

Nos. 18-1124, 18-1168

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

International Longshore & Warehouse Union

Petitioner/Cross-Respondent

v.

National Labor Relations Board
Respondent/Cross-Petitioner

and

International Association of Machinists and Aerospace Workers, AFL-CIO;
District Lodge 190; Local Lodge No. 1546
Intervenors

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

PETITION FOR REHEARING OR REHEARING EN BANC

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INTRODUCTION AND RULE 35(b) STATEMENT

International Longshore and Warehouse Union (ILWU) respectfully petitions for rehearing or rehearing en banc of the panel's August 21, 2020 opinion dismissing ILWU's petition for review of the National Labor Relations Board's (Board) order approving a settlement between Intervenor, the International Association of Machinists and Aerospace Workers, AFL-CIO/CLC (Machinists) and two employers not party to this appeal.¹ The panel dismissed ILWU's petition based solely on the Machinists' cursory statement that ILWU's objections to the settlement were moot. Despite the fact that the Machinists provided no legal or factual support for its statement, the panel dismissed ILWU's petition on the basis that ILWU had forfeited any objection to mootness by not responding to the Machinists' unsupported contention.

Rehearing is warranted for three reasons. First, the panel's deference to the Machinists' mootness contention is at odds with this Circuit's regular practice of declining to consider arguments that are insufficiently developed. This Circuit's regular practice is to deem waived arguments that, like the Machinists' here, do not

¹ ILWU petitioned for review of two National Labor Relations Board decisions: the Board's merits ruling that ILWU committed unfair labor practices and the Board's order approving the partial settlement. (Decision at 4.) The panel set aside and remanded the merits ruling (*id.* at 13); this petition only seeks rehearing of the panel's dismissal of ILWU's appeal of the Board's order related to the settlement.

provide any legal or factual basis. Therefore, the panel's decision to accept the Machinists' bare assertion as the basis to dismiss ILWU's petition for review is inconsistent with Circuit precedent.

Second, to the extent the panel considered the Machinists' contention, it departed from this Circuit's well-established mootness doctrine. This Circuit requires the party urging mootness to meet a "heavy burden" of establishing mootness, yet the panel accepted the Machinists' naked assertion at face value. Had the panel independently considered its jurisdiction, it would have found that ILWU's objections to the settlement are not moot because the Court can still provide effective relief. The panel's dismissal for mootness was therefore at odds with this Circuit's standards for mootness.

Third, the panel's decision to dismiss ILWU's petition for review on mootness grounds without considering vacatur is inconsistent with Supreme Court precedent. Specifically, the panel ignored the established practice that, when a case becomes moot on the way to appeal as a result of the unilateral action of the prevailing party below, as the Machinists assert occurred here, the court will vacate the decision below.

For these reasons, the Court should grant this petition and decide the merits of ILWU's objections to the Board's approval of the settlement or, alternatively,

modify the judgment of the panel to reflect that the Board and ALJ decisions below are vacated.

STATEMENT OF THE CASE

ILWU objects to a settlement that arose from a longstanding dispute regarding whether the ILWU or the Machinists represented a group of mechanics at the Port of Oakland, California. (Op. 2-3.) Relevant to the matter at issue here, in 2010, Ports America Outer Harbor leased and began operating several berths at the Port of Oakland and contracted with Pacific Crane Maintenance Company, who had already been employing mechanics at the berths, to continue to provide maintenance and repair services. (*Id.* at 3-4.) Pacific Crane recognized ILWU as the representative of its mechanic employees.

In 2013, Ports America brought the maintenance and repair services in house and hired many of the mechanics who had worked for Pacific Crane and recognized ILWU as the mechanics' representative. (*Id.* at 4-5.) The Machinists filed unfair labor practice charges against Ports America and ILWU, claiming that Ports America was a successor to Pacific Crane and obligated to recognize and bargain with the Machinists. (*Id.* at 5.)

While the administrative proceeding was pending, the Machinists reached a partial settlement with Ports America and MTC Holdings, a company the General Counsel had alleged was a single employer with Ports America. (Op. 5.) Ports

America and MTC agreed to pay \$3 million to the Machinists directly. (*Id.*) The settlement contained no distribution plan, but said the money would be “allocated to such payees as the Machinists may designate.” (JA 391.) ILWU objected to the settlement, as did the General Counsel initially. (JA 301-18, 319-33.) The Machinists then submitted a proposed distribution allocating: (1) \$943,121.05 to the Machinists’ health and pension funds, (2) \$1,904,999.90 to 58 individuals selected by the Machinists, and (3) \$151,871.05 to reimburse the Machinists’ legal fees and expenses. (JA 349-53; *see also* 383-84, 397-99.)

After the ALJ approved the settlement, ILWU filed a motion seeking reconsideration and providing evidence that the Machinists had made false statements and inaccurate representations about the settlement and proposed distribution. (JA 381-99, 405-09.) The ALJ granted reconsideration but denied ILWU’s motion on the merits. (JA 414-16.) ILWU then filed a motion for permission to appeal and, on November 8, 2016, the Board granted permission but denied the appeal on the merits. (JA 1712-13.)

On appeal, ILWU sought review of the Board order denying ILWU’s appeal of the ALJ’s orders approving the settlement. (*See* JA 381-99 [ALJ’s Aug. 26, 2016 Order], 414-16 [ALJ’s Sept. 7, 2016 Order], 1712-13 [NLRB’s Nov. 18, 2016 Order].) ILWU argued that the ALJ’s underlying orders failed to apply the correct legal standard for approving settlements and was not based on substantial

evidence. (ILWU Br. 39-46.) In its opening brief and reply, ILWU argued that multiple elements of the settlement, including but not limited to the proposed distribution scheme, did not effectuate the purposes and polices underlying the Act. (*Id.*; ILWU Reply 9-13.)

In response, the Machinists asserted – without any citation to the law or record – that ILWU’s objection to the distribution of the settlement funds was moot. (IAM Br. 1, 2, 13.) The Board did not assert mootness. The mootness contention was not discussed at oral argument; the Machinists did not appear at oral argument and no other party raised the issue.

The panel dismissed ILWU’s petition for review of the Board’s order refusing to set aside the partial settlement. (Op. 13.) The panel did not determine that ILWU’s objections were moot, but rather dismissed on the basis that ILWU had forfeited “any objection to mootness” by not responding to the Machinists’ contention. (*Id.* at 12.)

REASONS FOR GRANTING REHEARING

I. The Panel’s Deference to the Machinists’ Mootness Contention is Inconsistent with This Circuit’s Refusal to Consider Perfunctory Arguments

The panel’s deference to the Machinists’ unsupported mootness contention is inconsistent with this Circuit’s routine refusal to consider arguments that are undeveloped. Because ordinarily “mere reference to an issue does not present it

properly for review,” *Williams v. Romarm SA*, 756 F.3d 777, 784 n. 5 (D.C. Cir. 2014), the Machinists’ assertion was insufficient to require ILWU to substantively respond or risk forfeiting the appeal.

As a general matter, this Circuit declines to consider arguments “made in a perfunctory fashion.” *Lash v. Lemke*, 786 F.4d 1, 10 (D.C. Cir. 2015); *id.* (a claim is “doomed” by a party’s “failure to provide any meaningful argument”).

Nevertheless, the panel accepted the Machinists’ mootness argument that, in its entirety, consisted of the following three statements:

- Presenting as an issue, “[w]hether the distribution of the settlement funds renders the challenge to that distribution moot?” (IAM Br. 1.)
- “The settlement has already been distributed and PAOH has been liquidated. Any argument regarding distribution amounts is moot and should not be considered by this Court.” (*Id.* at 2.)
- “The distributions have already been made. PAOH has been liquidated. ILWU’s objections to the distribution methodology are moot and need not be considered by this Court.” (*Id.* at 13.)

The Machinists cited no legal or factual support for these assertions. (*Id.*) Yet, the panel dismissed ILWU’s appeal on the sole basis that it did not respond to these bare statements.

The panel’s willingness to accept the Machinists’ contention deviated from this Circuit’s practice of declining to “address so underdeveloped an argument.” *Am. Freedom Def. Initiative v. Washington Metro. Area Transit Auth., WMATA*, 901 F.3d 356, 369 (D.C. Cir. 2018), *cert. denied sub nom. Am. Freedom Def.*

Initiative v. Washington Metro. Area Transit Auth., 139 S.Ct. 2665 (2019). As this Circuit has recognized, including a “contention as a throwaway line” does not satisfy the Court’s “requirement that parties’ arguments be sufficiently developed lest waived.” *LaShawn A. by Moore v. Barry*, 144 F.3d 847, 852 (D.C. Cir. 1998). This Circuit declines to consider deficient arguments because “[i]t is not the task of this [C]ourt to consider all of the implications of a theory vaguely raised for the first time . . . on appeal and then search the record for supporting evidence.” *Tarpley v. Greene*, 684 F.2d 1, 7 n. 17 (D.C. Cir. 1982). As this Court explained in *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005):

It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work, create the ossature for the argument, and put flesh on its bones. . . . Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.

Id. at 200 n. 1 (citation omitted).

Based on this Circuit’s practice, the panel should have deemed the Machinists’ “argument” waived. The conclusory contention was devoid of any citation to law or any factual support. *See, e.g., Ry. Labor Execs.’ Ass’n v. U.S. R.R. Ret. Bd.*, 749 F.2d 856, 859 n.6 (D.C. Cir. 1984) (refusing to “resolve [an] issue on the basis of briefing which consisted of only three sentences . . . and no discussion of the relevant . . . case law”). The Machinists failed to provide the panel with even the bare minimum: it failed to cite the legal standard for mootness, failed

to provide any citation to the record to prove that any distributions were made, and failed to explain any connection between the distributions and mootness.

Therefore, the panel's decision to give credence to the Machinists' bare mootness contention is inconsistent with this Circuit's well-established practice of finding such deficient arguments waived.

In light of this Circuit's usual treatment of such arguments, the serious consequences the panel imposed – forfeiture of “any objections to mootness” and dismissal of its petition for review (Op. 12-13) – were unjust. Even assuming the normal rules of forfeiture apply,² forfeiture is not absolute. *Flynn v. C.I.R.*, 269 F.3d 1064, 1069 (D.C. Cir. 2001). This Court will exercise discretion to address otherwise forfeited arguments “in exceptional circumstances, as, for example, . . . extraordinary situations with the potential for miscarriages of justice.” *Id.* The implications of the panel's decision are extraordinary, even if the particular

² The ordinary rules of forfeiture apply when a party fails to press a claim that the court has jurisdiction in the district court, *Manitoba v. Bernhard*, 923 F.3d 173, 179 (D.C. Cir. 2019), but the alleged basis for the mootness contention arose entirely on appeal here. Neither of the cases cited by the panel “where one party raised an argument and the other has ‘offered nothing in opposition’” (Op. 12-13.) refer to forfeiture or support the full dismissal of an appeal. Rather, in each of those cases the party merely conceded a minor issue. *Tax Analysts v. IRS*, 117 F.3d 607, 610 (D.C. Cir. 1997) (conceded argument regarding the limited scope of the district court's remedy); *Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1267 (D.C. Cir. 1996) (conceded argument regarding partial basis for penalty). Absent clear support for applying the forfeiture doctrine in the circumstances of this case, the panel should not have deemed the argument forfeited.

circumstances of this case do not appear to be. It sets the precedent that an appellant must substantively address any and all unsupported assertions made by a respondent, lest opposition be deemed forfeited and the assertion accepted as true regardless of the merits. The decision thus opens the door to recurring miscarriages of justice, as it incentivizes and rewards a respondent for making bare assertions devoid of developed argument or citation to any legal authority or record evidence. It undermines this Circuit's own requirement that litigants sufficiently develop their arguments and likewise compels a petitioner to guess at what the legal and factual bases are for the respondent's contention when preparing a reply. Therefore, the panel should have excused any perceived failure by ILWU to object to mootness.

Because the panel's dismissal, premised wholly on the Machinists' deficient contention, is inconsistent with this Circuit's refusal to consider arguments that are not sufficiently made, the Court should rehear ILWU's petition for review.

II. The Panel's Deference to the Machinists' Mootness Contention Conflicts with the Well-Established Principle that the Party Asserting Mootness Bears a "Heavy Burden"

The Court should also rehear this petition because, to the extent the panel acquiesced to the Machinists' mootness contention, its conclusion in the Machinists' favor is inconsistent with this Circuit's mootness doctrine. The Machinists had the burden of establishing mootness in the first instance, which it

did not do. Moreover, had the panel endeavored to verify its jurisdiction independently, it would have found that ILWU's objections to the settlement are not moot.

First, the panel's deference to the Machinists' assertion ignored this Circuit's well-established standard that the "party seeking jurisdictional dismissal must establish mootness, while the opposing party has the burden to prove that a mootness exception applies." *Rief v. Hurwitz*, 920 F.3d 828, 832 (D.C. Cir. 2019) (citing *Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010)). "[T]he party urging mootness bears a heavy burden." *Zukerman v. United States Postal Service*, 961 F.3d 431, 442 (D.C. Cir. 2020); *Friends of the Earth v. Laidlaw Env'tl. Svcs. (TOC), Inc.*, 528 U.S. 176, 189, 190 (2000); *Honeywell*, 628 F.3d at 576; *see also Los Angeles County v. Davis*, 440 U.S. 625, 631 (1970). In particular, if "a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with subsequent events that have produced that alleged result." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 93 (1993). In order to meet that burden, the party asserting mootness must show that events have transpired that prevent the court granting the appellant effective relief, *Burlington N.R.R. v. Surface Transp. Bd.*, 75 F.3d 685, 688 (D.C. Cir. 1988), and that those events have

“completely and irrevocably eradicated” the effects of the alleged violation, *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979).

Here, the Machinists plainly failed to meet its burden. The only statement offered in support of the mootness argument is the vague assertion that settlement distributions have already been made. (IAM Br. 2, 13.) The Machinists provided no citation to the record, (*see id.*), because the record does not include any evidence showing whether, when, in what amount, or to whom distributions were made. Moreover, the Machinists made no effort to explain why the purported distribution prevents the Court from granting ILWU effective relief based on its objections to the Board’s approval of the settlement. Therefore, the Machinists did not meet its initial burden of establishing mootness and the panel should have considered the merits of ILWU’s objections to approval of the settlement.

Even if the panel had considered the mootness contention independently,³ ILWU’s objections to the settlement are not moot. A case becomes moot “when the issues are no longer ‘live’ or the parties lack a cognizable legal interest in the

³ Absent any factual or legal basis presented by the Machinists, the panel should have made an independent determination of its jurisdiction before dismissing ILWU’s petition. *See, e.g., Am. Freedom Def. Initiative*, 901 F.3d at 361 (“we have an independent obligation to assure ourselves of jurisdiction”)(quoting *Am. Council of Life Insurers v. D.C. Health Benefit Exch. Auth.*, 815 F.3d 17, 19 (D.C. Cir. 2016)); *Planned Parenthood of Wisc., Inc. v. Azar*, 942 F.3d 512, 416 (D.C. Cir. 2019)(same).

outcome,” *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), or when “intervening events make it impossible to grant the prevailing party effective relief,” *Lemon v. Green*, 514 F.3d 1312, 1315 (D.C. Cir. 2008). However, “as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Roane v. Leonhart*, 741 F.3d 147, 150 (D.C. Cir. 2014) (quoting *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012)). ILWU objected to the Board’s approval of the settlement because the Board did not apply the correct legal standard and did not base its decision on substantial evidence, specifically: (1) it was unreasonable to approve a settlement agreement based on the Machinists’ nonbinding distribution proposal; (2) the proposed distribution plan violated Section 8(b)(1)(A) of the Act by only giving money to people in the bargaining unit who were members of the Machinists; (3) the proposed distribution was based on individuals’ alleged entitlement to backpay that was not supported by the evidentiary record; (4) the payment to the Machinists for “legal fees and expenses” did not vindicate public rights; and (5) the ALJ’s conclusion that the settlement “excludes [Machinists] lost dues” was not supported by evidence. (ILWU Br. 39-46.) Based on the record before the panel, the alleged distribution of the settlement funds does not prevent the Court from granting ILWU effective relief.

Though not articulated, the Machinists' mootness contention appears to assume that distributed funds are outside the Court's and Board's control. First, nothing in the record indicates that, on remand, the Board could not order the Machinists to distribute the settlement funds according to a different distribution scheme than the one presented before the settlement was approved. As discussed above, there is no evidence that the funds have been paid to anyone other than the Machinists; this Court could thus remand with instructions for the Board to determine an appropriate and equitable distribution. Second, even assuming the Machinists have distributed settlement funds to individuals that cannot be recouped, the Court could still grant partial relief. *See Ct. for Biological Diversity v. Kempthorne*, 480 F. Supp. 2d 292, 296 (D.D.C. 2007) (court may not dismiss a case as moot if a "partial remedy" is available) (quoting *Calderon v. Moore*, 518 U.S. 149, 150 (1996)). ILWU's objections are not limited to the distribution scheme;⁴ ILWU also objects to the characterization of and actual payments to the Machinists for "legal fees and expenses" as well as for lost dues. (ILWU Br. 45-46.) This Court could thus remand with instructions for the Board to determine an

⁴ Notably, the Machinists' contend only that ILWU's "objections to the distribution methodology" are moot. (IAM Br. 13.) The panel erred by presuming that contention rendered all of ILWU's objections to the settlement moot.

appropriate and equitable distribution of money paid to and retained by the Machinists.

Further, if the Court determines that the Board's and ALJ's orders did not properly apply the applicable legal standard, set forth in *Independent Stave*, 287 NLRB 740, 743 (1987), or was not based on substantial evidence, an alleged distribution of settlement funds does not prevent the Court from reversing those orders and remanding to the Board to issue an order that properly applies the applicable legal standard and is based on substantial evidence. The Court could therefore grant at least partial relief by reversing the Board's order and remanding with instructions to evaluate the settlement in accordance with *Independent Stave* and/or determine an appropriate distribution of the settlement funds.

Because the panel departed from this Circuit's mootness doctrine by not holding the Machinists to its burden of establishing mootness and ILWU's claims are not, in any event, moot, the Circuit should rehear the merits of ILWU's petition.

III. Alternatively, Even if Dismissal was Appropriate, Controlling Precedent Obligated the Panel to Vacate the Board's and ALJ's Orders

Finally, even assuming that ILWU's objections to the settlement had become moot, this Circuit's precedent instructs that the panel should have vacated the Board's and ALJ's orders approving the settlement.

When a case becomes moot on its way to appeal, the Supreme Court’s “‘established practice’ is ‘to reverse or vacate the judgment below and remand with a direction to dismiss.’” *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Accordingly, “whenever a case becomes moot on petition for review of an agency order . . . a question remains – should the decision below be vacated?” *N. California Power Agency v. Nuclear Regulatory Comm’n*, 393 F.3d 223, 225 (D.C. Cir. 2004) (internal citations omitted). Vacatur need not be requested; it “should be ordered *sua sponte* when the circumstances so warrant.” *N. Cal. Power Agency*, 393 F.3d at 225. Because the Machinists’ mootness contention was premised on an intervening event – the purported distribution of settlement funds after the Board’s order – the panel erred by not considering vacatur. *See Sands v. NLRB*, 825 F.3d 778, 785 (D.C. Cir. 2016) (“Although the case is moot, our inquiry does not end there.”).

In this case, vacatur of the Board’s and ALJ’s orders approving the settlement is appropriate. The “normal principle is that when mootness results from unilateral action of the party who prevailed below, the moot judgment should be vacated.” *Hall v. CIA*, 437 F.3d 94, 99-100 (D.C. Cir. 2006); *see also Sands*, 825 F.3d at 785 (“Courts usually vacate a judgment ‘when mootness results from unilateral action of the party who prevailed below’ or from circumstances beyond the control of the parties.”)(quoting *Alvarez v. Smith*, 558 U.S. 87, 98

(2009)(Stevens, J., concurring in part and dissenting in part)); *Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1089 (D.C. Cir. 2017)(same). Vacatur is appropriate here because the alleged mootness occurred through the unilateral action of the Machinists, who claim to have distributed settlement funds while the appeal was pending. As the Machinists' actions have denied ILWU the opportunity to appeal the Board's approval of the settlement, the Board and ALJ decisions below may not stand. *See Garza*, 138 S.Ct. at 1792 ("It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment.")(quoting *Arizonians for Official English v. Arizona*, 520 U.S. 43, 71-72 (1997)); *Hall*, 437 F.3d at 99-100 ("the moot judgment should be vacated lest the losing party, denied the opportunity to appeal by its adversary's conduct, should later be subject to the judgment's preclusive effect"). It is appropriate to vacate both the Board's order denying ILWU's challenge to the settlement approval as well as the ALJ's orders approving the settlement. *Hall*, 437 F.3d at 99-100 (vacating each of the district court's decisions to the extent they dealt with mooted issue); *Arizonans for Officials English*, 520 U.S. at 75 (finding "vacatur down the line" the equitable solution).

Because the panel's failure to consider vacatur is contrary to the Supreme Court and this Circuit's practice, the Court should rehear ILWU's petition or, at a minimum, modify the panel's opinion to vacate the orders below.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for rehearing.

Dated: October 2, 2020

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CERTIFICATE OF COMPLIANCE

1. This document complies with the Federal Rule of Appellate Procedure, Rules 35(b)(2)(A) and 40(b)(1), and because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e), this document contains 3,860 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Office 2010, font Times New Roman, and font size 14.

Dated: October 2, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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Dated: October 2, 2020

LEONARD CARDER, LLP

By: /s/ Lindsay R. Nicholas
Lindsay R. Nicholas

ADDENDUM
Pursuant to D.C. Circuit Rule 35(c)

- A. Panel Opinion (August 21, 2020)
- B. Certificate of Parties, Rulings and Related Cases
- C. Corporate Disclosure Statement

ATTACHMENT A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 25, 2019

Decided August 21, 2020

No. 18-1124

INTERNATIONAL LONGSHORE & WAREHOUSE UNION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

EAST BAY AUTOMOTIVE MACHINISTS LODGE NO. 1546,
ET AL.,
INTERVENORS

Consolidated with 18-1168

On Petition for Review and Cross-Application
for Enforcement of Orders of
the National Labor Relations Board

Lindsay R. Nicholas argued the cause for petitioner. With her on the briefs were *Eleanor Morton* and *Emily M. Maglio*.

Gregoire Sauter, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were *Peter B. Robb*, General Counsel, *John W. Kyle*, Deputy

General Counsel, *Linda Dreeben*, Deputy Associate General Counsel, and *Usha Dheenan*, Supervisory Attorney.

David A. Rosenfeld was on the brief for intervenors East Bay Automotive Machinists Lodge No. 1546, et al. in support of respondent/cross-petitioner.

Before: GARLAND and KATSAS, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.*

Opinion for the Court filed by *Circuit Judge KATSAS*.

KATSAS, *Circuit Judge*: Under *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), a successor employer inherits the collective-bargaining obligations of its predecessor only if the previously recognized bargaining unit remains appropriate under the successor. In determining whether the unit remains appropriate, the National Labor Relations Board ignores workplace changes caused by unfair labor practices of the successor. Here, the NLRB extended that rule to ignore changes caused by unfair labor practices of the predecessor. We hold that the Board did not adequately explain its decision.

I

This case arises from a longstanding dispute about which of two competing unions represents a group of several dozen

* The late Senior Circuit Judge Stephen F. Williams was a member of the panel at the time the case was argued and participated in its consideration before his death on August 7, 2020. Because he died before this opinion's issuance, his vote was not counted. See *Yovino v. Rizo*, 139 S. Ct. 706, 710 (2019). Judges Garland and Katsas have acted as a quorum with respect to this opinion and judgment. See 28 U.S.C. § 46(d).

mechanics who maintain and repair shipping equipment in the Port of Oakland, California. The unions are the International Association of Machinists and Aerospace Workers, AFL-CIO/CLC (Machinists) and the International Longshore and Warehouse Union (ILWU). As the mechanics came to work for different companies, two related controversies developed. One, centered around a change in employers that occurred in 2005, has been finally resolved by this Court. Another, centered around a change in employers that occurred in 2013, is directly at issue here.

A

Before 2005, the mechanics at issue worked for the Pacific Marine Maintenance Company, a contractor providing maintenance and repair services to the shipping company A.P. Moller-Maersk. At that time, the Machinists represented the mechanics under a collective-bargaining agreement covering non-crane mechanics employed by Pacific Marine at the Ports of Oakland and Tacoma, Washington.

In 2005, Maersk ended its contract with Pacific Marine and engaged the Pacific Crane Maintenance Company to provide maintenance and repair services for its Oakland and Tacoma shipping operations. As a result, Pacific Marine shut down and laid off the mechanics. Pacific Crane immediately rehired most of them, but it refused to recognize the Machinists as their bargaining representative. Instead, it recognized ILWU under a collective-bargaining agreement encompassing a much larger unit of some 15,000 employees performing various jobs for various employers at various West Coast ports.

These 2005 changes spawned over a decade of litigation. The Machinists charged that Pacific Crane had committed unfair labor practices by refusing to bargain with it and by

recognizing ILWU as the mechanics' bargaining representative. Likewise, the Machinists charged that ILWU had committed unfair labor practices by accepting the recognition and by applying its collective-bargaining agreement to the mechanics. The NLRB agreed with the Machinists on both points. *PCMC/Pac. Crane Maint. Co.*, 359 N.L.R.B. 1206 (2013) (*Pacific Crane I*). The Board then vacated its decision on procedural grounds, but later reached the same conclusion. *PCMC/Pac. Crane Maint. Co.*, 362 N.L.R.B. 988 (2015) (*Pacific Crane II*). After the Machinists settled their claims against Pacific Crane, we upheld the Board's decision and enforced it against ILWU. *Int'l Longshore & Warehouse Union v. NLRB*, 890 F.3d 1100 (D.C. Cir. 2018) (*Pacific Crane III*). In doing so, we relied "heavily" on a stipulation that Pacific Marine and Pacific Crane, which were affiliated companies, should be treated as a single employer. *Id.* at 1110.

B

This case involves a third employer—Ports America Outer Harbor—which came into the picture as the *Pacific Crane* litigation unfolded. In 2010, Ports America acquired control of Oakland berths 20–24 from Maersk. As Maersk had done, Ports America used Pacific Crane to provide maintenance and repair services at those berths. Ports America then acquired berths 25–26 from the Transbay Container Terminal. Ports America expanded its service contract with Pacific Crane to cover these berths as well.

In 2013, Ports America decided to bring its maintenance and repair operations in-house. When its contract with Pacific Crane expired, Ports America hired most of the mechanics who previously had been working for Pacific Crane. In doing so, Ports America refused to bargain with the Machinists and

instead recognized ILWU, which continued to apply its collective-bargaining agreement to the mechanics.

The Machinists charged Ports America and ILWU with various unfair labor practices. They alleged that Ports America committed unfair labor practices by failing to bargain with them and by recognizing ILWU as the mechanics' bargaining representative. Further, they alleged that ILWU committed unfair labor practices by accepting the recognition and by applying its collective-bargaining agreement to the mechanics. All these allegations rested on one central claim—that Ports America had succeeded to Pacific Crane's duty to bargain with the Machinists.

An administrative law judge agreed with the Machinists. She reasoned that from 2005 to 2013, Pacific Crane had a continuing obligation to recognize and bargain with the Machinists. *Ports Am. Outer Harbor, LLC*, 366 N.L.R.B. No. 76, at 10–12 (May 2, 2018) (*Ports America*) (reprinting ALJ recommendation). She then concluded that Ports America succeeded to that obligation under *Burns*, in part by refusing to consider any counterarguments “built on unremedied unfair labor practices” committed by Pacific Crane before 2013. *Id.* at 14. In 2018, the Board substantially affirmed the ALJ's decision on similar reasoning. *See id.* at 3–4 & nn. 9–10.

While the proceeding was still pending before the ALJ, Ports America filed for bankruptcy, so the Machinists added new claims against MTC Holdings, another terminal services company, which the Machinists alleged was a single employer with Ports America. The Machinists then reached a partial settlement covering all their claims against MTC Holdings and their non-*Burns* claims against Ports America. Under the settlement, Ports America and MTC Holdings agreed to pay the Machinists \$3 million for distribution to the mechanics. In

August 2016, the ALJ approved the settlement and dismissed MTC Holdings from the case. ILWU objected to the settlement and sought reconsideration. In September 2016, the ALJ affirmed her August order. In November 2016, the Board denied ILWU's appeal from the settlement approval.

ILWU now seeks our review of the NLRB's merits order and its order approving the partial settlement. The NLRB seeks enforcement of the merits order. The Machinists have intervened in support of the Board. Ports America, which has ceased operations, did not appear before this Court.

II

We first consider the Board's ruling that ILWU committed unfair labor practices by accepting recognition as the mechanics' bargaining representative in 2013 and by applying its collective-bargaining agreement to them. ILWU argues that the Board arbitrarily refused to consider its arguments that the past bargaining unit was no longer appropriate. We agree.

Our review of NLRB decisions is deferential but not toothless. Among other things, we must consider whether the Board's findings of fact are supported by substantial evidence, 29 U.S.C. § 160(f), and whether its reasoning is arbitrary and capricious, 5 U.S.C. § 706(2)(A). For the latter, the question is whether the agency "examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (cleaned up). "[A]n agency's unexplained departure from precedent is arbitrary and capricious." *ABM Onsite Servs.—West, Inc. v. NLRB*, 849 F.3d 1137, 1142 (D.C. Cir. 2017). So too is an order resting on "clearly distinguishable precedent." *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 976 (D.C. Cir. 1998).

Section 7 of the National Labor Relations Act guarantees the right of employees “to bargain collectively through representatives of their own choosing.” 29 U.S.C. § 157. Section 8(a) prohibits employers from engaging in unfair labor practices, which include interfering with collective bargaining, *id.* § 158(a)(1); supporting a union, *id.* § 158(a)(2); and refusing to bargain with a union that enjoys majority support, *id.* § 158(a)(5). Section 8(b) prohibits unions from engaging in unfair labor practices, which include restraining collective bargaining by employees, *id.* § 158(b)(1)(A), and causing an employer to discriminate against an employee, *id.* § 158(b)(2).

The unfair labor practices at issue follow from a premise that Ports America had a duty to bargain with the Machinists when it insourced the Oakland maintenance and repair work in 2013. If so, then its failure to bargain with the Machinists violated sections 8(a)(1) and (5), and its recognizing ILWU violated sections 8(a)(1) and (2). Likewise, ILWU violated section 8(b)(1)(A) by accepting the recognition, and section 8(b)(2) by applying its collective-bargaining agreement to the mechanics. ILWU does not dispute that these conclusions follow from the premise.

In finding that Ports America had a duty to bargain with the Machinists, the Board reasoned in two steps. First, Pacific Crane had such a duty. We previously held that Pacific Crane had this duty as of 2005, *Pacific Crane III*, 890 F.3d at 1107–13, and the Board held that it continued through 2013, *Ports America*, 366 N.L.R.B. No. 76, at 2–4. Second, Ports America succeeded to Pacific Crane’s bargaining obligation when it hired the mechanics. In reaching this conclusion, the Board summarized the test for successorship as follows:

An employer is a successor employer obligated to recognize and bargain with the union representing the

predecessor's employees when (1) the successor acquires, and continues in substantially unchanged form, the business of a unionized predecessor (the "substantial continuity" requirement); (2) the successor hires, as a majority of its workforce at the acquired facility, union-represented former employees of the predecessor (the "workforce majority" requirement); and (3) the unit remains appropriate for collective bargaining under the successor's operations.

Id. at 2; *see Burns*, 406 U.S. at 277–81. ILWU accepts this formulation of the governing legal test.

Before the Board, ILWU sought to raise three arguments why the historic bargaining unit was no longer appropriate when Ports America hired the mechanics in 2013. First, the historic bargaining unit had accreted into ILWU's larger, coast-wide bargaining unit—in other words, the historic unit had lost its separate identity and acquired an "overwhelming community of interest" with the ILWU unit, *see Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1067 (D.C. Cir. 2009) (quotation marks omitted). Second, a majority of mechanics in the historic unit by then supported ILWU, not the Machinists. Third, Ports America had at least a good-faith doubt whether a majority of the unit still supported the Machinists.[†]

[†] As of 2005, the recognized bargaining unit encompassed non-crane mechanics employed by Pacific Marine in Oakland and Tacoma. *See Pacific Crane III*, 890 F.3d at 1103–04 & n.2. In this case, the Board expanded the historic unit to include mechanics at Oakland berths 25 and 26, which Ports America took over in 2010, and contracted it to exclude mechanics in Tacoma, who are not employed by Ports America. *See Ports America*, 366 N.L.R.B. No.

The Board declined to consider ILWU's arguments because they invoked changes that were "a direct result of the predecessor employers' unlawful assistance to and recognition of the ILWU." 366 N.L.R.B. No. 76, at 3 (emphasis added); *see also id.* at 3–4 nn. 9–10. In other words, if the historic bargaining unit had become inappropriate by the time Ports America took over, it was only because Pacific Crane had improperly recognized ILWU, and had failed to recognize the Machinists, during the eight prior years.

To justify its ruling, the Board invoked our decision in *Pacific Crane III*. But that case does not address whether an *incoming* employer may contest successorship obligations by citing workplace changes caused by unfair labor practices of the *outgoing* employer. *Pacific Crane III* involved no successorship issue because the parties there had stipulated that the outgoing Pacific Mutual and the incoming Pacific Crane, which were affiliated companies, should be treated as a single employer. *See* 890 F.3d at 1110. It was thus undisputed that Pacific Crane, when it took over in 2005, succeeded to the bargaining obligations of Pacific Mutual. Pacific Crane separately argued that the historic Machinists unit had accreted into the larger ILWU unit because of changes that occurred *after* 2005. In response, the Board held that Pacific Crane could not seek to benefit from *its own* unfair labor practices in recognizing ILWU and failing to recognize the Machinists. 359 N.L.R.B. at 1211. Likewise, we explained that "the Board should ignore any impermissible changes made unilaterally by the employer," because "to hold otherwise would allow the

76, at 3. ILWU contends that the historic unit was absorbed into its unit, but does not otherwise challenge the Board's adjustments to the historic unit.

employer to benefit from its own unlawful conduct.” 890 F.3d at 1111 (cleaned up).[‡]

We can imagine reasonable arguments either way on the question whether a successor employer should be barred from citing changes caused by the unfair labor practices of a predecessor. Perhaps current employee choices should be given effect, regardless of whether a former employer committed unfair labor practices. Or, perhaps the need to remedy past unfair labor practices is paramount. The Board simply did not engage these questions. Instead, it relied on inapposite precedent, as it virtually conceded at oral argument. Oral Arg. 22:50–56 (“there is no clear case on point”); *id.* 25:22–24 (“there are no cases governing”). That was arbitrary. *See Exxel/Atmos*, 147 F.3d at 976.

Before this Court, the Board presses an alternative theory that Ports America could not have claimed any good-faith doubt that a majority of workers in the unit supported the Machinists. According to the Board, this is so because Ports America knew of Pacific Crane’s unremedied unfair labor practices. *See Proxy Commc’ns*, 290 N.L.R.B. 540, 542 (1988), *enforced*, 873 F.2d 552 (2d Cir. 1989); *Bay Diner*, 279 N.L.R.B. 538, 546 (1986); *Silver Spur Casino*, 270 N.L.R.B. 1067, 1074 (1984). But neither the ALJ nor the Board articulated this rationale below, and neither made findings on whether Ports America knew of Pacific Crane’s unfair labor

[‡] The Board in this case also cited *Pacific Telephone & Telegraph Co.*, 80 N.L.R.B. 107 (1948), but it too has nothing to do with successorship. There, the Board held that a union could not seek a unit determination reflecting assistance that the employer had unlawfully provided to it. *Id.* at 111–12. The case involved no question of when bargaining obligations flow from a predecessor to a successor.

practices in sufficient time. ILWU suggests no, because Ports America had signed its contracts and made its hiring decisions before the Board decided *Pacific Crane I*. The Board suggests yes, because *Pacific Crane I* was decided before Ports America took over the maintenance and repair work. Because the Board did not address these issues below, much less make the findings necessary to resolve them, we cannot uphold its rejection of the good-faith defense on this ground. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

At oral argument, we asked the Board about another possible rationale for upholding its order: Even if Ports America could seek to benefit from the unfair labor practices of Pacific Crane, ILWU could not seek to benefit from its own past unfair labor practices. The Board wisely declined to press that rationale here. In the proceedings below, the Board pegged ILWU's liability entirely to the proposition that Ports America was a *Burns* successor and had violated its bargaining obligations as such. *See Ports America*, 366 N.L.R.B. No. 76, at 2. Under *Chenery*, we thus cannot uphold the Board's order on the theory that ILWU committed unfair labor practices even if Ports America did not.

As this analysis should make clear, our ruling is narrow. We hold only that the Board did not engage in reasoned decisionmaking in the order under review. On remand, the Board remains free to consider the various open issues and arguments in this case, unencumbered by its invocation of inapposite precedent.[§]

[§] The Board ordered Ports America to bargain with the Machinists if it resumed operations, and it ordered ILWU to reimburse fees and dues paid by the mechanics. *Ports America*, 366 N.L.R.B. No. 76, at 6. Because we have set aside the underlying

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III

ILWU also seeks review of the Board's order refusing to set aside the partial settlement among the Machinists, Ports America, and MTC Holdings. The Machinists contend that we lack jurisdiction to review that order for two reasons. First, ILWU lacks Article III standing to challenge a settlement of claims made against other parties, which in no way impaired ILWU's ability to defend the claims made against it. Second, the intervening distribution of the settlement funds mooted ILWU's objections to the settlement. We must consider both jurisdictional objections before reaching the merits, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998), but we may do so in either order, *see Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999). We begin—and end—with the question of mootness.

ILWU does not respond to the Machinists' contention that disbursement of the settlement funds mooted ILWU's challenge. By this silence, ILWU has forfeited any objection to mootness. "Although a party cannot forfeit a claim that we lack jurisdiction, it can forfeit a claim that we possess jurisdiction." *Scenic Am., Inc. v. DOT*, 836 F.3d 42, 53 n.4 (D.C. Cir. 2016). "[T]he ordinary rules of forfeiture apply" to a claim that we have jurisdiction, *Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019), so ILWU's "failing to respond" to an argument that we lack jurisdiction forfeited any counterargument that we have it, *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 618 (D.C. Cir. 2017); *see, e.g., Reid v. Hurwitz*, 920 F.3d 828, 833 n.4 (D.C. Cir. 2019). This is consistent with how ordinary forfeiture rules work in other

liability determinations, we need not consider ILWU's challenge to these two remedies. *See Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 19 (D.C. Cir. 2012).

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contexts where one party has raised an argument and the other has “offered nothing in opposition.” *Tax Analysts v. IRS*, 117 F.3d 607, 610 (D.C. Cir. 1997); see *Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1267 (D.C. Cir. 1996).

Because ILWU forfeited any argument that this case is not moot, we dismiss its petition to review the Board’s order accepting the partial settlement.

IV

We grant the petition for review of the Board’s final order, set aside that order, deny the Board’s cross-application for enforcement, and remand for further proceedings consistent with this opinion. We dismiss as moot the petition for review of the Board’s order refusing to set aside the partial settlement.

So ordered.

ATTACHMENT B

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 28(a)(1) and 35(c), the undersigned counsel for Petitioner/Cross-Respondent in the above-captioned matter submits this Certificate of Parties, Rulings, and Related Cases.

A. Parties and Amici.

1. International Longshore and Warehouse Union (“ILWU”) is the Petitioner/Cross-Respondent.

2. The National Labor Relations Board (“Board”) is the Respondent/Cross-Petitioner.

3. International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190 and Local Lodge No. 1546 (together “IAM”) were Charging Parties in the proceeding before Region 32 of the Board, and are Intervenors-Respondents in this appeal.

B. Rulings Under Review.

ILWU seeks review of the Board’s Decision and Order in *Ports America Outer Harbor, LLC, et al.*, Case Nos. 32-CA-110280 and 32-CB-118735, reported at 366 NLRB No. 76 (May 2, 2018), and the decision and order the National Labor Relations Board entered on November 18, 2016, which denied ILWU’s appeal of the Administrative Law Judge’s August 29, 2016 and September 7, 2016 orders. In this Petition, ILWU seeks rehearing or rehearing en banc of the opinion dated

August 21, 2020, issued by the Panel (Garland, Katsas, and Williams JJ.), which, in relevant part, dismissed ILWU's petition for review of the decision and order the Board entered on November 18, 2016, which denied ILWU's appeal of the Administrative Law Judge's August 29, 2016 and September 7, 2016 orders. The opinion is included in the Addendum and is published at *International Longshore & Warehouse Union v. National Labor Relations Board*, 971 F.3d 356 (D.C. Cir. 2020).

C. Related Cases.

To the best of counsel's knowledge, no related cases are currently pending in this Court or in any other federal court of appeals, or in any other court in the District of Columbia.

ATTACHMENT C

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 26.1 and 35(c), Petitioner/Cross-Respondent ILWU makes the following disclosures:

International Longshore and Warehouse Union is an unincorporated association constituting a labor union under federal labor law.