

16-0495-ag(L)
The Cement League, et al. v. NLRB, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION 'SUMMARY ORDER'). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for
2 the Second Circuit, held at the Thurgood Marshall United States
3 Courthouse, 40 Foley Square, in the City of New York, on the
4 21st day of April, two thousand seventeen.

5
6 PRESENT: JOHN M. WALKER, JR.,
7 DENNIS JACOBS,
8 BARRINGTON D. PARKER,
9 Circuit Judges.

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11 - - - - -X
12 THE CEMENT LEAGUE, NEW YORK CITY AND
13 VICINITY DISTRICT COUNCIL OF
14 CARPENTERS,

15 Petitioners-
16 Cross-Respondents,

17
18 -v.-

16-0495-ag(L),
16-0972-ag(XAP)

19
20 NATIONAL LABOR RELATIONS BOARD,
21 Respondent-
22 Cross-Petitioner,
23
24 NORTHEAST REGIONAL COUNCIL OF CARPENTERS,
25 Intervenor.

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27 - - - - -X

1 **FOR PETITIONERS-CROSS-RESPONDENTS:**

2
3 MICHAEL SALGO; New York, NY.

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5 James M. Murphy, Gillian Costello;
6 Spivak Lipton LLP, New York, NY.

7
8 Andrew D. Roth, Adam Bellotti;
9 Bredhoff & Kaiser PLLC,
10 Washington, DC.

11
12 Paul Salvatore, Andrew E. Rice;
13 Proskauer Rose LLP, New York, NY.

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15 **FOR RESPONDENT-CROSS-PETITIONER:**

16
17 KYLE A. DECANT, Robert J.
18 Englehart; National Labor
19 Relations Board, Washington, DC.

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21 **FOR INTERVENOR:**

22 RAYMOND G. HEINEMAN; Kroll
23 Heineman Carton, Iselin, NJ.

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25
26 Petition for review of an order of the National Labor
27 Relations Board.

28
29 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND**
30 **DECREED** that the petitions for review are **DENIED**, the
31 cross-petition for enforcement is **GRANTED** and the issuance of
32 the mandate is **HELD IN ABEYANCE**; the Clerk of Court is directed
33 to deliver a copy of this order to U.S. District Judge Richard
34 M. Berman, and the mandate **SHALL NOT ISSUE** until the lesser of
35 30 days from the issuance of this order or until the parties
36 advise this court as to Judge Berman's view whether this order
37 bears upon matters that are within the jurisdiction of his
38 supervision of a consent order in United States v. NYC Council,
39 No. 1:90-cv-5722. This order shall be subject to any further
40 measures that may be appropriate in light of such views as he
41 may express.

1 Petitioners--Cross-Respondents New York City and Vicinity
2 District Council of Carpenters ("NYC Council") and The Cement
3 League petition this court for review of a decision and order
4 of the National Labor Relations Board ("NLRB" or the "Board"),
5 which held that a provision of the collective bargaining
6 agreement ("CBA") between the NYC Council and The Cement League
7 violates the National Labor Relations Act ("NLRA") and ordered
8 that the provision not be enforced. The NLRB, joined by
9 Intervenor Northeast Regional Council of Carpenters ("Northeast
10 Council"), cross-petitions for enforcement of the NLRB's order.
11 We assume the parties' familiarity with the underlying facts,
12 the procedural history, and the issues presented for review.

13 The NYC Council and the Northeast Council are regional
14 councils--i.e., intermediate bodies--of the United Brotherhood
15 of Carpenters & Joiners of America. The NYC Council is composed
16 of union locals principally within New York City, and the
17 Northeast Council is composed of union locals principally in
18 northern New Jersey, upstate New York, and on Long Island. The
19 Cement League is an employer association that bargains on behalf
20 of its membership, which includes large construction contractors
21 doing business in New York City.

22 The Cement League has, over many years, executed a series
23 of CBAs with the NYC Council. Several versions of the CBA have
24 provided that covered employers could select fifty percent of
25 their employees from any source, without regard to union
26 membership, and had to hire the other fifty percent from an
27 out-of-work list that is maintained by the NYC Council but is
28 open to nonmembers. A recent modification of the CBA afforded
29 employers complete discretion to hire anybody they wish without
30 use of the out-of-work list if and only if the people they hire
31 are members of the NYC Council. Employers who hire nonmembers
32 must still match their selected employees one-to-one with hires
33 from the out-of-work list.

34 Given this "full-mobility" provision, an employer that has
35 a regular crew of employees and undertakes a project in New York
36 City covered by the CBA has an incentive to encourage its
37 employees to join the NYC Council in order to bypass the
38 requirement of matching them one-to-one with hires from the
39 out-of-work list. (Members of the Northeast Council can

1 transfer their membership easily and freely.) The Northeast
2 Council challenged the provision as an unfair labor practice
3 before the NLRB, on the ground that it effectuates a hiring
4 preference based on membership in the NYC Council, in violation
5 of § 8(a)(1) of the NLRA (29 U.S.C. § 158(a)(1)). That subsection
6 prohibits employers from interfering with, restraining, or
7 coercing employees in the exercise of their § 7 rights under
8 the NLRA, including the right to join or refrain from joining
9 a labor organization. Following a hearing, the administrative
10 law judge ("ALJ") found that The Cement League's CBA violated
11 the NLRA as alleged. The NYC Council, joined by The Cement
12 League, filed exceptions, and in February 2016, the NLRB issued
13 its decision agreeing with the ALJ.

14 The Cement League and NYC Council have petitioned for review
15 of that NLRB decision and the NLRB has cross-petitioned for
16 enforcement. The Northeast Council has intervened in support
17 of the NLRB.

18 "Our review is deferential: This court reviews the Board's
19 legal conclusions to ensure that they have a reasonable basis
20 in law. In so doing, we afford the Board a degree of legal
21 leeway." Long Island Head Start Child Dev. Servs. v. NLRB, 460
22 F.3d 254, 257 (2d Cir. 2006) (internal quotation marks omitted).
23 We uphold "the NLRB's legal determinations if not arbitrary and
24 capricious." Id. (internal quotation marks omitted).

25 Neither The Cement League nor the NYC Council argued before
26 the ALJ that the challenged provision of their CBA comports with
27 the NLRA; nor, after the ALJ concluded that the provision
28 violates the NLRA, did either of them file an exception to that
29 conclusion. We are therefore statutorily barred from
30 considering any challenge to that ruling now "unless the failure
31 or neglect to urge such objection shall be excused because of
32 extraordinary circumstances." 29 U.S.C. § 160(e).
33 Petitioners point to no extraordinary circumstance. We
34 therefore accept as uncontested for purposes of this proceeding
35 that the enforcement of the challenged provision of the CBA
36 violates the NLRA.

37 The NYC Council and The Cement League's only argument is
38 that any violation is merely technical or de minimis and was

1 in any event validated by court order. They contend that the
2 challenged provision furthers the anticorruption objectives of
3 a consent decree that the NYC Council entered in 1994 to settle
4 a civil RICO action brought by the Department of Justice. The
5 U.S. District Court for the Southern District of New York
6 (Berman, J.) monitors that consent decree and must review any
7 CBA that the NYC Council enters; acting in that capacity, the
8 district court approved the CBA in question. The NYC Council
9 and The Cement League argue that the NLRB should defer to that
10 approval, notwithstanding any technical NLRA violation.

11 The NLRB rejected that argument, reasoning that the district
12 court did not consider compliance with the NLRA and did not
13 premise approval upon it; that the challenged provision did not
14 appear to have been approved on the basis of an anticorruption
15 purpose or effect; and that any such anticorruption goal could
16 be served instead by NLRA-compliant hiring provisions. To the
17 extent that the NLRB is correct about the district court's
18 analysis, the NLRB's order has a reasonable basis in law and
19 is not arbitrary and capricious.

20 Accordingly, and subject to any further measures that may
21 be appropriate in light of such views as U.S. District Judge
22 Richard M. Berman may express, we hereby **DENY** the petition for
23 review of the NLRB's decision, **GRANT** the cross-petition for
24 enforcement of the order, and the issuance of the mandate is
25 **HELD IN ABEYANCE**; the Clerk of Court is directed to deliver a
26 copy of this order to U.S. District Judge Richard M. Berman,
27 and the mandate **SHALL NOT ISSUE** until the lesser of 30 days from
28 the issuance of this order or until the parties advise this court
29 as to Judge Berman's view whether this order bears upon matters
30 that are within the jurisdiction of his supervision of a consent
31 order in United States v. NYC Council, No. 1:90-cv-5722.

32 FOR THE COURT:
33 CATHERINE O'HAGAN WOLFE, CLERK

A circular official seal of the United States Court of Appeals for the Second Circuit is stamped over the signature. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS". The signature is written in cursive over the seal.