

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAYNES BUILDING SERVICES, LLC)	
)	
Petitioner/Cross Respondent)	
)	Nos. 16-1099, 16-1136
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	
Respondent/Cross Petitioner)	
)	

**REPLY TO THE OPPOSITION OF HAYNES BUILDING SERVICES TO THE
MOTION OF THE NATIONAL LABOR RELATIONS BOARD
TO SUPPLEMENT THE RECORD**

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate
General Counsel, hereby responds to the opposition of Haynes Building Services,
LLC (“the Company”) to the Board’s motion to supplement the agency record.

1. On September 6, 2016, the Board moved to supplement the record to
include the Notice of Ratification issued by the Board’s General Counsel, Richard
J. Griffin, Jr., on October 22, 2015. On September 13, 2016, the Company
opposed the Board’s motion, asserting that the ratification is not part of the record.
As we show below, that opposition is meritless.

2. As the Board indicated in its motion, the record on review consists of the order involved, “any findings or report on which it is based,” and “the pleadings, evidence, and other parts of the proceedings before the [Board].” Fed. R. App. P. 16(a). Contrary to the Company’s claim (Opp. at 8), the Notice of Ratification falls well within that broad definition. Specifically, the ratification constitutes a part “of the proceedings before the [Board].” Fed. R. App. P. 16(a). A Board order issued in any case is necessarily predicated on a complaint. *See* 29 U.S.C. § 160(b). Here, the Notice of Ratification informed the parties and the Board that General Counsel Griffin, after reviewing the original complaint, had exercised his discretion in deciding that the issuance and continued prosecution of the complaint were proper. The ratification therefore is inextricably linked to and a component of the original complaint, and the Board’s Order, issued months after the ratification, acted on that ratified complaint. Under these circumstances, the complaint and its subsequent ratification are clearly part of the “proceedings before the Board.”

3. Moreover, the Board’s Rules and Regulations establish that the ratification constitutes part of the administrative record. Specifically, the record is defined as: “The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic

report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs." 29 C.F.R. 102.45(b). The ratification of an original complaint falls within the term "complaint and any amendments thereto." As explained above, the ratification is inextricably linked to and a part of the complaint itself such that it is properly included in the record.

4. Significantly, the Company's 14-page opposition is silent regarding the undisputed fact that it received notice of the October 22, 2015 ratification. In its motion, the Board included the service affidavit, which establishes that the Company was served with the Notice of Ratification. (Attachment A of Board's Mot. Supp.) Moreover, that notice included a cover letter containing the General Counsel's direction to the Board's Executive Secretary to place the document in the case record. (Attachment B of Board's Mot. Supp.) Notably, in May 2015, opposing counsel affirmatively reached out to Board counsel asking whether the Board would amend the certified list to include, among other documents, the General Counsel's ratification.¹ (*See* Attachment A to this Reply.)

Having received notice of the ratification, the Company cannot now credibly claim that the ratification "was not raised at any point" (Opp. at 9) or that the

¹ Board counsel acknowledged the oversight and indicated that the Board would include the ratification in the record, which the Board ultimately sought to do with the subject motion on September 6, 2016.

Board is “attempt[ing] to introduce new evidence on appeal.” (Opp. at 9). Once the Company was put on notice of the General Counsel’s action, the Company had the opportunity to lodge any objections to the ratification at that time, and it could have done so by various means. For example, as the Board pointed out in its responsive brief to the Court, other parties before the Board have seized the opportunity to challenge certain ratifications. *See, e.g., Adriana’s Ins. Servs.*, 364 NLRB No. 17, 2016 WL 3085828, at *1 n.1 (May 31, 2016) (noting that employer filed response challenging Griffin’s ratification notice), *petition for review filed*, No. 16-1190 (D.C. Cir. June 10, 2016).² Despite undisputedly receiving notice of the ratification and the General Counsel’s request to have it placed in the record, and despite having ample opportunity to raise all of the concerns it is only just now raising (*see* Opp. at 10-11), the Company remained silent. For that same reason, the inclusion of the ratification in the record does not implicate the Company’s due process rights. (Opp. at 11-13.) The Company received notice of the ratification and chose not to contest it. Knowing silence on its part cannot provide the basis for a due process violation.

5. None of the Company’s remaining challenges to the Board’s inclusion in the record of the ratification is persuasive. The fact that the parties stipulated to

² Indeed, the Company could have availed itself of the very process it claims the General Counsel should have used (Opp. at 8), namely, it could have sought to file a supplemental brief challenging the ratification. *See* 29 C.F.R. § 102.46(h).

a record before the administrative law judge (Opp. at 8) has no bearing on what constitutes the *administrative* record on appeal. If the stipulated record were the exclusive source of the administrative record, nothing that occurred *after* the stipulation, such as the judge's decision itself, exceptions, cross-exceptions, and answering briefs, would be considered part of the administrative record. Further, the Company's position would allow the parties to determine through a stipulation, rather than through the federal rules and the Board's rules and regulations, the contents of the administrative record. In short, the parties here stipulated to a record in order to waive a hearing; they did not, nor could they, stipulate to the administrative record. Likewise, counsel cannot alter the federal rule and the regulatory definition of the administrative record by agreeing to a set of designations for the appendix. Opp. at 6-7. As the Advisory Committee Notes on Appellate Rules state with respect to Rule 30(a), "the Appendix is not the record."

Further, the Company's suggestion (Opp. at 12) that the General Counsel should have raised the issue of ratification before the parties filed their joint stipulation on November 15, 2013, turns a blind eye toward the procedural history of this case and defies logic. While General Counsel Griffin's tenure began in November 2013, he did not ratify the complaint until October 2015. It is therefore unreasonable to contend that the General Counsel should have raised the issue of ratification at the time of the parties' stipulation or prior to the issuance of the

administrative law judge's decision (February 7, 2014) when the General Counsel had not yet decided to ratify the complaint.

Finally, the Company's contention (Opp. at 8) that the General Counsel should have used 29 C.F.R. § 102.48 to reopen the record to admit the ratification misreads that regulation, which provides for the reopening of the record *after* the Board's decision or order. *See* 29 C.F.R. § 102.48(d). Here, because the ratification issued and the parties received it four months *before* the Board's Decision and Order, the General Counsel did not need to move to reopen the record, and the Board, by including a document in the record that existed before it closed, is not, contrary to the Company's assertion, "creat[ing] a new record on appeal by fiat." (Opp. at 8.)

WHEREFORE, the Board respectfully requests that the Court supplement the record to include the October 22, 2015 Notice of Ratification.

Respectfully submitted,

s/ Linda Dreeben

Linda Dreeben
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National Labor Relations Board
1015 Half Street S.E.
Washington, DC 20570-0001
(202) 273-1714

Dated at Washington, DC
this 23rd day of September 2016

Sheehy, Barbara

From: Sheehy, Barbara
Sent: Tuesday, May 31, 2016 5:59 PM
To: 'Rami Yomtov'
Subject: RE: Haynes v. NLRB

Just an FYI – we plan to file the amendment to the cert list (to include the ratification letter) by the end of this week. Thanks.

From: Sheehy, Barbara
Sent: Monday, May 23, 2016 11:54 AM
To: 'Rami Yomtov' <ryomtov@brgslaw.com>
Cc: Darla Salter <dsalter@brgslaw.com>; Zareh A. Jaltorossian <ZJaltorossian@brgslaw.com>
Subject: RE: Haynes v. NLRB

Hi Rami,

I checked in with the individuals who are responsible for every record we certify and asked them to help with your questions. Under the regs, briefs in support of exceptions are not part of the record. Answering briefs and exceptions themselves are part of the record, but not briefs in support of exceptions. Additionally, in stipulation cases the record only includes those documents in the joint stipulation. As for the ratification letter, that was an oversight and should have been included. We'll file a motion to supplement the record later this week.

Thanks.

From: Rami Yomtov [mailto:ryomtov@brgslaw.com]
Sent: Thursday, May 19, 2016 7:28 PM
To: Sheehy, Barbara <Barbara.Sheehy@nlrb.gov>
Cc: Darla Salter <dsalter@brgslaw.com>; Zareh A. Jaltorossian <ZJaltorossian@brgslaw.com>
Subject: Haynes v. NLRB

Hi Barbara,

We reviewed the Certified List of Record that was filed earlier this week and it looks like a few items were missing: (1) Respondent's 4/11/14 Brief in Support of Exceptions to the ALJ's decision; (2) not all of the Exhibits that were filed in connection with the Joint Motion to Transfer were listed; and (3) the 11/10/15 Notice of Ratification. Will you be filing an amended Certified List? Let us know, thanks.

Rami

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2016, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street S.E.
Washington, DC 20570-0001
(202) 273-1714

Dated at Washington, DC
This 23rd day of September 2016