

NO. 18-1245

In The
United States Court of Appeals
For The Fourth Circuit

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

RETRO ENVIRONMENTAL, INC. and GREEN JOBWORKS, LLC

Respondents

ON PETITION FOR REVIEW OF AN ORDER OF
The National Labor Relations Board

RESPONDENTS' REPLY BRIEF

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RESPONDENTS' JOINT REPLY MEMORANDUM

Appellees, Retro Environmental, Inc. (“Retro”) and Green JobWorks, LLC (“Green JobWorks”), by and through their respective undersigned counsel, hereby file this Reply to the Response briefs filed by Appellate, the National Labor Relations Board (the “Board”), and Intervenor, Construction and Master Laborers’ Local 11, a/w Laborers’ International Union of North America (“the “Union”), and state as follows:

The Parties are locked in a fundamental disagreement over the question of whether Retro and Green JobWorks were, and still are, joint employers. It is the question of whether the two "still are" joint employers that presents a most novel issue for this Court.¹ It is a question that Retro and Green JobWorks believes must be answered in the negative.

The very nature of the relationship between Retro and Green JobWorks itself is transient and temporary. Retro's projects vary in time and scope, and certainly vary in the type and size of workforce that it requires. At times, Retro may have a need to lease employees and it works with several companies, including Green

¹ As discussed herein, and contrary to the representation made by the Union in its brief, this dispute represents a novel issue that has yet to be decided in this Circuit, and perhaps any other Circuit Court of Appeals. At present, there appears to be no case law applying *Davey McKee's* imminent cessation of operations theory to alleged joint employers as was done in this case. *Davey McKee Corp.*, 308 NLRB 839 (1992). This is exemplified by the fact that none of the briefing parties - the Respondents, the Board, and the Union - have cited to such a case. The Respondents, therefore, request that this Court assign this matter for oral argument.

JobWorks, that can lease employees to perform certain kinds of work, when needed. Retro is not required to use any one company, including Green JobWorks, for any job and may choose the company it deems most suitable, which may or may not include Green JobWorks.

In this case, Retro leased employees from Green JobWorks, to perform demolition and asbestos abatement work on the DC Schools Projects. That work was required to be completed by mid-July 2015, when school would be back in session, students would be back in the buildings, and demolition and asbestos abatement work simply could not continue, a point that neither the Board nor the Union contest. Retro had no plans to continue leasing any of the Green JobWorks employees once the DC Schools Projects were complete, and in fact those employees did not perform any additional work for Retro after mid-July 2015.

Nonetheless, despite this very temporary arrangement, the Union filed a petition for a representation election. After a hearing, the Regional Director found that while he believed there was “colorable” evidence to hold Retro and Green JobWorks to be joint employers, he also found sufficient evidence to show that that joint employment relationship was scheduled to end within weeks of the hearing. The Regional Director determined that there would be no purpose by holding an election for a population of employees who would no longer be employed by the alleged joint employers. On appeal, the Board majority overturned the Regional

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Director's decision, because in their estimation, Retro and Green JobWorks had not provided enough evidence to prove the negative - that their temporary relationship would not continue. Instead, the Board majority speculated that the specific relationship between Retro and Green JobWorks that existed on the DC Schools Projects would continue endlessly if and when they ever work together in the future.

Retro and Green JobWorks remain steadfast that the Board's decision to order an election among the employees of the alleged joint employer was inappropriate in light of the imminent cessation of the relationship. As the Board correctly notes in its brief, it will decline to hold an election where the employer in the petitioned-for bargaining unit shows that it faces an “imminent cessation of...operations.” *Hughes Aircraft Pro.*, 308 NLRB 82, 82 (1992). The purpose of this application is based in logic, because “no useful purpose would be served by conducting an election” among employees who would no longer have an employer. *Martin Marietta Aluminum, Inc.*, 214 NLRB 646, 647 (1974). Clearly, no useful purpose would be served by holding an election of a group of employees who are no longer employed by the alleged joint Retro-Green JobWorks entity.

The Board correctly asserts that an imminent cessation of operations finding cannot be based on speculation, or even a future intent to cease operations. Rather, there must be certain evidence that the employer’s operations will in fact cease.

The Board argues that Retro and Green JobWorks have not met this evidentiary requirement, because testimony was elicited that the two entities would consider working together again, and that that consideration alone is enough to bind two companies legally in a joint employer relationship.

The cases put forward by the Board and the Union on imminent cessation of operations are instructive as to the application of the theory, but their specific application to the facts in this case are distinguishable. That is because each of those cases involved the dismissal of an election petition based on a single employer shutting down its operations, *see, e.g., Hughes Aircraft Co., supra, Martin Marietta, supra,* and *Larson Plywood Company, Inc., 223 NLRB 1161 (1976)*, or a single employer fundamentally changing the nature of its business, *see, e.g., Douglas Motors Corp., 128 NLRB 307 (1960)*. The Board and the Union have cited no cases where an alleged joint employer was involved. Here, the Union and the Board argue that because neither Retro nor Green JobWorks shut down their operations or changed the nature of their individual operations, there can be no finding of imminent cessation of operations. This argument, when applied to alleged joint employers who were set to stop working (and, in fact, did stop working) on a date certain, runs afoul of basic logic.

Equally unavailing is the Board's and Union's reliance on the cases that recognize that the nature of the construction industry means work and employment

that is oftentimes short and intermittent. Those cases, however, are also distinguishable from the scenario here. Specifically, those cases involved construction companies who argued for dismissal of election petitions based on imminent cessation of operations due to the end of a particular project even though the entity itself would continue to operate, seek new bids and work, and generally continue to employ individuals for the foreseeable future.

The key issue in this instance is nuanced and it is one that the Board and Union have sought to ignore. That issue is not focused on whether Retro or Green JobWorks individually would continue to operate in the same manner, and in the same jurisdiction on their own, but whether they would continue to operate together, in the exact same manner as they did in 2015 when they may have been joint employers.

While Retro and Green JobWorks may have had other projects in the region that continued, none of those projects involved working with each other. And while Retro would consider perhaps leasing employees from Green JobWorks again on another project, there was no expectation or requirement to do so, let alone a determination as to how they would do so. The Board and the Union rely heavily on the argument that cessation of operations cannot be speculative. It would, however, be the ultimate in speculation, based on the evidence presented, to find that the alleged joint employment relationship of Retro and Green JobWorks

would not imminently cease. Any expectation that Retro would lease Green JobWorks employees again, regardless of past history, would be an assumption and speculative.

The Board majority's reversal of the Regional Director's decision dismissing the election petition was illogical, and should not stand. Regardless of whether Retro and Green JobWorks are or were joint employers on the DC Schools Projects, that relationship ended in mid-July 2015. It would be inappropriate to hold Retro and Green JobWorks as joint employers in perpetuity based on a project they worked on together that ended almost three years ago now. The Regional Director was correct to dismiss the petition. That decision should be reinstated and the Board's decision should be reversed.

 /s/

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 18-1245 **Caption:** National Labor Relations Board v. Retro Env'l, et al.

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(s) Jennifer L. Curry

Party Name Retro Environmental, Inc.

Dated: June 19, 2018

CERTIFICATE OF SERVICE

I CERTIFY that on June 19, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/
Jennifer L. Curry

June 19, 2018
Date