FINAL BRIEF **Oral argument scheduled for March 6, 2008**

Nos. 07-1077 & 07-1097

UNITED STATES COURT of APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABBOTT AMBULANCE OF ILLINOIS

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABBOTT AMBULANCE OF ILLINOIS Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner	Nos. 07-1077, 07-1097

THE BOARD'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Circuit Rule 28(a)(1), the National Labor Relations Board respectfully submits the following Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici

1. Abbott Ambulance of Illinois ("the Company") was the respondent before the Board and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

3. The Professional EMTs and Paramedics (PEP) was the charging party before the Board.

B. Rulings Under Review

The Company is seeking review of a Decision and Order of the Board (Chairman Battista and Members Liebman and Kirsanow) in Case No. 14-CA-28826, finding that the Company unlawfully refused to bargain with the Union chosen by its employees. The Board issued its decision on February 28, 2007, and reported it at 349 NLRB No. 43. The Board's prior decision directing the opening of a challenged ballot in the union election is also under review; that Decision and Direction was Case No. 14-RC-12491, was decided on August 2, 2006, and is reported at 347 NLRB No. 82.

C. Related Cases

Board Counsel is not aware of any potentially related cases in this Court or any other court of the District of Columbia.

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February 5, 2008

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UNITED STATES COURT OF APPEALS
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ON PETITION FOR REVIEW AND CROSS-APPLICATION
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THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Abbott Ambulance of Illinois ("the Company"), to review an Order that the National Labor Relations Board ("the Board") issued against it. The Board has filed a cross-application for enforcement of its Order.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Decision and Order issued on February 28, 2007, and is reported at 349 NLRB No. 43. (JA 660-61.)[1] The Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).[2]

The Company filed its petition for review on March 28, 2007, and the Board filed its cross-application for enforcement on April 19, 2007. Both were timely; the Act places no time limit on the institution of proceedings to review or enforce Board orders. This Court has jurisdiction over both under Section 10(e) and (f) of the Act, which provides that petitions for review of Board orders may be filed in this Court.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are included in the Company's brief.

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[1] "JA" refers to the Deferred Joint Appendix. "Br." refers to the Company's brief. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The second page of the Board's three-page Decision and Order is missing from the Joint Appendix. (*See* JA 660-61.) For the Court's convenience, the Board has appended a copy of its entire order to this brief.

STATEMENT OF THE ISSUES PRESENTED

The primary issue presented is whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the duly certified representative of its employees after the Union won a Board-conducted election.

The subsidiary issue is whether the Board reasonably found that an employee on disability leave was an eligible voter, where the Company failed to establish that she was discharged or resigned before the election.

STATEMENT OF THE CASE

The Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Professional EMTS & Paramedics ("the Union"), as the certified collective-bargaining representative of an appropriate unit of the Company's employees. (JA 660.) The Company does not contest (Br. 5) the Board's finding that it refused to bargain with the Union, but instead disputes the Board's conclusion that the Union was properly certified. In support of that contention, the Company claims that Kelly Grant, an employee on disability leave, should not have been allowed to vote in the representation election. Specifically, the Company claims that the Board's test for determining the voting eligibility of employees on disability leave is arbitrary and capricious and should not be upheld.

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. EMT Kelly Grant Injures Her Wrist at Work and Begins Medical Treatment; After She Reinjures Her Wrist, the Company Assigns Her to Light Duty at the Company's Billings and Claims Department

The Company is an ambulance service that provides emergency medical treatment and transportation for patients throughout Madison and St. Clair counties in Illinois. (JA 518; 106.) The Company operated a facility in Belleville, Illinois, which was under the overall supervision of Operations Manager Scott Tiepelman. (JA 518; 104-05.)

Kelly Grant has worked as an EMT out of the Company's Belleville facility since 1999. (JA 519; 477, 118.) When Grant was lifting a stretcher on October 13, 2001, she felt a pop in her left wrist, then pain, tingling, and weakness. (JA 519; 478, 19, 46, 119.) On October 22, 2001, Grant saw Dr. Keith Byler for her injury, and he placed her on a 20-pound lifting restriction. (JA 519; 173-174, 196-97, 11, 47-48.) According to their job description, EMTs must be able to lift 283 pounds up to 25 percent of the time. (JA 519; 473, 109-10.) Thus, after her injury, Grant began performing light-duty tasks instead of her normal EMT duties. (JA 519; 68-69.) On November 5, Dr. Byler lowered Grant's lifting restriction to 5 pounds. (JA 519; 171, 198, 13.) Dr. Byler also referred Grant to Dr. Bradley, a

hand specialist, who put Grant's left wrist in a cast and restricted her to one-handed duty on November 20. (JA 519; 169, 199, 342-472, 13-14.)

In February 2002, Dr. Byler released Grant back to regular duty with no restrictions. (JA 519; 165, 479, 14, 50.) She worked as an EMT until May 23, when she re-injured her left wrist. (JA 519; 485, 120, 123.) After that, Grant was restricted to no lifting with her left wrist. (JA 519.)

In June 2002, the Company assigned Grant to light-duty in its Billings and Claims department ("BAC") at its facility in St. Louis, Missouri. (JA 519; 50-51, 56.) Grant was paid the same hourly rate she earned as an EMT. (JA 70-71.) At the BAC, Grant performed such tasks as making copies, filing documents, and data entry. (JA 519; 55, 83.) Grant would occasionally stop by the Belleville facility to visit with coworkers and pick up information and newsletters. (JA 521; 85.)

In the summer of 2002, Grant was offered a permanent position in the BAC, but she declined the offer in hopes of returning to regular duty as an EMT. (JA 519; 152.) Also in 2002, Grant applied for a supervisor position and customer representative position at the Belleville facility. (JA 519; 153.) She did not get the supervisor position, and the customer representative position was never filled. (JA 519; 153.)

B. Grant Begins Physical Therapy and Undergoes Wrist Surgery; the Company Informs Her that Light Duty Work is No Longer Available; Grant Continues to Attend Trainings and Meetings at the Company

From June to August 2002, Grant's lifting restriction fluctuated between 5 pounds and 50 pounds. (JA 520; 159, 486, 488, 491, 12.) On October 30, 2002, Grant met with Dr. Strege, an orthopedic surgeon, who diagnosed her with mid-carpal instability of the left wrist and kept her on a lifting restriction of no more than 5 pounds. (JA 520; 202, 87, 129.) Grant began physical therapy in January 2003. (JA 520; 202, 130.) On March 13, 2003, Dr. Strege performed surgery on Grant's wrist and instructed her to avoid using her left arm. (JA 520; 48-49, 130.)

In June 2003, after recovering from surgery, Grant was again placed on a 5-pound lifting restriction and assigned to resume physical therapy. (JA 520; 488, 130-31.) In August 2003, her lifting restriction was increased to 10 pounds. (JA 520; 491, 130-31.) In early October 2003, the Company informed Grant that light-duty work at BAC was no longer available for her. (JA 521; 51-52, 73.) She received her last paycheck for regular hours worked on October 16. (JA 521; 70-71, 505.)

In November 2003, Grant attended the Company's yearly training session, and the Company paid her for her time. (JA 521; 71-72.) Grant also attended Company "town hall meetings" in January and March 2004. (JA 521; 506, 74-75, 78-80.) Grant was paid for attending the March meeting, and at that time she also

received a bonus for her good attendance while working at the BAC. (JA 521; 506, 71-72, 74-75, 79-81.)

C. The Union Files a Representation Petition; a Doctor Gives Grant a Permanent 30-Pound Lifting Restriction; Grant Attends a Company Meeting and then Meets With Management Representatives to Discuss Work Rumors

On March 1, 2004, the Union filed a petition with the Board to represent the Company's EMTs, paramedics, customer representatives, and couriers employed at the Company's Belleville facility. (JA 517; 156.) That same month, Grant stopped physical therapy because it was determined that she had reached her maximum demand tolerance to activity and tasks. (JA 522; 492, 84.) On April 12, Dr. Strege discharged Grant from his care and informed her that she had reached maximum medical improvement and that she would require a permanent lifting restriction of no more than 30 pounds. (JA 522; 202, 49, 62, 87-88, 131-33.)

On April 13, 2004, Grant attended another town hall meeting at the Company's Belleville facility. (JA 522; 63.) Directly after the town hall meeting, Grant and another employee, Michelle White, requested a meeting with Tiepelman and Director of Human Resources Roby Walker. (JA 523; 145, 149.) White had been injured in May 2002, and was performing light-duty work at the BAC and the Belleville facility. (JA 523; 143-45.) During the meeting, Grant and White said they were concerned about rumors that they had insulted an office manager. (JA 523; 146, 148.) The situation had escalated to a point where people were calling

White at home and insulting her and Grant. (JA 523; 147.) Tiepelman and Walker told Grant and White to submit their concerns to them in writing. (JA 523; 146, 149.)

D. The Representation Proceeding: The Board Conducts an Election, Overrules a Challenge to Grant's Ballot, and Certifies the Union

On April 15, pursuant to a stipulated election agreement, the Board conducted a secret-ballot election in the bargaining-unit at the Belleville facility. (JA 517; 157.) In addition to 1 void ballot, 28 votes were cast in favor of the Union, and 28 votes were cast against the Union. (JA 517; 553.) There were three challenged ballots, a number sufficient to affect the outcome of the election. (JA 517.) One of those challenges was to the ballot of Kelly Grant. (JA 516-18.)

On May 10, the Regional Director for Region 14 issued his Report on Challenges, Order, and Order Directing Hearing, in which he approved the parties' agreement that the challenges to two of the ballots be sustained. (JA 518; 512-14.) The Regional Director concluded, however, that the challenge to Grant's ballot raised substantial and material questions of fact, which could best be resolved by a hearing. (JA 518; 512-14.) A hearing officer held a hearing, and on June 28 he recommended that the challenge to Grant's ballot be overruled, and her vote be opened and counted. (JA 516-30.)

On August 2, 2006, the Board (Members Liebman and Kirsanow, Chairman Battista, dissenting) issued a decision and direction adopting the hearing officer's findings and recommendations and directing the Regional Director to count Kelly Grant's ballot and issue the appropriate certification. (JA 659.) On August 22, after opening and counting Grant's ballot, the Regional Director issued an amended tally of ballots and certified the Union as the bargaining representative of the Company's employees. (JA 660.)

E. The Unfair Labor Practices Proceeding: The Company Refuses to Bargain and the Union Files Charges

Beginning on November 1, 2006, the Union requested that the Company recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit employees. (D&O 2 (*see* p.2 of the Addendum to this brief); JA 537-40, 543-44.) The Company refused. (JA 660; n.1, 2; 537-40, 543-44.) The Union filed an unfair labor practice charge, and the General Counsel issued a complaint on December 8, 2006, alleging that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. (JA 660; 535, 537-40.) The Company filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses. (JA 660; 543-44.) On January 4, 2007, the Board's General Counsel filed a motion for summary judgment, and the Board issued a notice to show cause. (JA 660; 532-33.) The Company filed a response. (JA 660; 662-97.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On February 28, 2007, the Board (Chairman Battista and Members Liebman and Kirsanow) issued a Decision and Order granting the General Counsel's motion for summary judgment and finding that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (JA 660.) The Board's Order requires the Company to cease and desist from refusing to bargain with the Union and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (D&O 2 (*see* p.2 of the Addendum to this brief).) Affirmatively, the Board's Order requires the Company to bargain with the Union upon request, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (*Id.*)

SUMMARY OF ARGUMENT

It is undisputed that the Company refused to bargain with the Union after the Board certified it as the collective-bargaining representative of the EMTs, paramedics, customer representatives, and couriers employed at the Belleville facility. In defense of its refusal, the Company argues that, because the challenge to Kelly Grant's ballot should have been sustained, the Union failed to garner a majority of votes. The Board's certification of the Union, according to the Company, was therefore improper. However, as the Board found, the Company failed to establish that Grant, who was on disability leave, either resigned or was

terminated from her EMT job as of the election. As such, under the Board's long-standing *Red Arrow* test, which presumes that employees on medical leave are entitled to vote unless their quit or discharge is proven, Grant was an eligible voter and her ballot must be counted.

The Company now attacks the Board's well-established *Red Arrow* test, claiming that it is an arbitrary and capricious exercise of the Board's authority in representational matters. Yet, as the Board recently reiterated, there are compelling policy reasons for the Board's bright-line test, particularly the need to promptly resolve union election contests with a minimum of litigation and delay. The Company's arguments to the contrary do not withstand scrutiny. The Board's test is entitled to deference and its decision in this case should be enforced.

ARGUMENT

An employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the duly certified collective-bargaining representative of an appropriate unit of its employees. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-37 (1967); *Pearson Education, Inc. v. NLRB*, 373 F.3d 127, 130 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1131 (2005); *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1090 (D.C. Cir. 2002).[3] In the present case, the Company admits (Br. 5) that it has refused to bargain with the Union, but defends its refusal by arguing that the Board improperly rejected the Company's challenge to the ballot of Kelly Grant. Indeed, the Company's opposition to Grant's vote is its only defense. Accordingly, if the Board acted within its broad discretion in dismissing that challenge, then the Company's refusal to bargain was unlawful and the Board is entitled to enforcement of its Order. *See NLRB v. Action*

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[3] Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7" of the Act. Section 7 of the Act (29 U.S.C. § 157), in turn, guarantees employees "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing . . . ." An employer who violates Section 8(a)(5) also commits a "derivative" violation of Section 8(a)(1). *See Brewers and Maltsters, Local Union No. 6 v. NLRB* 414 F.3d 36, 41 (D.C. Cir. 2005); *see generally NLRB v. Newark Morning Ledger Co.*, 120 F.2d 262, 265 n.1 (3d. Cir. 1941).

Automotive, Inc., 469 U.S. 490, 492-95 (1985); *Pearson Education*, 373 F.3d at 130.

I. THE BOARD ACTED WITHIN ITS DISCRETION IN REJECTING THE COMPANY'S CLAIM THAT KELLY GRANT WAS NOT AN ELIGIBLE VOTER AND THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION AS THE CERTIFIED REPRESENTATIVE OF ITS EMPLOYEES

A. Standard of Review

The Board has "broad discretion to assess the propriety and results of representation elections, and to establish procedure[s] and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *New York Rehabilitation Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1074 (D.C. Cir. 2007) (citations omitted). *Accord NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1178 (D.C. Cir. 2000). This Court will uphold the Board's exercise of discretion unless its action is "'unreasonable, arbitrary or unsupported by the evidence.'" *Antelope Valley Bus Co., Inc. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002) (quoting *BB&L, Inc. v. NLRB*, 52 F.3d 366, 369 (D.C. Cir. 1995)).

It is well established that the Board has primary responsibility for developing and applying national labor policy. *NLRB v. Curtis Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (citing *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963);

NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957)). A Board rule is therefore entitled to "considerable deference," and should be upheld as long as it is "rational and consistent with the Act." *Curtis Matheson Scientific*, 494 U.S. at 786-87. *See also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987).

That deference is particularly due where the Board's rule pertains to the employees' choice of bargaining representative. *See New York Rehabilitation Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1074 (D.C. Cir. 2007); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1178 (D.C. Cir. 2000). As the Supreme Court has noted, Congress entrusted the Board with a "wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *A.J. Tower Co.*, 329 U.S. at 330.

The Board's factual findings are "conclusive" if supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). *See also* 29 U.S.C. § 160(e); *Allentown Mack Sales & Services, Inc. v. NLRB*, 522 U.S. 359, 366 (1998). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp.*, 340 U.S. at 477. *Accord Allentown Mack*, 522 U.S. at 366-67.

B. The Presumption That Kelly Grant Continued in Employee Status Has Not Been Rebutted Because the Company Failed to Show that She Was Discharged or Resigned

The Board reasonably concluded that Kelly Grant, who was on disability leave because of a work-related injury, was eligible to vote in the election because the Company failed to show that her employment had terminated. Substantial evidence supports the Board's findings.

The fundamental rule followed by the Board in determining the voting eligibility of an employee on sick or disability leave "is that he or she is presumed to continue in . . . [employee] status unless and until the presumption is rebutted by an affirmative showing that the employee has been discharged or has resigned." *Red Arrow Freight Lines*, 278 NLRB 965, 965 (1986). *Accord Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 602 (3d Cir. 1996) (hereinafter "*Cavert Acquisition*"); *Home Care Network, Inc.*, 347 NLRB No. 80, 2006 WL 2282348 at *1 (2006); *Supervalu, Inc.*, 328 NLRB 52, 52 (1999); *Vanalco, Inc.*, 315 NLRB 618, 618 (1994). That rule, which has been consistently referred to as the "*Red Arrow* test" since 1986, has received judicial approval. *See Cavert Acquisition*, 83 F.3d at 602; *NLRB v. Newly Weds Foods*, 758 F.2d 4, 7-8 (1st Cir. 1985); *Medline Industries, Inc. v. NLRB*, 593 F.2d 788, 791 (7th Cir. 1979).

In general, an affirmative termination of employment in this context requires "a manifestation of intent to terminate which is clearly communicated to the other

party." *Cavert Acquisition*, 83 F.3d at 607 (quotations omitted). An affirmative termination can be found even in the absence of any formal or informal communication, in instances where the surrounding circumstances make clear that the employment relationship has ended. *Id.* *Accord Air Liquide America Corp.*, 324 NLRB 661, 663 (1997). The party seeking to preclude an individual from voting bears the burden of establishing that the individual is, in fact, ineligible to vote. *Cavert Acquisition*, 83 F.3d at 607; *Newly Weds Foods*, 758 F.2d at 7; *Golden Fan Inn*, 281 NLRB 226, 230 n.24 (1986).

It is undisputed that the Company never informed Grant that she had been discharged, and equally undeniable—given the Company's decision to give up on an argument it made to the Board below—that Grant never resigned. (JA 527.) And, notwithstanding the Company's protests, its treatment of Grant throughout her medical leave, up to and including the day of the election, confirmed that both the Company and Grant anticipated that Grant would return as an EMT when she recovered enough to perform her duties. For example:

- Grant testified that managers as well as employees consistently asked when she would return to work. (JA 85-86.) Indeed, John Depper, the Company's operations supervisor who was in charge of scheduling, testified that, at a January 2004 meeting, he approached Grant "like [he did] all [his] employees," and asked when he was going to "get her back" because the schedule had holes. (JA 96-98.)
- After Grant stopped performing light-duty work at the BAC, she attended the Company's yearly training in November as well as

town hall meetings in January, March, and April. (JA 521; 506, 71-72, 74-75, 78-80.) The Company paid Grant for attending the training and at least one of the meetings, and it also gave her a bonus for good attendance at the BAC. (JA 521; 506, 71-72, 74-75, 79-81.)

- Grant testified that supervisor Robin Peas invited her to the April 2004 town hall meeting. (JA 84.)

- Grant continued to undergo medical treatment, including physical therapy and surgery, and hoped that she could one day return to her EMT position. (JA 73, 82.)

- Grant retained a mailbox at the BAC through the date of the election. (JA 76.)

- The Company never requested that Grant return her ID card, nor did it conduct an exit interview, despite its past practice of doing so with other departing employees. (JA 527; 140, 151.)

- As little as 2 days before the election, on April 13, the Company met with Grant and one of her coworkers to discuss threatening rumors and phone calls. At the end of the meeting, the Company instructed Grant and her colleague to put their concerns in writing. (JA 141, 146, 149.) As the hearing officer observed (JA 528), "[s]uch an instruction suggests the [Company's] effort to adjust her grievance, and it does not stand to reason that the [Company] would do so for an employee who had just [resigned]."[4]

Under these circumstances, the Board reasonably concluded that "Grant was on disability leave and was neither affirmatively discharged nor had resigned at the

[4] Before the Board, the Company claimed that Grant resigned during the April 13 meeting, and that, had she not resigned, she would have been terminated because she recorded the town hall meeting, without permission, that same day. (JA 631-36.) The Board properly rejected both these claims, and the Company does not challenge those conclusions on review. (JA 527-29, 659.)

time of the election, and was therefore eligible to vote under *Red Arrow*. . . ." (JA 659 n.1.)

II. THE BOARD'S LONG-STANDING *RED ARROW* TEST IS A RATIONAL EXERCISE OF THE BOARD'S STATUTORY AUTHORITY AND THUS IS ENTITLED TO DEFERENCE

Presumably because of the absence of evidence showing Grant's resignation or termination, the Company aims its sights primarily at the *Red Arrow* rule itself. Thus, the Company asserts—in a variety of guises throughout its brief—that the *Red Arrow* rule is neither reasonable nor consistent with the Act itself. (Br. 29-41, 45-47.) In doing so, the Company adopts the cause of several dissenting Board members in suggesting that the Court should apply to sick leave employees the accepted rule for determining voter eligibility of employees on economic layoff, who may cast a ballot only if they have a "reasonable expectation of recall" to the job. As discussed below, however, the Board has consistently and thoughtfully rejected the same proposal in a series of cases reaching back over 20 years, where the Board offered reasonable policy-based explanations for adhering to the well-established *Red Arrow* test. The Courts of Appeals have regularly applied the Board's approach. Given the Board's wide discretion in fashioning rules for conducting representation elections, the Court should join its sister circuits and affirm the *Red Arrow* test as a reasonable exercise of administrative authority.

A. The Board's *Red Arrow* Test Allows for Simple Identification of Eligible Voters, Encourages Speedy Elections, and Reduces Litigation

Contrary to the Company's contention, the Board's rule governing eligibility of employees on sick or disability leave to vote in representation elections reflects a reasonable exercise of the Board's broad discretion in devising rules to decide voter eligibility. First, the *Red Arrow* test's bright-line rule—allowing employees on medical leave to vote unless the evidence shows that they have been discharged or quit—"avoids unnecessary litigation and 'endless investigation into states of mind or future prospects.'" *Home Care Network, Inc.*, 347 NLRB No. 80, 2006 WL 2282348 at *1 (2006) (quoting *Vanalco, Inc.*, 315 NLRB 618, 618 n.4 (1994)).[5] By focusing on objective evidence of how the parties have structured their relationship, the Board avoids inquiries into uncertain matters such as an employee's prognosis or an employer's intentions. *Vanalco, Inc.*, 315 NLRB at 618 n.4. Moreover, the *Red Arrow* standard is an easily administered test that provides desirable reliability for participants in a representation election. *See NLRB v. Hudson Oxygen Therapy Sales Co.*, 764 F.2d 729, 733 (9th Cir. 1985) ("bright line" rules in representation cases provide "predictability and stability").

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[5] *See also NLRB v. Newly Weds Foods, Inc.*, 758 F.2d 4, 8 (1st Cir. 1985) (Breyer, J.) (quoting *Whiting Corp.*, 99 NLRB 117, 123 (1952), *reversed*, 200 F.2d 43 (7th Cir. 1952)); *NLRB v. Staiman Bros.*, 466 F.2d 564, 566 n.2 (3d Cir. 1972).

Second, abandoning the *Red Arrow* test's predictable rule in favor of a "reasonable expectancy of return" test would require the Board to evaluate medical evidence, opening "a new avenue of litigation, possibly involving paid expert testimony, which is beyond the traditional expertise of the agency. . . ." *Home Care Network, Inc.*, 347 NLRB No. 80, 2006 WL 2282348 at *1 (2006). As the Board has explained, if required to decide whether an employee on disability leave will be medically fit to return to work, "medical evidence would become dispositive, and would therefore likely be countered by contrary medical evidence or opinion in almost all cases involving dispositive challenges to the ballots of employees on sick leave at the time of an election." *Associated Constructors*, 315 NLRB 1255, 1255 n.3 (1995).

Not only would that line of investigation require the Board to evaluate evidence outside its traditional expertise, it would be "inimical to the efficient and expeditious resolution of questions concerning representation." *Id.* As the Supreme Court observed long ago, it is the Board's responsibility to "adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946).

In sum, the origins of the *Red Arrow* test date back over 50 years,[6] and, since the Board reaffirmed the standard in 1986, it has been consistently applied and endorsed.[7] Furthermore—in a series of cases dating back before *Red Arrow*—the Courts of Appeals have regularly applied the Board's approach. *See Cavert Acquisition*, 83 F.3d at 606; *Central Soya Co. v. NLRB*, 867 F.2d 1245, 1248-49 (10th Cir. 1988); *NLRB v. Economics Laboratory, Inc.*, 857 F.2d 931, 936-38 (3d Cir. 1988); *NLRB v. Newly Weds Foods, Inc.*, 758 F.2d 4, 8 (1st Cir. 1985); *Medline Industries, Inc. v. NLRB*, 593 F.2d 788, 791-92 (7th Cir. 1979). As the Third Circuit observed in rebuffing the same arguments the Company advances here, the *Red Arrow* test "represents a rational attempt by the Board to balance the need to make accurate determinations . . . against the necessity to make such determinations quickly and definitively so that lengthy disputes regarding union elections can be avoided and employment relations can proceed normally. . . ." *Cavert Acquisition*, 83 F.3d at 606.

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[6] *Sylvania Elec. Prods.*, 119 NLRB 824, 832 (1957); *Wright Mfg. Co.*, 106 NLRB 1234, 1236-37 (1953).

[7] *See, e.g., Home Care Network, Inc.*, 347 NLRB No. 80, 2006 WL 2282348 at *1 (2006); *Supervalu, Inc.*, 328 NLRB 52, 52 (1999); *Pepsi-Cola Company*, 315 NLRB 1322, 1323-24 (1995); *Associated Constructors*, 315 NLRB 1255, 1255 n.3 (1995); *Vanalco, Inc.*, 315 NLRB 618, 618 (1994); *Thorn Americas, Inc.*, 314 NLRB 943, 943 (1994); *Edward Waters College*, 307 NLRB 1321, 1321-22 (1992); *Atlanta Dairies Cooperative, Inc.*, 283 NLRB 327, 327 (1987).

B. The Board Was Not Required To Adopt the "Reasonable Expectation of Recall" Test Traditionally Used for Determining Voting Eligibility of Employees Laid Off for Economic Reasons

The Company erroneously claims (Br. 36-41, 47-54) that the Board should have applied its test for deciding whether laid off employees can vote in a representation election to Grant, asking whether she had a "reasonable expectation of return" to determine her eligibility. The Board, however, has explicitly stated that it does not believe that "such a test, with the additional litigation it requires, is warranted regarding employees on sick or disability leave." *Vanalco, Inc.*, 315 NLRB 618, 618 (1994).

In the economic layoff context, consideration of whether potential voters have a reasonable expectation of returning to work makes sense. As the Company acknowledges (Br. 37), such a determination involves consideration of objective factors such as the economic circumstances of the layoff, which the Board commonly evaluates. *See, e.g.*, *Madison Industries*, 311 NLRB 865, 866 (1993) (discussing factors used to determine whether a laid off employee has a reasonable expectation of recall); *S & G Concrete Co.*, 274 NLRB 895, 896 (1985) (same); *accord Aqua Chem, Inc.*, 288 NLRB 1108, 1110 (1988), *enforced*, 910 F.2d 1487 (7th Cir. 1990). As discussed above, however, if the Board were to apply the "reasonable expectation of return" standard to employees on medical leave, that would require litigation of complicated medical evidence, delaying the results of

the election. The Board has reasonably declined the invitation to wade into those waters. *See Cavert Acquisition*, 83 F.3d at 606 ("We are not in a position to hold that it was unreasonable for the Board to have determined that engaging in fact-finding regarding the medical prognosis of employees would be too time-consuming.").

The Company misleadingly claims (Br. 37 n.13) that the Board "routinely" evaluates the adequacy and propriety of medical evidence in its decisions. In support of that claim, however, the Company cites only unfair labor practice cases involving allegations of discrimination against employees, not representation cases analyzing voter eligibility. *See Homer D. Bronson Co.*, 349 NLRB No. 50, 2007 WL 844698 at *60-64 (2007) (employee was discriminatorily denied light-duty work then terminated), *pet. for review pending*, No. 07-2447-ag (2d Cir.); *Regional Home Care*, 329 NLRB 85, 96-97 (1999) (employees were discriminatorily laid off and discharged and thus should have been eligible voters), *enforced*, 237 F.3d 62 (1st Cir. 2001); *Custom Window Extrusions, Inc.*, 314 NLRB 850, 859-68 (1994) (employee was discriminatorily discharged). Yet, even acknowledging that the Board sometimes considers medical evidence in deciding whether an employee was discharged for lawful or unlawful reasons, the policy concerns underlying *Red Arrow* (*see* pp. 18-21)—especially finality in representation matters and the quick

resolution of election disputes—are not implicated in discrimination cases. As such, the *Red Arrow* rule need not apply in such a context.

The Company also incorrectly claims (Br. 38) that *Advance Waste Systems*, 306 NLRB 1020 (1992), and *Thorn Americas, Inc.*, 314 NLRB 943 (1994), require the Board to apply the "reasonable expectation of return" test to sick leave cases. In *Advance Waste*, the administrative law judge found that an employee, who was originally on leave due to an injury, had been laid off by the time of the election. 306 NLRB at 1027. Thus, the judge applied the "reasonable expectation of return" test to conclude that the employee was not an eligible voter. *Id.* at 1032.[8]

Two years later, in *Thorn Americas, Inc.*, the Board specifically cautioned that, "[t]o the extent that *Advance Waste* is ambiguous and can be construed as applying a 'reasonable expectation of employment' test to sick leave cases, we disavow such a construction and adhere to the *Red Arrow* test in sick leave cases." 314 NLRB 943, 943 (1994). The Third Circuit has confirmed this reading.[9] Furthermore, on the facts, the Board observed that *Advance Waste* involved a lay-

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[8] It is not clear whether either party filed exceptions to the administrative law judge's findings on that issue. The Board did not specifically address the judge's findings. *Advance Waste*, 306 NLRB at 1020-21.

[9] *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 606 (3d Cir. 1996) (noting that the Board has explicitly disavowed any construction of *Advance Waste Systems* as appropriately applying a reasonable expectation of employment test to sick leave cases); *see also Pepsi-Cola Co.*, 315 NLRB 1322, 1324 (1995) (same).

off, and not simply an employee on sick leave, and thus the reasonable expectation of return test was not unsuitably applied. *Id.* As such, those cases merely illustrate the Board's distinction between two different categories of potential voters.

Finally, attempting to wedge Grant's case into the *Advance Waste* or economic layoff context, the Company now asserts (Br. 47-50) that Grant was laid off in October 2003, when she was told that there was no more work for her at the Billings and Claims department. But, as a factual matter, the Company's claim—that Grant was laid off as an EMT by virtue of being told that there was no light-duty work available—simply falls flat. To begin, there is no evidence that a supervisor ever *told* Grant that she was laid off from her EMT position. And the mere fact that there was no light-duty work available to continue accommodating Grant while on sick leave does not establish that the Company and Grant believed that no EMT work would be available—to the contrary, the record demonstrated that EMT work was plentiful—should Grant recover enough to return from medical leave. In any event, the Company continued to regard Grant as an employee, as noted above, by inviting her to company meetings, inquiring about her availability for work as an EMT, and allowing her to keep her mailbox and identification card, among other things. In sum, the Company treated Grant like an EMT on extended medical leave—which is why she was entitled to cast a vote as an EMT in the election.

Concededly, Grant's case—an employee on medical leave for 2 years with her ability to return to work uncertain—is the outlier, the unusual situation. Far more likely is the employee on sick leave for a brief medical procedure, for maternity leave, or for an unexpected illness. The Board's *Red Arrow* rule presumes that they may vote, resolving their routine situations straightforwardly and efficiently. If the Company's position were adopted, each of those medical situations would be subject to litigation. The atypical circumstances here conjure thoughts of Justice Holmes, who noted that the facts of a difficult case could force "even well settled principles of law [to] bend." *Northern Securities Co. v. United States*, 193 U.S. 197, 401 (1904). Although the temptation may exist to bend the law here, the Board respectfully requests the Court to reject the Company's arguments and affirm the Board's reasonable exercise of its broad discretion in representation matters to adhere to the *Red Arrow* test in finding Grant eligible to vote.

C. The Company's Remaining Arguments Demonstrate a Misunderstanding of Controlling Law

A potpourri of arguments scattered throughout the Company's brief remain for response. Distilled to their essence, they attempt to use dicta from various *Red Arrow* cases as swords to strike down *Red Arrow* itself. For the reasons explained below, the arguments fail.

1. Possibly picking up on stray language from *Cavert Acquisition*, 83 F.3d at 602-03, the Company repetitively suggests (Br. 33-35, 36, 41-45) that, because Grant has been on sick leave and temporary reassignment from her job as an EMT, applying the *Red Arrow* presumption to enfranchise Grant would undermine the Board's "community of interest" standards. But this suggestion only demonstrates the Company's effort to blur Grant's actual status at the time of the election, as an EMT on medical leave who had not resigned, been terminated, or been laid off.

As of the election, for the 2 years since her injury, the Company had taken no action to resolve Grant's employee status with any finality—either by reemploying her in another position if one existed or by affirmatively terminating her formal employment. Thus, despite the unusual circumstances, she remained an EMT, a position that was specifically included in the bargaining unit. (JA 658.) Put simply, on the day of the election, the Company failed to show that Grant was no longer on the EMT rolls; therefore, as an EMT, she shared a sufficient common interest with her fellow EMTs and unit members in their terms and conditions of employment to allow for effective bargaining. Rejecting a similar challenge over 10 years ago, the Board noted that, "if the[] employees [on sick leave] have not quit or been discharged, they continue to retain a sufficient community of interest

in the unit to warrant a finding that they are eligible to vote." *Vanalco, Inc.*, 315 NLRB 618, 618 (1994).[10]

2. Next, the Company seizes (Br. 50-54) on language in *NLRB v. Newly Weds Foods, Inc*., 758 F.2d 4, 8-9 (1st Cir. 1985), and *Cavert Acquisition*, 83 F.3d at 604, indicating that, where the employment status of an individual on sick leave is ambiguous, the Board should look to whether he or she had a reasonable expectation of return. That suggestion appears in the First Circuit's *Newly Weds Foods*—a case that pre-dates the Board's *Red Arrow* decision—as the Court observed that, "the Board uses the 'reasonable expectations' of 'sick leave' employees only to clarify ambiguities of employment status." Yet, the Board has never applied such an analysis in the context the Court suggested, or in a context similar to the one at bar. In turn, *Cavert Acquisition* merely quoted, but did not apply, the cited language from *Newly Weds Foods*.

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[10] In any event, although some cases (like *Cavert* and *Vanalco*) use the phrase "community of interest" to describe whether an employee on sick leave remains sufficiently connected to the bargaining unit to justify his or her participation in the election, it is unclear whether use of the phrase is accurate. In the typical case, the Board's community of interest standard asks whether *particular job classifications*, not *particular employees*, enjoy sufficient commonality to promote efficient bargaining. *See, e.g., Sundor Brands, Inc. v. NLRB*, 168 F.3d 515, 518 (D.C. Cir. 1999); *see generally*, NLRB OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 125-26 (July 2005 ed.). In contrast, the *Red Arrow* inquiry about whether a worker on sick leave enjoys voting rights probes the individual worker's continued status as an "employee" of the employer, and ignores the specifics of his job classification. *Id.* at 265.

Of the two Board cases the Company cites to support its assertion, each contains only the footnoted observations of a single Board member, not a full Board majority. *See Vanalco, Inc.*, 315 NLRB 618, 618 n.5 (1994) (view of Board Member Stephens); *Red Arrow Freight Lines, Inc.*, 278 NLRB 965, 965 n.4 (1986) (view of Board Member Babson). As such, it is not at all clear that the Board would apply such an analysis, as the Court in *Newly Weds Foods* stated,[11] if faced with an individual whose employment status was ambiguous.

In any event, here, Grant's employment status was not ambiguous; rather, the record fully supports the Board's conclusion that she was an employee on medical leave at the time of the election. The Board found, and the Company no longer disputes, that Grant did not resign, nor was she terminated. Further, as discussed above (p. 25), there is no indication that Grant was laid off; to the contrary, the evidence shows that the Company expected Grant to return as an

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[11] The First Circuit based its finding on a quote it attributed to the Board's 1952 decision in *Whiting Corporation*; however, the Board's full quote from that case does not appear to support the First Circuit's interpretation. *Compare Newly Weds Foods*, 758 F.2d at 8-9 (quoting *Whiting Corp.* as stating that "[s]ometimes it is difficult to ascertain whether an employee . . . has lost or retained his status as an employee. In such cases, the Board applies the 'reasonable expectation of further employment' standard as an aid in resolving the question."), *with Whiting Corp.*, 99 NLRB 117, 123 (1952) ("Sometimes it is difficult to ascertain whether an employee is permanently or only temporarily laid off, or in other words, whether he has lost or retained his status as an employee. In such cases, the Board applies the 'reasonable expectation of further employment' standard as an aid in resolving the question."), *enforcement denied*, 200 F.2d 43 (7th Cir. 1952).

EMT when she recovered from her injury. As such, Grant's employment status is not ambiguous and, as a factual matter, the Company's argument is unpersuasive.

3. Relying on disability discrimination manuals, the Company claims (Br. 39-40), for the first time, that the Board's rule presents a "Hobson's choice" between violating the Act and violating state and federal employment laws. Because the Company never presented that argument to the Board to decide in the first instance, however, this Court is jurisdictionally barred from considering it. Section 10(e) of the Act (29 U.S.C. § 160(e)). *See also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (Section 10(e) deprives the Court of jurisdiction over objections not presented to the Board); *Highlands Hospital Corp., Inc. v. NLRB*, 508 F.3d 28, 32-33 (D.C. Cir. 2007) (same). In any event, the Company's assertion is simply wrong. The Board does not require that an employer terminate sick or disabled employees, it simply holds that, if employees are not terminated or do not resign, then they have the right to vote in a Board-conducted representation election. To the extent that state and federal employment laws mandate that certain employees are protected and must not be terminated, the Board's rule compliments those requirements, mandating that those employees still be treated as employees and thus allowed to vote.

4. Finally, contrary to the Company's claim (Br. 35 n.12), the Board has consistently applied the *Red Arrow* rule for the last 20 years. The Company's primary support for its claim is *Red Arrow* itself, in which the Board acknowledged that it might have "inadvertently" used "reasonable expectation of employment" language in cases involving employees on sick or maternity leave. *Red Arrow*, 278 NLRB at 965 n.5. To clarify any uncertainty, the Board unambiguously reiterated that the proper test is that an employee is presumed eligible to vote "unless and until the presumption is rebutted by an affirmative showing that the employee has been discharged or has resigned." *Id.* at 965.

Since then, there has been "virtual consistency" in application of the *Red Arrow* test. *See Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 605 (3d Cir. 1996) (noting that "in the nine years since the *Red Arrow* decision there has been virtual consistency in application of the rebuttable presumption rule—now denominated as the '*Red Arrow*' test"); *see also* n.7 above (collecting cases). The cases the Company cites (Br. 35 n.12), by contrast, were either decided before *Red Arrow*, or have been clarified and disavowed by the Board. *See Price's Pic-Pac Supermarkets*, 256 NLRB 742, 743 (1981) (pre-*Red Arrow*), *enforced*, 707 F.2d 236 (6th Cir. 1983); *Sid Eland, Inc.*, 261 NLRB 11, 11 (1982) (pre-*Red Arrow*); *Advance Waste Systems*, 306 NLRB 1020, 1032 (1992) (clarified and disavowed in *Thorn Americas, Inc.*, 314 NLRB 943, 943 (1994)).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enter a judgment enforcing the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD

February 2008

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABBOTT AMBULANCE OF ILLINOIS Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner	Nos. 07-1077, 07-1097

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), the Board certifies that its brief contains 7,517 words of proportionally-spaced type, and the word processing system used was Microsoft Word 2003.

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February 5, 2008

ADDENDUM

Abbott Ambulance of Illinois and Professional EMTS & Paramedics (PEP). Case 14–CA–28826

February 28, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on November 24, 2006, the General Counsel issued the complaint on December 8, 2006, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 14–RC–12491. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(b); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On January 4, 2007, the General Counsel filed a Motion for Summary Judgment and a brief in support of the Motion. On January 9, 2007, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of the Board's disposition of a determinative challenged ballot in the representation proceeding.[1]

The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.[2] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[3]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Illinois not-for-profit corporation, with its principal office and place of business in Belleville, Illinois, has been engaged in the business of providing patient transportation services for various municipalities in the State of Illinois.

During the 12-month period ending November 30, 2006, the Respondent, in conducting its business operations described above, performed services valued in excess of $50,000 for the Illinois municipalities of Fairview Heights, Caseyville, Belleville, and Madison, each of which municipalities are directly engaged in interstate commerce.

During the 12-month period ending November 30, 2006, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $500,000.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held April 15, 2004, the Union was certified on August 22, 2006, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

[1] The Board's Decision and Direction adopting the Hearing Officer's findings and recommendations is reported at 347 NLRB No. 82 (2006).

In addition to denying that the certification was proper, the Respondent alleges, as an affirmative defense, that even if the allegations of the complaint are true, the charge was prematurely filed because no alleged unfair labor practice had occurred on or before November 24, 2006, as the Respondent did not refuse to bargain until it sent its December 4, 2006 letter. This argument is irrelevant because the Respondent has admitted the operative complaint allegations that the Union requested bargaining on November 1, 2006, and that the Respondent has refused to bargain with the Union since December 4, 2006.

[2] Chairman Battista dissented in the underlying representation case. Contrary to his colleagues in the majority, he would not apply the test in *Red Arrow Freight Lines*, 278 NLRB 965 (1986), to determine the voting eligibility of individuals who were absent from their unit positions for medical reasons. Rather, consistent with the Board's eligibility standard for laid-off employees, he would assess whether the employee, as of the date of the election, had a reasonable expectancy of returning to the unit. Applying that test, he would find that the employee at issue was not eligible to vote in the election. While he remains of that view, he agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). In light of this, and for institutional reasons, he agrees with the decision to grant the General Counsel's Motion for Summary Judgment.

[3] Therefore, we deny the Respondent's request that the complaint be dismissed in its entirety.

> All full-time and regular part-time EMT's, Paramedics, customer representatives, and couriers employed at the Employer's Belleville, Illinois facility, EXCLUDING all dispatchers, mechanics, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated November 1, 2006, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. By letter dated December 4, 2006, the Respondent refused to bargain collectively with the Union. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since on or about December 4, 2006, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Abbott Ambulance of Illinois, Belleville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Professional EMTS & Paramedics (PEP), as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the agreement in a signed agreement:

> All full-time and regular part-time EMT's, Paramedics, customer representatives, and couriers employed at the Employer's Belleville, Illinois facility, EXCLUDING all dispatchers, mechanics, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Belleville, Illinois, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 4, 2006.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 28, 2007

Robert J. Battista, Chairman

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Wilma B. Liebman, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with Professional EMTS & Paramedics (PEP), as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time EMT's, Paramedics, customer representatives, and couriers employed at our Belleville, Illinois facility, EXCLUDING all dispatchers, mechanics, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

ABBOTT AMBULANCE OF ILLINOIS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABBOTT AMBULANCE OF ILLINOIS Petitioner/Cross-Respondent	Nos. 07-1077, 07-1097
v.	
NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner	Board Case No. 14-CA-28826

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Board's final answering brief in the above-captioned case have this day been served by first class mail to the following persons at the address listed below:

D. Michael Linihan
Corey Louis Franklin
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222 South Central Ave., Suite 901
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Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
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February 5, 2008