

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

TEMPLE UNIVERSITY HOSPITAL, INC.

Case 04-CA-174336

and

TEMPLE ALLIED PROFESSIONALS,
PENNSYLVANIA ASSOCIATION OF STAFF
NURSES AND ALLIED PROFESSIONALS

CHARGING PARTY’S BRIEF ON ISSUES FOR REMAND

The Charging Party, Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP) submits the following brief on the issues identified by the U. S. Court of Appeals for the District of Columbia Circuit in its July 9, 2019 decision granting review in Temple University Hospital, Inc., v NLRB, United States Court of Appeals for the District of Columbia Circuit (Nos. 18-1150, 18-1164). In its brief, PASNAP urges the Board to continue its established practice of limiting judicial estoppel to cases in which the Board is a party to the proceeding. PASNAP further maintains that the Temple University Hospital (TUH) suffered no detriment as a result of the Pennsylvania Labor Relations Board’s (PLRB) assumption of jurisdiction over the parties in a prior proceeding.

In its decision, the Court of Appeals granted TUH’s petition for review, limiting its decision to TUH’s argument that PASNAP was judicially estopped from

bringing a petition before the Board because the Union had argued in a proceeding in 2006 before the PLRB that the Board lacked jurisdiction. *Temple Univ. Hosp. Inc. v NLRB*, 929 F.3d 729 (D.C. Cir. 2019). Specifically, the Court concluded that the Board erred in applying the judicial estoppel factors set out by the Supreme Court in *New Hampshire v. Maine*, 532 U.S. 742 (2001). *Id.* at 735. The Court then remanded the case to the Board to determine if judicial estoppel applied, and if it did, whether TUH met the Supreme Court’s *New Hampshire v. Maine* requirements:

We therefore remand the case for the Board to determine in the first instance whether judicial estoppel is available in NLRB proceedings. If the Board determines that judicial estoppel is available in appropriate circumstances, then under *New Hampshire v. Maine* it will next have to determine — and adequately explain — whether the Hospital has made a sufficient showing of unfair advantage or unfair detriment and whether the ultimate “balance of equities” favors its application on the facts of this case.

Id. at 736- 737. The Court did not reach TUH’s other arguments on appeal.

In this brief, PASNAP urges the Board to continue its established practice of limiting judicial estoppel to cases in which the Board is a party to the proceeding. PASNAP further maintains that the TUH suffered no detriment as a result of the PLRB’s assumption of jurisdiction.

ARGUMENT

The Board should continue its practice of restricting judicial estoppel to cases in which it has been a party. The Board has a broad responsibility to develop national labor relations policy and needs maximum flexibility to adopt policies and

procedures that respond to economic and political changes that impact American employers. Additionally, the Board has broad discretion in determining the businesses over which it wants to assume jurisdiction and should be free to make its jurisdictional decisions regardless of the prior positions taken by the parties before it.¹ Moreover, from time to time the Board has revised its standards for jurisdiction in an effort to maintain the effectiveness of the Act.² Consequently, the Board should not be precluded from exercising jurisdiction over Temple Hospital merely because a union representing its employees had previously sought jurisdiction from the PLRB.

A The Board has sound reasons for limiting judicial estoppel to proceedings in which it has been a party.

Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. *New Hampshire v. Maine*, 532 U.S. 742, 950 (2001); accord *Abteu v. U.S. Dep't of Homeland Security*, 808 F.3d 895, 899-900 (D.C. Cir. 2015). As the Third Circuit Court of Appeals has explained:

¹ In its original decision declining jurisdiction over Temple University, the Board exercised its discretion. At the request of the University, and over the objection of the petitioning union, the Board decided that “[u]nder the special circumstances of this case, we find that it would not effectuate the policies on the Act to assert jurisdiction over the University.” *Temple University*, 194 NLRB 1160 (1972).

² In fact, the Board’s changed policy, as set out in *Management Training Co.*, 317 NLRB 1355 (1995), for health care institutions that provided services through a contract with a state or political subdivision, was implicated in its decision to assume jurisdiction over TUH.

[J]udicial estoppel is an extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice. It is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when...there is no evidence of intent to manipulate or mislead the courts. Judicial estoppel is not a sword to be wielded by adversaries unless such tactics are necessary to secure substantial equity.

Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3rd Cir. 1996) (internal quotations omitted). “[J]udicial estoppel is an equitable doctrine to be invoked by a court at its discretion.” *New Hampshire v. Maine*, 532 U.S. at 750. The purpose is to prevent parties from “playing ‘fast and loose with courts’” (quoting *Stretch v. Watson*, 69 A.2d 596, 603 (N.J. Super. 1949). *Id.*

Many Courts of Appeals limit the reach of judicial estoppel to precluding parties from taking inconsistent positions in the same litigation. *See, Sexual Minorities Uganda v. Lively*, 899 F.3d 24, 32-34 (1st Cir. 2018) (judicial estoppel may be applied to preclude party from prevailing in a case on an argument and then relying on a contradictory argument in another phase) *Walton v. Bayer Corp.*, 643 F.3d 994, 1002–1003 (7th Cir. 2011) (although judicial estoppel is usually applied to successive suits, it can be applied in different stages of same lawsuit, because purpose of doctrine is to deter fraud in litigation). *Hossaini v. Western Mo. Med. Ctr.*, 140 F.3d 1140, 1142 (8th Cir. 1998) (“The doctrine of judicial estoppel prohibits a party from taking inconsistent positions in the same or related litigation.”); *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 602

n.7 (8th Cir. 2009) (judicial estoppel does not apply if litigant's previous position was asserted in unrelated proceeding against different party). *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 716 (9th Cir. 1990) (stating rule in terms of same litigation); *PowerAgent Inc. v. Electronic Data Sys. Corp.*, 358 F.3d 1187, 1191–1192 (9th Cir. 2004) (party arguing that arbitrator has authority to decide issue of arbitrability will not, after arbitrator has decided that issue, be permitted to take position that arbitrator lacked authority to decide arbitrability); *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 605 (9th Cir. 1996) (noting disagreement among courts on the question of whether judicial estoppel should be limited to assertion of inconsistent positions within single litigation); *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (“[The] doctrine of judicial estoppel ... [is] a doctrine of preclusion of inconsistent positions.”); *Abteu v. U.S. Dep’t of Homeland Sec.*, 808 F.3d 895, 899–900 (D.C. Cir. 2015) (declining to apply judicial estoppel against federal agency based on positions taken by agency in other litigation with other parties, because “the rule of judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.”); *Minnesota Mining & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1302–1304 (Fed. Cir. 2002) (applying Fifth-Circuit law; doctrine of judicial estoppel prevents party from taking position that trial court adopts, and then taking opposite position on appeal); *Key Pharms. v. Hercon Labs.*

Corp., 161 F.3d 709, 715–716 (Fed. Cir. 1998) (doctrine of judicial estoppel bars appellant from asserting position that trial court adopts, and then complaining about it on appeal).

Similarly, where other federal agencies have applied judicial estoppel to their own proceedings, they have done so where a party took inconsistent positions within a common or closely related proceeding in which the agency was a party.³ In *Doe v. Department of Justice, Agency*, the Merit System Protection Board invoked judicial estoppel against the Department. 2015 MSPB LEXIS 10035, ***11-***14. The Department of Justice (DOJ) first argued that two charges against Doe merged into a single issue disqualifying Doe’s employment but later, after the Board adopted the DOJ’s position (finding for Doe), changed course and maintained that each charge must stand alone. *Id.* at ***8-***11. In *re Time Warner Cable*, the Federal Communications Commission (FCC) applied judicial estoppel against Time Warner. 2006 FCC LEXIS 4470. The Commission noted that, within a period of two weeks, Time Warner first obtained regulatory relieve for implemented channel changes under CFR Section 76.1603(b) and later, facing an order to restore a one such eliminated channel, argued that same Code section did not apply. *Id.* at **12-**13.

³ The DC Circuit cited these two cases in *Temple Univ. Hosp., Inc. v NLRB*, 929 F.3d 729, 734 (2019).

Courts are especially cautious about applying judicial estoppel to jurisdictional decisions. “[T]here is an exception to the general concept of judicial estoppel when it comes to jurisdictional facts or positions,” such that the doctrine of judicial estoppel “does not prevent a party from making inconsistent legal assertions on the issue of the court’s subject-matter jurisdiction.” *Whiting v. Krassner*, 391 F.3d 540, 544 (3rd Cir. 2004) *cert. denied*, 545 U.S. 1131 (2005); *North Sound Capital LLC v. Merck & Co.*, 314 F.Supp.3d 589, 619 (D. NJ 2018); Moore’s Federal Practice—Civil § 134.30. “[C]ourts have generally refused to resort to principles of judicial estoppel to prevent a party from 'switching sides' on the issue of jurisdiction.” *Whiting*, 391 F.3d at 544; *see also*, *Da Silva v. Kinsho Int’l Corp.*, 229 F.3d 358, 361 (2d Cir. 2000) (“[T]he issue of subject matter jurisdiction is one we are required to consider, even if the parties have ignored it or . . . have switched sides on the issue.”); *United States v. Maranda*, 761 F.3d 689, 693–694 (7th Cir. 2014) (judicial estoppel may not be applied to give court jurisdiction it would not otherwise have); *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1227-28 (10th Cir. 2011) (rejecting defendant’s argument that would “allow judicial estoppel to substitute for subject-matter jurisdiction); *Gray v. City of Valley Park*, 567 F.3d 976, 982 (8th Cir. 2009) (finding no precedent for application of judicial estoppel to resolve an issue of the court’s jurisdiction).

The Board has soundly limited application of judicial estoppel in its proceedings. The Board will not estop a party from invoking rights under the Act where the Board did not participate in the prior proceeding in which the party had allegedly taken a contrary position. *Field Bridge Associates*, 306 NLRB 322, 323 (1992), *enforced sub nom., Service Employees Local 32 B-32J v. NLRB*, 982 F.2d 845 (2d Cir. 1993), *cert. denied*, 509 U.S. 904 (1993); *Precision Industries, Inc.*, 320 NLRB 661, 663 (1996), *enforced*, 118 F.3d 585 (8th Cir. 1997) (Rejecting judicial estoppel where neither the General Counsel nor the Union was a party to the proceeding before the EEOC); *Lincoln Center for the Performing Arts, Inc.*, 340 NLRB 1118, 1127 (2003) (rejecting judicial estoppel where the position taken by the respondent before the Board was clearly inconsistent with the position it had taken before the district court because the Board does not apply judicial estoppel in cases where it has not been a party to the prior proceeding); *Galaxy Towers Condominium Ass'n*, 361 NLRB 364, n. 3 (2014) (refusing to apply judicial estoppel to arguments made by the union in a district court case where the government was not a party to the proceeding). The Board has explained that “as a public agency asserting public rights[, it] should not be collaterally estopped by the resolution of private claims asserted by private parties.” *Field Bridge*, 306 NLRB at 323. Congress has given the Board the responsibility to enforce rights under the Act. The

actions of private parties in proceedings in which the Board did not participate cannot and should not prevent the Board from fulfilling that responsibility.

TUH claims that PASNAP's letter to the PLRB in 2006, expressing confidence that the Board would decline jurisdiction over the employer if asked, bars it from petitioning to represent the Employer's employees, and should nullify the employees' eleven-to-one vote designating the Union as their representative. In essence, the Hospital is demanding that "public rights" enshrined in the Act be determined by the Union's legal prediction of the outcome of a proceeding in which the Board did not participate. *Field Bridge*, 306 NLRB at 323.

As it correctly determined, however, the Board will not bar a party such as the Union from invoking rights under the Act based on a position the Union took in a proceeding in which the Board was not a party. Additionally, judicial estoppel "does not prevent [the Union] from making inconsistent legal assertions on the issue of [the Board's] subject-matter jurisdiction." That PASNAP, over a decade ago, predicted to the PLRB that the Board would decline jurisdiction, therefore did not prevent it from later arguing that the Board has jurisdiction. *Peoples State Bank v. General Elec. Capital Corp.*, 482 F.3d 319, 333 (5th Cir. 2007) (assumption underlying party's conduct in one case does not constitute "position taken" or "argument made" that would trigger judicial estoppel in subsequent case); Moore's Federal Practice—Civil §134.30.

The Board has also explained that judicial estoppel is inappropriate where “[i]t is not at all certain, or even probable that th[e] Court [in the prior proceeding] would have ruled differently” had the party not taken the position it took. *Lincoln Ctr. for the Performing Arts, Inc.*, 340 NLRB at 1127.

In any case, the Board has sound reasons for continuing its policy of only applying judicial estoppel to proceedings in which it was a party. Congress charged the Board with “the primary responsibility for developing and applying national labor policy. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). Permitting positions taken by private parties in previous litigation limit the Board’s flexibility to address issues under the National Labor Relation Act impedes the Board’s ability to meet its responsibility. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941); *Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984) (It is well settled that the Government may not be estopped on the same terms as any other litigant without undermining obedience to the rule of law.)

Preserving the Board’s flexibility is especially important when issues of jurisdiction are involved. The Board has wide discretion in the exercise of its jurisdiction. As Justice Burton wrote in dissent, “[t]he Board is not a court whose jurisdiction over violations of private rights must be exercised. It is an administrative agency whose function is to adjudicate public rights in a manner that will effectuate the policies of the Act.” *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 13 (1957).

Though the Board has set jurisdictional standards for some 30 different types of employers, the Board has held that it “has the administrative discretion to disregard its own self-imposed jurisdictional yardstick.” *NLRB v. Erlich’s* 814, 577 F.2d 68, 71 (8th Cir. 1978). Reviewing courts have repeatedly upheld the Board’s broad discretion in deciding whether to exercise its jurisdiction. *NLRB v. Reliance Fuel Oil Corp.* 371 U.S. 224, 226 (1963); *NLRB v Denver Bldg. & Construction Trades Council* 341 U.S. 675, 684 (1951). *Human Dev. Ass’n v. NLRB*, 937 F.2d 657, 661 (D.C. Cir. 1991) (Court will not reverse the NLRB’s decision to exercise its discretionary jurisdiction “absent a showing that [it] acted unfairly and caused substantial prejudice to the affected employer.”)

Moreover, a broad application of judicial estoppel could also lead to untoward circumstances. Would the fact that PASNAP succeeded in obtaining PLRB oversight preclude another union of TUH employees or individual employees from seeking the Board’s jurisdiction? Or, if the Board assumed jurisdiction over other bargaining units at TUH, would the fact that PASNAP petitioned a decade early for PLRB jurisdiction place it forever beyond the pale of Board jurisdiction?

In short, the Board should reject TUH’s plea to broaden judicial estoppel beyond proceedings to which the Board is a party.

B. TUH suffered no unfair detriment from being under the jurisdiction of the PLRB

Assuming the Board decides against application of judicial estoppel, there is no need to consider whether TUH has shown a detriment from PASNAP's pursuit of PLRB jurisdiction. But should the Board decide to apply judicial estoppel to this case, no detriment should be found.

Temple incurred no unfair detriment from PASNAP's pursuit of jurisdiction by the PLRB. Like the union, Temple opposed jurisdiction by the NLRB and agreed to PLRB jurisdiction. See, *Temple University*, 194 NLRB 1160 (1972); *In re the Employees of Temple University Health System*, 39 PPER ¶ 49 Case No. PERA-R-05-498-E (April 21, 2006). Temple can hardly complain about being prejudiced by the rules of a state agency whose jurisdiction TUH accepted.

Temple further complains that certain PLRB policies restricted its legal prerogatives. Under the Pennsylvania Employee Relations Act (PERA) an employer cannot implement its last best and final offer at impasse unless the union strikes. *Philadelphia Hous. Auth. v. Pennsylvania Labor Relations Bd.*, 620 A.2d 594 (Pa. Commw. Ct. 1993.) Temple also complains that under PERA, the union does not have an obligation to provide the 10-day notice before striking a health care institution required by Section 10(g) of the Act. 29 U.S.C. 158(g). But such "detriments" are more than balanced by the employer's expansive managerial

prerogatives as stated in Section 702 of the PERA, 43 P.S. § 1101.702⁴, and the ease with which an employer can enjoin a strike under Section 1003. 43 P.S. § 1101.1003. Consequently, in significant ways, PERA grants greater employer rights than the National Labor Relations Act.

Moreover, TUH's complaints of suffering a detriment from PLRB jurisdiction oddly conflicts with its actions. If it really believed that NLRA provided such significant advantages, the employer could have sought the Board's jurisdiction. The fact that it did not speaks volumes.

In short, TUH provides no evidence of any detriment it suffered by reason on the PLRB's jurisdiction.

⁴ The scope of bargaining is much narrower under Section 702 than under the NLRA. Under Section 702, the employer can unilaterally set staffing levels, *City of Philadelphia (First Responder) v. PLRB*, 588 A.2d 67 (Pa. Commw. 1991), *appeal denied*, 598 "A.2d 285 Pa. 1991) change employee schedules, *Fraternal Order of Transit Police v. SEPTA*, 36 PPER ¶ 115 (August 16, 2005), install video cameras *AFSCME, Council 13, State Sys. of Higher Educ., Indiana Univ.*, 30 PPER ¶ 30,323 (September 22, 1999), change an employee's workload, *Joint Bargaining Comm. of Pa. Social Services Union v. Pa. Labor Rel. Bd.* 469 A.2d 150 (Pa. 1983); institute random drug and alcohol testing, *Cambria Cty. Transit Auth.*, 21 PPER ¶ 21007 (Final Order 1989) and eliminate a tuition refund program. *SEPTA v. PLRB*, 654 A.2d 159 (Pa. Commw.1995), *appeal denied*, (670 A.2d 145 (Pa. 1995)

CONCLUSION

For the reasons elaborated above, PASNAP respectfully requests that the Board affirm its established position that application of judicial estoppel is only appropriate to positions taken by litigants in proceedings in which the Board is a party.

Respectfully submitted,

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STATEMENT OF SERVICE

This is to certify that a true and correct copy of the foregoing Charging Party's Brief on Issues for Remand were electronically filed with the NLRB e-filing system, and by email to the parties listed below:

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