Nos. 20-1060, 20-1061, 20-1134

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEGGETT & PLATT, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (IAM), AFL-CIO

Intervenor

KEITH PURVIS

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

PETITION FOR PARTIAL PANEL REHEARING BY THE NATIONAL LABOR RELATIONS BOARD

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Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the National Labor Relations Board ("the Board") respectfully petitions for partial panel rehearing of the Court's decision in this case. The Board requests rehearing for the limited purpose of enforcing those portions of its December 17, 2018 Order requiring Leggett & Platt ("the Company") to remedy the unfair-labor-practice violation involving its unlawful assistance with a decertification petition, a violation the panel referred to as the "assisting unfair labor practice." *See Leggett & Platt, Inc. v. NLRB*, slip op. at 15-17, 2021 WL 644100, at *7 (Feb. 19, 2021).

In its opinion, the panel agreed with the Board that the Company violated the Act by unlawfully assisting with the decertification petition but remanded for the Board to determine the appropriate remedy for that violation. The panel, however, overlooked the fact that the Board had already specified remedial provisions for that violation, and therefore remand of the issue was unnecessary.

BACKGROUND

1. On December 17, 2018, the Board issued a decision in this case finding that the Company violated the National Labor Relations Act ("the Act") by withdrawing recognition, unilaterally changing employees' terms and conditions of employment, and assisting with a decertification petition. (A. 344-46.)[1] The

[1] "A." refers to the Joint Deferred Appendix filed on September 4, 2020.

Board issued separate remedial provisions for each violation. (A. 347.) While the December 17, 2018 Decision and Order was pending before the Court on the Company's petition for review and the Board's cross-application for enforcement, the Board sought remand of the case to determine whether to apply retroactively new precedent concerning the legal standard for anticipatory withdrawals of recognition. Slip op. at 7-8, 2021 WL 644100, at *3.

On December 9, 2019, the Board issued a Supplemental Decision and Order, wherein it determined not to apply the new precedent retroactively. It then reaffirmed all its "findings, conclusions, Order and notice" in the December 17, 2018 Decision and Order. (A. 364.) The Company again petitioned for review, and the Board cross-applied for enforcement.

2. In an opinion that issued February 19, 2021, the Court (Judges Srinivasan, Rao, and Sentelle) granted the Company's petition for review in part and denied it in part, denied the Board's cross-application for enforcement, vacated the remedial order, and remanded for "the adjudication of an appropriate remedy for the assisting [unfair labor practice] taken alone." Slip op. at 3, 17, 2021 WL 644100, at *1, *7. Specifically, the Court rejected the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. §158(a)(5) and (1), by withdrawing recognition and unilaterally changing terms and conditions of

employment, and consistent with these findings. Slip op. at 8-15, 2021 WL 644100, at *4-*7.[2]

As mentioned above, the Court did find, however, that the Company violated the Act by unlawfully assisting with the decertification effort, and it denied the Company's petition for review as to this issue. Slip op. at 16-17, 2021 WL 644100, at *7. The Court, believing that the Board "had entered a remedial order applicable both to [the withdrawal of recognition] as well as the assisting [unfair labor practice]," denied the Board's cross-application for enforcement and remanded to the Board for an appropriate remedy. *Id.*

As we now show, the Board, in fact, entered remedial provisions with respect to the separate unfair labor practices. As such, the Board is entitled to enforcement of those portions of its Order remedying the unlawful assistance violation that the Court affirmed.

ARGUMENT

Under Federal Rule of Appellate Procedure 40(a)(2), a "point of law or fact that the petitioner believes the court has overlooked or misapprehended" may provide basis for panel rehearing. Fed. R. App. P. 40(a)(2). Here, rehearing is warranted because the panel opinion "overlooked or misapprehended" the Board's

[2] The Court also dismissed as moot the petition for review filed by Keith Purvis, the Intervenor, concerning the Board's refusal to allow him to intervene in the proceedings before the Board. Slip op. at 17, 2021 WL 644100 at *8.

December 17, 2018 Order that remedied the Company's unlawful-assistance violation. Specifically, that Order directed the Company to cease of desist from "[u]ndermining the Union and interfering with employee free choice by directing an employee to meet with another employee for the purpose of obtaining signatures on a petition to decertify or repudiate the Union." (A. 347.) The Board's December 17, 2018 Order also directed the Company to post a notice. (A. 347.) In the December 9, 2019 Supplemental Order, the Board "affirm[ed] its previous Order," and ordered the Company to take the action "set forth in the order." (A. 364.)

In other words, the Board's original Decision and Order clearly directs a remedy specific to each violation found, and the Supplemental Order—which addressed only the withdrawal of recognition issue—directs the Company to take the actions set forth in the December 17, 2018 Order. The Board outlined these remedies in its brief to the Court. (*See* Board Br., pp. 12-14.) Having concluded that substantial evidence supports the Board's finding that the Company unlawfully assisted with the decertification effort, and there being a specific remedial provision remedying that violation, the Court should have enforced the Board's Order as to that violation. In failing to do so, the Court overlooked the fact that the Board reaffirmed the terms of the December 17, 2018 Order in its December 9, 2019 Supplemental Order.

The Board has both a strong interest in remedying unfair labor practices and a statutory obligation to do so. 29 U.S.C. § 160(a), (c). Partial panel rehearing for the limited purpose of enforcing those portions of the Board's December 17, 2018 Order remedying the unlawful assistance violation will permit it to do so expeditiously in this case. There is no basis for the now-affirmed violation to be remanded to the Board for an appropriate remedy. The Board has already articulated the remedy—a cease-and-desist provision and a notice posting.[3]

[3] If the Court grants the Board's petition for rehearing, the Board will file a proposed judgement forthwith, consistent with Federal Rule of Appellate Procedure 19.

CONCLUSION

The Board respectfully requests that the panel partially rehear this case and enforce that portion of the Board's Order remedying the unlawful assistance violation.

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MARCH 2021

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	)	
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and	)	
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	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its document contains 1,159 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word for Office 365.

This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

/s/David Habenstreit
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Dated at Washington, DC
this 5th day of March 2021

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	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 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 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.

/s/David Habenstreit
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Dated at Washington, DC
this 5th day of March 2021