

In the Supreme Court of the United States



OAK HARBOR FREIGHT LINES, INC.,

Petitioner,

—v—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**On Petition for Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit**

REPLY BRIEF OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Petitioner is Oak Harbor Freight Lines, Inc., a for-profit closely-held corporation organized under the laws of the State of Washington. Oak Harbor Freight Lines, Inc. operates a multi-state transportation, delivery and logistics service business. Oak Harbor Freight Lines, Inc. has no corporate parents and no publicly-held corporation owns more than 10% or more of Oak Harbor Freight Lines, Inc.'s stock.

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REPLY BRIEF OF PETITIONER

Petitioner Oak Harbor Freight Lines, Inc. (“Oak Harbor” or “the Company”) respectfully submits this reply in support of its petition for a writ of certiorari.

I. SUPREME COURT REVIEW CONCERNING ECONOMIC EXIGENCIES IS COMPELLED TO DETERMINE BARGAINING OBLIGATIONS AND IMPLEMENTATION RIGHTS PENDING THE OUTCOME OF FULL CONTRACT NEGOTIATIONS

The Union¹ readily acknowledges that the subject of healthcare coverage is an important one. (Union brief, p.2.) However, in arguing against economic exigency, the Union misleadingly suggests that Oak Harbor simply could have chosen to maintain the Union medical plans for returning strikers instead of facing the choice of either (1) no coverage for these employees or (2) applying the Company medical plan. (Union brief, p.2.) The Union’s argument completely ignores the realities facing the parties at that point in time and misidentifies the “status quo.”

The status quo when the strikers returned to work in February 2009 was the Company medical plan. The parties had agreed to Company medical in October 2008 as an interim measure pending the outcome of the strike and overall contract negotiations. (App.156a-159a, 349a-351a, 369a-373a). By mid-February 2009, only the

¹ As used herein, “the Union” refers collectively to Teamsters Local Numbers 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962.

strike had come to a conclusion—not overall contract negotiations.

Furthermore, the status quo as of February 2009 cannot be separated from the Union’s and the Trust Funds’ demands that Oak Harbor sign both (1) an Interim Labor Agreement and (2) new Subscription Agreements in order to restore benefits contributions. (App.176a, 183a-194a, 202a-203a, 243a-251a, 376a-381a, 390a-395a).

Consistent with principles of economic exigency, Oak Harbor negotiated in good faith with the Union in February 2009 concerning returning strikers’ benefits and the Union’s Interim Labor Agreement. (App. 108a-133a, 176a, 183a-194a, 202a-203a, 243a-251a, 376a-381a, 390a-395a). However, the parties never reached agreement. (*Id.*)

Moreover, the Union’s insistence that Oak Harbor execute an Interim Labor Agreement defied Section 8(d) of the National Labor Relations Act (“the Act”). Oak Harbor did not have the choice of simply reinstating benefits contributions to the Trust Funds, as the Union claims. Instead, its only choice was to execute an Interim Labor Agreement it did not agree to (along with new Subscription Agreements), or continue to apply Company medical to returning strikers in order to avoid a lapse in healthcare coverage. The National Labor Relations Board (“the Board”) inexplicably shares the Union’s viewpoint that Oak Harbor should have executed the Union’s Interim Labor Agreement in order to restore benefits contributions. (Board’s brief, p. 21.) Their arguments are tantamount to a revocation of Section 8(d) of the Act. The law on economic

exigencies does not require an employer to abandon its Section 8(d) rights.

The Union and the Board further argue that no economic exigency existed because Oak Harbor cannot establish it was compelled to take prompt action, or that the circumstances satisfied one of the other purported requirements: that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable. Without conceding Oak Harbor's arguments in its petition concerning the appropriate economic exigency standard and circuit split, Oak Harbor has fully established the factors propounded by the Union and the Board. Had Oak Harbor not applied its Company medical plan to the returning strikers, these bargaining unit employees would have been left without healthcare coverage. This is because of factors beyond Oak Harbor's control—it was the Union and the Trust Funds that insisted Oak Harbor execute an Interim Labor Agreement and new Subscription Agreements to restore contributions. The Union and the Trust Funds made it abundantly clear that contributing to the Trusts without satisfying their conditions was not an option. (App.108a-133a, 176a, 183a-194a, 202a-203a, 243a-251a, 376a-381a, 390a-395a). Contrary to the Union's and the Board's arguments, Oak Harbor also did not have any knowledge at the time it lawfully ceased contributing to the Trust Funds that these conditions would be placed on reinstating benefits contributions.

Furthermore, the avoidance of a lapse in health-care coverage was a sufficiently compelling reason to require prompt action, despite the Board's arguments to the contrary. There is no basis for the Board's and

the Court of Appeals' failure to decide the present matter in accordance with *Mail Contractors of America, Inc.*, 346 NLRB 164 (2005) and *Electrical South, Inc.*, 327 NLRB 270 (1998), where the Board previously found economic exigency concerning an imminent lapse in employee healthcare coverage.

The decisions below additionally failed to recognize that Oak Harbor and the Union were negotiating over temporary medical coverage for returning strikers, pending the resolution of full contract negotiations. (App.15a-16a, 31a, 74a). The Board and the Union continue to assert that no overall impasse was reached in bargaining, but this misses the mark. Contrary to the Union's and the Board's arguments, the parties were at impasse on the subject of interim benefits for returning strikers. The parties had explored an Interim Labor Agreement to no avail. Both parties acknowledged that full contract negotiations would continue. (App.135a-137a, 189a-190a, 197a-198a, 224a-227a, 242a-254a, 271a-273a, 349a-351a, 376a-378a, 387a-389a, 390a-395a). However, the parties were at a stalemate by the time the strikers returned. (*Id.*) The decisions below conflated impasse concerning imminent lapse in healthcare coverage (the economic exigency) with impasse in full contract negotiations. (App. 16a, 74a). This utter confusion only underscores the necessity of Supreme Court review.

The Union also attempts to distinguish the Oregon Trust by claiming that it did not require any additional documents for Oak Harbor to reinstate contributions. (Union's Brief, p. 16.) This is not an accurate representation of what transpired. The Union insisted that Oak

Harbor sign an Interim Labor Agreement, which incorporated provisions pertaining to the Oregon bargaining unit employees and the Oregon Trust. (App.392a). The Union acknowledged that the purpose of this Interim Labor Agreement was to provide a mechanism for Oak Harbor to restore benefits contributions. (App.390a-391a). Furthermore, the Union demanded that Oak Harbor sign new Subscription Agreements in February 2009. (App.392a). Not once did the Union state, “except for the Oregon Trust—no Subscription Agreement is required for that Trust.” To claim now that there were no conditions placed on restoring contributions to the Oregon Trust is misleading, at best.

The question presented here, as to when employers may implement time-sensitive matters pending resolution of full contract negotiations, is an important question of federal labor law with significance well beyond Oak Harbor. Time does not stand still while labor negotiations ensue. Rather, crucial, time-sensitive matters can, and do, arise in the midst of full contract negotiations. Here, the time-sensitive matter concerned critical healthcare coverage pending the outcome of full contract negotiations. A mechanism promoting good faith bargaining in such circumstances is indispensable to labor peace. The legal principles of economic exigency provide this framework.

However, bargaining parties are currently left with conflicting guidance on when they may implement interim measures pending the resolution of full contract negotiations. The Board disputes the existence of a circuit split based upon its own speculation as to the Eleventh Circuit Court of Appeals’ future potential decisions. The Board’s hypothesis does not alter the

existence of a current circuit split. Regardless, this issue has not been previously addressed by this Court, and Rule 10(c) warrants review of this broad-reaching question of federal labor law concerning bargaining obligations and implementation rights.

II. SUPREME COURT REVIEW CONCERNING EQUITABLE ESTOPPEL IS NECESSARY TO ADDRESS WHETHER SILENCE OR ACQUIESCENCE ESTOP A PARTY FROM LATER ASSERTING CONTRARY FACTS

Contrary to the Union's and the Board's arguments, Oak Harbor has established that the Union's conduct warranted a finding of estoppel concerning Oregon Trust contributions. The Union argues that Oak Harbor should not have relied on Northwest Administrator's affirmations concerning the existence of a Subscription Agreement. However, it was the Union that remained silent when it should have spoken concerning the existence of an Oregon Subscription Agreement. It was the Union that continued to treat the Oregon Trust no differently than the other three Trust Funds in the parties' benefits discussions during the strike and thereafter. (*See* Oak Harbor's Petition for Writ of Certiorari, pp.12-18.)

The Union's assertion that Oak Harbor simply should have maintained the Oregon Trust contributions throughout the time period in question completely disregards the parties' clear and unequivocal understanding that the Oregon Trust contributions were cancelled pursuant to a Subscription Agreement, just as the other Union benefits contributions had been. Not once during the time period at issue did the Union assert that no Subscription Agreement existed for the Oregon Trust. Not once did the Union cast doubt on the

existence of an Oregon cancellation clause. Not once during negotiations concerning the strikers' return to work did the Union proclaim that the Oregon Trust did not require executing an Interim Labor Agreement or a new Subscription Agreement. Rather, the parties operated under the shared understanding and belief that the Oregon Trust was no different than the other three Trust Funds in its requirement for a new Interim Labor Agreement and new Subscription Agreement. It is this silence and acquiescence that principles of equitable estoppel are designed to thwart.

The Board points to the Court of Appeals' conclusion that Oak Harbor was put on notice concerning the lack of an Oregon Subscription Agreement by the filing of the Union's unfair labor practice charge. (Board brief, p. 16.) To the contrary, the Union's charge challenged Oak Harbor's right to cease contributing to the four Trust Funds based upon the purported status quo. (Reply App.1a-2a). The Union made no distinction concerning the Oregon Trust. (*Id.*) It raised no challenge to the existence of an Oregon Subscription Agreement. (*Id.*) The General Counsel's complaint in this matter alleged that Oak Harbor failed to apply the expired labor agreement's terms with respect to each of the four Trust Funds. (Reply App.3a-8a). Again, no reference was made to a lacking Oregon Subscription Agreement and applicable cancellation clause. This argument was first raised long after the events at issue. (App.139a-143a).

The Board's argument that Oak Harbor was unsure of the existence of the Oregon Subscription Agreement only underscores the reason the Union should have spoken instead of remaining silent. Oak Harbor

notified the Union and the Oregon Trust that it was not positive of the existence of the Subscription Agreement, but announced its intention of invoking its cancellation clause. (App.326a-327a). The Union and Oak Harbor necessarily bargained over interim benefits for crossovers in 2008 and for returning strikers in 2009. Despite numerous opportunities to reject Oak Harbor's Oregon cancellation notice, the Union never did so. To place the blame squarely on Oak Harbor's shoulders, and to reward the Union for its acquiescence and silence, flies in the face of principles of good faith bargaining and equitable estoppel.

The Union's argument that the Oregon Trust never declined contributions on behalf of all bargaining unit employees further misses the mark. The Union argues that the Oregon Trust refused to accept contributions following September 2008 solely due to Trust selectivity rules. However, if this were the case, then one would expect the Oregon Trust to simply state that Trust selectivity rules prohibited it from accepting contributions offered by Oak Harbor. Instead, the Oregon Trust refused contributions on behalf of crossovers, with no reference to the reason why. (App.345a-346a). Later, the Oregon Trust posed a question about the basis for accepting contributions for some but not other employees. (Reply App.9a-10a). Contrary to the Union's assertion, the Oregon Trust's correspondence did not put Oak Harbor on notice that no Subscription Agreement existed.

More importantly, however, the Union never denied the existence of an Oregon Subscription Agreement in any one of its numerous communications with Oak Harbor in 2008 and 2009 concerning interim medical

coverage and retirees' benefits. (App.109a-112a, 135a-138a, 162a-210a, 224a-254a, 349a-395a). Despite numerous communications regarding interim benefits during the strike and thereafter, the Union never proclaimed that Oregon Trust contributions should continue because there was no Subscription Agreement and, therefore, no cancellation provision.

The Union unquestionably understood that Oak Harbor cancelled Oregon Trust contributions based upon the belief that a Subscription Agreement containing a cancellation clause existed. To remain silent in such circumstances should not be rewarded under principles of good faith bargaining or equitable estoppel. The Union's failure to assert in 2008 or 2009 that no Subscription Agreement existed for Oregon (and, therefore, no cancellation provision) was inexcusable.

The Board additionally gets it wrong when it argues the lack of a conflict between this Court and the Court of Appeals' equitable estoppel laws. The Board argues that the Court of Appeals did not apply a heightened standard of equitable estoppel in this case. However, the Court of Appeals' decision in this case indicates otherwise. The Court of Appeals rejected Oak Harbor's equitable estoppel claim because it concluded there was no affirmative evidence that the Union misled Oak Harbor. (App.13a). No "affirmative" representation or action is necessary, however, under federal common law to establish estoppel. (*See* Oak Harbor's Petition for Writ of Certiorari, pp.29-34.) This was a requirement above and beyond what the law requires. In so holding, the Court of Appeals created a conflict within and without its circuit, warranting this Court's review.

III. SUPREME COURT REVIEW IS WARRANTED TO REDRESS THE BOARD'S DECISION EXCEEDING ITS STATUTORY AUTHORITY

The Union apparently opposes Oak Harbor's third argument by claiming that the parties never agreed to provide Company medical to returning strikers. The Union miscomprehends Oak Harbor's position. To the contrary, Oak Harbor has maintained that it: (1) lawfully ceased contributions to the Trust Funds; (2) reached an interim benefits arrangement with the Union for bargaining unit employees during the strike (crossovers); and (3) bargained in good faith to impasse on the subject of healthcare benefits for bargaining unit employees returning from the strike. Oak Harbor acknowledges that no agreement was made in February 2009 concerning healthcare for returning strikers. Rather, Oak Harbor bargained in good faith and applied the Company medical plan to the returning strikers in accordance with the law on economic exigencies. The Union wants to ignore the October 2008 agreement it reached with Oak Harbor concerning interim benefits pending the outcome of the strike and bargaining. Under the Union's interpretation of this agreement, the reference to overall contract negotiations renders that statement meaningless. The Union claims the October 2008 agreement could only last for the duration of the strike (because "crossovers" only exist during a strike). Instead, the appropriate interpretation of this October 2008 agreement is that the parties intended to maintain interim benefits for bargaining unit employees during the strike and thereafter, until another agreement was reached. The plain language does not support the Union's contention.

Furthermore, the misstatement raised by the Union concerning John Payne's February 2009 correspondence does not alter the above analysis. Mr. Payne's February 2009 correspondence presented Oak Harbor's intention of continuing to provide Company medical benefits to returning strikers, just as Oak Harbor and the Union had agreed to with respect to the crossover employees. Mr. Payne's letter emphasized that the Trust Funds had "consistently refused to accept contributions for returning strikers." (App.271a). This should have referenced "crossovers" or "bargaining unit employees," rather than "returning strikers." The letter additionally referenced the parties' October 2008 agreement pertaining to "returning strikers," when it should have referenced "crossovers" or "bargaining unit employees." Setting aside the misstatement, the fact of the matter was the parties had reached agreement on interim benefits for bargaining unit employees during the strike, and the Union and Trust Funds placed conditions precedent on Oak Harbor to reinstate benefits contributions after the strike. By mid-February 2009, the only way Oak Harbor could reinstate benefits contributions for bargaining unit employees was to concede to an Interim Labor Agreement and execute new Subscription Agreements—neither of which the Union or the Board had the lawful right to impose on Oak Harbor. Oak Harbor's other option was to provide Company medical to the returning strikers to avoid a lapse in healthcare coverage, which is the same interim arrangement the Union and Oak Harbor had agreed upon concerning bargaining unit employees during the strike. The substance of Mr. Payne's February 2009 correspondence was consistent with the facts as they transpired.

The Board's framing of this matter as a factual dispute is incorrect. Rather, the third question for review presented by Oak Harbor concerns the Board overstepping its authority in rewriting the terms of the agreement reached in October 2008 by Oak Harbor and the Union. Rather than enforce the terms of the parties' October 2008 agreement, the Board substituted its own interpretation and ignored the plain meaning of the parties' agreement. This is an issue of the Board exceeding its statutory authority rather than a factual dispute. Supreme Court review is necessary to address this abuse of authority.



CONCLUSION

For the reasons above and in Oak Harbor's petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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