

Nos. 15-1358, 15-1431

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

BENJAMIN H. REALTY CORP.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

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

(a) *Parties and Amici*: The Board is respondent/cross-petitioner before the Court; its General Counsel was a party before the Board (Board Case Nos. 22-CA-110689, 22-RC-87792). The Residential Construction and General Service Workers, Laborers Local 55 was the charging party before the Board. Benjamin H. Realty Corporation (“the Company”), petitioner/cross-respondent before the Court, was respondent before the Board.

(b) *Rulings Under Review*: This case is before the Court on a petition filed by the Company for review of an order issued by the Board on August 25, 2015, and reported at 362 NLRB No. 194. The Board seeks enforcement of that order against the Company.

(c) *Related Cases*: This case has not been before this or any other court. Board counsel are unaware of any related cases either pending or about to be presented to this or any other court.

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GLOSSARY OF ABBREVIATIONS

| | |
|---------|--|
| Act | National Labor Relations Act |
| Board | National Labor Relations Board |
| Company | Benjamin H. Realty Corporation |
| Union | Residential Construction and General Service Workers, Laborers Local 55 |

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

STATEMENT OF JURISDICTION

This case is before the Court on the petition for review of Benjamin H. Realty Corp. (“the Company”) and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the

Company on August 25, 2015, and reported at 362 NLRB No. 181. (A. 1441-44.)¹

The Board found that the Company unlawfully refused to bargain with the Residential Construction and General Service Workers, Laborers Local 55 (“the Union”), as the duly certified collective-bargaining representative of superintendents, maintenance employees, porters, and painters at several apartment buildings in New Jersey. (A. 1442.)

The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151 et seq., 160(a)) (“the Act”). The Board’s Order is final with respect to all parties. 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 that petitions for review and cross-applications for enforcement may be filed in this Court. The Company’s October 20, 2015 petition for review and the Board’s November 25, 2015 cross-application for enforcement are timely; the Act places no time limit on such filings.

Because the Board’s Order is based in part on findings made in the underlying representation proceeding, the record in that proceeding (Case No. 22-RC-087792) is also before the Court under Section 9(d) of the Act (29 U.S.C. § 159(d)). *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d)

¹ “A.” refers to the Joint Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Company’s opening brief.

does not give the Court general authority over the representation proceeding. Rather, it authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice order in whole or in part. The Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with the Court's ruling. 29 U.S.C. § 159(c); *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

All applicable provisions are set forth in the attached Addendum.

STATEMENT OF THE ISSUE

Whether the Board acted within its discretion in overruling the Company's challenge to the ballot of Superintendent Justo "Pastor" Perea based on its failure to prove that he was a statutory supervisor, and therefore properly found that the Company's admitted refusal to bargain violated Section 8(a)(5) and (1) of the Act.

STATEMENT OF THE CASE

In this test-of-certification case, the Company has admittedly refused to bargain with the Union in order to seek review of the Board's overruling of the challenge to the election ballot of Perea on the basis that he was not a statutory supervisor, contrary to the Company's challenge. Once his ballot was opened and counted, the Board certified the Union, and the Company refused to bargain,

disputing the certification. In the ensuing unfair-labor-practice case, the Board found (A. 1442-43) that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain. The relevant factual and procedural history of the representation and unfair-labor-practice proceedings are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. Company Operations and Organizational Structure

The Company manages approximately 16 residential properties in Orange and East Orange, New Jersey. (A. 1172, 1345, 1442; A. 31, 632.) Benjamin Herbst is the President and Owner of the Company, and oversees the 10 building superintendents and 8 maintenance employees who work in those properties. (A. 1172, 1345; A. 31, 195-96.)

Herbst is assisted with the Company's day-to-day operations by a manager who supervises and has authority to discipline superintendents and maintenance employees. The manager also assigns those employees to particular buildings and evaluates their work; makes hiring decisions; and offers recommendations on employees' requests for pay raises. In addition, the manager selects and works with contractors, purchases and brings workers the necessary materials to complete their work, and ensures the proper maintenance and cleaning of all properties. (A. 1172-75, 1345; A. 41, 70-72, 244-46, 341-42, 353, 396-400, 476-77, 499, 535, 538.)

Each building has a superintendent who reports to the manager and to President Herbst. Superintendents are responsible for making repairs to the apartments, including plumbing repair, and for handling some tenant complaints about minor apartment damage. (A. 1174-75; A. 304, 339-40, 354, 470-71, 533, 572, 708-09, 1126, 1128-29.)

B. Initially, Pastor Perea Works as a Manager and Building Superintendent

Until about May 2012, Justo “Pastor” Perea worked as both a manager and the superintendent of the 500 South Harrison building, where he resided in a two-bedroom apartment. (A. 1174; 284-86, 452-54.) In his capacity as a manager, he supervised other superintendents and was responsible for half of the Company’s properties. Another manager, Juan Carlos, oversaw the remaining properties. (A. 1174; A. 449, 452-54, 1134.)

Additionally, in his role as a manger prior to May 2012, Perea gave work orders to superintendents and maintenance employees, and assigned the latter to different buildings. (A. 1174; A. 394-95, 406.) He personally drove them to their assigned buildings in a company car, with the Company covering car insurance, car payments, and gas. Perea ordered supplies using his company credit card, and delivered them to the maintenance employees. He also signed employee paychecks issued by the Company, up until April 6, 2012. (A. 1172, 1174-75; A. 244-46, 256-57, 394-95, 399-406, 409, 462, 466, 699-702, 1131-33.) Before 2012,

Perea had hired employees and was involved in disciplining them. (A. 1172, 1174, 1176 n.8; A. 308, 460-61, 476-77.) Perea did not hire anyone in 2012. (A. 213.)

C. In March 2012, the Company Hires Moshe Weiss as Manager; Within Months, the Company Demotes Perea to Performing Maintenance and Plumbing Work as a Superintendent; Perea Goes on Disability Leave before the Election

Around March 2012, the Company hired Moshe Weiss as the new manager. He was the only individual hired in 2012, and Perea had nothing to do with his hiring. Initially, Weiss mainly handled office business and paperwork, and worked with contractors on renovating vacant apartments to prepare them for rental. (A. 1172; A. 197-98, 536-38.) On Weiss' first day, Herbst instructed Perea and Juan Carlos to introduce him to the employees. As they walked around, Perea and Juan Carlos informed the employees that Weiss was the new manager, and that if they needed anything, they would have to call Weiss. (A. 1173; A. 338-39, 395-96, 455-57, 541.) Privately, Herbst told Perea that operations would continue "more or less the same" and, at first, his duties remained unchanged. (A. 1173; A. 456-57, 473-74.)

By May 2012, however, Herbst had informed Perea that he would be the superintendent of two other properties, in addition to 500 South Harrison, and that Weiss was in charge of everything. (A. 1173-74; A. 458-60.) Herbst also took away Perea's company car, stopped paying his car expenses, and moved him into a smaller apartment. (A. 1173-74; A. 284-86, 407-12.) Perea no longer had any

authority to hire or discipline employees, and he no longer assigned them to work in buildings or on particular tasks. He also did not order materials and supplies as he had done previously, and, after April 6, 2012, he did not sign any employee paychecks. Perea's duties became limited to those of a building superintendent—performing maintenance and repair work. (A. 1173-74, 1776 & n.6; A. 405-07, 458-66, 470-71, 504-14, 532-34.)

Beginning in May 2012, employees, including Perea, received their work assignments from Weiss, who told them what work to perform and where. Weiss visited each building, telling the superintendents to instruct the other employees to move faster, and directly instructing them himself. (A. 1173; A. 340, 394-97, 402, 439-40, 470-71, 513, 572-73.) After Weiss became the manager, superintendents were no longer permitted to order hardware supplies without his prior approval. (A. 1173; A. 399-400, 405-07, 439, 466, 504-514, 562.) Additionally, if employees wanted to take leave, they either called Weiss directly or contacted Perea, who would report their requests to Weiss or Herbst. Employees also requested overtime directly from Weiss. (A. 1173-74; A. 311, 342, 400-01, 441.)

On September 10, 2012, Perea went on disability leave and did not return to work until after the November 8 election. (A. 1174; A. 446, 461.)

II. THE PROCEDURAL HISTORY

A. The Initial Representation Proceeding

In August 2012, the Union filed an election petition with the Board, seeking to represent a unit of superintendents, painters, maintenance employees, and porters at several of the Company's apartment buildings in Orange and East Orange, New Jersey. (A. 114.) The Company sought to dismiss the petition based on its assertion of anticipated changes to the unit workforce. On October 2, after a representation hearing, the Acting Regional Director issued a Decision and Direction of Election. (A. 611-23.) The Company requested review of that decision, and, on October 18, the Board (Chairman Pearce and Members Hayes and Griffin) denied the request for review. (A. 610, 1139-53.)

On November 8, 2012, a representation election was conducted pursuant to a Decision and Direction of Election. The Board agent conducting the election challenged Perea's ballot because his name did not appear on the *Excelsior* list of eligible voters. At the time, the Company argued that it had properly omitted Perea from the list because he was not employed in the bargaining unit during the relevant time period, while the Union asserted that he was employed and on disability status. (A. 604-05.) Perea therefore cast his ballot under challenge. His ballot turned out to be determinative because, of the twelve other individuals who

participated in the election, six voted for the Union and six voted against it. (A. 1160.)

Thereafter, the Regional Director ordered a hearing on Perea's eligibility to vote in the election. (A. 606.) At the hearing, the Company took the position that it had omitted him from the *Excelsior* list because he was a supervisor under Section 2(11) of the Act. The Union contended that Perea had lost his supervisory status in early 2012, before the election. (A. 1171; A. 183-85, 193.) The hearing officer issued a Report on Challenged Ballot, finding that the Company had failed to meet its burden of showing that Perea was a supervisor at the time of the election. Accordingly, he recommended that Perea's ballot be opened and counted. (A. 1179-80.)

On June 19, 2013, after considering the Company's exceptions, a Board panel (Chairman Pearce and Members Griffin and Block), adopted the hearing officer's findings and recommendations, and directed that Perea's ballot be opened and counted. (A. 1205-07.) The Regional Director then issued a revised tally of ballots, showing 7 votes for and 6 votes against the Union. On July 2, he certified the Union as the exclusive collective-bargaining representative of the petitioned-for unit. (A. 1208-11.)

B. The Subsequent Proceedings

On July 8, 11, and 24, 2013, the Union requested that the Company begin bargaining. The Company refused to do so, prompting the Union to file an unfair-labor-practice charge. (A. 1442; A. 1212.) Thereafter, a complaint was issued, alleging that the Company's refusals violated Section 8(a)(5) and (1) of the Act. (A. 1441; A. 1213-17.) On September 11, the Board, acting on a motion for summary judgment, transferred the proceeding to itself and issued a Notice to Show Cause why the motion should not be granted. (A. 1441; A. 1252.) The Company filed a response opposing the motion. (A. 1253-89.)

On June 26, 2014, while the summary judgment motion was pending before the Board, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which invalidated the January 2012 recess appointments of Members Block and Griffin, who had participated in certain rulings in the instant case.

On October 15, 2014, the Company moved to reopen the record to receive a complaint filed on June 30, 2014 by Perea's private attorney in an unrelated New Jersey state court case. (A. 1315-20.) In that complaint, the attorney alleged that the Company had discriminatorily demoted Perea in 2013. (A. 1339-42.) Perea did not verify or subscribe to the complaint allegations. In its motion to reopen, the Company argued that, given the complaint allegation that the demotion

occurred in 2013, Perea had committed perjury, and therefore the Board should reexamine its finding that he was demoted at an earlier date. (A. 1315-20.) The Union opposed the motion, noting that Perea's attorney had advised company counsel that the dates in the complaint were mistaken and that he wanted to amend the complaint.² (A. 1348-54.)

In the meantime, on November 13, 2014, a properly constituted Board panel (Chairman Pearce and Members Miscimarra and Hirozawa) issued a Decision, Certification of Representative, and Notice to Show Cause. 361 NLRB No. 103. (A. 1344-46.) The Board acknowledged that it had lacked a quorum at the time of the October 18, 2012 Order denying the Company's request for review and the June 19, 2013 Decision and Direction of Election. (A. 1344-45.) After considering *de novo* the Company's arguments in support of its request for review, the Board denied the request and issued a new certification of representative. (A. 1344-45.) On December 10, the Company moved the Board to reconsider its decision, noting that the Board had not yet acted on the motion to reopen the record. (A. 1367-73.)

² The Union attached a letter from Perea's attorney to company counsel, further explaining that his client's difficulty speaking English, as well as payroll documents that failed to show an immediate decrease in Perea's wages after his demotion, had created confusion about when the demotion took effect. On those grounds, Perea's attorney asked the Company to withdraw its motion to reopen the record. (A. 1353-54.)

On January 22, 2015, the Union again requested that the Company bargain with it as the unit employees' exclusive bargaining representative, but the Company refused to do so. On February 6, the General Counsel filed a motion to amend the complaint to include the new refusal-to-bargain allegations. The Company opposed that motion. (A. 1441; A. 1393-1401, 1403-08.)

On May 7, 2015, the Board denied the Company's motions to reopen the record and for reconsideration. (A. 1441; A. 1433-34.) In so ruling, the Board assumed *arguendo* that the state court complaint was previously unavailable to the Company, and that it had moved promptly for reconsideration upon its discovery. The Board, however, found that the complaint would not have changed the outcome of the election proceeding. As the Board noted, there was no indication that Perea had verified or subscribed to the complaint allegations, and his attorney had averred that the dates were erroneous and that he wished to amend them. Moreover, the Board emphasized that the Company did not dispute that Weiss was hired in March 2012. The Board further explained that, based on the credited testimony, it had found that the Company substantially altered Perea's duties after Weiss was hired in March 2012. (A. 1441; A. 1433-34.)

On May 27, the Board granted the General Counsel's motion to amend the complaint. The Company filed an answer, admitting its refusal to bargain. (A. 1441; 1435-37, 1438-40.)

III. THE BOARD'S DECISION AND ORDER

On November 25, 2015, the Board (Chairman Pearce and Members Miscimarra and Hirozawa) issued its Decision and Order in the unfair-labor-practice case, granting the General Counsel's motion for summary judgment. The Board found that "[a]ll representation issues raised by [the Company] were or could have been litigated in the prior representation proceeding." (A. 1442.) The Board also found that the Company did "not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding." (A. 1442.) Accordingly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees. (A. 1442-43.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, it requires the Company, upon request, to bargain with the Union and embody any understanding reached in a signed agreement, and to post a remedial notice. (A. 1442-43.)

SUMMARY OF ARGUMENT

The Board acted within its discretion in overruling the Company's challenge to the ballot of Superintendent Justo "Pastor" Perea based on its failure to prove that he was a statutory supervisor at the time of the election. Accordingly, the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the employees' collective-bargaining representative.

As the Board found, the Company did not establish that, during the relevant pre-election period, Perea possessed or exercised any of the supervisory functions enumerated in Section 2(11) of the Act using independent judgment. Instead, as the Board reasonably found, the Company demoted Perea after it hired Weiss as the new manager in March 2012. Thereafter, Perea merely performed the routine maintenance and plumbing work of a building superintendent, following Weiss' orders. Contrary to the Company's suggestion, after Perea was demoted, he did not have or exercise authority to hire or discipline employees. Nor did he assign them to buildings, give them significant overall duties, or responsibly direct them using independent judgment, as would be required to establish supervisory status under *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). In claiming otherwise, the Company offers only unspecified generalizations and the inconsequential fact that Perea accompanied one employee to certain jobsites and

told him where to paint. However, as the Board found, Perea's instructions were merely routine and did not involve independent judgment.

The Company's other arguments in support of supervisory status also lack merit. First, it mistakenly relies on secondary indicia, but its claims ignore the credited evidence, and do not establish Section 2(11) status given the complete absence of any primary indicia. The Company also fails to provide any basis for shifting the burden of proving supervisory status to the Union. Under settled law, the party asserting supervisory status must establish the exemption, and the Company did not do so.

Finally, the Board did not abuse its discretion in denying the Company's motion to reopen the record to include a state court complaint alleging that Perea was not demoted until 2013, after the election. As the Board found, the complaint would not have changed the outcome of the election proceeding because there was no indication that Perea had verified or subscribed to its allegations, and his attorney stated that the dates he cited in the complaint were mistaken and should be amended. Moreover, the credited testimony established that the Company substantially altered Perea's duties when it hired Weiss as the new manager before the election. Thus, the complaint would not have altered the Board's finding that the Company did not prove Perea was a supervisor during the relevant time period.

STANDARD OF REVIEW

In reviewing the Board's certification of a union, the Court's role is limited to determining whether the Board acted within the "wide degree of discretion" entrusted to it by Congress for resolving questions arising during the course of representation proceedings. *NLRB v. A.J. Tower*, 329 U.S. 324, 330 (1946). The scope of judicial review, therefore, is "extremely limited." *Timsko Inc. v. NLRB*, 819 F.2d 1173, 1176 (D.C. Cir. 1987) (quoting *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1564 (D.C. Cir. 1984)); accord *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1445 (D.C. Cir. 1996).

The Board's discretion in representation proceedings extends to its disposition of challenged ballots. See, e.g., *Schoolman Transp. Sys., Inc. v. NLRB*, 112 F.3d 519, 521 (D.C. Cir. 1997). In reviewing the Board's disposition of a challenged ballot, this Court "will uphold a Board's exercise of discretion 'unless its action is unreasonable, arbitrary or unsupported by the evidence,'" and "must therefore uphold a Board decision if it is 'rational and in accord with past precedent.'" *Desert Hosp. v. NLRB*, 91 F.3d 187, 191 (D.C. Cir. 1992) (quoting *BB & L, Inc. v. NLRB*, 52 F.3d 366, 369 (D.C. Cir. 1995) (per curiam)).

On the issue of supervisory status, the Court recognizes the Board's expertise in evaluating the "infinite variations and gradations of authority" that may exist in the workplace, and the Board's findings with regard to supervisory

status “are entitled to great weight.” *Oil, Chem. & Atomic Workers v. NLRB*, 445 F.2d 237, 241 (D.C. Cir. 1971) (“*Oil Workers*”) (quoting *NLRB v. Metro. Life Ins. Co.*, 405 F.2d 1169, 1172 (2d Cir. 1968)) (internal quotation marks omitted); accord *Desert Hosp. v. NLRB*, 91 F.3d 187, 193 (D.C. Cir. 1996). Those findings will be upheld as long as they are supported by substantial evidence. *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999).

A reviewing court may not displace the Board’s choice between two fairly conflicting views, even if the court “would justifiably have made a different choice had the matter been before it de novo.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). Rather, the Board’s decision ““may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view.”” *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 771 (D.C. Cir. 2012) (quoting *Robinson v. Nat’l Transp. Safety Bd.*, 28 F.3d 210, 215 (D.C. Cir. 1994)).

ARGUMENT

THE BOARD ACTED WITHIN ITS DISCRETION IN OVERRULING THE COMPANY’S CHALLENGE TO PEREA’S BALLOT BASED ON ITS FAILURE TO PROVE HIS SUPERVISORY STATUS, AND THEREFORE FOUND THAT THE COMPANY’S ADMITTED REFUSAL TO BARGAIN VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

Section 8(a)(5) and (1) of the Act prohibits an employer from refusing to bargain collectively with the representative of its employees. 29 U.S.C. §§

158(a)(5) and (1).³ Here, the Company has refused to bargain with the Union based on its erroneous claim (Br. 19-21, 24-30) that Perea was a statutory supervisor excluded from the Act’s coverage at the time of the November 2012 election—a claim which, had it been proven, would have invalidated his tie-breaking ballot. The Company also insists (Br. 21-23, 31-32) that the Board erred in denying its motion to reopen the record to admit into evidence a state court complaint that mistakenly alleged that Perea remained a supervisor until 2013. As shown below, both arguments fail.

A. Applicable Principles of Statutory Supervisory Status

Section 7 of the Act (29 U.S.C. § 157) guarantees collective-bargaining rights to all workers who meet the Act’s definition of “employee.” 29 U.S.C. § 152(3). Section 2(3) of the Act (29 U.S.C. § 152(3)) excludes from that definition “any individual employed as a supervisor.” *VIP Health Servs.*, 164 F.3d at 648. In turn, Section 2(11) of the Act provides, in pertinent part, that a “supervisor” is “any individual having authority, in the interest of the employer, to hire, . . . assign, . . . discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action,” provided that “the exercise

³ An employer who violates Section 8(a)(5) of the Act derivatively violates Section 8(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees” in the exercise of their Section 7 rights (29 U.S.C. § 157). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. § 152(11).

Thus, the Act dictates that individuals are not statutory supervisors, even if the employer uses that title, unless (1) they have the authority to engage in at least one of the listed supervisory functions, and (2) their exercise of that authority requires the use of independent judgment. *See NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 712 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *accord Avista Corp. v. NLRB*, 496 F. App’x 92, 93 (D.C. Cir. 2013) (noting that *Oakwood* “undisputedly reflects sound law”); *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 14 (1st Cir. 2015) (approving *Oakwood*). To exercise independent judgment, “an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood*, 348 NLRB at 693. Judgment is not independent “if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.” *Id.* at 693. *See also Kentucky River*, 532 U.S. at 713 (“Many nominally supervisory functions may be performed without [exercising] such a degree of . . . judgment or discretion . . . as would warrant a finding of supervisory status under the Act.”) (citation omitted).

In *Oakwood*, the Board clarified its interpretation of the term “assign” under Section 2(11), explaining that it means “designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” 348 NLRB at 689-90. By contrast, the Board explained, an individual does not “assign” by giving an “ad hoc instruction that the employee perform a discrete task.” *Id.* at 689. Nor does a putative supervisor assign by “choosing the order in which the employee will perform discrete tasks within th[eir] assignments.” *Id.*

In *Oakwood*, the Board also explained that the term “responsible direction” means “decid[ing] what job shall be undertaken next or who shall do it . . . provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.” *Id.* at 691. Furthermore, an individual has authority to responsibly direct employees only if he is held accountable for the performance of tasks by those employees; the individual must face the prospect of adverse consequences if the employees under his command fail to perform their tasks correctly. *Id.* at 692.

The Court has warned that “the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organization rights.” *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963

(D.C. Cir. 1999). Thus, in interpreting Section 2(11), the Board is mindful of the statutory goal of distinguishing truly supervisory personnel—who are vested with “genuine management prerogatives”—from employees who enjoy the Act’s protection even though they perform “minor supervisory duties.” *Oakwood*, 348 NLRB at 688 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (internal quotation marks omitted)).

The burden of demonstrating Section 2(11) supervisory status is on the party asserting it. *Kentucky River*, 532 U.S. at 711-12. The assertion must be supported with specific examples, based on record evidence. *See Oil Workers*, 445 F.2d at 243; *accord Securitas Critical Infrastructure Servs., Inc. v. NLRB*, ___ F.3d ___, 2016 WL 1161220, at *4 (8th Cir. Mar. 24, 2016). Conclusory or generalized testimony does not suffice. *See, e.g., Beverly Enters.-Mass.*, 165 F.3d at 963; *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983); *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006). Nor can a party meet its burden with “inconclusive or conflicting evidence.” *N.Y. Univ. Med. Ctr.*, 324 NLRB 887, 908 (1997), *enforced in relevant part*, 156 F.3d 405 (2d Cir. 1998); *accord Pac Tell Group, Inc. v. NLRB*, ___ F.3d ___, 2016 WL 1005428, at *4 (4th Cir. Mar. 15, 2016) (upholding Board finding that inconclusive, ambiguous evidence of raise recommendations was insufficient to establish supervisory status). And it is settled that designations of theoretical or “paper power”—as in a job description or title—

are insufficient to prove supervisory status. *Beverly Enters.-Mass.*, 165 F.3d at 962-63; *Oil Workers*, 445 F.2d at 243.

B. The Company Failed To Meet Its Heavy Burden of Proving that Perea Was a Statutory Supervisor at the Time of the Election

The credited evidence shows that after the Company made Weiss the new manager in March 2012, it demoted Perea and thereafter, he did not hire or discipline any employees, or assign or responsibly direct them. The Board therefore reasonably found that the Company failed to meet its burden of proving that Perea was a statutory supervisor when the election occurred on November 8, 2012.

1. The Board reasonably found that the Company demoted Perea after it hired Weiss

Substantial evidence supports the Board's finding that, by no later than May 2012, Perea's work duties and responsibilities were exclusively those of a nonsupervisory building superintendent who merely "work[ed] alongside other bargaining unit employees." (A. 1180.) To be sure, before the Company hired Weiss in March 2012, Perea had managed about half of the properties, hired employees, assigned them to particular buildings, oversaw their work, and issued them orders. He had also performed other, nonsupervisory duties, such as transporting employees to their assigned locations, reporting their requests for leave and overtime, and signing company paychecks. (A. 1173-74, 1176; A. 310-

11, 394-97, 398-400, 405-06, 412, 460-61, 476-77.) The credited evidence, however, shows that after the Company hired Weiss as the manager, it demoted Perea to the nonsupervisory position of a building superintendent. Thereafter, as the Board found, Perea “merely performed repair and maintenance work comparable to other nonsupervisory superintendents.” (A. 1174; A. 421-27, 459-60, 499-500, 533-35.) And employees sought Weiss’ approval, not Perea’s, for sick leave, time off, and overtime. (A. 396-400, 440-41.) Accordingly, although Herbst told Perea after Weiss’ hiring that his duties would remain the same, as the Board found and the credited evidence shows, “that was clearly not the case.” (A. 1176.) *See Beverly Enters.-Mass.*, 165 F.3d at 963 (“Statements by management purporting to confer authority do not alone suffice.”).

The record also plainly establishes that after Weiss’ arrival, Perea no longer had authority to hire or discipline employees, nor did he exercise those powers. (A. 1176; A. 470-71, 476-77.) In fact, no employees were hired in 2012, other than Weiss, and the Company admits as much (Br. 27). The Company asserts (Br. 27) that Perea hired 16 employees during the relevant time period, but as the record clearly shows, those individuals were hired prior to 2012, when Perea was a supervisor. (A. 1173-74; A. 335-36, 388, 435, 476.) Therefore, the Company errs in relying on Perea’s pre-demotion hiring activities.

Moreover, as the Board recognized (A. 1174, 1179-80), after hiring Weiss as the manager, the Company assigned Perea to superintend to two additional buildings, and instructed him to perform maintenance, repair, and plumbing work. (A. 1174; A. 421-22.) At that point, Perea did not “boss [employees] around” or issue directives for them to follow. (A. 426-27.) Rather, it was Weiss who took charge, telling superintendents to instruct other employees to work more quickly, and directing them to perform jobs based on his observation of their work. And in keeping with his authority as manager, Weiss instructed Perea to go to certain apartments to handle bathroom and plumbing repairs, garbage disposal, and painting. (A. 1180; A. 396-97, 421-22, 440, 445, 471.)

The Company accuses the Board of making a “quantum leap in logic” (Br. 21) in finding that Weiss’ hiring as a manager in March resulted in Perea’s loss of supervisory status. However, it is the Company that defies reason in claiming that Perea’s undisputed status as a supervisor “at some point” before Weiss’ hiring somehow constitutes “sufficient evidence to show that he continued to possess” supervisory authority in November 2012. (Br. 33.) The Company also overlooks the credited evidence which, as the Board found, illustrates that “after the hiring of Weiss there was clearly an impact on the duties of Perea,” and any evidence of Perea exercising supervisory authority was “limited.” (A. 1176.) Indeed, as one

employee testified, before Weiss was hired, “everything was Pastor” (A. 445); after Weiss became manager, “everything had to do with [Weiss]” (A. 437).

2. The Company failed to show that Perea assigned or responsibly directed employees using independent judgment

Substantial evidence supports the Board’s finding that the Company did not meet its burden of proving that, at the time of the election, Perea assigned or responsibly directed employees with the requisite exercise of independent judgment. (A. 1179.) First, as shown (pp. 7-8), the credited evidence demonstrates that Weiss, not Perea, assigned employees to perform maintenance work, painting, plumbing, and other repairs, and that Weiss either directly told them where and when to do the work, or instructed the superintendents (including Perea) to communicate Weiss’ directives to the other employees.

Indeed, the record shows that Weiss even went so far as to closely monitor the employees’ work, telling the superintendents to instruct the other employees to move faster, and directing the employees himself. (A. 1173-74; A. 340, 394-97, 402, 407, 439-40, 513, 572.) Under this new regime, Perea at most merely instructed employees about their assignments in accordance with Weiss’ orders (in addition to performing his own work as a building superintendent). It is well established that issuing assignments or directions in accordance with an employer’s prior instructions does not require the exercise of independent judgment. *See Pac Tell Group, Inc. v. NLRB*, 2016 WL 1005428, at *3 (putative

supervisors did not assign work with independent judgment, in part “because the decisions were made according to parameters set by management”); *Artcraft Displays, Inc.*, 262 NLRB 1233, 1234 (1982) (lead persons who issued orders in accordance with employer’s instructions merely gave “essentially routine” direction); *see also Pub. Serv. Co. of Colo. v. NLRB*, 405 F.3d 1071, 1078 (10th Cir. 2005) (limitations on putative supervisor’s discretion “are a crucial consideration” in assessing whether independent judgment is used). Accordingly, the Company did not establish that Perea exercised independent judgment in interacting with other employees, let alone that those interactions constituted assignment or responsible direction under Section 2(11) of the Act.⁴

At bottom, the Company (Br. 14) offered only one specific instance where Perea purportedly assigned and directed employees using independent judgment, and it involved nothing more than his limited interactions with maintenance employee Casnan. As the Board found, however, Perea simply told Casnan where

⁴ Additionally, the Company could not establish that Perea responsibly directed employees because it failed to show he was “fully accountable and responsible for the performance and work product of the employees.” *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 313 (6th Cir. 2012) (quoting *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986)). The putative supervisor must have “authority to take corrective action, if necessary” to ensure that the direction is followed. *Oakwood*, 348 NLRB at 692. He must also be held “accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly.” *Oakwood*, 348 NLRB at 691-92. Here, “there is no evidence that Perea [was] accountable for the performance of [employees’] tasks.” (A. 1179.)

to paint in the building to which Weiss had assigned him and how to complete the repairs, while also delivering materials that Weiss had asked to him procure. (A. 1179-80; A. 504-05, 513-14, 567-69, 572.) *See Oakwood*, 348 NLRB at 689 (individual does not “assign” by giving “ad hoc instruction that the employee perform a discrete task”); *Pac-Tell Group, Inc. v. NLRB*, 2016 WL 1005428, at *6 (telling employees “what they are going to do and how they are going to do it” was “not dispositive of the responsible direction inquiry” because the work was “sufficiently routine that the employees did not require extensive direction”).

Furthermore, the Board reasonably found that Perea’s interactions with Casnan, like his interactions with other employees, did not require independent judgment, as they “fail[ed] to rise about the merely routine.” (A. 1179.) *See NSTAR Elec. Co.*, 798 F.3d at 14 (routing field employees was “nothing more than a routine task” that did not require independent judgment). As the Board noted, in instructing Casnan, Perea gave “no apparent consideration” to “precisely how difficult the task [wa]s, nor to [Casnan’s] skills and experience.” (A. 1179; A. 471, 567-69, 572.) *See Shaw, Inc.*, 350 NLRB 354, 355-56 (2007) (no independent judgment where “much of the work . . . is routine and repetitive; there is no showing that such work requires more than minimal guidance”); *CGLM Inc.*, 350 NLRB 974, 984 (2007) (warehouse manager issued “routine or clerical” directions where “[l]oading trucks was performed in a set pattern”), *enforced*, 280 F. App’x

366 (5th Cir. 2008).⁵ The fact that Perea based his instructions to Casnan on Weiss' prior orders further supports the Board's finding that Perea was not exercising independent judgment. *See Oakwood*, 348 NLRB at 693 (judgment is not independent if dictated by verbal instructions of a higher authority).

3. The Company's remaining contentions are meritless

Despite the Company's myriad attempts to invalidate Perea's election ballot and avoid its duty to bargain with the Union, its entire argument ignores the law and the facts, and rests on mischaracterizations of the record. For example, the Company incorrectly relies (Br. 26, 28) on secondary indicia of supervisory status—ones that are “not included in the statutory definition of supervisor but that often accompany the status of supervisor.” *Public Serv. Co. of Colo.*, 405 F.3d at 1080. It is settled, however, that secondary indicators cannot substitute for the primary indicia explicitly delineated in the Act. *See, e.g., 735 Putnam Pike Operations, LLC v. NLRB*, 474 F. App'x 782, 784 (D.C. Cir. 2012); *Oil Workers*, 445 F.2d at 242. Accordingly, the Company gains no ground by asserting (Br. 26, 28) that Perea continued to carry keys to all of the buildings, that he earned more than other employees, and that he ordered supplies. As noted above, if none of the

⁵ In any event, even if Perea had taken Casnan's skills into account, which he did not, merely directing employees to perform specific tasks “based on an employee's trade or known skills” in a way that is “essentially self-evident” does not entail the exercise of independent judgment. *VIP Health Servs.*, 164 F.3d at 649 (nurses' role was merely routine where “it only takes common sense if a patient is not properly cleaned or dressed to then instruct the aide to rectify the situation”).

statutory indicia are present, secondary factors cannot establish supervisory status. *Jochims v. NLRB*, 480 F.3d 1161, 1173 (D.C. Cir. 2007).

Nevertheless, the credited evidence establishes that, after Weiss' hiring in March, Perea no longer had keys to all the buildings or ordered materials for other employees. Rather, he merely carried out Weiss' instructions to pick up supplies and deliver them to others. In fact, after Weiss became manager, employees often directly asked him for supplies. (A. 1180; A. 396-99, 427-32, 459, 504-14.) And although Perea continued to receive higher wages, that alone does not establish supervisory status. *See Oil Workers*, 445 F.2d at 242 (pay differential did not support finding of supervisory status where employer failed to show "evidence of the actual possession of supervisory responsibility"). Moreover, the Company neglects to mention that after hiring Weiss, it relegated Perea to performing mere plumbing and maintenance repairs, and assisting other employees based on Weiss' instructions.

The Company also inexplicably maintains that Perea "ceased, of his own volition" to act as a supervisor (Br. 25) and "manufactured" his own loss of supervisory status (Br. 29). There is absolutely no evidence, credited or otherwise, to support that fantastical assertion. In that vein, the Company places undue emphasis (Br. 26) on Herbst's unfounded "belief" (A. 1177) that Perea continued to serve in a supervisory capacity, and his alleged assurance to Perea that his duties

would remain unchanged. This Court recognizes, however, that “what the statute requires is evidence of actual supervisory authority [over employees] visibly translated into tangible examples demonstrating the existence of such authority.” *Oil Workers*, 445 F.2d at 243. As the Hearing Officer found, Herbst demonstrated a “poor recollection” for dates and had “limited knowledge of Perea’s day-to-day activities.” (A. 1177.) For instance, while Herbst “assumed” that Perea had discussed a wage increase with employee Cuevas, “Cuevas testified more credibly that he had not requested the pay raise from Perea, but rather had given his request directly to Weiss.” (A. 1177; A. 310, 341.) Therefore, Herbst’s limited knowledge and baseless assumptions are insufficient to prove Perea’s supervisory status.

Nor does the Company aid its cause by noting that supervisory authority may exist even if it is not frequently exercised. (Br. 25, 29.) As the Board stated in *Barstow Community Hospital*: “Although Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise, the evidence still must suffice to show that such authority actually exists and that its exercise requires the use of independent judgment.” 352 NLRB 1052, 1053 (2008), *incorporated by reference*, 356 NLRB No. 15 (Nov. 8, 2010), *enforced*, 474 F. App’x 497 (9th Cir. 2012). Thus, in evaluating whether supervisory authority exists, the Board appropriately proceeds with caution when proof of its exercise is scant and clearly outweighed by contrary record evidence.

See, e.g., NLRB v. Orr Iron, Inc., 508 F.2d 1305, 1307 (7th Cir. 1975) (although foreman once “told one of the steel handlers to do his work or to go home,” this was an “extraordinary exception[] to [the] regular practice, and when looked at against a total background” did not show disciplinary authority).

Applying these principles, the Board and reviewing courts have often found that “the nearly total lack of evidence of [supervisory] authority actually exercised negates its existence,” notwithstanding one or two isolated examples. *Oil Workers*, 445 F.2d at 244; *see, e.g., Frenchtown Acquisition*, 683 F.3d at 309, 310, 312 (upholding Board’s finding that one or two “isolated instances” of Section 2(11) activities were “not enough to support a finding of supervisory status”); *Res-Care*, 705 F.2d at 1467 (“with very little evidence in the record” of supervisory authority, “the Board did not have to be persuaded by a single instance in which a recommendation for discharge was made and followed”).

As noted above (pp. 29-30), given that President Herbst had a “poor recollection for dates” and was “never in the field” to observe Perea’s daily activities, his conclusory claims cannot establish that Perea retained any supervisory authority after Weiss’ arrival. (A. 1177.) Similarly, Weiss’ purported understanding that Perea would continue to be responsible for supervising daily maintenance work falls far short of establishing Perea’s status as a statutory

supervisor; indeed, Weiss could not even “provide details of his observations of Perea’s purported supervisory duties.” (A. 1177.)

Lastly, the Company inconsistently contends (Br. 32-33) that the Board improperly required it to prove Perea’s supervisory status, while simultaneously acknowledging that the party asserting that status bears that burden. However, the Company offers no basis for disturbing the settled rule that the burden falls squarely on the party seeking the exemption. *See Kentucky River*, 532 U.S. at 711-12; *Oil Workers*, 445 F.2d at 243. Moreover, the Company’s insistence (Br. 33) that it is “not claiming the benefit of the supervisory status” is spun from whole cloth. As the Company points out, the election resulted in 6 votes for and 6 votes against the Union, with “the tie breaking vote of Perea” favoring union representation. (Br. 12.) His ballot, therefore, triggered the Company’s duty to bargain with the certified Union, and the Company has continued to challenge Perea’s status as a basis for refusing to fulfill its bargaining obligation. Accordingly, the Court should reject the Company’s meritless claims.

C. The Board Did Not Abuse Its Discretion in Denying the Company’s Motion to Reopen the Record

The Company asserted below, and contends here (Br. 17-18, 31-32), that the Board erred in denying the Company’s motion reopen the record to receive the complaint filed by Perea’s attorney in an unrelated state court lawsuit. Contrary to the Company’s claims, the Board properly denied the motion because, as shown

below, the complaint does not conflict with Perea's prior Board testimony or the Board's finding that he was demoted before the November 2012 election, and therefore would not have changed the outcome of the representation proceeding.

A party seeking to introduce new evidence after the representation case record is closed must establish (1) that the evidence existed but was unavailable before the close of the proceeding; (2) that the evidence would have changed the result of the proceeding; and (3) that it moved promptly upon the discovery of the evidence. *Manhattan Ctr. Studios, Inc.*, 357 NLRB No. 139, slip op. at 3 (2011); accord *APL Logistics, Inc.*, 341 NLRB 994, 994 (2004); see 29 C.F.R. § 102.65(e)(1) ("A motion . . . to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited."). Here, the Board found that, even assuming the complaint was unavailable when the hearing closed and that the Company had moved promptly upon discovering it, the Company did "not show[] that the contents of the complaint would have changed the outcome of the proceedings." (A. 1433.) The Company fails to offer any basis for disturbing the Board's ruling.

It is axiomatic that the Board has broad discretion in deciding how to process its cases under its procedural rules, including whether to take additional

evidence on an issue. *See Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 139-40 (1971) (the Board has discretion whether to reopen issue where new evidence is available); *see generally Vermont Yankee Nuclear Corp. v. NRDC*, 435 U.S. 519, 543-44, 549 (1978) (agency's procedural rules for carrying out its statutory responsibilities are presumptively valid and may not be overturned unless shown to be unreasonable). The Board's decision to reopen the record for further fact finding is reviewed only for an abuse of discretion. *See Comar, Inc. v. NLRB*, 111 F. App'x 1, 2 (D.C. Cir. 2004) (the Board did not abuse its discretion in denying employer's motion to reopen the record); *Wash. Mobilization Comm. v. Jefferson*, 617 F.2d 848, 850 (D.C. Cir. 1980) (appellate court will only reverse decision not to reopen record if moving party shows abuse of discretion).

The Board did not abuse its discretion in denying the Company's motion because the Company failed to show that the contents of the complaint would have changed the outcome of the representation proceeding. (A. 1433.)

See Presbyterian Hosp. in the City of New York, 285 NLRB 935, 935 n.1 (1987) (denying motion to reopen based on movant's failure to demonstrate that circumstances arising after hearing closed would alter result). Indeed, as the Board emphasized, the Company "does not dispute that Weiss was hired in March 2012" (A. 1434), and his hiring prompted the substantial diminution in Perea's job duties well before the election. (A. 1180, 1345.)

Moreover, as the Board recognized, there is no indication on the face of the complaint—which was signed only by the attorney—that Perea verified or subscribed to its allegations. (A. 1433-34.) Furthermore, the attorney averred that the allegations were erroneous and that he wished to amend the complaint. As he explained, the confusion stemmed from Perea’s difficulty communicating in English and payroll documents that failed to reflect a wage decrease after Weiss arrived. (A. 1434; A. 1353-54.) The attorney also noted his understanding that the Company had hired Weiss as its manager in March 2012, which constituted a demotion of Perea, and that the “crux” of the state court complaint—the Company’s July 2013 reduction in Perea’s salary—had no bearing on the representation proceeding. (A. 1353-54.) These statements hardly conflict with Perea’s testimony or the Board’s finding that “shortly after the arrival of Weiss, Perea’s job responsibilities substantially changed” and “were exclusively those of a nonsupervisory superintendent.” (HOR 12.) In those circumstances, the Board properly concluded that “the fact that a complaint signed by Perea’s counsel, alone, alleged that Perea was demoted on subsequent dates does not ‘compel[] a different result.’” (A. 1434, quoting *Manhattan Ctr. Studios*, 357 NLRB No. 139, slip op. at 3).

* * * *

In sum, the Board reasonably found that the Company failed to meet its burden of proving that Perea was a statutory supervisor at the time of the November 2012 election. On that basis, the Board acted well within its discretion in overruling the Company's challenge to his ballot and certifying the Union. Accordingly, the Court should uphold the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by unlawfully refusing to bargain with the Union.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

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ADDENDUM OF STATUTES AND RULES

Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Sec. 2. [29 U.S.C. §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. [29 U.S.C. § 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).

Sec. 8. [29 U.S.C. § 158]

(a) 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, subject to the provisions of section 9(a).

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession

Sec. 9. [29 U.S.C. § 159.]

(c) (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) 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]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) 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 or has received a construction inconsistent therewith.

(e) 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 such 2112 of title 28, United States Code. 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. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive

(f) 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. 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.

Relevant provisions of the Board's Rules and Regulations are as follows:

Sec. 102.65 [29 C.F.R. § 102.65]

(e)(1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any regional director or hearing officer with respect to any matter which could have been but was not raised pursuant to any other section of these rules, except that the regional director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.

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

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|--------------------------------|------------------|
| BENJAMIN H. REALTY CORP. | * |
| | * |
| Petitioner/Cross-Respondent | * Nos. 15-1358, |
| | * 15-1431 |
| v. | * |
| | * Board Case No. |
| NATIONAL LABOR RELATIONS BOARD | * 22-CA-110689 |
| | * |
| Respondent/Cross-Petitioner | * |
| | * |

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,280 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 13th day of April, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, DC
this 13th day of April, 2016