William Beaumont Hospital *and* Michigan Nurses Association. Cases 07–CA–244615

August 13, 2020

ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN, EMANUEL AND MCFERRAN

On July 20, 2020, Deputy Chief Administrative Law Judge Arthur Amchan denied the Respondent's motion requesting that the hearing in the above-captioned case be conducted in person, finding that the current Coronavirus Disease (COVID-19) pandemic constitutes "compelling circumstances" warranting a remote hearing via video technology. Thereafter, in accordance with Section 102.26 of the National Labor Relations Board's Rules and Regulations, the Respondent filed the instant request for special permission to appeal the judge's July 20 Order. The General Counsel filed a response, taking no position.

Having duly considered the matter, we grant the Respondent's request for permission to file a special appeal, but we deny the appeal on the merits. For the reasons discussed below, we find that the Respondent has failed to establish that the judge abused his discretion in finding that good cause for a video hearing exists under the circumstances here, and that the Respondent has not shown that a hearing held by videoconference would deny it due process. To the extent the Respondent has nonspeculative concerns that arise during the course of the video hearing, it may raise them to the trial judge in the first instance, without prejudice to its right to file exceptions with the Board to any adverse rulings pursuant to Section 102.46 of the Board's Rules and Regulations.

In *Morrison Healthcare*, 369 NLRB No. 76 (2020), the Board recently found that the current Coronavirus Disease (COVID-19) pandemic constitutes "compelling circumstances" warranting a remote preelection hearing in a representation case. In so finding, the Board looked to Section 102.35(c) of the Board's Rules and Regulations, which permits a witness in an unfair labor practice case to testify by video. The Board imported the general Section 102.35(c) framework to representation cases, allowing for videoconference hearings "on a showing of good cause based on compelling circumstances and under appropriate safeguards." *Morrison*, 369 NLRB No. 76, slip op. at 1.

We find that the judge did not err in following that same approach in this unfair labor practice proceeding. Even before the Board promulgated Section 102.35(c), it permitted testimony by videoconference in unfair labor practice cases, finding that video can adequately address parties' concerns with "the judge and the parties being able to observe the witness for credibility, due process, and other reasons." *EF International Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 1 fn.1 (2015), enfd. 673 Fed. Appx. 1 (D.C. Cir. 2017). This is consistent with Section 102.35(c), which contemplates the taking of a single witness's testimony via video transmission during an in-person hearing, even though Section 102.35(c) is not controlling in a hearing conducted entirely by videoconference. *Morrison*, 369 NLRB No. 76, slip op. at 1 fn.2.

Notwithstanding this precedent, the Respondent claims that the judge's order abrogates its absolute right to an in-person hearing under the Board's Rules and Regulations. We disagree. Section 102.38 of the Board's Rules and Regulations, on which the Respondent primarily relies, provides that "[a]ny party has the right to appear at the hearing in person, by counsel, or by other representative . . . ." The right to appear in person is the right to appear at a hearing *at all*, not the right to be physically present in a hearing room. See *Dixon v. Love*, 431 U.S. 105, 113–114 (1977) (using the phrase "the right to appear in person" to denote the right to a hearing to contest an administrative action). Moreover, examining the "right to appear . . . in person" in context alongside the right to appear "by counsel" or "by other representative," it becomes clear that phrase further guarantees the right to proceed at the hearing pro se.[1] We find nothing in the Board's Rules, or the Act, that precludes a judge or Regional Director from ordering a videoconference hearing in an unfair labor practice case, on a showing of good cause based on compelling circumstances and under appropriate safeguards.[2]

[1] Cf. *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S. Ct. 1612, 1625 (2018) (where "a more general term follows more specific terms in a list, the general term is usually understood to 'embrace only objects similar in nature to those objects enumerated by the preceding specific words'") (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)).

[2] To the extent the Respondent advances a vague constitutional claim, courts have consistently rejected arguments that the Fifth Amendment's Due Process Clause per se precludes conducting administrative hearings via videoconference. See *Vilchez v. Holder*, 682 F.3d 1195, 1199–1200 (9th Cir. 2012) (immigration proceeding); *Toyama v. Leavitt*, 408 Fed. Appx. 351, 353 (Fed. Cir. 2010) (MSPB proceeding); *Pokluda v. Colvin*, 2014 WL 1679801, at *4 (N.D.N.Y. Apr. 28, 2014) (unpublished) (Social Security Administration hearing). Moreover, we note that a handful of district courts, referencing Rule 102.35(c)'s federal counterpart (FED R. CIV. P. 43(a)), have opted to conduct bench trials remotely via videoconference technology in light of the ongoing pandemic. *Gould Electronics Inc. v. Livingston County Road Commission*, No. 17-11130, -- F. Supp. 3d --, 2020 WL 3717792 (E.D. Mich. June 30, 2020); *Argonaut Insurance Co. v. Manetta Enterprises, Inc.*, No. 19-CV-00482 (PKC) (RLM), 2020 WL 3104033 (E.D.N.Y. June 11, 2020); *RFC & ResCap Liquidating Trust Action*, No. 13-CV-3451 (SRN/HB), -- F. Supp. 3d --, 2020 WL 1280931 (D. Minn. Mar. 13, 2020).

We further reject the Respondent's suggestion that the "compelling circumstances" (i.e., the ongoing Coronavirus Disease (COVID-19) pandemic) justifying a remote hearing in *Morrison*, and relied on by the judge here, are no longer compelling. The Respondent claims that the Board has conducted a handful of onsite representation elections since *Morrison*, and the Division of Judges has since "contemplate[d]" in-person hearings. But even if the Board has conducted some of its business in-person since the *Morrison* decision issued, that does not invalidate the judge's conclusions about holding an in-person hearing in this witness-heavy case. Additionally, the judge did not abuse his discretion in recognizing that a postponement until an in-person hearing is feasible may result in an indefinite delay of this case, a serious concern here, as the Respondent is alleged to have committed numerous Section 8(a)(3) and (1) violations during an organizing campaign.

We also find that the judge did not abuse his discretion in directing the trial judge to impose appropriate safeguards informed but not controlled by those listed in Section 102.35(c)(2) of the Board's Rules. As noted above, that direction is consistent both with *Morrison*, 369 NLRB No. 76, slip op. at 1 fn. 2, where we found that Section 102.35(c)(2)'s safeguards do not apply in all respects to a hearing conducted entirely via videoconference, and with Section 102.35(a)(6), which authorizes the trial judge to "regulate the course of the hearing."

Section 102.121 of the Rules and Regulations instructs us to "liberally construe[]" the rules "to effectuate the purposes and provisions of the Act." Here, recognizing judges' discretion to order videoconference hearings in unfair labor practice cases, upon good cause based on compelling circumstances and under appropriate safeguards, directly advances the Act's central goal of resolving unfair labor practice disputes without inordinate delay.

The Respondent's list of sundry problems that could occur during the video hearing is premature. The Respondent worries that the video technology will compromise the trial judge's ability to assess witness demeanor; prejudice the Respondent's ability to examine and cross-examine witnesses; create issues with introducing documentary evidence; result in delays in witness availability; suffer from witnesses' inability to access suitable technology; and/or be beset with technical glitches. Those concerns are, at this stage, speculative. Further, the Respondent fails to show that advances in current videoconferencing technology will not be able to address many, if not all, of its procedural concerns. Certainly, the trial judge has the discretion to determine whether the case is too complex; cumbersome; or witness-, document-, and fact-heavy to be heard remotely. And, to the extent the Respondent has a concrete, not speculative, concern that cannot be ameliorated by the videoconferencing technology, or other pretrial accommodations or stipulations among the parties, the Respondent may raise it to the trial judge in the first instance, or on exceptions to the Board pursuant to Section 102.46 of the Rules and Regulations, in the event the Respondent receives an adverse ruling.

Dated, Washington, D.C. August 13, 2020

_____
John F. Ring, Chairman

_____
Marvin E. Kaplan, Member

_____
William J. Emanuel Member

_____
Lauren McFerran Member

(SEAL) NATIONAL LABOR RELATIONS BOARD