SJT Holdings, Inc., McDonald's USA, LLC, and McDonald's Corp. *and* SEIU National Fast Food Workers Union. Case 20–CA–277353

April 26, 2023

ORDER[1]

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND PROUTY

SJT Holdings, Inc.'s (SJT) Petition to Revoke Subpoena Duces Tecum No. B-1-1HW10IH and McDonald's USA, LLC and McDonald's Corp.'s (McDonald's) Petition to Revoke Subpoena Duces Tecum No. B-1-1HW1URN are denied. The subpoenas seek information relevant to the matters under investigation and describe with sufficient particularity the evidence sought, as required by Section 11(1) of the National Labor Relations Act and Section 102.31(b) of the Board's Rules and Regulations. Further, the Petitioners have failed to establish any other legal basis for revoking the subpoenas.[2] See generally *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4th Cir. 1996).

In addition, we reject McDonald's[3] contention that the subpoena is defective because the structure of the National Labor Relations Board violates Article II of the Constitution and the separation of powers by insulating Board members from presidential removal except "for neglect of duty or malfeasance in office." 29 U.S.C. § 153(a). Supreme Court precedent recognizing that Congress may establish expert agencies like the Board, led by a group of principal officers and removable by the President only for good cause, forecloses McDonald's claim.[4] *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (Federal Trade Commission Act's restriction on President's removal power of FTC commissioners held constitutionally valid); see also *Precision Castings Co. v. Boland*, 13 F. Supp. 877, 884 (W.D.N.Y. 1936) (stating that the NLRA's "administrative machinery is substantially the same as the Federal Trade Commission Act"). The Supreme Court has repeatedly declined to revisit that precedent. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192, 2206 (2020) ("we do not revisit *Humphrey's Executor* or any other precedent"); see *Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021) (Court "did 'not revisit [its] prior decisions allowing certain limitations on the President's removal power'" (quoting *Seila Law*, 140 S. Ct. at 2192)); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (declining to reexamine *Humphrey's*

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Member Wilcox did not participate in this case.

McDonald's moves to recuse Member Prouty based on his former employment with SEIU Local 32BJ. Respondent SJT Holdings, Inc. joins in that motion. Member Prouty has considered the motion and has determined, in consultation with the Board's Designated Agency Ethics Official, not to recuse himself. McDonald's argues that recusal is warranted under par. 2 of the Biden Ethics Pledge, under the Standards of Conduct for Executive Branch employees set forth in 5 CFR § 2635, and under due process principles. Each of these arguments fails. Under par. 2 of the Biden Ethics pledge, which Member Prouty signed pursuant to Executive Order 13989, Member Prouty may not participate for the first two years of his term in cases in which his former employer, SEIU Local 32BJ, is or represents a party, or in which any of his former clients is or represents a party. However, SEIU Local 32BJ is not a party or the representative of a party to this case, and no former client of Member Prouty is or represents a party to this case. McDonald's contends that SEIU Local 32BJ should be considered the same entity as the Charging Party for recusal purposes, but it has offered no legal support for that contention. Legal authority is to the contrary. *Exela Enterprise Solutions, Inc. v. NLRB*, 32 F.4th 436, 447 (5th Cir. 2022) (individual's "role in the local affiliate does not confer an agency relationship with the [SEIU International] Union because international unions are independent legal entities from their local affiliates"), citing *In re General Teamsters, Warehousemen and Helpers Union*, Local 890, 265 F.3d 869, 874–875 (9th Cir. 2001) ("[F]ederal labor law has steadfastly recognized the separation of the International from its local affiliate." (citing *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922))). See *1621 Route 22 W. Operating Co., LLC v. NLRB*, 725 Fed. Appx. 129, 136 (3d Cir. 2018) (rejecting contention that Member Becker was obligated to recuse himself based on financial transactions and general collaboration between the International and the local union that was a party to the case). As to the Standards of Conduct, no person with whom Member Prouty has a covered relationship within the meaning of 5 CFR § 2635.502 is or represents a party to this case, nor does Member Prouty believe that his participation would "cause a reasonable person with knowledge of the relevant facts to question his impartiality." 5 C.F.R. § 2635.502(a)(1). Finally, McDonald's argument that due process requires Member Prouty's recusal lacks any legal or factual support. Accordingly, the motion to recuse Member Prouty is denied.

[2] To the extent SJT has provided some of the requested material, it is not required to produce that information again, so long as it accurately describes which documents under subpoena it has already provided, states whether those previously supplied documents constitute all of the requested documents, and provides all of the information that was subpoenaed.

[3] SJT "agrees with and adopts" McDonald's claim without argument.

[4] Even if McDonald's constitutional claim were viable, which it is not, we note that McDonald's has made no attempt to show that the relief requested—revocation of the subpoena—would be an appropriate remedy. See *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) ("Although the statute unconstitutionally limited the President's authority to *remove* the confirmed Directors, there was no constitutional defect in the statutorily prescribed method of appointment to that office. As a result, there is no reason to regard any of the actions taken by the [agency] . . . as void."); *Calcutt v. FDIC*, 37 F.4th 293, 316 (6th Cir. 2022) (stating that "[t]o invalidate an agency action due to a removal violation, that constitutional infirmity must 'cause harm' to the challenging party" and citing similar holdings from "sister circuits").

Executor and other precedent providing for limitations on President's removal power). And we certainly have no power to do so here.[5]

Dated, Washington, D.C. April 26, 2023

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Lauren McFerran, Chairman

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Marvin E. Kaplan, Member

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David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] In some prior cases, we have declined to exercise jurisdiction over a statutory or constitutional claim—particularly where a party seeks a remedy "in tension with our official duty to faithfully administer the National Labor Relations Act." *National Assn. of Broadcast Employees and Technicians—the Broadcasting and Cable Television Workers Sector of the CWA, AFL–CIO, Local 51*, 370 NLRB No. 114, slip op. at 1 & fn. 3, 4, 5 (2021) (leaving to the Federal courts whether President's removal of General Counsel violated Sec. 3(d) of the Act and whether subsequent designation of Acting General Counsel violated Appointments Clause). Here, however, we find that extant Supreme Court precedent squarely "foreclose[s] any reasonable argument" that the Board's structure violates separation of powers principles. See *Aakash, Inc. d/b/a Park Cent. Care & Rehab. Ctr.*, 371 NLRB No. 46, slip op. at 1 (2021) (finding that superseding Supreme Court decision resolved claim that President's removal of General Counsel violated Sec. 3(d)), enfd. 58 F.4th 1099, 1103–1105 (9th Cir. 2023).

Member Kaplan joins his colleagues in denying the petitions to revoke, but, just as he declined reaching the merits of the issue raised in *Aakash,* he does not join them in reaching the merits of the constitutional arguments raised by McDonald's. See *Aakash*, 371 NLRB No. 46, slip op. at 4–5 (Members Kaplan and Ring, concurring) ("It is for the courts, not the Board, to make the initial and final determinations on the issues presented here.") (quoting *National Assoc. of Broadcast Employees and Technicians—The Broadcasting and Cable Television Workers Sector of the CWA, AFL–CIO, Local 51*, 370 NLRB No. 114, slip op. at 2).