

Nos. 20-1090 & 20-1124

**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

v.

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**

**SUPPLEMENTAL BRIEF OF
THE NATIONAL LABOR RELATIONS BOARD**

JULIE BROIDO
Supervisory Attorney

GREGOIRE SAUTER
Attorney

**National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2996
(202) 273-1714**

PETER SUNG OHR
Acting General Counsel

IVA Y. CHOE
Acting Deputy General Counsel

RUTH E. BURDICK
Acting Deputy Associate General Counsel

DAVID HABENSTREIT
Assistant General Counsel

Repairs, Inc., and reported at 369 NLRB No. 36, 2020 WL 1283464 (Mar. 3, 2020).

C. Related Cases

The ruling under review was not previously before this or any other court, and Board counsel is not aware of any related cases currently pending or about to be presented in this or any other court.

s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, DC
this 18th day of February 2021

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GLOSSARY

3771 Merritt	3771 Merritt Avenue, Bronx, New York
3773 Merritt	3773 Merritt Avenue, Bronx, New York
The Board	National Labor Relations Board
Br.	Opening brief of RAV Truck & Trailer Repairs, Inc., and Concrete Express of NY, LLC
The Company	RAV Truck & Trailer Repairs, Inc. and Concrete Express of NY, LLC
Concrete Express	Concrete Express of NY, LLC
Edison	38 Edison Avenue, Mount Vernon, New York
The Order	<i>RAV Truck & Trailer Repairs, Inc.</i> , 369 NLRB No. 36, 2020 WL 1283464 (Mar. 3, 2020).
RAV	RAV Truck & Trailer Repairs, Inc.

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STATEMENT OF PERTINENT FACTS

The Company does not dispute that RAV and Concrete Express are a single employer. Until February 2018, RAV operated as a truck-repair business at Edison Avenue, a location registered as a motor-vehicle-repair shop under New York law. In March, RAV leased part of a building with a single open internal space (3773 Merritt); Concrete Express was already leasing the rest of the same building (3771

Merritt). RAV continued to perform motor-vehicle repairs, including on third-party vehicles, even though 3773 Merritt was not a registered motor-vehicle-repair shop. In May, the Company discharged and laid off RAV's employees and closed the business. At the time of the unfair-labor-practice hearing, Concrete Express was still renting 3771 and 3773 Merritt.

ARGUMENT

A. The Court's Question Is Based on a Hypothetical That Differs From the Facts of This Case

The Court has requested citations to authorities that support enforcing a restoration order where “the employer has entirely given up pieces of the operation that are needed to run the disputed business that is the subject of the Board’s order.” But the Company has not given up any of the pieces on which it depended to run RAV’s operation in May 2018. Thus, the Company failed to present any evidence that it no longer possesses the tools necessary to perform motor-vehicle repairs—hardly a surprise given its admission that it continues to repair Concrete Express’s trucks in-house. (Br.11,36-37.) Nor does the Company dispute that it was still leasing 3773 Merritt at the time of the hearing. Thus, all it would take to reopen RAV exactly as it existed in May 2018 would be for the Company to reinstate the unlawfully discharged employees.

Moreover, prior to this case the Company was content to operate RAV at 3773 Merritt without registering it as a motor-vehicle-repair shop. Accordingly,

the Company cannot rely on that self-imposed deficiency to avoid the restoration order. Further, the Company failed to meet its burden of showing that it could not register RAV without incurring an undue hardship. It did not provide any evidence about the availability and rates of registered motor-vehicle-repair shops, or the cost of retrofitting 3773 Merritt. Likewise, the Company offered no evidence, financial or otherwise, to show that leasing or retrofitting an appropriate location would be unduly burdensome.

B. *Douglas* Is Factually Distinguishable

The Court has asked the Board to distinguish the instant case from *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056 (D.C. Cir. 2001). There are stark differences between the two cases. First, as shown, the Company never relinquished the essential elements of RAV's motor-vehicle-repair business as they existed in May 2018. Second, the instrumentalities of RAV's motor-vehicle-repair business were fungible, unlike those in *Douglas*.

The employer in *Douglas* operated a fleet of food trucks, which only sold meals prepared by its own catering company, with individual trucks running designated routes. After a representation election, Douglas sold its trucks and catering routes, laying off employees until it was effectively retired from the mobile-catering business. *Id.* at 1059. The sales agreements provided that Douglas would not compete with buyers along their designated routes so long as

they continued purchasing food from Douglas and operating their trucks according to its guidelines. *Douglas Foods Corp.*, 330 NLRB 821, 837-38 (2000). The Board found that the sales agreements were sham transactions motivated by anti-union animus and ordered restoration of the *status quo ante*. *Douglas*, 251 F.3d at 1060. On review, this Court denied enforcement of the restoration order, finding that the sales were legitimate arms-length transactions, and questioning the Board's authority to require Douglas to repurchase the trucks and routes. *Id.* at 1063-65.

Douglas differs from this case in that the employer divested itself of the instrumentalities of its mobile-catering business in arms-length transactions. Further, those instrumentalities—the trucks and their unique routes—were nonfungible. By purchasing them, each buyer obtained exclusive rights to sell Douglas's food on a particular itinerary, and the only way to restore Douglas's operations would have been to buy back those exact routes. In those circumstances, the Court concluded, the Board could at most “order [Douglas] to offer to repurchase trucks and routes,” but could not force third parties to give them up. *Id.* at 1064.

By contrast, the Company admits not only that registered motor-vehicle-repair shops (like Edison) are available for rent, but also that non-registered locations can be retrofitted as repair shops. (Br.30.) Thus, the unique circumstances of *Douglas* are not present here.

C. Courts Have Enforced Restoration Orders in Circumstances Akin to the Court’s Hypothetical

The closest case to the Court’s hypothetical scenario that we found is *Coronet Foods, Inc.*, 305 NLRB 79 (1991), which is not cited in the Board’s brief.¹ Coronet processed fresh produce and delivered it to customers using its own transportation department, which had trucks, drivers, and mechanics. *Id.* at 81. When that department voted to join a union, Coronet decided to quit the transportation business entirely and offered to bargain over the effects of its decision, but the union declined. Coronet closed the department, laid off employees, and subcontracted operations to an outside company. *Id.* at 91. The Board found that Coronet’s decision was motivated by anti-union animus and ordered the department’s restoration. *Id.* at 92. The Board noted that Coronet had failed to show this remedy was unduly burdensome, but that it would get another chance to do so at compliance. *Id.* at 79 n.6.

¹ Other responsive cases include *Case, Inc.*, 237 NLRB 798, 819 (1978) (ordering employer to restore operations in space now leased by another company, and failing that, in any available local facility), *enforcement denied on other grounds sub nom. NLRB v. Gibraltar Industries, Inc.*, 653 F.2d 1091 (6th Cir. 1981), and *Ferragon Corporation*, 318 NLRB 359 (1995), *enforced mem.*, 88 F.3d 1278 (D.C. Cir. 1996). In *Ferragon*, a single employer operating two businesses (steel-processing and trucking) unlawfully laid off its drivers, transferred its vehicles to a subcontractor, and ceased trucking operations. The Board ordered the trucking business restored, rejecting Ferragon’s claim that doing so would be unduly burdensome because it would have to renew vehicle leases, rehire office staff, and take other actions. As the Board noted, Ferragon had taken those steps when it launched the business, and “but for its unlawful conduct would not be required to repeat them now.” 318 NLRB at 362 n.16.

On review, this Court enforced the Board’s order, finding that Coronet “utterly failed to carry” the burden on its hardship defense. *Coronet Foods, Inc. v. NLRB*, 981 F.2d 1284, 1288 (D.C. Cir. 1993). Noting that Coronet could still make its case at compliance, the Court concluded, “[I]t was no abuse of discretion for the Board to decline to assume itself a proof burden properly assigned to the company, and Coronet is not without means to achieve relief if its hardship plea remains genuine.” *Id.* Thus, Coronet’s decision to abandon the transportation business did not factor in the Court’s decision.²

² Following a compliance proceeding where the Board found that Coronet again failed to show restoration would cause an undue burden, *Coronet Foods, Inc.*, 322 NLRB 837 (1997), Coronet sought review in the Fourth Circuit, which denied enforcement of the order. *Coronet Foods, Inc. v. NLRB*, 158 F.3d 782 (4th Cir. 1998). But in doing so, the Court relied on factors absent here—mainly that the transportation industry had undergone “major changes,” with contract carriers replacing private fleets. *Id.* at 797. In these circumstances, the Court found that restoration would force Coronet to rebuild an anachronistic operation—or create an entirely new transportation department so unlike the original one that it would not restore the status quo. *Id.* at 796-97.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying RAV's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

/s/ Julie Broido

JULIE BROIDO

Supervisory Attorney

/s/ Gregoire Sauter

GREGOIRE SAUTER

Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2996
(202) 273-1714

PETER SUNG OHR

Acting General Counsel

IVA Y. CHOE

Acting Deputy General Counsel

RUTH E. BURDICK

Acting Deputy Associate General Counsel

DAVID HABENSTREIT

Assistant General Counsel

February 2021

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)	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(g)(1), the Board certifies that its supplemental brief contains 1,300 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word for Office 365. The Board further certifies that the electronic version of the Board’s supplemental brief filed with the Court in PDF form is identical to the hard copy that has been filed with the Court, and that the PDF file submitted to the Court has been scanned for viruses using Microsoft Defender and is virus-free according to that program.

s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2021, 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.

s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, DC
this 18th day of February 2021