

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA  
Consolidated Case Nos. 16-1317 and 16-1348

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H & M INTERNATIONAL  
TRANSPORTATION, INC.,

Petitioner/Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

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**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)**

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**REPLY IN FURTHER SUPPORT FOR STAY OF  
MANDATE PENDING FILING OF PETITION FOR  
WRIT OF CERTIORARI**

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Dated: May 24, 2018

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Respondent H & M International Transportation, Inc. (“H&M”) hereby files its Reply in Further Support of its Motion for Stay of Mandate Pending Filing of Petition for Writ of Certiorari. In support of its Motion to Stay, H&M reiterates that, notwithstanding the National Labor Relations Board’s (“NLRB” or “Board”) arguments, it has already demonstrated a substantial question which must be addressed by the Supreme Court, and has also shown good cause and the extraordinary circumstances necessary to stay the mandate in this matter. While the Board would like to neatly place this case in a box, the unique facts clearly establish that H&M’s assertions concerning the Board’s consistent misinterpretation of the National Labor Relations Act (“NLRA”) is an issue of first impression for the Supreme Court.

In opposition to H&M’s opening brief, the Board claims that H&M’s reading of the NLRA and the Board’s regulations is “specious” and “tortured.” While colorful, the Board fails to address H&M’s position – namely, that courts have adopted the Board’s misinterpretation of the NLRA and the regulations adopted pursuant to that misinterpretation, hook, line, and sinker. 29 U.S.C. § 160(e) does not state, as the Board’s regulations would lead one to believe, that “exceptions” not urged before the Board shall not be considered by a court – the statute clearly states that “[n]o *objection* that has not been urged before the Board ... shall be considered by the court.” Indeed, as cited by the Board, this Court –

and four other circuits – have consistently followed this misinterpretation. *See* Opp. at 6. As asserted in its opening brief, H&M clearly urged its objection concerning the improper Complaint before the Board.

Fatal to the Board’s argument is its failure to acknowledge that it has promulgated meaningless rules. Specifically, the Board did not address the fact that 29 C.F.R. § 102.45(b) states that decisions in a matter are based, in part, on a party’s answer, and H&M included the Lafe Solomon/Federal Vacancies Reform Act objection in its answer. Rather, the Board fails to provide an explanation of 102.45(b), and instead argues that it is not required “to ferret out and address every last argument in the administrative record.”

However, as this Court has previously held, “the critical question in satisfying section 10(e) is whether the Board received adequate notice of the basis for the objection.”<sup>1</sup> Alwin Mfg. Co. v. N.L.R.B., 192 F.3d 133, 143 (D.C. Cir. 1999). The Board cannot credibly claim that it did not have adequate notice of H&M’s Solomon objection because it was clearly included in the record – the record that the Board is required to base its decision upon. *See* 29 C.F.R. § 102.45(b).<sup>2</sup> Indeed, the Board obviously had notice of the Solomon objection because a properly appointed General Counsel attempted to ratify the Complaint in

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<sup>1</sup> As described, above Section 10(e) does not use the term “exception.” As stated by this Court, the term is “objection.”

<sup>2</sup> However, as asserted in H&M’s opening brief and above, the only “record” the Board looks to is what is asserted in the parties’ “exceptions.”

this matter less than one month before the Board issued the decision currently on appeal. If H&M had failed to urge the Solomon objection in its exceptions – according to the Board, “straightforward application of [a] settled legal principle[],” – there should have been no reason for the Board to attempt to ratify Solomon’s improper Complaint. The reasonable question then becomes, why did the Board attempt to ratify the Complaint? The obvious answer is because H&M had preserved its “objection.”

Additionally, as described in its opening brief, neither the Board nor the Court reviewed the Administrative Law Judge’s (“ALJ”) credibility findings. While the ALJ claimed that absent the surreptitious recording, she would have come to the same conclusions, a cursory review of the record reveals that all of the credibility findings hinged on the surreptitious recording. Had the Court complied with its mandate that it review the entire record, it would have come to the same conclusion. Failing to do so, the Court made a reversible error.

Finally, good cause exists for stay of the mandate because H&M will ultimately be placed in the position of having to recoup hundreds of thousands of dollars it will have paid to the four terminated employees. In opposition, the Board blithely claims that these payments would be recoverable. However, H&M would not be seeking to recover monies mistakenly paid to a corporation with deep pockets – H&M would be required to commence individual civil actions against

each former employee to recoup the improper windfall. Recovering those funds from the former employees would be highly specious.

For the reasons set forth above, and its initial brief, 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 24, 2018

Respectfully submitted,

/s/ David K. Broderick

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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 760 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 24, 2018

/s/ David K. Broderick

**CERTIFICATE OF SERVICE**

I hereby certify that on May 24, 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: May 24, 2018

/s/ David K. Broderick

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