citi Trends, Inc. v. NLRB*, No. 15-60913 (employer brief filed April 25, Board brief filed June 28); *Emp'rs Res. v. NLRB*, No. 16-60034 (employer brief filed April 25, Board brief filed June 30). *See also Prof'l Janitorial Serv. of Houston, Inc. v. NLRB*, No. 15-60858 (setting briefing schedule); *Securitas Sec. Serv. USA v. NLRB*, No. 16-60304 (same).

its Orders, however, the Board remains ready to brief this and any other similar case that is not stayed until *Murphy Oil* is final.

WHEREFORE, the Board respectfully requests that the Court deny the Company's motion for summary reversal.

Respectfully submitted,

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 15th day of July, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 15th day of July, 2016

EXHIBIT A

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

May 24, 2016

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 16-60197 Multiband E.C., Incorporated v. NLRB
Agency No. 25-CA-108828

Please disregard the letter issued May 23, 2016. Case remains in abeyance pending the time for petitioning the Supreme Court for a writ of certiorari has passed.

Once the case has been removed from abeyance, you will receive notification from this court with any additional instructions.

Sincerely,

LYLE W. CAYCE, Clerk

By: Shea E. Pertuit
Shea E. Pertuit, Deputy Clerk
504-310-7666

Mr. Gregory Harvey Andrews
Mr. Jared David Cantor
Ms. Linda Dreeben
Ms. Sarah Joelyn Gasperini
Ms. Kira Dellinger Vol