

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NANCY WILSON, Regional Director	:	
of the Sixth Region of the	:	
NATIONAL LABOR RELATIONS	:	
BOARD, for and on behalf of the	:	
NATIONAL LABOR RELATIONS	:	4:20-cv-00524-MWB
BOARD,	:	
	:	
Petitioner	:	
	:	
v.	:	Judge Matthew W. Brann
	:	
JERSEY SHORE STEEL CO.,	:	
	:	
Respondent	:	

**AMICUS CURIAE’S REPLY TO RESPONDENT’S RESPONSE
TO PETITIONER’S PETITION FOR INJUNCTIVE RELIEF
UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT**

Amicus Curiae United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (“USW” or “Union”), by and through undersigned counsel, submits this Reply to the Response, (“Response,” Dkt. 35), of Jersey Shore Steel Company (“Company” or “Respondent”) to the Petition, (“Petition, Dkt. 1), for injunctive relief under Section 10(j) of the National Labor Relations Act (“NLRA” or the “Act”), 29 U.S.C. § 160(j), filed by the Regional Director of the Sixth Region of the National Labor Relations Board (“Board” or “NLRB”).

The Company’s Response asked this Court to deny the Petition or, in the alternative, to order discovery and an in-person evidentiary hearing. The Company has identified no basis for denying the petition, and neither discovery nor a hearing is necessary in this case. Consequently, the Court should grant the Petition because the evidence already submitted by the Board compels

findings that there is reasonable cause to believe that the Company violated the NLRA and that injunctive relief is necessary and proper.

I. THERE IS NO BASIS FOR DENYING THE PETITION.

The Company's Response contained no substantive argument for denying the petition. It did not dispute that the facts alleged in the Petition would entitle the NLRB to injunctive relief. Although it generally stated that it disputed "many" of the allegations in the Petition, (Response, p. 12), the Respondent offered no specifics and presented no evidence. The Company neither presented any argument to the effect that there is not "reasonable cause to believe" that it violated the Act, nor did it make any submission contesting that injunctive relief is "just and proper." *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 877 (3d Cir. 1990).

Notwithstanding these omissions, the Company has audaciously asked the Court to deny the Petition. The Company's lone argument for denial of the petition is that an in-person evidentiary hearing cannot be held, it contends, until at least May 31, 2020. (Response, p. 12-13). That is not a valid basis for denying the Petition. Further, as discussed *infra*, an evidentiary hearing is unnecessary.

II. DISCOVERY AND A HEARING ARE UNNECESSARY WHERE THE BOARD'S EVIDENCE HAS ALREADY BEEN SUBMITTED.

The Company is not entitled to discovery because the Board has already produced, and filed with the Court, its evidentiary submission in support of injunctive relief. Indeed, even the cases relied upon by the Company make clear that additional discovery is not warranted here. In support of its request for "limited"¹ discovery in this case, the Company cites to *Kobell v. Reid Plastics, Inc.*, 136 F.R.D. 575 (W.D. Pa. 1991), *Bordone v. Electro-Voice, Inc.*, 879 F. Supp. 919

¹ The Company's view of "limited" discovery extends to in-person depositions and to subpoenas of documents from third parties. (Response, p. 13). The Company has articulated no limits to its request for discovery.

(N.D. Ind. 1995), *Fusco v. Richard W. Kaase Baking Co.*, 205 F. Supp. 459 (N.D. Ohio 1962), and *Kinney v. Chicago Tribune*, 1989 WL 91844 (N.D. Ill. 1989). (Response, p. 10-11). These cases stand only for the proposition that “a respondent is entitled to discover the facts upon which the Board will rely to support its allegation as set forth in the petition for relief.” *Kinney v. Chi. Tribune*, 1989 WL 91844 at *1 (quotation omitted); *see also Kobell v. Reid Plastics*, 136 F.R.D. at 579, *quoting Kinney v. Chi. Tribune*. “Broader discovery . . . is not permitted because the discovery ‘would not benefit respondent, even if they reflected facts squarely opposed to petitioner’s theory.’” *Kinney v. Chi. Tribune*, 1989 WL 91844 at *1, *quoting Fusco v. Richard W. Kaase*, 205 F. Supp. at 464; *see also Bordone v. Electro-Voice*, 879 F. Supp. at 924 (denying further discovery when petitioner offered to submit copies of affidavits and documentary evidence); *Kobell v. Reid Plastics*, 136 F.R.D. at 579, *quoting Kinney v. Chi. Tribune*.

These cases do not show that the Company is entitled to anything more than what it already has. The NLRB filed all of the evidence necessary for this Court to make a decision on April 1, 2020. Its filing included 17 affidavits and numerous other documents. This evidence consists of “the facts upon which the Board will rely to support its allegations.” *Kinney v. Chi. Tribune*, 1989 WL 91844 at *1; *see also Dunbar v. Landis Plastics, Inc.*, 977 F. Supp. 169, 176 (N.D.N.Y. 1997) (denying discovery sought by employer where extensive affidavit evidence had already been submitted). There is no basis for additional discovery, which will only serve to add delay and expense to the litigation of this matter without benefiting the Company’s case.

Neither is the fact that the affidavits submitted by the Board reference documents that are not included in the Board’s filing in this case a valid reason for affording the Company discovery. The relevant documents referenced in the affidavits overwhelmingly consist of correspondence between Union representatives and the Company or proposals that were

provided to or received from the Company during collective bargaining. (*See, e.g.*, Ex. H, ¶¶ 15, 19, 23, 24, 36, 37, 38, 39, 41, 42, 44, 45 (correspondence with the Company); *id.*, ¶¶ 3, 7, 9, 10, 20, 35 (proposals)). The Company therefore already possess these documents, which the affidavits describe sufficient detail to permit the Company to identify them. Many of these documents are in the record already. (*Compare*, Ex. G, ¶¶ 8, 9, 10, 11, 22, 26 and Ex. H, ¶¶ 33, 34, 43 (referencing correspondence with Company) with Ex. W, attachments A-I (consisting of correspondence referenced in Ex. G and Ex. H)).

This Court should grant the Petition without holding an evidentiary hearing. Numerous courts have issued injunctions based upon affidavit evidence. *See Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1134 (10th Cir. 2000); *Kennedy v. Teamsters Local 542*, 443 F.2d 627, 630 (9th Cir. 1971); *S.F.-Oakland Newspaper Guild v. Kennedy*, 412 F.2d 541, 546 (9th Cir. 1969); *Dunbar v. Landis Plastics, Inc.*, 996 F. Supp. 174, 180 (N.D.N.Y. 1997); *Squillacote v. Automobile Workers*, 383 F. Supp. 491, 493 (E.D. Wis. 1974). The Company argues that a hearing is necessary for the Court to resolve questions of credibility, (Response, p. 12) but matters of credibility are not for resolution in the District Court in a proceeding seeking injunctive relief under Section 10(j). *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1571 (7th Cir. 1996); *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d 953, 958-959 (1st Cir. 1983); *Dunbar v. Landis Plastics*, 977 F. Supp. at 176 & n.8; *Fuchs v. Jet Spray Corp.*, 560 F. Supp. 1147, 1150-51, n.2 (D. Mass. 1983), *aff'd. per cur.* 725 F.2d 664 (1st Cir. 1983); *Balicer v. I.L.A.*, 364 F. Supp. 205, 225-226 (D.N.J. 1973), *aff'd. per cur.* 491 F.2d 748 (3rd Cir. 1973). The Company therefore lacks any valid basis for its request for an evidentiary hearing.

Particularly in view of the serious logistical challenges that a hearing would present, and in view of the overwhelming body of evidence already submitted by the NLRB, this Court may properly resolve the issues presented without need for an evidentiary hearing.

III. THE COURT SHOULD GRANT THE PETITION FOR INJUNCTIVE RELIEF.

The evidence and argument submitted by the NLRB in support of its Petition amply demonstrate that injunctive relief is warranted. The Board's submission shows that there is both "reasonable cause to believe" that the Company violated the Act, and that injunctive relief is "just and proper." *Chester v. Grane Healthcare*, 666 F.3d 87, 100 (3d Cir. 2011); *Pascarell v. Vibra Screw Inc.*, 904 F.2d at 877.

The evidence in the instant case easily clears the "low threshold of proof" necessary to establish that there is reasonable cause to believe that the Company violated the Act. *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 905 (3d Cir. 1981). As described in more detail in the Board's Memorandum in support of the Petition ("Memorandum," Dkt. 6), The Company has engaged in a multi-pronged, unlawful campaign to break the Union. (Memorandum, p. 19-25). In the midst of a prolonged course of bad-faith, regressive bargaining designed to thwart any prospect of ever reaching a labor agreement, it simultaneously terminated each and every Union officer it employed at the facility. It did so with the object of changing the Union's bargaining representatives, cowing the Union into accepting its proposals, and undermining the role of the Union as the representative of unit employees. Both before and after the discharges, the Company committed serious unfair labor practices that impacted the whole body of employees: threatening employees in mass meetings; dealing with employees in mass meetings, rather than bargaining with the Union; and unilaterally changing established terms and conditions of employment.

The Company's unlawful actions have brought it close to its objective, and injunctive relief is necessary to prevent this outcome. "In § 10(j) cases, the public interest is to ensure that an unfair labor practice will not succeed . . ." *Frankl v. HTH Corp.*, 650 F.3d 1334, 1365 (9th Cir. 2011) (quotation omitted). The Company's serious violations of the Act reduced employee confidence in the Union's effectiveness, prompting employees to withdraw from the Union starting immediately after the Company's discharge of the Union's leaders. The Company subsequently unlawfully withdrew recognition from the Union as the representative of unit employees based upon an employee petition, tainted by the Company's numerous and serious unfair labor practices, that was purportedly signed by a slight majority of unit employees.

Injunctive relief is just and proper in this case, as the Memorandum in Support of the Petition details at length. (Memorandum, p. 25-43). Courts have held routinely that Section 10(j) injunctions are just and proper to reinstate workers discharged for their union activities when their discharge threatens to chill workers' support for the union, as it does here. *See, e.g., Vibra Screw, Inc.*, 904 F.2d at 881; *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 374-375 (11th Cir. 1992); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1053 (2d Cir. 1980); *Kobell v. Menard Fiberglass Prods., Inc.*, 678 F. Supp. 1155, 1167-1168 (W.D. Pa. 1988). Such injunctions are necessary to safeguard the public interest in protecting the collective bargaining process.

Eisenberg v. Wellington Hall Nursing Home, 651 F.2d at 906-907.

Absent the relief requested in the Petition, a Board order may not be a meaningful remedy. Lengthy administrative proceedings and further appeals mean that a final order compelling reinstatement of the fired Union leaders and good-faith bargaining may be years in the future.² This will, predictably, inflict progressively greater damage on the Union's ability to

² For one local example involving the USW, take *Wyman Gordon Pennsylvania, LLC*, 368 NLRB No. 150 (2019). The employer in that case unlawfully withdrew recognition of the USW in November 2016. The

represent employees, even after a Board order. *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 299 (7th Cir. 2001) (“The longer the Union is kept out [of the workplace] and from working on behalf of . . . employees, the less likely it is to be able to organize and represent those employees effectively . . .”). This Court should not permit the Company to destroy the Union’s ability to represent these employees. *See Chester v. Grane Healthcare*, 666 F.3d at 102-103 (recognizing that an interim bargaining order is necessary because a union will be ineffective if it has lost significant support). Neither should unit employees lose the benefit of good faith collective bargaining and Union representation at the present, which cannot be restored by a Board order to resume bargaining. *Chester v. Grane Healthcare*, 666 F.3d at 103; *Bloedorn v. Francisco Foods*, 276 F.3d at 299 (“[A] forward-looking order cannot fully compensate [employees] for the variety of benefits that good-faith collective bargaining with the Union might otherwise have secured for them in the present.”). The relief requested by the Petition is therefore just and proper.

IV. CONCLUSION

In view of the foregoing, the Court should grant, in full, the injunctive relief sought in the Petition, and the Company should be restrained from compounding its violations of the Act.

Respectfully submitted,
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administrative law judge issued a decision on July 13, 2018, and the NLRB issued its final decision on December 16, 2019. The employer subsequently appealed to the Court of Appeals for the District of Columbia Circuit, where the appeal remains pending to date.

CERTIFICATE OF SERVICE

I, Debra A. Jensen, hereby certify that on April 29, 2020, I electronically filed the Amicus Curiae's Reply to Respondent's Response to Petitioner's Petition for Injunctive Relief Under Section 10(j) of the National Labor Relations Act on the CM/ECF system, which will serve notice of the following counsel electronically:

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Respectfully submitted,
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