UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD, Defendant.	Case No. 20-cv-00675-KBJ

PLAINTIFF'S MOTION FOR RECONSIDERATION

Pursuant to Rule 5(e) of the Court's General Order and Guidelines for Civil Cases Before Judge Ketanji Brown Jackson, Plaintiff AFL-CIO hereby moves for reconsideration of that portion of the Opinion (ECF No. 36) issued on June 7, 2020, in this case that concludes that "At the AFL-CIO's request, the Court has not proceeded further to consider the AFL-CIO's remaining substantive APA challenges." Opinion at 52. Plaintiff has conferred with the Defendant National Labor Relations Board (NLRB) on this motion, and the NLRB opposes the motion.

In support of this Motion, the AFL-CIO states:

1. The AFL-CIO did not and could not have previously raised this issue because the AFL-CIO did not knowingly request that the Court need not or should not reach Counts Two, Three and Four of the Complaint even if it did not grant summary judgment in full on Count One, invalidating all parts of the rule; the Defendant NLRB never argued that the AFL-CIO had so requested, and the AFL-CIO was unaware until the issuance of the Opinion that the Court

believed the AFL-CIO had so requested. This motion, therefore, meets the requirements of Fed. R. Civ. P. 59(e) and 60(b); namely, that the Court may alter or amend a judgment based on mistake, inadvertence, or surprise based on a motion filed no later than 28 days after the entry of judgment.

2. The AFL-CIO believes that this Court was mistaken in stating that the AFL-CIO requested that the Court not proceed to Counts Two, Three, and Four of the Complaint if the Court granted any relief under Count One. The AFL-CIO did not suggest to the Court that it need not or should not reach Counts Two, Three, and Four of the Complaint if it did not grant summary judgment in full on Count One, and did not invalidate all parts of the rule. Instead, as demonstrated below, the AFL-CIO's suggestion that the Court did not need to proceed to Counts Two to Four was always premised on the Court's agreement with the AFL-CIO's argument that the provisions of the NLRB's rule were non-severable, and therefore, the entire rule was invalid on notice and comment grounds.

3. To begin, in both its opening Memorandum in Support of Motion for Summary Judgment (ECF No. 23-1) and in its Opposition to the Defendant's Cross-Motion for Summary Judgment (ECF No. 29), the AFL-CIO stated only that if the Court granted summary judgment on Count One of the Complaint *in full*, the Court need not address the other counts because all parts of the rule would have been struck down on notice and comment grounds.

4. The opening Memorandum began, after a short introductory paragraph, by noting that the Complaint (ECF No. 1) included four "grounds for invalidation" of the NLRB's Representation Case Rule. *See* Opening Mem. at 1-2. The Memorandum, in describing the "primary" ground for invalidation as the failure of the agency to satisfy the APA's notice-and-comment requirement, made a point of including a parenthetical explaining that this "primary" ground was

Count I of the Complaint. *Id.* at 1 ("The primary ground for invalidation (Count One) is that the NLRB's 2019 election rule was adopted without notice and comment."). Count One, in turn, included paragraphs numbered 43-50, and those paragraphs set forth, not only allegations stating that five "central" parts of the Rule were not "procedural" for purposes of the APA's notice-and-comment requirement, but also this crucial allegation as to the Rule as a whole:

> 47. The central parts of the 2019 election rule are not procedural rules as defined in the APA *and all other parts of the 2019 election rule are not severable from those central, substantive parts*.

Compl. ¶ 47 (Emphasis added.)

5. On the basis of that allegation, the theory of Count One was that the *entire* Rule was invalid, not just the five central, substantive parts—a point highlighted on page 2 of our Opening Memorandum:

> If the Court agrees with Plaintiff's primary claim that the NLRB promulgated the 2019 election rule in violation of the APA's notice-and-comment requirement, the Court may grant summary judgment and remand the rule to the Board without reaching Plaintiff's alternative grounds for invalidating the rule.

The reference to the Court's agreement with Plaintiff's "primary claim" was thus a reference back to Count One, which expressly alleged that the *entire* 2019 election rule was invalid. And the structure of the balance of the Opening Memorandum reflected that the relief the AFL-CIO sought in connection with Count One was invalidation of the entire Rule, for the argument made in Section I of that Memorandum had two components: first, a series of arguments that five central provisions of the Rule were not procedural (corresponding to Parts I.A. through I.E); and, second, an argument that the remaining provisions were not severable (corresponding to Part I.F). The severability argument, in other words, was not made outside the ambit of Count One but was part and parcel of our effort to establish that the appropriate relief, if the Court agreed

with our submission as to Count One, was a grant of summary judgment invalidating the entire rule, not partial summary judgment as to the five non-procedural parts of the Rule.

6. Similarly, the Memorandum in Opposition stated:

> In our opening Memorandum (at 12-29), we demonstrated that the National Labor Relations Board's (NLRB's) promulgation of Representation – Case Procedures, 84 Fed. Reg. 69,524 (Dec. 18, 2019) (the "2019 election rule") without notice and comment violated the requirements of the Administrative Procedure Act (APA). If the Court agrees, it should vacate the rule on that basis alone and thereby permit the Board to address the rule's general and specific logical flaws and erroneous empirical claims, as well as its inconsistency with the National Labor Relations Act (NLRA), after giving the public notice and providing an opportunity for comment.

Opp. Br. at 1. The reference to pages "12-29" in the parenthetical was to Section I of the opening Memorandum addressing Count One, *including* Part I.F, which argued for non-severability.

7. The AFL-CIO's position in this regard was further confirmed by the Motion for Clarification (ECF No. 35). In the Motion, the AFL-CIO stated:

> If the Order is interpreted to permit the Board merely to declare victory and put into immediate effect all of the provisions constituting the remainder of the Rule, that would be tantamount to interpreting it as having agreed with the NLRB on severability *and* granted the NLRB's cross-motion for summary judgment as to Plaintiff's Counts Two, Three, and Four rather than as having denied the motion as to those counts. It would also be tantamount to an Order rejecting on the merits the AFL-CIO's challenge to those provisions in the remainder of the Rule that were not challenged on notice-and-comment grounds, including, for example, the provision requiring impoundment of ballots. The Court did not reach those issues because they were potentially rendered moot by the directive to the Board to reconsider all aspects of the remainder of the Rule.

Mot. for Clarification at 5 (emphasis added). The Motion for Clarification asked this Court to clarify its original Order to make clear that the Court "(2) does not reach, but reserves, all challenges to any aspects of the Rule that the Board decides should be implemented." *Id.* at 7.

8. Once it is recognized that Count One included, as an integral component, the allegation that the procedural parts of the Rule are not severable from the non-procedural parts, then the puzzlement that the Court expressed as to the AFL-CIO's litigation strategy in the following passage should be cleared up.:

> In the instant case, the AFL-CIO might well have argued that, even if this Court agreed that the challenged provisions of the 2019 Election Rule are unlawful on notice-and-comment grounds, the Court should nonetheless proceed to reach the merits of its alternative claims that the 2019 Election Rule must be vacated in its entirety because it is arbitrary and capricious or violates the NLRA. (See Compl. ¶¶ 51, 81.) But, *for whatever reason*, the AFL-CIO maintained that this Court need not reach its other claims, apparently assuming that the Court would agree with its severability analysis.

Opinion at 48 n. 13 (emphasis added). This passage treats the severability analysis as something distinct from Count One; and. if that analysis were indeed distinct from Count One rather than embedded within it in paragraph 47, then it would be true that the AFL-CIO's decision to request that the Court not address the fully briefed Counts Two, Three, and Four would seem to lack any "reason." But the AFL-CIO fully briefed Counts Two, Three, and Four precisely because it recognized that, if the Court disagreed as to the severability argument embedded in Count One, then the Court would have to do more than find that the five central provisions enumerated in Count One were non-procedural. In other words, the AFL-CIO's briefing clearly demonstrates that it did not engage in a gamble that the Court would agree with it on severability. That is why we stated on page 2 of our Opening Memorandum that the Court could avoid reaching Counts Two, Three, and Four only if it agreed with our submission as to Count One in full, including that no provision of the rule was severable.

9. The Court's opinion cites one page of the AFL-CIO's Memorandum in Support of Motion for Summary Judgment[1] and two pages of the transcript as the basis of its understanding that the AFL-CIO "maintained that this Court need not reach its other claims. . . . (*See* Pl.'s Mot. for Summ. J. at 4, Hr'g Tr. at 38-39)." Opinion at 48 n. 13. But on page 4, the Memorandum contains no relevant discussion. The only possibly relevant language in the Memorandum is on page 2, which includes the "primary claim" passage that we discussed *supra* ¶ 5. That passage, as we explained, cannot fairly be read to constitute an assertion by the AFL-CIO that, even if the Court agreed only with only *part* of Count One, the AFL-CIO was content to forego a ruling on all of the other Counts. Similarly, pages 38 and 39 of the Transcript do not contain any discussion of whether the Court need reach Counts Two, Three, and Four of the Complaint, but rather concern the substance of Counts Two and Three, *i.e.* whether the Final Rule, as a whole and in its component parts, is arbitrary and capricious. Elsewhere, the Transcript shows that counsel for the AFL-CIO made clear that "if the Court agrees that the rule is substantive and that the Board should have engaged in notice and comment, then our

[1] The Opinion actually cites the Motion for Summary Judgment (ECF No. 23), but the Motion is only two pages long so we believe the Court intended to cite the Memorandum in Support. Moreover, the Motion states in its entirety:

> Pursuant to Federal Rule of Civil Procedure 56, Plaintiff American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") moves for summary judgment for the reasons set forth in the accompanying Memorandum of Points and Authorities, which incorporates a statement of facts with references to the administrative record. As shown by the Memorandum, (a) Defendant's rule, Representation-Case Procedures, 84 Fed. Reg. 69,524 (Dec. 18, 2019), was promulgated without notice and comment in violation of the Administrative Procedure Act, 5 U.S.C. § 500, et seq.; (b) the rule is arbitrary and capricious; and (c) the rule is inconsistent with the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq*. For these reasons, Plaintiff respectfully requests that this Court grant its motion for summary judgment and set aside and vacate the rule.

Mot. for Summ. J. at 1.

view is that it should send the rule in its entirety back to the Board, have it go through notice and comment." Tr. at 31. In the context of an argument in which counsel specifically addressed Counts Two through Four, *see, e.g.*, Tr. at 30, 36-41, we believe that statement in argument should be understood to mean "if the court agreed that the rule is substantive in its entirety because the procedural elements are not severable." But, in any event, the statement is clearly not the type of "unambiguous" concession as well-established precedent requires for a court to rely on a concession made in oral argument. *Crowe v. Coleman*, 113 F.3d 1536, 1542 (11th Cir. 1997). A review of the transcript demonstrates there was no such unambiguous concession in this case.

10. The claims stated in Counts Two, Three, and Four of the Complaint remain unresolved in important parts. Count Two alleged the rule is arbitrary and capricious as a whole. Count Three alleged that specific portions of the rule are arbitrary and capricious, including proposed new Section 102.67(c), requiring impounding of the ballots in any case where a party files a request for review with the Board within ten business days of the direction of election and requiring that the ballots not be opened until the Board rules on the request. Count Four alleged that specific portions of the rule are inconsistent with the National Labor Relations Act, also including proposed Section 102.67(c).

The continued importance of the claims that portions of the rule that the Board has now implemented are invalid is illustrated by Section 102.67(c), which was challenged in Courts Two, Three and Four. *See* Opening Mem. at 39, 42 (concerning Counts Three and Four). As set forth in Plaintiff's Memorandum in Support of Motion for Summary Judgment, that portion of the rule, now in effect, will make it more likely that employers will make unlawful unilateral changes that will frustrate later collective

bargaining and, in any case, is directly contrary to NLRA § 3(b), as the Board explicitly described the provision as a "stay" of the Regional Director's action in the preamble to the Final Rule. *See* Opening Mem. at 40, 42-43 (quoting 84 Fed. Reg. at 69,596). In addition, by delaying the tally of ballots, that portion of the rule also necessarily delays certification and, as the Court's Opinion states, the delay of certification "until any request for review has been decided by the Board . . . delays employees' procurement of significant statutory rights that depend on the NLRB's certification." Opinion at 40.[2] Thus, the unadjudicated challenges to that portion of the rule and others remain important.

For the above-stated reasons, Plaintiff request that the Court reconsiders that portion of its Opinion that states, "At the AFL-CIO's request, the Court has not proceeded further to consider the AFL-CIO's remaining substantive APA challenges." Opinion at 52. Plaintiff requests that the Court (1) grant partial summary judgment to the Plaintiff on Count One of its Complaint, finding the five specifically challenged portions of the rule invalid because they were issued without notice and comment, (2) not remand the case to the Board because the Board has already expressed its position on severability, and (3) proceed to rule on Counts Two, Three, and Four. Such a result would comport with judicial economy and efficiency, as the parties have fully briefed their positions on Counts Two, Three, and Four; the contrary result—requiring a new complaint reasserting the same allegations as those contained in those three counts—would obligate both the parties and the Court to engage in duplicative efforts.

[2] As we demonstrated in our Memorandum in Support of Motion for Summary Judgment, that delay is often extended, routinely lasting a year or more. *See* Opening Mem. at 24 & n. 17.

Dated: June 9, 2020

Respectfully Submitted,

/s/ Leon Dayan
Leon Dayan (D.C. Bar No. 444144)
Bredhoff & Kaiser, P.L.L.C.
805 15th Street, NW, Ste. 1000
Washington, D.C. 20005
Phone: (202)-842-2600
E-mail: ldayan@bredhoff.com
.
James B. Coppess (D.C. Bar No. 347427)
Matthew J. Ginsburg (D.C. Bar No. 1001159)
Maneesh Sharma (D.C. Bar No. 1033407)
(application for admission pending)
AFL-CIO Legal Department
815 16th Street, NW
Washington, DC 20006
Phone: (202)-637-5337
E-mail: jcoppess@aflcio.org
E-mail: mginsburg@aflcio.org
Email: msharma@aflcio.org

Counsel for Plaintiffs