

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

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

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

Respondent

**ON APPLICATION FOR ENFORCEMENT OF THREE ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**UNITED STATES COURT OF APPEALS
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Nos. 14-3622, 14-4440, 15-1353

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

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

Respondent

**ON APPLICATION FOR ENFORCEMENT OF THREE ORDERS OF
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

INTRODUCTION

Previously, in *Salem Hospital Corp. v. NLRB*, 808 F.3d 59 (D.C. Cir. 2015) (*Salem I*), the D.C. Circuit upheld the Board's certification of the Union and issued mandate, thereby conclusively establishing Salem's duty to bargain with the Union as the representative of Salem's registered nurses. Now, this consolidated case seeks enforcement of three individual unfair-labor-practice Orders remedying Salem's post-certification violations of that duty to bargain. However, rather than

directly challenging the Board’s unfair-labor-practice findings in its opening brief, Salem instead inappropriately asks the Court to revisit and invalidate the certification upheld by the D.C. Circuit in *Salem I*. Therefore, Salem’s arguments are precluded and the Board’s unfair-labor-practice Orders are entitled to summary enforcement.

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This consolidated case is before the Court on the applications of the National Labor Relations Board to enforce three unfair-labor-practice Orders issued against Salem Hospital Corporation. The Board’s Orders are reported at 360 NLRB No. 95 (2014); 361 NLRB No. 61 (2014), which incorporates 358 NLRB No. 95, 2012 WL 3111716, by reference; and 361 NLRB No. 110 (2014), which incorporates 359 NLRB No. 82, 2013 WL 1192307, by reference. (JA 27-41.)¹ The Court consolidated these cases on February 17, 2016.

The Board had subject matter jurisdiction over the proceedings under Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Orders are final, and the Court has jurisdiction over this

¹ “JA” references are to the appendix filed with Salem’s opening brief. “Br.” refers to Salem’s brief.

consolidated case under Section 10(e) of the Act, 29 U.S.C. § 160(e), because the unfair labor practices occurred in New Jersey.

The Board filed its applications for enforcement on August 13, 2014, November 6, 2014, and February 4, 2015. The applications are timely because the Act places no limit on the time for filing actions to enforce Board orders.

STATEMENT OF RELATED CASES AND PROCEEDINGS

In 2011, the Board certified Health Professionals and Allied Employees (“the Union”) as the collective-bargaining representative of Salem’s registered nurses after they voted for representation in a Board-conducted, secret-ballot election. (JA 27.) To seek court review of the certification, Salem refused to bargain, which the Board found unlawful. *Salem Hosp. Corp.*, 357 NLRB No. 119, 2011 WL 5976073. Salem petitioned for review of the Board’s decision in the D.C. Circuit, and that court enforced the Board’s Order. *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 62 (D.C. Cir. 2015) (“*Salem I*”).

Following certification, the Board found that Salem violated its duty to bargain with the Union in several ways and issued the three unfair-labor-practice orders consolidated in this proceeding. Two of the three Board Orders were previously before the Court. Those Orders were issued by Chairman Pearce and Members Griffin and Block and are reported at 358 NLRB No. 95, 2012 WL 3111716, and 359 NLRB No. 82, 2013 WL 1192307. The Board subsequently

filed applications for enforcement of those Orders in this Circuit (Nos. 12-3632 and 13-2003).

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550, holding that the January 2012 recess appointments to the Board, including those of Members Griffin and Block, were not valid. At that time, the parties had fully briefed, but not argued, No. 12-3632, and the Board had not yet filed the record in No. 13-2003. Accordingly, the Board moved to dismiss No. 13-2003, and to vacate and remand No. 12-3632. The Court granted the motions.

With both cases back before it, and acting with a quorum of Senate-confirmed members, the Board issued new decisions in which it “considered de novo the judge’s decision and the record in light of the exceptions and briefs.” (JA 38, 40.) Agreeing with the reasoning of the vacated decisions and orders, the Board in both cases affirmed the administrative law judges’ rulings, findings, and conclusions; adopted the judges’ recommended orders, as modified; and incorporated the prior decisions by reference. (JA 38, 40.)

STATEMENT OF THE ISSUES PRESENTED

1. Previously, in *Salem I*, the D.C. Circuit upheld the Board's certification of the Union and issued mandate, thereby establishing Salem's duty to bargain with the Union as the representative of Salem's registered nurses. Is Salem precluded from raising the same issues before this Court?

2. In its opening brief, Salem does not contest the Board's findings that it violated its duty to bargain with the Union by refusing to provide relevant and necessary information, by failing and refusing to bargain over employee discipline, and by unilaterally changing its dress code policy, all in violation of Section 8(a)(5) and (1) of the Act. Is the Board entitled to summary enforcement of its three Orders remedying those uncontested findings?

STATEMENT OF THE CASE

The facts underlying the Board's three unfair-labor-practice decisions, as well as the Board's conclusions underlying each of its three Orders, are undisputed. Summaries of those uncontested matters are set forth below.

I. THE BOARD'S FINDINGS OF FACT

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

Salem operates an acute-care hospital in Salem, New Jersey. (JA 32.) On September 1 and 2, 2010, the Board conducted an election at Salem's facility during which Salem's registered nurses selected the Union as their collective-

bargaining representative. (JA 33.) On August 3, 2011, the Board, after extensive proceedings in the underlying representation case, certified the Union as the exclusive bargaining representative of Salem's nurses. (JA 33.) To seek court review of the certification, Salem refused to bargain with the Union, which the Board found unlawful. *Salem*, 2011 WL 5976073, at *2. See *NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 105 (3d Cir. 1979) (explaining that representation cases are not directly reviewable; to obtain court review, an employer must first refuse to bargain). Salem petitioned for review of the Board's decision in the D.C. Circuit, and that court enforced the Board's order. *Salem I*, 808 F.3d at 62.

B. The Union Requests Bargaining and Information about Unit Employees and the Discipline Imposed Against Them; Salem Either Refuses or Ignores the Union's Requests

On August 15, 2011, following its certification as collective-bargaining representative, the Union contacted Salem's chief executive officer by letter. (JA 33.) The letter requested that the parties begin contract negotiations and included suggested dates for bargaining. In addition, the Union requested certain information in anticipation of bargaining, including a list of employees, employee wages and hours, and copies of hospital policies. (JA 33.) Two days later, Salem responded by refusing to provide the information and declining to bargain with the Union because it intended to challenge the Union's certification. (JA 33.)

On October 20, 2011, the Union sent Salem another letter, this time requesting bargaining over disciplinary measures taken against unit employees, including discharges, and requesting information about disciplined employees. (2013 WL 1192307, at *4.) The Union further stated that it was making an ongoing request for bargaining and for information regarding employees disciplined in the future. Salem did not respond to the Union's request. (*Id.*)

C. Salem Changes Its Longstanding Dress Code, the Union Requests Bargaining and Information, and Salem Ignores the Requests

In April 2012, Salem approved a revised dress code for nurses. (JA 27.) The new policy required color-coded uniforms, permitted only coordinating solid or print warm-up jackets, and imposed a new disciplinary process for dress code violations. (JA 28.) The new policy also represented a significant financial consequence to employees because it rendered useless many of their personal scrubs. (JA 28.) Under the old dress code policy, nurses had the freedom to choose their own scrubs; they also frequently wore clothing such as jackets and fleece to stay warm. (JA 33-34.) The old policy did not include disciplinary measures for dress code violations. (JA 33.)

Salem did not notify the Union of the changes. Instead, the Union learned of the changes from unit employees. (JA 28.) Thereafter, the Union twice requested information and bargaining, but Salem did not respond or provide any of the requested information. (JA 34.)

II. THE BOARD'S CONCLUSIONS AND ORDERS

On the foregoing facts, the Board issued three Orders finding that Salem violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. §158(a)(5) and (1). First, the Board (Chairman Pearce and Members Hirozawa and Johnson) found, in agreement with the administrative law judge, that Salem violated the Act by refusing the Union's August 15, 2011 demand for bargaining and request for information. (JA 38-39.) Second, the Board (Chairman Pearce and Members Hirozawa and Schiffer) found, in agreement with the administrative law judge, that Salem violated Section 8(a)(5) and (1) by failing to respond to the Union's October 20, 2011 demand for bargaining over, and request for information about, employee discipline. (JA 40-41.) Third, the Board (Chairman Pearce and Members Hirozawa and Schiffer) found, in agreement with the administrative law judge, that Salem violated Section 8(a)(5) and (1) by unilaterally changing its dress code policy and by refusing to provide the Union with requested information. (JA 27.)

The Board's Orders require Salem 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 the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. Affirmatively, the Orders direct Salem:

- To furnish the Union with the information it requested on August 15, 2011 (JA 38, 2012 WL 3111716 at *7);

- To furnish the Union with the information requested in its letter dated October 20, 2011, to the fullest extent allowed by law; and on request, bargain with the Union concerning discipline, including discharges (JA 40); and
- To notify the Union and bargain on request before implementing any changes in wages, hours, or other terms and conditions of employment; rescind the unlawful unilateral changes to the dress code; make unit employees whole for any losses incurred as a result of the unlawful unilateral changes to the dress code; and rescind any disciplinary action taken against unit employees for violating the new dress code; reinstate any employees discharged as a result of the change in dress code; make disciplined employees whole for any losses; remove any mention of discipline from employee files and notify employees that this has been done; and provide the requested information. (JA 29-30.)

Each Order also directs Salem to post a remedial notice and electronically distribute it to the employees. (JA 30, 40, 2012 WL 3111716, at *7.)

SUMMARY OF THE ARGUMENT

Salem devotes its entire brief to challenging the Board's certification of the Union. However, because the D.C. Circuit in *Salem I* upheld the validity of the certification in a final judgment and issued mandate, thereby conclusively establishing Salem's duty to bargain with the Union, Salem cannot now challenge the certification before this Court. Further, before the Court, Salem has failed to raise any direct challenge to the Board's unfair-labor-practice findings that it violated Section 8(a)(5) and (1) of the Act by refusing to provide information to the Union, refusing to bargain with the Union over discipline, and making unilateral changes to employees' terms and conditions of employment without giving the

Union notice and an opportunity to bargain. Accordingly, the Board is entitled to summary enforcement of its Orders.

STANDARD OF REVIEW

The Board's findings of fact are "conclusive" under Section 10(e) of the Act, 29 U.S.C. § 160(e), if supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951). The Court will "uphold the Board's conclusions of fact 'even if we would have made a contrary determination had the matter been before us de novo.'" *Mars Home for Youth v. NLRB*, 666 F.3d 850, 853 (3d Cir. 2011) (quoting *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001)). Here, however, where the key issue left for the Court's determination is whether the D.C. Circuit's *Salem I* decision has precluded all issues regarding the validity of the certification, the standard of review is de novo.

ARGUMENT

I. THE D.C. CIRCUIT’S DECISION IN *SALEM I* CONCLUSIVELY DECIDED THE VALIDITY OF THE CERTIFICATION, AND SALEM’S CHALLENGES ARE PRECLUDED FROM REVIEW

Instead of presenting a direct defense to the Board’s unfair-labor-practice findings, Salem instead attempts to challenge the validity of the Board’s certification of the Union a second time. Specifically, Salem argues (Br. 27-30) that the certification, although previously held valid by the D.C. Circuit in *Salem I*, is properly before the Court for a second review, and (Br. 30-54) that, contrary to *Salem I*, Salem was prejudiced by various rulings the Board made in the underlying representation proceeding. As Salem acknowledges (Br. 4, 17, 21, 25), however, it previously filed a petition for review in the D.C. Circuit to challenge the certification, and its brief to that court presented the same issues that Salem attempts to relitigate here. In *Salem I*, the D.C. Circuit considered—and rejected—each of Salem’s arguments, upheld the validity of the certification, and enforced the Board’s Order. *Salem I*, 808 F.3d at 62. Accordingly, the mandate of *Salem I* is res judicata for any challenge to the validity of the certification. *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 985 n.4 (3d Cir. 1984). *See, e.g., Glover Bottled Gas Corp. v. NLRB*, 47 F.3d 1230 (D.C. Cir. 1995) (per curiam) (finding that two issues raised by the employer “were actually decided by the Second Circuit, and [were], therefore, res judicata”). As shown below, the individual

issues Salem raises to the Court were decided by the D.C. Circuit and therefore are precluded from review.

As the Court has explained, the doctrine of issue preclusion prevents parties from relitigating an issue when (1) the party against whom preclusion is asserted was a party or in privity with a party in the prior adjudication, (2) the issue decided in the prior adjudication was identical to the one presented, (3) the party against whom preclusion is asserted had a full and fair opportunity to litigate the issue in the prior adjudication, and (4) the issue was necessarily determined by a final judgment on the merits. *See Peloro v. United States*, 488 F.3d 163, 174-75 (3d Cir. 2007) (quoting *Burlington Northern Railroad Co. v. Hyundai Merch. Marine Co.*, 63 F.3d 1227, 1231-32 (3d Cir. 1995)); *Witkowski v. Welch*, 173 F.3d 192, 199 (3d Cir. 1999). *Accord Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) (issue preclusion “foreclos[es] relitigation of a matter that has been litigated and decided”). All four requirements for issue preclusion are met here.

A. Salem Was a Party in the Prior Adjudication

Salem was a party in *Salem I*. Both cases—*Salem I* and the instant case—arise from Salem’s refusal to bargain with the Union following its certification in 2011. Salem admits (Br. 4, 17, 21, 25) it filed the petition for review against the Board in *Salem I* to test the Union’s certification. The Board sought enforcement of the three subsequent unfair-labor-practice orders against Salem in this Court.

Therefore, Salem, the party against whom estoppel is being asserted, and the Board were parties in *Salem I* and are parties here.

B. The Issues Decided in *Salem I* Are Identical to Salem’s Arguments Here

The issues Salem raises in its opening brief to this Court are the same issues it argued to the D.C. Circuit in *Salem I*. Before this Court, Salem argues that the Board prematurely closed the underlying representation proceeding (Br. 30-41), that the Board prejudiced Salem by granting the Union’s special appeal and refusing to consider Salem’s objections (Br. 41-49), and that the Board prejudiced Salem by precluding its supervisory taint defense (Br. 49-54). Salem raised the same issues in its brief to the D.C. Circuit in *Salem I*. See Brief for Petitioner, *Salem Hosp. Corp. v. NLRB* (D.C. Cir. Nos. 11-1466, 12-1009), 2012 WL 5927380, at * 21-28 (premature closure of the record), * 33-37 (Union’s special appeal and rulings by the Board and Regional Director on Salem’s objections to the election), * 37-42 (supervisory taint as a defense).

The D.C. Circuit explicitly rejected each of these arguments. Regarding the closure of the record, the court found that Salem did not seek to introduce “relevant, non-cumulative evidence,” and it was not, therefore, prejudiced by the decision to close the record. *Salem I*, 808 F.3d at 68. Similarly, the court provided “at least three reasons” Salem was not prejudiced by the Board’s decision to grant the Union’s special appeal or the Board’s rulings regarding Salem’s objections:

Salem’s objections, which related to the supervisory status of charge nurses, had already been litigated before the Board; the Board had already determined that Salem’s objections constituted relitigation (prohibited under the Board’s rules); and any prejudice was cured when the Board considered Salem’s motion for reconsideration prior to certifying the Union. *Id.* at 72.

Finally, the court rejected Salem’s “recycle[d]” argument that the Board prevented it from relitigating the issue of the charge nurses’ supervisory status. *Id.* at 73. The court found that Salem had “already litigated—and lost” the issue in the representation proceeding, and, in any event, “substantial evidence supports the Board’s conclusion that the [charge nurses] were not supervisors.” *Id.* at 73-74.

C. Salem Had a Full and Fair Opportunity To Litigate These Issues in the Prior Adjudication

Salem had a full and fair opportunity to litigate these issues—and exercised this opportunity both before the Board and before the D.C. Circuit. During the proceedings before the Board, Salem:

- Participated in a pre-election hearing to determine the supervisory status of Salem’s charge nurses. *Id.* at 64.
- Filed an unfair-labor-practice charge against the Union alleging supervisory taint. *Id.* at 64-65.
- Filed an appeal of the Regional Director’s decision, based on the insufficiency of Salem’s evidence, not to issue complaint against the Union in connection with Salem’s supervisory taint charge. *Id.* at 65.
- Filed a request for review of the Regional Director’s decision and direction

of election in which she concluded that all but two of Salem's charge nurses were not supervisors; Salem argued, among other things, that the closure of the pre-election hearing was premature and that the alleged supervisors tainted the election. *Id.*

- Filed 20 objections to the election, which included Salem's claims regarding the charge nurses' supervisory status, supervisory taint of the election, and premature closure of the record. *Id.*
- Filed an opposition to the Union's request for special permission to appeal (which argued that the Regional Director erroneously set Salem's objections 1-16 for hearing). *Id.* at 66.
- Moved for reconsideration of the Board's decision to grant the Union's special appeal and appealed the Regional Director's administrative dismissal of objections 1-16. *Id.*
- Participated in a hearing before an administrative law judge on Salem's objections 18-20 to the election. *Id.* at 65.
- Filed 7 exceptions to the administrative law judge's decision. *Id.* at 66.
- Filed an answer to the General Counsel's complaint that Salem unlawfully refused to bargain and argued that: the Board should have sustained Salem's objections to the election, the Board should not have granted the Union's special appeal, the General Counsel should have issued a complaint in connection with Salem's supervisory taint charge, and the Board failed to rule on Salem's appeal of the Regional Director's dismissal of its Objections 1-16 to the election. *Id.* at 67.

The Board ultimately rejected Salem's arguments and certified the Union.

As described above (pp. 13-14), Salem contested the Board's rulings before the D.C. Circuit. That court, while finding the Board's proceedings to be irregular in several instances, rejected Salem's claim that it did not have a fair opportunity to contest the Union's certification. *Id.* at 62. Because it determined that "Salem

failed to establish that it was prejudiced” by the Board’s rulings, the court denied Salem’s petition for review and enforced the Board’s order. *Id.*

D. The D.C. Circuit Determined the Issues by a Final Judgment on the Merits

The D.C. Circuit’s decision in *Salem I* is a final judgment on the merits. *See* 808 F.3d at 74 (denying Salem’s petition for review and granting the Board’s cross-application for enforcement). After the regular period for filing petitions for rehearing had passed, the Court issued the mandate on February 10, 2016. It is “settled law that the mandate of a court issuing a final judgment carries force beyond a victory in that immediate court.” *Qualcomm, Inc. v. FCC*, 181 F.3d 1370, 1378 (D.C. Cir. 1999). *See also Venetian Casino Resort, L.L.C. v. NLRB*, 484 F.3d 601, 609 (D.C. Cir. 2007) (finding casino precluded from arguing that it had a property interest in a sidewalk sufficient to allow it to exclude pro-union demonstrators because Ninth Circuit had already decided the issue).

Further, Salem’s argument (Br. 8) that the D.C. Circuit wrongly decided *Salem I* is “irrelevant” to the Court’s collateral estoppel analysis. *Raytech Corp. v. White*, 54 F.3d 187, 193 n.7 (3d Cir. 1995). As the Supreme Court has explained, “[a] judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action].” *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (quoting *Baltimore S.S. Co. v.*

Phillips, 274 U.S. 316, 325 (1927)). Salem’s proper course, then, would have been to file a petition for rehearing with the D.C. Circuit—not to argue the same claims decided by that court here. *See Raytech Corp.*, 54 F.3d at 193 n.7 (proper recourse for party challenging decision of a district court in Oregon was appeal to Ninth Circuit and Supreme Court).

Finally, Salem’s procedural suggestion (Br. 28) that these cases should have been deferred until after *Salem I* was decided is beside the point. As the Board pointed out in its initial brief to the Court in *NLRB v. Salem Hospital Corp.*, No. 12-3632, “[t]he outcome of this case is . . . contingent upon the D.C. Circuit upholding the Board’s certification of the Union in *Salem I*.” Brief of the National Labor Relations Board, *NLRB v. Salem Hosp. Corp.* (No. 12-3632), 2013 WL 5996632, at *2-3. The Board’s applications for enforcement were effectively stayed during the pendency of the D.C. Circuit’s proceedings in *Salem I*,² and are now being decided after the D.C. Circuit’s decision. The fact that Salem’s petition for review in the D.C. Circuit, and the Board’s applications for enforcement in this Circuit, were pending at the same time, was of no consequence. *See, e.g., Int’l Molders & Allied Workers Union, AFL-CIO v. NLRB*, 410 F.2d 1061, 1063 & n.4

² The Board filed applications for enforcement on August 13, 2014 (No. 14-3622), November 6, 2014 (No. 14-4440), and February 4, 2015 (No. 15-1353). The D.C. Circuit issued its decision in *Salem I* on December 15, 2015. One month later, on January 20, 2016, the Court issued its first briefing notice in these cases.

(D.C. Cir. 1969) (per curiam) (holding in abeyance determination whether employer unlawfully refused to bargain with union over wages and job changes because case was contingent on Fifth Circuit’s resolution of validity of union’s certification).

II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNFAIR-LABOR-PRACTICE ORDERS

In its opening brief, Salem stakes its entire defense on its attempt to relitigate issues already decided by the D.C. Circuit and abandons any challenge to the Board’s findings that it violated the Act by refusing to provide relevant and necessary information to the Union, refusing to bargain over employee discipline, and unilaterally changing employees’ terms and conditions of employment.

Under well-settled law, an employer violates Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), the Act when it “refuse[s] to bargain collectively with the representatives of [its] employees.” *Resorts Int’l Hotel Casino v. NLRB*, 996 F.2d 1553, 1556 (3rd Cir. 1993) (quoting 29 U.S.C. § 158(a)(5)).³ The duty to bargain includes the obligation to provide its employees’ bargaining representative with information relevant and necessary for the performance of its duties as representative and to refrain from making unilateral

³ See also *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983) (a violation of Section 8(a)(5) of the Act results in a “derivative” violation of Section 8(a)(1)).

changes to the terms and conditions of employment. *See id.* (finding that employer violated the Act by failing to provide information necessary for processing grievances); *NLRB v. New Jersey Bell Tel. Co.*, 936 F.2d 144, 150 (3d Cir. 1991) (same); *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 233 (3d Cir. 2001) (finding that employer violated the Act by making unilateral changes to employees' terms and conditions of employment without first bargaining with the union).

Salem's failure to contest the Board's findings that it unlawfully refused to bargain constitutes a waiver of any direct defense on the merits and warrants summary enforcement of the Board's Orders. *See, e.g., Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) (failure to raise argument in opening brief results in abandonment of argument). Indeed, where a party fails to challenge the Board's findings in its opening brief, the Court will "accept [those findings] as true." *NLRB v. Konig*, 79 F.3d 354, 356 n.1 (3d Cir. 1996). Moreover, by not raising the issues in its opening brief, Salem has abandoned these arguments and may not raise them later in the reply brief. *Kost*, 1 F.3d at 182 n.3 (arguments waived if raised for the first time in reply brief). Thus, because Salem failed to challenge the merits of the Board's unfair-labor-practice findings in its opening brief, the Court should "accept [those findings] as true" and grant summary enforcement of the Board's Orders.

In sum, where, as here, the requirements for issue preclusion are met, that doctrine “protects [parties] from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Montana v. United States*, 440 U.S. 147, 153-54 (1979). Salem’s arguments that this Court should overturn the Union’s certification are precisely the same issues, involving the identical parties that were fully litigated before the D.C. Circuit in *Salem I*, and cannot be relitigated here. Because Salem has failed to present any substantive merits argument with regard to the Board’s Orders and instead presents only arguments already decided by the D.C. Circuit, the Board’s Orders are entitled to summary enforcement. Given the lack of viability of this litigation stance, once again, Salem has taken an approach that suggests that it is merely seeking “the inevitable delay that review of Board orders affords.” *Salem I*, 808 F.3d at 68 n.13 (quoting *San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1188 (D.C. Cir. 2012)).

CONCLUSION

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

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April 2016

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

NATIONAL LABOR RELATIONS BOARD	*
	*
Petitioner	* Nos. 14-3622,
	* 14-4440,
v.	* 15-1353
	*
SALEM HOSPITAL CORP. A/K/A	* Board Case No.
THE MEMORIAL HOSPITAL OF SALEM COUNTY	* 04-CA-097635
	*
Respondent	*
	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 4,599 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that: the electronic version of the Board’s brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; 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 12th day of April, 2016

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

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

SALEM HOSPITAL CORP. A/K/A
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*
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CERTIFICATE OF BAR MEMBERSHIP

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

s/ Kellie Isbell

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Dated at Washington, DC
this 12th day of April, 2016

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	*

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that the 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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