ORAL ARGUMENT NOT YET SCHEDULED

No. 21-1188

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT

DISTRICT 4, COMMUNICATIONS WORKERS OF
AMERICA (CWA), AFL-CIO,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review from the National Labor Relations Board,
Case No. 07-CA-218455,
The Honorable Kaplan, Emanuel and Ring

Petitioner’s Reply Brief
(FINAL)

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Administrative Law Judge ................................................................. ALJ

Administrative Law Judge Decision .............................................. ALJD

Brief ................................................................................................................ Br.

Communications Workers of America ............................................ Union or Petitioner

Exhibit .............................................................................................................. Ex.

YP Midwest Publishing, LLC d/b/a Dex YP, 371 NLRB No. 23 (Aug. 26, 2021) ................................................................. Decision and Order (D&O)

General Counsel for the National Labor Relations Board............... GC

YP Holdings, LLC, YP Midwest Publishing, LLC d/b/a Dex YP, and Thryv, Inc. ...................................................... Intervenor (Int.) or Employer (Er.) or Company

National Labor Relations Board ............................... Board or NLRB or Respondent (R.)
I. SUMMARY OF THE ARGUMENT

The General Counsel ("GC") attempts to place herself in the position of two individuals who did not testify at the hearing and from whom no testimony has been elicited. Specifically, the GC repeatedly argues that the Company "inadvertently" included the "5%" provision in the final CBA. (R. Br. pp. 17, 21) Neither the party who would have agreed to this (Halpern), nor the party who drafted this provision (Herman) has ever been consulted at any time during the course of these proceedings. For the GC and Board to place themselves inside the mind of these two individuals without record evidence is astounding. Going one step further, the GC concludes, without supporting evidence, that because an early proposal of 5% from the Union was rejected by the Company early on in bargaining, such rejection must have necessarily continued in perpetuity.

The problems associated with the GC’s and Board’s approach in this case are never more evident in the disconnect between the GC’s brief—in which the GC advocates that only the term “5%” was included in the final CBA “inadvertently”—and the Board’s Decision and Order—in which the Board contrarily finds that the entire 401(k) “paragraph” was included inadvertently. [J.A. 813] (R. Br. p. 18 contra D&O fn. 2) Both of these views have the effect of nullifying agreed upon contractual language between the parties.
Further, perhaps recognizing the clear error of the ALJ and the Board in concluding that the MOA was an “integrated agreement,” the GC belatedly attempts to disavow this finding. (R. Br. p. 26) Lastly, the appropriateness of the Board’s express adoption of the ALJ’s findings regarding past practices between the Company and Union for purposes of varying the 401(k) language is properly before this Court.

II. Argument

A. Point 1: The GC’s Position That the 5% Match Was “Inadvertently” Included in the Final CBA is Not Supported in the Record.

To be clear, the Union does not challenge the ALJ’s, nor the Board’s, credibility findings as to any of the witnesses or evidence appropriately proffered in the course of these proceedings. Rather, the Union challenges the Board’s ability to draw conclusions about the mindsets of two Company representatives (Halpern and Herman) from whom absolutely no evidence has been elicited. (R. Br. p. 21 “Herman . . . inadvertently included a provision setting the Company’s matching contributions at 5 percent.”) Again, the party who made the agreements on behalf of the Company (Halpern) and the party who drafted the initial agreement (including the language at issue) on behalf of the Company (Herman) were never called as witnesses. Therefore, no credibility findings in this respect have been
made. Ergo, no conclusions as to these individuals’ mindsets can appropriately be
drawn by the Board, despite the GC’s contentions to the contrary.

B. Point 2: The GC Now Argues, Contrary to the Board’s Erroneous
Decision and Order, that the Entirety of the 401(k) Provision was
 Appropriately Agreed Upon and Memorialized in the Final CBA -- Aside
from the Inclusion of the Term “5%”. This Discrepancy Must Be
Remanded to the Board for Consideration.

The GC now argues the following:

Based on this ample evidence, it was eminently reasonable for the Board to
find that the parties agreed the 2016 contract should only guarantee the
continuing existence of the 401(k) benefit, without settling on the actual
amount of matching contributions.

(R. Br. p. 18) This position stands in stark contrast with the Board’s actual finding:

Finally, the [Company’s] clear rejection of the Union’s proposal for a 5
percent match was more than sufficient to have made it obvious to the Union
that the inclusion of the 5 percent paragraph in the new collective
bargaining agreement was a drafting error.

(emphasis added) [J.A. 813] (D&O fn.2) The paragraph at issue is structured as
follows:

The Company 401K matching rate for all bargaining unit employees
will be no less than 100% for each employee dollar contributed to
individual accounts up to 5% maximum contribution. If during the
term of the Agreement, the Company maximum contribution % is
increased for non-represented, non bargained employees, the % shall
also be increased for bargained employees.

[J.A. 371; J.A. 703-707] (GC Ex. 2, p. 133; GC Exs.10-11)
Perhaps the GC has recognized that by invalidating the final CBA provision, the Board has also vicariously undone the MOA, which required that “The Company agrees to acknowledge the provision of a 401(k) benefit to bargaining union [sic.] employees in the drafting of the collective bargaining agreement.” [J.A. 729] (Er. Ex. 2) In other words, the entire 401(k) provision cannot possibly be invalid, because this would also mean that the Board has completely eviscerated the parties’ express written agreement to definitively include a 401(k) provision in the final CBA.

Perhaps recognizing this fallacy, the GC now attempts to revise the Board’s Decision and Order retroactively to arbitrarily invalidate only the term “5%” rather than the entire “paragraph.” The GC cannot now retroactively disavow the Board’s finding that the entirety of the 401(k) paragraph somehow resulted from an error. If the Board now argues that the only portion of the paragraph that was not appropriately agreed upon and memorialized was the inclusion of term “5%”, then this matter must be remanded for reconsideration and the Board must issue a Decision and Order to that effect.

C. *Point 3: The GC and Board, Without Record Evidence, Improperly Conclude That Because the Company Rejected a Proposal of a 5% Match Early On In Bargaining That It Therefore Rejected the Arrangement In Perpetuity.*

The Board premises a significant portion of its brief upon the implicit assumption that the Company’s rejection of a proposal for a 5% 401(k) match early
on in bargaining necessarily means the Company rejected this arrangement in perpetuity. However, because there is no evidence on record from the actual contracting parties (Halpern and Herman), the GC cannot appropriately reach this conclusion. Here, the GC and Board repeatedly commit a compound error: (1) they attempt to place themselves inside the mind of two individuals from whom no testimony was offered; and (2) they then draw erroneous conclusions regarding what those individuals allegedly agreed to and when. (See, e.g., R. Br. p. 21) The Company in this case cannot simply be regarded as a monolithic entity: it, like any other organization, is comprised of individuals. The individuals who made the pertinent decisions on behalf of the Company must account for their own actions or inactions.

Halpern was the chief negotiator for the Company. He did not testify. Herman was the party responsible for drafting the final CBA. He did not testify. In an attempt to rewrite the damaging and inescapable fact that the Company (Herman and Flagler) drafted, reviewed and repeatedly included the language at issue in drafts of the final CBA, the GC argues: “There is no evidence that Herman, Flagler, or anyone else reviewed the document after they sent Pluta the
redlined draft.” (R. Br. p. 28) First, there is no dispute\(^1\) the Company (Herman) drafted and included the 401(k) provision that is the subject of this case. [J.A. 800-801] (ALJD pp. 7:34-35, 8:17-18) Second, there is also clear evidence that Flagler not only reviewed the CBA, but there is also clear evidence that he too specifically inserted the 401(k) provision into yet another draft of what became the final CBA. [J.A. 700-701] (GC Ex. 9, p. 77) The Board’s decision on this record cannot stand.

D. Point 4: The GC Appears to Now Disavow the ALJ’s and Board’s Errant Conclusion that the MOA Reached Prior to the Final CBA Was an “Integrated Agreement”.

There is no escaping the following finding of the ALJ: “In this case, the language contained in the physically signed version of the MOA makes clear it was an integrated agreement.” [J.A. 808] (ALJD p. 15:18-20) Moreover, there is no escaping the Board’s adoption of this finding. [J.A. 813] (D&O p. 1) However, the GC now attempts to walk back the Board’s conclusion, arguing,

\(^1\) Intervenor-Thryv Inc. contends there are “divergent views” regarding who drafted and inserted the language. (Int. Br. p. 12) To the extent this was true prior to the evidentiary hearing, those views were resolved by the ALJ’s and Board’s conclusion that the Company (Herman) drafted and inserted the language at issue. [J.A. 800-801] (ALJD pp. 7:34-35, 8:17-18)

Intervenor-Thryv Inc. also postulates that the Union should have known that the Company was actively depriving employees of .2% of their 401(k) matching entitlement, because it had been doing so for some time. This argument strains credulity because such a deviation would not be readily apparent to even the most diligent employee observing their payroll documentation. The Union timely filed a charge when the Employer explicitly made it clear that it was not and would not be adhering to the contractual 5% match. [J.A. 387-388; 790-792] (See GC Ex. 4 and R. Ex. 9)
In making that determination [that the 5-percent matching rate resulted from a drafting error], the Board did not need to rely on the judge’s recommended finding that the MOA was an integrated agreement because neither the MOA nor any prior agreement said anything about the specifics of a 401(k) plan.

(R. Br. p. 26) Nevertheless, because the Board “decided to affirm the judge’s rulings, findings, and conclusions” without excepting to this specific finding and without addressing the finding in its own Decision and Order, the Board expressly adopted the ALJ’s conclusion that the MOA was an “integrated agreement”. While the GC may now be uncomfortable with this fact, the only way to remedy any error in this respect would be to remand the matter to the Board for further consideration.

E. Point 5: The Board Inappropriately Adopted the ALJ’s Findings Regarding “Past Practices” Between the Parties, Even Though the GC Now Argues Otherwise.

Similar to the GC’s discomfort with the finding that the MOA was an “integrated agreement”, the GC seems to also express discomfort with respect to the Board’s failure to disavow the ALJ’s reliance upon “past practices” between the parties. Specifically, the ALJ analyzed evidence offered for purposes of showing a past practice that deviated from the explicit language contained in the final CBA. [J.A. 807] (ALJD p. 14:20-21) Thereupon, the ALJ concluded, “Moreover, evidence regarding prior match amounts shows that Respondent and its predecessor have never matched represented employees’ contributions at 5%.”
(Id.) Again, the Board adopted the ALJ’s findings in this respect without exception in its Decision and Order: merely labeling it a “contingent finding,” as the GC now does, doesn’t address the extent to which the Board found this evidence persuasive. As such, the extent to which the Board appropriately relied upon such evidence and/or findings of past practices, and/or the extent to which the Board found such evidence appropriately persuasive are both issues that are properly before this Court.

III. CONCLUSION

For all of the above-reasons the Court should Grant the Petition for Review, vacate the Board’s Decision, and issue an Order enforcing the terms of the Collective Bargaining Agreement at issue. In the alternative, the Court should remand this matter in order to resolve the inconsistencies between the GC’s position and the Board’s actual Decision and Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(A) and (B) and Circuit Rule 32(a)(7) because it contains 8 pages and 2,017 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rules 32(e) and (f). I further certify that 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 14-point Times New Roman font, a proportionally spaced typeface. This brief also complies with the requirements of Fed. R. App. P. 28(c).
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically and served through the Court’s CM/ECF system on May 9, 2022. A copy of the same was submitted to the following individuals via email the same day.

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