United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1112 **September Term, 2017**

NLRB-5CA31828
NLRB-5CA33125

Filed On: November 9, 2017

National Labor Relations Board,

Petitioner

v.

CNN America, Inc.,

Respondent

National Association of Broadcast Employees and Technicians - Communications Workers of America, Local Union No. 11 and National Association of Broadcast Employees and Technicians - Communications Workers of America, Local Union No. 31,
Intervenors

Consolidated with 15-1209

BEFORE: Garland, Chief Judge; Kavanaugh and Pillard, Circuit Judges

ORDER

Upon consideration of the revised proposed judgment filed by the National Labor Relations Board (NLRB); the response thereto filed by CNN America, Inc.; and the reply to the response, it is

ORDERED that the Board's revised proposed judgment of October 19, 2017 be adopted as the judgment of the court, replacing the judgment entered on August 4, 2017.

The court's August 4, 2017 opinion rejected the Board's finding that CNN and TVS were joint employers, 865 F.3d 740, 748, while affirming the Board's determination that CNN was a successor employer to TVS, *id.* at 760. The court also upheld the Board's findings that CNN violated the National Labor Relations Act by discriminating in hiring and through the no-union statements of its supervisors. *Id.* at 760-62. As to the Board's remedies, the court: 1) "remand[ed] for the Board to limit its backpay remedy" in

accordance with the court's precedents, *id.* at 763; 2) declined to consider a challenge to the Board's reinstatement remedy because the Board "reserve[d] the issue for later consideration," *id.* (quoting *Scepter Inc. v. NLRB*, 448 F.3d 388, 391 (D.C. Cir. 2006)); and 3) granted CNN's cross-petition for review on the Board's affirmative-bargaining remedy, finding that the Board failed to explain the basis for that order, as this circuit requires, *id.* at 764. The opinion's final paragraph explained that the court granted CNN's cross-petition for review in part and the Board's application for enforcement in part. *Id.* at 764-65.

On August 18, 2017, the Board submitted a proposed judgment. On October 12, after considering CNN's response and proposed judgment (and the replies to the response), the court ordered the NLRB to submit a revised proposed judgment that removed seven sections of its initial proposal.

CNN has now requested that the court enter four further, "clarifying modifications to conform" the revised proposed judgment (and attached order and appendix) to the Court's opinion. None of the proposed modifications is necessary to conform the judgment to the opinion, and each is contrary to the court's usual practice.

First, CNN requests that the revised proposed judgment "be modified to explicitly refer to remand" by adding language stating that the case "be remanded for further proceedings before the Board consistent with the Court's opinion." The requested language is unnecessary because the court granted CNN's petition for review concerning the various portions of the Board's order that the court remanded. The revised proposed judgment is consistent with this court's usual practice, which is not to include remand orders in judgments when we grant in part and deny in part petitions for review and applications for enforcement. *See Raymond Interior Sys. v. NLRB*, 812 F.3d 168, 173 (D.C. Cir. 2016); Judgment, *Raymond Interior Sys.*, No. 12-1011 (D.C. Cir. Mar. 24, 2016); *Fortuna Enters., LP v. NLRB*, 665 F.3d 1295, 1305 (D.C. Cir. 2011); Judgment, *Fortuna Enters., LP*, No. 10-1272 (D.C. Cir. Feb. 8, 2012).

Second, CNN requests that the revised proposed judgment "be modified to reflect the Board's reservation of important remedial issues [relating to reinstatement] to compliance proceedings." The court determined that CNN's challenge to the Board's reinstatement order was premature. 865 F.3d at 763-64. In cases declining to consider challenges to remedial orders, when the Board has reserved the issue for later consideration, this court's usual practice is to grant the Board's application for enforcement without modifying the NLRB's challenged order. *See E.I. Du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310, 1320 (D.C. Cir. 2007); *Scepter, Inc. v. NLRB*, 448 F.3d 388, 392 (D.C. Cir. 2006). As we stated in our opinion, "in holding that CNN's challenge is premature, we express no view on its merits. If the Board retains a reinstatement order after compliance proceedings, CNN will have the opportunity to present its arguments in a petition for review of that order." 865 F.3d at 764.

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Third, CNN requests that the revised proposed judgment "be modified to reflect this Court's limitation on the remedy based on *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999 (D.C. Cir. 1998)." The court's opinion "remand[s] for the Board to limit its backpay remedy in accordance with" *Capital Cleaning*, and it is unnecessary to repeat the point in the judgment. Nor are CNN's suggested deletions to the revised proposed judgment appropriate. The court's holding that CNN discriminated against union employees in its hiring process means that CNN "loses the right unilaterally to set the initial terms and conditions of employment; it must first bargain with the union." *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1008 (D.C. Cir. 1998). Each challenged section of the judgment properly reflects that obligation.[1]

Finally, CNN misreads the section of the court's opinion that rejects the Board's affirmative-bargaining order. This court's case law distinguishes between requiring a company "to cease refusing to bargain and to bargain upon request." *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). Because the latter requirement is "accompanied by a decertification bar that prevents employees from challenging the union's majority status for a reasonable period of time," our precedent requires the Board to explain why that remedy is appropriate. *Id.* The Board's failure to explain here does not call into question its order that CNN cease and desist from refusing to bargain with its union. *See, e.g.*, *Cogburn Health Ctr. v. NLRB*, 437 F.3d 1266, 1275 (D.C. Cir. 2006) (declining to enforce an affirmative-bargaining order but enforcing a cease-and-desist order).

For the foregoing reasons, we deny CNN's request to make further modifications in the NLRB's revised proposed judgment and adopt it as the judgment of the court.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

[1] The court declines to consider CNN's argument that *Capital Cleaning*'s backpay limitations should be extended to the union-dues context. CNN did not make this argument in its briefs, and the court will not consider it for the first time at this late stage. Nor will the court address CNN's argument, also made for the first time, that requiring CNN to remit union dues is contrary to Board precedent.