

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

NATIONAL LABOR RELATIONS BOARD	*	
	*	Case No. 20-2132
Petitioner	*	
	*	NLRB Case Nos.:
v.	*	12-CA-185172
	*	12-CA-186232
BETTERROADS ASPHALT, LLC AND	*	12-CA-186243
BETTERRECYCLING CORPORATION	*	12-CA-189888
	*	12-CA-192850
Respondents	*	
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**RESPONSE TO THE NATIONAL LABOR RELATIONS BOARD’S REPLY TO  
RESPONDENTS’ ANSWER TO THE BOARD’S APPLICATION**

TO THE HONORABLE COURT:

Now comes Betterroads Asphalt, LLC (“BALLC”) and Betterrecycling Corp. (“BRC”) (collectively “Respondents”), through their undersigned counsel, and very respectfully state and pray:

1. On November 30, 2020, the National Labor Relations Board (the “NLRB”) filed an “Application for Summary Entry of Judgment Enforcing an Order of the National Labor Relations Board” (the “Application”).

2. On December 22, 2020, Respondents filed their “Response to Application for Summary Entry of Judgment Enforcing an Order of the National Labor Relations Board” (the “Answer”).

3. On January 5, 2021, the NLRB filed a “Reply of the National Labor Relations Board to the Respondent’s Answer to the Board’s Application for Summary Enforcement of its Order” (the “Reply”).

4. In its Reply, the NLRB argues that Respondents failed to comply with the NLRB's order because they mailed their "own, unapproved, modified notice in addition to the Board's notice". Additionally, the NLRB argues that Respondents failed to comply with other provisions of the NLRB's order.

5. As stated in Respondents' Answer, on December 18, 2020, Respondents mailed the NLRB's notice to the required employees. Therefore, it is an undisputed fact that Respondents clearly complied with the mailing requirement and thus with the order which enforcement the NLRB seeks.

6. The fact that Respondents mailed the NLRB's notice together with a modified version of the notice does not mean that Respondents failed to comply with the NLRB's mailing requirement. As stated in Respondents' Answer, the modified notice mailed by Respondents included certain reservations, on advice of bankruptcy counsel for Respondents, given that the notice provided by the NLRB required Respondents to make certain representations that are incompatible with the payment and priority schemes established by the US Bankruptcy Code applicable to Respondents' bankruptcy cases. (See Exhibit 1 of Respondents' Answer). Moreover, nothing prohibits nor prohibited Respondents from mailing their own notice making the required reservations.

7. The NLRB's argument that the "Board's Order contains additional provisions besides the mailing of the notice with which Betterroads has not complied", includes returning to the employees the monies Respondents withheld from their wages<sup>1</sup>, which is clearly a monetary judgment/remedy.

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<sup>1</sup> See page 4, subsection (d), of the NLRB's Reply.

8. As Respondents previously stated to the NLRB, given the pendency of Respondents' bankruptcy proceedings, Respondents cannot consent to the enforcement of the monetary judgment in the NLRB's order against the estate nor consent to the request for Respondents to forcibly pay or represent that any kind of payment will be made in full.

9. The proceedings before the NLRB may have been exempted from the automatic stay, pursuant to the "regulatory power" exception in Section 362(b)(4) of the Bankruptcy Code. *See NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981). Nevertheless, this exception applies only to a certain extent. "If the action is an attempt by the government to recover property from the estate, it has a pecuniary purpose and so remains subject to the stay." *See Parkview Adventist Med. Ctr. V. U.S.*, 842 F.3d 757, 763 (1st Cir. 2016). "[T]here is a difference between prosecuting a regulatory action pursuant to the police power exemption and enforcing an order or judgment which could affect control over property of the estate." *See Montalvo v. Autoridad de Acueductos y Alcantarillados (In re Montalvo)*, 537 B.R. 128, 144 (Bankr. D.P.R. 2015).

10. Courts have denied enforcement of an order from the NLRB when doing so would be unfair, unnecessary, or inappropriate, or when enforcing the NLRB's order would be nothing short of punitive and not remedial. *See NLRB v. Intl. Broth. of Teamsters, Loc. 251*, 691 F.3d 49, 61 (1st Cir. 2012); *NLRB v. Mt. Country Food Store, Inc.*, 931 F.2d 21, 22-23 (8th Cir. 1991).

11. Given the circumstances of this case, i.e. Respondents' compliance with the mailing requirement and the pendency of Respondents' bankruptcy proceedings, it would be highly inappropriate and unfair to enforce the NLRB's order and force Respondents to make any kind of payment or provide assurances of payment and/or full compliance with the monetary remedies, thus disregarding the bankruptcy process and the jurisdiction of the Bankruptcy Court. Therefore, as Respondents have previously expressed to the NLRB, the reason why Respondents cannot make

any payment or provided assurance of payment and/or full compliance with the monetary remedies is because said actions are subject to bankruptcy law and procedure, and not because Respondents do not want to comply with the NLRB's order.

12. Finally, as an apparent justification for requesting the Court to enforce its order, the NLRB argues that the present phase of this case deals with liability determinations and not with compliance issues. If that were true, then the NLRB would not be requesting enforcement of an order that forces Respondents to return and/or pay monies<sup>2</sup> or provided assurance of payment and/or full compliance with monetary remedies. As stated above, Respondent cannot be forced to execute such actions, given that they are immersed in bankruptcy proceedings.

WHEREFORE Respondents respectfully request that the Honorable Court deny the NLRB's Application.

RESPECTFULLY SUBMITTED.

Certificate of Service: I hereby certify that on this same date I electronically filed a copy of the foregoing motion with the Clerk of the Court using the Court's CM/ECF system, which will send electronic notice of the same to counsel of record for the NLRB and to all other CM/ECF interested participants.

In San Juan, Puerto Rico on January 12, 2021.

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<sup>2</sup> See page 4, subsection (d), of the NLRB's Reply.