

Oral Argument Scheduled for February 17, 2017

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

GVS PROPERTIES, LLC)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 15-1305
)	15-1350
NATIONAL LABOR RELATIONS BOARD)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
INTERNATIONAL ASSOCIATION OF)	
MACHINISTS AND AEROSPACE WORKERS,)	
AFL-CIO, DISTRICT LODGE 15, LOCAL)	
LODGE 447)	
Intervenor)	

**REPLY OF THE NATIONAL LABOR RELATIONS BOARD
TO GVS'S RESPONSE TO THE BOARD'S MOTION TO DISMISS,
CANCEL ORAL ARGUMENT,
AND VACATE THE BOARD'S ORDER AS MOOT**

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

The National Labor Relations Board, by its Deputy Associate General Counsel, has filed a motion to dismiss the petition for review and cross-application for enforcement, the latter with prejudice; cancel oral argument; and vacate the Board's Order on mootness grounds. In its response, GVS does not specifically oppose that course of action. Regarding vacatur, however, GVS suggests that if

the Court were to deem the proceeding moot, then the Court should not only vacate the Board's Order as moot, but also ensure "that it is of no precedential value" and even "remove" the Order from the Board's reported volumes. (Resp. at 6.) As explained below, these requests are unwarranted and highly inappropriate.

1. Given the Union's disclaimer of interest in representing the bargaining unit, the Board no longer seeks enforcement of its Order, which would have required GVS, as a successor employer, to recognize and bargain with the Union on request. This development also means that there is no longer a controversy for the court to resolve. Further, if the Court dismisses the petition for review and cross-application for enforcement with prejudice, and vacates the Order as moot, then there will no longer be an order running against GVS. Simply put, once vacated, the Order can never be used against GVS, and GVS will be under no legal obligation to comply with the Order. Indeed, that is all the relief GVS could have obtained had a reviewing court denied enforcement of the Board's Order on the merits.

2. Not content to be relieved of any and all legal compulsion in this case, GVS complains that the Board's Decision "could potentially remain as precedent," possibly impacting it and "other real estate developers" in future cases. (Resp. at

4.) GVS, however, lacks standing to seek relief on behalf of other developers.¹

Just as fundamentally, its concern about what might happen in future cases is entirely speculative. Board orders are not self-enforcing, and if the Board were to issue a decision and order in some future case addressing the successorship issue presented here, then the “person aggrieved” by such an order would be entitled to petition for review under 10(f) of the Act. At that time, a court of appeals will have the opportunity to review the agency’s decision. Unless and until those events come to pass, however, there is no judicially reviewable case or controversy.²

3. Contrary to GVS’s suggestion, *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), supports vacating the Board’s Order on mootness grounds, not erasing it from the books. As the Supreme Court subsequently explained in *A.L. Mechling Barge Lines, Inc. v. U.S.*, 368 U.S. 324, 329 (1961), *Munsingwear* “expressed the view that a party should not be concluded [sic] in subsequent

¹ Under Section 10(f) of the Act, 29 U.S.C. 160(f), standing is limited to “person[s] aggrieved” by a Board order. This limitation is equivalent to the injury-in-fact requirement for standing under Article III of the Constitution. *Bell & Howell Co. v. NLRB*, 598 F.2d 136, 142 (D.C. Cir. 1979).

² To present a case or controversy under Article III, a petitioner must demonstrate that it “suffered a concrete and particularized injury that is imminent and not conjectural, that was caused by the challenged action, and that is likely to be redressed by a favorable decision.” *Texas v. EPA*, 726 F.3d 180, 198 (D.C. Cir. 2013). Further, a party may not gain judicial review of an administrative proceeding merely because it is displeased with the outcome; it must still meet standing requirements. *U.S. v. Fed. Maritime Comm’n*, 694 F.2d 793, 800 n.25 (D.C. Cir. 1982).

litigation by a District Court’s resolution of issues, when appellate review . . . fails because of intervening mootness.” *Mechling Barge* found this principle “equally applicable to unreviewed administrative orders,” and concluded that because disposition of the case there “rest[ed] solely on mootness,” it was “not to be taken as foreclosing determination, on any future occasion,” of the merits issues addressed by the district court. 368 U.S. at 329-30. Consistent with these cases, the Board’s Order should be vacated on mootness grounds. *See NTA Graphics, Inc. v. NLRB*, 114 U.S. 1124 (1994) (relying on *Munsingwear* and *Mechling Barge* in vacating Board order as moot).

4. Finally, GVS errs in suggesting (Resp. at 6) that the Board’s Decision and Order could somehow be erased from the Board’s reported volumes, as if it had never been issued. Contrary to GVS’s suggestion, that did not occur in *NTA Graphics, Inc.*, 316 NLRB 25 (1995). Rather, the underlying Decision and Order there simply happened to be an unreported one.

WHEREFORE, the Board respectfully requests that the Court grant its motion to dismiss the petition for review and the cross-application for enforcement with prejudice, remove the case from the oral argument calendar, and vacate the Board's Order on mootness grounds.

Respectfully submitted,

/s/Linda Dreeben

Linda Dreeben

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National Labor Relations Board

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(202) 273-2960

Dated at Washington, DC
this 14th day of February 2017

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CERTIFICATE OF SERVICE

I certify that on February 14, 2017, I electronically filed the foregoing motion 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 were served through the CM/ECF system.

Dated at Washington, DC this 14th day of February 2017	/s/Linda Dreeben Linda Dreeben Deputy Associate General Counsel National Labor Relations Board 1015 Half Street, SE Washington, DC 20570 (202) 273-2960
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its Reply to the Response to the Motion to Dismiss, Cancel Argument, and Vacate as Moot contains 801 words in proportionally spaced, 14-point Time New Roman type, and that the word processing system used was Microsoft Word 2003.

Dated at Washington, DC this 14th day of February 2017	<u>/s/Linda Dreeben</u> Linda Dreeben Deputy Associate General Counsel National Labor Relations Board 1015 Half Street, SE Washington, DC 20570 (202) 273-2960
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