

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

SCHNELLECKE LOGISTICS ALABAMA, LLC

and

DONALD EDWIN BUSSEY III, AN INDIVIDUAL **Case 10-CA-199183**

and

LASHOAN THOMAS, AN INDIVIDUAL **Case 10-CA-199732**

and

INTERNATIONAL UNION, UNITED **Cases 10-CA-201235**
AUTOMOBILE, AEROSPACE AND **10-CA-205320**
AGRICULTURAL IMPLEMENT WORKERS OF **10-CA-207265**
AMERICA (UAW), REGION 8

**COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S
MOTION TO STAY PROCEEDINGS**

The General Counsel submits this opposition to the motion to stay proceedings filed by Respondent Schnellecke Logistics Alabama, LLC. Respondent moves to stay pending the outcome of its motion to dismiss, in which Respondent claims that the administrative law judge who will hear this case is an “inferior officer” under the Constitution and was not appointed in a manner specified by the Constitution’s Appointments Clause for such officers. Initially, the Board has ordered that hearings proceed when similar motions have been filed. Furthermore, a stay would frustrate the remedial purposes of the Act. Finally, a stay is unnecessary, as ratification by the Board will cure any appointments clause defect in this case. For these reasons, Respondent’s motion to stay should be denied.

PROCEDURAL HISTORY

This case involves Respondent’s attempts to defeat a union organizing campaign by terminating the lead employee union activist; by terminating a union supporter; by engaging in

widespread unlawful threats, interrogations, solicitation of grievances; and by giving employees the impression of surveillance of their union activities. Regional Director John D. Doyle, Jr., issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on October 25, 2017. Respondent filed an answer on November 8, 2017. Its twenty-first affirmative defense claims that the administrative law judge before whom the case will be tried was not appointed in conformity with the Constitution's Appointments Clause.

On November 24, 2017, the Regional Director issued a second consolidated complaint adding cases 10-CA-205320 and 10-CA-207265. That same day, the Board authorized the Regional Director to initiate 10(j) proceedings in this case.

Respondent filed a motion to dismiss and a motion to stay proceedings pending outcome of its motion to dismiss with the Board on November 13, 2017, and before the Division of Judges on November 22, 2017. A hearing is scheduled for December 11, 2017.

ARGUMENT

I. THE BOARD HAS ORDERED HEARINGS TO PROCEED WHEN SIMILAR MOTIONS HAVE BEEN FILED.

In *WestRock Services, Inc.*, Case No. 10-CA-195617, the employer filed a Motion to Dismiss alleging that (i) the judge is an inferior officer under the Appointments Clause of the United States Constitution, and (ii) the Board is not a Head of Department with authority to validly appoint the judge pursuant to the Appointments Clause. In directing that hearing to proceed, the letter to the parties stated:

The Board has decided to take the Respondent's Motion to Dismiss under advisement; and pending the Board's further consideration and resolution of the Respondent's Motion, the parties and the judge are directed to conduct the hearing that is scheduled to commence on November 15, 2017 and to comply with the Board's normal post-hearing procedures, which shall be without prejudice to the position of the Respondent and other parties in relation to the Respondent's Motion to Dismiss.

Rothschild, Roxanne L., Dep. Ex. Sec., *WestRock Services, Inc.*, Case No. 10-CA-195617 (Executive Secretary's letter to parties dated November 15, 2017).

As the Motion to Dismiss filed in this case argues grounds identical to those argued in *WestRock Services, Inc.*, the motion to stay should be denied and the parties ordered to proceed with the hearing as scheduled before the administrative law judge.

II. A STAY WOULD FRUSTRATE THE REMEDIAL PURPOSES OF THE ACT

On November 24, 2017, the Board authorized the Regional Director to pursue 10(j) injunctive relief in this matter because, inter alia, injunctive relief is necessary to prevent irreparable harm to employees' statutory rights and to protect the remedial purposes of the Act.

Congress has declared that "encouraging the practice and procedure of collective bargaining" is "the policy of the United States..." 29 U.S.C. §151. Employees have the right to decide whether they wish "to bargain collectively through representatives of their own choosing..." 29 U.S.C. §157. If the lawful status quo is not fully restored in a timely manner, Respondent's actions will inflict irreparable harm to the national labor policy encouraging collective bargaining embodied in §1 of the Act, the employees' right to organize under §7 of the Act, and the efficacy of the Board's ultimate remedial order. Grant of Respondent's motion to stay will allow Respondent to forever profit from its illegal conduct.

Employees' organizing efforts are in jeopardy unless Respondent is timely ordered to reinstate the employees whom it unlawfully discharged. The grant of Respondent's stay would send an inescapable message to its remaining employees: engaging in organizing activity, including attending Union meetings, will cost them their jobs, and neither the Board nor the Union can provide a timely remedy. Indeed, Respondent's illegal discharges are already having a chilling effect on the organizing campaign, and Respondent's significant unlawful conduct has had the cumulative effect of successfully dissipating employee support for the Union.

For these reasons, the Region is moving expeditiously to hearing and is preparing to file a petition in the federal district court seeking an interim injunction under Section 10(j) of the Act compelling Respondent to reinstate the lead employee union activist and to cease and desist from its threats, interrogations, and other conduct that has demonstrably chilled employee exercise of Section 7 rights. If Respondent's motion to stay is granted, the harm to the organizational effort will not be effectively remedied. The remedial order could come years after the discharges – too late to erase their chilling effect and revive the campaign. See *Pye*, 238 F.3d at 75 (“a long time may pass before the Board decides the merits of this case ... the disappearance of the ‘spark to unionize’ may be an irreparable injury...”). By that time, the remaining employees will have observed that workers who “attempted to exercise rights protected by the Act had been discharged” and waited for “years to have their rights vindicated.” In those circumstances, no worker “in his right mind” will “participate in a union campaign... .” In fact, by that point, the terminated employees will likely have moved on to other jobs and will not be available to accept a Board order of reinstatement.¹ The fact that these original Union supporters “will likely never return to work ... may itself cause irreparable injury to the unionization effort... .” *Pye*, 238 F.3d at 75. The Board's order will be rendered an “empty formality.” If the stay in proceedings is granted, Respondent, by violating the Act, and delaying these proceedings, will have prevented the employees from exercising their § 7 right to freely decide whether to be represented by the Union.

¹ See generally Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1792-93 (1983) (studies show significant decline in proportion of discriminatees accepting reinstatement when offered more than six months after discriminatory act), cited with approval in *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1094 & n.32.

Thus, denying Respondent's motion to stay is necessary to protect the employees' Section 7 rights, preserve the remedial power of the Board, effectuate the will of Congress, and prevent manifest injustice.

**III. RATIFICATION BY THE BOARD WILL CURE ANY APPOINTMENTS
CLAUSE DEFECT IN THIS CASE.**

Although the issue is not directly presented here, Counsel for the General Counsel expressly reserves the right to argue that the Board can cure any Appointments Clause defects in this case by assuming *arguendo* that there is merit in Respondent's argument, and then proceeding to decide whether to ratify the administrative law judge's rulings, findings, and conclusions, or to substitute its own. Ratification by duly constituted officials is an accepted means for curing the harm of an *ultra vires* decision. *See generally Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1190-92 (9th Cir. 2016); *Advanced Disposal Services E., Inc. v. NLRB*, 820 F.3d 592 (3d Cir. 2016); *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998); *FEC v. Legi-Tech*, 75 F.3d 704 (D.C. Cir. 1996). Therefore, there is no reason to stay these proceedings.

For the foregoing reasons, Respondent's motion to stay proceedings should be denied.

Respectfully submitted this 27th day of November, 2017,

/s Joseph W. Webb
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Counsel for the General Counsel's Opposition to Respondent's Motion to Stay Proceedings by electronic transmission on this date to:

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