

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CABLEVISION SYSTEMS CORP.,

Employer,

and

TIFFANY OLIVER,

Petitioner,

Case 29-RD-138839

and

**LOCAL 1109, COMMUNICATIONS
WORKERS OF AMERICA, AFL-CIO,**

Union.

**EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S
ORDER DENYING REINSTATEMENT OF PETITION**

KAUFF MCGUIRE & MARGOLIS LLP
950 Third Avenue
Fourteenth Floor
New York, NY 10022
(212) 644-1010

Attorneys for Cablevision Systems Corp.

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I. INTRODUCTION

On October 16, 2014, over two years ago, Tiffany Oliver (the "Petitioner"), filed a petition (the "Petition") seeking to decertify Local 1109 of the Communications Workers of America, AFL-CIO (the "CWA"). Having previously conditionally dismissed the Petition, the Regional Director, in a Decision and Order dated November 23, 2016, has now denied the request of the Petitioner to reinstate it (the "November 23 Decision"). The Employer, Cablevision Systems Corporation (the "Employer" or "Cablevision"), requests review of the November 23 Decision, pursuant to Sections 102.71(a) and (c) of the Rules and Regulations of the National Labor Relations Board.¹

¹ Certain of the record materials referenced in this request for review are extremely voluminous. Accordingly, rather than attaching hard copies, all referenced record materials may be accessed at this link: https://file.ac/2xWSh_-wDGs/

The Regional Director's fundamental and plainly erroneous conclusion was that the alleged unfair labor practices of the Employer prevented a question concerning representation from being raised by way of the filing of the Petition. In reaching that conclusion, the Regional Director: (1) applied an inapplicable "laboratory conditions" standard to deny reinstatement of the Petition; (2) relied upon alleged unfair labor practices which, even if proven, were not of a type which would preclude the raising of a question concerning representation; (3) relied upon recommended decisions of Administrative Law Judges, never reviewed by the Board, on complaints and charges that were withdrawn; (4) cited alleged unfair labor practices which, in some cases, were exceedingly remote in time before the filing of the Petition and, in other cases, actually post-dated the Petitioner's gathering of a showing of employee interest in support for the Petition and even the filing of the Petition itself; (5) relied upon alleged unfair labor practices that did not involve, relate to or affect in any manner employees in the Brooklyn bargaining unit; (6) failed to make a critical factual finding as to whether a causal nexus existed between the Employer's alleged unfair labor practices and the unit employees' disaffection for the CWA; and (7) in violation of the Petitioner's rights of due process and in contravention of Board case law, failed to conduct an evidentiary all-parties hearing on the factual issues raised by the Petitioner's application to reinstate her Petition.²

For all of these reasons, the Employer submits that the Regional Director's November 23 Decision refusing to reinstate the Petition is without legal basis and

² Previously, on June 30, 2016, the Board denied the Employer's request for review of the Regional Director's conditional dismissal of the Petition. As discussed below, the reasoning of the Board in denying review at that juncture strongly supports the granting of the instant request in view of the facts and proceedings that have transpired in the interim.

should be reversed because:

(1) the Regional Director departed from officially reported Board precedent and substantial questions of law and policy are raised by the Regional Director's erroneous decision;

(2) the Regional Director's decision is erroneous as to record facts and these errors prejudice the Employer's rights and interests;

(3) the Regional Director's decision is arbitrary and capricious; and,

(4) alternatively, the dismissal of the Petition raises issues that can only be resolved upon the basis of a record developed at an evidentiary hearing in which all parties may participate. *See* Section 102.71(a) of the Board's Rules and Regulations.

II. FACTUAL BACKGROUND

The Bargaining Unit

The CWA was certified as the bargaining representative of field service technicians, outside plant technicians, audit technicians, inside plant technicians, construction technicians, network fiber technicians, logistics associates, regional control center representatives and coordinators at the Employer's Brooklyn, New York facilities on February 7, 2012.

The First Unfair Labor Practice Complaint

On January 24, 2013, shortly prior to the expiration of the certification year, the CWA filed an unfair labor practice charge alleging that the Employer had engaged in a pattern of surface bargaining. On the morning of January 30, 2013, twenty-two employees engaged in a strike; that same morning, the Employer informed

those employees that they had been permanently replaced. On January 31, 2013, the CWA filed an unfair labor practice charge alleging that the strikers had been unlawfully discharged. The Regional Director issued a consolidated complaint on the CWA's charges on April 29, 2013, Cases 02-CA-085811, *etc.* (the "First Complaint"),³ which alleged, *inter alia*, that Cablevision violated Sections 8(a)(1), (3) and (5) of the Act by engaging in surface bargaining, threatening employees for engaging in union activity, and discharging twenty-two employees (*i.e.*, the permanently replaced strikers) for their union and protected concerted activity. November 23 Decision at pp. 2-3.

A trial of the allegations in the First Complaint was held before Administrative Law Judge Steven Fish on various dates in 2013. In a decision issued on December 4, 2014, as discussed further below, Judge Fish recommended, *inter alia*, that that the allegation of a violation of Section 8(a)(5) (surface bargaining) be dismissed.

Solicitation of Signatures and Filing of the Petition

As early as July 31, 2014 (which, as discussed further below, predated a number of the alleged unfair labor practices upon which the Regional Director inappropriately relied), Cablevision was informed that several unit employees were collecting signatures in support of the instant Petition. This fact is undisputed because, on July 15, 2015, the then Regional Director of Region 29 issued a complaint against the CWA alleging that, on that date, July 31, 2014, three bargaining unit employees, Elizabeth Parkin, Bree Vandroff and Juanita Andjuaar, were threatened and intimidated

³ Several allegations in the First Complaint related only to events at a company facility located in the Bronx, New York, *i.e.*, the allegations in Cases 02-CA-085811 and 02-CA-090823. November 23 Decision at p. 3, fn. 1. As discussed below, these allegations have no relevance to the Brooklyn, New York bargaining unit that is the subject of the Petition.

by Malcom Hayes, a representative of the CWA, in violation of Section 8(b)(1)(A) of the Act, because of their solicitation of employees to support the Petition. More particularly, the Board later adopted the decision of Administrative Law Judge Mindy E. Landow, in which she ruled on that complaint as follows:

... [O]n July 31 [2014], ... Hayes threatened [Elizabeth] Parkin that [the CWA] would sue her, and other employees, in their individual capacities – specifically admonishing these employees to obtain attorney representation.... [These statements] were directly related to these employees' efforts to obtain signatures for a petition for decertification of the [CWA].

Based upon the foregoing, I find that the [CWA], by its agent Malcolm Hayes, violated Section 8(b)(1)(A) of the Act by threatening to sue employees for their concerted, protected activities, in particular for their activities in soliciting signatures for a decertification petition....

Communications Workers of America Local 1109, AFL-CIO (Cablevision Systems New York City Corp.), Case 29-CB-134066, JD(NY)-22-16, at pp. 6 and 8 (June 9, 2016), adopted by the Board *pro forma*, July 21, 2016.

The Employer was further informed by unit employees in August 2014 that there were in excess of 100 signatures supporting the Petition. The Petition was filed with Region 29 of the Board on October 16, 2014.

The Second Unfair Labor Practice Complaint

On November 6, 2014, the Regional Director issued a new, consolidated complaint in Cases 29-CA-134419, *etc.* (the “Second Complaint”) that was based on additional charges filed by the CWA in 2014. As later amended, the Second Complaint alleged that Cablevision violated Section 8(a)(1), (3) and (5) of the Act by making unilateral changes in conditions of employment; failing to provide information that was

relevant to bargaining; disciplining and discharging one employee in retaliation for his union activities; promising employees improved conditions if they abandoned support for the CWA; threatening employees with arrest, loss of a wage increase, and withholding of new technologies, if they supported the CWA; impliedly threatening employees with the loss of employment in retaliation for supporting the CWA; direct dealing with employees; polling employees regarding their support for the CWA; creating the impression of surveillance among employees and surveilling employees' union activities; and providing material assistance to employee efforts to decertify the CWA. November 23 Decision, at p. 4.

This conduct was predominantly alleged to have occurred in August and September 2014 – significantly, this was *after* the Employer was informed that 100 or more bargaining unit employees (in a unit of approximately 270 employees) had signed the Petition.

A trial of the allegations in the Second Complaint was held before Administrative Law Judge Raymond Green beginning in June 2015. In a decision on April 19, 2016, as discussed further below, Judge Green recommended, *inter alia*, that all of the alleged violations of Section 8(a)(5) be dismissed.

Conditional Dismissal of the Petition

On November 12, 2014, shortly after issuing the Second Complaint, the Regional Director issued an order conditionally dismissing the Petition. The November 12, 2014 order states, in relevant part, that “[t]he pending allegations [in both the First Complaint and the Second Complaint], if true, prevent a question concerning

representation from being raised because of the unremedied Section 8(a)(5) violations.

Moreover, the above-listed allegations, if found to be [sic] committed, destroy the laboratory conditions requisite for determining the desires of Brooklyn Cablevision employees regarding continued representation by the Communication Worker of America, AFL-CIO.” That order permitted the Petitioner to request reinstatement of the Petition upon the final resolution of the First and Second Complaints, which the Petitioner has now done. November 12, 2014 Order, at pp. 1-2 (emphasis supplied).

On June 30, 2016, the Board denied the Employer’s request for review of the Regional Director’s November 12, 2014 order conditionally dismissing the Petition, stating as follows:

The Board agrees with the dismissal of the petition in light of the nature of the unfair labor practice allegations of surface bargaining, which the Regional Director found to have merit and for which a bargaining order and extension of the certification year are being sought. Such conduct, if proven, would preclude the existence of a question concerning representation and therefore the petition is appropriately dismissed.... Should the surface bargaining allegation ultimately be found by the Board to be without merit, the Regional Director may consider whether dismissing the petition on other grounds may be appropriate based on the remaining unfair labor practice allegations found to be meritorious, if any, or whether the petition should be reinstated after final disposition of the unfair labor practice charges.

June 30, 2016 Order, at p. 1, fn. 1 (emphasis added).

ALJ Decision on First Complaint

As the quoted language demonstrates, the Board’s June 30, 2016 order denying review and affirming the conditional dismissal of the Petition turned in significant part on the allegation of unlawful surface bargaining violative of Section 8(a)(5) of the Act asserted in the First Complaint. That allegation had been dismissed

by the Administrative Law Judge but was still pending before the Board on exceptions as of the Board's June 30, 2016 order denying review. Specifically, on December 4, 2014, Administrative Law Judge Fish issued a decision after the trial of the First Complaint finding, *inter alia*, that (1) Cablevision did not engage in bad faith surface bargaining; and (2) the twenty-two strikers were economic strikers, but Cablevision had not shown that their replacements had been hired before the strikers were informed that they had been permanently replaced. *CSC Holdings, LLC and Cablevision Systems New York City Corp.*, Cases 02-CA-085811 *etc.*, JD(NY)-47-14 (the "First Decision") at pp. 252, 263-264. The Regional Director's order conditionally dismissing the Petition because of "unremedied Section 8(a)(5) violations" had been rendered a month earlier, without the benefit of Judge Fish's decision dismissing the primary Section 8(a)(5) allegation (surface bargaining). As decided by Judge Fish, there were no meritorious Section 8(a)(5) allegations arising from the First Complaint that would "prevent a question concerning representation from being raised" by the Petition.

Judge Fish separately found two Brooklyn unit-related violations, concerning remarks made by two supervisors to specific individuals (each an alleged Section 8(a)(1) violation); both dated from January 2013, nearly two years before filing of the Petition. First Decision, at p. 203. These were isolated acts and there was no evidence that the remarks were disseminated to the wider bargaining unit. Accordingly, there is no factual basis to conclude that these acts could have led to employee disaffection with the CWA or precipitated the filing of the Petition.

The last, relatively minor allegation from the First Complaint relating to the Brooklyn unit concerned events that occurred in August 2013. The allegation was

that in August 2013 (substantially more than a year before the Petition was filed in October 2014) Cablevision unilaterally instituted training on one new piece of equipment (hand-held meters) and then stopped the training two weeks later (essentially returning the employees to status quo). Although Judge Fish found these brief, temporary actions to be a unilateral change in a condition of employment, it was not found to be evidence of bad faith surface bargaining in violation of Section 8(a)(5) of the Act. First Decision, at pp. 206-09.

Most importantly, at the trial of the First Complaint no proof was offered by the CWA or the General Counsel that any of these few violations had any connection to the employees' support for the Petition.

ALJ Decision on Second Complaint

As previously noted, Administrative Law Judge Green issued a decision on April 19, 2016 on the allegations of the Second Complaint. Judge Green dismissed all of alleged violations of Section 8(a)(5) as well as all other alleged violations other than two minor Section 8(a)(1) allegations. *CSC Holdings, LLC, and Cablevision Systems New York City Corp.*, Cases 29-CA-134419 *etc.*, JD(NY)-9-16 (April 19, 2016) (the "Second Decision").

Specifically, the only violations found by Judge Green were that, on a single occasion on August 7, 2014, one employee was threatened with arrest when he failed to leave a company parking lot where he was loudly blasting pro-union songs from his automobile's music system. Judge Green found that this conduct was not so disruptive as to lose the protection of the Act and that the threat of arrest violated

Section 8(a)(1). Second Decision, at p. 22.

The second finding was that, on September 10, 2014, employees were polled on the question of whether they wished to continue to be represented by the CWA, which Judge Green found to be a violation of Section 8(a)(1) notwithstanding that the employees were told that the poll was non-binding and Cablevision would continue to recognize and bargain with the CWA regardless of the outcome of the poll. Second Decision, at p. 30.

Neither Section 8(a)(1) finding was ruled to be a refusal to bargain with the CWA in violation of Section 8(a)(5) of the Act, and neither would “prevent a question concerning representation from being raised” by the Petition. Second Decision, at pp. 21, 29, 32.

The Regional Director’s November 12, 2014 order conditionally dismissing the Petition was rendered without the benefit of Judge Green’s subsequent decision dismissing all of the Section 8(a)(5) allegations. And, once again, as with the allegations of the First Complaint, there was no proof offered by the CWA or the General Counsel in the trial of the Second Complaint that either of the Section 8(a)(1) violations found by Judge Green had any connection to the employees’ support for the Petition that was filed on October 16, 2014.

“Non-Unit” Cases

The November 23 Decision further rests on two other unfair labor practice cases that the Regional Director concedes affected only “Employees Outside the Unit Represented by the Union [the CWA].” November 23 Decision, at pp. 2 and 5. The first

of these two non-unit matters is the complaint in Case 29-CA-154544, involving the discharge of a single employee at Cablevision's Jericho, New York office (in which no violation of Section 8(a)(5) of the Act was alleged) and which is the subject of the Administrative Law Judge's decision in *CSC Holdings LLC and Cablevision Systems Corp.*, JD(NY)-15-16 (May 20, 2016). November 23 Decision, at p. 5. Most notably, the sole allegation in the case is that one employee was discharged on June 8, 2015, eight months *after* the Petition was filed. JD (NY)-15-16 at pp. 28-29, fn. 14.

The second, non-unit unfair labor practice matter is the consolidated complaint in Cases 02-CA-138301 *etc.* containing the single allegation that Cablevision transferred six employees out of its Bronx, New York facility on May 7, 2014 because of their protected concerted activity unrelated to the CWA. Once again, this complaint included no alleged violation of Section 8(a)(5) of the Act. This case is the subject of the Administrative Law Judge's decision in *CSC Holdings, LLC and Cablevision Systems New York City Corp.*, JD(NY)-37-16 (Sept. 23, 2016), which is now pending before the Board on exceptions. November 23 Decision, at p. 5.

In the November 23 Decision the Regional Director offers no explanation as to how the transfers of six employees from the Bronx, New York facility or the discharge of a single employee from the Jericho, New York facility were even known to, let alone how these events might have affected, employees in the Brooklyn bargaining unit or their support for the CWA.

Withdrawal of First, Second, and Jericho Complaints

All but one of these complaints and their underlying charges, *i.e.*, the First

and Second Complaint and the complaint in the Jericho, New York case, have been withdrawn by the CWA. As described by the Regional Director in the November 23 Decision:

On August 22, 2016, the [then] Regional Director approved the Union's request to withdraw the unfair labor practice charges in Case 29-CA-134419, et al. based upon a private settlement between the Union and the Employer. On September 12, 2016, the [then] Regional Director approved the Union's request to withdraw the unfair labor practice charges in Case 29-CA-097013, et al. based upon the same private settlement with the Employer.

On July 14, 2016, the Board ... remanded Case Nos. 29-CA-097013, et al. [the First Complaint], 29-CA-134491, et al. [the Second Complaint] and 29-CA-154544 [the Jericho, New York complaint] to the Regional Director for Region 29 for further action.... The non-Board settlement between Altice [Cablevision's purchaser and successor] and the Union thus resolved the unfair labor practice cases in those matters before the Board could issue any final order regarding the alleged violations.

November 23 Decision, at pp. 2 and 6 (emphasis supplied). The sole remaining complaint -- the non-unit complaint involving the Bronx transfers -- does not relate to employees represented by the CWA, nor is the CWA the charging party in that matter, which is pending at the Board on exceptions.

III. ARGUMENT

It is undisputed that the Petition was filed well after expiration of the certification year, that no contract bar exists, and that the Employer did not unlawfully assist in the preparation or filing of the Petition. Absent any such grounds, the Regional Director has denied the Petitioner's application to reinstate the Petition based solely on alleged unfair labor practices that do not implicate Cablevision's duty to bargain with the CWA; they therefore do not "prevent a question concerning representation from

being raised” and are insufficient under the terms of the Board’s June 30, 2016 order to bar reinstatement. Not only does the Regional Director misconstrue the Board’s order, but the decision to deny reinstatement of the Petition is contrary to Board law, due process and other Constitutional protections. Proper regard for the Section 7 rights of the unit employees requires that this long-delayed Petition be reinstated as requested by the Petitioner.

A. The Regional Director Adopted an Erroneous and Irrelevant “Laboratory Conditions” Standard and Misapplied Board Law.

In her November 23 Decision denying reinstatement of the Petition, the Regional Director substantially misstates the applicable standards recognized by Board law:

Having fully considered the administrative record developed before the Board in Case Nos. 29-CA-097013, et al. and 29-CA-134419 et al., the respective administrative law judge decisions in each of those cases, the administrative law judge decisions in other cases involving the Employer [Cablevision] and the Union [CWA], and relevant Board law, I have decided that the Petition herein shall not be reinstated. I am denying Petitioner’s request to reinstate the Petition for further processing, as will be discussed fully below, because the Employer has been found to have engaged in serious and pervasive unfair labor practices that remained unremedied at the time the Petition was filed. These unfair labor practices prevented a question concerning representation from being raised and destroyed the laboratory conditions necessary to determine the desires of Unit employees regarding continued representation by the Union. Under these circumstances, it is not appropriate to reinstate the Petition.

November 23 Decision, at p. 2 (emphasis supplied). The Regional Director cites no authority for the proposition that a representation petition may be dismissed on the basis that some unfair labor practices “destroy[] the laboratory conditions necessary to determine the desires of Unit employees regarding continued representation by the Union.” Indeed, no such authority exists.

The Board has *never* applied a “laboratory conditions” standard in this or any like context. Rather, “laboratory conditions” is the Board’s standard for determining, after an election has been conducted, whether conduct occurring after the petition was filed is objectionable and warrants setting aside the results of an election and conducting a second election. *General Shoe Corp.*, 77 NLRB 124, 126-127 (1948) (With respect to objections to conduct occurring in an election: “... it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.”); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787 (1962) (Unfair labor practices occurring during the pendency of an election petition *a fortiori* violate the “laboratory conditions” required for the conduct of a representation election). Additionally, Sections 101.19(a)(4) and (b), and 101.21(c) of the Board’s Statement of Procedures, 29 C.F.R. §§ 101.19(a)(4) and (b), and 101.21(c), which apply to representation cases (such as the present Petition) that were pending before April 4, 2015, provide that if election objections are timely filed after an election is conducted and are found to have merit, then the election results may be voided and a new election may be conducted. These regulations and settled Board precedent⁴ do not allow an objections determination to include dismissal of the affected petition as a remedy; rather, objections result only in the setting aside of the adversely affected election and the conduct of a second election. The Regional Director’s November 23, 2016 Decision,

⁴ The “critical period,” during which a party’s conduct may constitute objectionable conduct allowing the Board to set aside the results of an election, begins on the date the election petition is filed and ends on the date of the election. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278 (1961); *Flamingo Las Vegas Operating Co.*, 360 NLRB No. 41, slip op. at 4 (2014) (Board affirms rejection of pre-petition conduct as objectionable, ruling that “...only conduct occurring after the petition’s filing date may be the subject of an objection”; citing *Ideal Electric*, 134 NLRB at 1278.)

by improperly adopting the “laboratory conditions” standard as a basis for denying reinstatement of the Petition, is wholly at odds with Board law.

The Regional Director also asserts that Cablevision’s “unfair labor practices prevented a question concerning representation from being raised,” as the further basis for refusing to reinstate the Petition. November 23 Decision, at p. 2. While that correctly states a basis for dismissing a representation petition, it is entirely inapplicable in the instant case. The only unfair labor practices that prevent a question concerning representation from being raised by an election petition are violations of Section 8(a)(5) of the Act that call for a bargaining order remedy. It is undisputed that no such violations are presented here.⁵

A leading case setting forth this doctrine is *Big Three Industries, Inc.*, 201 NLRB 197 (1973), in which an unfair labor practice complaint alleged violations of Sections 8(a)(5), (3) and (1) of the Act involving the discharge of one employee and the concurrent failure of the employer to bargain in good faith with the recently-certified union. A decertification election petition was filed during the period that the employer was unlawfully refusing to bargain and shortly after the end of the certification year. The Regional Director dismissed this petition, on the grounds that “no question concerning representation exists, inasmuch as [he had] issued a complaint – alleging 8(a)(1) and (5) violations by the Employer...” 201 NLRB at 197 (brackets and ellipses in original). In affirming the conditional dismissal of the petition the Board emphasized

⁵ It bears emphasizing that out of all of the allegations advanced in the various proceedings cited by the Regional Director, the *only* violation of Section 8(a)(5) found in any of these cases was the finding by Judge Fish, on the First Complaint, that Cablevision’s institution of training on hand-held meters and the cessation of the training two weeks later was a unilateral change. These August 2013 events preceded the Petition by well over a year and, significantly, were found by Judge Fish *not* to constitute evidence of surface bargaining. First Decision, at p. 252.

the unique nature of violations of Section 8(a)(5) as precluding the raising of a question concerning representation:

Upon reconsideration of this case, the Board is satisfied on the basis of the foregoing facts that there is "no reasonable cause to believe" that, at this time, the petition herein raises a real question of representation, within the meaning of Section 9(c)(1) of the Act. In cases of this type, the Board recognizes that it must exercise discretion in balancing the interaction between an employer's obligation under Section 8(a)(5) of the Act to bargain with a duly designated statutory representative and the employees' right under Section 9(c) of the Act to terminate the statutory status of said representative. Here, the Union was certified as the exclusive bargaining representative and it is alleged in the complaint that, during the first year of such certification, the Employer violated the Act by engaging in surface bargaining with the Union. Thus, if the allegations of the complaint be proved, the appropriate remedy would include an affirmative bargaining order, and an extension of the certification year even though during the interim the Union may have lost its majority adherence. Indeed, at the time of the alleged refusal to bargain, the Union's certified representative status was not subject to direct or collateral attack; nor is it vulnerable during compliance with an affirmative bargaining order. In these circumstances, to find the existence of a real question concerning representation on the basis of the instant petition, in the face of the current litigation in the complaint case of the Employer's alleged refusal to bargain in good faith, would, in the Board's opinion, be contrary to the statutory scheme of the Act. The Board recognizes that this view postpones the employees' opportunity to decertify the Union herein, but believes that the orderly procedure of collective bargaining under the Act requires that the employees be bound by their choice of representatives during the period of ongoing negotiation as well as the period of litigation of the *bona fides* of an employer's bargaining efforts....

201 NLRB at 197.

Similarly, in *BPH & Co. v. NLRB*, 333 F.3d 213, 221 (D.C. Cir. 2003), denying enforcement to 334 NLRB 514 (2001), the Court held that a Section 8(a)(5) charge that was withdrawn without the employer agreeing to bargain or continue bargaining with the affected union provides no basis to dismiss a decertification petition

or preclude withdrawal of recognition based on a showing that the union had lost majority status.

In sum, there is no Board authority supporting the Regional Director's application of the "laboratory conditions" standard to the question of whether the showing of interest in support of a petition is valid or tainted. And the Regional Director also erred in failing to recognize that only a circumscribed universe of cases – those involving violations of Section 8(a)(5) that require a bargaining order remedy – preclude the raising of a question concerning representation. By virtue of these errors, the November 23 Decision departs from officially reported Board precedent and raises a substantial question of law and policy warranting review.

B. The Regional Director Erred by Failing to Require Proof of a Causal Nexus Between Alleged Unfair Labor Practices and the Petition.

In yet another respect the Regional Director correctly states but seriously misapplies the Board's relevant legal standard for determining whether a decertification petition is subject to dismissal. The Regional Director takes note of Board cases holding that dismissal is appropriate where "the employer is found to have engaged in unfair labor practices that cause the employee disaffection with their union" that is manifested by the employees' support for a decertification petition. November 23 Decision, at p. 7. Having enunciated this standard, the Regional Director wholly dispensed with an essential element: actual proof of a causal nexus between the unfair labor practices and initiation of the Petition.

In *Lee Lumber & Building Material Corp.* ("Lee Lumber II"), 322 NLRB 175 (1996), the Board ruled that a decertification petition may "... be raised in a context

free of unfair labor practices of the sort, likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship." *Id.* at 177, citing *Guerdon Industries*, 218 NLRB 658, 661 (1975). The Board then emphasized:

Not every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support....

Id. at 177 (emphasis supplied); citing, *inter alia*, *Master Slack Corp.*, 271 NLRB 78, 84 (1984). Although the Regional Director cites to these cases she fails to apply them: she requires no proof of a specific "causal relationship" between the unfair labor practices she cites and the CWA's loss of support among the Brooklyn unit employees. Instead, she relies upon rank speculation and convoluted inference to deny reinstatement of the Petition, thereby departing from settled principles of Board law.

The unfair labor practice complaints on which the November 23 Decision rests are the First and Second Complaints and two others that the Regional Director concedes only affected "Employees Outside the Unit Represented by the Union [the CWA]." November 23 Decision, at pp. 2 and 5: (1) the complaint in Case 29-CA-154544, involving the June 8, 2015 discharge of an employee at Cablevision's Jericho, New York office in which no violation of Section 8(a)(5) of the Act was alleged. November 23 Decision, at p. 5; and (2) the complaint in Cases 02-CA-138301 *etc.* which alleges that Cablevision transferred six employees out of its Bronx, New York facility because of their protected concerted activity which, again, involves no alleged violation of Section 8(a)(5) of the Act. November 23 Decision, at p. 5.

As the Regional Director acknowledges, all but one of the complaints and their underlying charges upon which she relied, i.e., the First and Second Complaint and the complaint in the Jericho, New York case, have been withdrawn by the CWA. The single remaining complaint involving the Bronx transfers does not relate to employees represented by the CWA, nor is the CWA the charging party in that matter. November 23 Decision, at pp. 2 and 6. Contrary to the Regional Director's speculation, none of these matters establish the requisite causal nexus between the alleged unfair labor practices and the initiation of the Petition.

1. Withdrawn Allegations Fail to Establish the Requisite Causal Nexus.

The recommended decisions of the Administrative Law Judges on the First Complaint, the Second Complaint, and the in the non-unit Jericho, New York case are nullities because it is well-settled that an unreviewed Administrative Law Judge's decision "is not binding authority." *St. Vincent Medical Center*, 339 NLRB 888, 888 (2003), *remanded on other grounds*, 463 F.3d 909 (9th Cir. 2006); *HealthBridge Management, LLC*, 362 NLRB No. 33, slip op. at 1, fn. 3 (2015). Additionally, even in a case in which the Board has affirmed an Administrative Law Judge's decision, the order may nonetheless subsequently be vacated by the Board (for example, pursuant to a settlement between the parties), and in such a case:

... [T]he decision has no preclusive effect on the parties (i.e., it will have no res judicata or collateral estoppel effect against the parties. Likewise, because the Board's finding of fact and conclusions of law with respect to the parties have been vacated, those findings and conclusions may not be used to establish a proclivity to violate the Act... (emphasis supplied; footnote omitted).

Caterpillar, Inc., 332 NLRB 1116, 1116 (2000); *see also, Associated Builders and*

Contractors, Inc., 333 NLRB 955, 955, fn. 3 (2001) (“When the Board vacates a decision or portion of a decision pursuant to a settlement, ... the vacated portion of the decision has no preclusive effect on the parties”; citing *Caterpillar*, *supra*).

An unreviewed decision of an Administrative Law Judge on a complaint and charges that have been withdrawn certainly can have no greater effect on the parties than does an order of the Board that has been vacated. Accordingly, the Judges’ unreviewed and now withdrawn decisions on the First and Second Complaints and the non-unit Jericho, New York complaint do not bind Cablevision in any manner. They therefore do not provide either *res judicata* or collateral estoppel support for the withdrawn unfair labor practice allegations on which the Regional Director has erroneously relied to deny reinstatement of the instant Petition. As such, these decisions cannot support a finding that the alleged unfair labor practices occurred, much less that they provoked the unit employees’ disaffection with CWA and the filing of the Petition.

2. The “Non-Unit” Cases Fail to Provide the Requisite Causal Nexus.

The Regional Director’s reliance upon two unfair labor practice cases that concededly affected only “Employees Outside the Unit Represented by the Union [the CWA]” in Brooklyn is similarly misplaced. November 23 Decision, at pp. 2 and 5. The Regional Director’s discussion of the non-unit cases fails to explain how these events (Case 29-CA-154544, involving the discharge of an employee at Cablevision’s Jericho, New York office, over 30 miles away from Brooklyn, and Cases 02-CA-138301 *etc.* concerning the transfer of six employees out of its Bronx, New York facility on May 7,

2014) could even arguably have “prevented a question concerning representation from being raised.” More specifically, those events were not shown even to have been disseminated to the Brooklyn unit employees, so there is no basis to argue that they caused disaffection among the CWA-represented employees leading them to support the Petition. Under applicable Board law, neither of these cases supports the November 23 Decision.

As discussed previously, the Regional Director’s reliance on the Jericho case was erroneous because the complaint in that case was withdrawn and, in any event, involved no allegation of any violation of Section 8(a)(5) of the Act. November 23 Decision, at p. 5. Most notably, the sole allegation in the case was that one employee was discharged on June 8, 2015, eight months *after* the Petition was filed, and it occurred far outside the Brooklyn unit that is the subject of the Petition. JD (NY)-15-16, at pp. 28-29, fn. 14. Nowhere does the Regional Director even attempt to explain how this June 2015 event could have caused employee disaffection with the CWA in the distant Brooklyn bargaining unit where the Petition was filed in October 2014. The Regional Director’s omission is explained by the fact that this *post hoc* event could not possibly have contributed to the Brooklyn employees’ filing of in the Petition many months earlier.

The Regional Director’s reliance on the Administrative Law Judge’s decision in the non-unit Bronx transfers case likewise is devoid of legal support.

First, like the Jericho single-discharge case, the Regional Director omits any explanation in her Decision as to how the transfer of employees from the Bronx,

New York facility to various other locations, not including Brooklyn, was even known to (let alone how it did or even might have affected) employees in the Brooklyn bargaining unit.

Second, the Bronx transfers complaint is now pending before the Board on Cablevision's exceptions to the Administrative Law Judge's recommended decision, which is neither final nor is it binding authority or preclusive in the present case. *CSC Holdings, LLC and Cablevision Systems New York City Corp.*, Cases 02-CA-138301 et al., JD(NY)-37-16 (Sept. 23, 2016). See *St. Vincent Med. Ctr.*, 339 NLRB at 888; and *HealthBridge*, 362 NLRB No. 33, slip op. at 1, fn. 3.

Third, the Regional Director seriously misapprehended the complaint allegation in that case by asserting that the basis for the alleged discrimination was that Cablevision "believed those [transferred] employees supported the Union [CWA] and were assisting the Union [CWA] in organizing employees at the Employer's Bronx facility." November 23 Decision, at p. 5. In fact, the CWA was not the charging party in any of the three consolidated cases and the complaint makes no mention whatsoever of the CWA. Rather, the only labor organization referred to in the complaint is the International Brotherhood of Electrical Workers, which manifestly is not the CWA. *CSC Holdings, LLC, and Cablevision Systems New York City Corp.*, Cases 02-CA-138301 et al., JD(NY)-37-16, at p. 2 (Sept. 23, 2016).

Finally, the non-unit Bronx complaint is not at all relevant to the present decertification case as that complaint contains no allegations of violations of Section 8(a)(5) of the Act and, of course, does not seek a remedial bargaining order in favor of

the CWA (which was not even a party to or the subject of any allegations in the case). Therefore the alleged unfair labor practices in the Bronx matter cannot possibly “prevent[] a question concerning representation from being raised” with respect to the CWA’s representation of employees in the Brooklyn unit. Even if it were to be considered here, which it should not be, there is neither any allegation let alone a finding in the Administrative Law Judge’s decision in the Bronx transfers case that the Brooklyn unit employees were prompted to support the Petition by the transfers of six Bronx employees. Accordingly, that distant event could not even arguably have caused disaffection of the Brooklyn employees with the CWA as their bargaining representative.

In sum, the Regional Director’s reliance on the non-unit cases to deny reinstatement of the Petition, notwithstanding the absence of proof of any causal nexus between alleged unfair labor practices of the Employer and the initiation of the Petition, was plainly erroneous.

3. The First Complaint Fails to Provide the Requisite Causal Nexus.

The Regional Director’s reliance on the First Complaint as a basis for denying reinstatement of the Petition is equally misplaced. Most significantly, the primary Section 8(a)(5) allegation contained in the First Complaint is that the Employer engaged in surface bargaining between February 2012 and December 2013. Judge Fish, however, dismissed that allegation entirely, finding that Cablevision had engaged in “hard, but lawful bargaining.” First Decision, at p. 252.

The only other Section 8(a)(5) allegation contained in the First Complaint was added by the General Counsel immediately prior to the trial -- apparently as an

afterthought -- and was exceedingly minor and remote in time to the filing of the Petition. That last minute amendment alleged the unilateral implementation and almost immediate withdrawal of training on a single new technology (hand-held meters) in August 2013 – approximately one year before the gathering of support for the Petition and more than a year before the Petition was filed. First Decision, at p. 206. Absolutely no evidence was offered at the trial on the First Complaint, and no finding was made, that employee disaffection with the CWA was caused by Cablevision’s offer of training or withdrawing of training on a single piece of equipment over a year before the Petition was filed. No causal nexus can be assumed; it must be proven, and it is inherently implausible where, as here, all that is involved is a minor incident, remote in time to the filing of the Petition.

The Judge’s decision on the First Complaint sustained the allegation that strikers were discharged in January 2013; however, it is undisputed that all of those employees had been reinstated within two months after the strike ended, well over a year before the Petition was filed. First Decision, at p. 262.

Lastly, the Regional Director contends in her Decision that five instances of violations of Section 8(a)(1) of the Act found by Judge Fish add to the warrant for refusing to reinstate the Petition. However, four of these incidents occurred at the non-unit Bronx facility and there is no evidence that any of them were disseminated to nor affected any Brooklyn unit employees, and they all occurred in 2012, more than two years before the Petition came into being. November 23 Decision, at p. 3; First Decision, at pp. 182, 197, 199 and 182. The sole allegation that even related to Brooklyn employees was “threatening employees that bargaining with the Union would be futile.”

That allegation refers to the comments on January 31, 2013 by one manager to a single shop steward employee – made a year and one-half before the advent of the Petition - that the “company wasn’t going to give [the CWA] anything at the table, anything different than what they gave to anybody else...” First Decision, at p. 205. Subsequent to this event, however, Cablevision entered into a complete collective bargaining agreement with the CWA in Brooklyn, a fact which largely dissipates whatever limited weight this incident might otherwise be accorded. November 23 Decision, at p. 6.

Conduct that occurred long before the Petition was signed cannot lead to an inference that it created disaffection from the CWA. *Garden Ridge Mgmt., Inc.*, 347 NLRB 131, 134 (2006) (five-month delay weighed against finding that unfair labor practices caused employee sentiment to turn against union); *Lexus of Concord, Inc.*, 343 NLRB 851, 852 (2004) (no temporal proximity when lapse of three months). Other than the surface bargaining allegation that was dismissed by Judge Fish, the August 2013 changes in training on new meters was the last occurring allegation of an unfair labor practice in the First Complaint that related in any manner to the Brooklyn unit employees. First Decision, at pp. 206-210. This was at least one full year before the advent of the Petition, and had no even arguable “temporal proximity” to the employees’ sentiment turning against the CWA and, accordingly, it supplies no support for a refusal to reinstate the Petition.

Most significantly, as previously discussed, the First Complaint and its underlying charges have been withdrawn by the CWA and the General Counsel and the Administrative Law Judge’s unreviewed decision does not serve as binding authority supporting the Regional Director’s refusal to reinstate the Petition.

4. The Second Complaint Fails to Provide the Requisite Causal Nexus.

The Regional Director's reliance on the Second Complaint was infected with similar errors. With regard to the charges included in the Second Complaint, the three alleged Section 8(a)(5) violations all were minor, discrete, and either remote in time to the Petition or occurred after employees had enough signatures to petition for a decertification election in any event.

The first Section 8(a)(5) allegation in the Second Complaint concerns the Company's alleged use of the ETAdirect time keeping system to issue a written warning to one bargaining unit employee. Judge Green dismissed this allegation on its merits. Second Decision, at p. 7. And even apart from its lack of merit, no one could conclude that the use of a time keeping system to issue one warning to a single unit employee caused employee disaffection with the CWA to such an extent that more than 100 employees signed a decertification petition.

The only other Section 8(a)(5) allegation in the Second Complaint relates to the September 9, 2014 speech to employees by the company's then-chief executive officer. However, Judge Green dismissed all allegations relating to the September 9 speech, including the statements that allegedly constituted direct dealing with the bargaining unit employees. In any event, the speech was given more than a month after Cablevision was informed that more than 100 employees had signed the Petition – which exceeded the number needed to file a decertification election petition. Unsurprisingly, no evidence was presented at the trial of the Second Complaint that the September 9 speech caused the considerable employee disaffection with the CWA that

clearly was present well before the speech was given. Accordingly, no conclusion about the effect of the September 9th speech on employees' disaffection from the CWA can be drawn.

D. A Decertification Petition May Not Be Dismissed Absent a Finding After an Evidentiary Hearing of a Relevant Unfair Labor Practice and Proof of a Fact-based Casual Nexus to the Employees' Support for the Petition.

While the November 23 Decision, for the reasons previously discussed, is fatally flawed as a matter of substance, it also is procedurally deficient. A timely-filed and otherwise valid decertification petition, such as the instant Petition, may be dismissed only on a factual finding, after a hearing, that the employer actually engaged in unfair labor practices and that those violations caused its employees' disaffection with the incumbent union. *Lee Lumber*, 322 NLRB at 177; *Saint Gobain Abrasives, Inc.*, 342 NLRB 434, 434 (2004); *Truserv Corp.*, 349 NLRB 227, 232 (2007). On the other hand, by dismissing the Petition without a hearing, the Regional Director here vitiates employee rights under Section 7 of the Act. Indeed, as the Board has recognized, dismissing a decertification petition deprives employees of their Section 7 rights even where the Regional Director purports to make such findings but does so without first conducting an evidentiary hearing. *Saint Gobain*, 342 NLRB at 434; *Truserv, Corp.*, 349 NLRB at 232.

Dismissing or failing to reinstate a conditionally dismissed decertification petition out of hand, based on unproven allegations that the petition has been tainted and without allowing all parties - the Petitioner included - to be heard, also offends basic principles of due process. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The

fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner”) (internal quotation marks omitted). What is more, any dismissal without an evidentiary hearing unfairly and unreasonably burdens employees’ freedom of association by forcing them, without review, to remain members of a union to which they no longer wish to belong. *Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 512 (5th Cir. 1982) (“One of the principal policies of the national labor laws . . . is the protection of the exercise by workers of full freedom of association.”); 29 U.S.C. § 157 (Section 7 rights include the “right to refrain” from collective action); *cf. Harris v. Quinn*, 134 S. Ct. 2618, 2639-2641 (2014). As the Board observed in *Truserv*, 349 NLRB at 232:

... Maintenance of stable collective-bargaining relationships is important [to the policies of the Act], but only when employees have freely chosen whether, and by whom, to be represented. The peaceful settlement of disputes is also important – but not so important that it should be obtained at the expense of abrogating employees’ Section 7 rights to reject or retain a union as their collective-bargaining representative.

Thus, Section 7, Fifth Amendment due process, and First Amendment rights of free association all forbid dismissing the Petition unless a fact-based finding is made, after a hearing in which all parties may appear, that Cablevision engaged in an unfair labor practice that demonstrably tainted the Petition.

The Regional Director’s refusal to reinstate the Petition here is irreconcilable with the Board’s decision in *Saint Gobain*, 342 NLRB at 434. In that case, the Regional Director dismissed a decertification petition, finding that the employer’s alleged unilateral change in health insurance benefits caused employee disaffection with the union. The Section 8(a)(5) complaint alleging a unilateral change in benefits had not yet proceeded to trial when the Regional Director dismissed the decertification

based on an inference of a causal nexus from the allegations of the untried complaint. 342 NLRB at 434. The Board held that “*such a factual determination of causal nexus should not be made without an evidentiary hearing.*” 342 NLRB at 434. Absent a hearing to determine whether in fact a causal nexus exists, the “employees are deprived . . . of their Section 7 rights on the question of union representation.” *Id.* The Board in *Saint Gobain* then concluded that:

[I]t is not appropriate to speculate, without facts established at a hearing, that there was a causal relationship between the conduct and the disaffection. To so speculate is to deny employees their fundamental Section 7 rights. Surely, a hearing and findings are prerequisites to such a denial.

Id. This result fully accords with the Board’s earlier decision in *Lee Lumber* requiring that “there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support” in deciding that employee disaffection from a union is tainted by the employer’s conduct. 322 NLRB at 177.

The Board, in *Truserv*, 349 NLRB at 228, reiterated that decertification petitions should not be dismissed “absent a finding of a violation of the Act or an admission by the employer of such a violation,” because “to do so would unfairly give determinative weight to allegations of unlawful conduct and be in derogation of employee rights under Section 7 of the Act.” *Id.* Even where the employer has settled unfair labor practice charges, the Region must conduct a hearing to determine whether the employer’s alleged actions caused employee disaffection. *Id.* Furthermore, “the fact that the alleged actions occurred prior to the filing of the decertification petition provides no basis for a conclusion that the petition was tainted by unlawful conduct.” *Id.*

The Regional Director's decision to abrogate the Section 7 rights of bargaining unit employees in the present case contradicts the controlling Board decisions holding that an evidentiary hearing is required to determine whether there was, in fact, *both an unfair labor practice and a causal nexus between the employer's actions and employee disaffection manifested in the decertification petition.* *Truserv*, 349 NLRB at 231-232 (a bare assumption that the employer has engaged in unlawful conduct requiring dismissal of a representation petition "is inconsistent with fundamental due process"). As the Board has stated, "[t]o so speculate [about alleged taint of a decertification petition] is to deny employees their fundamental Section 7 rights." *Saint Gobain*, 342 NLRB at 434; *Truserv*, 349 NLRB at 228.

The Board case law appropriately recognizes the compelling need for a hearing in those circumstances. The Petitioner, who alone directly represents the interests of the unit employees who are seeking to exercise their Section 7 right to vote against continued representation by the CWA, has a unique position to present in a hearing on the vitality *vel non* of the Petition. She should have had the opportunity to call and examine her own witnesses, cross-examine any witnesses presented by the CWA or Cablevision, present rebuttal witnesses, and to present her own arguments on all factual and legal disputes arising in the *Saint Gobain* hearing. Fundamental requirements of due process required that the Petitioner be permitted to appear and be heard before a final determination was made on the status of hers and the employees' Petition. Absent such a hearing, there currently is no factual basis suggesting that the signatures gathered in support of the Petition were tainted. At present, no one, other than the employees who signed the employee petition, knows whether the alleged unfair

labor practices occasioned those signatures. Without a hearing, the CWA -- upon whom the burden of proof must rest-- has not demonstrated that, in fact, any unit employees were affected by Cablevision's alleged conduct in any way, and denial of reinstatement of the Petition was improper.

In the context of this case, moreover, the Regional Director's error cannot be remedied merely by remanding the case for further hearings. It is now well-established that no finding of an unfair labor practice may be made in a representation case without a timely, relevant charge and a complaint being issued on that charge by the General Counsel which is consolidated with the representation proceeding. As the Board clearly stated in *All County Electric Co.*, 332 NLRB 863, 863 (2000) citing *Texas Meat Packers, Inc.*, 130 NLRB 279, 279-280 (1961) (and cases there cited): “[U]nfair labor practice issues ... are not appropriate for resolution in a representation case.... [Where] the union's claim would require a finding that the employer violated Section 8(a)(3), ... the Board could not appropriately do [so] in a representation proceeding without interfering with the General Counsel's exclusive authority with respect to the issuance and prosecution of unfair labor practice complaints....”

As demonstrated previously, the critical issue before the Regional Director -- whether the showing of interest gathered in 2014 in support of the Petition was tainted by Cablevision's alleged unfair labor practices -- requires proof as a threshold matter that those unfair labor practices were actually committed; and this cannot be achieved in a representation case unless and until it is consolidated with a timely unfair labor practice complaint. Any unfair labor practice charge filed now relating to events in 2014, of course, would plainly be barred by the six-month limitation of time set forth in

Section 10(b) of the Act. And because of the withdrawal of all of the charges and complaints relating to the Brooklyn unit, there is no timely charge and complaint now pending. Simply put, there is no proper vehicle through which an unfair labor practice allegation can be litigated in a hearing, as plainly required by the Board's decisions in *Saint Gobain*, 342 NLRB at 434, and *Truserv*, 349 NLRB at 228.

Accordingly, it would be futile to remand this case for a hearing and the Board should instead order that the Petition be reinstated. The Petition should be remanded to the Regional Director to conduct the long-delayed election first sought by unit employees more than two years ago.

IV. CONCLUSION

For the forgoing reasons, and based on the entire record in this case, the Employer's request for review of the Regional Director's November 23 Order and Decision denying reinstatement of the Petition should be granted, the Order and Decision should be overturned, and the Petition should be reinstated immediately and remanded to the Regional Director to proceed to an election. Alternatively, and without prejudice to Cablevision's position that an election should proceed without need for a hearing, the Petition must be reinstated subject to a hearing on the CWA's allegations that the showing of interest in support of the Petition has been tainted by unfair labor practices as provided for in *Saint Gobain Abrasives, Inc.*, 342 NLRB 434, 434 (2004) and *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996).

Dated: December 21, 2016 at
New York, New York

Respectfully submitted,

KAUFF MCGUIRE & MARGOLIS LLP
Counsel for the Employer
Cablevision Systems Corp.

By: /s/Kenneth A. Margolis
Kenneth A. Margolis

950 Third Avenue - Fourteenth Floor
New York, NY 10022
(212) 644-1010

CERTIFICATION OF SERVICE BY E-FILING & ELECTRONIC MAIL

The undersigned, an attorney admitted to practice before the Courts of the State of New York, affirms under penalty of perjury, that, on December 21, 2016, he caused a true and correct copy of the attached Request for Review on Behalf of Cablevision Systems Corp. to be served upon the Regional Director, counsel for the Communication Workers of America, and Petitioner, by electronic mail, pursuant to the Board's e-filing rules at the following addresses designated by each party for this purpose, respectively:

Kathy Drew-King
NLRB Region 29
Two Metro Tech Center
100 Myrtle Avenue, 5th Floor
Brooklyn, New York 11201-4201
KathyDrew.King@NLRB.gov
(Regional Director)

Tiffany Oliver
969 East 102d Street
Brooklyn, New York 11236
tmoliver80@hotmail.com
(Petitioner)

Gabrielle Semel, District Counsel
Legal Department, CWA District 1
230 Park Place, 5B
Brooklyn, New York 11238
ggsemel@gmail.com
(Counsel for CWA)

Dated: December 21, 2016 at
New York, New York

/s/ Kenneth A. Margolis
Kenneth A. Margolis