
**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

POLYWEAVE PACKAGING, INC.,

Petitioner

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, Pipeline and
Hazardous Materials Safety Administration,

Respondent.

On Petition for Review

MOTION TO VACATE AND REMAND

Petitioner challenges a final decision of the Pipeline and Hazardous Materials Safety Administration assessing a \$14,460 civil penalty. The government has determined that the official who issued the agency decision under review was invalidly appointed, and the government therefore agrees that the decision should be vacated and the matter remanded to the agency. Petitioner opposes this motion.

1. Petitioner manufactures special bags with liners used by the explosives industry and is accordingly subject to regulations governing the transportation of hazardous materials that are administered by the Pipeline and Hazardous Materials Safety Administration (PHMSA), an operating administration of the Department of

Transportation. *See generally* 49 U.S.C. Chapter 51; 49 C.F.R. Parts 171-180. Following an administrative appeal, PHMSA’s Chief Safety Officer issued a final decision on behalf of the agency finding four violations of these rules and assessing a \$14,460 penalty. Pet. Ex. 2, at 13. Petitioner filed a timely petition for review and filed its opening brief on April 13, 2022, seeking vacatur of the final decision. The government’s responsive brief is presently due on July 28.

2. In preparing its brief, the government has determined that PHMSA’s Chief Safety Officer, the official who issued the agency decision under review, was not properly appointed at the time that he issued that decision. Article II of the Constitution provides that an “Officer” must be appointed by “the President, a court of law, or a head of department.” *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018). The Chief Safety Officer who issued the agency decision at issue is an officer. *See id.* at 2051-2055. Among other things, he “hold[s] a continuing office established by law” and he exercises “significant discretion” on behalf of the agency, *id.* at 2053, including by adjudicating appeals over probable violations and proposed civil penalties.

At the time that the Chief Safety Officer entered the decision now on review, he was not properly appointed, *i.e.*, he had not been appointed by the President, a court of law, or a head of department. *See id.* at 2051. The Secretary of Transportation has subsequently appointed the Chief Safety Officer and ratified his prior appointment. But that does not cure the problem for petitioner. *See id.* at 2055 (explaining that a regulated

party is entitled to a decision by “a properly appointed” and different official who has “not adjudicated [the matter] before”).

Although petitioner did not make this argument in its opening brief, the issue is logically related to an Article II issue that petitioner did raise, *see* Brief of Petitioner at 44-47, as well as to petitioner’s suggestion that the Chief Safety Officer was not “empowered to issue the Decision on Appeal pursuant to a proper delegation,” *id.* at 47. In the circumstances presented here, the government agrees that vacatur is in order, so that the agency can determine on remand whether to proceed any further with this matter and, if it does so, can have the matter reviewed by a new and properly appointed official. Depending on the outcome, the remand proceeding may relieve this Court from the need to decide any of the other issues presented by the current petition. If nothing else, further agency proceedings may narrow the issues that the Court may eventually be asked to decide.

3. Counsel for petitioner represents that he opposes to this motion.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court vacate the final agency decision and remand to PHMSA for further proceedings before a properly appointed officer.

Respectfully submitted,

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JULY 2022

**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 27(d)**

I hereby certify that this motion complies with Federal Rule of Appellate Procedure 27(d)(1) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that it complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 583 words, according to the count of Microsoft Word.

/s/ Adam Jed

Adam C. Jed

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 22, 2022, I electronically filed and served the foregoing document by using the appellate CM/ECF system.

/s/ Adam Jed

Adam C. Jed