

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	No. 20-2132
Petitioner	:	
v.	:	Board Case Nos.:
	:	12-CA-185172
BETTERROADS ASPHALT, LLC AND BETTERRECYCLING	:	12-CA-186232
CORPORATION, A SINGLE EMPLOYER	:	12-CA-186243
	:	12-CA-189888
Respondent	:	12-CA-192850

REPLY OF THE NATIONAL LABOR RELATIONS BOARD TO  
THE RESPONDENT’S ANSWER TO THE BOARD’S  
APPLICATION FOR SUMMARY ENFORCEMENT OF ITS ORDER

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

The National Labor Relations Board (“the Board”), by its Assistant General Counsel, files this reply to the answer of Betterroads Asphalt, LLC and Betterrecycling Corporation, a single employer (“Betterroads”), to the Board’s application for summary entry of a judgment enforcing its Order. For the following reasons, the Board submits that Betterroads has failed to advance any valid defenses to the Board’s application, and accordingly, that the application should be granted.

1. As set forth in more detail in the Board’s application, the General Counsel filed a motion for summary judgment with the Board seeking a Decision and Order containing findings of facts and conclusions of law in accordance with

the allegations of the Complaint against Betterroads, and an order granting relief from the unfair labor practices. Betterroads did not file a response to the motion for summary judgment. The Board transferred the case to itself it and provided Betterroads another opportunity to show why the motion for summary judgment should not be granted. Betterroads again did not respond. On July 6, 2020, the Board issued a Decision and Order granting the General Counsel's Motion for Summary Judgment.

2. On December 1, 2020, the Board filed with this Court an application for summary entry of a judgment enforcing its Order of July 6, 2020. On December 22, 2020, Betterroads filed a response before this Court in which it asserts no justification or defense whatsoever for its failure to respond to the Board. Therefore, as put forth in greater detail in the Board's application, summary enforcement is clearly appropriate in this case.

3. Betterroads asserts that this case has now been mooted due to its self-proclaimed compliance with a portion of the Board's order, namely the mailing of the Board's Notice to Employees. Betterroads's assertion of mootness is erroneous for the following reasons:

- (a) Even if Betterroads had complied with the affirmative provisions of the Board's Order, it is well settled by decisions of the Supreme Court, and this and other courts, that even full compliance with the terms of a Board order

is no barrier to enforcement of the order by a court. *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 564, 567-568 (1950); *NLRB v. Local 1445, United Food & Commercial Workers Intern. Union, AFL-CIO*, 647 F.2d 214 (1st Cir. 1981).

- (b) Although Betterroads has engaged with the Board's Regional Office in discussions about modifying the notice expressly provided for in the Board's order, it has never moved for the Board to reconsider the notice's wording, much less done so in a timely manner, thereby forfeiting judicial review of its contention that the language directed by the Board is inappropriate standing on its own.
- (c) Betterroads suggests that it complied with the Board's Order when it mailed its own, unapproved, modified notice in addition to the Board's notice. That issue, if not already waived, is for the Board to decide in a supplemental compliance proceeding. The Board's case-handling process is bifurcated with the first phase involving liability determinations. That is the phase this case presently occupies and is what the enforcement of the Board's order in this case represents. The second phase deals with compliance issues. This bifurcated procedure of the Board has met with uniform approval. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984); *see*

*also NLRB v. J.H. Rutter–Rex Mfg. Co.*, 396 U.S. 258, 260 (1969);

*Nathanson v. NLRB*, 344 U.S. 25, 29–30 (1952).

- (d) The Board’s Order contains additional provisions besides the mailing of the notice with which Betterroads has not complied. These provisions included providing information to the Union and returning to employees the monies Betterroads withheld from their wages.<sup>1</sup> Additionally, the Board order’s provisions apply to the “officers, agents, successors, and assigns” of Betterroads. The fate of Betterroads’s facilities has not been concretely determined; however, the sale of the company’s assets could, under certain conditions, create a successor.

WHEREFORE, the Board respectfully requests that the Court grant the Board’s application and enforce its Order in full.

/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 5th day of January 2021

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<sup>1</sup> This Circuit has held, as a general rule, that NLRB proceedings are not automatically stayed by bankruptcy and should not be enjoined by a bankruptcy court, absent special circumstances. *See, e.g., In re Carib-Inn of San Juan Corp.*, 905 F.2d 561, 562 (1st Cir. 1990). In this case the “enforcement” of the Board’s order pursuant to 29 U.S.C. § 160(e) allows the entry of this aspect of the Board’s order as, in effect, a “money judgment.”

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

Respectfully Submitted,

/s/ David Habenstreit

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

Dated in Washington, D.C.  
this 5th day of January 2021