

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
AT LEXINGTON**

MATTHEW T. DENHOLM, REGIONAL DIRECTOR
OF THE NINTH REGION OF THE NATIONAL LABOR
RELATIONS BOARD, FOR AND ON BEHALF OF THE
NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

Civil No. 5:20-cv-00320-REW-MAS

SMYRNA READY MIX CONCRETE, LLC

Respondent

PETITIONER'S REPLY TO SMYRNA'S RESPONSE BRIEF

Pursuant to the Court's August 6, 2020 order setting a briefing schedule, Petitioner Matthew T. Denholm, Regional Director of the Ninth Region of the National Labor Relations Board ("the Board"), for and on behalf of said Board, hereby responds to Respondent ("Smyrna")'s Response Brief in Opposition to Injunctive Relief.

In its opposition to Section 10(j) relief, Smyrna maintains that the Petition should not be granted because the Regional Director was obligated to further develop his case in his opening memorandum. In support, Smyrna cited several summary judgment cases, none of which involved injunctions, let alone Section 10(j) NLRB injunction cases. As discussed in Petitioner's initial memorandum in support of its Section 10(j) petition, a district court in the Sixth Circuit considers only two issues: whether there is "reasonable cause to believe," that a respondent has violated the Act, and whether temporary injunctive relief is "just and proper. See, e.g., *Ahearn v. Jackson Hospital Corp.*, 351 F.3d, 226, 234 (6th Cir. 2003); *Glasser v. ADT Security Systems, Inc.*, 188 LRRM 2805, 2807, 2010 WL 2196084 at *2 (6th Cir. 2010). The director bears a

“relatively insubstantial” burden in establishing “reasonable cause.” *Ahearn v. Jackson Hospital*, 351 F.3d at 237. Factually, the director need only “produce some evidence in support of the petition.” *Kobell v. United Paperworks Intern.*, 965 F.2d 1401, 1407 (6th Cir. 1992). Indeed, the Sixth Circuit has consistently granted injunctions based on evidence similar to that presented in the present case. See, e.g. *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 228-240 (affirming district court order granting 10(j) petition ordering reinstatement of three employees when the terminations were motivated by antiunion animus).

Here, as in *Ahearn v. Jackson Hospital Corp.*, the Petitioner sufficiently developed his case in his Petition and Memorandum, and the injunction should be granted. In support of the petition, Petitioner included the NLRB complaint, the transcript in the underlying proceeding, affidavits, and a six page recitation of underlying facts supporting the need for an injunction. Petitioner further included eight pages describing the legal standards for how and why the alleged conduct violated the Act. Given the massive amount of information provided to the court, which necessitated several separate filings through the ECF system due to size, and based on which the Administrative Law Judge (ALJ) found violations of the National Labor Relations Act (the Act), it is unclear to Petitioner what additional information Smyrna believes should have been included. Smyrna has not identified what details it believes were missing or made the allegations unclear or insufficient. The law is clear: Petitioner need only “produce some evidence in support of the petition.” *Kobell v. United Paperworks Intern.*, 965 F.2d at 1407. It has done so. The district court is required to accept the Petitioner’s version of events, since facts exist which could support the Board’s theory of liability. See, *Ahearn v Jackson Hospital*, 351 F.3d at 237.

Smyrna further argues that the relief that is sought by the Regional Director seeking to enjoin Smyrna from continuing to break the law at any of its locations, is “extreme.” Although Smyrna would indeed be enjoined from breaking federal law in any state, it has failed to explain why being enjoined from continuing to flout the Act at its facilities is burdensome to its operations. Moreover, Petitioner is seeking that Smyrna only take affirmative actions reinstating the status quo and posting the Court’s order granting the injunction at its Winchester, Kentucky facility.

Smyrna also argues that the petition should not be granted because it was filed “after an unexplained delay of more than six months.” This is false. The Board cannot initiate 10(j) proceedings prior to the issuance of an administrative complaint on any matter. 29 U.S.C. Sec. 160(j). While the first complaint alleging the unlawful discharge of employee Sunga Copher and supervisor Aaron Highley issued on February 28, 2020, as Smyrna is aware, various other allegations, including the discharge of the remaining employees and the conversion of the plant to an on-demand facility, were still under investigation, and the third consolidated complaint including all of the allegations at issue did not issue until May 13, 2020. Thereafter, the Board had to engage in its own internal processes to determine whether seeking an injunction was appropriate.

Injunction proceedings were authorized by the Board in the middle of the evidentiary hearing, on July 13, 2020. Thereafter, on July 16, 2020, Smyrna sent the Board a letter threatening to file sanctions against Board attorneys in this matter (see Attachment 1) if the Board and any attorney files any 10(j) Petition without first undertaking a full review of the 7 day hearing transcript. The transcripts were not yet available. After a review of Smyrna’s July 16, 2020 claims, a Petition was filed with this Court on July 23, 2020. On July 30, 2020,

Smyrna requested the Court grant additional time to respond to the Petition. Smyrna cannot now claim prejudice for the timing of the filing, having itself created the delay.

Smyrna also maintains that an injunction is not necessary because the ALJ has already rendered his interim decision, and that under Board rules, its decision will be expedited in this case. As already explained in Petitioner's September 14, 2020 Motion to Supplement the Record with the Administrative Law Judge's Decision and Modify the Petition for 10(j) Injunction, the ALJ's decision is only an interim recommendation and is subject to review by the Board. See, *Schaub v. West Plumbing & Heating Co.*, 250 F.3d 962, 968 (6th Cir. 2001). On September 30, 2020, Smyrna filed exceptions to the ALJ's decision with the Board, thereby appealing the ALJ's decision.^{1/} Only after the Board enters a final order may a respondent be compelled to comply with any remedial provisions. See Board's Rules and Regulations, 29 C.F.R. §§ 102.45-102.52. It is unknown when the Board will decide the case.

Contrary to Smyrna's assertions, the Board's rules do *not* provide that the Board decision will be expedited in this case, thereby mooting the necessity of the injunction. Under the Board's Rules and Regulations, and specifically Section 102.94, 29 C.F.R. Sec. 102.94(a), Board proceedings are expedited only "when[] temporary relief or a restraining order pursuant to section 10(j) of the Act has been procured by the Board." Thus, *only if* this Court grants the Petition in this case can the Board expedite the proceedings.

Section 10(j) relief is specifically designed to cover the entire administrative period, until the Board reviews the ALJ's decision and issues a final Board order. The ALJ's decision does little to place Smyrna under legal constraint, provide immediate relief for the discharged

^{1/} Smyrna's exceptions were due on September 29, 2020. The exceptions were filed late so they were rejected by the Board. However, Smyrna has advised Petitioner that it intends to continue to attempt to pursue the filing of exceptions with the Board, presumably with a motion to reconsider.

employees, or restore the status quo. The ALJ decision does not render an injunction, or its appeal, moot. See, e.g., *Kaynard v. MIMIC, Inc.*, 734 F.2d 950, 952-53 (2d Cir. 1984) (affirming 10(j) injunction granted after ALJ's decision issued) and *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 37 n.7 (2d Cir. 1975)(injunction affirmed after ALJ decision issued; ALJ decision bolstered district court's findings); *Levin v. Fry Foods, Inc.*, 108 LRRM 2208, 2209 (N.D. Ohio 1979), affd. 108 LRRM 2280 (6th Cir. 1981) (issuance of administrative law judge decision does not terminate 10(j) decree); *Fleschaut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 28, and 31, 129 LRRM 2660 (6th Cir. 1988) (error for district court to limit duration of 10(j) decree to commencement of hearing before administrative law judge). The need for injunctive relief has not decreased. A violation has been found by the ALJ, and without an injunction and prompt reinstatement, employees may take other jobs and be unavailable for reinstatement, rendering the Board's order an empty formality. See, *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 881 (3d Cir. 1990) (even if open union supporters are "ultimately reinstated by the Board . . . [e]mployees will not risk the uncertainty and hardship attendant upon even temporary lay-off if that is the price they must pay for union activity"); *Angle v. Sacks*, 382 F.2d 655, 660-61 (10th Cir. 1967) (when the Board finally acts, "the employees then at the plant may not wish to exercise the rights thus secured to them"). With a final Board order not being imminent, the risk of irreparable harm to the unlawfully discharged employees and their statutory rights continues to grow. Smyrna should not be allowed to continue reaping the benefits of its unlawful conduct by allowing more time to pass without interim injunctive relief.

Smyrna argues that an injunction should not be granted because it has "an undisputed track record of a lack of anti-union animus." To the contrary, the ALJ correctly pointed out several examples of Smyrna's animosity towards union activity. For example, when General

Manager Ben Brooks was asked whose hours he investigated immediately prior to firing Sunga Copher, he could only remember Sunga Copher, Sheldon Walters, and Nicole Long, the only three drivers who he knew were pro-union. (ALJD p. 17) Brooks also never gave Copher any warning about his alleged misconduct/poor performance before discharging him, failed to give him an opportunity to address the allegations against him, and departed from Smyrna's progressive discipline policy. (ALJD p. 18) Moreover, with respect to Smyrna's prior acquisition of a unionized plant, the employment of former union stewards, or the Hollingshead family's past affiliation with unions, anti-union animus otherwise established is not disproved by an employer's failure to retaliate against all known union supporters. (ALJD p. 18, citing *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964))^{2/}

Moreover, Smyrna's recitation of the facts does not show what it claims. With respect to the purchase of the assets of Piqua Concrete, the record showed that the owner of the plant conditioned the sale of his profitable company on Smyrna remaining a union operation. (ALJD p. 18) Smyrna also misrepresents the circumstances of its purchase of Allied Ready Mix in December 2018. With respect to that purchase, the record established that Smyrna preferred that the employees work for it without a union and that it did not recognize any union at the facilities at which employees who were previously union members went to work. (ALJD p. 19)

In its Response Brief, Smyrna also argues that it should not have to reinstate Copher because of his alleged no-call/no-shows. As correctly noted by the ALJ, Smyrna has presented no evidence that it ever enforced its no-call/no-show policy. (ALJD p. 26) As the ALJ noted, it is well-settled Board law that employee misconduct discovered during an investigation

^{2/} References to the Administrative Law Judge's Decision, which was filed with this court on September 14, 2020, will herein be designated as (ALJD p. ____); references to the transcript in the unfair labor practice case, which was filed with this court on July 23, 2020, will be designated as (Tr. ____).

undertaken because of an employee's protected activity does not render the discharge lawful.

(ALJD p. 25) An employer seeking to be excused from its obligation to reinstate or pay backpay to a discriminatee for misconduct which was not a factor in the original discriminatory action has a heavier burden than when it is merely seeking to justify the original determination.

(ALJD p. 25) Such an employer must prove the misconduct was "so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant." (ALJD p. 25, citing *Hawaii Tribune-Herald*, AKA *Stephens Media, LLC*, 356 NLRB 661, 662-63 (2011), *O'Daniel Oldsmobile*, 179 NLRB 398, 405-05 (1969)) The ALJ correctly found that Smyrna has not established that Copher engaged in activity so flagrant to render him unfit for further service, and he should be reinstated. (ALJD p. 26) The ALJ correctly found that Copher is entitled to reinstatement, and that Smyrna is barred from raising its "after-acquired" evidence defense in a compliance proceeding because it did not comply with Petitioner's subpoena for such information in the hearing in this case. (ALJD p. 26) Such evidence is thus also inappropriate here.

Smyrna also argues that Aaron Highley should not be returned to work because the termination of Highley, a supervisor, does not violate the Act. As the ALJ correctly noted, it does. (ALJD p. 20-21, citing *Frenchy's K & T*, 263 NLRB 45, 47 (1982), et al.) The ALJ correctly found that termination of supervisors because they refuse to commit unfair labor practices or fail to prevent unionization violates the Act. (ALJD pp. 20-21) Unlawful terminations of supervisors in violation of the Act have been upheld by District Courts. See, e.g., *Marshall Durbin Poultry Co. v. NLRB*, 39 F.3d 1312 (5th Cir. 1994) (upholding unlawful discharge of a supervisor for refusal to commit an unfair labor practice). Since Smyrna violated the law by discharging Highley, requiring his reinstatement to remedy its unlawful behavior does

not, as Smyrna's alleges, "infringe[] upon [its] right to select its own supervisors and manage its own business." It simply requires adherence to federal law. See, e.g., *NLRB. V. Phelps Dodge Corporation*, 313 U.S. 177, 182 (1941)("Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise.")

Smyrna further argues that Petitioner's requested relief is overbroad because it requests that Smyrna resume its operations at the Winchester, Kentucky plant. The ALJ correctly discredited Smyrna's contentions that it closed the plant for reasons other than employee's union activity or other protected concerted activity. (ALJD pp. 9, 24) The court is required to credit the Petitioner's version of events so long as facts exist which could support the Board' theory of liability, and such version is bolstered by the ALJ's findings. *Ahearn v. Jackson Hospital*, 351 F.3d at 237; *Silverman v. J.R.L. Food Corp.*, 196 F.3d, 334, 335 (2d Cir. 1999)(the ALJ's findings "cannot be ignored"). Further, as noted by the ALJ, the resumption of operations is a standard Board remedy in these types of cases. (ALJD pp. 27-28) Smyrna has failed to show at trial that it closed its facility for legitimate business reasons. (ALJD p. 28) Thus, returning to the status quo that existed before Smyrna unlawfully converted the plant to an on-demand facility and discharged employees for their protected concerted and union activities is the correct and necessary remedy. (ALJD p. 28)

Smyrna argues here that it would be burdensome to reopen the facility because production is down by 14 percent from last year. This reduction in work may actually be beneficial to all parties involved, because the evidence at trial established that two employees voluntarily quit around the time of Smyrna's unfair labor practices. (Tr. 192, 304) Because those employees left voluntarily, Petitioner is not seeking those employees' reinstatement. Thus,

Smyrna only has to reinstate seven of its previous nine employees, and a supervisor, which amounts to 78 percent of its prior employees, or 80 percent of its workforce if the supervisor is included. This is nearly perfectly aligned with the decrease in volume of business from the prior year when the discriminatees were still employed, so there should be no need to lay off any employees.

Smyrna maintains that it has demonstrated that it should not have to fully reopen its shuttered plant because of the financial burdens involved. In *Calatrello v. Automatic Sprinkler Corp. of Am.*, 55 F.3d 208, 214 (6th Cir. 1995), cited by Smyrna in support of its contention that it has demonstrated evidence of financial burden, respondent's demonstration of hardship included having already sold tools, equipment, and materials its employees would need to perform the work in question. No such actions have taken place here, and Smyrna continues to employ mechanics at its Winchester location and sometimes run concrete out of the plant. Besides speculative assertions, it has not presented any compelling evidence that other employees would have to be laid off or adversely affected. With unemployment high in the Commonwealth due to the pandemic and Smyrna's admissions of how difficult it is to find good drivers, reinstating the experienced, unlawfully terminated drivers would benefit all parties. In fact, interim reinstatement helps reduce Smyrna's ultimate financial liability because it cuts off any continued accrual of backpay. See, *Hubbel v. Patrish LLC*, 903 F. Supp. 2d 813, 818 (E.D. Mo. 2012)

Smyrna further argues that reinstatement of employees is improper because they signed separation agreements. The ALJ correctly found that the separation agreements were unlawful. (ALJD pp. 26-27) Therefore, Smyrna's claims are without basis. Smyrna also argues that reinstatement is improper based on *NLRB v. Hartman and Tyner, Inc.*, 714 F.3d 1244 (11th Cir.

2013), in which the Eleventh Circuit held that temporary reinstatement of discharged employees was not a just and proper form of relief. In *Hartman*, the evidence established that the union organizing drive had grown cold prior to the employer's unfair labor practices. Here, in contrast, the union organizing drive was in its infancy, and Copher was discharged the day after the very first group meeting with the union organizer. This case is exactly the opposite of *Hartman* – the employees were gaining momentum, Copher's and Highley's discharges put it on ice, and the nail in the coffin was the discharge of the remaining employees shortly thereafter.

Finally, Smyrna argues that the Sixth Circuit should change its injunction standard for Section 10(j) relief to that set forth in *Winter v. Natural Resource Defense Council, Inc.*, 555 U.S. 7 (2008). *Winter* involved a preliminary injunction sought by an environmental organization based on the alleged violations of the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Administrative Procedures Act (APA), and the Coastal Zone Management Act (CZMA), not Section 10(j) of the National Labor Relations Act. It arose out of the Ninth Circuit. The *Winter* injunction standard is therefore inapplicable to the present case. The standard for granting 10(j) injunction cases has not been overruled. Petitioner submits that it is required only to show that relief is necessary and that the remedy is just and proper. Indeed, since 2008, after *Winter*, the courts within the Sixth Circuit have correctly continued to use its reasonable cause/just and proper standard in Section 10(j) cases. See, e.g. *Glasser v. Comau, Inc.*, 767 F.Supp. 2d 778 (2011); *Calatrello ex rel. N.L.R.B. v. DHSC, LLC*, 2014 WL 296634 (N.D.O.H. 2014). Nevertheless, and strongly objecting to the use of a *Winter* analysis in a 10(j) case, even under a *Winter* analysis in the Sixth Circuit, based on the facts already articulated in prior filings, irreparable injury is likely to occur to the employees, and public interest of timely rectification of the most egregious violations of the nation's labor laws

necessitates the granting of the injunction. (See, e.g., ALJD p. 24, identifying Smyrna's actions as inherently destructive of rights protected by Section 7 of the Act)

Based on the foregoing, Petitioner requests that the Court grant its Section 10(j) petition. The record is sufficient to show that interim relief is necessary and just and proper, so there is no need for an evidentiary hearing, and Petitioner urges the Court to grant the Petition based on the record.

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2020, I filed this Petitioner's Reply to Smyrna's Response Brief with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys of record.

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