

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	No. 20-2763
Petitioner	:	
v.	:	
	:	Board Case Nos.:
3H SERVICE SYSTEM, INC.	:	22-CA-236583
	:	22-CA-248356
Respondent	:	

MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO  
VACATE THE COURT’S ORDER DIRECTING THE FILING OF THE  
RECORD AND GRANT JUDGMENT ENFORCING THE BOARD’S ORDER

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 that the order directing the filing of the record in this case be vacated and that a judgment enforcing the Board’s Order against 3H Service System, Inc. be granted. The Board shows as follows:

1. On August 28, 2020, the Court docketed as no. 20-2763 the Board’s application for summary entry of a judgment enforcing its Order issued on July 9, 2020, and reported at 369 NLRB No. 116. To date 3H Service System, Inc. has not entered an appearance in this case, nor has it filed an answer to the Board’s application.

2. Federal Rules of Appellate Procedure Rule 15(b)(2) states that a respondent must file an answer to an application for enforcement within 21 days of

its being filed or “the court *will* enter judgment for the relief requested.” Fed. R. App. P. 15(b) (emphasis added). In the absence of an answer by 3H Service System, Inc. the Board’s application shall be granted.

3. On August 31, 2020, this Court issued an Order citing Fed. R. App. P. 17(a), and stating “the record or certified list in lieu of the record shall be filed in this office within 40 days from the date of service of the petition.” The order goes on to instruct, “The Agency is directed to file the record or certified list in lieu of the record on or before October 13, 2020.”

4. Under Federal Rule of Appellate Procedure 17(a), the Board is relieved from filing the record with the Court when the respondent fails to file an answer to the Board’s application for enforcement. *See* Fed. R. App. P. 17(a) (“The agency must file the record with the circuit clerk within 40 days . . . *unless* the respondent fails to answer . . . .”) (emphasis added). *See also* Fed. R. App. P. 17(a) advisory committee’s note (“Forty days are allowed in order to avoid useless preparation of the record or certified list in cases where the application for enforcement is not contested.”).

5. There are additional grounds that make the filing of the record completely unnecessary in this case. Prior to failing to respond to this Court, 3H Service System, Inc. also failed to respond to the Board and its proceedings. 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 Oldwick Materials, Inc. v. NLRB*, 732 F.2d 339, 341 (3d Cir. 1984); *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”). Consequently, the record is not in dispute and filing it would serve no purpose.

WHEREFORE, in order to conserve the resources and time of both the Court and the Board, the Board respectfully requests that the Court vacate its order directing the filing of the record and grant its application for enforcement of the Board’s order.

/s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
National Labor Relations Board  
1015 Half Street, S.E.  
Washington, D.C. 20570

Dated in Washington, D.C.  
this 9th day of October 2020

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CERTIFICATE OF SERVICE

The undersigned certifies that one copy each of the Board's motion to vacate the Court's Order and grant judgment enforcing the Board's Order, in the above-captioned case, has this day been served by first class mail upon the following parties at the addresses listed below:

Carl Mack, Manager  
3H Service System  
1700 Cumberland Point Dr., Ste 16  
Marietta, GA 30067

Russ Wetherington  
3H Service System, Inc.  
1700 Cumberland Point Dr., Ste 16  
Marietta, GA 30067

/s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
National Labor Relations Board  
1015 Half Street, S.E.  
Washington, D.C. 20570

Dated in Washington, D.C.  
this 9th day of October 2020