

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

THE COMMITTEE TO PRESERVE THE)	
RELIGIOUS RIGHT TO ORGANIZE)	
)	
Petitioner)	
)	
v.)	No. 19-1102
)	
NATIONAL LABOR RELATIONS)	
BOARD)	
)	
Respondent)	

**REPLY OF THE NATIONAL LABOR RELATIONS BOARD
TO THE PETITIONER’S OPPOSITION TO THE BOARD’S MOTION TO
DISMISS FOR LACK OF APPELLATE JURISDICTION**

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board (“the Board”) replies to the opposition of the Committee to Preserve the Religious Right to Organize (“the Committee”) to the Board’s motion to dismiss for lack of jurisdiction. The Committee presents no grounds for denying the Board’s motion.

1. The Committee, which does not claim to be a statutory labor organization, has no bargaining relationship with Hobby Lobby Stores, Inc., and does not represent or seek to represent its employees, filed a charge alleging that Hobby Lobby maintained an unlawful arbitration agreement that interfered with its employees’ statutory rights to engage in concerted activity. The General Counsel issued a complaint, which the Board ultimately dismissed. The Committee seeks

review of that dismissal here, but it has failed to show that it is aggrieved by the Board's Order and that it has constitutional standing to challenge it.

2. As the Board outlined in its Motion to Dismiss (Mot. 3-4), to petition this Court for review, the Committee must show that it is "aggrieved" by the Board's Order, which requires demonstrating that it has suffered an "adverse effect in fact." *See* 29 U.S.C. § 160(f); *Liquor Salesmen's Union Local 2 of State of N.Y. v. NLRB*, 664 F.2d 1200, 1206 n.8 (D.C. Cir. 1981) (quotation marks omitted).

The Committee claims (Opp. 1-3) aggrievement on the bare fact that it was a charging party before the Board and that the Board did not award the relief it requested. The Committee's right to file a charge, however, has no bearing on its right to petition this Court as a person aggrieved. "Any person," even one without a personal stake in the outcome of the proceedings, can file an unfair-labor-practice charge with the Board. 29 C.F.R. § 102.9; *NLRB v. Indiana & Michigan Elec. Co.*, 318 U.S. 9, 17 (1943) (charging party can be a "stranger" to the dispute). Thus, the Committee's mere status in this case as a charging party who did not get its requested relief does not establish an "adverse effect in fact." *See Richards v. NLRB*, 702 F.3d 1010, 1012, 1014-18 (7th Cir. 2012) (dismissing charging parties' petition because they were not injured or aggrieved by Board's refusal to provide remedy that they requested to benefit others). The Committee's "dissatisfaction with certain Board findings and conclusions," which is all that it has shown, "is not

enough” to establish aggrievement. *Harrison Steel Castings Co. v. NLRB*, 923 F.2d 542, 545 (7th Cir. 1991).

To support its claim that any charging party who does not get the relief it sought is statutorily aggrieved, the Committee relies on selective case quotations entirely removed from the factual contexts giving rise to aggrievement. In each case, the charging party, unlike here, had plainly suffered an “adverse effect in fact” from the Board’s order. See *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 694 F.2d 1289, 1292-96 (D.C. Cir. 1982) (charging-party union was aggrieved by a Board order that did not require employers to give the union all the information it requested as necessary to perform its representational duties); *Truck Drivers & Helpers Local No. 728 v. NLRB*, 386 F.2d 643, 644 (D.C. Cir. 1967) (charging-party union sought review of Board order that failed to enjoin employer from discriminating against union’s members). None of the Committee’s cited cases involved “a situation like this one, where the charging party was not actually injured by the final [Board] order.” *Richards*, 702 F.3d at 1016-18. Indeed, the Committee’s entire argument rests on the mistaken premise that it has a direct real-world stake in the fate of the Board’s Order, ignoring the

fact that its interest in this dispute stems solely from its act of bringing the matter to the General Counsel's attention.¹

Nor does the dicta in *International Union, UAW, Local 283 v. Scofield*, 382 U.S. 205 (1965), support the Committee's claim (Opp. 2-3) that it is "aggrieved" merely by virtue of its unsuccessful participation in the antecedent administrative proceedings. That case involved the entirely different context of the right of a *prevailing* party—one "wholly successful" in proceedings before the Board—to *intervention* in a court of appeals case, not a non-prevailing charging party's right to petition for review as a "person aggrieved." *Id.* at 207-08. Moreover, as the Court emphasized, the prevailing charging-party union in that case had "vital private rights in the Board proceeding," which involved the employer's refusal to bargain and its potential breach of the parties' collective-bargaining agreement. *Id.* at 207-08, 218-20 (quotation marks omitted). The Court was simply not presented with, and thus not addressing, the unusual circumstance presented here, where a non-prevailing charging party is seeking court review of a Board order in a

¹ Contrary to the Committee (Opp. 2), the Fourth Circuit in *Chatham Manufacturing Company v. NLRB*, 404 F.2d 1116 (1968), did not embrace the proposition that any charging party "who gets less than he requested" automatically is aggrieved, and expressly stated that it "[did] not reach" the question of whether the charging party before it was aggrieved. *Id.* at 1117-18.

proceeding where that party has no personal stake in the outcome and has suffered no “adverse effect in fact” from the order.

3. The Committee has also failed to show that it has Article III standing, either in its own right or by asserting the rights of its members. The “irreducible constitutional minimum of standing contains three elements:” (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Committee’s opposition does not even recognize those elements, let alone provide “evidence” of the “specific facts” necessary to support them. *Sierra Club v. EPA*, 292 F.3d 895, 898-902 (D.C. Cir. 2002).

4. The Committee contends (Opp. 3-5) that it has individual standing because it was the unsuccessful charging party before the Board. But this argument improperly conflates the right to participate in an administrative proceeding and the right to invoke the jurisdiction of an Article III court. *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 27-28 (D.C. Cir. 2002). As discussed, “[a]ny person” can file an unfair-labor-practice charge (p. 2), and the Committee’s failure to obtain all that it sought before the Board, in a proceeding where it had no personal stake, cannot alone establish an injury-in-fact. Indeed, no statute could provide that such a loss before an administrative tribunal automatically confers standing to appeal to an Article III court, because Congress “cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who

would not otherwise have standing.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) (quotation marks omitted). Holding otherwise would allow the Committee to impermissibly evade the requirements of Article III.

The Committee further claims that the Board’s Order harmed its generalized “interest in workers’ ability to join together to advance the collective cause of labor.” (Opp. 4.) This professed harm is both factually and legally insufficient for Article III standing, which requires an injury to be both “particularized”—that is, “affect[ing] the plaintiff in a personal and individual way”—as well as “concrete”—that is, “*de facto*,” “real,” and “actually exist[ent],” rather than “abstract.” *Id.*

Setting aside the paucity of evidence regarding the nature of the Committee and the interests it may hold, it is well established that “Article III requires more than a desire to vindicate value interests,” and that the injury-in-fact requirement distinguishes a person “with a mere interest in the problem” from a person “with a direct stake in the outcome of a litigation.” *Diamond v. Charles*, 476 U.S. 54, 66-67 (1986). To be sure, the Committee, by filing and pursuing its unfair-labor-practice charge, advocated its view that Hobby Lobby violated the Act, and that the Board should so find. But this demonstrates only the Committee’s “interest shared generally with the public at large in the proper application of the . . . law[]”—which cannot suffice to show standing. *Arizonans for Official English v. Arizona*,

520 U.S. 43, 64-65 (1997); *accord Lujan*, 504 U.S. at 571-78. In sum, the Committee’s filing of a charge establishes nothing more than its status as a “concerned bystander[.]” to the underlying controversy between Hobby Lobby and the employees affected by the arbitration agreement, and that status is insufficient to demonstrate standing. *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013).

The Committee’s specious quotation (Opp. 3) of *Warth v. Seldin*’s language that “[t]he actual or threatened injury required by [Article] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing,” does not support its claim that the statutory right to file charges *a fortiori* gives it the necessary injury to establish Article III standing. 422 U.S. 490, 500 (1975). This Court recently rejected a similar attempt to establish standing based on the same quoted language, noting that the plaintiffs “vastly overread that case.” *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016). The Committee also gains no ground in again selectively quoting (Opp. 4) *Warth*’s language indicating that a party may sometimes invoke, as part of its claim to standing, the legal rights of others or the public interest. 422 U.S. at 501. As the Court there explained, “[o]f course, Article III’s requirement remains: the plaintiff still must allege a distinct and palpable injury to himself,” which the Committee has utterly failed to do. *Id.*

5. The Committee’s alternative claim to associational standing (Opp. 5-7, 9-10) also fails. To begin, the Committee has not shown it is “the sort of organization that would qualify as a ‘membership association’ for purposes of [this Court’s associational] standing analysis.” *Sorenson Commc’ns, LLC v. FCC*, 897 F.3d 214, 225 (D.C. Cir. 2018). Indeed, its opposition does not attempt to show, let alone demonstrate with the required specificity, that it constitutes a “traditional membership organization” or the “functional equivalent” of one, including that its constituents possess the traditional “indicia of membership”—threshold preconditions under this Court’s precedent. *Am. Legal Found. v. FCC*, 808 F.2d 84, 90-91 (D.C. Cir. 1987). (*See also* Mot. 5-6.)

The Committee submits only a declaration of its counsel—who does not claim to be a leader, officer, or member, and whose “mere allegations” cannot establish standing. *Sierra Club*, 292 F.3d at 901. The declaration contains only “conclusory and general assertions . . . untethered from evidence” about the organization’s nature. *Sorenson*, 897 F.3d at 225. It claims that “several unions and other persons” (all unidentified) formed the Committee with counsel’s “help[]” and, as to its purpose, offers an unexplained reference to a law review article. (Decl. 1.) The declaration is decidedly silent as to the Committee’s organizational structure, governance, and leadership. And aside from noting that the Committee has “filed Labor Board charges in various cases,” there is no discussion of its

activities. (Decl. 1.) Further, the Committee presents no evidence showing that its constituents are a “discrete, stable group of persons with a definable set of common interests,” or that they play any role whatsoever in “selecting [the Committee’s] leadership,” “guiding [its] activities,” or “financing those activities.” *Am. Legal Found.*, 808 F.2d at 90. On this basis alone, the Committee’s claim to associational standing crumbles. *See Sorenson*, 897 F.3d at 225.

6. Moreover, the Committee has not shown that at least one of its members would have standing in his own right—including that the Board’s Order caused any of its purported members an Article III injury-in-fact. (*See* Mot. 6-7.) The Committee asserts that its members include former Hobby Lobby employees, employees of other employers, and two unions—none of whom are specifically identified—a failure that itself is fatal to its claim. (*See* Mot. 7.) Likewise, the Committee fails to show, or even to allege, that any of those purported members were Committee members at the time that it filed its petition for review. (*See* Mot. 7.) *See also Int’l Bhd. of Teamsters v. TSA*, 429 F.3d 1130, 1136 n.4 (D.C. Cir. 2005) (declaration fatally failed to aver membership at time union filed petition).

As to the two unidentified individuals whom the Committee asserts are “former [Hobby Lobby] employees” who were “required to sign [the arbitration agreement] as a condition of employment” (Opp. 5), the Committee provides no competent and specific evidence substantiating those assertions. *See Ass’n of*

Flight Attendants-CWA v. U.S. DOT, 564 F.3d 462, 465 (D.C. Cir. 2009) (affidavit supporting standing must “show that the affiant is competent to testify on the matters stated,” and must set forth “specific facts” that are “made on personal knowledge” and “would be admissible in evidence”). The Committee does not provide affidavits from the alleged former employees, and counsel’s assertions about them are insufficient. *See id.* at 465-67; *Sierra Club*, 292 F.3d at 901 (organization’s counsel cannot establish standing by providing a submission detailing members’ alleged injuries because such “matters [are] beyond the scope of counsel’s personal knowledge”).

As for the unidentified “employees of other employers” (Opp. 5) whom the Committee claims as members, the Committee fails to identify an injury that is concrete and particularized as well as actual or imminent, rather than conjectural or hypothetical. (*See* Mot. 5.) The Committee vaguely asserts that those other employees “want to assist” Hobby Lobby’s employees or “wish to assist [them to] eliminate the arbitration procedure.” (Opp 5-6, 9; Decl. 2.) It does not claim that such individuals have taken, or attempted to take, any specific action to “assist” the employees in any particular manner—or even that they have formed a specific plan to take such action. *See Lujan*, 504 U.S. at 564 (“‘some day’ intentions” not “actual or imminent”). And, in any event, Committee counsel lacks the competency and personal knowledge to testify as to those employees’ subjective

intentions. There is no showing how the Board’s Order harms those individuals—who were never employed by Hobby Lobby—in a “concrete and particularized” way, *Lujan*, 504 U.S. at 560, and “share[d] . . . concern[s]” (Decl. 2) is not evidence of a direct stake in this action.

The Committee’s amorphous assertions (Opp. 9, Decl. 2) regarding the two unidentified unions are also inadequate. The Committee concedes that the unions have not even “targeted Hobby Lobby for organizing.” (Decl. 2.) Further, Committee counsel is not competent to represent that a victory in this case would assist “any such [future] organizing” (Decl. 2), and that “speculative chain of possibilities” cannot establish an Article III injury. *Elec. Privacy Info. Ctr v. Commerce*, 928 F.3d 95, 102 (D.C. Cir. 2019) (quotation marks omitted). The unions’ desire to “make a point” (Decl. 2) to other employers seeks mere “psychic satisfaction,” insufficient for standing. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998).

The Committee is wildly off the mark with its overbroad and unsupported claim (Opp. 9) that because the National Labor Relations Act gives statutory employees and unions the right to assist employees of other employers, “[a]nything that [Hobby Lobby] does” that interferes with that right “is a sufficient harm to create standing.” That absurd assertion would make a nullity of the Constitution’s standing requirements.

WHEREFORE, the Board respectfully requests that the Court grant the Board's motion to dismiss.

/s/ David Habenstreit
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Dated at Washington, DC
this 6th day of August, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its reply contains 2,599 words of proportionally spaced, 14-point type, and that the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 6th day of August 2019

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2019, I filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for District of Columbia Circuit by using CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit
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Dated at Washington, DC
this 6th day of August 2019