

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
)	
v.)	No. 20-1210
)	
BOOTHWYN FIRE COMPANY NO. 1)	
)	
Respondent)	

**AMENDED MOTION OF THE NATIONAL LABOR RELATIONS BOARD
TO ENTER A JUDGMENT SUMMARILY GRANTING THE BOARD'S
APPLICATION FOR ENFORCEMENT**

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

The National Labor Relations Board (“the Board”), by its Assistant General Counsel, respectfully moves this Court for summary entry of judgment enforcing the Board’s Order against Boothwyn Fire Company No. 1 (“Boothwyn”). The Board is entitled to enforcement because Boothwyn waived its rights under Section 10(e) and (f) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(e) and (f), (“the Act”), to contest either the propriety of the Board’s Decision and Order, or the findings of fact and conclusions of law underlying that Decision and Order. In support of this motion, the Board shows as follows:

1. The Board’s Decision and Order (attached hereto as Exhibit 1) issued on May 16, 2016, and is reported at 363 NLRB No. 191.

2. On May 25, 2016, Boothwyn filed with this Court a petition for review of the Board's Decision and Order, which the Court docketed as Case No. 16-2607. On June 13, the Board cross-applied for enforcement, which the Court docketed as Case No. 16-2791.

3. On January 11, 2017, the Board entered into a mediated settlement agreement ("Agreement") with Boothwyn and Charging Party Aaron Kisela (attached hereto as Exhibit 2). Among other things, Boothwyn agreed to post a remedial notice, pay Kisela an agreed-upon amount of backpay, remove from its files any reference to his discipline and discharge, and notify him in writing "that this has been done and that the discipline and discharge will not be used against him in any way." Kisela waived his right to reinstatement. Boothwyn and Kisela also "waive[d] their rights under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), to contest the propriety of the Board's Order, the findings of fact and conclusions of law underlying the Order, or any of the relief due as provided in this Agreement."

4. On March 23, 2017, the parties filed a joint motion to dismiss (attached hereto as Exhibit 3). The parties specifically requested the Court dismiss Boothwyn's petition *with prejudice* and the Board's cross-application *without prejudice*, so that the Board could, if necessary, re-file to enforce the "continuing obligation" imposed on Boothwyn by the Board's Order. *NLRB v. Mexia Textile*

Mills, 339 U.S. 563, 567 (1950); accord *NLRB v. Raytheon Co.*, 398 U.S. 25, 27-28 (1970). On March 24, the Court entered an order (attached hereto as Exhibit 4), granting the motion and (as requested) dismissing Case Nos. 16-2607 and 16-2791 with prejudice to Boothwyn’s petition for review and without prejudice to the Board’s cross-application for enforcement.

5. In October 2019, Kisela filed an unfair-labor-practice charge alleging that Boothwyn had engaged in new misconduct by violating the same statutory provision involved in the Board’s May 16, 2016 Order; this conduct demonstrated noncompliance with the parties’ Agreement. Kisela’s new charge, which is not at issue here, is now proceeding separately before the Board.

6. In light of the new charge alleging Boothwyn’s misconduct, on January 29, 2020, the Board, consistent with its right to enforce the “continuing obligation” imposed on Boothwyn by the Board’s May 16, 2016 Order, filed an application for enforcement of that Order, which the Court docketed as Case No. 20-1210. Boothwyn filed an answer on February 18, denying that the Board is entitled to enforcement and “incorporat[ing] by reference all exceptions, claims and defenses” it asserted in the underlying administrative proceedings and prior Third Circuit proceedings.

7. Section 10(e) of the Act, 29 U.S.C. § 160(e), authorizes the Board to apply for enforcement of its Order before an appropriate U.S. Circuit Court of

Appeals and provides that “no objection that has not been urged before the Board . . . shall be considered by a court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” As this Court and the Supreme Court have recognized, the Board may “reactivate” enforcement proceedings “to insure the continued observance” of its order even when a party has complied with that order. *NLRB v. Weber*, 382 F.2d 387, 389 (3d Cir. 1967); *see also Mexia Textile*, 339 U.S. at 567. Indeed, compliance with a Board’s order does not render that order moot and does not bar judicial enforcement. *See NLRB v. Nat’l Car Rental Sys., Inc.*, 672 F.2d 1182, 1191 (3d Cir. 1982); *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 892 (7th Cir. 1990). This is so because “[a] Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree.” *Mexia Textile*, 339 U.S. at 567; *Weber*, 382 F.2d at 389 (same). And, once a Board order is enforced, “violations of it expose the violator to proceedings for contempt.” *P*I*E Nationwide*, 894 F.2d at 890.

8. Boothwyn’s waiver of its “rights under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), to contest the propriety of the Board’s Order, the findings of fact and conclusions of law underlying the Order, or any of the relief due[,]” constitutes a full and complete waiver of Boothwyn’s rights to defend against a proceeding for enforcement of the Board’s May 16, 2016 Order. *See*

*P*I*E Nationwide*, 894 F.2d at 892 (stipulation waives employer’s right to challenge the validity of the order as unsupported by substantial evidence or as contrary to the Act). *Accord NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322-23 (1961); *Weber*, 382 F.2d at 388-89; *NLRB v. Draper Corp.*, 159 F.2d 294, 297-98 (1st Cir. 1947); *see also NLRB v. C & C Roofing Supply, Inc.*, 569 F.3d 1096, 1099 (9th Cir. 2009) (settlement agreement waives “all defenses” that employer might have to unfair-labor-practice liability and liquidated backpay).

9. The Board is accordingly entitled to summary enforcement of its May 16, 2016 Order.

WHEREFORE, the Board respectfully requests that the Court enter a judgment summarily granting the Board’s application for enforcement of its Order against Boothwyn in Case No. 20-1210.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington DC
this 10th day of March, 2020

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BOOTHWYN FIRE COMPANY NO. 1)	Board Case Nos.
)	04-CA-133498, <i>et al.</i>
Respondent)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 1083 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

s/David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 10th day of March 2020

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CERTIFICATE OF SERVICE

I certify that on March 10, 2020, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that the foregoing document will be served via the CM/ECF on all counsel who are registered CM/ECF users.

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

Dated at Washington, DC
this 10th day of March 2020