

**Nos. 15-1445, 15-1501**

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

**AMERICAN BAPTIST HOMES OF THE WEST  
d/b/a PIEDMONT GARDENS  
Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD  
Respondent/Cross-Petitioner**

**and**

**SERVICE EMPLOYEES INTERNATIONAL UNION,  
UNITED HEALTHCARE WORKERS – WEST  
Intervenor**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

**A. Parties, Intervenors, and Amici:** American Baptist Homes of the West d/b/a Piedmont Gardens was the respondent before the Board and is the petitioner/cross-respondent before the Court. SEIU United Healthcare Workers—West was the charging party before the Board and is the intervenor before the Court. The Board's General Counsel was also a party before the Board.

**B. Rulings Under Review:** This case is before the Court on Piedmont's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board on June 26, 2015 and reported at 362 NLRB No. 139, which incorporates by reference an earlier Board decision issued on December 15, 2012, and reported at 359 NLRB No. 46. The Board's 2015 decision may be found at pages 151-68 of the joint appendix, and the Board's 2012 decision may be found at pages 132-50 of the joint appendix.

**C. Related Cases:** The ruling under review has previously been before the Court. On December 15, 2012, the Board (Chairman Pearce and Members Hayes, Griffin, and Block) issued a Decision and Order against Piedmont, reported at 359 NLRB No. 46. Piedmont filed a petition for review with this Court (No. 13-1011). 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 of Members Griffin and Block were not valid. The Board subsequently vacated its Decision and Order against Piedmont and filed a motion to dismiss Piedmont's petition for review, which the Court granted. Following that dismissal, the Board issued the decision on review here, which incorporates the earlier decision by reference.

The decision under review here has also been previously before another court. After the Board issued its 2015 decision, the Union petitioned for review in the Ninth Circuit (9th Cir. No. 15-72120), and Piedmont filed a petition for review with this Court. The Judicial Panel on Multidistrict Litigation transferred Piedmont's case to the Ninth Circuit. Subsequently, Piedmont moved to dismiss the Union's petition for review for lack of aggrievement and standing. Granting Piedmont's motion, the Ninth Circuit dismissed the Union's petition and transferred Piedmont's petition and the Board's cross-application to this Court.

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of American Baptist Homes of the West d/b/a Piedmont Gardens (“Piedmont”) to review, and the cross-application

of the National Labor Relations Board to enforce, a Board Order issued against Piedmont. In its Order, the Board found that Piedmont violated the National Labor Relations Act by failing to provide Service Employees International Union, United Healthcare Workers-West (“the Union”), with information necessary to process a grievance. (JA 157.)<sup>1</sup> The Board’s Decision and Order issued on June 26, 2015, and is reported at 362 NLRB No. 139. (JA 151-68.) This decision incorporates by reference an earlier decision issued on December 15, 2012, and reported at 359 NLRB No. 46. (JA 132-50.)

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the Act, 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e), 29 U.S.C. § 160(e), which allows the Board, in that circumstance, to cross-apply for enforcement.

The Union filed a petition for review in the Ninth Circuit on July 2, 2015 (9th Cir No. 15-72120). Piedmont filed a petition for review with this Court on July 6. The Judicial Panel on Multidistrict Litigation transferred Piedmont’s case to the Ninth Circuit. The Board cross-applied for enforcement in the Ninth Circuit

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<sup>1</sup> “JA” refers to the parties’ joint appendix, and “Br.” refers to Piedmont’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

on July 23 (9th Cir. No. 15-72242). Subsequently, Piedmont moved to dismiss the Union's petition for review for lack of aggrievement and standing. Granting Piedmont's motion, the Ninth Circuit dismissed the Union's petition and transferred Piedmont's petition and the Board's cross-application to this Court on December 7, 2015. The Union has intervened on behalf of the Board before this Court. Both Piedmont's petition and the Board's cross-application are timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

### **RELEVANT STATUTORY AND REGULATORY PROVISIONS**

Relevant sections of the National Labor Relations Act and the Board's rules and regulations are reproduced in the Addendum to this brief.

### **STATEMENT OF THE ISSUES PRESENTED**

In the Decision and Order under review, the Board overruled a prior decision that exempted witness statements from the general rule that employers must provide collective-bargaining representatives with relevant information upon request, so long as the witnesses received an assurance of confidentiality. The Board held that, in future cases, it would apply a balancing test to determine whether such statements must be provided. The Board did not apply the new standard to Piedmont. Applying the old standard, the Board found that Piedmont violated the Act by refusing to provide the Union with charge nurse Lynda Hutton's witness statements because she did not receive an assurance of

confidentiality. The Court's review of Piedmont's petition turns on the following issues:

1. Does substantial evidence support the Board's finding that Hutton provided her statements without receiving an assurance of confidentiality, and Piedmont, therefore, violated the Act by failing to provide the Union with those statements?

2. Does the Court lack jurisdiction to consider Piedmont's attacks on the Board's new standard with regard to witness statements when that standard was not applied to Piedmont, and accordingly (1) Piedmont has no standing to challenge that portion of the Board's decision because it is not aggrieved, and (2) the issue is not ripe for review?

## **STATEMENT OF THE CASE**

### **I. THE PROCEDURAL HISTORY**

Acting on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that Piedmont violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by failing to provide the Union with names, job titles, and written statements of three employees who claimed they witnessed another employee engaging in misconduct. (JA 151.) After a hearing, an administrative law judge found that Piedmont violated the Act

by failing to provide the requested names and job titles, and dismissed the allegation regarding the witness statements.

On December 15, 2012, the Board (Chairman Pearce and Members Hayes, Griffin, and Block) issued a Decision and Order against Piedmont, reported at 359 NLRB No. 46. Piedmont petitioned this Court for review (No. 13-1011). On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held that three recess appointments to the Board in January 2012, including those of Members Griffin and Block, were invalid under the Recess Appointments Clause. Following the Supreme Court's decision, the Board vacated its Decision and Order against Piedmont, and the Court dismissed Piedmont's challenge to that Order.

On June 26, 2015, a properly constituted Board (Chairman Pearce, and Members Miscimarra, Hirozawa, Johnson, and McFerran) issued the Decision and Order now before the Court. The Board "considered de novo the judge's decision and the record in light of the exceptions and briefs," as well as the now-vacated 2012 Decision and Order. (JA 151 n.1.) In its Order, the Board adopted the judge's rulings, findings, and conclusions in part, reversed them in part, and adopted the judge's recommended order as modified. (JA 151.)

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

### **A. Employee Bariuad's Alleged Misconduct Is Reported to Piedmont**

Piedmont is a continuing care retirement community in Oakland, California. (JA 142; JA 65.) The Union represents a unit of Piedmont's employees, which includes certified nursing assistants. (JA 142; JA 7.)

In June 2011, newly hired charge nurse Barbara Berg reported to the director of assisted living, Alison Tobin, that she had seen certified nursing assistant Arturo Bariuad sleeping on the job. (JA 142 & n.7; JA 78.) Tobin asked Berg to provide a written statement about the incident, which Berg did. (JA 142-43; JA 78-79.)

Tobin then asked certified nursing assistant Rhonda Burns, who worked the same shift as Berg and Bariuad, to write a statement documenting any times she had noticed Bariuad sleeping on the job. (JA 143, 152; JA 28.) Burns prepared the statement and slipped it under Tobin's door. (JA 143; JA 30.)

Charge nurse Lynda Hutton, who had been training new employee Berg, also provided an unsolicited written statement after learning that Berg had done so. (JA 144, 152; JA 37-39.) Tobin then asked Hutton for a second statement because the dates in her first statement were inconsistent with the statements of Berg and Burns. (JA 142 n.6; JA 81.) Piedmont later disciplined Hutton for failing to report Bariuad's alleged misconduct sooner. (JA 144; JA 41.)

Piedmont's practice is to tell employee witnesses during investigations that their statements will be kept confidential. The practice is not documented in a written policy, nor is it posted for employees. (JA 143, 145; JA 69, 71.) When Tobin asked Burns and Berg to prepare written statements about Bariudad's alleged misconduct, she assured them that the statements would be kept confidential. (JA 142-43; JA 29, 82.) Hutton provided her statement on her own initiative without receiving the same assurance of confidentiality from Tobin. (JA 144; JA 38, 40.) None of the three employees who provided written statements requested confidentiality. (JA 143, 144, 152; JA 29, 40, 49, 82.)

**B. Piedmont Fires Bariudad, the Union Requests Witness Information and Statements, and Piedmont Refuses to Provide Them**

After reviewing the witness statements, Piedmont fired Bariudad for allegedly sleeping on the job. (JA 144; JA 7.) The Union requested that Piedmont provide certain information, including the names and job titles of everyone involved in the investigation and copies of all witness statements used in the investigation. The Union then filed a grievance over Bariudad's firing. (JA 144; JA 93-94.)

Piedmont provided some of the information the Union requested but refused to provide the names and job titles of witnesses or the witness statements. In its response, Piedmont cited as support Board case law on witness statements, including *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978). (JA 144-45; JA 96-97.) The Union submitted a second request for information, again asking for witness

names and statements, in order to verify the accuracy of the facts underlying Bariuad's firing. (JA 145; JA 12, 98.) Piedmont never provided the witness names or statements to the Union. (JA 145; JA 36-38.)

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

On the foregoing facts, the Board (Chairman Pearce, and Members Miscimarra, Hirozawa, Johnson, and McFerran) affirmed the administrative law judge's findings in part and reversed them in part. In agreement with the judge, the Board found that Piedmont violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with the names and job titles of witnesses to the alleged employee misconduct. (JA 151, 156.) Further, in the absence of exceptions, the Board adopted the judge's finding that Piedmont did not violate the Act by refusing to provide the witness statements of Berg and Burns. (JA 157.) With regard to the statements of witness Hutton, however, the Board found in disagreement with the judge (Member Miscimarra, dissenting) that Piedmont violated the Act by failing to provide them to the Union. (JA 151 n.2, 157.) The Board's Order requires Piedmont 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. (JA 157.) Affirmatively, the Order directs Piedmont to provide the Union with the names and job titles of the witnesses against Bariuad as well as the witness statements of

Hutton. (JA 157.) Contrary to the administrative law judge, the Board found that the violations did not warrant a public reading of the Board’s remedial notice. (JA 151 n.3.)

Further, the Board (Members Miscimarra and Johnson, dissenting) overruled *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), under which witness statements had previously been exempt from disclosure, and detailed a new policy. Under the new policy, the Board would apply the balancing test set out in *Detroit Edison v. NLRB*, 440 U.S. 301 (1979), and balance the union’s need for the requested information against any “legitimate and substantial confidentiality interests established by the employer.” (JA 151.) The Board (Chairman Pearce, and Members Miscimarra, Hirozawa, Johnson, and McFerran) found that the new rule should be applied prospectively only and applied the prior *Anheuser-Busch* standard to Piedmont’s conduct. (JA 151 n.2, 156.)

### **SUMMARY OF ARGUMENT**

Under *Anheuser-Busch*, witness statements are exempt from disclosure if provided under an assurance of confidentiality. While it was Piedmont’s practice to provide assurances of confidentiality to witnesses, charge nurse Lynda Hutton provided her statements regarding Bariudad’s alleged sleeping on the job without receiving an assurance of confidentiality. Although Piedmont claims that Hutton provided the statements because she could no longer tolerate Bariudad’s misconduct

and because she was prompted to do so by Piedmont's confidentiality practice, substantial evidence supports the Board's findings that Hutton provided her statements only after learning that others had reported Bariuad first and because she wanted to avoid more severe discipline for failing to report Bariuad sooner. In those circumstances, the Board reasonably found that Hutton's statements were not confidential under *Anheuser-Busch*, and Piedmont violated the Act by failing to provide them to the Union. Further, the Board is entitled to summary enforcement of its finding that Piedmont violated the Act by failing to provide the Union with witness names and job titles because Piedmont no longer challenges that finding.

While the Board overruled the *Anheuser-Busch* standard and stated that it will apply a different standard in future cases, it still applied *Anheuser-Busch* in this case. Accordingly, because the change in law was not applied to Piedmont, the Court has no jurisdiction to consider Piedmont's claim that the Board improperly overruled *Anheuser-Busch*. Piedmont has no standing to challenge that portion of the Board's Order, and such a challenge is not yet ripe for review, because the Board applied the new standard prospectively only. The Act permits only a party "aggrieved" by a Board order to petition for review. A party is aggrieved if it suffers an injury that is certainly impending and immediate—not remote, speculative, conjectural, or hypothetical. Any concrete injury to Piedmont's interests would only occur, if at all, in a future proceeding if Piedmont again

refuses to provide a witness statement pursuant to a relevant request from the Union. Similarly, the Board's new rule is not ripe for judicial review because it has had no direct and immediate effect on Piedmont nor has Piedmont demonstrated that it will suffer a hardship from postponement of review.

### **STANDARD OF REVIEW**

This Court's review of Board decisions "is quite narrow."<sup>2</sup> The Court "applies the familiar substantial evidence test to the Board's findings of fact and application of law to the facts."<sup>3</sup> Under that standard, a reviewing court may not "displace the Board's choice between two fairly conflicting views of the facts, even though the court would justifiably have made a different choice had the matter been before it de novo."<sup>4</sup> When reviewing the Board's order, the Court grants deference to the Board's findings and the "reasonable inferences that the Board draws from the evidence."<sup>5</sup> The Court will uphold the Board's legal conclusions if they are "reasonable and consistent with controlling precedent."<sup>6</sup>

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<sup>2</sup> *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

<sup>3</sup> *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998).

<sup>4</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

<sup>5</sup> *U.S. Testing*, 160 F.3d at 19.

<sup>6</sup> *Cintas Corp. v. NLRB*, 482 F.3d 463, 468 (D.C. Cir. 2007).

When the Board engages in “the ‘difficult and delicate responsibility’ of reconciling conflicting interests of labor and management . . . , the balance struck by the Board is ‘subject to limited judicial review.’”<sup>7</sup> In particular, balancing the interests of employers and unions with regard to the need for information about investigatory witnesses “is a task delegated by Congress to the wisdom and expertise of the Board in the first instance.”<sup>8</sup>

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT PIEDMONT UNLAWFULLY FAILED TO PROVIDE THE UNION WITH RELEVANT INFORMATION**

#### **A. An Employer Violates Its Duty To Bargain Under the Act by Refusing To Provide the Union with Information Relevant to the Investigation of Grievances or the Enforcement of a Collective-Bargaining Agreement**

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to “refuse to bargain collectively with the representatives of [its] employees.”<sup>9</sup> An employer’s statutory duty to bargain includes the obligation “to provide information that is needed by the bargaining representative for the proper

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<sup>7</sup> *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (quoting *NLRB v. Teamsters Local 449*, 353 U.S. 87, 96 (1957)).

<sup>8</sup> *NLRB v. New Jersey Bell Tel. Co.*, 936 F.2d 144, 153 (3d Cir. 1991).

<sup>9</sup> 29 U.S.C. § 158(a)(5).

performance of its duties.”<sup>10</sup> The failure to furnish such information thus violates Section 8(a)(5) and, derivatively, Section 8(a)(1).<sup>11</sup>

The threshold question in determining an employer’s obligation to furnish requested information is one of relevance.<sup>12</sup> The Supreme Court has adopted a liberal, discovery-type standard by which the relevance of requested information is to be judged.<sup>13</sup> Information related to the investigation of potential grievances falls comfortably within this definition.<sup>14</sup>

Once the union’s need for the requested information is established, it must be produced unless the employer can demonstrate, for example, a legitimate and substantial countervailing confidentiality interest that might be compromised by disclosure.<sup>15</sup> When an employer asserts a confidentiality interest, the Board

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<sup>10</sup> *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1977). *Accord N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011).

<sup>11</sup> *See Crowley Marine Servs., Inc. v. NLRB*, 234 F.3d 1295, 1296 (D.C. Cir. 2000).

<sup>12</sup> *See N.Y. & Presbyterian Hosp.*, 649 F.3d at 730.

<sup>13</sup> *Acme Indus.*, 385 U.S. at 437 & n.6. *Accord Local 13, Detroit Newspaper Printing & Graphic Commc’ns Union, Int’l Printing & Graphic Commc’ns Union, AFL-CIO v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979).

<sup>14</sup> *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 443 (D.C. Cir. 2002) (citing *Acme Indus.*, 385 U.S. at 437-38).

<sup>15</sup> *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315, 318-320 (1979). *Accord Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 354, 359 (D.C. Cir. 1983).

applies a balancing test set out by the Supreme Court in *Detroit Edison Co. v. NLRB*, and weighs the union’s need for the information against any legitimate and substantial confidentiality interests established by the employer.<sup>16</sup> The Board’s determination whether requested information should be produced is entitled to “great deference.”<sup>17</sup>

The Board applies the *Detroit Edison* test to requested information such as witness names.<sup>18</sup> But in *Anheuser-Busch*, the Board exempted witness statements, where witnesses received assurances of confidentiality, from the employer’s general obligation to provide relevant information to the collective-bargaining representative.<sup>19</sup> The Board relied on the Supreme Court’s discussion in *NLRB v. Robbins Tire and Rubber Co.*,<sup>20</sup> of the potential for employer and union intimidation of potential witnesses, as well as the possibility that witnesses might

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<sup>16</sup> See *Detroit Edison*, 440 U.S. at 318-19. See also *Oil, Chem. & Atomic Workers*, 711 F.2d at 362.

<sup>17</sup> *Crowley Marine*, 234 F.3d at 1297.

<sup>18</sup> See *Pa. Power & Light Co.*, 301 NLRB 1104, 1105-06 (1991).

<sup>19</sup> *HTH Corp.*, 361 NLRB No. 65 (2014), slip op. at 48, *enforced in relevant part*, \_\_\_ F.3d \_\_\_, 2016 WL 2941936 (D.C. Cir. May 20, 2016) (No. 14-1222); *El Paso Elec.*, 355 NLRB 428, 428 n.3, 458 (2010), *enforced*, 681 F.3d 651 (5th Cir. 2012); *New Jersey Bell Tel. Co.*, 300 NLRB 42, 43 (1990), *enforced*, 936 F.2d 144 (3rd Cir. 1991).

<sup>20</sup> 437 U.S. 214 (1978).

be reluctant to give statements absent assurances of confidentiality.<sup>21</sup> Applying those principles and as shown below, the Board reasonably determined (JA 157) that Hutton's statements were not witness statements within the meaning of *Anheuser-Busch*, and therefore, Piedmont violated the Act by refusing to provide them to the Union.

**B. Substantial Evidence Supports the Board's Finding that Hutton's Witness Statements Were Not Confidential and, Therefore, Piedmont Had an Obligation To Provide Them to the Union**

As Piedmont acknowledges (Br. 43), *Anheuser-Busch* does not provide an unlimited exemption for all witness statements. Rather, employers are exempt from providing witness statements only where witnesses have received assurances of confidentiality. Substantial evidence supports the Board's finding that Hutton provided her initial statement without receiving any assurance of confidentiality. (JA 144, 157.) Unlike Berg and Burns, Hutton wrote her initial statement on her own initiative. (JA 144, 157; JA 38.) Berg and Burns received explicit assurances of confidentiality from Tobin, the director of assisted living, when Tobin requested their statements. (JA 142-43; JA 29, 78.) In contrast, as the Board found, "at no time was Hutton given any affirmative assurance that her statements would be kept confidential." (JA 157; JA 40.) Thus, the Board reasonably determined that under

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<sup>21</sup> *Anheuser-Busch, Inc.*, 237 NLRB 982, 984 (1978).

*Anheuser-Busch*, Hutton’s statements were not confidential because she did not receive an assurance of confidentiality.

Piedmont’s claim (Br. 44) that the Board “invent[ed]” the requirement that witnesses must be assured of confidentiality fails to mention prior Board cases holding that such an assurance is necessary.<sup>22</sup> To the extent that Piedmont argues (Br. 42, 43-44) that the Board’s finding of a violation was “legally erroneous” because Board law does not require an “affirmative” assurance of confidentiality and because Piedmont’s practice of providing assurances of confidentiality would meet any such requirement, the Court lacks jurisdiction to consider that argument because it was not first raised to the Board in a motion for reconsideration.<sup>23</sup>

Where it failed to provide an assurance of confidentiality to Hutton, as required by Board law, Piedmont relies on its unpublished confidentiality practice to argue (Br. 44) that her statements should still be exempt from disclosure, suggesting that its

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<sup>22</sup> *El Paso Elec.*, 355 NLRB at 428 n.3, 458; *New Jersey Bell*, 300 NLRB at 43. *See also HTH Corp.*, 361 NLRB No. 65, slip op. at 48.

<sup>23</sup> *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (appellate court lacked jurisdiction to hear aggrieved party’s challenge to Board decision on issue not expressly presented to Board by parties, in absence of motion for reconsideration); 29 C.F.R. § 102.48(d)(1) (“A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order”). *Accord Noel Foods Div., Noel Corp. v. NLRB*, 82 F.3d 1113, 1120-21 (D.C. Cir. 1996) (employer waived judicial review of issue where it “had the opportunity, and therefore the obligation, to raise its objections in a timely petition for rehearing or reconsideration”).

practice can substitute for an actual assurance of confidentiality. It cites no authority for this notion. It also cites no authority for its related position (Br. 44) that it need not have provided an assurance to Hutton at all because, based on the unwritten practice, she *believed* her statement would be confidential. Board law speaks to assurances from the employer, not merely the witness's belief or assumptions about confidentiality.<sup>24</sup>

Piedmont fares no better with its claim (Br. 45) that Hutton reported Bariudad because she could no longer tolerate his sleeping on the job. The Board specifically found that Hutton only reported Bariudad's alleged misconduct when she discovered that Berg, the new charge nurse in training, had reported it first. (JA 146; JA 36, 38-39.) Hutton then "voluntarily submitted her own statement to avoid being disciplined more severely for ignoring Bariudad's alleged repeated misconduct." (JA 146 n.14.)

Moreover, the Board rejected Hutton's attempts to cast Bariudad as a threat and to suggest that she needed confidentiality to protect herself. Specifically, the Board rejected as not credible Hutton's testimony that because she was afraid of Bariudad, she would not have written her first statement without a belief that Piedmont would keep the statement confidential. (JA 142, 146; JA 44-45.) While

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<sup>24</sup> *HTH Corp.*, 361 NLRB No. 65, slip op. at 48; *El Paso Elec.*, 355 NLRB at 428 n.3, 458; *New Jersey Bell*, 300 NLRB at 43.

relying on discredited testimony for its version of the facts (Br. 11), Piedmont does not challenge the Board’s credibility determination. Piedmont, by failing to argue this point in the argument section of its brief, has waived it.<sup>25</sup>

Finally, Piedmont misconstrues the Board’s decision when it argues (Br. 44) that the Board erred by finding that Hutton was required to report misconduct as part of her job duties. Contrary to Piedmont’s claim, the Board did not find that Hutton’s expectation of confidentiality was obviated by her job duties. Rather, the Board merely rejected Piedmont’s factual claim that Hutton was prompted to give her statements because of its confidentiality practice. The Board found that Hutton provided her statements, not because of the confidentiality practice, but because she was required to report employee misconduct. (JA 157.) In those circumstances, the Board reasonably determined that Hutton’s statements were not confidential under *Anheuser-Busch* and that Piedmont violated Section 8(a)(5) and (1) of the Act by refusing to provide them to the Union.

**C. The Board Is Entitled to Summary Enforcement of Its Uncontested Finding that Piedmont Violated the Act by Failing to Provide the Names and Job Titles of Employee Witnesses**

The Board affirmed the administrative law judge’s finding that Piedmont failed to establish a legitimate and substantial confidentiality interest in the names

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<sup>25</sup> *AMSC Subsidiary Corp. v. F.C.C.*, 216 F.3d 1154, 1161 n.\*\* (D.C. Cir. 2000) (deeming waived argument “alluded to” in statement of facts but not argued until reply brief).

and job titles of employee witnesses to alleged misconduct that “did not involve unsafe conduct, criminal activity, threats or harassment.” (JA 148.) The Board thus found that Piedmont’s failure to provide the witness names and job titles violated Section 8(a)(5) and (1) of the Act. (JA 151.) Piedmont no longer challenges (Br. 4 n.1) this finding. Accordingly, the Court should summarily enforce the relevant portion of the Board’s Order.<sup>26</sup>

**II. THE COURT LACKS JURISDICTION TO CONSIDER PIEDMONT’S CHALLENGES TO THE BOARD’S NEW STANDARD FOR DETERMINING WHETHER WITNESS STATEMENTS ARE CONFIDENTIAL BECAUSE PIEDMONT LACKS STANDING TO CHALLENGE THAT PORTION OF THE BOARD’S ORDER AND BECAUSE ITS CHALLENGE IS NOT RIPE FOR REVIEW**

In its decision (JA 151), the Board overruled *Anheuser-Busch*’s exemption for witness statements and determined that, in the future, it would apply the same test it applies in all other cases involving assertions that requested information is confidential: the balancing test set forth in *Detroit Edison Co. v. NLRB*.<sup>27</sup> Under that test, the Board will balance the Union’s need for the information against the employer’s “legitimate and substantial confidentiality interests.” (JA 151.) The Board, however, did not apply this new standard to Piedmont.

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<sup>26</sup> See *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006); *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 885 (D.C. Cir. 1997).

<sup>27</sup> 440 U.S. 301 (1979).

As the petitioning party, Piedmont has the burden of demonstrating that it has properly invoked this Court’s jurisdiction.<sup>28</sup> As shown below, Piedmont failed to meet that burden because it lacks standing to challenge the portion of the Board’s Order that overrules *Anheuser-Busch* and because the issue is not ripe for review.

**A. The Principles of Standing Require Piedmont To Demonstrate a Concrete and Particularized Injury that Is Not Conjectural**

In order to have standing to seek judicial review, a petitioner must, in accordance with Article III of the Constitution, present a case or controversy.<sup>29</sup> A petitioner meets this standard if it alleges that the challenged action caused it “injury in fact.”<sup>30</sup> Section 10(f) of the Act sets out the standing requirements for petitioners seeking court review of Board action: standing is limited to persons aggrieved by a Board order.<sup>31</sup> This Court has explained that Section 10(f)’s limitation of judicial review to persons aggrieved by a Board order is equivalent to

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<sup>28</sup> See *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002).

<sup>29</sup> 3 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise*, §16.1 (3d ed. 1994).

<sup>30</sup> *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970).

<sup>31</sup> 29 U.S.C. § 160(f).

the injury in fact requirement necessary to establish standing under Article III of the Constitution.<sup>32</sup>

Presenting a case or controversy under Article III requires a petitioner to demonstrate in its opening brief that it ““suffered a concrete and particularized injury that is imminent and not conjectural, that was caused by the challenged action, and that is likely to be redressed by a favorable judicial decision.””<sup>33</sup>

Further, a party may not gain judicial review of an administrative proceeding merely because it is displeased with the proceeding’s outcome but must still meet standing requirements.<sup>34</sup>

When asserting a future—rather than a current—injury, a petitioner “confronts a significantly more rigorous burden to establish standing . . . [and] must demonstrate that the alleged future injury is imminent.”<sup>35</sup> To establish that an

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<sup>32</sup> *Bell & Howell Co. v. NLRB*, 598 F.2d 136, 142 (D.C. Cir. 1979). *See also Liquor Salesmen’s Union Local 2 v. NLRB*, 664 F.2d 1200, 1206 n.8 (D.C. Cir. 1981) (person may not seek court review of Board order unless he has suffered “an ‘adverse effect in fact’” from order).

<sup>33</sup> *Delaware Dep’t of Nat. Res. & Env’tl. Control v. EPA*, 785 F.3d 1, 7 (D.C. Cir. 2015), *as amended* (July 21, 2015) (quoting *Texas v. EPA*, 726 F.3d 180, 198 (D.C. Cir. 2013)). *See also* D.C. Cir. R. 28(a)(7).

<sup>34</sup> *U.S. v. Fed. Maritime Comm’n*, 694 F.2d 793, 800 n.25 (D.C. Cir. 1982). *See also City of Orrville, Ohio v. FERC*, 147 F.3d 979, 985 (D.C. Cir. 1998).

<sup>35</sup> *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) (internal quotations and citations omitted). *See also Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (“Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be ‘certainly impending’ to

injury is imminent, rather than conjectural, the petitioner must show a substantial probability of injury.<sup>36</sup> Moreover, a petitioner's allegation of possible future injury is too speculative to establish standing.<sup>37</sup>

**B. Because Piedmont Failed To Demonstrate a Concrete and Particularized Injury, It Is Not Aggrieved by the Board's Decision to Overrule *Anheuser-Busch* and Lacks Standing to Seek Review of that Portion of the Decision**

Piedmont has no standing to challenge that portion of the Board's Order overruling *Anheuser-Busch* because Piedmont has not suffered any injury resulting from the new standard.<sup>38</sup> On review, Piedmont has not identified any present or immediate injury from the Board's new standard, nor could it. In its Order, the Board explicitly stated that its new standard for evaluating whether witness statements must be produced would be applied prospectively only. (JA 156.) In determining whether to apply a new standard retroactively, the Board considers

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constitute injury in fact") (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

<sup>36</sup> *Chamber of Commerce*, 642 F.3d at 200.

<sup>37</sup> *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 35 (D.C. Cir. 1992).

<sup>38</sup> *See Pirlott v. NLRB*, 522 F.3d 423, 433 (D.C. Cir. 2008) (finding that petitioners were not aggrieved under Section 10(f) by Board's refusal to adopt particular rule).

whether retroactive application will cause manifest injustice.<sup>39</sup> (JA 156.) In this case, the Board found it appropriate to apply the new rule prospectively because its decision marked a departure from longstanding precedent and because Piedmont “expressly relied on preexisting law” and cited *Anheuser-Busch* in its refusal to provide the witness statements to the Union. (JA 156; JA 95-97.) Indeed, the Board agreed with Piedmont that the standard in *Anheuser-Busch* was the appropriate standard to be applied in this case. Accordingly, the Board properly applied *Anheuser-Busch* in evaluating the lawfulness of Piedmont’s conduct, and, as the prevailing party on this issue, Piedmont was “not ‘aggrieved’ within the meaning of the NLRA.”<sup>40</sup>

Further, Piedmont failed to make any connection between the Board’s decision to overrule *Anheuser-Busch* and a harm to itself, much less “‘aver[er] facts” that demonstrate “a concrete and particularized injury that is imminent and not conjectural.”<sup>41</sup> Instead, Piedmont criticizes the Board for failing to adequately explain its departure from precedent and fails to establish any harm it suffered

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<sup>39</sup> *Pattern & Model Makers Ass’n of Warren & Vicinity*, 310 NLRB 929, 931 (1993). See also *Consol. Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989).

<sup>40</sup> *Pirlott*, 522 F.3d at 433. See also *Finch, Pruyn & Co. v. NLRB*, 296 F. App’x 83, 84 n.2 (D.C. Cir. 2008).

<sup>41</sup> *Delaware Dep’t of Nat. Res.*, 785 F.3d at 7 (quoting *Texas v. EPA*, 726 F.3d 180, 198 (D.C. Cir. 2013)). See also D.C. Cir. R. 28(a)(7).

from the Board's new standard. (Br. 19, 29-31, 33-36, 40.) But the Board did not apply the new standard to Piedmont's conduct, and Piedmont's "mere interest" in the Board's new standard is insufficient by itself to render Piedmont aggrieved by the Board's decision.<sup>42</sup> Moreover, none of Piedmont's criticism establishes an injury that is "certainly impending" and that would satisfy the requirements of Article III.<sup>43</sup>

Though Piedmont obliquely suggests (in its statement of issues at Br. 2 and in a parenthetical at Br. 24) that the Board has improperly ordered it to comply with the new standard through the Board's standard cease-and-desist order, Piedmont never made this argument to the Board in a motion for reconsideration<sup>44</sup> and failed to present any explicit or developed argument in its opening brief. Under Section 10(e) of the Act, the Court has no jurisdiction to consider arguments

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<sup>42</sup> *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) ("a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA").

<sup>43</sup> *Whitmore*, 495 U.S. at 158.

<sup>44</sup> *See* 29 C.F.R. § 102.48(d)(1) ("A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order").

not raised to the Board.<sup>45</sup> In addition, issues on which no discernible argument is raised in the opening brief are deemed waived by the Court.<sup>46</sup>

In any event, any harm Piedmont might suffer from the new standard is simply too speculative at this time to satisfy the requirements of standing. Piedmont is no more aggrieved by the new standard than any other employer under the jurisdiction of the Board, all of whom are now subject to the new standard and any of whom may challenge it—if it is applied unfavorably to them. To be sure, the Board could, in a future proceeding, determine that Piedmont unlawfully failed to provide the Union with a witness statement. Yet the fact that Piedmont “may be aggrieved by other, related orders does not cure a failure to show an injury in fact caused by the order actually under review.”<sup>47</sup> That is especially true where, as here, the Order does not predetermine the outcome of any subsequent proceeding.<sup>48</sup>

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<sup>45</sup> 29 U.S.C. § 160(e). *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *Accord N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011).

<sup>46</sup> *See Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (holding that contentions merely mentioned in party’s opening brief are deemed waived).

<sup>47</sup> *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 268 (D.C. Cir. 2007); *see also Sea-Land Serv., Inc. v. Dep’t of Trans.*, 137 F.3d 640, 648 (D.C. Cir. 1998) (“[M]ere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation”).

<sup>48</sup> *Wis. Pub. Power*, 493 F.3d at 268; *see also Platte River*, 962 F.2d at 35 (“Allegations of injury based on predictions regarding future legal proceedings are

**C. The Principles of Ripeness Require Piedmont To Demonstrate that It Has Suffered Sufficient Hardship to Justify Court Review**

In addition to meeting standing requirements, a petitioner must also demonstrate that the issue is ripe for judicial resolution before it can invoke the jurisdiction of the Court.<sup>49</sup> Ripeness overlaps with standing analysis and requires the Court to consider whether the petitioning party has “demonstrated sufficient hardship to outweigh any institutional interests in the deferral of review.”<sup>50</sup>

To determine ripeness, courts evaluate whether the issues are fit for judicial review and whether the petitioner would suffer hardship if that review were withheld.<sup>51</sup> As the Supreme Court has explained, ripeness doctrine prevents courts from involving themselves in theoretical disagreements and protects agencies from court review before the effects of an administrative decision have been felt in any tangible way by the petitioner.<sup>52</sup> Even in cases challenging final agency action,

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. . . too speculative to invoke the jurisdiction of an Art[icle] III Court”) (quotation omitted).

<sup>49</sup> *Sheet Metal Workers Int’l Ass’n, Local 270, AFL-CIO v. NLRB*, 561 F.3d 497, 501 (D.C. Cir. 2009).

<sup>50</sup> *Consol. Coal Co. v. Fed. Mine Safety & Health Review Comm’n*, 824 F.2d 1071, 1077 n.6, 1081 (D.C. Cir. 1987) (quotations omitted).

<sup>51</sup> *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

<sup>52</sup> *Id.* at 148-49.

judicial review “is likely to stand on a much surer footing in the context of a specific application” rather than a “generalized challenge.”<sup>53</sup>

**D. Piedmont Failed To Demonstrate that the Board’s New Analysis of Witness Statements Is Ripe for Review**

Nothing in Piedmont’s brief demonstrates that the Board’s decision to overrule *Anheuser-Busch* had a sufficiently direct and immediate effect on Piedmont to render the issue appropriate for judicial review or that Piedmont will suffer a hardship from postponement of review.<sup>54</sup> For example, Piedmont complains that human resources employees will be “in the position of having to perform legal analysis every time they initiate a routine investigation of employee misconduct” (Br. 38-39), and employees will be “chilled” in the exercise of their Section 7 rights (Br. 30). But without concrete examples of how—and whether—those fears will materialize, “it makes no sense for [the Court] to anticipate a wrong when none may ever arise.”<sup>55</sup> As this Court explained in an analogous case involving a new evidentiary rule that would not be applied until a subsequent compliance proceeding, “at this stage . . . the challenge is unripe.”<sup>56</sup>

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<sup>53</sup> *Toilet Goods Ass’n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967). *Accord Fed. Express Corp. v. Mineta*, 373 F.3d 112, 110 (D.C. Cir. 2004).

<sup>54</sup> *See Alascom, Inc. v. F.C.C.*, 727 F.2d 1212, 1217 (1984).

<sup>55</sup> *Fed. Express Corp.*, 373 F.3d at 110 (quoting *Cronin v. FAA*, 73 F.3d 1126, 1132-33) (D.C. Cir. 1996)).

<sup>56</sup> *Sheet Metal Workers*, 561 F.3d at 500, 501-02.

Further, Piedmont has failed to establish that postponing review—until there is a specific application of the Board’s new standard—will be a hardship, “let alone a hardship that is immediate, direct, and significant.”<sup>57</sup> At this juncture, the Board has simply applied its pre-existing *Anheuser-Busch* standard to the facts presented in this case. Should the Board, in the future, apply the new standard and find that Piedmont unlawfully refused to provide another witness statement, the application of the new standard would result in an actual aggrievement to Piedmont, and the issue would then be ripe for review. Its challenge could then be reviewed “in a concrete factual context, shedding light on how the new rule operates in practice.”<sup>58</sup> Without such a context, however, it is impossible to know how the rule would be applied to Piedmont or if its application would even be unfavorable.

Until Piedmont is faced with a Board order applying the new standard, as the Seventh Circuit has explained, “[t]he Board’s prospective suggestion about an analysis that it may apply if ultimately faced with such evidence does not present an issue currently ripe for review by this court. Indeed, the issue may never

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<sup>57</sup> *Fed. Express*, 373 F.3d at 110 (quotation omitted).

<sup>58</sup> *Sheet Metal Workers*, 561 F.3d at 501.

materialize . . . .”<sup>59</sup> Currently, therefore, Piedmont’s claim is unripe for judicial decision.<sup>60</sup>

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<sup>59</sup> *NLRB v. Intersweet, Inc.*, 125 F.3d 1064, 1070 (7th Cir. 1997).

<sup>60</sup> *See Sheet Metal Workers*, 561 F.3d at 502.

## CONCLUSION

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

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May 2016

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

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AMERICAN BAPTIST HOMES OF THE WEST	)	
d/b/a PIEDMONT GARDENS	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 15-1445
	)	15-1501
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No.
	)	32-CA-063475
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION,	)	
UNITED HEALTHCARE WORKERS - WEST	)	
Intervenor	)	

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**CERTIFICATE OF COMPLIANCE**

As required by Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 6,508 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben  
Linda Dreeben  
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Dated at Washington, DC  
this 26th day of May, 2016

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

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AMERICAN BAPTIST HOMES OF THE WEST	)	
d/b/a PIEDMONT GARDENS	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 15-1445
	)	15-1501
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No.
	)	32-CA-063475
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION,	)	
UNITED HEALTHCARE WORKERS - WEST	)	
Intervenor	)	

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 26, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I served the following counsel through the CM/ECF system:

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Dated at Washington, DC  
this 26th day of May, 2016

**STATUTORY AND REGULATORY ADDENDUM**

**STATUTORY AND REGULATORY ADDENDUM**

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## **1. NATIONAL LABOR RELATIONS ACT**

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

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, 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) . . . .

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

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \*

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) . . . .

### **Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:**

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

\* \* \*

(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 section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have

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

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as

it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

## **2. THE BOARD'S RULES AND REGULATIONS**

### **29 C.F.R. § 102.48(d)(1):**

A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. 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. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.