

Nos. 12-72526, 12-72639

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DIRECTV HOLDINGS, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 947**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT OF JURISDICTION

This case is before this Court on the petition of DIRECTV Holdings, LLC, (“DIRECTV”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Board’s Order in *DirectTV U.S. DirectTV Holdings LLC*, 358 NLRB No. 33 (April 16, 2012). (EOR 50-56.)¹ This case involves DIRECTV’s refusal to bargain with the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 947 (“the Union”), after DIRECTV’s employees voted in favor of union representation in a Board-conducted election. The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act, as amended (“the Act”) (29 U.S.C. §§ 151, 160(a)). The Board’s Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

DIRECTV filed its petition on April 27, 2012, and the Board filed its cross-application on August 20, 2012. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, because the unfair labor practices were committed in California. Because the Board’s Order is based on findings made in a representation proceeding, the record in that proceeding (Board Case No. 21-RC-

¹ Citations are to the Excerpts of Record (“EOR”) filed with DIRECTV’s brief and to the Board’s Supplemental Excerpts of Record (“SER”) filed with the Board’s brief. When a record citation contains a semicolon, references preceding it are to the Board’s findings, and references following it are to the supporting evidence.

21191), is before the Court pursuant to Section 9(d) of the Act, which provides the Court with jurisdiction to review the Board's actions in the representation case solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair labor practice] order of the Board." 29 U.S.C. § 159(d); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964); *accord Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 550 n.2 (9th Cir. 1997). The Board retains authority to resume processing the representation case in a manner consistent with the Court's rulings. 29 U.S.C. § 159(c); *see also Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

STATEMENT OF ISSUES

1. Whether the Board possessed a quorum when it issued the orders challenged in this case.
2. The ultimate issue is whether the Board reasonably found that DIRECTV violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union and provide certain information. DIRECTV admits that committed these acts. Thus, this case turns on whether substantial evidence supports the Board's findings that DIRECTV failed to meet its burden of proving that its 13 field supervisors have the authority to effectively recommend discipline within the meaning of Section 2(11) of the Act (29 U.S.C.

§ 152(11)) and therefore are not statutory supervisors who engaged in conduct tainting the election.

RELEVANT STATUTORY ADDENDUM

The addendum attached to this brief contains all applicable statutes.

STATEMENT OF THE CASE AND FACTS

I. FINDINGS OF FACT

A. DIRECTV's Rancho Dominguez Facility

DIRECTV provides digital television services. It maintains a facility in Rancho Dominguez, California, run, as of May 2010, by Site Manager Mike Schultz. Three operations managers and the human resources department report directly to Schultz. (EOR 45;61,69.)

DIRECTV employs approximately 215 employees at the Rancho Dominguez facility, including approximately 150 field technicians, as well as warehouse, dispatch, and quality control employees. (EOR 45;8-9,61.) Field technicians install, upgrade, and repair equipment at customer jobsites and work alone in the field. (EOR 45,9;61.) On average, each technician is expected to complete four jobs daily and is subject to discipline for failing to meet minimum productivity standards. (EOR 9,46 n.8;107,158-60,165-68,172,SER 18.)

There are 22 designated “field supervisors.” Thirteen lead a team of 10-15 field technicians. The remaining 9, who do not work with teams, handle complex or high-profile jobs.² (EOR 45;SER 2.)

B. DIRECTV’s Field Supervisors

DIRECTV’s field supervisors receive phone calls from technicians on their team seeking technical assistance, requesting additional equipment, or reporting problems with job assignments. (EOR 8,45;SER 7.) They monitor the field technicians’ productivity, inspect their vans, conduct weekly meetings, and visit jobsites to review field technicians’ work, point out any errors, and provide hands-on training. (EOR 8,17-19,45;76-77,109,SER 12-13,17.)

Field supervisors may verbally counsel technicians for performance issues or tardiness, which are recorded in “manager notes” that are not reviewed by management or retained in personnel files. (EOR 12,31,45;SER 10-11.) If conduct might warrant more than verbal counseling, the field supervisor may complete an Employee Consultation Form (“ECF”), on which the field supervisor describes the technician’s conduct and suggests an appropriate level of discipline. (EOR 13-14,45 & n.4;63,SER 3.)

² DIRECTV no longer contends that these 9 so-called “field supervisors without a team” are statutory supervisors. (EOR 46 n.10.)

Field supervisors do not have the authority to issue ECFs directly to technicians, but must submit drafts to management, where they are reviewed by an operations manager, the site manager, and the human resources department. (EOR 13-14,46;63,82,119,SER 8-9.) At each of the review stages, the reviewer may change how the ECF was written or its discipline or decide against issuing the ECF. (EOR 14-15,46;72,SER 5-6,14-15.) At the site manager stage of the process, Schultz reviews the employee's past performance and any prior corrective measures. (EOR 14,46 n.5,47;90,119-20.) DIRECTV did not present any evidence regarding the extent or the components of the review conducted by the operations managers or human resources. (EOR 47.)

If DIRECTV decides to issue an ECF that imposes discipline less than suspension or termination, the field supervisor and a witness meet with the employee. (EOR 46;SER 4.) The employee may then include his comments on the ECF. (EOR 15,46;155.) Finally, the employee, field supervisor, and witness sign the ECF, after which DIRECTV places it in the employee's personnel file. (EOR 13,15,46;157-73.)

In cases involving possible suspension or termination, the field supervisor must consult with his operations manager before drafting an ECF. (EOR 15 n.12,46 n.6,48 n.14;110-11.) Management and human resources consider a technician's overall performance when deciding whether to approve a recommended

termination or suspension. (EOR 15 n.12,46 n.6,48 n.14;64,110-11.) If DIRECTV decides to discharge or suspend the employee, the operations manager, not the field supervisor, runs the meeting in which the ECF is presented and signed. (EOR 16 n.13,46 n.6;110-11.)

II. THE PROCEEDINGS BELOW

A. The Representation Proceeding

On March 8, 2010, the Union filed with the Board a petition seeking to represent a unit of DIRECTV's field technicians, warehouse employees, dispatchers, and quality control employees at the Rancho Dominguez facility. (EOR 45;SER 19.) Pursuant to a stipulated election agreement, a secret-ballot election was conducted on April 16. (EOR 45;SER 20-21.) The tally of ballots showed a union victory, 85-80; there were 2 challenged ballots, which were insufficient to affect the results. (EOR 45;SER 22.)

DIRECTV filed objections to the election, arguing, *inter alia*, that, before the Union filed its petition, the field supervisors—whom DIRECTV contended are statutory supervisors within the meaning of the Act—improperly organized union meetings and solicited and coerced employees to sign union authorization cards and support the Union. (EOR 5-6,45 & n.2;SER 23-25.) The Regional Director ordered a hearing to resolve the objections. (EOR 3.)

After conducting a hearing, the Hearing Officer issued his Report and Recommendations on July 7, 2010, finding that DIRECTV's field supervisors are supervisors within the meaning of the Act. (EOR 1-44.) Although he rejected DIRECTV's arguments that the field supervisors have the authority to assign, adjust grievances, and discipline technicians by issuing undocumented verbal warnings, he found that they effectively recommend discipline and thus are statutory supervisors. (EOR 34.) He found the nature and extent of the field supervisors' pre-petition pro-union conduct was objectionable and recommended that the Board sustain the objection, set aside the Union's victory, and conduct a second election. (EOR 40.) He found insufficient evidence supporting DIRECTV's other objections. (EOR 41-42.)

The Union excepted to the Hearing Officer's recommendation to set the election aside. (EOR 45.) No party filed exceptions to his other rulings. (EOR 45 nn.1 & 2.)

On December 22, 2011, the Board (Chairman Pearce, Member Becker, and Member Hayes, dissenting) issued a Decision and Certification of Representative finding, contrary to the Hearing Officer, that DIRECTV failed to prove that field supervisors possess statutory supervisory authority. Therefore, the Board concluded that their pronoun activity did not constitute objectionable conduct.

(EOR 45-49.) Accordingly, the Board certified the Union as the employees' bargaining representative. (EOR 48.)

B. The Unfair Labor Practice Proceeding

After the Board issued the Certification of Representative, the Union requested that DIRECTV bargain and furnish it with specific information. (EOR 52.) DIRECTV refused both requests. (EOR 52.) The Union filed an unfair labor practice charge, and the Acting General Counsel issued a complaint, alleging that DIRECTV's refusals violated Section 8(a)(5) and (1) of the Act. (EOR 50.) In its answer, DIRECTV admitted that it rejected the Union's requests to bargain and for information. (EOR 50.) The Acting General Counsel then moved for summary judgment. The Board issued a notice to show cause why the motion for summary judgment should not be granted. (EOR 50.) In response, DIRECTV admitted its refusal to bargain and furnish requested information but contested both the validity of the certification and the relevance of some of the requested information. (EOR 50.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On April 16, 2012, the Board (Chairman Pearce and Members Hayes and Griffin) issued a Decision and Order granting the Acting General Counsel's motion

for summary judgment in part and denying it in part.³ (EOR 50-56.) The Board found that all of the election challenges raised by DIRECTV were, or could have been, litigated in the prior representation proceeding, and that DIRECTV did not offer to adduce any newly discovered evidence or allege any special circumstances that would require reexamination of the Board's decision in the representation proceeding. (EOR 50.) Accordingly, the Board found that DIRECTV violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. (EOR 52.)

With respect to the Union's request for information, the Board found that there were no factual issues warranting a hearing with respect to most of the items that the Union requested, and that DIRECTV violated Section 8(a)(5) and (1) by refusing to provide nonduplicative information regarding unit employees.

(EOR 50.) The Board found, however, that the Union's request for other information was not presumptively relevant and accordingly remanded those issues to the Regional Director for further appropriate action. (EOR 52.)

The Board ordered DIRECTV to cease and desist from failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, refusing to furnish the Union with relevant

³ Although Member Hayes dissented from the Board's Decision and Certification of Representative, he agreed with the Board's resolution of the unfair labor practice issues. (EOR 50 n.1.)

information, and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (EOR 53.) Affirmatively, the Board's Order requires DIRECTV to, on request, bargain with the Union; furnish the Union with the presumptively relevant information it requested; and post a remedial notice at its facility and distribute it electronically if DIRECTV customarily communicates with its employees by such means. (EOR 54-55.)

SUMMARY OF ARGUMENT

A. DIRECTV challenges the Board's composition when it issued the orders that are the subject of this appeal. These challenges are meritless.

1. DIRECTV first challenges the Board's authority to issue the April 16, 2012, unfair labor practice order, contending that the Board lacked a quorum because the President's recess appointments of three of the five Board Members acting at the time of that order were invalid. That claim is mistaken. The President made these appointments on January 4, 2012, during a 20-day period in which the Senate had declared itself closed for business—a period that constitutes a "Recess of the Senate" within the meaning of the Recess Appointments Clause. U.S. Const. art. II, § 2, cl. 3. The term "Recess of the Senate" has a well-understood meaning long employed by both the Legislative and Executive

Branches: it refers to a break from the Senate's usual business. Indeed, the Senate itself issued orders that declared its January break to be a "recess."

In any event, DIRECTV is incorrect that the Senate transformed a 20-day recess into a series of short non-recess periods—thereby blocking the President from exercising his constitutional appointment authority—by having a lone Senator gavel in for a few seconds every three or four days for what the Senate itself formally designated "*pro forma* sessions only, with no business conducted." Acceptance of that position would frustrate the constitutional design that ensures the continuous availability of a mechanism for filling vacant offices. It would also upend the established constitutional balance of power between the Senate and the President with respect to presidential appointments.

2. DIRECTV argues in the alternative that, if the current recess appointments are valid, the Board lacked a quorum when it issued its earlier December 22, 2011 representation order because former Board Member Craig Becker's recess appointment commission necessarily ended on December 17, and not on January 3, as the Board believed. But it is undisputed that Becker's recess appointment terminated at the close of the Senate's First annual Session of the 112th Congress. The Senate and Executive Branch agree that this annual Session ended at noon on January 3, 2012, and DIRECTV offers no sound basis for this Court to disregard the political branches' congruent views.

B. DIRECTV does not dispute that it refused to bargain with and furnish the Union with relevant information. Rather, it challenges the validity of the Board's certification of the Union, contending that the Board wrongly found that DIRECTV failed to prove that its field supervisors have supervisory authority within the meaning of the Act. Although the field supervisors are not included in the bargaining unit, DIRECTV maintains that they engaged in pronoun conduct before the Union filed its representation petition, and thereby unlawfully interfered with the employees' free choice in the election.

Substantial evidence supports the Board's findings that DIRECTV failed to meet its burden of establishing that field supervisors effectively recommend discipline. DIRECTV did not furnish proof that, at any stage of its three-level review process, it accepted the field supervisors' recommendations without conducting an independent investigation—indeed, it offered almost no evidence about two of them—or otherwise establish what weight, if any, they afford to those recommendations. Additionally, DIRECTV provided no evidence of the impact of a field supervisor's recommendation on an employee's job status or tenure. Because DIRECTV failed to establish that the field supervisors are statutory supervisors, their pronoun activity was permissible. As such, DIRECTV's admitted refusal to bargain and to provide the Union with requested information violated Section 8(a)(5) and (1) of the Act.

ARGUMENT

I. THE BOARD POSSESSED A QUORUM WHEN IT ISSUED THE ORDERS IN THIS CASE

A. Members Griffin, Block, and Flynn Held Valid Recess Appointments When the Board Issued Its April 16, 2012 Order

DIRECTV is incorrect that the Board lacked a quorum when it issued its April 16, 2012, order. Br. 25-32. For nearly a three-week period from January 3 until January 23, 2012, the Senate declared itself closed for business, and the terms of its adjournment order rendered the Senate unable to provide advice or consent on Presidential nominations. Messages from the President were neither laid before the Senate nor considered. The Senate considered no bills and passed no legislation. No speeches were made, no debates held. And although the Senate punctuated this 20-day break in business with periodic *pro forma* sessions that involved a single Senator and lasted for literally seconds, it ordered that “no business” would be conducted at those times.

At the start of this lengthy Senate absence, the Board’s membership fell below the statutorily mandated quorum when Craig Becker’s recess appointment term ended at noon on January 3, 2012, leaving the Board unable to carry out significant portions of its congressionally-mandated mission. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2645 (2010). Accordingly, the President

exercised his constitutional power to fill vacancies “during the Recess of the Senate,” U.S. Const. art. II, § 2, cl. 3, by appointing three Board members.

These appointments were valid because the Senate was plainly on “Recess” at the time under any reasonable understanding of the term. DIRECTV’s argument to the contrary is rooted in a misunderstanding of the meaning and purpose of the Recess Appointments Clause that—if adopted by this Court—would frustrate the Clause’s purpose and substantially alter the longstanding balance of constitutional powers between the President and the Senate.

1. Under the established understanding of the Recess Appointments Clause, the Senate was on recess between January 3 and January 23

a. The Recess Appointments Clause gives the President the “Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. Const. art. II, § 2, cl. 3. This Clause reflects the Constitution’s careful balancing of powers required of our democracy. The Constitution confers on the President the power to make appointments and, with respect to principal officers, ordinarily conditions such appointments on the Senate’s advice and consent. *Id.* art. II, § 2, cl. 2. But the Framers also created a second appointment process in recognition of the practical reality that the Senate could not (and should not) be “oblig[ated] . . . to be continually in session for the appointment of officers,” as well as the necessity

that there always be an available mechanism for filling offices. *The Federalist No. 67*, at 410 (Clinton Rossiter ed., 1961) (Alexander Hamilton); *see also id.* (noting the possibility of vacancies “which it might be necessary for the public service to fill without delay”).⁴ The Framers therefore provided for the President to make appointments of limited duration, without advice or consent, when the Senate is on recess. The provision for recess appointments frees Senators to return to their constituents (and families) instead of maintaining “continual residence . . . at the seat of government,” as might otherwise have been required to ensure appointments could be made.⁵ This provision reflects the constitutional design and the Framers’ understanding that the President alone is “perpetually acting for the public,” even in Congress’s absence, because the Constitution obligates the President at all times to “take Care that the Laws be faithfully executed.”⁶

⁴ 5 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 242 (Jonathan Elliot, ed., 2d ed. 1836) (Elliot’s Debates) (Charles Cotesworth Pinckney) (expressing concern that Senators would settle where government business was conducted).

⁵ 3 Elliot’s Debates 409-10 (James Madison); *see also, e.g.*, 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1551, at 410 (1833) (explaining the undesirability of requiring the Senate to “be perpetually in session, in order to provide for the appointment of officers”).

⁶ 4 Elliot’s Debates 135-36 (Archibald Maclaine) (the power “to make temporary appointments . . . can be vested nowhere but in the executive”); U.S. Const. art II, § 3.

b. DIRECTV's argument that the Senate was not on recess on January 4 rests on a misconception of the term "Recess." The Supreme Court has repeatedly stressed that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition." *United States v. Sprague*, 282 U.S. 716, 731 (1931). Accordingly, a constitutional term's meaning "excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

At the Founding, like today, "recess" was used to mean a "[r]emission or suspension of business or procedure," II N. Webster, *An American Dictionary of the English Language* 51 (1828), or a "period of cessation from usual work." Oxford English Dictionary 322-23 (2d ed. 1989) (citing sources from 1642, 1671, and 1706). The plain meaning of "Recess" as used in the Recess Appointments Clause is thus a break by the Senate from its usual business, such as those periods when Senators would return to their respective States as the Framers anticipated.

The settled understandings of the Executive Branch and the Senate of the term "Recess" are consistent with that plain meaning. The Executive Branch has long maintained the view that the Clause authorizes appointments when the Senate is not open to conduct business and thus unable to provide advice and consent on

Presidential nominations. Attorney General Daugherty explained in 1921 that the relevant inquiry is a functional one that looks to whether the Senate is present and open for business:

[T]he essential inquiry . . . is this: Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?

33 Op. Att’y Gen. 20, 21-22, 25 (1921); *see also* 13 Op. O.L.C. 271, 272 (1989) (reaffirming this test).

The Legislative Branch has long maintained a similar view of the President’s recess appointment power. In a seminal report issued over a century ago, the Senate Judiciary Committee expressed an understanding of the term “Recess” that looks to whether the Senate is closed for its usual business:

It was evidently intended by the framers of the Constitution that [the word “recess”] should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. It means, in our judgment, . . . the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.

S. Rep. No. 58-4389, at 2 (1905) (emphasis omitted). Attorney General Daugherty relied on this Senate definition in 1921, 33 Op. Att’y Gen. at 24, and the Senate’s parliamentary precedents continue to cite this report as an authoritative source “on

what constitutes a ‘Recess of the Senate.’” *See* Floyd M. Riddick & Alan S. Frumin, *Riddick’s Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 947 & n.46 (1992) [hereinafter “Riddick’s Senate Procedure”].

c. The President properly determined that the Senate’s 20-day break in January 2012 fit squarely within this well-established understanding of the term “Recess.” The Senate had ordered by unanimous consent that it would not conduct business during this entire period. The relevant text of the order provided:

Madam President, I ask unanimous consent . . . that the second session of the 112th Congress convene on Tuesday, January 3, at 12 p.m. for a *pro forma* session only, with no business conducted, and that following the *pro forma* session the Senate adjourn and convene for *pro forma* sessions only, with no business conducted on the following dates and times, and that following each *pro forma* session the Senate adjourn until the following *pro forma* session: [listing dates and times]

157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).⁷

Orders like this one, adopted by unanimous consent, “are the equivalent of ‘binding contracts’ that can only be changed or modified by unanimous consent.” Walter Oleszek, Cong. Res. Serv., *The Rise of Unanimous Consent Agreements*, in

⁷ This order also provided for an earlier period of extended absence punctuated by *pro forma* sessions for the final weeks of the First annual Session of the 112th Congress. *Id.* On January 3, 2012, that Session ended and the Second annual Session began, per the Twentieth Amendment. *See* U.S. Const. amend. XX, § 2. We assume for purposes of argument that there were two adjacent intrasession recesses, one on either side of this transition. In all events, it is clear that the Senate was no longer functionally conducting the business of the First Session well before January 3, 2012.

SENATE OF THE UNITED STATES: COMMITTEES, RULES AND PROCEDURES 213, 213-14 (J. Cattler & C. Rice, eds. 2008); *see also* Riddick's Senate Procedure at 1311 ("A unanimous consent agreement changes all Senate rules and precedents that are contrary to the terms of the agreement[.]"). Thus, the Senate could have conducted business during its January 2012 break only if it subsequently agreed to do so by unanimous consent. Even if a majority of Senators had wanted to conduct business during the January break, a single Senator could have prevented the Senate from doing so by objecting. *See* United States Senate, Senate Legislative Process, at http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm ("A single objection ('I object') blocks a unanimous consent request."). This was a crucial feature of the Senate's order because it thereby gave Senators firm assurance that they could leave the Capitol without concern that the Senate would conduct business in their absence.

Indeed, the Senate itself specifically and repeatedly referred to the January break as a "recess or adjournment," and arranged its affairs based on that understanding. For example, at the same time as it adopted the no-business order described above, the Senate made special arrangements for certain appointments during its January "recess or adjournment":

[N]otwithstanding *the upcoming recess or adjournment of the Senate*, the President of the Senate, the President pro tempore, and the majority and minority leaders [are] authorized to make appointments to commissions, committees, boards,

conferences, or interparliamentary conferences authorized by the law, by concurrent action of the two Houses, or by order of the Senate.

157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (emphasis added); *see also ibid.* (providing that “*notwithstanding the Senate’s recess*, committees be authorized to report legislative and executive matters” (emphasis added)). The Senate has taken similar steps before long recesses not punctuated by *pro forma* sessions,⁸ which indicates that the Senate viewed its January 2012 recess as equivalent to such recesses.

That the Senate was in recess during this extended period in January is further underscored by the fact that messages from the President and the House of Representatives were not laid before the Senate or entered into the Congressional Record until January 23, 2012, when the Senate returned from its recess.

See 158 Cong. Rec. S37 (daily ed. Jan. 23, 2012). Thus, any nomination sent by the President to the Senate during this 20-day break would not have been formally presented on the Senate floor during this time. The Senate also specifically identified January 23 as the next date it would vote on a pending nomination.

157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011).

The Supreme Court has explained that it is “essential . . . that each branch be able to rely upon definite and formal notice of action by another,” and warned

⁸ *See, e.g.*, 156 Cong. Rec. S6974 (daily ed. Aug. 5, 2010).

against the “uncertainty and confusion” of requiring the President to “determin[e] through unofficial channels” the meaning of Senate communications.

United States v. Smith, 286 U.S. 6, 35-36 (1932). The Senate here declared it would conduct “no business” between January 3 and 23, and referred to that January break as a “recess.” Thus, the President plainly could exercise his recess appointment power during that period.

2. The Senate’s use of *pro forma* sessions, at which no business was to be conducted, did not eliminate the President’s recess appointment power

a. DIRECTV mistakenly asserts (Br. 26-31) that, by holding intermittent and fleeting *pro forma* sessions, the Senate transformed the 20-day January break from a “Recess of the Senate” into a series of three-day breaks. DIRECTV’s logic fails, however, because the *pro forma* sessions were not designed to permit the Senate to do business, but rather to ensure that business was *not* done, *i.e.*, that “no business” would be conducted under the Senate’s own prescription. Indeed, the very label “pro forma” confirms that these sessions were only a “matter of form,” rather than indicating any substantive availability of the Senate.

The *pro forma* session on January 6 was typical. A virtually empty Senate Chamber was gaveled into *pro forma* session by Senator Jim Webb of Virginia. No prayer was said and the Pledge of Allegiance was not recited, as Senate Rules

require at the start of regular daily sessions.⁹ *See* Senate Rule IV.1(a). Instead, an assistant bill clerk read a two-sentence letter directing Senator Webb to “perform the duties of the Chair,” and Senator Webb immediately adjourned the Senate until January 10, 2012. The day’s “session” lasted 29 seconds. As far as the video reveals, no other Senator was present. *See* 158 Cong. Rec. S3 (Jan. 6, 2012); *Senate Session 2012-01-06*, <http://www.youtube.com/watch?v=teEtsd1wd4c>.¹⁰

These sessions allowed the Senate to assume compliance with the constitutional requirement that it not adjourn for more than three days without concurrence of the House,¹¹ a matter irrelevant for the Recess Appointments Clause analysis. *See infra* p. 28-29.

The occurrence of such *pro forma* sessions does not alter the fact that the Senate broke from business for a continuous 20-day period; the *pro forma* sessions were merely a mechanism used to facilitate that break. Historically, when the Senate wanted to take a break from regular business over an extended period of time—that is, to be on recess—it followed a process in which the two Houses of Congress would pass a concurrent resolution of adjournment authorizing the

⁹ *Compare* 158 Cong. Rec. S3-11 (daily eds. Jan. 6-20, 2012), *with* 157 Cong. Rec. S8745 (daily ed. Dec. 17, 2011).

¹⁰ *See also* 158 Cong. Rec. S11 (daily ed. Jan. 20, 2012) (29-second *pro forma* session); *id.* at S9 (daily ed. Jan. 17, 2012) (28 seconds); *id.* at S7 (daily ed. Jan. 13, 2012) (30 seconds); *id.* at S5 (daily ed. Jan. 10, 2012) (28 seconds).

¹¹ U.S. Const., art. I, § 5, cl. 4.

Senate to cease business over that time. Since 2007, however, the Senate has, instead, regularly used *pro forma* sessions to allow for recesses from business during times when it traditionally would have obtained a concurrent adjournment resolution, like the winter and summer holidays.¹²

This procedural innovation does not alter the application of the Recess Appointments Clause. For purposes of determining if the Senate is out on recess, the orders providing for adjournment accompanied by *pro forma* sessions are indistinguishable from concurrent adjournment resolutions: both allow the Senate to cease business for an extended and continuous period, thereby enabling Senators to return to their respective States without concern that business could be conducted in their absence. The only difference is that one Senator remains in the Capitol for the *pro forma* sessions, although no other Senator need attend and “no business [may be] conducted.” That single difference does not affect whether the Senate is on “Recess” as the term has long been understood. Indeed, the 1905

¹² The Senate had previously, on isolated occasions, used *pro forma* sessions over short periods when it was unable to reach agreement with the House on a concurrent adjournment resolution. *See, e.g.*, 148 Cong. Rec. 21,138 (Oct. 17, 2002). The Senate’s *regular* use of *pro forma* sessions in lieu of concurrent adjournment resolutions to allow for extended recesses, however, commenced at the end of 2007, and has continued frequently since. *See generally* Congressional Directory for the 112th Congress 536-38 (2011). Indeed, since August 2008, the Senate has, on five different occasions, used *pro forma* sessions to permit breaks in business in excess of thirty days. *See* 158 Cong. Rec. S5955 (daily ed. Aug. 2, 2012) (describing breaks of 31, 34, 43, 46, and 47 days punctuated by *pro forma* sessions).

Senate Report confirms that there cannot be a “constructive session,” any more than there can be a “constructive recess.” S. Rep. No. 58-4389, at 2.

Under this well-established standard, the Senate was on recess from January 3 to January 23. The *pro forma* sessions were part and parcel of the Senate’s 20-day recess—its ongoing “suspension” of the Senate’s usual “business or procedure,” II Webster, *supra* at 51—not an interruption of that recess. To conclude otherwise would “give the word ‘recess’ a technical and not a practical construction,” would “disregard substance for form,” 33 Op. Att’y Gen. at 22, and would contravene the Supreme Court’s admonition to exclude “secret or technical meanings that would not have been known to ordinary citizens in the founding generation” when interpreting constitutional terms. *Heller*, 554 U.S. at 577.¹³

b. DIRECTV urges (Br. 56-57) that the *pro forma* sessions were effective to interrupt the Senate’s January 2012 recess because the Senate had previously passed legislation by unanimous consent during a December session originally intended to be *pro forma* with no business conducted. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). That fact, however, does not alter the character of the

¹³ Even if this Court were to conclude that the only recess of the Senate relevant to these January 4, 2012 appointments occurred between January 3 and 6, that three-day break would support the President’s recess appointments in the circumstances of this case. That three-day break was not akin to a long-weekend recess between Senate working sessions. Rather, that recess was followed by a *pro forma* session at which no business was conducted, and was situated within an extended period—January 3 to 23, 2012—of Senate absence and announced inactivity.

January 2012 recess, during which the Senate passed no legislation. Thus, this Court need not address how the actual passage of legislation interrupts an ongoing recess.

Moreover, DIRECTV's reliance on the theoretical possibility that the Senate *could* have vitiated its order that no business be conducted and passed legislation (although only by unanimous consent) provides no basis for distinguishing the January 2012 recess from the many others that DIRECTV would concede constitute recesses under the Recess Appointments Clause. Indeed, DIRECTV's logic would place virtually *all* recesses outside the Clause's scope. Concurrent adjournment resolutions typically allow Congress to reconvene before a recess's scheduled end if the public interest warrants it. The Senate in fact has previously exercised that authority to pass legislation during what were undisputedly Recesses of the Senate. *See, e.g.*, 156 Cong. Rec. S6995-99 (daily ed. Aug. 12, 2010) (recalling the Senate during a recess scheduled by concurrent resolution¹⁴ to pass border security legislation by unanimous consent). That possibility does not alter the fact that the Senate had gone away on recess. Indeed, before the recess appointment at issue in *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (*en banc*), the Senate recessed per a resolution providing for the possibility of reassembly. *See* H.R. Con. Res. 361, 108th Cong. (2004); 150 Cong. Rec. 2145

¹⁴ 156 Cong. Rec. S6990 (daily ed. Aug. 5, 2010).

(2004). The *en banc* Eleventh Circuit nonetheless upheld the constitutionality of that appointment. *Evans*, 387 F.3d at 1221-22.

3. DIRECTV’s reliance on constitutional provisions other than the Recess Appointments Clause is unavailing

a. DIRECTV suggests (Br. 57) that the Senate determined that it was *not* on recess on January 4, and that under the Rules of Proceedings Clause, U.S. Const. art. I, § 5, cl. 2, this Court cannot second-guess the Senate’s determination.

The Rules of Proceedings Clause does not aid DIRECTV here. As an initial matter, the Senate’s decision to engage in *pro forma* sessions does not constitute a Senate determination that its 20-day January break was not a recess for purposes of the Recess Appointments Clause. The Senate as a body passed no contemporaneous rule or resolution setting forth the conclusion that the Senate was not on recess for purposes of the Clause. Indeed, as noted above, the only formal statements from the Senate were its order that there would be “no business conducted” during its *pro forma* sessions and the other orders declaring its January break to be a “recess.”¹⁵ And, as explained, the recess appointments here are

¹⁵ DIRECTV mistakenly relies (Br. 56 n.19, 58) on individual Senators’ statements regarding *pro forma* sessions. Those statements do not constitute a Senate determination. *Cf. Raines v. Byrd*, 521 U.S. 811, 829 (1997) (distinguishing between Members of Congress asserting individual interests and those “authorized to represent their respective Houses of Congress”); 2 U.S.C. § 288b(c) (authorizing the Senate Legal Counsel to assert the Senate’s interest in litigation as *amicus curiae* only upon Senate resolution).

entirely consistent with the Senate’s own longstanding interpretation of the Recess Appointments Clause.

Apart from DIRECTV’s failure to point to a “Rule” defining the January break as a non-recess, its argument ignores the President’s role in making recess appointments. The Rules of Proceedings Clause provides the Senate with authority only to establish rules governing the Senate’s “*internal matters.*” *INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (emphasis added); *see also id.* (noting that the Clause “only empowers Congress to bind itself”). Accordingly, the Supreme Court has made clear that Congress “may not by its rules ignore constitutional restraints.” *United States v. Ballin*, 144 U.S. 1, 5 (1892).¹⁶

Here, the President’s Article II appointment powers are at issue rather than just matters internal to the Senate. *See Evans*, 387 F.3d at 1222 (noting that “when the President is acting under the color of express authority of the United States Constitution, we start with a presumption that his acts are constitutional”). Indeed, in 1980, the Comptroller General—an officer of the Legislative Branch—recognized that the President’s own constitutional determinations are owed a measure of deference. In reaffirming the President’s authority to make recess

¹⁶ In *Ballin*, the question before the Court—whether the House possessed a quorum when it passed certain legislation—was answered conclusively by the contemporaneous congressional journal entries. 144 U.S. at 2-3. Here, the Congressional Record likewise confirms that the Senate was on recess: the Senate *declared* it was taking a “recess.” 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).

appointments to a newly created federal agency during an intrasession recess, the Comptroller General relied on Attorney General Daugherty's opinion that "the President is necessarily vested with a large, though not unlimited, discretion to determine when there is a real and genuine recess which makes it impossible for him to receive the advice and consent of the Senate." *See In re John D. Dingell*, B-201035, 1980 WL 14539, at *3 (Comp. Gen. Dec. 4, 1980) (citing 33 Op. Att'y Gen. 20 (1921)).

b. DIRECTV likewise misconstrues (Br. 53-55) the relevance of the Adjournment Clause, U.S. Const. art. I, § 5, cl. 4. That Clause provides that "[n]either House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days." U.S. Const. art. I, § 5, cl. 4. DIRECTV argues (Br. 55) that because the House of Representatives never consented to a Senate adjournment of more than three days, the Senate could not have been on recess for purposes of the Recess Appointments Clause.

This Court is not presented with the question whether the Senate complied with the Adjournment Clause, and need not decide that issue. DIRECTV provides no basis in the text or structure of the Constitution for equating Article I's Adjournment Clause with Article II's Recess Appointments Clause.¹⁷ As with any

¹⁷ DIRECTV cites the government's brief in *Evans v. Stephens* (Br. 54), which noted that the Adjournment Clause's built-in *de minimis* exception might be informative in determining the scope of any similar exception that could apply

other constitutional provision, the requirements of each Clause must be interpreted based on their separate text, history, and purpose.

Moreover, the Adjournment Clause relates primarily, if not exclusively, to the internal operations and obligations of the Legislative Branch. With respect to internal matters, Congress's view as to whether *pro forma* sessions satisfy the requirements of the Adjournment Clause may be entitled to some weight, and each respective House has the ability to respond to (or overlook) any potential violation of that Clause.¹⁸ In contrast, the Recess Appointments Clause defines the scope of a Presidential power, and that Clause's interpretation has ramifications far beyond the Legislative Branch. The Senate's *pro forma* sessions did not eliminate the President's recess appointment power, whatever their effect with respect to other constitutional provisions.

If this Court were to attempt to squarely confront the Adjournment Clause issue—which, again, it need not do—it would have to determine not only whether the Senate “adjourn[ed] for more than three days” within the meaning of that

under the Recess Appointment Clause. Reply Br. for the Intervenor, 21-22, *Evans v. Stephens*, 407 F.3d 1272 (11th Cir. 2005). That brief did not assert that the two Clauses were equivalent, nor did it argue for the much broader linkage DIRECTV advocates here.

¹⁸ The Senate has at least once previously violated the Adjournment Clause, and the only apparent recourse was to the House. *See* Riddick's Senate Procedure at 15 (noting that “the Senate adjourned for more than 3 days” in June 1916 “without the concurrence of the House of Representatives, and it was called to the attention of the House membership but nothing further was ever done about it”).

clause, but also, if the Senate did so adjourn, whether it was “without the Consent of the other,” *i.e.*, the House of Representatives. U.S. Const. art. I, § 5, cl. 4. With respect to the first question, the better view is that the Senate did adjourn for more than three days within the meaning of the Adjournment Clause. The basic purpose of the Adjournment Clause is to furnish each House of Congress with the power to ensure the simultaneous presence of the other so that they can together conduct legislative business. *See* Thomas Jefferson, Constitutionality of Residence Bill of 1790, 17 Papers of Thomas Jefferson 195-96 (July 17, 1790) (explaining the Adjournment Clause was “necessary therefore to keep [the houses of Congress] together by restraining their natural right of deciding on separate times and places, and by requiring a concurrence of will”). As explained above, the Senate rendered itself unavailable to do business between January 3 and 23, 2012.

Assuming the Senate thus had “adjourn[ed] for more than three days,” the question whether there was a violation of the Adjournment Clause then would depend on whether the House of Representatives “Consent[ed]” to the Senate order providing for its January recess; any such consent by the House would mean that there was no violation of the Adjournment Clause by the Senate. That, however, would be an issue for resolution by the House of Representatives or between the two Houses, not for this (or any) Court. And even if the Court could address it, the answer is unclear. Here, the House was aware that the Senate adopted an order to

not conduct business during the January break. Rather than objecting to that order, the House adopted its own corresponding resolution permitting the Speaker to “dispense with organizational and legislative business” over roughly that same period of time (January 3 to January 17). *See* H. Res. 493, 112th Cong. (2011). Whatever the implications of that course of events for purposes of the relationship between the two Houses under the Adjournment Clause, the Senate’s declared and actual break in business between January 3 and 23 was a “Recess of the Senate” for purposes of the President’s authority under the Recess Appointments Clause.

c. DIRECTV also mistakenly invokes (Br. 57) the Twentieth Amendment, which provides that “[t]he Congress shall assemble at least once in every year,” and that “such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.” U.S. Const., amend. XX, § 2. DIRECTV suggests that because the Senate held a *pro forma* session shortly after noon on January 3, 2012, in an effort to comply with this provision, such sessions must interrupt the 20-day recess under the Recess Appointments Clause.

Whether the *pro forma* session held on January 3 satisfied the Twentieth Amendment’s assembly requirement is not squarely presented in this case because the relevant recess here began after noon on January 3 and continued until January 23. In any event, DIRECTV’s suggestion again inappropriately equates two different constitutional provisions. Like the Adjournment Clause, the Twentieth

Amendment relates primarily to the internal operations and obligations of the Legislative Branch, and in that context, a congressional determination about the effects of the *pro forma* session might hold more sway than it would here, where the powers of a coordinate Branch are concerned.

To the extent DIRECTV suggests that the January 3 *pro forma* session was necessary to begin the annual Session of Congress, it is mistaken. The transition from one annual Session to the next occurred by operation of the Twentieth Amendment's requirement that the annual "meeting" of Congress "begin at noon on the 3d day of January," unless a different date is set by a law presented for the President's signature. Thus the annual "meeting," or annual Session of Congress, begins at noon on January 3 whether or not Congress in fact "assemble[s]" on this date—to hold otherwise would vitiate the Twentieth Amendment's requirement that the starting date may be changed only by law (rather than unilateral action of Congress or one of its Houses), subject to the corresponding requirement of presentment to the President.¹⁹ The fact that the First annual Session of the 112th Congress ended (and the Second annual Session of that Congress began) at noon on January 3, 2012, therefore does not depend on any *pro forma* session.

¹⁹ Congress sometimes has statutorily changed the date on which its annual session begins, *see, e.g.*, Pub. L. No. 111-289 (2010); Pub. L. No. 79-289 (1945), but did not do so here.

4. DIRECTV's position would frustrate the constitutional design and upend the longstanding balance of powers with respect to recess appointments

Allowing a *pro forma* session to disable the President from acting under the Recess Appointments Clause would frustrate the Constitution's design to ensure a mechanism for filling offices at all times, and would upend a long-standing balance of powers between the Senate and President. The Supreme Court has repeatedly condemned congressional action that "disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions." *See Morrison v. Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citations omitted). Accepting DIRECTV's position would do just that, by allowing the Senate to effectively eliminate the President's recess appointment power.

The constitutional structure requires the Senate to make a choice: either the Senate can remain "continually in session for the appointment of officers," *Federalist No. 67*, and so have the continuing capacity to perform its function of advice and consent; or it can "susp[en]d . . . business," II Webster, *supra* at 51, and allow its members to return to their States free from the obligation to conduct business during that time, whereupon the President can exercise his authority to make temporary appointments to vacant positions. *See S. Rep. No. 58-4389*, at 2 (noting that the Recess Appointment Clause's "sole purpose was to render it

certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.”).

This view is evidenced by past compromises between the President and the Senate over recess appointments.²⁰ For example, in 2004, the political Branches reached a compromise “allowing confirmation of dozens of President Bush’s judicial nominees” in exchange for the President’s “agree[ment] not to invoke his constitutional power to make recess appointments while Congress [was] away.” Jesse Holland, Associated Press, *Deal made on judicial recess appointments*, May 19, 2004. These political accommodations allowed both Branches to vindicate their respective institutional prerogatives: they gave the President assurance that the Senate would act on his nominations, while freeing the Senators to cease business and return to their respective States without losing the opportunity to provide “advice and consent.”

Under DIRECTV’s view, however, the Senate would have had little, if any, incentive to so compromise, because the Senate always possessed the unilateral authority to divest the President of his recess appointment power through the simple expedient of holding fleeting *pro forma* sessions over any period of time.

²⁰ See generally Patrick Hein, Comment, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 Cal. L. Rev. 235, 253-55 (2008) (describing various political confrontations over recess appointments culminating in negotiated agreements between the Senate and the President).

Indeed, under DIRECTV's logic, early Presidents could not have made recess appointments during the Senators' months-long absences from Washington if only the Senate had one Member gavel in an empty chamber every few days.

History provides no support for that view of the Constitution. To the contrary, the Senate had never before 2007 (when it began using *pro forma* sessions to create absences that it historically would have authorized by a concurrent resolution of adjournment) even arguably purported to exercise the power to be simultaneously in session for Recess Appointments Clause purposes and officially away for purposes of conducting business. That historical record "suggests an assumed *absence* of such power." *Printz v. United States*, 521 U.S. 898, 907-08 (1997). Indeed, senatorial "prolonged reticence" to assert that the President's recess appointment power could be so easily nullified "would be amazing if such [an ability] were not understood to be constitutionally proscribed." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

The separation-of-powers concerns raised by DIRECTV's position are vividly illustrated by this case. If, as DIRECTV urges, the Senate could prevent the President from filling vacancies on the Board while simultaneously being absent to act on nominations, there would have been a vacuum of appointment authority and the Board would have been unable to carry out significant portions of its statutory mission during the Senate's absence, thus preventing the execution of

a duly passed Act of Congress and the performance of the function of an office “established by Law,” U.S. Const. art. II, § 2, cl. 2. Such a result would undermine the constitutional balance of powers, which ensures that all Branches can carry out their duties, including the President’s duty to “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3.

In contrast, giving effect to the President’s recess appointments here leaves in place the established constitutional framework and the accumulation of interests based on it. A mechanism for making appointments remained available while the Senate was closed for business. The President’s recess appointments are only temporary, “expir[ing] at the End of [the Senate’s] next Session.” U.S. Const. art. II, § 2, cl. 3. The Senate retains authority to vote on the Board nominations, which remain pending before it. More broadly, the Senate has the choice it has always had between remaining continuously in session to conduct business, thereby removing the constitutional predicate for the President’s recess appointment power, or ceasing to conduct business (and being free to leave the Capitol) knowing that the President may make temporary appointments during that period.

Indeed, since the recess appointments at issue here, the President and Senate have resumed the traditional means of using the political process to reach inter-Branch accommodation regarding nominations. In April 2012, the Senate agreed “to approve a slate of nominees,” while the President “promis[ed] not to use his

recess powers.” Stephen Dinan, *The Washington Times*, *Congress puts Obama recess power to the test*, Apr. 1, 2012. That arrangement is the sort of compromise that the political Branches have often reached, and reflects a longstanding inter-Branch balance of power. This Court should not upset that balance.

B. The Board Likewise Possessed A Quorum When It Issued Its Earlier December 22, 2011 Decision and Certification of Representative

DIRECTV fares no better with its contention that the Board lacked a properly constituted quorum when it issued the December 22, 2011 decision and certification of representative; DIRECTV’s argument is based on the mistaken premise that Board Member Craig Becker’s recess appointment commission expired on December 17, 2011. As DIRECTV acknowledges (Br. 60), however, under the terms of the Recess Appointment Clause, Becker’s “Commission[] . . . expire[d] at the End of their [i.e., the Senate’s] next Session.” U.S. Const. art II, § 2, cl. 3. Because Member Becker had been appointed during the Second annual Session of the 111th Congress, *see National Labor Relations Board, Members of the NLRB since 1935*, at <http://www.nlr.gov/members-nlr-1935>, his term expired at the end of the Senate’s First annual Session of the 112th Congress. The Senate and the Executive Branch have uniformly expressed the understanding that the First annual Session of the 112th Congress ended at noon on January 3, 2012, well after the December 22, 2011 order was issued. *See Senate of the United States*,

Executive Calendar (Jan 3, 2012), *available at*

http://www.senate.gov/legislative/LIS/executive_calendar/2012/01_03_2012.pdf

(indicating that the First annual Session “adjourned January 3, 2012”); 158 Cong. Rec. H1 (daily ed. Jan. 3, 2012); *Entergy Mississippi Inc.*, 358 NLRB No. 99, slip op. at 1 (2012) (explaining that Becker continued to exercise his authority as a Member of the NLRB until noon on January 3, 2012); *see also* 157 Cong. Rec. H10035-36 (daily ed. Jan. 3, 2012) (House of Representatives declaring “the first session of the 112th Congress adjourned”).

DIRECTV’s assertion that the First annual Session of the 112th Congress ended on December 17 is contradicted not only by the shared understanding of the political branches, but also by decades of unbroken congressional practice. *See Mistretta v. United States*, 488 U.S. 361, 401 (1989) (“traditional ways of conducting business give meaning to the Constitution”). As the House Parliamentarian has explained, a specific type of adjournment known as an adjournment *sine die* (literally, adjournment without a day specified for return) is “used to terminate the sessions of Congress.” Wm. Holmes Brown, *et al.*, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House*, § 13, at 11 (2011) (hereinafter “*House Practice*”); *see also R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1064 n.2 (9th Cir. 1997) (“Adjournment *sine die* means final adjournment for the session.”). Absent adjournment *sine die* on an earlier date, a

Session of Congress, and thus the Sessions of the Senate and the House, end automatically with the commencement of the next annual Session, which the Twentieth Amendment sets for noon on January 3 unless Congress passes a law specifying a different date. *See* U.S. Const., amend. XX, § 2; *House Practice*, § 13, at 11 (“A session terminates automatically at the end of the constitutional term.”); 142 Cong. Rec. 1 (Jan. 3, 1996) (“The PRESIDENT pro tempore. The hour of 12 noon on January 3 having arrived, pursuant to the Constitution of the United States, the 1st session of the Senate in the 104th Congress has come to an end and the 2d session commences.”).²¹

In this case, Congress did not pass a concurrent resolution authorizing adjournment *sine die* of the First annual Session of the 112th Congress, and at no point did the Senate even purport to say it was adjourning *sine die* prior to January 3. Accordingly, the annual Session and Becker’s term both ended at noon on January 3, and the Board had a quorum when it issued its decision in this case more than a week before that.

DIRECTV’s claim to the contrary rests on the flawed assertion that, if the Court applies a functional analysis in determining whether there is a “Recess of the

²¹ *See also* General Accounting Office, *Matter of Commodity Futures Trading Commission*, B-288581, at 2-3 (Nov. 19, 2001) (“It is well established that a session of Congress is brought to a close through either (1) a concurrent resolution of both houses adjourning the session *sine die* or (2) operation of law, immediately prior to the beginning of the next session of Congress.”).

Senate,” it must use a similar analysis to determine the end of Congress’s annual Session. Br. 60-61. According to DIRECTV, under that functional analysis, the Senate ceased doing business between December 17 and January 23, and so the Senate effectively ended its annual session on the first of those dates.

That argument fails to comprehend the difference between an ordinary recess during an annual Session, and an adjournment *sine die*. And under longstanding Congressional practice, as well as the clear meaning of the Twentieth Amendment, only the latter type of adjournment (or a duly enacted statute) can terminate an annual Session before January 3. The Senate’s adjournment to a series of *pro forma* sessions is irrelevant for purposes of determining the end of an annual Session.

This point is reinforced by the Senate’s own actions at the end of 2007. As in 2011, the Senate held *pro forma* sessions in the waning days of the Second annual Session of the 110th Congress. But unlike 2011, when the Senate adjourned the *pro forma* session on December 31, 2007, it expressly did so *sine die*, pursuant to a concurrent resolution. *See* 153 Cong. Rec. 36,508 (Dec. 31, 2007). That meant that the annual Session ended on December 31, 2007, and the Senate was in an intersession recess until the commencement of the next annual Session. This conclusively demonstrates the Senate’s understanding that, even when it is

engaged in *pro forma* sessions, a concurrent resolution is required to terminate the annual Session before January 3.

II. THE BOARD REASONABLY FOUND THAT DIRECTV VIOLATED SECTION 8(a)(5) AND (1) BY REFUSING TO BARGAIN WITH THE UNION AND REFUSING TO PROVIDE INFORMATION THAT THE UNION REQUESTED

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) prohibits an employer from refusing to bargain collectively with the representative of its employees. Here, DIRECTV refused to bargain with the Union in order to contest the validity of its certification as the bargaining representative of DIRECTV's employees. The Board reasonably found that DIRECTV failed to meet its burden of proving that the field supervisors possess supervisory authority within the meaning of Section 2(11) of the Act. Because they are not statutory supervisors, they were free to engage in prounion activity, and that activity did not interfere with the election. As a result, the Board properly certified the Union as the employees' exclusive bargaining representative and DIRECTV's refusal to bargain and provide the Union with information violated Section 8(a)(5) and (1) of the Act.²²

²² A violation of Section 8(a)(5) of the Act produces a "derivative" violation of Section 8(a)(1), which makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in" Section 7 of the Act." See *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

A. Applicable Principles and Standard of Review

Section 2(3) of the Act (29 U.S.C. § 152(3)) excludes “any individual employed as a supervisor” from the definition of “employee” protected under the Act. Section 2(11) of the Act defines a “supervisor” as:

[A]ny 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.

The Supreme Court has explained that, under this language, “[e]mployees are statutory supervisors if (1) they hold the authority to engage in 1 of the 12 listed supervisory functions; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer.” *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711-12 (2001) (internal quotations omitted); *accord Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 551 (9th Cir. 1997).

It is settled that the party asserting that an individual is a supervisor—here, DIRECTV—bears the burden of proving supervisory status. *Kentucky River*, 532 U.S. at 711-12; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006). To meet this burden, DIRECTV must support its claim with specific examples based on record evidence. *See Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“[W]hat the statute requires is

evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.”). Conclusory or generalized testimony is insufficient to meet the burden of proof. *See Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999); *Lynwood Manor*, 350 NLRB 489, 490 (2007). And any lack of evidence in the record will be construed against the party asserting supervisory status. *Mountaineer Park, Inc.*, 343 NLRB 1473, 1476 (2004); *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 n.8 (1999).

In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel, who are vested with “genuine management prerogatives,” and employees—such as “straw bosses, leadmen, and set-up men, and other minor supervisory employees”—who enjoy the Act’s protections even though they perform “minor supervisory duties.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)); *accord Providence Alaska Med. Ctr.*, 121 F.3d at 551. Accordingly, in implementing that congressional intent, the Board, as cautioned by the courts, guards against construing supervisory status too broadly “because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.” *Oakwood Healthcare, Inc.*, 348 NLRB at 688; *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (the Board “must take care to assure that exemptions from NLRA

coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach”); *accord McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 936 (9th Cir. 1981).

On review, the Court recognizes the Board’s “expertise in making the subtle and complex distinctions between supervisors and employees,” and consequently accords the Board’s findings “particularly strong” deference. *Providence Alaska Med. Ctr.*, 121 F.3d at 551 (quotations omitted); *NLRB v. Adrian Belt Co.*, 578 F.2d 1304, 1311 (9th Cir. 1978). This is because the Board is “one of those administrative agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within the field carry the authority of an expertness which courts do not possess and therefore must respect.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord, NLRB v. Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 719 (9th Cir. 1972). As a result, 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.*, 340 U.S. at 488.

A Board finding of nonsupervisory status must be accepted if it is supported by the record and has a reasonable basis in law. *See McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 935 (9th Cir. 1981). Underlying factual findings are

conclusive if supported by substantial evidence on the record as a whole.

See George C. Foss Co. v. NLRB, 752 F.2d 1407, 1410, 1412 (9th Cir. 1985).

B. DIRECTV Failed to Meet Its Burden of Proving That the Field Supervisors Effectively Recommend Discipline

As now shown, DIRECTV failed to meet its burden of proof for three reasons. First, it did not prove that it generally accepts field supervisors' recommendations without an independent investigation. Second, it did not establish what weight it affords field supervisors' disciplinary recommendations. And, third, it failed to show that field supervisors' ECF recommendations affect job status or tenure. Therefore, the Board reasonably found that DIRECTV did not prove that the field supervisors effectively recommend discipline. Because DIRECTV did not prove that the field supervisors possess any other supervisory indicia under Section 2(11) of the Act, the Board reasonably rejected DIRECTV's arguments that they are statutory supervisors.

1. DIRECTV failed to establish that it accepts a field supervisor's recommendation without conducting an independent investigation

The Board, with approval of several reviewing courts, has consistently applied the principle that to possess authority to effectively recommend generally means that the action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. *See Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007) ("under Board precedent, . . . authority [to write

written reprimands] is not supervisory unless it results in personnel action . . . taken without independent investigation or review by others”) (internal quotation omitted); *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 145 (1st Cir. 1999) (to effectively recommend a reward, there must be a direct correlation between the putative supervisor’s recommendation and the employee’s receipt of the reward without independent investigation); *accord PHT, Inc.*, 297 NLRB 228, 234 (1989), *enforced*, 920 F.2d 71, 74 (D.C. Cir. 1990) (per curiam); *Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB 390, 392 (1989), *enforced*, 933 F.2d 626 (8th Cir. 1991). The Board’s interpretation of “effectively recommend” discipline under Section 2(11) is reasonably defensible and therefore entitled to deference. *See Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995); *accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996).

In light of major gaps in the evidence surrounding the ECF review process, the Board reasonably concluded (EOR 47) that DIRECTV did not meet its burden of showing that field supervisors’ effectively recommended discipline without independent investigation. It is undisputed that each ECF drafted by a field supervisor is subjected to a three-level review process, going first to an operations manager then to the site manager and human resources department. At the site manager level, the ECFs are subject to an independent investigation. This was made evident by Schultz’s testimony (EOR 110) that, in deciding whether or not to

approve an ECF, he reviews the employee's past performance and any prior corrective measures and might, for example, look at the employee's file or ask questions about the employee. DIRECTV adduced no evidence regarding the other two levels of review—none of the three operations managers testified, nor did anyone from the human resources department, and the record is silent about the review process at each of those stages. The record does reveal, however, that at each stage the reviewer may alter the language of the ECF, change the proposed level of discipline, or decide that the ECF should not be issued. (EOR 14-15,46; SER 5-6,14-15.)

In challenging the Board's finding that field supervisors do not effectively recommend discipline, DIRECTV misapprehends the burden of proof. It claims (Br. 41) that the Board, having found that DIRECTV "adduced no evidence" regarding the reviews conducted by the operations managers and human resources department, assumed that the review was an independent investigation. This is not so. In accordance with the burden allocation, the Board explained (EOR 47) that, in the absence of any evidence addressing those stages of review, the Board could not find that the field supervisors effectively recommend discipline.

DIRECTV claims (Br. 41-42) that because the hearing officer found that no one speaks with the employee before an ECF is issued, and that upper management accepted the field supervisor's "assertion of a violation . . . at face value," it does

not conduct independent investigations. But even assuming that DIRECTV does not always speak to an employee before deciding whether to issue an ECF, that simply establishes that management accepted the factual assertions in the ECF, not that any recommended discipline was accepted. Indeed, of the 16 ECFs entered into evidence, all involved objective fact reporting: 8 were issued to technicians who failed to meet DIRECTV's productivity standards (an average of three or four jobs per day, depending on the month); 5 were issued to technicians for calling in sick; 2 were issued to technicians who were late to meetings; and the last was issued to a technician because someone called in to complain about his driving. (EOR 46 n.8;158-73.)

Indeed, it is undisputed that the ECFs—and their recommended discipline—were subject to three levels of review and the reviewer could change the ECF at each of these levels. Thus, as the Board made clear, even if Site Manager Schultz's review did not constitute an independent investigation, DIRECTV failed to produce any evidence concerning the review conducted by the operations manager and human resources, and thus failed to establish that the field supervisors effectively recommend discipline.

2. DIRECTV failed to establish what weight, if any, it gives to the field supervisors' recommendations

In addition to finding that DIRECTV failed to establish that it does not independently investigate proposed discipline, the Board found (EOR 47) that

DIRECTV failed to establish what weight, if any, it gives to the field supervisor's recommendations. Schultz did not testify about the weight given to the recommendations and DIRECTV failed to call any of the three operations manager, or anyone from the human resources department, to testify at the hearing. Once again, this failure of proof sets this case apart from those relied on by the DIRECTV in which employers established that putative supervisor's recommendations were given significant weight. *See Caremore, Inc. v. NLRB*, 129 F.3d 365, 369-70 (6th Cir. 1997) (manager testified he gave a lot of weight to disciplinary reports); *Eastern Greyhound Lines v. NLRB*, 337 F.2d 84, 89 (6th Cir. 1964) (recommendations were given "great weight"); *Mountaineer Park, Inc.*, 343 NLRB 1473, 1476 (2004) (reliance on recommendations was "weighty").

Having failed to adduce such evidence, DIRECTV now argues (Br. 37) that, because it followed one of the field supervisors' recommended discipline most of the time, that should be enough to establish that the recommendations are effective. But the Board rejected this argument (EOR 47 n.11), which runs afoul of the Board's well-established principle that merely having recommendations "ultimately followed" in many cases does not establish that these recommendations

are effective.²³ *See, e.g., Third Coast Emergency Physicians, P.A.*, 330 NLRB 756, 760 (2000).

The Board's decisions in *Mountaineer Park, Inc.*, 343 NLRB 1473, 1475 (2004) and *Venture Industries, Inc.*, 327 NLRB 918, 919 (1999), are not, as DIRECTV maintains (Br. 36-38), to the contrary. In *Mountaineer Park*, the Board found that a manager credibly testified that he had "a policy of routinely 'signing off' on the disciplinary recommendations," which "[was] evidenced by the fact that [the manager] received three to five such recommendations from [one of the individuals] and, without conducting any sort of investigation, . . . followed her recommendations in all cases." *Id.* (emphasis added). Thus the fact that the manager followed the recommendations each time only served to further support the manager's testimony that he simply "sign[ed] off" on the recommendations. And the Board's decision in *Venture Industries, Inc.*, 327 NLRB 918, 919 (1999), does not establish a numerical, *per se* rule that recommendations are effective if followed 75 percent of the time. Instead, the Board found that individuals were supervisors because they had the undisputed authority to issue oral or written reprimands, which alone was sufficient to confer supervisory status. Although

²³ Moreover, DIRECTV presented no evidence concerning the extent to which it modifies the ECFs that are not rejected. It is undisputed that those ECFs may be revised at each stage of the three-stage review process and the only field supervisor who testified acknowledged that management will, at times, instruct him to change the ECFs. (EOR 105.)

they also recommended disciplinary actions, which were followed 75 percent of the time, the majority of those recommendations were not subjected to independent investigation. These cases do not establish that the mere frequency with which a recommendation is ultimately followed satisfies the statutory requirement that an individual “effectively recommends” discipline.

DIRECTV also incorrectly insists (Br. 40) that the Board’s decision runs afoul of *Progressive Transportation Services, Inc.*, 340 NLRB 1044 (2003). To the contrary, consistent with its rationale here, the Board in that case found that the individual was a supervisor based on its findings that management did not conduct an independent investigation. *Id.* at 1045. Moreover, as discussed below, in *Progressive Transportation* unlike here, the employer established that it followed a progressive discipline policy that included the supervisor’s warnings, thus establishing that the putative supervisor’s recommendations affected employees’ job status. *Id.* at 1046.

3. DIRECTV failed to present evidence addressing what impact a field supervisor’s recommendation has on an employee’s job status or tenure

Finally, the Board found (EOR 47-48) that DIRECTV did not meet its burden of producing evidence regarding what impact, if any, the field supervisors’ ECFs have on the technicians’ job status or tenure. Under the Board’s court-

approved principle, such evidence is vital to establishing that an individual's disciplinary recommendations are effective:

[T]he issuance of written warnings that do not alone affect job status or tenure do not constitute supervisory authority.

....

[F]or the issuance of reprimands or warnings to constitute statutory supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors.

Jochims v. NLRB, 480 F.3d 1161, 1170 (D.C. Cir. 2007) (quoting *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989)).

DIRECTV did not introduce any evidence establishing the existence of a progressive disciplinary policy. While the ECF form contains boxes for both suspensions and terminations, this does not, as DIRECTV asserts (Br. 46), “establish a progressive disciplinary system.” Although the Board found, in *Progressive Transportation Services*, 340 NLRB 1044 (2003), that the format of similar notices supported a finding that the employer maintained a progressive discipline system, there the record also included suspension notices issued to employees that referenced prior, lesser disciplinary sanctions. In sharp contrast here, none of the 16 ECFs that DIRECTV entered into evidence—14 “verbal”

warnings and 2 written warnings—referenced any prior discipline.²⁴ Indeed, as the Board pointed out (EOR 47 n.13), although field supervisor Nick Fernandez issued technician Jose Angulo two ECFs—both verbal warnings (EOR 160, 164)—in a short period of time, the latter did not reference the former.

DIRECTV's evidence concerning the field supervisor's role in suspensions and terminations is likewise insufficient to establish supervisory status. Field Supervisor Flores acknowledged (EOR 110) that that field supervisors cannot even draft an ECF recommending suspension or termination without consulting first with an operations manager. Indeed, DIRECTV produced no ECFs documenting either a suspension or termination. Instead, it relied entirely on the testimony of two witnesses, consisting chiefly of conclusory responses to leading questions by counsel, to support its assertion that field supervisors effectively recommend suspensions and terminations.²⁵ Neither witness provided any specific example of

²⁴ Although Site Manager Schultz testified (EOR 90) that he considers “[p]ast performance and what corrective measures have been implemented so far” in deciding whether to issue discipline, he failed to explain what impact, if any, prior corrective measures have on his assessment of the proposed ECF nor did he point to any progressive system of discipline.

²⁵ For instance, Schultz offered the following general testimony (EOR 64):

Q BY MR. WOLFLICK (counsel for DIRECTV): Do field supervisors have any authority with regard to the termination of employees?

A Yes.

Q What is their authority in that regard?

A Recommendation.

the role played by a field supervisor in the discharge of an employee or of what procedures or criteria govern the decisions of the operations managers, site manager, or human resources department.²⁶ This type of generalized testimony, lacking any specific examples of discipline, is insufficient to establish supervisory status. *See G4s Regulated Sec. Solutions*, 358 NLRB No. 160, slip op. at *2 (2012); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006).

The absence of specific evidence establishing the impact, if any, of ECFs on an employee's job status or tenure, further supports the Board's finding (EOR 48) that DIRECTV failed to establish that field supervisors possess statutory authority to make effective recommendations. As the D.C. Circuit explained, "what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority." *Oil, Chem. &*

Q And have you known field supervisors to make a recommendation to terminate employees?

A Yes.

Q Is that an uncommon thing?

A No.

²⁶ Additionally, DIRECTV overstates the field supervisors' involvement in this review process by suggesting (Br. 42) that field supervisor Juan Flores testified that he participates in "any discussion" that takes place regarding termination. To the contrary, Flores acknowledged (EOR 120) that he did not know "what level of discussion happens between the operations manager and human resources" concerning potential terminations, though he participates in some discussions between the operations manager and the site manager.

Atomic Workers Int'l Union, AFL-CIO v. NLRB, 445 F.2d 237, 243 (D.C. Cir. 1971). DIRECTV produced no such tangible examples.

C. DIRECTV's Remaining Arguments Lack Merit

For the first time in this proceeding, DIRECTV attacks (Br. 31-36) the Board's consideration of an independent investigation in assessing supervisory status, arguing that consideration of this factor is "legally erroneous." Under Section 10(e) of the Act, this Court is without jurisdiction to consider this challenge. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, . . . [absent] extraordinary circumstances."); *see also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) ("[t]he § 10(e) bar applies even though the Board [dismissed the complaint allegation because the petitioner] could have objected to the Board's decision in a petition for reconsideration or rehearing.") *Accord NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1126-27 (9th Cir. 2011). At no point did DIRECTV ask the Board to re-examine this factor, or the cases it now claims are pertinent. In its answering brief to the Union's exceptions (SER 26-43), DIRECTV did not argue that the Hearing Officer erred by analyzing whether the field supervisors' ECFs were subjected to independent investigation. Nor did it file for reconsideration after the Board's decision issued. Accordingly, this Court is without jurisdiction to consider these arguments. *See Int'l Union of Painter &*

Allied Trades, Dist. 15, Local 159 v. J & R Flooring, Inc., 656 F.3d 860, 867 (9th Cir. 2011) (holding that Board’s decision to reverse employer’s win before the administrative law judge did not permit employer to raise challenges in court that it should have first argued to the Board in a motion for reconsideration). In any event, as fully discussed above, the Board reasonably examines this factor in analyzing the employer’s proof that the putative supervisor has authority to “effectively recommend” discipline as it demonstrates the limits of the putative supervisor’s actions and, as such, the general effectiveness of the recommendation on management.

Notwithstanding DIRECTV’s efforts to divert this Court from its failure of proof, the record amply supports the Board’s finding that DIRECTV simply failed to prove that the field supervisors “effectively recommend” discipline. As discussed above, it is undisputed that the ECFs are subjected to three levels of review; at each step there may be changes made to the language or the discipline issued, including whether to issue the ECF at all. Indeed, Site Manager Schultz testified (EOR 52; 82) that he frequently rejects the field supervisors’ recommendations— 3 to 5 of the 15 to 20 ECFs submitted each week. And, there was no evidence whatsoever about the other two levels of ECF review, as none of the three Operations Managers, or anyone from the Human Resources Department,

testified about the process.²⁷ Simply put, DIRECTV's case was insufficient to establish that its field supervisors effectively recommend discipline. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 n. 8 (1999) (lack of evidence will be construed against the party asserting supervisory status).

DIRECTV also did not provide evidence of a progressive discipline system that would demonstrate that the ECFs "initiated" by the field supervisors had an impact on the employees' job status or tenure, as demonstrated above (pp. 51-54). Lacking such evidence, the Board reasonably concluded (EOR 52) that DIRECTV failed to meet its burden of proof.

Finally, DIRECTV asserts incorrectly (Br. 48) that the Board erred by not considering any secondary indicia of supervisory authority. In order for secondary indicia to be relevant, a party seeking to establish supervisory status must first prove that the individuals in question possess statutory indicia of supervisory authority. *See NLRB v. Chicago Metallic Corp.*, 794 F.2d 527, 531 (9th Cir.

²⁷ Despite DIRECTV's suggestion otherwise (Br. 35 n.12), nothing in the Board's decision or prior caselaw indicates that reviewing proposed discipline merely to ensure compliance with federal and state employment laws would amount to an independent investigation. Of course, given DIRECTV's decision against proffering evidence of its human resources department's review of ECFs, the record is silent as to whether that review is so limited.

1986). Finding that DIRECTV did not satisfy this standard, the Board reasonably found (EOR 48) any secondary indicia is immaterial.²⁸

. . .

In sum, the Board reasonably found that DIRECTV failed to meet its burden of proving that field supervisors are supervisors within the meaning of Section 2(11) of the Act. The field supervisors participation in prounion conduct before the election was therefore not objectionable. Accordingly, by refusing to bargain with the Union or to furnish relevant information requested by the Union, DIRECTV violated Section 8(a)(5) and (1) of the Act.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying DIRECTV's petition for review and enforcing the Board's Order in full.

²⁸ Should the Court conclude that the record does not support the Board's finding that DIRECTV failed to establish that field supervisors effectively recommend discipline, the Board asks the Court to remand the case so that the Board may determine in the first instance whether their conduct before the Union filed its representation petition was objectionable and warrants setting aside the election.

STATEMENT OF RELATED CASES

Board counsel are aware of one case currently in this Court that may raise a challenge to the expiration of Member Becker's term: *Rock-Tenn Services, Inc. v. NLRB*, 9th Cir. No. 12-70516, 70934 (briefing completed).

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January 2013

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DIRECTV HOLDINGS, LLC)	
)	
Petitioner/Cross-Respondent)	Nos. 12-72526, 12-72639
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	21-CA-71591
)	
and)	
)	
INTERNATIONAL ASSOCIATION OF)	
MACHINISTS AND AEROSPACE WORKERS,)	
AFL-CIO, DISTRICT LODGE 947)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,826 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 10th day of January, 2013

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AFL-CIO, DISTRICT LODGE 947)	
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Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth 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.

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ADDENDUM

STATUTORY ADDENDUM

The following statutory provisions are excerpted below pursuant to FRAP 28(f) and Circuit Rule 28-2.7:

United States Constitution

Article I, Section 5, cl. 2	1
Article I, Section 5, cl. 4	1
Article II, Section 2, cl. 2	2
Article II, Section 2, cl. 3	2
Article II, Section 3	2
Amendment XX, Section 2	2

National Labor Relations Act

Section 2(3) (29 U.S.C. § 152(3))	3
Section 2(11) (29 U.S.C. § 152(11))	3
Section 7 (29 U.S.C. §157)	3
Section 8(a)(1) (29 U.S.C. § 158(a)(1))	4
Section 8(a)(5) (29 U.S.C. § 158(a)(5))	4
Section 9(c) (29 U.S.C. § 159(c))	4
Section 9(d) (29 U.S.C. § 159(d))	5
Section 10(a) (29 U.S.C. § 160(a))	6
Section 10(e) (29 U.S.C. § 160(e))	6
Section 10(f) (29 U.S.C. § 160(f))	6

UNITED STATES CONSTITUTION

Article I, Section 5, cl. 2

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Article I, Section 5, cl. 4

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Article II, Section 2, cl. 2

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article II, Section 2, cl. 3

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Article II, Section 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Amendment XX, Section 1

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

NATIONAL LABOR RELATIONS ACT

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 [29 U.S.C. § 160] [Prevention of Unfair Labor Practices]

(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. . . .

(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. . . .