UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, Petitioner/Cross-Respondent, NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner.	)	Nos. 13-1569, 13-1629

PETITIONER SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN'S REPLY IN SUPPORT OF ITS MOTION TO HOLD THE CASE IN ABEYANCE

To the Honorable Judges of the United States Court of Appeals for the Sixth Circuit:

I. This Court enjoys the discretion to manage its docket and this case.

The Tribe and Board agree on one point: the *Noel Canning* decision invalidated all the "decisions" of the recess-appointment Board. Now that the Supreme Court has determined that those appointments did not abide the Constitution, each order issued from December 17, 2012 through August 2, 2013 suffers a fundamental constitutional infirmity. That infirmity is not "jurisdictional" inasmuch as courts need not *sua sponte* search for and decide challenges to Board

Member' appointments.[1] But once raised—by either party—it makes little sense for this Court to review the merits of an order that is, on its face, constitutionally invalid. And if further appellate review is had, failing to address the *Noel Canning* issue now *before* addressing the merits could easily set this court up for reversal by impermissibly treading into advisory-opinion territory. Clearly, remand is in order.

The question, though, is remand under what terms? The Board is adamant that it wants no strings attached. It seeks to "manage its large docket of pending cases" without regard for any "court-imposed supervision or deadlines[.]"[2] It shudders that 90 days is simply too short a time to re-decide this case, but offers no suggestion as to what length of time it believes *would* be appropriate, leaving the Tribe unable to even guess how long its case will sit if this Court grants the Board's request.[3]

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[1] *GGNSC Springfield LLC v. N.L.R.B.*, 721 403, 406 (6th Cir. 2013); *N.L.R.B. v. New Vista Nursing and Rehabilitation, LLC*, Supplement to the National Labor Relations Board's Petition for Rehearing or Rehearing en Banc, Case Nos. 11-3440, 12-1027, 12-1936 (3rd Cir. July 21, 2014) at 4 (citing cases), *available at Little River Band of Ottawa Indians v. N.L.R.B.*, Case Nos. 13-1464, 13-1583, Dkt. 120 (6th Cir. July 24, 2014).

[2] Response at 5.

[3] Review of the cases the board relies on confirms that remand is not likely to change the Board's analysis significantly, but is, without court supervision, likely to add significant length to an already lengthy process. *E.g.*, *Galicks, Inc. v. NLRB*, 671 F.3d 602, 607 (6th Cir. 2012) (2005 charge decided in 2012 after *New Process* remand, where Board did not depart from its earlier analysis); *Allied Mech. Servs. V. NLRB*, 668 F.3d 758, 764 (D.C. Cir. 2012) (same re. 1999 charge decided in 2012); *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 477 (1st Cir. 2011) (2001

To support its argument that vacatur and remand are "most appropriate[,]" the Board cites a slew of *New Process* cases that remanded without regard for whether the parties had fully briefed the cases.[4] But the Board failed to mention that those remands rested on joint and unopposed motions and *sua sponte* decisions, and so are inapposite here.[5] Similarly, the Board's reliance on other circuits' granting the Board's remand requests in *Noel Canning* cases ignores that those courts, too, considered joint and unopposed motions.[6] That courts grant

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charge decided 2011). Of the cases the Board relies on in note 1 of its response, it often adopted its earlier reasoning in toto, but did not once change its decision.

[4] Response at 2-3.

[5] *Galicks, Inc. v. N.L.R.B.*, Case Nos. 09-1972, 09-2441 (6th Cir. June 24, 2010) (*sua sponte* following call from Board); *J.S. Carambola, LLP v. N.L.R.B.*, Case Nos. 08-4729, 09-1035 (3d Cir. July 1, 2010) (unopposed motion); *Diversified Enter., Inc. v. N.L.R.B.*, Case Nos. 09-1464, 09-1537 (4th Cir. 2010) (petitioner concurred in motion); *N.L.R.B. v. Coastal Cargo Co., Inc.*, Case No. 09-60156 (5th Cir. June 23, 2010) (*sua sponte* following petitioner's submission of supplemental authority); *Leiferman Enterprises, LLC v. N.L.R.B.*, Case Nos. 09-3721, 09-3905 (8th Cir. July 8, 2010) (unopposed motion); *CSS Healthcare Servs., Inc. v. N.L.R.B.*, Case Nos. 10-10568, 10-10914 (11th Cir. July 16, 2010) (unopposed motion); *cf. Ne. Land Servs., Ltd. v. N.L.R.B.*, Case No. 08-1878 (1st Cir. July 30,2010) (granting motion to remand over opposition that court should dismiss outright instead of remand). Because the dockets for *Allied Mech. Servs. v. N.L.R.B.*, Case Nos. 08-1213, 08-1240 (D.C. Cir.) and *Cnty. Waste of Ulster, LLC* v. N.L.R.B., Case Nos. 09-1038, 09-1646 (2d Cir. July 1, 2010), are not available on PACER and the Board did not file copies of the unpublished authority it relies on, the Tribe is unable to evaluate the Board's reliance on these cases.

[6] *N.L.R.B. v. 833 Central Owners Corp.*, Case Nos. 13-684, 13-1240 (2d Cir. July 15, 2014) (unopposed motion); *N.L.R.B. v. Salem Hosp.*, Case No. 12-3632 (3d Cir. July 10, 2014) (unopposed motion); *Nestle Dreyer's Ice Cream Co. v. N.L.R.B.*, Case No. 12-1684 (4th Cir. July 29, 2014) (joint motion); *Relco Locomotives, Inc. v. N.L.R.B.*, Case No. 13-2722 (8th Cir. July 1, 2014)

unopposed motions is hardly convincing authority for granting *this* motion over the Tribe's objection. The fact that a case is fully briefed is beside the point if the parties *agree* on vacatur and remand.

The Board next searches for courts' "longstanding practice . . . of relinquishing jurisdiction,"[7] but its cases again do not fit its premise. In each of the cases it relies on, a court remanded and relinquished jurisdiction to allow the Board additional decision-making to address the effect of the appellate decision.[8] The courts had no reason to retain jurisdiction because their review work was complete.

Nor does the Board's creative quotation of Judge Posner support its argument. In *Jay Foods*, Judge Posner recognized that there is generally "no hard-and-fast rule" guiding courts' decision of when to retain jurisdiction and when to direct parties to file a brand-new suit.[9] Courts thus enjoy discretion in deciding

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(unopposed motion); *DirecTV Holdings, LLC v. N.L.R.B.*, Case Nos. 12-72526, 12-72639 (9th Cir. July 2, 2014) (unopposed motion); *Int'l Union of Operating Eng'rs, Local 627 v. N.L.R.B.*, Case Nos. 13-9547, 13-9564 (10th Cir. July 2, 2014) (joint motion); *cf. Dresser-Rand Co. v. N.L.R.B.*, Case No. 12-60638 (5th Cir. July 23, 2014) (granting motion to remand over opposition that court should vacate without remand).

[7] Response at 4.

[8] *N.L.R.B. v. Flour Daniel, Inc.*, 161 F.3d 953, 971 (6th Cir. 1998) (additional proceedings to prove elements defined by the court); *N.L.R.B. v. Hub Plastics, Inc.*, 52 F.3d 608, 11, 613 (additional proceedings after reminding Board of correct legal standard); *Fortuna Enters., LP v. N.L.R.B.*, 665 F.3d 1295, 1303 (D.C. Cir. 2011) (directing Board to weigh factors following appeal).

[9] *Jays Foods, L.L.C. v. Chem. & Allied Prod. Workers Union, Local 20, AFL-CIO*, 208 F.3d 610, 613 (7th Cir. 2000).

whether to retain jurisdiction during a remand, but *if* a court doesn't specify whether it retains jurisdiction or not, *then* "[t]he presumption . . . is in favor of relinquishment."[10] Judge Posner recognized, though, that courts who speak clearly may direct "a limited remand unlikely to resolve the case but intended rather to assist the court in making its decision . . . , or dismiss with leave to reinstate, which we treat as the equivalent of a stay."[11] That is precisely what the Tribe requests here.

In contrast to the Board's agency-takes-all request, the Tribe asks that this Court to allow the Board to fix its constitutional mistake, but that it do so while this Court retains jurisdiction over this appeal. The Board's argument that this approach is only available in "rare" cases ignores that this case *is* itself a rare exception. In its motion, the Tribe detailed the continuing incursion into its sovereignty that the Board's unlawful exercise of jurisdiction effects every day. The Board's response does not even *try* to argue against these facts. But the federal government's express support for and advancement of tribal self-government[12]

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[10] *Id.*

[11] *Id.* (internal citation of examples omitted).

[12] *E.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 217 n.21 (1987) (describing economic self-sufficiency, economic development of reservations, and tribal self-determination as "federal goals for the tribes."); 25 U.S.C. § 2701(4) ("[A] principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.").

cautions that this Court should most narrowly tailor its remedy for the *Noel Canning* issue by abating this appeal while a brief remand proceeds.

Even without those important federal interests at play, courts are well within their discretion to exercise supervisory authority to ensure that agencies fix their mistakes quickly to allow appellate review to proceed. For example, one District Court ordered the Environmental Protection Agency to publish a notice of proposed rulemaking within five months while it held a case in abeyance.[13] Another ordered the Secretary of the Department of Health and Human Services to enter a final agency decision within 30 days of its order while it retained jurisdiction over a complaint.[14]

This Court's power to hold this case in abeyance is no different. The National Labor Relations Act's statutory grant of jurisdiction to this Court affords it the "power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."[15] The First Circuit has relied on this grant to retain appellate jurisdiction while it remanded a case to the Board to issue a "meaningful Board opinion" that it could then

[13] *In re Envtl. Def.*, 03-1220, 2004 WL 885208, *1 (D.C. Cir. Apr. 22, 2004).
[14] *Boulder Cmty. Hosp. v. Heckler*, CA 85-0031, 1985 WL 81771, *1 (D.D.C. Oct. 3, 1985).
[15] 29 U.S.C. § 160(e).

review.[16] And both this and the Seventh Circuit have retained appellate jurisdiction while remanding to the Board for additional fact finding.[17]

What the Board really wants is a voluntary dismissal and unconditional do-over. The law generally disfavors such prejudicial tactics at this stage of the proceedings.[18] And the Supreme Court has made clear that *this* agency has no "absolute right to withdraw its petition at its pleasure."[19] Instead, permission to allow—or deny—the Board's request "'must rest in the sound discretion of the court, to be exercised in light of the circumstances of the particular case.'"[20] The circumstances of *this* case favor abatement, not vacatur.

II. The Tribe's proposal most effectively balances the equities of this case.

It is not, as the Board suggests, this Court's job to simply "approve the procedure that the agency deems most appropriate to cure the constitutional defect."[21] Rather, Supreme Court precedent directs that this Court's equitable discretion in deciding how to remedy the *Noel Canning* issue is broad:

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[16] *N.L.R.B. v. Auciello Iron Works, Inc.*, 980 F.2d 804, 812-13 (1st Cir. 1992).
[17] *Aquabrom, Div. of Great Lakes Chem. Corp. v. N.L.R.B.*, 746 F.2d 334, 337 (6th Cir. 1984); *New Alaska Dev. Corp. v. N.L.R.B.*, 441 F.2d 491, 495 (7th Cir.1971).
[18] *See* Fed. R. Civ. P. 41(a) (only allowing voluntary dismissal after service of an answer or motion for summary judgment by stipulation or court order "on terms that the court considers proper").
[19] *Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 370 (1939) (citing cased).
[20] *E.I. Du Pont de Nemours & Co. (Chestnut Run) v. N.L.R.B.*, 733 F.2d 296, 297 (3d Cir. 1984) (quoting *Ford Motor Co.*, 305 U.S. at 370).
[21] Response at 3 n.2.

> The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.[22]

In this case, the equities favor holding this appeal in abatement during remand.

The Board does not argue against the *FEC v. Legi-Tech, Inc.*[23] holding that ratification of an infirm agency order can "adequately address[. . .] the constitutional violation," making dismissal "neither necessary nor appropriate, and certainly [] not compelled[.]"[24] Instead, its quarrel is that retaining appellate jurisdiction while the Board determines whether to ratify its earlier order in this case would "unduly restrict the Board's discretion"[25] by impairing the Board's management of "its large docket of pending cases, which will now include cases remanded in light of *Noel Canning*[.]"[26] The Board, though, offers no concrete reason why it *could not* reconsider its order within 90 days, only the complaint that it does not want to.

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[22] *Ford Motor Co.*, 305 U.S. at 373.
[23] 75 F.3d 704 (D.C. Cir. 1996).
[24] *Id.* at 708.
[25] Response at 5.
[26] *Id.* at 5.

With respect, the problem the Board complains of is one it created. *A year* passed between the President's August 2013 appointment of a full Board with unquestionable authority and the Supreme Court's July 2014 decision that the recess appointments were not constitutional. A year passed when it could have taken the *Legi-Tech* step of revisiting the questionable orders to ensure the cases could proceed, fulfilling the Board's statutory mandate. But in the year that passed, even though the Tribe raised the issue to the Board, the Board chose to do nothing. The Board cannot now claim that equity requires this Court to afford it leeway in managing its docket when the Board's own inaction created the docket problem in the first place.

Against this backdrop, the Board does not even argue that an unrestricted remand would not offend the Tribe's sovereignty. It can't. As this Court decides this motion, the Board has hailed the Tribe before it again for a representation hearing that begins August 5. At that hearing, the Tribe will once again argue that federal Indian law prohibits the Board's exercise of jurisdiction, expending governmental resources that should be spent on fire and police departments, not unending litigation. The Board meekly offers that if after vacatur it ratifies the order, the parties could stipulate to resubmitting previously filed briefs.[27] But there

[27] Response at 8.

is simply no commitment now to what the Board will or won't stipulate to, so such speculation is hardly an adequate remedy for the prejudicial posture the Board has created. And indeed, that proposal does nothing to save *this Court's* investment in this case since, after vacatur, a new appeal would most likely be assigned to a new panel. The remedy that most effectively balances *all* the interests in this situation is the Tribe's.

WHEREFORE, the Tribe respectfully requests that the Court deny the Board's motion to vacate and remand, and grant the Tribe's Motion to Hold Appeal in Abeyance.

Respectfully Submitted on August 1, 2014,

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CERTIFICATE OF SERVICE

I certify that on August 1, 2014, I electronically filed the following documents with the Clerk of the Court for the 6th Circuit Court of Appeals in the above captioned case.

- Petitioner's Saginaw Chippewa Indian Tribe of Michigan's Reply in Support of its Motion to Hold the Case in Abeyance; and
- Certificate of Service.

Participants in the case who are registered with ECF will be served by the CM/ECF system.

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