Final Brief Oral Argument Not Yet Scheduled

Nos. 16-1332, 16-1379

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CVS ALBANY, LLC, d/b/a CVS,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CVS ALBANY, LLC, d/b/a CVS,	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-1332, 16-1379
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	29-CA-179095
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certifies the following:

A. Parties and Amici:

1. CVS Albany, LLC, d/b/a CVS, was the Respondent before the Board and is the Petitioner and Cross-Respondent before the Court.
2. The Board is the Respondent and Cross-Petitioner before this Court.
3. The Retail, Wholesale and Department Store Union, United Food and Commercial Workers International Union, Local 338, was the charging party before the Board.

B. Rulings Under Review:

The Company is seeking review of a Decision and Order issued by the Board in case number 29-CA-179095 on September 15, 2016, and reported at 364 NLRB No. 122.

C. <u>Related Cases:</u>

None.

/s/ Linda Dreeben
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Dated at Washington, DC
this 13th day of April, 2017

Glossary

CVS Albany, LLC, d/b/a CVS …….....Company

National Labor Relations Board…….....Board

Retail, Wholesale and Department Store Union,
United Food and Commercial Workers International Union,
Local 338……..……....Union

National Labor Relations Act…….....Act

Company's Brief.…….……....Br.

Company's Flatbush Avenue Store……..……Flatbush Store

Parties' Stipulated Election Agreement…….……..Agreement

TABLE OF CONTENTS

Headings **Page(s)**

Statement of jurisdiction 1

Statement of the issues 3

Relevant statutory provisions 3

Statement of the case 3

I. The representation proceeding 4

II. The unfair-labor-practice proceeding 9

III. The Board's conclusions and Order 10

Standard of review 11

Summary of argument 12

Argument 14

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and to furnish the Union with relevant and necessary information 14

A. The agreement is undisputedly ambiguous 16

B. The Board properly interpreted the agreement as excluding from the unit the employees who cast the challenged ballots 17

1. The Board's interpretation effectuates the whole Agreement; the Company's alternative interpretation improperly renders a term superfluous 17

2. Substantial evidence supports the Board's finding that the extrinsic evidence bolsters its interpretation of "floater" 21

3. The employees who cast the challenged ballots are "floaters," excluded from the stipulated unit 28

TABLE OF CONTENTS

Headings-Cont'd **Page(s)**

C. The Board did not abuse its discretion by failing to proceed to a community-of-interest analysis 29

Conclusion 32

TABLE OF AUTHORITIES

Cases **Page(s)**

Am. Hosp. Ass'n v. NLRB,
499 U.S. 606 (1991)..... 30

Armenian Assembly of Am., Inc. v. Cafesjian,
758 F.3d 265 (D.C. Cir. 2014)..... 24

**Associated Milk Producers, Inc. v. NLRB,*
193 F.3d 539 (D.C. Cir. 1999)..... 12, 15, 16, 17, 21, 29

Blue Man Vegas, LLC v. NLRB,
529 F.3d 417 (D.C. Cir. 2008)..... 31

Boire v. Greyhound Corp.,
376 U.S. 473 (1964)..... 2

Buckley Southland Oil,
210 NLRB 1060 (1974)..... 19, 20

Butler Asphalt, L.L.C.,
352 NLRB 189 (2008)..... 25, 26

Caesar's Tahoe,
337 NLRB 1096 (2002)..... 15

Consol. Edison Co. v. NLRB,
305 U.S. 197 (1938)..... 12

Desert Hosp. v. NLRB,
91 F.3d 187 (D.C. Cir. 1996)..... 11

DIRECTV, Inc. v. NLRB,
837 F.3d 25 (D.C. Cir. 2016)..... 12

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* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd **Page(s)**

Excelsior Underwear, Inc.,
156 NLRB 1236 (1966) 20

Freund Baking Co.,
330 NLRB 17 (1999) 3

**Gala Food Processing*,
310 NLRB 1193 (1993) 15, 21, 26

**Hard Rock Holdings*,
672 F.3d 1117 (D.C. Cir. 2012) 11, 15, 20, 21, 25, 26

Kroger Co.,
342 NLRB 202 (2004) 19

Los Angeles Water & Power Employees' Association,
340 NLRB 1232 (2003) 25, 26

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 17

Medina Cty. Publ'ns,
274 NLRB 873 (1985) 3

Metro. Edison Co. v. NLRB,
460 U.S. 693 (1983) 14

Nat'l Pub. Radio, Inc.,
328 NLRB 75 (1999) 22

New Process Steel, L.P. v. NLRB,
560 U.S. 674 (2010) 25

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TABLE OF AUTHORITIES

Cases -Cont'd **Page(s)**

NLRB v. A.J. Tower,
329 U.S. 324 (1946)..... 11

NLRB v. Acme Indus. Co.,
385 U.S. 432 (1967)..... 14

NLRB v. Curtin Matheson Sci., Inc.,
494 U.S. 775 (1990)..... 14

Pub. Serv. Co. of N.M. v. NLRB,
843 F.3d 999 (D.C. Cir. 2016)..... 14

Reg'l Emergency Med. Servs.,
354 NLRB 224 (2009)..... 21

S. Co. Servs., Inc. v. FERC,
353 F.3d 29 (D.C. Cir. 2003)..... 17

Schoolman Transp. Sys., Inc. v. NLRB,
112 F.3d 519 (D.C. Cir. 1997)..... 11

Serramonte Oldsmobile, Inc. v. NLRB,
86 F.3d 227 (D.C. Cir. 1996)..... 30

Tribune Co.,
190 NLRB 398 (1971)..... 15

United States v. Ins. Co. of N. Am.,
83 F.3d 1507 (D.C. Cir. 1996)..... 17

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951)..... 12

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd **Page(s)**

USF Reddaway, Inc.,
349 NLRB 329 (2007) 17, 18, 19

Viacom Cablevision,
268 NLRB 633 (1984) 16

White Cloud Prods.,
214 NLRB 516 (1971) 16

Statutes:

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 8(a)(1) (29 U.S.C. § 158(a)(1)) 3, 4, 9, 10, 12, 14, 16, 32
Section 8(a)(5) (29 U.S.C. § 158(a)(5)) 3, 4, 9, 10, 12, 14, 16, 32
Section 9(c) (29 U.S.C. § 159(c)) 3
Section 9(d) (29 U.S.C. § 159(d)) 2
Section 10(a) (29 U.S.C. § 160(a)) 2
Section 10(e) (29 U.S.C. § 160(e)) 2, 11
Section 10(f) (29 U.S.C. § 160(f)) 2

Other Authorities:

11 Williston on Contracts § 32:1 (4th Ed.) 17
11 Williston on Contracts § 31:4 (4th Ed.) 16
Restatement (Second) of Contracts § 203(a) (1981) 17

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of CVS Albany, LLC, d/b/a CVS ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a final Board Decision and Order. The Board's Decision and Order issued against the Company on September 15, 2016.

364 NLRB No. 122. (JA 339-42.)[1] The Board has subject-matter jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 151, 160(a), which empowers the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over the Company's petition and the Board's cross-application pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), which provides that petitions for review of Board orders may be filed in this Court. The Company's petition and the Board's cross-application were timely because the Act imposes no time limit on the initiation of review or enforcement proceedings.

The Board's Order is based, in part, on findings made in the underlying representation proceeding, *CVS Albany, LLC*, Board Case No. 29-RC-155927. (JA 300-02.) Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record before this Court therefore includes the record in the underlying representation proceeding. Section 9(d) authorizes judicial review of the Board's actions in representation proceedings for the limited purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair labor practice] order of the Board…."[2] The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to

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[1] "JA" references are to the joint appendix, and "Br." references are to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] 29 U.S.C. § 159(d); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964).

resume processing the representation case in a manner consistent with this Court's ruling.[3]

STATEMENT OF THE ISSUES

The ultimate issue in this case is whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with, and provide necessary, requested information to, its employees' certified bargaining representative. Resolution of that issue turns on whether the Board abused its discretion by sustaining challenges to three ballots cast in the representation election based on its finding that the bargaining unit described in the parties' stipulated election agreement excluded the challenged voters.

RELEVANT STATUTES AND REGULATIONS

The relevant statutory provisions are contained in an addendum to this brief.

STATEMENT OF THE CASE

This unfair-labor-practice case arises from the Company's admitted refusal to bargain with the Retail, Wholesale and Department Store Union, United Food and Commercial Workers International Union, Local 338 ("the Union"), the exclusive collective-bargaining representative of a unit of its employees, and to

[3] *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999); *Medina Cty. Publ'ns*, 274 NLRB 873, 873 (1985).

provide the Union with necessary, relevant information. (JA 339; 322-25.) The Company contested the validity of the Union's certification, asserting that the Board erroneously excluded three employees from the bargaining unit described in the parties' stipulated election agreement. (JA 339; 322-25.) The Board rejected that argument, and held that the Company's refusal to bargain and furnish information violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (JA 339-42.) The facts and procedural history relevant to both the representation and the unfair-labor-practice proceedings are set forth below.

I. THE REPRESENTATION PROCEEDING

The Company operates a store with both retail and pharmacy departments at 1070 Flatbush Avenue in Brooklyn, New York ("the Flatbush store"), as well as stores in other locations. (JA 184; 27-29, 46.) The retail department has a Store Manager, an Assistant Manager, various Shift Supervisors, and Clerks/Cashiers. (JA 184; 28.) The store is part of a larger district, overseen by a District Manager. (JA 184; 27-28.)

On July 14, 2015, the Union filed an election petition with Region 29 of the Board, seeking to represent the Company's retail employees at the Flatbush store. (JA 182; 158.) The petition included all regular, full- and part-time employees in the retail section of the store, but excluded "[a]ll employees in the pharmacy section of the store (including pharmacists, pharmacy interns, inventory specialists,

and pharmacy technicians), floaters, seasonal employees, managers, and others statutorily excluded by the Act." (JA 301; 158.) On July 23, the Regional Director approved a stipulated election agreement ("the Agreement") between the Company and the Union that defined the bargaining unit as follows:

> Included: All regular full-time and part-time retail employees, including Clerk/Cashiers, Shift Supervisor Bs, and Photo Lab Supervisors.
> Excluded: All floaters, seasonal employees and pharmacy employees, including pharmacists, pharmacy interns, inventory specialists, and pharmacy technicians, and guards, managers and supervisors as defined in the Act.

(JA 182; 161-63.) As per the Agreement, the Company provided the Union with a voter list. (JA 162.) The list included the three employees whose votes were later challenged by the Union: Kane Chow, Debra Ellsmore, and Debbie Henry-Aughton.

On August 7, the Board conducted an election among the unit employees. (JA 340.) The result was 4-3 in favor of the Union, with three challenged ballots. (JA 182; 165.) The Union raised the challenges, contending that Chow, Ellsmore, and Henry-Aughton were excluded from the unit as "floaters."[4] (JA 300; 168-69.) It argued that the term "floater" in the Agreement referred to employees whose "home store" was not Flatbush, but who worked there periodically or sporadically.

[4] The Union also filed objections to the election based on its ballot challenges. The Regional Director overruled those objections as duplicative of the challenges. (JA 173.)

(JA 300-01; 172.) The Company argued that "floater" referred to "pharmacist-floater," a classification used in the pharmacy department, and did not refer to any retail employees, including the three who cast the challenged ballots. (JA 300; 172.) The Regional Director issued a report recommending that a hearing be held to determine the meaning of the term "floater" within the context of the Company's operations, which the Board adopted. (JA 182-83; 171-76, 178-79.) The evidence adduced at the hearing showed the following with respect to the "home store" designation and the three employees' work at the Flatbush store.

All employees have an official "home store" in the Company's human-resources system. (JA 300 n.2, 184; 12, 31.) The Company may permanently transfer an employee to a new home store. (JA 184; 44-45, 101.) Neither temporary transfers nor work concurrently performed at other stores necessitate a change in the employee's home store, which retains responsibility for employees' paychecks, holiday pay, sick pay, performance evaluations, and wage increases. (JA 184; 44-45, 52-56, 63-64, 70-72, 88, 94-100, 112-13.) During the relevant time period, Chow, Ellsmore, and Henry-Aughton were the only three retail employees with home stores other than Flatbush who performed work at the Flatbush store. (JA 300 n.3; 55-56, 69, 74-82, 101-02.)

Chow's home store was the Metropolitan Avenue location. (JA 188; 69.) In 2010, the District Manager began sending Chow to other stores to sort out

backlogs and organize inventory as an "inventory specialist." (JA 188-89; 70-71.) After completing his overhaul at a particular store, Chow leaves, only returning periodically to check up on it. (JA 300 n.3; 70-71, 77-78.) Chow worked at Flatbush for two to three months, organizing inventory in the store's basement. (JA 300 n.3; 74-75.) At the time of the hearing, Chow did not have any specific plans to return to Flatbush. (JA 300 n.3; 89, 92-93.)

Ellsmore's home store was the Pennsylvania Avenue location, where she maintained a consistent schedule. (JA 187; 101-02, 115.) She also worked at several other stores, including Flatbush, primarily maintaining Hallmark displays. (JA 300 n.3; 94-100.) Beginning in February 2015, Ellsmore worked sporadically at Flatbush, between four and ten hours a week, reporting to the District Manager. (JA 188; 99, 103-05, 114-16.)

Henry-Aughton's home store was the Flatlands Avenue location, where she had a consistent schedule. (JA 186-87; 51-55.) In early spring 2015, she reached out to the Flatbush store manager to pick up extra hours. (JA 186-87; 53-55.) Although she worked two days a week at Flatbush, the particular shifts varied depending on the staffing needs of Flatbush's store manager and her schedule at her home store. (JA 300 n.3; 66-68.)

After the hearing, the hearing officer issued a report recommending that the Union's challenges to the ballots of Ellsmore and Henry-Aughton be overruled and

that the challenge to Chow's ballot be sustained. (JA 194-95.) Specifically, the hearing officer found that the Agreement's language was ambiguous and that the extrinsic evidence was insufficient to demonstrate the intent of the parties. (JA 191-92.) Thus, the hearing officer applied a community-of-interest analysis, finding that Ellsmore and Henry-Aughton shared sufficient community of interest with the unit employees to be included in the unit, while Chow did not. (JA 192-94.) Both parties filed exceptions. (JA 300; 197.) The Regional Director overruled the parties' exceptions, adopting the hearing officer's recommendations, and both parties filed requests for review with the Board. (JA 300; 197-209, 211-98.)

On June 7, 2016, the Board issued a Decision on Review and Order sustaining all three of the Union's ballot challenges. (JA 300.) While the Board agreed that the language of the Agreement was ambiguous, it found that the ambiguity could be resolved through ordinary methods of contract interpretation. (JA 301.) Specifically, the Board agreed with the Union's interpretation of the term "floaters": all employees whose home store was not the Flatbush location but who worked there periodically or sporadically. (JA 301.) The Board further concluded that the three employees who cast the challenged ballots were "floaters," excluded from the stipulated unit. (JA 302.) It remanded the proceeding to the Regional Director, who certified the Union as the exclusive

collective-bargaining representative of the unit employees on June 20. (JA 302; 306-08.)

II. THE UNFAIR-LABOR-PRACTICE PROCEEDING

On June 23, 2016, the Union requested that the Company bargain with it as the certified representative of the unit employees. (JA 340; 310-11.) The Union also requested that the Company provide it with information necessary for the Union's performance of its representational duties. (JA 340; 310-11.) The Company refused to recognize and bargain with the Union or to provide the information. (JA 340; 313-20.)

Based on the Company's refusal, the Union filed an unfair-labor-practice charge with the Board. (JA 339; 310-11.) Thereafter, the General Counsel issued a complaint alleging that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and refusing to provide the Union with necessary information. (JA 339; 313-20.) In response, the Company filed an answer admitting its refusal to bargain and provide information, but contesting the Board's certification of the Union. (JA 339-40; 322-25.) The General Counsel filed a motion for summary judgment, and the Board issued an order transferring proceedings to itself and a notice to show cause why the motion should not be granted. (JA 339.) The Company filed a response, again admitting

its refusal to bargain and provide information but contesting the Union's certification. (JA 339.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On September 15, 2016, the Board issued a Decision and Order granting the General Counsel's motion for summary judgment and finding that the Company's refusal to bargain with, and provide requested information to, the Union violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (JA 339-41.) In doing so, the Board concluded that all representation issues raised by the Company in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding and that the Company had neither offered to adduce any newly discovered evidence, nor shown any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. (JA 339.)

The Board's Order requires the Company to cease and desist from: failing and refusing to recognize and bargain with the Union; failing and refusing to furnish the Union with requested information that is necessary and relevant to its role as the exclusive collective-bargaining representative of the unit employees; or, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act. (JA 340-41.) Affirmatively, the Board's Order requires the Company to: bargain with the Union upon request and,

if an understanding is reached, embody that understanding in a signed agreement; furnish the Union with the requested information; and post a remedial notice. (JA 340-41.)

STANDARD OF REVIEW

Congress has "entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."[5] The Court will review the Board's disposition of ballot challenges for abuse of discretion, and will thus uphold the Board's decision to sustain such challenges "unless . . . unreasonable, arbitrary or unsupported by the evidence."[6] Although the Court reviews *de novo* the Board's determination that a stipulated election agreement is ambiguous, the Board's factual determinations are conclusive if "supported by substantial evidence on the record considered as a whole."[7] Evidence is substantial when "a reasonable

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[5] *NLRB v. A.J. Tower*, 329 U.S. 324, 330 (1946).

[6] *Desert Hosp. v. NLRB*, 91 F.3d 187, 191 (D.C. Cir. 1996); *see also Hard Rock Holdings*, 672 F.3d 1117, 1120 (D.C. Cir. 2012) (holding "the court must determine whether the Board abused its discretion" in sustaining challenges to ballots); *Schoolman Transp. Sys., Inc. v. NLRB*, 112 F.3d 519, 521 (D.C. Cir. 1997) (rejecting employer's argument that Board abused discretion "in determining which ballots to count in the election").

[7] *Hard Rock Holdings*, 672 F.3d at 1120-21 (citing Section 10(e) of the Act, 29 U.S.C. § 160(e)).

mind might accept [it] as adequate to support a conclusion."[8] Thus, the Court will not displace the Board's choice between two fairly conflicting views, even if it "would justifiably have made a different choice had the matter been before it *de novo*."[9]

SUMMARY OF ARGUMENT

The Board did not abuse its discretion in sustaining the Union's challenges to the ballots of three employees who were "floaters," excluded from the stipulated bargaining unit by the parties' Agreement. The Board, therefore, properly certified the Union as the collective-bargaining representative of the unit, and the Company's refusal to bargain or to provide the Union with necessary, relevant information violates Section 8(a)(5) and (1) of the Act.

The Board employed the applicable analysis for resolving disputes over the composition of a stipulated bargaining unit, and reasonably found that the Agreement's ambiguity with respect to the term "floater" could be resolved through normal methods of contract interpretation. Specifically, the Board relied upon the well-established interpretive principle of avoiding superfluity, finding that "floaters" could not, as the Company argued, refer to "pharmacy-floaters,"

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[8] *Associated Milk Producers, Inc. v. NLRB*, 193 F.3d 539, 542 (D.C. Cir. 1999) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[9] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord DIRECTV, Inc. v. NLRB*, 837 F.3d 25, 33 (D.C. Cir. 2016).

who were encompassed by a separate exclusion of all pharmacy employees. The Board found, instead, that "floaters" refers to employees who have a different home store than Flatbush, but who work at the Flatbush store periodically or sporadically. Moreover, the Board found that extrinsic evidence bolstered that interpretation. Having resolved the Agreement's ambiguity, the Board had no need to perform a community-of-interest analysis to assess whether the three employees who cast the challenged ballots should be included in the unit.

The Company does not contest the ambiguity of the agreement, and has failed to show that the Board misapplied the principle of superfluity or that the Board's assessment of the extrinsic evidence is not supported by substantial evidence. In short, the Company has not met its burden to show that the Board abused its discretion in sustaining the Union's ballot challenges and subsequently certifying the Union. Accordingly, the Board is entitled to enforcement of its Order requiring the Company to bargain with the Union and provide relevant, necessary information.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION AND TO FURNISH THE UNION WITH RELEVANT AND NECESSARY INFORMATION

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 . . . ."[10] The statutory duty to bargain includes the obligation of each party to provide the other with requested information necessary to addressing the issues that separate them.[11] Here, the Company does not dispute that it refused to recognize and bargain with the Union and to provide relevant requested information. Rather, the Company contends that its refusal is lawful because the Board erred in sustaining the Union's ballot challenges and, consequently, in certifying the Union as the bargaining representative of the unit employees.

The Board has a longstanding policy of permitting parties, as the Company and Union did here, to enter into stipulations regarding appropriate bargaining

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[10] 29 U.S.C. § 158(a)(5). A violation of Section 8(a)(5) results in a derivative violation of 8(a)(1) by interfering with employees' collective bargaining rights. *See, e.g., NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 778 (1990); *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

[11] *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967); *Pub. Serv. Co. of N.M. v. NLRB*, 843 F.3d 999, 1005 (D.C. Cir. 2016).

units.[12] When a question arises as to the interpretation of such an agreement that affects the composition of the stipulated unit, the Board resolves the dispute using an analysis adopted from this Court's decision in *Associated Milk Producers, Inc. v. NLRB.*[13] Under that analysis, the Board must first determine "whether the stipulation is ambiguous."[14] If the stipulation is unambiguous, then the Board "must simply enforce the agreement."[15] If the stipulation is ambiguous, however, the Board must proceed to the second step and "determine whether the parties' intent can nonetheless be discerned" by resorting to normal methods of contract interpretation, including the examination of extrinsic evidence.[16] In resolving ambiguities, the Board "examines the [parties'] intent on an objective basis, and

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[12] *See, e.g.*, *Tribune Co.*, 190 NLRB 398, 398 (1971) (To ensure speedy resolution of questions concerning representation, the Board permits parties "to stipulate to the appropriateness of the unit, and to various inclusions and exclusions."); *Gala Food Processing*, 310 NLRB 1193, 1193 (1993) ("It is settled Board policy to accept stipulations from parties as to bargaining unit composition and voter eligibility . . . .").

[13] *Associated Milk*, 193 F.3d at 543-44; *accord Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002) (expressly adopting *Associated Milk*'s test).

[14] *Associated Milk*, 193 F.3d at 543.

[15] *Id*.

[16] *Id*. at 543-44; *see also Hard Rock Holdings*, 672 F.3d at 1121 ("If the stipulation is ambiguous, however, the Board must apply ordinary principles of contract law in an attempt to determine the parties intent.").

denies recognition to any subjective intent at odds with the stipulation."[17] If the parties' intent still cannot be ascertained, the Board proceeds to the third step of the test and determines the bargaining unit by utilizing "its normal community of interest standard."[18]

As demonstrated below, the Board properly applied the three-pronged *Associated Milk* analysis, interpreting the Agreement to exclude from the stipulated unit, as "floaters," three retail employees who worked at the Flatbush store but were each assigned to a different home store. The Board thus did not abuse its discretion in sustaining the Union's ballot challenges and certifying the Union. Accordingly, the Company's admitted refusal to bargain and provide information to the Union violates Section 8(a)(5) and (1) of the Act and the Board is entitled to enforcement of its Order.

A. The Agreement Is Undisputedly Ambiguous

The Board properly found (JA 301), and the Company does not contest (Br. 22, 25), that the Agreement is ambiguous with respect to the excluded

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[17] *Viacom Cablevision*, 268 NLRB 633, 633 (1984); *see also White Cloud Prods.*, 214 NLRB 516, 517 (1971) (Board will not give meaning to intent "subjectively entertained" by the parties if at odds with the stipulation); *see generally* 11 Williston on Contracts § 31:4 (4th Ed.) ("[T]he object in interpreting or construing a written contract is to ascertain the meaning and intent of the parties as expressed in and determined by the words they used, irrespective of their supposed, actual subjective intent.").

[18] *Associated Milk*, 193 F.3d at 543 (collecting cases).

category of "floaters." The Agreement does not define that term, and the Company does not maintain any such job classification. (JA 301.)

B. The Board Properly Interpreted the Agreement as Excluding from the Unit the Employees Who Cast the Challenged Ballots

Moving to *Associated Milk*'s second prong, the Board found (JA 301) that the Agreement's ambiguity could be resolved through normal methods of contract interpretation. In doing so, the Board applied two established interpretive methods: the principle of avoiding superfluity and the examination of extrinsic evidence. (JA 301.)

1. The Board's interpretation effectuates the whole Agreement; the Company's alternative interpretation improperly renders a term superfluous

As the Board observed (JA 301), it is well established that an interpretation of a contract that gives "a reasonable, lawful, and effective meaning" to all terms is preferred over one that renders some terms superfluous.[19] Indeed, this Court has expressly stated that "[c]ontracts must be read as a whole, with meaning given to every provision."[20] In *USF Reddaway*, the Board utilized that principle to reject an

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[19] JA 301 n.4 (quoting Restatement (Second) of Contracts § 203(a) (1981)); *see also* 11 Williston on Contracts § 32:1 (4th Ed.) ("Individual clauses and particular words of the agreement . . . will, if possible, be given effect.").

[20] *S. Co. Servs., Inc. v. FERC*, 353 F.3d 29, 35 (D.C. Cir. 2003); *see also United States v. Ins. Co. of N. Am.*, 83 F.3d 1507, 1511 (D.C. Cir. 1996) (noting "the cardinal principle of contract construction: that a document should be read as to give effect to all its provisions") (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995)).

interpretation of a stipulated election agreement that would render one of its terms superfluous.[21] Here, the Board performed the same analysis to determine the most reasonable interpretation of the Agreement. The Agreement expressly excludes "all floaters" from the stipulated unit, and also excludes other categories of workers, including "all . . . pharmacy employees." The interpretation of "floater" adopted by the Board – an employee whose home store is not Flatbush but who works there periodically or sporadically – gives "a reasonable, lawful, and effective meaning" to all terms in the Agreement.

By contrast, the Company's proposed interpretation – that the term "floaters" refers to pharmacist-floaters, who are undisputedly pharmacy employees – would, as the Board explained (JA 301), render superfluous the Agreement's later exclusion of all pharmacy employees. The same is true of the Company's further suggestion that the term "floater" could have been "intended as a modifier" (Br. 26), because "pharmacist-floaters" were not listed among the excluded pharmacy employees. The Agreement explicitly states that all pharmacy employees are excluded from the unit. Its use of the word "including" before enumerating certain pharmacy job classifications makes clear that they are

[21] *USF Reddaway, Inc.*, 349 NLRB 329, 330 (2007) (finding term "all mechanics" in stipulated unit description could not encompass all job titles including word "mechanic" because same agreement separately included "trailer mechanics").

examples of pharmacy employees falling within the exclusion, not a list of the *only* pharmacy employees who are excluded.

The Company incorrectly claims (Br. 27-30) that the Board's superfluity analysis runs contrary to Board precedent, citing *Kroger Co.*, *USF Reddaway*, and *Buckley Southland Oil*.[22] As noted above, and as the Company essentially concedes (Br. 27-28), *USF Reddaway* supports the Board decision here by applying the same superfluity analysis in an analogous manner. That the Board in *USF Reddaway* did not ultimately define the unit based on the parties' stipulation is immaterial.

The analysis in *Kroger* is not inconsistent with the analysis in this case; it is distinguishable. In *Kroger*, the Board addressed a disconnect between the language of a stipulated election agreement and the actual composition of an employer's workforce, comparing the ambiguous terms of the agreement with actual employees and their classifications. By contrast, in this case, as in *USF Reddaway*, the Board addressed the incompatibility between the proposed interpretation of one term of an agreement ("all floaters") with another term in the same agreement ("all . . . pharmacy employees").[23]

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[22] *Kroger Co.*, 342 NLRB 202 (2004); *USF Reddaway*, 349 NLRB at 329; *Buckley Southland Oil*, 210 NLRB 1060 (1974).

[23] *Kroger*, 342 NLRB at 209-10 (rejecting proposed interpretation of stipulated election agreement to exclude certain employees from unit where only supporting

Finally, the Company's reliance on *Buckley Southland Oil* is premised on a misunderstanding of the Board's representation-election procedures. In *Buckley*, the Board found no meeting of the minds where the parties had explicitly agreed to wait and use postelection procedures to resolve the eligibility of certain employees.[24] The Company argues (Br. 28-29) that *Buckley* is analogous to the present case because the Union waited until after the election to challenge the eligibility of Chow, Ellsmore, and Henry-Aughton, despite their inclusion on the Company's "*Excelsior* list." An *Excelsior* list is a list of all eligible bargaining-unit employees, compiled by the employer and served upon the union following a direction of election by the Board.[25] The Company asserts that the Union's failure to object to the list in this case showed an *implicit* agreement to resolve the definition of "floater" through postelection procedures and, therefore, establishes that the parties, like the parties in *Buckley*, did not reach a meeting of the minds as to that issue in the Agreement. But that argument runs contrary to *Hard Rock Holdings*, where this Court rejected an employer's argument that a union "forfeited its right to challenge the ballots of eight dual-rated employees by not protesting

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evidence was that, if they fell outside the exclusion, no current employees would fit the exclusion, rendering it superfluous).

[24] *Buckley Southland Oil*, 210 NLRB at 1060-61.

[25] *See Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

their inclusion on the Excelsior list."[26] Because an *Excelsior* list's purpose is to encourage an informed electorate and advance the fair choice of bargaining representatives, "acknowledgement of the list [is] not tantamount to approving of the bargaining unit as constituting the employees whose names [are] on the list."[27] Accordingly, the Union's failure to protest the inclusion of Chow, Ellsmore, and Henry-Aughton on the *Excelsior* list has no significance in the determination of the parties' intent in this case.

2. Substantial evidence supports the Board's finding that the extrinsic evidence bolsters its interpretation of "floater"

In interpreting an ambiguous stipulation, the Board "may consider extrinsic evidence" to determine the parties' intent.[28] Such extrinsic evidence may include any changes from the language of the union's original election petition to that agreed upon by the parties in the stipulated election agreement.[29] Additionally, the intent of the parties concerning job classifications included in or excluded from a

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[26] *Hard Rock Holdings*, 672 F.3d at 1123.

[27] *Id*.

[28] *Id*. at 1121 (citing *Associated Milk*, 193 F.3d at 544).

[29] *See, e.g.*, *Gala Food Processing*, 310 NLRB 1193, 1193-94 (1993) (comparing union's initial petition with stipulation and highlighting addition of on-call employees in determining intent of parties); *Reg'l Emergency Med. Servs.*, 354 NLRB 224, 224-25 (2009) (noting presence of contingent EMTs in original petition but absence of them in stipulation in finding a clear intent to exclude that class of employee).

stipulated unit "may be determined by reference to the employer's regular use of the classifications in a manner known to its employees."[30]

After applying the well-established principle of avoiding superfluity, the Board found that the extrinsic evidence in the record strengthened its conclusion that "all floaters" referred to employees whose home store was not Flatbush but who worked there periodically or sporadically. (JA 301-02.) In doing so, the Board considered two sources of extrinsic evidence: the evolution of the language defining the stipulated unit, and testimony regarding the meaning of the term "floater." (JA 301-02.)

First, the Board found that the change in the structure of the language defining the unit, from the Union's original petition to the Agreement, "strengthen[ed] the distinction between 'floaters' and 'pharmacist-floaters.'" (JA 301.) The Union's original petition proposed to exclude "[a]ll employees in the pharmacy section of the store (including pharmacists, pharmacy interns, inventory specialists, and pharmacy technicians), floaters, seasonal employees…." (JA 301.) However, in the Agreement, the exclusion of "all floaters" was the first one listed, placing it before the enumeration of excluded pharmacy employees. That change in structure removes any possible confusion as to whether "floater" was meant to designate a subtype of pharmacy employee, like the others listed after the

[30] *Nat'l Pub. Radio, Inc.*, 328 NLRB 75, 75 n.2 (1999).

"pharmacy employee" exclusion, and thus strongly indicates that the parties did not intend "floater" to refer to "pharmacist-floaters." (JA 301.)

Second, the Board found that other extrinsic evidence, in the form of employee testimony as to the general use and understanding of the term "floater," also supported its interpretation. (JA 301-02 & nn.6 & 7.) On two occasions, store managers used the term, in the presence of employees, in a manner comporting with the Board's interpretation. (JA 301 & n.6.) Challenged voter Chow, for example, reported hearing a store manager use the term "floater" to describe employees, like him, who moved from store to store depending on the Company's operating needs. (JA 302 n.6; 90-91) When former employee Jason Ryan saw unfamiliar faces at the Flatbush store and protested to his manager that Flatbush employees were not getting enough hours, his manager addressed his concern by explaining that the unfamiliar employees were merely "floaters." (JA 301-02 n.6; 25-26.) The manager defined "floaters" as employees who were picking up extra hours at the Flatbush store because they did not have enough work at their home stores. (JA 301-02 n.6; 25-26.) The Board found that testimony "particularly persuasive" because the manager was directly addressing an employee's concern that the Flatbush store was hiring new employees, thus depressing hours for current ones. (JA 301 n.6.) By stating that those employees were "floaters," the manager was assuring Ryan they were essentially temporary, not employees based at the

store who would permanently reduce existing Flatbush employees' hours and presumably compete with Flatbush employees for regular shifts.

Employees had an understanding of the term "floater" similar to the one expressed by those managers. Two employees in the stipulated unit, Temanie Barthelemy and Adrian Caddle, testified that they understood a "floater" to be an employee who moved from store to store in accordance with the Company's staffing needs. (JA 302 n.7; 17-18, 22-23.) Challenged voter Ellsmore described "floaters" as people who "come and go" to help out at various locations other than their home stores. (JA 302 n.7; 106.) Indeed, one of the challenged voters, Henry-Aughton, testified that she would describe herself a "floater" at the Flatbush store, *but not at her home store*. (JA 302 n.7; 58-59.)

In challenging the Board's assessment of the extrinsic evidence, the Company attempts (Br. 30) to distance itself from the language of the Agreement it voluntarily signed. It asserts that the Union suggested the exclusion of "all floaters" and the Board agent determined the placement of the term in the unit description. But a party's post-hoc assertions of its "actual" belief when signing a contract cannot trump the objective meaning of that contract.[31] As the Company

[31] *See Armenian Assembly of Am., Inc. v. Cafesjian*, 758 F.3d 265, 278 (D.C. Cir. 2014) ("[T]he written language embodying the terms of an agreement will govern the rights and liabilities of the parties, [regardless] of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of a clear and definite undertaking."); *see supra* note 16.

admits (Br. 4), it signed the Agreement, explicitly "agreeing to the . . . unit description." Whether the Union requested the exclusion or the Board agent chose its placement is irrelevant; the Company signed the Agreement, thus approving of a unit description whose language objectively excludes the three challenged voters and does so in a manner even more evident than did the Union's original petition.

The Company's citation to *Hard Rock Holdings*, *Butler Asphalt*, and *Los Angeles Water & Power Employees' Association* does not support its related argument (Br. 30) that the Board "placed too much emphasis" on the change in location of the term "floaters" from the Union's original petition to the Agreement.[32] Those cases, the Company argues, show that the Board could not come to a "definitive resolution" regarding the meaning of the term "floater" based on that one piece of extrinsic evidence. (Br. 31.) But the Board did not claim to have reached a "definitive resolution" based solely upon the changed wording of the unit description, or even upon all of the extrinsic evidence taken together. Rather, the Board interpreted the term "floater" in the only proposed way that gave effective meaning to the language of the Agreement as a whole, consistent with the

[32] *Hard Rock Holdings*, 672 F.3d 1117 (D.C. Cir. 2012); *Butler Asphalt, L.L.C.*, 352 NLRB 189 (2008); *L.A. Water & Power Emps. Ass'n*, 340 NLRB 1232 (2003). While *Butler Asphalt* is distinguishable from the instant case, as discussed below, it also lacks precedential value because it was decided by a two-member Board. *See New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

established contract-interpretation principle of avoiding superfluity, and then found that the extrinsic evidence further supported that interpretation. (JA 301-02.)

That layered rationale distinguishes the present case from those cited by the Company in its brief. (Br. 31-34.) In *Butler Asphalt* and *Los Angeles Water & Power*, the Board found that changes in language from a union's election petition to the parties' stipulated agreement *alone* – rather than, as here, in combination with other extrinsic evidence and standard contractual analysis – could not definitively demonstrate the parties' intent.[33] And in *Hard Rock Holdings*, this Court rejected the employer's argument that, by agreeing to remove the term "regular" from the stipulated agreement, the union agreed to include the disputed employees in the unit.[34] The Court did so both because the revision itself was ambiguous and because no other evidence showed that the parties had agreed on the same interpretation of the revision.[35] None of those cases preclude the Board from, as it did here, considering the change in language between the Union's petition and the Agreement as a piece of relevant extrinsic evidence that *bolsters*

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[33] *Butler Asphalt*, 352 NLRB at 192; *L.A. Water & Power*, 340 NLRB at 1235-36. *Cf. Gala Food*, 310 NLRB at 1193-94 (finding sufficient evidence of parties' intent based on combination of both modification of unit description from petition to stipulated agreement and parties' communications describing the modification).

[34] *Hard Rock Holdings*, 672 F.3d at 1121-22.

[35] *Id*. at 1122.

the interpretation the Board had already reached through other methods of contract interpretation.

Finally, there is no merit to the Company's argument (Br. 34) that the Board erred by relying on employees' testimony as to the use and understanding of the term "floater" because their testimony was "subjective" and thus could not establish the Company's "regular use" of the term. The employees described not only their own understanding of the term but also similar interpretations expressed to them by the Company's agents. Equally unavailing is the Company's related assertion (Br. 36) that the testimony of its own witness, Senior Advisor of Human Resources Ana Valentin, should have been credited over the testimony of "non-managerial" employees in establishing the correct definition. While Valentin's testimony established that the Company does not officially maintain a retail "floater" position, her testimony describes technical definitions, presumably used and understood by human-resources employees and upper management. It provides no insight into the experience and understanding of unit employees in the workplace, involved in the everyday running of the Flatbush store, or their supervisors' representations. Though Valentin testified that she never personally heard a Flatbush supervisor use the term "floater," there is no evidence suggesting that Valentin was involved in the day-to-day operation of the store, or in the negotiation of the parties' Agreement. The inconsistencies between Valentin's

testimony and the testimony of employees are thus not a reason to completely disregard the employees' testimony as "subjective" or "their own impressions." (Br. 34-36.) Rather, the differences may reflect differing usage of the term "floater" in the official corporate context and on the ground at the Flatbush store. Moreover, the Company again ignores that the Board used the extrinsic evidence at issue only to buttress its contractual interpretation, rather than to "conclusively resolve the ambiguity" in the Agreement. (Br. 36.)

3. The employees who cast the challenged ballots are "floaters," excluded from the stipulated unit

Ample evidence further supports the Board's finding that each of the three challenged employees was a floater, i.e., an employee whose home store was not the Flatbush store, but who simply worked there periodically or sporadically. Although they each worked at the Flatbush store during the eligibility period preceding the election, it is undisputed that it was not the home store for any of them. Additionally, each of the three only worked at the Flatbush location periodically or sporadically. Chow came to the Flatbush store for a single two-to-three-month organizational stint, expecting to return only periodically to check on his work. Ellsmore visited the Flatbush store sporadically, along with four other stores, to maintain Hallmark displays. Henry-Aughton worked the majority of her hours at her home store according to a consistent schedule, while her hours at

Flatbush were dependent on that store's needs and her home store's scheduling priority.

The record does not support the Company's assertion that the Board "essentially permitted the Union to pick and choose which employees had the right to vote" (Br. 21), which it bases on the Union's failure to challenge all voters who worked at other stores in addition to Flatbush. That assertion shows the Company's fundamental misunderstanding of the Board's interpretation of the term "floaters." The Board found the term applied to employees who worked at the Flatbush store but had a different *home store*, not any Flatbush employee who also works at other stores. The Company has not identified any other employee who voted in the election who qualifies as a "floater" under the definition the Board applied. Accordingly, the Board acted well within its discretion in sustaining the Union's challenges to the three floater employees' ballots.

C. The Board Did Not Abuse its Discretion by Failing To Proceed to a Community-of-Interest Analysis

As just demonstrated, the Board properly found that the Agreement's ambiguity regarding the definition of "floater" could be resolved at the second prong of *Associated Milk*, using standard methods of contract interpretation. For that reason, and because the Company's arguments challenging the Board's interpretation of the Agreement are unavailing, the Board properly did not address the Company's contention that Chow, Ellsmore, and Henry-Aughton share a

community of interest with other employees in the unit. The Company's arguments (Br. 39-42) on the merits of the community-of-interest issue are therefore irrelevant.

Finally, the Company's claim (Br. 37) that the Board's decision will "effectively disenfranchise" Chow, Ellsmore, and Henry-Aughton – premised on its assertion that the three employees share a community of interest with the unit employees – is nothing more than hyperbole. While, as the Company points out, the three employees' votes were not counted, they are also not bound by the results of the election. Contrary to the Company's implication (Br. 37), not all employees who share a community of interest must be included in a bargaining unit.[36] More than one combination of employees may form an appropriate unit in a given workplace and, as this Court has held, the "Board need only select *an* appropriate unit, not *the most* appropriate unit."[37] Although the Company argues that Chow, Ellsmore, and Henry-Aughton share a community of interest with unit employees, it does not contend that they share an "overwhelming" community of interest such

[36] *Accord Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991) ("[E]mployees may seek to organize 'a unit' that is 'appropriate' – not necessarily *the* single most appropriate unit.").

[37] *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996) (emphasis in original).

that there is "no legitimate basis" for excluding them from the unit.[38] Moreover, while the Board's decision excludes the three from the Flatbush unit, it does not prevent their inclusion in other units if appropriate, presumably at their respective home stores.

[38] *See, e.g.*, *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421-22 (D.C. Cir. 2008) ("That the excluded employees share a community of interest with the included employees does not, however, mean there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate bargaining unit.").

CONCLUSION

The Company has not shown that the Board abused its discretion in sustaining the Union's challenges to the ballots of Chow, Ellsmore, and Henry-Aughton. Thus, the Board properly certified the Union as the collective-bargaining representative of the unit employees and the Company's admitted refusal to bargain with the Union and to provide the Union with information violates Section 8(a)(5) and (1) of the Act. Accordingly, the Board respectfully requests that the Court deny the Company's petition for review and grant the Board's application for enforcement.

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STATUTORY ADDENDUM
TABLE OF CONTENTS

National Labor Relations Act ("the Act"), 29 U.S.C. § 151, et seq.

Section 8(a)(1) (29 U.S.C. § 158(a)(1)) ii
Section 8(a)(5) (29 U.S.C. § 158(a)(5)) ii
Section 9(c) (29 U.S.C. § 159(c)) ii
Section 9(d) (29 U.S.C. § 159(d)) iii
Section 10(a) (29 U.S.C. § 160(a)) iii
Section 10(e) (29 U.S.C. § 160(e)) iii
Section 10(f) (29 U.S.C. § 160(f)) iv

THE NATIONAL LABOR RELATIONS ACT

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 9 of the Act (29 U.S.C. § 159) provides in relevant part:

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section];

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief

sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

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. 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 a 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. 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.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CVS ALBANY, LLC, d/b/a CVS,	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-1332, 16-1379
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	29-CA-179095
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 7,029 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 13th day of April, 2017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CVS ALBANY, LLC, d/b/a CVS,	)	
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v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	29-CA-179095
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2017, 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 the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 13th day of April, 2017