

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DELTA SANDBLASTING COMPANY, INC.,	)	
	)	
Petitioner/Cross-Respondent,	)	
	)	
v.	)	
	)	Nos. 18-73097
NATIONAL LABOR RELATIONS BOARD,	)	18-73305
	)	
Respondent/Cross-Petitioner,	)	Board Case Nos.
	)	20-CA-176434
DISTRICT COUNCIL 16 OF THE	)	32-CA-180490
INTERNATIONAL UNION OF PAINTERS	)	
AND ALLIED TRADES,	)	
	)	
Intervenor for Respondent/Cross-Petitioner.	)	
	)	

**OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD TO  
DELTA SANDBLASTING’S NOTICE OF STAY OF PROCEEDINGS**

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

The National Labor Relations Board (“the Board”) opposes the notice filed by Delta Sandblasting Company, Inc. (“Delta”) stating that a stay is required due to its recent filing of a Chapter 11 bankruptcy petition. As explained below, it is well established that bankruptcy petitions do not stay review or enforcement of Board orders. Accordingly, the Board submits that the Court should not stay the case and should instead conclude processing it by issuing mandate.

## **Background**

On October 16, 2018, the Board issued a Decision and Order (“the Order”) finding that Delta violated Section 8(a)(5) and (1) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 158(a)(5) and (1), by unilaterally decreasing pension contributions for its union-represented employees. *See Delta Sandblasting Co.*, 367 NLRB No. 17, 2018 WL 5026366 (Oct. 16, 2018). Delta petitioned this Court to review the Board’s Order and the Board filed a cross-application to enforce it. On August 11, 2020, the Court issued a decision enforcing the Board’s Order in full. *See Delta Sandblasting Co. v. NLRB*, 969 F.3d 957 (9th Cir. 2020), *reh’g pet. denied* (Oct. 13, 2020). On October 13, 2020, Delta filed a notice of pending Chapter 11 case and notice of stay of proceedings.

### **Bankruptcy Proceedings Do Not Operate to Stay Board Enforcement Proceedings**

Contrary to Delta’s implicit suggestion, the filing of a bankruptcy petition does not operate to stay Board enforcement proceedings. While Section 362 of the Bankruptcy Code, 11 U.S.C. § 362, “generally functions as a stay to all other proceedings against the debtor,” *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 832 (9th Cir. 1991), Section 362(b)(4) provides that the automatic stay does not apply to:

the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce [its] police and regulatory power, including the enforcement of a judgment other than a money

judgment, obtained in an action or proceeding by the governmental unit to enforce [its] police or regulatory power.

11 U.S.C. § 362(b)(4).

All circuit courts that have addressed this issue—including this one—have held that enforcement actions by the Board are not stayed by the commencement of a bankruptcy proceeding because the Board is a “governmental unit” with a right to enforce its “policy or regulatory power.” *See Continental Hagen*, 932 F.2d at 832-34; *see also Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23, 24 (1st Cir. 1983) (per curiam); *NLRB v. 15th Ave. Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992) (per curiam); *NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981) (per curiam); *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 941 & n.6 (6th Cir. 1986); *NLRB v. P\*I\*E Nationwide, Inc.*, 923 F.2d 506, 512 (7th Cir. 1991). Thus, Delta’s bankruptcy petition does not affect the Board’s right to seek enforcement of its Order.<sup>1</sup>

The fact that the Board’s Order includes a financial component does not alter this outcome.<sup>2</sup> Although Section 362(b)(4) provides that the automatic stay

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<sup>1</sup> The Board is exempt from the automatic stay regardless whether the debtor seeks relief under Chapter 7 or 11 of the Bankruptcy Code. *See, e.g., Continental Hagen*, 932 F.2d at 832 (Chapter 11 reorganization); *NLRB v. Twin Cities Elec.*, 907 F.2d 108 (9th Cir. 1990) (Chapter 7); *Edward Cooper Painting*, 804 F.2d at 937, 942 (Chapter 11 corporation liquidation); *P\*I\*E Nationwide*, 923 F.2d at 506 (Chapter 11 reorganization).

<sup>2</sup> The Board’s Order requires Delta to make up all unpaid pension contributions, continue making payments until collective-bargaining negotiations result in an

applies to actions to enforce “a money judgment,” “courts have drawn a distinction between the use of the terms ‘entry’ and ‘enforcement’” in this context.

*Continental Hagen*, 932 F.2d at 834. Thus, “the mere *entry* of a money judgment by a governmental unit [such as the Board’s entry of its Order against Delta] is not affected by the automatic stay.” *Id.* (quoting *Penn Terra Ltd. v. Dept. of Env’tl. Res.*, 733 F.2d 267, 275 (3d Cir. 1984)). This is in contrast with “a proceeding to *enforce* that money judgment[, which occurs] when, having obtained a judgment for a sum certain, a plaintiff attempts to seize property of the defendant in order to satisfy that judgment. It is this seizure of a defendant-debtor’s property, to satisfy the judgment obtained by a plaintiff-creditor, which is proscribed by” Section 362(b)(4). *Id.* *Accord Edward Cooper Painting*, 804 F.2d at 943; *P\*I\*E Nationwide*, 923 F.2d at 512 (Board does not run afoul of Section 362(b)(4) if it is “merely seeking entry of judgment and is not trying to seize . . . property to satisfy a money judgment.” (footnote omitted)). Stated differently, Delta’s bankruptcy filing does not stay the Board’s action in an appellate court to enforce its Order against Delta under Section 10(e) of the Act, 29 U.S.C. § 160(e), even if it will affect the means by which the Board can collect on that Order after it is enforced by the Court. *See S.E.C. v. Brennan*, 230 F.3d 65, 71 (2d Cir. 2000) (“[While] the

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agreement or a lawful impasse, and make employees whole, with interest, for any expenses resulting from its failure to make the required contributions. *Delta Sandblasting*, 2018 WL 5026366, at \*6.

governmental unit exception of § 362(b)(4) permits the *entry* of a money judgment against a debtor . . . *anything beyond the mere entry of a money judgment* against a debtor is prohibited by the automatic stay.”).

If the Court denies Delta’s request to stay proceedings and issues mandate in this case, the Board will certainly seek to collect on its judgment against Delta, at which point it will be subject to any pending bankruptcy stay. Until then, however, nothing in the Bankruptcy Code or applicable case precedent offers any reason for this Court to stay these proceedings.

WHEREFORE, the Board respectfully requests that the Court issue mandate in this case rather than entering a stay.

Respectfully Submitted,

s/ David Habenstreit  
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Dated at Washington, DC  
this 15th day of October 2020

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1), the Board certifies that this response in opposition contains 1001 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2016. The Board further certifies that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

s/ David Habenstreit  
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 15, 2020, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

s/ David Habenstreit  
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