

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
ACO-052

Nos. 19-3312, 19-3401, 19-3886, 19-3959, & 19-3993

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

v.

Occupational Safety and Health Administration
United States Department of Labor,
Respondent

North America's Building Trades Unions,
Petitioner in 19-3401

v.

Occupational Safety and Health Administration, U.S. Department of Labor,
Respondent

Marine Specialty Painting Inc,
Petitioner in 19-3886

v.

Occupational Safety and Health Administration,
United States Department of Labor; Secretary United States Department of Labor,
Respondents

Mobile Abrasives Inc; Harsco Corporation,
Petitioners in 19-3959

v.

Occupational Safety and Health Administration, United States
Department of Labor; Secretary, United States Department of Labor,
Respondents

National Association of Home Builders of The United States;
Mason Contractors Association of America;
Associated Builders and Contractors,
Petitioners in 19-3993

v.

Occupational Safety and Health Administration,
United States Department of Labor;
Secretary United States Department of Labor.
Respondent

(Agency No. OSHA-H005C-2006-0870)

Present: MCKEE, SHWARTZ and PHIPPS, Circuit Judges

1. Motion by Petitioner Marine Specialty Painting Inc in 19-3886, Petitioners Harsco Corp and Mobile Abrasives Inc in 19-3959 to un-consolidate the three petitions for review, Transfer the three petitions to the Eighth Circuit Court of Appeals or Stay Proceedings related to the Industry Petitioners' petitions for review pending OSHA's completion of the ongoing rulemaking process;
2. Response in Opposition by Respondents OSHA and United States Department of Labor in 19-3993, Respondent OSHA in 19-3312, 19-3401, Respondents OSHA and Secretary United States Department of Labor in 19-3886, 19-3959 to motion;
3. Response in Opposition by Petitioner United Steel Paper and Forestry Rubber Manufacturing Energy Allied Industrial and Service Workers International Union 60 Boulevard of the Allies Pittsburgh PA 15222 in 19-3312 to motion Transfer Proceedings;
4. Joint Reply by Petitioners in 19-3959, 19-3886 & 19-3993 in support of their Motion to un-consolidate the three petitions for review, Transfer the three petitions to the Eighth Circuit Court of Appeals or Stay Proceedings.

Respectfully,
Clerk/pdb

ORDER

The foregoing motion, responses, and reply are considered. Industry Petitioners' motion is denied in part and granted in part. The motion is denied with respect to severing the Industry Petitioners' petitions from those filed by the Union Petitioners.

Severing the petitions would contravene the purpose of 28 U.S.C. § 2112(a)(3). The motion is granted to the extent it seeks to transfer the petitions for review pursuant to 28 U.S.C. § 2112(a)(5). The Clerk is directed to transfer the five petitions for review to the Eighth Circuit.¹

¹ Judge Phipps dissents because, to him, today's order declining to sever five cases and transferring those cases to the Eighth Circuit continues a progression down the wrong path. That misdirection stems from an overreading of a statutory provision, 28 U.S.C. § 2112, which sets forth a procedure for consolidating challenges to agency *orders*, such as those issued by the Occupational Safety and Health Administration. But the challenges before us are to an agency *rule*, specifically OSHA's 2019 revised standards for beryllium exposure. *See Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors*, 84 Fed. Reg. 51377-01 (Sept. 30, 2019) (to be codified at 29 C.F.R. pts. 1915, 1926). As challenges to a *rule*, not an *order*, the consolidation statute does not apply here and never should have governed these cases, which were originally filed in four different circuits – one each in the Third, Fourth, and Eleventh Circuits, and two in the D.C. Circuit. To rectify this situation, those five cases should be severed, and the four cases originating in other circuits should be returned to those courts. But instead, today's order transfers the five consolidated cases to the Eighth Circuit for resolution with other challenges to a prior related OSHA rule.

A foundational, general principle of administrative law is that federal agencies take binding action through either rules or orders. Rules and orders are fundamentally different. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *Londoner v. City & Cty. of Denver*, 210 U.S. 373 (1908); *compare* 5 U.S.C. § 551(4) (defining “rule”), *with id.* § 551(6) (defining “order”). And while the line between a rule and an order is not always easy to draw, rules approximate legislation and orders result from adjudication.

Consistent with that distinction, Congress established unique procedures for litigating challenges to agency orders. *See* 28 U.S.C. § 2112(a); *see also* 29 U.S.C. § 660(a) (providing for judicial review of OSHA orders and specifically referencing 28 U.S.C. § 2112); *cf. id.* § 655(f) (providing for judicial review of OSHA standards, which are a subset of rules, without reference to 28 U.S.C. § 2112). Under the statutory framework, multiple challenges to an order are consolidated into a single action before one court. *See* 28 U.S.C. § 2112(a). In that sense, the consolidation statute functions in much the same way as the process for multi-party appeals of a trial court order – those typically proceed before a single appellate court as a consolidated appeal.

But the same cannot be said for challenges to agency rules. Just as a challenge to legislation may proceed in any court of competent jurisdiction, a challenge to an agency rule may do so as well – absent a statute restricting the permissible venues. And here, no statute requires the consolidation of challenges to an OSHA rule before one court. To the

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: July 13, 2020
Lmr/cc: Randy S. Rabinowitz
Andrew D. Roth
Joseph G. Gilliland



A True Copy:

A handwritten signature in cursive script that reads "Patricia S. Dodszeuweit".

Patricia S. Dodszeuweit, Clerk

contrary, any person adversely affected by an OSHA standard may challenge “such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business” 29 U.S.C. § 655(f). Yet, although these five separate cases from four different circuits challenge an OSHA *rule*, they were consolidated and transferred here as if they were petitions for review of an OSHA *order*. That was incorrect.

In sum, the consolidation statute does not authorize the consolidation and transfer of cases challenging an OSHA rule. The five cases here should be severed and returned to their courts of origin.