

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON
TRANSCRIPT OF PROCEEDINGS

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: LISA Y. HENDERSON, : CIVIL ACTION
: Acting Regional Director of : NO. 1:16-cv-06305
: the Tenth Region of the :
: NATIONAL LABOR RELATIONS :
: BOARD, for and on behalf of :
: the NATIONAL LABOR :
: RELATIONS BOARD, :
: :
: Petitioner, :
vs. :
: :
: BLUEFIELD HOSPITAL COMPANY, :
: LLC d/b/a BLUEFIELD :
: REGIONAL MEDICAL CENTER, :
: :
: Respondent. :
-----X

LISA Y. HENDERSON, : CIVIL ACTION
Acting Regional Director of : NO. 5:16-cv-06307
the Tenth Region of the :
NATIONAL LABOR RELATIONS :
BOARD, for and on behalf of :
the NATIONAL LABOR :
RELATIONS BOARD, :
: :
Petitioner, :
vs. :
: :
GREENBRIER VMC, LLC d/b/a :
GREENBRIER VALLEY :
MEDICAL CENTER, :
: :
Respondent. :
-----X

SEPTEMBER 13, 2016

HEARING ON PETITION FOR TEMPORARY INJUNCTION
BEFORE THE HONORABLE DAVID A. FABER
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Petitioner:

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Court Reporter:

Lisa A. Cook, RPR-RMR-CRR-FCRR

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P R O C E E D I N G S

1
2 THE COURT: Before the Court this morning are two
3 matters that have been consolidated by previous order. The
4 first is *Henderson* against *Bluefield Hospital Company*. This
5 is Civil Case Number 1:16-6305. And the second is *Henderson*
6 against *Greenbrier LLC*. This is 5:16-6307.

7 Will the attorneys note their appearances for the
8 record, please.

9 MR. CARMODY: Good afternoon, Your Honor. Bryan
10 Carmody representing the respondents.

11 MR. FOX: Yes, Your Honor, Sam Fox also here for
12 the respondents.

13 MR. WHITE: Good afternoon, Your Honor. Joel R.
14 White on behalf of the petitioner, Lisa Henderson and the
15 National Labor Relations Board.

16 MS. MEARES: Good afternoon. Shannon R. Meares
17 for the petitioner as well.

18 THE COURT: All right. The Court set this matter
19 for a hearing on the petition for a preliminary injunction.

20 So, Mr. White or Ms. Meares, you may proceed if you
21 wish.

22 MR. WHITE: Thank you, Your Honor.

23 Your Honor, would you have me stand up there or back
24 here?

25 THE COURT: Wherever you're most comfortable. I

1 could probably hear you better if you come up to the podium,
2 Mr. White.

3 MR. WHITE: I'll do that.

4 May it please the Court, Your Honor, to put this case
5 simply, this petition for Section 10(j) injunction is about
6 two respondents, Bluefield and Greenbrier, who are under the
7 umbrella of a parent company, CHS, Community Health Systems,
8 Incorporated, with other affiliated hospitals and are
9 represented by the same legal counsels and lead negotiators,
10 namely Bryan and Don Carmody.

11 Respondents' employees selected the National Nurses
12 Organizing Committee as their collective bargaining
13 representative in August of 2012, four years ago.

14 Since then, the respondents have engaged in a
15 systematic plan to thwart the union at every turn during its
16 first contract bargaining. First, --

17 THE COURT: Now, how do I know that, Mr. White?
18 What's in the record that tells me that the respondents have
19 engaged in a systematic plan to thwart the union at every
20 step?

21 MR. WHITE: Your Honor, with regard to the union's
22 actions and surface bargaining and bad faith bargaining
23 which would constitute its proposals that were made on
24 September 2nd, 2015, with regard to respondent Greenbrier
25 insisting on indemnification which was, which is a

1 permissible subject of bargaining, and refusing to provide
2 information and refusal to bargain over discipline which are
3 both mandatory subjects of bargaining.

4 Also we would conclude, Your Honor, that the proposals
5 that were initiated in October and November of 2015
6 contained surface bargaining positions.

7 THE COURT: Is there evidence in the record to
8 support that?

9 MR. WHITE: Yes, Your Honor, there's both, both in
10 affidavit form. There are employees who have noted the
11 delay tactics of respondent have trickled down to employees
12 such that they felt those effects.

13 Employees -- and it can also, Your Honor, be inferred
14 by the fact that employees have lost the benefit of any
15 provisions that could have been -- sorry -- could have been
16 gained by good faith bargaining in the interim.

17 THE COURT: Is there any evidence that there's
18 been a decline in membership in the union during this period
19 of time?

20 MR. WHITE: With regard to any decline in support,
21 one, we would point to the employees' affidavits; namely,
22 the ones saying that employees have grown apathetic towards
23 the union, that employees have -- don't want to participate
24 with the union with regard to fear of retaliation by the
25 employer.

1 THE COURT: Has the -- have the respondents'
2 conduct changed any since the Fourth Circuit ruled in this
3 case?

4 MR. WHITE: The Fourth Circuit --

5 THE COURT: It ruled in one of the cases I think,
6 did it not?

7 MR. WHITE: Yes, Your Honor, the Fourth Circuit
8 did rule in May of 2016 to enforce the Board's order to
9 bargain in good faith.

10 And, and there have not been -- well, there have been
11 bargaining sessions between February of 2015 and October and
12 November of 2015. But since the Fourth Circuit decision,
13 there has been some limited bargaining in July of this year.
14 And, again, I think there's one scheduled in October of, of
15 this year also.

16 THE COURT: Well, how, how do I know that those
17 efforts to bargain subsequent to the Fourth Circuit's
18 decision, Judge Agee's opinion, how do I know that they
19 haven't changed the conduct of the respondents to the extent
20 that they're now in compliance with the Court's order?

21 MR. WHITE: Well, Your Honor, with regard to
22 whether or not they could good faith bargain at this point,
23 especially with regard to respondent Greenbrier, there is no
24 possible way for them to take a good faith bargaining stance
25 at this point because they're still in a bad faith

1 bargaining position with regard to the indemnification
2 agreement, with regard to the provision of information, and
3 with regard to the refusal to bargain over --

4 THE COURT: Was Greenbrier -- I can't remember
5 whether Greenbrier was a party to the Fourth Circuit case or
6 not. Was Greenbrier?

7 MR. WHITE: I believe they were both parties.

8 THE COURT: Both parties, okay. I'm sorry. Go
9 ahead, please.

10 MR. WHITE: Oh, thank you, Your Honor.

11 And to get back to that point, Your Honor, with regard
12 to those bad faith positions that they've taken, there's no
13 way for them to engage in any good faith bargaining at this
14 point moving forward.

15 If they were to meet again in October, which is
16 currently set but there's no reason why that couldn't be
17 changed, they can't take a good faith bargaining position at
18 that point if they're still engaged in these bad faith
19 bargaining positions.

20 Your Honor, not only initially when the union first
21 came in in September of 2012 did -- the obligation at that
22 point would have been to bargain with the union in 2012.
23 Ultimately what the employer did initially was to test the
24 certification of the union which involved charges that were
25 filed by the union.

1 That ultimately resulted in a, in a Board decision
2 enforcing the certification in December of 2014 and, as you
3 mentioned, Your Honor, the Fourth Circuit Court of Appeals
4 decision in May of 2016.

5 Next the respondents began a wave of unfair labor
6 practices in violation of the Act. The Board has found some
7 of those allegations to violate the Act while others are
8 being heard in nationwide litigation against the respondents
9 and other CHS affiliated hospitals.

10 Those hearings began in February of 2016 and will
11 continue through early next year. Still more seem to be on
12 the horizon, Your Honor, including these allegations.

13 In addition to the unfair labor practices and following
14 the Board's decision in, in December of 2014 to uphold the
15 union certification, respondents again changed course.

16 Beginning in about February and March of 2015 the
17 respondents began meeting with the union under the veil of
18 bargaining.

19 At first, respondent failed to provide proposals when
20 they had promised to do so and failed to provide information
21 that the union had requested.

22 In August of 2015 respondent Greenbrier issued
23 discipline to the employee Julie Hoffman Jackson. The union
24 demanded immediately to bargain over that discipline and
25 made an information request pursuant to that discipline.

1 Respondents' tactics escalated as a result after that
2 point. In September of 2015 Don Carmody, who's the lead
3 negotiator in both, both respondents, Your Honor, made
4 proclamations that respondent Greenbrier would, quote,
5 never, ever, ever have a grievance and arbitration provision
6 in the contract, which is a critical part of the
7 representation process.

8 Respondent also refused to bargain or provide
9 information unless the respondent would sign --

10 THE COURT: The contract is not much good to the
11 union if they don't have a grievance procedure, is it?

12 MR. WHITE: No, Your Honor. A position like that
13 would be untenable for the union.

14 THE COURT: And arbitration is pretty standard,
15 isn't it? I know it's standard in the coalfields.

16 MR. WHITE: Yes, Your Honor. A grievance and
17 arbitration procedure is something that all unions, to my
18 knowledge, would insist on.

19 THE COURT: Right. Okay.

20 MR. WHITE: I'm sorry, Your Honor. Did you say
21 something?

22 THE COURT: No. Go ahead, please.

23 MR. WHITE: Thank you.

24 Respondent culminated its bargaining tactics with a
25 package proposal that stripped all meaningful

1 representational duties from the union. And those were in
2 October and November of 2015.

3 All of this was done in an environment of shouting and
4 verbal assaults toward the union and in front of employees
5 at bargaining sessions.

6 Based on that conduct, the Board authorized petitioner
7 to seek a 10(j) injunction on respondents which was filed
8 with this Court in July of 2016.

9 Other petitions for 10(j) injunction have been
10 authorized and pursued in other districts -- sorry -- in
11 other District Courts against respondents' other affiliated
12 hospitals for similar surface bargaining allegations.

13 THE COURT: Tell me, if you know, if these
14 hospitals have ever had a contract with a union that covers
15 employees such as the ones that are involved here.

16 MR. WHITE: I'm not sure, Your Honor, if this
17 union has had contracts with anybody, but I believe there's
18 one hospital, Watsonville. And the distinguishing fact
19 there, Your Honor, is that the union had already been at the
20 facility in Watsonville prior to the CHS takeover of that
21 particular hospital. And, so, the union was well entrenched
22 already in those, in that facility.

23 Namely, Your Honor, in the -- I'm sorry -- referring to
24 the 10(j) injunctions in other districts, namely they were
25 in the Northern District of Ohio and the Central District of

1 California.

2 In the latter case the temporary injunction was granted
3 on August 29th, 2016, which was filed with this Court on
4 Friday to give notice to you, Your Honor.

5 THE COURT: Well, that case comes out of the
6 Fourth Circuit. And the Fourth Circuit's kind of an outlier
7 with regard to the law that it covers here, is it not?

8 MR. WHITE: With regard to the, the four-prong
9 test that the Fourth Circuit does use, it's my understanding
10 that the Ninth Circuit also uses that four-prong test. In
11 terms of being an outlier in, in those particular factors, I
12 wouldn't be able to speak necessarily on that.

13 THE COURT: Well, the Eighth Circuit says you look
14 at irreparable harm first. And I don't know whether the
15 Fourth Circuit has ever specifically said that. Do you know
16 whether it has or not?

17 MR. WHITE: I'm not familiar with necessarily an
18 order in which the four prongs are looked at. It's my
19 understanding that the likelihood of success on the merits
20 is the first analysis that's been taken which is, which is
21 similar, I think, to, to the *Barstow* decision in the Ninth
22 Circuit.

23 THE COURT: Well, the Eighth Circuit case kind of
24 makes sense to me that you look at the irreparable harm
25 first. And if you can't get over that hurdle, then you're

1 out of the ballgame. Doesn't that, doesn't that make sense
2 and simplify the Court's job in cases like this?

3 MR. WHITE: If that's the case, Your Honor, I can
4 speak to the irreparable harm prong.

5 THE COURT: I think maybe you should do that
6 because, --

7 MR. WHITE: Okay.

8 THE COURT: -- because I'm, I'm inclined to think
9 that perhaps that approach is the correct one.

10 MR. WHITE: Absolutely, Your Honor.

11 The irreparable harm here is almost certain without a
12 temporary injunction. This is true really for three
13 reasons.

14 First, employees not only have felt and will feel the
15 effects of respondents' conduct, again that will continue to
16 do so unless enjoined.

17 Second, employees will lose benefits that could have
18 been obtained through the good faith bargaining if that had
19 taken place, and if it will have taken place.

20 And the third prong, Your Honor, or the third item is
21 the union's strength is undermined by the passage of time in
22 and of itself.

23 With regard to employees feeling respondents' conduct,
24 as I've mentioned, Your Honor, employees have testified by
25 affidavit that employees have grown apathetic towards the

1 union because they haven't seen anything get done, are
2 afraid of participating with the union for fear of
3 retaliation.

4 And specifically, Your Honor, the discharged employee,
5 Ms. Jackson, asks a union representative why there were no
6 consequences to the respondent Greenbrier's actions, stated
7 that they should be held accountable, that she didn't
8 understand how they could do this to her, and that it was --
9 and I won't use the term in this court, Your Honor, but to
10 use an acronym, BS. Though not dispositive, such evidence
11 is a hallmark for the necessity of 10(j) injunction.

12 Second, Your Honor, any contractual benefits to
13 employees that could have been gained by good faith
14 bargaining cannot be given retroactively. Benefits like a
15 grievance procedure, changes to work schedules, changes to
16 work hours, wages, et cetera, can be obtained in the interim
17 between now and the Board order.

18 There's no way to predict or determine which benefits
19 the employees would or would not have received. Thus,
20 remedial failure is a near certainty in those cases and in
21 the present case. Without injunction, the damage to the
22 union and to the employees is real and is significant.

23 Finally, Your Honor, --

24 THE COURT: I'm sorry. You go ahead and finish
25 and then I'll ask a question.

1 MR. WHITE: Go ahead, Your Honor.

2 THE COURT: No, please. I want to get your whole
3 list in my mind here.

4 MR. WHITE: Okay. Thank you, Your Honor.

5 Finally, the passage of time can be expected to
6 undermine employees' support for the union. Unless
7 prevented early, a union may be too weakened by an
8 employer's unlawful conduct to reconstitute in any
9 meaningful way, especially in the context of a newly
10 certified union bargaining for its first contract which is
11 the case we have here.

12 It stands to reason that the longer relief is delayed,
13 the less likely it is that a union will be able to represent
14 employees effectively after a Board order ultimately issues.
15 In essence, a Board order would be ineffective if this harm
16 continues.

17 Here employees voted for union representation in August
18 of 2012, which was four years ago. In that particular
19 election, Your Honor, the margin of victory in Bluefield was
20 a matter of 30 employees out of 176 that voted. And it was
21 even tighter in respondent Greenbrier's case where the
22 margin of victory was only 10 votes. So you can see that
23 the passage of time can deteriorate that support that a
24 union might see.

25 Since then -- since the time of the election, for over

1 two years respondent has refused to bargain with the union
2 and has attempted to undermine the union through unfair
3 labor practices. When the Board ruled against respondents'
4 test of certification, rather than continuing to refuse to
5 bargain, respondents instead began surface bargaining
6 seemingly in an attempt to bolster its argument to the
7 Fourth Circuit during that time that the Fourth Circuit
8 should decline enforcement of the Board's order to bargain.
9 Again, the purpose was to delay meaningful bargaining.

10 As time passes, nothing but an attempt -- a temporary
11 injunction could guarantee good faith bargaining. No matter
12 whether the parties met or would continue to meet in further
13 sessions, respondents cannot engage in good faith bargaining
14 because they are still in a bad faith bargaining posture.

15 Respondent Greenbrier continues to insist on
16 indemnification of permissive subject of bargaining and will
17 not fulfill its obligations to provide relevant information
18 or to bargain over Ms. Jackson's discipline.

19 Even if it would, Your Honor, nothing in respondents'
20 history with the union suggests that it will all of a sudden
21 flip a switch and begin to bargain in good faith or that it
22 will continue to do so in the future.

23 THE COURT: Except for your argument that the
24 decline in union membership or the weakening argument --
25 I'll call it that -- with that possible exception, and I'm

1 not even persuaded on that, I don't see how these things
2 can't be corrected in a final order.

3 MR. WHITE: Your Honor, with regard to wages,
4 we'll say, for instance, wages can be boiled down to a
5 monetary remedy. So the ultimate Board order could say,
6 "You may have gotten these wages in the interim. We'll go
7 ahead and remedy that."

8 With regard to a grievance process, discipline that's
9 involved, changes in work schedules, employees are being
10 affected in the interim between now and the Board order. We
11 ultimately don't know for sure when the Board order will
12 ultimately issue. It could be a year, two, three years down
13 the road.

14 And, essentially, that would cause those employees to
15 have to live with the fact that they have a bad faith
16 bargaining relationship with the employer during that time.
17 And there's no way to retroactively relieve that harm.

18 THE COURT: Suppose a preliminary injunction is
19 granted directing them to bargain in good faith. How, how
20 is the Court ever to know whether they've complied with that
21 or not?

22 It seems to me like you could, you could create a
23 situation where bargaining would continue and there would be
24 no -- and not result in a contract and there would be no way
25 for the Court to, to say that the bargaining was not in good

1 faith. It might just be a failure to reach an agreement.

2 You know, you're enjoining somebody, directing somebody
3 to do something that it's very difficult to police it seems
4 to me. And I'm sure you've had a lot more experience than I
5 have in these cases. How is that handled?

6 MR. WHITE: I wouldn't go so far as to say that,
7 Your Honor. But with regard to --

8 THE COURT: Well, if you've had more than one
9 occasion, that's more than I have.

10 MR. WHITE: True, Your Honor.

11 With regard to hard bargaining, which would be an
12 instance in which the employer could insist on certain
13 provisions that were permissible to, to hard bargain on,
14 there's nothing to -- nothing necessarily in a temporary
15 injunctive order that would require certain provisions be
16 done or anything like that.

17 Ultimately what the issue here is is that they're
18 insisting on bad faith bargaining positions like the
19 indemnification agreement, like the failure to provide
20 information, and with regard to the package proposal itself.

21 There's no grievance procedure in that package
22 proposal. They're insisting on a management rights clause
23 which essentially eviscerates all of the union's
24 representational duties.

25 And they also insist on the union agreeing that they're

1 subject to a neutrality agreement which, Your Honor, the
2 Fourth Circuit decision that you've read references in April
3 of 2015 the Board case. And in that Board case -- they
4 reference that neutrality agreement because it was brought
5 up by respondents' counsels.

6 In that case, the Board notes that respondents'
7 counsels have used that defense on a number of different
8 occasions; that they find that, that defense
9 non-meritorious; and that if respondent continues to use
10 that defense that it could open them up to sanctions.

11 Now, where that comes into play here, Your Honor, is
12 that with regard to the neutrality agreement, they were well
13 aware that not only would the Board find this
14 non-meritorious, but that the union had argued against this
15 on a number of different occasions.

16 And, so, the union both individually with this
17 neutrality agreement but also in the package proposal in
18 general with the other two items would find this completely
19 unpalatable and the union would in no way accept this. And
20 it goes to exactly what this is, Your Honor, which is sham
21 bargaining.

22 Your Honor, when the present violations occurred,
23 petitioner made every effort to expedite this Board case.
24 Petitioner attempted to consolidate this case with on-going
25 nationwide litigation in an effort to obtain the quickest

1 possible relief for the employees and the union absent 10(j)
2 injunction.

3 Ironically, respondent opposed the motion to
4 consolidate at that time. Ultimately the Administrative Law
5 Judge denied the petitioner's request.

6 So here we sit, Your Honor, four years removed from the
7 representational election, two years removed from the Board
8 finding that the respondents had failed to bargain,
9 currently in the midst of nationwide litigation against
10 respondents that will take place through January of next
11 year, and uncertainty on when Board order will ultimately
12 issue because of the complex nature of the on-going
13 litigation.

14 As it has in the past, respondents are likely to use
15 every avenue to avoid meaningful bargaining, meaning that
16 employees that haven't either moved on from the facility or
17 lost interest in the union completely may have to wait years
18 more for what they originally wanted in 2012. This case has
19 been and continues to be protracted.

20 Now, finally, Your Honor, the balance of equity, which
21 is something that you mentioned earlier, favors injunction.
22 An injunction could serve -- would serve the public
23 interest.

24 The respondents would simply be required to meet and to
25 bargain in good faith -- I'm sorry -- to bargain in good

1 faith, not necessarily a meeting scheduled.

2 THE COURT: How would it serve the public
3 interest? A union contract might drive up the cost of going
4 to the hospital which would be against the public interest,
5 wouldn't it?

6 MR. WHITE: Your Honor, with regard to the
7 legislation that we're looking at, the National Labor
8 Relations Act, Congress specifically enacted it for the
9 benefit of employees and to preserve the integrity of the
10 collective bargaining process. And, so --

11 THE COURT: And that's a public interest in and of
12 itself. Is that your argument?

13 MR. WHITE: Yes, Your Honor.

14 THE COURT: What if I disagree with you today but
15 still have some hesitancy? There's been some suggestion
16 that we ought to have discovery and an evidentiary hearing.
17 What's your position on that? Do you think, do you think
18 the record's in shape now for me to rule on it after this
19 hearing or should we perhaps allow the discovery and have
20 a --

21 MR. WHITE: Yes, Your Honor, I would -- it would
22 be our position that the record is, is what it is, can be
23 used to determine this case, and that discovery and an
24 evidentiary hearing are unnecessary.

25 Section 10(j) of the Act doesn't mandate witness

1 testimony or evidentiary hearings, despite providing
2 affidavits. If petitioner were so inclined, this case could
3 have been decided without affidavits because the facts are
4 not in dispute. The underlying facts aren't in dispute and
5 the irreparable harm is self-evident.

6 THE COURT: Well, Mr. Carmody can't cross-examine
7 an affidavit. Shouldn't he have the opportunity to confront
8 the witness and, and test the, whether the, the allegations
9 of the affidavit are solid or not?

10 MR. WHITE: With regard to an evidentiary hearing
11 that would probe union sentiments, which is essentially what
12 that would be and would be the only rational reason for
13 discovery or an evidentiary hearing, that in and of itself
14 would be against Board law.

15 In *NLRB vs. Gissel* it was -- things like that, rules
16 that would require us to probe into union sentiments in that
17 kind of a nature would be against Board law and Board
18 principle. Respondent --

19 THE COURT: I guess the principle behind that is
20 that the unions ought to be immune from having their
21 internal affairs examined to that extent. Am I right about
22 that? What's the reason for that?

23 MR. WHITE: Because the -- it's the tentative
24 nature of employees' sentiment towards the union. When
25 you -- when an employer who controls basically everything

1 about an employee's work, you know, work abilities and work
2 responsibilities is able to probe into those things and
3 potentially make decisions on the basis of those, which
4 would again be against Board law, that would be the
5 sentiment, Your Honor.

6 I, I say that the facts are not in dispute, Your Honor,
7 because the respondents do not dispute that it sent the
8 September 2nd, 2015, e-mail insisting on indemnification and
9 refusing to provide information or to bargain.

10 Respondent does not dispute that it gave the union the
11 package proposal that reiterated its well-treaded position
12 on the neutrality agreement and contained no grievance
13 provision.

14 These are all documents that are authored by
15 respondents and Your Honor has all the evidence needed to
16 make a decision on that case. To the extent respondents
17 would like to use again to this point, Your Honor, use an
18 evidentiary hearing to poll employees about their union
19 sentiments, that in and of itself would be a violation of
20 Board law.

21 Respondents were given an ample opportunity to provide
22 their evidence in their opposition memorandum via
23 affidavits, documentation, et cetera, and chose not to.

24 Respondents were also given an opportunity to provide
25 such evidence, including affidavits, during the

1 investigation of these allegations. Instead, respondents
2 did not fully cooperate in that. Relief need not be further
3 postponed to provide respondents another forum to
4 demonstrate their delay tactics.

5 In conclusion, Your Honor, Section 10(j) injunctive
6 relief is just and proper. Petitioner is likely to succeed
7 on the merits based on its firm stance on the Board law.

8 Irreparable harm is likely in this case given the
9 passage of time that's recognized by the Fourth Circuit in
10 *Muffley vs. Mammoth Coal*, the effect already felt by
11 employees, and respondents' continued insistence on its bad
12 faith bargaining demands.

13 Respondents' burden under a temporary injunction is
14 light compared to the harm suffered by the union and
15 employees. And maintaining the integrity of the collective
16 bargaining process entrenches the petitioner in the public
17 interest.

18 Discovery and an evidentiary hearing is unnecessary
19 since these facts are undisputed and with irreparable harm
20 being self-evident. Such an order would amount only to
21 further delay.

22 And as -- before I conclude, Your Honor, I would
23 respectfully request additional time for rebuttal after
24 respondents' oral argument.

25 THE COURT: All right. One last question. If

1 there's a bargaining session set up for October - that's
2 next month - shouldn't I wait and see what the hospitals do
3 in that -- maybe the mere fact that you've got this case
4 pending here in this court might be enough to cause them to
5 come in and talk turkey with you.

6 MR. WHITE: It's entirely possible that could take
7 place. But here's the issue, Your Honor, is that even if
8 they approach that meeting with good faith bargaining,
9 there's nothing to prevent them from moving back to a bad
10 faith bargaining position or to engage in further surface
11 bargaining after that absent temporary injunction.

12 THE COURT: Unless you get a contract in October.

13 MR. WHITE: Right, Your Honor.

14 THE COURT: Okay. Well, thank you, Mr. White.

15 MR. WHITE: Thank you, Your Honor.

16 THE COURT: Mr. Carmody, did I pronounce your name
17 right that time?

18 MR. CARMODY: You did, Your Honor.

19 Your Honor, I'd like to start with a, with an apology.
20 I was in Bluefield, I think as the Court is aware, not the
21 right place to be at 10:30 this morning. So I apologize to
22 your staff, to the Court, and I've already apologized to my
23 colleagues.

24 THE COURT: Well, I once -- as I told your
25 opponents this morning, I once drove from Bluefield to

1 Beckley for a hearing with my courtroom in Bluefield full of
2 lawyers. So it's a mistake that's easy to make.

3 And as Mr. Fox probably knows -- I don't think Sam's
4 ever been late in my court. But I tell lawyers when they're
5 late that I apply the English common law that related to dog
6 bites. You know, every dog got one free bite because it was
7 assumed that dogs were benevolent creatures and weren't
8 dangerous. So the owner wasn't responsible for them until
9 they bit somebody again. After the first bite, he was on
10 notice. So you've had your free bite, Mr. Carmody.

11 MR. CARMODY: Strict liability from this point
12 forward. Understood, Your Honor, and appreciated.

13 THE COURT: All right.

14 MR. CARMODY: Your Honor, is there a particular
15 area the Court would like me to begin?

16 THE COURT: No. I'd just like for you to go ahead
17 and rebut what you think you need to or to say what you need
18 to say. And if I have any questions as you go along, I'll
19 interrupt you and ask them.

20 MR. CARMODY: Okay. Well, listening to
21 Mr. White's presentation to the Court, there's an awful lot
22 I'd like to say. But I think I would start with the merits
23 of the petition. I know from Your Honor's order that was
24 one of the topics that you wanted to discuss today.

25 Judge, you referenced irreparable harm as perhaps being

1 a sensible starting point for the analysis.

2 THE COURT: Yeah. I'm inclined to look at that
3 first. And if, if the petitioner doesn't get over that
4 hurdle, then it seems to me that the other factors don't,
5 don't come into play. And if you look at them all as one
6 big ball of wax, you've still got to prove irreparable harm
7 anyway. So why not look at that one first before you
8 proceed to the other ones.

9 Do you agree with that?

10 MR. CARMODY: We do, Your Honor. It makes perfect
11 sense to us.

12 THE COURT: And that's the Eighth Circuit approach
13 as I understand it.

14 MR. CARMODY: I believe so, Your Honor. I, I --
15 actually, I think that's the approach taken by a few courts.
16 So, in any event, it is a critical part -- an indispensable
17 part of the general counsel's case.

18 THE COURT: But we don't have any Fourth Circuit
19 guidance on that, do we?

20 MR. CARMODY: I think what the Fourth Circuit has
21 indicated recently in *Muffley vs. Spartan Mining Company* is
22 that wherever you place the element in the analysis, it's an
23 essential element in the general counsel's case. Put a
24 different way, absent that, they don't get the injunction
25 that they're pursuing before this Court.

1 And as the Supreme Court made clear in the *Winter* case
2 which I know was cited by Your Honor's order, they've got to
3 show more than a possibility of irreparable harm. They've
4 got to show a likelihood of irreparable harm in order to
5 warrant the extraordinary remedy that is a remedy under
6 Section 10(j) of the Act.

7 And that standard, Judge, applied to the facts of this
8 case -- well, it's what you indicated already, Judge. They
9 need to show a union that is really on the ropes in terms of
10 the loss of employee support, a labor organization that is
11 perceived by its membership as simply not able to accomplish
12 any useful purpose with the membership.

13 And here, Judge, I don't think they've come even close
14 to meeting that standard for a variety of reasons. And it
15 starts with the delay. And the delay really is illustrated
16 in the first instance by the union itself.

17 The union is complaining about this, these sham
18 negotiations, this crazy negotiator during the period of
19 time of February of last year to November of last year.
20 And, yet, they wait until January, January 10th to file
21 their unfair labor practice charge. That doesn't indicate
22 to me, and I don't think it would indicate to most people, a
23 union that is really suffering from precarious
24 circumstances.

25 Likewise, the general counsel, they too delayed in

1 their pursuit of this claim. The complaint was issued on
2 March 10th of this year. Under Section 10(j) of the Act,
3 that is the action by which they're able to go into U.S.
4 District Court to seek this relief. They delayed until the
5 13th of July before these petitions were filed with this
6 Court.

7 Now, they tell you, "We had the administrative process
8 to go through. We need to get authority from the Board.
9 And as soon as we got that authority, two days later we
10 filed our petitions."

11 What they don't tell you is when they asked for that
12 authority from the Board. And I think the reason for that
13 is because they delayed in seeking that authority.

14 And there is, Your Honor, some language in this regard
15 concerning delay which I think is useful for purposes of the
16 Court's decision-making here. It comes from the *Spartan*
17 *Mining Company* case I mentioned before. Quoting here, Your
18 Honor, at Page 544 of the decision:

19 "Clearly excessive delay can undermine the propriety of
20 Section 10(j) relief. As time elapses it becomes less
21 likely that injunctive relief can undo harms that have
22 occurred in the interim."

23 So, Judge, we think that's the first factor on which
24 the Court can and should rely to conclude the absence of
25 irreparable harm and, therefore, the absence of any

1 entitlement to the relief they're seeking.

2 THE COURT: Well, the, the delay was caused by
3 the, the Board here, wasn't it? How, how is the union
4 responsible for the delay? It seems like you're punishing
5 the union for something that wasn't necessarily their fault.

6 MR. CARMODY: I, I, I can only circle back, Your
7 Honor, really to what I've covered so far. The -- to be
8 sure, the union does have the right under Section 10(b) of
9 the Act to file an unfair labor practice charge during the
10 six-month period. That's the general rule.

11 Here, though, even though they complain of negotiations
12 from the very beginning back to the early part of last year
13 was a sham, they waited until January of this year to file a
14 charge.

15 So it's not about punishing the union so much as taking
16 those facts and seeing they don't present any type of
17 atmospheric urgency.

18 And, again, in terms of the general counsel, they talk
19 about these tactical decisions that they were making as part
20 of the proceedings before the agency to consolidate the case
21 that's now before you with this rather massive case that's
22 been before the agency for some time. That is -- that's a
23 diversion.

24 The simple fact of the matter is that the moment that
25 complaint issued on March 10th of this year, they had the

1 right to go into this court to seek this relief. And,
2 again, although they say, "Within 48 hours of getting the
3 authority, we filed our petitions," they never tell you
4 between March and July when the general counsel's office
5 went to the Board to seek this authority.

6 So that's the first point we'd ask the Court to, to
7 consider, Your Honor, the delay.

8 More importantly, I think, Judge, there is the evidence
9 or, more to the point, lack thereof accompanying these
10 petitions with regard to loss of employee support.

11 In the case, Your Honor, of Bluefield, starting there
12 first, the general counsel does offer the Court affidavits
13 that cover this entire period of time beginning with late
14 2012 when this election was, was held and what the union
15 prevailed.

16 This is the affidavit from Ms. Galuszek, if I'm
17 pronouncing her name correctly. She covers essentially
18 union activity that's taking place during the period of time
19 my clients are exercising their rights to challenge this
20 election victory.

21 She recounts no fewer than three occasions on which
22 employees, lots of employees engaged in informational
23 picketing. She talks in terms of a demonstration that took
24 place in the CEO's office which was a play on Valentine's
25 Day. She talks about hand-billing that's taking place at

1 the facility, all sorts of different activity during this
2 period of time.

3 Likewise, Ms. Meadwell, you have an affidavit from her,
4 Your Honor. And this is -- this was executed just a few
5 months ago, June 6th of this year. She takes the Court
6 through, in effect, all of the union activity that's been
7 happening during the period of time negotiations have been
8 taking place.

9 And there's lots of examples there of in April of 2016
10 they have an outreach in the cafeteria where union fliers
11 are distributed to nurses. Notably, Ms. Meadwell does not
12 say in her testimony, "I'm sitting there in the cafeteria
13 with a union organizer and nobody would talk to us, nobody
14 would take our fliers," or, "people took our fliers and they
15 made some remark like, 'The union doesn't do us any good.
16 Why are we bothering?'" That testimony is noticeably
17 absent.

18 And there's additional examples in June, just two
19 months ago, or three months ago there was a meeting,
20 according to Ms. Meadwell's own testimony, between the union
21 and the nurses. She doesn't tell the Court, "We had the
22 meeting and nobody showed up," or, "people showed up and
23 they complained about the ineffectiveness of the union."

24 And, Your Honor, I think the, the part of
25 Ms. Meadwell's affidavit which I'd like to quote, and this

1 is worthy of emphasis, here's what she says summing it up.
2 This is at Page 12 of her June 6th, 2016, affidavit.

3 Quoting:

4 "I haven't heard any rumors from co-workers about the
5 bargaining sessions or about the fact that the bargaining
6 sessions have not occurred since November, 2015."

7 Your Honor, they picked Ms. Meadwell as presumably
8 their best witness to make this case of irreparable harm and
9 here's what she's telling the Court as of June 6th of this
10 year in terms of the perception of the union or lack of
11 perception between -- this relationship between the union
12 and the nurses.

13 The situation is no different with Greenbrier, Your
14 Honor. They offer an affidavit from Ms. O'Bryan. And I
15 know the Court has reviewed it. But just to highlight a few
16 examples, she testifies:

17 "Nurses continue to wear union buttons to work to show
18 support for the union. I still do."

19 She talks about meetings that are happening in the
20 cafeteria at, at Greenbrier. And she says, quoting here at
21 Paragraph 16 of her affidavit:

22 "I don't know if there was any change in the number of
23 nurses who would go down and meet with the organizer."

24 And, Your Honor, what I can tell you from prior
25 experience with these types of proceedings -- what's, what's

1 notable here too is what's missing in terms of the general
2 counsel's proof. They don't give you any affidavit from
3 Ms. Mahon or any other employee or organizer of the union
4 telling the Court, "These nurses won't talk to us."
5 Instead, they've offered this evidence which I've
6 highlighted for the Court. And we believe rather than
7 support a showing of irreparable injury, it very much shows
8 the opposite.

9 Your Honor, in terms of the other part, of course, Your
10 Honor, of, of the general counsel's burden here is
11 likelihood of success of the merits.

12 The general counsel's legal theory here is surface
13 bargaining. I don't think there's any dispute between the
14 two sides that the Board's standard that they'll apply to
15 decide that allegation is totality of the circumstances.

16 The Board looks at everything. They look at our
17 conduct. They look at the union's conduct. They look at
18 everything.

19 Here the general counsel has given you evidence, I
20 suppose you could call it, that covers a period of time
21 February to November of last year. They've given you a
22 one-sided picture of that evidence, only the facts they want
23 you to see, not the totality of the circumstances. And they
24 have given you nothing in terms of what has happened since
25 November -- basically almost the last year, Your Honor, what

1 has been happening since November of last year.

2 I can tell you what's been happening, Your Honor. We
3 would be able to demonstrate this absolutely with discovery
4 should Your Honor not be inclined to grant the petitions
5 today.

6 We have proposed -- and I want to be sure I get these
7 numbers right -- in the case of Greenbrier, Your Honor,
8 since negotiations got underway, 45 bargaining sessions that
9 the union has rejected. We have rejected one session that
10 they offered.

11 In the case of Bluefield we have offered 27 bargaining
12 dates that the union has rejected. In our case we've
13 rejected one.

14 Mr. White references a bargaining session in July.
15 There was bargaining in July. We made the offer to engage
16 in marathon negotiations where we would take as long as it
17 took to either reach agreement or reach an impasse.

18 THE COURT: Did the union give you reasons when
19 they turned down the bargaining sessions that were offered?

20 MR. CARMODY: I am not the chief negotiator, Your
21 Honor. But to my knowledge, I don't believe that they did.
22 I think instead they were essentially ignored more often
23 than not. I'm not certain about that, Judge, but I believe
24 that's, that's accurate.

25 THE COURT: To me that would be a pretty

1 devastating fact if you could prove it. Is it in the record
2 now?

3 MR. CARMODY: No, Your Honor, it's, it's, it's
4 not.

5 THE COURT: But you're saying if I let you do
6 discovery, you can prove it?

7 MR. CARMODY: Your Honor, --

8 THE COURT: You think you can.

9 MR. CARMODY: One of the points that the Court
10 wanted us to address is whether or not the record so far as
11 it goes right now is appropriate for the Court to decide
12 this case.

13 As, as I've been explaining hopefully convincingly, we
14 do believe that the case is ripe for action now, and the
15 action would be dismissal by virtue of the absence -- the
16 general counsel's failure to prove irreparable harm.

17 Should the Court not be inclined to, to take that step,
18 we don't think that anything else can happen right now in
19 terms of the decision-making process by the Court. That's
20 for two reasons: The state of the record such as it exists
21 currently before the Court and what's missing from the
22 record.

23 In that former regard, Your Honor, there's problems
24 even with the form of the evidence that's been presented to
25 the Court. There's pages missing from the affidavits. Some

1 of these affidavits the affiant is mentioning prior
2 affidavits that aren't presented to the Court. The exhibits
3 that have been presented in support of the petition are
4 incomplete.

5 I can't remember, Your Honor, ever seeing an affidavit
6 from the Board that doesn't have exhibits attached to it. I
7 know a sign-in sheet, for example, of union meetings, that's
8 conspicuously absent here.

9 But beyond those problems of form, there are real
10 problems with substance. As you were indicating, we've had
11 no opportunity to question these, these individuals. This
12 hearing that is associated with this complaint that's before
13 the Court still hasn't even been scheduled.

14 They issued the complaint in March. Here we are six
15 months later. We're still waiting for an opportunity to
16 defend ourselves before the agency.

17 So as I'm sure the Court has experienced, when
18 witnesses are questioned, sometimes they recant testimony.
19 Sometimes you're able to attract admissions. Sometimes they
20 volunteer new information that exists free and clear of
21 conflicts with other evidence.

22 We should have due process. That is missing right now.
23 I also think it's a problem for the Court because the
24 Court's role here is not to decide as a final matter have
25 the hospitals engaged in unfair labor practices or not. The

1 Court's role is to give its best guess as to what the Board
2 is likely to do.

3 And what you've been presented with, Your Honor, is
4 evidence which is laden with hearsay. It is laden with
5 speculation. There's all sorts of problems with regard to
6 the evidence.

7 In proceedings before the Board, the Federal Rules of
8 Evidence do apply so far as practicable. So, Your Honor,
9 how is the Court supposed to figure out whether evidence in
10 this condition is evidence that's even likely to make its
11 way into a record that's going to be considered by the
12 agency? So those are the problems that we see with the
13 evidence that's been presented so far.

14 And then there's the problem of the evidence that
15 hasn't been presented at all. And that's rounding out the
16 totality of the circumstances.

17 And if the Court is, is inclined to develop it and
18 enhance the record further, I came prepared today, Your
19 Honor, to talk about the -- consistent with your order, that
20 the timing and the scope of the, of the discovery.

21 THE COURT: Well, just tell me very briefly what,
22 what you would suggest in that regard if I decide to do it.

23 MR. CARMODY: Yes, sir.

24 I, I think that the discovery, Your Honor, would --
25 well, first of all, whereas this is an extraordinary remedy,

1 it is also a proceeding that is supposed to move quickly.
2 Congress clearly envisioned 10(j) proceedings moving
3 quickly. So in terms of the timing of the discovery, we
4 would be prepared to, to move as quickly as the Court would,
5 would so desire.

6 In terms of the, of the scope of the, of the discovery,
7 we would want to establish, as I mentioned before, the fact
8 that we have proposed all of these bargaining dates and they
9 have been rejected; the fact that we have offered to engage
10 in marathon bargaining and that's been rejected; the fact
11 that the union has refused to provide information which is
12 relevant to our assessment of their own proposals. This
13 goes to the union's good faith slash bad faith in the
14 negotiations which is absolutely pertinent for a legal
15 theory of this nature.

16 And, again, we want to talk about what's happening now
17 with negotiations. We have -- in connection with the
18 bargaining session scheduled for October, the parties have
19 agreed to involve a federal mediator, Commissioner Clifford
20 Crum. He will be there and hopefully able to help the
21 parties erase or at least narrow the gaps between their
22 positions.

23 Grievance and arbitration, Your Honor, I know is
24 something that you mentioned when Mr. White was addressing
25 the Court. And if I may, I'd like to address that briefly.

1 Your Honor, I've been doing labor law for a while now.
2 I, I can't remember seeing a contract, quite honestly,
3 without grievance and arbitration machinery in it. It is,
4 it is commonplace, to say the least, in contracts.

5 But this case presents unusual circumstances which I'll
6 explain in a moment. But I first want to point out that
7 during the negotiations, even though my clients have
8 maintained the position thus far that grievance and
9 arbitration isn't appropriate, they have also made clear
10 that the union will retain its right to strike. So there is
11 in that sense a, a value that the union would be retaining
12 during this course of time.

13 But the reason for my client's reluctance thus far to
14 agree to grievance and arbitration -- and, incidentally, it
15 also explains the positions that have been taken with regard
16 to Ms. Jackson at Greenbrier and the information request.

17 It all arises, Your Honor, from a jury verdict that was
18 entered in February of last year out in the State of Ohio
19 with Affinity Medical Center, one of these hospitals that's
20 involved in the underlying case before the Board.

21 What happened in that case, Your Honor, is you had a
22 nurse who was suspected of neglecting the care of an elderly
23 patient and then falsifying the medical record to make it
24 appear as though she had given care to this patient.

25 She was brought into an investigatory interview where a

1 gentleman accompanies her as a, a *Weingarten* representative.
2 In these circumstances, the nurse had the right to have a
3 union representative present.

4 During that meeting, as you'd expect, the HR Director
5 shares with the nurse and the *Weingarten* representative what
6 the allegations were. And they also provide a document that
7 confirmed the suspension and confirmed what the allegations
8 were.

9 These facts were taken by a jury in the State of Ohio
10 as being defamation. When this setting was able to
11 crystallize, did crystallize only by virtue of that hospital
12 honoring that employee's rights to have a union rep present.
13 So we, we think about Bluefield and Greenbrier. They think
14 about: How does that affect us?

15 Well, if we're going to have grievance meetings and
16 we're going to have the union present and we're going to be
17 making allegations that Nurse Mary Smith, you know, beat up
18 a patient, did something, you know, really, really serious,
19 is the defamation exposure there real? There's over a
20 million reasons in the State of Ohio to think that something
21 like that could, could happen.

22 And, so, this was about, Your Honor, trying to find in
23 very difficult circumstances some measure of fair protection
24 for the hospital. It's a factual situation that I've never
25 encountered. Lawyers I've talked to, they've never

1 encountered it. It is a novel question for the National
2 Labor Relations Board. They've never encountered facts
3 close to this. So that's what explains why we did what we
4 did.

5 I do think, though, Your Honor, there is some reason to
6 be hopeful that when the parties convene in October, there
7 may be some progress with grievance and arbitration.
8 There's a concept that I know the parties have been
9 discussing, and I can't be clairvoyant and say there will be
10 a tentative agreement reached, but I think that they're
11 moving in the right direction in that regard.

12 THE COURT: Did I understand you that the union
13 had taken the position they didn't want a grievance
14 procedure because they wanted to retain the right to strike?

15 MR. CARMODY: No, that wouldn't be fair to say,
16 Your Honor.

17 THE COURT: I misunderstood you then.

18 MR. CARMODY: And, and maybe I wasn't clear,
19 Judge. No, no, the union in all fairness I think has --
20 again, I haven't attended the negotiations, but my
21 understanding is, and I'd be surprised if this weren't
22 correct, they have consistently made clear they want
23 grievance and arbitration --

24 THE COURT: Okay.

25 MR. CARMODY: -- for, for obvious reasons.

1 THE COURT: If you've got a grievance procedure --
2 an arbitration procedure, you can't strike until you run
3 through that procedure. Is that --

4 MR. CARMODY: Typically, no. Usually what --

5 THE COURT: I've got -- my labor law goes back to
6 the days of *Buffalo Forge* and the --

7 MR. CARMODY: Yes.

8 THE COURT: -- problems in the coal industry.
9 And, so, I have a vague recollection that that case held
10 that if there was a grievance procedure, it was an implied
11 no strike clause. I'm probably oversimplifying that and I
12 don't mean to confuse you.

13 MR. CARMODY: No, no, it rings a bell. It does,
14 Your Honor. What I can tell you is that for decades and
15 decades and decades in collective bargaining there's a *quid*
16 *pro quo*. This is how the law and certainly the Board
17 typically describes it.

18 The union has a statutory right to strike. Some courts
19 have even said a constitutional right to strike. They give
20 that up in exchange for grievance and arbitration.

21 The thinking is that if we're going to have a problem
22 with our employees or if our employees are going to have a
23 problem with the employer, there's got to be some mechanism
24 to address and hopefully resolve the problem if we're not
25 going to be able to strike. That's, that's grievance and

1 arbitration.

2 But we have made clear -- the union, I think, has made
3 clear they want grievance and arbitration. Thus far, we
4 have made clear that given what happened in Ohio and given
5 the same union sponsorship of that litigation out in Ohio,
6 we're uncomfortable about this. But so long as we go down
7 these, these tracks, you can retain your right to strike.
8 So there is in that sense a fairness here.

9 But, again, I do have reason to believe that when the
10 parties convene in October, there may be a concept that's
11 being discussed, and I'm happy to share it with Your Honor
12 if you'd like, that might, that might bridge that gap.

13 Just to finish up, Your Honor, I can do it quickly.

14 THE COURT: Let me ask you a question before you
15 do that.

16 MR. CARMODY: Yes, sir.

17 THE COURT: How do you answer the argument that
18 the decline in union membership or the decline in enthusiasm
19 for the union among workers over time is irreparable harm?

20 MR. CARMODY: Well, at the outset, I would say it
21 assumes lots of facts not in evidence.

22 Following that, I would say that it really comes out
23 of, I believe, the Ninth Circuit jurisprudence where -- and
24 this is the *Frankel vs. HTH Corp.* case. There the Court did
25 say that if there was a likelihood of success on the merits,

1 there are certain circumstances in which it would be
2 appropriate for the Court to infer the existence of
3 irreparable harm. That was really the Ninth Circuit's case,
4 *Frankel* was, to the *Winter* case from the Supreme Court.

5 There is nothing that I see in the Fourth Circuit's
6 jurisprudence, Your Honor, that would suggest it would have
7 the same approach in mind for the courts here, including
8 Your Honor. In fact --

9 THE COURT: Well, that approach by the Ninth
10 Circuit is inconsistent with law from other circuits, is it
11 not?

12 MR. CARMODY: I believe that's true, Your Honor,
13 including the Fourth Circuit. And the basis for that
14 contention -- I go back to this *Spartan Mining Company* case.
15 If you look at the facts there, what it involved essentially
16 is you had a mining company that was in bankruptcy. You had
17 another company stepping in to acquire those assets to run
18 the business.

19 The, the problem arose because that new owner didn't
20 want to hire the represented workers. And, so, the, the
21 mine workers filed unfair labor practices and pursued it
22 through the Board.

23 What the Fourth Circuit did in that case is they said,
24 all right, there is irreparable harm with regard to these
25 folks not having jobs because they're either going to retire

1 or move on. They've got to do something to address the
2 problem that they're not working.

3 But as to the claim by the general counsel that the
4 company should as an interim measure under Section 10(j) be
5 obligated to recognize and bargain with the union, the
6 Fourth Circuit said, "We're not going to go that far."

7 And that was in circumstances where five years had gone
8 by. By the time that the Fourth Circuit decided that case,
9 that union had been on the sidelines for a five-year period.

10 So if ever there were an opportunity for the Court, the
11 Fourth Circuit to come up with a judicial contract --
12 concept, rather, which is comparable to what the Ninth
13 Circuit had, it was, it was there. But that they didn't,
14 that they didn't do.

15 Your Honor, I was going to say just very quickly just
16 by way of example another area where we would want to pursue
17 discovery is you've heard a lot about this, this management
18 rights provision, this nefarious and unreasonable management
19 rights provision that was proposed by management.

20 Your Honor, I fully expect that if we had an
21 opportunity to serve documents, I guess subpoenas -- it
22 would be a nonparty -- on the union, you're going to see
23 that they have agreed, this same union, which is the
24 California Nurses Association headquartered in Oakland,
25 California, that's the union here, they have agreed to

1 management right provisions almost identical to what we
2 proposed here. There is no substantial difference.

3 And, Your Honor, finally, with regard to discovery and
4 a hearing and the concern that Mr. White expressed as to
5 employees and putting them in the difficult position of
6 being in between their employ at the union, I think that's a
7 fair point.

8 And it would be my intention to try to pursue through
9 the discovery process in a way that would minimize, if not
10 eliminate, the need to put those folks in that uncomfortable
11 position. I think that I could pursue discovery through the
12 union and leave the employees out.

13 And if for some reason the employees were put into the
14 discovery process, in cases such as this, Your Honor,
15 there's typically protective orders that the parties are
16 able to agree to. And they're typically so ordered by the
17 magistrate.

18 May I have just one moment to go through my notes, sir?

19 THE COURT: Yes, please.

20 MR. CARMODY: I believe those are the points I
21 wanted to share with the Court, Your Honor.

22 THE COURT: All right. Thank you, Mr. Carmody.

23 MR. CARMODY: Thank you, sir.

24 THE COURT: Mr. White.

25 MR. WHITE: Thank you for the extra time, Your

1 Honor.

2 Respondents' counsel made a couple of different points
3 that I just want to highlight briefly.

4 He cited *Muffley vs. Spartan Mining*, which I, I
5 apologize, I called it *Mammoth Coal*, but *Muffley vs. Spartan*
6 *Mining*. The issue in that case was that it can be
7 distinguished from here.

8 There was a successor employer at that, at that
9 facility. And there was also a well-established union at
10 that facility. So part of the reason the temporary
11 injunction wasn't ordered in that case was because the union
12 had been so established.

13 And to set the status quo back to the original, the
14 successor employer at the time it took over didn't have the
15 obligation to bargain at that time. And, so, the status
16 quo, the temporary injunctive order wasn't ordered in that
17 case. But I do want to name a couple quotes here from that
18 case.

19 That *Spartan Mining* case says, "Even a well-established
20 union like the UMWA," which is the union at that facility,
21 "might well lose support over time such that when the Board
22 does issue its order, it might be impossible for the union
23 to reconstitute. The passage of time does pose a very real
24 and potentially irreparable harm to the effectiveness of the
25 Board's eventual order."

1 They also say in that case, "Nonetheless, delay is an
2 unfortunate reality in any matter before the Board. And not
3 only because of the volume of its docket, complicated labor
4 disputes like this one require time to investigate and
5 litigate," which is exactly what we have here, Your Honor.

6 We have complicated litigation that takes quite a while
7 to investigate, not only these allegations but also the
8 allegations that have been consolidated in the nationwide
9 litigation.

10 And, finally, there's one other quote, Your Honor.
11 They contemplate in *Spartan Mining* the potential that
12 interim relief may be necessary. And this is a quote:

13 "Of course, such interim relief may be necessary to
14 preserve the Board's power in other cases with other facts,"
15 which is what we have here, Your Honor. We have a union
16 that was newly certified which was seeking its first
17 contract which essentially puts it in a very tenable
18 position with employees.

19 Now, also, Your Honor, respondent mentioned
20 Ms. Meadwell and the fact that she had several instances in
21 her affidavit in which nothing bad happened to her in terms
22 of what the respondent could do.

23 But I'll point to Ms. Meadwell's affidavit on Page 8
24 that says on the very bottom, "I recall that when I spoke
25 with RN Tamara Holbrook and RN Serena Phipps about Mike

1 Adams's suspension, both said that they were surprised that
2 I hadn't been fired due to my participation in the union and
3 that they would be afraid that they would be fired if they
4 participated in the union."

5 So she does have some evidence, Your Honor, of, of, of
6 employees' sentiment toward what the respondent would do and
7 the effect that these ULPs, the bad faith bargaining, the
8 refusal to bargain, and the surface bargaining have had on
9 employees.

10 Your Honor, respondent also mentioned a couple of
11 occasions in which it felt that the union had engaged in
12 some, some bad actions over the course of, I believe, many
13 years if I, if I remember correctly from his oral argument.

14 The issue here is the charge that is filed through the
15 National Labor Relations Board is not just for employees and
16 for unions. The employer can also file charges through the
17 NLRB. And to date, there have not been any charges filed
18 from the employer against the union for any bad faith
19 bargaining or any surface bargaining or anything related to
20 that.

21 THE COURT: Mr. White, it's my understanding that
22 the Fourth Circuit has held that as a general principle that
23 irreparable harm exists only when the remedy will become
24 unavailable unless a preliminary injunction is granted, and
25 the District Court's judgment, or the final judgment, even

1 if it is favorable, will remain unsatisfied.

2 You're asking for a very extraordinary remedy here in
3 light of that principle. Why is it necessary in this case?

4 MR. WHITE: Your Honor, I would say that this,
5 this case is an extraordinary situation in the sense that
6 you have a first contract bargaining situation with a newly
7 certified union.

8 Not only is the situation with regard to the union's
9 relationship to employees tenable but, again, I'll point to
10 the fact that the employees themselves are missing out on
11 benefits that could be accrued from now until ultimately
12 when the Board order issues. Those things are very real,
13 very substantial benefits, grievance procedures, wages,
14 schedule changes, anything like that.

15 THE COURT: They can ultimately get them, can't
16 they? If the final decision is in their favor, it would
17 include that, wouldn't it?

18 MR. WHITE: It may include that, Your Honor, and
19 then moving forward from the Board order they would have
20 those things. But, in essence, they would be stripped of
21 those things for the interim period between now and the
22 Board order.

23 So those potential benefits would be lost for that
24 interim period which could have potential -- could have
25 significant ramifications for some of those employees.

1 THE COURT: The Board can't go back and order the
2 benefits in the period before the -- before they went into
3 effect under the contract?

4 MR. WHITE: To the extent that it can be relegated
5 down to a monetary remedy, you're correct.

6 Now, with regard to things like schedules, we all
7 know -- some of us may have kids, things like that. When
8 you, when you, when you adjust someone's work schedule --
9 say, for instance, when you adjust someone's work schedule,
10 that has ramifications that are not only monetary, but
11 life-style issues, things like that.

12 And when you make those changes or when you, when you
13 hold off those changes for a two-, three-year period, that
14 could have significant ramifications for any number of
15 things for those employees.

16 I'll point out, Your Honor, that the allegations that
17 we have before you today relate to surface bargaining. And,
18 so, surface bargaining is based on the content, not on the
19 number of times that the parties have met.

20 We've mentioned a couple times where the parties have
21 met between the periods where we were initially talking
22 about that February, 2015 to October of -- and November of
23 2015. The parties met, I believe, in Bluefield four times
24 and Greenbrier eight times.

25 But, in essence, it's inconsequential in this case

1 because the surface bargaining is based on the content of
2 those negotiations, not in the number of times that they've
3 done that.

4 THE COURT: So you're -- to interrupt your
5 argument here and go back to a previous point, your argument
6 is that there's no way the union can recoup the rights it's
7 lost during this period of delay. Is that right?

8 MR. WHITE: Your Honor, that's partially correct.
9 The union themselves may be able to reconstitute some of the
10 benefits we were talking about in that they would be
11 included in the collective bargaining agreement. The effect
12 that's felt with regard to the benefits is really felt on
13 the employee level.

14 Now, where the union loses out is that, as cited by the
15 *Spartan Mining* case, is that the union can lose support of
16 employees over time. And that's well established not only
17 in the Ninth Circuit which is what was mentioned before, but
18 also in the Fourth Circuit that the passage of time can have
19 a significant effect.

20 THE COURT: Okay.

21 MR. WHITE: Your Honor, I will also point out
22 another case. There was a Middle District of North Carolina
23 case, *Clark vs. Fieldcrest*, which stands for the proposition
24 that hearsay statements are admissible in 10(j) injunction
25 cases. 10(j) injunction cases, as mentioned by respondents'

1 counsel, are to be expedited. And that's the general
2 principle behind why certain hearsay statements, affidavits
3 can be used to judge 10(j) injunction cases.

4 And, finally, to the last --

5 THE COURT: What was their rationale for admitting
6 hearsay?

7 MR. WHITE: I'm sorry?

8 THE COURT: What was their rationale for admitting
9 the hearsay statements? How did they get around the hearsay
10 rule?

11 MR. WHITE: Well, it stands for the general
12 principle that hearsay statements are admissible in the
13 sense that they made their decision based on only
14 affidavits.

15 THE COURT: Okay.

16 MR. WHITE: And, lastly, Your Honor, I want to
17 cover just the discovery.

18 To the extent that Your Honor would, would decide that
19 an evidentiary hearing and discovery was necessary,
20 petitioner would insist that the scope should encompass just
21 these allegations and just the allegations before you
22 pursuant to this case.

23 Again, there's complicated nationwide litigation. A
24 number of case numbers that are listed in those affidavits,
25 many of which have nothing to do with these specific surface

1 bargaining and bad faith bargaining allegations and the
2 Board's processes themselves don't allow for discovery. So
3 we would obviously want that to be significantly limited.

4 And one final point, Your Honor. Respondent raised
5 that a significant part of the rationale for why he wanted
6 discovery was to question the union. And he mentioned that
7 he, he may be able to do that without talking to employees
8 which I found surprising, Your Honor, because part of the
9 rationale for discovery or evidentiary hearing would be,
10 from your own mouth, Your Honor, was to cross-examine
11 witnesses.

12 THE COURT: You say he can't talk to the
13 employees. Right?

14 MR. WHITE: Not -- well, to the extent that he
15 would want to probe for unfair labor practices, yes.

16 And that's all I have for you, Your Honor.

17 THE COURT: Okay. Well, --

18 MR. CARMODY: Your Honor, may I respond briefly,
19 sir?

20 THE COURT: Do you have any objection to him
21 getting another crack at the apple here, Mr. White?
22 Normally your rebuttal is the last word, but I'd like to
23 hear from him if you don't object.

24 MR. WHITE: That would be fine with me, Your
25 Honor.

1 THE COURT: All right.

2 Go ahead, Mr. Carmody.

3 MR. CARMODY: Thank you, Your Honor. I appreciate
4 the accommodation, Your Honor, from you and my adversary
5 alike. Just a few very quick things, Your Honor.

6 In terms of the position that I'm hearing now that
7 hearsay ought to be admissible in a proceeding such as this,
8 that's a new argument. I don't think that's something that
9 was asserted in any of the papers thus far.

10 And I will tell you, Judge, that you'll probably find
11 some cases where hearsay was admitted. But in those cases,
12 there was an opportunity, some previous opportunity that the
13 employer had to question these individuals as to, as to the
14 facts at hand. Again, we haven't had that opportunity
15 because this is a complaint where the hearing still hasn't
16 yet even been scheduled.

17 I heard Mr. White make the point that if we were so
18 upset with the union, why didn't we file unfair labor
19 practice charges? And we could have done so. We could have
20 filed charges that the union was engaged in bad faith.

21 I have a pretty good idea what the fate of those
22 charges would have been. They would have been dismissed
23 because to evaluate those charges, the general counsel would
24 have to evaluate the totality of the circumstances which, of
25 course, they've already done to issue the complaint against

1 my clients and have now pursued this extraordinary remedy
2 before Your Honor.

3 There's also a case, and I don't have the citation
4 handy, but *South Alabama Plumbing* is a case that I know has
5 been decided by the Board. And essentially in that case the
6 Board said in order to claim that the union has engaged in
7 bad faith negotiations, there's not some type of requirement
8 to pursue a charge. In other words, you can raise it as a
9 shield but not as a sword.

10 Your Honor, you'll notice if the Court gets this far in
11 its consideration of the case that one of the components of
12 the order that they asked the Court to enter here is that my
13 clients could no longer insist on this package proposal.

14 And it would be our position that that's a clear-cut
15 violation of *H.K. Porter*. And, and that is not a power that
16 the Board or Court would possess.

17 Finally, Judge, there was some discussion before about
18 the public interest. And, and one of the things that I
19 wanted to share with the Court is my clients were, were not
20 happy about the union's conduct in terms of the election and
21 we did pursue a challenge to the election. And that
22 challenge before the Board was exhausted in December of
23 2014.

24 At that point in time, Your Honor, when you're testing
25 certification, as they say, what labor lawyers do, typically

1 what you'll see, almost always, is the employer will not sit
2 down and bargain with the union. They're going to not
3 recognize or bargain with the union until the Court of
4 Appeals steps in and says, "You've had your shot to convince
5 us that the certification wasn't firm. We disagree with
6 you. Let's get started with bargaining."

7 MR. WHITE: Your Honor, just to interrupt, I'm
8 sorry, I would object to this. This is going well beyond
9 rebuttal. To the extent --

10 THE COURT: Well, I think you're right, but I'm
11 going to hear it. I've given you a wide latitude.

12 I'll let you finish, Mr. Carmody, if you don't go too
13 much further out.

14 MR. CARMODY: Your Honor, I'm 30 seconds, I think,
15 from being done.

16 The point I was going to make is the, the lesson here
17 would be don't do that because what they're focusing upon
18 are the negotiations that took place in 2015. Had my
19 clients followed the process that most employers do, they
20 wouldn't have recognized, they wouldn't have bargained with
21 the union.

22 THE COURT: This argument goes to the delay
23 question, doesn't it? I mean, isn't it at least in part an
24 explanation of the lapse of time and that that would make it
25 proper rebuttal to what Mr. White said?

1 MR. CARMODY: You're right, Your Honor. It can be
2 viewed in that context as well as the public interest.

3 THE COURT: Your objection is overruled,
4 Mr. White. Okay.

5 MR. CARMODY: I'm finished, Your Honor.

6 THE COURT: One more question.

7 MR. CARMODY: Yes, sir.

8 THE COURT: Is it your position that if I deny the
9 injunction here and this matter goes to a final order, the
10 final order could be fashioned in such a way that it would
11 in effect recoup everything that the union and/or the
12 employees have lost because of the time that's gone by here?

13 MR. CARMODY: I'm not sure I understand your
14 question, Your Honor.

15 THE COURT: Well, I'm, I'm looking at the issue of
16 irreparable harm. It seems to me that if a final order can
17 take care of any damage that occurred in any way to the
18 union or to the employees, then there wouldn't be any
19 irreparable harm.

20 MR. CARMODY: Oh, a final order by the Board.

21 THE COURT: Yes.

22 MR. CARMODY: Yes, sir, yes, sir.

23 THE COURT: I'm sorry. I confused you. I wasn't
24 talking about a final order by me. I was talking about a
25 final order by the Board.

1 MR. CARMODY: Now I understand. Yes, it would be,
2 Your Honor.

3 THE COURT: And, and what would that order say?

4 MR. CARMODY: The Board's order?

5 THE COURT: Yeah.

6 MR. CARMODY: We, we discussed, Your Honor, in our
7 opposition the broad authority that the Board has under
8 Section 10 of the Act to remedy unfair labor practices.

9 So the U.S. Supreme Court -- there are several cases
10 and I know that they're cited in our opposition -- they have
11 made clear that the Board has broad authority. It's subject
12 to very, very narrow --

13 THE COURT: That's the very principle my law clerk
14 just handed me.

15 MR. CARMODY: Okay.

16 THE COURT: Okay.

17 MR. CARMODY: Okay? Thank you, Your Honor.

18 THE COURT: I've probably heard enough. And I
19 appreciate the argument. It's helpful to me and you're both
20 very well prepared which is always good. And I'm glad you
21 had an opportunity to see some of the beautiful scenery in
22 southern West Virginia, Mr. Carmody.

23 MR. CARMODY: I did enjoy it, Your Honor, albeit
24 without intention.

25 THE COURT: All right. I'll get to this promptly.

1 And thank you all very much.

2 (Proceedings concluded at 2:13 p.m.)

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10 I, Lisa A. Cook, Official Reporter of the United
11 States District Court for the Southern District of West
12 Virginia, do hereby certify that the foregoing is a true and
13 correct transcript, to the best of my ability, from the
14 record of proceedings in the above-entitled matter.

15

16

17 s\Lisa A. Cook

September 20, 2016

18 Reporter

Date

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