

United States District Court  
Western District of Wisconsin

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Menard, Inc.,

Plaintiff,

v.

National Labor Relations Board,

Defendant.

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Case No. 18-CV-376

**Complaint for Declaratory  
Judgment and Preliminary  
and Permanent Injunction**

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**Complaint**

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Plaintiff Menard, Inc. through its attorney Gary K. Roehm asserts the following as Plaintiff's Complaint:

**Nature of Action**

Plaintiff Menard, Inc. ("Menard") defended against an action brought by the National Labor Relations Board ("the Board") in 2017, Case No. 18-CA-181821, alleging that K & S Deliveries, LLC, among others, were employees of Menard rather than independent contractors. K & S Deliveries, LLC provided delivery services to Menards store locations in Minnesota. Kevin Fisher, the owner of K & S Deliveries, LLC, testified during the Board's case. Menard won that case resoundingly, with the board's administrative law judge in the matter proclaiming what had been known all along: that the companies providing delivery services to Menard were clearly independent contractors. The Board did not appeal that decision. Having been unsuccessful in the first action, the Board now wishes to do an end-run around that decision and extend its jurisdiction to control the

relationship between Menard and its independent contractors. This action directly challenges this federal agency's unlawful assertion of authority over independent contractors, which the National Labor Relations Act (the "Act") expressly forbids.

### **Parties**

1. Menard, Inc. is a Wisconsin corporation with its corporate headquarters located at 5101 Menard Drive, Eau Claire, WI 54703. Menard is engaged in the retail sale of home improvement goods.

2. Defendant is an agency of the federal government charged with, among other things, protecting the rights of private sector employees.

### **Jurisdiction and Venue**

3. This Court has jurisdiction pursuant to the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 (Creation of Remedy), and 2202 (Further Relief); the implied non-statutory review procedure provided by 28 U.S.C. § 1331 (Federal Question); and the Administrative Procedure Act, 5 U.S.C. § 702. The action also implicates provisions of the National Labor Relations Act, 29 U.S.C. §§ 152 and 158.

4. Venue is proper in the Western District of Wisconsin under 5 U.S.C. § 703 and 28 U.S.C. § 1391(e)(3) because Menard is located in the City of Eau Claire, Wisconsin within the County of Eau Claire which is in this district.

### **Statement of Facts**

5. On December 22, 2016 the Board issued a Complaint in Case No. 18-CA-181821 alleging that the independent businesses providing delivery services to Menard are misclassified as independent contractors.

6. Following a long and drawn-out process, a 2 day trial was held in Minneapolis, Minnesota before an Administrative Law Judge ("ALJ") employed by the Board.

7. The Board's ALJ ruled that the independent businesses are independent contractors and not employees in a decision dated November 17, 2017. (Attached as *Exhibit A* and made a part of this pleading).

8. The Act specifically exempts independent contractors from seeking relief under its provisions. See 29 U.S.C. § 152(3).

9. During the trial described in paragraph 6, Kevin Fisher (“Fisher”), owner of K & S Delivery Services, LLC, testified during the Board’s case in chief.

10. Three months after the trial, August 23, 2017, Menard issued a voluntary 60-day termination notice to K & S Delivery Services, LLC pursuant to the parties’ contract. (The contract is attached as *Exhibit B* and made a part of this pleading).

11. Fisher filed an Unfair Labor Practice Charge with Region 18 of the Board on August 31, 2017 alleging he was retaliated against for engaging in protected concerted activities under 29 U.S.C. § 158(a)(4) the Act; Section 8(a)(4) covers retaliation against *employees*.

12. On November 1, 2017, Fisher filed an Amended Charge after the 60-day notice period described above had expired and he stopped providing delivery services to Menard.

13. When the ALJ released his decision on November 17, 2017 it was Menard’s reasonable belief that Fisher’s Charge would be dismissed as the Board had confirmed the relationship between K & S Deliveries, LLC and Menard to be one of independent contractor.

14. Five months went by with no action on the part of Region 18 of the Board.

15. On April 19, 2018 Board counsel for Region 18 contacted Menard and informed Menard counsel that the Region would proceed with a complaint despite the independent contractor determination.

16. Counsel for Menard informed Board Counsel that the Agency lacked authority to bring any action under the Act given the Board’s determination that K & S Deliveries, LLC was an independent contractor.

17. On May 16, 2018, Counsel for the Board filed a complaint against Menard based on 29 U.S.C. § 158(a)(4), retaliation against *employees*.

### **Count 1**

#### **Declaratory Judgment Regarding Board Authority**

18. Menard incorporates by reference the allegations contained in Paragraphs 1 through 17 of this complaint.

19. The Act, as described above, specifically exempts entities with independent contractor status from coverage under the Act. 29 U.S.C. § 152(3).

20. The Board has ruled that Menard and K & S Deliveries, LLC are separate businesses and that K & S Deliveries, LLC is an independent contractor in its relationship to Menard.

21. The Board, in pursuing this action on behalf of an independent contractor, exceeds its statutory authority.

22. Menard is entitled to a declaratory judgment and injunctive relief from the Board's unlawful exercise of authority pursuant to 28 U.S.C. §§ 2201 and 2202.

## **Count 2**

### **Violation of APA Prohibition of Arbitrary and Capricious Conduct**

23. Menard incorporates by reference the allegations contained in Paragraphs 1 through 22 of this complaint.

24. The Federal Administrative Procedure Act ("APA"), 5 U.S.C. § 706, prohibits the Board from engaging in "arbitrary and capricious" conduct that bears no rational connection to the facts and circumstances of a particular case.

25. The APA, 5 U.S.C. § 706(C), directs a reviewing court to hold unlawful agency action that is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

26. The Board has ruled K & S Delivery Services, LLC to be an independent contractor in its relationship to Menard.

27. The Board is pursuing this action on behalf of K & S Delivery Services, LLC, which is an independent contractor that did business with Menard.

28. 29 U.S.C. § 152(3) exempts entities with independent contractor status from coverage under the Act.

29. The Board's proceeding against Menard is fundamentally flawed in that no valid remedy can result from any administrative proceeding and immediate injunctive relief is proper to protect Menard from the Board's arbitrary and capricious conduct.

30. The Board's proceeding is in excess of statutory jurisdiction and authority and is therefore unlawful.

### Count 3

#### The Board's Actions are Ultra Vires

31. Menard incorporates by reference the allegations contained in Paragraphs 1 through 30 of this complaint.

32. Menard invokes the inherent equity power of the federal district court to prevent the Board's ongoing infringement of Menard's right to contract with independent contractors.

33. Menard and K & S Deliveries, LLC entered into a contract for services as separate business entities and K & S Deliveries, LLC status as an independent contractor. (See *Exhibit B*).

34. The contract includes an arbitration provision. The parties, as separate business entities, agreed to resolve all disputes by binding arbitration.

35. The Board has recognized K & S Deliveries, LLC status as an independent contractor in its relationship to Menard.

36. The Board is pursuing this action despite the clear statutory exemption of independent contractors from coverage under the Act.

37. The Board cannot act absent its statutory authority under the Act.

38. This federal district court has authority to review this federal agency action because the Board is acting *ultra vires* by proceeding without statutory authority. *Leedom v. Kyne*, 358 U.S. 184, 188-189 (1958).

39. Menard has no adequate remedy at law with respect to the Board's continuing wrongful conduct.

#### Prayer for Relief

Menard respectfully requests that the court enter judgment in its favor and against the Board by granting the following relief:

A. Enter a Declaratory Judgment that the Board exceeds its authority under the Act, 29 U.S.C. § 151 *et seq.*, by pursuing this action;

B. Enter a Declaratory Judgment that the Board's arbitrary and capricious conduct violates the APA, 5 U.S.C. § 706(A) and (C);

C. Enjoin and restrain the Board, its agents, and any other person acting on behalf of the Board from pursuing this unlawful action.

D. Award Menard its costs and Attorney's fees.

E. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

Menard, Inc.

Dated: May 18, 2018

By: /s/ Gary K. Roehm

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