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

Case Nos. 20-1090 & 20-1124

(Agency Decision in 02-CA-220395 Reported at 369 NLRB No. 36)

**RAV TRUCK & TRAILER REPAIRS, INC. & CONCRETE EXPRESS
OF NY, LLC, a Single Employer
Petitioner/Cross Respondent**

vs.

**THE NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner**

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

**PETITIONER/CROSS RESPONDENT RAV TRUCK & TRAILER
REPAIRS, INC. & CONCRETE EXPRESS OF NY, LLC'S REPLY IN
SUPPORT OF EMERGENCY MOTION FOR STAY**

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I. THIS COURT DOES NOT LACK SUBJECT MATTER JURISDICTION TO ISSUE A STAY

Petitioner was required to file its Motion for Emergency Stay, even though the Board's March 3, 2020 Order (the "Order") is not currently enforceable nor can any penalty accrue for disobeying it, because 29 U.S.C. §160(g) states that a petition for review shall not, unless specifically ordered by the court, operate as a stay of the Board's order. The Board maintains that this Court lacks subject matter jurisdiction to stay a "separate" administrative proceeding against Petitioner (2-CA-265683).

Petitioner is currently before this Court pursuant to Petition for Review filed on March 27, 2020. Specifically, Petitioner is seeking review the Order issued on March 3, 2020 reported at 369 NLRB No. 36. The Order is a "final order" under 29 U.S.C. §§ 160(f) and (e) that disposes of all the claims. Amongst the directives listed in the Order is a requirement that Petitioner bargain on request with Teamsters Local 456, I.B.T. ("Union"). The Union sent correspondence to Petitioner dated March 10, 2020 and received on March 11, 2020, seeking bargaining dates and enclosing a request for information. The Union expressly stated that in the correspondence that its requests were being submitted pursuant to the Board's Order that is currently under review in the matter herein and the stated purpose of the request for information was to allow the Union "to prepare for

negotiations and draft the Union's initial proposals." See Exhibit B attached to Petitioner's October 23, 2020 Emergency Motion for Stay.

The alleged "separate" administrative proceeding is based solely on the Order currently under review herein. Thus, the Board's classification of the newly issued Complaint as a "separate" proceeding from this matter is disingenuous. The Complaint was issued because the Petitioner made clear that it will not provide the information unless and until this Court determines that Petitioner is required to bargain with the Union. In the absence of the Order (which is not enforceable), the Regional Director could not have issued the Complaint.

The Order is not yet enforceable, and, therefore, no bargaining relationship currently exists between Petitioner and Union. Accordingly, Petitioner is neither required to bargain with nor provide information to the Union. This Court has made clear that until a Board's order has been affirmed by the appropriate Circuit Court of Appeals, "no penalty accrues for disobeying it." See, See, *B B & L,, Inc. v. NLRB*, Case No. 93-1479, 1994 U.S. App. LEXIS 24003 (D.C. Cir. 1994) and *Public Serv. Co.*, Case No. 93-1716, 1994 U.S. App. LEXIS 9993, citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 82 L. Ed. 638, 58 S. Ct. 459 (1938). The new Complaint issued against Petitioner improperly seeks to penalize Petitioner for lawfully disobeying the Board's order.

II. PETITIONER PROPERLY INVOKED FRAP 18 TO SEEK A STAY

The Board acknowledges that Order is not currently enforceable. (Resp. Mot. 8, fn 5.) The Board also acknowledges that Section 10(g) Act, 29 U.S.C. § 160(g) states that a Petition for Review does not operate as a stay of the Order, unless ordered by the Court. (Id.) Accordingly, Petitioner was forced to seek a stay once the Regional Director, relying solely an unenforceable Order, issued the Complaint. Essentially, the Regional Director is attempting to coerce the Petitioner to comply with an Order that the Board has already acknowledged is not enforceable. Further, the law is clear that Petitioner is not currently obligated to comply with the Order. As noted repeatedly, unless and until this Court enforces the Order, there is no bargaining relationship between Petitioner and Union. Therefore, it is axiomatic that Petitioner has no legal obligation to bargain with or provide any information to the Union. The Board's reliance on *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d, 516 (5th Cir. 1966) is misguided in that Winn-Dixie did not seek a stay. Petitioner has clearly established irreparable harm in that it has no legal obligation to currently abide by the Board's order nor can any penalty accrue for refusing to do so. Notwithstanding, the Petitioner is indisputably being penalized for not complying with the Board's Order.

III. CONCLUSION

Based on all of the above, and because the Board agrees that the Order is not currently enforceable, Petitioner respectfully requests that this Court grant its requested motion for stay pending a final determination of the merits of this review. No bargaining relationship currently exists between the Union and the parties are not currently required to meet and bargain. Consequently, neither the Board nor the Union will be harmed if this Court grants a stay to maintain the status quo.

Respectfully submitted,

/s/ Aaron Tulencik

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. 27(d)(1)-(2) because this motion contains 814 words and does not exceed 10 pages. Furthermore, this motion 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 motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion has been was filed on this 9th day of November, 2020. Notice of this filing will be sent via the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Aaron T. Tulencik
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