

16-3877, 17-8

U.S. Court of Appeals for the Second Circuit

JAMES G. PAULSEN, Regional Director of Region 29
of the National Labor Relations Board for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellee-Cross-Appellant

v.

PRIMEFLIGHT AVIATION SERVICES, INC.,

Defendant-Appellant-Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**DEFENDANT-APPELLANT-CROSS-APPELLEE
PRIMEFLIGHT AVIATION SERVICES, INC.'S
REPLY IN SUPPORT OF MOTION TO HOLD CASE IN
ABEYANCE**

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**REPLY IN SUPPORT OF
MOTION TO HOLD CASE IN ABEYANCE**

Defendant-Appellant-Cross-Appellee PrimeFlight Aviation
Services, Inc. (“PrimeFlight”) respectfully files this Reply in support of
its Motion to Hold Case in Abeyance (“Motion”).

As noted in PrimeFlight’s Motion, the fundamental question involved in this appeal is whether the NLRB is properly asserting jurisdiction over PrimeFlight’s operations at JFK Airport under the NLRA based on new NMB standards that deviate from the former 30-year-old standards under which PrimeFlight’s operations would have been deemed covered by the RLA. The district court relied on recent NMB precedent applying these new standards to issue an injunction under Section 10(j) of the NLRA ordering PrimeFlight to recognize and bargain with a union. If this Court holds, consistent with *ABM Onsite Services-West, Inc. v. National Labor Relations Board*, 849 F.3d 1137 (D.C. Cir. 2017), that the NMB’s recent unexplained changes to its jurisdictional standards are arbitrary and capricious, then the district court’s 10(j) injunction cannot be sustained.

As noted in PrimeFlight’s Motion, the NLRB has recently asked the NMB to clarify its jurisdictional test – the very one relied upon by

the district court in issuing its 10(j) injunction – as result of the D.C. Circuit’s decision in *ABM Onsite*. In light of the NMB’s pending reconsideration of its jurisdictional standards, it would be prudent and may conserve the resources of the Court and the parties to hold this appeal in abeyance until the NMB completes its review.

The NLRB’s opposition to PrimeFlight’s request for an abeyance rests on several flawed premises.

First, the NLRB contends the “pendency of [the NMB’s] clarification” of its new jurisdictional test under the RLA “does not change the issue presented to the Second Circuit – *inter alia*, whether the district court correctly found reasonable cause to believe that the Board will assert jurisdiction over PrimeFlight.” Petitioner-Appellee-Cross Appellant National Labor Relations Board’s Response to Motion to Hold Case in Abeyance (“NLRB Resp.”) at 1. But the NLRB is wrong. If the NMB modifies or abandons its new standards for asserting jurisdiction under the RLA – the same standards the district court applied to issue its injunction under the NLRA in this case but which the D.C. Circuit subsequently found to be arbitrary and capricious –

then there would be no “reasonable cause” to believe the Board will find it has jurisdiction over PrimeFlight based on those standards.

Second, the NLRB argues there is “no reason to think the NMB’s eventual decision will result in a material change in the law.” NLRB Resp. at 4. The NLRB asserts there “is little cause to believe that the NMB will not simply provide the requested explanation for its current standard as applied by the district court in this case.” *Id.*

Again the NLRB is wrong. In light of the D.C. Circuit’s holding that the NLRB’s application of the NMB’s new-but-never-justified standards for asserting RLA jurisdiction was arbitrary and capricious, there is substantial reason to believe the NMB may abandon those new standards and revert to the prior standards in place for the past 30 years. The D.C. Circuit’s decision does not suggest the NMB engaged in the merely technical oversight of neglecting to explain the reasons for its changed standards, as the NLRB implies; rather, the D.C. Circuit’s decision strongly suggests there were no valid reasons for the NMB’s change. The NLRB had every opportunity to attempt to articulate a reasoned basis for the NMB’s changed standards in defending them in *AMB Onsite* but failed to do so. And the NLRB’s briefing in this appeal

is equally devoid of any reasoned explanation for the NMB's changed standards. *See* Resp. & Reply Br. of Def.-Appellant-Cross-Appellee at 11 (noting that “[r]ather than attempting to justify the NMB’s and NLRB’s new standards, the Regional Director repeats the NMB’s reasoning in *Bags* and invokes the principle of agency deference”). There is thus significant cause to believe the NMB not only did not but also cannot provide a reasoned explanation for its changed standards.

The NLRB also fails to acknowledge that there has been a change in administration between the time when NMB began applying its new standards and the present time when NBM has been asked to reconsider those challenged standards. A change in administration can result in changes in administrative decision-making and the exercise of agency discretion. For this reason, numerous other federal agencies have recently moved for stays and abeyances in pending cases challenging agency actions under the prior administration to allow those agencies time to reconsider the action or policy at issue. *See, e.g.*, Supplemental Brief for the Federal Appellants at 2, *State of Wyoming et al. v. U.S. Dept. of the Interior et al.*, Nos. 16-8068 & 16-8069 (May 5, 2017) (where the U.S. Department of the Interior and other federal

parties argued that “[t]his Court should hold this appeal in abeyance during [the U.S. Bureau of Land Management’s (‘BLM’s’)] rulemaking” reviewing a challenged rule because “there may be no need for the Court to decide whether BLM had statutory authority to promulgate the 2015 Rule, because BLM may decide that no exercise of its authority is necessary and may rescind the Rule”); Motion to Hold Case in Abeyance filed by U.S. Department of Labor at 4, *Nat’l Fed’n of Indep. Bus. et al. v. R. Alexander Acosta, Secretary, U.S. Dep’t of Labor et al.*, No. 17-10054 (5th Cir. June 2, 2017) (where the U.S. Department of Labor argued that in light of an anticipated rulemaking that might rescind a challenged rule, “[a] period of abeyance is warranted to allow the Department of Labor to complete its orderly rulemaking process, which may narrow the issues or eliminate the need for this Court’s review”); Defs.’ Motion for Voluntary Remand & Stay at 1, *Franciscan Alliance, Inc. v. Thomas E. Price, M.D., Secretary of the United States Department of Health and Human Services, et al.*, No. 7:16-cv-00108-O (N.D. Tex. May 2, 2017), ECF No. 92 (where the U.S. Department of Health and Human Services argued the case should be stayed so that the Department could be given “the opportunity to reconsider the

regulation at issue in this case, based in part on the Department's desire to assess the reasonableness, necessity, and efficacy of the two aspects of the regulation that are challenged in this case, and to address issues identified by the Court in granting Plaintiffs a preliminary injunction").

By opposing an abeyance here, the NLRB has elected not to follow the prudent course taken by these other agencies. But it is perhaps significant that unlike these other agencies, the NLRB has continued until recently to operate under a majority appointed by the prior administration.¹ However, the constitution of the NLRB and NMB is expected to change in the near future. *See* Patrick Scully, *Kaplan Confirmed To NLRB, Emanuel Likely To Be Confirmed Following*

¹ The NLRB has recently been at odds with other federal actors. For example, the Acting Solicitor General has declined to defend the NLRB's position before the Supreme Court in several pending cases and gone so far as to file an amicus brief *opposing* the NLRB's position. *See* Br. for the United States as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and Supporting Respondents in No. 16-307, *Epics Sys. Corp., v. Lewis, Ernst & Young LLP et al. v. Morris et al., NLRB v. Murphy Oil USA, Inc. et al.*, Nos. 16-285, 16-300 & 16-307 (U.S. June 16, 2017) (urging the Supreme Court to reject the NLRB's decision in *Murphy Oil*), available at: <http://www.scotusblog.com/wp-content/uploads/2017/06/16-285-16-300-16-307-Brief-for-the-United-States.pdf>.

Recess, Flash, ABA Section of Labor and Employment Law (Sept. 2017), https://www.americanbar.org/content/dam/aba/publications/labor_employment_law_news/LEL%20Flash/article20.authcheckdam.html; Larry Swisher, *Trump Picks Second Republican to Seize Mediation Board Power*, Labor & Employment on Bloomberg Law (June 23, 2017), <https://www.bna.com/trump-picks-second-n73014460747/>. Accordingly, despite the NLRB's present opposition to an abeyance, there is a substantial likelihood the NMB and NLRB could change their positions with respect to the new RLA jurisdictional standards announced under the prior administration. It would therefore be prudent to allow the NMB to complete its review of those new standards before proceeding with this appeal, just as numerous other federal agencies have sought abeyances to allow them the opportunity to review challenged rules and potentially narrow or eliminate the disputes presented in pending litigation.

Finally, the NLRB argues that a “procedural delay in a case for injunctive relief is not appropriate.” NLRB Resp. at 1. But the NLRB fails to note that the District Court's 10(j) injunction ordering PrimeFlight to undertake certain actions, including recognizing and

bargaining with the union, would remain in place during any period of abeyance.

WHEREFORE, PrimeFlight respectfully requests that this Court place this case in abeyance for a period of six months, or until thirty days after the NBM responds to the three pending referrals from the NLRB, whichever is sooner. PrimeFlight respectfully requests that at the end of that period, the parties be permitted to file motions to govern further proceedings. Depending on the status of the NMB's responses to the referrals, the parties could seek to have the abeyance extended for an additional period, to set a schedule for supplemental briefing, or otherwise to dispose of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the fifth day of September, 2017, I caused the
REPLY IN SUPPORT OF MOTION TO HOLD CASE IN ABEYANCE
to be filed electronically with the Clerk of the Court using the CM/ECF
System, thereby serving all counsel.

s/Christopher C. Murray