Nos. 11-1458 & 11-1488

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EUROPA AUTO IMPORTS, INC.,
D/B/A MERCEDES-BENZ OF SAN DIEGO

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

MACHINISTS AUTOMOTIVE TRADES
DISTRICT LODGE 190, AFL-CIO

Intervenor for Respondent

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

USHA DHEENAN
Supervisory Attorney

NINA SCHICHOR
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2948
(202) 273-7957

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

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EUROPA AUTO IMPORTS, INC., D/B/A MERCEDES-BENZ OF SAN DIEGO	)	
Petitioner/Cross-Respondent	)	Nos. 11-1458, 11-1488
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case Nos. 21-RC-21210 21-CA-63725
and	)	
MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE 190, AFL-CIO	)	
Intervenor	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties and Amici

1. Europa Auto Imports, Inc. d/b/a Mercedes-Benz of San Diego, was the Respondent before the Board in the above-captioned case and is the Petitioner/Cross-Respondent in this court proceeding.

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

3. The Machinists Automotive Trades District Lodge 190, AFL-CIO was the charging party before the Board and is an Intervenor before the Court. It is also known as the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190.

B. Rulings Under Review

The case under review is a Decision and Order of the Board, issued on November 17, 2011 and reported at 357 NLRB No. 114. It relies on findings from the Board's Decision and Certification of Representative, issued on August 25, 2011 and reported at 357 NLRB No. 67; the Acting Regional Director's unpublished Decision and Direction of Election dated August 5, 2010 and unpublished Supplemental Decision and Order Directing Hearing and Notice of Hearing dated September 3, 2010; and an administrative law judge's unpublished decision dated November 23, 2010.

C. Related Cases

None.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, D.C.
this 19th day of July 2012

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National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

GLOSSARY

The Act	**=**	**The National Labor Relations Act (29 U.S.C. § 151 *et seq.*)**
The Board	**=**	**The National Labor Relations Board**
Br.	**=**	**The Company's Opening Brief**
The Company	**=**	**Europa Auto Imports d/b/a Mercedes-Benz of San Diego**
The Union	**=**	**Machinists Automotive Trades District Lodge 190, AFL-CIO**

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

INTRODUCTION

On August 31, 2010, the National Labor Relations Board ("the Board") conducted an election in which a majority of the eligible employees at Europa

Auto Imports, Inc. d/b/a Mercedes-Benz of San Diego ("the Company") voted to be represented by the Machinists Automotive Trades District Lodge 190, AFL-CIO ("the Union"). The Company now urges this Court to overturn that election without demonstrating any objectionable conduct. The Company has so far delayed bargaining by clinging to an untimely claim it should have made prior to the election and challenging a supervisor's ineligibility to vote despite his undisputed testimony. This type of delay "almost inevitably works to the benefit of the employer."[1] Respectfully, the Court should enforce the Board's order and end the Company's efforts to deprive its employees of their chosen bargaining representative.

STATEMENT OF JURISDICTION

This case is before the Court on the petition of the Company to review, and on the cross-application of the Board to enforce, a Board order issued against the Company. The Board had jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act,[2] as amended ("the Act"), which empowers the Board to prevent unfair labor practices. The Court has

[1] *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984).

[2] 29 U.S.C. § 151, § 160(a).

jurisdiction pursuant to Section 10(e) and (f) of the Act.[3] The Board's Decision and Order issued on November 17, 2011, and is reported at 357 NLRB No. 114.[4] (A. 11-14.) The Board's order is final with respect to all parties under Section 10(e) and (f) of the Act. The petition for review filed on November 28, 2011 and the cross-application for enforcement filed on December 23, 2011 are timely; the Act places no time limit on such filings.

As the Board's order is based, in part, on findings made in the underlying election ("representation") proceeding, the record in that case (Board Case No. 21-RC-21210) is also before the Court pursuant to Section 9(d) of the Act.[5] (A. 15-18.) Section 9(d) authorizes review of the Board's actions in a representation proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair labor practice order in whole or in part. The Board retains authority under Section 9(c) to resume processing the representation case in a manner consistent with the ruling of this Court.[6]

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[3] 29 U.S.C. § 160(e) and (f).

[4] "A." references are to the joint appendix and "S.A." references are to the supplemental joint appendix filed by the Board. "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.

[5] 29 U.S.C. § 159(d); *see Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964).

[6] 29 U.S.C. § 159(c); *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUES

The ultimate issue is whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, which had been certified as the representative of a unit of company employees. The subsidiary issues are:

1. Whether the Board acted within its discretion when it overruled the Company's objection that a Board agent engaged in misconduct when he denied election ballots to employees Lee Maher and Mauricio Zaragoza, whom the Board had already determined were ineligible to vote.

2. Whether substantial evidence supports the Board's finding that Remo Bersinger is a supervisor under Section 2(11) of the Act and ineligible to vote where the undisputed evidence shows he has sole authority to promote a unit employee.

3. Whether the Board is entitled to summary enforcement of its uncontested finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to provide information relevant to bargaining requested by the Union.

RELEVANT STATUTORY PROVISIONS

The pertinent statutory provisions are included in the addendum to this brief.

STATEMENT OF THE CASE

This case involves the Company's refusal to bargain and to provide information to the Union. The Union won a representation election in August 2010 and the Board (Chairman Liebman and Members Becker and Pearce) certified the Union as the exclusive bargaining representative on August 25, 2011. (A. 15-17.) On November 17, 2011, the Board (Chairman Pearce and Members Becker and Hayes) found that the Company's subsequent refusal to bargain and to furnish requested information to the Union violated Section 8(a)(5) and (1) of the Act.[7] (A. 11-12.) The Company does not dispute its refusal to bargain or provide information. (Br. 4.) Instead, it contests the validity of the election certification on the ground that two employees were improperly denied ballots and another employee's ballot was not counted because he was wrongly categorized as a supervisor. The Board's findings in the representation and unfair labor practice proceedings are set forth below.

[7] 29 U.S.C. § 158(a)(5) and (1).

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations; the Union Files a Petition To Represent the Employees

The Company operates a car dealership and repair shop in San Diego, California. (A. 12, S.A. 7.) Most of the Company's technicians are paid on a flat-rate basis determined by multiplying the factory-allocated time for a particular repair by the technician's hourly rate of pay. (A. 22; S.A. 27-28, 38-39, 67-68, 101.) Flat-rate technicians range in skill from certified (lowest) to master (highest), and all have certification and ongoing training requirements. (A. 23; S.A. 32-33, 72-73, 90.)

Remo Bersinger is a highly skilled technician at the Company; he diagnoses problems and repairs cars other technicians cannot. (A. 31-32; S.A. 87-88, A. 280:7-11.) Unlike other technicians, Bersinger opens the shop, attends leadership meetings, and dispatches work to other employees. (A. 32-34; S.A. 128-31, 145, A. 287-89, 294:18-19, 303:6-10.) Bersinger also trains Apprentice Technician S. Sengpaseuth. He works with Sengpaseuth four hours per day and has the sole authority to determine when he graduates from apprentice to journeyman technician. (A. 15 n.2; 295:10-16, 296-97.) In addition to flat-rate pay, Bersinger earns an extra $2500 monthly salary, a percentage of the shop's total billed hours, and $8 for every hour Sengpaseuth works. (A. 32; S.A. 48, A. 292-94, 298:13-18.)

Employees Lee Maher and Mauricio Zaragoza lack Mercedes-Benz technical certification. (A. 27; S.A. 86-87.) During the relevant period, Zaragoza spent 50-60 percent of his time as a car washer, and Maher worked as a greeter 65-70 percent of his time, welcoming customers and directing them to the appropriate service advisor. (A. 27-28; S.A. 21:17-25, 106:8-12, 135-36.) Zaragoza and Maher sometimes assisted Technician Ken Willard on heavy-duty vehicles called Sprinters, but earned the wages of a greeter or car washer whether they helped Willard or performed their regular duties. (A. 27; S.A. 44-48, 78-79, 120-24, A. 21, 27-28.)

On June 24, 2010, the Union filed a petition with the Board seeking certification as the representative of a unit of the Company's automotive technicians, consisting mainly of the flat-rate technicians. (A. 19.) The parties stipulated that the greeter and car washer positions were not in the unit. (A. 62 n.6.) Following a hearing on issues of certain employees' eligibility to vote, the Acting Regional Director issued a Decision and Direction of Election on August 5, 2010 finding Zaragoza, Maher, and Bersinger ineligible to vote. He found that Zaragoza and Maher were not part of the technicians' unit because they did not have the certification level of the unit technicians; were paid hourly, not on the flat-rate plan, and at a much lower rate than flat-rate technicians; and were

classified as greeter and car washer. He also found that Bersinger was a statutory supervisor. (A. 19, 27-28, 35-36, 41-42.)

B. The Board Affirms the Exclusion of Zaragoza and Maher from the Unit and Grants Bersinger a Challenged Ballot; the Union Wins the Election

On August 19, 2010, the Company filed a request for review of the Decision and Direction of Election to the Board. It argued Bersinger was not a supervisor and Zaragoza and Maher belonged in the technicians unit. On August 31, 2010, the Board affirmed the ineligibility of Zaragoza and Maher and permitted Bersinger to vote under challenge. (A. 15; 46-51,18.)

Later that same day, August 31, at the pre-election conference, the Board agent, in accordance with the Board order, struck Zaragoza and Maher from the eligible voters list. (A. 15.) Shortly after the conference, the Board agent conducted the election. (A. 15.) When the Board agent did not permit Zaragoza and Maher to vote, they left without comment. (A. 16; 233.) The tally of ballots showed that of 48 eligible voters, 24 voted in favor of union representation and 19 voted against. There were five challenged ballots including Bersinger's ballot. (A. 15; 53.) The other challenged ballots, from technicians Faber, Switzer, Casanova, Palmiter, are not at issue in this case; an administrative law judge found them valid and the Board affirmed those uncontested findings. (A. 15 n.2; 80, 18.)

C. After the Union Wins the Election, the Company Claims Zaragoza and Maher Were Eligible To Vote Because of Changed Circumstances; the Board Rejects That Claim as Untimely and Affirms Bersinger's Supervisory Status

On September 3, 2010, the Company filed an objection to the election alleging that Zaragoza and Maher were wrongfully refused ballots. (A. 54-55.) On September 17, the Acting Regional Director issued a supplemental decision finding that the Board agent acted properly but nevertheless permitting a post-election hearing concerning "possible changed circumstances in terms and conditions of employment for Zaragoza and Maher." (A. 16 n.3; 63-64.) At this hearing, the Company argued for the first time that it made Zaragoza and Maher flat-rate technicians before July 31, 2010, the cutoff date for employee eligibility set in the Decision and Direction of Election. (A. 16, 35-36.) An administrative law judge overruled the Company's objection, however, finding no changed circumstances during the eligibility period. (A. 72-73.) The judge concluded "it is reasonable to presume that the change was made in order to affect their voting eligibility." (A. 72.) He also upheld the challenge to Bersinger's ballot due to his supervisory status and recommended that the Board certify the election. (A. 15 n.2; 73-75.) On December 7, 2010, the Company filed exceptions to the administrative law judge's decision regarding Zaragoza and Maher and reiterated its exception to Bersinger's status. (A. 81-84.)

On August 25, 2011, the Board (Chairman Liebman and Members Becker and Pearce) issued a Decision and Certification of Representative affirming the judge's conclusions but applying a different rationale. Instead of ruling on the merits of the changed circumstances claim regarding Zaragoza and Maher, the Board rejected it as *untimely* because eligibility issues cannot be litigated through the post-election process. It noted that the Company had multiple opportunities to inform the Board of any changes that might have impacted Zaragoza's and Maher's eligibility prior to the election, but it could not do so afterwards. The Board found that its election agent did not act improperly when he declined to provide ballots to Zaragoza and Maher because the Company did not raise any changed circumstances to him at the time. The Board also affirmed Bersinger's supervisory status because he had the power to promote a unit employee. (A. 15 n.2.)

The Union filed a motion for reconsideration seeking a correction to the unit description. (A. 100-01.) On October 27, 2011, the Board issued a correction adding the PDI Technicians and Roadside Assistance Technicians to the unit description. (A. 12 n.5.)

D. The Unfair Labor Practice Proceeding

After the Board certified the Union, the Company refused to comply with the Union's request for bargaining and information, including an employee list and

personnel and benefit documents. (A. 106-07.) The Union filed an unfair labor practice charge, and the General Counsel issued a complaint alleging that the Company's failure to bargain and provide information violated Section 8(a)(5) and (1) of the Act.[8] (A. 105, 108.) The Company admitted its refusal to bargain and to produce the requested information, but asserted that the underlying union certification was invalid. (A. 113-15.) The General Counsel then filed a motion for summary judgment; the Company did not respond. (A. 11.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On November 17, 2011, the Board (Chairman Pearce and Members Becker and Hayes) issued its Decision and Order granting the General Counsel's motion for summary judgment. It found that by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees and by failing to furnish the Union with the requested information, the Company violated Section 8(a)(5) and (1).[9] The Board further found that the representation issues were, or could have been, litigated in the underlying representation proceeding, and that no newly discovered evidence or special circumstances required the Board to reexamine its certification. Lastly, it found the Union's

[8] 29 U.S.C. § 158(a)(5) and (1).

[9] *Id.*

information request presumptively relevant and unrebutted by the Company. (A. 11-12.)

The Board's order requires the Company to cease and desist from (1) failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit and furnish the Union with requested information that is necessary for and relevant to its role as the exclusive bargaining representative of the unit employees; and (2) in any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.[10] (A. 13.)

Affirmatively, the Board's order directs the Company to bargain with the Union upon request, to embody any understanding reached through bargaining in a signed agreement, to furnish the Union with information it requested in its August 26, 2011 letter, to post and electronically distribute copies of a remedial notice in its San Diego, California facility, and to notify the Board's Regional Office of its compliance efforts. (A. 13.)

SUMMARY OF ARGUMENT

The Company's attempts to avoid bargaining with the validly certified Union are baseless. First, the Company's claim that the Board agent conducting the election erred by denying ballots to two employees is unsupported by fact or

[10] 29 U.S.C. § 157.

law. The Supreme Court long ago endorsed the Board's rule that "challenges to the eligibility of voters [must] be made prior to the actual casting of ballots, so that all uncontested votes are given absolute finality."[11] The Company indisputably failed to provide the Board with any pre-election notice of the asserted changes to those employees' jobs that it claims made them eligible to vote. This case thus manifests a simple application of a well-established rule: when a company attempts to file eligibility challenges after an election ends, the Board acts within its wide discretion in dismissing such claims as untimely.

Second, substantial evidence supports the Board's conclusion that Remo Bersinger was ineligible to vote because he is a statutory supervisor. His undisputed testimony demonstrated his independent authority to promote Apprentice Technician S. Sengpaseuth. Last, assuming the Union was validly certified, the Board is entitled to summary enforcement of its unchallenged findings that the Company unlawfully failed to provide the Union with relevant requested information regarding the employees.

[11] *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 321 (1946).

ARGUMENT

I. THE BOARD ACTED WITHIN ITS DISCRETION IN CERTIFYING THE UNION AND PROPERLY FOUND THAT THE COMPANY VIOLATED THE ACT BY REFUSING TO BARGAIN WITH OR PROVIDE INFORMATION TO THE UNION

A. Section 8(a)(5) and (1) of the Act Requires an Employer To Bargain With and Provide Relevant Information to a Certified Union

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees . . . ."[12] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . ."[13] "[A]n employer who violates [S]ection 8(a)(5) also, derivatively, violates [S]ection 8(a)(1)."[14] Accordingly, an employer violates Section 8(a)(5) and (1) of the Act by refusing to bargain with a union and by refusing to provide it with requested relevant information.[15] Conceding its refusal to bargain and provide information (Br. 4), the Company's defense relies on an untimely challenge to the eligibility of

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[12] 29 U.S.C. § 158(a)(5).

[13] 29 U.S.C. § 158(a)(1).

[14] *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

[15] *See NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944); *Evergreen Am. Corp. v. NLRB*, 362 F.3d 827, 830 (D.C. Cir. 2004).

two employees and a misguided attempt to permit a statutory supervisor to vote in a union election.

In reviewing the Board's decision to certify a union, the Court's role is limited to determining whether the Board acted within the "wide degree of discretion" entrusted to it by Congress to resolve questions arising during the course of a representation proceeding.[16] A party seeking to overturn a Board election "bears a heavy burden."[17] The Board's underlying findings of fact are conclusive if supported by substantial evidence on the record considered as a whole.[18]

B. The Board Acted Within Its Discretion In Overruling the Company's Untimely Objection Regarding Zaragoza and Maher

1. The Board agent properly refused to permit ineligible employees to cast challenged ballots in the election

The Company's main defense is that, despite its admitted failure to apprise the Board agent conducting the election of its claim of changed circumstances, the

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[16] *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *accord S. S.S. Co. v. NLRB*, 316 U.S. 31, 37 (1942); *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996).

[17] *New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1077 (D.C. Cir. 2007); *see also Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002).

[18] 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Terrace Gardens Plaza. Inc. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996).

agent improperly refused to give Zaragoza and Maher ballots. This Court "will not overturn the Board's [election] decision as long as it is merely rational and in accord with past precedent[,]"[19] and, here, the Board agent tightly adhered to Board procedure. Section 11338.7 of the Board's Casehandling Manual (Part Two) Representation Procedures states that "Persons in job classifications specifically excluded by the Decision and Direction of Election should be refused a ballot, even under challenge, unless there have been changed circumstances."[20] The August 5, 2010 Decision and Direction of Election specifically excluded Zaragoza and Maher from voting. (A. 35-36.) The Board then affirmed their ineligibility in its order dated August 31, 2010. As the Company admits (Br. 2), the Board specified which employees could vote under challenge, which did not include Zaragoza and Maher, and denied the Company's request for review in "all other respects" not specifically granted. (A. 18.) Accordingly, because the Board deemed Zaragoza and Maher ineligible to vote, the Board agent could not allow them to vote, even under challenge.

Further, as the Board noted (A. 15-16), the Company failed to bring any evidence of "changed circumstances" to the Board's attention before the election

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[19] *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1178 (D.C. Cir. 2000) (internal quotation omitted).

[20] The Board's Casehandling Manual is available at http://www.nlrb.gov/sites/default/files/documents/44/chm2.pdf.

ended, so the Board agent could not have possibly known of the alleged operational change that may have affected Zaragoza's and Maher's eligibility to vote. The Company asserts (Br. 2) that it effected the change on July 28, so it could have informed the Board on August 19, 2010 in its request for review of the Decision and Direction of Election. Although the Company claims that it failed to do so because the changes were "not part of the record at that time," (Br. 11), it never suggested that the Board consider the circumstances or even reopen the record until after it lost the election. Similarly, the Company could have told the Board agent during the pre-election conference on August 31 or any time before the polls closed. Zaragoza or Maher or the Company's election observer each could have informed the Board agent during the election itself. But the Company stayed mute, despite these opportunities. Because of the Company's inexplicable silence even where it witnessed the Board agent strike Zaragoza and Maher from the voter list, there was no "reasonable doubt" to prompt the use of the challenged ballot procedure (Br. 15). Thus, under Section 11338.7 of the Casehandling Manual, the Board agent properly excluded the two ineligible employees from voting, and the Board did not abuse its discretion in overruling the Company's objection and certifying the election.

The Company's argument that Zaragoza and Maher were owed challenged ballots is meritless. Its citation to Section 11338.1 of the Board's Casehandling

Manual (Br. 16), is inapposite because the provision does not address employees the Board specifically determined ineligible to vote, as happened here. This Court should rebuff the Company's inapposite out-of-circuit citations (Br. 16), for the same reason: the cases do not pertain to employees already deemed ineligible to vote by the Board.[21] Lastly, contrary to the Company's intimation (Br. 15-16), the Board was not required to specifically name Zaragoza and Maher in its August 31 order. The Company concedes (Br. 2) that the August 31 order excluded Zaragoza and Maher. It does not challenge the clarity of the order, nor does it support its proposed requirement that each voter be named specifically with any precedent.

2. The Company's attack on the Board's longstanding prohibition against post-election challenges is meritless

The Company's opening argument boils down to an attack on the Board's prohibition against post-election challenges. (Br. 13-14.) Even if this Court agreed with the Company's view, it recognizes that it "is without authority to impose upon the NLRB the kind of election procedures that it may deem most appropriate."[22] Moreover, Supreme Court precedent firmly supports the Board's

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[21] Br. 16 (citing *NLRB v. Triangle Express, Inc.*, 683 F.2d 337, 338 (10th Cir. 1982) (affirming union certification and finding no disenfranchisement although employer omitted employees' names from the voter eligibility list and they failed to vote); *NLRB v. W.S. Hatch Co.*, 474 F.2d 558, 561-62 (9th Cir. 1973) (affirming the Board's decision to set aside an election when an employer violated a stipulated agreement to make all eligible employees available to vote)).

[22] *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002).

prohibition on post-election challenges to voter eligibility, even those styled as objections.[23] The Board distinguishes between *objections* and *challenges*.[24] Objections address whether the election and ballot count were conducted properly and can therefore be raised post-election.[25] Challenges, however, concern the eligibility of prospective voters and are not permitted postelection.[26] The Board uses this clear distinction as a matter of policy and the appellate courts are not free to disregard it.[27]

As the Board noted (A. 15-16) and as described above (pp. 16-17), the Company bypassed multiple opportunities to challenge the eligibility of Zaragoza and Maher before the election ended. Failing that, the Company cast its eligibility claims as an objection to the Board agent's conduct of the election. Although the Company faults the Board agent for not initiating a "conversation" during the pre-election conference (Br. 14), it does not provide any rationale for its own silence,

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[23] *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 329, 331 (1946) (explaining that bar on post-election challenges to voter eligibility promotes finality of election results); *Solvent Servs.*, 313 NLRB 645, 646 (1994) ("[I]n the interest of promoting election finality, postelection challenges will not be permitted").

[24] *Norris, Inc.*, 63 NLRB 502, 512 (1945).

[25] *A.J. Tower Co.*, 329 U.S. at 334.

[26] *Id.* at 333.

[27] *Id.* at 331; *Norris, Inc.*, 63 NLRB at 512.

nor does it offer any precedent foisting such a requirement upon the Board. Indeed, absent any mention of changed circumstances, it is unclear why the Board agent would initiate such a dialogue.[28] Given the Company's undisputed failure to mention any changed circumstances, it is immaterial that the Board does not record pre-election conferences (Br. 11, 14). Similarly, the fact that the Acting Regional Director, in compiling a full record and avoiding any due process concerns, permitted the Company to introduce evidence of "changed circumstances" does not require the Board to find that such circumstances existed or to engage in a belated re-examination of eligibility, (A. 16 n.3; Br. 14 (citing Collins's testimony)).

None of the Company's arguments change the controlling precedent: once the election ended, the Company could no longer challenge the eligibility of employees Zaragoza and Maher.[29] The Board's adherence to its established procedure does not warrant reversal in favor of the Company's untimely claim. The Supreme Court has observed 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."[30]

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[28] *See Solvent Servs.*, 313 NLRB at 646 (employer representative "gave no indication at the tally of ballots that he disputed" voter's eligibility).

[29] *A.J. Tower Co.*, 329 U.S. at 329.

[30] *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

C. Substantial Evidence Supports the Board's Conclusion That Bersinger Is a Statutory Supervisor and Ineligible To Vote

Section 2(3) of the Act excludes from the definition of the term "employee" "any individual employed as a supervisor."[31] A supervisor is any person

> having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, *promote*, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if . . . such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[32]

Exerting such authority over even one employee is sufficient to establish statutory supervisor status.[33] This Court affirms the Board's findings regarding supervisory status if supported by substantial evidence on the record as whole.[34] The Company does not dispute that authority to promote establishes supervisory status,[35] only whether the record supports that Bersinger had such authority.

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[31] 29 U.S.C. § 152(3).

[32] 29 U.S.C. § 152(11) (emphasis added).

[33] *Jack Holland & Son*, 237 NLRB 263, 265 (1978) (directing day-to-day activities of one employee sufficient for supervisory status); *Cartwright Hardware Co.*, 229 NLRB 781, 783 n.17 (1977) (assigning work, disciplining and making effective recommendations concerning wage increases for one employee sufficient for supervisory status), *modified on other grounds*, 600 F.2d 268 (10th Cir. 1979).

[34] *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1550 (D.C. Cir. 1984).

[35] *Entergy Sys. & Serv., Inc.*, 328 NLRB 902, 902-03 (1999) (crew leaders were statutory supervisors solely because they affected employees' promotional opportunities).

The record amply supports the Board's conclusion that Bersinger had authority to promote technician apprentice S. Sengpaseuth. Bersinger has undisputed authority to determine how long Sengpaseuth will remain an apprentice and when he will be promoted to journeyman. (A. 296-97, 74-75.) That not a single supervisor or manager disputed Bersinger's role is telling. Sengpaseuth reports directly to Bersinger, who teaches him how to perform work for approximately four hours a day, and gives him feedback on his progress. (A. 178-80, 74-75.) That Bersinger's title is not "team lead" is irrelevant (Br. 17), as the analysis turns on work duties, not title.[36] Further, because the Board relied only on Bersinger's promotion authority and no other supervisory indicia like assignment, Bersinger's ability to set employees' "hours of work" or "days of work" (Br. 17) is similarly irrelevant. In short, record evidence belies the Company's erroneous claim that "there is nothing in the record to support the Board's finding that Bersinger promotes anyone" (Br. 17).

D. The Board Is Entitled To Summary Enforcement of Its Uncontested Finding That the Company Violated 8(a)(5) and (1) By Failing To Provide Relevant Information to the Union

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by failing to provide the Company with requested information. In its opening brief, the Company does not seek review of that finding. Consistent with Rule 28

[36] *Alois Box Co., Inc. v. NLRB*, 216 F.3d 69, 76 (D.C. Cir. 2000) (finding supervisory status despite lack of a supervisory title).

of the Federal Rules of Appellate Procedure, this Court has made clear that when a party fails to sufficiently raise an issue in its opening brief, that issue is waived.[37] When an employer does not challenge in its initial brief the Board's findings regarding a violation of the Act, those unchallenged issues are waived on appeal, and the Board is entitled to summary enforcement.[38] Accordingly, assuming this Court upholds the election certification, the Board is entitled to summary enforcement of the portions of its order relating to the Union's information requests.

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[37] Fed. R. App. P. 28(a)(9)(A); *New York Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007).

[38] *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011); *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 n.3 (D.C. Cir. 2011).

CONCLUSION

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

/s/ Usha Dheenan
USHA DHEENAN
Supervisory Attorney

/s/ Nina Schichor
NINA SCHICHOR
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2948
(202) 273-7957

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
July 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EUROPA AUTO IMPORTS, INC. d/b/a MERCEDES-BENZ OF SAN DIEGO	)	
Petitioner/Cross-Respondent	)	Nos. 11-1458 & 11-1488
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 21-CA-63725
and	)	
MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE 190, AFL-CIO	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 4,329 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 19th day of July, 2012

STATUTORY ADDENDUM

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act, 29 U.S.C. §§ 151-69 (2000):

Sec. 2. [§152.] When used in this Act [subchapter]—

***

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

***

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Sec. 7. [§ 157.] 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 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 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 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 7 [section 157 of this title];
>
> ***
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Sec. 9 [§ 159.]

***

(c) [Hearings on questions affecting commerce; rules and regulations]

> (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> > (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or
> >
> > (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists

shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f)

[subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10. [§ 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. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

***

(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 proceeding, as provided in section 2112 of title 28, United States Code [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. If either party shall apply to the court for leave to adduce

additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(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 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, United States Code [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.

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MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE 190, AFL-CIO	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2012, 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 the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are a registered user or, if they are not, by serving a true and correct copy at the address listed below:

Gary Louis Lieber
Ford & Harrison LLP
1300 19th Street, NW
Suite 300
Washington, DC 20036

David A. Rosenfeld, Esq.
Caren P. Sencer, Esq.
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 2000
Alameda, CA 94501-6430

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
This 19th day of July, 2012