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Protecting a Union's Rights as NLRB Charging Party by Petitioning for Review in the Circuit Court – a New Twist on Procedure

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We all know that winning at the NLRB is hardly the end of the story. The respondent-employer, as a "person aggrieved" by the Board order, likely will file a petition for review in the court of appeals for the circuit where the unfair labor practice occurred or where the petitioner resides or does business, or in the D.C. Circuit (*see* 29 U.S.C. § 160(f)), undoubtedly choosing the court where the case law is most favorable to its position.

However, if the Board dismisses even part of the complaint, the charging party-union may also be a "party aggrieved" by the Board order (even though the order is generally favorable to the union), and will be entitled to file a petition for review of its own. *See Auto Workers v. Scofield*, 382 U.S. 205 (1965) (affirming right of charging party to seek review of dismissal or partial dismissal of complaint). This would give the union an opportunity to select the circuit court.

Where one or more petitions for review of a Board order are filed, the procedures of 28 U.S.C. Section 2112(a) apply. If only one petition for review is filed within ten days of the Board order, and the Board receives a copy of that petition, the Board must file the record in that circuit. *See* 28 U.S.C. § 2112(a)(1). However, where two or more petitions for review of the same Board order are filed in different circuits, the following provision applies:

> If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of

> appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection.

28 U.S.C. § 2112(a)(1). Paragraph (3) of the statute provides that the Board shall notify the Judicial Panel on Multidistrict Litigation, which will choose one of the circuit courts by random selection and order that the Board file the record in that circuit. *See* 28 U.S.C. § 2112(a)(3).

Notably, the statute defines "petition for review" as "a copy of the petition or other pleading which institutes proceedings in a court of appeals and *which is stamped by the court with the date of filing* . . . ." 28 U.S.C. § 2112(a)(2) (emphasis added). Thus, a petition for review is "receive[d]" by the Board only if it has been first "stamped by the court with the date of filing." *Id.* The statute does not define that phrase or any term contained therein. We do know that the "stamped by the court" requirement became law pursuant to an amendment passed in 1988 (*see* Pub. L. No. 100-236, 101 Stat. 1731 (Jan. 8, 1988)), a time when parties filed paper copies of petitions for review that were physically date-stamped by the clerk.

Today, some circuit courts, including the Second Circuit, generally forbid the filing of paper copies of most documents. *See* Second Circuit Local Rule 25.1(g)(2). The Second Circuit requires that a petition for review of an agency decision be filed in portable document format (or PDF) by emailing it to a specified email address. *See* Local Rule 25.1(c)(2). The rules further provide that a petition for review "is considered filed as of the date and time indicated on the email submission." Local Rule 25.1(d)(2). Thus, the actual petition for review of an agency decision is not physically "stamped by the court with the date of filing" as it would have been in 1988. Service on the other party is effected, per Local Rule 25.1(h)(3), by emailing a copy of the electronically filed petition.

The Second Circuit recently dealt with these issues in *Local Union 36, IBEW, AFL-CIO v. NLRB*, No. 10-3448 (2d Cir. Nov. 12, 2010). In that case, the underlying Board decision was generally favorable to the charging party-union, however the Board dismissed part of the complaint. *Rochester Gas & Elec. Corp.*, 355 NLRB No. 86 (2010). Within days, the respondent-employer filed a petition for review in the D.C. Circuit (D.C. Circuit case law is favorable to its position) and provided a copy of its petition to the Board. Before the ten-day period expired, the union filed a petition for review in the Second Circuit (Second Circuit case law is better) and provided a copy of its petition to the Board.

However, the Board did not thereafter refer the matter to the Judicial Panel on Multidistrict Litigation for random selection. Rather, the Board made a motion in the Second Circuit to transfer the union's petition to the D.C. Circuit because, it argued, the copy of the petition it received from the union was not "stamped by the court with the date of filing." 28 U.S.C. § 2112(a)(2). The union had not provided the Board with a copy of the petition that had been physically date-stamped by the court. The union did, however, provide the Board with a copy of the petition along with a copy of the email it sent to the Second Circuit which denoted the official date and time of filing under the local rules of that court.

The Second Circuit denied the Board's motion to transfer, holding that the union's petition satisfied the requirements of Section 2112(a)(2). Specifically, the court found that "where a party files a petition for review in the Second Circuit and then serves the agency with the petition accompanied by the email, bearing the date and time of filing, by which the petition was filed, the party has satisfied the requirements of 28 U.S.C. § 2112(a)(2)." *Local Union 36*, *supra*, at 2-3. The court reasoned that the Board's literal interpretation of the statute did injustice to its obvious purpose, which is "to provide [the agency with] a mechanism to verify that the party filed the petition for review within ten days." *Id.* at 11-12. Accordingly, the court denied the Board's motion.

The petition the Board received from the employer had not been date-stamped by the D.C. Circuit. Since that court's rules require the filing of paper copies and there was no way for the Board to verify that the employer's petition actually had been filed, the only statutorily sufficient petition under 28 U.S.C. Section 2112(a)(2) was that of the union. Consequently, the Board moved to transfer the employer's petition to the Second Circuit.