

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN DIRECTIONAL BORING, INC.
d/b/a ADB UTILITY CONTRACTORS, INC.

and

Cases 14-CA-27386,
14-CA-27570,
and 14-CA-27677

LOCAL 2, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO

COUNSEL FOR THE ACTING GENERAL COUNSEL'S RESPONSE IN
OPPOSITION TO RESPONDENT'S MOTION TO STAY PENDING A DETERMINATION
ON RESPONDENT'S PETITION FOR A WRIT OF PROHIBITION OR MANDAMUS

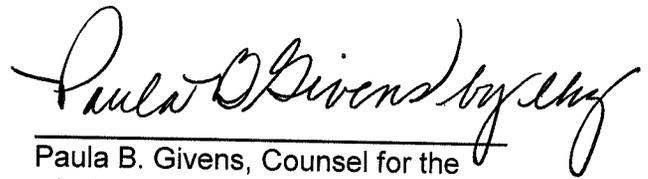
Counsel for the Acting General Counsel opposes Respondent's Motion for a Stay Pending a Determination of the Eighth Circuit Court of Appeals on Respondent's Petition for a Writ of Prohibition or Mandamus.

The Mandamus Petition referred to provides no basis for staying the Board's consideration of the instant unfair labor practice case. That petition has not, at this time, resulted in any order from the circuit court prohibiting Board action. Further, as the Board has explained through its counsel Deputy Associate General Counsel Linda Dreeben (see August 3, 2010 letter faxed from Ms. Dreeben to Bryan Kaemmerer, attached as Exhibit A), the Board has concluded that the Eighth Circuit's decision and mandate are not a final resolution of these unfair labor practice proceedings and the Board is free to consider the case, now that additional members have been appointed to the Board. To be sure, Respondent disagrees with the Board's view. Nevertheless it will not be prejudiced by continuing to proceed on the unfair labor practice case at this time; Respondent can preserve its arguments and raise them to the Eighth Circuit – in further litigation on its Mandamus petition if the court should invite it, or in any court proceeding that may follow the Board's decision.

On the other hand, given the already extensive delay in resolving the unfair labor practice allegations in this case, the Board should make every possible effort to expedite a final decision. The alleged violations arose out of an organizing campaign in 2003; the Respondent filed no exceptions to the administrative law judge's finding that it committed multiple Section 8(a)(1) violations (see 353 NLRB No. 21 slip op. at 1, n. 4) and it raised no argument in the original enforcement litigation before the Eighth Circuit objecting to the finding of Members Liebman and Schaumber that Respondent discriminatorily discharged 13 union supporter employees (see No. 09-1194 *National Labor Relations Board v. American Directional Boring, Inc. d/b/a ADB Utility Contractors, Inc.*, Brief for the National Labor Relations Board (April 8, 2009) at 43). Nevertheless, these violations remain unremedied seven years later. Surely, the employees are entitled to a final decision on these matters, as well as the General Counsel's request for a remedial bargaining order, as soon as possible.

For all these reasons, Counsel for the Acting General Counsel requests that the Respondent's motion be denied.

August 5, 2010



Paula B. Givens, Counsel for the
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United States Government



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VIA FACSIMILE

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Re: No. 09-1194--*NLRB v. American Directional Boring, Inc.*, Board Case No. 14-CA-27386

Dear Mr. Kaemmerer:

I am writing this letter to explain the Board's view of the meaning and effect of the unpublished decision of the Eighth Circuit in *NLRB v. American Directional Boring, Inc.* No. 09-1194, 2010 WL 2539448 (8th Cir. Jun. 24, 2010). As the Board's legal representative before the Court, this is a matter within my responsibility. For the reasons set forth below, the Board has concluded that the Court's decision and mandate are not a final resolution of the unfair labor practice issues litigated before the administrative law judge and are not reasonably interpreted as terminating further proceedings before the Board in this case.

At issue before the Court was the enforcement of an order entered by Chairman Schaumber and Member Liebman sitting as members of a three-member group to which the Board delegated all its powers in December 2007. When that order was entered on September 30, 2008, the five-member Board had only two members.

On June 24, 2010, the Eighth Circuit denied enforcement of the Board's order. The sole ground given for the Court's decision was that in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (June 17, 2010), the Supreme Court had determined that

“a two-member group may not exercise delegated authority when the total Board membership falls below three because ‘the delegation clause [in section 3(b)] requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board.’” *American Directional Boring*, 2010 WL 2539448 at *1 (quoting *New Process Steel*, 130 S. Ct. at 2644). The Court did not discuss, nor decide, the merits of Chairman Schaumber and Member Liebman’s unfair labor practice findings, none of which, as noted in the Board’s brief at pp. 43-44, were contested by your client, or the contested remedial order.

Because the Eighth Circuit predicated its denial of enforcement solely on *New Process Steel*’s determination that Chairman Schaumber and Member Liebman lacked authority to issue an order in the Board’s name, the Court’s denial of enforcement does not involve any determination of the unfair labor practice issues raised by the General Counsel’s complaint and litigated before the administrative law judges. Rather, all that was finally decided is that “a two-member group may not exercise delegated authority when the total Board membership falls below three.” 2010 WL 2539448 at *1.

No one disputes that where courts have set aside a final order issued by the full Board or a panel lawfully delegated the Board’s powers, the term “enforcement denied” can have the legal consequences of terminating further proceedings. *See, e.g., NLRB v. Lundy Packing Co.*, 81 F.3d 25 (4th Cir. 1996). Foreseeing that some practitioners would attribute that same legal consequence to the language “enforcement denied” in the *New Process* context, we requested the Eighth Circuit to clarify its judgment either by remanding or by explaining that the Court’s action did not preclude further proceedings before the Board.

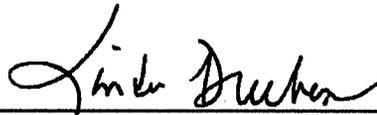
When the Court, without explanation, denied the Board’s request, the Board was required to construe the words used by the Court in its decision and mandate in light of the principle that a “mandate is ‘to be interpreted reasonably and not in a manner to do injustice.’” *Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962) (quoting *Wilkinson v. Massachusetts Bonding & Ins. Co.*, 16 F.2d 66, 67 (5th Cir. 1926)). *Accord NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 225-28 (1947). As noted, the Board has concluded that because the Court’s denial of enforcement was predicated solely on the Board’s lack of authority to issue decisions after vacancies reduced it to two members, the Board is free to consider the case now that additional members have been appointed to the Board.

That interpretation is consistent with decisions that the Second Circuit has issued in light of *New Process*. One of that court’s initial decisions, *NLRB v. Talmadge*

Park, 2010 WL 2509132 (2d Cir. 2010), simply denied enforcement, leading some to conclude that the Court intended to terminate further proceedings. Subsequently, the court granted the Board's motion for remand and issued mandate the same day. *NLRB v. Talmadge Park*, No. 09-2601 (2d Cir., filed July 27, 2010). Even prior to its July 27 order, the Second Circuit cited *Talmadge Park* as consistent with the Board's conducting further proceedings. For example, in *NLRB v. Domsey Trading Corp.*, 2010 WL 2649813 at *1 (2d Cir. 2010), the Court cited *Talmadge Park* in a context suggesting that, under *New Process*, court review of two-member group decisions was "premature" and that the court would hear the case "[i]f, after further proceedings before the NLRB, a new petition for enforcement or petition for review is filed" 2010 WL 2649813 at *1.

In sum, for the reasons stated above, the Board has concluded that the Court's decision and mandate are not a final resolution of the unfair labor practice issues litigated before the administrative law judges and are not reasonably interpreted as terminating further proceedings before the Board. Consistent with this view, the Board has advised the parties by letter dated July 22, 2010, that it has determined to consider this case and to issue a decision and order resolving the complaint allegations.

Sincerely yours,



Linda Dreeben
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202-273-2960

cc: Paula Givens, Esq.
Christopher N. Grant, Esq.

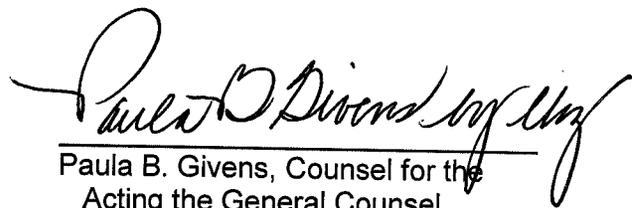
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SAINT LOUIS, MO 63103

CERTIFICATE OF SERVICE

Pursuant to the National Labor Relations Board's Rules and Regulations, Section 102.114, a true and correct copy of the foregoing Counsel for the Acting General Counsel's Response in Opposition to Respondent's Motion to Stay Pending a Determination on Respondent's Petition for a Writ of Prohibition or Mandamus was served via electronic mail, on this 5th day of August 2010, upon the following:

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