

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

ALLIED AVIATION SERVICE COMPANY)	
OF NEW JERSEY)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 15-1321
)	& 15-1360
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	22-CA-127150
)	
and)	
)	
LOCAL 553, INTERNATIONAL BROTHERHOOD)	
OF TEAMSTERS)	
)	
Intervenor)	
)	
)	
)	

**OPPOSITION OF THE NATIONAL LABOR
RELATIONS BOARD TO ALLIED AVIATION’S EMERGENCY
MOTION FOR STAY OF ENFORCEMENT PENDING
SUBMISSION OF A WRIT OF CERTIORARI**

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, opposes the motion of Allied Aviation Service Company of New Jersey (“Allied”) to stay enforcement of the Court’s decision pending Allied’s petition for a writ of certiorari. As explained below, Allied ignores the fact that mandate has issued in this case and it is well established that recall of the mandate is an extraordinary remedy that

can only be granted in exceptional cases. This is not such a case, and Allied has not even attempted to argue that this case satisfies the heightened standard for such an extraordinary remedy. Furthermore, even applying the standard to stay enforcement under which Allied pleads its case, a stay is not justified.

I. BACKGROUND

On June 7, 2012, a unit of Allied's Fueling Supervisors, Tank Farm Supervisors, and Maintenance Supervisors at its Newark airport location voted for representation by Local 553, International Brotherhood of Teamsters ("the Union") in a Board-conducted secret-ballot election. On December 3, 2013, following a post-election hearing on challenged ballots, the Board issued a certification of representative for the unit employees. Allied refused to recognize and bargain with the Union, raising for the first time the validity of the Board's certification on the grounds that it is not an employer within the meaning of the National Labor Relations Act ("the Act") but rather is subject to the Railway Labor Act ("the RLA") and, therefore, the Board lacked jurisdiction. On August 19, 2015, the Board, rejecting Allied's jurisdictional challenge on the merits and finding that all other issues Allied raised were or could have been litigated in the underlying representation (election) proceeding, issued a Decision and Order finding that Allied's refusal violated Section 8(a)(5) and (1) (29 U.S.C. § 158(a)(5) and (1)) of the Act. The Board's order requires Allied to recognize the Union and, on request, bargain with it, as well as to post a remedial notice at its facility.

On April 18, 2017, in a published opinion, this Court enforced the Board's order in full, rejecting Allied's argument that the Board lacked jurisdiction over Allied because its work is so extensively directed by common carriers at Newark airport that Allied is governed by the RLA.¹ *Allied Aviation Serv. Co. of New Jersey v. NLRB*, 854 F.3d 55, 58-59 (D.C. Cir. 2017). Allied filed a petition for rehearing and rehearing en banc, both of which the Court denied on June 23. On July 3, the Court issued mandate in this case.

On July 25, Allied filed an emergency motion to stay enforcement of the Court's decision pending a petition for certiorari to the Supreme Court.² Because mandate has issued, Allied's motion implicitly asks the Court to recall the mandate and set aside the judgment.

II. ARGUMENT

A. Allied Has Not Met Its Burden of Showing Extraordinary Circumstances Warranting a Recall of Mandate

¹ The Court rejected additional arguments Allied raised in its petition for review of the Board's order. Allied did not reassert those arguments in its petition for rehearing or rehearing en banc, nor has it reasserted them in its motion for a stay of enforcement, or as a basis for its planned petition for certiorari.

² Allied contends (Motion at 4) that the reason for the "emergency" nature of its motion filed on July 25 is that the Board sent a request for compliance indicating that Allied must post the remedial notice within 14 days, which Allied states expires on July 31. Allied further states (Motion at 9) that the Board issued a demand on July 18 that Allied commence bargaining with the Union by August 4. The Board sent its standard request for compliance on July 12. (Allied has also attached to its motion another July 12 letter requesting compliance with a settlement agreement in a different case, which was contingent on resolution of the case before this Court.) Allied utterly fails to show how the Board's solicitation of compliance with a court-enforced Board order constitutes an emergency.

It is well established that “[i]ssuance of the mandate formally marks the end of appellate jurisdiction.” *Johnson v. Bechtel Assocs. Prof’l Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986). Accordingly, once a mandate has been issued, “it is logically and legally too late to stay it.” *Meredith v. Fair*, 306 F.2d 374, 376 (5th Cir. 1962). In the instant case, because mandate has already issued, Allied’s “sole alternative [i]s a motion to recall the mandate.” *Johnson*, 801 F.2d at 416. *See also Meredith*, 306 F.2d at 376 (“Unless the Court should recall the mandate, the Court’s control over the judgment below comes to an end after the mandate has been issued.”).

The Supreme Court has held that the power to recall a mandate “can be exercised only in extraordinary circumstances,” and that such power “is one of last resort, to be held in reserve against grave, unforeseen contingencies.” *Calderon v. Thompson*, 523 U.S. 538, 550 (1998); *accord Johnson*, 801 F.2d at 416 (limiting the power to recall the mandate to “exceptional circumstances”). Such circumstances do not exist in the present case, and Allied has not even attempted to allege them. There are no “grave, unforeseen contingencies” that would warrant recalling the mandate or excuse Allied’s delay leading to what it has deemed an “emergency” in its motion. Instead, like thousands of other litigants, Allied has merely decided to seek a writ of certiorari from the Supreme Court. That decision is far from an “extraordinary circumstance” justifying recall of the mandate. *See, e.g., United States v. Holland*, 1 F.3d 454, 455-56 (7th Cir. 1993) (Ripple, J., in chambers) (denying motion to recall mandate where movant had

merely filed for certiorari). Simply put, the alleged burden to Allied in having to comply with the Court's order does not constitute an "extraordinary" or "unforeseen" contingency that would justify recalling the mandate. *See Calderon*, 523 U.S. at 550.

B. Even if Mandate Were Recalled, Allied Has Not Shown that a Stay of Enforcement is Warranted

Even if this Court were to recall the mandate and therefore reach the question of a stay of enforcement, Allied has to show that it has "a reasonable probability of succeeding on the merits" before the Supreme Court and that it "will suffer irreparable injury" if the stay is not granted. *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993) (Ripple, J., in chambers). *See also Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Neither of those showings has been made here.

i. Allied Has Not Shown a Reasonable Probability of Success on the Merits for Its Planned Petition for Certiorari

First, to show a reasonable probability of succeeding on the merits, a party must demonstrate a "reasonable probability that four Justices will vote to grant certiorari and a reasonable possibility that five will vote to reverse the judgment of [the appeals] court." *Holland*, 1 F.3d at 456 (Ripple, J., in chambers) (citing *Rostker*, 448 U.S. at 1308 (Brennan, J., in chambers)). Allied has not, and cannot, meet that test.

It is highly unlikely that the Supreme Court will grant certiorari given that Allied's petition will not assert a conflict among the courts of appeals. As Allied admits (Motion at 10-11), there is presently no conflict in the circuits on the issue it seeks to present

regarding the carrier control test for RLA jurisdiction. *See* U.S. S. Ct. R. 10(a). Indeed, not only is there a lack of a circuit split, but the Court’s decision here and in *ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017), are the only circuit court decisions to address the issue Allied claims will be the subject of its petition for certiorari.

Allied’s attempt (Motion at 14) to claim a conflict between those two decisions is to no avail. Not only is there no conflict but, even if there were, an intra-circuit conflict is not a basis for further review. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (“It is primarily the task of a [c]ourt of [a]ppeals to reconcile its internal difficulties.”). In *ABM Onsite*, the Court remanded a Board decision that rejected a claim of RLA jurisdiction. The Court explained that in 2013, the NMB made an unexplained departure from precedent by focusing on only one factor—“that air carriers exercise a substantial ‘degree of control over the firing[] and discipline of a company’s employees’—before it would find that company subject to the RLA,” rather than applying the six-factor test to determine whether an employer is under the control of a carrier, as previously required. 849 F.3d at 1144-45. The Court directed the Board on remand to either offer its own reasoned explanation for the changes in the traditional test

or refer the jurisdictional question to the NMB “and ask[] that agency to explain its decision to change course” (*id.* at 1147).³

There is no conflict between that decision and the Court’s decision here that substantial evidence supported the Board’s determination that Allied was subject to NLRB jurisdiction. As the Court explained, the Board’s decision was distinguishable from the Board decision considered in *ABM Onsite*, because the Board here did not rely only on a single factor, but “acknowledged the relevance of all of the factors and reasonably concluded that Allied’s evidence fell short even under the traditional six-factor test.” *Allied Aviation*, 854 F.3d at 63. The Court’s decision, therefore, wholly refutes Allied’s claim (Motion at 16) that the decision here “represents an adoption of a ‘new test’ which was specifically rejected” in *ABM Onsite*.⁴

³ The Board has accepted the remand but has not yet issued any decision. (See Letter from Board Office of Executive Secretary April 21, 2017, at Attachment A.) Therefore, any outstanding questions as to the carrier control test have not yet been answered by either administrative agency (the Board or the NMB) whose jurisdiction is potentially implicated. Contrary to Allied’s suggestion (Motion at 15), the mere possibility that future agency decisions could eventually lead to a conflict in the circuits on an issue of RLA jurisdiction does not establish a probability that four Justices will vote for certiorari.

⁴ Allied pointlessly seeks to conjure up (Motion at 11-12, 13-14) a “potential split” between the D.C. Circuit and the Second Circuit, based on a convoluted—and incorrect—claim about how the Board has cited the Court’s *Allied* decision to the Second Circuit. Allied incorrectly claims (Motion at 14) that a brief the Board’s General Counsel filed in the Second Circuit cited the Court’s decision in this case as support for the single-factor test rejected in *ABM*, which, it hypothesizes, could lead to a future conflict between this Court and the Second Circuit. The brief, which was filed before the Court’s *Allied* decision issued, in fact cited the Board’s decision in *Allied Aviation*, 362 NLRB No. 173 (2015). See *Paulsen v. Primeflight Aviation Servs.*, 2d Cir. Case Nos. 16-3877,

Nor does the case present any significant legal issue that would compel the Supreme Court to grant certiorari in the absence of a circuit split, much less to reverse this Court's decision. Allied repeatedly asserts (Motion at 3, 11, 13, 17) that this Court improperly held that Allied had waived "a non-waivable jurisdictional objection" that it is an employer covered by the RLA. That assertion is simply wrong. Allied fails to acknowledge that the Court did not rely on waiver, but explicitly addressed the jurisdictional issue: "[W]e need not decide whether Allied forfeited its bid for the [Board] to dismiss this case in order that it might be reheard before the NMB because the record clearly supports the [Board]'s exercise of jurisdiction." *Allied Aviation*, 854 F.3d at 63.

Nor, contrary to Allied's assertion (Motion at 16-17), is any issue presented with respect to the standard of review or burden of establishing jurisdiction. Allied did not present any argument to the Court, in either its opening brief or reply brief, as to the proper standard of review or evidentiary burden, despite the Board's arguments regarding both points (Br. 21-22, 24-25). *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.") (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)). In any event, in reviewing the Board's decision, the Court correctly

17-8 (appeal of district court injunction pending). In any event, a hypothetical claim of conflict presents no basis for a grant of certiorari.

determined that the Board’s conclusion that Allied failed to establish it is subject to the RLA is “legally correct *and* supported by substantial evidence.” 854 F.3d at 62 (emphasis added).

In short, this case turns not on any legal issue, but on the application of an uncontested legal standard to the factual record. This Court upheld the Board’s findings under the six-factor test to determine carrier control—the test Allied claims is the correct test—and held that the Board properly rejected Allied’s jurisdictional claim of RLA-coverage based on the lack of record evidence of carrier control. *Id.* As the Court observed, the “lack of record evidence of carrier control is not surprising” because “Allied missed chances to build a record on the issue by failing to object to NLRB jurisdiction until after the factual record had been developed.” *Id.*⁵ A case that turns simply on the facts (or lack thereof), like this one, does not warrant Supreme Court action. *See* Sup. Ct. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . .”).

ii. Allied Has Not Shown Irreparable Harm

Given Allied’s failure to show a reasonable probability that certiorari will be granted and that this Court’s decision will be reversed, this Court need not consider the

⁵ When the Board’s hearing officer directly asked whether Allied was owned or controlled by an RLA carrier, Allied’s acting general manager/operations manager testified, “Not that I know of. I would have to look into that.” (JA 141.) As the Court stated, “neither during the ensuing five days of hearings nor during the following two years of proceedings before the Board did Allied ‘look into’ the question or make any mention whatsoever of any objection to the [Board]’s jurisdiction.” 854 F.3d at 61.

element of irreparable harm. *See, e.g., Rostker*, 448 U.S. at 1308 (showing of both reasonable probability of success and irreparable harm required for stay of mandate). In any event, as shown below, Allied has not established that it will suffer irreparable harm as a result of bargaining with the Union while its petition for certiorari is pending. At the same time, Allied ignores the significant harm that employees' rights under the Act will suffer from further delay.

Allied avers that if it “commences the bargaining process, it may subject not only itself, but the global transportation system, to a possible work stoppage.” (Motion at 19.) Allied acknowledges that the Act provides some procedural safeguards against a work stoppage, but that it has fewer such safeguards than the RLA “in the event the negotiations reach impasse.” (Motion at 20.) Allied fails to acknowledge that simply beginning the bargaining process does not lead to an impasse. Allied then proceeds to claim that a strike, however remote the possibility, by the approximately 44 employees in this unit at one of its locations providing fueling services, would cripple global air transportation. In an effort to avoid its obligations under an order of this Court, for which mandate has already issued, Allied has spun out a scenario of a potential work stoppage before it has even arrived at the bargaining table. Its contrived and hyperbolic focus on a work stoppage does not constitute irreparable harm.⁶

⁶ Allied states (Motion at 19) that it risks a contempt proceeding for not commencing compliance with its bargaining obligation, and it has designated its motion as an “emergency” because of the Board’s request for compliance. However, solicitation of

Likewise, Allied falls far short of demonstrating (Motion at 19) that it will be irreparably harmed by having to post a notice accurately advising employees that “[t]he National Labor Relations Board has found that [Allied] violated Federal labor law,” and promising that Allied will bargain with the representative its employees selected. The Court’s decision upholding the Board’s findings is already a matter of public record, as will be any petition for certiorari Allied may file. Accordingly, employees will learn about the petition in due course.

Allied goes on to posit that the Union would suffer “little harm if bargaining is delayed another few months.” (Motion at 20.) However, vindication of employee rights has been delayed over three years from the time the Union was certified as the Board and appellate review process has, thus far, run its course. Contrary to Allied’s assumption, that regrettable fact is no justification for authorizing further delay by recalling the mandate and staying enforcement while Allied seeks rarely granted discretionary review in the Supreme Court. Employee rights, in the interim, will suffer.

It is settled that an employer’s refusal to bargain with employees’ legitimately chosen representative “disrupts the employees’ morale, deters their organizational

compliance with a court judgment does not constitute irreparable harm. Moreover, the Board’s issuance of its standard post-enforcement compliance letter does nothing to change Allied’s obligation to bargain, which flows from the Court’s enforcement of the Board’s order. And, in any event, Allied overlooks that it can avoid contempt sanctions by simply complying with the Board’s Order while the Supreme Court considers its petition. As shown above, Allied suffers no harm from compliance, which requires bargaining in good faith with the Union, posting a notice, and refraining from like or related violations of the Act.

activities, and discourages their membership in unions.” *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 49-50 (1987) (quoting *Frank Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944)). Allowing Allied to prolong its refusal to bargain would continue that disruption of employees’ rights and would interfere with their “significant interest” in “being represented as soon as possible” after voting in favor of the Union. *Id.* at 49; accord *Frankl v. HTH Corp.*, 650 F.3d 1334, 1362 (9th Cir. 2011) (“[C]ontinuation of th[e] unfair labor practice, failure to bargain in good faith, has long been understood as likely causing an irreparable injury to union representation.”); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996) (“As time passes, the benefits of unionization are lost and the spark to organize is extinguished. The deprivation to employees from the delay in bargaining and the diminution of union support is immeasurable.”).

WHEREFORE, the Board respectfully requests that the Court deny Allied’s emergency motion to stay enforcement pending its submission of a petition for writ of certiorari.

Respectfully submitted,

/s/ Linda Dreeben

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Dated at Washington, DC
this 4th day of August, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its opposition contains 2,613 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
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Dated at Washington, DC
this 4th day of August, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2017, I electronically filed the foregoing document with Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Linda Dreeben
Linda Dreeben
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Dated at Washington, D.C.
this 4th day of August, 2017