

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial and Service
Workers International Union

Petitioners,

No. 19-3312

v.

Occupational Safety and Health Administration, et. al.

Respondents,

North America's Building Trades Unions

Petitioners,

No. 19-3401

v.

Occupational Safety and Health Administration, et. al.

Respondents,

Marine Specialty Painting, Inc.

Petitioner,

No. 19-3886

v.

Occupational Safety and Health Administration, et. al.

Respondents,

Mobile Abrasives, Inc. and Harsco Corporation,

Petitioners,

No. 19-3959

v.

Occupational Safety and Health Administration, et. al.

Respondents,

National Association of Home Builders of the United
States, Mason Contractors Association of America,
and Associated Builders and Contractors,

Petitioners,

No. 19-3993

v.

Occupational Safety and Health Administration, et al.,

Respondents,

**INDUSTRY PETITIONERS' JOINT MOTION TO
SEVER/UNCONSOLIDATE THEIR PETITIONS AND TRANSFER THEM
TO THE EIGHTH CIRCUIT OR, ALTERNATIVELY, STAY THEIR
PETITIONS IN THIS COURT PENDING COMPLETION OF OSHA'S
RULEMAKING PROCESS**

Petitioners Mobile Abrasives, Inc. and Harsco Corporation (No. 19-3959), Marine Specialty Painting, Inc. (No. 19-3886), and National Association of Home Builders of the United States, Mason Contractors of America, and Associated Builders and Contractors (No. 19-3993) (“Industry Petitioners”) respectfully move for an order to (1) sever/unconsolidate their three petitions for review from the two petitions for review filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union (No. 19-3312) and North America’s Building Trades Unions (No. 19-3401) (“Union Petitioners”) and (2) pursuant to 28 U.S.C. § 2112(a)(5) and/or the Court’s inherent authority, transfer their three petitions to the Eighth Circuit Court of Appeals where appeals based on the same issues as raised here by the Industry Petitioners are already pending or, alternatively, (3) stay proceedings related to their petitions for review in this Court pending OSHA’s completion of an ongoing rulemaking process related to the issues raised by the Industry Petitioners in their petitions. Additionally, the Industry Petitioners hereby request expedited consideration of this motion pursuant to 3d Cir. L.A.R. 27.7.

Furthermore, if this Court chooses to deny the requested relief, the Industry Petitioners respectfully seek an additional thirty days to file their briefs from the current March 16, 2020 deadline set forth in the Court's Briefing and Scheduling Order.

To avoid unnecessarily burdening the Court, the Industry Petitioners approached OSHA about the possibility of getting OSHA's consent to transferring or staying their petitions for review herein. OSHA notified the Industry Petitioners on Friday, February 14, 2020, that OSHA would not consent, thus prompting this motion.

The petitions for review of the Industry Petitioners and the Union Petitioners are significantly different as to their scope and nature as to make severance/unconsolidation both appropriate and necessary. The Union Petitioners narrowly challenge only the stated compliance deadline for the workplace standards referenced in the subject OSHA rule. In contrast, the Industry Petitioners do not challenge the compliance deadline, but instead challenge each of the substantive standards in the OSHA rule as lacking legal and scientific justification required by the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, et seq. Furthermore, appeals are already pending, and have been since early 2017, before the Eighth Circuit Court of Appeals, including petitions for review filed by these same Industry Petitioners, which are based on essentially

the *same* substantive issues raised herein by the Industry Petitioners. Of note, the Eighth Circuit appeals are being held in abeyance pending OSHA's completion of the rulemaking process concerning the subject standards. OSHA and the Industry Petitioners *jointly* moved to hold those proceedings in abeyance and continue to provide status updates to the Court.

Therefore, the requested relief is not only appropriate and necessary, but would benefit the interests of the parties in that the narrow issue raised herein by the Union Petitioners could proceed now before this Court, while the broader, substantive issues raised by the Industry Petitioners could, in the interest of justice and judicial economy, be decided by the Eighth Circuit together with the prior similar appeals, or could be decided by this Court after OSHA's ongoing rulemaking process is completed.

BACKGROUND/PROCEDURAL HISTORY

On January 9, 2017, OSHA promulgated and published in the Federal Register, at 82 Fed. Reg. 2470, a final rule entitled "Occupational Exposure to Beryllium," 29 CFR Parts 1910, 1915, and 1926, Docket No. OSHA-H005C-2006-0870, RIN 1218-AB76 (the "01/09/2017 Final Rule"), which sets forth new workplace standards regarding beryllium exposure applicable to the general industry, construction and maritime/shipyards sectors.

Between January and March 2017, the Industry Petitioners filed petitions for review in the Fourth, Eleventh, and D.C. Circuits challenging the 01/09/2017 Final Rule regarding its construction and maritime/shipyards standards and on January 30, 2017, the Judicial Panel on Multidistrict Litigation consolidated all of the petitions for review in the Eighth Circuit.

About six months later, on June 27, 2017, OSHA published in the Federal Register a Notice of Proposed Rulemaking (at 82 FR 29182) which proposed to revoke the so-called “ancillary provisions” of the construction and maritime/shipyards standards of the 01/09/2017 Final Rule, which are the substantive provisions that detail all of the various workplace monitoring and protective measures required by the Rule, but still keep the new PEL (permissible exposure limit) and STEL (short-term exposure limit). The comment period for the above-referenced rulemaking closed on August 28, 2017. The Industry Petitioners were among the many parties that submitted comments.

As elimination of the ancillary provisions would address a number of the issues raised by the Industry Petitioners in their Eighth Circuit challenge of the 01/09/2017 Final Rule, the Industry Petitioners and OSHA agreed to a stipulated Order entered September 11, 2017, holding the Eighth Circuit proceedings in abeyance pending OSHA’s completion of its rulemaking process regarding the

ancillary provisions. That stay remains in place to this day because the rulemaking process is still ongoing.

On September 30, 2019, OSHA published what it termed a “final rule” in which it (1) extended the compliance date for nearly all of the construction and shipyard beryllium standards in the 01/09/2017 Final Rule to September 30, 2020, (2) stated that OSHA was not adopting the portion of its June 2017 Notice of Proposed Rulemaking that would have revoked the ancillary provisions from the construction and shipyards standards, and (3) stated that OSHA would publish a new proposal for the ancillary provisions. (84 FR 51377).

On October 8, 2019, OSHA published a Notice of Proposed Rulemaking in which it proposed to keep nearly all of the ancillary provisions from the 01/09/2017 Final Rule in the construction and shipyards beryllium standards, but with some modifications. (84 FR 53902). The comment period for the above-referenced rulemaking closed on November 7, 2019. The Industry Petitioners were among the many parties that submitted comments. An informal public hearing was held by OSHA on December 3, 2019 and post-hearing comments were permitted to be submitted up until January 31, 2020. This rulemaking process is still ongoing at present. No final rule has been published to date by OSHA stating the final, substantive content of the ancillary provisions of the construction and shipyards beryllium standards.

The Union Petitioners filed their petitions for review of the subject September 30, 2019 final rule in the Third and D.C. Circuits in early October 2019. Shortly thereafter, OSHA filed a Notice of Multicircuit Petitions for Review with the Judicial Panel on Multidistrict Litigation (the “MDL Panel”) referencing the two filings by the Union Petitioners. On October 15, 2019, the MDL Panel consolidated the two Union Petitioners’ petitions for review in this Court.

The Industry Petitioners approached OSHA about possibly proceeding by stipulation to address the September 30, 2019 final rule in the Eighth Circuit, but OSHA’s counsel stated that the Agency believed it could not so stipulate because of the existing MDL Panel Order consolidating appeals of the September 30, 2019 final rule in this Court. Thus, on November 27, 2019, the Industry Petitioners filed petitions for review of the subject September 30, 2019 final rule in the Fourth, Eleventh, and D.C. Circuits.¹ On December 9 and 11, 2019, OSHA filed motions in those three Circuit Courts seeking to transfer the Industry Petitioners’ petitions for review of the September 30, 2019 final rule to this Court pursuant to the October 15, 2019 MDL Panel Order. The Industry Petitioners consented to the transfer motions with the express understanding that they were reserving their right

¹ Petitioners Mobile Abrasives, Inc. and Harsco Corporation filed petitions for review of the September 30, 2019 final rule in the Eleventh Circuit and Marine Specialty Painting filed its petition for review in the Fourth Circuit. Petitioner National Association of Home Builders of the United States, et. al., filed a petition for review of the same rule in the D.C. Circuit.

to potentially seek to consolidate all of their related petitions for review in the Eighth Circuit. The Fourth, Eleventh, and D.C. Circuits granted OSHA's motions and all petitions were transferred and docketed in this Court. On January 7, 2020, the petitions of the Union Petitioners and the Industry Petitioners were ordered consolidated by this Court for all purposes. (Third Cir. Docket, Doc. 32). On February 4, 2020, this Court issued a Briefing and Scheduling Order requiring that all Petitioners file their briefs and a joint appendix by March 16, 2020. (*Id.* at Doc. 33).

ARGUMENT

I. This Court Should Sever/Unconsolidate the Industry Petitioners' Petitions for Review from the Union Petitioners' Petitions for Review.

The Union Petitioners raise a single issue for review, which is separate and distinct from the issues raised by the Industry Petitioners. As set forth in the Union Petitioners' Concise Summary of the Case filed with this Court, both Unions only seek to challenge the discrete portion of the September 30, 2019 final rule that "further delay[s]" the compliance date for the ancillary provisions of the construction and shipyard beryllium standards until September 30, 2020 as being "arbitrary and capricious, without substantial evidence, or otherwise contrary to law."

On the other hand, the Industry Petitioners do not challenge the September 30, 2020 compliance date. Rather, they challenge the legality and underlying basis for each of the substantive provisions of the construction and shipyards beryllium standards, including (1) whether the threshold requirements for promulgating an occupational safety and health standard, as established in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) (plurality opinion)(the “*Benzene* case”), were satisfied by OSHA in promulgating the subject standards and (2) whether the subject rule is based on substantial evidence in the rulemaking record.

These distinct differences in the issues raised by the Industry Petitioners and by the Union Petitioners make severance necessary and appropriate. Likewise, severance is further justified by the fact that the issues for review raised by the Industry Petitioners, but not by the Union Petitioners, could be impacted by the outcome of OSHA’s presently ongoing rulemaking process.

II. This Court Should Transfer the Petitions of the Industry Petitioners to the Eighth Circuit or, Alternatively, Stay Their Petitions Pending the Outcome of OSHA’s Further Rulemaking.

As stated above, the same issues raised for review herein by the Industry Petitioners are already before the Eighth Circuit Court of Appeals by virtue of the petitions for review filed in 2017 as to the 01/09/2017 Final Rule regarding the beryllium workplace standards. As the Eighth Circuit proceedings have been held

in abeyance since shortly after they were commenced, the Industry Petitioners' petitions herein could easily be added to the Eighth Circuit proceedings and all of the related petitions could be fully briefed, argued, considered and decided under one schedule and before one court. Therefore, in the interest of judicial economy, for the convenience of the parties and in the interest of justice, the petitions of the Industry Petitioners should be transferred to the Eighth Circuit, under 28 U.S.C. § 2112(a)(5) or the Court's "inherent power to order [a transfer] in the interest of justice and sound judicial administration." *American Tel. & Tel. Co. v. Federal Communications Com.*, 519 F.2d 322, 325 (2d Cir. 1975).

Alternatively, this Court may stay a proceeding based upon its inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). As noted above, in addition to stating a new compliance deadline, OSHA's subject September 30, 2019 final rule stated that OSHA was not adopting its June 2017 proposal to revoke the ancillary provisions from the construction and shipyard beryllium standards and that OSHA would be issuing a new proposal for the ancillary provisions. (84 FR 51377). On October 8, 2019, OSHA published a new Notice of Proposed Rulemaking to amend the ancillary provisions of the construction and shipyard beryllium standards. (84 FR 53902). While the comment period for the proposal closed on November 7, 2019 and

OSHA held an informal public hearing on the proposal on December 3, 2019, that rulemaking still remains ongoing. The outcome of this rulemaking may well change the substance of the workplace standards that are the subject of the Industry Petitioners' petitions for review. Thus, if this Court elects not to transfer the Industry Petitioners' petitions to the Eighth Circuit, it should at least stay proceedings regarding the Industry Petitioners' petitions pending completion of OSHA's further ongoing rulemaking.

CONCLUSION

For the forgoing reasons, this Court should (1) sever/unconsolidate the three petitions for review filed by the Industry Petitioners from the two petitions for review filed by the Union Petitioners and (2) pursuant to 28 U.S.C. § 2112(a)(5) and/or the Court's inherent authority, transfer their three petitions to the Eighth Circuit Court of Appeals where appeals based on the same issues as raised here by the Industry Petitioners are already pending or, alternatively, (3) stay proceedings related to the Industry Petitioners' petitions for review pending OSHA's completion of the ongoing rulemaking process. Furthermore, if the Court chooses to deny the above-requested relief, the Industry Petitioners respectfully request a thirty-day extension of time to file their briefs from the current March 16, 2020 deadline in the Court's current Briefing and Scheduling Order.

Dated: February 20, 2020

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