No. 21-2243

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 663;
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 550;
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 2; and
UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO, CLC,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

SEABOARD FOODS, LLC,

Putative Intervenor-Appellant.

On Appeal from the United States District Court for the District of Minnesota
Hon. Joan N. Ericksen
No. 19-cv-2660 (JNE/TNL)

PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

One month after the district court ruled on cross-motions for summary judgment, vacating in part a U.S. Department of Agriculture (USDA) rule, Seaboard Foods moved to intervene to ask the district court to modify the remedy that the court had ordered and allow the rule to remain in effect as to Seaboard's Guymon, Oklahoma plant (and no others) for an additional 10.5 months. Although Seaboard had submitted a declaration in August 2020, when the parties briefed the issue of remedy, its post-summary-judgment intervention motion was the first time that Seaboard raised the issue of delaying vacatur. The district court did not abuse its discretion in determining that Seaboard's motion was untimely. Moreover, "[i]ntervenors … must take the lawsuit as they find it." *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 738 F.2d 82, 85 (8th Cir. 1984). Seaboard cannot properly use intervention to relitigate the issue of remedy and obtain reconsideration of the district court's decision.

Contrary to Seaboard's suggestion, this case is not one in which the government has shifted its position. Throughout extensive briefing on remedy, USDA *never* asserted that vacatur should be delayed—as to Seaboard or as to any other plant. And whether USDA appeals the district court's summary judgment order on the merits is irrelevant because Seaboard has identified no flaw in that order and does not seek to challenge the court's decision on the merits.

Beyond Seaboard's failure to show a likelihood of success on the merits of its appeal, the equities do not warrant a stay. Seaboard voluntarily accepted the strategic risk of converting to the New Swine Inspection System (NSIS) and increasing its line speeds five months after Plaintiffs-Appellees commenced this litigation challenging NSIS. And Seaboard alone is responsible for its decision to sit back and await the court's decision before deciding to intervene. Because vacatur will restore Seaboard to its pre-March 2020 status quo and have minimal economic impact, because a stay would allow Seaboard to continue to operate at increased line speeds that the district court found pose risks to worker health and safety, and because Seaboard showed a lack of diligence in raising its new argument, the extraordinary relief of a stay pending appeal should be denied.

BACKGROUND

I. Regulatory History

Since 1985, large swine-slaughter plants have been allowed to operate their slaughter lines at a maximum rate of 1,106 head per hour (hph). *See* 9 C.F.R. § 310.1(b)(3). Seaboard Foods operated its Guymon, Oklahoma plant at this rate until March 2, 2020. *See* Dist.Ct.Dkt.90 ¶ 6.

On October 1, 2019, USDA promulgated a rule creating NSIS. *See* 84 Fed. Reg. 52,300 (Oct. 1, 2019). Under the Rule, plants that opted into NSIS could make certain changes to their operations, including operating their slaughter lines without

regard to line-speed limits. *See id.* at 52,314. Seaboard's Guymon plant converted to NSIS five months after this action was filed. Dist.Ct.Dkt.90 ¶5.

II. Procedural History

A. The Case through Summary Judgment

Six days after USDA published the NSIS Rule, the United Food and Commercial Workers Union and three of its local unions with members who work in plants likely to convert to NSIS[1] (collectively, UFCW) filed this action under the Administrative Procedure Act (APA) arguing that the Rule was arbitrary, capricious, and contrary to law, and requesting that the entire Rule be vacated. Dist.Ct.Dkt.1.

On December 6, 2019, USDA filed a motion to dismiss the action. Dist.Ct.Dkt.14. On April 1, 2020, the district court granted in part and denied in part the motion. Dist.Ct.Dkt.30 at 1. As relevant here, the court held that UFCW stated a claim that the line-speed provision was arbitrary and capricious, pointing out "internal inconsisten[cies]" in how the agency addressed worker safety, and finding the agency's explanation for "declining to consider" the effects of NSIS on workers "was not a rational explanation." *Id.* at 20–22.

On May 15, 2020, USDA filed a motion to stay proceedings and for voluntary remand. Dist.Ct.Dkt.40. UFCW opposed, arguing that the court should vacate the

[1] Plaintiff-appellees UFCW International and UFCW Local 2 represent Seaboard's workers in Guymon. *See* Dist.Ct.Dkt. 71 ¶5; Dist.Ct.Dkt.73 ¶4.

rule if UFCW prevailed in the lawsuit. *See* Dist.Ct.Dkt.49. On July 22, 2020, the Court denied USDA's stay request, noting that it would "consider the propriety of a voluntary remand without vacatur alongside" UFCW's motion for summary judgment. Dist.Ct.Dkt.85 at 1.

The parties then briefed summary judgment. As to remedy, UFCW argued for vacatur of the NSIS Rule. Dist.Ct.Dkt.69 at 34. USDA disagreed, arguing that vacatur would create costs for regulated entities. Dist.Ct.Dkt.89 at 30–31. In the alternative, USDA argued that vacatur should be limited to the line-speed provision. *Id.* at 31–33. USDA did not reference a delayed vacatur.

After USDA stated its position on remedy, the North American Meat Institute and National Pork Producers Council appeared as amici curiae and asked the court to "exercise its 'remedial discretion'" to decline to vacate the rule. Dist.Ct.Dkt.105 at 14. They submitted declarations from three executives of three companies whose plants were participating in NSIS, including Seaboard, Dist.Ct.Dkt.104-3. Seaboard's Senior Vice President provided detail about the Guymon plant's operations, conversion to NSIS, and the impact of vacatur. *See id.* He stated that "[t]o achieve non-NSIS production output comparable to its expected NSIS production output, the Guymon facility would have to operate an additional 23 Saturdays per year." *Id.* at ¶ 13. The declaration did not suggest that operating on Saturdays was not feasible and did not mention concern about excess animal supply.

On March 31, 2021, the court granted UFCW's motion for summary judgment in part and denied USDA's motion for summary judgment and motion for remand without vacatur. Dist.Ct.Dkt.125. The court held that USDA "failed to satisfy the APA's requirement of reasoned decision-making" in adopting the line-speed provision. *Id.* at 2. The court then discussed remedy at length, considering the arguments and evidentiary submissions of the parties and amici, including amici's declarants. *Id.* at 57–68. Accepting USDA's arguments "that the agency would have still implemented NSIS even if it had retained the line speed limits" and "that the NSIS program can function without the elimination of line speed limits," the district court held the line-speed provision severable from the rest of the Rule. *Id.* at 59. The court then applied the factors set out by the D.C. Circuit in *Allied-Signal v. United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993), to determine whether it should remand without vacatur. Dist.Ct.Dkt.125 at 60–61.

As to the first *Allied-Signal* factor, the court found it "unclear whether FSIS c[ould] rehabilitate its Final Rule without taking an entirely new agency action," counseling against remand without vacatur. *Id.* at 63. As to the second *Allied-Signal* factor, the court found vacatur of the line-speed provision appropriate. *Id.* at 64. It noted that many of the costs incurred in converting to NSIS would "not be forfeited by a vacatur" of the line-speed provision alone, given other benefits of NSIS. *Id.* at

65. It also found that many plants had already slowed their line speeds due to COVID-19, demonstrating that they can do so. *Id.*

Although the court declined to remand without vacatur, it acknowledged that, if "vacatur were to take effect immediately, pork producers may be forced into a period of noncompliance with the line speed limits." *Id.* at 65–66. Thus, the court invoked its "remedial discretion" to stay vacatur for 90 days to "allow the agency to decide how to proceed in light of this opinion and give regulated entities time to prepare for any operational change." *Id.* at 67–68.

USDA has not yet decided whether to appeal, but it has informed regulated entities to "prepare" for the impact of vacatur and that the agency will "work with the establishments to comply with the Court's ruling and minimize disruptions to the supply chain."[2]

B. The Intervention Motions

Thirty days into the 90-day transition period set by the district court, Seaboard Foods moved to intervene for the purpose of obtaining a 10.5 month stay of the district court's order as to its Guymon plant.[3] USDA opposed, arguing that Seaboard did not demonstrate inadequate representation. Dist.Ct.Dkt.153 at 5–7. UFCW

[2] https://www.fsis.usda.gov/news-events/news-press-releases/special-alert-constituent-update-may-26-2021.

[3] In the district court, Seaboard sought both intervention as of right and permissive intervention. Its motion to stay only addresses intervention as of right and thus UFCW does not address permissive intervention.

opposed the motion as untimely. Dist.Ct.Dkt.141 at 15–27. Before the Court ruled on its intervention motion, Seaboard also filed a "Motion to Stay Judgment of Vacatur as to Seaboard." Dist.Ct.Dkt.136.

Later, three other NSIS participants filed their own motion seeking leave to intervene to "obtain clarity" that the Court's vacatur of the line-speed provision of the NSIS rule automatically reinstated their prior waivers to exceed regulatory line-speed limits, which had been terminated. Dist.Ct.Dkt.147; Dist.Ct.Dkt.150. Again, both USDA and UFCW opposed. Dist.Ct.Dkt.156; Dist.Ct.Dkt.157.[4]

On May 20, 2021, the district court denied both intervention motions as untimely. Dist.Ct.Dkt.163. All four movants appealed and moved for stays pending appeal in the district court. Balancing the four factors identified in *Brakebill v. Jaeger*, 905 F.3d 553, 557 (8th Cir. 2018), the district court denied both stay motions. Dist.Ct.Dkt.189. The court concluded that none of the plants had "made a strong showing of a likelihood of success on appeal or raised difficult legal issues." *Id*. at 2. Even "assum[ing] without deciding" that there would be irreparable harm, the court found that the balancing of any such harm and the risks to worker health and safety were policy considerations that USDA was in a better position to assess. *Id.* at 3. The court also found that the public interest weighed against a stay. *Id.*

[4] That request to intervene is the subject of a separate appeal, No. 21-2220, and motion to stay, which UFCW addresses in a separate opposition.

LEGAL STANDARD

In determining whether to issue a stay pending appeal, this Court balances four factors: "(1) whether the party seeking the stay has demonstrated a strong likelihood of success on the merits; (2) whether the party seeking the stay will be irreparably injured without a stay; (3) whether a stay would substantially injure other parties; and (4) the public's interest." *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020). "The most important factor is likelihood of success on the merits, although a showing of irreparable injury without a stay is also required." *Brakebill*, 905 F.3d at 557.

ARGUMENT

"'A stay is not a matter of right, even if irreparable injury might otherwise result.' It is instead 'an exercise of judicial discretion,' and 'the propriety of its issue is dependent upon the circumstances of the particular case.'" *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). The circumstances of this particular case do not weigh in favor of a stay. Seaboard is unlikely to prevail on the merits of its appeal because the district court properly exercised its discretion in assessing timeliness. The balance of equities also tilts strongly against Seaboard, given its decision to convert to NSIS while litigation was pending, its prior representations as to the impact of vacatur, the minimal

economic impact of a reversion to the pre-March 2020 status quo, and the increased risk to worker health and safety that would result from a stay.

I. Seaboard does not have a strong likelihood of success on the merits.

A stay pending appeal is only appropriate where a movant has made a "strong showing that he is likely to succeed on the merits." *Brakebill*, 905 F.3d at 557; *see also Craig v. Simon*, 978 F.3d 1043, 1050–51 (8th Cir. 2020) (finding irreparable harm does not justify a stay absent a "substantial likelihood of success").[5] Seaboard has not made such a showing.

A. The district court's untimeliness finding was not an abuse of discretion.

"[T]he timeliness of a motion to intervene is a decision within the district court's discretion." *ACLU of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1094 (8th Cir. 2011); *see also In re Wholesale Grocery Prods. Antitrust Litig.*, 849 F.3d 761, 766 (8th Cir. 2017). This Court has "articulated factors that the district court should specifically consider: (1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the

[5] Citing earlier cases, Seaboard contends it need only show "serious and substantial legal issues." Stay Mot. at 12. This Court's more recent cases, however, as well as the Supreme Court's decision in *Nken*, require a strong showing of likely success on the merits. *See, e.g.*, *Org. for Black Struggle*, 978 F.3d at 607; *Brakebill*, 905 F.3d at 557; *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011).

delay in seeking intervention may prejudice the existing parties." *ACLU*, 643 F.3d at 1094. Here, the district court considered each of these factors. Dist.Ct.Dkt.163 at 3–7. Seaboard has not shown a substantial likelihood that this Court will find the district court "rest[ed] its conclusion on clearly erroneous factual findings or erroneous legal conclusions." *In re Uponor, Inc. F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1065 (8th Cir. 2013) (citation omitted). As in *ACLU*, the district court "listed the relevant factors and acknowledged that timeliness is determined from all the circumstances." 643 F.3d at 1094; *see* Dist.Ct.Dkt.163 at 3–7 (addressing the four factors one by one).

First, the district court found that its "consideration of the case on the merits has concluded." *Id.* at 3. Addressing this factor, Seaboard contends that intervention was timely *despite* the progression of the case to its conclusion. *See* Stay Mot. at 14–17. This argument, however, goes to the third factor, the excuse for delay. *See* pp. 11–14 *infra*; *see also* Dist.Ct.Dkt.163 at 4–6.

Second, the district court found that Seaboard had known of the litigation well before it sought to intervene, noting its declaration submitted nearly a year earlier. *Id.* at 4 (citing *U.S. Bank Nat'l Ass'n v. State Farm Fire & Cas. Co.*, 765 F.3d 867, 869–70 (8th Cir. 2014)). Seaboard does not dispute this factual finding. *See* Stay Mot. 18–19.

As to the third factor, the district court found "no reason that…[Seaboard] could not have asked the Court to consider [its] concerns nine months ago when [it] submitted affidavits through amici." Dist.Ct.Dkt.163 at 6. The court noted it would have considered those concerns then—as it did the other concerns raised by amici. *Id.* Seaboard does not contend that this finding was clearly erroneous. It instead argues that its failure to intervene earlier is excusable because there was a "material change in USDA's defense of the rule." Stay Mot. 15. But as the district court found, that assertion is incorrect. In July 2020, USDA argued that vacatur of the line-speed provision was an appropriate alternative remedy to remanding without vacatur; it never argued that vacatur should be delayed. Dist.Ct.Dkt.89 at 5. Thus, any divergence of interest between USDA and Seaboard was apparent last summer—during the last Administration. Yet Seaboard did not to raise its concern at that time. Seaboard's suggestion of a "Catch-22," Stay Mot. 21, is thus unsupported by the facts. Had Seaboard timely raised concerns as to the need for a delay of vacatur, the district court would have considered them, as it did other arguments that Seaboard *did* timely raise. Dist.Ct.Dkt.163 at 6.

Nothing USDA has done or not done since March 2021 excuses Seaboard's untimeliness. Seaboard faults USDA for not moving for a stay on Seaboard's behalf, Stay Mot. at 15, but Seaboard had no reason to assume that USDA would seek any stay, much less a stay on behalf of a single plant. *Cf. Mausolf v. Babbitt*, 85 F.3d

1295, 1303 (8th Cir. 1996) (noting that "when the proposed intervenors' concern is not a matter of 'sovereign interest,' there is no reason to think the government will represent it").

That USDA has not yet indicated whether it will appeal the district court's judgment is irrelevant. A party's decision not to appeal does not *de facto* excuse an untimely motion to intervene. *See, e.g.*, *In re Wholesale Grocery Products Antitrust Litig.*, 849 F.3d 761, 768 (8th Cir. 2017) (affirming finding of untimeliness after party did not appeal); *Floyd v. City of N.Y.*, 770 F.3d 1051, 1058–59 (2d Cir. 2014) (affirming denial of intervention on timeliness grounds where change in administration led to city dropping appeal). Furthermore, here, whether or not USDA appeals the district court's final judgment is irrelevant: Seaboard explicitly does *not* seek to challenge the district court's "up-or-down decision on vacatur," but only to ask the court to reconsider its remedy to add an additional 10.5 months to the 90-day stay period. Dist.Ct.Dkt.177 at 12. And USDA cannot appeal the district court's failure to delay vacatur, because USDA never asked the district court to do so. *See, e.g.*, *Orion Fin. of S.D. v. Am. Foods Grp.*, 201 F.3d 1047, 1048 (8th Cir. 2000) (noting "the basic principle that one cannot raise issues on appeal that have not been raised before the district court").

USDA's May 26 Constituent Update, Dist.Ct.Dkt.178, is similarly relevant. Rather than indicate USDA's position as to the merits of the district court's decision,

that document informs regulated entities to "prepare" for the impact of vacatur—reflecting the reality that, 56 days into the 90-day stay, no further stay applications were pending. That USDA did not ignore the district court's order or direct regulated entities to do so is not a "policy shift," as Seaboard suggests. Stay Mot. 17.

The district court correctly found that "the fact that the case was not resolved in [Seaboard's] preferred manner does not justify an untimely intervention." Dist.Ct.Dkt.163 at 5–6. As the court explained, the circumstances here are analogous to those in *Cuyahoga Valley Railway Co. v. Tracy*, 6 F.3d 389 (6th Cir. 1993), where the Sixth Circuit reversed a grant of intervention on timeliness grounds. There, after the State of Ohio decided not to appeal an adverse decision, railway companies sought to intervene to request that the district court modify the scope of its summary judgment order so that it did not impact them. The Sixth Circuit held that intervention should have been denied, explaining: "The intervenors chose to rely on the Attorney General's best efforts, which they were entitled to do. They are not, however, entitled to then enter the proceedings after the case has been fully resolved, in an attempt to achieve a more satisfactory resolution." *Id.* at 396. Similarly, here, Seaboard relied on USDA's best efforts through summary judgment; it may not now enter the case to attempt to achieve a different resolution. *See also ACLU*, 643 F.3d at 1095 (affirming denial of intervention where parties relied on defendant "to

adequately represent their interests despite their knowledge of the case and its progress").

Finally, the district court found a risk of prejudice to USDA, accepting USDA's arguments that intervention "would frustrate USDA's ability to manage a national food safety system." Dist.Ct.Dkt.163 at 6–7; *see also* Dist.Ct.Dkt.153 at 10–11 (USDA opposition to Seaboard's motion). Seaboard argues this finding was an abuse of discretion because harm would result not from delay of intervention, but intervention itself. Stay Mot. 20. Not true. Had Seaboard raised its concerns in a timely manner, the district court could have addressed them in shaping an industrywide remedy. And while Seaboard is correct that USDA has previously supervised plants operating under regulatory waivers, Stay Mot. 21, in those situations, USDA controlled those waivers pursuant to its discretion under 9 C.F.R. § 303.1(h). It is entirely different for a court to exempt a plant from USDA's general rules.

B. Seaboard is unlikely to obtain the ultimate relief it seeks.

Given the equitable nature of a stay pending appeal, this Court can consider not only Seaboard's likelihood of success in obtaining intervention but also whether it will likely succeed in obtaining the ultimate relief it seeks: a 10.5 month delay of

vacatur solely as to its Guymon plant.[6] *Cf. Common Cause Rhode Island v. Gorbea*, 970 F.3d 11 (1st Cir. 2020) (considering merits argument in denying motion to stay judgment pending appeal of denial of motion to intervene). Seaboard is unlikely to obtain that relief because, as the district court explained, "'permission to intervene does not carry with it the right to relitigate matters already determined in the cause, unless those matters would otherwise be subject to reconsideration.'" Dist.Ct.Dkt.163 at 6 (quoting *Arizona v. California*, 460 U.S. 605, 615 (1983)). The district court's refusal to reconsider its remedy would be well within its discretion. *See, e.g.*, *Dunne v. Res. Converting, LLC*, 991 F.3d 931, 940 (8th Cir. 2021) (district court's denial of equitable relief reviewed for abuse of discretion); *Paris Limousine of Okla., LLC v. Exec. Coach Builders, Inc.*, 867 F.3d 871, 873 (8th Cir. 2017) ("[W]e will reverse a denial of a motion for reconsideration only for a clear abuse of discretion.").

[6] Although Seaboard makes reference to "perfect[ing] an appeal," Stay Mot. 18, it does not identify any bases for reversing the district court's merits determination—for good reason. As the district court explained, in adopting NSIS, USDA "was silent as to its ability to consider worker safety, did not consider the comments [it solicited on worker safety], and did not explain a change of position." Dist.Ct.Dkt.125 at 52. Such errors violate bedrock principles of administrative law. *See id.* (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016); *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009)). And Seaboard does not argue that the district court erred in declining to "exercise its discretion to depart from the normal APA remedy of vacatur." Dkt. 125 at 66. *Cf. Neb. Dep't of Health & Hum. Servs. v. Dep't of Health & Hum. Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) (noting decision to vacate is reviewed for abuse of discretion).

That Seaboard seeks reconsideration in the district court is clear from the "stay" motion it filed while its intervention motion was pending. That motion asked the district court to revisit several of its earlier holdings. *See* Dist.Ct.Dkt.136 (motion); Dist.Ct.Dkt.138 (supporting memorandum). For example, Seaboard argued that there was no relationship between line speeds and worker safety, Dist.Ct.Dkt.138 at 8, although the court had explicitly concluded otherwise, Dist.Ct.Dkt.125 at 33. Seaboard also asserted that it "detrimentally relied" on the NSIS rule by making certain capital expenditures. Dist.Ct.Dkt.138 at 9; *but see* Dist.Ct.Dkt.142 ¶¶ 23–38 (explaining expenditures were unrelated to line speeds and predated NSIS Rule). Again, the district court had already considered that argument and concluded that NSIS facilities could adapt to lower speeds and still benefit from other efficiencies allowed for by NSIS, and that a 90-day stay was sufficient to "give regulated entities time to prepare for any operational change." Dist.Ct.Dkt.125 at 66–68.

"Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988) (quoting *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir.), *as amended*, 835 F.2d 710 (7th Cir. 1987)). Seaboard has not identified any such manifest errors or newly discovered evidence; it simply believes the district court should have, as a matter of discretion,

weighed equitable factors differently. Seaboard's unlikelihood of obtaining the ultimate relief it seeks weighs against a stay.

II. Seaboard's assertions of irreparable injury are overstated.

To prove irreparable harm, Seaboard "must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996). Seaboard has not made that showing.

Seaboard claims that reverting to the pre-March 2020 status quo—an 1106 hph line-speed—will require it to reduce the total number of hogs it processes, and thus either sell excess hogs or undertake "mass eradication." Stay Mot. 9–10. But a third option exists: increasing the number of hours during which it operates at lines. Notably Seaboard *itself* told the district court this is what it would do in its summary-judgment declaration. Dist.Ct.Dkt.104-3 ¶ 13.

That Seaboard could move from eight-hour to ten-hour shifts, and/or add Saturday shifts, is confirmed by the fact that that was how Seaboard operated the Guymon plant until March 2020—when it was subject to the 1106 hph limit. *See* Dist.Ct.Dkt.142 ¶¶ 14–18. Seaboard's suggestion that "labor constraints" will prevent it from pursuing this course, Stay Mot. 8, is unsupported by the record. In the declaration Seaboard relies upon, an executive of the company states that "the toll of working continuous six-day work weeks is difficult for plant employees."

Dist.Ct.Dkt.131-1 ¶ 23. But as the legally recognized representative of Seaboard's workers told management:

> As you must know, workers would prefer to work more hours safely, even an additional shift, than suffer speed-up that puts them at risk. Any assertions that the workers have rejected Saturday shifts to address line speed up is false.

Dist.Ct.Dkt.186-5, Ex. A at 3. Seaboard's workers are eager and willing to work Saturday shifts and have repeatedly said so. Dist.Ct.Dkt.142 ¶¶ 13, 52–54.

Seaboard has not shown that increasing its hours of operation is unworkable or would result in "such additional expenditures [that] will so severely impact the company's bottom line that the increased costs [associated with vacatur] threaten the company's very existence." *Am. Meat Inst. v. USDA*, 968 F. Supp. 2d 38, 78 (D.D.C. 2013), *aff'd on other grounds,* 760 F.3d 18 (D.C. Cir. 2014). Any harm that it could mitigate by doing so is "not irreparable harm of the kind that could justify a stay pending appeal." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1010 (9th Cir. 2020).

Finally, even if Seaboard chooses to reduce its capacity rather than run additional shifts, it provides no competent evidence that it will be unable to sell excess hogs. As explained by economist and Professor C. Robert Taylor, an expert on the pork processing industry, the current state of the market indicates any excess hogs can and will easily be absorbed by other plants. Dist.Ct.Dkt.186-1 ¶¶ 50–59.

III. A stay would substantially injure the Unions' members and other workers.

Any harm to Seaboard must be balanced against the harm a stay would cause to others. That balance tips decidedly against Seaboard.

As the district court held, extensive evidence "clearly demonstrates" that increased line speeds puts the workers on those lines at increased risk of musculoskeletal injuries and lacerations. Dist.Ct.Dkt.125 at 27–33. As occupational health expert Professor Melissa Perry has explained, "increased line speeds increase the risks of injury to workers, including laceration injuries." Dist.Ct.Dkt.186-2 ¶ 16; *see also id.* at ¶¶ 17–26.

The widespread transmission of COVID-19 at meatpacking facilities poses an additional concern. *See* Tina L. Saitone, K. Aleks Schaefer, & Daniel P. Scheitrum, *COVID-19 morbidity and mortality in U.S. meatpacking counties*, 101 Food Policy 102072 (2021).[7] Indeed, Seaboard's Guymon plant had one of the largest outbreaks in the meatpacking industry, with over 1,000 cases and six deaths. *See* Sierra Pizarro, *Oklahoma meatpacking plant under OSHA investigation for 'COVID safety failures*, 2 News Oklahoma (Apr. 12, 2021) (quoting David Eaheart of Seaboard)[8];

[7] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8026277/.

[8] https://www.kjrh.com/news/local-news/oklahoma-meatpacking-plant-under-osha-investigation-for-covid-safety-failures.

Dist.Ct.Dkt.142 ¶ 58. As explained by Professor Perry, higher line speeds contribute to this crisis by causing workers to be packed closer together on the slaughter lines. Dist.Ct.Dkt.186-2 ¶¶ 29–31; *see also* Charles A. Taylor, Christopher Boulos, & Douglas Almond, *Livestock plants and COVID-19 transmission*, 117 Proceedings of the Nat'l Acad. of Scis. 31706, 31708 (2020) (based on poultry-plant data, finding a correlation between line speed and COVID-19 transmission).[9] Although rates of COVID-19 transmission are falling, outbreaks in meatpacking facilities continue.[10]

Seaboard states that "the record data show no correlation between workplace injuries and evisceration line speeds above 1,106," pointing only to non-expert declarations that the district court rejected. Stay Mot. 25–26. These declarations do not provide a basis to disturb the district court's well-supported, detailed findings as to the connection between line speeds and worker safety. Dist.Ct.Dkt.125 at 27–33. Nor has Seaboard acknowledged that injuries at the Guymon plant reached a three-year high after it converted to NSIS in 2020. *See* Tom Polansek & P.J. Huffstutter,

[9] https://www.pnas.org/content/pnas/117/50/31706.full.pdf.

[10] *See, e.g.*, Madison McVan, et al., "Thousands of meatpacking workers have been vaccinated, but the industry's crisis continues," USA Today (Apr. 8, 2021), https://www.usatoday.com/in-depth/news/investigations/2021/04/08/meatpacking-workers-still-face-risks-one-year-after-coronavirus/4842584001/.

As U.S. pork plant speeds up slaughtering, workers report more injuries, Reuters, Feb. 19, 2021.[11]

The increased risk of musculoskeletal injuries, lacerations, and COVID-19 to Seaboard's workers weighs strongly against a stay.

IV. A stay is contrary to the public interest.

Finally, in assessing the public interest factor, "foremost consideration must be given to any demonstrable danger to the public health." *Rsrv. Mining Co. v. United States*, 498 F.2d 1073, 1077 (8th Cir. 1974). As discussed above, allowing plants to continue to operate at increased line speeds is such a demonstrable danger.

Additionally, "the public interest in expeditious resolution of litigation" weighs in favor of allowing the Court's final judgment to go into effect in its entirety—particularly because Seaboard makes no argument as to the validity of the line-speed provision. *Boyle v. Am. Auto Serv.*, 571 F.3d 734, 741 (8th Cir. 2009).

Seaboard ignores these considerations, solely asserting that the "public interest lies in a steady supply of safe pork products." Stay Mot. 26. But it cites no evidence of any risk to the pork supply. As Professor Taylor explained, record domestic sales and exports refute the suggestion that the food supply is in danger. *See* Dist.Ct.Dkt.186-1 ¶¶ 55–58. And USDA has made clear that it will utilize the

[11] https://www.reuters.com/article/us-usa-pork-insight/as-u-s-pork-plant-speeds-up-slaughtering-workers-report-more-injuries-idUSKBN2AJ179.

tools it has to "minimize disruptions to the supply chain," without indicating any stay of this Court's order is necessary to do so. *See* Dist.Ct.Dkt.178 (USDA May 26, 2021 Constituent Update). The Court should not conclude otherwise based on Seaboard's unsupported assertion. *Cf. City of Dallas v. FCC*, 165 F.3d 341, 354 (5th Cir. 1999) ("Judicial deference to agency judgments is near its zenith where issues of the public interest are involved."); *Ofosu v. McElroy*, 98 F.3d 694, 702 (2d Cir. 1996) (in determining whether to grant stays, "courts give significant weight to the public interest served by the proper operation of the regulatory scheme").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the motion to stay.

Respectfully submitted,

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June 23, 2021

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), it contains 5107 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 MSO in 14-point Times New Roman.

3. This motion has been scanned for viruses and is virus-free.

June 23, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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