In the United States Court of Appeals for the District of Columbia Circuit

Nos. 15-1112 & 15-1209

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CNN AMERICA, INC., RESPONDENT

RESPONDENT'S STATEMENT OF ISSUES TO BE RAISED

Respondent CNN America, Inc. (CNN) states that it expects to raise the following issues in support of its petition for review:

1. In this case, two members of a divided panel of the National Labor Relations Board, over the strenuous dissent of their colleague, abandoned the Board's long-standing rule that, before a company will be considered a joint employer for purposes of the National Labor Relations Act (NLRA), the company must have exercised direct and immediate control over the terms and conditions of employment. The panel majority then ruled that CNN was a joint employer of the employees of two contractors that until

2003 provided camera, audio, and other technical support to the network's D.C. and New York bureaus.

(a) Did the panel majority err in discarding a rule that had stood for thirty years without providing any rational explanation for the change?

(b) Did the panel majority err in applying its new rule retroactively and without notice, without considering whether retroactive application is fair or appropriate?

(c) Was the dissent correct that, under the Board's established joint-employer standard, CNN is not a joint employer, where it had no direct role in hiring, firing, disciplining, discharging, promoting, or evaluating employees, and for twenty years the unions engaged in collective bargaining solely with CNN's contactors?

2. Did the panel majority err in concluding that CNN became a successor employer upon the hiring of its own workforce in 2003, without determining whether the contractors' bargaining units remained appropriate in light of CNN's decision to redesign positions based on editorial needs and changing technology, and to combine elements of work previously contracted out with other production functions and roles into an overall production unit

that the NLRB has traditionally found appropriate in the broadcasting industry?

3. Did the panel majority err in ruling that CNN discriminated *en masse* based upon anti-union animus against all 114 former employees whom it did not hire, where (a) CNN hired more than a majority of the prior unionized workforce, (b) the only statistical evidence in the record showed that union members were four times more likely to be hired than other applicants and that CNN hired twelve of nineteen union officials, (c) that ruling rested in part on assumptions flowing from the erroneous ruling that CNN was a joint employer, (d) the majority considered the challenged hiring decisions *en masse*, rather than analyzing whether discrimination had been proven as to each challenged hiring decision, and (e) the majority erroneously speculated that CNN manipulated its hiring process on the basis of a projection as to the size of an appropriate bargaining unit?

4. "[T]he general rule . . . is that a successor employer is, like any non-union employer, free to set the initial terms upon which it offers employment[,]" *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1007 (D.C. Cir. 1998), except that "when a successor refuses to hire its predecessor's employees based upon anti-union animus, the successor loses

the right unilaterally to set the initial terms and conditions of employment; it must first bargain with the union." *Id.* at 1008. Even if CNN was a successor, did the panel majority err in concluding that the foregoing exception extends to a situation in which a successor hired a majority of the prior unionized workforce and did not engage in broad hiring discrimination against union members?

5. Is the remedial order:

(a) punitive and not remedial under this Court's decision in *Capital Cleaning Contractors* in requiring CNN to pay backpay and benefits to all hired and not hired employees until it bargains to agreement or impasse many years after the fact, based upon the terms of collective bargaining agreements that long ago expired and to which CNN never agreed?

(b) arbitrary, unreasonably burdensome, and contrary to the First Amendment in requiring the hiring and retraining of all 114 union members who were not hired in 2003 twelve years later, without any consideration of (1) whether they possess the basic skills necessary to meet CNN's current editorial needs in a workplace that is now vastly different

because of technological changes, or (2) the central role that photojournalists and others now play in shaping the editorial content of CNN's programming?

(c) arbitrary and contrary to the rights of employees in CNN's current workforce who never were union-represented by requiring CNN to recognize and bargain with the union, without considering changes in the workforce since 2003 or conducting the analysis required by *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996), to guard against "the obvious danger that a bargaining order that is intended to vindicate the rights of past employees will infringe upon the rights of the current ones to decide whether they wish to be represented by a union"?

(d) arbitrary, unreasonably burdensome, and contrary to the First Amendment in requiring CNN to rescind any changes it implemented in the terms and conditions of employment after hiring its own workforce?

Respectfully submitted,

s/ Kannon K. Shanmugam

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2015, 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 other parties or their counsel of record through the appellate CM/ECF system.

By s/ Paul Mogin
PAUL MOGIN