

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	No. 20-1398
Petitioner	:	
v.	:	Board Case No.
	:	09-CA-231106
JUSTICE ENERGY, INC.	:	
Respondent	:	

REPLY OF THE NATIONAL LABOR RELATIONS BOARD
TO THE COMPANY’S ANSWER TO THE BOARD’S APPLICATION
FOR SUMMARY ENFORCEMENT OF ITS ORDER

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

The National Labor Relations Board (the “Board”), by its Assistant General Counsel, files this reply to the answer of Justice Energy, Inc. (the “Company”) that was filed in response to the Board’s application for summary entry of a judgment enforcing its order. For the following reasons, the Board submits that the Company has failed to advance any valid defense to the Board’s application, which, accordingly, should be granted.

1. As set forth in more detail in the Board’s application, a Board administrative law judge issued a decision finding that the Company violated the Act in certain respects. Thereafter, the Company did not file any exceptions with the Board to the judge’s decision and recommended order and, accordingly, the Board adopted it *pro forma*. Under the Board’s Rules and Regulations, if no

exceptions are filed to an administrative law judge's recommended decision and order, the Board adopts that decision and order, and all objections to that decision and order are deemed waived. *See* 29 C.F.R. §§ 102.46 and 102.48.

2. Under Section 10(e) of the Act, “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). Therefore, “the Court of Appeals lacks jurisdiction to review objections that were not urged before the Board.” *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *Accord W & M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008) (Section 10(e) imposes a “jurisdictional bar” in the face of which the Court is “powerless in the absence of ‘extraordinary circumstances,’ to consider arguments not made to the Board”).

Applying the jurisdictional bar of Section 10(e) of the Act, the circuits have consistently held that a respondent's failure to file exceptions before the Board entitles the Board, absent extraordinary circumstances, to summary enforcement. *See, e.g., NLRB v. Ferguson Electric Co.*, 242 F.3d 426, 435 (2d Cir. 2001) (“No “extraordinary circumstances” excusing Ferguson's failure to urge its objection before the Board have been alleged here. As a result, we believe that we are prevented from considering the issue by the operation of the statute.”). The Company's answer asserts no “extraordinary circumstances” in this case that

would excuse its failure to file exceptions before the Board. In fact, the Company's answer admits to all elements stated in the Board's application for enforcement.

3. The Company argues that "[t]his Court should not enforce any administrative order without the opportunity to review the record." Answer, p. 3. This statement misperceives the nature of this summary enforcement action. As explained, in this "no exceptions" case the jurisdictional bar of Section 10(e) of the Act applies and no issues have been preserved for the Court's review. Consequently, the record is not in dispute and filing it would serve no purpose. Accordingly, contrary to the Company's assertion, the fact that the administrative record has not been filed is not "fatal" to this summary case. Answer, p. 3.¹

WHEREFORE, the Board respectfully requests that the Court grant the Board's application for summary entry of a judgment enforcing its order.

Respectfully Submitted,

/s/ David Habenstreit

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Dated in Washington, D.C.
this 5th day of May, 2020

¹ The Company incorrectly states (Answer, p. 3) that the Board has not provided the Court with a copy of the administrative law judge's decision. That decision is attached to the Board's docketing statement with the Board's order adopting it.

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

Respectfully Submitted,

/s/ David Habenstreit

David Habenstreit
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Dated in Washington, D.C.
this 5th day of May, 2020