

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAV TRUCK AND TRAILER REPAIRS INC.	)	
AND CONCRETE EXPRESS OF NY, LLC,	)	
	)	
Petitioners/Cross-Respondents	)	Nos. 20-1090
	)	20-1124
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD,	)	02-CA-220395
	)	
Respondent/Cross-Petitioner	)	
	)	

**OPPOSITION OF  
THE NATIONAL LABOR RELATIONS BOARD  
TO PETITIONERS/CROSS-RESPONDENTS' MOTION  
TO STAY A SEPARATE, ONGOING AGENCY PROCEEDING**

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

The National Labor Relations Board, by its Assistant General Counsel, opposes the emergency motion filed in this case by RAV Truck & Trailer Repairs, Inc. and Concrete Express of NY, LLC (together, “the Company”), which apparently seeks to stay a different, ongoing administrative proceeding—an unfair-labor-practice complaint issued by the Board’s Regional Director for Region 2. Simply put, the Court lacks subject-matter jurisdiction to grant the requested stay. As explained below, actions taken by the Board’s General Counsel and his agents in the Board’s regional offices to issue and prosecute complaints are not final orders of the Board subject to judicial review under Section 10(f) of the National

Labor Relations Act, 29 U.S.C. § 160(f). Instead, under Section 3(d) of the Act, 29 U.S.C. § 153(d), the General Counsel is endowed with final, unreviewable authority to issue and prosecute complaints. The Company also errs in relying on Federal Rule of Appellate Procedure (“FRAP”) 18, which governs stays of final agency orders, not interim prosecutorial actions.

## **I. BACKGROUND**

On March 3, 2020, the Board issued a final Decision and Order against the Company in Board Case No. 02-CA-220395, finding that the Company, as a single employer, violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by discharging employees and closing RAV’s business operations because the employees sought representation by Teamsters Local 456, International Brotherhood of Teamsters (“the Union”). To remedy that unfair labor practice, the Board ordered the Company to bargain with the Union on request. *See RAV Truck & Trailer Repairs, Inc.*, No. 02-CA-220395, 369 NLRB No. 36, 2020 WL 1283464 (Mar. 3, 2020). The Company petitioned this Court to review the Board’s Order pursuant to Section 10(f) of the Act, and the Board filed a cross-application for enforcement. The case is fully briefed and awaiting oral argument.

While this case was pending in this Court, the Union requested to bargain with the Company. When the Company refused, the Union filed an unfair-labor-practice charge with Region 2. On October 14, 2020, the Regional Director, acting

on behalf of the General Counsel, issued a complaint in a new case, Board Case No. 02-CA-265683, alleging that the Company violated 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with and provide information to the Union.

On October 23, the Company, mistakenly relying on FRAP 18, filed in the instant case (Nos. 20-1090 & 20-1194, reviewing Board Case No. 02-CA-220395) a motion to stay the separate, ongoing unfair-labor-practice proceeding that is pending in Region 2. As explained below, the Court lacks jurisdiction to grant the requested relief. In addition, FRAP 18 cannot properly be invoked as a basis for staying the prosecution of an unfair-labor-practice complaint.

## **II. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER THE ONGOING ADMINISTRATIVE PROCEEDING BECAUSE NO FINAL BOARD ORDER HAS ISSUED IN THAT CASE**

The Company's motion must be denied because it asks the Court to assert jurisdiction over, and stay, a separate, ongoing administrative proceeding against the Company, which was initiated by the Regional Director, an agent of the General Counsel.<sup>1</sup> As explained below, only final orders issued by the Board itself

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<sup>1</sup> See *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 71 (D.C. Cir. 2015) (“To manage the volume of [unfair-labor-practice] charges filed each year, the General Counsel has delegated his authority to investigate charges and issue complaints to thirty-two regional directors.” (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 139 (1975))); see also 29 C.F.R. §§ 102.10 (directing that unfair-labor-practice charges be filed with regional directors), 101.8 (regional directors review charges and issue formal complaints if they appear to have merit); 102.15 (same).

are judicially reviewable under Section 10(f) of the Act. By contrast, under Section 3(d) of the Act, decisions by the General Counsel to file and prosecute complaints are not subject to judicial review. Therefore, the Court lacks the necessary subject-matter jurisdiction to grant the requested relief.

“Federal courts are courts of limited jurisdiction [which] possess only that power authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Thus, the courts’ ability to review Board actions extends only to those subjects over which Congress has granted jurisdiction by statute. *See Am. Fed’n of Labor v. NLRB*, 308 U.S. 401, 404 (1940).

Congress gave the Board exclusive jurisdiction in the first instance to administer unfair-labor-practice provisions of the Act. *See* 29 U.S.C. §§ 153(a), 160(a), (c); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50 (1938). Furthermore, Congress expressly restricted judicial review of Board decisions until administrative proceedings have concluded, and the Board has issued a “final order . . . granting or denying in whole or in part the relief sought.” 29 U.S.C. § 160(f); *Myers*, 303 U.S. at 48 n.5; *United Aircraft Corp. v. McCulloch*, 365 F.2d 960, 961 (D.C. Cir. 1966).<sup>2</sup> Once the Board issues a final order, the authority to review that

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<sup>2</sup> Circuits that have considered the issue uniformly agree that a “final order of the Board” in an unfair-labor-practice case must be a Board order that dismisses or remedies alleged unfair labor practices. *See, e.g., Harrison Steel Castings Co. v.*

order lies exclusively with the federal courts of appeals, and extends to “all questions of the jurisdiction of the Board and the regularity of its proceedings, [and] all questions of constitutional right or statutory authority.” *Myers*, 303 U.S. at 49; *McCulloch*, 365 F.2d at 961.

Here, of course, no “final order of the Board” within the meaning of Section 10(f) has issued, adjudicating the complaint that the Company seeks to enjoin. Nor could it have; the hearing is a month away, to say nothing of the Board’s internal exceptions process. There is simply no order upon which Section 10(f) could operate.<sup>3</sup> Indeed, the Company’s motion is so thoroughly premature that the case it seeks to enjoin is not yet even within the Board’s control. Section 3(d) of the Act specifically provides that “the General Counsel has ‘final authority’ regarding

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*NLRB*, 923 F.2d 542, 545 (7th Cir. 1991); *Decaturville Sportswear Co. v. NLRB*, 573 F.2d 929, 930 (6th Cir. 1978); *J.P. Stevens Emps. Educ. Comm. v. NLRB*, 582 F.2d 326, 328 (4th Cir. 1978); *Shell Chem. Co. v. NLRB*, 495 F.2d 1116, 1120 & n.7 (5th Cir. 1974).

<sup>3</sup> It is equally well established that general-jurisdiction statutes, the Administrative Procedure Act, the All Writs Act, and the Mandamus Act do not create subject-matter jurisdiction over pending Board proceedings. *See Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989) (“The courts uniformly hold that statutory review in the agency’s specially designated forum prevails over general federal question jurisdiction in the district courts.”); *Califano v. Sanders*, 430 U.S. 99, 105-06 (1977) (explaining that the Administrative Procedure Act does not provide subject-matter jurisdiction to challenge agency action in federal courts); *In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004) (observing that the All Writs Act “is not itself a grant of jurisdiction”); *Starbuck v. City & Cnty. of S.F.*, 556 F.2d 450, 459 n.18 (9th Cir. 1977) (noting that the Mandamus Act “does not provide an independent ground for jurisdiction.”).

the filing, investigation, and ‘prosecution’ of unfair labor practice complaints.” *NLRB v. United Food & Commercial Workers Union, Local 23 (UFCW)*, 484 U.S. 112, 124 (1987) (quoting 29 U.S.C. § 153(d)). Part of that authority includes the exclusive power to reschedule unfair-labor-practice hearings that are more than 21 days from scheduling. 29 C.F.R. § 102.16. The Board’s determination that the rescheduling of unfair-labor-practice hearings lies within the General Counsel’s sphere of authority is unchallenged here and is, in any event, eminently reasonable. *See UFCW*, 484 U.S. at 125.

As just shown, the lack of a final Board order is fatal to the Company’s motion. But even if it were not, the fact that the Company is challenging a prosecutorial action dooms its motion for a second reason: the General Counsel’s prosecutorial actions are not to be considered actions of the Board and are therefore not subject to judicial review. *See id.* at 128-29 (Section 10’s legislative history “discloses Congress’ decision to authorize review of [Board] adjudications, not of prosecutions”).

### **III. THE COMPANY CANNOT INVOKE FRAP 18 TO STAY THE REGIONAL DIRECTOR’S PROSECUTION OF A SEPARATE, ONGOING PROCEEDING**

As shown above, because this Court lacks jurisdiction to halt the General Counsel’s prosecution of Case No. 02-CA-265683, it cannot order the stay requested by the Company. Furthermore, FRAP 18 would not help the Company

achieve its goal. FRAP 18 has no application here because it governs stays pending review of an “agency decision and order,” and the Company does not seek to stay enforcement of the final Board Decision and Order that is currently before the Court.<sup>4</sup> Instead, the Company is attempting to shoehorn a different, ongoing proceeding (Case No. 02-CA-265683) into the instant case. But there is, of course, no petition for review pending in that proceeding—nor could there be, since the Board has yet to issue a final order in that case. “It is beyond dispute that a court does not have jurisdiction to review an agency order unless a petition for review of the order has been filed in that court.” *In re GTE Serv. Corp.*, 762 F.2d 1024, 1026 (D.C. Cir. 1985) (citing 28 U.S.C. § 2349(a) (“The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review.”)).

Because FRAP 18 cannot be invoked to halt the ongoing administrative proceeding in Case No. 02-CA-265683, the Court need not consider whether the Company meets the criteria for granting a stay. Nor could the Company make such a showing. First, it never filed a motion with the Board “for a stay pending review of its decision and order,” nor did it show that filing such a motion with the

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<sup>4</sup> To the extent the Company seeks a stay to keep the Board from enforcing the Decision and Order currently under review, its concerns are misguided. It is settled that Board orders are not self-enforcing, as Section 10(e) and (f) of the Act make plain and the Company acknowledges (Mot. 8). *In re NLRB*, 304 U.S. 486, 495 (1938). Indeed, that is why the Board has cross-applied for enforcement of its Order pursuant to Section 10(e) and (f).

Board was “impracticable.” *See* FRAP 18(a)(1) and (2)(A)(i).<sup>5</sup> Second, as shown in the Board’s responsive brief, substantial evidence supports the Board’s finding that the Company violated the Act, and the Board properly exercised its discretion in ordering the Company to bargain with the Union. Accordingly, the Company cannot establish a likelihood of success on the merits in countering those findings. Third, the balance of the substantial-harm and public-interest factors favors the Board. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (explaining that those factors merge when the government is the opposing party). Congress created the Board to administer the Act, the primary purpose of which is to protect the public interest. *See, e.g., Vaca*, 386 U.S. at 182 n.8; *U.A.W. Local 283 v. Scofield*, 382 U.S. 205, 220 (1965). Thus, staying the General Counsel’s ability to prosecute unfair labor practices harms not only the general public, but also the affected employees, by essentially abrogating their statutory rights. This result contravenes the recognition that neither the courts nor the Board are “required to place the consequences of [the Board’s] delay, even if inordinate, upon wronged employees

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<sup>5</sup> The Company errs in relying on Section 10(g) of the Act to argue that seeking a stay with the Board would be impracticable. (Mot. 1.) Under Section 10(g), “[t]he commencement of proceedings under [29 U.S.C. § 160(e) or (f)] shall not, unless specifically ordered by the court, operate as a stay of the Board’s order.” 29 U.S.C. § 160(g). Stated differently, Section 10(g) provides that the instant review proceeding does not stay the final Board Order in the underlying case, No. 02-CA-220395. It has no bearing on other ongoing administrative proceedings like Case No. 02-CA-265683, which the Company ostensibly seeks to stay.

to the benefit of wrongdoing employers.” *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). Fourth, the Company similarly would be unable to show irreparable harm from having to continue litigating the unfair-labor-practice proceeding pending in Region 2. Contrary to the Company (Mot. 9), it cannot base a claim of irreparable injury on the Regional Director’s issuance of a complaint and scheduling of a hearing. Indeed, Section 10(g) makes clear that the requirements imposed in Board orders are not suspended while those orders are under review. *See NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512, 516 (5th Cir. 1966) (rejecting employer’s claim that it was not required to bargain pending judicial review of the Board’s order as directly contrary to Section 10(g)).

Finally, it is a “long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Myers*, 303 U.S. at 50-51; *Ass’n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 158 (D.C. Cir. 2007). Moreover, the rules requiring exhaustion “cannot be circumvented by asserting . . . that the mere holding of the prescribed administrative hearing would result in irreparable damage.” *Myers*, 303 U.S. at 51-52; *accord Sears, Roebuck*, 473 F.2d at 93 (“Irreparable harm cannot be established by a mere reliance on the burden of submitting to agency hearings.”). Likewise, the theoretical possibility that the Court might not enforce the final Board Order under review does not mean the

Company will be irreparably harmed by defending itself in the administrative hearing. *Myers*, 303 U.S. at 51-52. Thus, even if FRAP 18 were applicable here, which it is not, the Company could not be found to meet the requisites of the rule.

#### **IV. CONCLUSION**

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's motion in full.

Respectfully submitted,

s/ David Habenstreit  
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Dated at Washington, DC  
this 2nd day of November 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 2,333 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 Microsoft Defender and is virus-free according to that program.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 2, 2020, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia 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.

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