UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION, Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 760 Intervenor	Nos. 12-1115, 12-1153

OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD TO THE JOINT MOTION FOR CONSOLIDATION OF MERITS BRIEFS OF PETITIONER AND MOVANT-INTERVENORS

The National Labor Relations Board ("Board"), by its Deputy Associate General Counsel, opposes the Joint Motion ("Motion") filed by Petitioner Noel Canning ("Petitioner") and Movant-Intervenors Chamber of Commerce of the United States of America and Coalition for a Democratic Workplace ("Movant-Intervenors"), requesting that the Court allow Petitioner and Movant-Intervenors to file consolidated principal and reply briefs in this proceeding.

As explained below, this Court has not granted Movant-Intervenors status as intervenors, and instead has deferred that determination to the merits panel. The

Motion, however, seeks to circumvent that ruling by proceeding as if Movant-Intervenor have already been granted intervenor status, and, further, does not demonstrate that the briefing proposal would promote efficiency. Accordingly, the Motion should be denied.

BACKGROUND

On March 15, 2012, Movant-Intervenors filed a Motion for Leave to Intervene on behalf of the Petitioner in this case. The Board opposed that motion, in large part, because Movant-Intervenors lack a legally protectable interest that would entitle them to intervene as parties and their position in this case is actually that of *amici curiae*. NLRB Opp. to Mot. to Intervene at 3-17. On June 21, the Court referred the question of intervenor status to the merits panel and ordered Movant-Intervenors and the Board "to address in their briefs the question of movants' standing to intervene rather than incorporate those arguments by reference." Order at 2. On July 10, 2012, the Court issued a scheduling order, which requires Petitioner and Movant-Intervenors to file separate principal briefs on August 22 and September 6, respectively, and does not provide for Movant-Intervenors to file a reply brief.

ARGUMENT

As this Circuit's Rules make clear, an "intervenor" is "an interested person who has sought and obtained the court's leave to participate in an already instituted

proceeding." D.C. Cir. R. 28(d)(4). Without having been granted leave to intervene, the Movant-Intervenors are merely proposed intervenors. A proposed or "would-be" intervenor "has not acquired the status of a party." *Atl. Mut. Ins. Co. v. Northwest Airlines, Inc.*, 24 F.3d 958, 960 (7th Cir. 1994).

There is no provision in the Federal Rules of Appellate Procedure ("FRAP") for a nonparty to join in a brief of a party. Rule 28(i), for example, provides that "any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief." Fed. R. App. P. 28(i). By its terms, only "appellants or appellees" may join in a brief. Those who do not have such status and, in fact, are nonparties, like Movant-Intervenors here, are not within the scope of the Rule.

Movant-Intervenors' motion improperly presumes that Movant-Intervenors are entitled to be treated as if this Court has already granted their motion to intervene. The Motion presumes, for example, that Movant-Intervenors have the right to file a reply brief, even though the Court's scheduling order clearly does not so provide. Given that the Court has reserved decision on the motion to intervene, there is no basis for Movant-Intervenors' positing that the Court's Scheduling Order somehow "omitted" the Movant-Intervenors' reply brief, Jt. Mot. at 2 n.2, or that there is a need for this Court to "*clarify* that their reply brief will be due on [the same date as the Petitioner's reply brief]." *Id.* at 4 (emphasis added). An

amicus curiae does not have a right to file a reply brief. Fed. R. App. P. 29(f); D.C. Cir. 32(a)(3).

Similarly, Movant-Intervenors improperly presume that the word limit for an intervenor's principal brief—8,750—would apply to Movant-Intervenors' brief. D.C. Cir. R. 32(a)(2)(B). Under both FRAP and this Court's rules, however, the principal brief of an *amicus curiae* not appointed by the Court would be 7,000 words, "one-half of the maximum length authorized by [FRAP] for a party's principal brief." Fed. R. App. P. 29(d), 32(a)(7). *See* Fed. R. App. P. 32(a)(7)(B) (14,000-word limit for party's principal brief).[1] By presuming that Movant-Intervenors' briefing rights should be measured by those granted an intervenor, the Motion seeks to appropriate rights that have not yet been granted.

The Motion's assertion (Jt. Mot. at 3) that consolidated briefing would promote "judicial and administrative efficiency" does not advance its cause. Such claimed efficiency is not a basis for obliterating the distinctive roles of intervenors and *amici curiae*. An intervenor "is treated just as if it were an original party." *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985). In contrast, an *amicus curiae* is "not a party to the action, but is merely a friend of the court whose sole function is to advise or make suggestions to the court." *Clark*

[1] Rule 29(d) also notes that if the court grants a party permission to file a longer brief, that extension does not affect the length of an *amicus* brief. Fed. R. App. P. 29(d).

v. Sandusky, 205 F.2d 915, 917 (7th Cir. 1953) (internal quotation marks and citation omitted). Maintaining this distinction between intervenors and *amici curiae* is what promotes judicial efficiency and, accordingly, this Court draws that line carefully "for the sake of clarity, simplicity, and administrative rationality." *Rio Grande Pipeline Co. v FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999) (distinguishing between intervenors and *amici curiae*).

In any event, the Motion overstates the claimed "efficiency" to be achieved from a consolidated brief. The Circuit Rules of this Court state that the briefs of both intervenors and *amici curiae* "must avoid repetition of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief, and focus on points not made or adequately elaborated upon in the principal brief, although relevant to the issues before this court." D.C. Cir. R. 28(d)(2) (intervenors), 29(a) (*amicus curiae*). Under the Court's scheduling order, Movant-Intervenors' brief is due two weeks after Petitioner Noel Canning's principal brief, thereby affording Movant-Intervenors ample time to "avoid repetition" and "focus on points not made or adequately elaborated upon" in the opening brief. [2]

[2] Another reason for doubting Movant-Intervenors' efficiency claims is that the motion, if granted, would expand the length of the briefs before the Court. Under the motion, which presumes that Movant-Intervenors have the word limits and reply brief rights of an intervernor, there would be a 31,000-word limit. By contrast, under the applicable limits, Petitioner Noel Canning could file opening and reply briefs totaling 21,000 words and Movant-Intervenors could file a brief of

Finally, whether or not Petitioner Noel Canning decides to retain the same counsel representing Movant-Intervenors is irrelevant to this Motion. As set forth in case law, FRAP, and this Court's rules cited above, petitioners, intervenors and *amici curiae* have distinct roles in appellate litigation, which should not be trumped by the identity of counsel representing the distinct participants in the litigation.

CONCLUSION

By presuming that Movant-Intervenors have been granted the status and attendant rights of intervenors, the Motion seeks to evade the Court's deferral of that issue to the merits panel. Because the Court has not yet granted Movant-Intervenors the status of intervenors, the Motion should be denied.

/s/ Linda Dreeben
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Dated at Washington, D.C.
This 27th day of July 2012

7,000 words. Fed. R. App. P. 32(a)(7)(B), 29(d). Together, those filings would total 28,000 words.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION	:
Petitioner	:
v.	: Case No. 12-1115
NATIONAL LABOR RELATIONS BOARD	: Board Case No. 19-CA-32872
Respondent	:

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of the Columbia Circuit by using the appellate CM/ECF system.

I certify that the participant in the case is a registered CM/ECF user and that service will be accomplished by the appellate CM/ECF system.

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