

United States District Court
Western District of Wisconsin

Menard, Inc.,

Case No. 18-CV-376

Plaintiff,

v.

National Labor Relations Board,

Defendant.

**Plaintiff's Response in Opposition to Defendant's Motion to Dismiss for
Lack of Subject Matter Jurisdiction**

On behalf of Plaintiff, Menard, Inc.:

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Plaintiff Menard, Inc. (“Menard”) submits the following Response Brief in opposition to Defendant National Labor Relations Board’s (“NLRB” or “Board”) Motion to Dismiss for Lack of Subject Matter Jurisdiction. For the reasons set forth below, Menard requests that this Court deny the Motion to Dismiss in its entirety.

Introduction

Imagine a statutory provision that was so clearly drafted by Congress that it had not been challenged in its over seventy-year existence. While the National Labor Relations Act (“NLRA” or “Act”) itself cannot boast of such an achievement, one of its provisions can: the exclusion of independent contractors from coverage under the Act. In its Motion to Dismiss, the Board spends 11 pages grasping at straws and throwing up smoke-screens, and only then admits on page 12 of the brief that there is simply no precedent for what it is attempting to do to Menard.

The Board attempts to explain the different procedures it has for prosecuting unfair labor practice charges and appeals, but the Board simply misses the point: as an independent contractor, Kevin Fisher (“Fisher”) is excluded from the act and cannot bring an unfair labor practice (“ULP”) charge against Menard. This Court need not even enter any independent contractor/employee analysis, as the Board’s own Administrative Law Judge (“ALJ”) ruled that Fisher was an independent contractor and excluded from protection under the Act. The Board *did not* appeal that decision. Menard spent more than a year successfully defending the misclassification charge from the Board to prove that Fisher was an independent contractor and excluded from the Act. Menard is astonished by the Board’s brazen

disregard for its own statutory authority. Once the Board's own ALJ classified Fisher as an independent contractor, and excluded from the NLRA's protections, Fisher's ULP charge had to be dismissed. Contrary to its own ruling, and after six months of delay, the Board filed a complaint on behalf of Fisher.

The Board is acting without authority; therefore, 28 U.S.C. §1331 grants jurisdiction to this federal court to hear this case along with a federal court's inherent non-statutory review authority of agency action. This Court should exercise its proper jurisdiction and deny the Board's Motion to Dismiss.

Argument

To invoke a federal court's subject-matter jurisdiction, a plaintiff needs to provide only "a short and plain statement of the grounds for the court's jurisdiction." Fed. R. Civ. P. 8(a)(1). Menard has met this requirement under 28 U.S.C. § 1331 and the inherent equity power of this court to preside over actions that allege an agency is acting beyond its authority. This court has subject matter jurisdiction and the Board's motion should be denied.

1. 28 U.S.C. § 1331 grants this Court jurisdiction to review agency action.

28 U.S.C. § 1331 bestows upon federal courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This grant of subject matter jurisdiction authorizes federal courts to hear claims arising under the Administrative Procedure Act ("APA") as well as "nonstatutory" and constitutional claims. *Califano v. Sanders*, 430 U.S. 99, 105 (1977) (§1331 confers "jurisdiction on federal courts to review agency action, regardless of the whether the

APA of its own force may serve as a jurisdictional predicate); *Sutton v. Napolitano*, 986 F.Supp. 2d 948, 956 (W.D. Wis. 2013); *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 185 (D.C. Cir. 2006).

Menard specifically points to 28 U.S.C. §1331 as granting this Court jurisdiction in this matter. Menard also alleges that the Board is violating the APA through its arbitrary and capricious prosecution of an administrative complaint on behalf of an independent contractor. The Board is prohibited from prosecuting Fisher's ULP charge under the NLRA. The Board's complaint is also in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. 5 U.S.C. § 706. Menard meets the pleading standard of APA review and this Court has subject matter jurisdiction under 28 U.S.C. § 1331.

2. The NLRB has no authority over independent contractors and this Court has the power to review agency action when it acts *ultra vires*.

Admittedly, the Court's jurisdictional inquiry could end here. However, the Board has raised several ancillary issues and Menard will respond.

The biggest problem for the NLRB is that it has no authority to bring an action on behalf of an independent contractor. The fact that the Board is pursuing a ULP charge on behalf of Fisher is contrary to the clear statutory exclusion of independent contractors in the NLRA.

A. Because the Board is acting beyond of its authority, this Court can review its actions under its non-statutory review power.

29 U.S.C. §152(3) defines the term "employee" under the NLRA and also defines what is *not* an employee and, therefore, not covered by the NLRA:

(3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, **but shall not include** any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or **any individual having the status of an independent contractor**, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

(emphasis added).

Even if the Board were correct in arguing that 28 U.S.C. § 1331 does not give this Court jurisdiction, non-statutory review is available because the Board is acting beyond its authority. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178 (D.C. Cir. 2006).

In *Trudeau v. Federal Trade Comm'n.*, the Plaintiff argued that he could maintain his case as a non-statutory action. The Court agreed and found that “[i]f a plaintiff is unable to bring his case predicated on either a specific or general statutory review provision, he may still be able to institute a non-statutory review action.” *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 189–90 (D.C. Cir. 2006) (citing *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1992). The

Trudeau Court went on to cite the long-held view that judicial review is available in such circumstances. “Because “[j]udicial review is favored when an agency is charged with acting beyond its authority,” “[e]ven where Congress is understood generally to have precluded review, the Supreme Court has found an implicit but narrow exception, closely paralleling the historic origins of judicial review for agency actions in excess of jurisdiction.” *Trudeau v. Fed. Trade Comm’n*, at 189. Therefore, “judicial review is available when an agency acts *ultra vires*, even if a statutory cause of action is lacking.” *Trudeau v. Fed. Trade Comm’n.*, at 190 (internal citations omitted).

Here, Menard has specifically alleged that the Board is acting *ultra vires*, i.e. beyond its authority. Therefore, this Court has jurisdiction under its inherent non-statutory review authority.

B. The Board’s argument regarding the Unfair Labor Practice process fails to consider the independent contractor exclusion.

In the instant action, just because Fisher filed a ULP with the Board does not give the Board the authority to investigate the ULP and issue a complaint. Fisher’s status as an independent contractor precludes the Board from doing so. Following the established view that federal courts have the power to review agency action when the agency is acting outside of its authority, this Court is vested with subject matter jurisdiction.

The Board relies on *Myers v. Bethlehem Shipbuilding Corp.* to argue that this Court does not have subject matter jurisdiction. In *Myers*, the Supreme Court held

that a federal district court could not enjoin an unfair labor practice proceeding. Bethlehem had argued that because it was not engaged in interstate or foreign commerce, which is a prerequisite to a finding of Board jurisdiction, the Board could not proceed with its ULP charge and complaint. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). However, when Bethlehem had brought its action in federal district court to enjoin the Board from proceeding administratively, the Board had not yet proven whether Bethlehem was engaged in interstate or foreign commerce and subject to the act; the Board had only alleged it in its complaint based on the ULP. *Myers v. Bethlehem Shipbuilding Corp.*, at 45. To put it a different way, the *Myers* case was at the “misclassification” stage; i.e. the Board had yet to determine if the company was engaged in interstate or foreign commerce to then be able to decide if it could find the company committed the alleged ULP’s.

Here, the Board’s ALJ has already issued the ruling that destroys the Board’s jurisdiction to issue a complaint against Menard. The Board surrendered any jurisdiction it may have had over Fisher when it chose not to appeal the ALJ ruling. These facts run contrary to *Myers*, where the Board had not yet determined whether the company at issue was excluded from the Act due to its claimed interstate/foreign commerce exemption. Once the Board in *Myers* went through its process of investigating a ULP, filing a complaint, holding a hearing, and issuing an order, then Bethlehem Shipbuilding could have appealed to the circuit court if it disagreed with the Board. In this case the Board had the chance to appeal the determination that Fisher is an independent contractor to the circuit court and it

refused. The Board's reliance on *Myers* does not give the appropriate context to the proceedings in this case and it cannot be applied to this case.

The Board also looks to *NLRB v. Sears, Roebuck & Co.*, to support its position that Congress provided for review of final orders in the federal courts of appeals. But the Board again misses the mark by retreating to this case to outline the process of getting to the federal courts of appeals. *NLRB v. Sears, Roebuck & Co.* stands for the proposition that the General Counsel has unreviewable authority to determine whether a complaint shall be filed. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975). While this may be true, it does not entertain the question of whether a complaint *can* be filed. These are two different questions indeed. For if a party who does not have any protections under the act cannot file a ULP (the very argument Menard is making here) then such a complaint cannot be filed.

Menard is not questioning whether the process of how the Board processes its ULP's and Complaints is valid – the sole argument is that the Board simply has no authority over independent contractors. When the Board relies on cases such as *Myers* and *Sears* to show that the Board has the authority to investigate ULP's and process complaints, it skips the most important question: *Can* the Board do so on behalf of an independent contractor? The answer is an unequivocal “no.”

C. The Board's misclassification process resolved whether Fisher could file an Unfair Labor Practice.

As the Board points out in its Brief, this case originates from a previously adjudicated administrative proceeding where the Board alleged that Fisher, among

others, was an employee and not an independent contractor. The complaint that spawned the administrative hearing included allegations that Menard had committed several ULP's in relation to its independent contractors. The ALJ ruled that the contract haulers were independent contractors and excluded from the Act. (See *Exhibit 1* to Menard's Complaint – ALJ Decision). The ALJ dismissed the complaint brought by the General Counsel. If (as the Board argues now) an independent contractor such as Fisher could still be brought under the protections of the act, the ALJ would have then made a decision on the ULP's in the Board's complaint. Of course the ALJ did not do that, because the independent contractor determination required dismissal of the ULP's. That very decision is what belies and undercuts what the Board is attempting to do in this current case: bring a ULP complaint on behalf of an independent contractor.

The Board does not have authority to pursue any matters on behalf of an entity that is expressly excluded from the NLRA. The Board's ALJ determined Fisher was an independent contractor. Once Fisher was ruled an independent contractor the Board could no longer afford him any protections under the Act pursuant to the clear statutory language of 29 U.S.C. §152(3).

If the Board is allowed to proceed with its complaint in the administrative action at issue here, the time and resources that Menard spent defending its classification of the contract haulers as independent contractors in the original administrative action, vindicated in an overwhelming decision in its favor, will have been pointless. Indeed the entire "misclassification" legal theory upon which the

Board has relied for decades would be out the window – independent contractors could just file ULP’s and not have to go through a classification trial.

This Court must find that it has jurisdiction to review the underlying agency action at issue here as the Board’s conduct is *ultra vires* and the Supreme Court has ruled that a district court has non-statutory jurisdiction in such an instance. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Trudeau v. Fed. Trade Comm’n*, 456 F.3d 178 (D.C. Cir. 2006).

3. Because the Board’s actions are contrary to a specific prohibition in the Act, Menard can seek review in this Court.

Similar to the actions taken by the Board in *Leedom v. Kyne*, the actions of the Board in this case are an “attempted exercise of a power that [has] been specifically withheld” by Congress and it will deprive Menard of a right assured to it by Congress. *Leedom v. Kyne*, 358 U.S. 184 (1958).

The Act specifically excludes independent contractors from the protections of the Act. Therefore, an independent contractor relationship confers a right upon Menard and the businesses it contracts with to be free from interference by the NLRB.

The *Leedom* framework applies in this case. In *Leedom*, the Supreme Court found that Congress gave professional employees the right to determine whether they preferred to be included in a collective bargaining unit consisting of both professional and nonprofessional employees. *Id.*, at 191. However, the Board included in a bargaining unit employees whom it found were not professional

employees after refusing to determine whether a majority of the professional employees would vote for inclusion in such unit. *Id.*, at 189. The Court held that this was an attempted exercise of power that had been specifically withheld from the Board. *Id.*

Congress guaranteed a right to individuals and business entities that they would not be subject to suit under the Act for actions taken in relation to independent contractors by excluding independent contractors from coverage under the NLRA. As the *Leedom* Court held, “Surely in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.” *Id.* Were there any ambiguity in the NLRA, the Board’s argument regarding *Leedom* and its other jurisdictional arguments might stand a chance; however, the withholding of power from the Board to act on behalf of independent contractors could not be more clear than the express statutory exclusion in 29 U.S.C. §152(3). As the *Leedom* Court held, the absence of jurisdiction of this court to decide this action would mean a “sacrifice or obliteration of a right which Congress has given . . . and the inference is strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control.” *Leedom v. Kyne*, at 190 (quoting *Switchmen’s Union of North America v. National Mediation Board*, 320 U.S. 297 (1943)); see also *Califano v. Sanders*, 430 U.S. 99, 105 (1977) (28 U.S.C. §1331 confers “jurisdiction on federal courts to review agency action”).

This Court has jurisdiction because the Board is acting in excess of its delegated powers and contrary to a specific prohibition in the Act. Menard has no

alternative opportunity for review to prevent the Agency from moving forward with its complaint and the Agency is clearly acting in violation of a specific statutory mandate of the NLRA. *Leedom v. Kyne*, at 188-190.

4. Other federal employment-law statutes carve out independent contractors and prevent them, and federal agencies on their behalf, from seeking redress under those statutes.

The underlying agency action at the heart of Menard's complaint is akin to an action brought by the EEOC for violations of Title VII (Civil Rights Act of 1964) or the Age Discrimination in Employment Act (ADEA), which cover employees and not independent contractors. It is also much like an action brought under the Employee Retirement Income Security Act (ERISA), which only covers employees. Once the determination is made that an aggrieved party is an independent contractor for purposes of these statutes, the case must be dismissed because they only cover employees. The same result should have followed here: once the Board's ALJ ruled that Fisher was an independent contractor and excluded from the Act's protections, the ULP charge should have been dismissed and no complaint issued.

A. Once independent contractor status is found, federal suits involving employment law are terminated.

In *Nationwide Mut. Ins. Co. v. Darden*, the Supreme Court was faced with a statute (ERISA) that defined employee as "any individual employed by an employer." *Id.*, at 321. Because ERISA only allowed "employees" to seek redress under the statute, the case turned on whether Darden was an employee. *Id.* The Court remanded the case back to the lower court to engage in the analysis of

determining whether or not Darden was a statutory employee and covered under the act. In doing so, the Court looked at the definition of “employee” under other statutes such as the FLSA (“Any individual employed by an employer”). The Court found the FLSA definition of employee to be “expansive” and that it “stretches the meaning of “employee” to cover some parties who might not qualify as such under a strict application of traditional agency law principles.” *Id.*, at 326. Yet, under both ERISA and the FLSA, if employee status is not found, any suits brought pursuant to those acts are dismissed.

Title VII defines employee very broadly: “employee” means “an individual employed by an employer....” 42 U.S.C. § 2000e(f). *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 380 (7th Cir. 1991). In *Knight*, the Court found that while there was no doubt the Plaintiff was sexually harassed, she could not bring an action against the insurance company she contracted with because she was an independent contractor and not an employee. *Id.* (“Knight must prove the existence of an employment relationship in order to maintain a Title VII action against Farm Bureau”).

The ADEA prohibits “an employer . . . from failing or refusing to hire or to discharge any individual because of such individual’s age.” 29 U.S.C. § 623(a)(1). Because “employers” only “hire” and “discharge” *employees*, courts have excluded independent contractors from the ADEA’s protection. *EEOC v. North Knox School Corp.*, 154 F.3d 744 (7th Cir. 1998) (citing *Hayden v. La-Z-Boy Chair, Co.*, 9 F.3d 617, 619 (7th Cir. 1993).

In *EEOC v. North Knox School Corp.*, the Court found that the school bus drivers at issue were independent contractors and thus the agency could not file suit on their behalf since they were excluded from the ADEA's protections. *EEOC v. North Knox School Corp.*, at 751 ("In short, the district court correctly held that Schuckman and Schultz were independent contractors and thus not covered by the ADEA").

B. The NLRA should be treated the same as other federal statutes regarding independent contractor classification.

The NLRA defines employee in almost an exact manner as ERISA and the FLSA: "The term "employee" shall include any employee. . . ." 29 U.S.C. §152(3). And independent contractors are excluded from coverage under Title VII, ADEA, ERISA and the FLSA just as they are under the NLRA. The NLRA also goes a step further than any of these statutes and uses language that specifically excludes independent contractors from coverage under the Act.

Here, when the Board's ALJ ruled Fisher was an independent contractor, he had no protection under the Act. Congress mandated that Fisher must suffer the same fate in this case as the Plaintiffs, including the EEOC, suffered in the above cited cases. The Board cannot be allowed to subvert the clear statutory language of the Act by bringing an action on behalf of an independent contractor after the independent contractor classification has been cemented by an NLRB ALJ.

5. Independent Contractors and Supervisors are treated differently under the Act.

The Board also argues that, while Supervisors are also excluded from the definition of “employee” under the Act, courts have found that in certain circumstances they can still bring an unfair labor practice charge. It is not difficult to differentiate the standard applied to supervisors and to independent contractors because this Court needs to look no further than the Act itself.

A. 29 U.S.C. §152 supplies different definitions of independent contractors and supervisors.

29 U.S.C. §152(3) alerts the reader to the difference between supervisors and independent contractors: one is “employed” as a Supervisor, while one has the “status” of an independent contractor. *Supra*. There is no ambiguity in that statutory language, just as there is no ambiguity in the exclusion of independent contractors from the Act. It is obvious to anyone with a basic understanding of employment relationships that Supervisors, while not standing in the same position as a rank-and-file employee, are still “employed” by an employer and that any actions they take will have a direct impact on employees of the same employer. However, an independent contractor is not “employed” by an employer. They are *contracted* and have the *status* of independent contractor in its relationship to any individual or business with which they are contracted.

B. The Board's supervisor cases do not provide the proper context for the independent contractor exclusion.

The supervisor cases cited by the Board mostly involve supervisors testifying in Board proceedings in furtherance of employee interests. See *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982). Here, no employees of Menard testified on behalf of General Counsel in the previous administrative action and none of Fisher's actions could be construed as acting in concert with Menard employees or trying to further Menard employees' interests. Fisher was at no point deemed an "employee" of Menard. Fisher contracted with Menard as the owner of his own business. His independent contractor status was confirmed by the Board's ALJ and the Board did not appeal that decision. No employees of Menard would have had any change in their employment rights through the actions of Fisher and none of have been affected in any actions Menard has taken toward Fisher.

The Board cites to *NLRB v. Advertisers Mfg. Co.* to support its supervisor theory applying to independent contractors. But, in that case a "supervisory employee was fired in retaliation for her son's union activity and the Court noted that the purpose of the firing was to intimidate union-supporters-consisting mainly of workers protected by the Act . . . showing the lengths to which the company would go to punish one of them." See *Defendant's Brief*, page 14. The Board argues that this advanced the *Parker-Robb* line of cases. In *Parker-Robb*, the Board held the "discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give

testimony adverse to their employers' interest or when they refuse to commit unfair labor practices." *Parker-Robb Chevrolet, Inc.*, at 404. The Board went on to hold that the "discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is not unlawful *for the simple reason that employees, but not supervisors, have rights protected by the Act.*" *Id.* (emphasis added). So *Parker-Robb* does not throw independent contractors and supervisors into the same cauldron; independent contractors cannot give "testimony adverse to their employers' interest" or commit any other act 'adverse to their employers' interest' because they are not *employed*. Rather, they have the *status* of "independent contractor" under the act. See 29 U.S.C. § 152(3). Supervisors, pursuant to § 152(3), are *employed*, and can act adversely to their employers interest, as well as on behalf of their fellow employees.

As stated above, the underlying misclassification trial where Fisher testified involved no Menard employees. Fisher was not acting on their behalf nor trying to advance any interests of Menard employees when he testified. He testified in order to advance a theory of the Board that he was an employee, a theory which ultimately failed.

Applying the treatment supervisors receive under the Act to independent contractors is forbidden by the clear language of the Act, and this Court should not entertain such a leap of interpretive faith. The Act itself distinguishes between the two categories, and the exclusion of independent contractors from any protection under the Act is unequivocal. Simply put, it is time for the Board to move on.

Conclusion

This Court has subject matter jurisdiction to review the actions of the Board pursuant to 28 U.S.C. §1331 and its inherent non-statutory review authority when an agency acts outside of its statutory authority. Independent Contractors are excluded from the protections of the NLRA. Any attempt by the Board to bring an action on behalf of an independent contractor is, therefore, outside of its statutory authority. Menard respectfully asserts that this Court must reject the Board's 12(b)(1) motion.

Respectfully submitted,

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