UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMPERSAND PUBLISHING, LLC d/b/a SANTA BARBARA NEWS-PRESS Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner	)	Nos. 15-1082 15-1154 Board Case No. 31-CA-029253

OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD TO THE MOTION OF AMPERSAND PUBLISHING, LLC d/b/a SANTA BARBARA NEWS-PRESS FOR CONSOLIDATED OR COORDINATED ORAL ARGUMENT AND ASSIGNMENT TO A SPECIFIC PANEL

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

The National Labor Relations Board ("the Board"), by its Deputy Associate General Counsel, respectfully opposes the motion of Ampersand Publishing, LLC d/b/a Santa Barbara News-Press ("the Company") for consolidated or coordinated oral argument in *Ampersand Publishing, LLC d/b/a Santa Barbara News-Press v. NLRB*, Docket Nos. 15-1082 & 15-1154 ("*Ampersand II*"), and *Ampersand Publishing, LLC d/b/a Santa Barbara News-Press v. NLRB*, Docket Nos. 15-1074 & 15-1130 ("*Ampersand III*"). Contrary to the Company's claims, these cases are not related in any meaningful way. Rather, the operative facts and the unfair-

labor-practice issues to be decided are entirely separate. The only commonality is a jurisdictionally barred and meritless defense the Company has belatedly attempted to raise in both proceedings. Accordingly, consolidation or coordination of these unrelated cases would not only unduly delay resolution of *Ampersand II*, which is already scheduled for oral argument on December 9, 2016, but it would also make argument unnecessarily complex.

The Board likewise opposes the Company's extraordinary request for argument before a specific panel (Senior Circuit Judges Williams and Sentelle, and Circuit Judge Henderson) that decided a separate unfair-labor-practice case in favor of the Company nearly four years ago. *See Ampersand Publ'g, LLC v. NLRB*, 702 F.3d 51 (D.C. Cir. 2012) ("*Ampersand I*"). The Company's request for the *Ampersand I* panel creates needless scheduling challenges for the Court, as well as the potential for additional unnecessary delay, with no corresponding gains in efficiency or consistency of decision-making.

BACKGROUND

1. *Ampersand I*. In *Ampersand I*, the Court held that during the Union's organizing campaign in 2006 and early 2007, employees engaged in concerted activities that were unprotected because they were motivated by an objective of gaining control over the Company's editorial policies. 702 F.3d at 56-57.

2. *Ampersand II*. On November 3, 2014, the Board issued a Decision and Order against the Company, finding that it had engaged in a single unfair labor practice in May 2009. Specifically, the Board found that the Company had violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by serving subpoenas on current and former employees, demanding that they produce—directly to the Company, and outside the protective context of a hearing—copies of confidential affidavits given to the Board in the course of a government investigation into the Company's alleged unfair labor practices. *See* 361 NLRB No. 88, *incorporating by reference* 358 NLRB 1539 (2012). The Board specifically noted that *Ampersand I* did "not affect [its] decision." *Id.* at 1539, n.1.

The Company petitioned for review of the Board's order on April 9, 2015, and the Board cross-applied for enforcement. The parties have now fully briefed the single unfair-labor-practice issue presented in *Ampersand II*, and, as noted, the Court has scheduled oral argument for December 9, 2016.

3. *Ampersand III*. On March 17, 2015, the Board issued another Decision and Order against the Company, finding that it had violated Section 8(a)(1), (3), and (5) of the Act (29 U.S.C. § 158(a)(1), (3), and (5)) in numerous respects between May 2007 and May 2009. *See* 362 NLRB No. 26, *incorporating by reference* 358 NLRB 1415 (2012) and 359 NLRB No. 127 (2013). Specifically, as set forth in more detail in the Board's *Ampersand III* proof brief (pp. 19-21), the Board found that, after the Company's employees voted to be represented by the Union, the Company violated Section 8(a)(5) and (1) of the Act by: delaying furnishing information the Union required for collective-bargaining purposes; failing to notify and offer to bargain with the Union before making numerous unilateral changes to employees' terms and conditions of employment; dealing directly with an employee; and bargaining in bad faith over an extended period of time. The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging an employee because of his union activities, and by transferring work away from union-represented employees to weaken the Union. Finally, the Board found that the Company coerced employees in violation of Section 8(a)(1) of the Act.

The Board also noted that the Company had never argued that the Court's decision in *Ampersand I* had any impact on its findings or its order in *Ampersand III*. As a result, the Board observed, any such argument would be jurisdictionally

barred in a subsequent review proceeding. *See* Board Proof Br., *Ampersand III*, at 72-73.

The Company petitioned for review of the Board's order on March 31, 2015, and the Board cross-applied for enforcement. The briefing of *Ampersand III* is ongoing, with the Company's proof reply brief due on November 18, 2016, and the parties' final briefs due on December 9, 2016. Oral argument has not yet been scheduled.

4. Before now, the Company has not suggested any need for consolidation. In the Certificates of Interested Parties appended to the opening briefs in *Ampersand II* and *Ampersand III*, for instance, the Company asserted that the two cases are "related" because they involve "the same parties" and "similar" or "common core" issues. Opening Br., *Ampersand II*, at ii; Proof Opening Br., *Ampersand III*, at ii. Nevertheless, the Company did not request that the two cases be consolidated for any purpose.

Moreover, the same week that the Company filed its opening brief in *Ampersand II*, it separately moved in *Ampersand III* for leave to file an oversized 20,000-word opening brief, with no mention of *Ampersand II*. Case No. 15-1074, ECF Doc. No. 1594069. In support of that motion, the Company pointed to the underlying 3,427-page transcript in *Ampersand III* and argued that the case involved "dozens of separate allegations of unfair labor practices and failure to

bargain in good faith."[1] *Id.* at 2. Indeed, the Company represented that the numerous charges the Board addressed in *Ampersand III* "did not emerge from a common set of facts," but rather from many "factually distinct incidents," requiring that the Court "hear the facts and argument relevant to each specific violation of the Act." *Id.* at 2-3. And the Company further represented that it would need to "brief several complex legal issues and describe the relevant factual background giving rise to each." *Id.* at 3. Granting the Company's motion in part, the Court issued an order permitting 17,000-word opening briefs. Case No. 15-1074, ECF Doc. No. 1606597.

5. Having allowed *Ampersand II* and *Ampersand III* to proceed on separate tracks for over a year and a half, through completion of the briefing process in *Ampersand II*, the Company now asserts that it would promote "efficient use of the Court's resources" and "consistency in its decisions" to consolidate or coordinate argument in the two cases and to have the *Ampersand I* panel decide both cases. (Mot. at 3.) These contentions lack merit, and the Court should deny the Company's motion.

[1] Notably, in sharp contrast to the large record in *Ampersand III*, *Ampersand II* has a 104-page transcript.

ARGUMENT

1. Under the Court's practices and procedures, cases "may" be consolidated if doing so will achieve the efficient use of judicial resources and maintain consistency in the Court's decisions. *See* D.C. Circuit Handbook of Practice and Internal Procedures 23. The Court has recognized that a party seeking consolidation of distinct cases, or assignment of separate oral arguments to the same panel, bears the burden of "demonstrat[ing] that any benefit to the court's disposition of the[] [cases] would outweigh the administrative burdens likely to result from the requested relief." *Transcon. Gas Pipe Line Corp. v. FERC*, No. 93-1632, 1994 WL 315382, at *1 (D.C. Cir. June 16, 1994) (per curiam).

The Company has failed to carry that burden here. These cases involve two entirely separate Board decisions addressing dissimilar unfair labor practices. Given the two cases' different litigation stages, as well as their strikingly limited factual and legal commonalities, consolidation for argument is not appropriate, would unduly delay resolution of *Ampersand II*, and would unnecessarily complicate oral argument. Under these circumstances, the Company's requests would result in unneeded administrative burdens without any true benefit to the Court or the parties.

There are no significant factual or legal similarities between *Ampersand II* and *Ampersand III*. Although both cases have their genesis in the same labor

dispute between the Company and the Union, that is where the similarity begins and ends; the cases are otherwise legally and factually distinct. *Ampersand II* involves the Board's finding of a single unfair labor practice, based on undisputed evidence that the Company, over three days in May 2009, served subpoenas on employees improperly demanding pre-hearing production of confidential investigative affidavits. *Ampersand III*, by contrast, involves far more extensive unlawful conduct over a period of approximately two years, having nothing to do with the issuance of improper, coercive subpoenas. Indeed, as noted above (pp. 5-6), the Company trumpeted the unusual legal and factual complexity of *Ampersand III* in its motion for oversized briefs.

The Company errs (Mot. at 4) in insisting that consolidation or coordinated argument is warranted because a "core issue" nevertheless unites the two cases. The "core issue" to which the Company refers is not properly before the Court at all, as it is nothing more than a defense that the Company has belatedly sought to inject in these cases on appeal. At bottom, the Company's novel and unsupported defense is that because the Union pursued aims unprotected by the Act in the past, relating to the Company's editorial discretion, the First Amendment gives the Company license to violate its employees' rights under the Act in perpetuity. As explained in the Board's briefs, not only is that argument plainly wrong, the Company never raised it in the proceedings before the Board in either case.

Therefore, under Section 10(e) of the Act (29 U.S.C. § 160(e)), the Court lacks jurisdiction to consider it. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). Board Br., *Ampersand II*, at 30- 32; Board Proof Br., *Ampersand III*, at 71-75. The Company's tardy attempt to introduce the same jurisdictionally barred defense in two different cases does not warrant consolidating or coordinating them for argument.[2]

As these cases accordingly share only the most superficial of similarities—in the general background, an unpreserved defense the Court lacks jurisdiction to consider, and the identity of some but not all of the parties—there is no real efficiency to be gained from simultaneous or tandem consideration, as the Company suggests (Mot. at 5). On the contrary, consolidation at this late stage would serve only to delay resolution of a straightforward, single-issue case with a short transcript that is calendared for argument (*Ampersand II*), while the process of briefing continues to unfold and the Court prepares to hear argument in a separate, more complex case involving numerous and dissimilar unfair labor practices (*Ampersand III*). Further, given these strikingly different facts and legal issues, consolidation would serve only to make oral argument unnecessarily

[2] Furthermore, contrary to the Company's assertion (Mot. at 3), the parties before the Court in *Ampersand II* and *Ampersand III* are not identical. Rather, as the Company concedes (Mot. at 3 n.1), the Graphics Communications Conference of the International Brotherhood of Teamsters ("the Union") intervened and filed a brief in *Ampersand III*, but did not do so in *Ampersand II*.

complicated with no benefit to the Court or the parties. And contrary to the Company's claims (Mot. 4-5), consolidation is not necessary to ensure consistent results between the two cases. Indeed, because no common issues are properly before the Court, there is no danger of any real tension in the ultimate decisions in these cases simply because they were not heard at the same time, by the same panel.

2. There is no cause for the Court to entertain the disruption of its normal panel-assignment process that would be created by the Company's request for consolidated or coordinated argument before the same panel that decided *Ampersand I* nearly four years ago. The Company has failed to identify any compelling need to justify that extraordinary imposition on the Court's schedule.

As explained above, the Company's contentions regarding the relevancy of *Ampersand I* are not properly before the Court. And no special familiarity with that case will be necessary for different panels to apply Section 10(e)'s jurisdictional bar in *Ampersand II* and *Ampersand III*. In any event, even if Section 10(e) had no application here, the Board's findings and the underlying records in those cases separately and soundly refute the unsupported and ahistorical representations (Mot. at 7-8) the Company offers in an attempt to conflate the facts of those cases with the earlier events previously at issue in *Ampersand I*. The Board submits that any panel of this Court assigned according

to the Court's regular procedures will be well equipped to evaluate those representations by simply reviewing the Court's succinct recitation of the operative facts in its *Ampersand I* decision, 702 F.3d at 53-55, and the parties' briefs in *Ampersand II* and *Ampersand III*. *See* Board Br., *Ampersand II*, at 27-28, 32-34; Board Proof Br., *Ampersand III*, at 65-80.

Moreover, the Company's suggestion (Mot. at 6) that only the *Ampersand I* panel is competent to decide *Ampersand II* and *Ampersand III* flies in the face of the basic principle of *stare decisis*, long recognized by the Court, that a panel of the Court is bound by another panel's prior decision. *See, e.g.*, *Humane Soc'y of U.S. v. EPA*, 790 F.2d 106, 111 n.32 (D.C. Cir. 1986) (citing *United States v. Doe*, 730 F.2d 1529, 1531 n.2 (D.C. Cir. 1984)). Thus, even if the Company's arguments based on *Ampersand I* were properly before the Court, there would be no basis for presuming that any panel of the Court would disregard its obligation faithfully to apply the law set forth by Senior Circuit Judges Williams and Sentelle and Circuit Judge Henderson in *Ampersand I*.

WHEREFORE, the Board respectfully opposes the Company's requests for: (1) consolidation of the above-captioned cases for oral argument or, in the alternative, coordinated argument on the same day before the same panel; and (2) argument before the same panel that heard and decided *Ampersand I*.

/s/ Linda Dreeben
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Dated at Washington, D.C.
this 3rd day of November 2016

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CERTIFICATE OF SERVICE

I hereby certify that, on November 3, 2016, I electronically filed the foregoing Opposition with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that all counsel of record are registered CM/ECF users and have been served through the CM/ECF system.

/s/ Linda Dreeben
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Dated at Washington, D.C.
this 3rd day of November 2016