UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

YALE UNIVERSITY	**Case Numbers** **01-RC-183014** **01-RC-183016** **01-RC-183022** **01-RC-183025**
and	**01-RC-183031** **01-RC-183038** **01-RC-183039** **01-RC-183043**
UNITE HERE LOCAL 33	**01-RC-183050**

PETITIONER'S OPPOSITION TO THE EMPLOYER'S APRIL 3, 2017 LETTER SEEKING TO FILE A SECOND REQUEST FOR REVIEW OF THE D.D.E.

UNITE HERE Local 33 ("Petitioner") hereby opposes Yale University's ("Employer's") April 3, 2017 letter in which it purports to provide "further support" for its argument that it should be permitted to file a second Request for Review of the Regional Director's January 25, 2017 Decision and Direction of Election ("DDE") in the above-captioned cases. ("April 3 Letter," pp. 1-2.) This is the Employer's *sixth* submission to the Board since February 15, 2017 asserting a non-existent right to file piecemeal, serial requests for review of the same decision and direction of election ("DDE").

The Board's rules—particularly 29 CFR § 102.67 (e) and (i)(1)—permit just one request for review of a single DDE. The Employer's abuse of these rules and attempt to evade fair process have already prejudiced the Petitioner. The Petitioner will suffer significantly more unfair prejudice if the Board grants the Employer's baseless mews for special treatment. The Employer should not be permitted multiple bites at the apple.

ARGUMENT

No known appellate body allows a party aggrieved by a lower-body decision to file serial requests for review, appeals, or petitions for certiorari. Allowing such multiplicity would result in inefficient, prejudicial, and duplicative tactical filings intended to get more bites at the apple.

The Board's rules forbid multiple requests for review. Rule 102.67(e) prohibits piecemeal requests for review of a single DDE. It provides that a party must place its request for review in "*a* self-contained document" that contains "*all* evidence or rulings bearing on *the issues*" in the DDE. § 102.67(e) (emphasis added); *see also, e.g.*, § 102.67(c) (Board may review a DDE "[u]pon the filing of *a* request therefor"). The Employer's urged division of "the issues" piecemeal among several requests submitted in multiple documents would violate § 102.67(e).

It would also violate § 102.67(i)(1). Subsection (i)(1) prohibits multiple requests for review of the same DDE. The term "repetitive requests" in § 102.67(i)(1), read in context with the prior sentence and § 102.67(e), unambiguously prohibits serial requests for review of a single DDE—especially when they are filed pre- and post-election as the Employer has done here.

The Employer's April 3, 2017 Letter advances two new arguments not addressed in the Employer's March 2017 submissions: that 29 CFR § 102.67(i)(1) does not prohibit serial requests for review; and that the Petitioner has not shown prejudice. Each of these arguments is meritless for the following reasons:

(1) Rule 102.67(i)(1) unambiguously prohibits multiple, piecemeal requests for review. This is particularly clear when that rule is read with the rest of § 102.67—including Subsection (e)'s requirement that a request for review be "a self-contained document" that addresses "all evidence or rulings bearing on the issues" in the DDE; and

(2) although the Petitioner need not prove any prejudice for the Board to apply its rules, the Petitioner *has* suffered significant prejudice already from the Employer's evasion and abuse of those rules. The Petitioner will suffer substantially more if the Board underwrites the Employer's tactics.

Each of these points will be addressed in turn.

First, the Employer's reading of 29 CFR § 102.67(i)(1) would render that provision absurd. That rule—like every rule—must be read in context. As previously noted, the Board's rules provide that "[a] request for review must be *a self-contained document*" that addresses "all evidence or rulings bearing on the issues" in the DDE. § 102.67(e). Rule 102.67(i)(1), in turn, provides as follows:

> A party may combine a request for review of the regional director's decision and direction of election with a request for review of a regional director's post-election decision, if the party has not previously filed a request for review of the pre-election decision. Repetitive requests will not be considered.

The term "repetitive requests" in the second sentence of § 102.67(i)(1) can be understood only by identifying its referent—i.e., the "requests" to which the term refers. That referent is obvious: the sentence immediately preceding the term refers to multiple requests for review of a single Regional Director decision. As § 102.67(i)(1) and § 102.67(e) make clear, such serial requests "will not be considered." § 102.67(i)(1).

To arrive at its contrary interpretation of § 102.67(i)(1), the Employer divorces the ultimate sentence of that Subsection from the sentence preceding it, thereby removing any rational meaning from either sentence. The Employer reads the penultimate sentence to mean that a party filing a request for review of a post-election decision may file serial requests for review of a DDE so long as it does not combine them with a request for review (or serial requests for review) of a post-election decision. In other words, the Employer insists that the

Board's purpose in drafting that penultimate sentence was to encourage separate, multiplicitous requests for review of the same DDE and disallow consolidation of briefing. Particularly in light of § 102.67(e)'s requirement that the request for review of a single action be in "a self-contained document" with "all evidence or rulings bearing on the issues" in the DDE, the Employer's proposed interpretation of § 102.67(i)(1)'s penultimate sentence makes it nonsensical.

And the Employer's reading of the § 102.67(i)(1)'s ultimate sentence is even more tendentious. The Employer contends that the term "repetitive" in that sentence disallows only requests for review that cover the same legal "issue" covered in a previous request. That interpretation makes no sense. What makes one legal argument "repetitive" of or different from another? Is the argument that *Columbia* should be reversed different from the argument that *Columbia* is distinguishable? Does the fact that the Employer summarized *both* of those arguments in its February 15 request for review render further arguments on those points "repetitive"? Many equally facile semantic arguments could be made that "repetitive requests" prohibits only requests that are word-for-word identical, or have certain paragraphs in common.

But parsing the term "repetitive requests" out of context is unnecessary. The term's referent makes clear its meaning: it refers to the serial requests at issue in the prior sentence. The Employer's proposition that § 102.67(i)(1) could permit serial requests so long as a party nags the Board with those requests piecemeal is contrary to the purpose of the Board's rules, would permit the Employer's gamesmanship, and would impose on the party who prevailed in the DDE severe unpredictability and unnecessary cost. The purpose of the Board's new rules was to streamline the process—not to make it more byzantine.

The meaning of "repetitive requests" is separately and independently made clear by § 102.67(e). As noted above, that provision states that the Employer's February 15 request for

review of the DDE was required to be in a "self-contained document" that summarized "*all* evidence or rulings bearing on *the issues*" in the DDE. § 102.67(e) (emphasis added).

The Employer's February 15 request identified the Regional Director's ruling regarding *Columbia*—one of "the issues" in the DDE—but then purposefully withheld "evidence or rulings" regarding that issue. § 102.67(e). The Employer's intentional withholding of that support was in direct violation of § 102.67(e). It had no "right" to "reserve" presentation of "all evidence or rulings"; it was required to present them. *Id*. Permitting the Employer to file a second, third, or fourth request for review of the DDE would result in serial requests none of which is a "self-contained document" as required by § 102.67(e).

Second, the Employer's "prejudice" argument is meritless. The Petitioner is not seeking an injunction or extraordinary relief. The Petitioner just wants the Board to apply its own rules. Prejudice need not be shown here.

In any event, the Petitioner *has* suffered significant prejudice from the Employer's evasion and abuse of the rules. And the Petitioner will suffer much more prejudice if the Board applies the Employer's irrational interpretation of those rules.

Prejudice thus far: The Employer's six submissions asserting a non-existent right to serial, piecemeal requests for review have prejudiced the Petitioner by denying it the benefit of the streamlined process that the recent amendments to the rules were intended to establish. The Employer's February 15 request for review came just days before the election, forcing the Petitioner to take time away from campaigning at a crucial point and to expend considerable attorney's fees. Since then, each of the Employer's five successive post-election Board filings (one on March 9, two on March 10, one on March 14, and one on April 3) further diverted the Petitioner from its organizing and unnecessarily forced it to expend resources.

Styled as a request for "expedited" review, the Employer's February 15 request waited until three weeks after the DDE and did not even cite the standard applicable to such emergency requests—showing that the very *purpose* of the Employer's February 15 request was to undermine the Petitioner's eleventh hour organizing efforts. Rather than cite that standard or attempt to show any cognizable harm that would result from denying pre-election review, the Employer's request was simply a re-write of its post-hearing brief regarding *Specialty Healthcare*. Simultaneously, the Employer purported to "reserve" the "right" to file a later request for review on *Columbia*-related issues that were resolved by argument at the pre-election hearing. In this way, the Employer's half-cocked pre-election request sought with relatively little effort to reveal as little as possible in the way of new written arguments and yet frustrate and drain resources from Petitioner's critical pre-election preparations.

Prejudice if the Board were to submit to the Employer's unfair tactics: Were the Board to undersign the Employer's attempted rule violations, the Petitioner would be further prejudiced during the critical last months of the Spring semester. This prejudice would take multiple forms.

Rewarding the Employer's unfair tactics would do violence to the reliability of, and unions' faith in, the Board's rules and procedures. And responding to a second request for review would cost the Petitioner significant resources and time due to collection of evidence and attorneys' fees. The Petitioner likely would need to request more than a week to analyze and respond to "all evidence" detailed in the Employer's serial submission (especially with the extra pages requested by the Employer), causing additional delay in these remaining months.

Allowing such violence to Board rules, resource drain, and unwarranted delay would undermine the units' rights to have their union focused on representing them in bargaining at this

crucial time. The Spring semester ends in May. In the face of such significant prejudice, it would be particularly unfair to allow the Employer to violate the Board's unambiguous rules.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests an order prohibiting the Employer from filing any additional requests for review of the Regional Director's January 25, 2017 decision and direction of election.

Respectfully submitted this 4th day of April, 2017.

/s/ Yuval Miller

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I am employed in the city and country of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 595 Market Street, Suite 800, San Francisco, CA 94105.

I hereby certify that a true and correct copy of the foregoing document entitled PETITIONER'S OPPOSITION TO THE EMPLOYER'S APRIL 3, 2017 LETTER SEEKING TO FILE A SECOND REQUEST FOR REVIEW OF THE D.D.E. was filed using the National Labor Relations Board on-line E-filing system on the Agency's website and copies of the aforementioned were therefore served upon the following parties via electronic mail on this 4th day of April, 2017 as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 4, 2017 at San Francisco, California.

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