

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

United Parcel Service, Inc.

and

Ben Egerman, an individual

Case 18-CA-167042

MOTION TO ALLOW FOR TESTIMONY BY VIDEO

Counsel for the General Counsel in the above-captioned case hereby moves the Administrative Law Judge, in order to effectuate the purposes of the Act and to avoid unnecessary delay and to preserve administrative resources, to permit testimony by a witness via GlowPoint video transmission.

In support of the instant Motion, Counsel for the General Counsel alleges that Mr. Egerman is the charging party in this case, and since the investigation concluded he has moved for personal reasons to Baltimore, Maryland. The complaint allegations do not include any discharge or time off or backpay, so existing regulations put the cost of transporting Mr. Egerman to the trial site solely on the NLRB and US taxpayers.

The Board approved the use of video testimony in EF Int'l Language Schools, Inc., 363 NLRB No. 20 fn. 1 (Oct. 1, 2015). The Federal Rules of Civil Procedure provide that "for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."

Counsel for the General Counsel proposes to have Mr. Egerman testify from the office of the NLRB in Baltimore, Maryland, in front of the Agency's GlowPoint video transmission equipment.¹ Counsel for the General Counsel submits that the agency budget provides "good cause" for taking video testimony in this case, and "the appropriate safeguards" are available. As noted in EF Int'l Lanugage Schools, use of video necessarily obviates problems associated with testimony by telephone alone, a practice previously categorically rejected by the Board. With video testimony, the parties can observe the witness's demeanor and see what the witness is seeing. Counsel for the General Counsel is able to assure the parties that a Board agent will be present in front of the camera to point the camera upon request, ensure the integrity of the room, and assist with examination of documents, and he offers Respondent an opportunity to have a representative present in the room. Use of video technology promises that Egerman's testimony may be evaluated "on an equal footing with the testimony of witnesses appearing in person at the hearing." Id., ALJD at 5. Additionally, Mr. Egerman is not a discriminatee and is instead testifying as to various threats that were made, which testimony will be largely corroborated by other witnesses. Although his testimony is critical to the case, it is not likely to last more than two hours.

¹ See the Board's unpublished order in MPE, Inc., 09-CA-084228 (Jan. 29, 2015), approving use of GlowPoint technology over Skype (copy attached, marked as Exhibit A).

Therefore, based on all the above, Counsel for the General Counsel contends that this case is particularly well-suited for video testimony, and asks your honor to grant the motion.

Dated at Minneapolis, Minnesota, this 21st day of July, 2016.

/s/ Joseph H. Bornong

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MPE, INC.

and Case 09-CA-084228

RICHARD RANKIN

and Case 09-CA-084595

NATHAN RANKIN

ORDER

On December 3, 2014, Administrative Law Judge Mark Carissimi issued an order denying the General Counsel's Motion to Allow Video Testimony. Thereafter, the General Counsel filed a timely request for special permission to appeal the judge's ruling, and the Respondent filed a brief in opposition.

The General Counsel's request for special permission to appeal is granted. After careful consideration we find that the judge erred in denying the motion to allow video testimony. The General Counsel has demonstrated that Nathan Rankin is a key witness in this matter, and that Mr. Rankin is unavailable to testify in person because he is incarcerated in the federal prison in Morgantown, West Virginia. While we agree with the judge that Skype technology, in its current form, is not a viable means for taking video testimony, we are persuaded by the General Counsel's argument that the GLOWPOINT video conference technology used by the Board and by the Federal Bureau of Prisons is acceptable for video testimony, subject to appropriate procedural safeguards to preserve the due process rights of the parties, such as those described in

OM 08-20 (Pilot Video Testimony Program in Representation Cases), or as otherwise may be agreed upon by the parties.

Accordingly, we sustain the General Counsel's appeal, and remand this matter to the Administrative Law Judge for a hearing, which will include the video testimony of Nathan Rankin. The parties are directed to meet and confer in advance of the hearing regarding the appropriate procedural safeguards for taking Mr. Rankin's video testimony within the capabilities of the GLOWPOINT video conference technology, and to ensure that there are no technological problems that could impede the hearing. If the parties are unable to agree, the judge shall implement such procedural safeguards as he believes are appropriate.

This order is without prejudice to the judge striking the video testimony of Rankin if the judge subsequently determines that the actual circumstances of the video testimony do not provide the parties with a meaningful opportunity to examine and cross-examine the witness, or give the judge the appropriate ability to assess Mr. Rankin's demeanor for the purposes of assessing his credibility.²

Dated, Washington, D.C., January 29, 2015

PHILIP A. MISCIMARRA,
MEMBER

KENT Y. HIROZAWA,
MEMBER

HARRY I. JOHNSON, III,
MEMBER

² The Respondent's request that it be awarded attorney's fee and costs is denied.

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **Motion to Allow for Testimony by Video** were served by electronic mail on the 21st day of July, 2016, on the following parties:

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