

**Nos. 15-1203 & 15-1235**

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

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**SCHWARZ PARTNERS PACKAGING, LLC  
D/B/A MAXPAK**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION AFL-CIO-CLC**

**Intervenor**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (“the Board”) certifies the following:

### **A. Parties and Amici**

Schwarz Partners Packaging, LLC d/b/a MaxPak (“the Company”), was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union AFL-CIO-CLC (“the Union”), was the charging party before the Board and is intervenor on behalf of the Board before the Court. There were no intervenors or amici before the Board.

### **B. Ruling Under Review**

The ruling under review is a decision and order of the Board in *Schwarz Partners Packaging, LLC d/b/a MaxPak*, 362 NLRB No. 138 (June 26, 2015).

### **C. Related Cases**

This case has not previously been before this or any other court. *Barstow Cmty. Hosp.*, 361 NLRB No. 34, 2014 WL 4302559, at \*7 n.5 (2014), *petition & cross-application filed*, Nos. 14-1167, 14-1195 (D.C. Cir.) (argued Nov. 9, 2015), is a related case.

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## **GLOSSARY**

The Act	National Labor Relations Act, 29 U.S.C. § 151, et seq.
The Board	National Labor Relations Board
The Company	Schwarz Partners Packaging, LLC d/b/a MaxPak
The Order	<i>Schwarz Partners Packaging, LLC d/b/a MaxPak</i> , 362 NLRB No. 138 (June 26, 2015)
The Union	United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union AFL-CIO- CLC
Br.	The Company's opening brief
D&O	The Board's Decision and Order
D&D	The Board's Decision and Direction
MSJ	The General Counsel's Motion for Summary Judgment

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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the petition of Schwarz Partners Packaging, LLC, d/b/a MaxPak (“the Company”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Company on June 26, 2015, and reported at 362 NLRB No. 138. (D&O 1-5.)<sup>1</sup> The United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union AFL-CIO-CLC (“the Union”), the charging party below, subsequently intervened on behalf of the Board. The Board had jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), which provides for the filing of petitions for review and cross-applications for enforcement of final Board orders in this Circuit. The Company’s petition and the

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<sup>1</sup> Pursuant to the Court’s September 18, 2015 Order, there is no appendix in this matter and, therefore, the Board’s citations are to the record. “D&O” references are to the Board’s Decision and Order. “D&D” references are to the Board’s Decision and Direction, which is appended to the Company’s opening brief (“Br.”). “MSJ” references are to the General Counsel’s Motion for Summary Judgment and attached exhibits. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Board's cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

### **STATEMENT OF THE ISSUE**

The issue in this case is whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and then failing and refusing to recognize and bargain with, the Union.

### **RELEVANT STATUTORY PROVISIONS**

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

### **STATEMENT OF THE CASE**

This unfair-labor-practice case arises from the Company's admitted refusal to recognize or bargain with the Union as the certified representative of its employees. In the administrative proceeding, the Board rejected the Company's belated challenges to the Union's certification, finding that the Company had waived all such challenges by recognizing and bargaining with the Union after the Union's certification instead of following the Board's established test-of-certification procedures. (D&O 1-2.) Accordingly, the Board found (D&O 3) that the Company's withdrawal of recognition from, and failure and refusal to recognize and bargain with, the Union violated Section 8(a)(5) and (1) of the Act,

29 U.S.C. § 158(a)(5) and (1). The relevant procedural history and facts, which are undisputed, are set forth below.

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

### **A. The Union's Certification as Bargaining Representative**

Pursuant to a stipulated election agreement, the Regional Director held a representation election on March 15, 2012, among a unit of the Company's employees. It resulted in 39 votes for, and 38 against, the Union, with 2 determinative challenged ballots. (D&O 2; DDE 1, MSJ Ex. 2.) After a hearing on objections and the challenged ballots, a hearing officer issued a report. On review, the Board (Chairman Pearce; Members Griffin and Block) issued a Decision and Direction on August 29, 2012, resolving various objections to the election, ordering the opening of the challenged ballots, and directing a second election if the tally showed the Union lost the election. (D&O 1; DDE 1-5.) In accordance with that order, the Regional Director for Region 12 opened the challenged ballots, issued a revised tally showing 39 votes for, and 40 against, the Union, set aside the election, and ordered another. (D&O 2; MSJ Ex. 11-12.) The Regional Director held the second election on October 19, 2012, and the final tally showed 55 votes for, and 21 against, the Union. (D&O 2; MSJ Ex. 13.) On November 6, 2012, after the Company withdrew its post-election objections (MSJ

Ex. 14-16), the Regional Director issued a certification of representative. (D&O 2; MSJ Ex. 17.)

**B. The Company Recognizes and Bargains with the Union, then Refuses To Recognize or Bargain with the Union**

On or about November 14, 2012, the Union requested that the Company recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit. (D&O 2; MSJ Ex. 21 p. 4, 23 p. 1.) The Company met and bargained with the Union with respect to the terms of an initial collective-bargaining agreement on or about January 8, 9, and 10, 2013. (D&O 2; MSJ Ex. 21 p. 4, 23 p. 1.) The Company also agreed to attend additional collective-bargaining meetings with the Union on March 19, 20, and 21, 2013. (D&O 2; MSJ Ex. 21 p. 4, 23 p. 1.) On January 25, 2013, the Court issued its decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *affirmed on other grounds*, 134 S. Ct. 2550 (June 26, 2014), which held that the recess appointments of two members of the panel that had issued the Decision and Direction were invalid.

Thereafter, by email dated March 15, 2013, the Company cancelled “any bargaining sessions with the Union, including, but not limited to, the sessions scheduled for . . . March 19, 20, and 21, 2013.” (D&O 2; MSJ Ex. 21 p. 4, 23 p. 1.) The Company further informed the Union that it would file a lawsuit challenging the Board’s authority to issue the Decision and Direction in the representation proceeding and the validity of the Union’s certification, and seeking

to enjoin the Acting General Counsel from pursuing any unfair-labor-practice charges based on the certification. (D&O 2; MSJ Ex. 21 p. 4, 23 p. 1.) Since March 15, the Company has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees. (D&O 3; MSJ Ex. 21 p. 4, 23 pp. 1-2.)

### **C. The Present Unfair-Labor-Practice Proceeding**

Based on a charge filed by the Union, the Board's Acting General Counsel issued a complaint alleging that the Company had violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and by failing and refusing to recognize and bargain with, the Union as its employees' representative. (D&O 1; MSJ Ex. 18, 21.) The Company filed an answer, which admitted in part and denied in part the allegations in the complaint and asserted special defenses, and the Acting General Counsel then filed a motion for summary judgment. (D&O 1; MSJ Ex. 23.) The Company opposed that motion, admitting its refusal to recognize or bargain with the Union but arguing that the Union's certification was invalid due to the composition of the Board panel that issued the August 29, 2012 Decision and Direction. (D&O 1.)

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

On June 26, 2015, the Board (Chairman Pearce; Members Hirozawa and McFerran) issued a Decision and Order granting the motion for summary

judgment, holding that the Company had waived its right to challenge the validity of the Union's certification by entering into negotiations with the Union, and finding that the Company had violated Section 8(a)(5) and (1) by withdrawing recognition from, and subsequently failing and refusing to recognize and bargain with, the Union as the exclusive collective-bargaining representative of its employees. (D&O 1, 3.) To remedy those unfair labor practices, the Board's Order requires the Company to cease and desist from the violations found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. (D&O 3.) Affirmatively, the Order directs the Company to bargain with the Union on request, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (D&O 3-4.)

### **STANDARD OF REVIEW**

This Court's review of the Board's unfair-labor-practice determinations is "quite narrow." *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000). When supported by substantial evidence on the record as a whole, the Board's findings of fact are "conclusive." 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Kiewit Power Constr. Co. v. NLRB*, 652 F.3d 22, 25 (D.C. Cir. 2011). The Court also applies that test to the Board's "application of law to the facts, and accords due deference to the reasonable

inferences that the Board draws from the evidence, regardless of whether the court might have reached a different conclusion *de novo*.” *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). Finally, the Board’s legal determinations under the Act are entitled to deference: this Court will “abide [the Board’s] interpretation of the Act if it is reasonable and consistent with controlling precedent.” *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002).

### **SUMMARY OF ARGUMENT**

In the present case, substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) by withdrawing recognition from, and failing and refusing to bargain with, the Union. It is undisputed that the Company bargained with the Union after its certification as the collective-bargaining representative, then cancelled further negotiating sessions and refused to bargain further or recognize the Union as its employees’ representative.

Under settled law, when an employer bargains with a union after certification instead of following the established test-of-certification procedural course, it waives its right to contest the certification in any respect. Applying that precedent, the Board reasonably held that the Company had waived all challenges to the Union’s certification by bargaining with the Union. Simply stated, the present Section 8(a)(5) unfair-labor-practice violation is based on the Company’s

withdrawal of recognition from, and failure and refusal to bargain with, a union that it previously had recognized and with which it had bargained. Having chosen to negotiate, the Company cannot now dispute the validity of the certification at all, so its contentions that it did not waive a particular argument and that its quorum-based challenge is unwaivable are inapposite.

**ARGUMENT****SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM, AND FAILING AND REFUSING TO RECOGNIZE AND BARGAIN WITH, THE UNION**

Section 7 of the Act grants employees the right to choose a representative and to have that representative bargain with their employer on their behalf. 29 U.S.C. § 157. Employers have a corresponding duty to bargain with their employees’ chosen representatives, and a refusal to bargain violates that duty under Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1).<sup>2</sup> *See C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 881-82 (D.C. Cir. 1988). Here, the Company does not dispute (Br. 4) that, after recognizing and bargaining with the Union, it cancelled scheduled bargaining sessions, refused to participate in further bargaining, and informed the Union that it would file a lawsuit challenging the validity of the Board’s certification of the Union. Therefore, substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act. The Company could not, contrary to its assertions, lawfully walk away from its duty to recognize and bargain with the Union.

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<sup>2</sup> A violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . .” *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

**A. An Employer that Forgoes the Established Test-of-Certification Procedures, and Instead Recognizes and Bargains with a Certified Union, Waives All Challenges to the Certification**

Under the Act, “Board orders in certification proceedings . . . are not directly reviewable in the courts.” *Boire v. Greyhound Corp.*, 376 U.S. 473, 476 (1964) (internal citation omitted). Accordingly, to obtain judicial review of a union’s certification, an employer must avail itself of the Board’s well-established test-of-certification procedures: refusing categorically from the outset to bargain with the certified Union, then defending against the resulting refusal-to-bargain allegation by asserting as an affirmative defense that the certification was improper. *See NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012) (refusal to bargain “sets up judicial review of an election certification that is otherwise insulated from direct review”). Only when an employer follows that procedure, which results in the issuance of a final Board unfair-labor-practice order reviewable by the courts under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) & (f), is the certification (and the record upon which it was based) before a court. 29 U.S.C. § 159(d); *Boire*, 376 U.S. at 477-79 (1964). In other words, as the Court has explained, an employer has two options once a certification issues: “the employer must either bargain unconditionally or, if it wants to contest the union’s right to represent the employees, refuse to bargain and defend itself in an unfair labor practice proceeding.” *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222,

225-26 (D.C. Cir. 1996). And the Court has made clear that an employer “may negotiate with, or challenge the certification of, the Union; it may not do both at once.” *Id.* at 225.

A corollary to the foregoing principle is the Board’s longstanding rule that an employer waives all challenges to certification when it bargains with a certified union instead of following the test-of-certification procedural course. *See Prof’l Transp., Inc.*, 362 NLRB No. 60, 2015 WL 1510979, at \*2 (2015); *Barstow Cmty. Hosp.*, 361 NLRB No. 34, 2014 WL 4302559, at \*7 n.5 (2014), *petition & cross-application filed*, Nos. 14-1167, 14-1195 (D.C. Cir.) (argued Nov. 9, 2015); *Fallbrook Hosp.*, 360 NLRB No. 73, 2014 WL 1458265, at \*4 n.2 (2014), *enforced*, 785 F.3d 729 (D.C. Cir. 2015); *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921, 922 fn. 6 (1997); *Nursing Ctr. at Vineland*, 318 NLRB 901, 904 (1995), *enforced mem.*, 1996 WL 199152 (3rd Cir. 1996); *King Radio Corp.*, 166 NLRB 649, 661 (1967), *enforced*, 98 F.2d 14 (10th Cir. 1968). That policy of rejecting challenges to election certifications after commencement of negotiations is not only consistent with the statutory review procedures but also furthers a prime purpose of the Act—fostering industrial peace through collective bargaining.

The Board’s policy, moreover, met with judicial approval.

Courts have explicitly adopted or expressed agreement with the Board’s waiver rule. Thus, for instance, the Court of Appeals for the Eighth Circuit has

determined that “in order to challenge the propriety of a certification, an employer must refuse to recognize a union immediately after the collective bargaining unit has been certified and the union has been elected as the representative for the bargaining unit. Once an employer honors a certification and recognizes a union by entering into negotiations with it, the employer has waived the objection that the certification is invalid.” *Technicolor Gov’t Servs. v. NLRB*, 739 F.2d 323, 327 (8th Cir. 1984). Similarly, the Court of Appeals for the Tenth Circuit has concluded that “[w]hen an employer honors a certification and recognizes and begins bargaining with the certified representative, it waives a contention that the election and certification are invalid.” *King Radio Corp. v. NLRB*, 398 F.2d 14, 20 (10th Cir. 1968). *See also Peabody Coal v. NLRB*, 725 F.2d 357, 365 (6th Cir. 1984) (employer may have jeopardized its certification challenge just by consulting with a union), *overruled on other grounds by Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996); *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1005 (8th Cir. 1965) (employer would have prejudiced certification challenge by bargaining with union).

**B. The Company Waived All Challenges to the Certification by Recognizing and Bargaining with the Union**

Substantial, undisputed evidence shows that following the Board’s certification of the Union, and in response to the Union’s request that the Company recognize and bargain with it, the Company met with the Union regarding an initial

collective-bargaining agreement over the course of three days in January 2013. After the conclusion of those initial negotiating sessions, the Company then agreed to additional collective-bargaining meetings with the Union to be held on three consecutive days in March. The Company, however, subsequently cancelled those sessions, withdrew recognition from the Union, and failed and refused to recognize or bargain with the Union, asserting that the certification, which it had previously honored, was invalid because the Board lacked a quorum at relevant times in the representation proceedings. Following the settled precedent cited above, the Board reasonably declined to consider (D&O 1-2) that belated challenge to the Union's certification, because the Company had waived it by entering into negotiations with the Union. This Court should do the same notwithstanding the Company's arguments.

As an initial matter, there is no merit to the Company's contention (Br. 10) that its decision to negotiate rather than follow established test-of-certification procedures did not constitute a waiver because, in choosing to negotiate, it did not "explicitly accept" the Board's lack of quorum or "have the benefit" of this Court's or the Supreme Court's decisions in *Noel Canning*. Those arguments are disingenuous. The Company plainly was aware of the quorum issue during the representation proceeding. Indeed, it specifically argued to the Board, in its exceptions to the Hearing Officer's Report on Challenges and Objections to the

first election, that “[t]he Board lacks a quorum to act.” (MSJ Ex. 8.)<sup>3</sup> Nonetheless, the Company chose, for its own reasons, not to reassert a quorum-based challenge in its objections to the second election (MSJ Ex. 14), which it withdrew (MSJ Ex. 15). More significantly, after the issuance of the certification, the Company did not pursue its challenge through the test-of-certification procedures, instead electing to recognize and bargain with the Union.

In arguing that it did not (Br. 10-11), or could not (Br. 9-10), waive its quorum-based challenge to the certification by bargaining with the Union, the Company heavily relies on *UC Health v. NLRB*, 803 F.3d 669 (D.C. Cir. 2015), and *SSC Mystic Operating Co. v. NLRB*, 801 F.3d 302, 308 (D.C. Cir. 2015), *petition for rehearing filed* (October 30, 2015). But in those two cases, employers took the opposite approach by properly utilizing the test-of-certification

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<sup>3</sup> The potential legal grounds on which the Company might have asserted such a claim of *ultra vires* action—that the recess appointments were invalid and the Board therefore lacked a quorum—are the same constitutional arguments that had previously been considered in published decisions by three courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962). Moreover, the petition for review in *Noel Canning* had been filed with the Court on February 24, 2012, and the matter was argued on December 5, 2012, nearly a month before the Company bargained with the Union. The Company, therefore, had every opportunity to pursue its quorum-based challenge in the representation proceeding, and in a subsequent test-of-certification, had it precipitated such a proceeding by refusing to bargain.

procedures, preserving their baseline right to challenge the validity of the unions' certifications. That difference is dispositive here.

The Company's deliberate decision to bargain categorically waived all of its challenges to certification, unlike the employers' stipulated election agreements in *UC Health* and *SSC Mystic*. In those cases, the Court examined in the context of direct challenges to the certifications whether the employers had waived their quorum-based arguments by signing those agreements. *UC Health*, 803 F.3d at 673 (employer "did not expressly give up the challenge it brings now when it executed the Agreement; it merely signed a form agreement providing that the Board's regulations would govern the election"); *SSC Mystic*, 801 F.3d at 308 (same). By contrast, after the certification of the Union, the Company—with full knowledge of the quorum issue—chose to forego *any* challenges to the validity of the Union's certification and instead recognize and bargain with the Union. In those circumstances, finding its present challenge waived is not, as the Company claims (Br. 10), tantamount to holding the Company "responsible for failing to see the future." *UC Health*, 803 F.3d at 673; *see also SSC Mystic*, 801 F.3d at 308.

The Company is also mistaken in relying (Br. 9-10) on *UC Health* and *SSC Mystic* to argue that its challenge is "not waivable." In both of those cases, the Court agreed that the employers had not waived quorum-based challenges to certification that they had failed to raise during their representation proceedings, as

is generally required. *UC Health*, 803 F.3d at 672-73; *SSC Mystic*, 801 F.3d at 308. But, as noted, the employers' violations of the Act in those cases, unlike the Company's, were based on their refusal to recognize or bargain with their employees' unions from the moment of certification, in order to challenge the validity of the certifications. Consequently, in both *UC Health* and *SSC Mystic*—unlike here—the underlying representation proceedings, and thus the unions' certifications, were properly before the Court as part of the unfair-labor-practice case; at issue was which particular arguments the employers had preserved.

Moreover, the Company is mistaken in claiming (Br. 7-9) that its challenge is “jurisdictional.” To the contrary, several courts have held such quorum-based challenges to be nonjurisdictional. *See GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 406-07 (6th Cir. 2013) (court not required to consider belated argument that Board lacked quorum due to an invalid recess appointment; “[e]rrors regarding the appointments of officers under Article II are ‘nonjurisdictional’”) (internal citation omitted); *accord D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 351-52 (5th Cir. 2013); *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 793-96 (8th Cir. 2013); *cf. Freytag v. CIR*, 501 U.S. 868, 878-79 (1991) (belated Appointments Clause challenge was a “nonjurisdictional” claim that Court had “discretion,” but not obligation, to decide); *LaRouche v. FEC*, 28 F.3d 137, 139-40 (D.C. Cir. 1994) (rejecting argument that constitutional challenge to FEC's membership was

jurisdictional).<sup>4</sup> As the Company itself recognizes (Br. 7), this Court has not held that quorum-based challenges are “jurisdictional.” *See Noel Canning*, 705 F.3d 490-515. *Noel Canning* involved a question of whether the Court had jurisdiction to consider a quorum-based challenge that the employer had failed to raise before the Board in the proceeding under review. As in *UC Health* and *SSC Mystic*, there was no dispute that the Board order issued by the panel whose validity the employer challenged was properly before the Court. By contrast, as explained above, the Union’s certification is not before the Court in this case.<sup>5</sup>

In sum, the Company chose to forego the long-established procedural route for challenging a certification and instead commenced bargaining with the Union. Under those circumstances, there is no reason to depart from established principles holding (*see supra* 11-13) that the Company thereby waived any and all challenges to the certification. *See Technicolor*, 739 F.2d at 327; *King Radio*, 398 F.2d at 20.

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<sup>4</sup> Although the Company points to *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203, 213 (3rd Cir. 2013), the Third Circuit granted the Board’s petition for rehearing and vacated that decision. *See NLRB v. New Vista Nursing & Rehabilitation*, Nos. 11-3440, 12-1027, 12-1936 (3rd Cir. Aug. 11, 2014), ECF No. 3111703922. The Company’s reliance on unsupported speculation (Br. 8 n.3) that the court’s grant of rehearing may have been based on a distinct issue that “does not affect the Third Circuit’s jurisdictional conclusion,” is unpersuasive. In any event, the Third Circuit’s position was inconsistent with the weight of authority, which recognizes that appointment challenges are waivable.

<sup>5</sup> For that reason, the Company’s claim (Br. 9) that, under *Noel Canning*, the nature of its challenge is an “extraordinary circumstance” that excuses its failure to raise it below is beside the point.

**CONCLUSION**

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

Respectfully submitted,

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National Labor Relations Board

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## STATUTORY ADDENDUM

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

**Sec. 7 [Sec. 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 of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

**Sec. 8(a) [Sec. 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];

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(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].

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**Sec. 9(d) [Sec. 159(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 [Sec. 160]**

**(a)** [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

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

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

**(f)** [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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Dated at Washington, DC  
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