

Nos. 15-1179, 15-1220

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

BREAD OF LIFE, LLC, d/b/a PANERA BREAD,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**BAKERY, CONFECTIONARY, TOBACCO WORKERS AND GRAIN MILLERS
INTERNATIONAL UNION, LOCAL 70, AFL-CIO, CLC**

Intervenor

**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**

KIRA DELLINGER VOL
Supervisory Attorney

MARNI VON WILPERT
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-0656
(202) 273-2903

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

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

BREAD OF LIFE, LLC, d/b/a PANERA BREAD)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD	)	Nos. 15-1179
	)	15-1220
Respondent/Cross-Petitioner)	
)	
and	)	Board Case No.
	)	7-CA-088519
BAKERY, CONFECTIONARY, TOBACCO)	
WORKERS AND GRAIN MILLERS)	
INTERNATIONAL UNION,)	
LOCAL 70, AFL-CIO, CLC)	
)	
Intervenor)	
)	

CERTIFICATE AS TO PARTIES, RULING, 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. Bread of Life, LLC d/b/a Panera Bread, 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 the Court.

3. The Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 70, AFL-CIO, CLC (“the Union”) was the charging party before the Board, and is the Intervenor before the Court.

B. Rulings Under Review:

The Company is seeking review and the Board is seeking enforcement of a Decision and Order issued by the Board in case number 07-CA-088519 on June 5, 2015, and reported at 362 NLRB No. 106.

C. Related Cases:

None.

s/ Linda Dreeben _____
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, N.E.
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
This 28th day of January 2016

Glossary

Bread of Life, LLC, d/b/a Panera Bread	the Company
National Labor Relations Board.....	the Board
Brief of the Company	Br.
The Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 70, AFL-CIO, CLC	the Union
Board's June 5, 2012 Decision and Order.....	D&O
Board's December 16, 2014 Decision, Certification of Representative, and Notice to Show Cause	D&C
Acting Regional Director's Decision and Direction of Election	DDE

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction.....	1
Applicable statutory provisions	3
Statement of issue presented.....	4
Statement of the case.....	4
I. Statement of facts	5
A. Background: the Company’s three retail districts.....	5
B. Supervisory and management structure	6
C. Baker’s job duties.....	9
D. The Company separates the I-94 bakers from the non-unit bakers for administrative purposes	9
E. I-94 bakers have little interchange with bakers or cafes in other districts..	11
II. Procedural history	11
A. Prior proceedings	11
B. The representation and unfair-labor-practice proceedings after remand	13
III. The Board’s conclusions and order	14
Summary of argument.....	15
Standard of review	17
Argument.....	18

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
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	18
A. A multi-facility unit comprising some, but not all, of an employer’s facilities is appropriate when the unit employees share a community of interest distinct from that of employees at the remaining facilities	19
B. The bakers in the Company’s I-94 district share a distinct community of interest.....	23
C. The Regional Director had the authority to conduct the election pursuant to the Board’s delegation of authority	35
1. The Company waived its challenge to Acting General Counsel Lafe Solomon’s authority by failing to raise it in the representation proceeding	36
2. In any event, the Company’s challenge to the Regional Director’s authority to conduct the election is meritless	38
Conclusion	40

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Acme Markets, Inc.</i> , 328 NLRB 1208 (1999)	22
* <i>Alamo Rent-A-Car</i> , 330 NLRB 897 (2000)	20,31,32
<i>Am. Hosp. Ass'n v. NLRB</i> , 499 U.S. 606 (1991).....	19
<i>Avecor, Inc. v. NLRB</i> , 931 F.2d 924 (D.C. Cir. 1991).....	18
<i>Bashas', Inc.</i> , 337 NLRB 710 (2002)	20, 21, 31, 32, 33
<i>Blue Man Vegas LLC v. NLRB</i> , 529 F.3d 417 (D.C. Cir. 2008).....	17, 20, 22, 28, 29
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	3
<i>Brewers & Maltsters v. NLRB</i> , 414 F.3d 36 (D.C. Cir. 2005).....	18
<i>Compare Clarian Health Partners, Inc.</i> , 344 NLRB 332 (2005)	25
<i>Country Ford Trucks, Inc. v. NLRB</i> , 229 F.3d 1184 (D.C. Cir. 2000).....	17, 18, 19, 22, 28, 29, 34
<i>Dean Transp., Inc. v. NLRB</i> , 551 F.3d 1055 (D.C. Cir. 2009).....	19

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Dodge of Naperville, Inc. v. NLRB</i> , 796 F.3d 31 (D.C. Cir. 2015).....	19
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999)	3
<i>Joseph T. Ryerson & Son, Inc. v. NLRB</i> , 216 F.3d 1146 (D.C. Cir. 2000).....	36
<i>Laboratory Corp. of America Holdings</i> , 341 NLRB 1079 (2004),	20,31,32,33,34
<i>Lawson Milk Co.</i> , 213 NLRB 360 (1974)	21,22,30,33
<i>Medina County Publ’ns</i> , 274 NLRB 873 (1985)	3
<i>New Process Steel, L.P. v. NLRB</i> , 560 U.S. 674 (2010).....	31
<i>NLRB v. Action Auto., Inc.</i> , 469 U.S. 490 (1985).....	20
* <i>NLRB v. Carson Cable TV</i> , 795 F.2d 879 (9th Cir. 1986)	20, 22, 24, 34
<i>NLRB v. Coca-Cola Bottling Co. of Buffalo</i> , 191 F.3d 316 (2d Cir. 1999)	34
<i>NLRB v. Noel Canning</i> , 134 S. Ct. 2550 (2014).....	13, 29

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Pace Univ. v. NLRB</i> , 514 F.3d 19 (D.C. Cir. 2008).....	36
<i>Packard Motor Car Co. v. NLRB</i> , 330 U.S. 485 (1947).....	17
<i>RC Aluminum Indus., Inc. v. NLRB</i> , 326 F.3d 235 (D.C. Cir. 2003).....	20, 22
<i>Sleepy’s Inc.</i> , 355 NLRB 132 (2010)	31, 32, 33, 34
<i>S. Power Co. v. NLRB</i> , 664 F.3d 946 (D.C. Cir. 2012).....	17, 19
<i>South Prairie Constr. Co. v. Operating Eng’rs, Local 627</i> , 425 U.S. 800 (1976).....	19
<i>SW General v. NLRB</i> , 796 F.3d 67 (D.C. Cir. 2015).....	36, 37, 38
<i>UC Health v. NLRB</i> , 803 F.3d 669 (D.C. Cir. 2015).....	39
<i>U.S. v. L. A. Tucker Truck Lines, Inc.</i> , 344 U.S. 33 (1952).....	36
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	18
* <i>Verizon Wireless</i> , 341 NLRB 483 (2004)	21,24,26,28

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Weis Markets, Inc.</i> , 142 NLRB 708 (1963)	22, 28
<i>White Cross Disc. Ctrs.</i> , 199 NLRB 721 (1972)	21, 25
 Statutes:	
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 3(b) (29 U.S.C. § 153(b)).....	38, 39
Section 7 (29 U.S.C. § 157)	3
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	4,5,13,14,15,18
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3,4,5,12,14,15,18
Section 9(b) (29 U.S.C. § 159(b)).....	4, 19
Section 9(c) (29 U.S.C. § 159(c))	3, 12
Section 9(d) (29 U.S.C. § 159(d)).....	2, 3
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2, 4, 37
Section 10(f) (29 U.S.C. § 160(f))	2
 Regulations:	
29 C.F.R. § 102.67	39

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

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

Nos. 15-1179, 15-1220

BREAD OF LIFE, LLC, d/b/a PANERA BREAD,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**BAKERY, CONFECTIONARY, TOBACCO WORKERS AND GRAIN
MILLERS INTERNATIONAL UNION, LOCAL 70, AFL-CIO, CLC**

Intervenor

**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 SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of Bread of Life, LLC (“the Company”) for review, and the cross-application of the National Labor Relations

Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Company on June 5, 2015, and reported at 362 NLRB No. 106.¹ The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. §§ 151, et seq. The Board’s Order is final under Section 10(e) of the Act, 29 U.S.C. § 160(e). The petition for review, filed on June 22, 2015, and the cross-application for enforcement, filed on July 15, were timely as the Act places no time limit on either filing. This Court has jurisdiction over the petition and cross-application pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f).

The Board’s unfair-labor-practice Order is based, in part, on findings made in an underlying representation proceeding, *Bread of Life, LLC d/b/a Panera Bread*, Board Case No. 07–RC–072022 (Decision, Certification of Representative, and Notice to Show Cause reported at 361 NLRB No. 142 (December 16, 2014)). Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record before this Court therefore includes the record in that proceeding. Section 9(d) authorizes judicial review of the Board’s actions in a representation proceeding for the limited purpose of deciding whether to “enforc[e], modify[], or set[] aside in whole or in

¹ “JA” refers to the Joint Appendix, and “Br.” to the Company’s brief. Where applicable, references preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

part the [unfair-labor-practice] order of the Board” 29 U.S.C. § 159(d); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court in the unfair-labor-practice case. *See Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *Medina County Publ’ns*, 274 NLRB 873, 873 (1985).

APPLICABLE STATUTORY PROVISIONS

Section 7 of the Act, 29 U.S.C. § 157:

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

Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5):

It shall be an unfair labor practice for an employer—
(5) to refuse to bargain collectively with the representatives of his employees

Section 9(b) of the Act, 29 U.S.C. § 159(b):

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof

Section 10(e) of the Act, 29 U.S.C. § 160(e):

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.

STATEMENT OF THE ISSUE PRESENTED

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) by refusing to bargain with its employees' certified bargaining representative, Local 70 of the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL-CIO, CLC. The contested issue before this Court is:

When a union petitions to represent employees at some, but not all, of an employer's facilities, the Board analyzes whether the employees in the petitioned-for bargaining unit share a community of interest distinct from the employees at the remaining facilities. Did the Board abuse its discretion by finding that the bakers at the six cafes in the Company's I-94 district constitute an appropriate unit, when they are geographically and administratively separated from, and have little interaction with, bakers working at cafes in other districts?

STATEMENT OF THE CASE

This unfair-labor-practice case arises from the Company's admitted refusal to bargain with Local 70, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL-CIO, CLC ("the Union"), which the Board certified as the exclusive bargaining representative of a unit of bakers working at the six cafes that make up the Company's I-94 district in Michigan. (JA 642-43.)

In the underlying representation proceeding, the Company challenged the propriety of a unit limited to those six cafes, arguing that the smallest appropriate unit would include the bakers at all 17 cafes it owns in Michigan. Having found the unit appropriate (JA 642 n.1), the Board held (JA 665-66) that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). The facts and procedural history relevant to both the representation and unfair-labor-practice proceedings are set forth below.

I. STATEMENT OF FACTS

A. Background: the Company's Three Michigan Retail Districts

The Company's corporate offices are in California, and it owns and operates a number of Panera Bread cafes, including 17 in Michigan. (JA 435; JA 13, 138.) The Company refers to its cafes in Michigan collectively as its West Michigan Market. (JA 435; JA 12, 16.) It has divided the West Michigan Market into three retail districts, two near Grand Rapids and one along Interstate I-94. (JA 436; JA 20, 34-35.) Those three districts are based on the geographic proximity of, and convenience of travel between, their component cafes. (JA 439; JA 44-45, 145.)

The Grand Rapids district consists of six cafes clustered around the City of Grand Rapids. (JA 436 & n.4; JA 34-35, JA 351-52.) Also near to Grand Rapids is the Company's Lakeshore district, which is made up of five cafes located along the shore of Lake Michigan. (JA 436 & n.5; JA 34-35, JA 351-52.) The six

southern-most cafes in the West Michigan market (Gull Road, Jackson, Kalamazoo, Portage, Battle Creek, and St. Joseph) are all located along Interstate 94 and are grouped in the Company's I-94 district because of their easy accessibility to each other via that thoroughfare. (JA 435, 439; JA 34-35, JA 351-52.) A few of the I-94 cafes are further from each other than certain I-94 cafes are from those in other districts. All of the I-94 cafes are separated from the closest cafe in the Grand Rapids and Lakeshore districts by at least 49.6 miles. (JA 439; JA 351-52.)

B. Supervisory and Management Structure

Each cafe has a retail side and a bakery side: the retail associates serve the customers and the bakers prepare the baked goods that are sold in each cafe. (JA 436, 438; JA 15, 21.) The Company has different management hierarchies for those two sides of its business. (JA 436; JA 15.) Greg Collins is the Company's director of retail operations for the West Michigan Market. (JA 436; JA 13.) Each of the three retail districts – I-94, Grand Rapids, and Lakeshore – has a district manager who reports to Collins. (JA 436; JA 13.)

Rodney Alman is the Bakery Market Manager for the West Michigan Market and reports to Collins and to David Griego, who directs baking operations

for the Company's parent corporation.² (JA 436; JA 13, 48.) Alman hires and oversees all of the bakers in the West Michigan Market, evaluates them annually, and communicates labor-relations issues to Griego or to a human resources representative in California. (JA 436-37; JA 66-67, 82, 129, 137-36.) Directly below Alman are two Bakery Training Specialist ("Training Specialist") positions, one covering both the Lakeshore and Grand Rapids districts and the other covering the I-94 district. (JA 642 n.1, JA 437; JA 15-16, 87-88, 116, 160.)

The Training Specialists report to Alman and manage the day-to-day bakery operations. They train bakers, draft bakers' schedules, fill in for absent bakers at cafes, and ensure that the baking equipment is properly maintained. (JA 437; JA 24-25, JA 354.) They also evaluate and coach bakers, which can include putting positive remarks on a baker's performance in his or her record when the baker performs well or recommending disciplinary actions to Alman when appropriate. (JA 437; JA 24-25, 27-28, 43, 104, JA 354.) Either Alman or a Training Specialist may complete the "calibration sheets" the Company uses to assess the quality of the bake and the baker's productivity, which are shared with the cafe and retail-side managers. (JA 437; JA 26-27, 133, JA 421, 428.) Alman implements most disciplinary decisions himself, but the Training Specialists fill in

² Manna Development owns the Company and three other Panera Bread franchisees. (JA 435; JA 13.)

for him when he is out, including by imposing discipline after consulting with him. (JA 437; JA 32, 104.) Unlike the hourly baker positions in the bargaining unit, the training-specialist position is salaried. (JA 437; JA 148-49.)

During the relevant time period, April Kibby was the Training Specialist in charge of the bakers working in both the Lakeshore and Grand Rapids districts. The training-specialist position overseeing the I-94 district was vacant. (JA 437; JA 87.) Because of that vacancy, the bakers in the I-94 district cafes reported directly to Alman who either performed the training-specialist duties for that district or delegated them to others. (JA 437; JA 116, 160.) Kibby generally did not cover the I-94 stores. (JA 87-88, 177-78.) For example, Kibby assisted Alman with his nightly calls to each store in the Lakeshore and Grand Rapids districts (to determine if the bakers had arrived and if they had any problems with the dough or equipment). In the absence of an I-94 Training Specialist, Alman frequently delegated the nightly I-94 calls to the lead baker in the Kalamazoo cafe. (JA 439, 441; JA 101-02, 116, 167, 184.) If the calls turned up a problem in the I-94 district, Alman handled it himself. (JA 439; JA 160.)

C. Bakers' Job Duties

The cafes operate 362 days a year; the retail store at each cafe is open from 6:00 a.m. to 9:00 p.m., and the bakers work overnight from 10:00 p.m. until 6:00 a.m. (JA 438; JA 88.) The bakers prepare the bread and other baked goods

that are sold in the cafes in which they work, but they do not serve or interact with customers. (JA 438; JA 21.) Each cafe's retail managers review the bakery schedule, and meet with bakers daily both to discuss which baked goods the cafe needs and to check the bakers' products. (JA 437-38; JA 18-19, 163-65, JA 376.)

When first hired, bakers are classified as trainee bakers until they complete a six-to-eight-week training program to become "certified bakers." (JA 438; JA 155.) From there, they may have opportunities to become lead bakers, or lead training bakers who are certified to train other bakers. (JA 23.) In the West Michigan Market, bakers start at \$8 per hour when they are in training, and receive \$10 per hour when they become certified bakers. (JA 22.) The Company offers bonuses for the top three performers in each baking classification (bakers, lead bakers, and lead training bakers). (JA 438; JA 100-101.) It employs a total of 43 bakers in its West Michigan Market, and 17 of them – seven bakers, six lead bakers, and four lead training bakers – work in the I-94 district. (JA 438; JA 21, 121, 156, JA 380-82.)

D. The Company Separates the I-94 Bakers from the Non-Unit Bakers for Administrative Purposes

The Company groups its Lakeshore and Grand Rapids districts together for many administrative purposes on the baking side of the business, dealing with the I-94 district separately. As described, the Training Specialists in charge of day-to-day operations have distinct geographic coverage areas, and one training-specialist

position covers only the I-94 stores. Bargaining-unit job openings for lead and training bakers in the I-94 district are only posted in the I-94 cafes. Similar postings for openings in the Grand Rapids or Lakeshore districts are generally posted in both of those districts, but are generally not posted in the I-94 Corridor. (JA 438-39; JA 124-26.)³ The bakers' schedules are also grouped by district. (JA 438; JA 117-18, 162.) The schedules for the I-94 bakers are listed together on one sheet, which is posted at I-94 cafes, and the schedules for the bakers in the Grand Rapids and Lakeshore districts are on another, which is not. (JA 438; JA 380-82; JA 162.) Similarly, the calibration sheets the Company uses to evaluate bakers describe the I-94 district as its own "market." (JA 437; JA 421, 428.)

The Company also holds "celebration meetings" five times per year, at which Alman meets with the bakers to disseminate information about new products, menu changes, and other issues. (JA 439; JA 90.) Each time, Alman hosts a single meeting for the Grand Rapids and Lakeshore district bakers and a separate meeting for the bakers who work in the I-94 district, with the exception of the Jackson cafe bakers who attend a meeting solely for their cafe. (JA 439; JA 91.)

³ The non-unit training-specialist position was posted in the entire West Michigan Market. (JA 439; JA 119.)

E. I-94 Bakers Have Little Interchange with Bakers or Cafes in Other Districts

The Company permanently assigns each baker to work in a specific cafe, and each cafe has one or two bakers during each shift, depending on the cafe's volume. (JA 439; JA 62, 126.) Bakers may work in other cafes sporadically to cover shifts for vacations, illnesses, and injuries, and may bake products for another cafe in case of emergency. (JA 439; JA 137, 139.) Typically, pursuant to Alman's policy, bakers provide such assistance only at cafes within their own geographic district – it is not routine for I-94 bakers to cover for other bakers outside of the I-94 district, nor for bakers in the Grand Rapids/Lakeshore districts to cover outside of their districts, but it may happen 5-15 times per year. (JA 439; JA 126, 138-41, 154.) When bakers are required to split their shifts, they may do so between two cafes within the Grand Rapids and Lakeshore districts or two within the I-94 district. They do not split shifts between an I-94 cafe and one in either of the other two districts. (JA 439; JA 126-27, 166.)

II. PROCEDURAL HISTORY

A. Prior Proceedings

In January 2012, the Union filed a petition under Section 9(c) of the Act, 29 U.S.C. § 159(c), seeking to represent a unit of the Company's full-time and regular part-time bakers, lead bakers, and lead training bakers employed at the six cafes in

the Company's I-94 district.⁴ (JA 643; JA 396.) The Company challenged the petitioned-for unit as inappropriate. It argued that the only appropriate unit would include the bakers at all seventeen cafes in its West Michigan Market. (JA 435.) On February 24, 2012, after a hearing, the Board's Acting Regional Director issued a Decision and Direction of Election finding that the petitioned-for unit was appropriate. (JA 435, 442.)

The Company requested review of the Acting Regional Director's Decision, which the Board (Members Hayes, Flynn, and Griffin) denied on March 21, 2012. The representation election took place on March 22 and 23, 2012, and the Union won. (JA 666.) On August 22, 2012, the Union requested that the Company meet to negotiate a collective-bargaining agreement. Since August 31, 2012, the Company has admittedly refused to do so. (JA 666.) The Acting General Counsel issued a complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 8(a)(5) and (1), and moved for summary judgment before the Board. On November 21, 2012, a three-member panel of the

⁴ The petitioned-for bargaining unit consists of "[a]ll full-time and regular part-time bakers, lead bakers, and lead training bakers employed by [Bread of Life] at its facilities located at 5119 West Main Street, Kalamazoo, Michigan; 5627 Gull Road, Kalamazoo, Michigan; 5970 South Westnedge Avenue, Portage, Michigan; 2810 Capitol Avenue SW, Battle Creek, Michigan; 1285 Boardman Road, Jackson, Michigan 49202; and 3260 Niles Road, St. Joseph, Michigan." It excludes "all clerks, baker training specialists, confidential employees, managers and guards and supervisors as defined in the Act and all other bakery/cafe employees." (JA 643.)

Board (Chairman Pearce; Members Hayes and Griffin) granted summary judgment, finding that the Company violated the Act as alleged. *See Bread of Life, LLC d/b/a Panera Bread*, 359 NLRB No. 24.

The Company petitioned this Court for review of that order and the Board cross-applied for enforcement. D.C. Cir. Nos. 12–1469, 12–1484. On January 25, 2013, the Court placed the case in abeyance pending resolution of then-pending litigation challenging the recess appointments of Members Griffin and Flynn. On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which invalidated those appointments. Accordingly, on November 18, 2014, this Court vacated the Board’s November 21, 2012 Decision and Order and remanded the case back to the Board, which had five Senate-confirmed members.

B. The Representation and Unfair-Labor-Practice Proceedings after Remand

On December 16, 2014, a properly constituted Board panel (Chairman Pearce; Members Hirozawa and Schiffer) issued a “Decision, Certification of Representative, and Notice to Show Cause” denying the Request for Review, certifying the Union, and issuing a notice to show cause why the General Counsel’s motion for summary judgment on the failure-to-bargain allegation should not be granted. (JA 642-43.) The Board stated that it considered the Company’s arguments in support of the request for review *de novo* and found them

without merit. (JA 642.) That December 2014 decision supplanted the Board's March 21, 2012 denial of review.

On December 22, 2014, the Union wrote to the Company requesting to bargain. The Company refused. On December 24, 2014, the General Counsel issued an amended unfair-labor-practice complaint adding December 16, 2014, as the date the Board certified the Union, and alleging that the Company's failure to bargain with its employees' duly certified union violated Section 8(a)(5) and (1) of the Act. (JA 665 & n.1.) In its answer to the amended complaint and opposition to summary judgment, the Company admitted the factual allegations of the complaint and reiterated its argument, from the underlying representation proceeding, that the unit is not appropriate. It also argued, for the first time, that the Union's certification is invalid because the Acting General Counsel at the time of the representation election was not properly appointed. (JA 665 n.1.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On June 5, 2015, the Board (Chairman Pearce; Members Hirozawa and McFerran) issued a Decision and Order finding that the Company had violated Section 8(a)(5) and (1) as alleged. (JA 666.) In its decision, the Board noted that all representation issues raised by the Company were or could have been litigated in the prior representation proceeding, and rejected, as both untimely and without merit, the Company's argument based on the Acting General Counsel's

appointment. (JA 665-66.) To remedy the unfair labor practice, the Board's Order requires the Company to cease and desist from failing and refusing to recognize and bargain with the Union or, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act. Affirmatively, the Order requires the Company to bargain with the Union upon request and, if an understanding is reached, to embody that understanding in a signed agreement. The Order also requires the Company to post a remedial notice. (JA 667-68.)

SUMMARY OF ARGUMENT

The Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union is supported by substantial record evidence. The Board acted within its broad discretion in finding a bargaining unit of the bakers at the Company's six I-94 cafes appropriate under its well-established community-of-interest test, and the Company's arguments to the contrary are unavailing.

As an initial matter, the Company's arguments are directed towards the wrong Board decision. The Company challenges the Board's March 21, 2012 denial of review from the underlying, pre-*Noel Canning* representation proceeding, but the Board's December 2014 decision supplanted that 2012 decision.

Accordingly, the December 2014 decision is the operative decision from the underlying representation proceeding.

In the December 2014 decision, the Board cogently analyzed the record evidence and found the petitioned-for unit of I-94 bakers appropriate based on several community-of-interest factors. Specifically, it noted that the I-94 bakers are geographically and administratively separated from, and have little interaction with, bakers working at cafes in other districts. Because the Board reasonably found that the I-94 bakers constitute *an* appropriate unit, the Company's arguments must fail. Under well-settled law, the Board has broad discretion to select an appropriate unit for collective-bargaining purposes and, as long as the unit is appropriate, the Company cannot challenge it simply by pointing out that another unit may also be appropriate. Instead, the Company must meet its burden to show that the Board's unit selection is truly inappropriate, which it has failed to do here.

Finally, the Company's belated challenge to the Regional Director's authority to conduct the election is meritless. The Company waived any such challenge by failing to raise it in the representation proceeding. In any event, its assertion that Acting General Counsel Lefe Solomon's designation was invalid is inapposite because the Regional Director conducted the election pursuant to a delegation of authority from the Board, not from the Acting General Counsel.

STANDARD OF REVIEW

The Supreme Court and this Court have recognized that “determining what constitutes an appropriate bargaining unit ‘involves of necessity a large measure of informed discretion.’”⁵ Accordingly, the Court gives “great deference to the Board’s selection of bargaining units,” and reviews such determinations for abuse of discretion.⁶ It will uphold the Board’s choice of bargaining unit unless the Board’s decision “is arbitrary or not supported by substantial evidence in the record.”⁷ Under the substantial-evidence standard, a reviewing court may not displace the Board’s choice between two fairly conflicting views, even if the court “would justifiably have made a different choice had the matter been before it *de novo*.”⁸ In reviewing the record, this Court will thus accord “substantial deference

⁵ *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)).

⁶ *S. Power Co. v. NLRB*, 664 F.3d 946, 951 (D.C. Cir. 2012); *see Country Ford Trucks*, 229 F.3d at 1186 (affirming Board’s finding because petitioner “fail[ed] to demonstrate that [the] NLRB abused its discretion in making the unit determination”).

⁷ *Country Ford Trucks*, 229 F.3d at 1189; *accord Blue Man Vegas LLC v. NLRB*, 529 F.3d 417, 420 (D.C. Cir. 2008); *see also* 29 U.S.C. § 160.

⁸ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

to inferences drawn from the facts,” as well as to ““the reasoned exercise of [the Board’s] expert judgment.””⁹

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

“Under section 8(a)(5) of the Act, it is an unfair labor practice for an employer to refuse to bargain with the exclusive bargaining representative of its employees.¹⁰ A violation of Section 8(a)(5) constitutes a derivative violation of Section 8(a)(1), which makes it an unfair labor practice to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]” of the Act.¹¹ Here, the Company admittedly refused to recognize and bargain with the Union, but argues that the Union’s certification was improper because, in its opinion, the I-94 bakers in the petitioned-for unit do not share a sufficiently distinct community of interest. Accordingly, the question before the Court is whether the Board properly rejected that argument and certified the Union. As shown below, the Board acted within its broad discretion in finding the unit

⁹ *Country Ford Trucks*, 229 F.3d at 1189 (quoting *Avecor, Inc. v. NLRB*, 931 F.2d 924, 928 (D.C. Cir. 1991)).

¹⁰ *Brewers & Maltsters v. NLRB*, 414 F.3d 36, 41 (D.C. Cir. 2005).

¹¹ *Id.*

appropriate based on several community-of-interest factors. The Company's refusal to bargain thus violates the Act.

A. A Multi-Facility Unit Comprising Some, But Not All, of an Employer's Facilities Is Appropriate When the Unit Employees Share a Community of Interest Distinct from That of Employees at the Remaining Facilities

“[I]n order to assure to employees the fullest freedom in exercising the rights guaranteed by [the Act],” Section 9(b) empowers the Board to decide in each case whether “the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof”¹² Construing that section, the Supreme Court has stated that the determination of an appropriate unit “lies largely within the discretion of the Board, whose decision, ‘if not final, is rarely to be disturbed’”¹³ The Board is only required, as this Court has long held, to select “*an* appropriate unit, not the *most* appropriate unit.”¹⁴

¹² 29 U.S.C. § 159(b); *see Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 609-10 (1991).

¹³ *South Prairie Constr. Co. v. Operating Eng’rs, Local 627*, 425 U.S. 800, 805 (1976) (quoting *Packard Motor Car*, 330 U.S. at 491). *Accord Country Ford Trucks*, 229 F.3d at 1189.

¹⁴ *S. Power Co.*, 664 F.3d at 951 (quoting *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1063 (D.C. Cir. 2009)) (emphasis in original); *accord Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 38 (D.C. Cir. 2015).

In assessing the appropriateness of a proposed unit, the Board’s “focus is on whether the employees share a ‘community of interest.’”¹⁵ When evaluating a unit made up of employees working at more than one location, the Board considers several community-of-interest factors, including: “(1) similarity in employee skills, duties, and working conditions, (2) functional integration of the business, including employee interchange, (3) centralized control of management and supervision, (4) geographical separation of facilities, (5) collective bargaining history and extent of union organization, and (6) employee choice.”¹⁶ As in any community-of-interest assessment, “no particular factor” is controlling.¹⁷

When the petitioned-for unit includes employees at some, but not all, of a multi-facility employer’s locations, the Board takes care to determine whether the interests shared by the unit employees are distinct from those of employees working at facilities excluded from the unit.¹⁸ Various considerations may contribute to finding such a distinction. For example, coherent geographic

¹⁵ *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985); accord *Blue Man Vegas*, 529 F.3d at 421.

¹⁶ *NLRB v. Carson Cable TV*, 795 F.2d 879, 884-85 (9th Cir. 1986); accord *RC Aluminum Indus., Inc. v. NLRB*, 326 F.3d 235, 240 (D.C. Cir. 2003); *Lab. Corp. of Am. Holdings*, 341 NLRB 1079, 1081 (2004); *Bashas’, Inc.*, 337 NLRB 710, 711 (2002); *Alamo Rent-A-Car*, 330 NLRB 897, 897 (2000).

¹⁷ *RC Aluminum*, 326 F.3d at 240.

¹⁸ *Lab. Corp. of Am. Holdings*, 341 NLRB at 1082; *Bashas’*, 337 NLRB at 711; *Alamo Rent-A-Car*, 330 NLRB at 898.

grouping of the facilities in the petitioned-for unit supports finding a distinct community of interest, particularly when that grouping is consistent with the employer's own administrative divisions or other organizational categories.¹⁹

Separate supervision of the unit also contributes to a distinct community of interest.²⁰ Likewise, substantial employee interchange among the locations in the unit, but not between the unit and the excluded locations, is another relevant consideration.²¹

¹⁹ *Lawson Milk Co.*, 213 NLRB 360, 361 (1974) (finding employees in petitioned-for unit shared community of interest “separate and distinct” from employees in remaining stores in part because they “are geographically proximate” and “comprise an administrative subdivision”); *White Cross Discount Ctrs.*, 199 NLRB 721, 722 (1972) (“[T]he Board has found appropriate a geographic grouping of retail chain stores less than chainwide in scope, particularly where such grouping coincided with an administrative division within the Employer’s organization.”). *Cf. Bashas’*, 337 NLRB at 711 (finding employees in petitioned-for unit of stores did not share distinct community of interest “based solely on the fact that they are in the same county” when unit did “not conform to any administrative function or organizational grouping”).

²⁰ *Verizon Wireless*, 341 NLRB 483, 486, 490 (2004) (finding distinct community of interest among employees in stores in petitioned-for unit when those stores had individual managers who “control[ed] the day-to-day activities of the [unit] employees” even though all of employer’s stores were overseen by a regional district manager); *Lawson Milk Co.*, 213 NLRB at 361 (1974) (finding distinct community of interest when supervisor dedicated solely to employees in petitioned-for unit provided unit “with a degree of autonomy”); *White Cross Discount Ctrs.*, 199 NLRB at 722 (noting that stores in petitioned-for unit were “supervised collectively by two supervisors who oversee no other stores”).

²¹ *Verizon Wireless*, 341 NLRB at 490 (finding distinct community of interest when “the employees at the [petitioned-for] stores have contact with each other and they do not have any significant contact with other employees” outside the

As this Court has recognized, the community-of-interest test entails a fact-intensive analysis,²² and “unit determinations must be made only after weighing all relevant factors on a case-by-case basis.”²³ The party challenging the Board’s unit determination has the burden to show that the Board abused its discretion by demonstrating that the unit the Board approved is “truly inappropriate.”²⁴ Merely pointing to the existence of another appropriate unit, or even a more appropriate unit, will not suffice.²⁵ If, as here, the employer contends that the unit must include additional employees, it must show that “there is no legitimate basis upon which to exclude [those employees] from the bargaining unit.”²⁶

unit); *Lawson Milk Co.*, 213 NLRB at 361-62 (same); *Weis Markets, Inc.*, 142 NLRB 708, 710 (1963) (finding distinct community of interest when “[t]emporary transfers among stores within each of the requested units [were] more frequent than transfers between such stores and stores outside”). *Cf. Acme Markets, Inc.*, 328 NLRB 1208, 1209 (1999) (finding no distinct community of interest when “there have been more instances in which pharmacists have transferred between [unit and non-unit] pharmacies than within pharmacies in the petitioned-for unit”).

²² *RC Aluminum*, 326 F.3d at 240.

²³ *Blue Man Vegas*, 529 F.3d at 421.

²⁴ *Id.* (quoting *Country Ford Trucks*, 229 F.3d at 1189). *Cf. RC Aluminum*, 326 F.3d at 240 (“[T]he Board has wide latitude in determining an appropriate bargaining unit.”).

²⁵ *Blue Man Vegas*, 529 F.3d at 421; *accord Carson Cable TV*, 795 F.2d at 887.

²⁶ *Blue Man Vegas*, 529 F.3d at 421.

B. The Bakers in the Company's I-94 District Share a Distinct Community of Interest

The Board acted well within its broad discretion in approving a bargaining unit composed of the Company's I-94 cafes. As the Board found, the I-94 bakers share a sufficient community of interest to constitute an appropriate unit: they have common skills and job duties, earn similar wages, receive the same benefits, and produce the same products. (JA 642 n.1, 440; JA 137.) Moreover, as detailed below, substantial record evidence supports the Board's finding that the I-94 district bakers share a community of interest distinct in three key respects from that of the bakers in the Company's other cafes. Accordingly, a unit confined to the I-94 bakers is appropriate.

First, the I-94 district is, as the Board found (JA 642 n.1, 436,439,441), both geographically coherent and distinct from the Grand Rapids and Lakeshore districts: the I-94 cafes are the Company's southernmost cafes in its West Michigan Market, each of the cafes is accessible from Interstate 94 and each is separated from the Grand Rapids and Lakeshore cafes by at least 49.6 miles. (JA 45, 132, JA 351-52.) As the Company's Director of Operations Collins explained, the I-94 district was based "[t]o a great extent" on geographical considerations. (JA 45.) Bakery Market Manager Alman agreed that the I-94 district is "geographically pretty far away from the Lakeshore and the Grand Rapids market[s]." (JA 132.) By contrast, the Grand Rapids and Lakeshore

districts are near each other; when scheduling the celebration meetings, Alman brings the Lakeshore and Grand Rapids bakers together for one meeting in the west side of Grand Rapids because those bakers can all assemble while remaining within “close proximity of their cafes.” (JA 91.)

Second, the I-94 unit is consistent with the Company’s administrative divisions.²⁷ As the Board explained (JA 642 n.1, 440-41), the Company has a Training Specialist devoted only to the Grand Rapids/Lakeshore districts and another devoted to the I-94 district. Those separate Training Specialists are the first level of supervision for the bakers in each district; they create the bakers’ schedules, coach the bakers and reward them for positive performance, evaluate the bakers and recommend disciplinary action to Alman. (JA 642 n.1, 440-41; JA 27, 30, 32, 42-43, 97, 104.) The Board has previously found that employees in a petitioned-for unit shared a distinct community of interest based in part on similar differences in supervisory or operational hierarchy.²⁸

²⁷ See *Carson Cable TV*, 795 F.2d at 885 (noting that “[i]t is significant that the multi-location unit designated by the Board mirrors the respondents’ own administrative grouping” when upholding Board’s unit selection).

²⁸ See *Verizon Wireless*, 341 NLRB at 486, 490 (while all of employer’s stores were overseen by one regional district manager, grouping of stores in petitioned-for unit reported to local store managers who “directly supervise[d] the day-to-day operations of the stores,” “schedule[d] the hours of employees,” “evaluate[d] employees,” and “discipline[d] employees subject to approval from the area human resources department”).

In addition, the Company groups I-94 bakers' schedules on one sheet, which it posts at their cafes. It does not post the Grand Rapids and Lakeshore schedules in the I-94 cafes. (JA 642 n.1, 438, 441; JA 162, JA 380-82.) And, as the Board found (JA 642 n.1, 438-39), vacancy postings for baker positions do not overlap between the I-94 Corridor and Grand Rapids/Lakeshore districts. Bargaining-unit job openings for lead and training bakers in the I-94 district are only posted in the I-94 cafes, and Alman stated that throughout his employment with the Company he has not seen any baker from the I-94 district take a promotion in the Lakeshore or Grand Rapids districts. (JA 124-26.)²⁹ Based on those facts, ample evidence supports the Board's finding that the I-94 district is a coherent geographic and administrative grouping, distinct from the Lakeshore/Grand Rapids districts. (JA 642 n.1.)³⁰

And, third, the evidence of employee interchange among the Company's three districts supports the Board's finding that the I-94 unit has a distinct

²⁹ Compare *Clarian Health Partners, Inc.*, 344 NLRB 332, 332 (2005) (finding employees in petitioned-for unit did not share distinct community of interest when, *inter alia*, "[j]ob openings, regardless of location, are posted on the Employer's single website and on bulletin boards at all three hospitals . . . and hiring preference is given to applicants who are current employees of the Employer regardless of [the location] where they work").

³⁰ See *White Cross Disc. Ctrs.*, 199 NLRB at 722 ("Th[e] geographic proximity and concentration as well as the Employer's organizational structure compel the conclusion that the employees working in these eight stores share a community of interest separate and apart from the community of interest of other employees.").

community of interest. The Board found that, while the bakers in the I-94 district have regular contact with each other, there is little to no interaction among the bakers in the I-94 district and those in the Grand Rapids/Lakeshore districts. (JA 642 n.1, 441.) For example, although bakers in the Grand Rapids and Lakeshore districts often cover shifts for each other, the I-94 bakers only split shifts within their own district and generally only cover for other bakers within their own district. (JA 642 n.1, 439, 441; JA 126-27, 165-66.)³¹ Alman himself explained that it was not “routine” for bakers to move across districts. (JA 125.) And lead baker Daniel Wood (who works at an I-94 district cafe) stated that he had covered shifts for bakers at other cafes in the I-94 district but had never worked at a cafe outside the I-94 district in the four years he had been working for the Company. (JA 158, 165-66.) Moreover, in the absence of a Training Specialist, Alman frequently designated Wood to call the other I-94 bakers each night to ensure they had arrived at work and to make sure their equipment was working properly. Alman or Kibby would make the nightly calls to the bakers in the Grand Rapids/Lakeshore districts. (JA 642 n.1, 439, 441; JA 101-02, 116, 167, 184.) Finally, the I-94 bakers have their own celebration meetings – separate from the

³¹ See *Verizon Wireless*, 341 NLRB at 490 (employees in petitioned-for unit had distinct community of interest in part because “employees in the [petitioned-for] Bakersfield stores and kiosk regularly communicate with other Bakersfield employees” but “do[] not communicate with employees outside of the Bakersfield area”).

celebration meetings the Grand Rapids and Lakeshore bakers attend – in which they discuss new products, baking techniques and proofing styles.³²

In conducting its community-of-interest analysis, the Board did acknowledge (JA 642 n.1) that some factors were shared across the West Michigan Market. But it found those factors insufficient to outweigh the several factors supporting a finding that the smaller, petitioned-for unit was distinct and appropriate. Specifically, as the Board found (JA 441) – and, as the Company notes (Br. 18) – the record indicates that all bakers share the same job duties, terms and conditions of employment and bonus plan, and are subject to the same labor relations policies. As the Board explained (JA 642 n.1, 441), however, the record shows that the I-94 bakers share a community of interest separate and apart from the remaining cafes, due to their geographic separation, the Company’s administrative divisions, and the lack of interaction between the I-94 bakers and bakers in other districts. The Board has previously found that “the fact that the wages, fringe benefits, and personnel policies are uniform for all employees throughout the chain” does not necessarily “militate against a finding of an appropriate geographical unit” when other factors favor a distinct community of

³² *Id.* at 489 (finding distinct community of interest in part because employees regularly “interact[ed] at joint meetings [only] for employees of [the petitioned-for] facilities during which new promotions, new products, or performance goals [we]re discussed”).

interest.³³ In sum, having identified several bases for distinguishing the petitioned-for unit from bakers at the Company's other facilities, the Board acted within its broad discretion in determining that the petitioned-for unit is appropriate.³⁴

Contrary to the Company's assertions, the Board cogently analyzed whether the I-94 bakers shared a distinct community of interest, and its unit determination is well-supported. The Company's repeated assertions (Br. 10, 12, 13, 20) that the Board issued its decision "without analysis or explanation" or "without any reference to the evidence" are not only unfounded, but are directed toward the wrong Board decision. The Company challenges the Board's March 21, 2012 order denying review of the Regional Directors Decision in the underlying representation proceeding. But, as discussed *supra*, pp. 12-13, that March 21 order was issued by a Board panel that included Members Flynn and Griffin, whose

³³ *Weis Markets*, 142 NLRB at 710 (finding two units of employees, at only a few of employer's stores, appropriate, despite common wages, benefits and working conditions at all stores, where petitioned-for units were made up of stores in coherent geographic groupings and employee transfers among stores within the requested units were more frequent than transfers between those stores and others); *Verizon Wireless*, 341 NLRB at 485, 487-88 (finding employees in petitioned-for unit at one group of stores shared distinct community of interest despite employer's "centralized administrative structure" including benefits program and human resources department covering all stores.)

³⁴ *See Blue Man Vegas*, 529 F.3d at 421 ("There is no hard and fast definition" of an appropriate unit, but "[r]ather, unit determinations must be made only after weighing all relevant factors on a case-by-case basis." (quoting *Country Ford Trucks*, 229 F.3d at 1190-91)).

recess appointments were found to be invalid. *See NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). Subsequently, the Board considered *de novo* the Company's arguments about the propriety of the petitioned-for unit, and on December 16, 2014, a properly constituted Board panel (Chairman Pearce; Members Hirozawa and Schiffer) issued a "Decision, Certification of Representative, and Notice to Show Cause" denying the Company's arguments, and specifically analyzing the facts to determine whether the petitioned-for unit of the Company's I-94 district bakers shared a distinct community of interest. (JA 642-43.) That December 2014 decision supplanted the March 21, 2012 decision. Accordingly, the December 2014 decision is the operative order from the underlying representation proceeding.

The Company, moreover, has not met its burden to show that the bargaining unit is truly inappropriate.³⁵ As this Court has explained, "[a] unit is truly inappropriate if, for example, there is no legitimate basis upon which to exclude certain employees from it."³⁶ As described above, the Board identified multiple factors supporting a distinct I-94 unit, and the Company has not demonstrated that those factors either do not, or insufficiently, distinguish the I-94 bakers notwithstanding other terms of employment shared across the Company's stores.

³⁵ *Country Ford Trucks*, 229 F.3d at 1189; *accord Blue Man Vegas*, 529 F.3d at 421.

³⁶ *Blue Man Vegas*, 529 F.3d at 421.

The record evidence does not, for example, indicate that the cafes in the I-94 and Lakeshore/Grand Rapids districts are as functionally integrated as the Company insists (Br. 18). Alman explained that there is “generally” no need for bakers to interact with each other among stores and that bakers will produce goods for another cafe “[o]nly in an emergency.” (JA 137, 142.) Alman also estimated that bakers cross districts to cover shifts only 5-15 times during the 362 days the cafes are open each year. (JA 339; JA 119-20, 139). The testimony the Company cites (Br. 8-9) is not to the contrary; there, Alman vaguely described five or six instances – without dates, durations, or specific details – when employees from the Grand Rapids and Lakeshore districts provided coverage for cafes in the I-94 district. But Alman also explained that the need to cover shifts was not frequent (JA 140-41) and that he “attempt[s] to keep the baker as close to their vicinity as possible” when he does need to arrange coverage. (JA 139-40.) Lead baker Wood similarly explained that bakers from the Grand Rapids/Lakeshore districts cover shifts in I-94 cafes only in “rare” and “extraordinary” circumstances, such as when another baker is injured. (JA 166.) Moreover, the Board has previously held that a small degree of employee interchange among all of an employer’s facilities does not necessarily render the petitioned-for unit of only a few of the facilities inappropriate.³⁷

³⁷ *Lawson Milk Co.*, 213 NLRB at 361-62 (“While it thus appears that a degree of

The Company's division of the cafes between its Training Specialists also cuts against its arguments that all cafes are functionally integrated. At the time of the petition, the bakers in the Lakeshore and Grand Rapids districts reported to Training Specialist Kibby and, due to a vacancy in the I-94 training-specialist position, the bakers in the I-94 cafes reported directly to Alman. (JA 437; JA 87, 160.) Further, the record belies the Company's assertion (Br. 7) that there "was no reason to think" the I-94 cafes would have their own Training Specialist. The Company had previously staffed a Training Specialist in the I-94 district (JA 118), Alman himself stated that there was an open training-specialist position that "[p]rimarily would be for the I-94 area" (JA 116), and Collins, the Company's Director of Operations, said that the Company "would like to fill" the open position. (JA 16.)

Nor, contrary to the Company's arguments (Br. 15-18), are *Sleepy's Inc.*, 355 NLRB 132 (2010),³⁸ *Laboratory Corp. of America Holdings*, 341 NLRB 1079 (2004), *Bashas', Inc.*, 337 NLRB 710 (2002), or *Alamo Rent-A-Car*, 330 NLRB 897 (2000), inconsistent with the Board's unit determination here. The Company

interchange exists between [unit] store employees and other stores [outside the petitioned-for unit], we do not believe it is so significant as to render inappropriate the proposed [petitioned-for] unit.").

³⁸ *Sleepy's* was issued by a panel of two Board members. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 688 (2010) (holding the Board must "maintain a membership of three in order to exercise the delegated authority of the Board").

asserts that the Board in those cases rejected petitioned-for units under factually analogous circumstances. But, as the Board explained (JA 642 n.1), the unit employees in the cases the Company cites shared many more community-of-interest factors with the employees in the excluded facilities than do the I-94 bakers. Indeed, those cases are distinguishable with respect to the very factors the Board found determinative in this case.

In *Alamo*, for example, the employees in the petitioned-for unit performed the same work under the same conditions as employees outside the unit. But the Board found that, unlike here, “the proposed unit d[id] not conform to any administrative function or grouping of the Employer’s operations.”³⁹ The Board in *Alamo* also found that, unlike here, there was “neither substantial employee interchange nor significant functional integration between the [petitioned-for] facilities that is distinguishable from” the excluded facilities.⁴⁰

Similarly, as the Board noted (JA 642 n.1, 441), in *Sleepy’s, Laboratory Corp.*, and *Bashas’* the petitioned-for units did not comport with the employers’ organizational or administrative divisions, as the I-94 bargaining unit does here.⁴¹

³⁹ *Alamo Rent-A-Car*, 330 NLRB at 898.

⁴⁰ *Id.*

⁴¹ *Sleepy’s Inc.*, 355 NLRB at 134 (finding proposed unit was “neither geographically coherent nor stable” and did “not conform to one of the Employer’s organizational groupings” or “administrative functions”); *Lab. Corp. of Am.*

And in both *Sleepy's* and *Bashas'*, the Board found that the petitioned-for units plainly failed to form coherent geographic groupings, and only noted that there were excluded stores near unit stores as further support for its conclusion that the geographic factor did not support finding the petitioned-for unit appropriate.⁴²

Moreover, the Board has found that the proximity of some excluded stores to some in a petitioned-for unit does not necessarily render the unit inappropriate.⁴³

The Board also explained (JA 441) that in *Sleepy's* and *Laboratory Corp.*, interchange between the employees in the petitioned-for units and employees at the excluded locations was much more significant than in this case. In those cases, unit employees frequently worked in stores excluded from the unit and, indeed,

Holdings, 341 NLRB at 1082 (the “seven [petitioned-for stores] d[id] not constitute a coherent geographic grouping”); *Bashas'*, 337 NLRB at 711 (petitioned-for unit did “not conform to any administrative function or organizational grouping” or “constitute a coherent geographic unit”).

⁴² *Sleepy's Inc.*, 355 NLRB at 134 (noting first that employer’s regional vice president “testified several times” that petitioned-for unit did “not designate a geographical area or grouping of stores” (emphasis in original) before pointing out that some excluded stores were “in close proximity to some of the [included] stores”); *Bashas'*, 337 NLRB at 711 (where petitioned-for unit did not conform to employer’s administrative divisions, the “mere fact that the 17 petitioned-for stores [we]re all in the same county [wa]s insufficient to establish the appropriateness of this unit” when “there [wa]s at least one other store . . . in close geographic proximity to other stores in the unit, and where there [wa]s no other basis for excluding [that] store other than the fact it [wa]s not in [the] County”).

⁴³ See *Lawson Milk Co.*, 213 NLRB at 362 (finding petitioned-for unit of only a few of employer’s stores appropriate even though “some stores in adjacent districts [we]re close to [the petitioned-for] stores”).

such interchange was a regular part of their job duties. That contrasts with the occasional, non-“routine” shift coverage that occurs between the I-94 district and the Grand Rapids and Lakeshore districts.⁴⁴ Moreover, as the Board noted (JA 441-42), the employees in the petitioned-for unit in *Laboratory Corp.* attended regular, region-wide “employee ‘speak out’ meetings” with employees from the excluded facilities, but here the bakers working in cafes in the Company’s I-94 district attend separate “celebration meetings” from the bakers in the Grand Rapids and Lakeshore cafes. In any event, this Court has explained that the “NLRB is expected to make unit determinations on a case-by-case basis” and, accordingly “there is no need to harmonize all NLRB [bargaining unit] decisions into a uniform pattern.”⁴⁵

⁴⁴ *Sleepy’s Inc.*, 355 NLRB at 134 (finding “significant employee interchange with employees at stores outside the proposed unit” when “50 percent of the employees” who worked in the region were “floaters’ who travel between stores” and employee who worked inside petitioned-for unit also worked outside the unit “approximately 52 percent of the time”); *Lab. Corp. of Am. Holdings*, 341 NLRB at 1082 (finding “regular interchange” among employees in petitioned-for unit and excluded stores when employees rotated shifts at stores in and out of the unit “every weekend”).

⁴⁵ *Country Ford Trucks*, 229 F.3d at 1190-91 (internal quotation marks and citation omitted); see also *NLRB v. Coca-Cola Bottling Co. of Buffalo*, 191 F.3d 316, 323 (2d Cir. 1999) (“[S]ince the Board has wide discretion in designating bargaining units, minor factual differences between cases may justify contrary results.”); *Carson Cable TV*, 795 F.2d at 885 (“Because unit determinations are dependent on slight variations of facts, the Board decides each case on an *ad hoc* basis, and it is not strictly bound by its prior decisions.”).

More fundamentally, the Company's contentions (Br. 15-18) that there are more commonalities than differences among all employees in the West Michigan Market would not, even if it were true, satisfy its burden of proving that an I-94 district unit is truly inappropriate. As discussed above, *supra* pp. 19-22, the Board is only required to approve *an* appropriate unit, and a unit comprising employees at more than one, but fewer than all, of an employer's facilities may be appropriate where there are legitimate bases for distinguishing the smaller unit. Here, the balance of factors indicates that the bakers in the I-94 cafes have a sufficiently distinct community of interest to justify the distinct bargaining unit. Accordingly, the Company has not demonstrated that the Board abused its discretion in approving the petitioned-for unit of bakers at the Company's I-94 district cafes.

C. The Regional Director Had the Authority To Conduct the Election Pursuant to the Board's Delegation of Authority

The Company claims (Br. 20-22) that the Court should deny enforcement because, at the time of the underlying representation proceeding, Acting General Counsel Lafe Solomon was serving in violation of Section 3(d) of the NLRA, 29 U.S.C. § 153(d), and the Federal Vacancies Reform Act, 5 U.S.C. § 3345, et seq. ("FVRA"). On that basis, the Company contends that the Board's decision should be vacated because the underlying representation proceeding took place within the period that Solomon was assertedly serving invalidly. As discussed below, the Company's defense is untimely and, in any event, without merit.

1. The Company Waived Its Challenge to Acting General Counsel Lafe Solomon’s Authority by Failing To Raise It in the Representation Proceeding

As discussed above, *supra* p. 14, the Company did not challenge the authority of Acting General Counsel Lafe Solomon in the representation proceeding, but first raised that challenge in the post-*Noel Canning* unfair-labor-practice proceeding. That was, as the Board found (JA 665-66), too late. As this Court has noted with approval, “[t]he Board has drawn a ‘well established’ line between representation and unfair labor practice proceedings, requiring that any issues that may be presented during the representation proceeding must be offered there.”⁴⁶ The Court’s acceptance of that distinction is consistent with the Supreme Court’s admonition that “[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.”⁴⁷

⁴⁶ *Pace Univ. v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008) (quoting *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1151 (D.C. Cir. 2000)).

⁴⁷ *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952), *quoted in Pace Univ.*, 514 F.3d at 24; *see also Pace Univ.*, 514 F.3d at 24 (citing Section 10(e) of the Act, 29 U.S.C. § 160(e)); 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”).

In that regard, this Court's observations in *SW General v. NLRB* are pertinent here. While ruling on the employer's FVRA argument, the Court there expressed "doubt that an employer that failed to timely raise an FVRA objection" could successfully raise it in this Court.⁴⁸ Since the Company failed to raise its FVRA challenge in the underlying representation proceeding, it failed to raise that argument at the appropriate time under the Board's practice, and consequently has waived that challenge.

For the same reasons, the Company also waived its equally belated challenge to the Regional Director's authority based on the assertion that Solomon's service as Acting General Counsel failed to conform to the requirements of Section 3(d) of the Act, 29 U.S.C. § 153(d). That argument is, in any event, inapposite since, as this Court previously recognized, the President relied on FVRA when designating Solomon to serve as Acting General Counsel, and did not invoke Section 3(d).⁴⁹

⁴⁸ 796 F.3d 67, 83 (D.C. Cir. 2015). The Company (Br. 21) cites *SW General* for its holding that Solomon served in violation of the FVRA after the President nominated him to be General Counsel. On October 5, 2015, the General Counsel, on behalf of the Board and with the support of the Department of Justice, filed a petition for rehearing in *SW General*, arguing that the Court's conclusion is based on a misreading of the FVRA.

⁴⁹ *SW Gen.*, 796 F.3d at 71 & n.2.

2. In Any Event, the Company's Challenge to the Regional Director's Authority To Conduct the Election is Meritless

In any event, there is no merit to the Company's argument (Br. 20-22) that Solomon's designation as Acting General Counsel has any bearing on the Regional Director's ability to conduct an election. Under the NLRA's express terms, Regional Directors' representation-case authority derives from the Board, not the General Counsel, and is reviewable by the Board, not the General Counsel.

Section 3(b) of the Act, 29 U.S.C. § 153(b), provides that the Board may "delegate to its regional directors its powers under [Section 9 of the Act, 29 U.S.C. § 159] . . . to direct an election or take a secret ballot . . .," subject to discretionary review by the Board. Acting on that authority, the Board in 1961 delegated decisional authority in representation cases to Regional Directors (26 Fed. Reg. 3911),⁵⁰ and thereafter promulgated rules implementing that delegation.⁵¹

⁵⁰ The delegation provides:

Pursuant to section 3(b) of the National Labor Relations Act, as amended, and subject to the amendments to the Board's Statements of Procedure, Series 8, and to its Rules and Regulations, Series 8, effective May 15, 1961, and subject to such further amendments and instructions as may be issued by the Board from time to time, the Board delegates to its Regional Directors "its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof." Such delegation shall be effective with respect to any petition filed under subsection (c) or (e) of section 9 of the Act on May 15, 1961.

Furthermore, as this Court has explained, “the statute preserves for the *Board* the power to review ‘any action of a regional director’ taken pursuant to that delegation, should a party object.”⁵²

In sum, because the Regional Director’s authority to conduct the election derives from the Board, not the General Counsel, and all actions taken in the representation proceeding are subject to review by the Board, any purported defect in Acting General Counsel Solomon’s authority would not affect the validity of the Regional Director’s or the Board’s actions or decisions in the representation case.

See also UC Health v. NLRB, 803 F.3d 669, 671 (D.C. Cir. 2015).

⁵¹ *See* 29 C.F.R. § 102.67.

⁵² *UC Health*, 803 F.3d at 671 (citing 29 U.S.C. § 153(b)) (emphasis added).

CONCLUSION

At bottom, the Company urges that the Court deny the I-94 bakers the representation they sought and voted for solely because a geographically and administratively separate group of bakers – who are not seeking union representation and have little contact with the unit employees – were not included in the demonstrably appropriate petitioned-for bargaining unit. But the Company has not shown that the Board selected a truly inappropriate unit, as required to warrant rejecting the Union’s certification and the Board’s unfair-labor-practice finding. The Board therefore respectfully requests that the Court enter a judgment denying the Company’s petition for review and enforcing the Board’s Order in full.

RICHARD F. GRIFFIN, JR.
General Counsel

s/ Kira Dellinger Vol
KIRA DELLINGER VOL
Supervisory Attorney

JENNIFER ABRUZZO
Deputy General Counsel

s/ Marni von Wilpert
MARNI VON WILPERT
Attorney

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0656
(202) 273-2903

National Labor Relations Board
January 2016

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

BREAD OF LIFE, LLC, d/b/a PANERA BREAD)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD	)	Nos. 15-1179
	)	15-1220
Respondent/Cross-Petitioner)	
)	
and	)	Board Case No.
	)	7-CA-088519
BAKERY, CONFECTIONARY, TOBACCO)	
WORKERS AND GRAIN MILLERS)	
INTERNATIONAL UNION,)	
LOCAL 70, AFL-CIO, CLC)	
)	
Intervenor)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 9,670 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 28th day of January 2016

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

BREAD OF LIFE, LLC, d/b/a PANERA BREAD)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD	)	Nos. 15-1179
	)	15-1220
Respondent/Cross-Petitioner)	
)	
and	)	Board Case No.
	)	7-CA-088519
BAKERY, CONFECTIONARY, TOBACCO)	
WORKERS AND GRAIN MILLERS)	
INTERNATIONAL UNION,)	
LOCAL 70, AFL-CIO, CLC)	
)	
Intervenor)	
)	

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

s/Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 28th day of January 2016