Marathon Petroleum Co., d/b/a Catlettsburg Refining, LLC *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, and its Local 8-719. Case 09–CA–162710

February 9, 2023

ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND WILCOX

On January 7, 2022, the National Labor Relations Board issued a Notice to Show Cause in this proceeding, which invited any party to show cause why the Board's June 23, 2020 Order granting the General Counsel's Motion to Remand this case to the Regional Director for Region 9 should not be vacated, and why the Board should not re-adjudicate this case, following the Board's acceptance of a determination by the Designated Agency Ethics Official (DAEO) that then-Member Emanuel, who participated in the Order along with Member Kaplan, and then-Chairman Ring, should have been disqualified. As the Notice explained, the DAEO's determination was based on an investigation conducted by the Board's Inspector General, who concluded that then-Member Emanuel's participation violated a criminal statute, 18 U.S.C. Sec. 208(a), and its implementing regulations, 5 C.F.R. Sec 2640.201(b)(2)(i), because of his ownership of a conflicting financial interest in a sector mutual fund.[1] The Notice observed that the "presumptively appropriate remedy for Member Emanuel's unlawful participation in this case is to vacate the order and to re-adjudicate the Motion to Remand *de novo*." In response to the Notice, the Respondent filed a brief arguing that the Board should not vacate its prior order.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

For the reasons explained below, the Board has decided to vacate and set aside the June 23, 2020 Order, re-adjudicate the Motion to Remand, and in recognition of the circumstances presented in this case, issue a new order granting the Motion nunc pro tunc as of June 23, 2020. In light of Section 10(d) of the Act, we disagree with our dissenting colleague's position that the Board lacks jurisdiction here, having remanded the case to the Regional Director.[2]

As set forth in *Exxon Mobil Research & Engineering*, 371 NLRB No. 128, slip op. at 2 (2022), decided after the notice to show cause here was issued, the Board has concluded that vacatur "is the proper remedy . . . where a

[1] At relevant times, Member Emanuel owned more than $50,000 in shares of the Energy Select.

Sector SPDR ETF, which in turn owned Marathon Petroleum Corporation common stock. Member Emanuel did not timely disclose his ownership of this sector mutual fund, which prevented a disqualification determination from being made before Member Emanuel participated in this case and before the Order remanding issued. Based on an inadvertent error in the Inspector General's memorandum, the Board's Notice to Show Cause erroneously identified the conflict in this case as based on the sector fund's ownership of stock in a separate company, Marathon Oil Corporation. The Respondent has pointed out this error, but the error is immaterial, because as the Inspector General subsequently advised the DAEO in an April 8, 2022 memorandum, his investigation determined that the sector fund also owned stock in Marathon Petroleum.

[2] Citing Sec. 10(d), the Supreme Court has observed that the Act "specifically gives the Board wide powers of modification" with respect to its orders. *International Union of Mine, Mill & Smelter Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 341 (1945). Sec. 10(d) provides:

> Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

29 U.S.C. § 160(d). As a statutory matter, then, only the filing of the record in a court of appeals, when review or enforcement of a Board order is sought, divests the Board of jurisdiction to "modify or set aside" the order. Judicial review of the Board's order in this case was never sought, nor was the record ever filed in a court of appeals. Thus, the Board retains the power to set aside its original order here and to issue a new order nunc pro tunc.

Contrary to our dissenting colleague's view, Sec. 3(d) of the Act, which grants authority to the General Counsel to prosecute unfair labor practices, in no way limits the Board's authority to modify or set aside its own order properly issued in a case before it. Nothing in the text or the legislative history of the Act suggests that when Congress added Sec. 3(d) to the Act, it intended to limit the Board's existing authority under Sec. 10(d). Nor does the Board's case law support the view that once the Board orders a case remanded to the Regional Director, it loses the statutorily granted power to modify or set aside the remand order. Indeed, precedent suggests otherwise. See *Community Medical Services of Clearfield, Inc.*, 239 NLRB 1244 (1979) (denying motion seeking reconsideration of order remanding case to Regional Director, without addressing jurisdiction). Finally, we find no textual support for our colleague's view that Sec. 10(d) only confers authority on the Board to modify or set aside "final appealable orders." Instead, by its terms, Sec. 10(d) applies broadly to "*any finding or order* made by the Board," (emphasis added), which plainly encompasses the remand order at issue here. Today's order does not interfere with the General Counsel's prosecutorial authority in any sense. The General Counsel was indisputably required to seek a remand from the Board originally, which the Board granted, and we now simply affirm our original order granting the remand. Our decision does not require the General Counsel to take any further action. Notably, the General Counsel did not respond to the Notice to Show Cause here and thus raised no objection to the possibility of vacating the Board's order.

Finally, we reject our colleague's suggestion that this decision—in which vacatur is based on the disqualification of a Board member under a federal criminal statute—somehow establishes a precedent for setting aside prior Board remand orders in different circumstances. It is our colleague's position, rather, that might lead to unacceptable consequences. Under his view, the Board would lack jurisdiction to set aside even a remand order procured by fraud.

violation of 18 U.S.C. § 208(a) is established." Thus, we conclude that vacating the February 5 decision is appropriate and consistent with *Exxon.*

Accordingly, we shall re-adjudicate the Motion to Remand. We see no reason for additional briefing from the parties. Having reviewed that Motion de novo, we find that the Motion should be granted. In order to avoid unnecessary litigation and injustice to the parties,[3] we enter our re-adjudicated order nunc pro tunc to June 23, 2020.

ORDER

The Board's June 23, 2020 order remanding this case to the Regional Director for Region 9 is vacated and set aside. Having re-adjudicated the General Counsel's Motion to Remand, we affirm the Board's order of June 23, 2020, and enter our re-adjudicated order nunc pro tunc to June 23, 2020.

Dated, Washington, D.C. February 9, 2023

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

The Respondent observes in its response to the Notice to Show Cause that, because this case was remanded to the General Counsel, the Board lacks the authority to take any further action. I agree, and I do not join my colleagues in purporting to vacate the June 23, 2020 Order remanding.

In that Order, the Board granted the General Counsel's motion to remand the case to the Regional Director for Region 9 to permit the Charging Party to withdraw its charge pursuant to the resolution of the underlying dispute. After the Board remanded the case, final authority resided with the General Counsel under Section 3(d) of the Act,[1] and on July 14, 2020, then-General Counsel Robb closed the case.

Having transferred jurisdiction of the case back to the General Counsel, the Board now lacks authority to reclaim jurisdiction, vacate the remand Order, and re-adjudicate the matter. Such action encroaches on the General Counsel's jurisdiction and necessarily nullifies his unreviewable post-remand exercise of authority, including allowing the withdrawal of the charge.[2] Even though my colleagues have reissued the remand Order nunc pro tunc so that their action will not have any practical effect on the parties, their infringement on the General Counsel's jurisdiction is very real and, accordingly, establishes a troubling precedent. Were the Board to have the sweeping authority it purports to exercise here, it could sua sponte re-adjudicate any unfair labor practice case that it has remanded to the General Counsel, even years later, voiding any post-remand actions properly taken by the General Counsel under the authority designated by Section 3(d).

My colleagues erroneously rely on Section 10(d) of the Act to justify vacating the underlying remand Order and reclaiming jurisdiction from the General Counsel. Section 10(d) was enacted as part of the 1935 Wagner Act and provides in part that the Board may "set aside, in whole or in part, any finding or order made or issued by it" prior to submission of a transcript to a court of appeals.[3] However,

[3] The Board recently entered an order nunc pro tunc in another case involving former Member Emanuel's improper participation. See *CVS Pharmacy*, 372 NLRB No. 1 (2022). The Board has previously entered orders nunc pro tunc in numerous situations, including amending a Board certification to exclude supervisors who were previously included in the certified unit (see, e.g., *Western Cartridge Co.*, 55 NLRB 1171, 1172–1173 (1944)) and to affirm appointments and other administrative actions entered by the Board when the Board was without a quorum. See, e.g., *Professional Transportation, Inc.*, 362 NLRB 534, 535 fn. 7 (2015). Additionally, Supreme Court and federal court precedent broadly supports entering a judgment or order nunc pro tunc where an act of the court, rather than the parties' conduct, caused delay in rendering a judgment or decree and justice may require that the judgment or decree be entered nunc pro tunc based on the particular circumstances of a case. *Mitchell v. Overman*, 103 U.S. 62, 64–65 (1880) ("[W]here the delay in rendering a judgment or a decree arises from the act of the court, that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, either the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties, the judgment or the decree may be entered retrospectively, as of a time when it should or might have been entered up . . . . A *nunc pro tunc* order should be granted or refused, as justice may require in view of the circumstances of the particular case."). See also *Transamerica Ins. Co. v. South*, 975 F.2d 321, 326 fn. 2 (7th Cir. 1992) (citing cases supporting proposition that a nunc pro tunc order may be entered where the court's delay prejudices the parties).

[1] Sec. 3(d) provides that the General Counsel "shall have final authority . . . in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board."

[2] The decision to both investigate and dismiss a charge "is committed by statute to the unreviewable discretion of the General Counsel of the agency, not to the Board." *Morgan's Holiday Markets*, 333 NLRB 837, 839 (2001).

[3] Thus, Sec. 10(d) specifically addresses the authority of the Board to modify findings or orders prior to filing the record of a case in court and the transfer of jurisdiction to a court in appeals and enforcement proceedings. And the Supreme Court has interpreted Sec. 10(d) squarely in that context:

> It is obvious that Congress intended to confer no jurisdiction upon the reviewing court to prevent the Board from seasonably vacating or modifying its order so as to make it comport with right and justice. The Act

for the first 12 years after passage of the Wagner Act, no jurisdictional division existed within the Agency; the Wagner Act did not create an independent General Counsel. It was not until the 1947 Taft-Hartley Act (also known as the Labor Management Relations Act, or LMRA) that Congress enacted Section 3(d) to establish the General Counsel as an autonomous, independent prosecutorial officer with final authority over the prosecution of unfair labor practice cases.[4] As a result of that enactment, the Board cannot set aside "any" order sua sponte insofar as certain orders remand cases back to the General Counsel's jurisdiction for further action within her sole discretion. Accordingly, any reading of the Board's authority under Section 10(d) is constrained by the jurisdictional divisions created by Section 3(d). As my colleagues put it in *ExxonMobil Research & Engineering*, 371 NLRB No. 128, slip op. at 2 (2022), Section 10(d) acknowledges the Board's authority to set aside an order "'made or issued by it,' *so long as the Board retains jurisdiction in the case*." (Emphasis added).[5] This case has been remanded, and the Board does not retain jurisdiction despite my colleagues' novel efforts to re-establish it.

Moreover, because Section 10(d) concerns the transfer of jurisdiction to a court of appeals, its reference to Board orders refers specifically to final appealable orders. As shown below, it has only been applied in that context. In contrast, the underlying remand Order in this case is not a final appealable order to which Section 10(d) would even apply, and neither the subsequent withdrawal of the charge nor the closure of the case by the General Counsel is reviewable by the Board.[6] Nevertheless, my colleagues nullify those actions so that they can reissue the prior remand with a swap of the panel members. In sum, contrary to my colleagues, Section 10(d) is entirely inapplicable, both by design and by the constraints of the later amendment.

It is no surprise then that my colleagues fail to cite any decision in which the Board has sua sponte vacated an order remanding a case to the General Counsel or claimed that Section 10(d) (or any other authority) permits such action. Not only is applying Section 10(d) here contrary to the Act, but with the exception of the 2022 *ExxonMobil* decision, above, the Board has only sparingly relied on Section 10(d) to make material amendments to remedies or to reconsider decisions as necessary to prevent manifestly unfair outcomes.[7] No such circumstance exists in the instant proceeding. It does, however, set damaging precedent and has the potential to undermine public trust

> plainly indicates that the purpose [of Sec. 10(d)] was to give the court full and exclusive jurisdiction to review the Board's order in the respects indicated by the Act once the transcript of the Board's proceedings is before it. It is equally plain that the court is to have no power to prevent the Board from vacating or modifying its order prior to such plenary submission of the cause.

In re NLRB, 304 U.S. 486, 494 (1938).

[4] As Senator Taft remarked in the Senate hearings prior to the passage of the LMRA, Sec. 3(d) was enacted "to make an effective separation between the judicial and prosecuting functions of the Board and yet avoid the cumbersome device of establishing a new independent agency in the executive branch of the Government . . . . So far as having unfettered discretion is concerned, he, of course, must respect the rules of decision of the Board and of the courts. In this respect his function is like that of the Attorney General of the United States or a State attorney general." Congressional Record, Senate, June 12, 1947, pp. 1622–1623.

[5] I did not participate in that case and express no opinion whether it was correctly decided.

[6] *Morgan's Holiday Markets,* above.

[7] Thus, *In re NLRB*, above, arose from the Board's April 25, 1938 decision to change its procedures for adopting trial examiner's rulings to protect parties' due-process rights. Id. at 489. The Board vacated its decisions in several cases and restored them to its docket for readjudication. Id. The specific controversy in that case was the Board's failure to transfer records to the appellate court after respondent *Republic Steel* filed a petition for review, leading to a jurisdictional stalemate that the Supreme Court resolved by construing Sec. 10(d) in the Board's favor. See also *Int'l. Union of Operating Engineers*, 168 NLRB 818, 818 (1967) (amending decision to add make-whole remedy); *Tennessee Coach Co*., 115 NLRB 677, 679 (1956) (amending Order to reflect derivative violation of 8(a)(1)), enfd. 237 F.2d 907 (6th Cir. 1956); *National Carbon Company, Inc.*, 104 NLRB 416, 416 (1953) (amending decision and Order on Board's own motion and dismissing complaint due to legal error); *Al Massera*, 101 NLRB 837, 838 (1952) (amending Order to reverse prior finding that union security clause and discharges pursuant to it were unlawful); *Ohio Power Co*., 80 NLRB 1334, 1334 (1948) (reopening case two months after prior decision to review supervisory status question in light of Taft-Hartley amendment to Sec. 2(11)), enf. denied 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949); *Thompson Products*, 72 NLRB 886, 886–887 (1947) (reversing prior decision and dismissing complaint on ground that discharged employees were engaged in unlawful strike); *The Wallace Corp*., 50 NLRB 138, 141 (1943) (vacating decision and readjudicating unfair labor practices case 6 months after prior decision to find that respondent unlawfully discharged employees pursuant to unlawful closed-shop agreement); *Somerset Shoe Co*., 12 NLRB 1057, 1057–1060 (1939) (amending Order; expanding make-whole remedy). More recently, the Board has noted in dicta that it had authority to sua sponte reopen closed cases, but was in fact acting on motions. E.g., *Dorsey Trailers, Inc.,* 322 NLRB 181, 181 (1996) (granting motion to correct failure to include make-whole remedy in order).

In none of the above cases did the Board claim authority to vacate a decision remanding a case to the General Counsel, and all involved final, appealable Board orders.

Even in cases nullified as a matter of law by the Supreme Court's decisions in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), and *NLRB v. Noel Canning,* 573 U.S. 513 (2014), the Board only re-adjudicated open cases that remained under, or were properly remanded to, the Board's jurisdiction. E.g., *Allservice Plumbing and Maintenance,* 15–CA–019433 (2014) (not reported in Board volumes). And although the Board recently vacated a remand order in *CVS Pharmacy*, 372 NLRB No. 1 (2022), that was a representation case. Under Sec. 3(b) of the Act, a Regional Director's authority over representation cases is only by delegation from the Board, which retains ultimate authority. As emphasized above, Sec. 3(d) of the Act gives the General Counsel jurisdiction over the prosecution of unfair labor practice cases.

in the stability of long-closed and settled cases, as well as the Board's fidelity to its own statute.

In sum, the Board remanded the case to the General Counsel, and the General Counsel closed it by mutual agreement of the Charging Party and Respondent. No party has asked the General Counsel to exercise her independent prosecutorial authority to reopen the case and present it to the Board for readjudication. And nothing in the Act or Board rules legitimizes the majority's apparent and erroneous notion that "vacatur" may be used as a stratagem for reclaiming jurisdiction over a case once it has been remanded to the General Counsel. In my view, the only statutorily permissible action here is to notify the parties that we have considered the Respondent's response to the show-cause notice and have concluded that the Board lacks the jurisdiction to take any further action.[8]

Accordingly, I respectfully dissent.

Dated, Washington, D.C. February 9, 2023

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

[8] Because I find that the Board lacks jurisdiction over this case, I decline to pass on whether the majority's assertion that the Designated Agency Ethics Official (DAEO) made an official "determination" in this case is accurate, whether the DAEO has the authority to make determinations regarding a Board member's participation in a case, or whether vacatur is the presumptively appropriate remedy for an alleged violation of 18 U.S.C. Sec. 208(a).