

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

NOVELIS CORPORATION)	
)	
Petitioner)	Nos. 16-3076, 16-3570
)	
v.)	Board Case Nos.
)	03-CA-121293 et al.
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent)	
)	
and)	
)	
UNITED STEEL, PAPER AND FORESTRY,)	
RUBBER, MANUFACTURING, ENERGY,)	
ALLIED INDUSTRIAL & SERVICE WORKERS)	
INTERNATIONAL UNION, AFL-CIO, CLC)	
)	
Intervenor)	

**OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD
TO NOVELIS CORPORATION’S MOTION FOR LEAVE
TO FILE AN OVERSIZED PRINCIPAL BRIEF**

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

The National Labor Relations Board, by its Deputy Associate General Counsel, hereby opposes the motion of Novelis Corporation for leave to file an oversized principal brief, and shows as follows:

1. On September 6, 2016, Novelis filed a petition for review of a Board Decision and Order dated August 26, 2016 (364 NLRB No. 101). On October 24,

the Board filed a cross-application for enforcement of its Order, and the Court subsequently consolidated the two cases.

2. On November 9, Novelis filed a motion for leave to file an oversized principal brief up to 21,000 words—a 50% increase from the limit provided by the rules.

3. The Board respectfully requests that the Court deny Novelis’s motion because, as explained below, Novelis has not shown that this case warrants such an unusual dispensation.

ARGUMENT

The Court “disfavors motions to file a brief exceeding the length permitted by FRAP 32(a)(7).” *See* Second Cir. Rule 27.1(e). In the Board’s view, Novelis has not provided sufficient justification to support its request for additional words in this case.

As an initial matter, neither the size of the record nor the length of the briefs below necessitates special treatment. While the record is substantial, it is not extraordinary for the transcript in a Board proceeding to contain over three thousand pages, for the accompanying exhibits to number in the hundreds, or for the briefs to the administrative law judge and to the Board to exceed administrative page limits. In Board counsel’s experience, the great majority of such large-record

cases can be briefed on appeal—where parties tend to narrow the issues and focus their arguments—within the standard page limit envisioned by the Federal Rules.

Indeed, while Novelis exhaustively lists the number of pages and words spent on the case below (Mot. ¶¶ 6-8), it ignores the need for appellate counsel to focus the issues before the Court. As the D.C. Circuit observed, “[i]t might be appropriate to suggest that in appellate argument, the proverbial rifle is preferable to a machine gun....” *San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1188 (D.C. Cir. 2012); *see generally Jones v. Barnes*, 463 U.S. 745, 752-53 (1983) (discussing appellate advocacy in general; “There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review”); *Beverly Calif. Corp. v. NLRB*, 227 F.3d 817, 829 (7th Cir. 2000) (rejecting employer’s request to file brief 40% longer than the rules permit; “[t]he pressure of a large complex proceeding puts a premium on good organization and efficient use of time and space, but that is a good thing, not a bad thing”); *United States v. Battle*, 163 F.3d 1, 2 (11th Cir. 1998) (“the best advocacy relies on selectivity”).

Moreover, the applicable standards of review for Board cases should inform Novelis’s choice of issues on appeal. *Beverly Calif.*, 227 F.3d at 829 (“the substantial evidence standard of review should guide appellate counsel in the selection of issues that deserve presentation to the court of appeals”). Novelis’s

motion indicates that many of the issues it will raise on appeal involve challenges to the Board's factual findings. (Mot. ¶ 4 (“this case involves numerous employer-employee interactions, employer speeches which must be taken in context and examined in their entirety, employer decisions, union actions, employee perceptions, and surrounding circumstances in relation to a failed union campaign”).) Yet, the Court will reject arguments where “the company simply disagrees with the Board's findings and asks [the Court] to accept its characterization of the evidence as though [the Court's] function were to determine facts rather than to decide whether the Board's findings are supported by substantial evidence on the record considered as a whole.” *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 958 (2d Cir. 1988). Similarly, to the extent that challenges to the Board's findings turn on its credibility determinations, Novelis faces a daunting standard of review and appealing Board findings that turn on those determinations makes little sense. *See e.g., NLRB v. Katz's Delicatessen of Houston Street, Inc.*, 80 F.3d 755, 763 (2d Cir. 1996) (credibility determinations of the administrative law judge, when adopted by the Board, “may not be disturbed unless incredible or flatly contradicted by undisputed documentary evidence” (quoting *S.E. Nichols*, 862 F.2d at 958)); *Beverly Calif.*, 227 F.3d at 829 (“Arguments to the effect that the ALJ should not have found certain witnesses to be credible are, to put it bluntly, almost never worth making”).

Thus, the substance of the case on appeal does not warrant oversized briefs. A common thread links all of the contested violations, which arose in the context of a union organizing campaign: Novelis engaged in coercive action to discourage employee support for the Union. Fact patterns like this are familiar to the Board and to this Court, and the substantial-evidence dispute regarding Novelis's violations should be fairly straightforward. The Board's imposition of a remedial bargaining order does not present a novel issue and does not necessitate expanding the word limit to address it, particularly if the other issues on appeal are chosen wisely and handled efficiently.

In sum, the Board submits that Novelis should be able to brief the issues in this case comfortably within the word limitations contained in the Federal Rules of Appellate Procedure and the Second Circuit Rules. In the alternative, should the Court be inclined to expand the word count, the Board believes that 16,000 words would be sufficient and presumes that the word count for its responsive brief would be expanded correspondingly.

WHEREFORE, the Board respectfully requests that the Court deny
Novelis's motion to exceed the word limit.

Respectfully submitted,

/s/ Linda Dreeben

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

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that the foregoing document will be served via the CM/ECF system on the following counsel, who are registered CM/ECF users:

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Dated at Washington, D.C.
November 15, 2016