

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR
RELATIONS BOARD,

Petitioner,

v.

RM BAKERY, LLC D/B/A
LEAVEN & CO., A WHOLLY-
OWNED SUBSIDIARY OF BKD
GROUP, LLC,

Respondent.

No. 19-3716

Board Case No.:
02-CA-235116

MOTION TO RECALL MANDATE

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Attorneys for Respondent RM Bakery, LLC

CORPORATE DISCLOSURE STATEMENT

RM Bakery, LLC d/b/a Leaven & Co., is a wholly-owned subsidiary of BKD Group, LLC. BKD Group, LLC is not a publicly traded Corporation or entity.

Respondent RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC (“RMB”) hereby moves this Court to recall its mandate dated December 27, 2019 (the “Mandate”) and remand this matter to the National Labor Relations Board (the “NLRB”) to reopen the record and permit RMB to defend this matter on the merits.

This case satisfies the stringent standard for recalling a mandate: RMB defaulted in the NLRB and in this Court due to misrepresentations or omissions by its Chief Financial Officer (the “CFO”) who falsely stated that he was handling the matter but, in reality had allowed RMB to default. In similar circumstances, this Court has found that “manifest injustice” would result and has recalled its mandate. *See Calloway v. Marvel Entm't Grp., a Div. of Cadence Indus. Corp.*, 854 F.2d 1452, 1475 (2d Cir. 1988) (recalling mandate where litigant was incorrectly sanctioned in district court and would have prevailed on appeal but for counsel’s failure to perfect the appeal) (reversed on other grounds); *Bennett v. Mukasey*, 525 F.3d 222, 223 (2d Cir. 2008) (recalling mandate where attorney intentionally failed to prosecute appeal).

RMB faces a judgment of over \$181,000—most of it back pay and related enhancements—for five delivery drivers (the “Complainants”) who worked with RMB for less than two months as independent contractors. RMB is confident that this judgment would not have been entered if RMB were allowed to defend itself

because the Complainants as independent contractors are not entitled to the protections of the National Labor Relations Act.

Accordingly, RMB will face a manifest injustice if the Mandate is not recalled.

I. FACTUAL BACKGROUND

In or about August or September, 2018, RMB acquired a bakery called Good Bread. Declaration of Dan Wilczynski (the “Wilczynski Dec.”) ¶2. After the acquisition, it was learned that Good Bread had been contracting with several drivers—the Complainants—who were delivering products on an independent contractor basis. RMB continued to work with Complainants. *Id.*

Complainants owned their own trucks and paid their own expenses in connection with the trucks. RMB never directed the Complainants in their daily work and did not require them to pick up RMB products at any particular time, or at all. Rather, Complainants determined if, and when, they would pick up RMB products to deliver them to customers. Wilczynski Dec. ¶3. Complainants were not on RMB’s payroll, but rather were paid as independent contractors without deduction of taxes or other customary deductions. Complainants were not paid hourly. *Id.* ¶4. Complainants did not only work for RMB; rather, they were free to, and did, deliver products for various separate companies on a daily basis including florists and others whose businesses are not known to RMB. *Id.* ¶5.

Shortly after Complainants began to do business with RMB, the CFO informed Complainants that RMB needed paperwork in order to properly pay their businesses, including IRS Forms W-9. *Id.* ¶6. The CFO also told the Complainants that they must provide RMB proof of product liability insurance and automotive liability insurance, with RMB as an additional insured, in order to continue to deliver RMB products. *Id.*

After the Complainants repeatedly refused to provide proof of insurance or provide Forms W-9, RMB ended its relationship with Complainants. *Id.* ¶7. Complainants then filed a charge with the NLRB for unfair labor practices, in particular, for RMB's alleged interference with their right to engage in concerted activity in violation of the National Labor Relations Act.

Although the Company was generally aware that some proceeding was taking place in connection with complaints made by an independent contractor, the only person at the Company who was involved in the matter was the CFO. The CFO assured RMB on multiple occasions that he was handling the matter. Wilczynski Dec. ¶8.

In or about October or November, 2019, Mr. Wilczynski participated in a call with the CFO and a person named Patricia; Mr. Wilczynski was not aware at the time that Patricia was from the NLRB. Patricia said she had just received the matter and would call RMB back, and that is the last Mr. Wilczynski heard of this

matter from the CFO. After the call, CFO informed Mr. Wilczynski that the call was about a “state” matter that had already been resolved with the Complainants being declared independent contractors. *Id.* ¶9 This was consistent with the CFO’s previous assurances that the NLRB matter was a “state” matter that was under control.

In or about late November, 2019, the CFO left the Company abruptly, due to what RMB has been informed was [REDACTED] Wilczynski Dec. ¶10. RMB has generally been unable to contact the CFO with the exception of one conversation in early January, 2020. In that conversation, the CFO stated that [REDACTED]

[REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] *Id.* ¶10.

In mid to late December, 2019, Mr. Wilczynski found numerous communications—including at least one communication addressed to Mr. Wilczynski from the NLRB and dozens of other parcels addressed to Mr. Wilczynski from other senders—buried, unopened, in the CFO’s office. The CFO had hundreds, or thousands, of unopened mail packages. Wilczynski Dec. ¶11. Among other things, the CFO had allowed bills to go unpaid and as a result, two of RMB’s vehicles were impounded by New York State.

Many of the communications from the NLRB, while stating that they were sent by regular mail and email, only had the CFO's email address on them and did not indicate that they were sent to Mr. Wilczynski's email address. *Id.* ¶12. Thus, it appears that only the CFO, and not any other person at RMB, was receiving information about this matter. Whether intentional or not, the CFO had falsely led RMB to believe he was handling the matter. This had been made possible, in part, due to the fact that all mail was brought to the CFO of RMB; Mr. Wilczynski, who works primarily on the production floor, was not apprised of any mail to him. *Id.*

In mid-January, 2020, RMB received a letter from the NLRB attaching the Mandate. *Id.* ¶13. RMB learned in that letter that (1) a default had been obtained against RMB in the NLRB and (2) a default had been obtained in this Court against RMB. *Id.*

Since receiving the Mandate, RMB has acted expeditiously, communicating regularly, through its lawyers, with the NLRB and filing this petition and related motions as promptly as possible. RMB has informed the NLRB that it intends to comply with the non-monetary portions of the Order and wishes to contest the monetary portion of the Order, but the NLRB has stated that it will not go forward with a hearing while this Petition is pending and that it may seek contempt notwithstanding RMB's filings in this Court.

II. ARGUMENT

A. Legal Standards

“Fed. R. App. P. 2 clearly authorizes [this Court] to relieve litigants of the consequences of default ‘where manifest injustice would otherwise result.’” *Calloway v. Marvel Entm’t Grp., a Div. of Cadence Indus. Corp.*, 854 F.2d 1452, 1475 (2d Cir. 1988) (citing Fed. R. App. P. 2 advisory committee’s notes) (reversed on other grounds).

The power to recall a mandate “apparently originated in the inherent power of all federal courts to set aside any judgment [] entered[.] It exists as part of the court’s power to protect the integrity of its own processes [] and is analogous to the power conferred on district courts by Fed. R. Civ. P. 60(b).” *Sargent v. Columbia Forest Prod., Inc.*, 75 F.3d 86, 89 (2d Cir. 1996) (citations and quotation marks omitted).

“However, this power is to be ‘exercised sparingly, []and reserved for “exceptional circumstances.” *Id.* (citations omitted).

B. Exceptional Circumstances Require A Recall Of The Mandate

RMB’s defaults were not due to any fault of its own, but rather were the result of misrepresentations and omissions by a trusted employee, the CFO.

Although RMB is unaware of a mandate being recalled in this precise situation, this Court has recalled mandates in the similar context of attorney malfeasance. *Calloway v. Marvel Entm't Grp., a Div. of Cadence Indus. Corp.*, 854 F.2d 1452, 1475 (2d Cir. 1988) (recalling mandate where litigant was incorrectly sanctioned in district court and would have prevailed on appeal but for counsel's failure to perfect the appeal) (reversed on other grounds); *Bennett v. Mukasey*, 525 F.3d 222, 223 (2d Cir. 2008) (recalling mandate where attorney intentionally failed to prosecute appeal).

Here, like an attorney, an employee has a fiduciary duty to his or her employer. *See, e.g., Bullard v. Drug Policy All.*, No. 18 CIV. 8081 (KPF), 2019 WL 7291226, at *6 (S.D.N.Y. Dec. 30, 2019) (“An employee’s fiduciary duty to her employer prohibits her from “acting in any manner inconsistent with h[er] agency or trust,” and she is “at all times bound to exercise the utmost good faith and loyalty in the performance of h[er] duties.”).

Thus, regardless of the reasons for the CFO’s actions, RMB was entitled to place its trust in him. *Id.* Through no fault of its own and based on that trust, RMB suffered defaults in both the NLRB and in this Court and is now facing a judgment of over \$181,000, comprised mostly of back pay, for a group of independent contractors who never would have been entitled to the protections of the National Labor Relations Board if RMB had been able to defend itself.

The NLRB has informed RMB that it is determining whether contempt proceedings are available appropriate against RMB, even though RMB is properly exercising its appellate rights in this Court thus requiring RMB to choose between paying a judgment that should not have been entered on the one hand, and seeking to vacate that judgment on the other.

C. RMB Would Succeed On The Merits And Thus Its Inability To Oppose The NLRB's Charge On The Merits Would Be A Manifest Injustice

If RMB were able to defend itself, RMB would have likely prevailed on the merits in the NLRB. Thus, holding RMB to the current judgment would be a manifest injustice.

The underlying action is a complaint against RMB for violation of the N.L.R.A, which expressly applies only to employees and not independent contractors. 29 U.S.C. § 152(3) (“employee” specifically excludes “any [] independent contractor”).

The NLRB’s “common law” test shows that the Complainants were independent contractors. *SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338*, 367 N.L.R.B. 75 (2019) (citing *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968)). The common law factors include:

- (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
- (b) Whether or not the one employed is engaged in a distinct occupation or business.
- (c) The kind of

occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision. (d) The skill required in the particular occupation. (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work. (f) The length of time for which the person is employed. (g) The method of payment, whether by the time or by the job. (h) Whether or not the work is part of the regular business of the employer. (i) Whether or not the parties believe they are creating the relation of master and servant. (j) Whether the principal is or is not in business.

Id.

“In applying these factors, [] there is no ‘shorthand formula’ and [] “all the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.” *Id.* (citation omitted).

Here, the majority of factors and the “total factual context” support independent contractor status.

Factor (a) favors independent contractor status because RMB did not exercise any control over the details of Complainants’ work. Wilczynski Dec. ¶3. With regard to factor (b), Complainants were engaged in their own delivery businesses, working for many companies, while RMB was engaged in the distinct bakery business.

Factor (c) is neutral as the record does not have sufficient information about local practices to provide an analysis. Factor (d) favors independent contractor

status because the Complainants, as owners of vehicles and as contractors who work with many businesses, must have the skill to manage their own business. Alternatively, this factor could favor employee status because, generally, delivering bakery products does not require specialized training. *See Supershuttle*, 367 N.L.R.B. 75 (franchisees' work did not require any specialized training which weighed toward employee status). Thus, at worst, this factor is neutral.

Factor (e) favors RMB because the Complainants supplied the instrumentalities and tools (their delivery trucks) and worked off-premises thus RMB did not supply a "place of work," and RMB required Complainants to purchase their own product liability and vehicle insurance. Complainants worked with RMB at their discretion, for just over one month, and thus the length of employment was short (factor "f"), and were not by the amount of time they worked (factor "g") thus favoring independent contractor status.

There is no indication in the record that the parties intended to create a "master and servant" relationship and in fact, to the contrary, RMB repeatedly conditioned Complainants' continued work on their provision of Forms W-9 and the purchase of insurance which employees do not provide (factor "i").

Last, it appears that Complainants were "in business" because they owned their own trucks and paid the expenses for those trucks, and used the trucks to work for multiple clients in addition to RMB (factor "j").

Indeed, this case is strikingly similar to *Super Shuttle*, a case in which the NLRB held that shuttle drivers were independent contractors rather than employees. In that case, like here, the drivers “ma[de] a significant initial investment in their business by purchasing or leasing a van,” and had “total control over their schedule,” thus working “as much as they choose, when they choose.” The drivers were “free from control . . . in the day-to-day performance of their work,” just as the Complainants were in this case. Wilczynski Dec. ¶3. The drivers were also free to choose “where they work” which is similar to the independence the Complainants had here to work for any other companies they desired. *Id.* ¶5. The *SuperShuttle* drivers were required to indemnify and hold harmless SuperShuttle for claims arising against them; similarly here, RMB required the Complainants to take out insurance naming RMB as an additional insured. This “indemnification greatly lessens [RMB’s] motivation to control [the Complainants because RMB] is not liable for” their acts. *Supershuttle*, 367 N.L.R.B. 75. The NLRB also noted that the drivers “are not generally supervised,” like the Complainants here, and the drivers’ “near-absolute autonomy in performing their daily work without supervision supports a finding that they are independent contractors.” *Id.*

Last, with regard to investments in the instrumentalities, tools, and place of work, the NLRB noted that:

The primary instrumentalities of franchisees' work are their vans and the Nextel dispatching system. As noted, franchisees purchase their vans . . . or they lease their vans, also a significant investment....In addition, franchisees pay for gas, tolls, repairs, and any other costs associated with operating their vans. Franchisees' full-time possession of their vans facilitates their ability to work whenever and wherever they choose. These factors weigh in favor of independent-contractor status.

The Complainants here similarly owned or leased their own vehicles, RMB did not pay any expenses relating to the vehicles, and presumably the Complainants were in possession of the vehicles and thus were able to use them to "work whenever and wherever they choose."

Moreover, RMB has a strong case to reopen the record in the NLRB, if such a motion must be made after the present review, because "extraordinary circumstances" exist to justify RMB's failure to respond in the NLRB. Those reasons are the same as stated below in RMB's arguments concerning "good cause" for its default: that the CFO falsely assured RMB was handling the matter, and concealed the truth, and thus RMB could not properly exercise diligence. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.").

D. The Equities Favor Recalling The Mandate

Here, RMB informed the NLRB in advance of its concurrently filed motion for a panel rehearing. Although the NLRB's statements have varied somewhat, the essence of the NLRB's position is that the NLRB may seek contempt against RMB even while RMB is pursuing its rights in this Court. This position as a practical matter infringes on RMB's ability to exercise its rights.¹

Indeed, RMB has acted in good faith since receiving the Mandate, and has informed the NLRB that it is complying with all non-monetary aspects of the Mandate while challenging the Mandate including (1) offering the Complainants employment; (2) posting the notices required by the Mandate; and (3) notifying the Complainants that it does not have any reference in its files to the termination of its relationship with the Complainants and will not use that termination against them.

If RMB were given a chance to defend this action on the merits, it would not be not facing the somewhat coercive threat of contempt while asserting its rights in this Court.

¹ RMB has been in contact with more than one NLRB attorney and has received slightly different position statements from each. One attorney informed RMB that the NLRB intended to seek contempt, and another attorney told RMB that the matter has been referred to the NLRB's Contempt & Special Litigation Branch for a "determination as to whether contempt proceedings are appropriate[.]" Nonetheless, the effect is the same: that the threat of a contempt proceeding by the NLRB exists.

CONCLUSION

For the foregoing reasons, the Court should recall the Mandate.

DATED: February 13, 2020

GARDY & NOTIS, LLP

By: s/Orin Kurtz

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3,029 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), which is less than the 5,200 word limitation set forth in Fed. R. App. P. 27(d)(2)(A). The motion complies with the typeface and style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5) and 32(a)(6) because it was prepared in Microsoft Word using 14-point Times New Roman font, with footnotes in 14-point Times New Roman font.

s/Orin Kurtz

Attorney for Respondent RM Bakery, LLC

Dated: February 13, 2020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS
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Petitioner,

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RM BAKERY, LLC D/B/A LEAVEN &
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Respondent.

No. 19-3716

Board Case No.:
02-CA-235116

DECLARATION OF DAN WILCZYNSKI

Pursuant to 28 U.S.C. §1746, under penalty of perjury, Dan Wilczynski states:

1. I am the Executive Vice President RMB Bakery. I am fully familiar with the circumstances set forth in this Declaration and would testify to any of these facts if called at trial.

2. In or about August or September, 2018, RMB acquired a bakery called Good Bread. After the acquisition, I learned that Good Bread had been contracting with several drivers—the Complainants—who were delivering products on an independent contractor basis. RMB continued to work with Complainants.

3. Complainants owned their own trucks and paid their own expenses in connection with the trucks. RMB never directed the Complainants in their daily work and did not require them to pick up RMB products at any particular time, or at

all. Rather, Complainants determined if, and when, they would pick up RMB products to deliver them to customers.

4. Complainants were not on RMB's payroll, but rather were paid as independent contractors without deduction of taxes or other customary deductions. Complainants were not paid on an hourly basis.

5. Complainants did not only work for RMB; rather, they were free to, and did, deliver products for various separate companies on a daily basis including florists and others whose businesses are not known to RMB.

6. Shortly after Complainants began to do business with RMB, the CFO informed Complainants that RMB needed paperwork in order to properly pay their businesses, including IRS Forms W-9. The CFO also told the Complainants that they must provide RMB proof of product liability insurance and automotive liability insurance, with RMB as an additional insured, in order to continue to deliver RMB products.

7. After the Complainants repeatedly refused to purchase or provide proof of insurance or provide Forms W-9, RMB ended its relationship with Complainants.

8. Although the Company was generally aware that some proceeding was taking place in connection with complaints made by an independent contractor, the only person at the Company who was involved in the matter was the CFO. The CFO assured RMB on multiple occasions that he was handling the matter.

9. In or about October or November, 2019, I participated in a call with the CFO and a person named Patricia; I was not aware at the time that Patricia was from the NLRB. Patricia said she had just received the matter and would call RMB back, and that is the last I heard of this matter from the CFO. After the call, CFO informed me that the call was about a “state” matter that had already been resolved with the Complainants being declared independent contractors. This was consistent with the CFO’s previous assurances that the NLRB matter was a “state” matter that was under control.

10. In or about late November, 2019, the CFO left the Company abruptly, due to what I have been informed was [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

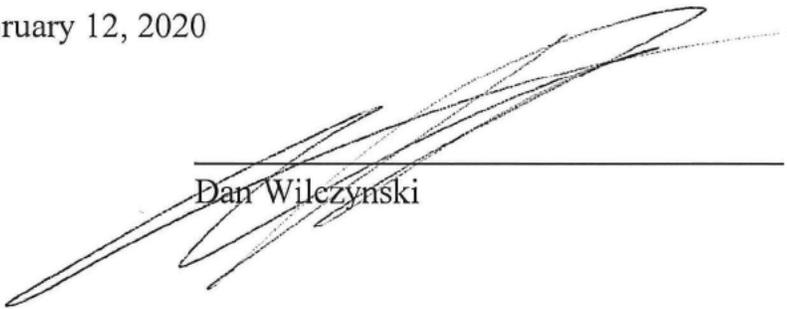
[REDACTED]

11. In mid to late December, 2019, I found numerous communications—including at least one communication addressed to me from the NLRB and dozens of other parcels addressed to me from other senders—buried, unopened, in the CFO’s office. The CFO had dozens of unopened mail packages. Among other things, the CFO had allowed bills to go unpaid and as a result, two of RMB’s vehicles were impounded by New York State.

12. Many of the communications from the NLRB, while stating that they were sent by regular mail and email, only had the CFO's email address on them and did not indicate that they were sent to my email address. Thus, it appears that only the CFO, and not any other person at RMB, was receiving information about this matter. Whether intentional or not, the CFO had falsely led RMB to believe he was handling the matter. This had been made possible, in part, due to the fact that all mail was retained by the CFO; I work primarily on the production floor, and was not apprised of any mail received on my behalf.

13. In mid-January, 2020, after RMB enacted a policy whereby all mail was delivered to me upon receipt, I received a letter from the NLRB attaching this Court's December 27, 2019 order. RMB learned in that letter that (1) a default had been obtained against RMB in the NLRB and (2) a default had been obtained in this Court against RMB.

Executed on February 12, 2020



Dan Wilczynski

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19-3716

Caption [use short title]

Motion for: Motion to Recall Mandate

NLRB v. RM Bakery, LLC

Set forth below precise, complete statement of relief sought:

Respondent RMB requests that the Court recall the mandate entered December 27, 2019

MOVING PARTY: RM Bakery

OPPOSING PARTY: National Labor Relations Bd

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Orin Kurtz

OPPOSING ATTORNEY: David Halberstreit

[name of attorney, with firm, address, phone number and e-mail]

Gardy & Notis, LLP

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Washington, DC 20570, appellatecourt@nlrb.gov

Court-Judge/Agency appealed from:

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain): Notified NLRB of concurrently filed motion, NLRB indicated that filing does not change its position.

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Has this relief been previously sought in this Court? Requested return date and explanation of emergency:

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney: s/Orin Kurtz Date: 2/13/2020

Service by: CM/ECF Other [Attach proof of service]