

No. 12-3632

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

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

**SALEM HOSPITAL CORP. A/K/A
THE MEMORIAL HOSPITAL OF SALEM COUNTY**

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board to enforce a Board Order issued against Salem Hospital Corporation. The Board found that Salem violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to

provide relevant and necessary information to the Health Professionals and Allied Employees Union, which is certified to represent a unit of Salem's nurses.

The Board's Decision and Order issued on July 31, 2012, and is reported at 358 NLRB No. 95.¹ (A. 8-12.) The Board's Order is final with respect to all parties. The Court has jurisdiction over this proceeding under Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practice occurred in Salem, New Jersey. The Board's application for enforcement, filed on September 18, is timely; the Act places no limit on the time for filing actions to enforce Board orders.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court or any other court. A related case reviewing an earlier Board order, however, is currently pending before the D.C. Circuit. *Salem Hosp. Corp. v. NLRB* (D.C. Cir. Nos. 11-1466, 12-1009) ("*Salem I*") (oral argument scheduled for Mar. 22, 2013), reviewing 357 NLRB No. 119 (2011). In that review proceeding, Salem is challenging the Board's certification of the Union as the exclusive bargaining representative of Salem's nurses, the same unit for which the Union requested relevant information necessary to its bargaining duties in this case. The outcome of this case is therefore

¹ "A." references are to the appendix filed with Salem's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

contingent upon the D.C. Circuit upholding the Board's certification of the Union in *Salem I*.

STATEMENT OF THE ISSUES PRESENTED

1. Does this Court have jurisdiction to hear Salem's challenges to the Union's certification given that the matter is currently under the exclusive jurisdiction of the D.C. Circuit in *Salem I*?

2. If the D.C. Circuit subsequently upholds the Board's certification of the Union in *Salem I*, is the Board entitled to summary enforcement of its uncontested finding that Salem refused to provide the Union with requested information in violation of Section 8(a)(5) and (1) of the Act?

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

This case involves Salem's refusal to provide information to the Union. Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging that Salem violated Section 8(a)(5) and (1) of the Act by refusing to provide information to the Union that was relevant and necessary to its bargaining duties. (A. 9; A. 325.) After a hearing during which Salem admitted its refusal to provide that information and otherwise presented no evidence in support

of its asserted defenses, an administrative law judge issued a recommended order finding that Salem violated the Act. On review, the Board found, in agreement with the judge, that Salem violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with the relevant and necessary information. (A. 8.) The Board's findings of fact are set forth below, followed by a summary of the Board's Conclusions and Order.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Union Wins an Election and Is Certified as the Collective-Bargaining Representative of Salem's Nurses

Salem operates an acute-care hospital in Salem, New Jersey. (A. 10.) On September 1 and 2, 2010, the Board conducted an election at Salem's facility during which Salem's nurses selected the Union as their collective-bargaining representative. (A. 9.) On August 3, 2011, the Board, after extensive proceedings in the underlying representation case, certified the Union as the exclusive bargaining representative of Salem's nurses. (A. 9.) To seek court review of the Board's certification of the Union, Salem refused to bargain with the Union, which the Board found unlawful.² *Salem I*, 357 NLRB No. 95. As noted (p. 2), Salem's

² See *NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 105 (3d Cir. 1979) (explaining that representation cases are not directly reviewable; to obtain court review, an employer must first refuse to bargain).

petition for review of that Board decision is currently pending before the D.C. Circuit. (A. 9 n.3.)

B. The Union Requests Information, and Salem Refuses to Provide It

On August 15, 2011, the Union sent a letter to Richard Grogan, Salem's interim chief executive officer. (A. 9; A. 412.) The letter requested that the parties begin contract negotiations and included suggested dates for bargaining. In addition, the Union included a list of information it was requesting "in order to provide adequate representation to our members and prepare for upcoming contract negotiations." (A. 10; A. 368-72, 412.) The attached request sought information such as current bargaining unit employees' date of hire, rate of pay, earnings, scheduled hours, and overtime; information about pension and health benefits; staffing policies, procedures, and guidelines; and copies of all employer policy and procedure manuals. (A. 9-10; A. 413.) In addition, the Union requested a list of "agency" nurses, a copy of their contracts, and information about their hours worked. (A. 9; A. 368, 413.) Agency nurses are not employed directly by Salem but perform the same work as the unit nurses. (A. 9; A. 368.) Two days later, Grogan responded by refusing to provide the information and "declin[ing] to meet and bargain" with the Union because Salem intended to "continue [its] challenges" to the Board's certification. (A. 10; A. 414.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Griffin and Block) found, in agreement with the administrative law judge, that Salem violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with requested information relevant and necessary to its collective-bargaining responsibilities. (A. 8.) The Board's Order requires Salem to cease and desist from the unfair labor practice found and from, 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). (A. 11-12.)

Affirmatively, the Order directs Salem to furnish the Union with the information it requested, and to post a remedial notice and electronically distribute it. (A. 12.)

SUMMARY OF THE ARGUMENT

Salem devotes its entire brief to challenging the Board's certification of the Union. But Salem's challenges to the certification are currently under the exclusive jurisdiction of the D.C. Circuit, and this Court has no jurisdiction to hear them. Moreover, because Salem fails to challenge the Board's finding that it violated the Act by refusing to provide information to the Union, the Board is entitled to summary enforcement of its Order, contingent on the D.C. Circuit's agreement that the Board properly certified the unit.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO HEAR SALEM'S CHALLENGES TO THE UNION'S CERTIFICATION

Before this Court, the Board is seeking enforcement of its July 31, 2012 Order finding that Salem violated the Act by refusing to provide information to the Union. (A. 8-12.) In its brief, however, Salem fails to present any defense to that violation, and instead challenges the Board's decision in *Salem I*.³ Specifically, Salem argues (Br. 4, 19) that the Board's certification of the Union should be set aside, contending (Br. 21-30) that the Board's 20-year-old health care rule is invalid because it gives controlling consideration to the extent of organization in violation of Section 9(c)(5) of the Act.⁴ Salem also claims (Br. 31-44) that the Board abused its discretion in rendering a procedural ruling that denied Salem the opportunity to present certain evidence in that earlier proceeding.

But this Court has no jurisdiction to hear the arguments presented in Salem's opening brief because they are under the exclusive jurisdiction of the D.C. Circuit. As Salem acknowledges (Br. 13, 16), it filed a petition for review of *Salem I* in the D.C. Circuit on December 1, 2011, and its brief to that Court presents the same

³ See *Salem I*, 357 NLRB No. 119 (2011).

⁴ 29 U.S.C. § 159(c)(5). The D.C. Circuit recently rejected this argument. See *San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1185 (D.C. Cir. 2012) (finding that the Board's health care rule does not violate Section 9(c)(5) of the Act by giving controlling consideration to the extent of organization).

issues Salem raises here.⁵ Under Section 10(e) of the Act, “[u]pon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final”⁶ In *Salem I*, the Board filed the record with the D.C. Circuit on January 25, 2012, and at that time, the D.C. Circuit gained exclusive jurisdiction over that case. Therefore, this Court has no jurisdiction over Salem’s challenges to the Board’s certification of the Union.

II. UPON A DECISION BY THE D.C. CIRCUIT UPHOLDING THE BOARD’S CERTIFICATION OF THE UNION, THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDING THAT SALEM REFUSED TO PROVIDE INFORMATION TO THE UNION

An employer violates Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the representative of its employees.⁷ That duty to bargain includes the duty, in good-faith, “to provide information that is needed by the bargaining representative for the proper performance of its duties.”⁸ The critical

⁵ See Salem’s opening brief in *Salem I*, D.C. Cir. Nos. 11-1466, 12-1009, available at 2012 WL 5927380.

⁶ See 29 U.S.C. § 160(e). See also *Hicks v. NLRB*, 100 F.2d 804, 805 (4th Cir. 1939) (“exclusive jurisdiction cannot reside in different courts at one and the same time”).

⁷ 29 U.S.C. § 158(a)(5) and (1). See also *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983) (a violation of Section 8(a)(5) of the Act results in a “derivative” violation of Section 8(a)(1)).

⁸ *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967). Accord *NLRB v. United States Postal Serv.*, 18 F.3d 1089, 1100-01 (3rd Cir. 1994).

question in determining whether information must be produced is that of relevance. Information pertaining to employees in the bargaining unit is presumptively relevant.⁹ Presumptively relevant information includes unit employees' names, addresses, wage rates, job classifications, and other similar information.¹⁰ Moreover, a union is entitled to information on non-bargaining unit members so long as the union shows a "probability that the desired information is relevant."¹¹ An employer is required to disclose relevant information related to both negotiation and administration of collective-bargaining agreements.¹²

Before the Board, Salem failed to provide any evidence in defense of the allegation that it did not provide presumptively relevant information to the Union. (A. 10-11.) Though Salem claimed in its amended answer to the complaint that the information request was overly broad and unduly burdensome, and that the Union sought confidential or proprietary data, Salem put on no witnesses at the hearing and "submitted no evidence . . . in support of its bald and conclusory assertions."

⁹ See *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998).

¹⁰ *NLRB v. CJC Holdings, Inc.*, 97 F.3d 114, 117 (5th Cir. 1996).

¹¹ *Acme*, 385 U.S. at 437. See also *NLRB v. New Jersey Bell Tel. Co.*, 936 F.2d 144, 150 (3d Cir. 1991) (citing *Transport of New Jersey*, 233 NLRB 694, 694 (1977) ("it is sufficient that the union's request for information be supported by a showing of 'probable' or 'potential' relevance")).

¹² See *Curtiss-Wright Corp., Wright Aeronautical Div. v. NLRB*, 347 F.2d 61, 68 (3d Cir. 1965). Accord *NLRB v. Lumber & Mill Employers Ass'n*, 736 F.2d 507, 508 (9th Cir. 1984).

(A. 11; A. 400.) The Board, therefore, found that Salem failed to meet its burden of proof and ordered it to provide the information. (A. 11-12.)

Before this Court, Salem has abandoned any challenge to the Board's finding that it violated Section 8(a)(5) and (1) by refusing to provide information to the Union. Under well-settled law, Salem's failure to contest this finding constitutes a waiver of any defense and warrants summary enforcement of the Board's Order.¹³ Where a party fails to challenge the Board's findings in its opening brief, the Court will "accept [those findings] as true."¹⁴ Moreover, by not raising the issue in its opening brief, Salem has abandoned the argument and may not raise it in the reply brief.¹⁵ Thus, because Salem failed to challenge the Board's unfair labor practice finding in its opening brief, the Court should "accept [that finding] as true" and grant summary enforcement of the Board's Order.

¹³ See, e.g., *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) (failure to raise argument in opening brief results in abandonment of argument); *NLRB v. Browning-Ferris Indus., Inc.*, 691 F.2d 1117, 1125 (3d Cir. 1982) (where brief "failed to challenge the Board's order on the merits, that issue is considered as having been abandoned and will not be considered by the Court on . . . review") (quoting *NLRB v. Tennessee Packers, Inc.*, 344 F.2d 948, 949 (6th Cir. 1965)); see also *Reform Party v. Allegheny County Dep't of Elections*, 174 F.3d 305, 316 n.11 (3d Cir. 1999) ("[a]n issue is waived unless a party raises it in its opening brief") (citation omitted).

¹⁴ *NLRB v. Konig*, 79 F.3d 354, 356 n.1 (3d Cir. 1996).

¹⁵ *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 593 (2d Cir. 1994) (arguments are waived if not raised until the reply brief).

Nevertheless, summary enforcement of the Board's finding that Salem unlawfully refused to provide information to the Union is contingent upon the Union's certification as the exclusive bargaining representative of Salem's nurses.¹⁶ Therefore, when the D.C. Circuit subsequently upholds the Board's certification of the Union, Salem must bargain with the Union and provide it with the requested information. Accordingly, the Board will provide the Court with the decision of the D.C. Circuit in *Salem I* immediately upon its issuance.

¹⁶ See *Int'l Molders & Allied Workers Union v. NLRB*, 410 F.2d 1061, 1063 (D.C. Cir. 1969) (per curiam) (noting that the employer's duty to bargain with the union was contingent upon the union's certification).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enforce the Board's Order in full.

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National Labor Relations Board
February 2013

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CERTIFICATE OF BAR MEMBERSHIP

In accordance with Third Circuit LAR 46.1(e) and pursuant to LAR 28.3(d),
Kellie Isbell certifies that she is a member in good standing of the bar of the
Maryland Court of Appeals and is not required to be a member of the bar of this
Court because she represents the federal government in this case.

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Dated at Washington, DC
this 6th day of February 2013

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Respondent)	

CERTIFICATE OF VIRUS SCAN

The Board certifies that the electronic copy of the brief submitted in Portable Document Format (PDF) has been scanned for viruses using the Symantec Antivirus Corporation Edition version 11.0, and no virus has been detected.

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CERTIFICATE OF IDENTITY

I certify that hard copies of the text of the Board's brief are identical to the electronically filed copy.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 2,507 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2013, I electronically filed the Board's brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that the Board's brief was served on Salem Hospital Corporation's counsel of record through the CM/ECF system:

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NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

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

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

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;

* * *

(5) to refuse to bargain collectively with the representatives of his employees

Section 9(c)(5) of the Act, 29 U.S.C. 159(c)(5), provides:

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

Section 10(e) of the Act, 29 U.S.C. 160(e), provides:

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the

filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.