16-3076

No. 16-3570

United States Court of Appeals for the Second Circuit

NOVELIS CORPORATION, *Petitioner – Cross-Respondent,*
and

JOHN TESORIERO, MICHAEL MALONE, RICHARD FARRANDS, AND ANDREW DUSCHEN, *Intervenors,*
-v-

NATIONAL LABOR RELATIONS BOARD, *Respondent – Cross-Petitioner,*
and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, *Intervenor.*

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF INTERVENORS JOHN TESORIERO, MICHAEL MALONE, RICHARD FARRANDS, AND ANDREW DUSCHEN IN SUPPORT OF NOVELIS CORPORATION'S PETITION FOR REVIEW OF NLRB DECISION AND ORDER

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INTRODUCTION

The current Novelis employees have a fundamental and statutory right to select their own bargaining representative. The National Labor Relations Board has wrongfully denied them this right by: (1) invalidating the initial election results, in which the employees rejected the Union; and (2) having found unlawful conduct, by refusing to order the traditional remedy of a rerun election.

Intervenors respectfully submit this Reply Brief in further support of their challenge to the unwarranted and extraordinary bargaining order imposed on them and their co-workers by the NLRB.

All parties recognize that *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969) and its progeny establish the controlling legal principles for the analysis of the bargaining order issue. Under *Gissel*, a necessary prerequisite to the issuance of a bargaining order is a finding that the Union established majority status. 395 U.S. at 614. In this case, majority status cannot be shown (and a bargaining order cannot issue) because the attempted authentication of the union cards, at trial, was seriously and systematically flawed.

Further, the Board, in its decision, failed to demonstrate that the preferred, traditional remedies and a re-run election would be ineffective in determining the employees' preference for or against union representation.

Neither the Board nor the Intervenor Union has advanced an adequate justification for the Board's decision on this record.

Accordingly, to the extent that the Court upholds the Board's unfair labor practices findings, the Court must, nonetheless, reverse the NLRB order to impose union representation upon the Intervenors and the other Novelis employees by government fiat, rather than through a self-determination election.

ARGUMENT

NEITHER THE BOARD NOR THE INTERVENOR UNION HAS SUBSTANTIATED THE NEED FOR AN EXTRAORDINARY BARGAINING ORDER REMEDY

I. The Finding of Union Majority Status Cannot Be Sustained.

Regarding the first *Gissel* prerequisite – a showing of majority status -- Intervenors have asserted two principal arguments: (1) that, in fact, the GC failed to establish the Union's majority status because 52 of the union cards were not properly authenticated at trial (see Int. Br. at 11-22);[1] and (2) in the evaluation of the alternative remedies that *Gissel et al*. require, the Board and this Court cannot ignore the glaring weaknesses and systemic unreliability of the authorization card evidence as the predicate for disenfranchising the Novelis employees.

[1] Intervenors' Principal Brief is cited herein as "Int. Br." Novelis' Principal Brief is cited as "Nov. Br." The Board's Principal Brief is cited as "Bd. Br." The Intervenor Union's Brief is cited as "Un. Br."

Before this Court, the Board choose only to respond to the first issue.[2] In that response, the Board's assertion that Intervenors did not properly file exceptions to the ALJ's authentication of the union cards is clearly incorrect.[3] See Intervenors Exceptions to the Decision of the ALJ at p. 2 (exception #3) and Memorandum of Law in Support of Exceptions at p. 28 ("While the ALJ found that the General Counsel had authenticated 351 cards (ALJD at 63), his analysis is perhaps the weakest, most questionable aspect of his decision. Essentially, the ALJ relied on the words written on the card and his eyeballing of the employees' signatures, regardless of perjured testimony, misrepresentations, credited security records that the solicitor was not on site when the card was signed, and a host of other conflicting testimony over the process by which cards were obtained.")

Before this Court, the Board is also wrong in casting Intervenors' argument as a challenge to the Board's credibility findings.[4] In fact, Intervenors rely on the ALJ's credibility findings, particularly relating to Chris Spencer (ALJ Decision at 18, n. 36 (Spencer "was not entirely credible")) and the security records (*Id.* ("reliable and mostly accurate"), to demonstrate the lack of substantial evidence and fatal flaws in the analysis of the card authentication. Notably, the ALJ concluded that certain cards were signed off-site (*Id.*), apparently because the

[2] See Bd. Br. at 63-72.
[3] Bd. Br. at 65.
[4] Bd. Br. at 66-67.

security records demonstrate that either the solicitor or the signer were not at the plant on the days in question. However, the only record evidence on where the cards were signed is the witness testimony that the cards were signed at the plant. The ALJ's conclusions and basis to authenticate the cards was spun from whole cloth.

II. A Full and Complete *Gissel* Analysis Establishes that a Rerun Election Better Protects Employee Free Choice.

In their effort to justify the bargaining order to this Court, the Board and the Intervenor Union focus on their categorization of the alleged unfair labor practices as "hallmark" and "serious" violations, on the perceived "continuing coercive influence" of that conduct, and on the need to impose a bargaining order to prevent the employer from benefitting from its misconduct.

Lost in these myriad arguments is proper consideration for the Section 7 rights of the Novelis employees (new and old) to select a representative for themselves. In *Gissel*, the Supreme Court articulated this need for a balanced approach:

> The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. . . . If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee

> sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

395 U.S. at 614-15 (emphasis supplied).

This Court has also expressed the importance of protecting employee free choice:

> Our preference not to enforce a bargaining order in all but the most extreme of circumstances 'reflects the important policy that employees not have union representation forced upon them when, by exercise of their free will, they might choose otherwise.' *NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 230 (2d Cir. 1983). It needs saying that, in a union representation election, the NLRB has no vote.

Kinney Drugs, Inc., v. NLRB, 74 F.3d 1419, 1432 (2d Cir. 1996); see also, *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 214 (2d Cir. 1980) (if relevant factors are ignored, a bargaining order could "unnecessarily thwart[] the genuine desires of the current work force. If a new election would reliably reflect genuine, uncoerced employee sentiment, it does not reward the employer to hold one.")

Even in the context of evaluating "hallmark" violations in *Gissel II* cases, this Court has held that the analysis of the unlawful conduct alone is not sufficient and so-called "hallmark" violations will not support the issuance of a bargaining order where some significant mitigating circumstances exist. *NLRB v. Jamaica Towing*, 632 F.2d at 212; *J.L.M., Inc. v. NLRB*, 31 F.3d 79, 83-84 (2d Cir. 1994).

Neither the Board in its decision or in its brief to this Court, nor the Intervenor Union, seek to balance whether, at the time of the Board's decision,

"employee sentiment" would be "better protected" by a second election or reliance on the sentiment expressed in the union cards, as *Gissel* requires. 395 U.S. at 614-15. While the Board concluded that the likelihood of a fair election was slight (Board decision at 5-6), it did not engage in the balancing required to determine whether the expression of current employee sentiment is better protected through self-determination or the "admittedly inferior" cards. *Gissel*, 395 U.S. at 603.

On the present record, the reliability of the expression of employee sentiment through the card authentication is paper thin, at best, and the purported showing is only of a slim majority from 2014, which is wholly inadequate to supersede the employees' right to self-determination, as of the time of the NLRB's decision.[5] It is simply inconceivable, on a review of the hearing record in this case, to conclude that the proof of the showing of union support is so superior to a second secret ballot election, under existing law and policy, that a remedy predicated on that showing is the sole appropriate remedy.

Moreover, the subsequent and mitigating circumstances to the alleged unfair practices are substantial. They include:

- A rigorous and open pro- and anti-union campaign that was conducted throughout January and February 2014;

[5] With 255 additional employees by the time of the Board's decision, even the 352 cards would not represent a majority.

- Substantial voter turnout at the election with the result ultimately decided by a slim margin of 287 to 273 with 10 challenged ballots and 1 void ballot out of 599 eligible employees at the time (ALJ decision at 32; GC. Ex. 13). See, *Kinney Drugs*, 73 F.3d at 1432;
- Subsequently, at least 255 additional employees have been hired into the bargaining unit (Int. Br. at 25);
- At least 84 employees who were eligible to vote were no longer employed at the time of the Board's decision (*Id.*);
- The two senior Novelis leaders, Philip Martens and Chris Smith, who the NLRB pilloried for "hallmark" threats of job loss and other allegedly unlawful remarks, are no longer employed with Novelis (*Id.* at 26);
- Other managers who were alleged to have committed unfair practices are also no longer employed;
- The U.S. District Court for the Northern District of New York temporarily enjoined substantial aspects of Novelis' conduct including the return of Mr. Abare to his prior position, but specifically declined to issue an interim bargaining order because the evidence before the court showed that the employees were sharply divided over unionization and the court could not comfortably resolve the issue of irreparable harm. *Ley v. Novelis Corp.*, 2014 U.S. Dist. LEXIS 123059, (N.D.N.Y. Sept. 4, 2014);

- Novelis established full compliance with the terms of the District Court injunction in September 2014 including full reinstatement of Mr. Abare, suspension of its social media policy, public reading of the court's order to all employees, and publication of the court's order throughout the plant, and thereby re-established the status quo ante. ALJ Decision at 68.[6] By the time of the Board's Decision, that pre-election status quo had been in place for almost two years; and
- Finally, 2½ years had elapsed between the election and the Board's decision.

Given the recognized superiority of, and preference for, the secret ballot election, the Board carries a heavy burden to justify a bargaining order in lieu of a second election. See *J.L.M., Inc. v. NLRB*, 31 F.3d 79, 83-84 (2d Cir. 1994)(bargaining order is a rare remedy warranted only when it is clearly established that traditional remedies cannot eliminate the effects of the employer's past unfair labor practices).

Where, as here, the Board, in its decision and before this Court, does not carefully "analyze not only the nature of the misconduct but 'the surrounding and

[6] Intervenor Union's argument that the reading of the court's order perpetuated the impact of the alleged unlawful conduct (Un. Br. at note 18) perversely stands the rationale for remedial notice posting on its head.

succeeding events in each case.' (*Id.*, *citing J.J. Newberry Co. v. NLRB,* 645 F.2d 148, 153 (2d Cir. 1981)), its order cannot be enforced.

While, in its brief, the Board relies on footnote 17 from the Board's decision to make the argument that the Board adequately considered subsequent events,[7] this argument is wholly unpersuasive. Footnote 17 was the Board's weak attempt to placate the judicial requirement that it evaluate the bargaining order issue as of the time of its decision. In that analysis the Board wholly ignores most of the relevant "surrounding and succeeding events" including specifically, the slim margin of the vote, the 10(j) injunction, Novelis compliance with that injunction and, perhaps most significantly, the fact that Martens and Smith, the faces of Novelis' campaign, are no longer with Novelis. See Board Decision at 6, note 17. Before this Court, the Board simply cannot defend these significant omissions.

The Board is charged with carefully protecting employees' freedom to choose their representatives while remedying unlawful conduct. In response to the Intervenors' concerns that the NLRB's order will deprive them of their statutory rights for up to three years, give the Union exclusive control over their wages, benefits, and other terms and conditions of employment, and adversely affect their employment, the Board cites to *Gissel* for support. But, of course, Gissel explained that, as a matter of law, the impact that bargaining orders would have on

[7] See Bd. Br. at 80-84.

employees' free choice was not so severe or long lasting as to rule out that remedy in every case. 395 U.S. at 612-13. It does not follow that in this case, on a proper analysis of the "surrounding and succeeding events," a bargaining order is warranted. Further, the Board's conclusion that Intervenors can wait a reasonable time and then pursue decertification (Board Decision at 6) is oddly inconsistent with its position that, years after the alleged unfair labor practices were remedied by the District Court's injunction, a fair election cannot be held.

In summary, the Board's analysis gave far too little weight and value to the secret ballot election process and the primacy of the employees' choice that are protected by Section 7. By its own terms, the Board's decision does not meet the rigorous *Gissel* standard for issuance of a bargaining order. When one considers the remedial impact of the 10(j) Injunction, the numerous new employees who have worked solely under the terms of that injunction, the departures of Martens and Smith, the employee turnover, the passage of nearly three years since the election, and the totality of the circumstances (all of which the Board failed to do), this record is wholly inadequate to support the conclusion that the sophisticated Novelis employees facility would no longer be able to make a free choice on union representation -- the paramount interest protected by the Act. *Rollins Transp. Sys.*, 296 NLRB 793, 794 (1989).

CONCLUSION

Issuance of a bargaining order in this case would eviscerate, rather than enforce, the policy of the NLRA because it would violate the statutory rights of the Intervenors and their co-workers, to self-determine their union representation through the NLRA election process. Accordingly, if the Court upholds the Board's decision that Novelis engaged in conduct sufficient to set aside the February 2014 election, Intervenors respectfully request that the Court overturn the issuance of a bargaining order and instead, instruct the Board to conduct a second election.

Dated: April 27, 2017

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,223 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point.

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Dated: April 27, 2017

CERTIFICATE OF SERVICE

I, Thomas G. Eron, Esq., do hereby certify that on April 27, 2017 an electronic copy of Intervenors' Reply Brief in Support of Petitioner Novelis Corporation's Petition For Review Of NLRB Decision and Order was filed with the Court via the CM/ECF system and that I have completed the service section in CM/ECF when filing said Brief listing the following Filing Users:

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I, Thomas G. Eron, hereby certify under penalty of perjury that on April 27, 2017, I served six (6) copies of Intervenors' Reply Brief in Support of Petitioner Novelis Corporation's Petition For Review Of NLRB Decision And Order by U.S. Mail and E-mail to:

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