

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Julie KELLY, as General Manager of
THE NEW YORK-NEW JERSEY REGIONAL JOINT BOARD,
WORKERS UNITED, A/W SEIU and its subordinate
bodies, LOCAL 340 and LOCAL 25,

Plaintiffs,

v.

MARK GASTON PEARCE, as Chairman and
Member, and KENT HIROZAWA, PHILIP MISCIMARRA,
and LAUREN McFERRAN as Members of the
NATIONAL LABOR RELATIONS BOARD,

Defendants.

1:15-cv-05117-CM

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Dawn L. Goldstein
Supervisory Attorney
National Labor Relations Board
Contempt, Compliance, and Special Litigation Branch
1015 Half Street, S.E.
Room 4017
Washington, DC 20570
(202) 273-2936
Dawn.Goldstein@nlrb.gov
admitted *pro hac vice*

Matthew Bruenig
Attorney
(202) 273-3831
mbruenig@nlrb.gov
admitted *pro hac vice*

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REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

The National Labor Relations Board (“NLRB” or “Board”) submits this Reply to the Union’s Opposition to the NLRB’s Motion to Dismiss (“Union Op.”) (Dkt. No. 45). As set forth below, nothing in that Opposition supports the conclusion that the instant case should be an exception to the general rule that representation proceedings before the Board are not reviewable in District Court. Accordingly, the Court should dismiss this case for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

I. The Union’s Opposition Presents Only New Arguments, Which this Court Should Not Consider

The Union’s Opposition abandons its initial arguments for relief in favor of new ones. In its supporting memorandum (“Union Mem.”) (Dkt. No 23) for its initial motion for injunctive relief (Dkt. No. 22), the Union claimed that the Board violated its rights under Section 8(d) of the National Labor Relations Act (“Act” or “Labor Act”), 29 U.S.C. § 158(d), by (1) requiring the

Union to seek representation of future units of employees of Brooks Brothers Group, Inc. (“the Employer”) solely through a Board election (Union Mem. at 9-13), and (2) compelling the Union to represent any future units of employees of the Employer in a bargaining unit separate from the Union’s existing bargaining units (Union Mem. at 13-14).

In its Opposition, however, the Union acknowledges that the Board has since issued a ruling in the underlying unit clarification (“UC”) proceeding making clear that the UC decision *did not* require the Union to seek representation of future employees solely through a Board election. (Union Op. at 1-2). Additionally, the Union’s Opposition wholly ignores its second argument.

Now seeking a “second bite at the apple,” the Union argues that the Board violated its statutory rights merely by subjecting it to the UC proceeding. Thus, the Union no longer claims that the UC case was wrongly decided or contained unlawful orders; rather, it claims that the Board violated the Labor Act by simply processing the Employer’s UC petition. Because issues raised for the first time in a reply brief are generally deemed waived, these arguments are not properly before this Court and should not be considered. *See Connecticut Bar Ass’n v. United States*, 620 F.3d 81, 91 n.13 (2d Cir. 2010); *see also In re Barr Laboratories, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) (“as Barr raised the issue only in its reply, respect for the adversary process makes it inappropriate to address the claim at all.”).¹ Nevertheless, the Board explains below why these arguments still fail to supply any source for jurisdiction under *Leedom v. Kyne*, 358 U.S. 184 (1958).

¹ Here, although the Union’s filing combines its opposition to the Board’s motion to dismiss and its reply in support of its motion for injunctive relief, it is clear that the Union’s arguments are aimed at supplanting its inadequate original claims.

II. The Union Has Not Shown that the Board Violated a Clear and Mandatory Provision of the Labor Act By Processing the Employer's Unit Clarification Petition

By a series of interpretive leaps, the Union asserts that it has been deprived of the benefit of its bargain, which in turn violates the portion of Section 8(d) of the Act that prohibits the Board from “compel[ling] either party to agree to a proposal or require the making of a concession,” 29 U.S.C. § 158(d). As explained below, none of this attenuated string of assertions suffices to bring this case within *Leedom*'s terms, because even assuming their merit, none shows a “clear, specific and mandatory provision of the [Labor] Act,” as required for this Court to assert jurisdiction. *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir. 1968). And in any event, the Union's newest claims confuse the issues present in this case and lack legal support.

Initially, the Union claims that “[a]n implicit, and essential, right a union obtains from an ‘after acquired stores’ clause is that any statutory issues that may arise under the [Labor Act] are heard in an unfair labor practice case,” rather than a representation proceeding. (Union Op. 6-10). Consequently, it asserts that the Board refused to recognize the Employer's alleged waiver of its right to file a UC petition to clarify whether an accretion of new employees had occurred (Union Op. 10-15). According to the Union, the “primary issue is that the Union had the right to enforce the ‘after acquired stores’ clause before the arbitrator” rather than having the Board intervene in the representation dispute. (Union Op. 10-11). Thus, the Union concludes that the NLRB has violated Section 8(d) because it has “*indirectly* compel[led]” a concession concerning the collective bargaining agreement's substantive terms. Union Op.7-8 (emphasis added); *see also* Union Op. 1.

Most significantly, the Union's use of the term “indirectly,” to describe its convoluted argument should suffice to demonstrate the Union's failure to show any Board action here

warranting extraordinary District Court review. A mere disagreement with the Board's resolution of an issue committed to its primary, if not exclusive, authority to decide under Section 9 of the Act, 29 U.S.C. § 159, does *not* make out a showing that the Board's actions were "manifestly beyond the realm of its delegated authority," *Southern Ohio Coal Co. v. Office of Surface Mining*, 20 F.3d 1418, 1424 (6th Cir. 1994), or "blatantly lawless." *Abercrombie v. Office of Comptroller of Currency*, 833 F.2d 672, 675 (7th Cir. 1987).

But regardless, none of the Union's disagreements with the Board's statutory interpretation in this case have any merit. First, in *Shaw's Supermarkets*, 343 NLRB 963 (2004), the Board construed an after-acquired stores clause as potentially permitting the employer to file an election petition at a store that the Union asserted to be covered by the clause. *Id.* at 963-64. In so finding, the Board made two determinations: first, that the clause at issue did not describe *how* majority status was to be shown, whether by a count of signed authorization cards only, or by means of a Board election, *id.* at 963; second, that representation case issues such as unit appropriateness "are for the Board to decide." *Id.* at 964. Thus, the Board refused to construe the after-acquired stores clause at issue as "inferring a waiver of access to Board processes." *Id.* at 963.² In view of the Board's construction of the clause at issue in *Shaw's Supermarkets* as insufficient to find a waiver of access to the Board's processes, the Union here has made no showing as to why the clauses at issue here should be construed differently.

² *Shaw's Supermarkets* is consistent with Supreme Court and Board case law. A court should "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is explicitly stated. More succinctly, the waiver must be *clear and unmistakable*." *Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708 (1983) (emphasis added and quotation omitted). Under Board law, it is well-established that "[t]he determination of questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria." *Marion Power Shovel Co., Inc.*, 230 NLRB 576, 577 (1977).

Moreover, the Employer's agreement in the after-acquired clause to recognize the Union when majority support is shown at a particular store was *not* set aside by the Board's UC proceeding. This is because a demonstration of majority support at a particular store is a wholly different question than whether the Board should find an "accretion," which requires a much higher standard. (Board Mem. at 14). The Union did not have majority support at the 1180 Madison Avenue store at the time the Employer filed the UC petition, and accordingly, the after-acquired stores clause was not then implicated. And because the Union has since asserted majority support at that store (Union Opp. 2), the clause has only now been properly brought into play by the Union's seeking arbitration of that issue (while also pursuing a Section 8(a)(5) charge for refusal to bargain, 29 U.S.C. § 158(a)(5)).³ Because the UC proceeding is wholly separate from issues concerning the after-acquired stores clauses, the Union has in no way been forced into a contractual concession which would allegedly violate Section 8(d) of the Labor Act.

In support of its mistaken claim that after-acquired stores clauses prohibit employers from invoking Board processes in UC accretion cases, the Union cites (at 6-7) four Board and Circuit Court cases dismissing unit clarification petitions in the face of extant contracts. *See Sunoco, Inc.*, 347 NLRB 421, 422 (2006); *Edison Sault Electric Co.*, 313 NLRB 753, 753 (1994); *Stanford Hosp. & Clinics v. NLRB*, 370 F.3d 1210, 1214 (D.C. Cir. 2004); *Consolidated Papers, Inc. v. NLRB*, 670 F.2d 754, 757 (7th Cir. 1982). The Board explained in *Sunoco* that it:

³ The Union also asks this Court to imply that the after-acquired store clauses at issue here require that *only* arbitration may be used to settle an accretion issue, even though the Union "admits that there was no explicit agreement to submit unit issues to the arbitrator." (Union Mem. 10-11). This request is in error, as even where there is an explicit agreement to submit representational issues to arbitrators, the Board retains concurrent jurisdiction over those issues. *Restaurant Employees, Local 217, v. J.P. Morgan Hotel*, 996 F.2d 561, 565 (2d Cir. 1993).

generally dismisses unit clarification petitions submitted during the term of a collective-bargaining agreement where the contract clearly defines the bargaining unit. . . .The Board's rule is based on the rationale that entertaining a unit clarification petition during the term of a contract that clearly defines the bargaining unit is unnecessarily disruptive of the parties' collective-bargaining relationship. . . . '[T]o permit clarification during the course of a contract would mean that one of the parties would be able to effect a change in the composition of the bargaining unit during the contract term after it agreed to the unit's definition.'

347 NLRB at 422 (quoting *Edison Sault Electric Co.*, 313 NLRB at 753). In all of the cases cited by the Union, a labor organization sought to use a UC petition to change a clearly defined, bargained-for unit. Here, the Employer sought to use a UC petition to *prevent a change* in the clearly defined, bargained-for unit, *i.e.*, accretion of the 1180 Madison Avenue employees. Thus, the Board's underlying policy rationale of respecting bargained-for units favored processing the unit clarification petition in this case.

Additionally, none of the cases cited by the Union concern after-acquired stores clauses, let alone conclude that such clauses alter the rights of parties to submit UC petitions to the Board. These four cases are not about what contractual rights after-acquired stores clauses give to parties, but instead demonstrate the Board's discretionary policy to limit parties from attempting to change the composition of units. Thus, these cases provide no support to the Union's specific legal theory, and significantly, cannot provide support for this Court's limited ability to assert jurisdiction where a clear violation of a statutory mandate has been shown.⁴

⁴ The Union also argues that alleged procedural defects concerning subpoena disputes in the UC proceedings violated the Administrative Procedure Act, 5 U.S.C. § 556. (Union Op. 8-10). However, as the Union notes, unlike unfair labor practice proceedings, the Board's representation proceedings are not governed by APA procedural rules. (Union Op. 8). And more to the point, none of these allegations make out a clear, specific, and mandatory violation of the Labor Act, as required for jurisdiction under *Leedom*.

CONCLUSION

For the reasons stated above, this Court lacks jurisdiction to review the Agency's representation proceedings involving the Union. Because no claim may be made to review a representation decision of the Board, the Complaint also fails to state a claim upon which relief may be granted. Accordingly the Court should dismiss the Complaint.

Respectfully submitted,

/s/ Dawn L. Goldstein

Dawn L. Goldstein
Supervisory Attorney
National Labor Relations Board
Contempt, Compliance, and Special Litigation Branch
1015 Half Street, S.E.
Room 4017
Washington, DC 20570
(202) 273-2936
Dawn.Goldstein@nlrb.gov
admitted *pro hac vice*

Matthew Bruenig
Attorney
(202) 273-3831
mbruenig@nlrb.gov
admitted *pro hac vice*

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