
**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**

**SUPPLEMENTAL BRIEF OF PETITIONER
RAV TRUCK & TRAILER REPAIRS, INC.
& CONCRETE EXPRESS OF NY, LLC**

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The Petitioner is not aware of any amici in this matter.

(B) Rulings Under Review.

The ruling under review in this proceeding is the National Labor Relations Board's March 3, 2020 Decision and Order issued in Case No. 2-CA-220395.

(C) Related Cases.

The ruling under review was not previously before this Court or any other court. There is a case pending before the National Labor Relations Board (2-CA-265683) on summary judgment wherein the Board maintains that RAV violated the Act because it failed to bargain with the Union (refusal to provide information) pursuant to the Order on review herein.

/s/ Aaron Tulencik

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Dated: February 19, 2021
Columbus, Ohio

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TABLE OF AUTHORITIES**CASES**

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<i>Teamsters Local Union No. 171 v. NLRB</i> , 863 F.2d 946 (D.C. Cir. 1988)	5

GLOSSARY

3771 Merritt	3771 Merritt Avenue, Bronx, New York
3773 Merritt	3773 Merritt Avenue, Bronx, New York
The Board	National Labor Relations Board
Edison	38 Edison Avenue, Mount Vernon, New York
JA	Joint Appendix
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.

I. SUMMARY OF ARGUMENT

The Board failed to address the explicit requests in this Court's February 17, 2021 Order. Specifically, the Court's Order states in relevant part:

The supplemental brief shall provide citations to Board or D.C. Circuit authority justifying a restoration order in a situation in which 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. In particular, the supplemental brief shall explain how the Board's order in this case can be squared with the court's decision in Douglas Foods Corp. v. NLRB, 251 F.3d 1056, 1064-65 (D.C. Cir. 2001) (vacating restoration order that would require a "forced repurchase of independently owned assets"). In Douglas, the court noted that the Board acted "without any explanation of its authority to enter such order or [the company's] ability to carry it out." *Id.* at 1064.

See, ECF Doc # 1885769.

The Board maintains that RAV did not give up any of the pieces which it depended to run RAV's operation in May 2018 and, as such, RAV failed to present any evidence that it no longer performed the tools necessary to perform motor vehicle repairs. Accordingly, the Board asserts that all that is needed to restore RAV's operation as it existed in May 2018 is for RAV to reinstate Gonzalez and Valencia, even though Valencia admitted that he is not authorized to work in the United States. This is the same argument the Board previously made before this Court in its initial Brief. However, the Board's restoration Order requires RAV to operate an unregistered motor vehicle repair shop in contravention of New York

state law. Each violation will result in a civil penalty of a \$1,000.00 fine. Thus, the Board's Order is arbitrary and irrational and, therefore, should be vacated.

II. ARGUMENT

A. RAV Cannot Lawfully Operate a Motor Vehicle Repair Shop at the Merritt Avenue Location

From the inception of this case, the Board has refused to give credence to the fact that RAV was registered as a motor vehicle repair shop by the state of New York Department of Motor Vehicles and that when RAV unexpectedly lost its lease at Edison it also lost its ability to lawfully repair motor vehicles for compensation. The building Edison, as evidenced by the green sign on the left hand side of the building was registered as a motor vehicle repair shop. (JA 268.)

The structure at Edison was comprised of a 4000 sq. ft. four-bay industrial garage with 8,000 sq. ft. of outdoor parking. (JA 4, 165, 266 & 268.) The facility could house up to four trucks (one in each bay) on the inside and the outdoor space could house up to fifteen trucks. (JA 166.) There were usually four trucks being repaired on the inside and there would be up to six trucks stored outside waiting to be repaired. (Id.)

In February 2018, RAV unexpectedly lost its lease for the Edison facility. (JA 6 & 169-170.) Consequently, on March 23, 2018 RAV secured a lease for a new location at 3773 Merritt. (JA 278-288.) The lease expressly stated that the lease ends on May 31, 2018. (Id.) The lease further stated that the sole purpose of

the lease was “to finish the repairs from the previous location. (Id.) Vehicle repairs were not to commence until April 1, 2018 because the interior sewer lines in the new location were broke. (Id.)

In stark contrast to Edison, 3773 Merritt was only 600 sq. feet. (Id.) 3773 Merritt was not registered as a department of motor vehicle public repair shop by the New York Department of Motor Vehicles. As such, RAV could no longer legally perform repairs on third party vehicles for compensation. (JA 200-204 & 569.) As admitted by Jorge Valencia (“Valencia”), neither 3773 nor 3371 Merritt had any outdoor parking space. (JA 150.) See also, JA 6, 198, 200 & 271. As admitted by Valencia, Merritt did not have a designated area to perform repairs. (JA 149.) As admitted by Valencia, Merritt Avenue did not have the necessary space to perform repairs without first moving trucks and/or other equipment to Concrete Express (2279 Hollers Avenue.) (JA 150, 154 & 156-157.) As admitted by Valencia, Merritt only had a single garage door. (JA 149-150.) See also (JA 175-176 & 271.) Further, unlike Edison, Merritt did not have mechanical ventilation, automatic sprinklers, inceptors and separators to insure all oil-bearing and grease bearing wastes must be discharged into oil/water separators before entering any building drainage system or any other point of disposal leading to the city’s sewer, (JA 566-588, 594, 601 and 613). There is no comparison between the structures at Edison and Merritt.

B. The Board's Restoration Order is an Unauthorized Penal Order

The Board failed to provide citations to Board or D.C. Circuit authority justifying the restoration order in this matter. Similar to its initial Brief, the Board fails in its attempt to distinguish *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056 (D.C. Cir. 2001). In its simplest terms, Douglas Foods sold its trucks and this Court vacated the Board's restoration order that would require a "forced repurchase of independently owned assets." Similarly, when RAV lost its Edison lease, through no fault of its own, it lost its ability to lawfully repair motor vehicles for compensation. Thus, RAV had entirely given up pieces of the operation that are needed to run a lawful motor vehicle repair shop registered by the New York Department of Motor Vehicles. As evidenced by the express language of the lease, the lease expired on May 31, 2018 and RAV leased the space only to "finish the repairs from the previous location." (JA 278-288)

The Board cited two other cases from this Court. However, both cases fail to justify the restoration order in this Case. In *Ferragon Corp.*, 381 NLRB 359 (1995), *enforced mem.*, 888 F.3d 1278 (D.C. Cir. 1996) this Court enforced the Board's Order restoration order requiring the employer to reestablish and restore the delivery work it had subcontracted to another Company and to reinstate the drivers who were laid off/terminated. Likewise, in *Coronet Foods, Inc. v. NLRB*, 981 F.2d 1285 (D.C. Cir. 1993), this Court enforced the Board's Order that

required the Employer to restore its trucking department where the Employer laid off/terminated the drivers and contracted out the work. Even more pertinent as it relates to this Court's Order, pursuant to an injunction filed by the NLRB, the Employer in *Coronet Foods* was prevented from "selling . . . or otherwise disposing of any vehicles, equipment, or assets used in the operation of . . . the department." *Id.* at 1286. Accordingly, the Employer had not given up the pieces of the operation needed to operate the trucking department. The cases cited by the Board are no different than the cases cited in its initial brief wherein the Employer never ceased doing bargaining unit work. Rather, the Employer subcontracted the work or closed a facility, only to open a new facility to perform the work. See, *Power Inc., v. NLRB*, 40 F.3d 409 (D.C. Cir. 1994) and *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946 (D.C. Cir. 1988).¹

III. CONCLUSION

The Board still has not provided any explanation or citations to Board or D.C. Circuit authority justifying the the restoration order in this matter. Accordingly, the Board's Order is arbitrary and irrational and the Petitioner's Petition for Review should be granted and the Board's Order should be vacated.

¹ The remaining case cited by the Board was decided in the 6th Circuit. The Court have did not rule on the Board's restoration order because the Court determined the closing was lawful. See, *NLRB v. Gib. Indus.*, 653 F.2d 1091 (6th Cir. 1981).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,296 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii). Furthermore, this brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.

CERTIFICATE OF SERVICE

I hereby that on February 19, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

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