

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEWARK ELECTRIC CORP., ET AL.)	
)	
Petitioners/Cross-Respondents)	Nos. 15-1111
)	15-1162
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

**OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD
TO PETITIONER/CROSS-RESPONDENT’S MOTION TO
RECALL THE MANDATE AND STAY BOARD PROCEEDINGS**

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” or “NLRB”), by its Deputy Associate General Counsel, opposes the motion of Petitioner/Cross-Respondent Newark Electric Corp., et. al. (“the Companies”) to recall the mandate and stay Board proceedings in this case. The Companies have not established any basis for these extraordinary actions, which would serve only to delay final resolution of this case.

PROCEDURAL BACKGROUND

The present case originated with unfair-labor-practice charges filed by the International Brotherhood of Electrical Workers, Local 840 (“the Union”), alleging

that the Companies, as a single employer and alter egos, violated various provisions of the National Labor Relations Act (29 U.S.C. §§ 151 et seq.) (“the Act”) by refusing to recognize and bargain with the Union, repudiating certain written agreements with the Union, and constructively discharging an employee because he was a union member. Acting on the Union’s charges, the Regional Director for NLRB Region 3 issued a complaint, under the authority of Acting General Counsel Lafe Solomon, against the Companies. In the ensuing administrative proceedings, the Companies argued, unsuccessfully, that the complaint was improper because Acting General Counsel Solomon was not authorized to serve in his position under the Federal Vacancies Reform Act (5 U.S.C. §§ 3345 et seq.) (“FVRA”) when the complaint issued on May 30, 2013.

On March 26, 2015, the Board issued a Decision and Order, finding that the Companies had committed unfair labor practices as alleged in the complaint. 362 NLRB No. 44. The Companies thereafter petitioned for review of the Order in this Court, and the Board cross-applied for enforcement.

On April 18, 2016, after the close of briefing, the Court placed the case in abeyance pending the Supreme Court’s consideration of the FVRA issue in *NLRB v. SW General, Inc.*, 136 S. Ct. 2489 (April 6, 2016) (No. 15-1251), *granting cert. review of* 796 F.3d 67 (D.C. Cir. 2015). On March 21, 2017, the Supreme Court issued its decision, which held, in agreement with this Court, that under FVRA,

Acting General Counsel Solomon could not continue serving in his position after former President Obama nominated him to be General Counsel on January 5, 2011. *NLRB v. SW General, Inc.*, 137 S. Ct. 929. Accordingly, the Supreme Court affirmed this Court's order vacating the Board's order against SW General, which was based on a complaint issued under Acting General Counsel Solomon after January 5, 2011. 137 S. Ct. at 944.

In light of the Supreme Court's decision, the Board immediately moved the Court to vacate the underlying Order against the Companies in this case and remand the case to the Board, "to enable the Agency to take further action consistent with the Supreme Court's decision." (Mot. for Remand 3.) The Board further moved that the Court "exercise its discretion to issue the mandate forthwith and return the record, so that the agency may give prompt consideration to the case." (Mot. for Remand 6.) The Companies agreed that vacatur was appropriate, but opposed the motion for remand and said nothing about the Board's separate request for expedited issuance of the mandate. The Court ultimately granted the Board's motion and remanded the case to the Board on July 14, 2017, issuing its mandate the same day.

On July 18, 2017, the Board advised the parties that it had accepted the remand and invited them to file position statements with respect to the issues raised by the remand. Ten days later, the Companies filed a motion in this Court, seeking

recall of the mandate and a stay of Board proceedings pending resolution of the request for recall.

ARGUMENT

As this Court has emphasized, “[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, “in light of ‘the profound interests in repose’ attaching to the mandate of a court of appeals[,] . . . the power [to recall a mandate] can be exercised only in extraordinary circumstances,” as a “last resort” to address “grave, unforeseen contingencies.” *Calderon v. Thompson*, 523 U.S. 538, 550 (1998) (citation omitted); *accord Greater Boston Tel. Corp. v. FCC*, 463 F.2d 268, 277-78 (D.C. Cir. 1971) (noting that the Court’s recall power is to be used “sparingly,” only in “exceptional circumstances,” and that recall is “the exception rather than the rule” (internal quotation marks and citations omitted)). Here, the Companies have failed to demonstrate “exceptional circumstances” or “grave, unforeseen contingencies” necessary to warrant recalling the mandate.

1. The Companies argue that recall is necessary to “avoid[] differences in results” between this case and *SW General*, noting that the relevant court orders in *SW General* do not expressly provide for a remand, whereas the Court’s order in this case does so. (Mot. 3-4, *citing Greater Boston Tel.*, 463 F.2d at 278-79.) The Companies’ argument is without merit.

The absence of an express remand order in *SW General* does not preclude further proceedings before the Board in that case. Indeed, as this Court recognized in *Noel Canning v. NLRB*, 823 F.3d 76, 79-80 (2016), where a court vacates a Board decision without a remand “for reasons unrelated to the merits,” the Board may consider the merits of the case in a subsequent proceeding. *Id.* at 80. In *SW General*, this Court vacated the Board’s order without considering the merits of the case. Accordingly, consistent with *Noel Canning*, the vacatur in *SW General* does not necessarily mean, as the Companies assert, that “the complaint against the employer must be discontinued with prejudice” or without the possibility of any further proceedings. (Mot. 12.)

Because the Companies have misinterpreted the import of the vacatur in *SW General*, their assertions of disparate treatment are without any sound basis. The Companies, thus, have failed to establish that the Court must recall the mandate “to prevent injustice.” *Greater Boston Tel.*, 463 F.2d at 277 (internal quotation marks and citation omitted).

Contrary to the Companies’ further claim (Mot. 10-11), the remand in this case does not suggest any pre-determined conclusion. Rather, as the Board explained in its earlier filings, the remand simply enables the current General Counsel “to consider ratification of the complaint” previously issued under Acting General Counsel Lafe Solomon, or “to take some other appropriate action to

address the charging party’s timely-filed allegations.” (Board Mot. for Remand and Expedited Mandate 4; Board Reply 2.) Thereafter, assuming *arguendo*, that the General Counsel ratifies the complaint, the Board will have the opportunity “to consider the effect of any action taken by the General Counsel,” as well as to consider the laches argument identified in the Court’s remand order. (Board Mot. for Remand 4; Board Reply 2.) Importantly, as the Court’s remand order recognized, the Companies will have the option of later court review, if and when the Board issues a final reviewable order, and if the Companies are aggrieved by it.

2. There is similarly no merit to the Companies’ alternative argument that the Court must recall the mandate in order to provide “specific instructions as to the issues to be addressed on remand.” (Mot. 8; *see also* Mot. 9-10.) The Court’s remand of the present case “for further proceedings before the Board” in light of *SW General* is entirely consistent with the practice the Court has followed in the wake of other Supreme Court decisions invalidating agency action for reasons unrelated to the merits of any unfair-labor-practice claim.¹

¹ *See, e.g., Lancaster Symphony Orchestra v. NLRB*, Case Nos. 12-1371 & 12-1384 (D.C. Cir. Oct. 21, 2014) (remanding case to the Board “for further proceedings,” citing *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)), *on remand* 361 NLRB No. 101 (2014), *enforced*, 822 F.3d 563 (D.C. Cir. 2016); *Marquez Bros. Enters., Inc. v. NLRB*, Nos. 12-1278 & 12-1357 (D.C. Cir. Nov. 18, 2014) (same), *on remand* 361 NLRB No. 150 (2014), *enforced*, 650 F. App’x 25 (D.C. Cir. 2016); *Allied Mech. Servs. v. NLRB*, Case Nos. 08-1213, 08-1240 (D.C. Cir., Sept. 20, 2010) (remanding “for further proceedings before the Board,” citing *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and *Laurel Baye Healthcare*

Moreover, much of what the Companies now raise, they could have raised in their prior pleadings and did not do so. For example, the Companies never mentioned any need for specific remand instructions in their response to the Board's motion for a remand, nor did they explain why, in their view, mandate should not issue immediately. The Companies' strategic oversights and belated arguments do not qualify as extraordinary circumstances warranting recall of the mandate.

Even at this late stage, in asking the Court to take the extraordinary step of recalling the mandate, the Companies provide no justification for any particular instruction, much less an accounting of what "specific instructions" are purportedly necessary. The Companies instead rest on a litany of speculations as to what the Board's motives will be on remand. (Mot. 8-11.) Plainly, such speculations are insufficient to justify recalling the mandate.

3. To the extent that the Companies seek to clarify the matters to be addressed on remand (Mot. 8-10), and to press their laches argument (Mot. 7-8), they can do so in a position statement before the Board, which, as noted, the Board has already solicited. The Companies' continuing effort to litigate remand-related matters before this Court only compounds the problem of delay of which the Companies have complained, and impedes the orderly consideration and resolution

of Lake Lanier, Inc. v. NLRB, 564 F.3d 469, 476 (D.C. Cir. 2009)), *on remand* 356 NLRB No. 1 (2010), *enforced*, 668 F.3d 758 (D.C. Cir. 2012).

of the Companies' concerns through the administrative process, as contemplated by the Court's mandate. As the Court specifically noted in its remand order, the Companies can seek judicial review if they are aggrieved by a final Board order. Later review, rather than recall of the mandate, is the proper procedural vehicle for the Companies' concerns.

Likewise, the Companies' request that the Court stay further Board proceedings pending ruling on their recall motion should be denied. The Companies, which did not file their motion until 10 days after the Board issued the order to file position statements, show no basis for the Court to take such extraordinary action where the Board has exclusive jurisdiction and the Companies have not shown, and cannot show, irreparable harm from denial of a stay. Accordingly, in the interest of promoting timely resolution of this case, the Board urges the Court to deny the Companies' request for a stay of administrative proceedings, as well as their request for recall of the mandate.

WHEREFORE, the Board respectfully requests that the Court deny the Companies' motion to recall the mandate and stay proceedings before the Board.

Respectfully submitted

/s/ Linda Dreeben

Linda Dreeben

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Dated at Washington, D.C.
this 7th 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 the foregoing Opposition contains 1,810 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, 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 parties or their counsel of record are CM/ECF users and will be served through the CM/ECF system.

/s/ Linda Dreeben

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Dated at Washington, D.C.
this 7th day of August 2017