

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Consolidated Case Nos. 16-1317 and 16-1348

H & M INTERNATIONAL
TRANSPORTATION, INC.,

Petitioner/Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

**ON PETITION FOR REVIEW FROM ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD
363 NLRB NO. 139 (MARCH 1, 2016) AND 363 NLRB NO.
189 (MAY 11, 2016)**

**MOTION FOR STAY OF MANDATE PENDING FILING
OF PETITION FOR WRIT OF CERTIORARI**

Dated: May 10, 2018

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Respondent H & M International Transportation, Inc. (“H&M”) hereby moves, pursuant to Federal Rule of Appellate Procedure 41, for an order staying the issuance of this Court’s mandate in the above-captioned matter, pending the filing by H&M of a petition for writ of certiorari in the United States Supreme Court. This motion is made on grounds that the certiorari petition would present substantial questions and because there is good cause for issuance of a stay.

I. THE PROCEDURAL POSTURE OF THE CASE

On March 20, 2018, this Court issued a judgment denying H&M’s cross-petition to vacate a decision by the National Labor Relations Board (“NLRB” or “Board”). As permitted by law, within the ninety (90) days of the Court’s judgment, H&M will file a petition for writ of certiorari in the United States Supreme Court seeking review of the judgment. Pursuant to Federal Rule of Appellate Procedure 41, this Court may stay the mandate pending the filing of this application for a writ of certiorari upon a showing that the petition will present a substantial question and good cause exists for a stay. Fed. R. App. Proc. 41(d)(2).

II. H&M’S PETITION FOR WRIT OF CERTIORARI WILL PRESENT SUBSTANTIAL QUESTIONS

The “substantial question” standard under Rule 41 is not onerous. It does not require this Court to find that a movant for stay is likely to succeed on the merits. Rather, a stay of the mandate is considered sufficient if there is a

“reasonable probability” of the Supreme Court granting certiorari and reversing. *See NextWave Personal Commc’ns v. FCC*, 2001 U.S. App. LEXIS 19617, at *4 (D.C. Cir. Aug. 23, 2001) (*quoting Books v. City of Elkhart*, 239 F.3d 826 (7th Cir. 2001)); *see also Munaf v. Geren*, 2007 U.S. App. LEXIS 11283 (D.C. Cir. May 9, 2007) (staying this Court’s mandate even though the Court had rejected the movant’s claims on the merits).¹

This Court’s misinterpretation of the NLRB’s rules has wide-ranging impact for all parties that litigate before the Board. While the Court held that H&M’s position concerning Lafe Solomon’s improper appointment was not “urged before the Board” (*H&M Int’l Transp., Inc. v. Nat’l Labor Relations Bd.*, 2018 WL 1896482, at *1 (D.C. Cir. Mar. 20, 2018)), a review of the Board’s rules reveals that H&M did indeed properly present the argument before the Board.

H&M asserted the Solomon argument in its answer to the Board’s complaint. Under the Board’s rule that provides the manner in which it issues its decisions, the Board is required to issue rulings “upon the record.” *See* 29 C.F.R. §

¹As the Supreme Court has explained in describing its similar standard: “obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.” *See Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983), *superseded on other grounds*.

102.45(b).² The Board's rules define "the record in the case" as:

The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, *answer* and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in section 102.46...

29 C.F.R. § 102.45(b) (emphasis added). Here, because H&M asserted the Solomon argument in its answer, and its answer was part of the record, it is undisputed that H&M issued the argument before the Board.

The Board argued that because H&M waived the Solomon argument because it was not asserted in its exceptions to the administrative law judge's decision ("ALJ"), and 29 C.F.R. § 102.46(g) states that "[n]o matter not included in exceptions ... may thereafter be urged before the Board." The Court adopted the Board's argument and in doing so read § 102.46(g) in a vacuum. Such a reading of § 102.46(g) renders § 102.45(b) superfluous. Indeed, according to the Board's and this Court's interpretation of the Board's rules, the Board is not to issue a decision "upon the record" but rather the Board can only issue a ruling on "exceptions urged before the Board."

Notably, 29 U.S.C. § 160(e) does not state that "exceptions" not urged

² The Board amended its rules after the underlying case was commenced. All references to Board rules are to the then-applicable rules.

before the Board shall not be considered by the Court – the statute states that “[n]o *objection* that has not been urged before the Board ... shall be considered by the court.” *See id.* (emphasis added). H&M clearly urged its objection before the Board in its answer and its motion for reconsideration. Accordingly, the argument was not waived.

Similarly the Court’s ruling on the surreptitiously recorded conversation between H&M management and union members is also subject to reversal by the Supreme Court. Although the Board is afforded deference in its decision, “where the record evidence is in conflict, the substantial evidence test requires the Board to take account of contradictory evidence, and to explain why it rejected evidence that is contrary to its finding.” *See Carpenters & Millwrights, Local Union 2471 v. N.L.R.B.*, 481 F.3d 804, 809 (D.C. Cir. 2007) (citations and quotations omitted).

While it appears from the Board’s decision that it did review the record and found that absent the surreptitious recording H&M violated the National Labor Relations Act (“the Act”), an inspection of the Board’s decision reveals that all it really did was adopt the ALJ’s decision. Indeed, the Board did not cite to any evidence showing that it reviewed the record, let alone conducted any independent analysis of the record. All the Board’s decision shows is that it adopted the ALJ’s decision. However, a review of the ALJ’s decision reveals that all of the credibility findings were poisoned by the surreptitious recording. In turn it follows

that this Court did not comply with its mandate,³ and simply adopted the Board's finding that ALJ had relied on evidence beyond the surreptitious audio-recording.

Accordingly, H&M's intended certiorari petition will present substantial questions, warranting that a stay be issued by this Court.

III. GOOD CAUSE EXISTS FOR A STAY OF MANDATE

Good cause for a stay of the mandate is warranted where H&M can show a likelihood of irreparable harm and/or that a stay is in the public interest. *See Books v. City of Elkhart*, 239 F.3d 826, 829 (7th Cir. 2001); Knibb, *Federal Court of Appeals Manual* 34:13, at 924 (6th ed. 2013). In *American Gas Ass'n v. FERC*, 912 F.2d 1496, 1519 (D.C. Cir. 1990), after ruling against the moving party on the merits, this Court stayed its mandate so that the status quo would not have to be "unscramble[d]" until "the review process comes to a complete end." For similar reasons, good cause exists to stay the Court's mandate in the present case.

In the instant matter, the Court's decision denied H&M's cross-petition for review and granted the Board's application for enforcement. In granting the Board's petition, H&M is now obligated to re-hire four terminated employees and

³ As stated by the Ninth Circuit, "'the substantial evidence test requires a case-by-case analysis and a review of the whole record,' and requires a reviewing court to 'take into account whatever in the record fairly detracts' from the Board's conclusions." *See Healthcare Employees Union, Local 399, Affiliated With Serv. Employees Int'l Union, AFL-CIO v. N.L.R.B.*, 463 F.3d 909, 918 (9th Cir. 2006) (quoting *Cal. Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 307 (9th Cir.1996) and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

make these employees whole for nearly six years of back pay and benefits. If the mandate issues, H&M will be required to re-hire and then make payments to these individuals before it is finally determined whether H&M's actions violated the Act. Should the Supreme Court grant certiorari and thereafter reverse the judgment and find that H&M's actions were not a violation of the Act, H&M, in absence of the requested stay, will have been forced to comply with the Board's order, re-employ individuals and make them "whole" when H&M's actions were legal in the first place. Thus, without a stay, H&M will be required to "unscramble" its employment and attempt to recoup hundreds of thousands of dollars it will have made pursuant to the mandate in this matter. Thus, good cause exists to avoid the potential waste of H&M's—and judicial—resources in complying with the mandate, should certiorari be granted and this Court's judgment be reversed by the Supreme Court.

IV. CONCLUSION

For the reasons set forth above, H&M respectfully requests that this Court grant its motion for a stay of the mandate pending the filing of a petition for a writ of certiorari in the U.S. Supreme Court.

Dated: May 10, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 1,494 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(f). I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word 2010 in a proportionally spaced typeface with serifs, 14-point Times New Roman font.

Date: May 10, 2018

/s/ David K. Broderick

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2018, I electronically filed the foregoing document with the Clerk of the Court using the appellate CM/ECF system, which sent notice to the participants and parties in this case.

Dated: May10, 2018

/s/ David K. Broderick

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