

**Nos. 10-1278 & 10-1291**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**THE NEW YORK AND PRESBYTERIAN HOSPITAL**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE NEW YORK AND PRESBYTERIAN  
HOSPITAL

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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\* Nos. 10-1278,  
\* 10-1291  
\* **ORAL ARGUMENT**  
\* **SCHEDULED 5/6/11**  
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\* Board Case No.  
\* 2-CA-38512  
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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

**A. Parties and Amici**

The New York and Presbyterian Hospital (“the Hospital”) was the respondent before the National Labor Relations Board (“the Board”), and is the petitioner/cross-respondent in Case. Nos. 10-1278 and 10-1291 herein. The Board is the respondent/cross-petitioner in Case Nos. 10-1278 and 10-1291 herein. The Board’s General Counsel was a party before the Board. The New York State Nurses Association (“the Union”) was the charging party before the Board.

## **B. Rulings Under Review**

The ruling under review is a decision and order of the Board (Chairman Liebman and Members Schaumber and Hayes), in *The New York Presbyterian Hospital and New York State Nurses Association*, Case No. 2-CA-38512, issued on August 26, 2010, and reported at 355 NLRB No. 126.<sup>1</sup> This decision and order incorporates an earlier decision, on April 29, 2009, reported at 354 NLRB No. 5, by two sitting members of the Board (Chairman Liebman and Member Schaumber) upholding an administrative law judge's findings that the Company violated Section 8(a)(1) and (5) of the Act, and additionally finding that the Hospital unlawfully refused to furnish the Union with another category of documents.<sup>2</sup>

## **C. Related Cases**

After the Board's April 29, 2009 two-member decision, the Hospital petitioned for review of the Board's Order in the D.C. Circuit. That case was previously before this Court as Case No. 09-1200. The Board subsequently filed a cross-application for enforcement. That case was previously before this Court as

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<sup>1</sup> On September 3, 2010, the Board issued a Correction that is incorporated into the decision dated August 26, 2010 and reported at 355 NLRB No. 126.

<sup>2</sup> After the Board issued its April 29, 2009 Order, the Hospital filed a motion for reconsideration with the Board. On June 9, 2009, the Board denied the motion for reconsideration.

Case No. 09-1210. The D.C. Circuit put these cases in abeyance before the Board filed the record.

On August 17, 2010, the Board vacated the Board's original Decision and Order in light of the Supreme Court's decision in *New Process Steel L.P. v. NLRB*, 130 S.Ct. 2635, 2640 (2010), and pursuant to Section 10(d) of the Act, which provides that, "[u]ntil the record in a case shall have been filed in a court, . . . the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."<sup>3</sup> 29 U.S.C. § 160(d). This Court subsequently dismissed Nos. 09-1200 and 09- 1210.

On August 26, 2010, as discussed above, the Board (Chairman Liebman, Member Schaumber and Member Hayes) issued the Decision and Order at issue here, adopting the Board's prior Decision and Order, and incorporating it by reference. *See* 355 NLRB No. 126.

The Board then filed an application for enforcement in the Second Circuit Court of Appeals (No. 10-3471), and the Hospital filed the currently pending petition for review in the D.C. Circuit. The Board subsequently withdrew its

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<sup>3</sup> In 1959, Section 10(d) was amended. Prior to amendment, it was the filing of the "transcript of the record" that gave the courts exclusive jurisdiction.

application in the Second Circuit and filed the currently pending cross-application for enforcement in the D.C. Circuit.

Finally, Board Counsel are unaware of any related cases either pending in this Court or any other court.

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Dated at Washington, DC  
this 30th day of March, 2011

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## **GLOSSARY**

“2009 D&O” = The Board’s April 29, 2009 Decision & Order, reported at 354 NLRB No. 5 (2009)

“2010 D&O” = The Board’s August 26, 2010 Decision & Order, reported at 355 NLRB No. 126 (2010)

“[the]Act” = The National Labor Relations Act (29 U.S.C §§ 151 *et seq.*)

“Board” = The National Labor Relations Board

“Br.” = Hospital’s opening brief

“FRAP” = Federal Rules of Appellate Procedure

“GX” = General Counsel’s Exhibit from hearing before administrative law judge

“the Hospital” = The New York and Presbyterian Hospital

“JX” = Joint Exhibit from hearing before administrative law judge

“RX” = Respondent Hospital’s Exhibit before administrative law judge

“Tr.” = Transcript from hearing before administrative law judge

“the Union” = The New York State Nurses Association

“The University” = Columbia University

**UNITED STATES COURT OF APPEALS  
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**Petitioner/Cross-Respondent**

**v.**

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**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of The New York and Presbyterian Hospital (“the Hospital”) to review, and the application of the National Labor Relations Board (“the Board”) to enforce, an Order issued against the Hospital. The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Decision and Order is final under

Section 10(e) and (f) of the Act (29 U.S.C. § 160(e)) and (f)), and this Court has jurisdiction pursuant to the same section of the Act.

Previously, a two-member panel of the Board (then-Chairman Schaumber and then-Member Liebman) issued a Decision and Order in this case on April 29, 2009. *The New York Presbyterian Hospital*, 354 NLRB No. 5 (2009) (“the 2009 Decision and Order”) (A 47-55.)<sup>1</sup> In its decision, the Board found that the Hospital violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) & (1)) by failing to provide the New York State Nurses Association (“the Union”) with requested information about nurse practitioners working at the Hospital. (A 47-48.)

The Company petitioned this Court for review of the 2009 Decision and Order (D.C. Cir. No. 09-1200) and the Board cross-applied for enforcement (D.C. Cir. No. 09-1210). Before the Board filed the record, the Court put the case in abeyance because the issue of whether a two-member panel of the Board constituted a quorum was being considered, first by this Court, in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *cert.*

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<sup>1</sup> Record references in this final brief are to the Joint Appendix (“A”) filed on March 24, 2011, and the Supplemental Appendix (“SA”) that the Board is moving to file with this final brief. “Br.” references are to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

*denied*, 130 S. Ct. 3498 (2010), and ultimately, by the Supreme Court in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

On June 17, 2010, the Supreme Court decided *New Process*, and held that a Board delegee group must maintain at least three members in order to exercise the delegated authority of the Board. *Id.* at 2640-42. On August 17, 2010, the Board vacated the Board's 2009 Decision and Order in light of *New Process* and pursuant to Section 10(d) of the Act, which provides that, "[u]ntil the record in a case shall have been filed in a court, . . . the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." This Court subsequently dismissed the pending petition for review and cross-application for enforcement of the 2009 Decision and Order.

On August 26, 2010, a three-member panel of the Board (Chairman Liebman and Members Schaumber and Hayes) issued the Decision and Order ("the 2010 Decision and Order") that is now before the Court. The 2010 Decision and Order, which is reported at 355 NLRB No. 126, incorporates by reference the 2009 Decision and Order. (SA 1.)<sup>2</sup>

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<sup>2</sup> On September 3, 2010, the Board corrected an inadvertent error in its August 26, 2010 Decision and Order. Specifically, the Board corrected the last sentence of the first paragraph in footnote 3. That sentence originally stated that "deferral would in any event be inappropriate because an arbitrator has already *ruled against the Union's* subpoena demand for information." The corrected

On August 27, 2010, the Board filed an application for enforcement of the 2010 Decision and Order in the Second Circuit, because the unfair labor practice occurred in New York. The Hospital filed a petition for review of the 2010 Board Decision and Order in this Court and, at the same time, moved to dismiss the Board's application for enforcement from the Second Circuit. In order to avoid the delay caused by litigation over the appropriate venue, the Board, with the Hospital's consent, filed a motion pursuant to FRAP 42(b) to dismiss the Board's application for enforcement from the Second Circuit. The Board's motion stated that the parties intended to proceed with the litigation in the D.C. Circuit. On September 30, 2010, after the Second Circuit granted the Board's motion, the Board filed its cross-application for enforcement in this Court. The pending petition for review and cross-application for enforcement are timely, as there is no time limit in the Act for seeking enforcement or review of Board orders.

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sentence reads that “deferral would in any event be inappropriate because an arbitrator has already *refused to rule on* the Union’s subpoena demand for information.” (A 79, SA 1.) (emphasis added).

## **STATEMENT OF THE ISSUE PRESENTED**

Whether substantial evidence supports the Board's finding that the Hospital violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with requested information relevant to a grievance arbitration proceeding.

## **RELEVANT STATUTORY AND REGULATORY PROVISIONS**

Relevant statutory and regulatory provisions are reproduced in the Addendum.

## **STATEMENT OF THE CASE**

After the Union filed unfair labor practice charges against the Hospital, the Board's General Counsel issued a complaint and a hearing was held before an administrative law judge. (A 359, 360.) The judge found merit in the complaint allegations, specifically, that the Hospital violated the Act by failing to provide the Union with requested information about bargaining unit nurse practitioners represented by the Union and nonunit nurse practitioners on the payroll of Columbia University ("the University") who worked in the Hospital. (A 47-55.)

After considering the exceptions and briefs of the parties, the Board issued the 2009 Decision and Order, adopting the administrative law judge's findings and recommended order, and making an additional finding that the Hospital also

unlawfully refused to furnish the Union with all documents between the Hospital and the University concerning the employment of nurse practitioners at the Hospital. The Board ordered the Hospital to provide the information to the Union and post a remedial notice. (A 47.) After the Board issued the 2009 Decision and Order, the Hospital filed a motion for reconsideration asking the Board to reconsider its decision to proceed with only two members, which the Board denied.

The Hospital filed a petition for review and the Board filed a cross-application for enforcement of the 2009 Decision and Order, which this Court put into abeyance before the Board filed the record. After the Supreme Court issued *New Process*, the Board vacated the 2009 Decision and Order. A three-member panel of the Board then issued the 2010 Decision and Order, incorporating by reference the Board's previous two-member panel decision. The facts supporting the Board's decision, as well as the Board's conclusions and order, are summarized below.

## **STATEMENT OF FACTS**

### **I. THE BOARD'S FINDINGS OF FACT**

#### **A. Background: the Hospital, Nurse Practitioners, and Relevant Portions of the Collective-Bargaining Agreement**

The Hospital is a huge metropolitan complex encompassing 6 main buildings and 10 satellite clinics in the Washington Heights section of Manhattan. (A 49; A 186.) It employs about 2600 bargaining unit nurses. (A 49; A 185.)

The Hospital is also a teaching hospital affiliated with the Columbia University School of Medicine. (A 49; A 191.) Almost all of the physicians who perform medical services for patients at the Hospital are on the faculty of the University and the University directly employs these physicians. (A 49; A 191.)

For many years, the Hospital has directly employed a group of nurse practitioners who perform services for hospital patients. (A 49; A 185, 1350-1584.) Nurse practitioners are licensed nurses who have obtained an advanced degree and a certification that allows them to perform some, but not all, of the functions normally done by a physician in a particular field of practice. (A 49; A 187-89.) Certified nurse practitioners may diagnose illness and physical conditions, and perform therapeutic and corrective measures within a specialty or practice in collaboration with a licensed physician. (*Id.*)

Since 1973, the Hospital and the Union have had a collective-bargaining relationship covering these nurse practitioners. (A 49; A 185, 1350-1584.) The nurse practitioner classification is signified by the category of “clinical nurse VI” in the parties’ successive collective-bargaining agreements. (A 49; A 150, 1350-1584.) Article I of the most recent collective-bargaining agreement (“Agreement”) covers:

all full-time and regularly employed part-time professional nurses, per diem nurses, and individuals authorized to practice as registered professional nurses employed by New York Presbyterian Hospital, Columbia Presbyterian Medical Center in a variety of titles including clinical nurse VI,

but excluding various supervisory and managerial people who hold nursing degrees as well as all office clerical, managerial and supervisory employees as well as confidential employees, and security employees.

(A 49; A 1512.)

In addition, the Agreement contains a side letter, which contains the following provision:

Except for certification, training or experimentation and emergencies, registered nurses who are outside of the bargaining unit will not routinely or consistently perform those clinical duties normally performed by members of this bargaining unit.

(A 49; A 1413.)

**B. Non-Bargaining Unit Nurse Practitioners Are Seen Performing Medical Services in the Hospital; the Union Files a Grievance, which the Hospital Denies; the Union Continues to Investigate and Files an Arbitration Demand**

In 2004, unit nurse practitioners noticed a small group of nonunit nurse practitioners in the Hospital. (A 49; A 150-51, SA 2.) These nonunit nurse practitioners, like the unit nurse practitioners, were performing medical services for hospital patients. (*Id.*)

Specifically, in the spring of 2004, Union Representative Roberta Murphy learned that there was a nurse practitioner in the Hospital's Obstetric Department who was not in the bargaining unit and that she may have been a university employee. (SA 2.) When Murphy investigated the matter, she discovered that there were about seven other nurse practitioners who were working in the Hospital

in various medical departments but who were not bargaining unit members. (A 49; A 151-53, 313-14.)

On June 4, 2004, the Union filed a grievance alleging that the Hospital violated the Agreement in relation to, but not limited to, “Section 1, Agreement Scope.” (A 49; A 1342.) The grievance states that the Hospital “has hired nurse practitioners in a nonunion capacity to do bargaining unit work.” (*Id.*) As a remedy, the grievance states: “Make whole. Make nurse practitioners union positions.” (*Id.*)

By letter dated May 18, 2005, Hospital Human Resources Manager Stacie Williams wrote to Murphy to deny the grievance. (A 50; A 1343.) In the letter, Williams stated that “the individuals you are referring to are Columbia University employees, not Hospital employees.” (*Id.*) Williams also stated that the individuals “do not fall within the Hospital’s span of control nor are they governed by the Hospital’s policies and procedures.” (*Id.*)

Murphy then had several meetings with hospital management about the issue. (A 50; A 155.) In these meetings, the Hospital continued to take the position that the Union’s grievance lacked merit because the nurse practitioners involved were not covered by the Agreement because they were employees of the University rather than the Hospital. (*Id.*)

Murphy continued to investigate. (A 50; A 154.) Specifically, Murphy and other union representatives went to various hospital units and inquired about the duties of the nonunit nurse practitioners. (A 155.) One nurse told Murphy that she had applied for a nurse practitioner position in the Hospital only to be told that it was a university position. (A 306.) Murphy also checked the assignment boards in the neurology units, which identify the nurse practitioner responsible for each patient. Based on Murphy's conversations and the assignment boards, she compiled a list of about 44 nurse practitioners who were not members of the bargaining unit. (A 175, 184, 404-05.) Murphy also collected job advertisements from a trade magazine and job listings from the University website for nurse practitioner positions at the Hospital. (A 155-56, 168, 382-404.) These advertisements asked for nurse practitioners to work in the Clinical Cardiac Unit and Medical Intensive Care Unit—units in which bargaining unit nurse practitioners work. (A 162, 168, 219.)

On June 27, 2005, the Union referred its grievance to arbitration. (A 53; A 1344.) The Union's arbitration demand alleges that the Hospital violated the Agreement, "including but not limited to Section 1—Agreement Scope." (*Id.*) The arbitration demand further states that, "[t]he employer has violated the [Agreement] by employing non-union nurse practitioners to perform bargaining unit work of union nurse practitioners." (*Id.*) As remedies, the demand asks that

the Hospital stop employing nonunion nurse practitioners, make the nonunion nurse practitioners union employees, and make the nurses whole for any losses incurred. (*Id.*)

**C. The Union Files an Unfair Labor Practice Charge Against the Hospital and the University; the Board Defers the Charge to Arbitration; the University States that It Will Not Participate in the Arbitration**

On August 31, 2006, the Union filed an unfair labor practice charge against both the Hospital and the University. (A 50; A 1328.) The charge alleges that the Hospital and the trustees of the University were a single employer or alter egos, and that they had “restrained and coerced nurse practitioners at New York Presbyterian Hospital” by “employing nurse practitioners to work at the Hospital under terms and conditions of employment different from those specified in the collective-bargaining agreement.” (*Id.*) The charge further alleges that the Hospital and the University, as a single employer, or alter ego, “discriminated against employees based on their union affiliation or membership by not applying the terms and conditions of employment specified in the agreement between the Nurses Association and the Hospital.” (*Id.*) On October 23, 2006, the Board’s Regional Director deferred the charge to arbitration. (A 50; A 1330-33.)

On October 30, 2006, Michael McGrath, the University’s counsel, wrote to the Union and the Hospital stating that the University, as a non-signatory to the Agreement, would not participate in any arbitration. (A 50; A 1592-97.) McGrath

also stated that the University would not consider itself bound by any award or agreement resulting from such arbitration. (*Id.*)

**D. The Union Issues a Subpoena to the Hospital Asking for Information in Preparation for the Arbitration**

The arbitration hearing was originally scheduled for March 13, 2007. (A 50; A 127.) On February 27, 2007, the Union issued a subpoena duces tecum to the Hospital, requesting that a representative of the Hospital appear at the arbitration hearing. (A 50; A 126, 1338.) The subpoena also asked the Hospital to produce the following information:

1. All documents between [the Hospital] and [the University] and/or the Trustees of [the University] . . . concerning employment of nurse practitioners for the period January 1, 2004 to date.
2. Documents as will show the (a) names, (b) titles, (c) unit(s) assignments, (d) shift(s) worked and (e) date of hire/termination date of all nurse practitioners designated as [Union-]represented employees.
3. Documents as will show the: (a) names, (b) titles, (c) unit(s) assignments, (d) shift(s) worked and (e) date of hire/termination date of all nurse practitioners who are *not* designated as [Union-]represented employees working on the premises of [the Hospital] for the period January 1, 2004 to date.
4. Documents as will show the job description and/or duties for each nurse practitioner in items #2 and #3 above.
5. Documents as will show (a) names, (b) titles, (c) unit(s) assignments, (d) shift(s) worked and (e) date of hire/termination date for any nurse practitioner who has worked at [the Hospital] in the period January 1, 2004 to date who has been at any time designated as an employee of [the University] and/or Trustees of [the University] in the City of New York.

6. Documents as will show the salary/wages and benefits of all Nurse Practitioners not currently represented by [the Union] as set for in item #3 for the period January 1, 2004 to date.

*(Id.)*

**E. The March 2007 Arbitration Is Postponed; the Union Issues Another Subpoena in Preparation for the Hearing, and Sends an Information Request to Hospital Human Resources Manager Williams**

The arbitrator assigned to the case became ill and the arbitration was postponed to October 25, 2007. (A 50; A 128.) On October 10, 2007, the Union issued another subpoena to the Hospital, requesting that the Hospital produce the same documents that the Union previously requested on February 27, 2007, and some other information. *Id.*

On October 11, 2007, the Union also requested information from Hospital Human Resources Manager Williams. (A 51; A 143, 1599.) The Union asked for essentially the same information that it had requested in its subpoena one day earlier, including employment documents between the University and the Hospital. (A 50; A 1345.)<sup>3</sup>

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<sup>3</sup> The October 11 request omitted a specific request that the Union had made in its subpoena regarding a possible alter ego, single employer, or joint employer relationship between the University and the Hospital. (A 51; A 1345.)

**F. The Arbitrator Refuses To Decide the Information Request Issue; the Hospital Refuses to Provide Much of the Requested Information; the Union Asks for an Adjournment; the Union Files the Instant Unfair Labor Practice Charge**

The arbitration hearing opened on October 25, 2007, and the Hospital and the Union presented arguments about the appropriateness of the information that the Union had demanded in its most recent subpoena. (A 51; A 135.) The arbitrator, however, refused to decide the issue. (A 51; A 178-80.) Although the Hospital eventually produced most of the Unions' requested information about the bargaining unit nurse practitioners, it did not produce information showing the specific shifts that they worked. (A 51; A 279.) The Hospital also refused to provide any information about nonunit nurse practitioners working in the Hospital. (A 51; A 179-81.)

The Union asked for an adjournment of the arbitration due to the Hospital's refusal to provide all of the information the Union had requested. (A 51; A 121-22.) On October 31, 2007, the Union filed the instant charge. (A 51; A 359.)<sup>4</sup>

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<sup>4</sup> There were three more arbitration sessions—January 17, 2008, February 21, 2008, and May 29, 2008. (A 177-80.) Although the Union continued to ask for the information it had requested at the October 27, 2007 hearing, the arbitrator repeatedly refused to rule on the issue. (*Id.*)

**G. The University Provides Information Indicating that the Hospital Has Documents in its Credentialing Files Responsive to the Union's Information Requests**

In the course of the unfair labor practice investigation by the Board's Regional Office ("the Region"), the Hospital asserted that it did not have the information requested about the nonunit nurse practitioners working in the Hospital. (A 51; A 1586.) The Region asked the Hospital to request the information from the University, which it did. (*Id.*)

The University replied by letter, stating that the Hospital had documents between it and the University concerning the employment of nurse practitioners, as well as information concerning the names, titles, and unit assignments of non-union nurse practitioners who worked in the Hospital. (A 51; A 1592-97.) Specifically, the University's letter stated that the Hospital had such information because "the Hospital contracts with certain faculty of the School of Nursing for the provision of [nursing practitioner] services at the Hospital," and "all such [nurse practitioners] are now credentialed through the Hospital's Nursing Office." (SA 3.) The letter also stated that, "[t]o the extent that this inquiry refers to [nurse practitioners] who are employed in University Faculty Practices but work in buildings or on floors . . . that are controlled by the Hospital, or to the contracts between the School of Nursing and the Hospital for [nurse practitioner] services,

we believe that the Hospital has potentially responsive documents in the credentialing files of such [nurse practitioners].” (A 1593, SA 3.) The Hospital refused to produce the credentialing files. (A 54; Tr. 180-81.)

#### **H. The Hospital’s Credentialing Files Contain Information About Both Unit and Nonunit Nurse Practitioners Working in the Hospital**

In order to work at the Hospital, a nurse practitioner, whether or not directly employed by the Hospital, must be “credentialed.” (A 52; A 330.) This means that at the end of a review process conducted by the Hospital, a nurse practitioner receives privileges to work in a specific area of medicine within the Hospital. (*Id.*)

As part of the review process, nurse practitioners must submit the same information and complete the same forms whether they are employed by the University or the Hospital. (A 52; A 329, 334-35, 348, 406.) The credentialing documents show the nurse practitioners’ names (including those on the University’s payroll), the departments or units where the nurse practitioners are assigned to work, their job duties, and their start dates at the Hospital. (A 52; A 193, 194, 195-96, 210-11, 337-38, 341, 346, 406.)

### **II. THE BOARD’S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (Chairman Liebman and Members Schaumber and Hayes) found that the Hospital violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to provide the Union with

requested information relevant to its grievance. (SA 1 (incorporating by reference A 47-55).) Specifically, the Board found (SA 1) that the Hospital failed to provide the Union with information regarding the shifts worked by unit employees, information regarding the working conditions of nonunit nurse practitioners working at the Hospital, and documents between the Hospital and University regarding the employment of nurse practitioners at the Hospital.

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (SA 1 (incorporating A 54-55).) Affirmatively, the Board's Order requires the Company to provide the requested information to the Union and to post a remedial notice. (*Id.*)

### **SUMMARY OF ARGUMENT**

Despite the Hospital's repeated attempts to complicate the issues, this is a straightforward case in which the Board reasonably found that the Hospital unlawfully failed to provide the Union with requested information relevant to the Union's grievance. As an initial matter, most of the Hospital's speculative attacks on the Board's decision-making process are jurisdictionally barred. In any event, all of these attacks are also without any substantive merit, because the Hospital did not show that the Board failed to engage in reasoned decision-making.

Substantial evidence supports the Board's finding that the Hospital failed to provide the Union with information that the Union requested for its nurse practitioner grievance. The Union had filed the grievance because it believed that the Hospital was allowing nonunit nurse practitioners on the university's payroll to perform unit nurse-practitioner work in the Hospital in contravention of the parties' collective-bargaining agreement. The Board, applying the presumptively relevant standard for information regarding unit employees, first found that the Union was entitled to the information it requested about the shifts worked by its own unit employees.

In addition, the Board reasonably found that under the long-settled, liberal relevance standard applied to information about nonunit employees, the Union was entitled to the information that it requested concerning the employment and duties of the nonunit nurse practitioners. This information was clearly relevant to the Union's grievance that nonunit nurse practitioners were performing unit work.

The Hospital's claims that the information was not relevant and that the Union had an improper purpose for seeking the information turn the applicable standard on its head. In addition, the Hospital's assertions that it does not have the relevant information are belied by the record evidence that its credentialing files contain just such relevant information. Finally, the Hospital's argument that the Board should have deferred the information-request allegation to arbitration is

contrary to both extant Board law and to the Board's additional finding that an arbitrator already refused to rule on the information request. Accordingly, the Board's findings in this matter should be upheld.

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE HOSPITAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO PROVIDE THE UNION WITH REQUESTED INFORMATION RELEVANT TO A GRIEVANCE ARBITRATION PROCEEDING**

The record amply demonstrates that the Board reasonably found that the Hospital failed to provide the Union with requested information relevant to the pending grievance arbitration. Before challenging the merits of the Board’s findings, however, the Hospital makes a series of procedural attacks (Br. 28-36) on the Board’s 2010 Decision and Order. As an initial matter, as discussed below, these procedural challenges are without merit.

#### **A. The Board Engaged in Reasoned Decision-Making and the Hospital’s Protestations to the Contrary Are Without Merit**

As discussed above in the Statement of Jurisdiction and Statement of Facts (pp. 2-3, 17), a three-member panel of the Board issued the 2010 Decision and Order after the Board vacated the 2009 Decision and Order, which had been issued by a two-member Board panel. The Hospital argues (Br. 30-36) that this Court should vacate the Board’s 2010 Decision and Order because “it was not a reasoned decision.” Notwithstanding the Hospital’s considerable hyperbole, it has demonstrated no grounds to impugn the Board’s decision-making process. As a threshold matter, the Court must disregard the Hospital’s claims because it has waived any such arguments by failing to raise them to the Board via a motion for

reconsideration. In any event, the Hospital's arguments are meritless: the Hospital's speculative claims regarding the Board's decision-making process are contrary to the presumption of regularity the courts afford agency decision-making and provide no basis for the Court to disturb the 2010 Decision and Order.

**1. The Hospital waived its arguments challenging the Board's decision-making process by not raising them to the Board**

After the three-member panel of the Board issued the 2010 Decision and Order, the Hospital had the opportunity to file a motion for reconsideration, rehearing, or reopening of the record pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations. 29 C.F.R. § 102.48(d)(1). The Hospital had 28 days from service of the 2010 Decision and Order in which to file such a motion. 29 C.F.R. § 102.48(d)(2). It did not do so. Because the Hospital failed to file such a motion to assert its claims regarding the Board's decision-making process, the Court lacks jurisdiction to consider such arguments raised in the Hospital's brief.

Specifically, Section 10(e) of the Act (29 U.S.C. § 160(e)) provides, “[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” Thus, if a particular objection has not been raised before the Board, a reviewing court, absent extraordinary circumstances, has no

jurisdiction to consider the issue in a subsequent enforcement proceeding.<sup>5</sup> *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (holding that the court of appeals lacked jurisdiction to consider an issue not raised by either party in an motion for reconsideration before the Board).

The Hospital cites no extraordinary circumstances to excuse its failure to file a motion for reconsideration to preserve its arguments regarding the Board's decision-making process. An extraordinary circumstance "exists only if there has been some occurrence or decision that prevented a matter which should have been presented to the Board from having been presented at the proper time." *NLRB v. Allied Prods., Corp.*, 548 F.2d 644, 654 (6th Cir. 1977). An issue arising for the first time in the Board's decision does not constitute an extraordinary circumstance. The Supreme Court has made clear that the proper time to challenge aspects of a case that arise for the first time in a Board decision is in a timely motion for reconsideration. *See Woelke & Romero*, 456 U.S. at 665; *International Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281

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<sup>5</sup> *See generally United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts . . . . Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

n.3 (1975). *See Allied Prods.*, 548 F.2d at 654 (Board’s *sua sponte* adoption of a remedy does not in itself amount to “extraordinary circumstances” to excuse failure to file motion for rehearing).

The Hospital’s repeated suggestion (Br. 8, 29) that the Board filed its initial application for enforcement of the 2010 Decision and Order in the Second Circuit “before the Hospital was served with the D&O” does not constitute an extraordinary circumstance.<sup>6</sup> The Hospital had 28 days from when it was served to file a motion for reconsideration with the Board. Such a motion was not precluded by the filing of the application for enforcement because, as noted earlier at p. 3,

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<sup>6</sup> The Hospital’s claim (Br. 29) that the Board engaged in a “textbook case of forum shopping” by quickly filing an application for enforcement of the August 26 Order in the Second Circuit is false. Rather, the Board simply attempted to expedite resolution of this matter, which has been significantly delayed, by immediately filing an application for enforcement in the Second Circuit—the only Circuit in which it could have filed. Although an aggrieved party is permitted to file a petition for review of a Board order in the D.C. Circuit, the Board is restricted by Section 10(e) of the Act and may only file an application for enforcement in a circuit “wherein the unfair labor practice in question occurred or wherein such person resides or transacts business.” The Board, however, may file a cross-application in the D.C. Circuit once an aggrieved party has filed a petition for review in that Circuit. As discussed later at pp. 29-30, once the Hospital filed its petition for review in the D.C. Circuit, the Board again acted to expedite the matter by withdrawing its application from the Second Circuit and, instead, cross-applying for enforcement in this Circuit.

Section 10(d) of the Act vests the Board with continued jurisdiction to modify its order until the record is filed. *See also* Section 10(e) of the Act (“[u]pon the filing of the record with it the jurisdiction of the court shall be exclusive . . .”). Here, the record was not filed until October 25, 2010—well after the Hospital received the 2010 Decision and Order and its 28-day period for filing a motion for reconsideration had run. Within those 28 days, the Hospital could have raised any concerns about the decision-making process in a motion to the Board and the Board would have had jurisdiction to rule on the motion.

Therefore, because the Hospital failed to give the Board the opportunity to either explain its decision-making process or reopen the record by filing a timely motion for reconsideration, this Court has no jurisdiction to hear the Hospital’s complaints.

**2. In any event, courts afford administrative agencies a presumption of regularity and will not delve into agencies’ internal deliberative processes based on pure speculation**

In any event, courts afford administrative agencies like the Board a presumption of regularity in their decision-making, and the Hospital has offered nothing but conjecture in arguing that the Board deviated from its established procedures in considering this case. Thus, even if the Court considers the Hospital’s claims that the Board failed to engage in reasoned decision-making, it should reject them as unmeritorious.

It is well-established that courts presume that public officials have properly discharged their official duties, absent “clear evidence to the contrary.” *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *see also Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967) (“A strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues and adverted to the views of their colleagues.”). Indeed, the Board incorporated by reference its earlier decision only after it explicitly explained that it “considered the judge’s decision and the record in light of the exceptions and briefs . . . .” (SA 1.) The Hospital offers no factual support, much less any “clear evidence to the contrary,” as the Supreme Court requires, *Chemical Foundation*, 272 U.S. at 14-15, that would warrant disregarding this explanation or delving into the processes the Board followed in issuing its decision.

Indeed, in *United States v. Morgan*, 313 U.S. 409, 422 (1941), the Supreme Court concluded that it was error to permit the Secretary of Agriculture to be deposed regarding the process by which he reached his decision, including the extent to which he studied the record and consulted with subordinates. As the Court explained, the federal courts may not “probe [the Secretary’s] mental processes” because, “[j]ust as a judge cannot be subjected to such a scrutiny, so the

integrity of the administrative process must be equally respected.” Consistent with that reasoning, absent evidence to the contrary, the Supreme Court has held that courts must take at face value the Board’s assurances that it adequately considered the record before issuing a decision. *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229-30 (1947) (rejecting argument that Board failed to consider additional evidence upon remand where the Board assigned case to the same trial examiner, and the Board, in turn, issued virtually the same order as it had the first time).

Moreover, contrary to the Hospital’s view (Br. 31-32), the speed with which the Board issued the 2010 Decision and Order following its vacating of the 2009 Decision and Order does not counter the presumption that the Board members properly discharged their duties.<sup>7</sup> In fact, courts have consistently rejected attempts to delve into administrative agencies’ decision-making processes based on how quickly they carried out their duties. *See, e.g., National Nutritional Food Ass’n v. FDA*, 491 F.2d 1141, 1146 (2d Cir. 1974) (FDA Commissioner issued

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<sup>7</sup> The Hospital also insinuates (Br. 35-36) that the Board disregarded this Court’s authority by vacating the 2009 Decision and Order and issuing the 2010 Decision and Order while the Board’s application for enforcement of the 2009 Decision and Order was pending in this Court. As noted above, p. 2, because the D.C. Circuit quickly put the 2009 case in abeyance, the Board never filed the agency record. Therefore, under Section 10(d) and (e) of the Act (as described above), the Board had concurrent jurisdiction and its actions were consistent with that jurisdictional power. Moreover, on September 29, 2010, in the face of similar arguments by the Hospital, this Court granted the Board’s opposed motion to dismiss its application for enforcement of the 2009 proceedings.

new regulations 13 days after he took office; court rejects claims that it was impossible for the Commissioner to have reviewed and considered the more than 1,000 exceptions filed in opposition to the proposed regulations); *NLRB v. Biles Coleman Lumber Co.*, 98 F.2d 16, 17 (9th Cir. 1938) (“bare allegation” that Board failed to read transcript or examine exhibits is not a viable allegation of denial of due process).

Likewise, the Hospital’s bare assertion (Br. 32-33) that the Board would have reached a different conclusion on the deferral-to-arbitration issue if it had engaged in “de novo” review of the case provides no ground to counter the Board’s presumption of regularity. In the 2010 Decision and Order, Chairman Liebman and Member Schaumber unremarkably relied on extant Board law in refusing to defer this information-request case to arbitration as they had done in the original 2009 Decision and Order. Member Hayes’ comments regarding extant deferral law did not change the finding of the Board in any way, particularly as all three panel members, including Member Hayes, agreed that regardless of extant deferral law, deferral was inappropriate in the instance case given the arbitrator’s refusal to rule on the information request.<sup>8</sup>

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<sup>8</sup> In any event, and contrary to the Hospital’s claim, there was nothing out of the ordinary in the positions taken by Members Schaumber and Hayes. Board members routinely do not vote to overrule Board law in the absence of a three-member Board majority because it is established Board practice that only a three-member Board majority may overrule its precedent. *See, e.g., DaimlerChrysler*

The Hospital's additional claim (Br. 27, 32-35) that the Board improperly incorporated the 2009 Decision and Order into the 2010 Decision and Order is based on the inapplicable *Action on Smoking & Health v. Civ. Aeronautics Board*, 713 F.2d 795 (D.C. Cir. 1983), and wholly without merit. To begin, that case, unlike the instant adjudication, is a rulemaking case involving agencies' procedures for revisiting a notice and comment period. Moreover, this Court has held in the adjudication context that incorporation by reference is perfectly acceptable. *See FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707 (D.C. Cir. 1996) (taking the FEC's post-reconstitution ratification of its prior decisions at face value and treating it as an adequate remedy for an earlier constitutional violation).<sup>9</sup>

Other courts have also routinely upheld agency decisions incorporating by reference previously infirm decisions. *See e.g., Wu Xiong Tao v. Holder*, 367

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*Corp.*, 344 NLRB 1324 n.1 (2005); *Tradesmen Int'l*, 338 NLRB 460, 460 (2002). Moreover, as is routine, the Board gave its members not assigned to the panel here "the opportunity to participate in the adjudication of [the] decision," *see* 2010 D&O 1, n.2. As this Court cautioned in *Braniff Airways, Inc. v. Civil Aeronautics Board*, 379 F.2d 453, 462 (D.C. Cir. 1967) a court "cannot allow the recital by an administrative agency that it has considered the evidence and rendered a decision according to its responsibilities to be overcome by speculative allegations."

<sup>9</sup> Indeed, in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), this Court, citing *Legi-Tech*, suggested that a properly constituted Board could in some manner reissue the invalid two-member decisions. *Laurel Baye*, 564 F.3d at 476 ("[p]erhaps a properly constituted Board, or the Congress itself, may also minimize the dislocations engendered by our decision by ratifying or otherwise reinstating the rump panel's previous decisions, including the case before us").

F.App'x. 898, 901 (10th Cir. 2010) (enforcing Bureau of Immigration Affairs (BIA) decision incorporating by reference an earlier vacated order); *Shenxing Zeng v. Mukasey*, 280 F.App'x 93 (2d Cir. 2008) (enforcing BIA's decision and noting procedural posture of BIA incorporating by reference previous vacated order); *Combs v. Commissioner of Social Security*, 459 F.3d 640 (6th Cir. 2006) (approvingly noting incorporation by reference of vacated decision). Accordingly, the Court should reject the Hospital's claim that the Board acted improperly.

The Hospital makes one last baseless procedural argument challenging the Board's enforcement action. The Hospital asserts (Br. 28-30) that the Second Circuit dismissed the Board's August 27, 2010 application for enforcement of the 2010 Decision and Order with prejudice and that *res judicata* principles preclude the Board from seeking enforcement in this Court. As demonstrated below, this argument ignores the context and language of the Second Circuit's Order, relies on inapplicable cases, and ignores the authority given the Court under Section 10(e) and (f) of the Act.

To begin, the Hospital disregards the context surrounding the Second Circuit's Order. As discussed above, the Board initially filed an application for enforcement of the 2010 Decision and Order in the Second Circuit, and the Hospital later filed a petition for review of the same Order in this Circuit. To avoid litigation over the appropriate venue, and thereby to expedite resolution of the

matter, the parties agreed that the Board would dismiss its application for enforcement in the Second Circuit and that the parties would litigate the matter in the D.C. Circuit. To that end, with the Hospital's consent, the Board filed a motion pursuant to FRAP 42(b) to dismiss its application in the Second Circuit, stating its intent to proceed in the D.C. Circuit.<sup>10</sup>

The Hospital also inaccurately describes the language of the Second Circuit's Order. In ruling on the Board's Rule 42(b) motion, that court stated, in relevant part, "that the motion by the National Labor Relations Board, on consent, to withdraw its application for enforcement of its order is granted with prejudice." (See September 14, 2010 Order). Accordingly, the Hospital's mantra—that the earlier case "was dismissed with prejudice"—mischaracterizes the Second Circuit's action, which granted with prejudice the Board's consent motion to withdraw its application from the Second Circuit.

In addition, the cases on which the Hospital relies (Br. 28-29) to assert *res judicata* are inapplicable. Two of the three cases involve stipulations or settlement agreements in which both parties agreed to request that the court dismiss an action with prejudice. See *Burns v. Ficke*, 197 F.2d 165 (D.C. Cir. 1952) (stipulations of dismissal with prejudice); *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 284 (2d

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<sup>10</sup> The Board has filed a motion to lodge with this Court the Rule 42(b) motion it filed in the Second Circuit.

Cir. 2002) (settlement agreement agreeing to dismiss with prejudice). In contrast, this case involves no such stipulations or settlement agreements. Indeed, the circumstances here were just the opposite—the Board filed, with the Hospital’s consent, an unopposed motion to dismiss the enforcement application from the Second Circuit in order to seek enforcement in the D.C. Circuit.

The Hospital’s remaining case, *Hilton Hotels Corp. v. Weaver*, 325 F.2d 1010 (D.C. Cir. 1963), is also inapposite. In that case, the D.C. Circuit determined that the Third Circuit actually “considered and resolved” the matters. Here, of course, the Board explicitly asked the Second Circuit to allow it to dismiss the proceedings, without that Circuit having “considered and resolved” them, so that the Board could instead proceed in this Circuit.

Finally, regardless of the Second Circuit’s Order, this Court has jurisdiction to enforce the 2010 Decision and Order. Under Section 10(f) of the Act, once the Hospital filed its petition for review, this Court was given “the same jurisdiction to . . . make and enter a decree enforcing . . . the order of the Board.” 29 U.S.C. § 160(f). *See also IBEW Local 501 v. NLRB*, 341 U.S. 694, 700, 706 (1951) (affirming court of appeals’ enforcement of Board Order pursuant to 10(f)); *Cf. Ford Motor Co. v. NLRB*, 305 U.S. 364, 369 (1939) (citing Section 10(f) of the Act and holding that Section 10(e) and (f) of the Act do not require “unnecessary

duplication of proceedings.”) Accordingly, the Hospital has failed to demonstrate that the Board is not entitled to enforcement of this matter.<sup>11</sup>

**B. The Board Reasonably Found that the Hospital Violated Section 8(a)(5) and (1) of the Act by Refusing To Provide the Union with Requested Information Relevant to the Grievance Arbitration Proceeding**

Substantial evidence supports the Board’s findings that the Union showed the requisite relevance of the information that it requested concerning the shifts of its unit nurse practitioners and the information it requested regarding the nonunit nurse practitioners working in the Hospital. Most of the Hospital’s challenges rely on misconstructions of the well-established relevancy standards, and none of them warrant overturning the Board’s reasonably-based findings.

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<sup>11</sup> Notwithstanding the Hospital’s final accusation—that the Court should dismiss the Board’s cross-application for enforcement because the Board engaged in “skullduggery” by filing promptly for enforcement of its Order (Br. 29)—the Board, as fully addressed above, acted properly and with an eye toward expediting the proceeding throughout the litigation of this matter. The Hospital’s citation to the Casehandling Manual in these circumstances (Br. 29, n.9) is of no moment because those guidelines, directed to the Board’s Regional Offices, are not binding on the Board. *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996) (noting that casehandling manual does not constitute a binding authority on the Board); NLRB Casehandling Manual, Part Two, Purpose of Manual (“[t]he guidelines included . . . are not intended to be and should not be viewed as binding procedural rules”). In any event, the Casehandling Manual does not require the Board to refrain in all circumstances from seeking enforcement in order to secure compliance. *See, e.g.*, Casehandling Manual, Pt. III, Section 10606.3 (“the Region may recommend enforcement of a Board [o]rder notwithstanding a respondent’s offer of compliance or even the achievement of compliance”).

## 1. Governing legal principles and standard of review

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 representative of its employees. It is well settled that an employer's duty to bargain includes the duty, in good-faith, "to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-37 (1967). Accordingly, an employer's failure to provide relevant information upon request constitutes a violation of Section 8(a)(5) and (1) of the Act. *Id.*<sup>12</sup>

The critical question in determining whether information must be produced is that of relevance. Information pertaining to employees in the bargaining unit is presumptively relevant. *See United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). Presumptively relevant information includes unit employees' names, addresses, wage rates, job classifications, and other similar information. *NLRB v. CJC Holdings, Inc.*, 97 F.3d 114, 117 (5th Cir. 1996). With respect to such presumptively relevant information, "the union is not required to show the precise relevancy of the requested information to particular current bargaining

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<sup>12</sup> 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. A violation of Section 8(a)(5) of the Act therefore results in a "derivative" violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

issues.” *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979).

Information pertaining to nonunit employees, while not presumptively relevant, is nevertheless relevant if it meets a “discovery-type standard,” pursuant to which “[t]he fact that the information is of probable or potential relevance is sufficient to give rise to an obligation . . . to provide it.” *Crowley Marine Services, Inc. v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000) (citation and quotation marks omitted). Under that standard, requested information must be produced “whether or not the theory of the complaint [or grievance] is sound or the facts, if proved, would support the relief sought.” *Acme*, 385 U.S. at 437 (citation omitted). See also *Detroit Newspaper Printing & Graphic Communications Union v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979) (information is relevant if it is germane and “has any bearing” on the subject matter of the case). Accord *United States Testing Co.*, 160 F.3d at 19-20.

The Board’s judgment on the question of relevance is entitled to “great deference,” because “[d]etermining whether a party has violated its duty to ‘confer in good faith’ is particularly within the expertise of the Board.” *Crowley Marine Services*, 234 F.3d at 1297 (citation omitted); *Detroit Newspaper*, 598 F.2d at 272 (Board determination as to whether requested information is relevant is to be paid “great deference” because it is “particularly within the expertise of the Board”).

The Board's factual findings are "conclusive" under Section 10(e) of the Act if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). So long as the Board's findings with respect to the underlying operative facts are supported by substantial evidence, the Board's judgment that the "minimal" showing that requested information is relevant has been made—a showing in which "context is everything"—should be upheld on review unless patently unreasonable. *See United States Testing Co.*, 160 F.3d at 19-20; *accord Oil, Chemical & Atomic Workers Local Union v. NLRB*, 711 F.2d 348, 360 & n.31 (D.C. Cir. 1983). Under this standard, a reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

**2. The Board reasonably found that the Hospital unlawfully withheld presumptively relevant information that the Union requested concerning the shifts of its own bargaining unit nurse practitioners**

The Board reasonably found (A 51, 52) that the Union's information request about shifts worked by unit nurse practitioners is presumptively relevant and that the Hospital did not provide this information to the Union. The Board's finding is consistent with settled law that information pertaining to employees in the bargaining unit is presumptively relevant. *See United States Testing Co.*, 160 F.3d at 19; *New Surfside Nursing Home*, 330 NLRB 1146, 1149 (2000) (hours of work

presumptively relevant). Here, it is virtually undisputed that the information request concerning the shifts worked by unit nurse practitioners is relevant to the Union's grievance alleging that nonunit nurse practitioners were working in the Hospital and doing bargaining unit work during the unit nurse practitioners' shifts.<sup>13</sup>

Substantial evidence also supports the Board's finding (A 51-52, 54) that the Hospital failed to provide the requested shift information to the Union. The Union asked for the shift information in its October 11, 2007 information request (A 143, 1599), repeated its request before the arbitrator on October 25, 2007, and again at the May 29, 2008 session. But, as Union representative Murphy incontrovertibly testified (A 183), the Union never received the requested shift information.

The Hospital's sole defense (Br. 51-52) is that it already provided documents "regarding shifts worked" in "its regular document production" to the Union, and in other responses. As shown below, the Board reasonably rejected (A 54) this defense.

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<sup>13</sup> The Hospital's passing claim (Br. 52) that the Union did not demonstrate the relevance of the shift information ignores the law that such information is presumptively relevant, and wholly fails to establish that such shift information is irrelevant to the pending grievance arbitration. *See United States Testing Co.*, 160 F.3d at 19 (bargaining unit information presumptively relevant unless employer can show it is irrelevant).

None of the evidence that the Hospital points to (Br. 51-53) impugns Murphy's testimony that the Hospital did not provide the Union with the specific shift information that the Union requested. Neither the exhibits nor the testimony cited by the Hospital (Br. 51-53) demonstrate that the Union received information chronicling which shifts were worked by which unit employees. To be sure, the Hospital points to exhibits (Br. 52, citing A 450-1022, 1317) showing that it provided some shift differential pay information, but none of these exhibits indicates that the Hospital furnished the Union with sufficient information to discern, for all unit nurse practitioners, which nurse practitioners worked on which shifts.<sup>14</sup>

Moreover, the Hospital called no witness of its own to contradict Murphy's testimony (A 183) that she did not receive this information. Instead, the Hospital tries to undermine (Br. 52-53) Murphy's testimony by implying that she "admitted" to receiving the requested shift information. To the contrary, Murphy's testimony (A 183, 232-47) merely indicates that she received information from the Hospital such as names, hiring and termination information (A 241), job titles, seniority, dates of hire, and department identification. (A 243). In sum, the

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<sup>14</sup> The Hospital's reliance on RX 2-5 (A 450-1022) is also unfounded because those exhibits were introduced but never admitted into evidence (*see* A 148). In any event, as discussed above, these documents do not identify the specific shifts worked by each unit employee.

Hospital simply has not contradicted Murphy's testimony (A 183) that she did not receive the shift information that the Union requested. Accordingly, the Hospital has failed to disturb the Board's findings that it unlawfully failed to furnish the Union with presumptively relevant information regarding the shifts worked by its unit members.

**3. The Board reasonably found that the Hospital unlawfully withheld relevant information related to the nonunit nurse practitioners working in the Hospital**

The Board also reasonably found (SA 1) that the Hospital violated Section 8(a)(5) and (1) of the Act "by failing and refusing to furnish the Union with requested information about nurse practitioners working at the Hospital's facility," who were "nonunit nurse practitioners on the payroll of Columbia University." The Union's request for information about the working conditions of the nonunit nurse practitioners working in the Hospital was relevant to the Union's pending grievance. Specifically, the request was relevant because the Union had an objective belief that the Hospital had violated the Agreement's restriction on nonunit nurse practitioners performing nurse practitioner duties. As shown below, notwithstanding the Hospital's litany of excuses, its failure to provide this information violated the Act.

**(a) The Union established the relevance of the information concerning the nonunit nurse practitioners**

While information concerning nonunit employees does not enjoy a “presumption” of relevance, it can be shown relevant by the party requesting it under the liberal, “discovery-type standard” discussed above. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 n.6 (1967). Under this standard, information must be provided if there is a “probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.” *Acme*, 385 U.S. at 437; *see also NLRB v. J.P. Stevens & Co.*, 538 F.2d 1152, 1164 (5th Cir. 1976) (“requested data must be supplied unless it is plainly irrelevant”).

Pursuant to these well-established standards, the Board found (A 53) that the Union’s grievance “related to the alleged performance of bargaining unit work by certain individuals whom [the Hospital] asserts are not really its own employees.” And the evidence amply supports the Union’s belief, as described by the Board (A 53), that “these individuals (who happen to be on the payroll of Columbia University) performed work as nurse practitioners (a bargaining unit position), within the hospital for patients who are being treated in the hospital.” Indeed, union representative Murphy received numerous reports of nonunit nurse practitioners working in the areas of unit nurse practitioners, had seen nonunit

nurse practitioners listed on assignment boards, and had seen on-line and newspaper advertisements for nonunit nurse practitioner positions at the Hospital. Thus, the Board reasonably found (A 53) that “[f]rom any objective point of view, these people are doing the same type of functions, in the same place, for the same people, under the same supervision, under the same State laws and pursuant to the same type of privileges as the nurse practitioners who are directly employed by the Hospital.”

Based on this information, the Union reasonably believed that the Hospital had violated the Agreement and Side Letter prohibiting nonunit nurse practitioners from performing the duties of unit nurse practitioners in the Hospital.<sup>15</sup> Under these circumstances, the Board reasonably found (A 53) that the Union, “in pursuing its contract breach claim, is entitled to know who these people are, what they do, what hours they work, when they were hired or fired, and where they are assigned to work.” *See ATC of Nevada*, 348 NLRB 796, 803 (2006) (where union

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<sup>15</sup> The Hospital makes vague assertions (Br. 37-38, 41) that the Union did not have an objective basis to believe there had been a violation of the Agreement, and did not communicate to the Hospital its reasons for wanting the information. To the contrary, the above-discussed evidence amply supports the Board’s finding (SA 1, n.1, A 47, n.4) that the Union believed non-bargaining unit employees were performing their work in contravention of the Agreement and Side Letter, and that the Hospital had been placed on notice of that belief by Union Representative Murphy’s statements and by the written communications between the Union and the Hospital.

files grievance alleging nonunit employees are performing unit work, union entitled to information regarding nonunit employees and their working conditions), *enforced* 309 Fed. App'x. 98 (9th Cir. 2009). Similarly, the Board reasonably found (SA 1, incorporating A 47) that documents between the Hospital and the University concerning the employment of nurse practitioners were relevant to the pending grievance “[f]or the same reasons set forth in the judge’s decision regarding the relevance of other requested information about Columbia University nurse practitioners.”

**(b) The Hospital’s claim that the Union’s information requests regarding nonunit employees are irrelevant to the grievance arbitration are meritless**

The Hospital first challenges (Br. 38-40) the Board’s relevance finding on the basis of the wording of the Union’s grievance and later arbitration demand, which allege that the Hospital violated the Agreement and Side Letter by “hiring” or “employing” the nonunit nurse practitioners. According to the Hospital, because it does not technically “hire” or “employ” the nonunit nurse practitioners, the Union seeks information that is not relevant to the grievance.

However, regardless of the wording of the grievance, the Board reasonably found (A 53-54) that information as to the working conditions of nurse practitioners in the Hospital, as well as documents between the Hospital and University concerning their employment, met the liberal discovery standard of

relevance. As this Court has stated, “context is everything” in considering the relevance of an information request. *United States Testing Co., Inc. v. NLRB*, 160 F.3d 14, 19-20 (D.C. Cir. 1998). Thus, contrary to the Hospital’s assertion that the judge improperly “recast and substantially changed the grievance,” the judge simply considered the context and noted (A 52-53) that nonunit nurse practitioners appeared to be doing “the same type of functions,” and working “in the same place,” pursuant to “the same type of privileges as the nurse practitioners who are directly employed by the [Hospital].” Accordingly, the Hospital’s myopic focus on the language of the grievance and arbitration demand improperly elevates its own crabbed notion of the dispute above the proper analysis of the context surrounding the Union’s information request.<sup>16</sup>

Moreover, in a related argument, the Hospital turns the relevancy standard on its head by arguing (Br. 36-41) that it has no duty to furnish the requested information because “the [nonunit] nurses are not performing the same functions as the [unit] nurse practitioners and are not working under the same supervision.”

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<sup>16</sup>The Hospital is also incorrect in its claim (Br. 39) that the Union and the General Counsel stipulated that the nonunit nurse practitioners were not employees of the Hospital. The evidence to which the Company directs the Court (Br. 39) does not reveal any such “stipulation.” At most, the evidence indicates that the unit as defined by the parties’ Agreement encompasses only nurse practitioners employed by the Hospital. In any event, the Board’s relevance finding is based on nonunit nurse practitioners in the Hospital appearing to perform unit work, regardless of who may have been their technical employer.

Such a formulation would require the Union prove the merits of its grievance before getting the relevant information. To the contrary, the Union was entitled to investigate “for itself, rather than take the employer’s word for,” the nature of the duties performed by the nonunit nurse practitioners. *See Beverly California v. NLRB*, 227 F.3d 817, 844 (7th Cir. 2000) (union does not have to take employer’s word for assertions regarding nonunit employees). All that was required for the Union to make the requisite showing is that the requested information was of “probable” relevance. As amply demonstrated, the Board reasonably found that the Union’s evidence—including that 44 nonunit nurses appeared to be doing the same duties, in the same departments, as the unit nurse practitioners, in arguable violation of the Agreement and Side Letter—sufficiently demonstrated the requisite relevance.

The Hospital’s reliance (Br. 41-42) on the testimony of nurse Greg Navarro does not advance its case. Indeed, Navarro’s testimony (A 316-18) that some of the nonunit nurse practitioners in the cardiac unit sometimes performed tasks similar to physicians, hardly undermines the Union’s objective belief that numerous nonunit nurse practitioners appeared to be performing similar duties as unit nurse practitioners during the unit nurse practitioners’ shifts. Thus, the Hospital has provided no basis to disturb the Board’s reasonable finding (A 47) that the Union’s information requests “were relevant to the processing of a

grievance alleging that the nonunit nurse practitioners performed bargaining unit work in contravention of restrictions set forth in the collective-bargaining agreement between the Hospital and the Union.”

**(c) The Hospital failed to demonstrate that it did not have the requested relevant information**

The Board also reasonably rejected (A 52) the Hospital’s affirmative defense (Br. 43-44) that it did not “possess[] the information sought.” The Board found, and the Hospital admits (Br. 43), that it has credentialing files for the nonunit nurse practitioners. (A 406.) After review of the evidence—including testimony by Mayra Marte-Miraz, the Director of Operations for the University’s Department of Medicine, and the Hospital’s Mary Lou Prado-Inzerillo, the two individuals who exchange the credentialing documents—the Board reasonably concluded (A 52) that the credentialing files contain relevant information about the nonunit nurse practitioners. For example, Marte-Miraz testified that the credentialing information contains a “collaborative physician’s statement between the [nurse practitioner] and the physician understanding their job duties as it relates to the position,” and a description of the unit in which the individual would be expected to perform duties. (A 193, 223.) Indeed, the University, too, stated (A 1593) that the credentialing files possessed by the Hospital have “potentially responsive documents [to the Union’s information request].”

Ignoring its burden of proving its affirmative defense, the Hospital merely complains (Br. 43-44) that the credentialing files do not contain *all* of the information that the Union has requested. This assertion hardly establishes that the Hospital does not in those files possess any of the requested information. The testimony cited above, as well as the sample credentialing file (A 406), amply show that the credentialing files contain information about what the nurse practitioners can do while in the Hospital, and in what departments they work, yet the Hospital has failed to provide any of this responsive information.<sup>17</sup>

In a related argument (Br. 44-45), the Hospital claims (Br. 44) that “the Board erred in granting the [General Counsel’s] exceptions to the [judge’s] exclusion of [the Union’s] request for all documents between [the Hospital and the University] . . . concerning the employment of nurse practitioners.”<sup>18</sup> Repeating

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<sup>17</sup> The Hospital claims (Br. 42-43) that the information regarding such “privileges” are not equivalent to the requested “duties” of the nurse practitioners. However, this is a nomenclature distinction without a difference for the purpose of determining whether the credentialing files contain potentially relevant information. Moreover, Marte-Miraz testified (A 205) that “privileges are those duties that a nurse practitioner can perform in the setting in which she is credentialed.”

<sup>18</sup> The Hospital’s claim (Br. 46-47) that the Board’s decision did not sufficiently carry over the judge’s confidentiality protections for the credentialing files is barred by Section 10(e) of the Act because the Hospital failed to raise it in a motion for reconsideration before the Board (see above at pp. 21-23). In any event, the judge’s confidentiality protections, such as allowing the Hospital to redact where needed, were contained in his decision’s “remedy” section (A 54), and the Board did not remove or change any part of that “remedy” section

its assertion that the credentialing files do not contain relevant information, the Hospital argues that the files do not contain “documents between the Hospital and the University concerning the employment of nurse practitioners.” As demonstrated above, however, the files indeed contain information about the functions of the nonunit nurse practitioners on the payroll of the University, and, given that the Hospital provided credentials for the nonunit nurse practitioners, the Union was entitled to explore the relationships of the Hospital, the University, and the nurse practitioners. The Hospital has accordingly failed to prove that it does not possess relevant information in its credentialing files.

**(d) The Hospital failed to prove that the Union sought information for an improper purpose, in violation of Section 8(e) of the Act**

The Hospital also attempts (Br. 47-51) to escape liability by asserting that the Union sought the requested information for the improper secondary objective of forcing the Hospital to stop doing business with the University. However, the Hospital has failed to demonstrate that the Union had such a prohibited secondary objective.

As the judge explained (A 53), “unions and employers are entitled to negotiate contracts that ‘preserve’ unit work by way of no-contracting or similar

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affirming the judge’s rules, findings, and conclusions unless specifically modified. (A 47).

clauses.” And if the contract provision is found to be a proper work-preservation provision, it is not illegal for a union to seek enforcement of such an agreement even if it would cause the contracting employer to cease doing business with someone else. *See National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 644-45 (1967). As the judge found, there was no evidence indicating that either the Agreement or the Side Letter constituted facially invalid “secondary objective” agreements. Thus, without more, the fact that one of the remedies the Union sought in arbitration was for the Hospital to stop allowing university employees to do bargaining unit work is insufficient to establish an improper secondary objective.

Moreover, the only cases (Br. 48) that the Hospital cites that remotely suggest that a Union should be denied information based on its conduct involve vastly different circumstances. In *Local 777 Democratic Union Organizing Committee., Seafarers Int’l Union v. NLRB*, 603 F.2d 862, 911 (D.C. Cir. 1978), which did not involve an information request, the union conditioned bargaining on a request that the employer permit independent contractors to join the bargaining unit. Here, in contrast, the Union placed no such conditions on the Hospital. And in *NLRB v. Wachter Construction Inc.*, 23 F.3d 1378 (8th Cir. 1994), the Court found specific evidence that the union’s intent in seeking information was “to harass” a group of employers, a circumstance utterly lacking in this case.

Accordingly, the Hospital's reliance on Section 8(e) to shield it from liability does not withstand scrutiny.

**(e) The Hospital's claim that the information requests should have been deferred to arbitration is without merit**

The Hospital fares no better in arguing (Br. 53-57) that the Board should have deferred the information requests to the parties' grievance and arbitration machinery. As shown below, the Board properly relied on two distinct grounds in its decision not to defer to arbitration, and the Hospital has failed to undercut either one.

First, and wholly apart from the legal merits of the issue, the Board found SA 1, A 47) that the arbitrator's refusal to rule on the Union's subpoena demand for production of the information militates against deferral in this case. Noting Representative Murphy's uncontradicted testimony (A 51, 54; 177-78, 179-80, 264) that the arbitrator continually "refused to rule" on the issue, the judge reasonably found (A 51, 54) that deferral was inappropriate. Accordingly, the Hospital's reliance (Br. 25, 54, 57) on *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), is misplaced, as both of those cases involved deferral to an arbitration that had concluded.

The Hospital's weak attempt (Br. 56) to counter this solid finding is based on its parsing of Murphy's testimony. Contrary to the Hospital's assertion (Br. 56), Murphy did not "admit[ ] that she knew that the arbitrator had ruled on the

subpoenas by not ordering the Hospital to furnish the information.” *See* A 263-64. Under cross-examination, Murphy merely said (A 264) that the arbitrator once suggested that if he eventually found for the Union on the merits, the Union would not need the requested information. The Hospital’s exclusive reliance on this part of Murphy’s cross-examination fails to undermine the judge’s finding that she testified “without contradiction” that the arbitrator refused to rule on the issue. *See Universal Camera Corp*, 340 U.S. at 488 (reviewing court “may [not] displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*”). Accordingly, on this basis alone, the Court should uphold the Board’s decision not to defer.

Moreover, the Board’s additional basis for its ruling (A 47, 54), that information requests are not generally appropriate for deferral, was reasonable and should not be disturbed. Indeed, the Board’s law has been upheld by this Circuit. *See DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 444-48 (D.C. Cir. 2002). As Member Schaumber noted (A 47, n. 3), he concurred in the non-deferral decision on this “additional basis.” As discussed above at pp. 27-28, n.8, there was nothing otherwise remarkable or improper about the Board’s decision in this regard. Thus, the Hospital has provided no reason to disturb either of the Board’s bases for non-deferral.

**CONCLUSION**

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

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NATIONAL LABOR RELATIONS BOARD

March 2011

# **ADDENDUM**

## **STATUTORY ADDENDUM**

Relevant provisions of the National Labor Relations Act (“the Act”), 29 U.S.C. Section 151, et. seq., and the Federal Regulations (“C.F.R.”), are excerpted below:

**Section 7 of the Act (29 U.S.C. § 157): Rights of employees as to organization, collective bargaining, etc.**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

**Section 8 of the Act (29 U.S.C. § 158):**

**(a) Unfair labor practices by employer**

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

**(e) Enforceability of contract or agreement to boycott any other employer; exception**

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent [unenforceable] and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms “any employer”, “any person engaged in commerce or an industry affecting commerce”, and “any person” when used in relation to the terms “any other producer, processor, or manufacturer”, “any other employer”, or “any other person” shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

**Section 10 of the Act (29 U.S.C. § 160):**

**(a) Powers of Board generally**

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

**(d) Modification of findings or orders prior to filing record in court**

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable

notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

**(e) Petition to court for enforcement of order; proceedings; review of judgment**

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

**(f) Review of final order of Board on petition to court**

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in

section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive

### **Regulations:**

#### **29 C.F.R. § 102.48**

##### **Action of the Board upon expiration of time to file exceptions to the administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions.**

**(d)(1)** A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

**(2)** Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly on the other parties.



UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE NEW YORK AND PRESBYTERIAN HOSPITAL	*
	*
Petitioner/Cross-Respondent	* Nos. 10-1278,
	* 10-1291
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 2-CA-38512
	*
Respondent/Cross-Petitioner	*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11,575 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

/s/Linda Dreeben  
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Dated at Washington, DC  
this 30th day of March, 2011

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE NEW YORK AND PRESBYTERIAN HOSPITAL	*
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Petitioner/Cross-Respondent	* Nos. 10-1278,
	* 10-1291
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 2-CA-38512
	*
Respondent/Cross-Petitioner	*

**CERTIFICATE OF SERVICE**

I hereby certify that on March 30, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC  
this 30th day of March, 2011