

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MIKE-SELL’S POTATO CHIP COMPANY)	
)	
Petitioner)	Case No. 13-1139
)	
v.)	Board Case No.
)	09-CA-072637
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent)	
)	

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD
FOR DISMISSAL OF CASE**

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, respectfully requests that the Court dismiss this case because the Board, pursuant to Section 10(d) of the National Labor Relations Act (29 U.S.C. §160(d)), has vacated the order pending before the Court. In support of this motion, the Board shows as follows:

1. On March 19, 2013, the Board issued a Decision and Order in this case, which is reported at 359 NLRB No. 86.
2. Petitioner filed a petition for review of that Order on April 19, 2013. The Court put the case in abeyance on April 25, 2013, before the Board filed the record.

3. Section 10(d) of the NLRA provides that, “[u]ntil the record in a case shall have been filed in a court, . . . the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.” Exercising its Section 10(d) authority, the Board on June 27, 2014, issued an Order setting aside the Decision and Order currently pending review in this case. It did so in response to the Supreme Court’s decision in *NLRB v. Noel Canning*, No. 12-1281, ___ S. Ct. ___, 2014 WL 2882090 (June 26, 2014). The Board’s Order is attached.

4. The Board’s exercise of its Section 10(d) authority is in accord with long-established precedent. The Supreme Court has explained that Section 10(d) empowers the Board, before the filing of the record, “to vacate or modify its orders.” *In re National Labor Relations Board*, 304 U.S. 486, 494 (1938). In that case, the Court further held that, because the Act so empowers the Board, “it does not confer jurisdiction upon the reviewing court to prohibit the exercise of the granted power.” *Id.* As the Court concluded, while the Act “plainly indicates that the purpose was to give the court full and exclusive jurisdiction to review the Board’s order in the respects indicated by the act once the transcript of the Board’s proceedings is before it[, i]t is equally plain that the court is to have no power to prevent the Board from vacating or modifying its order prior to such plenary submission of the cause.” *Id.*

5. Because the Board has exercised its authority to set aside the Decision and Order that is the subject of the petition for review, there is no order pending this Court's review. *See In re National Labor Relations Board*, 304 U.S. at 495 (observing that had the circuit court not improperly restrained the Board, "its order would have been vacated and there now would be no order outstanding"). Accordingly, the case must be dismissed. *See Harris v. NLRB*, 100 F.2d 197, 197 (3d Cir. 1938) (dismissing case where Board vacated order to be reviewed prior to filing of record). Numerous unreported orders of this Court are in accord. *See, e.g., Fred Meyer Stores, Inc. v. NLRB*, Case No. 10-1010 (D.C. Cir., dismissed Aug. 19, 2010), *Regency Heritage Nursing & Rehab. Ctr. v. NLRB*, Case Nos. 09-1132, 09-1146 (D.C. Cir., dismissed Aug. 19, 2010); *Starbucks Corp. v. NLRB*, Case Nos. 09-1273, 09-1295 (D.C. Cir., dismissed Aug. 19, 2010).

WHEREFORE, the Board respectfully requests that this Court dismiss this case.

Respectfully submitted,

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington DC 20570
(202) 273-2960

Dated at Washington, DC
this 30th day of June 2014

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MIKE-SELL'S POTATO CHIP Co.

and

Case 09-CA-072637

BAKERY, CONFECTIONARY, TOBACCO
WORKERS AND GRAIN MILLERS
INTERNATIONAL UNION, LOCAL 57
AFL-CIO-CLC,

ORDER

On March 19, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No.86.

Thereafter, an application for enforcement and/or petition for review was filed in the United States Court of Appeals for the District of Columbia. Subsequently, the court ordered that the proceedings be held in abeyance, and the record in this case was not filed with the court.

On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning, a Division of the Noel Corp.*, No. 12-1281, S.Ct., 2014 WL 2882090 (June 26, 2014). In view of the Court's decision in *Noel Canning*, pursuant to Section 10(d) of the National Labor Relations Act, the Board hereby sets aside the above-referenced Decision and Order.¹ The

¹ Section 10(d) states "[u]ntil the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." See also *In re NLRB*, 304 U.S. 486 (1938)

Board will retain this case on its docket and take further action as appropriate.

Dated, Washington, D.C., June 27, 2014

By direction of the Board:



Gary Shinnors
Executive Secretary

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CERTIFICATE OF PARTIES

Pursuant to Circuit Rule 27(a)(4), counsel for the Board certifies the following: Mike-Sell’s Potato Chip Co., the petitioner herein, was the respondent in the case before the Board. The Board is the respondent herein, and the Board’s General Counsel was a party to the case before the Board. The Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 57, AFL–CIO–CLC, was the charging party before the Board.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 30th day of June 2014

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2014, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the foregoing 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
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 30th day of June 2014