United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1109 **September Term, 2018**

FILED ON: JANUARY 11, 2019

COLLECTIVE CONCRETE, INC.; REMCO CONCRETE LLC,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

NEW JERSEY BUILDING LABORERS DISTRICT COUNCIL,
INTERVENOR

Consolidated with 18-1140, 18-1169

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: HENDERSON, ROGERS, and PILLARD, *Circuit Judges*.

J U D G M E N T

This petition for review and the cross-application for enforcement were considered on the record from the National Labor Relations Board ("NLRB") and the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The court has afforded the issues full consideration and determined a published opinion is unwarranted. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the petition for review be dismissed in part and denied in part, and the cross-application for enforcement be granted.

Petitioners challenge the Board's Decision and Order that Remco Concrete, LLC ("Remco") is an alter ego of Collective Concrete, Inc. ("Collective") and RDM Concrete & Masonry, LLC ("RDM"), and that Remco violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) & (5), by failing to meet its collective bargaining obligations with the New Jersey Building Laborers District Council ("the union"), which had agreements with Collective and RDM. *RDM Concrete & Masonry, LLC, Collective Concrete, Inc., & Remco*

Concrete, LLC, Alter Egos & A Single Employer & N.J. Bldg. Laborers Dist. Council, 366 NLRB 34 (2018). Petitioners contend that (1) the Board's finding Remco is an alter ego of Collective and/or RDM is not supported by substantial evidence, and (2) the Board failed to consider the equities when determining that Remco is an alter ego. Pet'rs' Br. at 14–15.

The court lacks jurisdiction to consider the first challenge because petitioners failed to raise this objection in their exceptions to the decision of the Administrative Law Judge ("ALJ") and have offered no extraordinary circumstances to excuse that failure. *See* 29 U.S.C. § 160(e); *Pa. State Corr. Officers Ass'n v. NLRB*, 894 F.3d 370, 376 (D.C. Cir. 2018). Their exceptions summarily objected to "the ALJ's determination and conclusion that Remco is an alter ego of Collective and RDM" and their accompanying brief argued only that that the ALJ had erred as a matter of law by failing to consider whether applying the alter ego doctrine would be inequitable under the circumstances. The exceptions and brief thus failed to "provid[e] the detail required by the Board's rules." *See Nova Se. Univ. v. NLRB*, 807 F.3d 308, 313 (D.C. Cir. 2015). Although an exception may "[c]oncisely state the grounds for the exception," the analysis still must set forth "argument and citation of authorities" in support of the exception. 29 C.F.R. § 102.46(a)(1)(i)(D); *see id.* § 102.46(a)(2)(iii). Petitioners' exception and brief do neither with respect to an evidentiary insufficiency underlying the alter ego finding. *See Nova*, 807 F.3d at 316. Hence, petitioners fail to show "the objection[] made before the Board w[as] adequate to put the Board on notice that the issue might be pursued on appeal." *Consol. Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981).

The court is unable to address petitioners' second challenge because it was not presented to the ALJ and petitioners point to no extenuating circumstances that might excuse this failure. *See Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 116–17 (D.C. Cir. 1996). Although the Board did not object that this challenge is forfeited, the union did object on that ground, *see* Intervenor's Br. at 3, and an intervenor can preserve such an argument. *See Masias v. EPA*, 906 F.3d 1069, 1075–76 (D.C. Cir. 2018); *see generally United States v. Olano*, 507 U.S. 725, 733 (1993). Because petitioners waited to raise the issue of equities until they filed their exceptions with the Board, the Board's General Counsel was not on notice of the equities argument at the time of the hearing before the ALJ and consequently did not have "any real opportunity to cross-examine the witness on this point or to provide counterevidence." *Trident Seafoods*, 101 F.3d at 117. Petitioners respond, in a footnote, that forfeiture only applies to new facts that are raised, not legal issues, and thus "the concerns underlying raising a factual issue post-hearing (i.e., a fair opportunity to develop the record) are not present." Reply Br. at 19 n.2. "[A] basic tenet of administrative law [is] that each party to a formal adjudication must have a full and fair opportunity to litigate the issues to be decided by the agency," *Trident Seafoods*, 101 F.3d at 116, because otherwise, "the record developed with regard to that issue will usually be inadequate to support a substantive finding in [the proponent's] favor," *id*. That is the situation here. Petitioners' equities argument relies on factual assertions that the intervening union was neither harmed by Remco's formation nor deceived about Remco's relationship to the other entities. *See* Pet'rs' Br. at 32–36. The union contests petitioners' position on the equities both as a matter of law, insofar as they rely on authority under a different statutory scheme (ERISA) and ignore the Board's precedent and the parties' collective bargaining agreement prohibiting "double-breasted" operations, and as a matter

of the facts shown by the record evidence. Intervenor's Br. at 14–21. Although the Board's brief defends its Decision on the merits, *see* Resp't's Br. at 29–35, relevant facts as regards equities were not fully developed in the record and the ALJ made no findings on harm or deception. "[A] significant issue" not raised before the ALJ is therefore forfeited. *Trident Seafoods*, 101 F.3d at 116.

Accordingly, we dismiss the petition in part, deny the petition in part, and grant the Board's cross-application for enforcement of its Order.

Pursuant to D.C. Cir. Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk