UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.	)	
Petitioner/Cross-Respondent	)	Nos. 15-1126
v.	)	15-1168
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 ACTION

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 Midwest Terminals of Toledo International, Inc. ("the Company") to recall the mandate and stay Board action in this case. The Company has not established any basis for these extraordinary actions, which would serve only to delay final resolution of the case.

PROCEDURAL BACKGROUND

The present case originated with unfair-labor-practice charges filed by several individual employees and Local 1982, International Longshoremen's Association, AFL–CIO ("the Union"). The charges alleged, *inter alia*, that the Company unlawfully interfered with, restrained, or coerced employees in the exercise of their rights under the National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*); unlawfully retaliated against an employee who filed grievances to enforce the terms of the collective-bargaining agreement between the Company and the Union; and unlawfully refused to honor a dues-checkoff provision agreed upon through collective bargaining. Acting on these unfair-labor-practice charges, the Regional Director for NLRB Region 8 issued complaints, under the authority of Acting General Counsel Lafe Solomon, against the Company. In the ensuing administrative proceedings, the Company argued, unsuccessfully, that the complaints were 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 relevant complaints issued in the spring of 2013.

On March 31, 2015, the Board issued a Decision and Order, finding that the Company had committed certain unfair labor practices as alleged in the

complaints. 362 NLRB No. 57. The Company thereafter petitioned for review of the Order in this Court, and the Board cross-applied for enforcement.

On May 19, 2016, before briefing had begun, 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 Company 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 Company 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. (Opposition 15-16.) 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. Sixteen days later, the Company filed a motion in this Court, seeking recall of the mandate and a stay of Board action 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 Company has failed to demonstrate "exceptional circumstances" or "grave, unforeseen contingencies" necessary to warrant recalling the mandate.

1. The Company argues that recall is necessary so that the Company may petition for rehearing or rehearing *en banc* over an alleged conflict between this case, in which the Court ordered a remand to the Board, and *SW General*, in which this Court and the Supreme Court did not expressly provide for a remand. (Mot. 2-6, 10-11, *citing Greater Boston Tel.*, 463 F.2d at 275-80.) The Company's 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 Company assumes, that "the litigation in *SW General* is over," or that there is no possibility of further proceedings in that case. (Mot. 5.)

Because the Company has misinterpreted the import of the vacatur in *SW General*, its assertions of conflict and disparate treatment are without any sound basis. The Company, thus, has 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 Company's further claim (Mot. 7-9), 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 complaints previously issued under Acting General Counsel Lafe Solomon, or to take "other appropriate action" to address the outstanding unfair-labor-practice charges. (Board Mot. for Remand and Expedited Mandate 4; Board Reply 2, 6.) 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 6-7.) Importantly, as the Court's remand order recognized, the Company will have the option of later court review, if and when the Board issues a final reviewable order, and if the Company is aggrieved by it.

2. There is similarly no merit to the Company's suggestion that the mandate must be recalled because the Court "gave zero guidance to the NLRB as to what it can or cannot do on remand." (Mot. 6.) The Court's remand of the present case "for further proceedings before the Board" in light of *SW General* was 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]

Moreover, much of what the Company now raises, it could have raised in its prior pleadings and did not do so. For example, the Company never mentioned any need for specific remand instructions in its response to the Board's motion for a remand, nor did it explain why, in its view, mandate should not issue immediately. The Company's 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 Company provides no justification for any particular instruction, much less an accounting of what specific instructions are purportedly necessary. The Company instead rests on a litany of speculations as to what the Board's motives will be on remand. (Mot. 6-9.) Plainly, such speculations are insufficient to justify recalling the mandate.

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[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 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).

3. To the extent that the Company seeks to clarify the matters to be addressed on remand (Mot. 6-7), and to press its laches argument (Mot. 10), it can do so in a position statement before the Board, which, as noted, the Board has already solicited. The Company's continuing effort to litigate the merits of the remand and remand-related matters before this Court only compounds the problem of delay of which the Company has complained, and impedes the orderly consideration and resolution of the Company's concerns through the administrative process, as contemplated by the Court's mandate. As the Court specifically noted in its remand order, the Company can seek judicial review if it is aggrieved by a final Board order. Later review, rather than recall of the mandate, is the proper procedural vehicle for the Company's concerns.

Likewise, the Company's request (Mot. 5-6) that the Court stay further Board proceedings pending ruling on its recall motion should be denied. The Company, which did not file its motion until 16 days after the Board issued the order to file position statements, shows no basis for the Court to take such extraordinary action where the Board has exclusive jurisdiction and the Company has 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 Company's request for a stay of administrative action, as well as its request for recall of the mandate.

WHEREFORE, the Board respectfully requests that the Court deny the Company's motion to recall the mandate and stay Board action.

Respectfully submitted

/s/ Linda Dreeben

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Dated at Washington, D.C.
this 11th 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 1,923 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 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.

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Dated at Washington, D.C.
this 11th day of August, 2017