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800 River Road Operating Company, LLC d/b/a Care One at New Milford and 1199 SEIU United Healthcare Workers East. Case 22–CA–204545

August 29, 2019

ORDER¹

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

On March 30, 2018, the General Counsel issued the complaint in this case, alleging that the Respondent violated the National Labor Relations Act. Thereafter, the parties litigated the case before Administrative Law Judge Benjamin W. Green, who issued a decision on November 20, 2018, finding that the Respondent violated Section 8(a)(5) and (1) by reducing the work hours of 20 unit employees and by discharging one unit employee and suspending three others without providing the Union with notice and an opportunity to bargain over the discipline. The Respondent relevantly excepted, and the parties thereafter filed briefs responding to the exceptions. These included the Charging Party Union’s 17-page answering brief, filed on March 14, 2019, supporting all of the judge’s unfair labor practice findings. The General Counsel’s answering brief, also filed on March 14, supported the judge’s finding that the Respondent unlawfully reduced unit employees’ hours. The brief also acknowledged that the judge’s finding that the unilateral imposition of discretionary discipline violated the Act was consistent with the record evidence and extant Board precedent, citing *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016). However, the General Counsel argued that the Board should overrule *Total Security Management*, return to the standard set forth in *Fresno Bee*, 337 NLRB 1161, 1186 (2002), and find that the unilateral imposition of discipline was lawful under that standard.

On July 1, 2019, the Charging Party filed a Motion for Partial Withdrawal of the Charge, seeking to withdraw only the allegations that the unilateral imposition of discretionary discipline violated the Act. The reason given for this about-face is as follows: “The Union . . . has further investigated the circumstances of the disciplinary actions addressed in the charge and determined that in each instance the employee engaged in misconduct and the misconduct was the reason for the discipline. In other words, the disciplinary actions complained of were for cause . . . and therefore no reinstatement or make-whole remedy is

available” for this alleged violation of the Act. Thus, in the Union’s opinion, further processing of this allegation in the charge “would not effectuate the purposes of the Act.” The Union provides no information concerning its “further investigation” or the facts that investigation uncovered. The Union, however, maintains its position that the reduction in unit employees’ hours was unlawful, and thus it does not seek withdrawal of its charge in its entirety.

After careful consideration, we have concluded that the Charging Party’s Motion should be denied. Section 102.9 of the Board’s Rules and Regulations provides that after a case has been transferred to the Board, a charging party may withdraw its unfair labor practice charge only with the Board’s consent. As the Board explained more than 60 years ago, “[i]t is well established that the Board’s power to prevent unfair labor practices is exclusive, and that its function is to be performed in the public interest and not in vindication of private rights. Thus, the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned.” *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957) (footnote omitted), *enfd.* 251 F.2d 639 (6th Cir. 1958); see also *Flyte Tyme Worldwide*, 362 NLRB 393, 393 (2015) (citing *Robinson Freight Lines*, *supra*); *Retail Clerks, Local 1288 (Nickel’s Pay-Less Stores)*, 163 NLRB 817, 817 fn. 1 (1967) (“When a matter has ripened to the point of being before the . . . Board for decision, we must of course give paramount weight to the public interest affected by withdrawal of the underlying charge.”), *enfd.* 390 F.2d 858 (D.C. Cir. 1968). In short, it is for the Board to determine whether permitting partial withdrawal of the charge would effectuate the purposes of the Act, not the Charging Party.

Here, the Board and the parties have already expended significant resources in the litigation of this case, and there is no evidence that the Respondent has either remedied the violations found by the Administrative Law Judge or reached a settlement with the Charging Party Union. Moreover, the motion only seeks withdrawal of the charge in part; thus, the Board will have to continue processing the case in any event. In addition, this case presents the Board with an opportunity to address significant issues of law under the National Labor Relations Act involving the obligation of the Respondent, and other employers, to engage in bargaining before imposing discipline on employees. Indeed, the Respondent opposes the motion precisely because it would be deprived of that guidance if the motion were granted. For all these reasons, we do not find

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

that it would effectuate the purposes of the Act to grant the motion for partial withdrawal of the charge in this case.

Our dissenting colleague contends that the Charging Party's Motion should be granted because, in light of the Charging Party's and General Counsel's change of position, there is no longer a "case or controversy." The dissent cites no authority for the proposition that the justiciability doctrines applicable in an Article III court apply to agency adjudications under the Administrative Procedure Act, and that statute makes no mention of a "case or controversy" requirement. Indeed, the very fact that under Section 102.9 of its Rules and Regulations, the Board may withhold its consent to withdrawal of a charge demonstrates that a case is not mooted simply because the charging party requests withdrawal of the charge—or, as here, withdrawal of part of the charge. And nothing in Section 102.9 or in Board decisions applying it requires the Board to consent if, at a certain stage of the litigation, the General Counsel changes position. Moreover, regardless of the parties' current positions, the "concrete adverseness which sharpens the presentation of issues" is present here because the parties vigorously contested the issues before the judge, *Baker v. Carr*, 369 U.S. 186, 204 (1962), and it is not unlikely that once this Order is published and the broader public is put on notice that reconsideration of *Total Security Management* is sought in this case, one or more interested parties will move for leave to file amicus briefs.

The dissent also gives no weight to the significant resources already expended in the litigation of this case, to the Respondent's interest in a determination of its rights and obligations under the Act with respect to future disciplinary actions, or to the fact that the motion only seeks partial withdrawal of the charge, so the Board must expend further resources in processing the case in any event. Instead, she gives dispositive weight to the Union's claim, which our colleague uncritically accepts at face value, that between March and July, 2019, the Union somehow (it does not say how) obtained additional information (it does not say what) demonstrating that the suspensions and discharge were for cause, when the Union had vigorously contended the opposite ever since it filed the charge. The dissent thus effectively elevates the Union's wishes concerning the continued litigation of this issue over all other considerations. For the reasons stated above, we do not.

Having denied the Motion for Partial Withdrawal of the Charge, we will consider in due course the issues presented in this case, including the General Counsel's and

Respondent's request that we reconsider *Total Security Management*. While our dissenting colleague evidently believes that the only legitimate result would be to reaffirm that precedent, its validity is not before us now, and we express no view concerning that matter. Accordingly, we also do not address the dissent's speculation about possible outcomes for this case.

ORDER

IT IS ORDERED THAT the Charging Party's Motion for Partial Withdrawal of the Charge is denied.

Dated, Washington, D.C. August 29, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

The decision to deny the Charging Party's motion for partial withdrawal of its unfair labor practice charge is inexplicable—unless, of course, the majority intends to use this case to overrule *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), which held that employers have a statutory duty to bargain with unions before—not just after—imposing discipline on employees.¹ But the majority's apparent desire to reverse precedent does not justify keeping this case alive artificially.

Applying *Total Security* here, the administrative law judge found that the Respondent violated Section 8(a)(5) of the Act by unilaterally suspending three employees and discharging another. Thus, the General Counsel—who had issued and pursued the complaint—prevailed. But in his brief to the Board, the General Counsel reverses course completely. He now urges the Board to overrule *Total Security*, reiterating the arguments of Member Miscimarra's dissent in that case.² The Charging Party, meanwhile, seeks to withdraw the charge in relevant part. Barely acknowledging the General Counsel's remarkable about-face, the majority—denies the motion. The majority concludes that it would "not effectuate the purposes of the Act" to permit partial withdrawal. Here, the majority

¹ In a prior decision, Members Kaplan and Emanuel pointedly "express[ed] no opinion whether *Total Security Management* was correctly decided." *Windsor Redding Care Center, LLC*, 366 NLRB No. 127, slip op. at 1 fn. 3 (2018).

² Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision at 23–37 (March 14, 2019).

offers several reasons for denying the Charging Party's motion: (1) that "the Board and the parties have already expended significant resources in the litigation of this case;" (2) that "there is no evidence that the Respondent has either remedied the violations found by the Administrative Law Judge or reached a settlement with the Charging Party;" (3) that the motion "only seeks withdrawal of the charge in part; thus, the Board will have to continue processing the case in any event; and (4) that "this case presents the Board with an opportunity to address significant issues of law under the National Labor Relations Act involving the obligation . . . of employers to engage in bargaining before imposing discipline on employees" (a reference to the overruling of *Total Security*). None of these reasons, separately or together, justify denying the Charging Party's motion.

First, it would be one thing for the majority to say that the Board should act in order to ensure that the violations found by the judge *will* be remedied. But if the majority overrules *Total Security*—as seems likely—then the violations found by the judge will fall with it. Thus, the majority's rationale here—the importance of remedying violations—would be revealed as a pretext, damaging to the institutional integrity of the Board. Put another way, it would not be appropriate for the majority to force the Charging Party to proceed, simply to ensure that it loses.

Second, it is manifestly *not* true that "this case presents the Board with an opportunity to address" *Total Security*—at least a legitimate opportunity. The developments in the case—first, the General Counsel's change in position to advocate for reversal of current law, and then the Charging Party's subsequent decision to seek withdrawal of the charge—mean that there is no longer a live dispute over the *Total Security* issue. The only party that intended to seek a remedy under current law no longer seeks that remedy, while the two entities seeking to continue the litigation, the General Counsel and the Respondent, are no longer adversarial: they are seeking the same outcome. The adversarial process at the heart of Board adjudication requires more to function properly: parties with a stake in the case actively advocating opposing views.³ "With one

exception," not implicated today, "the Board does not render advisory opinions."⁴

The majority's other arguments are similarly unpersuasive. The majority insists that because "significant resources" have already been spent in litigation, and because the case will continue even if partial withdrawal of the charge is permitted, the Board might as well decide the *Total Security* issue. But by that standard, the Board should never permit withdrawal of a charge once a case has reached the Board, and it should never permit resolution of only part of a case. Of course, the Board has done both things at once, appropriately.⁵ As the Board has explained, the proper focus is whether the "expenditure of *further* potentially significant resources best serves the public interest."⁶ Here, the majority insists that it must expend further resources to decide the *Total Security* issue in order to provide "guidance" to the Respondent and other employers. But existing Board precedent already provides that guidance, and the Board has explained "[a]lthough Board decisions do provide guidance, the Board's primary purpose is to resolve *actual disputes*."⁷ There is no such actual dispute here.

Unfortunately, today's decision is only the latest example of a larger pattern of procedural overreach by the current majority. In *Hy-Brand*,⁸ for example, the majority attempted to reverse the Board's joint-employer standard in a case where no party asked it to do so, where the new standard did not impact the outcome of the case, and where the case could have been decided without reaching the joint-employer issue at all—as it ultimately was upon reconsideration.⁹ Similarly, in *PCC Structurals*,¹⁰ the majority seized on an otherwise straightforward case involving a bargaining unit that was manifestly appropriate under a narrow doctrine of current law (which the Board did not purport to change)¹¹ to make sweeping and unwarranted changes to the Board's overall approach in assessing the appropriateness of bargaining units. In *Boeing*,¹² the majority reversed settled law *sua sponte* and without public participation, adopting a comprehensive framework for evaluating employer rules that went far beyond the single rule presented in the case, categorically

³ See generally *U.S. Parole Comm'n v Geraghty*, 445 U.S. 388, 395–396 (1980) (discussing mootness with respect to constitutional "case or controversy" requirement for federal jurisdiction).

⁴ *Snohomish County Headstart*, 254 NLRB 1372, 1372 (1981) (citing Sec. 102.98 of Board's Rules and Regulations, providing for advisory opinions with respect to applicability of Board's discretionary jurisdictional standards where state proceeding is ongoing).

⁵ E.g., *Dow Chemical Co.*, 349 NLRB 104 (2007).

⁶ *Id.* at 104 (emphasis added).

⁷ *Id.* at 105 (emphasis added).

⁸ *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017), vacated 366 NLRB No. 26 (2018).

⁹ *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 94 (2018).

¹⁰ 365 NLRB No. 160 (2017).

¹¹ *Id.*, slip op. 13 at fn. 27 (dissenting opinion of Member McFerran) (explaining that the unit in question could be found appropriate in a manner not implicating the question whether to overturn *Specialty Healthcare* because it was a traditional craft unit of the type that the Board has found to be presumptively appropriate, and noting that the Board had previously found similar units of welders in the aerospace industry to be appropriate on this rationale).

¹² *Boeing Co.*, 365 NLRB No. 154 (2017).

adjudicating the lawfulness of specific, unrelated rules not before the Board. In *Ridgewood*,¹³ the majority reversed precedent and permitted a successor employer guilty of discrimination to make unilateral changes in working conditions, instead of finding a violation on an alternative basis fully supported by the record.

Adding today's decision to the mix, it becomes increasingly clear that the current majority is inclined to disregard the nature of the contested issues actually presented for adjudication in the case before them—or in this case the *absence* of such contested issues—and instead view the facts of the case as a mere jumping-off point to enable discussion of the issues it wants to address and the precedents it wants to overrule. There is no shortage of significant issues under the National Labor Relations Act. But the Board cannot and should not reach out to address them wherever it likes, based simply on a predetermined desire to change the law at the first conceivable opportunity.

¹³ *Ridgewood Health Care Center, Inc. and Ridgewood Health Services, Inc.*, 367 NLRB No. 110 (2019).

¹⁴ Even if the Board majority cannot be swayed from using this case to revisit *Total Security*, at a minimum it should not only be transparent about its intentions, but it should also issue a notice and invitation to file briefs, so that interested members of the public can weigh in. The majority cites the prospect of amicus briefs here—“once this Order is published and the broader public is put on notice that reconsideration of *Total Security* is sought”—but it inexplicably fails to issue a notice and invitation to file briefs. The current majority has occasionally issued such notices when it has contemplated reversing precedent, see, e.g., Notice and Invitation to File Briefs, *Loshaw Thermal Technology, LLC*, Case 05–CA–15860 (Sept. 11, 2018), but more often has not (with no clear rationale for which approach is followed). See, e.g., *Johnson Controls*, 368 NLRB No. 20, slip op. at 14 (2019) (Member McFerran, dissenting); *UPMC*, 368 NLRB No. 2, slip op. at 15 & fn. 56 (2019) (Member McFerran, dissenting); *SuperShuttle DFW, Inc.*, 367 NLRB No. 75, slip op. at 15 & fn. 2 (2019) (Member McFerran, dissenting); *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 12 & fn. 18 (2019) (Member McFerran, dissenting); *E.I. Du Pont de Nemours, Louisville Works*, 367 NLRB No. 12, slip op. at 3–4 (2018) (Member McFerran, dissenting); *Boeing Co.*, supra, 366 NLRB No. 128, slip op. at 9–10 (Members Pearce and McFerran, dissenting); *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 22 (2017) (Members Pearce and McFerran,

Following such a course does damage to both the law and to the Board.¹⁴

The Board can act via adjudication when there is a case or controversy presented, or it can act via rulemaking when it wants to address an issue in the absence of a specific case or controversy. What it cannot do is act via adjudication in the absence of a case or controversy because it wants to change the law as quickly as possible.¹⁵ Manufacturing an occasion to overrule precedent is the essence of arbitrary and capricious agency action. Accordingly, I dissent.

Dated, Washington, D.C. August 29, 2019

Lauren McFerran,

Member

NATIONAL LABOR RELATIONS BOARD

dissenting); *PCC Structurals, Inc.*, supra, slip op. at 14, 16 (Members Pearce and McFerran, dissenting); *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, supra, 365 NLRB No. 156, slip op. at 36, 38 (Members Pearce and McFerran, dissenting), vacated 366 NLRB No. 26 (2018); *Boeing Co.*, 365 NLRB No. 154, slip op. at 30–31 (2017) (Member McFerran, dissenting); *UPMC*, 365 NLRB No. 153, slip op. at 17–19 (2017) (Member McFerran, dissenting). Here, it would be improper to rely solely on the brief of the Charging Party, given its demonstrated desire to terminate the litigation.

¹⁵ Contrary to the majority's claim, I do not argue that the “case or controversy” requirement applicable to Article III courts applies to the Board. My point, rather, is that in exercising its discretion to dismiss a matter as moot, an administrative agency such as the Board necessarily “receives guidance from the policies that underlie the ‘case or controversy’ requirement of [A]rticle III” and “is informed by an examination of the proper institutional role of an adjudicatory body and a concern for judicial economy.” *Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447, 451 (10th Cir. 1983) (holding that Federal Mine Safety and Health Review Commission did not abuse discretion in affirming dismissal of administrative proceeding contesting safety citations after Secretary of Labor vacated citations, and rejecting mine operator's argument that it was entitled to interpretation of safety standard underlying citations). That is the approach the Board has followed before today. See, e.g., *Dow Chemical Co.*, supra, 349 NLRB at 104–105.