IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al.*,	)	Case No. 1:11-cv-01629-ABJ
	)	
	)	Judge Amy Berman Jackson
Plaintiffs,	)	
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION TO SUPPLEMENT COMPLAINTS

The Coalition for a Democratic Workplace ("CDW"), National Right to Work Legal Defense and Education Foundation, Inc. ("NRTW"), National Federation of Independent Business ("NFIB"), Southeast Sealing, Inc. and Racquetball Centers, Inc. (hereafter collectively the "Plaintiffs") hereby submit this Reply to Defendants' Opposition to Plaintiffs' Motion to Supplement Complaints. For the reasons explained below, Defendants have failed to justify their contentions that Plaintiffs' Motion is either futile or prejudicial, and Plaintiffs' Motion should therefore be granted.

1. **Plaintiffs Have Standing To Challenge The Invalid Appointments In This Case**.

Defendants first argue that Plaintiffs lack standing to challenge the Board's implementation and enforcement of the Notice Rule notwithstanding the Board's loss of its quorum, as alleged in Plaintiffs' Motion and attached supplemental pleadings. (Opp. at 5). Defendants argue that Plaintiffs must demonstrate that the harm they will suffer from the challenged rule has been "caused" by the January appointments. Defendants further assert that

such a showing cannot be made because the Board had a quorum when the rule was actually promulgated, and "no action of the newly-constituted Board is required in order for employers to be under a legal obligation to post the required notice of employee rights" when the effective date arrives on April 30, 2012. (*Id*.). Defendants are mistaken as to the facts and the law.

First, Defendants cite no legal authority for the proposition that an agency rule can take effect on a date subsequent to the expiration of the agency's authority to act once the agency's quorum has been lost. There appears to be no such case, *i.e*., this is a case of first impression, because no agency has previously had the temerity to act beyond the scope of its authority in such a manner. The only case cited by the Board for its contention, *Braniff Airways, Inc. v. Civil Aeronautics Bd*., 379 F.2d 453 (D.C. Cir. 1967), is completely inapposite. *Braniff* did not involve promulgation of a rule whose effective date arose after the loss of a quorum. Instead, all that was at issue in that case was the "ministerial act" of service (a day late) of an order that was properly signed and issued by a fully constituted Board.

In the present case, as a result of the Board's delay of the effective date of the challenged rule, the rule will not go into effect until nearly four months after the Board has lost its quorum to transact business. This case thus does not turn on a one-day, ministerial act of service of an order on individual parties, but on the nationwide implementation of an unprecedented new obligation being imposed on six million employers by a Board that no longer has the quorum needed to implement or enforce its new rule.

Under such circumstances, it is absurd for Defendants to argue that no further Board action is required to impose the new rule. Indeed Defendants' claim is belied by the Board's own actions. Among other things, since January 4 the Board has issued announcements and instructions to employers on its website regarding the new rule's implementation; has issued

letters to employers (prematurely) telling them that compliance with the Rule is required; and has otherwise taken affirmative steps to implement the Notice Rule, all without a valid quorum to transact business. These actions, which Plaintiffs contend are unauthorized and unlawful, plainly threaten harm to Plaintiffs and to the millions of employers and workers whose interests are represented in this proceeding.

2. Plaintiffs' Contention That The Recent Board Appointments Are Unconstitutional And Invalid Is Ripe For Immediate Review.

Equally wrong is the Defendants' further contention that Plaintiffs' challenge to the Board's authority to enforce the Notice Rule is somehow "speculative" or otherwise not "ripe." (Opp. at 7-8). Defendants cannot have it both ways: They cannot claim that Plaintiffs are "obligated" to comply with the new rule (see above) and at the same time assert that Plaintiffs' fears of Board enforcement of the Rule are "speculative." Yet Defendant argue that Plaintiffs cannot complain about the Board's lack of authority to enforce the rule until the Board actually decides an enforcement action. That is not the law.

Whether a case is ripe for judicial review depends upon an evaluation of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner,* 387 U. S. 136, 152-154 (1967). Under this two-pronged test, it is well settled that "a substantive rule which as a practical matter requires plaintiffs to adjust their conduct immediately" is ripe for review "at once." *National Ass'n Of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1283 (D.C. Cir. 2005) (quoting *Lujan v. National Wildfire Federation*, 497 U.S. 871 (1990)). As the D.C. Circuit further explained: "'[I]f the possibility ... of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule ... would ever be final as a matter of law.' That the [agency] retains some measure of discretion with respect to the

[rule] does not make the appellants' purely legal challenge unripe…. We see no reason here to 'wait for a rule to be applied to see what its effect will be.'" *Id*. at 1282 (citation omitted) (quoting *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002), and *Atl. States Legal Found. v. EPA*, 325 F. 3d 281, 284 (D.C. Cir. 2003)).

Defendants' response (Opp. at 9) dwells at length on the three different enforcement mechanisms by which the Board has announced that it will enforce the challenged rule, ignoring the fact that Plaintiffs have brought a facial challenge against the *entire* Rule, including *all* of these enforcement mechanisms. Such a facial challenge is plainly ripe for review under the cases cited above. Also contrary to Defendants' response (*id*.), it is irrelevant whether the General Counsel has some measure of discretion during the enforcement process or whether some unknown number of future unfair labor practice cases may settle. (Opp. at 10). The simple fact remains that the Board has explicitly refused to make the new rule voluntary on the part of employers. 76 Fed. Reg. 54031. The challenged rule therefore requires employers across the country to adjust their conduct immediately or else face some form of enforcement from an unlawfully constituted Board. For this reason as well, all issues regarding the Board's lack of authority to enforce the challenged rule, including the Board's current lack of a quorum, are plainly fit for immediate judicial review.

Even more compelling is the "hardship" prong of the ripeness test set forth above. As previously noted, millions of employers are faced with immediate confusion and uncertainty as to their notice posting obligations due to the widely publicized questions regarding the constitutional legitimacy of the current Board. Absent immediate judicial review of the validity of the recent Board appointments, such widespread confusion will continue and the Board's authority will be challenged *ad hoc* in multiple cases. Indeed, it should be in the Board's interest,

as well as Plaintiffs', to have the serious pending questions regarding the Board's authority to transact business resolved as soon as possible. As the D.C. Circuit has repeatedly held, where there is no institutional interest in postponing review, and there is resultant hardship to the parties and the public interest from such a postponement, the case should be considered ripe for immediate review. *National Ass'n of Home Builders*, 417 F.3d at 1283-84; *Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1035, 1041 (D.C. Cir. 1991).[1]

3. **The Board Is Not At All Prejudiced By The Supplemental Pleadings, Which Will Serve The Interests Of All Parties By Preventing Piecemeal Litigation**.

Defendants are mistaken in their contention that the motion to supplement pleadings should be denied here because the motion so radically alters the scope and nature of the case as to cause prejudice and/or delay. It was the Administration which injected this issue into the current litigation by allowing the Board to lose its quorum, by making appointments to the Board that violated the Appointment Clause of the Constitution, and by attempting to substitute the invalidly appointed Board members as Defendants in this action. Faced with these actions defying the plain language of the Constitution, Plaintiffs have acted in a timely manner in order to seek judicial relief from the Board's unauthorized actions as quickly as possible in this ongoing litigation.

The only case cited by Defendants to support the denial of supplemental pleadings bears no similarity to the present case. (Opp. at 12). *See Mississippi Ass'n of Cooperatives v. Farmers Home Admin*., 139 F.R.D. 542, 544 (D.D.C. 1991) (attempt to transform FOIA lawsuit into an unrelated complaint of racial discrimination). Unlike such an inapposite case, courts in this and

[1] As an added ground for ripeness, the question of the Board's authority is inextricably linked to the severability issue now being considered by the Court. If the Court finds that the rule is somehow severable and requires that some portion of the rule should be severed, then the Board would necessarily have to determine whether to implement the amended rule or to withdraw it entirely. But if the Board lacks authority to transact business due to the absence of a quorum, then the Board can neither make that determination nor implement the amended rule.

other circuits have freely granted motions to supplement pleadings where granting the motion has allowed an entire controversy between the parties to be more expeditiously resolved than would otherwise occur via piecemeal litigation. *See Jones v. Bernanke*, 685 F. Supp. 2d 31, 42 (D.D.C. 2010); *see also Flue-Cured Tobacco Coop. Stabilization Corp. v. United States*, 4 F. Supp. 2d 435 (M.D. N.C. 1998) ("[Supplemental pleadings are] a useful device, enabling a court to award complete relief, or more nearly complete relief, in one action, and to avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted. So useful they are and of such service in the efficient administration of justice that they ought to be allowed as of course, ….).

It is surely true here that granting Plaintiffs' motion to supplement will allow the entire controversy over the Board's authority to impose new obligations on millions of employers to be most expeditiously resolved. Plaintiffs' original complaints each questioned the Board's statutory authority to promulgate, implement and enforce the new rule. The questions that have been newly raised regarding the validity of the Board appointments impact directly on the same issues by challenging the Board's statutory authority to transact any business at all. The small amount of additional time required to address the purely legal issues presented by Plaintiffs' motion constitutes insufficient ground to deny the motion. It is plainly in the public interest to resolve the serious questions regarding the Board's authority as soon as possible.

Conclusion

For each of the foregoing reasons and those set forth in the Memorandum in support of Plaintiffs' original motion to supplement the pleadings, Plaintiffs' motion should be granted.[2]

Respectfully submitted,

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[2] Defendant's Opposition at 1 n.1 further errs in stating that substitution of the new Board appointees under Fed. R. Civ. P. 25(d) is "automatic." To the contrary, substitution is improper where no successor has been validly appointed. "Rule 25(d) can only be satisfied by a successor in office." *Fleming v. Taylor*, 70 F. Supp. 222, 224 (N.D. Tex. 1947); *see also* 2 Barron & Holtzoff, Federal Practice and Procedure § 626 (Wright ed. 1961), 27 F.R.D. 221, 240 (1961) (a "successor can hardly be automatically substituted until there is a successor.") There is no successor where one has not been validly appointed. *See Fleming*, 70 F. Supp. at 224.