NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 18-1161, 18-1182

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

UPS GROUND FREIGHT, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 773,
Intervenor.

ON PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

JOINT APPENDIX – VOLUME II

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UPS Ground Freight, Inc. v. NLRB
Case Nos. 18-1161, 18-1182

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[1] This document is not part of the record submitted by the NLRB.
[2] This document is not part of the record submitted by the NLRB.

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[3] The first page of this letter is erroneously dated November 25, 2015.

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[4] Exhibits A-D are attached to UPS Ground Freight's Original Request for Review, dated April 1, 2016, at JA pp. 0842-0860.

Case No. 04-CA-205359

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[5] Exhibits 1-17, 20, and 23-25 were detached from the General Counsel's Motion for Summary Judgment and placed in chronological order in the Joint Appendix designated as "(GC Exh. ___).

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FORM NLRB-502 (RC)
(4-15)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 04-RC-165805	Date Filed 12/10/15

***INSTRUCTIONS:** Unless e-Filed using the Agency's website, www.nlrb.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.*

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer UPS FREIGHT TRUCKLOAD	2b. Address(es) of Establishment(s) involved *(Street and number, city, State, ZIP code)* 9755 COMMERCE CIRCLE KUTZTOWN PA 19530
3a. Employer Representative – Name and Title RAYMOND COPELAND	3b. Address (if same as 2b – state same) 9755 COMMERCE CIRCLE KUTZTOWN PA 19530

3c. Tel. No.	3d. Cell No.	3e. Fax No.	3f. E-Mail Address
610-285-5380	610-285-5380	610-285-5384	RAYMONDCOPELAND@UPS.COM

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*	4b. Principal product or service	5a. *City and State where unit is located:*
WAREHOUSE	DELIVERY OF GOODS	KUTZTOWN PA

5b. Description of Unit Involved

Included: ALL REGULAR FULL-TIME AND PART-TIME DRIVERS

Excluded: ALL OTHER EMPLOYEES INCLUDING GUARDS AND SUPERVISORS AS DEFINED IN THE ACT

6a. No. of Employees in Unit: 29

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes [✓] No [ ]

Check One: [✓] 7a. Request for recognition as Bargaining Representative was made on (Date) 12/10/2015 and Employer declined recognition on or about _____ (Date) *(If no reply received, so state).* NO REPLY

[ ] 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state).	8b. Address
NONE	

8c. Tel No.	8d Cell No.	8e. Fax No.	8f. E-Mail Address

8g. Affiliation, if any	8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, If any *(Month, Day, Year)*

9. Is there now a strike or picketing at the Employer's establishment(s) involved? NO If so, approximately how many employees are participating? _____

(Name of labor organization) _____, has picketed the Employer since *(Month, Day, Year)* _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. *(If none, so state)*
NONE

10a. Name	10b. Address	10c. Tel. No.	10d. Cell No.
		10e. Fax No.	10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.		11a. Election Type: [ ] Manual [✓] Mail [ ] Mixed Manual/Mail
11b. Election Date(s): 12/22/2015	11c. Election Time(s): N/A	11d. Election Location(s): N/A

12a. Full Name of Petitioner *(including local name and number)*	12b. Address *(street and number, city, state, and ZIP code)*
INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 773	1345 HAMILTON ST ALLENTOWN PA 18102

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent *(If none, so state)*
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

12d. Tel No.	12e. Cell No.	12f. Fax No.	12g. E-Mail Address
610-434-4451	484-714-5414	610-770-9581	BTAYLOR@TEAMSTER773.ORG

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title BRIAN A. TAYLOR ORGANIZER/TRUSTEE	13b. Address *(street and number, city, state, and ZIP code)* 1345 HAMILTON ST ALLENTOWN PA 18102

13c. Tel No.	13d. Cell No.	13e. Fax No.	13f. E-Mail Address
610-434-4451	484-714-5414	610-770-9581	BTAYLOR@TEAMSTER773.ORG

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name *(Print)*	Signature	Title	Date
BRIAN A. TAYLOR	Brian A. Taylor	ORGANIZER/TRUSTEE	12/10/2015

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 4
615 Chestnut St Ste 710
Philadelphia, PA 19106-4413

Agency Website: www.nlrb.gov
Telephone: (215)597-7601
Fax: (215)597-7658

Download
NLRB
Mobile App

December 10, 2015

URGENT

raymondcopeland@ups.com

Raymond Copeland, Interim Terminal Manager
Ups Freight Truckload
9755 Commerce Circle
Kutztown, PA 19530

Re: UPS Freight Truckload
Case 04-RC-165805

Dear Mr. Copeland:

Enclosed is a copy of a petition that Teamsters Local 773 filed with the National Labor Relations Board (NLRB) seeking to represent certain of your employees. After a petition is filed, the employer is required to promptly take certain actions so please read this letter carefully to make sure you are aware of the employer's obligations. This letter tells you how to contact the Board agent who will be handling this matter, about the requirement to post and distribute the Notice of Petition for Election, the requirement to complete and serve a Statement of Position Form, a scheduled hearing in this matter, other information needed including a voter list, your right to be represented, and NLRB procedures.

Investigator: This petition will be investigated by Field Examiner KATHLEEN O'NEILL whose telephone number is (215)597-7645. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. If the agent is not available, you may contact Supervisory Attorney EMILY DESA whose telephone number is (215)597-7626. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Required Posting and Distribution of Notice: You must post the enclosed Notice of Petition for Election by December 14, 2015 in conspicuous places, including all places where notices to employees are customarily posted. The Notice of Petition for Election must be posted so all pages are simultaneously visible. If you customarily communicate with your employees electronically, you must also distribute the notice electronically to them. You must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Posting and distribution of the Notice of Petition for Election will inform the employees whose representation is at issue and the employer of their rights and obligations under the National Labor Relations Act in the representation context. Failure to post or distribute the notice may be grounds for setting aside an election if proper and timely objections are filed.

Required Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, the employer is required to complete the enclosed Statement of Position form (including the attached Commerce Questionnaire), have it signed by an authorized representative, and file a completed copy (with all required attachments) with this office and serve it on all parties named in the petition such that it is received by them by **noon Eastern Time** on **December 17, 2015**. This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. **This form may be e-Filed, but unlike other e-Filed documents, will *not* be timely if filed on the due date but after noon December 17, 2015.** If you have questions about this form or would like assistance in filling out this form, please contact the Board agent named above.

List(s) of Employees: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under Section 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

> A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the

appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Notice of Hearing: Enclosed is a Notice of Representation Hearing to be conducted at **10:00 AM** on **Friday, December 18, 2015** at **a Hearing Room**, **615 Chestnut Street, Suite 710, Philadelphia, PA 19106,** if the parties do not voluntarily agree to an election. If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, the NLRB will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party, the regional director may postpone the hearing for up to 2 business days upon a showing of special circumstances and for more than 2 business days upon a showing of extraordinary circumstances. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is preferred, but not required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Other Information Needed Now: Please submit to this office, as soon as possible, the following information needed to handle this matter:

(a) A copy of any existing or recently expired collective-bargaining agreements, and any amendments or extensions, or any recognition agreements covering any of your employees in the unit involved in the petition (the petitioned-for unit);

(b) The name and contact information for any other labor organization (union) claiming to represent any of the employees in the petitioned-for unit;

(c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.

(d) If you desire a formal check of the showing of interest, you must provide an alphabetized list of employees in the petitioned-for unit, with their job classifications, for the payroll period immediately before the date of this petition. Such a list should be submitted as early as possible prior to the hearing. Ordinarily a formal check of the showing of interest is not performed using the employee list submitted as part of the Statement of Position.

Voter List: If an election is held in this matter, the employer must transmit to this office and to the other parties to the election, an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of eligible voters. Usually, the list must be furnished within 2 business days of the issuance of the Decision and

Direction of Election or approval of an election agreement. I am advising you of this requirement now, so that you will have ample time to prepare this list. When feasible, the list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or at the Regional office upon your request.

If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the NLRB. Their knowledge regarding this matter was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Procedures: Also enclosed is a Description of Procedures in Certification and Decertification Cases (Form NLRB-4812). We strongly urge everyone to submit documents and other materials by E-Filing (not e-mailing) through our website, www.nlrb.gov. E-Filing your documents places those documents in our official electronic case files. On all your correspondence regarding the petition, please include the case name and number indicated above.

Information about the NLRB and our customer service standards is available on our website, www.nlrb.gov, or from an NLRB office upon your request. We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

Dennis P. Walsh

DENNIS P. WALSH
Regional Director

Enclosures

1. Petition
2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)

Form NLRB-5492
(4-2015)

National Labor Relations Board

NOTICE OF PETITION FOR ELECTION

This notice is to inform employees that Teamsters Local 773 has filed a petition with the National Labor Relations Board (NLRB), a Federal agency, in Case 04-RC-165805 seeking an election to become certified as the representative of the employees of Ups Freight Truckload in the unit set forth below:

Included: All regular full-time and part-time drivers. Excluded: All other employees including guards and supervisors as defined in the Act.

This notice also provides you with information about your basic rights under the National Labor Relations Act, the processing of the petition, and rules to keep NLRB elections fair and honest.

YOU HAVE THE RIGHT under Federal Law

- **To self-organization**
- **To form, join, or assist labor organizations**
- **To bargain collectively through representatives of your own choosing**
- **To act together for the purposes of collective bargaining or other mutual aid or protection**
- **To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustments).**

PROCESSING THIS PETITION

Elections do not necessarily occur in all cases after a petition is filed. NO FINAL DECISIONS HAVE BEEN MADE YET regarding the appropriateness of the proposed unit or whether an election will be held in this matter. If appropriate, the NLRB will first see if the parties will enter into an election agreement that specifies the method, date, time, and location of an election and the unit of employees eligible to vote. If the parties do not enter into an election agreement, usually a hearing is held to receive evidence on the appropriateness of the unit and other issues in dispute. After a hearing, an election may be directed by the NLRB, if appropriate.

IF AN ELECTION IS HELD, it will be conducted by the NLRB by secret ballot and Notices of Election will be posted before the election giving complete details for voting.

ELECTION RULES

The NLRB applies rules that are intended to keep its elections fair and honest and that result in a free choice. If agents of any party act in such a way as to interfere with your right to a free election, the election can be set aside by the NLRB. Where appropriate the NLRB provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with employees' rights and may result in setting aside the election:

- **Threatening loss of jobs or benefits by an employer or a union**
- **Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises**
- **An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity**
- **Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or the mail ballots are dispatched**
- **Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals**
- **Threatening physical force or violence to employees by a union or an employer to influence their votes**

Please be assured that IF AN ELECTION IS HELD, every effort will be made to protect your right to a free choice under the law. Improper conduct will not be permitted. All parties are expected to cooperate fully with the NLRB in maintaining basic principles of a fair election as required by law. The NLRB as an agency of the United States Government does not endorse any choice in the election.

For additional information about the processing of petitions, go to www.nlrb.gov or contact the NLRB at (215)597-7601.

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE. IT MUST REMAIN POSTED WITH ALL PAGES SIMULTANEOUSLY VISIBLE UNTIL REPLACED BY THE NOTICE OF ELECTION OR THE PETITION IS DISMISSED OR WITHDRAWN.

National Labor Relations Board

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

Ups Freight Truckload **Employer** **and** **Teamsters Local 773** **Petitioner**	**Case 04-RC-165805**

NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at 10:00 AM on **Friday, December 18, 2015** and on consecutive days thereafter until concluded, at the National Labor Relations Board offices located at a Hearing Room, 615 Chestnut Street, Suite 710, Philadelphia, PA 19106, a hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Ups Freight Truckload must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Eastern time on December 17, 2015**.** The Statement of Position may be E-Filed but, unlike other E-Filed documents, must be filed by noon Eastern on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: December 10, 2015

Dennis P. Walsh

DENNIS P. WALSH
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 04
615 Chestnut St Ste 710
Philadelphia, PA 19106-4413

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DESCRIPTION OF REPRESENTATION CASE PROCEDURES IN CERTIFICATION AND DECERTIFICATION CASES

The National Labor Relations Act grants employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity. A party may file an RC, RD or RM petition with the National Labor Relations Board (NLRB) to conduct a secret ballot election to determine whether a representative will represent, or continue to represent, a unit of employees. An **RC** petition is generally filed by a union that desires to be certified as the bargaining representative. An **RD** petition is filed by employees who seek to remove the currently recognized union as the bargaining representative. An **RM** petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition as the bargaining representative, or based on a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status. This form generally describes representation case procedures in RC, RD and RM cases, also referred to as certification and decertification cases.

Right to be Represented – Any party to a case with the NLRB has the right to be represented by an attorney or other representative in any proceeding before the NLRB. A party wishing to have a representative appear on its behalf should have the representative complete a Notice of Appearance (Form NLRB-4701), and E-File it at www.nlrb.gov or forward it to the NLRB Regional Office handling the petition as soon as possible.

Filing and Service of Petition – A party filing an RC, RD or RM petition is required to serve a copy of its petition on the parties named in the petition along with this form and the Statement of Position form. The petitioner files the petition with the NLRB, together with (1) a certificate showing service of these documents on the other parties named in the petition, and (2) a showing of interest to support the petition. The showing of interest is not served on the other parties.

Notice of Hearing – After a petition in a certification or decertification case is filed with the NLRB, the NLRB reviews both the petition and the required showing of interest for sufficiency, assigns the petition a case number, and promptly sends letters to the parties notifying them of the Board agent who will be handling the case. In most cases, the letters include a Notice of Representation Hearing. Except in cases presenting unusually complex issues, this pre-election hearing is set for a date 8 days (excluding intervening federal holidays) from the date of service of the notice of hearing. Once the hearing begins, it will continue day to day until completed absent extraordinary circumstances. The Notice of Representation Hearing also sets the due date for filing and serving the Statement(s) of Position. Included with the Notice of Representation Hearing are a copy of the petition, this form, a Statement of Position form, a Notice of Petition for Election, and a letter advising how to contact the Board agent who will be handling the case and discussing those documents.

Hearing Postponement: The regional director may postpone the hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should include the positions of the other parties regarding the postponement. The request should be filed with the regional director. E-Filing the request is preferred, but not required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Statement of Position Form and List(s) of Employees – The Statement of Position form solicits commerce and other information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. As part of its Statement of Position form, the employer also provides a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. If the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department).

Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list

must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

Ordinarily the Statement of Position must be filed with the Regional Office and served on the other parties such that it is received by them by noon on the business day before the opening of the hearing. The regional director may postpone the due date for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. The Statement of Position form may be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Statement of Position requirement are discussed on the following page under the heading "Preclusion."

A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Posting and Distribution of Notice of Petition for Election – Within 2 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and must also distribute it electronically if the employer customarily communicates with its employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed.

Election Agreements – Elections can occur either by agreement of the parties or by direction of the regional director or the Board. Three types of agreements are available: (1) a Consent Election Agreement (Form NLRB-651); (2) a Stipulated Election Agreement (Form NLRB-652); and (3) a Full Consent Agreement (Form NLRB-5509). In the Consent Election Agreement and the Stipulated Election Agreement, the parties agree on an appropriate unit and the method, date, time, and place of a secret ballot election that will be conducted by an NLRB agent. In the Consent Agreement, the parties also agree that post-election matters (election objections or determinative challenged ballots) will be resolved with finality by the regional director; whereas in the Stipulated Election Agreement, the parties agree that they may request Board review of the regional director's post-election determinations. A Full Consent Agreement provides that the regional director will make final determinations regarding all pre-election and post-election issues.

Hearing Cancellation Based on Agreement of the Parties – The issuance of the Notice of Representation Hearing does not mean that the matter cannot be resolved by agreement of the parties. On the contrary, the NLRB encourages prompt voluntary adjustments and the Board agent assigned to the case will work with the parties to enter into an election agreement, so the parties can avoid the time and expense of participating in a hearing.

Hearing – A hearing will be held unless the parties enter into an election agreement approved by the regional director or the petition is dismissed or withdrawn.

Purpose of Hearing: The purpose of a pre-election hearing is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or, in the case of a decertification petition, concerning a unit in which a labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.

Issues at Hearing: Issues that might be litigated at the pre-election hearing include: jurisdiction; labor organization status; bars to elections; unit appropriateness; expanding and contracting unit issues; inclusion of professional employees with nonprofessional employees; and eligibility formulas. At the hearing, the Statement of Position will be received into evidence and, prior to the introduction of further evidence, all other parties will respond on the record to each issue raised in the Statement. The hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

Preclusion: At the hearing, a party will be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. As set forth in §102.66(d) of the Board's rules, if the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Conduct of Hearing: If held, the hearing is usually open to the public and will be conducted by a hearing officer of the NLRB. Any party has the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer also has the power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses will be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Parties appearing at any hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, should notify the regional director as soon as possible and request the necessary assistance.

Official Record: An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. (Copies of exhibits should be supplied to the hearing officer and other parties at the time the exhibit is offered in evidence.) All statements made in the hearing room will be recorded by the official reporter while the hearing is on the record. If a party wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. After the close of the hearing, any request for corrections to the record, either by stipulation or motion, should be forwarded to the regional director.

Motions and Objections: All motions must be in writing unless stated orally on the record at the hearing and must briefly state the relief sought and the grounds for the motion. A copy of any motion must be served immediately on the other parties to the proceeding. Motions made during the hearing are filed with the hearing officer. All other motions are filed with the regional director, except that motions made after the transfer of the record to the Board are filed with the Board. If not E-Filed, an original and two copies of written motions shall be filed. Statements of reasons in support of motions or objections should be as concise as possible. Objections shall not be deemed waived by further participation in the hearing. On appropriate request, objections may be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

Election Details: Prior to the close of the hearing the hearing officer will: (1) solicit the parties' positions (but will not permit litigation) on the type, date(s), time(s), and location(s) of the election and the eligibility period; (2) solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election if an election is directed; (3) inform the parties that the regional director will issue a decision as soon as practicable and will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and (4) inform the parties of their obligations if the director directs an election and of the time for complying with those obligations.

Oral Argument and Briefs: Upon request, any party is entitled to a reasonable period at the close of the hearing for oral argument, which will be included in the official transcript of the hearing. At any time before the close of the hearing, any party may file a memorandum addressing relevant issues or points of law. Post-hearing briefs shall be filed only upon special permission of the regional director and within the

time and addressing the subjects permitted by the regional director. If filed, copies of the memorandum or brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the memorandum or brief. No reply brief may be filed except upon special leave of the regional director. If allowed, briefs should be double-spaced on 8½ by 11 inch paper. Briefs must be filed in accordance with the provisions of Section 102.111(b) of the Board's Rules. E-Filing of briefs through the Board's website, www.nlrb.gov, is encouraged, but not required. Facsimile transmission of briefs is NOT permitted.

Regional Director Decision - After the hearing, the regional director issues a decision directing an election, dismissing the petition or reopening the hearing. A request for review of the regional director's pre-election decision may be filed with the Board at any time after issuance of the decision until 14 days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The Board will grant a request for review only where compelling reasons exist therefore.

Voter List – The employer must provide to the regional director and the parties named in the election agreement or direction of election a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (''cell'') telephone numbers) of all eligible voters. (In construction industry elections, unless the parties stipulate to the contrary, also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.) The employer must also include in a separate section of the voter list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge.

The list of names must be alphabetized (overall or by department) and be in the same Microsoft Word file (or Microsoft Word compatible file) format as the initial lists provided with the Statement of Position form unless the parties agree to a different format or the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list must be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction.

To be timely filed and served, the voter list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction unless a longer time is specified in the agreement or direction. A certificate of service on all parties must be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Waiver of Time to Use Voter List – Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 days after the date when the employer must file the voter list with the Regional Office. However, the parties entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483. A waiver will not be effective unless all parties who are entitled to the list agree to waive the same number of days.

Election – Information about the election, requirements to post and distribute the Notice of Election, and possible proceedings after the election is available from the Regional Office and will be provided to the parties when the Notice of Election is sent to the parties.

Withdrawal or Dismissal – If it is determined that the NLRB does not have jurisdiction or that other criteria for proceeding to an election are not met, the petitioner is offered an opportunity to withdraw the petition. If the petitioner does not withdraw the petition, the regional director will dismiss the petition and advise the petitioner of the reason for the dismissal and of the right to appeal to the Board.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A STATEMENT OF POSITION FORM

Completing and Filing this Form: The Notice of Hearing indicates which parties are responsible for completing the form. If you are required to complete the form, you must have it signed by an authorized representative and file a completed copy (including all attachments) with the RD and serve copies on all parties named in the petition by the date and time established for its submission. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You may E-File your Statement of Position at www.nlrb.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed.**

> **Note:** ***Non-employer parties who complete this Statement of Position are NOT required to complete items 8f and 8g of the form, or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to complete items 3, 5, 6, and 8a-8e of the form.***

Required Lists: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at **www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015**.

Consequences of Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

> A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

FORM NLRB-505
(4-15)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE	
Case No. 04-RC-165805	Date Filed December 10, 2015

INSTRUCTIONS: *Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.*
Note: *Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.*

1a. Full name of party filing Statement of Position	1c. Business Phone:	1e. Fax No.:
1b. Address *(Street and number, city, state, and ZIP code)*	1d. Cell No.:	1f. e-Mail Address

2. Do you agree that the NLRB has jurisdiction over the Employer in this case? [ ] Yes [ ] No
(A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)

3. Do you agree that the proposed unit is appropriate? [ ] Yes [ ] No *(If not, answer 3a and 3b.)*

a. State the basis for your contention that the proposed unit is not appropriate. (*If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards.)*

b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.

Added	Excluded

4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

5. Is there a bar to conducting an election in this case? [ ] Yes [ ] No *If yes, state the basis for your position.*

6. Describe all other issues you intend to raise at the pre-election hearing.

The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at **www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015**.
A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B)
If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be *added* to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be *excluded* from the proposed unit to make it an appropriate unit. (Attachment D)

State your position with respect to the details of any election that may be conducted in this matter. 8a. Type: [ ] Manual [ ] Mail [ ] Mixed Manual/Mail

8b. Date(s)	8c. Time(s)	8d. Location(s)
8e. Eligibility Period (e.g. special eligibility formula)	8f. Last Payroll Period Ending Date	8g. Length of payroll period [ ] Weekly [ ]Biweekly [ ] Other *(specify length)*

9. Representative who will accept service of all papers for purposes of the representation proceeding

9a. Full name and title of authorized representative	9b. Signature of authorized representative	9c. Date
9d. Address *(Street and number, city, state, and ZIP code)*		9e. e-Mail Address
9f. Business Phone No.:	9g. Fax No.	9h. Cell No.

WILLFUL FALSE STATEMENTS ON THIS STATEMENT OF POSITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

Revised 3/21/2011 NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME	CASE NUMBER
UPS Freight Truckload	04-RC-165805

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)

2. TYPE OF ENTITY

[ ] CORPORATION [ ] LLC [ ] LLP [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP [ ] OTHER (Specify)

3. IF A CORPORATION or LLC

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS

5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR

6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS *(Products handled or manufactured, or nature of services performed).*

7. A. PRINCIPAL LOCATION:	B. BRANCH LOCATIONS:

8. NUMBER OF PEOPLE PRESENTLY EMPLOYED

A. Total:	B. At the address involved in this matter:

9. DURING THE MOST RECENT ***(Check appropriate box):*** **[ ] CALENDAR YR [ ] 12 MONTHS or [ ] FISCAL YR** ***(FY dates)***

	YES	NO
A. Did you **provide services** valued in excess of $50,000 directly to customers outside your State? If no, indicate actual value. $_____		
B. If you answered no to 9A, did you **provide services** valued in excess of $50,000 to customers in your State who purchased goods valued in excess of $50,000 from directly outside your State? If no, indicate the value of any such services you provided. $_____		
C. If you answered no to 9A and 9B, did you **provide services** valued in excess of $50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than $50,000, indicate amount. $_____		
D. Did you **sell goods** valued in excess of $50,000 directly to customers located outside your State? If less than $50,000, indicate amount. $_____		
E. If you answered no to 9D, did you **sell goods** valued in excess of $50,000 directly to customers located inside your State who purchased other goods valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $_____		
F. Did you **purchase and receive goods** valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $_____		
G. Did you **purchase and receive goods** valued in excess of $50,000 from enterprises who received the goods directly from points outside your State? If less than $50,000, indicate amount. $_____		
H. **Gross Revenues** from all sales or performance of services ***(Check the largest amount)***: [ ] $100,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 or more If less than $100,000, indicate amount.		
I. **Did you begin operations within the last 12 months?** If yes, specify date: _____		

10 ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?

[ ] YES [ ] NO *(If yes, name and address of association or group).*

11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)*	SIGNATURE	E-MAIL ADDRESS	DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

In the Matter of	)	
	)	
UPS FREIGHT TRUCKLOAD,	)	
	)	
	)	
Employer,	)	
	)	
and	)	Case 04-RC-165805
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 773,	)	
	)	
	)	
Petitioner.	)	
	)	

MOTION TO POSTPONE REPRESENTATION HEARING AND FOR EXTENSION OF TIME TO FILE STATEMENT OF POSITION

The Employer, UPS Freight Truckload ("UPS" or "the Company"), by counsel and pursuant to Sections 102.67 and 102.63 of the Rules and Regulations of the National Labor Relations Board ("NLRB"), hereby moves for an extension of time to file its Statement of Position and for the postponement of the Representation Hearing in the above-captioned matter. Special circumstances exist to support this motion upon the following:

1. On December 10, 2015, the International Brotherhood of Teamsters Local 773 ("the Union") filed its petition for election in the above-captioned matter, seeking to be certified as the the authorized representative of all regular, full-time and part-time drivers employed by the Company at its operations located at 9755 Commerce Circle, in Kutztown, Pennsylvania. Pursuant to the Notice of Representation Hearing issued following the filing of the Union's petition, the Company is required to file its Statement of Position in response to the Union's petition by 12:00 p.m. EST, on Thursday,

December 17, 2015. The Representation Hearing is currently scheduled for Friday, December 18, 2015, at 10:00 a.m., in Philadelphia, Pennsylvania.

2. Section 102.63 of the Board's Rules and Regulations expressly authorizes the Regional Director to extend the time for filing and serving the Statement of Position, and to postpone the Representation Hearing, for up to 2 business days upon a showing of "special circumstances." *See* Rules and Regulations of the National Labor Relations Board, Sections 102.63(a); (b)(1).

3. Special circumstances justify an extension/postponement in the instant case. Specifically, the undersigned counsel was just retained in this matter, and is currently travelling in relation to other, unrelated business. As a result, the undersigned is not available to meet with representatives of the Company concerning the Union's petition until Wednesday, December 16, 2015, at the earliest. The requested extension of time is necessary to ensure that the undersigned has adequate time to investigate the Union's petition, both for the purpose of preparing the Company's Statement of Position, includsing any necessary objections, and to fully and adequately address the Company's interests at the Representation Hearing.

4. Moreover, the timing of the Union's petition, which was filed in the midst of the holiday season, presents singificant difficulties to the Company given the nature of its business. In short, it is quite burdensome for UPS to afford the petition its due attention while it is busy meeting its significant holiday delivery commitments. Even the brief extension requested herein would provide significant relief in this respect.

5. Finally, the requested extension is particularly vital given the penal nature of Section 102.66(d) of the Board's Ryules and Regulations, which expressly provides, in pertinent

part, that "[a] party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position . . . ." Given the undersigned's travel schedule and pre-existing obligations, the brief postponement/extension requested herein is necessary to ensure that the Company has adequate time to address the issues presented by the Union's petition and to avoid the manner of waiver contemplated by Section 102.66(d), which necessarily would prejudice its ability to fully respond.

6. The undersigned has contacted the Union's designated representative prior to the filing of this motion, and has been informed that the Union opposes the postponement/extension requested herein. The Union did not provide any reason for its opposition to this motion, or any explanation as to how or why its interests would be prejudiced.

7. For the reasons stated herein, the Company respectfully requests that the deadline for the filing and serving of the Company's Statement of Position be extended until **12:00 p.m. EST, on Monday, December 21, 2015**, and that the Representation Hearing be postponed until **10:00 a.m. EST, on Tuesday, December 22, 2015**, or until another later date agreeable to the parties.

Respectfully submitted,

UPS FREIGHT TRUCKLOAD,

/s/ Kurt G. Larkin

Kurt G. Larkin (VSB No. 70730)
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8776
klarkin@hunton.com

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to §102.67(i)(3), a true and exact copy of the foregoing Motion To Postpone Representation Hearing And For Extension Of Time To File Statement Of Position was served by email this 15th day of December, 2015 to:

Brian A. Taylor
Organizer/Trustee
International Brotherhood of Teamsters, Local 773
1345 Hamilton Street
Allentown, PA 18102-4387
484-717-5414
btaylor@teamsters773.org

/s/ Kurt G. Larkin

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

UPS FREIGHT TRUCKLOAD

Employer

and Case 04–RC–165805

TEAMSTERS LOCAL 773

Petitioner

ORDER RESCHEDULING HEARING GRANTED IN-PART

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from Friday, December 18, 2015 to Monday, December 21, 2015 at 10:00 a.m. in the Regional Office, 615 Chestnut Street, Suite 710, Philadelphia, PA. The hearing will continue on consecutive days until concluded.

The Statement of Position in this matter must be filed with the Regional Director and served on the parties listed on the petition by **no later than noon Eastern time on December 18, 2015**. The Statement of Position may be e-Filed but, unlike other documents, must be filed by noon Eastern time on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: December 16, 2015

Harold A. Maier

HAROLD A. MAIER
Acting Regional Director, Fourth Region
National Labor Relations Board
615 Chestnut Street, Suite 710
Philadelphia, PA 19106

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

In the Matter of	)	
	)	
UPS FREIGHT TRUCKLOAD,	)	
	)	
	)	
Employer,	)	
	)	
and	)	Case 04-RC-165805
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 773,	)	
	)	
	)	
Petitioner.	)	
	)	

REQUEST FOR THE ISSUANCE OF HEARING SUBPOENAS AD TESTIFICANDUM

Pursuant to Section 102.31 of the Board's Rules and Regulations, counsel for the employer, UPS Freight Truckload ("UPS"), hereby requests the issuance of eight (8) subpoenas ad testificandum directing witnesses to appear before an Administrative Law Judge of the National Labor Relations Board in the above matter on Monday, December 21, 2015, and/or any subsequent date(s), at 10:00 a.m. at 615 Chestnut Street, Suite 710, Philadelphia, PA 19106.

Dated: December 17, 2015

Respectfully submitted,

UPS FREIGHT TRUCKLOAD,

/s/ Kurt G. Larkin

Kurt G. Larkin (VSB No. 70730)
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8200
klarkin@hunton.com

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to §102.67(i)(3), a true and exact copy of the foregoing Request for the Issuance of Hearing Subpoenas Ad Testificandum was electronically filed with the NLRB and was served by electronic mail this 17th day of December, 2015 to:

Brian A. Taylor
Organizer/Trustee
International Brotherhood of Teamsters, Local 773
1345 Hamilton Street
Allentown, PA 18102-4387
484-717-5414
btaylor@teamsters773.org

/s/ Kurt G. Larkin

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE	
Case No. 04-RC-165805	Date Filed

INSTRUCTIONS: *Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.*
Note: *Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.*

1a. Full name of party filing Statement of Position	1c. Business Phone:	1e. Fax No.:
UPS Ground Freight, Inc.	610-285-5380	610-285-5384
1b. Address *(Street and number, city, state, and ZIP code)*	1d. Cell No.:	1f. e-Mail Address
9755 Commerce Circle, Kutztown, PA 19530	404-991-0206	Raymondcopeland@UPS.com

2. Do you agree that the NLRB has jurisdiction over the Employer in this case? ☒ Yes ☐ No
(A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)

3. Do you agree that the proposed unit is appropriate? ☐ Yes ☒ No *(If not, answer 3a and 3b.)*

a. State the basis for your contention that the proposed unit is not appropriate. (*If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards.)*

See Attachment B, appended hereto.

b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.

Added	Excluded
See Attachment C, appended hereto.	None.

4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

See Attachment D, appended hereto.

5. Is there a bar to conducting an election in this case? ☐ Yes ☒ No *If yes, state the basis for your position.*

6. Describe all other issues you intend to raise at the pre-election hearing.

See Attachment E, appended hereto.

7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at http://www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.
(a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B)
(b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be *added* to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be *excluded* from the proposed unit to make it an

State your position with respect to the details of any election that may be conducted in this matter. 8a. Type: ☒ Manual ☐ Mail ☐ Mixed Manual/Mail

8b. Date(s)	8c. Time(s)	8d. Location(s)
		Temporary Mobile Office (R/V) located in trailer lot adjacent to Maintenance Shop located at address above
8e. Eligibility Period (e.g. special eligibility formula)	8f. Last Payroll Period Ending Date	8g. Length of payroll period
None	December 12, 2015	☒ Weekly ☐ Biweekly ☐ Other *(specify length)*

9. Representative who will accept service of all papers for purposes of the representation proceeding

9a. Full name and title of authorized representative	9b. Signature of authorized representative	9c. Date
Kurt G. Larkin, Esq.	/s/ Kurt G. Larkin	December 18, 2015
9d. Address *(Street and number, city, state, and ZIP code)*		9e. e-Mail Address
Hunton & Williams LLP, 951 East Byrd Street, Richmond, VA 23219		Klarkin@hunton.com
9f. Business Phone No.: 804-788-8776	9g. Fax No. 804-788-8218	9h. Cell No. 804-332-3985

WILLFUL FALSE STATEMENTS ON THIS STATEMENT OF POSITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

CASE NO. 04-RC-165805
ATTACHMENT A
TO UPS GROUND FREIGHT INC.'S
STATEMENT OF POSITION

List of Employees in Proposed Unit

Employee Name	Work Location	Shift	Job Classification
Burger, David	Kutztown	Varies	Road Driver
Camuso, Christopher	Kutztown	Varies	Road Driver
Cappetta, Frank[1]	Kutztown	Varies	Road Driver
Cox, Clifton	Kutztown	Varies	Road Driver
David, Carl[2]	Kutztown	Varies	Road Driver
Delacruz, Marcelo	Kutztown	Varies	Road Driver
Dubon, Sebastian	Kutztown	Varies	Road Driver
Faith, Barrie	Kutztown	Varies	Road Driver
Falcone, Gregory	Kutztown	Varies	Road Driver
Finlayson, Alan	Kutztown	Varies	Road Driver
Franco, Gary	Kutztown	Varies	Road Driver
Hertzog, Tim	Kutztown	Varies	Road Driver
Hyman Jr, Alex	Kutztown	Varies	Road Driver
Irizarry, Carlos	Kutztown	Varies	Road Driver
Johnson, Arthur	Kutztown	Varies	Road Driver
Johnson, Willie	Kutztown	Varies	Road Driver
Juya, Farid	Kutztown	Varies	Road Driver
Kline, Merle	Kutztown	Varies	Road Driver
Knappenberger, Gene	Kutztown	Varies	Road Driver
Long, Nathan	Kutztown	Varies	Road Driver
Luna Jr, Vinicio	Kutztown	Varies	Road Driver
Pascarella, Ronald	Kutztown	Varies	Road Driver
Rose, Ken	Kutztown	Varies	Road Driver
Roush, Donald	Kutztown	Varies	Road Driver
Sealey Jr, Ivan	Kutztown	Varies	Road Driver
Shoestock, Mark	Kutztown	Varies	Road Driver
Stachowicz, Bogdan	Kutztown	Varies	Road Driver
Thomas, Kaliek	Kutztown	Varies	Road Driver
Wentz, Wayne	Kutztown	Varies	Road Driver

[1] For the reasons set forth in this SOP, the Company challenges Mr. Cappetta's inclusion in the bargaining unit.

[2] For the reasons set forth in this SOP, the Company challenges Mr. David's inclusion in the bargaining unit.

CASE NO. 04-RC-165805
ATTACHMENT B
TO UPS GROUND FREIGHT INC.'S
STATEMENT OF POSITION

3(a): State the basis for your contention that the proposed unit is not appropriate.

I. INTRODUCTION

On December 10, 2015, the International Brotherhood of Teamsters Local 773 ("the Union"), filed a petition for election ("the Union's petition") seeking to represent a unit of all regular full-time and part-time drivers employed by UPS Ground Freight, Inc. ("UPS Freight" or "the Company") at its Kutztown facility located at 9755 Commerce Circle in Kutztown, Pennsylvania ("Kutztown facility"). The petitioned-for unit, however, is inappropriate because it excludes the regular drivers (full-time and part-time) ("Road Drivers") employed by the Company at eight other distribution facilities, which the evidence will prove share an overwhelming community of interest with the employees sought to be represented by the Union.

In summary and as described more fully below, the bargaining unit proposed by the Union is inappropriate because the Road Drivers assigned to the Kutztown, PA facility are part of an integrated system of warehouse facilities established specially and solely for the purpose of providing national service to a single commercial customer through a unified delivery operation. UPS Freight is party to a national contract with Advance Auto Parts ("AAP"), under which it performs operations relating to the distribution of AAP parts and other supplies from nine distribution centers to regional AAP stores around the country. To most efficiently service the contract, UPS Freight has established on site facilities at each of AAP's nine strategically located parts distribution centers across the United States. The distribution centers comprising the Company's AAP operation are located in Kutztown, PA ("Kutztown facility"), Enfield, CT ("Enfield facility"), Lakeland, FL ("Florida facility"), Salina, KS ("Kansas facility"), Gastonia,

NC (Gastonia facility"), Delaware, OH ("Delaware facility"), Roanoke, VA ("Virginia facility"), Hazelhurst, MS ("Hazelhurst facility"), and Thomson, GA ("Thomson facility") (collectively the "AAP distribution facilities"). Road Drivers at these facilities share an overwhelming community of interest with those at Kutztown; therefore the only appropriate bargaining unit is one including the Road Drivers at all nine AAP distribution facilities.

II. APPLICABLE LEGAL STANDARDS

Section 9(a) of the Act permits employees to form a bargaining unit "appropriate" for collective bargaining purposes. *See* 29 U.S.C. § 159(a). To determine the appropriateness of a proposed bargaining unit, the National Labor Relations Board ("NLRB" or "the Board") first assesses whether the employees in the petitioned-for unit are identifiable "readily as a group who share a community of interest." *See A.S.V., Inc*., 360 NLRB No. 138, slip op. at 14-15 (2014) (citing *United Operations, Inc*., 338 NLRB 123 (2002)). In so doing, the Board considers whether the employees: (1) are organized into a separate department; (2) have distinct job functions and perform distinct work; (3) are functionally integrated with the Employer's other employees; (4) have frequent contact with other employees; (5) interchange with other employees; (6) have distinct terms and conditions of employment; and (7) are separately supervised. *Id*.

In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), one of its most controversial decisions to date, the NLRB overturned twenty years of precedent by permitting bargaining units to be petitioned-for and certified even when a larger and "more appropriate" bargaining units exist in the employer's workforce. *See id*. (finding that "[b]ecause a proposed unit need only be an appropriate unit and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the

proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate.”).[3] Nevertheless, even under *Specialty Healthcare* and its progeny, the Board has recognized that a petitioned-for unit will be deemed inappropriate where ***“the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit . . .”*** *See id.*, at 11. (emphasis added).

III. THE COMPANY’S POSITION

The Union’s petitioned-for bargaining unit is not appropriate under the Act because the Road Drivers employed by the Company at its other AAP distribution facilities share an overwhelming community of interest with the Road Drivers at the Kutztown facility. Stated differently, the Union’s petitioned-for bargaining unit is inappropriate because the only appropriate unit is a “system wide” unit comprised of all Road Drivers employed by the Company at all of its AAP distribution facilities. This conclusion is compelled by considerable evidence the Company intends to present at the Representation Hearing, including but not limited to:

- UPS Freight is party to a national contract with AAP, under which it performs all operations relating to the distribution of AAP parts and other supplies from nine distribution centers to regional AAP stores around the country. In other words, UPS Freight is AAP’s primary contractual delivery service nationwide. To most efficiently service the contract, UPS Freight has established on site facilities at each of AAP’s nine strategically located parts distribution centers across the United States.

[3] *Specialty Healthcare* was wrongly decided and should be overturned for all of the reasons stated in the dissents of Member Miscimarra in *Macy’s, Inc.*, 361 NLRB No. 4, slip op. at 22-33 (2014) and Member Johnson in *DPI Secuprint*, 362 NLRB No. 172, slip op. at 9-19 (2015). *See also NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1581-82 (4th Cir. 1995). These dissents are fully incorporated into this Statement of Position by reference, and the Company expressly preserves its right to rely upon them throughout the course of these proceedings in asserting that the Board’s traditional community of interest standards should apply. The Company, however, acknowledges *Specialty Healthcare* provides the rule of decision in this proceeding (although it objects to application of that rule here).

- The Road Drivers at all of the Company's AAP distribution facilities perform work under a single, national contract with AAP.

- The Company has a single centralized management team (Regional Operations Manager, AAP Manager, Operational Support Supervisor, Support Manager) that is responsible for overseeing the Company's contractual and operational relationship with AAP, including the provision of services by Road Drivers from all of the Company's AAP distribution facilities.

- All Road Drivers employed by the Company at the nine AAP distribution facilities have same job title.

- All Road Drivers use, and are trained on, the same equipment - tractor trailers (either sleeper cabs or day cabs).

- All Road Drivers perform the same duties relating to the transport and delivery of parts and other supplies to regional AAP stores around the country. They are tasked on a daily basis with hauling a tractor trailer load of AAP parts and other equipment that is loaded at their assigned distribution facility. Once on the road, they make a series of stops at the AAP retail stores located within the delivery territory of the AAP distribution center to which they are assigned, where they offload each store's requested inventory. UPS Freight Road Drivers working under the AAP contract do the exact same work, and do not perform work, or make deliveries, for any other UPS Freight customer besides AAP.

- All Road Drivers are evaluated under the same Company performance criteria, including accident frequency, driver behavior, miles per gallon on tractors, and delivery performance.

- UPS Freight considers the nine AAP distribution facilities part of a single integrated customer service initiative set up just for AAP. The "departmental line" that results from the Company's integrated operation encompasses Road Drivers at all of the Company's AAP distribution facilities.

- There is a frequent transfer of equipment among AAP distribution facilities. Road Drivers from various AAP distribution facilities participate in the shifting of such equipment, and are assigned the task according to driver staffing and availability.

- Road Drivers from the Roanoke facility deliver intra-company mail to the other AAP distribution facilities in the integrated unit every week.

- All Road Drivers at the Company's AAP distribution facilities have access to a centralized job database and are eligible to apply for jobs at each of the other AAP distribution facilities. Road Drivers have permanently transferred from one AAP distribution facility to another in the past.

- There is substantial evidence of permanent Road Driver transfers between and among AAP distribution centers. In the past several years, 27 UPS Freight Road Drivers assigned to one AAP distribution center have been transferred to a different AAP distribution center within the system.

- There is also substantial evidence of temporary Road Driver transfers between and among distribution centers. There is significant driver-interchange between locations. For example, when AAP opened the Enfield facility in 2014, UPS Freight temporarily transferred Road Drivers from the Kutztown facility to the Enfield facility to perform freight deliveries until the Enfield facility hired its own group of Road Drivers (and/or temps). During the hiring period, Kutztown and Enfield Road Drivers worked together. Additionally, there are currently six Road Drivers temporarily assigned to the Kutztown facility from other AAP distribution facilities (3 from the Florida facility, 3 from the Hazlehurst facility) to assist with a shortage of available Road Drivers. The visiting Road Drivers are completely integrated into the Kutztown operation. Additional evidence of Road Driver interchange is plentiful. Over the past 3 years, ***117 Road Drivers*** have been temporarily transferred to the Company's other AAP distribution facilities to perform work for a total of ***413 weeks***. In that same time period, ***44 Road Drivers*** have been temporarily transferred to the Kutztown facility from the Company's other AAP distribution facilities to perform work for a total of ***163 weeks***.

- The Company has centralized Human Resources and Employee Relations functions that are responsible for all nine AAP distribution facilities.

- All Road Drivers are employed under the same UPS Freight corporate policies.

- All Road Drivers receive roughly the same rates of pay.

- All Road Drivers are entitled to the same corporate benefit plans.

- All Road Drivers receive the same corporate training/orientation, as well as specialized training from AAP regarding hazards and operational matters relevant to working in one of its distribution centers.

- The Company provides trainers from AAP to participate in conference calls with the Road Drivers from each of the distribution centers. These Road Drivers together serve on the Company's Comprehensive Health and Safety Committee to discuss best safety practices, current operational issues, and improved incident occurrences at all of the AAP distribution facilities.

- The Company has traditionally utilized the same Road Driver schedule at all of its AAP distribution facilities. Earlier this year, the Company implemented a pilot program revising the Road Driver schedule at the Kutztown facility, and is in the process of implementing the same Road Driver schedule at all of the other AAP distribution facilities. Once the pilot is fully implemented, the Company's expectation is that all Road Drivers will work under the revised delivery schedule system-wide.

Specialty Healthcare and its progeny recognize that "[a] petitioner cannot fracture a unit, seeking representation in 'an arbitrary segment of what would be an appropriate unit.'" *Odwalla*, 357 NLRB 132, slip op. at 5 (citing *Specialty Healthcare*, 357 NLRB 83, slip op. at 13)). Here, the facts will show that the Union is attempting to do just that. As the Board stated in *Specialty Healthcare*, "[i]t is highly significant that, except in situations where there is a prior bargaining history, the community of interest test focuses almost exclusively on how the employer has chosen to structure the workplace." 357 NLRB No. 83, slip op. at 9, n.19. The facts set forth above, which will be further developed at the Representation Hearing, demonstrate that the Company has chosen to structure its AAP distribution facilities under a single contract, with centralized management, with a high degree of integration and interchange of Road Drivers provided substantially similar terms and conditions of employment. Given these facts, which unquestionably establish an overwhelming community of interest shared by the Road Drivers employed at all of the Company's AAP distribution facilities, the Union's petitioned-for unit is wholly inappropriate, and should be rejected in favor of the bargaining unit proposed in Attachment C to the Company's Statement of Position.

If the Region agrees the petitioned-for unit is inappropriate, it must dismiss the petition inasmuch as the Union cannot demonstrate the requisite showing of interest in the unit proposed in Attachment C.

CASE NO. 04-RC-165805
ATTACHMENT C
TO UPS GROUND FREIGHT INC.'S
STATEMENT OF POSITION

3b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.

List of Employees to be Added to Unit

Employee Name	Work Location	Shift	Job Classification
Acheampong, Prince	Delaware	Varies	Road Driver
Akenteng, Alfred	Delaware	Varies	Road Driver
Blackshear IV, Louis	Delaware	Varies	Road Driver
Byrdsong, Willie	Delaware	Varies	Road Driver
Coburn, Vernon	Delaware	Varies	Road Driver
Crosby, Eric	Delaware	Varies	Road Driver
Crowder, Dawn	Delaware	Varies	Road Driver
Dill, Todd	Delaware	Varies	Road Driver
Eddy II, Richard	Delaware	Varies	Road Driver
Fickle, Gary	Delaware	Varies	Road Driver
Grauman, Alexander	Delaware	Varies	Road Driver
Gregory, Daniel	Delaware	Varies	Road Driver
Halloum, Tarik	Delaware	Varies	Road Driver
Hawkins, Eddie	Delaware	Varies	Road Driver
Hickman, David	Delaware	Varies	Road Driver
Holloway, Charles	Delaware	Varies	Road Driver
Hunt, Larry	Delaware	Varies	Road Driver
Jahr, Wendell	Delaware	Varies	Road Driver
Jones, Gregory	Delaware	Varies	Road Driver
Lee, Teddy	Delaware	Varies	Road Driver
Leezer, David	Delaware	Varies	Road Driver
Link, Steve	Delaware	Varies	Road Driver
Marcum, Robert	Delaware	Varies	Road Driver
Mays Jr, Donald	Delaware	Varies	Road Driver
Mckenzie, William	Delaware	Varies	Road Driver
Miller, Rodney	Delaware	Varies	Road Driver
Neff, Adam	Delaware	Varies	Road Driver
Neff, Victor	Delaware	Varies	Road Driver
Perroud, Charles	Delaware	Varies	Road Driver
Rutledge, David	Delaware	Varies	Road Driver
Sutton, Dwight	Delaware	Varies	Road Driver
Tyler, Alonzo	Delaware	Varies	Road Driver
White, Chris	Delaware	Varies	Road Driver
Wilgus, Kevin	Delaware	Varies	Road Driver

Employee Name	Work Location	Shift	Job Classification
Williams, Ronald	Delaware	Varies	Road Driver
Wrenn, Sean	Delaware	Varies	Road Driver
Zeeb, Richard	Delaware	Varies	Road Driver
Acevedo Molina, Angel	Enfield	Varies	Road Driver
Alberti, Martin	Enfield	Varies	Road Driver
Baloune, Zakaria	Enfield	Varies	Road Driver
Brown, Jimmy	Enfield	Varies	Road Driver
Butcher, Darrell	Enfield	Varies	Road Driver
Campbell, Oneil	Enfield	Varies	Road Driver
Casler, Colin	Enfield	Varies	Road Driver
Cintron, Edwin	Enfield	Varies	Road Driver
Daniels, Deon	Enfield	Varies	Road Driver
Dixon, Christopher	Enfield	Varies	Road Driver
Fuentes Jr, Francisco	Enfield	Varies	Road Driver
Gifford, Sean	Enfield	Varies	Road Driver
Hall, Ainsworth	Enfield	Varies	Road Driver
Hoy, Ricky	Enfield	Varies	Road Driver
Jensen, Richard	Enfield	Varies	Road Driver
Johnson, Ainsworth	Enfield	Varies	Road Driver
Moody, Dion	Enfield	Varies	Road Driver
Perez Jr, Raynie	Enfield	Varies	Road Driver
Ransom, Sean	Enfield	Varies	Road Driver
Thresher, Robert	Enfield	Varies	Road Driver
Wiggins, Ernest	Enfield	Varies	Road Driver
Annas, Wesley	Gastonia	Varies	Road Driver
Arrowood, Robert	Gastonia	Varies	Road Driver
Braun, Edward	Gastonia	Varies	Road Driver
Cauthen, Steven	Gastonia	Varies	Road Driver
Davis Jr, Jimmy	Gastonia	Varies	Road Driver
Davis Sr, Kenneth	Gastonia	Varies	Road Driver
Davis, Jordan	Gastonia	Varies	Road Driver
Davis, Virgil	Gastonia	Varies	Road Driver
Geddis, Aaron	Gastonia	Varies	Road Driver
Hager, Charley	Gastonia	Varies	Road Driver
Hood, Gary	Gastonia	Varies	Road Driver
Hopper, Robert	Gastonia	Varies	Road Driver
Jenkins, Marvin	Gastonia	Varies	Road Driver
Kendrick, Randy	Gastonia	Varies	Road Driver
Mccrae, Valentino	Gastonia	Varies	Road Driver
Meek, Ronnie	Gastonia	Varies	Road Driver
Morris, Michael	Gastonia	Varies	Road Driver
Osterhoudt, Douglas	Gastonia	Varies	Road Driver
Pendergraph, Clyde	Gastonia	Varies	Road Driver
Phillips, Robert	Gastonia	Varies	Road Driver

Employee Name	Work Location	Shift	Job Classification
Poole, Joshua	Gastonia	Varies	Road Driver
Pope Sr, William	Gastonia	Varies	Road Driver
Postell, James	Gastonia	Varies	Road Driver
Ramsey, Michael	Gastonia	Varies	Road Driver
Reinhardt, Terry	Gastonia	Varies	Road Driver
Scarborough Sr, Johnny	Gastonia	Varies	Road Driver
Shepard, Kyle	Gastonia	Varies	Road Driver
Shepherd III, James	Gastonia	Varies	Road Driver
Simmons Jr, David	Gastonia	Varies	Road Driver
Vinesett, Wallace	Gastonia	Varies	Road Driver
Walker, Paul	Gastonia	Varies	Road Driver
Whitehouse, Don	Gastonia	Varies	Road Driver
Whitman, Whitcomb	Gastonia	Varies	Road Driver
Adams, Jarvis	Hazelhurst	Varies	Road Driver
Aucoin, Eugene	Hazelhurst	Varies	Road Driver
Brown, Chad	Hazelhurst	Varies	Road Driver
Brown, Kadarrius	Hazelhurst	Varies	Road Driver
Brown, Terrance	Hazelhurst	Varies	Road Driver
Buckley, Richard	Hazelhurst	Varies	Road Driver
Burns, Roger	Hazelhurst	Varies	Road Driver
Craft, Willie	Hazelhurst	Varies	Road Driver
Cruel, Ronnie	Hazelhurst	Varies	Road Driver
Dille, Archie	Hazelhurst	Varies	Road Driver
Dyess, Joe	Hazelhurst	Varies	Road Driver
Gentry, Chauncey	Hazelhurst	Varies	Road Driver
Graves, Dennis	Hazelhurst	Varies	Road Driver
Greer Jr, Ras	Hazelhurst	Varies	Road Driver
Heidelberg, Craig	Hazelhurst	Varies	Road Driver
Hemphill Sr, William	Hazelhurst	Varies	Road Driver
Henderson, Eric	Hazelhurst	Varies	Road Driver
Johnson, Kenneth	Hazelhurst	Varies	Road Driver
Johnson, Reginald	Hazelhurst	Varies	Road Driver
Jones Jr, Steve	Hazelhurst	Varies	Road Driver
Kelly Jr, Alex	Hazelhurst	Varies	Road Driver
Lloyd, Carl	Hazelhurst	Varies	Road Driver
Lowery, Rodney	Hazelhurst	Varies	Road Driver
Mack, Edward	Hazelhurst	Varies	Road Driver
Marler, Ronald	Hazelhurst	Varies	Road Driver
Moody Jr, Wesley	Hazelhurst	Varies	Road Driver
Phillips, Michael	Hazelhurst	Varies	Road Driver
Rhymes, Leonard	Hazelhurst	Varies	Road Driver
Shorter, Carroll	Hazelhurst	Varies	Road Driver
Smith, Tim	Hazelhurst	Varies	Road Driver
Spann, Vincent	Hazelhurst	Varies	Road Driver

Employee Name	Work Location	Shift	Job Classification
Spencer Jr, Roy	Hazelhurst	Varies	Road Driver
Sullivan, Barry	Hazelhurst	Varies	Road Driver
Thomas, Jamaal	Hazelhurst	Varies	Road Driver
Walls, Bobby	Hazelhurst	Varies	Road Driver
Barchanowicz Sr, Richard	Lakeland	Varies	Road Driver
Barrow, Gordon	Lakeland	Varies	Road Driver
Bembry, Eric	Lakeland	Varies	Road Driver
Bettard, Alfred	Lakeland	Varies	Road Driver
Bolton, Mary	Lakeland	Varies	Road Driver
Broome, Kelvin	Lakeland	Varies	Road Driver
Burgess, Kevin	Lakeland	Varies	Road Driver
Cabrera, Daniel	Lakeland	Varies	Road Driver
Carroll, Anthony	Lakeland	Varies	Road Driver
Carter Jr, Willie	Lakeland	Varies	Road Driver
Clifton, Ryan	Lakeland	Varies	Road Driver
Crottie, Joseph	Lakeland	Varies	Road Driver
Davis, Eric	Lakeland	Varies	Road Driver
Dignin, Thomas	Lakeland	Varies	Road Driver
Duffey Sr, Gerald	Lakeland	Varies	Road Driver
George, Nepton	Lakeland	Varies	Road Driver
Gomez Jr, Alfredo	Lakeland	Varies	Road Driver
Gordon, Antoine	Lakeland	Varies	Road Driver
Graham, Darryl	Lakeland	Varies	Road Driver
Griggs Jr, Bibb	Lakeland	Varies	Road Driver
Herrera, Jorge	Lakeland	Varies	Road Driver
Johnson, Larry	Lakeland	Varies	Road Driver
Kozlov, Vassili	Lakeland	Varies	Road Driver
Leonard, James	Lakeland	Varies	Road Driver
Madden Jr, Richard	Lakeland	Varies	Road Driver
Mills, Carol	Lakeland	Varies	Road Driver
Mills, Glenn	Lakeland	Varies	Road Driver
Monroe II, Alvin	Lakeland	Varies	Road Driver
Moore, Vance	Lakeland	Varies	Road Driver
Nelson, Eric	Lakeland	Varies	Road Driver
Norton, Melvin	Lakeland	Varies	Road Driver
Nunez, Jorge	Lakeland	Varies	Road Driver
Odum, Phillip	Lakeland	Varies	Road Driver
Ortiz, Oscar	Lakeland	Varies	Road Driver
Perry, Joshua	Lakeland	Varies	Road Driver
Peters, Michael	Lakeland	Varies	Road Driver
Ramberac, Jason	Lakeland	Varies	Road Driver
Ruiz, Confesor	Lakeland	Varies	Road Driver
Sanders, Byron	Lakeland	Varies	Road Driver
Satchel III, Frank	Lakeland	Varies	Road Driver

Employee Name	Work Location	Shift	Job Classification
Stephens Jr., Billy	Lakeland	Varies	Road Driver
Stewart II, Samuel	Lakeland	Varies	Road Driver
Vanhouter, Gregory	Lakeland	Varies	Road Driver
Viveiros, Joseph	Lakeland	Varies	Road Driver
Ayers, Christopher	Roanoke	Varies	Road Driver
Bridgman, Daniel	Roanoke	Varies	Road Driver
Brown, Kenneth	Roanoke	Varies	Road Driver
Burton, Randall	Roanoke	Varies	Road Driver
Claybrook, Jimmy	Roanoke	Varies	Road Driver
Clements, Marvin	Roanoke	Varies	Road Driver
Cockram, Lelan	Roanoke	Varies	Road Driver
Ferrell Jr., William	Roanoke	Varies	Road Driver
Fowler, Dennis	Roanoke	Varies	Road Driver
Fullen, Marcus	Roanoke	Varies	Road Driver
Goad, Robert	Roanoke	Varies	Road Driver
Harper, Clayton	Roanoke	Varies	Road Driver
Higgs, Gregory	Roanoke	Varies	Road Driver
Ingraham, David	Roanoke	Varies	Road Driver
Kalstrom, C. Mark	Roanoke	Varies	Road Driver
King, Thomas	Roanoke	Varies	Road Driver
Loback, Keith	Roanoke	Varies	Road Driver
Locklear, Roy	Roanoke	Varies	Road Driver
Miller, Timmy	Roanoke	Varies	Road Driver
Montgomery, David	Roanoke	Varies	Road Driver
Morris, Samuel	Roanoke	Varies	Road Driver
O'dell, Darren	Roanoke	Varies	Road Driver
Page, Thomas	Roanoke	Varies	Road Driver
Poff Jr, Massie	Roanoke	Varies	Road Driver
Pryor, Gabriel	Roanoke	Varies	Road Driver
Rauscher, Kyle	Roanoke	Varies	Road Driver
Reynolds, Linwood	Roanoke	Varies	Road Driver
See, Stephen	Roanoke	Varies	Road Driver
Smith, Ricky	Roanoke	Varies	Road Driver
Stump, Willie	Roanoke	Varies	Road Driver
Thurman, Charles	Roanoke	Varies	Road Driver
Tosh, Phillip	Roanoke	Varies	Road Driver
Walls, Edward	Roanoke	Varies	Road Driver
Wells, Jerry	Roanoke	Varies	Road Driver
Wenger, Charles	Roanoke	Varies	Road Driver
Williams, Hugh	Roanoke	Varies	Road Driver
Beckley, Errol	Salina	Varies	Road Driver
Burge, Christopher	Salina	Varies	Road Driver
Chamberlin, Kenneth	Salina	Varies	Road Driver
Dater, Greg	Salina	Varies	Road Driver

Employee Name	Work Location	Shift	Job Classification
Dwerlkotte, Jeffrey	Salina	Varies	Road Driver
Epp, Steven	Salina	Varies	Road Driver
Godfrey, Richard	Salina	Varies	Road Driver
Grieser, Paul	Salina	Varies	Road Driver
Harder, Jerry	Salina	Varies	Road Driver
Imhof, Robert	Salina	Varies	Road Driver
Jennings, Bernard	Salina	Varies	Road Driver
Meehan, John	Salina	Varies	Road Driver
Potts, Mitchell	Salina	Varies	Road Driver
Pudge, Harold	Salina	Varies	Road Driver
Ramsdale, Leigh	Salina	Varies	Road Driver
Reidelberger, Joey	Salina	Varies	Road Driver
Rundell, Steven	Salina	Varies	Road Driver
Schneider, Steven	Salina	Varies	Road Driver
Shatto, Terry	Salina	Varies	Road Driver
Walker III, Ira	Salina	Varies	Road Driver
Wegele, Weldon	Salina	Varies	Road Driver
Weidner, Dave	Salina	Varies	Road Driver
Wheeler, Max	Salina	Varies	Road Driver
Abrams, Joseph	Thompson	Varies	Road Driver
Bowman Sr, Larry	Thompson	Varies	Road Driver
Clem, William	Thompson	Varies	Road Driver
Cunningham, Robert	Thompson	Varies	Road Driver
Dickerson, Gabrium	Thompson	Varies	Road Driver
Elliott, Tracy	Thompson	Varies	Road Driver
Griffin, David	Thompson	Varies	Road Driver
Harrison, David	Thompson	Varies	Road Driver
Hillman, Danny	Thompson	Varies	Road Driver
Hinton, Benjamin	Thompson	Varies	Road Driver
Hope, Jerry	Thompson	Varies	Road Driver
Jett, Michael	Thompson	Varies	Road Driver
Johnson, William	Thompson	Varies	Road Driver
Jones, Michael	Thompson	Varies	Road Driver
Lawton Jr, James	Thompson	Varies	Road Driver
Lewis Sr, Dedrick	Thompson	Varies	Road Driver
Moore, Karl	Thompson	Varies	Road Driver
Nolen, Zachary	Thompson	Varies	Road Driver
Smith, Gary	Thompson	Varies	Road Driver
Smith, Jarvis	Thompson	Varies	Road Driver
Stewart Jr, Goldie	Thompson	Varies	Road Driver
Strong, Lional	Thompson	Varies	Road Driver
Swint, Sidney	Thompson	Varies	Road Driver
Thomas, Willie	Thompson	Varies	Road Driver
Turner, Michael	Thompson	Varies	Road Driver

Employee Name	Work Location	Shift	Job Classification
Welch, Jeffery	Thompson	Varies	Road Driver
Williams, Kevin	Thompson	Varies	Road Driver
Wilson, Richard	Thompson	Varies	Road Driver
Wirsu, Thomas	Thompson	Varies	Road Driver

CASE NO. 04-RC-165805
ATTACHMENT D
TO UPS GROUND FREIGHT INC.'S
STATEMENT OF POSITION

4. List any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

I. EMPLOYEE FRANK CAPPETTA IS A STATUTORY SUPERVISOR INELIGIBLE TO VOTE IN THE PETITIONED-FOR ELECTION.

The Company intends to contest at the pre-election hearing the eligibility of Frank Cappetta to vote in the petitioned-for election on the basis of his status as a statutory supervisor within the meaning of the Act.[4] Specifically, Section 2(11) of the Act provides that individuals are supervisors if: (1) they hold the authority to engage in any of twelve delineated supervisory functions; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. *Loparex LLC,* 353 NLRB No. 126 (2009), *enf. Loparex LLC v. NLRB,* 591 F.3d 540 (7th Cir. 2009). "Supervisory status may be shown if the putative supervisor has the authority to either perform a supervisory function or to effectively recommend the same." *Oakwood Healthcare, Inc.,* 348 NLRB 686, 687 (2006). In order to satisfy Section 2(11)'s "independent judgment" requirement, the putative supervisor must act or effectively recommend action "free of control of others and form an opinion or evaluation by discerning and comparing data." Furthermore, such judgment must rise above the "routine or clerical." *Id.* at 693.

The facts presented at the Representation Hearing will establish that Mr. Cappetta performs a number of the supervisory functions contemplated by Section 2(11) (each independently sufficient) with the requisite independent judgment. Mr. Cappetta was hired by

[4] As set forth in greater detail in Attachment E, Mr. Capetta's supervisory status is relevant not only to his eligibility to vote in the petitioned-for election, but also to the validity of any cards solicited by him in support of the Union's showing of interest supporting its petition.

the Company as a Road Driver in July 2009. However, he has been acting almost exclusively as the Company's dispatcher since 2011. In this position, Mr. Cappetta has, for the past four years, responsibly directed the work of every other employee in the petitioned-for unit. Mr. Cappetta's responsibility as a dispatcher is to plan and execute the Company's daily delivery operation, in part by assigning every delivery route originating from the Kutztown facility. He routinely and on a daily basis coordinates loads, assigns work to drivers and other employees, dispatches the Company's daily list of runs, creates and coordinates the drivers' schedules, and assigns and schedules replacement drivers (for example, if an employee calls out sick, etc.). No one in the Company's management chain directs or oversees the manner in which Mr. Cappetta sets the daily schedule, assigns work, and covers open delivery routes – he performs these tasks with complete autonomy. Indeed, between July and October 2015, Mr. Cappetta had no direct on site supervisory oversight – the managerial positions budgeted for the Kutztown facility were vacant during that time.

Mr. Capetta also participates in the Company's hiring process. He evaluates driver applicants and makes recommendations concerning new hires, administers pre-hire road tests and evaluates employee performance in the completion of the test, evaluates and supervises driver pre-trip and post-trip tasks, and performs driver skill assessments related to driver qualifications, among other tasks. Additionally, for most of the time since mid-July 2015 (when the previous site manager left the Company), Mr. Cappetta has physically occupied the site manager's office, with the knowledge and consent of his Regional Operations Manager. When employees enter the Company's assigned office area in the Kutztown facility to check in for work and pick up their assigned daily load, they literally see Mr. Cappetta sitting in the site manager's office, from where he assigns their driving duties that day.

Each of these functions correspond with various primary and secondary indicia of supervision set forth in Section 2(11), and require Mr. Cappetta to exercise independent judgment that is not merely routine or clerical in nature in the interest of the Company. As a result, Mr. Cappetta is a statutory supervisor and therefore is not eligible to vote in the petitioned-for election.

II. EMPLOYEES FRANK CAPPETTA AND CARL DAVID ARE INELIGIBLE TO VOTE BECAUSE THEY DO NOT SHARE A COMMUNITY OF INTEREST WITH THE DRIVERS COMPRISING THE PUTATIVE UNIT.

Even if Mr. Cappetta is not deemed ineligible as a statutory supervisor, both he and employee Carl David are ineligible to participate in the election. As set forth in the Union's petition, the proposed bargaining unit is comprised of only those individuals employed as "regular full-time and part-time drivers." Here, the facts will show that Mr. Cappetta has, since 2011, almost never performed functions as a Road Driver for the Company, and that Mr. David rarely performed such functions in the year preceding the Union's petition. As stated above, Mr. Cappetta's regular duties involve dispatch functions requiring him to perform various tasks relating to the assignment of work, scheduling, performance evaluations, and the hiring and training of new employees. Mr. David serves in a similar capacity, albeit without the degree of autonomy and independent judgment exercised by Mr. Cappetta.[5]

As the Board held in *Columbia College*, 346 NLRB 726, 728-729 (2006), "an employee with job responsibilities encompassing more than one position [is] a dual function employee...." The Board includes such employees in an appropriate unit only if they have a community of interest with the petitioned-for unit. The relevant test, in this regard, is whether they "regularly perform duties similar to those performed by unit members for sufficient periods of time to

[5] For this reason, the Company does not allege that Mr. David is a statutory supervisor under the Act. He is, nevertheless, ineligible to participate in the vote for the reasons set forth above.

demonstrate that they have a substantial interest in working conditions in the unit." *Berea Publishing Co*., 140 NLRB 516, 519 (1963).

The record at hearing will reflect that neither Mr. Cappetta nor Mr. David performs duties sufficiently similar to those performed by the putative unit members for a sufficient period of time to establish the requisite community of interest. To the contrary, both perform dispatch functions that are, at best, incompatible, and at worst, antagonistic, to those performed by the Drivers comprising the petitioned-for unit. As a result, both should be excluded from the unit, and deemed ineligible to participate in any election resulting from the Union's petition.

CASE NO. 04-RC-165805
ATTACHMENT E
TO UPS GROUND FREIGHT INC.'S
STATEMENT OF POSITION

6. Describe all other issues you intend to raise at the pre-election hearing.

I. THE COMPANY INTENDS TO CHALLENGE THE BOARD'S NEWLY-ENACTED ELECTION RULES.

The Union's petition is being processed in accordance with the procedures set forth by the Board in its new election rule entitled "Representation – Case Procedures; Final Rule," 29 C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74439 ("the Final Rule"), which became effective April 14, 2015. The Final Rule is intended to "remove unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation case procedures, codify best practices, and make them more transparent and uniform across regions." *See NLRB Guidance Memorandum on Representation Case Procedure Changes*, Memorandum GC 15-06 (April 6, 2015). According to the Board, the Final Rule provides "targeted solutions to discrete, specifically identified problems to enable the Board to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation." *Id*.

The reality, however, is that the Final Rule enacted comprehensive modifications to the Board election process. Viewed as a whole, those modifications severely and unfairly abbreviate the pre-election period, burden employers with new and onerous administrative tasks upon pain of waiver, and all but eliminate formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit. Specifically, the Final Rule incorporates, among others, the following modifications:

a. The Final Rule requires employers to post a notice of election within 2 business days after service of the notice of hearing and prior to any determination by the Board that the petition has sufficient merit to justify an election. *See* 29 C.F.R. §102.63(a).

b. The Final Rule abbreviates the time between the filing of the union petition and the first day of a hearing, except in limited cases shown to be sufficiently "complex" to warrant delay for a limited additional time period or under undefined "special circumstances" and/or "extraordinary circumstances." *See* 29 C.F.R. §102.63(a).

c. The Final Rule requires employers, during the critical initial days following the filing of a petition for election, to prepare and file a burdensome written "statement of position" addressing, *inter alia*, the basis for any employer contention that the petitioned-for unit is inappropriate, the basis for any employer contention for excluding individual employees from the petitioned-for unit, and the basis for all other issues the employer intends to raise at the hearing, upon risk of waiving employers' legal rights to contest any omitted issues at the hearing. *See* 29 C.F.R. §§102.63(b); 102.66(d).

d. The Final Rule requires employers to prepare and include with the statement of position a list of all employees in the petitioned-for unit, including their work location, shifts, and job classifications, as well as a second list (together with the above described additional information) of all individuals in any alternative unit contended for by the employer; and a third list (together with the above described additional information) of all individuals who the employer contends should be excluded from the petitioned-for unit. *See* 29 C.F.R. §102.63(b).

e. The Final Rule contemplates that the pre-election hearing required under Section 9(c) of the Act be conducted solely "to determine if a question of representation exists," and provides that "disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit," which have traditionally been deemed necessary and appropriate issues for pre-election consideration, "ordinarily need not be litigated or resolved before an election is conducted." *See* 29 C.F.R. §102.64(a).

f. Relatedly, the Final Rule limits the parties' right to introduce evidence at the Section 9(c) hearing solely to that which is "relevant to the existence of a question of representation." *See* 29 C.F.R. §102.66(a).

g. The Final Rule requires parties to prepare and present "offers of proof" at the outset of the Section 9(c) hearing, and authorizes Regional Directors to bar the parties from entering evidence into the record if such offers of proof are deemed to be insufficient to sustain the proponent's position. *See* 29 C.F.R. §102.66(c). Employers are further precluded from introducing evidence into the record on issues that were not previously addressed in the newly-required statement of position. *Id.*

h. The Final Rule precludes employers from presenting post-hearing briefs and from reviewing a record transcript prior to stating their post-hearing positions, except

upon special permission from, and addressing only subjects permitted by, the Regional Director. *See* 29 C.F.R. §102.66(h).

i. The Final Rule requires employers to disclose to unions unprecedented personal and private information pertaining to employees, including home phone numbers and personal email addresses. *See* 29 C.F.R. §102.67(1). The Final Rule drastically shortens the time in which such information must be prepared and provided by employers and requires such personal disclosures even as to employees whose eligibility to vote has been contested and not yet determined.

For the reasons articulated by the Plaintiffs in *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015), *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D. Tex. 2015), and *Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D. D.C. 2015), UPS Freight objects to the Final Rule and its application in these proceedings. UPS Freight incorporates by reference each and every objection to the Final Rule raised by the Plaintiffs in those proceedings such that those objections and arguments shall be deemed to be set forth fully herein. The relevant filings are attached to the Company's Statement of Position as Attachment F.

UPS Freight also objects to the application of the guidance set forth in General Counsel Memorandum 15-06, entitled Guidance Memorandum on Representation Case Procedure Changes. The application of certain principles in that memorandum even further restrict and interfere with an employer's right to fully investigate and respond to a union's petitioned-for representation. For example, the memorandum allows a Regional Director to decline to hold a pre-election hearing on subjects crucial to the viability to the union's petitioned-for unit, including whether supervisory participation in union organizing tainted the showing of interest (an objection the Company is raising here). *See* GC Memorandum 15-06 at 18.

Among other harms, the procedural modifications imposed by the Final Rule severely hinder the Company in the following manner.

A. The Final Rule Severely Hinders the Company's Ability and Opportunity to Effectively Respond to the Union's Petition

The Final Rule severely hinders the Company's ability and opportunity to investigate all issues related to the petition, unfairly burdens the Company with onerous administrative tasks upon pain of waiver, all but eliminates formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit, and prejudices the Company's ability respond to the Union's organizing campaign in violation of the United States Constitution and Section 8(c) of the National Labor Relations Act ("NLRA" or "the Act").

The restrictions imposed by the Final Rule have already materially prejudiced UPS Freight in several respects. The Union's petition was filed in the midst of the holiday season, which presents significant difficulties to the Company given the nature of its business. Additionally, the task of investigating the petition, adequately preparing and preserving its position in response, protecting its own business interests, and engaging in lawful dialogue with its employees concerning the ramifications of representation, is rendered near-impossible, however, as a result of the unfairly shortened "critical period" and the new and onerous administrative tasks imposed by the Final Rule. This is particularly true given the penal nature of Section 102.66(d) of the Board's Rules and Regulations, which expressly provides, in pertinent part, that "[a] party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position."

Anticipating this severe prejudice to the Company, the undersigned counsel specifically requested additional time both for the preparation of this Statement of Position and for the scheduled Representation Hearing, but only a portion of the requested extension was granted.

The Regional Director's denial of even the brief extension requested by the Company presents significant prejudice to the Company. Indeed, although the Union's petition purports to implicate only a limited number of employees at a single location, the compelling circumstances set forth in Attachment B to the Company's Statement of Position dictate that the appropriate scope of the proposed unit is significantly greater, and requires investigation of significant factors involving nearly three hundred employees at nine locations in the same number of states. The logistical obstacles created by the breadth of the required investigation are further complicated both by the expected scattering of employees during the holiday season, and the increased operational demands placed upon the Company during this time of year. Despite these real and obvious complications, the imposition of the Final Rule, even with the limited extension granted by the Regional Director, limits the Company to just eight days from the date of the filing of the Union's petition to prepare its Statement of Position, upon pain of waiver, and to eleven days in which to prepare for the Representation Hearing. This simply is not enough time given the gravity of the issue involved, which implicates not only the Company's business operations, but also the terms and conditions under which the unit employees will be employed and the Section 7 rights of employees both in (and outside of) the petitioned-for unit.

Despite these obvious harms, the Company has attempted, in good faith, to investigate and to preserve its rights going forward to the best of its ability given the considerable time limitations, and has attempted in good faith to comply with the procedural requirements imposed by the Final Rule despite their obvious prejudicial impact. For these reasons, and for the others set forth in the filings included in Attachment F, the Company maintains that its submission of its Statement of Position and its other efforts to comply with the Final Rule cannot be deemed a waiver of its objections to the Final Rule, and respectfully asserts that the Board's processing of

the Union's position in accordance with the Final Rule has rendered it unable to ascertain all facts and issues necessary to effectively protect its rights, and the rights of its employees, in the instant proceeding.

B. The Final Rule Severely Hinders the Company's Ability and Opportunity to Respond to the Union's Organizing Campaign in Violation of Section 8(c).

Moreover, Section 8(c) of the Act provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." Consistent with Section 8(c), "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969). The Final Rule, however, infringes upon an employer's Section 8(c) rights in several respects.

1. The Final Rule Violates the Section 8(c) Policy of Encouraging Uninhibited Debate.

By unfairly reducing the critical period between the filing of the petition for election and the election itself, the Final Rule effectively deprives an employer of adequate time to present its views in a meaningful manner to its employees. Such a result is inconsistent with the policies reflected in Section 8(c) favoring uninhibited, robust, and wide-open debate.

This is particularly true given the Final Rule's imposition of additional and unilateral obligations on the employer, including: (1) the compelled posting of an election notice within 2 business days after service of the notice of hearing; (2) the expectation that the hearing is to be opened within 8 days after the service of the notice of hearing; (3) the requirement that employers prepare and file a comprehensive Statement of Position addressing the issues they wish to litigate at the hearing, among other information, upon risk of waiving their legal rights to

contest any issue not presented in the statement; (4) the requirement that the parties prepare and present written "offers of proof" in support of their position at the hearing; and (5) the requirement that employers prepare and provide to the labor organization "a list of full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters." These obligations, all of which must be satisfied during a now-abbreviated critical period, preoccupy and avert employers from the exercise of their lawful rights under Section 8(c), and, when viewed as a whole, render employers unable to effectively respond to a union organizing campaign.

The practical impact of these modifications is to effectively eliminate any meaningful opportunity for an employer to lawfully communicate with its employees concerning campaign issues during the pre-election timeframe the Board has traditionally referred to as the "critical period" – "a period during which the representation choice is imminent and speech bearing on that choice takes on heightened importance." *See* 79 Fed. Reg. at 74,439-40 & n.591 (Dec. 15, 2015)(dissent) (citing *Goodyear Tire & Rubber Co*., 138 NLRB 453 (1962); *E.L.C. Elec., Inc*., 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc*., 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir; 2012); *NLRB v. Curwood Inc*., 397 F.3d 548, 553 (7th Cir. 2005). Such a result is not only contrary to the spirit and intent of the Act, but threatens the express rights granted to both employers and employees by the Act.

2. <u>The Final Rule Improperly Compels Employer Speech</u>.

Additionally, the unfairly shortened "critical period" contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively compel

an employer to address the issue of unionization prior to the filing of a petition in violation of Section 8(c) and the Constitution. The time between the filing of a petition and the conduct of the election has long been referenced as the "critical period" for a reason. As noted in the dissent to the Final Rule, the critical period is the point in time in during which "the representation choice is imminent and speech bearing on that choice takes on heightened importance." *See* 79 Fed. Reg. at 74,439-40 & n.591 (Dec. 15, 2015)(dissent) (citing *Goodyear Tire & Rubber Co*., 138 NLRB 453 (1962); *E.L.C. Elec., Inc*., 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc*., 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir; 2012); *NLRB v. Curwood Inc*., 397 F.3d 548, 553 (7th Cir. 2005)).

For this reason alone, an employer's ability to make general, pre-petition statements concerning its position on unionization, based on general observations at a time when no organizing efforts are taking place, is no substitute for post-petition speech. The benefit of the critical period is that it permits an employer to identify and understand the issues fueling the organizing effort and address them in a specific manner during the campaign, while at the same time lawfully educating its workforce on the lawful changes that would necessarily take place in the event of unionization, such as the collective bargaining process and the impact it might have on their terms and conditions of employment. The artificially abbreviated critical period imposed by the Final Rule's modifications severely and unreasonably restrict the employer's ability to respond to union campaign efforts or to provide a lawful, management-sided perspective on the changes that could result from representation.

In reality, the unfairly shortened critical period contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively *compel* an employer to address the issue of unionization ***prior*** to the filing of a petition – and quite possibly

prior to the onset of any organizing efforts - for fear that it will not have adequate opportunity to do so once a petition is filed. The danger inherent in such compelled speech is obvious. While there undoubtedly are circumstances where preemptive, pre-petition discussions with employees will serve to further an employer's position with respect to unionization, it is also conceivable that, by addressing the issue of unionization prior to the filing of a petition, and at a time when organizing efforts may not yet have occurred, an employer will scatter a seed it does not intend to sow. Employers were not forced to make that choice prior to the implementation of the Final Rule. The First Amendment, which protects "both the right to speak freely and the right to refrain from speaking at all," *see Wooley v. Maynard*, 430 U.S. 705, 714 (1977), preserves the employer's right to decide when and how to address the issue of unionization with its employees, or to refrain from doing so at all. The Company's right to refrain from such speech is directly, and prejudicially, implicated by the Final Rule.

C. The Final Rule Also Hinders Employees in the Full Exercise of the Rights Guaranteed Them Under Section 7 of the Act.

Finally, the Final Rule severely restricts an employer's rights under Section 8(c) by eliminating any meaningful opportunity to lawfully communicate with employees concerning the issues raised by a union campaign ***during*** the pre-election timeframe. These Section 8(c) violations necessarily result in the frustration of the rights of those employees participating in the election. Indeed, as Board Members Miscimarra and Johnson noted in their dissent to the Final Rule: "[T]he inescapable impression created by the Final Rule's overriding emphasis on speed is to *require employees to vote as quickly as possible* – at the time determined exclusively by the petitioning union – *at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues*." 79 Fed. Reg. 74,460 (emphasis added).

The harm identified in the dissent's analysis of the Final Rule's emphasis on the unfairly abbreviated critical period is precisely the harm that must be avoided here. The Board's newly-enacted election process permits the Union to act upon its leisure in disseminating information to employees in support of its organizing efforts, and to file its petition at a time when it is confident it has secured sufficient support to prevail in the election (or, as here, at a time when the Company is materially prejudiced due to significant seasonal operational obligations). The prior election processes provided an employer – even one with no previous notice of the union's efforts - with ample opportunity to address the relevant issues with its workforce and to meaningfully communicate its response to the union's efforts. The Final Rule, however, unreasonably circumscribes the Company's opportunity ***to respond***. The undesirable, but likely, result is an election decided by uninformed voters.

Such a result flies directly in the face of rights the Act was intended to protect. By its terms, Section 7 of the Act provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, ***and shall also have the right to refrain from any or all of such activities*** . . . ." 29 U.S.C. §157 (emphasis added). But, the right to refrain is only meaningful if the employees have full access to information concerning the consequences of representation before the election. The modifications to the election process imposed by the Board's adoption of the Final Rule ensure that they do not.

D. Conclusion

Based on the foregoing, there are compelling reasons for the Regional Director to dismiss the Union's petition. The procedural modifications imposed by the new Rule severely hinder the

Company's ability and opportunity to investigate all issues related to the petition, burden the Company with onerous administrative tasks upon pain of waiver, all but eliminate formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit, and prejudice the Company's ability respond to the Union's organizing campaign in violation of the United States Constitution and Section 8(c) of the Act. Additionally, the unfairly shortened "critical period" contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively compel an employer to address the issue of unionization prior to the filing of a petition in violation of Section 8(c) and the Constitution. Finally, the Final Rule hinders employees in the full exercise of the rights guaranteed them under Section 7 of the Act. For these reasons, and others set forth in the filings included in Attachment F, the Company respectfully requests that the Union's petition be dismissed, or alternatively that it be processed in a manner which effectively relieves the Company of the harms set forth above.

II. THE COMPANY INTENDS TO CHALLENGE THE UNION'S PETITION ON THE GROUNDS THAT THE SHOWING OF INTEREST WAS TAINTED BY SUPERVISORY SOLICITATION

As set forth in Attachment D, the Company intends to present evidence at the Representation Hearing that its employee, Frank Cappetta, is a statutory supervisor as that term is contemplated by Section 2(11) of the Act. Mr. Capetta's supervisory status is relevant not only to his eligibility to vote in the petitioned-for election, but also to the viability of the Union's petition to the extent it is supported by a showing of interest based on "tainted" cards solicited by him.

Indeed, the Board noted in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), that "solicitations [of union authorization cards by supervisors] are inherently coercive absent

mitigating circumstances." *Id*. at 906, 911 (emphasis added). The *Harborside* Board noted in this regard that "supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not" because the employee "will reasonably be concerned that the 'right' response will be viewed with favor, and a 'wrong' response with disfavor." *Id*. at 911. As such, including cards solicited by supervisors in a tally of the union's support "can paint a false portrait of employee support during [the union's] election campaign." *Id*. at 912 (citation omitted). The Board has found supervisor coercion not only in cases of direct solicitation, but also in cases where "employees had reason to believe that whether they signed a card would become known" to a pro-union supervisor. *See, e.g., Madison Square Garden CT, LLC*, 350 NLRB 117, 122 (2005).

For this reason, when evaluating a claim of majority support, the Board has a longstanding policy of refusing to consider union authorization cards solicited by supervisors. *See, e.g., Reeves Bros.*, 277 NLRB 1568, 1568 n.1 (1986) (accepting cards of employees solicited by supervisors, or which were signed while supervisors were present, "at odds with the Board's longstanding policy of rejecting cards directly solicited by supervisors"); *Sarah Neuman Nursing Home*, 270 NLRB 663, 663 n.2 (1984) (noting "the Board has long refused to count cards directly solicited by supervisors"); *A.T.I. Warehouse, Inc*., 169 NLRB 580, 580 (1968) ("It is well settled that cards obtained with the direct and open assistance of a supervisor are invalid" for purposes of determining union majority); *see also Heck's, Inc*., 61 LRRM 1128 (1966) (neither cards signed by statutory supervisors nor those solicited by supervisors constitute valid designations of union as bargaining representative).

And, upon this same reasoning, the Board has held that, if a supervisor directly solicits authorization cards, those cards are tainted and may not be counted for the showing of interest.

See, e.g., Dejana Industries, Inc., 336 N.L.R.B. 1202 (2001) (dismissing petition for election where supervisor was directly involved in collecting the authorization cards used to support the showing of interest); *National Gypsum Co*., 215 NLRB 74 (1974) (finding supervisory taint when supervisors personally solicited and obtained signatures and signed their names as "witnesses" on the back of many of the cards before turning them in to the petitioner); *Southeastern Newspapers, Inc*., 129 NLRB 311 (1960) (dismissing petition when a supervisor participated in obtaining the signatures of all the employees whose cards were submitted for the showing of interest); *The Toledo Stamping & Manufacturing. Co*., 55 NLRB 865, 867 (1944) (dismissing petition when authorization cards secured with the assistance of a supervisor). As the Board noted:

> [W]e recognize that applying this bright-line rule of excluding all cards directly solicited by a supervisor may seem unduly harsh in situations in which employees and petitioning unions may not be fully aware that the card solicitor possesses any of the indicia of statutory supervisory status. However, we find this possible disadvantage is outweighed by the benefits of providing the Board's Regional Directors and all parties in representation cases with clear procedural guidance. A bright-line rule also avoids possible election delays due to administrative investigations, by encouraging petitioners to gather new, untainted cards where there is any allegation that the petitioner's card solicitor possesses supervisory authority.

Dejana Industries, Inc., 336 N.L.R.B. at 1202.

Upon good faith belief, the Company intends to prove through the course of these proceedings that the Union's showing of interest, and indeed the campaign itself, has been tainted as a result of the solicitations and other participation by Mr. Cappetta. Given the impact of the Final Rule, which unfairly shortens the time between the filing of the Union's petition and the Representation Hearing, the Company has been unable to fully develop the facts giving rise to this issue and posits that the best, current evidence of Mr. Cappetta's participation in the Union's card solicitation activities may well exist in the cards themselves. Pending the

Company's development of additional, relevant evidence, the Company requests that a formal check of the cards be conducted by the Regional Director to ascertain Mr. Cappetta's participation as a witness to the card signings for the purpose of evaluating the validity of the showing of interest supporting the Union's petition. Ultimately, however, and regardless whether Mr. Cappetta witnessed the signing of some or all of the authorization cards presented by the Union, the Company believes that Mr. Cappetta was actively involved in the union organizing effort and that he encouraged some or all of the drivers in the unit either to sign cards or support the Union. Any such actions by Mr. Cappetta would taint the showing of interest and require that the petition be dismissed.

CASE NO. 04-RC-165805
ATTACHMENT F
TO UPS GROUND FREIGHT INC.'S
STATEMENT OF POSITION

Relevant Filings From *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015), *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D. Tex. 2015), and *Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D. D.C. 2015).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ASSOCIATED BUILDERS AND CONTRACTORS OF TEXAS, INC. 823 Congress, Suite 230 Austin, TX 78701, ASSOCIATED BUILDERS AND CONTRACTORS, INC. CENTRAL TEXAS CHAPTER 2600 Longhorn Blvd., Suite 105 Austin, TX 78758, and NATIONAL FEDERATION OF INDEPENDENT BUSINESS/ TEXAS 400 W. 15TH St., #804 Austin, TX 78701 Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD, 1099 14th St., N.W. Washington, D.C. 20570 Defendant.	Case No. 1:15-cv-00026 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. Plaintiffs ASSOCIATED BUILDERS AND CONTRACTORS OF TEXAS, INC. ("ABC OF TEXAS"), ASSOCIATED BUILDERS AND CONTRACTORS, INC., CENTRAL TEXAS CHAPTER ("ABC CENTRAL TEXAS") and NATIONAL FEDERATION OF INDEPENDENT BUSINESS/TEXAS ("NFIB/TEXAS") (collectively "THE PLAINTIFFS"), seek declaratory and injunctive relief against the Defendant NATIONAL LABOR RELATIONS BOARD ("DEFENDANT" OR "THE BOARD"), for violating Federal law.

2. This civil action seeks judicial review of the Board's issuance of a new rule entitled "Representation – Case Procedures; Final Rule," 29 C.F.R. Parts 101 102, and 103, 79 Fed. Reg. 74308 (Dec. 15, 2014) (hereafter the "new Rule") (attached hereto). The new Rule revises and supersedes longstanding regulations implementing Section 9 of the National Labor Relations Act, as amended (the "Act"), pursuant to which the Board conducts union representation elections among employees of employers covered by the Act.

3. As further explained below, the new Rule makes sweeping changes in pre-election and post-election procedures that depart from the plain language and legislative history of the Act and exceed the Board's statutory authority. The evident purpose of the changes is to achieve the impermissible pro-union objective of accelerating the election process to such an extent that employers will be unable to respond effectively to union organizing campaigns. The new Rule achieves this result by preventing employers in most cases from exercising their statutory rights to appropriate hearings regarding voting eligibility, and by shortening the election period so that employers have no meaningful opportunity to lawfully communicate with affected employees about their electoral rights. As stated in the strongly dissenting opinion of Board Members Miscimarra and Johnson: "[T]he inescapable impression created by the Final Rule's overriding emphasis on speed is to require employees to vote as quickly as possible – at the time determined exclusively by the petitioning union – at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues." 79 Fed. Reg. 74,460.

4. The Board also has provided no adequate justification for overruling many decades of Board and judicial precedent that preserved a careful balance of employer, employee, and union rights in the election process. The Board's failure to provide an adequate justification

supported by substantial evidence in the record renders the new rule arbitrary and capricious and an abuse of discretion, all in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

5. The new Rule will have a deeply destabilizing and harmful impact on many of Plaintiffs' member employers and their employees in Texas (and elsewhere). If the Board's new rule is allowed to go into effect as scheduled on April 14, 2015, Plaintiffs' member employers will be deprived of their rights to appropriate hearings and due process relating to the conduct of pre-election and post-election proceedings. Plaintiffs' members will also lose their statutorily protected rights to communicate with their own workers on union-election-related issues.

6. Absent judicial intervention, the new Rule is scheduled to go into effect on April 14, 2015. For the reasons more fully set forth below, the Rule should be declared unlawful and set aside prior to its effective date.

JURISDICTION AND VENUE

7. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §1331 (Federal question jurisdiction) and the Administrative Procedure Act, 5 U.S.C. § 702 ("[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof").

8. Venue is proper in this Court under 28 U.S.C. § 1391(e) because ABC of Texas and ABC Central Texas are corporations residing within the Western District of Texas. In addition, all of the Plaintiffs have members that are incorporated and reside in this District, and the new Rule will adversely impact Plaintiffs and their members in this District. This Court is authorized to grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 701-706, for violations of, *inter alia*, the APA, 5 U.S.C. § 706.

PARTIES

9. Plaintiff ABC of Texas, a Texas corporation headquartered in Austin, is a trade association representing seven chapters and more than 1500 member construction contractors and related employers in Texas. ABC of Texas advocates on behalf of its chapters and members in support of free enterprise and the Merit Shop philosophy, which holds that work in the construction industry should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC Central Texas, a Texas corporation headquartered in Austin, is one of the chapter members of ABC of Texas and itself represents more than 200 merit shop construction contractors and related employers in Texas. Plaintiffs are affiliated with Associated Builders and Contractors, Inc., a national trade association representing more than 21,000 chapter members. ABC and many of its members filed comments opposing the new Rule prior to its issuance.

10. Plaintiff NFIB/Texas represents approximately 24,000 Texas employers from its office located in Austin. NFIB Texas is the state's leading small business advocacy organization. NFIB nationally is the leading advocate of small business owners representing hundreds of thousands of small business owners throughout the country. NFIB and many of its members filed comments opposing the new Rule prior to its issuance.

11. Plaintiffs have standing to pursue this action on behalf of their members under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) Plaintiffs' members would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes; and (3)

neither the claims asserted nor the relief requested requires the participation of Plaintiffs' individual members.

12. Plaintiffs' members would otherwise have standing to sue in their own right because they will suffer imminent harm under the new Rule, both legal and practical, unless the Rule is declared unlawful and enjoined by this Court. *Inter alia*, Plaintiffs' members will be required to spend many hours and many dollars in efforts to prepare in advance for union petitions, and will be compelled to participate in an invalid administrative process, because they will not have sufficient time or opportunity to respond to such petitions under the new Rule.

13. The interests at stake are germane to Plaintiffs' principles, which include the mission of protecting the rights of their members to freedom from unlawful government interference with the operation of their businesses and to communicate with their employees regarding their rights to refrain from supporting unionization.

14. The claims asserted and relief requested by Plaintiffs do not require participation of Plaintiffs' members, because Plaintiffs' Complaint is a facial challenge to the new Rule based upon the Rule's unlawful departure from the statutory authority delegated by Congress under the Act. The Complaint also challenges the arbitrary and capricious nature of the new Rule, based upon the absence of substantial evidence supporting the Rule in the Administrative Record and the failure of the Department to provide adequate explanation of its reversal of four decades of policy implementing the Act's requirements. The Complaint is entirely based on principles of law and the Administrative Record and thus requires no individual employer participation.

15. The Defendant Board is an independent federal agency charged with administration and enforcement of the Act. The Board has been delegated rulemaking authority

to carry out these functions, but is required to exercise such rulemaking authority in a manner consistent with the Act and is subject to suit and judicial review under the provisions of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq*. (the "APA").

STATUTORY AND REGULATORY FRAMEWORK PRIOR TO THE NEW RULE

16. In Section 9 of the Act, 29 U.S.C. 159, Congress spelled out the means by which employees of private sector employers should be allowed to designate unions as their exclusive collective bargaining representatives or to refrain from that action.

17. Section 9(a) allows unions to represent employees in collective bargaining provided that they are "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes…." Section 9(b) provides that it is the Board's obligation to "decide in each case" the "unit appropriate for purposes of collective bargaining, "in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act." Section 9(c) provides that when a petition for a representation election is filed, the Board must investigate the petition and "shall provide for an appropriate hearing upon due notice" before the election is held. This provision also states that "[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto."

18. Congress amended the Act in 1947 (the "Taft-Hartley amendments") because of concerns that the Board had adopted election procedures that were not sufficiently neutral to preserve employee freedom of choice with regard to union representation, including an early attempt by the Board to eliminate pre-election hearings. See S. Rep. 80-105, 80th Cong. at 3, reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947.

19. One of the Taft-Hartley Amendments was the enactment of Section 8(c) of the Act, which protects the right of employers to engage in protected speech prior to an election. The Supreme Court has characterized Section 8(c) as reflecting a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes." *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2009).

20. Congress further amended the Act in the Labor Management Reporting and Disclosure Act ("LMRDA") of 1959. At that time, Congress rejected legislative efforts to shorten the time period for holding elections, and specifically rejected a bill that would have deferred voter eligibility issues to post-election hearings. Senator John F. Kennedy, then-chair of the Conference Committee, repeatedly stated that at least 30 days were required between the petition's filing and the election in order to "safeguard against rushing employees into an election where they are unfamiliar with the issues." 105 Cong. Rec. 5361 (1959), reprinted in 2 LMRDA Hist. 1024.

21. Pursuant to the foregoing statutory requirements, the Board has for decades adhered to a balanced set of pre-election procedures that have allowed employers sufficient time and opportunity to raise issues affecting the conduct of elections in appropriate pre-election hearings. *See* 29 C.F.R. 102.60, *et seq*. Such issues have included questions regarding the appropriateness of the requested bargaining unit as well as the eligibility of certain categories of employees to vote in the election. *Id.* at 102.66. Following such hearings, employers have been allowed 25 days to request review of regional director decisions by the Board prior to any tally of ballots in an election. *Id.* at 102.67.

22. The foregoing procedures of the Board have worked effectively and in a timely but balanced manner to allow the full exercise of free choice by employees with regard to

unionization, while at the same time preserving employer due process and free speech rights, consistent with the protections of the Act. Thus, the Board has consistently met or improved upon its time targets to conduct elections over the last decade: elections have been conducted within a median of 38 days from the filing of union petitions, bettering the Board's time targets of 42 days from petition to election. In addition, more than 90% of all petitions do not currently require pre-election litigation under the Board's procedures but are resolved by agreement of the parties. Unions are not prejudiced by the operation of the current procedures, as they have won a substantial majority of elections conducted under the Board's current rules.

THE BOARD'S NEW RULE

23. The Board's new Rule is "[m]assive in scale and unforgiving in its effect." 79 Fed. Reg. at 74430 (dissenting opinion). The Rule's primary purpose and effect are to accelerate the timetable of union representation elections, in particular by shortening the time allowed for employers to contest the appropriateness of the petition in pre-election hearings, and in some instances disallowing such hearings altogether on such fundamental questions as who is eligible to vote.

24. Specific provisions of the new Rule that Plaintiffs contend below violate the Act and/or the APA include the following:

a. The new Rule improperly shortens the time between the filing of the union petition and the first day of a hearing, except for cases shown to be sufficiently "complex" as to be delayed for a limited additional time period under undefined "special circumstances" and/or "extraordinary circumstances." *See* Section 102.63(a) of the new Rule.

b. The new Rule imposes an unprecedented new requirement that employers must first file a written "statement of position" providing a long list of burdensome information prior to exercising their statutory right to a pre-election hearing. Section 102.63(b). Such information must for the first time include, *inter alia*, a list of all employees, work location, shifts, and job classifications of all individuals in the petitioned-for unit, as well as a second list of all such employees (together with the above described additional information) for all individuals in any alternative unit contended for by the employer; and a third list of all such employees (together

with the above described additional information) for all individuals who the employer contends should be excluded from the petitioned-for unit. *Id.*

c. The above required statement of position must also for the first time state in writing, *inter alia*, the basis for any employer contention that the petitioned-for unit is inappropriate, the basis for any employer contention for excluding any individual employees from the petitioned-for unit, and the basis for all other issues the employer intends to raise at the hearing. *Id. See also* Section 102.66(d). No comparable requirement is imposed on union petitioners. All of the above information must be provided, upon risk of waiving employers' legal rights to contest such issues at the hearing, in a length of time that is inadequate for many employers to meaningfully understand and exercise their legal rights.

d. The new Rule improperly limits the purpose of a hearing conducted under Section 9(c) of the Act as being solely "to determine if a question of representation exists." *See* Section 102.64(a). For the first time, the Rule asserts that "disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted." *Id.*

e. The new Rule also for the first time limits the right of parties in such hearings to introduce into the record evidence to that which is "relevant to the existence of a question of representation" thereby excluding other issues contemplated by Section 9(c) of the Act. *See* Section 102.66(a).

f. The new Rule also for the first time requires parties to make "offers of proof" at the outset of any hearing, and authorizes Regional Directors to bar the parties from entering evidence into the record if such offers of proof are deemed to be insufficient to sustain the proponent's position. Section 102.66(c). Employers are further precluded from introducing evidence into the record that is not previously encompasses by various aspects of the newly required Statement of Position. *Id.*

g. The new Rule for the first time denies employers the opportunity to present post-hearing briefs and to review a hearing transcript prior to stating their post-hearing positions on the record, except upon special permission of the Regional Director and addressing only subjects permitted by the Regional Director. Section 102.66(h).

h. The new Rule requires employers to disclose to unions unprecedented personal and private information pertaining to employees, including home phone numbers and personal email addresses. See Section 102.67(l). The Rule drastically shortens the time in which such information must be prepared and provided by employers and requires such personal disclosures even as to employees whose eligibility to vote has been contested and not yet determined.

i. The new Rule for the first time eliminates the longstanding requirement that election ballots be impounded while any request for review of the Regional Director's decision is pending at the Board and eliminates the previous 25-day waiting period for review filings which previously allowed the Board time to consider such requests for review prior to the vote. *See* Section 101.21(d), removed and reserved.

j. The new Rule for the first time eliminates the right of employers to obtain mandatory Board review of post-election disputes if they enter into stipulated election agreements prior to the election instead of exercising their right to a pre-election hearing. See Section 102.62(b) and 102.69.

25. Due to the length of the new Rule (182 pages of the Federal Register), the foregoing summary of significant and unprecedented changes which Plaintiffs seek to challenge in this Complaint is necessarily a non-exclusive list.

CLAIMS FOR RELIEF

COUNT I – The New Rule Exceeds The Board's Statutory Authority Under Section 9 of the Act, In Violation of the APA.

26. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 25 of this Complaint, as though fully set forth below.

27. As noted above, Section 9(b) of the Act, 29 U.S.C. 159(b) requires the Board to "decide in each case … the unit appropriate for collective bargaining…." Section 9(c) further provides that when a petition for a representation election is filed, the Board must investigate the petition and "shall provide for an appropriate hearing upon due notice" before the election is held. This provision also states "[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto."

28. Legislative history of the Act including rejected amendments to the Act in 1947 and 1959 confirms that the Act requires the Board to allow employers the right to adequately prepare for, present evidence at and otherwise fairly litigate issues of unit appropriateness and voter eligibility in appropriate pre-election hearings, and that the Board must decide "in each case" the unit that is appropriate for the purposes of collective bargaining based on all the evidence submitted. Congress further rejected efforts to expedite the election process in the manner now adopted in the new Rule.

29. The new Rule, by the provisions summarized above and in other ways, violates each of the foregoing statutory provisions and Congressional intent. Specifically, the new Rule impermissibly restricts employers' ability to prepare for, present evidence and fairly litigate issues of unit appropriateness and voter eligibility in petitioned-for bargaining units.

30. The new Rule further vests excessive authority in Hearing Officers and excessively derogates the Board's own decision-making authority, both of which violate the foregoing provisions of the Act and Congressional intent and exceeding statutory authority within the meaning of the Administrative Procedure Act.

COUNT II – The New Rule Violates The Act and The APA By Failing To Assure To Employees The Fullest Freedom In Exercising The Rights Guaranteed By [The] Act.

31. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Complaint, as though fully set forth below.

32. As noted above, Section 9(b) of the Act requires the Board to "assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act." The new Rule violates this provision, inter alia, by compelling the invasion of privacy rights of the employees of Plaintiffs' member employers by disclosure of their names and job duties to a petitioning union prior to any determination that the petition is supported by a sufficient showing of interest to proceed to an election in an appropriate bargaining unit.

33. The new Rule further violates the Act and the privacy rights of employees by compelling employers to disclose unprecedented personal information, including personal phone numbers and email addresses, about all employees who are deemed to be part of an appropriate bargaining unit, and additional employees whose status has not been determined prior to a direction of election.

COUNT III – The New Rule Violates The Act And The APA By Interfering With Protected Speech During Representation Election Campaigns.

34. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 33 of this Complaint, as though fully set forth below.

35. Section 8(c) of the Act, 29 U.S.C. 158(c) protects the free speech rights of employees, employers, and unions, consistent with similar guarantees afforded by the First Amendment. As noted above, the Supreme Court has characterized Section 8(c) as favoring uninhibited, robust, and wide-open debate in labor disputes. *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008). This right only has meaning if there is enough time for parties to communicate with employees about their choice of representation.

36. The new Rule interferes with these protected rights because it is intended to, and inevitably will, substantially shorten the time between the filing of a representation petition and the date of the election, thereby curtailing the ability of parties to exercise their rights to engage in protected speech.

COUNT IV – The New Rule Is Arbitrary And Capricious And An Abuse of Agency Discretion Within The Meaning Of The APA

37. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 36 of this Complaint, as though fully set forth below.

38. By reversing decades of policy and precedent without adequate justification, the Defendants have acted in an arbitrary and capricious manner in violation of the APA, and the new Rule should be set aside on this additional ground pursuant to 5 U.S.C. § 706.

PRAYER FOR RELIEF

Wherefore, the Plaintiffs respectfully request this Court to enter judgment in their favor and:

1. Declare that the provisions of the new Rule described above violate the Act and the APA;

2. Vacate and set aside the provisions of the new Rule shown to be unlawful in this Complaint and any related provisions that cannot be lawfully severed therefrom;

3. Declare that the new Rule is arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law;

4. Issue an injunction vacating the new Rule and barring the Board from enforcing or applying the challenged portions of the Department's new Rule, together with any other provisions of the Rule that incorporate or otherwise rely on the challenged provisions found to be unlawful.

5. Award Plaintiffs their costs of litigation, including reasonable attorneys' fees; and

6. Grant Plaintiffs such other relief as may be necessary and appropriate.

Respectfully submitted,

/s/ Mark Jodon

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BAKER DC, LLC AND SHANNON W. COTTON, MICHAEL A. MURPHY, AND JORGE E. GONZALEZ VILLAREAL **1110 Vermont Avenue, NW** **Washington, D.C. 20005,** **Plaintiff,** **v.** **NATIONAL LABOR RELATIONS BOARD** **1099 Fourteenth Street, NW** **Washington, D.C. 20570,** **Defendant.**	**Case No. 15-cv-00571-ABJ**

AMENDED COMPLAINT

1. On April 14, 2015, the National Labor Relations Board ("the Board") put into effect a new Rule entitled "Representation – Case Procedures; Final Rule," 29 C.F.R. Parts 101, 102, and 103, 79 Fed. Reg. 74308 (Dec. 15, 2014) (hereafter the "new Rule").

2. The new Rule went into effect notwithstanding a pending legal challenge filed in this district by a broad coalition of trade associations representing millions of businesses throughout the country, who have alleged that the new Rule violates the National Labor Relations Act ("the Act") and the Administrative Procedure Act (the "APA").[1]

3. On April 15, 2015, the United Construction Workers Local Union No. 202-Metropolitan Regional Council of Carpenters ("the Union") filed a petition with the National

[1] *See Chamber of Commerce of the United States of America, et al v. NLRB, Case No. 15-cv-00009-ABJ.* Dispositive cross-motions have been filed in that case and have been fully briefed by the parties.

Labor Relations Board (the "Board") seeking to represent employees of Baker DC, LLC ("Baker") working as carpenters and laborers on construction sites in the Washington, D.C. metropolitan area. The Board has indicated to Baker its intent to process the petition in all respects under the new Rule.

4. Among other dramatic changes to the representation election process, the new Rule:

a. Requires employers to post a notice of election constituting compelled speech prior to any determination by the Board that the petition has sufficient merit to require an election to be held;

b. Requires employers to file a burdensome written Statement of Position prior to any hearing being held, upon penalty of precluding employers from presenting evidence at the hearing on any issue not addressed in the Statement, contrary to the rights given to employers to present such evidence in Section 9 of the Act;

c. Requires employers to disclose to a petitioning union confidential information about employees inside and outside the petitioned-for unit prior to any hearing being held, upon the same unlawful penalty;

d. Postpones evidence taking and litigation over critical issues of voter eligibility until *after* an election takes place;

e. Requires employers to turn over employees' highly personal and private information such as personal phone numbers and e-mail addresses to labor organizations within two business days after a decision and direction of election is issued;.

f. Sharply limits the opportunity for employers to seek pre-election Board review, and a stay of the election, by eliminating a 25-day automatic waiting period for such review; and

g. Eliminates employers' automatic right to post-election Board review (post-election review would now be discretionary).

5. Because the new Rule offends the First and Fifth Amendments of the Constitution of the United States, contravenes clear Congressional requirements, and is arbitrary and capricious, it should be held unlawful and set aside.

JURISDICTION AND VENUE

6. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises under and concerns provisions of the Act, the Administrative Procedure Act ("the APA"), and the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

7. Venue is proper in this Court under 28 U.S.C. § 1391(b) because (i) the Board resides in the District of Columbia; (ii) a substantial part of the events giving rise to this claim including hearings and other actions taken by the Board in promulgating the new Rule—occurred in the District of Columbia; and (iii) Baker is headquartered and does business in the District of Columbia.

PARTIES

8. The Board is an independent federal agency in the Executive Branch and is subject to the APA. The Board's headquarters are located at 1099 Fourteenth Street, NW, Washington, D.C. 20570.

9. Baker is a concrete contractor operating in the greater Washington DC area from its headquarters location at 1100 Vermont Ave., N.W., Washington, D.C. 20005. Baker

specializes in commercial "cast in place" concrete construction, restoration, retrofit, specialty underpinning work, and blast fortification.

10. Baker employs employees who are covered by the Act and are subject to the Board's rules regarding union organizing, to the extent that such rules are consistent with the Act. Baker's employees are not currently covered by a union. Plaintiffs Cotton, Murphy, and Gonzalez Villlareal are employed by Baker. There are several hundred other employees employed by Baker who are similarly situated. As noted above, the Union filed a petition with the Board on April 15, 2015 seeking to represent Baker's employees working as carpenters and laborers on construction sites in the Washington, D.C. metropolitan area.

STANDING AND RIPENESS

11. The Board has indicated to Baker its intent to process the petition in all respects under the new Rule. Accordingly, Baker and its co-Plaintiff employees will imminently suffer concrete and substantial injury in fact, including **irreparable harm,** as a result of the new Rule. Such harm includes but is not limited to the following:

a. Compelled infringement of Plaintiffs' free speech rights due to the newly required posting of a notice of election on or before April 17, 2015, (two business days after receipt of the Notice of Petition from the Board);

b. Unprecedented compelled pre-hearing disclosure of the names and locations of Baker's employees' to an outside third party (the Union), upon penalty of being precluded from presenting evidence relating to the voting eligibility and appropriate unit of such employees, in direct violation of the Section 9(c)(1) of the Act;.

c. Compelled filing by Baker of a newly required pre-hearing Statement of Position upon penalty of being precluded from presenting evidence relating to any issue not addressed in the Statement, in further violation of Section 9.

d. Preclusion of Baker from presenting evidence on voter eligibility issues in violation of Congressional intent to allow all such evidence to be presented under the Taft-Hartley Act.

e. Unprecedented compelled post-hearing disclosure of private and personal phone numbers and e-mail addresses of Baker's employees, within the impracticable deadline of 2 business days following the Board's direction of election.

f. Infringement of Plaintiffs' free speech rights during the unlawfully abbreviated election campaign.

CLAIMS FOR RELIEF

COUNT I: The New Rule Exceeds The Board's Authority Delegated By Congress By Imposing Unprecedented Disclosure Requirements On Baker, Including Compelled Disclosure Of Confidential, Personal and Private Information Regarding Their Employees.

12. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further alleges as follows:

13. Section 7 of the Act gives employees the right to "form, join, or assist" unions; to bargain collectively with their employer; or to refrain from engaging in such activities.

14. Section 9(b) of the Act provides that the Board shall "assure to employees the fullest freedom in exercising the rights guaranteed by" the Act.

15. Section 9(c)(1) of the Act, enacted as one of the Taft-Hartley amendments of 1947, requires that the Board conduct an "appropriate hearing" with regard to all "questions concerning representation." As was made clear by Senator Robert Taft, chief sponsor of the Taft-Hartley Act, Congress intended by this language to require the Board to hold such hearings in order to "decide questions of unit and eligibility to vote." 93 Cong. Rec. 6858, 6860 (June 12, 1947).

16. Nothing in the Act authorizes the Board to require employers to disclose the confidential names and work locations of their employees prior to a determination that a petition merits a direction of election after an appropriate hearing, upon penalty of being precluded from presenting evidence regarding the voting eligibility or unit appropriateness of such employees. Section 102.63(b) of the new Rule nevertheless requires Baker and similarly situated employers to make such a disclosure upon penalty of otherwise being precluded from presenting evidence that Section 9(c)(1) guarantees to employers the right to present.

17. Nothing in the Act authorizes the Board to require employers to disclose the personal and private phone numbers and personal email addresses of their employees within two business days after a direction of election is issues, or at any other time. Section 102.62 of the new Rule nevertheless requires such post-hearing disclosures, exceeding the Board's authority under the Act and constituting a gross invasion of employer and employee privacy contrary to the intent of Congress.

Count II: The New Rule Impermissibly Restricts Baker's Right To Present Evidence On Questions Concerning Representation At An Appropriate Hearing In Violation Of Section 9 and the Fifth Amendment to the U.S. Constitution.

18. Section 9 of the Act states that the Board "shall decide in each case" the unit that is appropriate for the purposes of collective bargaining. 29 U.S.C. § 159(b). Section 9(c) of the Act further provides that, when a petition for a representation election is filed, the Board must investigate that petition and "shall provide for an appropriate hearing upon due notice" before the election is held. 29 U.S.C. § 159(c)(1). The same provision provides that "[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto."

19. The new Rule violates the Act's requirement of an "appropriate" pre-election

hearing by restricting Baker's ability to present evidence and litigate issues of voter eligibility or inclusion in the putative bargaining unit. In particular, the requirement that Baker file a written Statement of Position on each and every potential that could arise during a hearing, at a time when no pre-hearing discovery is permissible, upon penalty of precluding Baker from presenting evidence on unit and voter eligibility issues as expressly permitted by the Act, violates Section 9 and Congressional intent.

20. The new Rule also conflicts with Section 9(c)(1)'s requirement that the Board's hearing officers "shall not make any recommendations with respect" to the hearings they conduct. The new Rule effectively vests hearing officers with decision-making authority regarding the evidence that will be admitted and the issues that will be litigated at the pre-election hearing.

21. By authorizing hearing officers to prevent employers from litigating issues as to the eligibility of certain employees to vote in the election, and by limiting the available time for the Baker to communicate about the election and for Plaintiff employees to decide whether to vote for or against union representation, the new Rule fails to assure employees the "fullest freedom" in exercising their rights under Section 7 of the Act and is otherwise contrary to Section 9(b) of the Act.

22. The new Rule also deprives Baker of due process in NLRB representation case proceedings, in violation of the Fifth Amendment, by preventing Baker from litigating issues of voter eligibility and inclusion at the pre-election hearing, and then denying Baker the right to seek any Board review of those issues, whether pre- or post-election, by making all Board review discretionary.

Count III: The New Rule Violates Plaintiffs' First Amendment and Statutory Rights of Free Speech.

23. Section 8(c) of the Act protects an employer's freedom of speech: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisals or force or promise of benefit." 29 U.S.C. § 158(c). Section 8(c) "implements the First Amendment" to the United States Constitution and "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board." *Chamber of Commerce v. Brown,* 554 U.S. 60, 67-68 (2008); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

24. Notwithstanding these requirements, the new Rule violates Plaintiffs' free speech rights by compelling Baker to engage in certain speech prior to the Board making any determination that an election will be held on the Union petition. Specifically, the new Rule requires Baker to post a new mandatory workplace notice to be posted within two days after the filing of a representation petition. In the present case, because Baker received the Board's Notice of Petition on April 15, 2015, the new Rule unlawfully requires Baker to post the mandatory new notice by April 17, 2015. The new Rule violates the D.C. Circuit's holding in *National Association of Manufacturers v. NLRB*, 717 F. 3d 947, 955 (D.C. Cir. 2013), overruled on other ground by *American Meat Inst. v. U.S Dept. of Agriculture*, 760 F. 3d 18 (D.C. Cir. 2014) (*en banc*).

25. By enacting Section 8(c), Congress further directed that employers be given sufficient opportunity to meaningfully express their views in the election process. Specifically, Congress determined that employers, such as Baker, must have the opportunity to effectively

communicate with their employees on the subjects of union organizing and collective bargaining. *Chamber of Commerce v. Brown*, *supra*, 554 U.S. at 67–68 (2008) (Section 8(c) reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide open debate in labor disputes." (internal quotation omitted)); *Nat'l Ass'n of Manufacturers v. NLRB*, 717 F.3d 947, 955 (D.C. Cir. 2013) (Section 8(c) "serves a labor law function of allowing employers to present an alternative view and information that a union would not present." (citation omitted)).

26. The new Rule impermissibly curtails Plaintiffs' right to communicate with each other by substantially shortening the period between an election petition and the holding of an election, and the new Rule impermissibly limits Plaintiffs' ability to exercise its rights under Section 8(c) of the Act and the First Amendment.

COUNT IV: The Board's Actions Are Arbitrary and Capricious

27. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further alleges as follows:

28. "The APA commands reviewing courts to 'hold unlawful and set aside' agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (citing 5 U.S.C. § 706(2)(A)). The APA also requires courts to hold unlawful and set aside agency action that is not in accordance with procedure required by law. 5 U.S.C. § 706(2)(D).

29. The new Rule is overly broad in changing election procedures in a manner impacting all cases, as the alleged "problems" identified by the Board to justify the new Rule exist only in a small fraction of cases.

30. The new Rule seeks to arbitrarily expedite the election process, even though the data show that the Board already conducts elections below its established time targets in more

than 90 percent of cases.

31. The new Rule introduces no new time targets for representation elections, further undermining the rational basis for radically altering procedures that have met the Board's established time targets for many years.

32. The new Rule promotes speed in holding elections at the expense of all other statutory goals and requirements, including but not limited to Baker's free speech rights and the opportunity for a full and informed debate before an election.

33. The new Rule also mandates, for the first time in the Board's history, that Baker gives its employees' personal phone numbers and email addresses to labor organizations. The Board acknowledged that "the privacy, identity theft, and other risks may be greater than the Board has estimated," but nonetheless concluded, without adequate justification and concern for employee rights, that these "risks are worth taking." 79 Fed. Reg. at 74,342.

34. The new Rule's elimination of mandatory Board review of post-election disputes, during a period of dramatically reduced case loads, is arbitrary and capricious given the Board's statutory obligation to oversee the election process.

35. The new Rule's elimination of mandatory Board review of post-election disputes, during a period of dramatically reduced case loads, is arbitrary and capricious given the Board's statutory obligation to oversee the election process.

36. The new Rule concludes that it will reduce election-related litigation, despite available evidence that the new Rule's sweeping changes will reduce the high rate of election agreements, and will result in more, not less, litigation overall, including more litigation in federal court. As the dissenting Board Members explained: "An employer will now be forced to litigate in an unfair labor practice case, before the Board and in Federal court, issues that are

currently reviewed by the Board in a post-election appeal as a matter of right. Given the process an employer must go through to have a Federal court of appeals review any disputed issue regarding an election, there is often substantial delay in the final resolution of the representation case." 79 Fed. Reg. at 74,451.

37. Based on the above, the Board failed to meaningfully consider numerous legal, policy, and economic factors, or to articulate a rational basis for rejecting them.

38. The Board's actions in adopting the new Rule are arbitrary and capricious, and the new Rule was enacted without observance of the necessary procedures required by law. 5 U.S.C. § 706(2)(A)-(D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court enter judgment in its favor and:

1. Vacate and set aside the new Rule;
2. Declare that the new Rule is contrary to the First and Fifth Amendments to the Constitution of the United States and to the Act, and in excess of the Board's statutory jurisdiction and authority;
3. Declare that the Board violated the APA in issuing the new Rule;
4. Declare that the new Rule is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;
5. Enjoin and restrain the Board, its agents, employees, successors, and all persons acting in concert or participating with the Board from enforcing, applying, or implementing (or requiring others to enforce, apply, or implement) the new Rule;
6. Award Plaintiffs their costs of litigation, including reasonable attorney's fees; and
7. Grant Plaintiffs such other relief as may be necessary and appropriate or as the Court deems just and proper.

Dated: April 21, 2015

Respectfully submitted,

/s/ *Maurice Baskin*

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, 1615 H Street, NW Washington, D.C. 20062 and COALITION FOR A DEMOCRATIC WORKPLACE, 901 7th Street NW, 2nd Floor Washington, D.C. 20001 and NATIONAL ASSOCIATION OF MANUFACTURERS, 733 10th Street NW, Suite 700 Washington, D.C. 20001 and NATIONAL RETAIL FEDERATION 1101 New York Ave NW Washington, D.C. 20005 and SOCIETY FOR HUMAN RESOURCE MANAGEMENT 1800 Duke Street Alexandria, VA 22314 Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD 1099 14th Street NW Washington, D.C. 20570 Defendant.	Case No. 1:15-cv-9 **COMPLAINT**

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INTRODUCTION

1. For nearly 80 years, the National Labor Relations Board ("NLRB" or "Board") has conducted workplace elections so that workers can decide if they want to be represented by a union for purposes of collective bargaining. Like political elections, representation elections offer all participants in the process—the union, the employer, and the employees—a critical opportunity to engage in protected, lawful speech about how workers should vote in the election.

2. Congress's overarching "policy judgment . . . favoring uninhibited, robust, and wide-open debate in labor disputes"—including the "freewheeling use of the written and spoken word" (*Chamber of Commerce v. Brown*, 554 U.S. 60, 67–68 (2008))—is so central to the representation election process that Congress expressly guaranteed an employer's right to engage in speech concerning unionization (so long as that speech, of course, "contains no threat of reprisal or force or promise of benefit"). 29 U.S.C. § 158(c).

3. The Board's recently issued "ambush" election rule (the "Final Rule") implements sweeping changes to the NLRB's representation election process that, as the dissenting Board Members explained, impermissibly "limits the right of all parties to engage in protected speech at precisely the time when their free speech rights are most important." 79 Fed. Reg. 74,308, 74,439 (Dec. 15, 2014). By rapidly (and needlessly) accelerating the election process, the Final Rule "improperly shortens the time needed for employees to understand relevant issues, compelling them to 'vote now, understand later.'" *Id.* at 74,430.

4. In doing so, the Final Rule is "contrary to common sense, contrary to the [National Labor Relations] Act and its legislative history, and contrary to other legal requirements directed to the preservation of employee free choice, all of which focus on guaranteeing enough time for making important decisions." *Id.* at 74,430-31. And the Final

Rule is "fundamentally unfair and will predictably deny parties due process by unreasonably altering long established Board norms for adequate notice and opportunity to introduce relevant evidence and address election-related issues." *Id.* at 74,431.

5. Although the Final Rule does not provide any guidelines about the time frame in which elections will be conducted, the changes implemented in the Final Rule would allow elections to be held in as little as 14 days after the employer is first notified of the election petition. Under the NLRB's current procedures, the Board expects that elections will be held within a median of 42 days from the filing of a petition, and that 90 percent of elections will be held within 56 days of the filing of a petition.

6. Among other dramatic changes to the representation election process, the Final Rule:

a. Postpones evidence taking and litigation over critical issues of voter eligibility until *after* an election takes place;

b. Sharply limits the opportunity for employers to seek pre-election Board review, and a stay of the election, by eliminating a 25-day automatic waiting period for such review;

c. Eliminates employers' automatic right to post-election Board review (post-election review would now be discretionary); and

d. Requires employers to turn over employees' highly personal information such as home and cell phone numbers and e-mail addresses to labor organizations to aid unions in their election campaign efforts.

7. Moreover, as the dissenting Board Members point out, the Final Rule "leaves unanswered the most fundamental question regarding any agency rulemaking, which is whether

and why rulemaking is necessary." 79 Fed. Reg. at 74,431. The Board already handles election requests quickly, with over 95 percent of elections occurring in less than two months (and with over 90 percent of elections generating no pre-election litigation, above the Board's stated goal of 85 percent). Indeed, for several years, the Board has surpassed its own internal time target for handling elections—a feat its prior General Counsel has described as "outstanding." And unions already win more than two-thirds of all representation elections—so the Board's massive modifications to the election process cannot be justified or explained by any legitimate concern about employer "coercion" during the current pre-election period.

8. Because the Final Rule offends the First and Fifth Amendments to the Constitution of the United States, contravenes clear congressional requirements, and is arbitrary and capricious, it should be held unlawful and set aside.

JURISDICTION AND VENUE

9. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises under and concerns provisions of the National Labor Relations Act ("NLRA"), the Administrative Procedure Act ("APA"), and the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

10. Venue is proper in this Court under 28 U.S.C. § 1391(b) because (i) the NLRB resides in the District of Columbia; (ii) a substantial part of the events giving rise to this claim—including hearings and other actions taken by the Board in promulgating the Final Rule—occurred in the District of Columbia; and (iii) the Chamber, CDW, NAM, and NRF are headquartered or maintain offices in the District of Columbia, and SHRM does business in the District of Columbia.

PARTIES

11. Plaintiff Chamber of Commerce of the United States of America ("Chamber") is a

non-profit organization created and existing under the laws of the District of Columbia. The Chamber's headquarters are located at 1615 H Street, NW, Washington, D.C. The Chamber is the world's largest federation of businesses and associations, directly representing 300,000 members and indirectly representing more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region of the country. Of particular relevance here, the Chamber represents the interests of its member-employers in employment and labor-relations matters—including matters arising under the NLRA—before courts, Congress, the Executive Branch, and regulatory agencies of the federal government. The Chamber is authorized to bring this action on behalf of its member companies.

12. Plaintiff Coalition for a Democratic Workplace ("CDW") represents millions of businesses of all sizes. CDW's membership includes hundreds of employer associations, individual employers, and other organizations that together employ tens of millions of individuals working in every industry and every region of the country. CDW is authorized to bring this action on behalf of itself, its members, and its member companies.

13. Plaintiff National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM is authorized to bring this action on behalf of itself, its members, and its member companies.

14. Plaintiff National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main

Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—a total of 42 million working Americans. NRF is authorized to bring this action on behalf of itself, its members, and its member companies.

15. Plaintiff Society for Human Resource Management ("SHRM") is the world's largest membership organization devoted to human resource management. Representing more than 275,000 members in over 90,000 companies, SHRM is the leading provider of resources to serve the needs of human resource professionals and advance the professional practice of human resource management. SHRM members represent their employer companies on a myriad of human resource issues, including labor relations matters. SHRM is authorized to bring this action on behalf of itself and its members.

16. Plaintiffs collectively represent millions of employers and human resource professionals in companies covered by the NLRA and subject to the Final Rule. These employers, in turn, employ millions of employees who are covered by the NLRA and entitled to organize and petition the NLRB to hold a representation election pursuant to the Final Rule's expedited procedures. The vast majority of these employees are not currently represented by a union. There are, however, active union organizing campaigns involving employees of many of the businesses represented by Plaintiffs. The Plaintiffs' members expect that these employees, or the unions that seek to represent them, will file election petitions soon after the Final Rule becomes effective on April 14, 2015, and all subsequent elections will be governed by the Final Rule's expedited procedures.

17. These injuries that the Plaintiffs' members will incur as a result of the Final Rule include less time for employers to communicate with workers about the election, in derogation of

employers' free speech rights under Section 8(c) of the NLRA, the First Amendment, and the clear congressional intent for a full and informed debate before workers cast their votes; less time for employers to investigate whether it is even appropriate for the NLRB to hold an election in the petitioned-for bargaining unit; less time for employers to determine whether other employees should be included or excluded from the petitioned-for bargaining unit; less time for employers to determine whether individuals encompassed by the petition are actually eligible to vote in the election; less time to prepare for a pre-election hearing and file a binding position statement under penalty of issue waiver; and less time for employers to negotiate an election agreement that would obviate the need for a pre-election hearing. Many of Plaintiffs' members will incur additional costs in order to prepare for the shortened, and inadequate, time to respond to an election petition under the Final Rule.

18. In addition, the Final Rule will restrict employers' ability to litigate issues of eligibility and inclusion at the pre-election hearing, even if those issues are timely raised; sharply limit employers' opportunity to seek Board review of a Regional Director's decision before the election; and eliminates mandatory Board review of post-election disputes, making such review discretionary only. In these circumstances, if the union wins the election, the employer may be denied any Board review of the Regional Director's decision and the employer's only recourse for judicial review will be to subject itself to an unfair labor practice proceeding by refusing to bargain with the union.

19. Therefore, in the absence of relief from this Court, many of the Plaintiffs' members will suffer concrete and particularized injuries as a result of the Final Rule soon after it becomes effective.

20. Defendant NLRB is an independent federal agency in the Executive Branch and is

subject to the APA. The NLRB's headquarters are located at 1099 14th Street, NW, Washington, D.C.

21. The Board consists of a Chairman and four Members.

22. Mark G. Pearce, in his official capacity, is Chairman of the Board.

23. Kent Y. Hirozawa, in his official capacity, is a Member of the Board.

24. Philip A. Miscimarra, in his official capacity, is a Member of the Board.

25. Harry I. Johnson III, in his official capacity, is a Member of the Board.

26. Nancy Schiffer, in her previous official capacity, was a Member of the Board until her term expired on December 16, 2014.

27. Richard F. Griffin, Jr., in his official capacity, is the NLRB's General Counsel.

FACTS

28. For nearly 80 years, the Board has conducted workplace elections so that workers can decide whether they want to be represented by a union for purposes of collective bargaining.

29. In the last ten years, the Board has conducted elections within a median of 38 days from the filing of the petition—well below the Board's time target of 42 days.

30. By comparison, in 1960 the median time from petition to the Board's *direction* of an election was 82 days, with even more time elapsing before the election actually occurred. 76 Fed. Reg. at 36,814, n.16.

31. By 1975, however, the Board had succeeded in reducing the time between petition and election. That year, only 20.1 percent of all elections occurred more than 60 days after a petition was filed—and this percentage later decreased to 16.5 percent by 1985. *Id.* at 36,814, n.19.

32. In the past two years, the Board has beat its own time targets for conducting representation elections, deciding pre-election issues at the regional level, and closing pending

representation cases:

a. In 2013, 94.3 percent of all elections occurred within a 56-day period after the filing of the petition, which was better than the Board's stated goal of 90 percent. That rate improved to 95.7 percent in 2014, again well above the 90 percent goal.

b. In 2013, regional directors issued 159 pre-election decisions in a median of 32 days after the petition, below the 45-day target.

c. In 2014, 88.1 percent of all NLRB representation cases were "closed" within 100 days of the petition being filed. That rate exceeded the agency's stated goal of 85.3 percent for 2014.

33. The speed with which the Board conducted elections in 2013 and 2014 under its existing procedures is consistent with the trend over the past five decades of reducing the time period between the filing of the petition and the election.

34. The number of representation cases processed by the Board has also dropped substantially:

a. In 1959, there were 9,347 representation case filings, 8,840 case closings, and 2,230 cases pending at the end of the year. The Board itself decided 1,880 cases. 79 Fed. Reg. at 74,450.

b. In fiscal year 2013, only 1,986 representation petitions were filed, almost the same number as the year before, and reflecting a decline of about 80 percent over the last 50 years. *Id.*

35. As of October 1, 2014, there were only 48 representation cases pending at the Board—well below the caseload 50 years ago. *Id.*

36. In fiscal year 2014, the Board itself decided only 43 representation cases, down

from 1,880 cases in 1959.

37. Under the Board's current election procedures, there is no pre-election litigation in more than 90 percent of representation cases because the parties negotiate and enter into an election agreement. 79 Fed Reg. at 74,387.

38. In 2013, labor organizations won 64.1 percent of the representation elections conducted by the Board.

39. Nonetheless, in June 2011, the Board proposed unprecedented and sweeping changes to its procedures for conducting representation elections designed to further reduce the time between an election petition being filed and the holding of an election. 76 Fed. Reg. 36,812 (June 22, 2011) (Notice of Proposed Rulemaking) ("the Proposed Rule").

40. Less than 30 days after publishing the Proposed Rule, the Board held a two-day hearing at which nearly 70 witnesses testified, with each witness having approximately 5 minutes to speak. Many witnesses testified against the Proposed Rule.

41. When the comment period for the Proposed Rule closed, the Board had received more than 65,000 comments—many of them, like Plaintiffs' comments, opposed to the Proposed Rule.

42. About two months after the comment period closed, the Board announced that it would hold a public meeting less than two weeks later during which the Board's Members would vote on a resolution concerning a modified rule.

43. At the meeting, the Board adopted the resolution it had released only the day before, including certain changes that differed from those set forth in the 2011 Proposed Rule.

44. Sometime the next month—in December 2011—Board Chairman Mark Pearce and then-Member Craig Becker voted to approve the rule as modified. The final rule issued on

December 22, 2011 ("2011 Final Rule"). Then-Member Hayes did not participate in the vote, but subsequently published a dissent.

45. Plaintiffs Chamber and CDW filed a complaint asking this Court to invalidate the 2011 Final Rule.

46. In May 2012, this Court did so on the ground that the Board, with only two Members voting, lacked a statutory quorum when it approved the 2011 Final Rule. *Chamber of Commerce of the U.S. v. NLRB*, 879 F. Supp. 2d 18, 28-30 (D.D.C. 2012). The Court did not "reach—and expresse[d] no opinion on—Plaintiffs' other procedural and substantive challenges to the rule." *Id.* at 30.

47. The Board appealed the Court's decision to the U.S. Court of Appeals for the District of Columbia Circuit, but later voluntarily sought and obtained dismissal of its own appeal. 2013 WL 6801164 (D.C. Cir. 2013).

48. The Board issued a second Notice of Proposed Rulemaking ("2014 Proposed Rule") on February 6, 2014, under the same docket number as the 2011 Proposed Rule and containing the same proposals on workplace elections. 79 Fed. Reg. 7,318.

49. In doing so, the Board remarked that the 2014 Proposed Rule was "in essence, a reissuance of the proposed rule of June 22, 2011." *Id.*

50. Except for Chairman Pearce, none of the Members on the Board when it issued the 2014 Proposed Rule served on the Board or otherwise participated in the 2011 rulemaking process.

51. The Board provided for a 60-day comment period for the 2014 Proposed Rule. The Board told commentators that it was not necessary to "resubmit any comment or repeat any argument that has already been made." *Id.* at 7,319.

52. Plaintiffs all filed comments on the 2014 Proposed Rule.

53. On April 10-11, 2014, the Board held a public hearing on the 2014 Proposed Rule.

54. Plaintiffs CDW, NAM, SHRM, and the Chamber participated, through their respective representatives, at the public hearing.

55. On December 12, 2014, the Board announced that a majority of its Members had voted to adopt a final rule, which would be published in the Federal Register on December 15, 2014 and take effect on April 14, 2015. Members Phillip A. Miscimarra and Harry I. Johnson III dissented.

56. The Final Rule was published in the Federal Register on December 15, 2014. 79 Fed. Reg. 74,308.

57. The Final Rule largely adopted the changes outlined in the 2014 Proposed Rule, with some modifications. Nonetheless, as the dissenting Board members remarked, "the Rule's primary purpose and effect remain the same: Initial representation elections must occur as soon as possible." 79 Fed. Reg. at 74,430.

58. The dissenting Board Members expressed concern that "[w]e still do not understand the reason for embarking on the path our colleagues have taken." 79 Fed. Reg. at 74,434. They wrote that "the Final Rule manifest[s] a relentless zeal for slashing time from every stage of the current pre-election procedure in fulfillment of the requirement that an election be scheduled 'at the earliest date practicable,' but the Final Rule's keystone device to achieve this objective is to have elections occur *before* addressing important election-related issues." *Id.* at 74,432.

59. "Unfortunately," the dissenting Board Members explained, "the inescapable

impression created by the Final Rule's overriding emphasis on speed is to require employees to vote as quickly as possible—at the time determined exclusively by the petitioning union—at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues." *Id.* at 74,460.

CLAIMS FOR RELIEF

COUNT I
(The Final Rule Is Not in Accordance With the NLRA, Exceeds the Board's Statutory Authority, and Violates the First and Fifth Amendments of the Constitution of the United States)

60. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further allege as follows:

61. Section 7 of the NLRA gives employees the right to "form, join, or assist" unions; to bargain collectively with their employer; or to refrain from engaging in such activities.

62. Section 6 of the NLRA authorizes the Board to promulgate "rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156.

63. Section 9(b) of the NLRA provides that "in order to assure to employees the fullest freedom in exercising the rights guaranteed by" the NLRA, the Board "shall decide in each case" the unit that is appropriate for the purposes of collective bargaining. 29 U.S.C. § 159(b).

64. Section 9(c) of the NLRA provides that, when a petition for a representation election is filed, the Board must investigate that petition and "shall provide for an appropriate hearing upon due notice" before the election is held. 29 U.S.C. § 159(c)(1). The same provision provides that "[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto."

65. The Final Rule violates the Act's requirement of an "appropriate" pre-election

hearing by restricting the employer's ability to present evidence and litigate issues of voter eligibility or inclusion in the putative bargaining unit.

66. The Final Rule also conflicts with Section 9(c)(1)'s requirement that the Board's hearing officers "shall not make any recommendations with respect" to the hearings they conduct. The Final Rule effectively vests hearing officers with decision-making authority regarding the evidence that will be admitted and the issues that will be litigated at the pre-election hearing.

67. By authorizing hearing officers to prevent employers from litigating issues as to the eligibility of certain employees to vote in the election, and by limiting the available time for the employer to communicate about the election and for employees to decide whether to vote for or against union representation, the Final Rule fails to assure employees the "fullest freedom" in exercising their rights under Section 7 of the NLRA and is otherwise contrary to Section 9(b) of the NLRA.

68. Section 8(c) of the NLRA protects an employer's freedom of speech: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisals or force or promise of benefit." 29 U.S.C. § 158(c). Section 8(c) "merely implements the First Amendment" to the United States Constitution and "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

69. By these provisions, Congress directed that employers would be given sufficient opportunity to meaningfully express their views in the election process. Specifically, Congress

determined that employers must have the opportunity to effectively communicate with their employees on the subjects of union organizing and collective bargaining. *See Chamber of Commerce v. Brown,* 554 U.S. 60, 67–68 (2008) (Section 8(c) reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide open debate in labor disputes." (internal quotation omitted)); *Nat'l Ass'n of Manufacturers v. NLRB*, 717 F.3d 947, 955 (D.C. Cir. 2013) (Section 8(c) "serves a labor law function of allowing employers to present an alternative view and information that a union would not present." (citation omitted)).

70. The Final Rule impermissibly curtails an employer's right to communicate with its employees by substantially shortening the period between an election petition and the holding of an election, and the Final Rule impermissibly limits employers' ability to exercise their rights under Section 8(c) and the First Amendment.

71. The Final Rule further violates the Free Speech Clause of the First Amendment by compelling employers to engage in certain speech during the election process, specifically a new mandatory workplace notice to be posted after the filing of a representation petition.

72. The Final Rule also deprives employers of due process in NLRB representation case proceedings, in violation of the Fifth Amendment, by preventing employers from litigating issues of voter eligibility and inclusion at the pre-election hearing, and then denying the employer the right to seek any Board review of those issues, whether pre- or post-election, by making all Board review discretionary.

73. The Board's actions are not in accordance with law, contrary to constitutional rights, and in excess of the Board's statutory jurisdiction and authority and in violation of 5 U.S.C. § 706(2)(A)-(C).

74. Unless vacated, held unlawful, and set aside, the Final Rule will adversely affect

the rights of Plaintiffs and their members.

COUNT II
(The Board's Actions Are Arbitrary and Capricious)

75. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further allege as follows:

76. "The APA commands reviewing courts to 'hold unlawful and set aside' agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (citing 5 U.S.C. § 706(2)(A)).

77. The APA also requires courts to hold unlawful and set aside agency action that is not in accordance with procedure required by law. 5 U.S.C. § 706(2)(D).

78. The Final Rule is overly broad in changing election procedures in a manner impacting all cases, as the alleged "problems" identified by the Board to justify the Final Rule exist only in a small fraction of cases.

79. The Final Rule seeks to arbitrarily expedite the election process, even though the data show that the Board already conducts elections below its established time targets in more than 90 percent of cases.

80. The Final Rule introduces no new time targets for representation elections, further undermining the rational basis for radically altering procedures that have met the agency's established time targets for many years.

81. The Final Rule promotes speed in holding elections at the expense of all other statutory goals and requirements, including but not limited to employer free speech rights and the opportunity for a full and informed debate before an election.

82. The Final Rule also mandates, for the first time in the Board's history, that

employers give their employees' personal phone numbers and email addresses to labor organizations. The Board acknowledged that "the privacy, identity theft, and other risks may be greater than the Board has estimated," but nonetheless concluded, without adequate justification and concern for employee rights, that these "risks are worth taking." 79 Fed. Reg. at 74,342.

83. The Final Rule's elimination of mandatory Board review of post-election disputes, during a period of dramatically reduced case loads, is arbitrary and capricious given the Board's statutory obligation to oversee the election process.

84. The Final Rule concludes that it will reduce election-related litigation, despite available evidence that the Final Rule's sweeping changes will reduce the high rate of election agreements, and will result in more, not less, litigation overall, including more litigation in federal court. As the dissenting Board Members explained: "An employer will now be forced to litigate in an unfair labor practice case, before the Board and in Federal court, issues that are currently reviewed by the Board in a post-election appeal as a matter of right. Given the process an employer must go through to have a Federal court of appeals review any disputed issue regarding an election, there is often substantial delay in the final resolution of the representation case." 79 Fed. Reg. at 74,451.

85. Based on the above, the Board failed to meaningfully consider numerous legal, policy, and economic factors, or to articulate a rational basis for rejecting them.

86. The Board's actions in adopting the Final Rule are arbitrary and capricious, and the Final Rule was enacted without observance of procedure required by law. 5 U.S.C. § 706(2)(A)-(D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court enter judgment in their favor and:

1. Vacate and set aside the Final Rule;
2. Declare that the Final Rule is contrary to the First and Fifth Amendments to the Constitution of the United States and to the NLRA, and in excess of the Board's statutory jurisdiction and authority;
3. Declare that Defendant violated the APA in issuing the Final Rule;
4. Declare that the Final Rule is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;
5. Enjoin and restrain Defendant, its agents, employees, successors, and all persons acting in concert or participating with Defendant from enforcing, applying, or implementing (or requiring others to enforce, apply, or implement) the Final Rule;
6. Award Plaintiffs their costs of litigation, including reasonable attorney's fees; and
7. Grant Plaintiffs such other relief as may be necessary and appropriate or as the Court deems just and proper.

Dated: January 5, 2015

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al., Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD Defendant.	Case No. 1:15-cv-00009-ABJ Judge Amy Berman Jackson

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, National Association of Manufacturers, National Retail Federation, and Society for Human Resource Management, by and through undersigned counsel, respectfully move this Court to enter summary judgment in Plaintiffs' favor. The grounds for this motion are set forth in the accompanying memorandum of points and authorities. In accordance with Local Civil Rule 7(c), a Proposed Order is attached as Exhibit 1. Plaintiffs also respectfully request oral argument.

Dated: February 4, 2015

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al., Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD Defendant.	Case No. 1:15-cv-00009-ABJ Judge Amy Berman Jackson

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

For nearly 80 years, the National Labor Relations Board has conducted workplace elections for union representation. Union elections provide all participants in the process—the union, the employer, and the employees—a critical opportunity to engage in protected speech. Congress's overarching "policy judgment . . . favoring uninhibited, robust, and wide-open debate in labor disputes"—including the "freewheeling use of the written and spoken word," *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008)—is so central to the union election process that Congress expressly guaranteed an employer's right to engage in speech concerning unionization, 29 U.S.C. § 158(c) (so long as that speech, of course, "contains no threat of reprisal or force or promise of benefit").

The Board's "ambush" or "quickie" election rule (the "Final Rule") makes sweeping changes to the election process that, as the dissenting Board Members put it, impermissibly "limit[ ] the right of all parties to engage in protected speech at precisely the time when their free speech rights are most important." Representation—Case Procedures, 79 Fed. Reg. 74,308, 74,439 (Dec. 15, 2014) (Members Miscimarra & Johnson, dissenting ("dissent")). It "improperly shortens the time needed for employees to understand relevant issues, compelling them to 'vote now, understand later.'" *Id.* at 74,430.

It also sharply curtails the statutorily mandated pre-election review of issues critical to the election process—as well as limits the taking of evidence necessary for meaningful post-election review. In these ways and others, the Final Rule is "contrary to the [National Labor Relations] Act and its legislative history, and contrary to other legal requirements directed to the preservation of employee free choice, all of which focus on guaranteeing enough time for making important decisions." *Id.* at 74,430-31.

Even if the Board's choices were permissible under the National Labor Relations Act ("NLRA"), which they are not, they are invalid under the Administrative Procedure Act ("APA"). The administrative record demonstrates a gaping disconnect between the problem the Board purported to address and the solution it adopted. The vast majority of elections go forward with no "delay" at all—and the Final Rule "does not even identify, much less eliminate, the reasons responsible for those few cases that have excessive delays." *Id.* at 74,431. Although the Board's goal of eliminating "unnecessary" litigation may be laudable, the available evidence demonstrates that the Final Rule will have the opposite effect. *Id.* at 74,449-50. And the Board declined to adopt—without a reasoned explanation—common-sense protections against the invasion of employee privacy threatened by new mandatory disclosures of personal information.

In addition to violating the NLRA and the APA, the Final Rule also runs afoul of the First Amendment's prohibition against compelled speech by impermissibly co-opting employers to deliver the government's own preferred message. The Board's mandatory disclosures on behalf of those filing petitions do not involve commercial speech but, instead, serve the interests of those seeking union representation. Such compulsion is unconstitutional.

For all these reasons, summary judgment should be granted to plaintiffs and the Final Rule vacated and set aside.

BACKGROUND

Congress has authorized the Board to conduct workplace elections regarding union representation provided certain conditions are satisfied. Section 6 of the NLRA authorizes the Board to promulgate "rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156. The Board's regulations setting forth the election procedures at

issue in this case—the Final Rule—consume, in total, almost 200 pages in the Federal Register and are codified at 29 C.F.R. part 102, subpart C.[1]

I. Plaintiffs

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and associations, directly representing 300,000 members and indirectly representing more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region of the country.

The Coalition for a Democratic Workplace ("CDW") represents millions of businesses of all sizes. Its membership includes hundreds of employer associations, individual employers, and other organizations that together employ tens of millions of individuals working in every industry and every region of the country.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women throughout the country.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—a total of 42 million working Americans.

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[1] Because this case is governed by Local Civil Rule 7(h)(2), such that any facts will be derived solely from the administrative record (and from judicial notice), Plaintiffs are not required to submit a Rule 7(h)(1) Statement of Material Facts As To Which There Is No Genuine Dispute. Because the Board has not yet filed the administrative record, Plaintiffs have attached for the Court's convenience, as Exhibits 2-11, their comments, which are part of the administrative record.

The Society for Human Resource Management ("SHRM") is the world's largest membership organization devoted to human resource management, representing more than 275,000 members in over 90,000 companies.

Plaintiffs collectively represent millions of employers and human resource professionals in companies covered by the NLRA and subject to the Final Rule. *See* Exhibit 2 (Chamber 2011 comments) at 1; Exhibit 3 (CDW 2011 comments) at 2; Exhibit 4 (NAM 2011 comments) at 1-2; Exhibit 5 (NRF 2011 comments) at 1; Exhibit 6 (SHRM 2011 comments) at 13-14. These employers, in turn, employ millions of employees who are not currently represented by a union but are covered by the NLRA and thus entitled to petition the Board to hold a representation election in accordance with the Final Rule's expedited procedures. *Id.* Unions have, in recent years, filed petitions for elections involving employees at many of the businesses represented by plaintiffs.[2] Particularly given the recent history of union election petitions involving many of the plaintiffs' member companies, it is likely that election petitions will be filed involving employees at many of these companies once the Final Rule becomes effective on April 14, 2015.

As a result of the forthcoming application of the Board's Final Rule to these petitions and elections, Plaintiffs' members will suffer the following injuries, among others:

- Less time for employers to communicate with workers about the election, in derogation of employers' free speech rights under § 8(c) of the NLRA, the First Amendment, and the clear congressional intent for a full and informed debate before workers cast their votes, 79 Fed. Reg. at 74,318-19 (citing Chamber, NAM, NRF, and SHRM comments);
- Less time for employers to investigate whether it is even appropriate for the NLRB to hold an election in the petitioned-for bargaining unit, *id.* at 74,369-73;

[2] Monthly reports of elections are publicly available on the NLRB's website. *See* NLRB, Election Reports, http://www.nlrb.gov/reports-guidance/reports/election-reports (last visited Feb. 4, 2015).

- Less time for employers to determine whether other employees should be included or excluded from the petitioned-for bargaining unit, and whether they are even eligible to vote, *id.*;
- Less time to prepare for a pre-election hearing and file a binding position statement under penalty of issue waiver, *id.*; and
- Less time for employers to negotiate a stipulated election agreement that would obviate the need for a pre-election hearing. *Id.* at 74,375 (citing CDW comments).

Plaintiffs' members also will incur economic costs before election petitions are filed because of the shortened, and inadequate, time to respond once an election petition is filed under the Final Rule. *See* Exhibit 2 (Chamber 2011 comments) at 56-57 (noting economic costs); Exhibit 4 (NAM 2011 Comments) at 24 (same); Exhibit 5 (NRF 2011 Comments) at 1-2 (same). The Board, in the Final Rule, recognized and estimated that employers will incur additional post-petition costs as well, including the new notice of petition, statement of position, voter lists, and costs related to the expedited timeline for the election process. 79 Fed. Reg. at 74,461-66.

II. Representation Election Procedures

Under long-established procedures—outlined by Board rules and regulations in 29 C.F.R. Parts 101, 102, and 103—the election process begins when an employee, union, or employer files a petition for an election with the Board. 29 C.F.R. § 101.17. The petition is filed with one of the Board's many regional offices throughout the country. *Id.* To conduct an election (and certify the results thereof), the Board, through its regional offices, initially assigns the petition to a regional staff member for a preliminary investigation. *Id.* § 101.18(a). If the petition presents reasonable cause to believe that a "question of representation" exists—that is, the regional director finds a sufficient basis to spend taxpayer resources to consider holding an election—the

regional office will proceed to hold an "appropriate" hearing concerning the petition. 29 U.S.C. § 159(c)(1). The hearing provides an opportunity for the parties to present evidence on issues that will affect the election, such as whether the employees are covered by the NLRA, whether the collective bargaining unit defined in the petition is an appropriate one, and whether certain individuals or groups of individuals would be eligible to vote in the election, or be included in the putative bargaining unit, or both. 29 C.F.R. §§ 102.64(a) & 102.66(a).

This pre-election hearing, which usually occurs within 7 to 14 days after the petition is filed, is conducted "before a hearing officer who normally is an attorney or field examiner attached to the Regional Office." *Id.* § 101.20(c). The hearing officer does not have authority to make "any recommendations" with respect to the issues presented in the hearing. 29 U.S.C. § 159(c)(1). The hearing officer only "insure[s] that the record contains a full statement of the pertinent facts as may be necessary for determination of the case." 29 C.F.R. § 101.20(c). All parties "are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions." *Id.* The record developed at the hearing is the basis for all subsequent decision-making on these issues. *Id.* § 101.21(b).

When the hearing concludes, the hearing officer does not render any decision or make any recommendations. The evidentiary record is presented to the regional director, who decides the issues in dispute before the election occurs. *Id.* The parties may file post-hearing briefs with the regional director on these issues. *Id.*

Although § 3(b) of the Act authorizes the Board "to delegate to its regional directors its powers" to "investigate and provide for hearings," to "determine whether a question of representation exists," and to "direct an election" and "certify the results thereof," it also provides an opportunity to request Board review (before the election is held) of any action taken

by regional directors. 29 U.S.C. § 153(b). Therefore, if the regional director decides to hold an election based on the evidence introduced at the pre-election hearing, the election is set for a date at least 25 to 30 days after the regional director's decision, to allow the Board sufficient time to consider a party's request to review that decision. 29 C.F.R. § 101.21(d).

After the election is held as scheduled by the regional director, the election results will be certified only after any post-election hearing and resolution of challenges and objections. *Id.* § 102.69(b)-(h). The parties are entitled to seek post-election Board review of the resolution of challenges and objections, unless restricted in some manner by an election agreement. *Id.* § 102.69(c), (e), (f). If the union wins the majority of valid votes cast in the election, the employer is obligated to engage in collective bargaining with the union over wages, hours, and other terms and conditions of employment for the employees in the bargaining unit. *See* 29 U.S.C. § 158(a)(5).

Over the last ten years, under the procedures described above, elections have occurred within a median of 38 days from the filing of the petition—below the Board's internal target of 42 days.[3] In 2013, nearly 95 percent of all elections occurred within 56 days from the filing of the petition—better than the Board's internal target of 90 percent.[4] That rate improved to 95.7 percent in 2014.[5] And the vast majority of elections—90 percent—go forward without any pre-election litigation at all because the parties negotiate some form of election agreement. 79 Fed. Reg. at 74,375.

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[3] NLRB, Summary of Operations, 2002-2012 Reports, http://www.nlrb.gov/reports-guidance/reports/summary-operations (last visited Feb. 4, 2015).

[4] NLRB, FY 2013 Performance & Accountability Report, http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/NLRB2013par.pdf, at 38 (lasted visited Feb. 4, 2015).

[5] NLRB, Summary of Operations, FY2014 Performance and Accountability Report, http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/13682%20NLRB%202014%20PAR%20v5%20-%20508.pdf, at 41 (last visited Feb. 4, 2015).

Historically, a majority of elections result in union representation. For example, unions won 71 percent of about 1,600 elections in 2011, 59 percent of about 1,550 elections in 2012, 60 percent of about 1,450 elections in 2013, and 63 percent of about 1,450 elections in 2014.[6]

III. In 2011, The Board Made Changes To The Election Rules, Which Were Set Aside By This Court

In 2011, the Board proposed sweeping changes to the election process intended to drastically reduce the time between petition and election. Representation—Case Procedures, 76 Fed. Reg. 36,812, 36,812-47 (June 22, 2011). Dissenting Member Hayes criticized the changes as not rationally related to any systemic problem of procedural delay, and criticized the Board for engaging in an illicit attempt to enshrine by "administrative fiat in lieu of Congressional action . . . organized labor's much sought-after 'quickie election,' a procedure under which elections will be held in 10 to 21 days from the filing of the petition." *Id.* at 36,831 (Member Hayes, dissenting). In the dissent's view, "the principal purpose for this radical manipulation of our election process [wa]s to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining.'" *Id.*

Less than a month after publishing the proposed rule, the Board held a two-day hearing at which nearly 70 witnesses testified (with each witness having about 5 minutes to speak). Representation—Case Procedures, 76 Fed. Reg. 80,142 (Dec. 22, 2011). Many witnesses testified against the proposed rule. *Id.* When the comment period closed, the Board had received more than 65,000 comments—many of them, like those submitted by plaintiffs here, opposed the proposed rule and offered alternatives for the Board to consider. *Id.* at 80,140.

On November 18, 2011, the Board announced that it would hold a public meeting on November 30, 2011, during which the Board would vote on a resolution concerning a modified

[6] NLRB, Election Reports, http://www.nlrb.gov/reports-guidance/reports/election-reports (last visited Feb. 4, 2015).

rule.[7] The Board issued the resolution the day before the hearing. Board Resolution No. 2011-1.[8] At the meeting, the Board adopted the resolution, including changes (immaterial to the instant litigation) to the proposed rule. *Chamber of Commerce of the United States v. NLRB*, 879 F. Supp. 2d 18, 22-23 (D.D.C. 2012). At some point within the next month, Board Chairman Pearce and then-Member Becker voted to approve the rule as modified. *Id.* at 23-24. The final rule issued on December 22, 2011 ("2011 Final Rule"). 76 Fed. Reg. at 80,138. Then-Member Hayes did not participate in the vote, but subsequently published a dissent. *Chamber of Commerce*, 879 F. Supp. 2d at 23-24; *see also* Representation, Case Procedures, 77 Fed. Reg. 25,548-75 (Apr. 30, 2012) (Member Hayes, dissenting).

Two of the plaintiffs in the instant litigation, Chamber and CDW, challenged the 2011 Final Rule in this Court. *Chamber of Commerce*, 879 F. Supp. 2d at 21. In May 2012, the Court set aside the 2011 Final Rule on the ground that the Board lacked a statutory quorum when it approved the rule. *Id.* at 28-30. The Court did not "reach—and expresse[d] no opinion on—Plaintiffs' other procedural and substantive challenges to the rule." *Id.* at 30. The Board appealed the decision, but subsequently sought and obtained voluntary dismissal of its own appeal. *Chamber of Commerce of the United States v. NLRB*, No. 12-5250, 2013 WL 6801164, at *1 (D.C. Cir. Dec. 9, 2013).

IV. In 2014, The Board Issued The Final Election Rule Challenged Here

In February 2014, the Board issued a second Notice of Proposed Rulemaking ("2014 Proposed Rule") under the same docket number as the 2011 Proposed Rule and containing the same proposals on elections. Representation—Case Procedures, 79 Fed. Reg. 7318 (Feb. 6,

[7] NLRB, NLRB Sets Vote on Portions of Proposed Election Rule (Nov. 18, 2011), http://www.nlrb.gov/news-outreach/news-story/nlrb-sets-vote-portions-proposed-election-rule (last visited Feb. 4, 2015).

[8] NLRB, Board Chairman Releases Details of Election Proposal for Wednesday Vote (Nov. 29, 2011), http://www.nlrb.gov/news-outreach/news-story/board-chairman-releases-details-election-proposal-wednesday-vote (last visited Feb. 4, 2015).

2014). In doing so, the Board remarked that the 2014 Proposed Rule was "in essence, a reissuance of the proposed rule of June 22, 2011." *Id.*

Among other changes, the Board proposed:

- To require employers to post a workplace notice immediately after a petition is filed;
- To require employers to disclose to unions the personal information of employees including personal telephone numbers and email addresses;
- To severely limit the scope of pre-election hearings to focus solely on whether there is a "question of representation," meaning:
    - Hearing officers could exclude evidence unrelated to the basic question of whether the Board should hold an election; and
    - The parties would not have the right to present evidence on important issues affecting the election, such as whether certain employees or groups of employees are eligible to vote in the election;
- To eliminate the mandatory 25-30 day period between the regional director's decision to hold an election and the election itself; and
- To eliminate post-election Board review as a matter of right and make it solely at the Board's discretion.

Id. at 7318-37.

The Board provided for a 60-day comment period and informed commenters that it was not necessary to "resubmit any comment or repeat any argument that has already been made." *Id.* at 7319. To ensure that the Board understood the ramifications of its proposed actions, however, many commenters who previously submitted comments (like plaintiffs) did so again, highlighting the disconnect between the proposed changes and the Board's election-handling

performance in recent years, and recommending that the Board focus instead on the small subset of cases actually delayed under current procedures. *See, e.g.*, 79 Fed. Reg. at 74,315-17, 74,419; *see also* Exhibits 2-11 (copies of plaintiffs' 2011 & 2014 comments). Commenters asserted that the proposed changes conflict with the NLRA, particularly with §§ 3, 8(c), and 9. *Id.* at 74,318-19, 74,385-86, 74,395. Commenters expressed further concern that the proposed changes, contrary to the Board's stated goal of reducing election-related litigation, would actually increase it by reducing the time and incentives to enter election agreements. *Id.* at 74,324, 74,334, 74,388, 74,408-09. Under the Board's current procedures, there is no pre-election litigation in more than 90 percent of cases because the parties enter into an election agreement. *Id.* at 74,375.

Commenters offered various alternatives to the changes proposed by the Board. To address privacy concerns raised by the mandatory release of employee personal information, commenters proposed offering employees an opt-out procedure (an "unsubscribe" option for election-related texts and emails), imposing penalties for misuse of the information, and requiring the lists containing the information to be destroyed after the election. *Id.* at 74,341-42, 74,346, 74,358-60.

The Board announced its adoption of the Final Rule on December 12, 2014, and published it in the Federal Register three days later.[9] Members Miscimarra and Johnson submitted a lengthy dissent highlighting the numerous, serious flaws they perceived in the Final Rule. *Id.* at 74,430 (dissent). Expressing regret that the Board declined to pursue a more targeted approach that could have garnered broad, bipartisan support without creating a conflict with the Board's statutory mandate, the dissent argued that the Rule's "election now, hearing later" and "vote now, understand later" approach violates both the NLRA and the APA. *Id.*

[9] NLRB, NLRB Issues Final Rule to Modernize Representation-Case Procedures (Dec. 12, 2014), http://www.nlrb.gov/news-outreach/news-story/nlrb-issues-final-rule-modernize-representation-case-procedures (last visited Feb. 4, 2015).

Specifically, the dissent identified conflicts with the NLRA that are created by the Final Rule's quest for "quickie elections"; curtailment of robust debate and free speech; limitations on the scope of pre-election hearings and the type of evidence that may be taken in those hearings; allowance of *ultra vires* decision-making and recommendations by hearing officers; and imposition of unequal burdens on employers. The dissent further argued that even if the Final Rule did not conflict with the NLRA, it was still arbitrary and capricious under the APA given the lack of a coherent rationale; the conflict between the Board's determinations and the actual evidence before it; and the Board's failure to meaningfully address evidence that reducing the opportunity for pre-election and post-election Board review would result in more litigation, not less, and jeopardize the stipulated-election agreements that govern 90 percent of Board-conducted elections. *Id.* at 74,434-52.

The dissent further argued that the Final Rule implicates serious constitutional concerns by infringing on protected speech and raising due process concerns. *Id.* at 74,431-36. The dissent noted the "great care" the Board has taken in the past "to avoid interpreting and applying [NLRA § 8(c)] in a manner that raises serious constitutional concerns regarding free speech infringement." *Id.* at 74,440 (citing *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797, 807-11 (2010)). The dissent echoed the employee-privacy concerns raised by the commenters, *id.* at 74,452-55, and lamented that the Board's insistence on pursuing the course adopted in the Final Rule made consensus impossible on reforms the dissenting members might also have embraced. *Id.* at 74,431. In the dissent's view, the Final Rule was so flawed in so many respects that they "must dissent from the Final Rule including all its parts." *Id.*

The Rule is set to take effect on April 14, 2015. *Id.* at 74,308.

STANDARD OF REVIEW

The Final Rule is agency action subject to judicial review under the APA, 5 U.S.C. § 706. Under § 706, a reviewing court must "'hold unlawful and set aside' agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting 5 U.S.C. § 706(2)(A)). A court must also invalidate any agency action that is "contrary to constitutional right," 5 U.S.C. § 706(2)(B), "in excess of statutory jurisdiction, authority, or limitations," *id.* § 706(2)(C), or that fails to "observ[e] … procedures required by law," *id.* § 706(2)(D).

"[W]hen a party seeks review of agency action under the APA . . . [t]he 'entire case' on review is a question of law" and may be resolved on a motion for summary judgment. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). The Court's review is generally confined to the administrative record before the Board when it issued the Final Rule. *See, e.g.*, *Brodie v. U.S. Dep't of Health & Human Servs.*, 796 F. Supp. 2d 145, 150 (D.D.C. 2011). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Id.* Where a plaintiff prevails on its APA challenge, vacating the agency action and remanding to the agency is the standard remedy. *See, e.g.*, *Am. Bioscience, Inc.*, 269 F.3d at 1084; *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 163 (D.D.C. 2002) ("As a general matter, an agency action that violates the APA must be set aside.").

ARGUMENT

I. The Final Rule Is Contrary To §§ 3, 8, And 9 Of The NLRA.

Where, as here, an APA challenge "involves an agency's interpretation of its governing statute, *Chevron*'s familiar framework applies." *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567

F.3d 659, 663 (D.C. Cir. 2009) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Under that framework a reviewing court first asks if the statute itself resolves the issue—and if so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 (footnote omitted). An agency interpretation fails that standard if it "runs counter to the unambiguously expressed intent of Congress" as expressed through the Act's "text, legislative history, and structure as well as its purpose." *Shays v. FEC*, 414 F.3d 76, 96, 105 (D.C. Cir. 2005). If the statute is ambiguous—that is, if the congressional mandate is susceptible of more than one interpretation—then a reviewing court considers whether the agency's interpretation of the statute is a reasonable one. *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1049 (D.C. Cir. 1997).

Under *Chevron*, a reviewing court has "a duty to conduct an 'independent examination' of the statute in question looking not only 'to the particular statutory language at issue,' but also to 'the language and design of the statute as a whole.'" *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1, 9 n.4 (D.C. Cir. 2011) (quoting *Martini v. Fed. Nat'l Mortg. Ass'n*, 178 F.3d 1336, 1345-46 (D.C. Cir. 1999)). "For this purpose the court 'must first exhaust the traditional tools of statutory construction.'" *Office of Commc'n, Inc. of United Church of Christ v. FCC*, 327 F.3d 1222, 1224 (D.C. Cir. 2003) (quoting *Bell Atl.*, 131 F.3d at 1047). "The traditional tools include examination of the statute's text, legislative history, and structure, as well as its purpose." *Bell Atl.*, 131 F.3d at 1047 (internal citations omitted); *see also Hammontree v. NLRB*, 894 F.2d 438, 444 (D.C. Cir. 1990). It is a cardinal principle of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly

contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fl. Gulf Coast Build. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

In this case, the Final Rule fails the *Chevron* analysis because it creates a process for handing representation elections that is irreconcilable with §§ 3, 8, and 9 of the Act. First, the Final Rule improperly limits pre-election hearings by allowing hearing officers to exclude evidence regarding fundamental issues affecting the election, such as whether certain employees or groups of employees are eligible to vote in the election. The exclusion of this evidence prevents effective pre-election consideration of those issues by the regional director or the Board in violation of §§ 3(b) and 9(c)(1) of the NLRA, and undermines effective post-election review of any sort as well.

Most fundamentally, the Final Rule violates § 9(c)(1)'s requirement of an "appropriate" pre-election hearing by creating a "quickie election" process that resembles legislative proposals Congress considered and rejected in amending the Act in 1947 and 1959. The Rule's operative premise—speed at all costs—is squarely contradicted by legislative history indicating that Congress believed that there should be a period of at least 30 days between the petition and the election in order to ensure that employees are adequately informed before they cast their votes. In all events, an "appropriate hearing" must be one that conforms with the Fifth Amendment's guarantee of due process, and the system left in place by the Final Rule fails on that score.

Second, the Final Rule improperly truncates informed debate regarding union representation, contrary to §§ 8(c) and 9(b) of the Act—statutory text that reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes." *Brown*, 554 U.S. at 67-68 (internal quotation marks and citation omitted). Depriving the parties of adequate time for that debate, the new Rule rushes them into

an uninformed election. Indeed, the Final Rule subverts the Act's primary purpose—to permit sufficient time and information to "assure . . . the *fullest* freedom in exercising the rights guaranteed by [the] Act," 29 U.S.C. § 159(b) (emphasis added)—and improperly interferes with the free speech rights protected under § 8(c) of the Act, 29 U.S.C. § 158(c), and guaranteed by the First Amendment. At a minimum, the agency's interpretation of its statutory mandate is constitutionally suspect and should thus be avoided.

A. The Final Rule Violates The NLRA By Undermining The Statutorily Guaranteed "Appropriate Hearing."

The Final Rule severely restricts the scope of the pre-election hearing required by the NLRA. Under the Final Rule, the hearing officers who preside over pre-election hearings are advised to exclude evidence on fundamental issues affecting the election, including supervisory status and other issues of voter eligibility or inclusion. *See* 29 C.F.R. § 102.64(a) ("Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted."); *id.* § 102.66(a) (a party's indisputable right to introduce at the pre-election hearing is now limited to "the existence of a question of representation"). This contradicts the fundamental understanding—recognized by the Supreme Court, Congress, and the Board itself—that Congress required an "appropriate hearing" to give interested parties a full and adequate opportunity to present their evidence on *all* substantial issues. By allowing the exclusion of evidence on important election issues of voter eligibility, inclusion, and supervisory status, the Final Rule fails to provide an "appropriate" pre-election hearing for all employers as required under § 9(c)(1) of the NLRA, thus precluding the creation of an adequate record for decision-making or subsequent review.

1. Congress has already spoken to the issue of an "appropriate" pre-election hearing.

Section 9(c)(1) establishes the process that must be followed after a representation petition is filed, including the requirement of an "appropriate" pre-election hearing and an adequate "record of such hearing" to permit resolution by the Board of election-related issues:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . 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 thereto.

29 U.S.C. § 159(c)(1) (emphases added). Section 9(c)(1) necessarily requires "an appropriate hearing upon due notice" *before* an election, because the hearing provides the basis for the Board to determine whether and how an election shall occur. *Id.* The right to a pre-election hearing is reinforced by § 9(c)(4), which only permits "the waiving of hearings by stipulation." *Id.* § 159(c)(4).

Congress further intended that hearing officers who preside over pre-election hearings perform only an evidence-gathering function, not a decision-making function. Under §§ 4(a) and 9(c)(1) of the NLRA, Board members (or, under the delegation authority set forth in § 3(b), regional directors) are exclusively responsible for all decision-making in representation cases. Indeed, § 9(c)(1) prohibits hearing officers from having *any* decision-making authority—they cannot even make "any recommendations." *Id.* § 159(c)(1). Moreover, "[t]he Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts."

29 U.S.C. § 154(a). The Act thus vests all decision-making authority on election-related issues exclusively in Board members (or regional directors by delegation).

What is more, the pre-election hearing record provides the sole basis for the following key decisions (among others):

- Whether the Board's jurisdictional standards and other prerequisites for an election are satisfied;
- What constitutes the "appropriate bargaining unit" for purposes of the election; and
- Whether particular individuals are eligible to vote, whether such issues require resolution before any election, and if so how they should be resolved.

29 U.S.C. §§ 153(b), 159(c)(1).

And the NLRA requires that "any interested person" have a *pre-election* opportunity to seek Board review of "*any action* of a regional director" delegated under § 3(b). 29 U.S.C. § 153(b) (emphasis added). This pre-election review is the only mechanism for the Board to order a "stay of *any action* taken by the regional director." *Id.* For the Board to review "any action" of a regional director and decide whether to issue a stay of the election, there necessarily must be record evidence on the issues that are subject to review—in particular, issues of voter eligibility, inclusion, and supervisory status. Even if the regional director decides to defer a decision on voter eligibility issues until after the election, there still must be an evidentiary record concerning those issues for the Board to consider in reviewing the propriety of the regional director's decision to defer resolution of those issues—a decision that may well affect the validity of the entire election. *See Barre-Nat'l, Inc.*, 316 NLRB 877, 878 n.9 (1995) (noting that the right to present evidence at a pre-election hearing is distinct from the issue whether the regional director or Board makes a pre-election decision based on that evidence).

The statutory conflict between the NLRA and the Final Rule is further evidenced by the Rule rendering superfluous a provision of the statute that authorizes an expedited election procedure. *See* 29 U.S.C. § 158(b)(7)(C). The § 8(b)(7) exception applies when a union engages in so-called "recognitional picketing"—picketing intended to force the employer to recognize a union as the bargaining representative of its employees—and an employer files an unfair labor practice charge as a result. *Id.* Under the Board's implementing regulations for that statutory provision, where there is recognitional picketing "the Director may, *without a prior hearing*, direct that an election be held in an appropriate unit of employees" and "fix[] the basis of eligibility of voters . . . ." 29 C.F.R. § 101.23(b) (emphasis added). Section 8(b)(7)(C) was "designed to shield employers and employees from the adverse effects of prolonged recognitional or organizational picketing and to provide a procedure whereby the representation issue that gave rise to the picketing could be resolved as quickly as possible." *Teamsters Local Union No. 115 (Vila-Barr Co.)*, 157 NLRB 588, 589 (1966).

But as the Board has explained, when Congress created that expedited election procedure, it also "rejected efforts . . . to dispense generally with preelection hearings" in all other representation cases. *Int'l Hod Carriers Bldg. & Common Laborers Union of Am.*, 135 NLRB 1153, 1154, 1157 (1962) ("The expedited election procedure is applicable, of course, only in a Section 8(b)(7)(C) proceeding."). The Final Rule would effectively implement an expedited procedure for *all* § 9(c) cases—rendering superfluous the statutorily provided expedited process in cases of recognitional picketing.

The history of amendments to the NLRA's text further confirms the importance, and required scope, of the pre-election hearing. From the beginning, Congress attached importance to the development of an adequate record in election hearings, including evidence pertaining to

election issues generally. *See, e.g.*, 79 Fed. Reg. at 7343 n.100 (citing S. Rep. No. 74-573, at 14 (1935), reprinted in 2 NLRB, Legislative History of the NLRA, 1935, at 2314 (hereinafter "NLRA Hist.")) (in representation cases the "entire election procedure becomes part of the record," providing a "guarantee against arbitrary action by the Board" (internal quotation marks omitted)); H.R. Rep. No. 74-1147, at 23 (1935), reprinted in 2 NLRA Hist. at 3073 ("The hearing required to be held in any [representation] investigation provides an appropriate safeguard and opportunity to be heard."). But as the Supreme Court explained, the NLRA as originally enacted in 1935 did not require the Board to hold elections at all, much less to hold pre-election hearings. *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 707 (1945). The Board thus held a number of "prehearing elections"—*i.e.*, elections conducted before a hearing was held to determine the scope of the bargaining unit and the eligibility of certain employees to vote in the election.[10] The Board's rules and regulations in effect at the time entitled parties to a pre-election hearing only if "substantial issues" were raised. *See NLRB v. S. W. Evans & Son*, 181 F.2d 427, 430 (3d Cir. 1950). Such issues concerned the "[bargaining] unit, eligibility to vote, and timeliness of the election." *Id.* at 430.

In 1947, Congress amended the Act to make pre-election hearings mandatory by adding §§ 9(c)(1) and (4) to the Act. 29 U.S.C. §§ 159(c)(1) & (4). These require the Board to conduct the "appropriate hearing" *before* any election, and permit "the waiving of hearings" *only* "by stipulation" of all parties. *Id.*; *see also S. W. Evans*, 181 F.2d at 429 (noting that the amended Act now makes mandatory a pre-election hearing"); *Utica Mut. Ins. Co. v. Vincent*, 375 F.2d

[10] *See, e.g.*, H.R. Rep. No. 86-741, at 24 (1959), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 782 (1974) (hereinafter "LMRDA Hist.") ("During the last 19 months of the Wagner Act . . . a form of prehearing election was used by the NLRB."); S. Rep. No. 86-187, at 30 (1959), *reprinted in* 1 LMRDA Hist. 426 (the practice of holding prehearing elections "was tried in the last year and a half prior to passage of the Taft-Hartley Act, but it was eliminated in that [A]ct").

129, 133-34 (2d Cir. 1967) (noting that "under the amendment the hearing must invariably precede the election").

The purpose of pre-election hearings, as reflected in the legislative history of the 1947 amendments, is to collect evidence concerning all of the issues relevant to the election—including the eligibility of employees to vote in the election:

> Obviously, ***there can be no choice of representatives and no bargaining unless units for such purposes are first determined.*** And employees themselves cannot choose these units, because ***the units must be determined before it can be known what employees are eligible to participate in a choice of any kind.***
>
> This provision is similar to section 2 of 1934 amendments to the Railway Labor Act (48 Stat. 1185), which states that—In the conduct of any election for the purpose herein indicated the Board shall designate ***who may participate in the election*** and establish the rules to govern the election.

S. Rep. No. 74-573, at 14 (1935), *reprinted in* 2 NLRA Hist. 2313 (emphases added); *see also* 76 Fed. Reg. at 80,165 n.116 (citing 93 Cong. Rec. 7002 (1947), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1625 (supplemental analysis of LMRA by Senator Taft—the principal sponsor of the 1947 amendments)) (noting that the House rejected a provision authorizing pre-election hearings). Congress thus intended that issues of voter eligibility and inclusion would *not* be litigated separately (and post-election) from issues concerning the appropriateness of the bargaining unit.

When it amended the Act again in 1959, Congress once more rejected proposals to permit the Board to conduct elections with no pre-election hearing. *See* H.R. Rep. No. 86-741, at 24-25 (1959), *reprinted in* 1 LMRDA Hist. 782-83. Conference Committee members who opposed the proposals for pre-hearing elections regarded them as improperly effectuating "quickie elections," and insisted on leaving unchanged the conventional role played by pre-election hearings. 105 Cong. Rec. A8062 (1959) (conf. report), *reprinted in* 2 LMRDA Hist. 1813 (opposing "pre-

hearing or so-called quickie election" and stating that the "right to a hearing is a sacred right"). As an alternative to scaling back pre-election hearings, Congress adopted the language in § 3(b) of the Act authorizing the Board to delegate its election responsibilities to regional directors, subject to each party's right to seek pre-election Board review regarding "any action" by regional directors, including the right to seek a Board-ordered "stay" of any election. 29 U.S.C. § 153(b). The ranking House conferee, Chairman Barden, described the approach as follows:

> The conferees adopted a provision that there should be some consideration given to expediting the handling of some of the representation cases. Therefore, the Board is authorized, but not commanded, to delegate to the regional directors certain powers which it has under section 9 of the act.
>
> Upon an appeal to the Board by any interested party the Board would have the authority to review and stay any action of a regional director, delegated to him under section 9. But the hearings have not been dispensed with. *There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out.* The right to a formal hearing before an election can be directed is preserved without limitation or qualification.

105 Cong. Rec. 16,629 (1959), *reprinted in* 2 LMRDA Hist. 1714 (emphasis added), *describing* H.R. Rep. No. 86-1147, at 1 (1959) (conf. report), *reprinted in* 1 LMRDA Hist. 934. Chairman Barden expressed opposition to any "so-called quicky election," again stating that "[t]he right to a hearing is a sacred right . . . ." 105 Cong. Rec. A8062 (1959) (conf. report), *reprinted in* 2 LMRDA Hist. 1813.

The failure of the proposed reform underscores the conflict between the Final Rule and congressional intent concerning the election process. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" (quoting *NLRB v. Bell Aerospace Co.*, 416

U.S. 267, 275 (1974))). The Board is attempting to implement, through rulemaking, the very type of expedited election process that Congress rejected. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137-39 (2000). This attempt cannot survive *Chevron* scrutiny.

2. The Final Rule deprives employers of an appropriate hearing, as the Board has previously recognized.

The Final Rule should be set aside because it eviscerates the pre-election hearing and takes numerous steps to slash the time between the petition and election—thereby adopting the very type of expedited election system that Congress has repeatedly rejected. By authorizing regional directors and hearing officers to reject evidence on the scope of the bargaining unit for voter eligibility and inclusion purposes, the Final Rule makes the taking of evidence useless for all of the decision-making required under §§ 3 and 9 (except on the narrow issue whether an election of some kind is required under the Act). Significantly, the Final Rule suggests that evidence pertaining to voter eligibility should be excluded from the pre-election hearing even if the relevant issues affect a substantial portion of the bargaining unit. 29 C.F.R. § 102.64(a).

This approach is "not in accordance" with the Act, 5 U.S.C. § 706(2)(A), since it is contrary to the requirement in § 9(c)(1) that in all cases, absent stipulation otherwise, an "appropriate hearing" must be conducted before the election. Congress provided that an "appropriate hearing" must include the "full and adequate opportunity" to present evidence on *all* issues related to the election and disputed by the parties: "We think the statutory purpose . . . is to provide for a hearing in which interested parties shall have full and adequate opportunity to present their objections." *Inland Empire*, 325 U.S. at 708; *see also S. W. Evans*, 181 F.2d at 430 (parties entitled to pre-election hearing to present substantial issues related to the election). And when the pre-election hearing is bypassed, the foreseeable result will be more post-election

litigation and more elections set aside after the fact. *See* 79 Fed. Reg. at 74,445 (dissent); *see also infra* 33-40.

The Final Rule's shortcoming here is confirmed by its rejection of over 60 years of agency practice under the § 9(c)(1) framework adopted by Congress in 1947. The Board reaffirmed, during the Clinton Administration and with all members agreeing, that § 9(c) limits its authority to narrow the scope of pre-election hearings. Specifically, the Board recognized that § 9(c) provides a *statutory* right to introduce evidence on issues of voter eligibility and inclusion at the pre-election hearing. *See Barre-Nat'l, Inc.*, 316 NLRB 877; *see also N. Manchester Foundry, Inc.*, 328 NLRB 372 (1999) (affirming requirement to allow evidence-taking at pre-election hearing). All of the participating Board members held that § 9(c) of the Act itself—not just the Board's then-existing regulations—require the Board to permit parties to present evidence in support of their positions at a pre-election hearing.

For example, in *Barre-National*, the regional director instructed the hearing officer to refuse to allow the employer to present evidence at a hearing regarding the supervisory status of a group of employees that constituted eight to nine percent of the potential bargaining unit. 316 NLRB at 877. Instead, the regional director permitted only an offer of proof by the employer and—similar to what the Final Rule would accomplish—permitted the employees to vote subject to challenge, leaving the evidence gathering and resolution of the supervisory issue to the post-election challenge procedure.

The Board held that the regional director erred by refusing to allow the employer to present this evidence. According to the Board, the pre-election hearing "did not meet the requirements *of the Act* and the Board's Rules and Statements of Procedure." *Id.* at 878 (emphasis added); *see also N. Manchester Foundry*, 328 NLRB at 372-73 (holding that pre-

election hearing "did not meet the requirements *of the Act*, or of the Board's Rules" because the hearing officer "precluded the employer from presenting witnesses and introducing evidence in support of its contention that certain individuals were not eligible voters" (emphasis added)).

The Board cannot discharge its § 3(b) authority over all representation cases—to effectively decide whether issues of voter eligibility require pre-election resolution, how they should be resolved, or whether there should be a stay of the election pending resolution of such matters—without an adequate hearing record at the regional office level, including all evidence that reasonably bears on those issues. And if the Board's delegate admits evidence only on, for example, *whether* an appropriate bargaining unit exists, but excludes evidence of *who* may be in the bargaining unit or eligible to vote in the election, the review promised by statute becomes illusory and the election results themselves suspect.

Even if Congress left the definition of an "appropriate hearing" to the Board's unfettered discretion—which it did not—avoiding due process concerns would supply an additional reason to reject the Board's interpretation of the NLRA to permit the evisceration of the pre-election hearing that must take place absent an election agreement. *Cf. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) ("[I]n the absence of a clear expression of Congress' intent . . . we decline to construe the [NLRA] in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.").

The Fifth Amendment precludes government decisions that would otherwise deprive a party of liberty or property and "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Here, as the dissent

explains, the "private interests affected by this extraordinary government action are substantial" and include "the potential deprivation in every election proceeding of the statutorily assured right of parties to full pre-hearing litigation [and] the fundamental right of an employer . . . to ensure that a certified union truly represents a majority of employees in an appropriate bargaining unit." 79 Fed. Reg. at 74,451 (dissent). At the least, the hearing left in place by the Final Rule—a hearing that allows exclusion of evidence on important questions before an election—raises serious constitutional questions and should therefore be rejected.

For these reasons, the Final Rule is irreconcilable with the statutory scheme established by Congress and should be vacated.

B. The Final Rule Conflicts With The NLRA By Impermissibly Limiting Robust Debate And Depriving Employees Of An Informed Election.

The Final Rule also conflicts with § 8(c) of the NLRA, a critical piece of the NLRA's election scheme. Section 8(c) protects the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form," provided there is no "threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). The § 8(c) free-speech guarantee reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes." *Brown*, 554 U.S. at 67-68 (internal quotation marks and citation omitted). Robust debate is thus indispensable to the procedure for free and fair elections established by the NLRA.

Consistent with § 8(c), "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The time during the critical pre-election "campaign" period is when employers can provide information to their employees regarding the election and the consequences of unionization. *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 955

(D.C. Cir. 2013) (hereinafter "*NAM*"), *overrruled on other ground by Am. Meat Inst. v. United States, Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc) (noting that § 8(c) "serves a labor law function of allowing employers to present an alternative view and information that a union would not present." (internal quotation marks and citation omitted)).

The Act does not just protect the free speech rights of employers. The NLRA also gives employees the right "to bargain collectively through representatives of their own choosing . . . and to refrain from . . . such activit[y] . . . ." 29 U.S.C. § 157. Section 9(b) provides that "[t]he Board shall decide in each case whether, in order to assure *to employees* the *fullest freedom* in exercising the rights guaranteed by [the Act], the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b) (emphases added). The "fullest freedom" requirement is reinforced by the protection of free speech rights in § 8(c). *Gissel Packing Co.*, 395 U.S. at 617.

But these rights are meaningful only if the parties have sufficient time to engage in free speech *before* an election. *See* 79 Fed. Reg. at 74,438 (dissent) ("[The right to engage in protected speech before an election] only has meaning if there is sufficient time for the parties to communicate with employees about the choice of representation."); *cf. Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976), *superseded by statute on other ground as stated in McConnell v. FEC*, 124 S. Ct. 619 (2003) ("Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."). An election can affect workers for years to come. This is exactly why Congress and the courts guarantee, and protect, employer free speech rights in the labor relations setting. *NAM*, 717 F.3d at 955.

It is impossible to square Congress's policy judgment in favor of *robust* debate with the Board's directive that regional directors schedule elections *as quickly as possible*, regardless of other statutory objectives and requirements that do not support the fastest possible NLRA elections. When elections can take place in as little as two weeks from the filing of the petition, parties "will have too little time[,] measured by any reasonable standard," for robust debate to occur. 79 Fed. Reg. at 74,439 (dissent).

The Board's curtailment of debate mirrors the sort that courts have routinely rejected when applied to political electioneering. *Id.* at 74,439 n.588 (dissent) (citing *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating state ban on election-day newspaper editorials); *Emineth v. Jaeger*, 901 F. Supp. 2d 1138 (D. N.D. 2012) (enjoining state ban on all electioneering on election day); *Curry v. Prince George's Cnty., Md.*, 33 F. Supp. 2d 447, 454-55 (D. Md. 1999) (invalidating county ban on display of political signage for all but 45 days before and 10 days after a political election)). This is especially true where, as (regrettably) here, the government seeks to privilege some speech based on its content. *See* 79 Fed. Reg. at 74,440 (dissent) ("It is apparent from the statements of numerous commentators supporting the Rule that . . . the Final Rule will specifically disadvantage anti-union speech more than pro-union speech," by depriving employers of sufficient time to express their views against unionization, "and will correspondingly enhance a petitioning union's chances of electoral success."). The Board was never meant to have the power to suppress debate, much less to the advantage of one side.

The Board's stated justification for impinging on § 8(c) rights revolves around the idea that employers still have time to speak, either before an election petition is filed or during the limited time between the filing of the petition and the election. *Id.* at 74,319. This explanation does not withstand scrutiny. An employer's ability to make general, pre-petition observations

about unions is no substitute for post-petition speech. It is the filing of the petition that "initiates what the Board and the courts consider the 'critical period' prior to the election, a period during which the representation choice is imminent and speech bearing on that choice takes on heightened importance." *Id.* at 74,439-40 & n.591 (dissent) (citing *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962); *E.L.C. Elec., Inc.*, 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc.*, 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir. 2012); *NLRB v. Curwood Inc.*, 397 F.3d 548, 553 (7th Cir. 2005)).

Moreover, the legislative history of the 1959 amendments demonstrates that Congress believed that at least 30 days between petition and election was necessary to adequately assure employees the statutorily guaranteed "fullest freedom" in choosing whether to be represented by a union. As explained by then Senator John F. Kennedy, Jr., who chaired the Conference Committee, a 30-day period before an election is a necessary "safeguard against rushing employees into an election where they are unfamiliar with the issues." 105 Cong. Rec. 5361 (1959), *reprinted in* 2 LMRDA Hist. 1024 (emphasis added). Senator Kennedy stated "there should be at least a 30-day interval between the request for an election and the holding of the election," and he opposed an amendment that failed to provide "at least 30 days in which both parties can present their viewpoints." *Id.* at 5770, *reprinted in* 2 LMRDA Hist. 1085; *see also* H.R. Rep. No. 86-741, at 25 (1959), *reprinted in* 1 LMRDA Hist. 783 (30-day period was designed to "guard[] against 'quickie' elections").

Notably, until now, the Board's own procedures, consistent with congressional intent, have required the interval between petition and election to be longer than 30 days (absent stipulation by the parties). Under those procedures, at least 7 days were required before the pre-

election hearing, 76 Fed. Reg. at 80,139; an additional 7 days elapsed before the filing of post-hearing briefs, *id.* at 80,140; and regional directors were instructed not to schedule an election sooner than 25-30 days after directing an election. *Id.* These rules resulted in a pre-election period of at least 39 days from the filing of a petition (again, excluding situations where the parties voluntarily agreed to a shorter pre-election period).

Congress's rejection of pre-hearing election proposals based on opposition to "quickie elections" demonstrates that Congress believed a minimum period of 30 days after the filing of a petition was necessary for employers and employees to enjoy the "fullest freedom" in connection with representation elections. Indeed, Congress specifically rejected proposals to expedite the Board's pre-election procedures based on concerns that elections would take place *too quickly* to satisfy the Act's objective of giving employees (and employers) "the fullest freedom in exercising the rights guaranteed by [the] Act." 29 U.S.C. § 159(b); *see* 105 Cong. Rec. 16,629 (1959), *reprinted in* 2 LMRDA Hist. 1714, *describing* H.R. Rep. No. 86-741, at 1 (1959), *reprinted in* 1 LMRDA Hist. 934 ("There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out."). The Final Rule's deliberate attempt to reduce the time for free speech and debate to much less than 30 days—potentially cutting that minimum time in half—thus contravenes clear congressional intent. The Board does not have "general authority to define national labor policy by balancing the competing interests of labor and management." *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965); *see Hammontree*, 894 F.2d at 441 (rejecting the Board's argument that in light of "competing" objectives it has discretion to disregard one of Congress' goals).

As the dissent explains, the Board's rationale for limiting the opportunity for free speech is "the hallmark characteristic associated with *every* infringement on free speech: the government

simply determines the speech is not necessary." 79 Fed. Reg. at 74,440 (dissent). But Congress has already made a specific, contrary policy judgment in favor of robust debate. The Final Rule cannot be reconciled with—and, indeed, thwarts—that legislative judgment. Furthermore, the Rule's impingement on free speech unacceptably creates "serious constitutional difficulties" with the First Amendment that cannot stand. *See AFL-CIO v. FEC*, 333 F.3d 168, 175-79 (D.C. Cir. 2003). For these reasons, too, the Final Rule conflicts with the NLRA and should be set aside.

II. The Final Rule Is Arbitrary And Capricious In Violation Of The APA.

Even if the Final Rule were consistent with the NLRA, which it is not, it would still violate the APA because it is arbitrary and capricious. Agency action is arbitrary and capricious when the agency has not engaged in "reasoned decision-making"—that is, the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to . . . the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Moreover, the "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014).

The hundreds of pages in the Board's Final Rule contain remarkably little logic or sound explanation for the sweeping changes made by the Final Rule—which "leaves unanswered the most fundamental question regarding any agency rulemaking, which is whether and why rulemaking is necessary." 79 Fed. Reg. at 74,431 (dissent).

All available evidence indicates that the vast majority of election cases go forward with no "delay" at all—and the Final Rule "does not even identify, much less eliminate, the reasons responsible for those few cases that have excessive delays." *Id.* As for the Board's goal of

eliminating "unnecessary" litigation in the representation-election process, the available evidence demonstrates instead that the Final Rule will have the opposite effect. *Id.* at 74,449-50 (dissent). As the dissent sums up, "the available data do not provide a rational basis for the Final Rule's wholesale reformulation of election procedures." *Id.* at 74,434. Indeed, the record squarely contradicts the purported reasons for the Final Rule. Because the Board has thus "offered an explanation for its decision that runs counter to the evidence," *State Farm*, 463 U.S. at 43, the Final Rule must be set aside. *See Chevron*, 467 U.S. at 842-43; *Sorenson*, 755 F.3d at 709-10.

A. The Final Rule Unnecessarily Abandons Established Procedures For Unexplained Reasons, Despite The Board's Undisputed Success In Timely Conducting Elections.

In light of all available objective data regarding the Board's election-related performance measures, the Final Rule is best characterized as a "solution in search of a problem." 79 Fed. Reg. at 74,449 (dissent). Most glaringly, the Board did not find the "problem"—significant delays, characterized as more than 56 days from petition to election—in more than a fraction of all cases. To the contrary, the evidence shows that significant delays occur in less than 6 percent of elections. *Id.* at 74,434. And only about one-tenth of those elections, or 0.6 percent of all elections, involve delays related to the procedures the Rule eviscerates: the pre-election hearing or regional director decision-making before the election. 79 Fed. Reg. at 7349 (Members Miscimarra & Johnson, dissenting from Notice of Proposed Rulemaking). As the dissent from the Final Rule put it, "[t]hese relatively few cases do not provide a rational basis for rewriting the procedures governing *all* elections." 79 Fed. Reg. at 74,456 (dissent).

Recent D.C. Circuit precedent demonstrates why the Board acted arbitrarily and capriciously here. In *Sorenson*, the FCC sought to implement a new rule mandating sales charges on phones manufactured for the hearing impaired. 755 F.3d at 707. According to the FCC, the new rule was intended to deter fraudulent acquisition and use of the equipment—fraud

that could artificially drain the fund created to finance use of the devices. *Id.* The problem was that "the agency offer[ed] no evidence suggesting there [wa]s fraud to deter." *Id.* Insofar as the agency could point only to a speculative problem it sought to resolve, actions taken to remedy that problem were arbitrary and capricious. *Id.* at 709. So too here, the Final Rule is a solution in search of problem that cannot withstand even deferential reasonableness review. In the D.C. Circuit's words, the Board cannot create a rule to "defeat a bogeyman whose existence was never verified." *Id.* at 710.

There is simply no rational connection between the Board's massive overhaul of the entire election process for *all* cases and the narrow subset of election cases in which a significant delay occurs. The Final Rule thus epitomizes arbitrary and capricious agency action. This Court should vacate it.

B. Contrary To The Board's Stated Goals, The Final Rule Will Trigger *More* Election-Related Litigation.

Worse still, the available evidence here actually contradicts the Board's stated rationale for its action. *See State Farm*, 463 U.S. at 43 ("Normally, the agency rule would be arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency."). The lone tangible goal articulated by the Final Rule is that "[d]uplicative and unnecessary litigation is eliminated." 79 Fed. Reg. at 74,308. But even if *some* litigation is eliminated, the Board failed to consider that the *total amount* of election-related litigation will only increase under the Final Rule. *See id.* at 74,435 (dissent) ("our colleagues do not adequately address the likelihood that the *overall* time needed to resolve post-election issues *will increase*, as will the number of rerun elections"). That is because (1) the Final Rule sharply reduces the ability of and incentives for parties to enter into stipulated or consent election agreements, and (2) the Final Rule's elimination of the 25 to 30-day waiting

period for the Board to grant pre-election review of a regional director's decision, together with the elimination of mandatory post-election review and the exclusion of relevant evidence necessary for any meaningful review, will lead to an increase federal-court litigation that can take years to resolve.

1. The Final Rule undermines the incentive for the parties to negotiate election agreements, a critical litigation-reducing component of representation elections.

Under the election procedures that the Final Rule would displace, there is no pre-election litigation in 90 percent of cases because the parties negotiate an election agreement. *Id.* at 74,375. The high number of stipulated elections, in turn, has enabled the Board to conduct elections within a median of 38 days after the petition. *Id.* at 74,341 (dissent). That is likely why the Board's own Casehandling Manual directs Board agents to make every effort to secure an election agreement as early as possible in the process.[11]

The Board admits that existing procedures lead to election agreements in an overwhelming majority of cases. *Id.* at 74,318. And the Board acknowledges that "the bargaining units and election details agreed upon in the more than 90 percent of representation elections that are currently conducted without pre-election litigation are unquestionably influenced by the parties' expectations concerning what would transpire if either side insisted upon pre-election litigation." *Id.* at 74,387. But the Final Rule eliminates the very incentives and expectations that drive the parties toward election agreements.

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[11] *See, e.g.*, Casehandling Manual, Part Two, § 11008 (Noting, as part of the Board's initial communication, "it should be emphasized that it is the Agency's policy to make every effort to secure an election agreement . . . ."); *id.* § 11084.2 ("[E]fforts to dispose of a case by agreement should begin during the first contacts with the parties, and continue at all stages thereafter . . . ."); *see also* Report of Best Practices Committee: Representation Cases (December 1997) at 8 ("[T]he Committee concludes that the best practice is to keep the lines of communication open with the parties . . . and be tenacious in pursuing an agreement, as well as in narrowing the issues in the event a hearing is necessary . . . .").

For example, the Final Rule provides no guidance on when an election will be scheduled if an employer enters into an election agreement with the union, despite many calls from commenters for the Board to provide this guidance. *Id.* at 74,324. This information is essential in negotiating an election agreement. Under existing procedures, the time target for an election is well known and clearly communicated to all parties and the general public.[12] Employers are well aware of the 42-day target for holding an election and are routinely told that, if they enter into an election agreement, there is discretion to negotiate an election date anywhere within that 42-day period. The ability to negotiate a mutually acceptable date, within that known time target, is a significant incentive to enter into an election agreement.

Furthermore, without the failsafe of mandatory post-election review, employers will be more reluctant to enter into binding election agreements. *See id.* at 74,450 ("[M]aking Board review of post-election disputes discretionary is likely to discourage parties from entering into stipulated election agreements, *the principal mechanism for shortening the pre-election timeline*, thereby resulting in an increase in pre- and post-election litigation." (emphasis added)).

The Board acknowledges as much, but speculates that "[a]ny short term difficulties in reaching election agreements[ ] should dissipate quickly, as they have in the past when prior time targets have been adjusted." *Id.* at 74,324. Changes effected by the Final Rule, however, are so sweeping and unprecedented that the Board's reliance on the "past" rings hollow. *See id.* at 74,450 (dissent) ("It [is] natural that the elimination of the right to agree to mandatory post-election Board review will adversely affect the parties' willingness to compromise on pre-election issues."). The Board is introducing a scheme that fundamentally changes the hearing process envisioned by Congress. And whatever deference may be due to some predictive

[12] *See, e.g.*, GC Mem. 11-09, at 18-19 (Mar. 16, 2011); GC Mem. 07-04, at 10 (Apr. 4, 2007); GC Mem. 06-04, at 8 (Mar. 21, 2006); GC Mem. 04-02, at 2 (Apr. 22, 2004).

judgments of agencies, courts are required to step in when those predictions defy logic and the available evidence. *Sorenson*, 755 F.3d at 710 ("But unlike its counterpart, the [agency's new] Rule did not want for evidence; instead, there was contrary evidence questioning its efficacy and necessity. The Commission left these serious concerns unaddressed. Accordingly, its decision to implement the [new] Rule was arbitrary and capricious."). Removing an essential litigation-reducing tool will necessarily cause pre- and post-election litigation increases in these cases—an arbitrary and capricious result that this Court should refuse to countenance. *Id.*

The Board's failure to adequately address these concerns, especially given the contradictions between the stated objectives of the Final Rule and the actual evidence before the Board, underscores the conflict between the agency's action and the outcome.

2. The Final Rule will increase federal-court litigation.

In severely curtailing the opportunity for Board review—*i.e.*, by removing the 25-30 day waiting period (thus shrinking the time for pre-election review) and by making mandatory post-election review discretionary—the Final Rule will force more employers to turn to the federal courts for the review that is denied by the Board. To be clear, the NLRA does not permit direct judicial review of representation decisions. *AFL v. NLRB*, 308 U.S. 401, 405, 409-11 (1940). As a consequence, an employer may seek judicial review only indirectly—after an election has been held and the results certified—by refusing to bargain with the union, at which point the Board can prosecute an unfair labor practice complaint that will result in a final, appealable Board order. *See, e.g.*, *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 709 (2001). In seeking review of that order in a court of appeals, the employer can then challenge the Board's (or regional director's) determinations in the underlying representation case.

Under the Board's current election system, "in only very few cases do employers refuse to bargain in order to test the validity of the certification. From FY 2008 to FY 2013, between 8

and 13 test of certification cases were filed each year in the U.S. Circuit Courts of Appeals." 79 Fed. Reg. at 74,344 n.176. That is not surprising, given the opportunities for Board review under the current system. But the Final Rule's severe curtailment of those opportunities likely will lead to an increase in "test of certification" cases in federal court—and even a slight increase in these cases will necessarily trigger more litigation, as the dissent explains. *Id.* at 74,451 (dissent) ("The elimination of mandatory post-election Board review is also likely to cause an increase in 'test of certification' cases where employers engage in post-certification refusals to bargain as the only means of obtaining review of the Board's certification.").

In *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004), the D.C. Circuit made clear that an agency acts arbitrarily and capriciously if it counts the benefits of a rule without accounting for the offsetting costs. *Id.* at 1217-19 ("That analysis, then, assumes away the exact effect that the agency attempted to use it to justify. The agency's reliance on the cost-benefit analysis to justify this increase is therefore circular, and the rationality of that explanation is correspondingly doubtful."). The D.C. Circuit reaffirmed that same precept in *Chamber of Commerce v. SEC*, 412 F.3d 133, 142-44 (D.C. Cir. 2005) ("And, as we have just seen, uncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure."). Here, the Final Rule pursues quicker elections at all costs, including the likelihood of increased post-election litigation that will delay the resolution of the ultimate question in an election: whether the union properly represents a particular group of employees. That selective focus on purported benefits while ignoring offsetting costs is arbitrary and capricious. *See Pub. Citizen*, 374 F.3d at 1217-19.

3. The potential to moot litigation involving some voter eligibility issues cannot justify increasing litigation concerning the validity of the election itself.

According to the Board, a party that, under the current system, would have litigated a supervisory status issue before an election may decide not to litigate that issue post-election under the Final Rule if the margin of victory for the union makes those voters irrelevant to the outcome. 79 Fed. Reg. at 74,387. In this light, the Board advocates that under its "vote now, hearing later" model for voter eligibility and inclusion disputes—including supervisory status—only 15 percent of deferred issues "will ever have to be addressed." *Id.* at 74,387 n.370. But that proposition fails to consider that deferring voter eligibility and inclusion issues can taint the entire election, no matter how the vote tally comes out.

For example, as commenters explained, employees whose supervisory status is in doubt may engage in conduct that will later require overturning the election.[13] *Id.* at 74,388, 74,408. There is no shortage of cases in which the Board has ruled that objectionable conduct by low-level or first-line supervisors materially affected an election.[14] Thus, deferring resolution of issues of supervisory status will not serve to reduce litigation, as the Final Rule purportedly seeks to do. It will result in the Board having to set aside more elections. And there is little point to reducing pre-election litigation if the results of the election must ultimately be set aside.

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[13] *See SNE Enters.*, 348 NLRB 1041, 1043-44 (2006) (setting aside election result even though supervisors who engaged in pro-union conduct had been eligible voters in three prior Board elections, stating that it does not matter "that the supervisors here engaged in the conduct prior to the time when they were adjudicated to be supervisors"); *Harborside Healthcare, Inc.*, 343 NLRB 906, 911(2004) ("The essential point . . . is that employees should be free from coercive or interfering tactics by individuals who are supervisors, even if the employer or union believes that the individual is not a supervisor.").

[14] *See Harborside Healthcare*, 343 NLRB at 911-14 (comments by first-level supervisor encouraging nursing assistants to vote for the union and solicitation of union authorization cards interfered with the nursing assistants' free choice and materially affected the outcome of the election); *Barton Nelson, Inc.*, 318 NLRB 712, 712-13 (1995) (personal distribution of anti-union hats by shift supervisors directly to large number of employees in the petitioned-for unit was objectionable conduct requiring setting aside an election); *Cmty. Action Comm'n of Fayette Cnty., Inc.*, 338 NLRB 664, 667 (2002) (setting aside an election where a supervisor responded to an employee's question about rumors that she would not get her job back after the annual summer layoff by stating that if the union won she might not have a job).

Indeed, the Final Rule would put employers "on the horns of a difficult dilemma." *See Barre-Nat'l, Inc.*, 316 NLRB at 880 (Member Cohen, dissenting). As the dissent here points out, "[m]any employers will be placed in an untenable situation regarding such individuals based on uncertainty about whether they could speak as agents of the employer or whether their individual actions—though not directed by the employer—could later become grounds for overturning the election." 79 Fed. Reg. at 74,438 n.581 (dissent). Furthermore, "[w]here employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or character from the proposed bargaining unit, the employees have effectively been denied the right to make an informed choice in the representation election." *NLRB v. Beverly Health & Rehab. Servs., Inc.*, 120 F.3d 262, 1997 WL 457524, at *4 (4th Cir. Aug. 12, 1997) (unpublished table decision).[15]

Thus, the Final Rule would not only shift litigation from the pre-election phase to the post-election phase, it also would transfer the litigation from the Board to the federal courts, by making the circuitous path of a "certification test" case the only guaranteed opportunity for review of a regional director's decision. Worse still, the chances that a new election will need to be held, months or years after the first, will also increase if crucial issues of eligibility and inclusion are deferred until after the election. For these reasons, the Final Rule is entirely counter-productive. The Board's elaborate efforts to shirk its statutory obligations to conduct an "appropriate" pre-election hearing and to review the decisions of its regional directors will not

[15] *See also NLRB v. Parsons Sch. of Design*, 793 F.2d 503, 507-08 (2d Cir. 1986) (finding a post-election change in unit size of about 10 percent denied employees the right to an informed vote); *NLRB v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1302 (9th Cir. 1985) (holding that a unit reduction from 17 employees in two classifications to 11 employees in one classification required a new election); *Hamilton Test Sys., New York, Inc. v. NLRB*, 743 F.2d 136, 140-41 (2d Cir. 1984) (ruling that reduction of unit by 50 percent and removal of two classifications rendered election results void).

reduce litigation; it will only move it to federal court and delay the ultimate resolution of the representation case. Where, as here, an agency's explanation of facts runs counter to the actual evidence before it and cannot answer the comments raised during the rulemaking process, the agency's action should be set aside. *See State Farm*, 463 U.S. at 43; *Sorenson*, 755 F.3d at 710.

C. The Final Rule's Mandatory Disclosures of Employees' Personal Information Is Arbitrary and Disregards Substantial Privacy Concerns.

The Final Rule mandates disclosure of all potential voters' personal telephone numbers and email addresses. The Rule accomplishes that result by requiring employers to provide labor organizations "a list of full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ('cell') telephone numbers) of all eligible voters." 29 C.F.R. §§ 102.62(d) & 102.67(l). Not only has the Board imposed these new and intrusive disclosure obligations, it has also failed to provide any "opt-out" procedure for employees, 79 Fed. Reg. at 74,346, 74,453 (dissent), and failed to provide any meaningful penalty for misuse of the personal information.

Under the existing system, employers are required to provide unions only with employees' home addresses per the Board's 1966 decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1939-40 (1966). The Board points to technological developments in support of its expanded disclosure requirements, but does not explain why those requirements are necessary. Though commenters pointed out the privacy danger of disclosing email addresses, 79 Fed. Reg. at 74,341-42, the Board's only response was that disclosing home addresses is even more dangerous.[16] But no one can reasonably question that technology brings greater risks when employees' personal data is compromised.

[16] The Board also discounted the point that home phone numbers are not required under *Excelsior* even though they existed at the time of that decision. 79 Fed. Reg. at 74,338-39.

Even worse, while acknowledging that "the privacy, identity theft, and other risks may be greater than the Board has estimated," the Board nonetheless asserted—without any reasoning or analysis—that those "risks are worth taking." 79 Fed. Reg. at 74,341-42. That conclusory statement is insufficient to satisfy the reasoned decision-making requirement of the APA. *See Pub. Citizen*, 374 F.3d at 1217 ("The agency may of course think that [the] effects [of its Rule] are not problematic (or are outweighed by other considerations, like cost), but if so it was incumbent on it to say so in the rule *and to explain why*." (emphasis added)); *cf. Comcast Corp. v. FCC*, 579 F.3d 1, 7 (D.C. Cir. 2009) ("That a problem is difficult may indicate a need to make some simplifying assumptions, but it does not justify ignoring altogether a variable so clearly relevant and likely to affect" the agency's rule. (citation omitted)). At the same time, the Board inexplicably declined to put in place common-sense privacy protections—like those suggested by the National Association of Manufacturers and the Chamber—that would require unions to destroy the personal contact information after a period of time. 79 Fed. Reg. at 74,360.

The Board gave those concerns even shorter shrift by declining to announce penalties for misusing the information. Although the Final Rule provides that "[p]arties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters," the Rule stops short of announcing a penalty, saying only that "should such misuse of the list occur, the Board will provide an appropriate remedy." *Id.* at 74,344. The APA's reasoned-analysis standard—though a deferential one—requires more than an agency's *ipse dixit* assurances that its decision is for the best, especially in the face of serious privacy and safety concerns. *See Sorenson*, 755 F.3d at 709; *Pub. Citizen*, 374 F.3d at 1217. The Rule should be set aside for that reason, too.

III. The Final Rule Unconstitutionally Compels Employer Speech.

Quite apart from the conflict discussed above with § 8(c)'s free-speech guarantees, the Final Rule also violates the First Amendment by compelling employer speech through a mandatory post-petition notice that must be posted in the employer's workplace within two business days after the employer receives notice that a petition has been filed. 79 Fed. Reg. at 74,309 (dissent). In essence, the Board is commandeering employers to disseminate a message the employer may not support or agree with, simply because someone filed a petition with the government—a petition that may not even provide a valid basis to proceed to an election.

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This principle applies to individuals and corporations alike; thus, "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Ca.*, 475 U.S. 1, 16 (1986) (plurality opinion). A regulation compelling speech is therefore generally subject to strict scrutiny, and can survive only if it is a "narrowly tailored means of serving a compelling state interest." *Id.* at 19.

Here, the Rule compels employers to post workplace notices after a petition is filed with the Board, but before the Board has even determined that an election should occur. 79 Fed. Reg. at 74,309 ("When a petition is filed, the employer must post and distribute to employees a Board notice about the petition and the potential for an election to follow."). By forcing employers to post a notice that facilitates a union's organizing campaign, the Rule conscripts employers in speech that they may not want to make. That compelled speech implicates employers' First Amendment rights just as surely as a law requiring the employer to post notices of political campaign meetings.

Nor can it be argued that the government may compel employers' speech as a form of commercial speech regulation. Under the commercial speech doctrine, the government's "power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 499 (1996) (citation omitted). The Supreme Court has thus held that the government can require commercial speech to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). And under Supreme Court precedent, it can include compelled disclosures about the efficacy, safety, and quality of the advertiser's product. *See, e.g.*, *Zauderer v. Office of Disciplinary Council for Supreme Court of Ohio*, 471 U.S. 626, 637-40 (1985); *Am. Meat Inst.*, 760 F.3d at 22.

But the Final Rule's mandate that employers must post workplace notices after a petition is filed with the Board has nothing to do with regulating a commercial transaction. Under *Zauderer* and its progeny, compelled disclosure may be permissible to convey "purely factual and uncontroversial" information—but such disclosures may be required only if they regulate commercial messages. *See Zauderer*, 471 U.S. at 651; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 59 U.S. 229, 249-50 (2010).

Where, as here, the government seeks to co-opt a speaker's message not to regulate a commercial transaction but, rather, to assist a union in its campaign to organize employees, the regulation is presumptively unconstitutional. Indeed, this case is all but controlled by *Pacific Gas & Elec. Co.* In that case, the challenged law required a commercial actor (a power company), in a commercial setting (the posting of its bills to consumers), to disseminate the message of other groups with competing policy goals. *Pac. Gas & Elec. Co.*, 475 U.S. at 4-7.

The Supreme Court held that the law could not survive strict scrutiny without once suggesting that a different standard should apply merely because the speech of a commercial actor was being regulated. *Id.* at 19-21; *see also Wooley*, 430 U.S. at 714-16 (prohibiting government from compelling speech when the message favored another party). The *Zauderer* exception is thus just as inapplicable here as it would be in other First Amendment contexts. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994).

Indeed, while the D.C. Circuit did not have occasion to address directly the validity of the Final Rule's election-notice requirement in *NAM*, 717 F.3d at 959 n.19, it did hold in that case that *Zauderer* was inapplicable in a materially indistinguishable context. Specifically, the Board in *NAM* argued that it could compel employers to post a notice of employee rights, notwithstanding NLRA § 8(c), because the notice was a compelled commercial disclosure, subject to less scrutiny under *Zauderer*. *Id.* at n.18. The D.C. Circuit rejected that argument, however, because there was no suggestion that the notice was intended or needed to regulate a commercial transaction. *Id.*[17]

Because the Final Rule's notice requirement is not a regulation of a commercial transaction, and instead compels speech in support of a union's organizing campaign, it is subject to strict scrutiny—a burden it cannot satisfy.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to plaintiffs and vacate the Final Rule.

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[17] Although the en banc D.C. Circuit recently abrogated *NAM* to the extent that it held that *Zauderer* applied only to disclosure requirements intended to prevent customer deception, the Court did not attempt to expand *Zauderer* beyond the context of commercial transactions. *See Am. Meat Inst.*, 760 F.3d at 20-22 (noting that the Court was addressing "commercial speech" and merely holding *Zauderer* is not limited to cases where the government is seeking to prevent deception in commercial transactions).

Dated: February 4, 2015

Respectfully submitted,

/s/ Allyson N. Ho

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*Application for admission to the U.S. District Court for the District of Columbia pending

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Statement of Position was served by electronic mail this 18th day of December, 2015 to:

Brian Taylor
Organizer/Trustee
International Brotherhood of Teamsters Local 773
1345 Hamilton Street
Allentown, PA 18102
(610) 434-4451 (office)
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(610) 770-9581 (fax)
btaylor@teamster773.org

/s/ Kurt G. Larkin

From: O"Neill, Kathleen
To: Larkin, Kurt G.
Subject: UPS Ground Freight 4-RC-165805
Date: Friday, December 18, 2015 3:42:18 PM

We have received your Statement of Position. Concerning the allegations of taint, you will not be permitted to put evidence of taint on the record. If you have evidence of taint, submit a brief description of your evidence and the names of the witnesses prior to the opening of the hearing on Monday. The Regional Director will determine whether or not he will need to conduct an investigation. We will have another Board Agent available to take statements on Monday on taint, if necessary.

Will you please submit the complete commerce questionnaire so I can have the commerce stipulation prepared prior to the hearing.

Give me a call when you land. 215-901-7379.

Kathleen O'Neill
National Labor Relations Board
615 Chestnut Street
7th Floor
Philadelphia, PA 19106

215-597-7645 (ph)
215-597-7658 (fax)

Larkin, Kurt G.

From: Larkin, Kurt G.
Sent: Monday, December 21, 2015 7:29 AM
To: Kathleen.oneill@nlrb.gov
Cc: Larkin, Kurt G.
Subject: Fwd: UPS Ground Freight 4-RC-165805

> Kathy,
>
> The Company's evidence of supervisory taint is as follows: Tammy Cadman is an administrative assistant permanently assigned at the Company's AAP Salina, Kansas distribution center. She has recently worked in a temporary capacity at the AAP Kutztown facility. In recent weeks, Frank Capetta approached her and asked her, "Do you know what's going on here." Ms. Cadman replied that she did not, to which Mr. Capetta replied: "We're going to try to get a union at this location, you may want to share that with your drivers." Ms. Cadman interpreted Mr. Capetta's comment to mean that he was organizing the Kutztown workplace and also that he wanted her to encourage the Road Drivers at UPSF's Salina, Kansas facility to unionize when she returned to that facility following her temporary assignment at Kutztown.
>
> UPSF contends that Mr. Capetta is a supervisor within the meaning of the Act. If the Regional Director agrees, it is incumbent on the region to interview Ms. Cadman and any Kutztown Road Driver who either signed an authorization card or was included in any other showing of interest submitted by the Union. The Region must investigate to determine the extent to which Mr. Capetta was involved in the solicitation or signing of union cards and/or encouraging employees to support unionization at Kutztown. The Company was unable, in the inappropriately abbreviated period provided under the new NLRB representation procedures, to interview Kutztown Road Drivers; moreover, the Company believes it would be more appropriate for the Region to do so, notwithstanding the Jonny's Poultry rules, to avoid any allegation of interrogation the Union may assert were the Company to attempt on its own to obtain such information.
>
> The Company reserves the right to offer additional evidence as it may develop during the course of this proceeding.
>
>
>
> On Dec 18, 2015, at 3:42 PM, O'Neill, Kathleen
<Kathleen.oneill@nlrb.gov<mailto:Kathleen.oneill@nlrb.gov>> wrote:
>
> We have received your Statement of Position. Concerning the allegations of taint, you will not be permitted to put evidence of taint on the record. If you have evidence of taint, submit a brief description of your evidence and the names of the witnesses prior to the opening of the hearing on Monday. The Regional Director will determine whether or not he will need to conduct an investigation. We will have another Board Agent available to take statements on Monday on taint, if necessary.
>
> Will you please submit the complete commerce questionnaire so I can have the commerce stipulation prepared prior to the hearing.
>
> Give me a call when you land. 215-901-7379.
>
> Kathleen O'Neill
> National Labor Relations Board
> 615 Chestnut Street
> 7th Floor

> Philadelphia, PA 19106
>
> 215-597-7645 (ph)
> 215-597-7658 (fax)
>

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

UPS GROUND FREIGHT, INC.[1]

Employer

and **Case 04-RC-165805**

TEAMSTERS LOCAL 773

Petitioner

DECISION AND DIRECTION OF ELECTION

The major issue presented in this case is whether the petitioned-for unit of road drivers at the Employer's Kutztown, Pennsylvania facility is an appropriate unit for bargaining, or whether the unit also must include employees at the Employer's eight other facilities around the country.

Teamsters Local 773 (Petitioner) seeks an election in a unit of all full-time and regular part-time road drivers including certified safety instructors and dispatchers employed by UPS Ground Freight, Inc. (the Employer) at its Kutztown, Pennsylvania facility.[2] The Employer contends that the unit sought by Petitioner is inappropriate because the road drivers employed at its other eight facilities share an overwhelming community of interest with the Kutztown road drivers.

A hearing officer of the Board held a hearing in this matter. As explained below, based on the record and relevant Board law, I find that the unit sought by Petitioner is appropriate, and I shall direct an election in that unit.

THE EMPLOYER'S OPERATIONS

The Employer, a subsidiary of UPS, Inc., provides transportation and delivery services for Advance Auto Parts (AAP) from nine AAP distribution centers to AAP retail stores nationwide. AAP is the Employer's sole customer.

The Employer's headquarters is in Richmond, Virginia. Its contract with AAP is administered by a central management team consisting of: Vice President of Operations for UPS Truckload Division Ted Lovely; National AAP Account Manager Quincy Adams; Operations Support Manager Paul D'Alessandro; Operational Support Supervisor Mark Grisham; and

[1] The Employer's name was amended at the hearing.
[2] I grant Petitioner's motion to amend the petition as to the unit description.

Support Manager Mina Metry. The Employer's Human Resources Manager is Ryan Owens, and its Employee Relations Supervisor is Ken Thomas.

The nine distribution centers are owned or leased by AAP. They are located in: Delaware, Ohio; Enfield, Connecticut; Gastonia, North Carolina; Hazlehurst, Mississippi; Lakeland, Florida; Roanoke, Virginia; Salina, Kansas; and Thomson, Georgia. At these facilities, AAP provides office space for the Employer's supervisory and administrative staff and parking areas for the Employer's tractors.

The Employer's operations at each of the nine facilities are managed by an Operations Manager and an Operations Supervisor. The Operations Managers report to Quincy Adams. At the time of the hearing those positions at the Kutztown facility had been vacant for about five months, since around July 2015. From July to October, Operations Support Manager D'Alessandro managed the Kutztown facility, with a schedule alternating between one week on-site and one week working remotely. Since then, Monte Copeland, a supervisor from Georgia, has served as the on-site acting Kutztown Operations Manager, with support from Operational Support Supervisor Mark Grisham. Since October 5, 2015, Matt DiBiase has been the Operations Supervisor at the Kutztown facility. DiBiase reports to Copeland or Grisham.

Currently, there are about 30 road drivers employed at the Kutztown facility. A year ago, the Kutztown facility had more than 70 road drivers, but staffing was reduced around November 2014 when AAP opened the new distribution center in Enfield, Connecticut, and certain retail stores previously serviced by the Kutztown facility were reassigned to the Enfield facility. The Kutztown facility is now understaffed, and the Employer is seeking to hire more road drivers there; the full complement is expected to be in the range of 45 to 50. Currently, there are about two to six temporary transfers from the Hazlehurst and Lakeland facilities who are working at the Kutztown facility.[3] In addition, at the time of the hearing, the Employer was supplementing the Kutztown workforce with about 10 to 15 temporary drivers leased from a third-party contractor.

The Employer seeks to add to the petitioned-for unit about 258 road drivers who are employed at the other eight facilities, specifically: 37 at the Delaware facility; 21 at the Enfield facility; 33 at the Gastonia facility; 35 at the Hazlehurst facility; 44 at the Lakeland facility; 36 at the Roanoke facility; 23 at the Salina facility; and 29 at the Thomson facility.

Each of the nine facilities covers a specific geographic area for delivery of freight from a single AAP distribution center to the AAP retail stores in that facility's delivery territory. There is no overlap of delivery territories. The Kutztown delivery territory covers central Pennsylvania, New Jersey, New York, and Delaware. The routes for the Kutztown road drivers range from 150 to 600 miles.

AAP products are delivered from the distribution centers to AAP retail stores using trailers owned by AAP, which are hauled by the Employer's single or double-axle tractors. Tractors may be day cabs or sleeper cabs; sleepers contain a bunk for overnight runs. At the

[3] The record is unclear as to the exact number of these temporary transfers.

Kutztown facility, the Employer maintains about 40 to 50 double-axle tractors, the majority of which are sleeper cabs.

Pursuant to AAP requirements, the Employer is implementing a "5X schedule" at all facilities, meaning that each AAP retail store will receive product deliveries five days per week. Previously, each AAP store received deliveries once or twice a week. The 5X schedule has been implemented already at the Lakeland, Enfield, and Gastonia facilities and will be implemented at all nine facilities by 2017. Since prior to Thanksgiving, 2015, the Employer has been phasing in the 5X schedule at the Kutztown facility.

About 23 to 25 road drivers at the Kutztown facility are assigned to a regular route. They report to work at different times ranging from midnight to 8:00 a.m. and return to the facility at various times ranging between 7:00 a.m. and 7:00 p.m. As the facilities transition to the 5X schedule, the majority of deliveries will occur at night. The road drivers' daily job duties include: performing pre-trip inspection of the tractor; reviewing paperwork for their daily loads; making deliveries of freight to AAP retail stores on their assigned routes and picking up any returned products; and returning to the distribution center to unload any returned products.

BOARD LAW

Where an employer operates multiple facilities, the Board presumes that a petitioned-for unit limited to employees at a single facility is appropriate. *J&L Plate, Inc.,* 310 NLRB 429 (1993); *Bowie Hall Trucking, Inc.,* 290 NLRB 41, 42 (1988). This presumption in favor of a single-location unit can be overcome by a showing that the facility has been effectively merged into a more comprehensive unit or is so functionally integrated with another unit that it has lost its separate identity. *Budget Rent a Car Systems, Inc.,* 337 NLRB 884, 885 (2002); *New Britain Transportation Co.,* 330 NLRB 397 (1999). The burden is on the party opposing a petitioned-for single-location unit to present evidence to overcome the presumption. *J&L Plate,* supra; *Red Lobster,* 300 NLRB 908, 910-911 (1990). The Board has described the burden of overcoming the single-facility presumption as "heavy." *Mercy Sacramento Hospital,* 344 NLRB 790 (2005). To determine whether the single-facility presumption has been rebutted, the Board examines (1) central control over daily operations and labor relations, including the extent of local autonomy; (2) similarity of employee skills, functions, and working conditions; (3) the degree of employee interchange; (4) the distance between locations; and (5) bargaining history, if any exists. See, e.g., *Trane*, 339 NLRB 866 (2003); *J &L Plate*, supra; *New Britain Transportation,* supra; *Globe Furniture Rentals, Inc.,* 298 NLRB 288 (1990).

In *Specialty Healthcare and Rehabilitation Center of Mobile,* 357 NLRB No. 83, slip op. at 10-13 (2011), enfd. 727 F.3d 552 (6th Cir. 2013), the Board modified the framework to be applied in making certain unit determinations. The *Specialty Healthcare* framework applies when the petitioner seeks a unit consisting of employees readily identifiable as a group who share a community of interest, but another party seeks a broader unit. The party seeking a broader unit must demonstrate, "that employees in the larger unit share an *overwhelming* community of interest with those in the petitioned-for unit." [Emphasis added]. To determine community of interest, the Board examines such factors as the degree of functional integration between employees, common supervision, employee skills and job functions, contact and

interchange, and similarities in wages, hours, and other terms and conditions of employment. *Publix Super Markets, Inc.,* 343 NLRB 1023 (2004); *Home Depot USA, Inc.,* 331 NLRB 1289 (2000); *United Operations, Inc.,* 338 NLRB 123 (2002). Additional employees share an overwhelming community of interest with petitioned-for employees only where there is no legitimate basis upon which to exclude them from the unit because the traditional community-of-interest factors overlap almost completely. *Northrop Grumman Shipbuilding, Inc.,* 357 NLRB No. 163, slip op. at 3 (2011).

The Board did not indicate in *Specialty Healthcare* whether the analytical framework set forth in that case is intended to apply to a multi-facility unit issue. Assuming *Specialty Healthcare* applies, it would transform the multi-facility burden applied in these cases into a requirement that the party seeking to overturn the single-facility presumption demonstrate that employees at the facilities it seeks to add share an overwhelming community of interest with employees at the petitioned-for location. Because of the uncertainty regarding the Board's intentions in this area, I will analyze the multi-facility issue using both the traditional and the *Specialty Healthcare* standards.

APPLICATION OF BOARD LAW TO THIS CASE

In reaching the conclusion that the single-facility unit is appropriate, I rely on the following analysis and record evidence.

1. *Central Control over Daily Operations and Labor Relations*

The Board has made clear that "the existence of even substantial centralized control over some labor relations policies and procedures is not inconsistent with a conclusion that sufficient local autonomy exists to support the single location presumption." (Citations omitted). *California Pacific Medical Center*, 357 NLRB No. 21, slip op. at 2 (2011). Thus, "centralization, by itself, is not sufficient to rebut the single-facility presumption where there is significant local autonomy over labor relations. Instead, the Board puts emphasis on whether the employees perform their day-to-day work under the supervision of one who is involved in rating their performance and in affecting their job status and who is personally involved with the daily matters which make up their grievances and routine problems." (Citations omitted). *Hilander Foods*, 348 NLRB 1200, 1203 (2006). The Board has found the presence of local managers to be evidence of significant autonomy over local terms and conditions of employment supportive of a single-facility unit. *D&L Transportation,* 324 NLRB 160, 161 (1997); also see *Cargill, Inc.,* 336 NLRB 1114, 1114 (2001). Therefore, the primary focus of this factor is the control that facility-level management exerts over employees' day-to-day working lives.

The Employer maintains centralized control over many aspects of personnel and labor relations for all nine facilities, including payroll and recordkeeping. Employees at all of the facilities are subject to the same personnel policies, wage and benefits programs, performance criteria, and training/orientation policies. All road drivers are subject to the same corporate policies including anti-harassment and anti-violence policies. The Employer maintains a website where work rules and policies are posted, along with information about employee benefits. The Employer also maintains a driver's handbook and guidelines for safety, CSA (Compliance, Safety, Accountability), and hours of service. All employee pay and benefits, including health

insurance and a 401(k) plan, are determined at the corporate level, and all road drivers are entitled to the same time-off package, including vacation, sick days, holidays, and personal days. Personnel files are maintained on-line. Local managers' recommendations concerning suspension and termination of employees must be approved by the central management team and/or Human Resources.

All road drivers are paid pursuant to the same general guidelines. Road drivers are paid "activity based pay," which is based on their mileage and number of delivery stops at AAP retail stores. Mileage pay varies from 39¢ to 46¢ per mile, depending on geographic location. For example, the mileage pay for the Enfield and Kutztown facilities is higher than that for the Gastonia and Lakeland facilities. Pay for delivery stops varies depending on whether a facility has implemented the 5X schedule. Employees who are not working a 5X schedule are paid $16 per stop for the first three stops and $21 per stop for all additional stops, while employees on a 5X schedule receive $13 per stop. For non-driving work, such as training and safety meetings, road drivers are paid an hourly wage ranging from $16.50 to $17.50, depending on their length of service. When road drivers are driving a shuttle between the Kutztown facility and the Inmar warehouse (discussed below), they are paid a flat rate. Employees may be paid a premium rate when they are temporarily transferred to work at a different facility, and they may be paid "delay pay" when appropriate. In general, the annual wages of road drivers range from $60,000 to $100,000.

Twice a year, the Employer requires a safety review, known as an "S&V" (space and visibility) ride, for all road drivers. Road driver performance is monitored continuously via a "route tracker," an onboard system monitor that records specific data points including speed, braking, and miles per gallon (MPG) for each tractor. Local facility management can access the route tracker data and generate reports to evaluate road drivers and to improve their safety and efficiency. Employees may be disciplined based on this data but such discipline is not automatic. The Employer uses the same software system to dispatch all road drivers on their routes.

While there is much centralized control over personnel and labor relations, this is not sufficient to rebut the single-location presumption because the evidence demonstrates significant local autonomy over labor relations at the Employer's nine facilities. See, e.g., *New Britain Transportation Corp.*, supra; *Carter Hawley Hale Stores,* 273 NLRB 621, 623 (1984).

Thus, management at each facility has the authority to make decisions regarding employee schedules and assignments, including designating "standby employees" as needed for 24-hour coverage. Local management[4] has authority to approve vacation, personal day, and sick leave requests, and to schedule days off. Any employee disputes over dispatching or work assignments are resolved at the local level. Local managers independently address minor

[4] As used in this Decision, the terms "local management" and "local managers" refer to the local supervisors and managers based at the Employer's nine facilities and their designees, who may include the Operations Manager, Operations Supervisor, dispatchers, certified safety instructors, and trainers. However, these terms are not intended to convey any determination regarding the supervisory status of dispatchers or certified safety instructors or whether they are appropriately included in the petitioned-for bargaining unit.

disciplinary problems and have authority to issue oral and written warnings. They also make recommendations to the central management team and Human Resources for suspensions or terminations, which are followed if properly documented and if the discipline is warranted. Although personnel files are maintained online, disciplinary files are kept at the local facility. Local management is also responsible for preparing weekly payroll and addressing adjustments or corrections to payroll.

Applicants for employment apply online and are initially screened, interviewed, and pre-qualified by the Employer's central Recruiting Department, which eventually communicates any job offers. But after the Recruiting Department initially approves an applicant, local management is responsible for reviewing the application and interviewing and testing the applicant. Local testing includes both a road test and backing test to assess abilities. Local management has final authority to decide whether to hire an applicant.

All new employees receive the same training, including basic orientation in the Employer's general policies and procedures, HAZMAT training, and specialized training from AAP for AAP procedures, paperwork, delivery equipment, and the use of lift gates and power jacks.[5] This training and orientation is provided at the local facility and may last from two weeks to three months. Local management is responsible for ongoing safety training, including the S&V test required twice a year for all road drivers. During the S&V test, local management will inspect the vehicle and ride as a passenger with the road driver for one or two hours, monitoring the driver's performance.

Local management regularly evaluates the performance, efficiency, and safety records of road drivers. It is also responsible for accessing route tracker data on specific performance measurements and generating reports to flag irregularities, which are then investigated locally. For example, if there is an excessive speed recording, local management will investigate whether there was driver error or inaccurate recording by the monitor. Similarly if the MPG is too low, local management will determine whether a road driver is idling too long at delivery stops. Local managers handle problems encountered by road drivers during their routes, prepare accident reports, contact third-party contractors to lease temporary drivers, and purchase office supplies. For accidents or equipment breakdowns, road drivers contact a third-party tractor maintenance contractor, and/or the national "UPS breakdown number," and then their local facility. Customer complaints about road drivers are communicated to and addressed by local management, which deals directly with the local AAP representative.

In summary, local managers make the final hiring evaluations and determinations, issue low-levels of discipline without central oversight, and make recommendations as to higher levels of discipline. They regularly test, train, and monitor the performance of road drivers at their facilities. Thus, the record demonstrates that employees at the petitioned-for facility "perform their day-to-day work under the immediate supervision of local managers who are involved in rating their performance and affecting their job status and who are personally involved with the

[5] Lift gates are devices on the trailers used to lower product from the trailer to ground level when there is no loading dock at the AAP retail store. Power jacks are small forklifts used to lift and move pallets of freight.

daily matters which make up their grievances and routine problems." *Penn Color, Inc.*, 249 NLRB 1117, 1119 (1980). Accordingly, I find that there is significant local autonomy over labor relations to support the single-facility presumption.

2. *Similarity of Skills, Functions, and Working Conditions*

The similarity or dissimilarity of duties, qualifications, working conditions, wages, and benefits among employees at all of the employer's facilities has some bearing on determining the appropriateness of the single-facility unit. See, e.g., *Dattco, Inc.*, 338 NLRB 49, 51 (2002).

With the exception of working from geographically separate facilities, employees at all of the Employer's locations essentially share identical skills and functions. All road drivers are responsible for delivering freight from the distribution centers to the AAP stores in a safe and efficient manner. The road drivers perform the same work, share the same qualifications, are paid with wages determined under the same criteria, receive identical benefits, are assigned work by the same method, and record their hours of work using the same form. All road drivers wear the same uniform and use the same types of equipment, including the tractors, lift gates, and power jacks. They are all required to follow DOT regulations and complete daily DOT logs.

While there are substantial similarities in working conditions among the road drivers at the nine facilities, there are some working conditions that are particular to the Kutztown facility. One difference concerns product returns. Most facilities have an on-site location at the AAP distribution center for returned products, but the Kutztown facility has an off-site center for returns at Inmar, Pennsylvania, approximately 10 miles away. At the end of his or her route, a Kutztown road driver travels to the Inmar location to offload returned product and then returns to the distribution center. If the Inmar location is closed, the driver returns directly to the Kutztown facility, and returned products will be delivered by shuttle the next day to Inmar by Kutztown road drivers. Additionally, as noted above, the mileage rate varies depending on geographic location, so the Kutztown mileage rate differs from that at other facilities.

Despite these differences, I find that this factor generally favors the Employer's position. However, this factor is less important than whether individual facility management has autonomy and whether there is substantial interchange.

3. *Functional Integration*

Evidence of functional integration is also relevant to the issue of whether a single-facility unit is appropriate. Functional integration refers to when employees at two or more facilities are closely integrated with one another functionally notwithstanding their physical separation. *Budget Rent A Car Systems*, supra, 337 NLRB 884 (2002). This functional integration involves employees at the various facilities participating equally and fully at various stages in the employer's operation, such that the employees constitute integral and indispensable parts of a single work process. Id. An important element of functional integration is that the employees from the various facilities have frequent contact with one another. Id. at 885.

Generally, each of the Employer's facilities is managed as a separate entity for the purpose of providing freight services for a specific AAP delivery territory, but there is limited evidence of functional integration as to staffing and equipment. AAP generally sets the requirements for the design of the Employer's delivery routes, and staffing and equipment levels for all facilities are decided by the central management team. When a facility is short-staffed, the local Operations Manager will notify central management, and the central management team, in consultation with the local Operations Managers, will decide whether to transfer road drivers temporarily from another facility or authorize temporary leased labor from a third-party contractor. However during the last six months, the Kutztown facility has been authorized to contact these third-party contractors directly for extra drivers when needed. The central management team is responsible for determining the occasional transfer of equipment from one facility to another. Such transfers occur at least once a year, and road drivers may be assigned to deliver the equipment between facilities.

Except for the evidence of interchange and transfers described below, there is no evidence that the Employer's limited functional integration results in any contact among employees at the different facilities. Road drivers from the Kutztown facility do not speak with employees at other facilities by telephone or have personal contact with them in the normal course of their work duties. Road drivers from the Roanoke facility make weekly deliveries of intra-Employer mail to the Kutztown facility, but the record contains no evidence of any contact among road drivers resulting from these deliveries. Safety trainers from different facilities may participate in occasional group conference calls with managers to discuss safety and compliance matters, but there were no such group conference calls during 2015. Such sporadic contact provides little basis for overcoming the single-facility presumption. Moreover, the record fails to demonstrate that the employees employed in the Employer's separate facilities are part of a single work process, where work is performed at various stages on the same product at different facilities. Rather, the function served by each of the Employer's facilities is to meet the delivery needs of AAP for the specific delivery territory served by that facility.

This lack of functional integration supports a finding that the single-facility unit at the Kutztown facility is appropriate.

4. *The Degree of Employee Interchange*

The Board has identified employee interchange as another critical factor in deciding whether the single-facility presumption has been rebutted. *Mercy Sacramento Hospital,* 344 NLRB 790 (2005); *First Security Services Corp.,* 329 NLRB 235, 236 (1999). Employee contact is considered interchange where a portion of the work force of one facility is involved in the work of other facilities through temporary transfer or assignment of work. However, a significant portion of the work force must be involved and the work force must be actually supervised by the local branch to which they are not normally assigned in order to meet the burden of proof on the party opposing the single-facility unit. *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999). The regular shifting of employees between facilities tends to undermine the identity of employees at a particular site as a discrete group and indicates the merger of employees into a multi-location grouping. In *New Britain Transportation,* supra, the Board suggested that a party seeking to rely on this factor to rebut the single-facility presumption

must present detailed evidence of interchange, in context, and show that a high percentage of employees regularly work in the jurisdiction of other facilities. For example, the Board found that interchange was established and significant where during a one-year period there were approximately 400 to 425 temporary employee interchanges among three terminals in a workforce of 87 and the temporary employees were directly supervised by the terminal manager where the work was being performed. *Dayton Transport Corp.* 270 NLRB 1114 (1984). On the other hand, where the amount of interchange is unclear both as to scope and frequency because the record does not show how the total amount of interchange compares to the total amount of work performed, the burden of proof is not met, including where a party fails to support a claim of interchange with either documentation or specific testimony providing context. *Cargill, Inc.*, supra, 336 NLRB 1114 (2001); *Courier Dispatch Group*, 311 NLRB 728, 731 (1993). Also important in considering interchange is whether the temporary employee transfers are voluntary or required, the number of permanent employee transfers, and whether the permanent employee transfers are voluntary or mandatory. *New Britain Transportation Co.*, supra.

Temporary transfers

Temporary transfers of the Employer's road drivers are generally initiated by a local Operations Manager and arranged by the central management team in consultation with Operations Managers. These transfers may last from a few days to two months. On occasion, the Employer may provide housing for temporarily transferred drivers, but generally the Employer does not provide housing or a food allowance, and employees are expected to sleep in sleeper cabs. Most temporary transfers are voluntary, although for assignments of no more than a week, the Employer will select employees if there are no volunteers. While working as temporary transfers at a different facility, road drivers' duties remain unchanged.

The record does not establish that a significant percentage of the road drivers transfer among the Employer's various facilities. The Employer presented a chart showing, for the past three years, the total number of employees temporarily transferred from and to each facility, and the total number of workweeks for employees at the facility. During those three years, the Kutztown facility temporarily transferred 17 road drivers to three other facilities (Enfield, Roanoke, and Salina) for a total of 72 workweeks, and 44 temporary transfers worked at the Kutztown facility for a total of 163 workweeks. Thus, there were a total of 235 workweeks of temporary transfers involving the Kutztown facility road drivers. However, the chart does not show the dates or duration of transfers, and the record does not reflect whether these temporary transfers occurred voluntarily or were required by the Employer. Further, the record evidence does not allow for comparison with total work performed because the Employer did not present evidence comparing temporary transfer workweeks to the total number of workweeks or indicate the percentage of total employees involved in temporary interchange. The data in the chart thus lacks needed context.

The party opposing the single-facility presumption has the burden of presenting sufficient evidence to rebut it. *J&L Plate,* supra, 310 NLRB at 429, and the presumption has not been rebutted where an employer's interchange data is represented in aggregate form rather than as a percentage of total employees. *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 849 fn. 5 (7th Cir. 1999), citing *Walgreen Co. v. NLRB*, 564 F.2d 751, 754 (7th Cir. 1977). See also *New Britain*

Transportation Co., supra, 330 NLRB 397 at 398. I therefore find that the Employer has failed to meet this burden with respect to evidence of temporary transfers.

However, even assuming a reasonable context for the Employer's proffered evidence, the temporary transfers do not approach the degree usually found significant in a multi-facility analysis. Thus, assuming that the current complement of 30 road drivers at Kutztown worked 52 weeks per year, these drivers worked a total of 4,680 workweeks in three years. Accordingly, the 235 workweeks of temporary transfers involving the Kutztown facility road drivers constitute only about five percent of total Kutztown workweeks.[6] It is also significant that about 23 percent of the temporary transfers occurred during the opening of the Enfield facility in around November 2014 when Kutztown sent 10 employees there for a total of 54 employee workweeks. Temporary transfers due to the opening of a facility are generally not entitled to as much weight as temporary transfers between regularly operating facilities in determining the scope of the appropriate unit. *Renzetti's Market*, supra, at 175 fn. 8. Currently, there are two to six road drivers temporarily assigned to the Kutztown facility from other AAP distribution centers, including a safety trainer from Lakeland to assist with year-end S&V safety training. This amounts to between 7 and 20 percent of the 30 Kutztown road drivers currently employed. Road driver/dispatcher Frank Cappetta testified that during 2015, only three to five percent of Kutztown routes were staffed by road drivers from other facilities.

The evidence also shows that there were a total of 117 temporary transfers for 413 workweeks for all of the Employer's facilities over the three years. This accounts for less than one percent of the 44,900 total weeks worked by the Employer's 288 road drivers. Thus, even putting the number of temporary transfers into context, I find that employee interchange is far lower than the level of interchange typically present in cases where the Board has found it to be significant. See e.g., *Purolator Courier Corp.*, 265 NLRB 659, 661 (1982) (interchange factor met when 50 percent of work force came within the jurisdiction of other branches on a daily basis and there existed a greater degree of supervision from other terminals than from the supervisors at their own terminals); *Dayton Transport Corp.*, supra (single-facility presumption rebutted where in one year there were 400 to 425 temporary transfers in a work force of 85-87); *P.S. Elliott Services, Inc.* 300 NLRB 1161, 1162 (1990) (single-facility presumption rebutted where at least 50 percent of employees were transferred).

Finally, the evidence suggests that the majority of temporary transfers are voluntary. Such voluntary interchange is given less weight in determining if employees from different locations share a common identity. *D&L Transportation*, supra, 324 NLRB at 162 fn. 7.

Permanent transfers

Employees may request permanent transfers, and the Employer will review a centralized data base to ascertain whether there any available positions. The Employer provided a chart showing 27 permanent transfers since 2011, including five transferred supervisors, but the record

[6] As noted above, there were considerably more than 30 drivers at the Kutztown facility at times during the three-year period. Thus, the transfer percentages posited in this paragraph are, if anything, higher than the actual percentages.

contains no information as to the reasons for these transfers. Of the 22 non-supervisor transfers, there were 14 transfers from, and two transfers to, the Kutztown facility. The majority of permanent transfers (15) occurred in 2011 (10 in April from Kutztown to Lakeland, three from Delaware to Salina, one each from Kutztown and Salina to Delaware). There were no transfers in 2012, and in 2013, there were two transfers (Kutztown to Lakeland, and Roanoke to Kutztown). In 2014, there were four transfers: (Hazlehurst to Delaware, Roanoke to Lakeland, and two from Kutztown to Enfield, when the Enfield facility opened). In 2015, there was one transfer (Delaware to Kutztown). The chart shows that four permanent transfers occurred 15 days or less after the employee's hire date, and that eight transfers occurred less than one month after hire. Some of these newly-hired employees were at the Kutztown facility solely for training and then transferred to another facility.

I find that there is no substantial evidence of permanent transfers involving the petitioned-for facility, as since the beginning of 2013, there were only five transfers involving this facility, including one related to the opening of the Enfield warehouse. Moreover, it is well established that the Board considers permanent transfers to be a less significant indication of actual interchange than temporary transfers. *Red Lobster*, supra, 300 NLRB at 911 (1990).

On balance, after reviewing the evidence of temporary and permanent transfers, I find that this factor does not weigh in favor of rebutting the single-facility presumption.

5. *Distance Between Locations*

The Kutztown facility is approximately 250 miles from the Enfield facility, 360 miles from the Roanoke facility, 460 miles from the Delaware facility, 560 miles from the Gastonia facility, 740 miles from the Thomson facility, 1,100 miles from the Lakeland facility, 1,130 miles from the Hazlehurst facility, and 1,265 miles from the Salina facility.[7] This geographic separation, while not determinative, gains significance where, as here, there are other persuasive factors supporting the single-facility unit. *Bowie Hall Trucking*, supra, 290 NLRB at 43. In view of my conclusions regarding the other factors, I conclude that the substantial distance between the Kutztown facility and all of the other AAP distribution facilities further supports my determination that a single-facility unit is appropriate. See e.g. *Marine Spill Response Corp.*, 348 NLRB 1282, 1287 (insufficient evidence of functional integration given distance of about 100 miles of San Diego facility from Long Beach facility, local autonomy and presence of supervision at facilities, and lack of regular employee interchange or interaction); *Rental Uniform Service,* 330 NLRB 334 (1999) (Board relied on evidence of geographic separation of 22 and 50 miles and significant local autonomy over labor relations and absence of interchange and work interaction to find that presumptive appropriateness of petitioned-for single facility unit had not been rebutted). Compare *Cargill, Inc.*, supra (13 to 14 incidents of interchange among 23 employees in eight-month period insufficient to overcome the single-facility presumption).

This factor clearly favors a finding that the petitioned-for single-facility unit is appropriate.

[7] Mileage estimates were taken from *Google Maps*.

6. *Bargaining History*

The absence of bargaining history is a neutral factor in the analysis of whether a single-facility unit is appropriate. *Trane*, 339 NLRB 866, 868, fn. 4 (2003). Thus, the fact that there is no bargaining history in this matter does not support nor does it negate the appropriateness of the unit sought by Petitioner.

CONCLUSION CONCERNING WHETHER SINGLE-FACILITY UNIT IS APPROPRIATE

In determining that the single-facility unit sought by Petitioner is appropriate, I have carefully considered the record evidence and weighed the various factors that bear on this issue. In particular, I rely on the significant evidence of local autonomy over labor relations matters at the Kutztown facility, the absence of evidence showing any contact between the Kutztown road drivers and drivers from other facilities in the course of normal work duties, the lack of evidence of substantial temporary or permanent transfers among the facilities, and the considerable distance between the Kutztown facility and the other facilities. I have considered the similarity of skills and functions and the common personnel policies and wage and benefit structure, but find these factors insufficient to meet the Employer's heavy burden of overcoming the single-facility presumption. I also note that the terms and conditions of employment for Kutztown road drivers vary from those at other facilities as to mileage rates and product return procedures. On balance, I find that the Employer has failed to establish that the Kutztown facility has been so effectively merged into the other facilities that it has lost its separate identity to the point where the presumptive appropriateness of the petitioned-for unit has been rebutted such that the only appropriate unit would include employees from all facilities. *New Britain Transportation Co.*, supra. See also *Hilander Foods*, supra, 348 NLRB at 1202-1204; *Cargill, Inc.,* supra, 336 NLRB 1114 (2001).

SPECIALTY HEALTHCARE ANALYSIS

I reach the same result applying the *Specialty Healthcare* standards. The initial step required under *Specialty Healthcare* is a determination of whether employees in the petitioned-for unit constitute a discrete group with a community of interest. In this case, the Kutztown employees constitute such a group, as they perform the same job duties, operate in the same clearly-defined geographical area, and share the same local supervision. Since this community of interest has been demonstrated, the burden is on the Employer to show that employees at the other eight AAP distribution facilities share an overwhelming community of interest with the Kutztown employees. As the Board explained in *Northrop Grumman Shipbuilding, Inc.,* supra, 357 NLRB No. 163, slip op. at 3, "additional employees share an overwhelming community of interest with the petitioned-for employees only when there 'is no legitimate basis on which to exclude [the] employees from' the larger unit because the traditional community-of-interest factors overlap almost completely."

The Employer has failed to meet this burden. Each facility is supervised separately on a day-to-day basis by different managers and employees. The different facilities cover different areas, the drivers receive different mileage rates, and there is little functional integration or

contact between the drivers based at different facilities. The existence of these factors favoring separate units is sufficient to defeat any claim of an overwhelming community of interest between the Kutztown employees and the employees employed at the Employer's eight other facilities, and to require a finding that the Kutztown facility employees constitute an appropriate unit. *Macy's, Inc.,* 361 NLRB No. 4 (2014); *Guide Dogs for the Blind*, 359 NLRB No. 151 (2013).

In short, whether the Board's traditional single-facility unit presumption or the *Specialty Healthcare* framework applies, I find that the Employer has not carried its burden of rebutting the appropriateness of a unit limited to Kutztown employees. Accordingly, I shall direct an election in a Kutztown-only unit.

OTHER ISSUES

The Employer contends that two road drivers, Frank Cappetta and Carl David, who also work as dispatchers and/or certified safety instructors, are dual-function employees who do not share a community of interest with the petitioned-for road drivers. The Employer further contends that Cappetta is a supervisor under Section 2(11) of the Act and that the petition may be tainted because of Cappetta's alleged involvement in obtaining the showing of interest.

The Employer's contention that dispatchers and/or certified safety instructors are dual-function employees who should be excluded from the bargaining unit concerns their eligibility to vote. I find that the Hearing Officer appropriately excluded evidence as to this issue, and that the Employer's contention need not be resolved before the election because the resolution of the issue would not significantly change the size or character of the unit.

Although the Hearing Officer received evidence concerning the supervisory status of Frank Cappetta, the Employer's contention that Cappetta is a supervisor and should be excluded from the unit concerns his eligibility to vote, and I conclude that this issue need not be resolved before the election because resolution of the issue would not significantly change the size or character of the unit. Accordingly I shall not address the Employer's arguments concerning the exclusion of Cappetta and David from the unit, and those employees may vote under challenge.

The Employer's allegations of supervisory taint of the Petitioner's showing of interest will be investigated administratively. The Board has long held that it is inappropriate to litigate such matters in representation proceedings, and accordingly I will not consider that issue in this Decision. *Lampcraft Industries,* 127 NLRB 92 fn. 2 (1960).

The Employer has also challenged the Board's Final Rule entitled "Representation – Case Procedures," 29 C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74.308 (December 15, 2014) and its application to this case. The Board has already considered and rejected arguments concerning the validity of the Final Rule, and accordingly I shall not address the Employer's similar arguments. See *Pulau Corporation*, 363 NLRB No. 8, slip op. at 1 (September 16, 2015).

Finally, the Employer argues that *Specialty Healthcare*, supra, was wrongly decided by the Board. As I am bound by the Board's decision in *Specialty Healthcare*, I shall not address the claim that the case was wrongly decided.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. [8]

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania, excluding all other employees, guards, and supervisors as defined in the Act.

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[8] The Employer raised several procedural objections concerning the hearing: (1) that it was granted only a one-workday postponement of the hearing, from December 18 to December 21, although it had requested a two-workday postponement; (2) that it had inadequate time to prepare for the hearing under the Board's representation case rules; and (3) that denial of its request to prepare overnight for oral argument was a denial of due process. In reference to the third contention, at the close of the hearing the Employer chose not to make an oral argument as to the merits but simply stated its objection that the time allotted to prepare oral argument was insufficient.

I find that the hearing was conducted properly, that the multi-location issue was fully litigated, and that the Employer suffered no prejudice from the Hearing Officer's rulings. I reject the Employer's claim that it was denied due process as to the time allotted to prepare for oral argument. In this connection, the legal issues in this case are based on well-established Board principles, and the facts are not especially voluminous or complex. Moreover, the Employer presented a detailed version of its view of the facts and the law in its Statement of Position. I note, additionally, that Petitioner was able to present its oral argument at the conclusion of the hearing.

> Others Permitted to Vote: At this time, no decision has been made regarding whether the dispatchers and certified safety instructors are included in, or excluded from, the bargaining unit, and these individuals may vote in the election, but their ballots shall be challenged since their eligibility has not been resolved. The eligibility of these individuals will be resolved, if necessary, following the election.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Teamsters Local 773**.

A. Election Details

The parties disagree as to whether to conduct a manual or mail-ballot election.[9] The Petitioner contends that the election should be conducted by mail ballot because the road drivers have widely varying and uncertain schedules and are not present at a common place at a common time. The Employer disagrees and contends that the Region should conduct a manual election, noting that the Board generally favors in-person balloting over mail balloting. The Employer asserts that it can work with AAP in order to stagger schedules and rearrange delivery routes, so that the employees would be able both to vote and to complete their work duties. The Employer suggests that an election be conducted from 3:00 a.m. to 5:00 a.m. and 3:00 p.m. to 5:00 p.m. to enable all employees in the unit to have an adequate opportunity to vote.

In agreement with the Petitioner, I have decided to conduct a mail-ballot election. In *San Diego Gas & Electric,* 325 NLRB 1143, 1145 (1998), the Board stated that a mail ballot is preferable when eligible voters are "scattered." The Board has defined "scattered" to include situations involving both geography and varied work schedules. See *GPS Terminal Services,* Inc., 326 NLRB 839 (1998); *San Diego Gas & Electric,* supra. According to the Board, "the 'scattered' criteria are intended to apply in any situation where all employees cannot be present at the same place at the same time." *San Diego Gas & Electric,* supra, at 1145, fn. 7. The nature of the Employer's freight delivery service requires employees to travel long distances on highways and local roads. Traffic and weather conditions, particularly in winter, may hinder employees from returning to the Employer's facility in time to permit them to vote. Therefore, they may not all be present at the Kutztown facility at the same time. The Board additionally stated in *San*

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[9] Election arrangements, including the voting method, are not matters within the scope of a pre-election hearing. Pursuant to its longstanding practice, the Board has left such determinations to the discretion of the Regional Director. *2 Sisters Food Group, Inc.,* 357 NLRB No. 168, slip op. at 5 (2011); *Halliburton Services,* 265 NLRB 1154, 1155-1156 (1982); *Manchester Knitted Fashions, Inc.,* 108 NLRB 1366, 1367-1368 (1954). See also NLRB Casehandling Manual (Part Two), Representation Proceedings Sections 11228, 11301.4. Accordingly, although the Hearing Officer permitted the parties to state their positions at the hearing, the parties were not permitted to present evidence.

Diego Gas & Electric, supra, that in a scattered voter situation, the Board should also consider, inter alia, "what constitutes the efficient use of Board resources, because economic use of Board agents is reasonably a concern." Id. at 1145. In this case, the Employer's proposal for a four-hour election over a 26-hour time period for 30 voters would not facilitate an economic or efficient use of Board resources. I have therefore decided that a mail ballot would best accommodate the needs of the voters while also providing for a more efficient use of Board resources. See also *California Pacific Medical Center*, supra, 357 NLRB No. 21, slip op. at 3-4.

The National Labor Relations Board will conduct a secret mail ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local 773. The ballots will be mailed **at 5:00 p.m. on Monday, January 11, 2016** to employees employed in the appropriate collective-bargaining unit. Ballots will be mailed to voters from the National Labor Relations Board, Region 4, 615 Chestnut Street, Philadelphia, PA 19106. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void. Voters must return their mail ballots to the Region 4 office **by close of business on Friday, January 29, 2016.**

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail **by Tuesday, January 19, 2016,** should communicate immediately with the National Labor Relations Board by either calling the Region 4 Office at 215-597-6037 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

All ballots will be commingled and counted at the Region 4 Office at 615 Chestnut Street, Philadelphia, Pennsylvania **on Monday, February 1, 2016 at 2:00 p.m.** In order to be valid and counted, the returned ballots must be received in the Region 4 Office prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **Saturday, January 2, 2016,** including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Also eligible to vote using the Board's challenged ballot procedure are Frank Cappetta and Carl David, whose eligibility remains unresolved as specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3)

employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this Decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. The Employer must also include in a separate section of that list the same information for those individuals who, according to this Direction of Election, will be permitted to vote subject to challenge.

To be timely filed and served, the list must be *received* by the Regional Director and the parties **by Thursday, January 7, 2016.** The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer

customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least three (3) full working days prior to 12:01 a.m. of the day on which the ballots are mailed to employees and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this Decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: January 5, 2016

Harold A. Maier

HAROLD A. MAIER
Acting Regional Director, Region Four
National Labor Relations Board

Form NLRB-4910
(4-2015)

United States of America
National Labor Relations Board

NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. (See VOTING UNIT in this Notice of Election for description of eligible employees.) A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by secret ballot carried out through the U.S. mail under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Employees eligible to vote will receive in the mail *Instructions to Employees Voting by United States Mail*, a ballot, a blue envelope, and a yellow self-addressed envelope needing no postage.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are not eligible to vote.

CHALLENGE OF VOTERS: An agent of the Board or an authorized observer may question the eligibility of a voter. Such challenge must be made at the time the ballots are counted.
AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

METHOD AND DATE OF ELECTION

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 5:00 p.m. on Monday, January 11, 2016, ballots will be mailed to voters from the National Labor Relations Board, Region 04, 615 Chestnut St Ste 710, Philadelphia, PA 19106-4413. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.
Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Tuesday, January 19, 2016, should communicate immediately with the National Labor Relations Board by either calling the Region 04 Office at 215-597-6037 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).
Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 04 office by close of business on Friday, January 29, 2016.
All ballots will be commingled and counted at the Region 04 Office on Monday, February 1, 2016 at 2:00 p.m. In order to be valid and counted, the returned ballots must be received in the Region 04 Office prior to the counting of the ballots.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

Form NLRB-4910
(4-2015)

United States of America
National Labor Relations Board

NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

VOTING UNIT 04-RC-165805

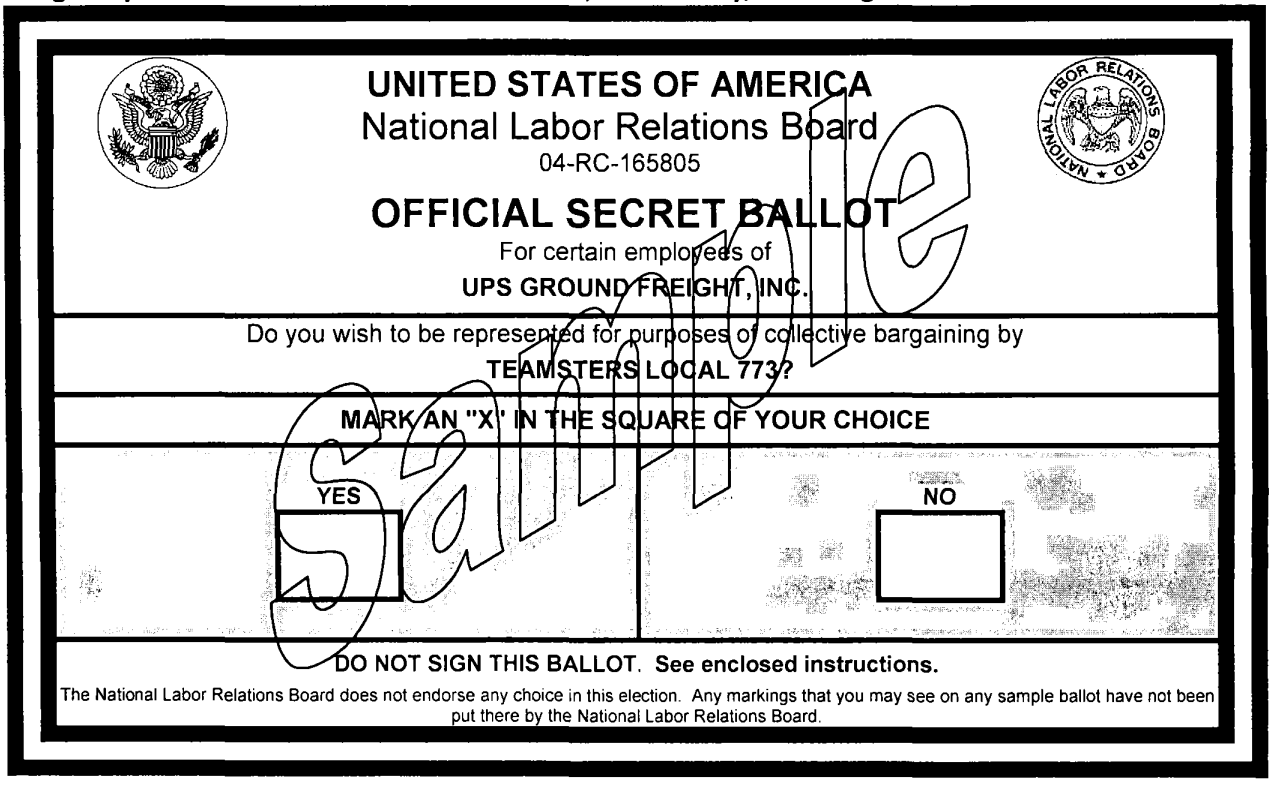
EMPLOYEES ELIGIBLE TO VOTE:

Those eligible to vote are: All regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania who were employed during the payroll period ending January 2, 2016.

EMPLOYEES NOT ELIGIBLE TO VOTE:

Those not eligible to vote are: All other employees, guards and supervisors as defined in the Act.

OTHERS PERMITTED TO VOTE: At this time, no decision has been made regarding whether the dispatchers and certified safety instructors are included in, or excluded from, the bargaining unit, and these individuals may vote in the election, but their ballots shall be challenged since their eligibility has not been resolved. The eligibility of these individuals will be resolved, if necessary, following the election.


UNITED STATES OF AMERICA
National Labor Relations Board
04-RC-165805
OFFICIAL SECRET BALLOT
For certain employees of
UPS GROUND FREIGHT, INC.
Do you wish to be represented for purposes of collective bargaining by
TEAMSTERS LOCAL 773?
MARK AN "X" IN THE SQUARE OF YOUR CHOICE
YES
NO
DO NOT SIGN THIS BALLOT. See enclosed instructions.
The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

Form NLRB-4910
(4-2015)

United States of America
National Labor Relations Board

NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities
- In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- Threatening loss of jobs or benefits by an Employer or a Union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time where attendance is mandatory, within the 24-hour period before the mail ballots are dispatched
- Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (215)597-7601 or visit the NLRB website www.nlrb.gov for assistance.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

HUNTON & WILLIAMS

HUNTON & WILLIAMS LLP
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951 EAST BYRD STREET
RICHMOND, VIRGINIA 23219-4074

TEL 804 • 788 • 8200
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KURT G. LARKIN
DIRECT DIAL: 804-788-8776
EMAIL: klarkin@hunton.com

FILE NO: 22749.001962

November 25, 2015

Mr. Harold A. Maier
Acting Regional Director, Region Four
National Labor Relations Board
615 Chestnut Street, Suite 710
Philadelphia, PA 19106-4413

Re: UPS Ground Freight, Inc., Case 04-RC-165805

Dear Mr. Maier:

I write to bring your attention to some factual errors reflected in your Decision and Direction of Election ("D&D") that require immediate correction. As you know, the parties disagreed over the election details; the Union requested a mail ballot, while the employer (UPS Freight) requested that the Region follow the NLRB's preferred, traditional method of a live ballot. In rejecting UPS Freight's request and granting the Union's request, you noted that the employees in the proposed unit are "scattered" in that they may not all be present at the Kutztown facility at the same time. This is incorrect. The employees in the unit all begin, and end, their workday in the same place: the Kutztown facility. Moreover, UPS Freight explained at the hearing that it would adjust delivery schedules to accommodate two windows of time during which all drivers would be present in the Kutztown facility. Under these circumstances, employees in the voting unit plainly are not "scattered" within the meaning of Board precedent. As such, a mail ballot cannot be held inasmuch as the Region's other justification for a mail ballot, "economic and efficient use of Board resources," cannot be determinative of whether a mail ballot is ordered. *See* NLRB Casehandling Manual ¶11301.2 (citing *San Diego Gas & Elec*., 325 NLRB 1143 (1998)).

You also concluded that a live ballot was not appropriate because "the Employer's proposal for a four-hour election over a 26-hour time period for 30 voters would not facilitate an economic or efficient use of Board resources." UPS Freight, however, proposed a split poll that would run from 3:00 a.m. through 5:00 a.m., and then again from 3:00 p.m. through 5:00 p.m. on a single election day. These polling times would result in a 1-day election over a 14-hour time period, almost 50% less time than the incorrect 26-hour period noted in the D&D. The upshot is that the Region could easily conduct a live ballot in a single day. The Board

routinely conducts split polls in both certification and decertification elections, and in units much smaller than the 30 voters here. There is simply no basis for a conclusion that a 14-hour polling period over a single day would be a waste of Board resources.

As you know, statistics show that voter turnout in mail ballots is often significantly lower than in traditional manual ballots. So the Region's decision to hold a mail ballot is likely to result in suppressed voter turnout, which is contrary to the purposes of the Act.

While we have a number of additional objections to the Region's D&D which we will make at the appropriate time, the errors described above require immediate review and correction. We request that the Region correct the D&D to reflect the actual election proposal made by UPS Freight and promptly change the election details to require a manual election.

Finally, we request that you place this correspondence in the evidentiary record and afford us an opportunity to speak with you about this issue before you make any decision regarding the issues raised in this correspondence.

Respectfully Submitted,

/s/ Kurt G. Larkin
Kurt G. Larkin
Counsel for UPS Ground Freight, Inc.

cc. Dennis P. Walsh
Kathleen O'Neill
Jeremy Meyer, Esq.
James P. Naughton, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing letter to Harold A. Maier, Acting Regional Director, National Labor Relations Board, Region Four, was served by electronic mail this 6th day of January, 2016 on the following:

Dennis P. Walsh
Regional Director, Region Four
National Labor Relations Board, Region Four
615 Chestnut Street, Suite 710
Philadelphia, PA 19106-4413
Dennis.Walsh@nlrb.gov

Kathleen O'Neill
Field Examiner
National Labor Relations Board, Region Four
615 Chestnut Street, Suite 710
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Jeremy Meyer, Esquire
Cleary, Josem & Trigiani
325 Chestnut Street, Suite 200
Philadelphia, PA 19106-2602
jmeyer@cjtlaw.org

/s/ Kurt G. Larkin

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

UPS GROUND FREIGHT, INC. **Employer**	
and	**Case 04-RC-165805**
TEAMSTERS LOCAL 773 **Petitioner**	

ERRATUM

On January 5, 2016, the Acting Regional Director's Decision and Direction of Election issued in this case. A sentence in the first paragraph on page 16 contains an inadvertent error and is hereby corrected to read as follows:

> "In this case, the Employer's proposal for a four-hour election over a 14-hour time period for 30 voters would not facilitate an economic or efficient use of Board resources."

Dated: January 7, 2016

/s/ Harold A. Maier
HAROLD A. MAIER
Acting Regional Director, Region Four
National Labor Relations Board

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KURT G. LARKIN
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EMAIL: klarkin@hunton.com

FILE NO: 22749.001962

January 7, 2016

Mr. Harold A. Maier
Acting Regional Director, Region Four
National Labor Relations Board
615 Chestnut Street, Suite 710
Philadelphia, PA 19106-4413

Re: UPS Ground Freight, Inc., Case 04-RC-165805

Dear Mr. Maier:

This letter is a follow up to our conference call held with you, Kathleen O'Neill and another staff member this afternoon at 3:30 p.m. During the call, UPS Ground Freight, Inc. (the "Company") made a revised proposal for conducting a manual ballot. The Company proposes a single polling time at the Advance Auto Parts Kutztown, PA distribution center, from 2:00 a.m. to 8:00 a.m. on a Wednesday to be determined in the Regional Director's discretion. The Company represents that all employees in the bargaining unit scheduled to work on election day will be present in the facility during the proposed period. The Company will delay all dispatch times on election day so that the starting times of eligible voters will begin during that period. In other words, employees would vote before they leave the facility to begin their shift.[1]

The Company's proposal eliminates any concern that the voting group would be "scattered" within the meaning of Board precedent. Under *San Diego Gas & Elec.*, 325 NLRB 1143 (1998), the Board considers employees to be scattered where, among other factors not present here: (i) they work over a wide geographic area, or (ii) their work schedules vary

[1] In response to an inquiry from one of your colleagues as to whether a continuous six-hour polling period would be uncomfortable for the Board agent conducting the election, we assured you that the Company is amenable an intermission of some reasonable length to allow the Board agent an appropriate break during the polling period. Despite our repeated requests, you declined to offer any suggestion regarding how long of a break you thought would be appropriate.

significantly so that they are not present at a common location at common times. Neither of these circumstances is present under the Company's revised proposal. All of the employees in the unit report to the same facility, so they are not assigned over a wide geographic area. Moreover, since all drivers would be voting before they leave the building, there is no concern they would not be present at a common location at common times. In this circumstance, the only possible reason for denying a manual ballot would be the efficient use of Board resources. However, the Board has made clear that "Regional Directors should not order mail ballot elections based solely on budgetary concerns." *San Diego Gas & Elec.*, 325 NLRB at 1145, n.8 (citing *Willamette Industries*, 322 NLRB 856 (1997)). Thus, the Company asserts that the Region should revise the Decision and Direction of Election and order a manual ballot.

You expressed doubt regarding the Regional Director's authority to revise the election details following issuance of a Decision and Direction of Election. You also intimated that it was too late for the Company to make this proposal now. To the contrary, it is well-within the Regional Director's broad discretion in conducting representation proceedings to revise the election details at any point. The Board has recognized election details may be worked out after the issuance of the Decision and Direction. *See* NLRB Casehandling Manual ¶11301.3 ("a determination may not be possible until, for example, after a decision and direction of election has issued"). Moreover, the Region is authorized to refuse to allow litigation regarding the facts or circumstances relevant to election details. *See* NLRB Casehandling Manual ¶11301.4 ("[T]here is no requirement that parties be permitted to litigate the election arrangements in the hearing . . . the arrangements as to the type of election may be resolved administratively and the parties so notified by letter separate from the decision and direction of election").

Accordingly, we disagree that the close of a pre-election evidentiary hearing is the last point at which a party may make a proposal regarding election details. Frankly, any refusal by the Region to consider this proposal now would be because it simply does not want to consider it, not because it is precluded from doing so. In this regard, we respectfully suggest the rapidly approaching deadline for dispatching the mail ballots is not sufficient justification for refusing to revise the election details, particularly where the compressed timeframe is of the Board's own making and the mail ballot decision was the Region's decision.

At the conclusion of our call, you indicated the Region was not inclined to change the election details. We would note the Board employs an abuse of discretion standard in determining whether to overturn the decision to conduct a mail ballot, and the standard "encompasses whether the Regional Director acted within the guidelines that [the Board has] outlined in directing a mail ballot election." *San Diego Gas & Elec.*, 325 NLRB at 1144, n.4. The Company's current proposal eliminates any reasonable contention the voting group is

"scattered" under Board precedent. Thus, proceeding with a mail ballot at this point would run afoul of the guidelines set forth in *San Diego Gas*.

The Company asks that you promptly reconsider your decision, accept the Company's revised proposal, order that a manual ballot be conducted at the Kutztown facility between 2:00 a.m. and 8:00 a.m. on a Wednesday of the Region's choosing, and amend the Decision and Direction of Election to reflect the same.

Respectfully Submitted,

/s/ Kurt G. Larkin
Kurt G. Larkin
Counsel for UPS Ground Freight, Inc.

cc. Dennis P. Walsh
Kathleen O'Neill
Jeremy Meyer, Esq.
James P. Naughton, Esq.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

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January 11, 2016

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Kurt G. Larkin, Esquire
Hunton & Williams, LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074

Re: UPS Ground Freight, Inc.
Case 04-RC-165805

Dear Mr. Larkin:

I am in receipt of your letter dated January 7, 2016, concerning this case. In that letter you ask that I reconsider my decision to conduct a mail ballot and request that I now direct a manual ballot using the 2 a.m. to 8 a.m. time frame offered during our telephonic meeting held earlier on January 7. I hereby deny that request. My reasons for doing so are as follows.

While you cite Casehandling Manual Sections 11301.3 and 11301.4, I do not find either of them helpful to the arguments you are making. In the circumstances before us, Section 11301.3 would not apply in light of the fact that, under the new Representation Case rules in effect since April 14, 2015, (hereinafter, the Rules), determinations on election arrangements are now expected to be made at the time the Decision and Direction of Election issues, as was done here. The parties made their positions as to the election arrangements known on the record. With the information available at the time the decision was issued, the judgment was made that a mail ballot offered the best chance for all members of the bargaining unit to be able to vote their ballots. Much the same can be said of Section 11301.4. There is no need for further administrative action once the Decision has issued as the Decision and Direction of Election now contains, as directed by the Rules, the terms under which the election will be conducted. Thus, I find that neither of the cited Sections necessarily allows me to reconsider my decision to order a mail ballot in this matter.

In any event, the Employer's proposal was fully considered and, you may recall, I noted that if the Employer and Petitioner could arrive at a joint Motion, it may have been granted and the election details changed accordingly. I also explained that, in my view, at least one purpose of the Rules was to get elections scheduled quickly and without lengthy and unnecessary procedural impediments. All parties were given an opportunity to offer election arrangement proposals for days prior to the hearing and the decision was made based upon what was present in the record. To allow any party to now, after public issuance of the Decision and Direction of Election, in essence begin to negotiate or offer alternative positions concerning the terms of the election is wholly out of step with the spirit of the Rules and would be manifestly unfair to other parties and the bargaining unit employees. Upon the issuance of the Decision and Direction of

Election, other parties to the matter have, no doubt, begun to formulate their strategies to publicize their positions to employees, strategies which will almost certainly be affected by the terms of the election. Bargaining unit employees also have a right to know what the election terms are so that they can begin to plan how to go about casting their ballots, and any "after the fact" change to the arrangements could give the impression that the process is still fluid, and that any decisions made remain subject to alterations attributable either to a party to the proceeding or the NLRB.

Accordingly, your request to change the terms of the election in this matter is denied and the mail ballot election will be conducted as ordered in the Decision and Direction of Election.

Very truly yours,

Harold A. Maier

HAROLD A. MAIER
Acting Regional Director

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

UPS GROUND FREIGHT, INC.,

Employer

and Case 04-RC-165805

TEAMSTERS LOCAL 773,

Petitioner

SPECIAL APPEAL AND REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S DECISION TO DIRECT A MAIL BALLOT ELECTION

Pursuant to Section 102.67(c) and (j) of the National Labor Relations Board's Rules & Regulations, 29 C.F.R. §102.67(c) and (j), UPS Ground Freight Inc., ("UPS Freight" or the "Company"), submits the following Special Appeal and Request for Review ("Special Appeal") of the Acting Regional Director's January 5, 2016 Decision and Direction of Election ("D&D"), *see* Ex. A., in which he denied the Company's request for a manual ballot and instead ordered a mail ballot election.

There is good cause for granting this Special Appeal. The Acting Regional Director's decision to hold a mail ballot election plainly departs from officially reported Board precedent and represents an abuse of discretion. The Board should reverse the D&D and order that a manual ballot, the Board's preferred method of conducting representation elections, be conducted instead.

Expedited review of this Special Appeal is necessary. The mail ballots are scheduled to be released to eligible voters today, January 11, 2016, and the Region has indicated it will count ballots at its Philadelphia offices on February 1, 2016. *See* Ex. A at 16. Under these

circumstances, the Board should impound the ballots pending its disposition of this Special Appeal.

I. BACKGROUND

UPS Freight, headquartered in Richmond, Virginia, provides transportation and delivery services for a variety of customers across the United States, including commercial customers. One of those customers is Advance Auto Parts ("AAP"), a national auto parts retailer.[1] Under its contract with AAP, UPS Freight delivers AAP products from nine AAP distribution centers to AAP retail stores nationwide. The Company employs truck drivers (called "Road Drivers") to drive tractor trailers on delivery routes from each distribution center to the retail stores serviced by that center.

The Union's petition in this case seeks an election in a unit consisting of all full-time and regular part-time UPS Freight Road Drivers assigned to work at AAP's Kutztown, Pennsylvania distribution center. Road Drivers at the Kutztown facility are assigned delivery routes servicing AAP stores in an area including parts of Pennsylvania, New Jersey and New York. Virtually all delivery routes can be completed in a single shift (i.e., less than one day). At the beginning of each shift, Road Drivers report to the Kutztown distribution center to start work and pick up their assigned tractor trailer. Upon completion of their route, they return to the Kutztown facility to drop off their tractor trailer. In other words, Road Drivers begin and end each work day at the Kutztown facility.

In its Petition, the Union requested a mail ballot. *See* Ex. B. UPS Freight objected to a mail ballot and requested a manual ballot in its Statement of Position. *See* Ex. C. at 8a. A pre-election hearing was held in Philadelphia, PA on December 21, 2015. At the conclusion of the

[1] The Acting Regional Director erroneously referred to AAP as UPS Freight's "sole customer" in the D&D. *See* Ex. A at 1.

hearing, the Union again requested a mail ballot, asserting that Road Drivers worked "odd[]" shifts and that a mail ballot was "the best way to do it." *See* Hearing Transcript ("Tr.") at 315-16.[2] UPS Freight reiterated its request for a manual ballot and proposed a one-day, single-site election consisting of two polling times, from 3:00 a.m. to 5:00 a.m. and again from 3:00 p.m. to 5:00 p.m. *See* Tr. at 316-17. The Company's proposal would have resulted in an election day of roughly 14 hours, not a particularly long time in comparison to myriad manual ballot Board elections held over multiple days and in multiple locations. The Company further represented that it would rearrange the dispatch schedule on election day to ensure that all Road Drivers scheduled to work would either begin their shift during the first polling window or complete it during the second window. *See* Tr. at 319. In other words, the Company offered to arrange driver schedules so that everyone would be present at the facility with ample time to vote in person. In considering the parties' positions, the Hearing Officer never hinted that the Region had any concerns with this proposal or that it might consider the unusual step of ordering a mail ballot.

Nevertheless, the Acting Regional Director granted the Union's request and ordered a mail ballot. He stated in the D&D that the Road Drivers were "scattered" within the meaning of Board precedent, notwithstanding that they all work at a single facility, because "the nature of the Employer's freight delivery service requires employees to travel long distances on highways and local roads." Ex. A at 15. He speculated that the weather might be bad on election day and that as a result, the Road Drivers "may not all be present at the Kutztown facility at the same time." *Id.* He then erroneously noted that the Company's proposal "for a four-hour election over a *26-hour time period* for 30 voters would not facilitate an economic or efficient use of Board resources." *Id.* at 16 (emphasis added). On these grounds, the Acting Regional Director

[2] An excerpt of transcript pages cited herein is attached as Ex. D.

concluded a mail ballot was appropriate. The D&D indicates that ballots will be mailed to eligible voters at 5:00 p.m. on Monday, January 11, 2016 and are to be returned to the Region 4 offices by the close of business on Friday, January 29, 2016. Ballots are to be counted on Monday, February 1, 2016 at 2:00 p.m. *Id.*

UPS Freight immediately objected to the D&D. Counsel electronically filed a letter to the Acting Regional Director on January 6, 2016, *see* Ex. E[3], noting that he had erroneously calculated the Company's election proposal as spanning a 26-hour time period instead of a 14-hour time period. The Company also explained that the Acting Regional Director was mistaken in concluding that employees who all begin and end their workday at a single location were "scattered," particularly where the Company had offered to adjust the dispatch schedule to ensure the Road Drivers would be present in the Kutztown facility during the proposed polling times. The Company requested that the Acting Regional Director correct his errors and reconsider the election details.

On January 7, 2016, the Acting Regional Director issued an Erratum to the D&D in which he corrected the miscalculation of the length of time the polls would have been open under the Company's election proposal, but made no other changes. *See* Ex. F. The same day, the Region 4 Investigating Officer (Kathleen O'Neill) called counsel and indicated in a voicemail that the Acting Regional Director would not change his decision to hold a mail ballot election. Counsel requested a telephone conference with the Acting Regional Director, which took place that afternoon. During the telephone conference, counsel made a revised election proposal offering a single polling time, from 2:00 a.m. to 8:00 a.m., on a Wednesday of the Acting Regional Director's choosing. Counsel explained that the Company would arrange the dispatch

[3] The first page of Ex. E is erroneously dated November 25, 2015. Internal header on page 2 reflects the correct date of January 6, 2016.

schedule so that all Road Drivers assigned to work would begin their shift during the polling period. UPS Freight's revised proposal thus eliminated any concern that Road Drivers who missed the first polling time under the Company's original proposal could be stuck on the road or in bad weather and fail to return to the facility in time to vote during the second polling time.[4]

At the conclusion of the call, the Acting Regional Director stated that he was refusing the Company's request to revisit the election details. He indicated that it was "too late" for the Company to revise its proposal, among other things, because the ballots were going out in just a few days. He also questioned whether he had the authority to revise the election details following his issuance of a Decision and Direction of Election. UPS Freight filed another letter with the Region on the afternoon of January 7th stating its revised election proposal in writing and urging the Acting Regional Director to reconsider his ruling. *See* Ex. G.

The Acting Regional Director responded by letter dated January 11, 2016. *See* Ex. H. In it, he did not respond substantively to the Company's revised proposal and did not address the question of whether voters remained "scattered" under Board precedent. Instead, he noted that under the Board's new representation case rules, "determinations on election arrangements are now expected to be made at the time the Decision and Direction of Election issues." The Acting Regional Director offered no citation to where in the new rules this "expectation" may be found.

The Acting Regional Director then incongruously suggested that "if the Employer and Petitioner could arrive at a joint Motion, it may have been granted and the election details changed accordingly." He concluded with the assertion that "to allow any party to now, after

[4] In response to an inquiry from one of the Acting Regional Director's colleagues on the call as to whether a continuous six-hour polling period would be difficult for a Board agent to administer, Company counsel stated that the Company was totally amenable to an intermission in the polling period of whatever length the Region wanted to allow the Board agent an appropriate comfort break. Despite having brought up the subject, the Region refused to offer any suggestion regarding what length break they felt would be appropriate.

public issuance of the Decision and Direction of Election, in essence begin to negotiate or offer alternative positions concerning the terms of the election is wholly out of step with the spirit of the Rules."

II. STANDARD OF REVIEW

The Board's rules do not establish any specified standard of review for a special appeal. However, they do provide that as to requests for review generally:

> (c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
>
> (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

29 C.F.R. §102.67(c). Accordingly, if the Regional Director's decision departs from established Board precedent, a request for review of that decision should be granted.[5]

The Board "employs an abuse of discretion standard in determining whether to overturn the decision of a Regional Director as to whether an election should be conducted manually or by mail." *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 n.4 (1998)(citing *Shepard Convention Services*, 314 NLRB 689 (1994), enf. denied on other grounds, 85 F.3d 671 (D.C. Cir. 1996) and *London's Farm Dairy*, 323 NLRB No. 186 (Jun. 20, 1997)). "The abuse of discretion issue encompasses whether the Regional Director acted within the guidelines that we have outlined in directing a mail ballot." *Id.* (emphasis added). Thus, the Regional Director must follow established Board precedent in determining whether a mail ballot is appropriate under the circumstances of each case.

[5] The Board treats requests for expedited consideration of a request for review, as well as requests for impoundment and/or segregation of ballots, as requests for "extraordinary relief." *See* 29 C.F.R. §102.67(j). Such relief is granted "only upon a clear showing that it is necessary under the particular circumstances of the case." *Id.*

III. APPLICABLE LEGAL PRECEDENT

The Regional Director has broad discretion in determining the arrangements for an election. That discretion, however, "is not unfettered and is to be exercised within certain guidelines." *San Diego Gas*, 325 NLRB at 1144. In this regard, the Board has held that the manual ballot election procedure is presumptively appropriate. *See Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998)(denying mail ballot election where voting group consisted of over 1,600 employees employed at various sites throughout New York City metropolitan region and assigned a "myriad of schedules, including being on-call 24 hours a day"). The Board's "longstanding policy, to which we adhere, has been that representation elections should as a general rule be conducted manually, either at the workplace or at some other appropriate location." *San Diego Gas* at 1144; *see also* NLRB Casehandling Manual (Part Two) Representation Proceedings §11301.2 ("The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually").

The circumstances under which the Board has authorized Regional Directors to order a mail ballot election are narrow. As the federal appellate courts have recognized, "[t]he purpose of such narrow criteria is to ensure that mail balloting is employed in a limited number of cases each year." *NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794, 797 (3d Cir. 1999); *see also Shepard Convention Servs. v. NLRB*, 85 F.3d 671, 674 (D.C. Cir. 1996)("in absence of any new evidence indicating 'infeasibility' of a manual election," Regional Director "properly denied the Union's request for an election by mail").

Thus, when deciding whether to conduct a manual or mail ballot election, a Regional Director should consider: (i) whether eligible voters are "scattered" because of their job duties

over a wide geographic area; (ii) whether eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times, and (iii) whether there is a work stoppage (i.e., strike or walkout) in progress. *San Diego Gas* at 1145. Voters may be deemed to be scattered "where they work in different geographic areas, work in the same areas but travel on the road, work different shifts, or work combinations of full-time and part-time schedules." *Id.* at 1145, n. 7. However, "the mere fact that employees may work multiple shifts, thereby necessitating more than one voting session during the course of the workday, is not in and of itself a sufficient basis for directing a mail ballot election." *Id.*

If, and only if, any of these circumstances are present, the Regional Director may then consider using a mail ballot, but in doing so "should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and finally, what constitutes the efficient use of Board resources." *Id.* In other words, if the facts do not indicate a scattered voting group or a work stoppage, the Regional Director cannot order a mail ballot election.[6]

IV. ARGUMENT

The Acting Regional Director's decision to hold a mail ballot election in this case is an abuse of discretion and must be overturned. Simply put, the Road Drivers eligible to vote in the election are not scattered within the meaning of *San Diego Gas*. They do not work over a wide geographic area. They are all assigned to a single employment site, the AAP Kutztown distribution center. They report to work each day at Kutztown and return there at the end of every shift. This is not a case in which eligible voters are employed at different work sites over a

[6] The Board has made clear that the efficient use of agency resources is not an acceptable reason for holding a mail ballot if one of the other factors outlined above is not present: "Regional Directors should not order mail ballot elections based solely on budgetary concerns." *San Diego Gas* at 1145, n.8.

wide geographic area. While Road Drivers certainly drive many miles in the performance of their duties, all of their delivery routes are designed to allow their return to Kutztown the same day.

Moreover, Road Drivers are not scattered in the sense that they are not at the Kutztown facility at the same time. In this regard, UPS Freight assured the Region that it would adjust dispatch times so that all Road Drivers assigned to work on election day would be at the facility either before the beginning of their assigned route (from 3:00 a.m. to 5:00 a.m. under the Company's original proposal) or after the completion of their assigned route (from 3:00 p.m to 5:00 p.m. under the Company's original proposal). The Company further revised its proposal following the D&D to suggest a single polling time, from 2:00 a.m. to 8:00 a.m. on a Wednesday (when all or nearly all of the voting group would be assigned to work) and assured the Region that all assigned Road Drivers would begin their shift during the polling period. UPS Freight's proposals eliminated any risk that a Road Driver would miss an opportunity to vote because he was stuck on the road.

Under these circumstances, the Acting Regional Director is wrong as a matter of law to conclude that the voting group is "scattered" under *San Diego Gas*. It plainly is not. None of the "scattered" criteria are present in this case, particularly under the Company's revised election proposal. As such, the Acting Regional Director did not have discretion under Board precedent to order a mail ballot election. His decision to do so in the face of clear evidence that the voting group is not scattered (and based mainly on unsupported speculation about the weather) is an abuse of discretion.

A finding that the voting group is not scattered renders unnecessary analysis of whether the efficient use of Board resources requires a mail ballot. But it is more than clear in any event

that a manual ballot election would not tax the Board's resources. The Company's original proposal called for a one-day, single-site election with the polls to be open for a total of 4 hours over a 14 hour period, to be conducted at a site about an hour's drive from the Region 4 offices in Philadelphia. UPS Freight's revised proposal would reduce the election time to just six hours. Thus, a manual ballot election could easily be completed in one day. It is implausible to suggest that such an election would result in misuse of Board resources. The Board has conducted countless manual ballot elections of much longer duration and routinely orders manual ballots consisting of split polling times, particularly in situations where employees work different shifts. It is disingenuous for the Acting Regional Director to suggest that adhering to the Board's preferred method of conducting elections is inappropriate under either of UPS Freight's election proposals, particularly given the widely recognized fact that mail ballots disenfranchise a larger number of voters than manual ballots.[7]

Finally, the Acting Regional Director is clearly wrong to suggest it is too late to consider the Company's revised election proposal. It is well-within his broad discretion to revise the election details at any point in the proceedings. The Board recognizes that election details may be worked out by the parties after the issuance of a Decision and Direction of Election. *See* NLRB Casehandling Manual (Part Two) Representation Proceedings §11301.3 ("a determination may not be possible until, for example, after a decision and direction of election has issued"). Additionally, the Region is permitted to refuse to allow litigation regarding the facts and circumstances relevant to election details. *See Id.* at §11301.4 ("[T]here is no requirement that parties be permitted to litigate the election arrangements in the hearing"). Thus, any suggestion by the Region that the Company is limited to the proposal it made at the hearing is without merit

[7] Indeed, a study cited by the dissent in *San Diego Gas* "showed that 87.9 percent of eligible employees participated in manual elections, and 68.14 percent participated in mail ballot elections, a difference of almost 20 percent." *Id.* at 1151, n.3 (Hurtgen and Brame, dissent).

and the Acting Regional Director's assertion that he is unable to revisit the election details following issuance of the D&D is incorrect.

In this regard, the Acting Regional Director's January 11, 2016 written rejection of the Company's revised mail ballot proposal is baffling. While claiming that the "expectation" under the new rules is that election arrangements are to be made at the time a Decision and Direction of Election issues, he cited no authority for that point. That is because no such authority exists in the rules or in the Casehandling Manual. The closest thing, 29 C.F.R. §102.66(g), merely states that a hearing officer must solicit the parties' positions on election details prior to closing the record. This rule does not remotely suggest either: (i) that a party is foreclosed from making additional proposals regarding election details after the hearing closes, or (ii) that the Regional Director is forbidden from revising the election details following issuance of a Decision and Direction of Election.

Presumably then, the Acting Regional Director's refusal to reconsider the election details is based on his understanding of the General Counsel's expectations regarding administration of the new rules. But the General Counsel's official guidance on the subject says nothing about whether a Regional Director is precluded from revisiting election details following issuance of a Decision and Direction. *See* MEMORANDUM GC 15-06. Even if it did, the Board has made clear that its decisional law trumps the General Counsel's administrative guidance. *See, e.g., San Diego Gas* at 1145, n.5 ("while the Casehandling Manual can be regarded as generally reflecting Board policies, in the event of conflict it is the Board's decisional law, not the Manual, that is controlling").

All this is aside from the fact that no one at the Region ever hinted before or during the hearing that they were seriously considering the Union's mail ballot proposal. Had the Hearing

Officer ever suggested that the Region might take this highly unusual step, the Company would have made its revised proposal at the hearing.[8] Regardless, the D&D did not issue until January 5, 2016, over two weeks after the hearing. The Region and the parties would have had ample opportunity to continue the discussion on election details had the Region taken the time to notify the parties of its concerns. The Region, however, said nothing. This may or may not be the Region's prerogative, but by doing so the Region denied the Company any opportunity to revise its election proposal prior to the D&D. Under these circumstances, the Acting Regional Director's contention that "all parties were given an opportunity to offer election arrangement proposals for days prior to the hearing" in hard to understand.

Equally hard to understand is the Acting Regional Director's alternative claim – that he might have accepted the Company's revised proposal if only the Company could get the Union to agree. The Region has known all along that the Union strongly opposed a manual ballot and that it wanted a mail ballot. The Union made this point clear both in the Petition and at the hearing and the Region knew such a proposal would be a non-starter with the Union. That being so, the Region's suggestion that the Company seek the Union's blessing and present a joint motion for a manual ballot, and that the Region "might" then look favorably on it, is little more than a post hoc rationalization.[9]

Ultimately, and regardless of the reasons for the Region's puzzling refusal to reconsider the election details, its most fundamental error is the Acting Regional Director's failure to acknowledge that if a voting group is not scattered, Board precedent does not allow the Region

[8] Indeed, the Company would have gladly considered any proposal the Region might have made to accommodate a manual election.

[9] The Acting Regional Director's remaining reasons for refusing to reconsider the election details, including his view of the potential unfairness to the parties and employees of revising his decision at this point, are based on factors that were never addressed in *San Diego Gas*. It would be inappropriate to hinge a decision for a mail ballot on such rationale.

to order a mail ballot. UPS Freight's original proposal, made on the record at the hearing and which the Acting Regional Director indisputably was required to consider, eliminates the possibility of a scattered voting group. Its modified proposal, which the Acting Regional Director has arbitrarily refused to consider, makes this point even more clear. Thus, even if the Acting Regional Director was not abusing his discretion by refusing to consider the Company's revised proposal (he was), he certainly abused it by rejecting the Company's original proposal.

V. CONCLUSION

The Acting Regional Director plainly erred in deciding that a single-site, one-day election in two polling periods over approximately fourteen hours (much less six hours under the Company's revised proposal) is inconsistent with the Board's longstanding policy favoring manual ballot elections. The voting group is not "scattered" under the law. Thus, the Acting Regional Director's direction of a mail ballot election exceeds his authority under Board precedent and constitutes an abuse of discretion under the standard set forth in *San Diego Gas*. The Board should grant UPS Freight's Special Appeal, expedite its review and/or impound the mail ballots pending review. Ultimately, it should reverse the Acting Regional Director and order that a manual ballot election be conducted.

Respectfully submitted,

UPS GROUND FREIGHT, INC.

/s/ Kurt G. Larkin

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Special Appeal and Request for Review was served by electronic mail this 11th day of January, 2016 on the following:

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/s/ Kurt G. Larkin

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

UPS GROUND FREIGHT, INC.[1]
Employer

and **Case 04-RC-165805**

TEAMSTERS LOCAL 773
Petitioner

DECISION AND DIRECTION OF ELECTION

The major issue presented in this case is whether the petitioned-for unit of road drivers at the Employer's Kutztown, Pennsylvania facility is an appropriate unit for bargaining, or whether the unit also must include employees at the Employer's eight other facilities around the country.

Teamsters Local 773 (Petitioner) seeks an election in a unit of all full-time and regular part-time road drivers including certified safety instructors and dispatchers employed by UPS Ground Freight, Inc. (the Employer) at its Kutztown, Pennsylvania facility.[2] The Employer contends that the unit sought by Petitioner is inappropriate because the road drivers employed at its other eight facilities share an overwhelming community of interest with the Kutztown road drivers.

A hearing officer of the Board held a hearing in this matter. As explained below, based on the record and relevant Board law, I find that the unit sought by Petitioner is appropriate, and I shall direct an election in that unit.

THE EMPLOYER'S OPERATIONS

The Employer, a subsidiary of UPS, Inc., provides transportation and delivery services for Advance Auto Parts (AAP) from nine AAP distribution centers to AAP retail stores nationwide. AAP is the Employer's sole customer.

The Employer's headquarters is in Richmond, Virginia. Its contract with AAP is administered by a central management team consisting of: Vice President of Operations for UPS Truckload Division Ted Lovely; National AAP Account Manager Quincy Adams; Operations Support Manager Paul D'Alessandro; Operational Support Supervisor Mark Grisham; and

[1] The Employer's name was amended at the hearing.
[2] I grant Petitioner's motion to amend the petition as to the unit description.

Support Manager Mina Metry. The Employer's Human Resources Manager is Ryan Owens, and its Employee Relations Supervisor is Ken Thomas.

The nine distribution centers are owned or leased by AAP. They are located in: Delaware, Ohio; Enfield, Connecticut; Gastonia, North Carolina; Hazlehurst, Mississippi; Lakeland, Florida; Roanoke, Virginia; Salina, Kansas; and Thomson, Georgia. At these facilities, AAP provides office space for the Employer's supervisory and administrative staff and parking areas for the Employer's tractors.

The Employer's operations at each of the nine facilities are managed by an Operations Manager and an Operations Supervisor. The Operations Managers report to Quincy Adams. At the time of the hearing those positions at the Kutztown facility had been vacant for about five months, since around July 2015. From July to October, Operations Support Manager D'Alessandro managed the Kutztown facility, with a schedule alternating between one week on-site and one week working remotely. Since then, Monte Copeland, a supervisor from Georgia, has served as the on-site acting Kutztown Operations Manager, with support from Operational Support Supervisor Mark Grisham. Since October 5, 2015, Matt DiBiase has been the Operations Supervisor at the Kutztown facility. DiBiase reports to Copeland or Grisham.

Currently, there are about 30 road drivers employed at the Kutztown facility. A year ago, the Kutztown facility had more than 70 road drivers, but staffing was reduced around November 2014 when AAP opened the new distribution center in Enfield, Connecticut, and certain retail stores previously serviced by the Kutztown facility were reassigned to the Enfield facility. The Kutztown facility is now understaffed, and the Employer is seeking to hire more road drivers there; the full complement is expected to be in the range of 45 to 50. Currently, there are about two to six temporary transfers from the Hazlehurst and Lakeland facilities who are working at the Kutztown facility.[3] In addition, at the time of the hearing, the Employer was supplementing the Kutztown workforce with about 10 to 15 temporary drivers leased from a third-party contractor.

The Employer seeks to add to the petitioned-for unit about 258 road drivers who are employed at the other eight facilities, specifically: 37 at the Delaware facility; 21 at the Enfield facility; 33 at the Gastonia facility; 35 at the Hazlehurst facility; 44 at the Lakeland facility; 36 at the Roanoke facility; 23 at the Salina facility; and 29 at the Thomson facility.

Each of the nine facilities covers a specific geographic area for delivery of freight from a single AAP distribution center to the AAP retail stores in that facility's delivery territory. There is no overlap of delivery territories. The Kutztown delivery territory covers central Pennsylvania, New Jersey, New York, and Delaware. The routes for the Kutztown road drivers range from 150 to 600 miles.

AAP products are delivered from the distribution centers to AAP retail stores using trailers owned by AAP, which are hauled by the Employer's single or double-axle tractors. Tractors may be day cabs or sleeper cabs; sleepers contain a bunk for overnight runs. At the

[3] The record is unclear as to the exact number of these temporary transfers.

Kutztown facility, the Employer maintains about 40 to 50 double-axle tractors, the majority of which are sleeper cabs.

Pursuant to AAP requirements, the Employer is implementing a "5X schedule" at all facilities, meaning that each AAP retail store will receive product deliveries five days per week. Previously, each AAP store received deliveries once or twice a week. The 5X schedule has been implemented already at the Lakeland, Enfield, and Gastonia facilities and will be implemented at all nine facilities by 2017. Since prior to Thanksgiving, 2015, the Employer has been phasing in the 5X schedule at the Kutztown facility.

About 23 to 25 road drivers at the Kutztown facility are assigned to a regular route. They report to work at different times ranging from midnight to 8:00 a.m. and return to the facility at various times ranging between 7:00 a.m. and 7:00 p.m. As the facilities transition to the 5X schedule, the majority of deliveries will occur at night. The road drivers' daily job duties include: performing pre-trip inspection of the tractor; reviewing paperwork for their daily loads; making deliveries of freight to AAP retail stores on their assigned routes and picking up any returned products; and returning to the distribution center to unload any returned products.

BOARD LAW

Where an employer operates multiple facilities, the Board presumes that a petitioned-for unit limited to employees at a single facility is appropriate. *J&L Plate, Inc.,* 310 NLRB 429 (1993); *Bowie Hall Trucking, Inc.,* 290 NLRB 41, 42 (1988). This presumption in favor of a single-location unit can be overcome by a showing that the facility has been effectively merged into a more comprehensive unit or is so functionally integrated with another unit that it has lost its separate identity. *Budget Rent a Car Systems, Inc.,* 337 NLRB 884, 885 (2002); *New Britain Transportation Co.,* 330 NLRB 397 (1999). The burden is on the party opposing a petitioned-for single-location unit to present evidence to overcome the presumption. *J&L Plate,* supra; *Red Lobster,* 300 NLRB 908, 910-911 (1990). The Board has described the burden of overcoming the single-facility presumption as "heavy." *Mercy Sacramento Hospital,* 344 NLRB 790 (2005). To determine whether the single-facility presumption has been rebutted, the Board examines (1) central control over daily operations and labor relations, including the extent of local autonomy; (2) similarity of employee skills, functions, and working conditions; (3) the degree of employee interchange; (4) the distance between locations; and (5) bargaining history, if any exists. See, e.g., *Trane*, 339 NLRB 866 (2003); *J &L Plate*, supra; *New Britain Transportation,* supra; *Globe Furniture Rentals, Inc.,* 298 NLRB 288 (1990).

In *Specialty Healthcare and Rehabilitation Center of Mobile,* 357 NLRB No. 83, slip op. at 10-13 (2011), enfd. 727 F.3d 552 (6th Cir. 2013), the Board modified the framework to be applied in making certain unit determinations. The *Specialty Healthcare* framework applies when the petitioner seeks a unit consisting of employees readily identifiable as a group who share a community of interest, but another party seeks a broader unit. The party seeking a broader unit must demonstrate, "that employees in the larger unit share an *overwhelming* community of interest with those in the petitioned-for unit." [Emphasis added]. To determine community of interest, the Board examines such factors as the degree of functional integration between employees, common supervision, employee skills and job functions, contact and

interchange, and similarities in wages, hours, and other terms and conditions of employment. *Publix Super Markets, Inc.*, 343 NLRB 1023 (2004); *Home Depot USA, Inc.*, 331 NLRB 1289 (2000); *United Operations, Inc.*, 338 NLRB 123 (2002). Additional employees share an overwhelming community of interest with petitioned-for employees only where there is no legitimate basis upon which to exclude them from the unit because the traditional community-of-interest factors overlap almost completely. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip op. at 3 (2011).

The Board did not indicate in *Specialty Healthcare* whether the analytical framework set forth in that case is intended to apply to a multi-facility unit issue. Assuming *Specialty Healthcare* applies, it would transform the multi-facility burden applied in these cases into a requirement that the party seeking to overturn the single-facility presumption demonstrate that employees at the facilities it seeks to add share an overwhelming community of interest with employees at the petitioned-for location. Because of the uncertainty regarding the Board's intentions in this area, I will analyze the multi-facility issue using both the traditional and the *Specialty Healthcare* standards.

APPLICATION OF BOARD LAW TO THIS CASE

In reaching the conclusion that the single-facility unit is appropriate, I rely on the following analysis and record evidence.

1. *Central Control over Daily Operations and Labor Relations*

The Board has made clear that "the existence of even substantial centralized control over some labor relations policies and procedures is not inconsistent with a conclusion that sufficient local autonomy exists to support the single location presumption." (Citations omitted). *California Pacific Medical Center*, 357 NLRB No. 21, slip op. at 2 (2011). Thus, "centralization, by itself, is not sufficient to rebut the single-facility presumption where there is significant local autonomy over labor relations. Instead, the Board puts emphasis on whether the employees perform their day-to-day work under the supervision of one who is involved in rating their performance and in affecting their job status and who is personally involved with the daily matters which make up their grievances and routine problems." (Citations omitted). *Hilander Foods*, 348 NLRB 1200, 1203 (2006). The Board has found the presence of local managers to be evidence of significant autonomy over local terms and conditions of employment supportive of a single-facility unit. *D&L Transportation,* 324 NLRB 160, 161 (1997); also see *Cargill, Inc.*, 336 NLRB 1114, 1114 (2001). Therefore, the primary focus of this factor is the control that facility-level management exerts over employees' day-to-day working lives.

The Employer maintains centralized control over many aspects of personnel and labor relations for all nine facilities, including payroll and recordkeeping. Employees at all of the facilities are subject to the same personnel policies, wage and benefits programs, performance criteria, and training/orientation policies. All road drivers are subject to the same corporate policies including anti-harassment and anti-violence policies. The Employer maintains a website where work rules and policies are posted, along with information about employee benefits. The Employer also maintains a driver's handbook and guidelines for safety, CSA (Compliance, Safety, Accountability), and hours of service. All employee pay and benefits, including health

insurance and a 401(k) plan, are determined at the corporate level, and all road drivers are entitled to the same time-off package, including vacation, sick days, holidays, and personal days. Personnel files are maintained on-line. Local managers' recommendations concerning suspension and termination of employees must be approved by the central management team and/or Human Resources.

All road drivers are paid pursuant to the same general guidelines. Road drivers are paid "activity based pay," which is based on their mileage and number of delivery stops at AAP retail stores. Mileage pay varies from 39¢ to 46¢ per mile, depending on geographic location. For example, the mileage pay for the Enfield and Kutztown facilities is higher than that for the Gastonia and Lakeland facilities. Pay for delivery stops varies depending on whether a facility has implemented the 5X schedule. Employees who are not working a 5X schedule are paid $16 per stop for the first three stops and $21 per stop for all additional stops, while employees on a 5X schedule receive $13 per stop. For non-driving work, such as training and safety meetings, road drivers are paid an hourly wage ranging from $16.50 to $17.50, depending on their length of service. When road drivers are driving a shuttle between the Kutztown facility and the Inmar warehouse (discussed below), they are paid a flat rate. Employees may be paid a premium rate when they are temporarily transferred to work at a different facility, and they may be paid "delay pay" when appropriate. In general, the annual wages of road drivers range from $60,000 to $100,000.

Twice a year, the Employer requires a safety review, known as an "S&V" (space and visibility) ride, for all road drivers. Road driver performance is monitored continuously via a "route tracker," an onboard system monitor that records specific data points including speed, braking, and miles per gallon (MPG) for each tractor. Local facility management can access the route tracker data and generate reports to evaluate road drivers and to improve their safety and efficiency. Employees may be disciplined based on this data but such discipline is not automatic. The Employer uses the same software system to dispatch all road drivers on their routes.

While there is much centralized control over personnel and labor relations, this is not sufficient to rebut the single-location presumption because the evidence demonstrates significant local autonomy over labor relations at the Employer's nine facilities. See, e.g., *New Britain Transportation Corp.,* supra; *Carter Hawley Hale Stores,* 273 NLRB 621, 623 (1984).

Thus, management at each facility has the authority to make decisions regarding employee schedules and assignments, including designating "standby employees" as needed for 24-hour coverage. Local management[4] has authority to approve vacation, personal day, and sick leave requests, and to schedule days off. Any employee disputes over dispatching or work assignments are resolved at the local level. Local managers independently address minor

[4] As used in this Decision, the terms "local management" and "local managers" refer to the local supervisors and managers based at the Employer's nine facilities and their designees, who may include the Operations Manager, Operations Supervisor, dispatchers, certified safety instructors, and trainers. However, these terms are not intended to convey any determination regarding the supervisory status of dispatchers or certified safety instructors or whether they are appropriately included in the petitioned-for bargaining unit.

disciplinary problems and have authority to issue oral and written warnings. They also make recommendations to the central management team and Human Resources for suspensions or terminations, which are followed if properly documented and if the discipline is warranted. Although personnel files are maintained online, disciplinary files are kept at the local facility. Local management is also responsible for preparing weekly payroll and addressing adjustments or corrections to payroll.

Applicants for employment apply online and are initially screened, interviewed, and pre-qualified by the Employer's central Recruiting Department, which eventually communicates any job offers. But after the Recruiting Department initially approves an applicant, local management is responsible for reviewing the application and interviewing and testing the applicant. Local testing includes both a road test and backing test to assess abilities. Local management has final authority to decide whether to hire an applicant.

All new employees receive the same training, including basic orientation in the Employer's general policies and procedures, HAZMAT training, and specialized training from AAP for AAP procedures, paperwork, delivery equipment, and the use of lift gates and power jacks.[5] This training and orientation is provided at the local facility and may last from two weeks to three months. Local management is responsible for ongoing safety training, including the S&V test required twice a year for all road drivers. During the S&V test, local management will inspect the vehicle and ride as a passenger with the road driver for one or two hours, monitoring the driver's performance.

Local management regularly evaluates the performance, efficiency, and safety records of road drivers. It is also responsible for accessing route tracker data on specific performance measurements and generating reports to flag irregularities, which are then investigated locally. For example, if there is an excessive speed recording, local management will investigate whether there was driver error or inaccurate recording by the monitor. Similarly if the MPG is too low, local management will determine whether a road driver is idling too long at delivery stops. Local managers handle problems encountered by road drivers during their routes, prepare accident reports, contact third-party contractors to lease temporary drivers, and purchase office supplies. For accidents or equipment breakdowns, road drivers contact a third-party tractor maintenance contractor, and/or the national "UPS breakdown number," and then their local facility. Customer complaints about road drivers are communicated to and addressed by local management, which deals directly with the local AAP representative.

In summary, local managers make the final hiring evaluations and determinations, issue low-levels of discipline without central oversight, and make recommendations as to higher levels of discipline. They regularly test, train, and monitor the performance of road drivers at their facilities. Thus, the record demonstrates that employees at the petitioned-for facility "perform their day-to-day work under the immediate supervision of local managers who are involved in rating their performance and affecting their job status and who are personally involved with the

[5] Lift gates are devices on the trailers used to lower product from the trailer to ground level when there is no loading dock at the AAP retail store. Power jacks are small forklifts used to lift and move pallets of freight.

daily matters which make up their grievances and routine problems." *Penn Color, Inc.*, 249 NLRB 1117, 1119 (1980). Accordingly, I find that there is significant local autonomy over labor relations to support the single-facility presumption.

2. *Similarity of Skills, Functions, and Working Conditions*

The similarity or dissimilarity of duties, qualifications, working conditions, wages, and benefits among employees at all of the employer's facilities has some bearing on determining the appropriateness of the single-facility unit. See, e.g., *Dattco, Inc.*, 338 NLRB 49, 51 (2002).

With the exception of working from geographically separate facilities, employees at all of the Employer's locations essentially share identical skills and functions. All road drivers are responsible for delivering freight from the distribution centers to the AAP stores in a safe and efficient manner. The road drivers perform the same work, share the same qualifications, are paid with wages determined under the same criteria, receive identical benefits, are assigned work by the same method, and record their hours of work using the same form. All road drivers wear the same uniform and use the same types of equipment, including the tractors, lift gates, and power jacks. They are all required to follow DOT regulations and complete daily DOT logs.

While there are substantial similarities in working conditions among the road drivers at the nine facilities, there are some working conditions that are particular to the Kutztown facility. One difference concerns product returns. Most facilities have an on-site location at the AAP distribution center for returned products, but the Kutztown facility has an off-site center for returns at Inmar, Pennsylvania, approximately 10 miles away. At the end of his or her route, a Kutztown road driver travels to the Inmar location to offload returned product and then returns to the distribution center. If the Inmar location is closed, the driver returns directly to the Kutztown facility, and returned products will be delivered by shuttle the next day to Inmar by Kutztown road drivers. Additionally, as noted above, the mileage rate varies depending on geographic location, so the Kutztown mileage rate differs from that at other facilities.

Despite these differences, I find that this factor generally favors the Employer's position. However, this factor is less important than whether individual facility management has autonomy and whether there is substantial interchange.

3. *Functional Integration*

Evidence of functional integration is also relevant to the issue of whether a single-facility unit is appropriate. Functional integration refers to when employees at two or more facilities are closely integrated with one another functionally notwithstanding their physical separation. *Budget Rent A Car Systems*, supra, 337 NLRB 884 (2002). This functional integration involves employees at the various facilities participating equally and fully at various stages in the employer's operation, such that the employees constitute integral and indispensable parts of a single work process. Id. An important element of functional integration is that the employees from the various facilities have frequent contact with one another. Id. at 885.

Generally, each of the Employer's facilities is managed as a separate entity for the purpose of providing freight services for a specific AAP delivery territory, but there is limited evidence of functional integration as to staffing and equipment. AAP generally sets the requirements for the design of the Employer's delivery routes, and staffing and equipment levels for all facilities are decided by the central management team. When a facility is short-staffed, the local Operations Manager will notify central management, and the central management team, in consultation with the local Operations Managers, will decide whether to transfer road drivers temporarily from another facility or authorize temporary leased labor from a third-party contractor. However during the last six months, the Kutztown facility has been authorized to contact these third-party contractors directly for extra drivers when needed. The central management team is responsible for determining the occasional transfer of equipment from one facility to another. Such transfers occur at least once a year, and road drivers may be assigned to deliver the equipment between facilities.

Except for the evidence of interchange and transfers described below, there is no evidence that the Employer's limited functional integration results in any contact among employees at the different facilities. Road drivers from the Kutztown facility do not speak with employees at other facilities by telephone or have personal contact with them in the normal course of their work duties. Road drivers from the Roanoke facility make weekly deliveries of intra-Employer mail to the Kutztown facility, but the record contains no evidence of any contact among road drivers resulting from these deliveries. Safety trainers from different facilities may participate in occasional group conference calls with managers to discuss safety and compliance matters, but there were no such group conference calls during 2015. Such sporadic contact provides little basis for overcoming the single-facility presumption. Moreover, the record fails to demonstrate that the employees employed in the Employer's separate facilities are part of a single work process, where work is performed at various stages on the same product at different facilities. Rather, the function served by each of the Employer's facilities is to meet the delivery needs of AAP for the specific delivery territory served by that facility.

This lack of functional integration supports a finding that the single-facility unit at the Kutztown facility is appropriate.

4. ***The Degree of Employee Interchange***

The Board has identified employee interchange as another critical factor in deciding whether the single-facility presumption has been rebutted. *Mercy Sacramento Hospital,* 344 NLRB 790 (2005); *First Security Services Corp.,* 329 NLRB 235, 236 (1999). Employee contact is considered interchange where a portion of the work force of one facility is involved in the work of other facilities through temporary transfer or assignment of work. However, a significant portion of the work force must be involved and the work force must be actually supervised by the local branch to which they are not normally assigned in order to meet the burden of proof on the party opposing the single-facility unit. *New Britain Transportation Co.,* 330 NLRB 397, 398 (1999). The regular shifting of employees between facilities tends to undermine the identity of employees at a particular site as a discrete group and indicates the merger of employees into a multi-location grouping. In *New Britain Transportation,* supra, the Board suggested that a party seeking to rely on this factor to rebut the single-facility presumption

must present detailed evidence of interchange, in context, and show that a high percentage of employees regularly work in the jurisdiction of other facilities. For example, the Board found that interchange was established and significant where during a one-year period there were approximately 400 to 425 temporary employee interchanges among three terminals in a workforce of 87 and the temporary employees were directly supervised by the terminal manager where the work was being performed. *Dayton Transport Corp.* 270 NLRB 1114 (1984). On the other hand, where the amount of interchange is unclear both as to scope and frequency because the record does not show how the total amount of interchange compares to the total amount of work performed, the burden of proof is not met, including where a party fails to support a claim of interchange with either documentation or specific testimony providing context. *Cargill, Inc.*, supra, 336 NLRB 1114 (2001); *Courier Dispatch Group*, 311 NLRB 728, 731 (1993). Also important in considering interchange is whether the temporary employee transfers are voluntary or required, the number of permanent employee transfers, and whether the permanent employee transfers are voluntary or mandatory. *New Britain Transportation Co.*, supra.

Temporary transfers

Temporary transfers of the Employer's road drivers are generally initiated by a local Operations Manager and arranged by the central management team in consultation with Operations Managers. These transfers may last from a few days to two months. On occasion, the Employer may provide housing for temporarily transferred drivers, but generally the Employer does not provide housing or a food allowance, and employees are expected to sleep in sleeper cabs. Most temporary transfers are voluntary, although for assignments of no more than a week, the Employer will select employees if there are no volunteers. While working as temporary transfers at a different facility, road drivers' duties remain unchanged.

The record does not establish that a significant percentage of the road drivers transfer among the Employer's various facilities. The Employer presented a chart showing, for the past three years, the total number of employees temporarily transferred from and to each facility, and the total number of workweeks for employees at the facility. During those three years, the Kutztown facility temporarily transferred 17 road drivers to three other facilities (Enfield, Roanoke, and Salina) for a total of 72 workweeks, and 44 temporary transfers worked at the Kutztown facility for a total of 163 workweeks. Thus, there were a total of 235 workweeks of temporary transfers involving the Kutztown facility road drivers. However, the chart does not show the dates or duration of transfers, and the record does not reflect whether these temporary transfers occurred voluntarily or were required by the Employer. Further, the record evidence does not allow for comparison with total work performed because the Employer did not present evidence comparing temporary transfer workweeks to the total number of workweeks or indicate the percentage of total employees involved in temporary interchange. The data in the chart thus lacks needed context.

The party opposing the single-facility presumption has the burden of presenting sufficient evidence to rebut it. *J&L Plate,* supra, 310 NLRB at 429, and the presumption has not been rebutted where an employer's interchange data is represented in aggregate form rather than as a percentage of total employees. *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 849 fn. 5 (7th Cir. 1999), citing *Walgreen Co. v. NLRB*, 564 F.2d 751, 754 (7th Cir. 1977). See also *New Britain*

Transportation Co., supra, 330 NLRB 397 at 398. I therefore find that the Employer has failed to meet this burden with respect to evidence of temporary transfers.

However, even assuming a reasonable context for the Employer's proffered evidence, the temporary transfers do not approach the degree usually found significant in a multi-facility analysis. Thus, assuming that the current complement of 30 road drivers at Kutztown worked 52 weeks per year, these drivers worked a total of 4,680 workweeks in three years. Accordingly, the 235 workweeks of temporary transfers involving the Kutztown facility road drivers constitute only about five percent of total Kutztown workweeks.[6] It is also significant that about 23 percent of the temporary transfers occurred during the opening of the Enfield facility in around November 2014 when Kutztown sent 10 employees there for a total of 54 employee workweeks. Temporary transfers due to the opening of a facility are generally not entitled to as much weight as temporary transfers between regularly operating facilities in determining the scope of the appropriate unit. *Renzetti's Market*, supra, at 175 fn. 8. Currently, there are two to six road drivers temporarily assigned to the Kutztown facility from other AAP distribution centers, including a safety trainer from Lakeland to assist with year-end S&V safety training. This amounts to between 7 and 20 percent of the 30 Kutztown road drivers currently employed. Road driver/dispatcher Frank Cappetta testified that during 2015, only three to five percent of Kutztown routes were staffed by road drivers from other facilities.

The evidence also shows that there were a total of 117 temporary transfers for 413 workweeks for all of the Employer's facilities over the three years. This accounts for less than one percent of the 44,900 total weeks worked by the Employer's 288 road drivers. Thus, even putting the number of temporary transfers into context, I find that employee interchange is far lower than the level of interchange typically present in cases where the Board has found it to be significant. See e.g., *Purolator Courier Corp.*, 265 NLRB 659, 661 (1982) (interchange factor met when 50 percent of work force came within the jurisdiction of other branches on a daily basis and there existed a greater degree of supervision from other terminals than from the supervisors at their own terminals); *Dayton Transport Corp.*, supra (single-facility presumption rebutted where in one year there were 400 to 425 temporary transfers in a work force of 85-87); *P.S. Elliott Services, Inc.* 300 NLRB 1161, 1162 (1990) (single-facility presumption rebutted where at least 50 percent of employees were transferred).

Finally, the evidence suggests that the majority of temporary transfers are voluntary. Such voluntary interchange is given less weight in determining if employees from different locations share a common identity. *D&L Transportation*, supra, 324 NLRB at 162 fn. 7.

Permanent transfers

Employees may request permanent transfers, and the Employer will review a centralized data base to ascertain whether there any available positions. The Employer provided a chart showing 27 permanent transfers since 2011, including five transferred supervisors, but the record

[6] As noted above, there were considerably more than 30 drivers at the Kutztown facility at times during the three-year period. Thus, the transfer percentages posited in this paragraph are, if anything, higher than the actual percentages.

contains no information as to the reasons for these transfers. Of the 22 non-supervisor transfers, there were 14 transfers from, and two transfers to, the Kutztown facility. The majority of permanent transfers (15) occurred in 2011 (10 in April from Kutztown to Lakeland, three from Delaware to Salina, one each from Kutztown and Salina to Delaware). There were no transfers in 2012, and in 2013, there were two transfers (Kutztown to Lakeland, and Roanoke to Kutztown). In 2014, there were four transfers: (Hazlehurst to Delaware, Roanoke to Lakeland, and two from Kutztown to Enfield, when the Enfield facility opened). In 2015, there was one transfer (Delaware to Kutztown). The chart shows that four permanent transfers occurred 15 days or less after the employee's hire date, and that eight transfers occurred less than one month after hire. Some of these newly-hired employees were at the Kutztown facility solely for training and then transferred to another facility.

I find that there is no substantial evidence of permanent transfers involving the petitioned-for facility, as since the beginning of 2013, there were only five transfers involving this facility, including one related to the opening of the Enfield warehouse. Moreover, it is well established that the Board considers permanent transfers to be a less significant indication of actual interchange than temporary transfers. *Red Lobster*, supra, 300 NLRB at 911 (1990).

On balance, after reviewing the evidence of temporary and permanent transfers, I find that this factor does not weigh in favor of rebutting the single-facility presumption.

5. ***Distance Between Locations***

The Kutztown facility is approximately 250 miles from the Enfield facility, 360 miles from the Roanoke facility, 460 miles from the Delaware facility, 560 miles from the Gastonia facility, 740 miles from the Thomson facility, 1,100 miles from the Lakeland facility, 1,130 miles from the Hazlehurst facility, and 1,265 miles from the Salina facility.[7] This geographic separation, while not determinative, gains significance where, as here, there are other persuasive factors supporting the single-facility unit. *Bowie Hall Trucking*, supra, 290 NLRB at 43. In view of my conclusions regarding the other factors, I conclude that the substantial distance between the Kutztown facility and all of the other AAP distribution facilities further supports my determination that a single-facility unit is appropriate. See e.g. *Marine Spill Response Corp.*, 348 NLRB 1282, 1287 (insufficient evidence of functional integration given distance of about 100 miles of San Diego facility from Long Beach facility, local autonomy and presence of supervision at facilities, and lack of regular employee interchange or interaction); *Rental Uniform Service,* 330 NLRB 334 (1999) (Board relied on evidence of geographic separation of 22 and 50 miles and significant local autonomy over labor relations and absence of interchange and work interaction to find that presumptive appropriateness of petitioned-for single facility unit had not been rebutted). Compare *Cargill, Inc.,* supra (13 to 14 incidents of interchange among 23 employees in eight-month period insufficient to overcome the single-facility presumption).

This factor clearly favors a finding that the petitioned-for single-facility unit is appropriate.

[7] Mileage estimates were taken from *Google Maps*.

6. ***Bargaining History***

The absence of bargaining history is a neutral factor in the analysis of whether a single-facility unit is appropriate. *Trane*, 339 NLRB 866, 868, fn. 4 (2003). Thus, the fact that there is no bargaining history in this matter does not support nor does it negate the appropriateness of the unit sought by Petitioner.

CONCLUSION CONCERNING WHETHER SINGLE-FACILITY UNIT IS APPROPRIATE

In determining that the single-facility unit sought by Petitioner is appropriate, I have carefully considered the record evidence and weighed the various factors that bear on this issue. In particular, I rely on the significant evidence of local autonomy over labor relations matters at the Kutztown facility, the absence of evidence showing any contact between the Kutztown road drivers and drivers from other facilities in the course of normal work duties, the lack of evidence of substantial temporary or permanent transfers among the facilities, and the considerable distance between the Kutztown facility and the other facilities. I have considered the similarity of skills and functions and the common personnel policies and wage and benefit structure, but find these factors insufficient to meet the Employer's heavy burden of overcoming the single-facility presumption. I also note that the terms and conditions of employment for Kutztown road drivers vary from those at other facilities as to mileage rates and product return procedures. On balance, I find that the Employer has failed to establish that the Kutztown facility has been so effectively merged into the other facilities that it has lost its separate identity to the point where the presumptive appropriateness of the petitioned-for unit has been rebutted such that the only appropriate unit would include employees from all facilities. *New Britain Transportation Co.*, supra. See also *Hilander Foods*, supra, 348 NLRB at 1202-1204; *Cargill, Inc.*, supra, 336 NLRB 1114 (2001).

SPECIALTY HEALTHCARE ANALYSIS

I reach the same result applying the *Specialty Healthcare* standards. The initial step required under *Specialty Healthcare* is a determination of whether employees in the petitioned-for unit constitute a discrete group with a community of interest. In this case, the Kutztown employees constitute such a group, as they perform the same job duties, operate in the same clearly-defined geographical area, and share the same local supervision. Since this community of interest has been demonstrated, the burden is on the Employer to show that employees at the other eight AAP distribution facilities share an overwhelming community of interest with the Kutztown employees. As the Board explained in *Northrop Grumman Shipbuilding, Inc.*, supra, 357 NLRB No. 163, slip op. at 3, "additional employees share an overwhelming community of interest with the petitioned-for employees only when there 'is no legitimate basis on which to exclude [the] employees from' the larger unit because the traditional community-of-interest factors overlap almost completely."

The Employer has failed to meet this burden. Each facility is supervised separately on a day-to-day basis by different managers and employees. The different facilities cover different areas, the drivers receive different mileage rates, and there is little functional integration or

contact between the drivers based at different facilities. The existence of these factors favoring separate units is sufficient to defeat any claim of an overwhelming community of interest between the Kutztown employees and the employees employed at the Employer's eight other facilities, and to require a finding that the Kutztown facility employees constitute an appropriate unit. *Macy's, Inc.*, 361 NLRB No. 4 (2014); *Guide Dogs for the Blind*, 359 NLRB No. 151 (2013).

In short, whether the Board's traditional single-facility unit presumption or the *Specialty Healthcare* framework applies, I find that the Employer has not carried its burden of rebutting the appropriateness of a unit limited to Kutztown employees. Accordingly, I shall direct an election in a Kutztown-only unit.

OTHER ISSUES

The Employer contends that two road drivers, Frank Cappetta and Carl David, who also work as dispatchers and/or certified safety instructors, are dual-function employees who do not share a community of interest with the petitioned-for road drivers. The Employer further contends that Cappetta is a supervisor under Section 2(11) of the Act and that the petition may be tainted because of Cappetta's alleged involvement in obtaining the showing of interest.

The Employer's contention that dispatchers and/or certified safety instructors are dual-function employees who should be excluded from the bargaining unit concerns their eligibility to vote. I find that the Hearing Officer appropriately excluded evidence as to this issue, and that the Employer's contention need not be resolved before the election because the resolution of the issue would not significantly change the size or character of the unit.

Although the Hearing Officer received evidence concerning the supervisory status of Frank Cappetta, the Employer's contention that Cappetta is a supervisor and should be excluded from the unit concerns his eligibility to vote, and I conclude that this issue need not be resolved before the election because resolution of the issue would not significantly change the size or character of the unit. Accordingly I shall not address the Employer's arguments concerning the exclusion of Cappetta and David from the unit, and those employees may vote under challenge.

The Employer's allegations of supervisory taint of the Petitioner's showing of interest will be investigated administratively. The Board has long held that it is inappropriate to litigate such matters in representation proceedings, and accordingly I will not consider that issue in this Decision. *Lampcraft Industries,* 127 NLRB 92 fn. 2 (1960).

The Employer has also challenged the Board's Final Rule entitled "Representation – Case Procedures," 29 C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74.308 (December 15, 2014) and its application to this case. The Board has already considered and rejected arguments concerning the validity of the Final Rule, and accordingly I shall not address the Employer's similar arguments. See *Pulau Corporation*, 363 NLRB No. 8, slip op. at 1 (September 16, 2015).

Finally, the Employer argues that *Specialty Healthcare*, supra, was wrongly decided by the Board. As I am bound by the Board's decision in *Specialty Healthcare*, I shall not address the claim that the case was wrongly decided.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. [8]

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania, excluding all other employees, guards, and supervisors as defined in the Act.

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[8] The Employer raised several procedural objections concerning the hearing: (1) that it was granted only a one-workday postponement of the hearing, from December 18 to December 21, although it had requested a two-workday postponement; (2) that it had inadequate time to prepare for the hearing under the Board's representation case rules; and (3) that denial of its request to prepare overnight for oral argument was a denial of due process. In reference to the third contention, at the close of the hearing the Employer chose not to make an oral argument as to the merits but simply stated its objection that the time allotted to prepare oral argument was insufficient.

I find that the hearing was conducted properly, that the multi-location issue was fully litigated, and that the Employer suffered no prejudice from the Hearing Officer's rulings. I reject the Employer's claim that it was denied due process as to the time allotted to prepare for oral argument. In this connection, the legal issues in this case are based on well-established Board principles, and the facts are not especially voluminous or complex. Moreover, the Employer presented a detailed version of its view of the facts and the law in its Statement of Position. I note, additionally, that Petitioner was able to present its oral argument at the conclusion of the hearing.

> Others Permitted to Vote: At this time, no decision has been made regarding whether the dispatchers and certified safety instructors are included in, or excluded from, the bargaining unit, and these individuals may vote in the election, but their ballots shall be challenged since their eligibility has not been resolved. The eligibility of these individuals will be resolved, if necessary, following the election.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Teamsters Local 773**.

A. Election Details

The parties disagree as to whether to conduct a manual or mail-ballot election.[9] The Petitioner contends that the election should be conducted by mail ballot because the road drivers have widely varying and uncertain schedules and are not present at a common place at a common time. The Employer disagrees and contends that the Region should conduct a manual election, noting that the Board generally favors in-person balloting over mail balloting. The Employer asserts that it can work with AAP in order to stagger schedules and rearrange delivery routes, so that the employees would be able both to vote and to complete their work duties. The Employer suggests that an election be conducted from 3:00 a.m. to 5:00 a.m. and 3:00 p.m. to 5:00 p.m. to enable all employees in the unit to have an adequate opportunity to vote.

In agreement with the Petitioner, I have decided to conduct a mail-ballot election. In *San Diego Gas & Electric,* 325 NLRB 1143, 1145 (1998), the Board stated that a mail ballot is preferable when eligible voters are "scattered." The Board has defined "scattered" to include situations involving both geography and varied work schedules. See *GPS Terminal Services,* Inc., 326 NLRB 839 (1998); *San Diego Gas & Electric,* supra. According to the Board, "the 'scattered' criteria are intended to apply in any situation where all employees cannot be present at the same place at the same time." *San Diego Gas & Electric,* supra, at 1145, fn. 7. The nature of the Employer's freight delivery service requires employees to travel long distances on highways and local roads. Traffic and weather conditions, particularly in winter, may hinder employees from returning to the Employer's facility in time to permit them to vote. Therefore, they may not all be present at the Kutztown facility at the same time. The Board additionally stated in *San*

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[9] Election arrangements, including the voting method, are not matters within the scope of a pre-election hearing. Pursuant to its longstanding practice, the Board has left such determinations to the discretion of the Regional Director. *2 Sisters Food Group, Inc.,* 357 NLRB No. 168, slip op. at 5 (2011); *Halliburton Services,* 265 NLRB 1154, 1155-1156 (1982); *Manchester Knitted Fashions, Inc.,* 108 NLRB 1366, 1367-1368 (1954). See also NLRB Casehandling Manual (Part Two), Representation Proceedings Sections 11228, 11301.4. Accordingly, although the Hearing Officer permitted the parties to state their positions at the hearing, the parties were not permitted to present evidence.

Diego Gas & Electric, supra, that in a scattered voter situation, the Board should also consider, inter alia, "what constitutes the efficient use of Board resources, because economic use of Board agents is reasonably a concern." Id. at 1145. In this case, the Employer's proposal for a four-hour election over a 26-hour time period for 30 voters would not facilitate an economic or efficient use of Board resources. I have therefore decided that a mail ballot would best accommodate the needs of the voters while also providing for a more efficient use of Board resources. See also *California Pacific Medical Center*, supra, 357 NLRB No. 21, slip op. at 3-4.

The National Labor Relations Board will conduct a secret mail ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local 773. The ballots will be mailed **at 5:00 p.m. on Monday, January 11, 2016** to employees employed in the appropriate collective-bargaining unit. Ballots will be mailed to voters from the National Labor Relations Board, Region 4, 615 Chestnut Street, Philadelphia, PA 19106. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void. Voters must return their mail ballots to the Region 4 office **by close of business on Friday, January 29, 2016.**

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail **by Tuesday, January 19, 2016,** should communicate immediately with the National Labor Relations Board by either calling the Region 4 Office at 215-597-6037 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

All ballots will be commingled and counted at the Region 4 Office at 615 Chestnut Street, Philadelphia, Pennsylvania **on Monday, February 1, 2016 at 2:00 p.m.** In order to be valid and counted, the returned ballots must be received in the Region 4 Office prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **Saturday, January 2, 2016,** including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Also eligible to vote using the Board's challenged ballot procedure are Frank Cappetta and Carl David, whose eligibility remains unresolved as specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3)

employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this Decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. The Employer must also include in a separate section of that list the same information for those individuals who, according to this Direction of Election, will be permitted to vote subject to challenge.

To be timely filed and served, the list must be *received* by the Regional Director and the parties **by Thursday, January 7, 2016.** The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer

customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least three (3) full working days prior to 12:01 a.m. of the day on which the ballots are mailed to employees and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this Decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: January 5, 2016

Harold A. Maier

HAROLD A. MAIER
Acting Regional Director, Region Four
National Labor Relations Board

Form NLRB-4910
(4-2015)

United States of America
National Labor Relations Board

NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. (See VOTING UNIT in this Notice of Election for description of eligible employees.) A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by secret ballot carried out through the U.S. mail under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Employees eligible to vote will receive in the mail *Instructions to Employees Voting by United States Mail*, a ballot, a blue envelope, and a yellow self-addressed envelope needing no postage.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are not eligible to vote.

CHALLENGE OF VOTERS: An agent of the Board or an authorized observer may question the eligibility of a voter. Such challenge must be made at the time the ballots are counted.
AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

METHOD AND DATE OF ELECTION

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 5:00 p.m. on Monday, January 11, 2016, ballots will be mailed to voters from the National Labor Relations Board, Region 04, 615 Chestnut St Ste 710, Philadelphia, PA 19106-4413. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.
Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Tuesday, January 19, 2016, should communicate immediately with the National Labor Relations Board by either calling the Region 04 Office at 215-597-6037 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).
Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 04 office by close of business on Friday, January 29, 2016.
All ballots will be commingled and counted at the Region 04 Office on Monday, February 1, 2016 at 2:00 p.m.. In order to be valid and counted, the returned ballots must be received in the Region 04 Office prior to the counting of the ballots.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

Form NLRB-4910
(4-2015)

United States of America
National Labor Relations Board

NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

VOTING UNIT 04-RC-165805

EMPLOYEES ELIGIBLE TO VOTE:
Those eligible to vote are: All regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania who were employed during the payroll period ending January 2, 2016.

EMPLOYEES NOT ELIGIBLE TO VOTE:
Those not eligible to vote are: All other employees, guards and supervisors as defined in the Act.

OTHERS PERMITTED TO VOTE: At this time, no decision has been made regarding whether the dispatchers and certified safety instructors are included in, or excluded from, the bargaining unit, and these individuals may vote in the election, but their ballots shall be challenged since their eligibility has not been resolved. The eligibility of these individuals will be resolved, if necessary, following the election.

UNITED STATES OF AMERICA
National Labor Relations Board
04-RC-165805

OFFICIAL SECRET BALLOT
For certain employees of
UPS GROUND FREIGHT, INC.

Do you wish to be represented for purposes of collective bargaining by
TEAMSTERS LOCAL 773?

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES	NO
☐	☐

DO NOT SIGN THIS BALLOT. See enclosed instructions.

The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

Sample

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

Form NLRB-4910
(4-2015)

United States of America
National Labor Relations Board

NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities
- In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- Threatening loss of jobs or benefits by an Employer or a Union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time where attendance is mandatory, within the 24-hour period before the mail ballots are dispatched
- Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (215)597-7601 or visit the NLRB website www.nlrb.gov for assistance.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

FORM NLRB-502 (RC)
(4-15)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No.	Date Filed
04-RC-165805	12/10/15

***INSTRUCTIONS:** Unless e-Filed using the Agency's website, www.nlrb.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.*

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer	2b. Address(es) of Establishment(s) Involved *(Street and number, city, State, ZIP code)*
UPS FREIGHT TRUCKLOAD	9755 COMMERCE CIRCLE KUTZTOWN PA 19530

3a. Employer Representative – Name and Title	3b. Address (if same as 2b – state same)
RAYMOND COPELAND	9755 COMMERCE CIRCLE KUTZTOWN PA 19530

3c. Tel. No.	3d. Cell No.	3e. Fax No.	3f. E-Mail Address
610-285-5380	610-285-5380	610-285-5384	RAYMONDCOPELAND@UPS.COM

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*	4b. Principal product or service	5a. *City and State where unit is located:*
WAREHOUSE	DELIVERY OF GOODS	KUTZTOWN PA

5b. Description of Unit Involved

Included: ALL REGULAR FULL-TIME AND PART-TIME DRIVERS

Excluded: ALL OTHER EMPLOYEES INCLUDING GUARDS AND SUPERVISORS AS DEFINED IN THE ACT

6a. No. of Employees in Unit: 29

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes [✓] No [ ]

Check One:
[✓] 7a. Request for recognition as Bargaining Representative was made on (Date) 12/10/2015 and Employer declined recognition on or about _____ (Date) *(If no reply received, so state).* NO REPLY
[ ] 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. *Name of Recognized or Certified Bargaining Agent (If none, so state).*	8b. Address
NONE	

8c. Tel No.	8d Cell No.	8e. Fax No.	8f. E-Mail Address

8g. Affiliation, if any	8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any *(Month, Day, Year)*

9. Is there now a strike or picketing at the Employer's establishment(s) involved? NO If so, approximately how many employees are participating? _____
(Name of labor organization) _____, has picketed the Employer since *(Month, Day, Year)* _____.

10. Organizations or individuals other than Petitioner and those named in Items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. *(If none, so state)*
NONE

10a. Name	10b. Address	10c. Tel. No.	10d. Cell No.
		10e. Fax No.	10f. E-Mail Address

11. **Election Details:** If the NLRB conducts an election in this matter, state your position with respect to any such election.		11a. Election Type: [ ] Manual [✓] Mail [ ] Mixed Manual/Mail
11b. Election Date(s): 12/22/2015	11c. Election Time(s): N/A	11d. Election Location(s): N/A

12a. **Full Name of Petitioner** *(including local name and number)*	12b. Address *(street and number, city, state, and ZIP code)*
INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 773	1345 HAMILTON ST ALLENTOWN PA 18102

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent *(If none, so state)*
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

12d. Tel No.	12e. Cell No.	12f. Fax No.	12g. E-Mail Address
610-434-4451	484-714-5414	610-770-9581	BTAYLOR@TEAMSTER773.ORG

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title	13b. Address *(street and number, city, state, and ZIP code)*
BRIAN A. TAYLOR ORGANIZER/TRUSTEE	1345 HAMILTON ST ALLENTOWN PA 18102

13c. Tel No.	13d. Cell No.	13e. Fax No.	13f. E-Mail Address
610-434-4451	484-714-5414	610-770-9581	BTAYLOR@TEAMSTER773.ORG

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name *(Print)*	Signature	Title	Date
BRIAN A. TAYLOR	Brian A. Taylor	ORGANIZER/TRUSTEE	12/10/2015

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE	
Case No. 04-RC-165805	Date Filed

INSTRUCTIONS: *Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.*
Note: *Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.*

1a. Full name of party filing Statement of Position	1c. Business Phone:	1e. Fax No.:
UPS Ground Freight, Inc.	610-285-5380	610-285-5384
1b. Address *(Street and number, city, state, and ZIP code)*	1d. Cell No.:	1f. e-Mail Address
9755 Commerce Circle, Kutztown, PA 19530	404-991-0206	Raymondcopeland@UPS.com

2. Do you agree that the NLRB has jurisdiction over the Employer in this case? ☒ Yes ☐ No
(A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)

3. Do you agree that the proposed unit is appropriate? ☐ Yes ☒ No *(If not, answer 3a and 3b.)*

a. State the basis for your contention that the proposed unit is not appropriate. *(If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards.)*

See Attachment B, appended hereto.

b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.

Added	Excluded
See Attachment C, appended hereto.	None.

4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

See Attachment D, appended hereto.

5. Is there a bar to conducting an election in this case? ☐ Yes ☒ No *If yes, state the basis for your position.*

6. Describe all other issues you intend to raise at the pre-election hearing.

See Attachment E, appended hereto.

7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at http://www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.
(a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B)
(b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be *added* to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be *excluded* from the proposed unit to make it an

State your position with respect to the details of any election that may be conducted in this matter. 8a. Type: ☒ Manual ☐ Mail ☐ Mixed Manual/Mail

8b. Date(s)	8c. Time(s)	8d. Location(s)
		Temporary Mobile Office (R/V) located in trailer lot adjacent to Maintenance Shop located at address above
8e. Eligibility Period (e.g. special eligibility formula)	8f. Last Payroll Period Ending Date	8g. Length of payroll period
None	December 12, 2015	☒ Weekly ☐ Biweekly ☐ Other *(specify length)*

9. Representative who will accept service of all papers for purposes of the representation proceeding

9a. Full name and title of authorized representative	9b. Signature of authorized representative	9c. Date
Kurt G. Larkin, Esq.		December 18, 2015
9d. Address *(Street and number, city, state, and ZIP code)*		9e. e-Mail Address
Hunton & Williams LLP, 951 East Byrd Street, Richmond, VA 23219		Klarkin@hunton.com
9f. Business Phone No.: 804-788-8776	9g. Fax No. 804-788-8218	9h. Cell No. 804-332-3985

WILLFUL FALSE STATEMENTS ON THIS STATEMENT OF POSITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of: UPS FREIGHT TRUCKLOAD, Employer, and TEAMSTERS, LOCAL 773, Petitioner.	Case No. 04-RC-165805

The above-entitled matter came on for hearing pursuant to Notice before KATHLEEN O'NEILL, Hearing Officer, at the National Labor Relations Board, Region 4, 615 Chestnut Street, 7th Floor in Courtroom 3, Philadelphia, Pennsylvania 19106, Monday, December 21, 2015, at 10:00 a.m.

1 MR. MEYER: We're willing to proceed on any other -- any
2 other appropriate unit, but I don't know -- I believe I would
3 ask for the petition to be dismissed if their unit's approved
4 because -- because then --
5 HEARING OFFICER O'NEILL: You would have --
6 MR. MEYER: -- we would have less than 30 percent since
7 all of our showing of interest is in the 30 that we --
8 HEARING OFFICER O'NEILL: Well, you would -- you would
9 have -- let me go off the record for a minute.
10 (Whereupon, a brief recess was taken.)
11 HEARING OFFICER O'NEILL: Back on the record.
12 What's the estimated length of the transcript?
13 COURT REPORTER: Two hundred pages, give or take 30.
14 That's my best guess.
15 MR. NAUGHTON: So 200 to 230?
16 COURT REPORTER: Somewhere like that.
17 HEARING OFFICER O'NEILL: Okay, I want to explore the
18 election details.
19 The Petitioner on the petition has asked for a mail
20 ballot; is that still your position?
21 MR. MEYER: Yes. Frankly, I don't see any other practical
22 way to do this within the oddness of their shifts. So yes, we
23 believe a mail ballot is the best way to do it.
24 HEARING OFFICER O'NEILL: Okay. And is there any -- is
25 there any time in January that -- presumably a decision would

1 issue in January. Is there any time in January that would --
2 that is not a good time for a mail ballot? Is there
3 anything --
4 MR. MEYER: I don't think so.
5 HEARING OFFICER O'NEILL: No.
6 MR. MEYER: Just as quick as possible.
7 HEARING OFFICER O'NEILL: And for the Employer, what is
8 your position on the election details?
9 MR. LARKIN: The --
10 MR. NAUGHTON: Go ahead.
11 MR. LARKIN: The Company would just note that it's the
12 Board's longstanding policy that elections, as a general rule,
13 should be conducted manually in the absence of good cause to
14 the contrary. The Company is -- believes that we can set a
15 split poll that would --
16 HEARING OFFICER O'NEILL: And what hours -- what hours do
17 you suggest?
18 MR. LARKIN: 3:00 to 5:00 a.m. --
19 MR. NAUGHTON: And 3:00 to 5:00 p.m.
20 MR. LARKIN: -- and 3:00 to 5:00 p.m. And that would be
21 more than adequate to capture the bargaining unit. Assuming --
22 assuming, this is all assuming, of course, that the petitioned
23 for unit is found appropriate. If that's the case, then -- and
24 we're proceeding to an election in the petitioned for unit at
25 Kutztown, we're talking about 3:00 to 5:00 a.m., 3:00 to 5:00

1 p.m. at Kutztown.
2 HEARING OFFICER O'NEILL: Now --
3 MR. LARKIN: Yeah, we also have an appropriate location on
4 site to conduct the secret ballot.
5 HEARING OFFICER O'NEILL: And what is that?
6 MR. LARKIN: The Company has brought a RV on site.
7 HEARING OFFICER O'NEILL: Um-hmm.
8 MR. LARKIN: More than adequate to set up a polling --
9 HEARING OFFICER O'NEILL: What is that RV currently being
10 used for?
11 MR. LARKIN: Meetings.
12 HEARING OFFICER O'NEILL: Supervisory meetings? Or are
13 they employee meetings?
14 MR. LARKIN: Employee meetings. Employee meetings, I
15 don't think supervisors. You guys won't be out there, right?
16 UNIDENTIFIED SPEAKER: No.
17 HEARING OFFICER O'NEILL: Was it brought for the Union
18 campaign?
19 MR. LARKIN: Yes.
20 HEARING OFFICER O'NEILL: And so it's for employee
21 meetings are held in this RV. And do any supervisors have
22 their offices in there?
23 MR. LARKIN: No.
24 HEARING OFFICER O'NEILL: Well temporarily?
25 MR. LARKIN: No.

1 that RV there permanently?
2 MR. LARKIN: No.
3 HEARING OFFICER O'NEILL: Okay.
4 MR. MEYER: Can I just add about their hours?
5 HEARING OFFICER O'NEILL: Yes.
6 MR. MEYER: I -- I think on their own testimony there are
7 people who go out around midnight and don't come back until
8 8:00 in the morning. I don't know how that -- their hours
9 capture everybody.
10 MR. LARKIN: The company, Advance Auto Parts, is -- will
11 be able to work with the Company once the Regional Director
12 picks a date so that the loads are scheduled for that
13 particular day in a way in which the employees are available in
14 those windows.
15 HEARING OFFICER O'NEILL: So despite the customer demand,
16 you can still schedule everyone to -- to be present during one
17 of those schedules?
18 MR. LARKIN: To hold the National Labor Relations Board
19 election, yes.
20 HEARING OFFICER O'NEILL: Okay. And how far -- these
21 drivers, how far -- miles, are -- kind of, the longest routes,
22 how far out might they be that they're going to come back for
23 this?
24 MR. LARKIN: Well, that assumes that they've gone yet.
25 HEARING OFFICER O'NEILL: Yeah. If --

HUNTON & WILLIAMS

HUNTON & WILLIAMS LLP
RIVERFRONT PLAZA, EAST TOWER
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RICHMOND, VIRGINIA 23219-4074

TEL 804 • 788 • 8200
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KURT G. LARKIN
DIRECT DIAL: 804-788-8776
EMAIL: klarkin@hunton.com

FILE NO: 22749.001962

November 25, 2015

Mr. Harold A. Maier
Acting Regional Director, Region Four
National Labor Relations Board
615 Chestnut Street, Suite 710
Philadelphia, PA 19106-4413

Re: UPS Ground Freight, Inc., Case 04-RC-165805

Dear Mr. Maier:

I write to bring your attention to some factual errors reflected in your Decision and Direction of Election ("D&D") that require immediate correction. As you know, the parties disagreed over the election details; the Union requested a mail ballot, while the employer (UPS Freight) requested that the Region follow the NLRB's preferred, traditional method of a live ballot. In rejecting UPS Freight's request and granting the Union's request, you noted that the employees in the proposed unit are "scattered" in that they may not all be present at the Kutztown facility at the same time. This is incorrect. The employees in the unit all begin, and end, their workday in the same place: the Kutztown facility. Moreover, UPS Freight explained at the hearing that it would adjust delivery schedules to accommodate two windows of time during which all drivers would be present in the Kutztown facility. Under these circumstances, employees in the voting unit plainly are not "scattered" within the meaning of Board precedent. As such, a mail ballot cannot be held inasmuch as the Region's other justification for a mail ballot, "economic and efficient use of Board resources," cannot be determinative of whether a mail ballot is ordered. *See* NLRB Casehandling Manual ¶11301.2 (citing *San Diego Gas & Elec.*, 325 NLRB 1143 (1998)).

You also concluded that a live ballot was not appropriate because "the Employer's proposal for a four-hour election over a 26-hour time period for 30 voters would not facilitate an economic or efficient use of Board resources." UPS Freight, however, proposed a split poll that would run from 3:00 a.m. through 5:00 a.m., and then again from 3:00 p.m. through 5:00 p.m. on a single election day. These polling times would result in a 1-day election over a 14-hour time period, almost 50% less time than the incorrect 26-hour period noted in the D&D. The upshot is that the Region could easily conduct a live ballot in a single day. The Board

routinely conducts split polls in both certification and decertification elections, and in units much smaller than the 30 voters here. There is simply no basis for a conclusion that a 14-hour polling period over a single day would be a waste of Board resources.

As you know, statistics show that voter turnout in mail ballots is often significantly lower than in traditional manual ballots. So the Region's decision to hold a mail ballot is likely to result in suppressed voter turnout, which is contrary to the purposes of the Act.

While we have a number of additional objections to the Region's D&D which we will make at the appropriate time, the errors described above require immediate review and correction. We request that the Region correct the D&D to reflect the actual election proposal made by UPS Freight and promptly change the election details to require a manual election.

Finally, we request that you place this correspondence in the evidentiary record and afford us an opportunity to speak with you about this issue before you make any decision regarding the issues raised in this correspondence.

Respectfully Submitted,

/s/ Kurt G. Larkin
Kurt G. Larkin
Counsel for UPS Ground Freight, Inc.

cc. Dennis P. Walsh
Kathleen O'Neill
Jeremy Meyer, Esq.
James P. Naughton, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing letter to Harold A. Maier, Acting Regional Director, National Labor Relations Board, Region Four, was served by electronic mail this 6th day of January, 2016 on the following:

Dennis P. Walsh
Regional Director, Region Four
National Labor Relations Board, Region Four
615 Chestnut Street, Suite 710
Philadelphia, PA 19106-4413
Dennis.Walsh@nlrb.gov

Kathleen O'Neill
Field Examiner
National Labor Relations Board, Region Four
615 Chestnut Street, Suite 710
Philadelphia, PA 19106-4413
Kathleen.oneill@nlrb.gov

Jeremy Meyer, Esquire
Cleary, Josem & Trigiani
325 Chestnut Street, Suite 200
Philadelphia, PA 19106-2602
jmeyer@cjtlaw.org

/s/ Kurt G. Larkin

EXHIBIT F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

UPS GROUND FREIGHT, INC. **Employer**	
and	**Case 04-RC-165805**
TEAMSTERS LOCAL 773 **Petitioner**	

ERRATUM

On January 5, 2016, the Acting Regional Director's Decision and Direction of Election issued in this case. A sentence in the first paragraph on page 16 contains an inadvertent error and is hereby corrected to read as follows:

> "In this case, the Employer's proposal for a four-hour election over a 14-hour time period for 30 voters would not facilitate an economic or efficient use of Board resources."

Dated: January 7, 2016

/s/ Harold A. Maier
HAROLD A. MAIER
Acting Regional Director, Region Four
National Labor Relations Board

EXHIBIT G

HUNTON & WILLIAMS

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KURT G. LARKIN
DIRECT DIAL: 804-788-8776
EMAIL: klarkin@hunton.com

FILE NO: 22749.001962

January 7, 2016

Mr. Harold A. Maier
Acting Regional Director, Region Four
National Labor Relations Board
615 Chestnut Street, Suite 710
Philadelphia, PA 19106-4413

Re: UPS Ground Freight, Inc., Case 04-RC-165805

Dear Mr. Maier:

This letter is a follow up to our conference call held with you, Kathleen O'Neill and another staff member this afternoon at 3:30 p.m. During the call, UPS Ground Freight, Inc. (the "Company") made a revised proposal for conducting a manual ballot. The Company proposes a single polling time at the Advance Auto Parts Kutztown, PA distribution center, from 2:00 a.m. to 8:00 a.m. on a Wednesday to be determined in the Regional Director's discretion. The Company represents that all employees in the bargaining unit scheduled to work on election day will be present in the facility during the proposed period. The Company will delay all dispatch times on election day so that the starting times of eligible voters will begin during that period. In other words, employees would vote before they leave the facility to begin their shift.[1]

The Company's proposal eliminates any concern that the voting group would be "scattered" within the meaning of Board precedent. Under *San Diego Gas & Elec.*, 325 NLRB 1143 (1998), the Board considers employees to be scattered where, among other factors not present here: (i) they work over a wide geographic area, or (ii) their work schedules vary

[1] In response to an inquiry from one of your colleagues as to whether a continuous six-hour polling period would be uncomfortable for the Board agent conducting the election, we assured you that the Company is amenable an intermission of some reasonable length to allow the Board agent an appropriate break during the polling period. Despite our repeated requests, you declined to offer any suggestion regarding how long of a break you thought would be appropriate.

significantly so that they are not present at a common location at common times. Neither of these circumstances is present under the Company's revised proposal. All of the employees in the unit report to the same facility, so they are not assigned over a wide geographic area. Moreover, since all drivers would be voting before they leave the building, there is no concern they would not be present at a common location at common times. In this circumstance, the only possible reason for denying a manual ballot would be the efficient use of Board resources. However, the Board has made clear that "Regional Directors should not order mail ballot elections based solely on budgetary concerns." *San Diego Gas & Elec.*, 325 NLRB at 1145, n.8 (citing *Willamette Industries*, 322 NLRB 856 (1997)). Thus, the Company asserts that the Region should revise the Decision and Direction of Election and order a manual ballot.

You expressed doubt regarding the Regional Director's authority to revise the election details following issuance of a Decision and Direction of Election. You also intimated that it was too late for the Company to make this proposal now. To the contrary, it is well-within the Regional Director's broad discretion in conducting representation proceedings to revise the election details at any point. The Board has recognized election details may be worked out after the issuance of the Decision and Direction. *See* NLRB Casehandling Manual ¶11301.3 ("a determination may not be possible until, for example, after a decision and direction of election has issued"). Moreover, the Region is authorized to refuse to allow litigation regarding the facts or circumstances relevant to election details. *See* NLRB Casehandling Manual ¶11301.4 ("[T]here is no requirement that parties be permitted to litigate the election arrangements in the hearing . . . the arrangements as to the type of election may be resolved administratively and the parties so notified by letter separate from the decision and direction of election").

Accordingly, we disagree that the close of a pre-election evidentiary hearing is the last point at which a party may make a proposal regarding election details. Frankly, any refusal by the Region to consider this proposal now would be because it simply does not want to consider it, not because it is precluded from doing so. In this regard, we respectfully suggest the rapidly approaching deadline for dispatching the mail ballots is not sufficient justification for refusing to revise the election details, particularly where the compressed timeframe is of the Board's own making and the mail ballot decision was the Region's decision.

At the conclusion of our call, you indicated the Region was not inclined to change the election details. We would note the Board employs an abuse of discretion standard in determining whether to overturn the decision to conduct a mail ballot, and the standard "encompasses whether the Regional Director acted within the guidelines that [the Board has] outlined in directing a mail ballot election." *San Diego Gas & Elec.*, 325 NLRB at 1144, n.4. The Company's current proposal eliminates any reasonable contention the voting group is

"scattered" under Board precedent. Thus, proceeding with a mail ballot at this point would run afoul of the guidelines set forth in *San Diego Gas*.

The Company asks that you promptly reconsider your decision, accept the Company's revised proposal, order that a manual ballot be conducted at the Kutztown facility between 2:00 a.m. and 8:00 a.m. on a Wednesday of the Region's choosing, and amend the Decision and Direction of Election to reflect the same.

Respectfully Submitted,

/s/ Kurt G. Larkin
Kurt G. Larkin
Counsel for UPS Ground Freight, Inc.

cc. Dennis P. Walsh
Kathleen O'Neill
Jeremy Meyer, Esq.
James P. Naughton, Esq.

USCA Case #18-1161 Document #1769787 Filed: 01/23/2019 Page 252 of 652

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 04
615 Chestnut St Ste 710
Philadelphia, PA 19106-4413

Agency Website: www.nlrb.gov
Telephone: (215)597-7601
Fax: (215)597-7658

January 11, 2016

klarkin@hunton.com
Kurt G. Larkin, Esquire
Hunton & Williams, LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074

Re: UPS Ground Freight, Inc.
Case 04-RC-165805

Dear Mr. Larkin:

I am in receipt of your letter dated January 7, 2016, concerning this case. In that letter you ask that I reconsider my decision to conduct a mail ballot and request that I now direct a manual ballot using the 2 a.m. to 8 a.m. time frame offered during our telephonic meeting held earlier on January 7. I hereby deny that request. My reasons for doing so are as follows.

While you cite Casehandling Manual Sections 11301.3 and 11301.4, I do not find either of them helpful to the arguments you are making. In the circumstances before us, Section 11301.3 would not apply in light of the fact that, under the new Representation Case rules in effect since April 14, 2015, (hereinafter, the Rules), determinations on election arrangements are now expected to be made at the time the Decision and Direction of Election issues, as was done here. The parties made their positions as to the election arrangements known on the record. With the information available at the time the decision was issued, the judgment was made that a mail ballot offered the best chance for all members of the bargaining unit to be able to vote their ballots. Much the same can be said of Section 11301.4. There is no need for further administrative action once the Decision has issued as the Decision and Direction of Election now contains, as directed by the Rules, the terms under which the election will be conducted. Thus, I find that neither of the cited Sections necessarily allows me to reconsider my decision to order a mail ballot in this matter.

In any event, the Employer's proposal was fully considered and, you may recall, I noted that if the Employer and Petitioner could arrive at a joint Motion, it may have been granted and the election details changed accordingly. I also explained that, in my view, at least one purpose of the Rules was to get elections scheduled quickly and without lengthy and unnecessary procedural impediments. All parties were given an opportunity to offer election arrangement proposals for days prior to the hearing and the decision was made based upon what was present in the record. To allow any party to now, after public issuance of the Decision and Direction of Election, in essence begin to negotiate or offer alternative positions concerning the terms of the election is wholly out of step with the spirit of the Rules and would be manifestly unfair to other parties and the bargaining unit employees. Upon the issuance of the Decision and Direction of

Election, other parties to the matter have, no doubt, begun to formulate their strategies to publicize their positions to employees, strategies which will almost certainly be affected by the terms of the election. Bargaining unit employees also have a right to know what the election terms are so that they can begin to plan how to go about casting their ballots, and any "after the fact" change to the arrangements could give the impression that the process is still fluid, and that any decisions made remain subject to alterations attributable either to a party to the proceeding or the NLRB.

Accordingly, your request to change the terms of the election in this matter is denied and the mail ballot election will be conducted as ordered in the Decision and Direction of Election.

Very truly yours,

Harold A. Maier

HAROLD A. MAIER
Acting Regional Director

jmeyer@cjtlaw.org
Jeremy Meyer, Esquire
Cleary, Josem & Trigiani
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January 12, 2016

Electronic Filing

Gary Shinners, Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington D.C. 20570-0001

Re: UPS Ground Freight, Inc.
Case No. 04-Rc-165805

Dear Mr. Shinners:

This office represents the Teamsters Local 773 (the "Union"), the petitioner in the above matter. Please consider this letter as the Union's response to the Special Appeal and Request for Review of Acting Regional Director's Decision to Direct a Mail Ballot Election which was filed by UPS Ground Freight, Inc. (the "Employer") yesterday.

Despite the Employer's long and vehement arguments, the Acting Region Director's decision to order a mail ballot election is clearly not an abuse of discretion and there clearly is no "compelling" reason for the Board to grant the Employer's request for review as required under 29 C.F.R. §102.67(c). Indeed, under Section 11301.2(b) of the NLRB Casehandling Manual, a mail ballot election should be ordered in cases "where eligible voters are 'scattered' in the sense that their work schedules vary significantly, so that they are not present at a common location at common times." That is precisely the case here. The thirty (30) drivers in the bargaining unit depart at various times over the course of a night. They are clearly "scattered" because the drivers are not present at a common location at a common time.

The Employer has offered to cure that problem by varying employee work schedules on the night of the election. The Union objected to that proposal because for the Employer to change employees' regular shift for the election would open the door for the Employer to manipulate employees' ability to vote. While the Employer claims that it will make sure all employees are at the premises during the election hours, it could make sure that certain employees have more time to vote than others. For those reasons, the Union did agree to alter employees regular work schedule for the election. It is no abuse of discretion for the Acting Regional Director to

conclude that altering working conditions without the Union's agreement during an election would be prejudicial. Thus, the Acting Regional Director properly rejected the Employer's proposed cure of the scattered employee problem.

Moreover, because the ballots were mailed yesterday, to cancel the mail ballot election at this point would create tremendous voter confusion. If the Employer's request for review were granted and an in-person election were ordered at a later date, employees would receive contradictory instructions, with a new posting at their workplace instructing them to vote in person and another set of instructions arriving at their home instructing them to vote by mail.

For the foregoing reasons, the Employer cannot establish that the Acting Regional Director abused his discretion in ordering a mail ballot election. Thus, there is no compelling reason to grant the Employer's Request for Review.

Statement of Service Pursuant to 29 C.F.R. §102.67(k)(2)

I hereby certify that on the date of this letter, I served the individuals listed below as carbon copies on letter at the email addresses provided next to each of their respective names.

Respectfully submitted,

JEREMY E. MEYER

cc. Harold A. Maier, Acting Regional Director (by email, harold.maier@nlrb.gov)
Kurt G. Larkin, Esquire (by email, klarkin@hunton.com)
Kathleen O'Neill, Esquire (by email, kathleen.oneill@nlrb.gov)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPS GROUND FREIGHT, INC.
Employer

and Case 04-RC-165805

TEAMSTERS LOCAL 773
Petitioner

ORDER

The Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.[1]

MARK GASTON PEARCE, CHAIRMAN

PHILIP A. MISCIMARRA, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., January 29, 2016.

[1] The Employer's request for expedited review and impoundment of the ballots is denied.

This case involves the Board's Final Rule on representation case procedures, with which Member Miscimarra disagrees for the reasons expressed in his dissenting views in the Final Rule. 79 Fed. Reg. 74308, at 74430-74460 (December 15, 2014) (dissenting views of Members Miscimarra and Johnson). In the instant case, however, Member Miscimarra agrees with denying review of the Regional Director's decision to direct a mail ballot election and to deny the Employer's request for expedited review or to impound the ballots.

FORM NLRB-760
(7-10)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

UPS GROUND FREIGHT, INC.
Employer

and

TEAMSTERS LOCAL 773
Petitioner

Case No. 04-RC-165805 | Date Filed 12-10-2015

Date Issued 02-01-2016

City Regional Office, Phila., State PA

Type of Election: *(Check one:)*

- [ ] Stipulation
- [ ] Board Direction
- [ ] Consent Agreement
- [x] RD Direction Incumbent Union (Code)

(If applicable check either or both:)

- [ ] 8(b) (7)
- [X] Mail Ballot

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of tabulation of ballots ~~case~~ cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters — 32
2. Number of Void ballots — 0
3. Number of Votes cast for Petitioner — 27
4. ~~Number of Votes cast for~~
5. ~~Number of Votes cast for~~
6. Number of Votes cast against participating labor organization(s) — 1
7. Number of Valid votes counted (sum 3, 4, 5, and 6) — 28
8. Number of challenged ballots — 2
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) — 30
10. Challenges are (not) sufficient in number to affect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (Item 9) has (~~not~~) been cast for Petitioner

For the Regional Director K O'Neill

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For Employer

For Petitioner

For

GPO U.S.GOVERNMENT PRINTING OFFICE: 2011 - 367-429

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

In the Matter of	)	
	)	
UPS GROUND FREIGHT, INC.	)	
	)	
	)	
Employer,	)	
	)	
and	)	Case 04-RC-165805
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 773,	)	
	)	
	)	
Petitioner.	)	
	)	

REQUEST FOR THE ISSUANCE OF SUBPOENAS DUCES TECUM

Pursuant to Section 102.31 of the Board's Rules and Regulations, counsel for the employer, UPS Ground Freight, Inc. ("UPS") hereby requests the issuance of five (5) subpoenas duces tecum in the referenced matter.

Dated: February 2, 2016

Respectfully submitted,

UPS GROUND FREIGHT, INC.,

/s/ Kurt G. Larkin

Kurt G. Larkin (VSB No. 70730)
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8200

22749.001962 EMF_US 59167265v2

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

UPS GROUND FREIGHT, INC.

Employer

and Case 4–RC–165805

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 773

Petitioner

ORDER DENYING REQUEST FOR ISSUANCE OF SUBPOENAS DUCES TECUM

Request having been made for issuance of Subpoena Duces Tecum in the above-captioned matter by the Attorney for the Employer, and, based on the lack of a currently outstanding Notice of Hearing in this matter,

IT IS HEREBY ORDERED that said request be, and it hereby is, denied.

Dated at Philadelphia, Pennsylvania this 3rd day of February, 2016.

/s/ Harold A. Maier
HAROLD A. MAIER[1]
Acting Regional Director, Fourth Region
National Labor Relations Board
615 Chestnut Street, Suite 710
Philadelphia, PA 19106-4413

[1] Regional Director Dennis P. Walsh is recused from this matter.

Confirmation Number	1000052468
Date Submitted	2/4/2016 4:56:24 PM (GMT-05:00) Eastern Time (US & Canada)
Case Name	UPS Ground Freight, Inc.
Case Number	04-RC-165805
Filing Party	Employer
Name	Larkin, Kurt G.
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Address	Hunton & Williams LLP 951 E. Byrd Street Richmond, VA 2321904074
Telephone	(804) 788-8776
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Original Due Date	2/8/2016
Date Requested	2/15/2016

Reason for Extension of Time	The Company requests an extension of time to file its offer of proof in support of election objections. Additional time is needed to further develop evidence to support, among others, its objection that the election was invalid due to supervisory taint, and that the Region failed to investigate the issue in violation of Board policy and due process. The Company consistently maintained that employee Frank Cappetta was a statutory supervisor, that the Union's showing of interest was invalid due to tainted cards solicited by him, and that the election was void ab initio due to his coercive conduct. The Company was refused the opportunity to litigate these issues, but was given assurances that the Region would investigate them administratively. Since the election, the Company has obtained further evidence of Cappetta's supervisory status, and of the Region's failure to investigate his status and solicitation efforts. The Company attempted to utilize the Board's subpoena authority to obtain information relevant to these issues, but was denied by the Region. The Region's failure to investigate the Company's allegations, and denial of Company's subpoena request, obligates the Company to utilize other lawful means to compile relevant evidence of supervisory taint, which the Board has recognized "can paint a false portrait of employee support during [the union's] election campaign." See Harborside, 343 NLRB 906 (2004). Additional time is needed to do so.
What Document is Due	Unknown
Parties Served	Brian A. Taylor Organizer/Trustee International Brotherhood of Teamsters, Local 773 1345 Hamilton Street Allentown, PA 18102-4387 484-717-5414 btaylor@teamsters773.org

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

UPS GROUND FREIGHT, INC.

Employer

and Case 04–RC–165805

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 773

Petitioner

ORDER GRANTING EXTENSION OF TIME TO FILE PROOF OF OBJECTIONS

Request for extension of time to file Offer of Proof of Objections having been made by Counsel for the Employer, and said request having been duly considered.

IT IS HEREBY ORDERED that said request be, and it hereby is, granted. Time for filing offer of proof of objections is extended to February 15, 2016.

Dated: February 5, 2016

Harold A. Maier

HAROLD A. MAIER[1]
Acting Regional Director, Fourth Region
National Labor Relations Board
615 Chestnut Street, Suite 710
Philadelphia, PA 19106

[1] Regional Director Dennis P. Walsh is recused from this matter.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

UPS GROUND FREIGHT, INC.,

Employer

and Case 04-RC-165805

TEAMSTERS LOCAL 773,

Petitioner

UPS GROUND FREIGHT INC.'S OBJECTIONS TO THE RESULTS OF THE ELECTION

Pursuant to Section 102.69(a) of the National Labor Relations Board's Rules & Regulations, 29 C.F.R. §102.69(a), UPS Ground Freight Inc., ("UPS Freight" or the "Company"), respectfully submits[1] the following objections to the mail ballot election and to the conduct of that election by Region 4 of the National Labor Relations Board ("NLRB" or "the Board") on February 1, 2016:

1. UPS Freight objects to the application of the new rule entitled "Representation - Case Procedures; Final Rule," 29 C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74439, effective April 14, 2015 ("the Final Rule") in this proceeding.[2] The imposition of the Final Rule in this proceeding, and the Region's arbitrary and unfair interpretation and enforcement of its provisions throughout, resulted in significant prejudice to UPS Freight's statutory rights and

[1] Due to technical issues on Monday, February 8, 2016, the Agency's E-Filing system was determined to be in technical failure. In accordance with the Agency's E-File Terms and Conditions, the due date for E-Filed documents due to be filed on February 8, 2016, were extended to Tuesday, February 9, 2016 at 11:59 p.m. (Eastern Time). *See* Attachment 1.

[2] UPS Freight incorporates by reference each and every objection to the Final Rule raised by the Plaintiffs in their Complaints and other filings in *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015), *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D. Tex. 2015), and *Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D. D.C. 2015), as well as those specifically raised by UPS Freight in its Statement of Position ("SOP") submitted in this proceeding, such that those objections and arguments shall be deemed to be set forth fully herein.

materially affected the results of the election to the Company's detriment. The Final Rule's application was prejudicial to UPS Freight in at least the following respects:

a. The Final Rule unfairly abbreviated the pre-election period, burdened the Company with new and onerous administrative tasks upon pain of waiver, and all but eliminated formal consideration of issues essential to the conduct of the election, such as voter eligibility and appropriate inclusion/exclusion in the proposed unit.

b. The Final Rule severely hindered the Company's ability to investigate the issues related to the Petition and to prepare for the representation hearing. Specifically, the Company's tasks of investigating the petition, adequately preparing and preserving its position in response to the petition, and engaging in lawful dialogue with its employees concerning the ramifications of representation, were rendered nearly impossible as a result of the unfairly shortened "critical period" and the new and onerous administrative tasks imposed by the Final Rule.

c. By unfairly reducing the critical period between the filing of the petition for election and the election itself, the Final Rule effectively deprived the Company of adequate time to present its views on unionization to its employees in a meaningful fashion. Such a result is contrary to the policies reflected in Section 8(c) of the National Labor Relations Act ("the NLRA" or "the Act") favoring uninhibited, robust, and wide-open debate and necessarily resulted in the frustration of the rights of those employees participating in the election by denying them full access to information regarding unionization and the employer's position, all in violation of Section 7 of the Act.

d. The Final Rule unlawfully compelled UPS Freight to violate the personal privacy rights of its employees by forcing the disclosure of employees' personal e-mail addresses and phone numbers.

2. UPS Freight also objects to the application of the guidance set forth in General Counsel Memorandum 15-06, entitled Guidance Memorandum on Representation Case Procedure Changes. The application of certain principles in that memorandum further restricts and interferes with an employer's right to fully investigate and respond to a representation petition. For example, the memorandum allows the Regional Director to decline to hold a pre-election hearing on subjects crucial to the viability to the union's petitioned-for unit, including

whether supervisory participation in union organizing tainted the showing of interest (an objection the Company is raising herein). *See* GC Memorandum 15-06 at 18.

3. UPS Freight also objects to the Region's arbitrary interpretation and enforcement of the Final Rule in this proceeding, which resulted in a patently unfair and prejudicial process that contravened the Company's rights under the Act and its right to due process under both the Act and the Constitution, as a result of the following:

a. The hardships imposed upon the Company by the unfairly shortened "critical period" prescribed by the Final Rule were exacerbated by the Acting Regional Director's partial denial of the Company's Motion To Postpone Representation Hearing And For Extension Of Time To File Statement Of Position. The Union's petition was filed in the midst of the holiday season, which presented significant logistical difficulties to the Company given the nature of its business. Moreover, although the Union's petition purported to implicate only a limited number of employees at a single location, the circumstances set forth in Attachment B to the Company's SOP dictated that the appropriate scope of the proposed unit was significantly greater and required investigation of factors involving nearly three hundred employees at nine locations in the same number of states. The natural logistical challenges of gathering evidence in support of the Company's position on the unit were further complicated both by the dispersion of employees during the holiday season and the operational demands on the Company. For these reasons, the Company requested a two-day extension of time to file the SOP (from Thursday, December 17, 2015, until Monday, December 21, 2015), and also requested that the Representation Hearing be postponed from Friday, December 18, 2015, until Tuesday, December 22, 2015.

The Company's requests were consistent with the provisions of Section 102.63 of the Board's Rules and Regulations, which expressly authorizes the Acting Regional Director to extend the time for filing and serving the Statement of Position, and to postpone the Representation Hearing, for up to 2 business days. And, given the facts and the gravity of the issues involved, the Company clearly presented "special circumstances" warranting the relief requested. *See* Rules and Regulations of the National Labor Relations Board, §§102.63(a); (b)(1). The Acting Regional Director, however, only partially "granted" the Company's motion, ordering that the Company's SOP be filed by 12:00 PM on Friday, December 18, 2015, and that the hearing be conducted at 10:00 AM on Monday, December 21, 2015. The Acting Regional Director's arbitrary denial of the full extension requested by the Company prejudiced the

Company in its preparation of the SOP and for the hearing. Moreover, the Acting Regional Director's partial "granting" of the Company's motion directly aided the Union in its preparation for the Representation Hearing by giving the Union access to the Company's SOP, and thus the issues and facts the Company intended to raise at the hearing, for an entire weekend prior to the hearing. Of course, the Region did not provide equivalent information to the Company regarding the Union's evidence and witnesses. Had the Acting Regional Director granted the Company's request in full, the Union would have had the Company's statement of position for less than one day prior to the pre-election hearing, which is the amount of time called for under the Rules when applied in due course.

b. The Region denied the Company the "appropriate" hearing guaranteed by Section 9(c) of the Act and the due process guaranteed by the Constitution as a result of the draconian conditions under which the hearing was conducted. There was no practical or legal justification for the Hearing Officer's decision to begin the hearing over an hour late for reasons unexplained, or her decision to virtually confine the parties to the building for the duration of the hearing, effectively precluding counsel from taking a meaningful lunch break. Moreover, the Final Rule provides that hearings "shall continue from day to day until completed." *See* 29 C.F.R. §102.64(c). Thus, nothing in the Final Rule requires the completion of the hearing in a single calendar day.

Nevertheless, the Hearing Officer repeatedly refused requested adjournments to complete live witness testimony the following morning, and instead required the parties to present live testimony until almost 7:00 p.m., nearly two hours beyond the end of the normal business day. Additionally, the Final Rule expressly provides for the filing of post-hearing briefs upon "special permission" from the Acting Regional Director. *See* 29 C.F.R. §102.66(h). The Acting Regional Director summarily denied the Company's request without explanation. Tr. at 328:24-25.

Finally, the Final Rule provides that "any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument." *See* 29 C.F.R. §102.66(h). But, despite the fact that the nine and a half hour hearing resulted in over 350 pages of witness testimony concerning a number of facts and issues of which the Company had no prior notice,[3] the Hearing Officer denied the Company's request for adjournment until the next morning to permit it reasonable time to prepare closing argument, and permitted only 30 minutes for the Company to

[3] Unlike the Company, the Union had full notice of the anticipated issues and evidence the Company intended to present at hearing as a result of its receipt of the Company's statement of position on the Friday before the Monday hearing. This allowed the Union to prepare both its rebuttal to those issues and an appropriate closing argument.

prepare its closing argument. The Hearing Officer's conduct and arbitrary denial of the Company's requests indicates the existence of bias by the Region that is particularly evident given the fact that the Acting Regional Director's Decision and Direction of Election did not issue for over two weeks following the close of the hearing. An adjournment for what would have amounted to a scant few hours to permit counsel to review the evidence and to prepare meaningful oral argument, was clearly warranted. The Hearing Officer's arbitrary denial of that request violated the Board's own rules, as well as the Company's right to an "appropriate hearing" under Section 9(c) of the Act, and represented an intentional denial of due process.

c. The Acting Regional Director's failure to address the Company's position that employees Frank Cappetta and Carl David should be excluded from the unit and deemed ineligible to vote further prejudiced the Company. The Hearing Officer excluded evidence as to this issue, and the Acting Regional Director, in apparent reliance on the Section 102.64(a)[4], agreed that the issue "need not be resolved before the election." Nevertheless, the evidence presented at the hearing established that Mr. Cappetta primarily performs duties related to the position of dispatcher, that Mr. David is primarily employed by the Company as a certified safety instructor and assists Mr. Cappetta from time to time with his dispatch duties, and that neither had, for some time, performed duties sufficiently similar to those performed by the putative bargaining unit members to establish the requisite community of interest. As a result, both should have been excluded from the unit and deemed ineligible to participate in any election resulting from the Union's petition. Instead the Hearing Officer refused to take evidence on these issues and both were permitted to vote under challenge. Even if their votes are determined not to have materially affected the results of the vote, Mr. Cappetta and Mr. David, and any other employee who now, or in the future, regularly perform duties as a dispatcher or certified safety instructor, should be excluded from the bargaining unit since the positions require functions that are, at best, incompatible, and at worst, antagonistic, to those performed by the road drivers employed by the Company.

d. The Region's refusal to address Mr. Cappetta's supervisory status prior to the issuance of the Acting Regional Director's Decision and Direction UPS Freight resulted in additional prejudice to the Company. UPS Freight has maintained since the outset of this proceeding that Mr. Cappetta is a statutory supervisor within the meaning of Section 2(11) of the Act. The

[4] Specifically, Section 102.64(a) provides, in pertinent part, that "[d]isputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ***ordinarily*** need not be litigated or resolved before an election is conducted." *See* 29 C.F.R. §102.64(a) (emphasis added). For the reasons stated herein, the eligibility of Mr. David, and particularly Mr. Cappatta, who the Company has consistently maintained is a section 2(11) supervisor as contemplated by the Act and who engaged in conduct evincing supervisory taint during the Union's campaign, should have been litigated prior to the election.

evidence presented at the Representation Hearing established that Mr. Cappetta performed a number of the supervisory functions contemplated by Section 2(11) (each independently sufficient) with the requisite independent judgment that was not merely routine or clerical in nature in the interest of the Company. As a result, Mr. Cappetta should have been deemed a statutory supervisor and therefore should not have been eligible to vote in the election. The Acting Regional Director concluded, again in apparent reliance upon Section 102.64(a) of the Final Rule, that the issue "need not be resolved before the election because resolution of the issue would not significantly change the size or character of the unit," and instead permitted Mr. Cappetta to vote under challenge. The Region's refusal to decide Mr. Cappetta's status prior to the election denied UPS Freight fair notice of whether it could expect and require Mr. Cappetta to advocate and support the Company's position during the campaign as a result of his supervisory status, or was required to treat him as a bargaining unit employee during the election campaign. It is well-settled that "an employer is entitled to the undivided loyalty of its representatives." *See NLRB v. Yeshiva University*, 444 U.S. 672, 682, 100 S. Ct. 856, 63 L. Ed. 2d 115 (1980). The Region's refusal to address this issue before the vote deprived the Company of its right to insist upon such loyalty from Mr. Cappetta, as is its right with respect to all Company supervisors.

e. Similarly, the Region's refusal to address whether the Union's petition for election was tainted because of solicitations and other conduct by Mr. Cappetta in support of the Union resulted in further prejudice to the Company. It is well-settled that "solicitations [by supervisors] are inherently coercive absent mitigating circumstances" and "can paint a false portrait of employee support during [the union's] election campaign." *Harborside Healthcare, Inc*., 343 NLRB 906, 911-912 (2004). For this reason, when evaluating a claim of majority support, the Board has a longstanding policy of refusing to consider union authorization cards solicited by supervisors. *See, e.g., Reeves Bros.*, 277 NLRB 1568, 1568 n.1 (1986); *Sarah Neuman Nursing Home*, 270 NLRB 663, 663 n.2 (1984); *A.T.I. Warehouse, Inc*., 169 NLRB 580, 580 (1968); *Heck's, Inc*., 61 LRRM 1128 (1966). Upon this same reasoning, the Board has held that, if a supervisor directly solicits authorization cards, those cards are tainted and may not be counted for the showing of interest. *See, e.g., Dejana Industries, Inc*., 336 N.L.R.B. 1202 (2001); *National Gypsum Co*., 215 NLRB 74 (1974); *Southeastern Newspapers, Inc*., 129 NLRB 311 (1960); *The Toledo Stamping & Manufacturing. Co*., 55 NLRB 865, 867 (1944).

The Company maintained since the onset of the pre-election process that Mr. Cappetta had engaged in conduct that effectively tainted the Union's showing of interest, and, by direct consequence, the election campaign and

ultimate vote. The Company presented evidence of Mr. Cappetta's likely involvement in the Union's organizing campaign to the Region prior to the Representation Hearing, and requested that the Region conduct both employee interviews and a formal check of the cards to ascertain Mr. Cappetta's participation in the campaign for the purpose of evaluating the validity of the showing of interest supporting the Union's petition. The Acting Regional Director, however, declined to consider the issue of supervisory taint prior to the election, noting that "[t]he Board has long held that it is inappropriate to litigate such matters in representation proceedings." The Acting Regional Director, instead, indicated in the Decision and Direction of Election that the Region would investigate the matter administratively. The Region's mishandling of this issue is an affront to the Company's due process rights in myriad respects. First, there is no indication that the Region conducted any investigation concerning the issue of supervisory taint. In fact, evidence points to the contrary. There is no indication that the Region ever conducted a formal check of the cards, as requested by the Company – a significant omission given that the cards potentially represent the best, current evidence of Mr. Cappetta's participation in the Union's campaign activities and since the Company has no access to the cards themselves during the pre-election process given the Board's own policies. Moreover, to the best of the Company's knowledge, the Region did not interview unit employees.

Finally, the Acting Regional Director's reliance on "long held"[5] Board precedent to justify his decision to forego litigation of the issue is misguided given the fact that the Final Rule has effectively rendered the pre-election process as the ***only*** meaningful point in which the issue can affectively be addressed given the speed with which the election machinery is now intended to move. Indeed, the Board maintains that "[a]fter an election has been held, the adequacy of the showing of interest

[5] The supposed purpose for prohibiting litigation of supervisory taint during the pre-election process is to protect the identity of the employees who signed cards or otherwise indicated their support of the union. For this reason, an employer is prohibited from producing evidence of taint during the Representation Hearing and from utilizing the Board's subpoena powers to obtain access to the cards signed by the employees in support of the showing of interest. The significance of these prohibitions cannot be ignored. The Representation Hearing is the only opportunity an employer has to obtain testimony from witnesses, ***under oath***, about the circumstances under which the Union obtained its showing of interest. Since the Company is precluded from doing so, the onus is on the Region to investigate timely raised allegations of taint. The Board has made clear that supervisory participation in the card solicitations and other conduct on behalf of the union "has an inherent tendency to interfere with the employee's freedom to choose," *see Harborside Healthcare, Inc*., 343 NLRB 906, 911 (2004), and has, as a result, adopted a bright line approach of deeming any election obtained through a tainted showing of interest void *ab initio*. *See Dejana Industries, Inc*., 336 N.L.R.B. 1202 (2001). Thus, failure by the Region to investigate upon receipt of evidence that such conduct may have occurred results not only in a fundamental due process violation, but also in the disregard of employees' Section 7 rights under the Act. These potential harms are particularly present in cases such as this one, where the Region orders the election to occur via mail ballot, which increases the likelihood that the same supervisory influence over the card signings could reoccur during the mail ballot voting process. Stated differently, the same influences that justify the Board's longstanding preference for a manual ballot election – secrecy, freedom of choice, freedom from coercion – heighten the Region's obligation to investigate allegations of supervisory taint in cases where a mail ballot election is approved.

is irrelevant." *See* NLRB Casehandling Manual (Part Two) Representation Proceedings §11028.4 (citing *Gaylord Bag Co*., 313 NLRB 306 (1993)). The Company timely raised the issue and presented sufficient evidence to demonstrate reasonable cause to believe that supervisory taint occurred. The Region had an obligation to investigate the matter promptly and fully to determine the validity of the showing of interest. *See Perdue Farms, Inc*., 328 N.L.R.B. 909, 911 (1999) ("Once presented with evidence that gives the Acting Regional Director reasonable cause to believe that the showing of interest may have been invalidated . . . further administrative investigation should be made provided the allegations of invalidity are accompanied by supporting evidence."). The Region cannot sidestep this obligation by simply moving forward with the election and seeking to moot the issue. Put another way, the Region cannot refuse to allow the Company to litigate the taint question pre-election, fail in its obligation to investigate, and then unilaterally declare the issue to be over and done with simply because the election has taken place.

f. The Acting Regional Director's decision to hold a mail ballot election, as opposed to the traditional Board practice of conducting a manual ballot election, plainly departed from Board precedent and represented an abuse of discretion. The Board has long held that the manual ballot election procedure is presumptively appropriate. *See Nouveau Elevator Industries, Inc*., 326 NLRB 470, 471 (1998) (denying mail ballot election where voting group consisted of over 1,600 employees employed at various sites throughout New York City metropolitan region and assigned a "myriad of schedules, including being on-call 24 hours a day"); *San Diego Gas and Elec*., 325 NLRB 1143, 1144 (1998) (The Board's "longstanding policy, to which we adhere, has been that representation elections should as a general rule be conducted manually, either at the workplace or at some other appropriate location."); *see also* NLRB Casehandling Manual (Part Two) Representation Proceedings §11301.2 ("The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually").

When deciding whether to conduct a manual or mail ballot election, a Regional Director should consider: (i) whether eligible voters are "scattered" because of their job duties over a wide geographic area; (ii) whether eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times, and (iii) whether there is a work stoppage (i.e., strike or walkout) in progress. *San Diego Gas* at 1145. Voters may be deemed to be scattered "where they work in different geographic areas, work in the same areas but travel on the road, work different shifts, or work combinations of full-time and part-time schedules." *Id*. at 1145, n. 7. However, "the mere fact that employees may work multiple shifts, thereby necessitating more than one voting session during the course of

the workday, is not in and of itself a sufficient basis for directing a mail ballot election." *Id*. The evidence presented demonstrated that the voting group was not "scattered" under the standards imposed by existing Board law. Thus, the Acting Regional Director plainly erred in deciding that a single-site, one-day election in two polling periods over approximately fourteen hours[6] was inconsistent with the Board's longstanding policy favoring manual ballot elections, and his decision constituted an abuse of discretion. The Acting Regional Director's decision to hold a mail ballot election, as opposed to the prudent and traditional Board practice of conducting a manual ballot election, further abridged the Company's ability to exercise its 8(c) right to speak to employees in that it precluded the Company's ability to make group presentations as of the date ballots were mailed to the voting group, unfairly burdened the Company with onerous administrative tasks upon pain of waiver, prejudiced the Company's ability respond to the Union's organizing campaign in violation of the United States Constitution and Section 8(c) of Act, and needlessly subjected employees to the potential harms that the Board's preferred method of manual ballot voting was intended to limit, including the loss of secrecy and integrity in the voting process, as well as prospect of interference and/or coercion.

g. The Acting Regional Director's refusal to consider the Company's revised election proposal following its objection to his erroneous calculations of the Company's original election proposal represented further arbitrary denial of the Company's rights and interests during the pre-election process. The Company's original proposal at the Representation Hearing called for a one-day, single-site election with the polls to be open for a total of 4 hours over a 14 hour period, to be conducted at a site about an hour's drive from the Region 4 offices in Philadelphia. During a conference call on January 7, 2016, to discuss the Company's objection to the Acting Regional Director's erroneous interpretation of that proposal, counsel for the Company made a revised election proposal offering a single polling time, from 2:00 a.m. to 8:00 a.m., on a Wednesday of the Acting Regional Director's choosing. UPS Freight's revised proposal eliminated all concerns raised by the Acting Regional Director. Nevertheless, the Acting Regional Director refused to consider the revised proposal, stating that, under the Final Rule, "determinations on election arrangements are now expected to be made at the time the Decision and Direction of Election issues." The Acting Regional Director offered no citation to where in the new rules this "expectation" may be found. Contrary to the Acting Regional Director's finding, it is well-within his broad discretion to revise the election details at <u>any</u> point in the

[6] The Regional Director rejected the Company's revised proposal to conduct the election within a six-hour period, despite the undeniable fact that it eliminated any potential concerns raised by the initial proposal. His decision to do so represents further departure from the Board's longstanding policy favoring manual ballot elections, and constituted further abuse of discretion.

proceedings. The Board recognizes that election details may be worked out by the parties after the issuance of a Decision and Direction of Election. *See* NLRB Casehandling Manual (Part Two) Representation Proceedings §11301.3 ("a determination may not be possible until, for example, after a decision and direction of election has issued"). Additionally, the Region is permitted to refuse to allow litigation regarding the facts and circumstances relevant to election details. *See Id*. at §11301.4 ("[T]here is no requirement that parties be permitted to litigate the election arrangements in the hearing"). Thus, any suggestion by the Region that the Company is limited to the proposal it made at the hearing is without merit and the Acting Regional Director's assertion that he is unable to revisit the election details following issuance of the D&D is incorrect.[7]

h. The Region's denial of UPS Freight's Request for the Issuance of Subpoena *Duces Tecum* prejudiced the Company in the preparation of these objections and will detract from its written offer of proof in support of them. Specifically, on February 2, 2016, the Company requested the issuance of five (5) subpoenas. Its request was denied by the Region as a result of the "lack of a currently outstanding Notice of Hearing in this matter," a position based on the Casehandling Manual, which has not been updated since passage of the Final Rule. The Region's denial is yet another example of the prejudice imposed by the Final Rule, and by its application of the Final Rule in this proceeding. Section 102.69(c) of the Final Rule authorizes the conduct of a hearing on objections and challenges to the election if, among other grounds, "the regional director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing." The Company requested subpoenas to further its efforts to compile information relevant to the issue of supervisory taint. The subpoenas were necessary as a result of the Region's comprehensive failure, as set forth in objection 3(e), above, to investigate the issue administratively, or to otherwise permit the Company to litigate the matter during the pre-election process. But, its requests were denied by the Region. The Region's ruling violates the Company's due process rights by denying it the means to obtain the very evidence that is required under the Final Rule to obtain an post-election evidentiary hearing.

4. UPS Freight objects to a voting unit comprised of "all regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle,

[7] As well, when soliciting the parties' positions on the balloting, the Hearing Officer gave the Company no indication that its initial suggestion might be in any way problematic. In other words, she made no serious attempt to reach a mutually acceptable resolution and kept the Company in the dark about the possibility that the Region might reject the Company's balloting proposal.

Kutztown, Pennsylvania who were employed during the payroll period ending January 2, 2016," because it excludes the regular drivers (full-time and part-time) employed by the Company at its eight other distribution facilities, which the evidence proved share an overwhelming community of interest with the employees sought to be represented by the Union. The Company further objects to the Regional Director's analysis of the unit in accordance with the standards set forth in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), which was wrongly decided and should be overturned for all of the reasons stated in the dissents of Member Miscimarra in *Macy's, Inc*., 361 NLRB No. 4, slip op. at 22-33 (2014) and Member Johnson in *DPI Secuprint*, 362 NLRB No. 172, slip op. at 9-19 (2015).

5. UPS Freight objects to a voting unit that includes certified safety instructors and dispatchers, as proposed in the Union's motion to amend the petition for election. For the same reasons stated in Objection 3(c), above, employees performing the duties associated with these positions do not "regularly perform duties similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit." *Berea Publishing Co*., 140 NLRB 516, 519 (1963). To the contrary, they perform duties that are, at best, incompatible, and at worst, antagonistic, to those performed by the road drivers employed by the Company, and should be excluded from the unit as a result.

6. UPS Freight objects to the conduct of the election, and the results of the election, on the basis that the showing of interest supporting the Union's petition for election, the election campaign, and the vote itself, were all tainted as a result of Mr. Cappetta's solicitation efforts and other participation in support of the Union, which the NLRB has repeatedly found to be inherently coercive. *Harborside Healthcare, Inc*., 343 NLRB 906 (2004); *Madison Square Garden CT, LLC*, 350 NLRB 117, 122 (2005); *Reeves Bros*., 277 NLRB 1568, 1568 n.1 (1986);

Sarah Neuman Nursing Home, 270 NLRB 663, 663 n.2 (1984); *A.T.I. Warehouse, Inc.*, 169 NLRB 580, 580 (1968); *Heck's, Inc.*, 61 LRRM 1128 (1966); *Dejana Industries, Inc.*, 336 N.L.R.B. 1202 (2001); *National Gypsum Co.*, 215 NLRB 74 (1974); *Southeastern Newspapers, Inc.*, 129 NLRB 311 (1960); *The Toledo Stamping & Manufacturing. Co.*, 55 NLRB 865, 867 (1944). The election, therefore, should be considered a nullity. *Id*; *see also* NLRB Casehandling Manual (Part Two) Representation Proceedings §11028.4 ("[W]hen the petition itself was tainted by unfair labor practices and thus was void *ab initio*, the petition should be dismissed irrespective of the conduct of an election, which is considered a nullity.").

Respectfully submitted,

UPS GROUND FREIGHT, INC.

/s/ Kurt G. Larkin

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of UPS GROUND FREIGHT INC.'S OBJECTIONS TO THE RESULTS OF THE ELECTION was served by electronic mail this 9th day of February, 2016 on the following:

Jeremy Meyer, Esquire
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

UPS GROUND FREIGHT, INC.,

Employer

and Case 04-RC-165805

TEAMSTERS LOCAL 773,

Petitioner

OFFER OF PROOF IN SUPPORT OF UPS GROUND FREIGHT'S OBJECTIONS TO THE RESULTS OF THE ELECTION

Pursuant to Section 102.69(a) of the National Labor Relations Board's Rules & Regulations, 29 C.F.R. §102.69(a), UPS Ground Freight, Inc. ("UPS Freight" or "the Company"), respectfully submits the following Offer of Proof in support of its Objections to the Results of the Election ("the Election Objections"), filed with Region 4 of the National Labor Relations Board on February 9, 2016:

1. UPS Freight's Objection to the Final Rule

UPS Freight's objections contained in paragraph 1, subsections (a) through (d) of the Election Objections, are based principally on the challenges to the new rule entitled "Representation - Case Procedures; Final Rule," 29 C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74,439, effective April 14, 2015 ("the Final Rule") and its application in this proceeding as articulated by the Plaintiffs in their Complaints and other filings in *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015), *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D. Tex. 2015), and *Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D. D.C. 2015), and as stated in both the Company's Statement of Position and the

Objections. The objections contained in these filings and lawsuits are incorporated by reference.[1]

In addition to those challenges, Vice President of Operations Ted Lovely, Human Resources Manager Ryan Owens, Employee Relations Supervisor Ken Thomas, and/or Matt DiBiase, the Operations Supervisor of UPS Freight's Advance Auto Parts Kutztown distribution center located at 9755 Commerce Circle, Kutztown, Pennsylvania ("the AAP Kutztown distribution center") would testify that imposition of the Final Rule in this proceeding severely hindered the Company's ability to investigate the issues related to the Union's petition for election and to prepare for the Representation Hearing, limited the Company's opportunity to engage in lawful dialogue with its employees concerning the ramifications of representation, obligated the Company to violate the personal privacy rights of its employees by forcing the disclosure of employees' personal e-mail addresses and phone numbers, and materially prejudiced the Company and affected the outcome of the election.

2. <u>UPS Freight's Objection to General Counsel Memorandum 15-06</u>

UPS Freight's objections contained in paragraph 2 of the Election Objections are based principally on the guidance set forth in General Counsel Memorandum 15-06, entitled Guidance Memorandum on Representation Case Procedure Changes ("GC Memo 15-06"). Specifically, UPS Freight objects to the portion of GC Memo 15-06 that vests in the Regional Director the authority to "decide not to permit litigation of supervisory status prior to the election even if a party asserts that pro-union conduct by a supervisor tainted the petition or the showing of interest," despite its acknowledgement that "a petition filed by a supervisor cannot raise a valid

[1] In this regard, and for the avoidance of doubt, the Company's challenges to the Final Rule include its objection to the very concept of requiring an "offer of proof" as a prerequisite to the granting of such a hearing, *see* 29 C.F.R. §102.69(a), (c)(9) & (ii), particularly where, as here (and as described herein), the Region disallowed the Company the opportunity to develop a key line of evidence that would have supported this Offer of Proof.

question concerning representation." *See* GC Memorandum 15-06 at 18. GC Memo 15-06 was intended to describe "the changes made by the final rule and provide[] guidance to Agency personnel, parties, practitioners, and other stakeholders on how the final rule will impact representation case processing from the initial processing through certification." *Id.*, at 2. Thus, UPS Freight incorporates by reference the offer of proof set forth in Section 1, *supra*. Additionally, the Company incorporates by reference the anticipated testimony and evidence set forth in the offers of proof set forth in Sections 3(d), 3(e), 3(h), and 6, *infra*.

3. <u>UPS Freight's Objections to the Final Rule as Applied in This Proceeding</u>

UPS Freight's objections contained in paragraph 3, subsections (a) through (h), of the Election Objections, are based on the arbitrary and prejudicial manner in which the Final Rule was applied by the Region in this proceeding. UPS Freight incorporates by reference the offers of proof set forth in Sections 1 and 2, *supra*, the record pleadings, motions, and formal communications filed with, or submitted to, the Region in this proceeding, and the transcript and associated exhibits from the December 21, 2015 Representation Hearing.[2]

The Company additionally states as follows in support of these objections:

a. The Unfairly Truncated Time Period In Which to File the Statement of Position and the Acting Regional Director's Partial Denial of the Company's Motion To Postpone Representation Hearing And For Extension Of Time To File Statement Of Position

Lovely, Owens, and/or Thomas would testify that the Final Rule's seven-day deadline for filing the Statement of Position significantly impeded the Company's ability to investigate the issues raised by the Union's petition and to adequately complete its Statement of Position.

[2] Citations to the transcript of the December 21, 2015 Representation Hearing will be referenced as "(Tr. __)." Citations to the Company's exhibits introduced at hearing will be referenced as "(Emp. Exh. __)." Citations to the Region's exhibits introduced at hearing will be referenced as "(R. Exh. __)." Citations to the Union's exhibits introduced at hearing will be referenced as "(U. Exh. __)."

Complying with this extraordinarily abbreviated filing period was made more difficult here given the nature of UPS Freight's business and its transition to a new, customer-imposed delivery schedule, which was ongoing at the time the Union filed the petition. The administrative burden was even more onerous with respect to the Company's position as to the appropriate bargaining unit, which required that the Company gather and assess evidence from nine different locations scattered across the eastern United States and involving nearly three hundred employees. These individuals would also testify that the logistical challenges of gathering evidence in support of the Company's position on the unit issue were complicated both by the dispersion of employees during the holiday season and the operational demands on the Company. These logistical challenges warranted the full relief requested in the Company's Motion To Postpone Representation Hearing And For Extension Of Time To File Statement Of Position. Lovely, Owens, Thomas and others would testify that the Acting Regional Director's order granting only a portion of the extension/postponement requested by the Company materially prejudiced UPS Freight both in its preparation for the Representation Hearing and in its efforts to defend its position during these proceedings.[3]

b. The Region's Denial of an "Appropriate" Hearing Guaranteed by Section 9(c) of the Act and Violation of the Company's Due Process Rights Guaranteed by the Constitution

The majority of the evidence supporting UPS Freight's objections contained in paragraph 3, subsection (b) of the Election Objections is generally set forth in the transcript of the December 21, 2015 Representation Hearing, which the Company incorporates herein by reference. Additionally, Lovely and/or Dibiase, who were present throughout the proceeding,

[3] As well, the two-day limit on extensions is arbitrary and capricious when applied to the Company in this case. Even if the Company had been given a two-day extension, it could not have adequately prepared for the hearing. This raises the question of whether the two-day limit on extensions not only has the effect, but the purpose, of preventing employers from adequately preparing for a hearing.

would testify, if necessary, to statements made "off the record" relating to the delayed start of the hearing, the Hearing Officer's refusal to allow the parties to litigate a variety of issues including the issue of supervisory taint as well as several unit inclusion issues, the decision to virtually confine the parties to the building for the duration of the hearing, the denial of a reasonable meal period, no available water fountain or water cooler, the refusal of requested adjournments to complete live witness testimony the following morning, the denial of the Company's request to file post-hearing briefs, and the denial of a reasonable period for the Company to prepare for, and present, an oral closing argument. Each of these actions individually violated the Company's right to an "appropriate hearing" under Section 9(c) of the Act, and represented a denial of due process.

c. The Acting Regional Director's Refusal to Litigate the Company's Contention that Employees Frank Cappetta and Carl David Should be Excluded From the Unit

The majority of the evidence supporting UPS Freight's objections contained in paragraph 3, subsection (c) of the Election Objections is generally set forth in the transcript of the December 21, 2015 Representation Hearing, which the Company incorporates herein by reference. Specifically, as set forth in paragraph 3(d), *infra*, the transcript demonstrates that Cappetta primarily performs supervisory duties related to the position of dispatcher. (Tr. 219). Additionally, the transcript demonstrates that David is primarily employed by the Company as a certified safety instructor and assists Cappetta with dispatch duties. (Tr. 148-149, 152, 172, 174).[4] Lovely and/or DiBiase would further testify that Cappetta had worked as a Road Driver only a few times in 2015, and David had not done so regularly.

[4] The Hearing Officer excluded evidence as to the issue of Cappetta's and David's inclusion in the unit, and the Acting Regional Director, in apparent reliance on the Section 102.64(a), agreed that the issue "need not be resolved before the election." *See* Decision and Direction of Election, p. 13. Although the record contains significant testimony relating to Cappetta's primary duties due to inquiries concerning

Additionally, DiBiase would testify regarding the duties performed by the dispatcher, which regularly involve functions such as the assignment of routes, the scheduling of work and time off, the resolution of complaints from the customer and from Road Drivers, and the scheduling of third-party temporary drivers, among other responsibilities. DiBiase would further testify that the duties performed by the certified safety instructors are incompatible with, and potentially antagonistic to, those performed by the Road Drivers employed by the Company. Finally, Owens and DiBiase would testify that the Acting Regional Director's failure to address the Company's arguments regarding Cappetta's and David's exclusion from the unit prejudiced the Company by denying it the benefit of knowing, prior to the election, whether Cappetta and David would be included in the unit. This uncertainty hindered the Company in the exercise of its Section 8(c) speech rights with regard to Cappetta and David.

d. The Region's Decision Not to Address Frank Cappetta's Supervisory Status Prior to the Issuance of the Acting Regional Director's Decision and Direction of Election

The majority of the evidence supporting UPS Freight's objections contained in paragraph 3, subsection (d) of the Election Objections is generally set forth in the transcript of the December 21, 2015 Representation Hearing, which the Company incorporates herein by reference. Specifically, the testimony elicited at the hearing demonstrates that, although he performs duties as a dispatcher, certified safety instructor, and (very infrequently) Road Driver, about 80% of Cappetta's work hours during the past year were devoted to the functions associated with his dispatcher duties. (Tr. 219, 265. 290). In this position, Cappetta, among other duties, regularly coordinates routes and assigns drivers to those routes (Tr. 125, 127, 129, 135), coordinates with the Company's customer to determine the number of routes required each day

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his supervisory status, the evidence concerning David's job functions is incomplete as a result of the Hearing Officer's ruling.

(Tr. 126-127), identifies and resolves "split routes" and "overloads" (Tr. 136-137), regularly assigns coverage for absences resulting from sick days, vacation days, and other leaves of absence (Tr. 138, 141-142), is authorized to contact third party temporary labor providers and to schedule temporary drivers as needed (Tr. 139-141)[5], schedules vacation and coordinates employee absences with payroll (Tr. 142), establishes his own schedule, hours of work, and break times and duration (Tr. 146-147, 157), holds meetings with multiple drivers at a time (Tr. 157), receives and resolves complaints from Advance Auto Parts concerning deliveries (Tr. 169-170), and receives and resolves complaints from drivers concerning their assigned routes (Tr. 129). Importantly, Cappetta decides which drivers to assign by exercising his judgment. (Tr. 272; 281-82; 310-11).

Additionally, the evidence and testimony demonstrates that Capetta evaluates driver applicants and makes recommendations concerning new hires (Tr. 174), administers pre-hire road tests and evaluates employee performance in the completion of the test, evaluates and supervises driver pre-trip and post-trip tasks, and performs driver skill assessments related to driver qualifications, among other tasks (Tr. 172-174). Additionally, since at least October 2015, Cappetta has physically occupied the site manager's office. (Tr. 187-189).

In addition to the evidence adduced at the hearing, UPS Freight's new on-site manager at the AAP Kutztown distribution center, Jeremiah Andrefski, would testify that in January 2016, Cappetta told him: "No offense to you Jeremiah, but I can run this place by myself. I've done it before." This comment is particularly noteworthy given that the conversation occurred after the December 21, 2015 Representation Hearing, during which Cappetta repeatedly denied performing supervisory functions or that he ran that Kutztown operation. This anticipated

[5] The Company can submit records at the hearing demonstrating the numerous occasions on which Cappetta subcontracted delivery routes to outside carriers.

testimony further supports the Company's position as it relates to Cappetta's supervisory capacity. Additionally, Andrefski and/or DiBiase would testify that Road Drivers cannot refuse dispatch assignments made by the dispatcher without good cause, and that the penalty for a Road Driver refusing one of Cappetta's assignments (without good cause) would be disciplinary action up to and including discharge.

Accordingly, the evidence presented at the Representation Hearing, as supplemented by the offers of proof above, plainly establishes that Cappetta performed a number of the supervisory functions contemplated by Section 2(11) (each independently sufficient) with the requisite independent judgment that was not merely routine or clerical in nature, in the interest of the Company. As a result, Cappetta should have been deemed a statutory supervisor and therefore should not have been eligible to vote in the election.

The Region's decision not to decide Cappetta's status prior to the election deprived UPS Freight of fair and adequate notice of whether it could expect and require Cappetta to advocate and support the Company's position during the campaign as a result of his supervisory status, or whether the Company was required to treat him as a bargaining unit employee during the election campaign. In this regard, Lovely, Dibiase and/or Owens would testify that the uncertainty caused by the Region's handling of this issue severely prejudiced the Company. As UPS Freight has stated (and demonstrated by various evidentiary showings) throughout, and as Lovely, Dibiase and/or Owens would testify, Cappetta exercised substantial influence over the Road Drivers at Kutztown. On many occasions, they have observed Road Drivers defer to Cappetta's judgment, route assignments, other decisions, and opinion on various work-related matters. Having the ability to treat Cappetta as a supervisor would have materially enhanced the Company's chances of prevailing in the election given his influence over the bargaining unit.

Lovely, Dibiase and/or Owens will testify they felt compelled to treat Cappetta like a bargaining unit member given the Region's failure to decide his status, as they did not want to risk a ULP charge for treating him like a supervisor. They will further testify that the Region's decision not to rule on Cappetta's status before the election certainly contributed to the Company losing the election, as it eliminated the Company's ability to rely on arguably the most influential figure at Kutztown to present the Company's message regarding unionization to employees. In effect, the Region's decision denied the Company its statutory rights regarding supervisors.

e. The Region's Refusal to Address Whether the Union's Petition for Election Was Tainted Because of Solicitations and Other Conduct by Frank Cappetta

The Company maintained since the onset of the pre-election process that Cappetta engaged in conduct that tainted the Union's showing of interest, and by direct consequence, the election campaign and ultimate vote. The evidence supporting UPS Freight's contention that Cappetta is a statutory supervisor under Section 2(11) of the Act is generally set forth in the transcript of the December 21, 2015 Representation Hearing, and supplemented in the offer of proof set forth in Section 3(d), above. Additionally, the evidence supporting UPS Freight's contention that Cappetta likely engaged in solicitation efforts and other participation in support of the Union that had the result of tainting the showing of interest supporting the Union's petition for election, the election campaign, and the vote itself, is set forth in Section 6, *infra*.

The Acting Regional Director declined to consider the issue of supervisory taint prior to the election, noting that "[t]he Board has long held that it is inappropriate to litigate such matters in representation proceedings." *See* Decision and Direction of Election, p. 13. The Acting Regional Director, instead, indicated in the Decision and Direction of Election that: "the Employer's allegations of supervisory taint of the Petitioner's showing of interest **will be investigated administratively**." *Id*. (emphasis added) There is, however, no indication that the

Region conducted any investigation concerning the issue of supervisory taint. In this regard, Willie Johnson, Kaliek Thomas, Ken Rose, Tim Hertzog, Gene Knappenberger, Don Roush, and Chris Camuso, all of whom are Road Drivers who are part of the bargaining unit, would testify that no one from the NLRB attempted to contact them at any time since the filing of the petition. Given the relatively small size of the petitioned-for unit, it stands to reason that any investigation by the Region would have included interviews with bargaining unit members to determine whether, and how, Cappetta participated in the card signing process and/or the Union's pre-election campaign. The fact that these employees were not interviewed tends to establish that the Region did not make any meaningful effort to interview any bargaining unit members.[6]

Additionally, as set forth in detail in Section 6, *infra*, Tammy Cadman, a former temporary administrative assistant at the AAP Kutztown distribution center employed in the same position on a permanent basis at the Company's Salina, Kansas distribution center, was told by Cappetta that he was organizing the Kutztown facility and that she should encourage the Road Drivers at Salina to unionize when she returned there at the end of her temporary assignment at Kutztown. UPS Freight provided this information to the Region in advance of the Representation Hearing and specifically requested that the Region interview Cadman and "any Kutztown Road Driver who either signed an authorization card or was included in any other showing of interest submitted by the Union" in order to determine the extent to which Capetta was involved in the solicitation or signing of union cards and/or encouraging employees to support unionization at Kutztown. Cadman would testify that she was never contacted by the Region.

[6] As well, since employers have a statutory right to require supervisors to support/advocate their position on unions, if the Company had determined that Cappetta was advocating for the Union, it would have had the statutory right to discipline him. The Region's failure to determine his supervisory status effectively eliminated this right.

As stated in its Objections, the Company timely raised this issue and presented sufficient evidence to demonstrate reasonable cause to believe that supervisory taint occurred. The Region had an obligation to investigate the matter promptly and fully to determine the validity of the showing of interest. *See Perdue Farms, Inc.*, 328 N.L.R.B. 909, 911 (1999) ("Once presented with evidence that gives the Acting Regional Director reasonable cause to believe that the showing of interest may have been invalidated . . . further administrative investigation should be made provided the allegations of invalidity are accompanied by supporting evidence."). The Region cannot sidestep its obligation to investigate by simply moving forward with the election and seeking to moot the issue. Put another way, the Region cannot refuse to allow the Company to litigate the taint question pre-election, decline to investigate, and then unilaterally declare the issue to be over and done with simply because the election has taken place.

In sum, the Company intends to establish at hearing that the Region did not meaningfully investigate the Company's allegations of supervisory taint and that this failure is an abdication of the Region's responsibility under the Rules and the Casehandling Manual.[7]

[7] As discussed in detail in the Company's Objections, the Region cannot avoid this issue simply by concluding that Cappetta is not a supervisor. For one thing, the Region has yet to formally notify the parties it has reached that finding. The only notice UPS Freight has received regarding the issue is an oral statement from Ms. O'Neill, who presided over the ballot count, that the Acting Regional Director decided Cappetta was not a supervisor. Cappetta is a supervisor and the Company intends to present further evidence in support of this contention at the hearing. Any finding – by the Region, the full Board, or a federal court – that Cappetta is a supervisor would almost necessarily invalidate the election result in this case given the Region's failure to follow up on the Acting Regional Director's now-unfulfilled promise in the Decision and Direction that the Region would investigate. The casual manner in which the Region appears to have disposed of the question of Cappetta's supervisory status suggests it may never have intended to investigate the taint claim. This presents yet another problem for the Region: if the Acting Regional Director had already decided when he issued the Decision and Direction that the Region would not investigate the Company's taint allegations, it could only be because he had determined Cappetta was not a supervisor. In that case, why omit that finding from the Decision and Direction, particularly when doing so kept the Company in the dark about Cappetta's status and prevented it from knowing how to deal with him during the campaign? The Region's handling of these issues suggests it abandoned its role as neutral referee and took sides. This only further illustrates that it has denied the Company's rights to due process and a fair hearing.

f. The Acting Regional Director's Decision to Hold a Mail Ballot Election

The Acting Regional Director's decision to hold a mail ballot election, as opposed to the traditional Board practice of conducting a manual ballot election, departed from Board precedent and represented an abuse of discretion. In this regard, Lovely, DiBiase, and/or Andrefski would testify that the putative bargaining unit members at the AAP Kutztown distribution center do not work over a wide geographic area, are all assigned to a single employment site, report to work each day at the AAP Kutztown distribution center and return there at the end of every shift, and that the delivery routes assigned to the Road Drivers are designed to allow their return to the Kutztown distribution center at the end of each shift. Additionally, DiBiase, and/or Andrefski would testify to the manner in which the Company would have adjusted dispatch times so that all Road Drivers assigned to work on election day could be at the facility either before the beginning of their assigned route (from 3:00 a.m. to 5:00 a.m. under the Company's original proposal) or after the completion of their assigned route (from 3:00 p.m. to 5:00 p.m. under the Company's original proposal).

Under these circumstances, the voting group is clearly not "scattered" under the standards set forth by the Board in *San Diego Gas and Elec.*, 325 NLRB 1143 (1998). As such, the Acting Regional Director did not have discretion under Board precedent to order a mail ballot election. His decision to do so in the face of clear evidence that the voting group was not scattered (and based mainly on unsupported speculation about the weather) was an abuse of discretion and denied the Company due process. In this regard, DiBiase and/or Lovely would testify to the obvious point that scheduling a mail ballot election, which commenced on January 11, 2016 and ended on January 29, 2016, allowed the Union a period of fifteen additional days during which it was legally permitted to hold group meetings and home visits with bargaining unit employees,

while the Company was not. Union organizer Brian Taylor can testify to this same fact and can further testify to any meetings the Union did hold with employees during this time period. Thus, the evidence at hearing will establish that the Region's decision to proceed with a mail ballot gave the Union an unfair – and unwarranted – campaign advantage while effectively preventing the Company from exercising its statutory right to communicate its views on unionization to employees.

g. The Acting Regional Director's Refusal to Consider the Company's Revised Election Proposal Following its Objection to His Erroneous Calculations of the Company's Original Election Proposal

The Acting Regional Director's refusal to consider the Company's revised election proposal following its objection to his erroneous calculations of the Company's original election proposal represented further arbitrary denial of the Company's rights and interests during the pre-election process. In this regard, Lovely and/or DiBiase would testify, consistent with the Company's revised election proposal submitted to the Acting Regional Director on January 7, 2016, that the Company would have made operational adjustments to the work schedule that would have effectively permitted a manual ballot election to be conducted at a single polling time, during a six-hour period from 2:00 a.m. to 8:00 a.m., on a Wednesday of the Acting Regional Director's choosing. They will testify that UPS Freight and its customer could readily have adjusted the dispatch schedule on the date of the election so that all Road Drivers assigned to work on that date would have been dispatched between the hours of 2:00 a.m. and 8:00 a.m. That is, they would have been required to physically be at the Kutztown facility at some point during that time period. The Regional Director rejected the Company's revised proposal to conduct the election within a six-hour period, despite the fact that it eliminated any potential concerns raised by the initial proposal. His decision to do so represents further departure from

the Board's longstanding policy favoring manual ballot elections, and constituted further abuse of discretion. The Region's refusal to reconsider on this point prejudiced UPS Freight for all of the reasons set forth in Section (f) above.

h. The Region's Denial of UPS Freight's Request for the Issuance of Subpoena Duces Tecum

Section 102.69(c) of the Final Rule authorizes the conduct of a hearing on objections and challenges to the election if, among other grounds, "the regional director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing." Thus, the Final Rule authorizes the Region to decline to hold a post-election hearing if the evidence included in the offer of proof is not sufficient. As such, the Final Rule places an additional and unfair burden on an employer to present all of the evidence it intends to introduce at the hearing in its offer of proof. This is particularly the case since the Casehandling Manual arguably does not provide for the issuance of investigative subpoenas in the absence of a direction of hearing by the Region – which has not yet occurred.

In this case, on February 2, 2016, the Company requested that the Region issue several subpoenas duces tecum, in order that the Company might further develop evidence that Cappetta's participation in the Union campaign tainted the election result. The Region denied this request on the grounds that no "currently outstanding Notice of Hearing" had been issued. The Region's denial cut off the Company's means of obtaining the very evidence it is now required under the Final Rule to present in order to obtain a post-election hearing.

In any case, and despite the fact that the Board's rules do not require a party to state the purpose of a request for subpoenas, in order to preserve this issue in the administrative record the Company states as follows: as described more fully in Section 6 below, the Company learned that Cappetta was in cell phone contact with lead Union organizer Brian Taylor during the

election campaign. As such, it requested document subpoenas in order to obtain relevant cell phone records of Cappetta and Taylor (and, perhaps, others at the Union) during the period relevant to this proceeding. The Company has reason to believe that a review of those records would show frequent contact between Cappetta and the Union, which would further support UPS Freight's contention that Cappetta was a key figure in the Union's organizing campaign and that his participation in the campaign tainted both the Union's original showing of interest and the results of the election itself. The Region's denial of UPS Freight's subpoena request arbitrarily cut off the Company's ability to develop this line of evidence. Under these circumstances, any decision by the Region not to grant a hearing on the question of supervisory taint based on the Company's "lack" of evidence presented in this offer of proof would indisputably violate the Company's right to a fair hearing under the Act and to due process under the U.S. Constitution.[8]

4. <u>UPS Freight's Objection to a Voting Unit Comprised of "All Regular Full-Time and Part-Time Road Drivers Employed by the Employer at its Facility Located at 9755 Commerce Circle, Kutztown, Pennsylvania</u>"

The majority of the evidence supporting UPS Freight's objections contained in paragraph 4 of the Election Objections is generally set forth in the transcript of the December 21, 2015 Representation Hearing, which the Company incorporates herein by reference. Specifically, the evidence demonstrates that UPS Freight is party to a national contract with Advance Auto Parts ("AAP"), under which it performs operations relating to the distribution of AAP parts and other supplies from nine distribution centers to regional AAP stores around the country. (Tr. 21-24). The distribution centers comprising the Company's AAP operation are located in Kutztown, PA, Enfield, CT ("Enfield facility"), Lakeland, FL ("Florida facility"), Salina, KS ("Kansas facility"), Gastonia, NC (Gastonia facility"), Delaware, OH ("Delaware facility"), Roanoke, VA

[8] UPS Freight incorporates by reference the offers of proof set forth in Sections 1, 2, 3(d), and 3(e), *supra*, and Section 6, *infra*.

("Virginia facility"), Hazelhurst, MS ("Hazelhurst facility"), and Thomson, GA ("Thomson facility") (collectively the "AAP distribution facilities"). (Tr. 23). UPS Freight considers the nine AAP distribution facilities part of a single integrated customer service initiative set up just for AAP. (Tr. 24-25).

The Company has a single centralized management team (Regional Operations Manager, AAP Manager, Operational Support Supervisor, Support Manager) that is responsible for overseeing the Company's contractual and operational relationship with AAP, including the provision of services by Road Drivers from all of the Company's AAP distribution facilities. (Tr. 25-31). The Company has centralized Human Resources and Employee Relations functions that are responsible for all nine AAP distribution facilities. (Tr. 78-79).

All Road Drivers employed by the Company at the nine AAP distribution facilities have the same job title. (Tr. 36, 39). All Road Drivers use, and are trained on, the same equipment - tractor trailers (either sleeper cabs or day cabs). (Tr. 36, 39). UPS Freight Road Drivers working under the AAP contract do the exact same work, and do not perform work, or make deliveries, for any other UPS Freight customer besides AAP. (Tr. 38-39). All Road Drivers are evaluated under the same Company performance criteria, including accident frequency, safety and efficiency indicia such as "hard brakes" and "overspeed," miles per gallon on tractors, and delivery performance. (Tr. 48-51). All Road Drivers are employed under the same UPS Freight corporate policies. (Tr. 46-47, 72). All Road Drivers receive roughly the same rates of pay. (Tr. 75-76, 116-118). All Road Drivers are entitled to the same corporate benefit plans. (Tr. 105). All Road Drivers receive substantially the same training/orientation, as well as specialized training from AAP regarding hazards and operational matters relevant to working in one of its distribution centers. (Tr. 45-48).

All Road Drivers at the Company's AAP distribution facilities have access to a centralized job database and are eligible to apply for driving jobs at any of the other AAP distribution facilities. (Tr. 51-52). Road Drivers have, in fact, permanently transferred from one AAP distribution facility to another in the past. (Tr. 52-56) (Emp. Exh. 1). In the past several years, 27 UPS Freight Road Drivers assigned to one AAP distribution center have been transferred to a different AAP distribution center within the system. (Tr. 52)(Emp. Exh. 1). There is significant driver interchange between locations. (Tr. 56-61). Recently, six Road Drivers have been temporarily assigned to the AAP Kutztown distribution center from other AAP distribution facilities (3 from the Florida facility, 3 from the Hazlehurst facility) to assist with a shortage of available Road Drivers. (Tr. 56-66). Over the past 3 years, 117 Road Drivers have been temporarily transferred to the Company's other AAP distribution facilities to perform work for a total of 413 weeks. (Tr. 60)(Emp. Exh. 2). In that same time period, 44 Road Drivers have been temporarily transferred to the AAP Kutztown distribution center from the Company's other AAP distribution facilities to perform work for a total of 163 weeks. (Tr. 65-66)(Emp. Exh. 2).

Given this evidence, which establishes an overwhelming community of interest shared by the Road Drivers employed at all of the Company's AAP distribution facilities, the Union's petitioned-for unit is inappropriate and should be rejected in favor of the bargaining unit proposed in Attachment C to the Company's Statement of Position, which was submitted to the Region on December 18, 2015.

5. <u>UPS Freight's Objection to a Voting Unit That Includes Certified Safety Instructors and Dispatchers</u>

UPS Freight incorporates by reference the offer of proof set forth in Section 3(c), *supra.* For the reasons stated therein, any employee who now, or in the future, regularly performs duties

as a dispatcher or certified safety instructor, should be excluded from the bargaining unit since the positions require functions that are incompatible with, and potentially antagonistic to, those performed by the road drivers employed by the Company.

6. UPS Freight's Objection to the Conduct of the Election, and the Results of the Election, On the Basis of Supervisory Taint

UPS Freight objects to the conduct of the election, and the results of the election, on the basis that the showing of interest supporting the Union's petition for election, the election campaign, and the vote itself, were all tainted as a result of Cappetta's solicitation efforts and other participation in support of the Union, which the NLRB has repeatedly found to be inherently coercive. *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004); *Madison Square Garden CT, LLC*, 350 NLRB 117, 122 (2005); *Reeves Bros.*, 277 NLRB 1568, 1568 n.1 (1986); *Sarah Neuman Nursing Home*, 270 NLRB 663, 663 n.2 (1984); *A.T.I. Warehouse, Inc.*, 169 NLRB 580, 580 (1968); *Heck's, Inc.*, 61 LRRM 1128 (1966); *Dejana Industries, Inc.*, 336 N.L.R.B. 1202 (2001); *National Gypsum Co.*, 215 NLRB 74 (1974); *Southeastern Newspapers, Inc.*, 129 NLRB 311 (1960); *The Toledo Stamping & Manufacturing. Co.*, 55 NLRB 865, 867 (1944). In support of this objection, UPS Freight incorporates by reference the offers of proof stated in Sections 2, 3(d), 3(e), and 3(h), *supra.*

In addition, Cadman would testify that, in the weeks prior to the filing of the Union's petition for election, Capetta approached her and asked her, "Do you know what's going on here?" Cadman replied that she did not, to which Capetta replied: "We're going to try to get a union at this location, you may want to share that with your drivers." Cadman interpreted Capetta's comment to mean that he was organizing the Kutztown workplace and also that he wanted her to encourage the Road Drivers at UPSF's Salina, Kansas facility to unionize when she returned to that facility following her temporary assignment at Kutztown.

Additionally, DiBiase would testify that, on January 8, 2016, he and the Company's Implementation Supervisor, Monte Copeland, were entering the Kutztown facility having just returned from lunch, and heard a phone ringing in the office. Cappetta's personal phone was sitting in plain sight, unattended, next to his company laptop. Cappetta was not in the immediate area at the time. When DiBiase glanced down at the phone (simply because it was ringing), its display reflected an incoming call from Union Organizer/Trustee Brian Taylor. DiBiase's anticipated testimony supports a reasonable belief that further investigation or evidence obtained through litigation would provide further proof of Cappetta's involvement in the Union's initial organizing efforts, as well as its pre-election campaign. The date of Taylor's call to Cappetta – January 8, 2016 – is particularly noteworthy as it shows that Cappetta remained in contact with the Union after the mail ballots had been mailed to eligible voters.[9]

Given the other evidence presented by UPS Freight at various stages of this proceeding (including in this Offer of Proof), there is reasonable cause to believe Cappetta continued to solicit Road Drivers to vote for the Union after ballots were issued. Any such solicitation plainly would have interfered with the conduct of the election given Cappetta's well-known influence over the Road Drivers at Kutztown. For example, Road Drivers including Tim Hertzog, Nate Long, and Don Roush, have indicated to the Company that Cappetta was "in charge" of day-to-day operations at the AAP Kutztown distribution center following the prior on-site operation manager's separation from the Company in around July 2015.[10]

The election, therefore, should be considered a nullity. *Id*; *see also* NLRB Casehandling Manual (Part Two) Representation Proceedings §11028.4 ("[W]hen the petition itself was tainted

[9] The Company would have had additional cell phone records to include in this Offer of Proof had the Region granted its request to subpoena those records from Cappetta and the Union.

[10] This is information the Region could have learned for itself had it contacted the Road Drivers or otherwise investigated the Company's allegations of taint.

by unfair labor practices and thus was void *ab initio*, the petition should be dismissed irrespective of the conduct of an election, which is considered a nullity").

CONCLUSION

Based on the foregoing, the Company respectfully submits that the Acting Regional Director should overturn the results of the election, order that a new election be conducted in accordance with Board Rules & Regulations as they existed prior to the effective date of the Final Rule, afford the Company the due process to which it is entitled under both the Act and the United States Constitution, and promptly address the issues and objections raised in UPS Ground Freight's Objections to the Results of the Election, as supported by this Offer of Proof.

Respectfully submitted,

UPS GROUND FREIGHT, INC.

/s/ Kurt G. Larkin

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

UPS FREIGHT TRUCKLOAD

Employer

and **Case 04-RC-165805**

TEAMSTERS LOCAL 773

Petitioner

SUPPLEMENTAL REGIONAL DIRECTOR'S DECISION ON OBJECTIONS TO ELECTION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Decision and Direction of Election, an election was conducted on January 11, 2016 in the following unit of employees[1]:

INCLUDED: All regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania.

EXCLUDED: All other employees, guards, and supervisors as defined in the Act.

The Tally of Ballots, copies of which were made available to the parties at the conclusion of the election, showed the following results:

Approximate number of eligible voters	32
Void ballots	0
Votes cast for Petitioner	27
Votes cast against participating labor organization	1
Valid votes counted	28
Challenged ballots	2
Valid votes counted plus challenged ballots	30

[1] The Decision and Direction of Election also set forth undecided classifications that would be permitted to vote in the election subject to challenge, described as follows:

> At this time, no decision has been made regarding whether the dispatchers and certified safety instructors are included in, or excluded from, the bargaining unit, and these individuals may vote in the election, but their ballots shall be challenged since their eligibility has not been resolved. The eligibility of these individuals will be resolved, if necessary, following the election.

On February 9, 2016, the Employer timely filed Objections to conduct affecting the results of the election. A copy of the Employer's Objections is appended as **Attachment A**.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, I directed an evaluation of the Employer's Objections and offer of proof. Based on that evaluation, I hereby issue this Supplemental Decision and Certification of Representative.

I. THE OBJECTIONS

Objection 1

In Objection 1, subsections (a) through (d), the Employer challenges the application of the new rules concerning representation cases entitled "Representation-Case Procedures; Final Rule," 29 C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74439. (Final Rule) The Employer primarily relies on challenges to the Final Rules set forth in recent court filings in unrelated cases.[2] In the subsections of Objection 1, The Employer set forth that application of the new rules: (a) abbreviated the pre-election period and burdened the Employer with onerous administrative tasks; (b) hindered the Employer's ability to investigate issues and prepare for the hearing; (c) deprived the Employer of adequate time to present its views on unionization to its employees; and (d) compelled the Employer to violate the privacy rights of employees when it was forced to disclose employees' personal e-mail addresses and phone numbers.

In its offer of proof in support of Objection 1, the Employer proffered that witnesses would testify that the imposition of the Final Rule severely hindered the Employer's ability to investigate issues and prepare for the hearing, obligated the Employer to disclose employees' personal email addresses and phone numbers, and limited the Employer's ability to lawfully discuss ramifications of representation with employees, thereby prejudicing the Employer in the outcome of the election. However, these are conclusory assertions and the Employer failed to offer probative information to show how the application of the Final Rules affected the results of the election. In the absence of such information, I find that the Employer has failed to carry its burden to show that any aspect of the Rule affected the outcome of this case. 5 U.S.C. § 706 (in administrative cases, "due account shall be taken of the rule of prejudicial error"); *Salem Memorial Hospital v. NLRB*, 808 F.3d 59, 67 (D.C. Cir. 2015) (party asserting procedural error in Board representation case "must show that prejudice resulted from the Board's lapses")(internal quotation omitted).[3] Accordingly, Objection 1 is overruled.

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[2] *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015), *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D. Tex. 2015), and *Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D. D.C.2015).

[3] I further reject any claim that the Rule is unlawful on its face, for the reasons stated in my earlier Decision and Direction of Election, at 13 (Jan. 5, 2015) (citing *Pulau Corp.*, 363 NLRB No. 8, slip op. at 1 (Sep. 16, 2015)), and those stated in the district court opinions in *Chamber of Commerce*, 118 F. Supp. 3d 171 (D.D.C. 2015), and *Assoc. Builders and Contractors*, 2015 WL 3609116 (W.D. Tex. June 1, 2015).

Objection 2

In Objection 2, the Employer challenges the application of General Counsel's Guidance Memorandum on Representation Case Procedure Changes ("Memorandum GC 15-06"). That memorandum has been issued by the General Counsel to regional offices pursuant to his supervisory authority over such offices, 29 U.S.C. §153(d), and I lack authority to modify it. UPS may seek correction of purported errors in the memorandum's legal analysis through the vehicle of a request for Board review.

To the extent that I have authority to rule on this Objection, I find it presents no substantial and material factual question, and overrule it. UPS cites Memorandum GC 15-06 for the proposition that the filing of a petition by a supervisor cannot raise a question of representation, then cites purportedly conflicting language concerning regional directors' authority to defer "assert[ions] that pro-union conduct by a supervisor tainted the petition or the showing of interest" to post-election proceedings. *Id.* at 18. There is no conflict between the cited provisions. Where the filer of a petition is allegedly a supervisor, supervisory status must be resolved before an election may be directed. *Id.* (citing *Modern Hard Chrome Service Co.*, 124 NLRB 1235, 1236 (1959)). Where, as here, a supervisor is merely alleged to have affected the petition or showing of interest, a preelection hearing is not mandatory. *Id.* (citing *Terry Machine Co.*, 356 NLRB No. 120 (2011); *Harborside Healthcare*, 343 NLRB 906 (2004)). Accordingly, I find nothing in Memorandum GC 15-06 to be irrational or objectionable.

Objection 3

In Objection 3, the Employer challenges the Region's interpretation and enforcement of the Final Rule as having resulted in a patently unfair and prejudicial process that contravened the Employer's rights under the Act and its right to due process under both the Act and the Constitution. The Employer described the following conduct in Objection 3:

a. In Objection 3(a), the Employer contends that it was prejudiced by the Acting Regional Director's partial denial of the Employer's Motion To Postpone Representation Hearing And For Extension of Time to File a Statement of Position. As set forth in footnote eight of the Decision and Direction of Election, I find that the Employer suffered no prejudice as a result of the decision to partially grant these requests. 5 U.S.C. § 706, *supra*. The Employer requested an extension of time to file its Statement of Position (SOP) from Thursday, December 17, 2015, to Monday, December 21, 2015, and also requested that the hearing be postponed from Friday, December 18, 2015 to Tuesday, December 22, 2015. In response to the request, the Employer was granted a one day postponement for both the SOP and the hearing, rather than the two business days the Employer requested. Accordingly, the SOP was due to be filed by 12:00 PM on Friday, December 18, 2015, and the hearing was scheduled for 10:00 AM on Monday, December 21, 2015. In its postponement

request, the Employer set forth that it needed additional time because one of the Employer's attorneys was unable to meet with the Employer until December 16; the timing of the Union's petition, in the midst of the holiday season, presented significant difficulties given the nature of the Employer's holiday delivery commitments; and that the Employer was unable to immediately focus its attention on the petition because it was busy meeting its significant holiday deliveries. The Petitioner opposed the postponement request.

In GC 15-06, the General Counsel provides guidance concerning postponement requests. Specifically, GC 15-06 sets forth that a regional director may postpone the hearing for up to two business days upon request of a party showing special circumstances and for more than two business days upon request of a party showing extraordinary circumstances. The postponement request did not assert that there were extraordinary circumstances. Moreover, while it did assert special circumstances, it is within the purview of Regional Director to determine if such circumstances exist. I concluded that the special circumstances presented by the Employer's motion warranted only a one-day postponement, based upon the claim that Employer counsel would not be able to meet with its personnel until December 16th. In application, however, by granting the one day postponement for the filing of the SOP and the hearing, the Employer actually had three additional days to prepare for the hearing as a weekend intervened between the date of the initial hearing and the date for the rescheduled hearing. While the Employer argues that the Petitioner had an unfair advantage because it received the SOP on a Friday and therefore had a weekend to prepare, that does not work to prejudice the Employer's ability to prepare for the hearing. The Employer has simply not offered to provide evidence that would suggest that a further one day's postponement would have made a difference in this case. For these reasons, Objection 3(a) is overruled.

b. In Objection 3(b), the Employer contends that it was denied an appropriate hearing and its constitutional right to due process was violated as a result of the conditions in which the hearing was conducted. In support of its objection, the Employer referenced the hearing transcript and stated that its witnesses would testify concerning a number of issues that arose at the hearing. I have considered each of the issues raised by the Employer in connection with the hearing and conclude that the Employer was not prejudiced by any of the conduct occurring during the hearing and overrule Objection 3(b) in its entirety. I will discuss each issue raised in this Objection in more detail.

i. The Employer objects to the fact that the hearing, scheduled to begin at 10:00 a.m., did not start until 11:17 a.m. The investigation disclosed that prior to the Hearing Officer's opening of the record, the parties engaged in preliminary discussions in order to attempt to reach agreement on certain issues. For example, the parties discussed whether or not the dispatcher and certified safety instructor should be included or excluded from the Unit, and discussed, for the first time, whether or not the employees holding these

positions were dual function employees. The Hearing Officer then sought the Acting Regional Director's authorization for the Union to amend its petition consistent with these discussions. In addition, on the morning of the hearing, the Employer submitted a written summary of evidence alleging that the showing of interest was tainted and advised the Hearing Officer that it intended to present one or more witnesses in support of that assertion. Accordingly, the Region had to determine whether to allow such testimony in light of our normal procedures where such matters are usually determined administratively.

ii. The Employer contends that the Hearing Officer virtually confined the parties to the building for the duration of the hearing and denied the parties a reasonable lunch period. The hearing transcript indicates that the parties had a 30 minute lunch break, the customary amount of time allotted for lunch. In addition, the Employer complains that there was no available water fountain. While there is no water fountain in the Regional office, there is no evidence indicating that any party was denied the opportunity to take a short break to obtain water from another source, such as the convenience store on the first floor of the building where the Regional Office is housed or from shops and food carts located nearby.

iii. The Employer objects that the hearing was permitted to run two hours beyond the normal workday rather than continue the following morning - thereby denying the Employer the evening to prepare oral argument. I find that the hearing was properly conducted and that the Employer did not suffer prejudice nor was denied due process as a result of the Hearing Officer's rulings. Although the hearing closed at 7:35 p.m., since it did not open until 11:17 a.m., it lasted a little over eight hours. The parties were advised at the beginning of the hearing that oral argument would be permitted rather than the filing of briefs. The Employer submitted a thorough legal argument in its Statement of Position and, as allowed for in the Rules, was entitled to offer into evidence a written memorandum prior to the close of the record. In addition, the parties were allowed 30 minutes to prepare an oral argument for the record. After consuming that time, the Employer was offered additional time to prepare but declined the offer.

iv. In its offer of proof, the Employer objects being denied the opportunity to file a post hearing brief**.** Post hearing briefs are only permitted by special permission of the Regional Director. The Regional Director considers the number and complexity of issues presented and whether significant issues are legal, factual or a combination. In addition, the Regional Director considers whether the law is evolving and whether the case presents issues of first impression or of an unusual or novel nature, and the parties' positions on briefs. **(See GC-15-06 at 24.)** The issue presented in this case was whether a single location or a multi-location unit is appropriate, an issue that is neither complex nor involving law that is in flux. Moreover, as noted above, any party may offer into

evidence a written memorandum prior to the closing of the record. For these reasons, Objection 3(b) is overruled.

c. In Objection 3(c), the Employer challenges the Acting Regional Director's decision not to address whether dispatchers or certified safety instructors should be excluded from the Unit. As set forth on page 13 of the Decision and Direction of Election, the Hearing Officer properly excluded evidence on this issue since resolution of this issue would not impact the size or character of the Unit. Section 102.64 of the Final Rule provides that disputes concerning individual eligibility to vote need not be litigated before an election is conducted. The Unit consisted of approximately 32 employees and the eligibility of the two employees at issue was not sufficient to warrant a hearing. The two individuals voted in the election and their ballots were challenged. However, their ballots were set aside and not opened or counted as they would not affect the results of the election. Accordingly, Objection 3(c) is overruled.

d. In Objection 3(d), the Employer contends that the Region's failure to address Frank Cappetta's supervisory status denied the Employer the opportunity to know what it could expect or require from Cappetta during the campaign. This argument is without merit. As the Board held in issuing the Final Rule, uncertainty as to the supervisory status of employees is inevitable. 79 Fed. Reg. at 74389. A decision as to Cappetta's supervisory status could not have provided the Employer the certainty it sought. Consequently, I find that the Employer was not prejudiced by the fact that Cappetta's supervisory status was not the subject of a preliminary decision prior to the election. **See GC 15-06 at 18.** In the event, the Employer treated him as a unit employee and the Region determined that he was not a supervisor within the meaning of Section 2(11). Under the Final Rule, because questions of supervisory status do not directly impact on whether or not there is a question concerning representation, regional directors may decide not to permit litigation of supervisory status prior to the election. Accordingly, Objection 3(d) is overruled.

e. In Objection 3(e), the Employer contends that the Region refused to address whether the Petition was tainted based on Frank Cappetta's involvement. I find no merit to this Objection. The Employer submitted a request to investigate an allegation of taint on December 21, 2015. The Region conducted an investigation and determined that Cappetta was not a supervisor within the meaning of Section 2(11) of the Act. Crucially, the Employer had ample opportunity to present evidence on Cappetta's supervisory status *at the preelection hearing*. The Employer was not prevented from putting on its supervisory-status case.[4] According it a second bite at the apple would serve no purpose. Since the investigation (including the record of the preelection hearing) did not demonstrate that Cappetta was a supervisor, his involvement did not taint the Petition. The Employer was informed of the findings of the Region's

[4] Litigation of supervisory status issues may sometimes be deferred to post-election proceedings under the Final Rule. 79 Fed. Reg. at 74398. In this case, however, Cappetta's status was litigated pre-election.

investigation concerning taint prior to the ballot count. Thus, there is no evidence that the Employer was prejudiced by the manner in which the issue of taint was resolved. Accordingly, Objection 3(e) is overruled.

f. In Objection 3(f), the Employer challenges the Acting Regional Director's decision to conduct a mail ballot rather than a manual election. The Employer was not prejudiced by the decision to hold a mail ballot election. For the reasons explained on page 15 of the Decision and Direction of Election, a mail ballot election was the appropriate choice in the circumstances present in this matter. The employees in this Unit work a variety of different hours and their work, freight delivery, takes them to varied locations, often hundreds of miles from the Kutztown facility. The normal dispatch hours for this Unit start around midnight and are staggered over an eight hour period, ending around 8:00 a.m. Although the Employer proposed two manual sessions, 3:00 a.m. to 5:00 a.m. and 3:00 p.m. to 5:00 p.m. and advised that it would work with its customer to assure that drivers were present during one of the voting periods, it was decided that a mail ballot election would ensure greater voter participation since drivers could run into problems on the road with traffic, weather, or other unforeseen circumstances and miss the manual voting sessions. There was a very high return rate for ballots in the mail ballot election as 30 out of 32 ballots were returned and counted. There is no evidence that any voter was prevented from voting because of the mail ballot. While not dispositive, it is further noted that, with the substantial margin of victory present, the two ballots not received would not have affected the outcome of the election. Accordingly, Objection 3(f) is overruled.

g. In Objection 3(g), the Employer challenges the Region's rejection of the Employer's revised proposal to hold a manual election from 2:00 a.m. to 8:00 a.m. The Employer advised the Region of a new proposal for terms for the election by phone on January 7, 2015, two days after the Decision and Direction of Election issued, even though it had the opportunity to present this proposal at the hearing. The Employer was advised that its proposal had been considered and that if a joint motion with the Petitioner was submitted it might have been acted upon. However, it is undisputed that the Union maintained that a mail ballot election was appropriate. Under the procedures set forth in the Final Rules, Notices of Election are issued to all parties simultaneously with the Decision and Direction of Election. To issue a revised Notice of Election that changed the type and date of election would have risked confusion among voters. In this election where 30 out of 32 voters returned their ballots and there were no void ballots, I do not find that there was any prejudice in holding a mail ballot election. Accordingly, Objection 3(g) is overruled.

h. In Objection 3(h), the Employer claims that it was prejudiced in its ability to prepare its Objections and written Offer of Proof in Support of its Objections by the Region's denial of its Request for the Issuance of Subpoena Duces Tecum on February 2, 2016. As no hearing was pending, the Region is not authorized to issue subpoenas. See Section 102.31 of the Board's Rules and Regulations. To issue subpoenas in the absence of a Board proceeding would create chaos in the administrative process. The

issuance of subpoenas is warranted as a means of facilitating the production of evidence in connection with formal proceedings and not as an investigation tool for the parties. Nothing prevents an employer from speaking to its employees, or pursuing other relevant lines of inquiry to investigate any potential election irregularities. Summary taint evidence should have been submitted for an independent investigation by the Region. The Regional Office then can use its investigatory powers to gather and examine evidence or issue subpoenas in appropriate circumstances. Accordingly, Objection 3(h) is overruled.

Objections 4 and 5

In Objection 4, the Employer challenges the voting unit found appropriate in the Decision and Direction of Election and argues that a multi-facility unit is the appropriate unit in this situation, not a single facility. This is not a proper subject for an Objection, but rather an issue that can be considered in a Request for Review. In Objection 5, the Employer challenges the inclusion of certified safety instructors and dispatchers in the unit. As a threshold matter, the certified safety instructors and dispatchers are neither included, nor excluded. Beyond that, this assertion also is not a proper subject for an Objection. Issues of exclusion or inclusion may be examined in a Request for Review. Accordingly, Objections 4 and 5 are overruled.

Objection 6

In Objection 6, the Employer contends that the conduct of the election and its results were tainted by the involvement of purported statutory supervisor Frank Cappetta in the election campaign and in securing the showing of interest. As noted in discussing Objection 3(e) above, the Region conducted an investigation on this issue, which included evidence offered by the Employer during the hearing, and determined that Cappetta is not a statutory supervisor; therefore, the Region found that there was no taint. Accordingly, Objection 6 is overruled.

II. CONCLUSION AND CERTIFICATION OF REPRESENTATIVE

For the reasons set forth above, and upon my evaluation of the Employer's objections as a whole, I conclude that the Employer's Objections are without merit, and I am overruling the Employer's Objections in their entirety. As such, **IT IS CERTIFIED** that a majority of the valid ballots has been cast for the Teamsters, Local 773 in the following unit:

> **INCLUDED**: All regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania.

EXCLUDED: All other employees, guards, and supervisors as defined in the Act.[5]

IV. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision which may be combined with a request for review of the regional director's decision to direct an election as provided in Sections 102.67(c) and 102.69(c)(2), if not previously filed. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by March 25, 2016**.** If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at Philadelphia, Pennsylvania this 11th day of March, 2016

/s/ Harold A. Maier
HAROLD A. MAIER[6]
Acting Regional Director
National Labor Relations Board
615 Chestnut Street, Suite 710
Philadelphia, PA 19106

[5]The dispatchers and certified safety instructors are neither included in nor excluded from the bargaining unit covered by this certification, inasmuch as I directed that they vote subject to challenge and resolution of their inclusion or exclusion was unnecessary because their ballots were not determinative of the election results.

[6] Regional Director Dennis P. Walsh is recused from this matter.

Confirmation Number	1000060984
Date Submitted	3/18/2016 5:55:05 PM (GMT-05:00) Eastern Time (US & Canada)
Case Name	UPS Ground Freight, Inc.
Case Number	04-RC-165805
Filing Party	Employer
Name	Larkin, Kurt G
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Telephone	(804) 788-8776
Fax	(804) 788-8218
Original Due Date	3/25/2016
Date Requested	4/1/2016
Reason for Extension of Time	Respondent respectfully requests a one week extension of the deadline for filing a request for review of the Region's Decision on Objections to Election and Certification of Representative. Respondent's counsel of record testified yesterday as a witness before the U.S. House Small Business Committee in a hearing regarding the Board's joint-employer standards. Counsel was required to submit detailed written comments and make an oral statement at the hearing. As a result, he was almost completely unable to attend to any client business at all, from the date of his invitation to testify (3-10-16, one day before the RD's decision issued) until today. A seven day extension would effectively allow Respondent's counsel a full 14 days to prepare the company's request for review. Confirmation of the hearing and counsel's participation in same can be found at: http://www.smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=398913
What Document is Due	Request for Review of RDs Decision and Order

Parties Served	Jeremy Meyer, Esq. Cleary, Josem & Trigiani 325 Chestnut Street, Suite 200 Philadelphia, PA 19106-2602 jmeyer@cjtlaw.org Counsel for Petitioner Kathleen O'Neill National Labor Relations Board, Region Four 615 Chestnut Street, Suite 710 Philadelphia, PA 19106-4413 Kathleen.oneill@nlrb.gov

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, S.E.
Washington, D.C. 20570-0001

March 21, 2016

Re: UPS Ground Freight, Inc.
Case 04-RC-165805

The due date for the receipt in Washington, D.C. of the Request for Review of the Regional Director's Decision and Order is extended to **April 1, 2016.**

/s/ Gary Shinners
Executive Secretary

cc: Parties
NLRB Region 4

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPS GROUND FREIGHT, INC.,

Employer

and **Case 04-RC-165805**

TEAMSTERS LOCAL 773,

Petitioner

_____/

REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION AND DECISION ON OBJECTIONS TO ELECTION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to Sections 102.67(c) and 102.69(c)(2) of the National Labor Relations Board's Rules & Regulations, 29 C.F.R. §§102.67(c); 102.69(c)(2), UPS Ground Freight Inc., ("UPS Freight" or the "Company"), submits the following Request for Review of the Acting Regional Director's January 5, 2016 Decision and Direction of Election ("RD Decision")[1], and his March 11, 2016 Decision on Objections to Election and Certification of Representative ("Certification of Representative")[2], and states the following in support:

I. PRELIMINARY STATEMENT

The National Labor Relations Board ("NLRB" or "the Board") is an independent federal agency created to enforce the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. §§ 151-169, which, by its terms, applies equally to both unions and employers. The Board has authorized regional offices across the country to exercise its jurisdiction over matters involving labor relations. Region 4, which maintains jurisdiction over eastern Pennsylvania and southern

[1] The Acting Regional Director's Decision and Direction of Election will be cited in this request as "(D&D, at ___)."

[2] The Acting Regional Director's Decision on Objections to Election and Certification of Representative will be cited in this request as "(CofR, at __)."

New Jersey, has, at all times, governed these proceedings, and has exercised the authority granted it by the Board to evaluate the Union's petition for election and accompanying showing of interest, to oversee the pre-election process and representation hearing, to direct and conduct the election, to perform the tally of the ballots, and to consider and resolve the parties' objections to the election, among other duties.

Dennis P. Walsh ("Mr. Walsh") was selected by the Board on January 29, 2013, to serve as Regional Director of Region 4, and has maintained that role at all relevant times during these proceedings. By any reasonable account, Mr. Walsh has been vested with substantial quasi-judicial and quasi-prosecutorial authority over all matters within Region 4's jurisdiction. As the Board is undoubtedly aware, Mr. Walsh was suspended without pay for a period of 30 days at the end of December following the filing of the Union's petition for election in this matter. Although the grounds for his suspension have not been made public by the Region, reports have recently surfaced that raise serious questions regarding the impartiality with which the Region has been exercising its authority. (Exh. A).

While serving as Regional Director of Region 4, Mr. Walsh allegedly is also serving as chairman of the Peggy Browning Fund ("PBF"), an organization whose stated mission "is to educate and inspire the next generation of law students to become advocates for workplace justice." Despite this seemingly benign description, PBF is widely known to have strongly pro-union, anti-employer leanings. Indeed, in a letter recently submitted to members of Pennsylvania's congressional delegation (Exh. B), PBF is described as "a union activist organization funded solely with donations from organized labor," whose signature event is a "worker's rights conference" aimed at "organizing low wage workers." (Id.). The letter characterizes Mr. Walsh as "the chairman of a union activist organization whose stated goal is to

organize workers, and at the same time asked to be a neutral investigator of labor unions that violate labor laws and employers that allegedly violate union rights," and alleges significant conflicts of interests as well as numerous ethical and legal violations. (Id).

The allegations levied against Mr. Walsh raise substantial questions concerning his impartiality, and, by association, the impartiality of the Region itself. The Company maintains that, for the reasons stated herein, Board review of the issues raised in this request is appropriate on their merits. As well, given the allegations regarding Mr. Walsh, and the appearance of culpability raised by his recent disciplinary suspension[3], the Company urges the Board to view its request for review with an eye towards the possibility that all of the Region's actions in this matter have been systematically tainted by a partiality instilled from the top down.

II. BACKGROUND

UPS Freight, headquartered in Richmond, Virginia, provides transportation and delivery services for a variety of customers across the United States, including commercial customers. One of those customers is Advance Auto Parts ("AAP"), a national auto parts retailer. Under its contract with AAP, UPS Freight delivers AAP products from nine AAP distribution centers to AAP retail stores nationwide. The Company employs truck drivers (called "Road Drivers") to drive tractor trailers on delivery routes from each distribution center to the retail stores serviced by that center.

On December 10, 2015, the International Brotherhood of Teamsters Local 773 ("the Union"), filed a petition for election ("the Union's petition") seeking to represent a unit of all regular full-time and part-time drivers employed by UPS Ground Freight, Inc. ("UPS Freight" or

[3] The Company has only learned of the disciplinary action taken against Mr. Walsh as a result of the apparent undisclosed conflict of interest in the past few days, and intends to file an appropriate request under the Freedom of Information Act in order to obtain additional information concerning these matters. Accordingly, the Company reserves the right to file a supplemental brief on this issue, and to take other action, as necessary, to preserve its rights under both the Act and the United States Constitution.

"the Company") at its facility located at 9755 Commerce Circle in Kutztown, Pennsylvania ("Kutztown distribution center"). The Union's petition was processed in accordance with the procedures set forth by the Board in its new election rule entitled "Representation – Case Procedures; Final Rule," 29 C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74439 ("the Final Rule"), which became effective April 14, 2015, and in accordance with guidance set forth in General Counsel Memorandum 15-06 entitled "Guidance Memorandum on Representation Case Procedure Changes."

In accordance with the requirements set forth in the Final Rule, the Company submitted its timely statement of position[4] on December 18, 2015. A representation hearing[5] was conducted by the Region on December 21, 2015. During that hearing, the Union moved to amend its petitioned-for unit to include all "certified safety instructors and dispatchers employed by UPS Ground Freight, Inc. at its Kutztown, Pennsylvania facility." (Tr., at 8-10). Its motion was subsequently granted in the RD Decision. (D&D, at 1, n. 2). Following the issuance of the RD Decision (and over the Company's strong objection), the Region conducted the election by mail ballot. A tally of ballots conducted on February 1, 2016, resulted in the Region's determination that a majority of the employees in the petitioned-for voting unit cast votes in favor of representation.

Following the election, on February 9, 2016 and February 16, 2016, respectively, the Company filed its Objections to the Result of the Election[6] and accompanying offer of proof[7] setting forth, in sum, the following challenges that the Company advances herein:

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[4] The Company's Statement of Position will be cited in this request as "(SOP, at __)."

[5] The transcript of the December 21, 2015 representation hearing will be cited in this request as "(Tr, at __)."

[6] The Company's election objection will be cited in this request as "(Obj., at __)."

[7] The Company's offer of proof in support of its election objections will be cited at "(Offer, at __)."

A. The Region's decisions and arbitrary treatment of the Company's position throughout these proceedings, including its refusal to address significant issues relating to the supervisory status of employee Frank Cappetta and the potential that his conduct tainted the showing of interest, its conduct of the election by mail ballot and refusal to consider the Company's revised election proposal, and its administration of the pre-election process, the election, and the post-election process, resulted in a patently unfair and prejudicial process that contravened the Company's rights under the Act and its right to due process under both the Act and the Constitution.

B. The approved voting unit comprised of "all regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania who were employed during the payroll period ending January 2, 2016," was inappropriate because it excludes the regular drivers (full-time and part-time) employed by the Company at its eight other distribution facilities, which the evidence proved share an overwhelming community of interest with the employees sought to be represented by the Union.

C. The approved voting unit is inappropriate to the extent it includes certified safety instructors and dispatchers, as proposed by the Union at the representation hearing, since the employees performing the duties associated with these positions do not "regularly perform duties similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit."

D. The imposition of the Final Rule in this proceeding, and the Region's arbitrary and unfair interpretation and enforcement of its provisions throughout, resulted in significant prejudice to UPS Freight's statutory rights and materially affected the results of the election to the Company's detriment.

E. The application of the guidance set forth in General Counsel Memorandum 15-06 further restricted and interfered with the Company's right to fully investigate and respond to the representation petition.

These objections, which the Company now sets forth in support of this request for review, are consistent with the positions maintained by the Company throughout these proceedings, as set forth both in the Company's statement of position and its election objections, and are supported by substantial evidence contained in the transcript of the December 21, 2016 representation hearing and submitted by the Company in its offer of proof. The Company incorporates fully by reference the arguments and evidence set forth in these filings and transcripts such that they shall be deemed to be set forth fully herein.

II. STANDARD OF REVIEW

Section 102.67(c) of the Board's Rules and Regulations authorizes the Board to grant a request for review upon one or more of the following grounds:

1. That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

2. That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

3. That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

4. That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. §102.67(c).

III. ARGUMENT

Upon the Board's stated standards, compelling reasons exist for the Board to grant review of the following issues:

A. Board Review is Appropriate Since the Region's Decisions on Substantial Factual Issues, and Prejudicial and Arbitrary Treatment of the Company's Position Throughout These Proceedings, Resulted in Prejudicial Error Adversely Affecting the Company's Rights.

UPS Freight seeks review as a result of the Region's arbitrary interpretation and enforcement of the Final Rule in this proceeding, which resulted in a patently unfair and prejudicial process that contravened the Company's rights under the Act and its right to due process under both the Act and the Constitution. At a minimum, the Region's following decisions, and otherwise arbitrary and prejudicial treatment of the Company's position, warrant review, particularly given the dark shadow cast over these proceedings as a result of the afore-mentioned accusations against Mr. Walsh and the disciplinary suspension that appears to have resulted from them:

1. <u>The Region's Disregard of the Company's Position with Respect to Frank Cappetta's Supervisory Status</u>.

Perhaps the most significant evidence of the Region's arbitrary and prejudicial treatment of the Company's rights in this proceeding lies with its consistent and blatant refusal to address the Company's position that Mr. Cappetta is a statutory supervisor within the meaning of Section 2(11) of the Act.

Since the outset of these proceedings, the Company has steadfastly asserted Mr. Cappetta's supervisory status. Mr. Cappetta's supervisory status under Section 2(11) is significant, and even vital, to the Company's rights in these proceedings for three reasons. First, and most obviously, it dictates his eligibility to vote in the election. Next, and more importantly, Board law makes clear that "an employer is entitled to the undivided loyalty of its representatives." *See NLRB v. Yeshiva University*, 444 U.S. 672, 682, 100 S. Ct. 856, 63 L. Ed. 2d 115 (1980). To this point, the Company has consistently maintained that a determination of Mr. Cappetta's supervisory status was necessary prior to the election to provide UPS Freight fair notice of whether it could expect and require Mr. Cappetta to advocate and support the Company's position during the campaign. Finally, and most significantly, the Company has maintained since the onset of these proceedings that Mr. Cappetta's supervisory status is relevant to the viability of the Union's petition, and ultimately to the results of the election, to the extent it is supported by a showing of interest based on "tainted" cards solicited by him. *See Harborside Healthcare, Inc.*, 343 NLRB 906, 911 (2004) (finding that "solicitations [of union authorization cards by supervisors] are inherently coercive absent mitigating circumstances.").

a. <u>The Company Presented Substantial Evidence of Mr. Cappetta's Supervisory Status</u>.

The record evidence shows that Mr. Cappetta is a statutory supervisor. The Company elicited substantial evidence, both at the representation hearing and in its offer of proof, to support its position, all of which was literally ignored by the Region throughout this proceeding. Specifically, the testimony elicited at the hearing demonstrates that, although he performed duties as a dispatcher, certified safety instructor, and (very infrequently) Road Driver, about 80% of Mr. Cappetta's work hours during the past year were devoted to the functions associated with his dispatcher duties. (Tr., at 219, 265. 290). In this position, Mr. Cappetta, among other duties, regularly coordinated routes and assigned drivers to those routes (Tr., at 125, 127, 129, 135), coordinated with the Company's customer to determine the number of routes required each day (Tr., at 126-127), identified and resolved "split routes" and "overloads" (Tr., at 136-137), regularly assigned coverage for absences resulting from sick days, vacation days, and other leaves of absence (Tr., at 138, 141-142), was authorized to contact third party temporary labor providers and to schedule temporary drivers as needed (Tr., at 139-141), scheduled vacation and coordinated employee absences with payroll (Tr., at 142), established his own schedule, hours of work, and break times and duration (Tr., at 146-147, 157), held meetings with multiple drivers at a time (Tr., at 157), received and decided complaints from AAP concerning deliveries (Tr., at 169-170), and received and resolved complaints from drivers concerning their assigned routes (Tr., at 129). Importantly, Mr. Cappetta decided which drivers to assign by exercising his independent judgment. (Tr., at 272; 281-82; 310-11).

Additionally, the evidence and testimony demonstrates that Mr. Cappetta evaluated driver applicants and made recommendations concerning new hires (Tr., at 174), administered pre-hire road tests and evaluated employee performance in the completion of the test, evaluated and

supervised driver pre-trip and post-trip tasks, and performed driver skill assessments related to driver qualifications, among other tasks (Tr., at 172-174). Additionally, beginning in at least October 2015, Mr. Cappetta physically occupied the site manager's office at the Kutztown distribution center. (Tr., at 187-189).

In addition to the evidence adduced at the hearing, UPS Freight submitted an offer of proof asserting that the new on-site manager at the AAP Kutztown distribution center, Jeremiah Andrefski ("Andrefski"), would testify that, in January 2016, Mr. Cappetta told him: "No offense to you Jeremiah, but I can run this place by myself. I've done it before." (Offer, at 7). This comment is particularly noteworthy given that the conversation occurred after the December 21, 2015 Representation Hearing, during which Mr. Cappetta repeatedly denied performing supervisory functions or that he ran that Kutztown operation. Additionally, the Company offered proof that Andrefski and Matt DiBiase ("DiBiase"), the Operations Supervisor of UPS Freight's Advance Auto Parts Kutztown distribution center, would testify that Road Drivers could not refuse dispatch assignments made by the dispatcher without good cause, and that the penalty for a Road Driver refusing one of Mr. Cappetta's assignments (without good cause) would be disciplinary action up to and including discharge. (Offer, at 8).

Accordingly, the evidence presented at the Representation Hearing, and through the Company's offer of proof, established that Mr. Cappetta performed a number of the supervisory functions contemplated by Section 2(11) (each independently sufficient) with the requisite independent judgment that was not merely routine or clerical in nature in the interest of the Company. As a result, Mr. Cappetta should have been deemed a statutory supervisor.

b. <u>The Company Presented Substantial Evidence of Supervisory Taint by Mr. Cappetta, and Formally Requested That the Region Conduct an Administrative Investigation</u>.

Furthermore, the Company presented significant evidence to support its position that Mr. Cappetta likely engaged in solicitation efforts and other conduct in support of the Union that had the result of tainting the showing of interest supporting the Union's petition for election, the election campaign, and the vote itself. Indeed, the Company informed the Region prior to the representation hearing, and again in its offer of proof, that Tammy Cadman ("Ms. Cadman"), a former temporary administrative assistant at the AAP Kutztown distribution center employed in the same position on a permanent basis at the Company's Salina, Kansas distribution center, would testify that, in the weeks prior to the filing of the Union's petition for election, Mr. Cappetta approached her and asked her, "Do you know what's going on here?" Ms. Cadman replied that she did not, to which Cappetta replied: "We're going to try to get a union at this location, you may want to share that with your drivers." Ms. Cadman interpreted Cappetta's comment to mean that he was organizing the Kutztown workplace and also that he wanted her to encourage the Road Drivers at UPSF's Salina, Kansas facility to unionize when she returned to that facility following her temporary assignment at Kutztown.

The Company formally requested that the Region conduct an administrative investigation and that a formal check of the cards be conducted by the Acting Regional Director to ascertain Mr. Cappetta's participation as a witness to the card signings for the purpose of evaluating the validity of the showing of interest supporting the Union's petition. (SOP, at 14; CofR, at 6). The Region, therefore, had an obligation to investigate the matter promptly and fully to determine the validity of the showing of interest. *See Perdue Farms, Inc.*, 328 N.L.R.B. 909, 911 (1999) ("Once presented with evidence that gives the Acting Regional Director reasonable cause to

believe that the showing of interest may have been invalidated . . . further administrative investigation should be made provided the allegations of invalidity are accompanied by supporting evidence.”).

Additionally, the Company offered proof that Matt DiBiase (“Mr. DiBiase”), the Operations Supervisor of UPS Freight’s Advance Auto Parts Kutztown distribution center, would testify that, on January 8, 2016, he and the Company’s Implementation Supervisor, Monte Copeland, were entering the Kutztown facility having just returned from lunch, and heard a phone ringing in the office. Mr. Cappetta’s personal phone was sitting in plain sight, unattended, next to his company laptop. Mr. Cappetta was not in the immediate area at the time. When Mr. DiBiase glanced down at the phone (simply because it was ringing), its display reflected an incoming call from Union Organizer/Trustee Brian Taylor. Mr. DiBiase’s anticipated testimony supports a reasonable belief that further investigation or evidence obtained through litigation would provide further proof of Mr. Cappetta’s involvement in the Union’s initial organizing efforts, as well as its pre-election campaign. The date of Taylor’s call to Mr. Cappetta – January 8, 2016 – is particularly noteworthy as it shows that Mr. Cappetta remained in contact with the Union after the representation hearing and during the critical period prior to the date the mail ballots were mailed to eligible voters.

c. The Region’s Treatment of Mr. Cappetta’s Supervisory Status Evinces a Disdain for the Company’s Rights Under the Act and the Constitution.

Despite the substantial evidence presented by the Company concerning Mr. Cappetta’s supervisory authority, and the compelling evidence elicited concerning the potential taint by him, the Region simply refused to address the issue of Mr. Cappetta’s supervisory status, for any reason, prior to the election (D&D, at 13), and has provided nothing more than lip service to the

issue since (CofR, at 6-8). In addressing the Company's contention that Mr. Cappetta was a statutory supervisor, and therefore ineligible to vote, the Acting Regional Director stated in the RD Decision as follows:

> Although the Hearing Officer received evidence concerning the supervisory status of Frank Cappetta, the Employer's contention that Cappetta is a supervisor and should be excluded from the unit concerns his eligibility to vote, and I conclude that this issue need not be resolved before the election because resolution of the issue would not significantly change the size or character of the unit. Accordingly, I shall not address the Employer's arguments concerning the exclusion of Cappetta . . . from the unit, and [he] may vote under challenge.[8]

(D&D, at 13). The Acting Regional Director's treatment of the Company's position with respect to supervisory taint was equally indifferent. According to the Acting Regional Director:

> The Employer's allegations of supervisory taint of the [Union's] showing of interest will be investigated administratively. The Board has long held that it is inappropriate to litigate such matters in representation proceedings, and accordingly I will not consider that issue in this Decision.

(*Id*.).

In addressing these same issues in response to the Company's objections, the Acting Regional Director was more verbose, but nevertheless unresponsive. According to the Acting Regional Director:

> [T]he Employer contends that the Region's failure to address Frank Cappetta's supervisory status denied the Employer the opportunity to know what it could expect or require from Cappetta during the campaign. This argument is without merit. As the Board held in issuing the Final Rule, uncertainty as to the supervisory status of employees is inevitable. 79 Fed. Reg. at 74389. A decision as to Cappetta's supervisory status could not have provided the Employer the certainty it sought. Consequently, I find that the Employer was not prejudiced by the fact that Cappetta's supervisory status was not the subject of a preliminary decision prior to the election. *See* GC 15-06 at 18. In the event, **the Employer treated him as a unit employee and the Region determined that he was not a supervisor within the meaning of Section 2(11).** Under the Final Rule, because questions of supervisory status do not directly impact on whether or not there is a

[8] The Acting Regional Director also addressed the Company's purported assertion that employee Carl David should also be deemed ineligible to vote as a result of his supervisory status. The Company has never alleged that Mr. David was a Section 2(11) supervisor, and does not advance that position herein.

> question concerning representation, regional directors may decide not to permit litigation of supervisory status prior to the election. Accordingly, [the Company's objection] is overruled.

(CofR, at 6). In addressing the Company's objections relating to his prior refusal to consider the issue of supervisory taint, the Acting Regional Director stated:

> [T]he Employer contends that the Region refused to address whether the Petition was tainted based on Frank Cappetta's involvement. I find no merit to this Objection. The Employer submitted a request to investigate an allegation of taint on December 21, 2015. **The Region conducted an investigation and determined that Cappetta was not a supervisor within the meaning of Section 2(11) of the Act.** Crucially, the Employer had ample opportunity to present evidence on Cappetta's supervisory status at the pre-election hearing. The Employer was not prevented from putting on its supervisory-status case. According it a second bite at the apple would serve no purpose. **Since the investigation (including the record of the pre-election hearing) did not demonstrate that Cappetta was a supervisor, his involvement did not taint the Petition.** The Employer was informed of the findings of the Region's investigation concerning taint prior to the ballot count. Thus, there is no evidence that the Employer was prejudiced by the manner in which the issue of taint was resolved. Accordingly, [the Company's objection] is overruled.

(CofR, at 6). The Acting Regional Director found further that:

> [T]he Employer contends that the conduct of the election and its results were tainted by the involvement of purported statutory supervisor Frank Cappetta in the election campaign and in securing the showing of interest. As noted in discussing [the objection above], **the Region conducted an investigation on this issue, which included evidence offered by the Employer during the hearing, and determined that Cappetta is not a statutory supervisor; therefore, the Region found that there was no taint**. Accordingly, Objection 6 is overruled.

(*Id*.).

The above-referenced quotes represent the entirety of the Region's treatment of these substantial factual issues. On the face of the Acting Regional Director's decisions, it is clear that he made no investigative findings, no factual findings, offered no applicable legal standards, and provided no reasoned analysis **at all** regarding Mr. Cappetta's supervisory authority. He simply proclaimed that he was not a supervisor. And, although the Region was obligated to investigate

the Company's allegations of supervisory taint, and the Acting Regional Director expressly stated that the Region had done so, there is no evidence that an investigation actually occurred. Indeed, his "investigation" was his finding, without any factual or legal analysis, that Mr. Cappetta was not a supervisor within the meaning of the Act.

Indeed, the Company offered proof in support of its election objections that Willie Johnson, Kaliek Thomas, Ken Rose, Tim Hertzog, Gene Knappenberger, Don Roush, and Chris Camuso, all of whom are Road Drivers in the proposed bargaining unit, would testify that no one from the NLRB attempted to contact them at any time since the filing of the petition. (Offer, at 10). Given the relatively small size of the petitioned-for unit, it stands to reason that any investigation by the Region would have included interviews with bargaining unit members to determine whether, and how, Cappetta participated in the card signing process and/or the Union's pre-election campaign. The fact that these employees were not interviewed tends to establish that the Region did not make any meaningful effort to interview any bargaining unit members.

Additionally, the Company offered proof in support of its election objections that Tammy Cadman, the former temporary administrative assistant at the AAP Kutztown distribution center who was told by Cappetta that he was organizing the Kutztown facility, discussed *supra*, would also testify that she was never contacted by the Region despite the asserted fact that she had witnessed conduct evincing taint. (Offer, at 10). There is also no indication in the record that the Region conducted the card check formally requested by the Company. It is ironic that the Acting Regional Director chides the Company for seeking what he terms " a second bite of the apple." (CofR. at 6). The record makes abundantly clear that the Company never got a first bite.

Section 120.67(c) of the Board's Rules and Regulations authorizes the Board to grant review if a regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party. The Acting Regional Director's decision with respect to the Company's position that Mr. Cappetta was a statutory supervisor – undoubtedly a substantial factual issue given its significance to the issue of taint – is not just erroneous, **it is nonexistent**. The Region effectively punted the ball on the issue before the election, but never returned to the issue after the election. In so doing, the Region left unanswered significant factual issues directly implicating the Company's right to the undivided loyalty of its representatives, *see NLRB v. Yeshiva University*, 444 U.S. 672, 682, 100 S. Ct. 856, 63 L. Ed. 2d 115 (1980), and its employees' right to election conditions free from conduct the Board has repeatedly found to be inherently coercive. *See Harborside Healthcare, Inc*., 343 NLRB 906 (2004); *Madison Square Garden CT, LLC*, 350 NLRB 117, 122 (2005); *Reeves Bros*., 277 NLRB 1568, 1568 n.1 (1986); *Sarah Neuman Nursing Home*, 270 NLRB 663, 663 n.2 (1984); *A.T.I. Warehouse, Inc*., 169 NLRB 580, 580 (1968); *Heck's, Inc*., 61 LRRM 1128 (1966); *Dejana Industries, Inc*., 336 NLRB 1202 (2001); *National Gypsum Co*., 215 NLRB 74 (1974); *Southeastern Newspapers, Inc*., 129 NLRB 311 (1960); *The Toledo Stamping & Manufacturing. Co*., 55 NLRB 865, 867 (1944),

Any finding – by the Region, the full Board, or a federal court – that Mr. Cappetta is a supervisor would necessarily invalidate the election result in this case, particularly given the Region's apparent failure to follow up on the Acting Regional Director's promise in the RD Decision that the Region would investigate the issue of supervisory taint. The casual manner in which the Region appears to have disposed of the question of Cappetta's supervisory status suggests it may never have intended to investigate the taint claim. This presents yet another

problem for the Region: if the Acting Regional Director had already decided when he issued the Decision and Direction that the Region would not investigate the Company's taint allegations, it could only be because he had determined Cappetta was not a supervisor. In that case, why omit that finding from the Decision and Direction, particularly when doing so kept the Company in the dark about Cappetta's status and prevented it from knowing how to deal with him during the campaign? The Region's handling of these issues suggests it abandoned its role as neutral referee and took sides. This only further illustrates that it has denied the Company's rights to due process and a fair hearing.

2. The Acting Regional Director's Decision to Hold a Mail Ballot Election.

The Acting Regional Director's decision to hold a mail ballot election, as opposed to the traditional Board practice of conducting a manual ballot election, should also be reviewed since it plainly departed from Board precedent and represented an abuse of discretion. The Board has long held that the manual ballot election procedure is presumptively appropriate. *See Nouveau Elevator Industries, Inc*., 326 NLRB 470, 471 (1998) (denying mail ballot election where voting group consisted of over 1,600 employees employed at various sites throughout New York City metropolitan region and assigned a "myriad of schedules, including being on-call 24 hours a day"); *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998) (The Board's "longstanding policy, to which we adhere, has been that representation elections should as a general rule be conducted manually, either at the workplace or at some other appropriate location."); *see also* NLRB Casehandling Manual (Part Two) Representation Proceedings §11301.2 ("The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually").

When deciding whether to conduct a manual or mail ballot election, a Regional Director should consider: (i) whether eligible voters are "scattered" because of their job duties over a wide geographic area; (ii) whether eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times, and (iii) whether there is a work stoppage (i.e., strike or walkout) in progress. *San Diego Gas,* at 1145. Voters may be deemed to be scattered "where they work in different geographic areas, work in the same areas but travel on the road, work different shifts, or work combinations of full-time and part-time schedules." *Id*. at 1145, n. 7. However, "the mere fact that employees may work multiple shifts, thereby necessitating more than one voting session during the course of the workday, is not in and of itself a sufficient basis for directing a mail ballot election." *Id*. The evidence presented demonstrated that the voting group in this case was not "scattered" under the standards imposed by existing Board law. Indeed, the Road Drivers who participated in the election start and finish their routes at the same terminal, and their participation in a manual ballot election could easily have been accommodated as a result.

Thus, the Acting Regional Director plainly erred in deciding that a single-site, one-day election in two polling periods over approximately 14 hours was inconsistent with the Board's longstanding policy favoring manual ballot elections, and his decision constituted an abuse of discretion. The Acting Regional Director's decision to hold a mail ballot election, as opposed to the prudent and traditional Board practice of conducting a manual ballot election, further abridged the Company's ability to exercise its 8(c) right to speak to employees in that it precluded the Company's ability to make group presentations from the date ballots were mailed to the voting group (nearly two weeks before the date of the vote count), unfairly burdened the Company with onerous administrative tasks upon pain of waiver, prejudiced the Company's

ability respond to the Union's organizing campaign in violation of the United States Constitution and Section 8(c) of Act, and needlessly subjected employees to the potential harms that the Board's preferred method of manual ballot voting was intended to limit, including the loss of secrecy and integrity in the voting process, as well as the prospect of interference and/or coercion.

3. The Acting Regional Director's Refusal to Consider the Company's Revised Election Proposal.

The Acting Regional Director's refusal to consider the Company's revised election proposal following its objection to his erroneous calculations of the Company's original election proposal represented further arbitrary denial of the Company's rights and interests during the pre-election process. The Company's original proposal at the Representation Hearing called for a one-day, single-site election with the polls to be open for a total of four hours over a 14-hour period, to be conducted at a site about an hour's drive from the Region 4 offices in Philadelphia. During a conference call on January 7, 2016 to discuss the Company's objection to the Acting Regional Director's erroneous interpretation of that proposal, counsel for the Company made a revised election proposal offering a single polling time, from 2:00 a.m. to 8:00 a.m., on a Wednesday of the Acting Regional Director's choosing. (Exh. C). The polling times assured that all employees would have ample opportunity to vote either before they left the terminal on their route or when they returned at the end of their route. In short, UPS Freight's revised proposal eliminated all potential concerns raised by the Acting Regional Director. (Id.).

Nevertheless, the Acting Regional Director refused to consider the revised proposal, stating that, under the Final Rule, "determinations on election arrangements are now expected to be made at the time the Decision and Direction of Election issues." The Acting Regional Director offered no citation to where in the new rules this "expectation" may be found.

Inexplicably, the Acting Regional Director also expressed doubt that he had the authority to modify his original decision on the balloting method. (Exh. C). Obviously, it is well within his broad discretion to revise the election details at any point in the proceedings. The Board recognizes that election details may be worked out by the parties after the issuance of a Decision and Direction of Election. *See* NLRB Casehandling Manual (Part Two) Representation Proceedings §11301.3 ("a determination may not be possible until, for example, after a decision and direction of election has issued"). Thus, any suggestion by the Region that the Company is limited to the proposal it made at the hearing is without merit and the Acting Regional Director's assertion that he is unable to revisit the election details following issuance of the RD Decision is incorrect. The Region's refusal to reconsider this point prejudiced UPS Freight for all of the reasons set forth in Section C(6) above.

4. The Region's Denial of UPS Freight's Request for the Issuance of Subpoena *Duces Tecum*.

The Region's denial of UPS Freight's Request for the Issuance of Subpoena *Duces Tecum* prejudiced the Company in the preparation of its election objections. Specifically, on February 2, 2016, the Company requested that the Region issue several subpoenas *duces tecum*. The Company requested document subpoenas in order to obtain relevant cell phone records of Mr. Cappetta and Union organizer Brian Taylor (and, perhaps, others at the Union) during the period relevant to this proceeding. For the reasons stated previously in Section A(1), *supra*, the Company had reason to believe that a review of those records would show frequent contact between Mr. Cappetta and the Union, which would further support UPS Freight's contention that Mr. Cappetta was a key figure in the Union's organizing campaign and that his participation in the campaign tainted both the Union's original showing of interest and the results of the election

itself. The Region denied the Company's request on the grounds that no "currently outstanding Notice of Hearing" had been issued.

The Region's denial, which was based on portions of the Casehandling Manual that have not been updated since passage of the Final Rule, is yet another example of the prejudice imposed by the Final Rule, and by its application of the Final Rule in this proceeding. Indeed, Section 102.69(c) of the Final Rule authorizes the conduct of a hearing on objections and challenges to the election if, among other grounds, "the regional director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing." Thus, the Final Rule authorizes the Region to decline to hold a post-election hearing if the evidence included in the offer of proof is not sufficient. As such, the Final Rule places an additional and unfair burden on an employer to present all of the evidence it intends to introduce at the hearing in its offer of proof. This is particularly the case since the Casehandling Manual arguably does not provide for the issuance of investigative subpoenas in the absence of a direction of hearing by the Region.

The Company requested subpoenas to further its efforts to compile information relevant to the issue of supervisory taint. The subpoenas were necessary as a result of the Region's comprehensive failure, as set forth in Section A(1), above, to investigate the issue administratively, or to otherwise permit the Company to litigate the matter during the pre-election process. But, its requests were denied by the Region based on policy and procedure that pre-dates the Final Rule and fails to contemplate the administrative processes and deadlines imposed by it. The Region's ruling violated the Company's due process rights by denying it the means to obtain the very evidence that is required under the Final Rule to obtain an post-election evidentiary hearing. Under these circumstances, the Region's subsequent decision not to grant a

hearing on the question of supervisory taint based on the Company's "lack" of evidence presented in its offer of proof indisputably violated the Company's right to a fair hearing under the Act and to due process under the U.S. Constitution.

5. The Acting Regional Director's Partial Denial of the Company's Motion To Postpone Representation Hearing And For Extension Of Time To File Statement Of Position.

The hardships imposed upon the Company by the unfairly shortened "critical period" prescribed by the Final Rule, discussed *supra*, were exacerbated by the Acting Regional Director's partial denial of the Company's Motion To Postpone Representation Hearing And For Extension Of Time To File Statement Of Position. The Union's petition was filed in the midst of the holiday season, which presented significant logistical difficulties to the Company given the nature of its business. Moreover, although the Union's petition purported to implicate only a limited number of employees at a single location, the potential scope of the appropriate unit was significantly greater[9] and required investigation of factors involving nearly three hundred employees at nine locations in the same number of states. The natural logistical challenges of gathering evidence in support of the Company's position on the unit were further complicated both by the dispersion of employees during the holiday season and the operational demands on the Company. For these reasons, the Company requested a two-day extension of time to file its statement of position (from Thursday, December 17, 2015 until Monday, December 21, 2015), and also requested that the Representation Hearing be postponed from Friday, December 18, 2015 until Tuesday, December 22, 2015.

The Company's requests were consistent with the provisions of Section 102.63 of the Board's Rules and Regulations, which expressly authorizes the Acting Regional Director to

[9] The factual and legal grounds supporting a company-wide unit, as opposed to the single-site unit proposed in the Union's petition, are set forth fully in Attachment B to the Company's Statement of Position, filed with the Region on December 18, 2015 (SOP, Attachment B), and in Section B, *infra*.

extend the time for filing and serving the Statement of Position, and to postpone the Representation Hearing, for up to 2 business days. And, given the facts and the gravity of the issues involved, the Company clearly presented "special circumstances" warranting the relief requested. *See* Rules and Regulations of the National Labor Relations Board, §§102.63(a); (b)(1). The Acting Regional Director, however, only partially "granted" the Company's motion, ordering that the Company's statement of position be filed by 12:00 PM on Friday, December 18, 2015, and that the hearing be conducted at 10:00 AM on Monday, December 21, 2015. The Acting Regional Director's arbitrary denial of the full extension requested by the Company prejudiced the Company in its preparation of the statement of position and for the hearing. Moreover, the Acting Regional Director's partial "granting" of the Company's motion directly aided the Union in its preparation for the Representation Hearing by giving the Union access to the Company's statement of position, and thus the issues and facts the Company intended to raise at the hearing, for an entire weekend prior to the hearing. Of course, the Region did not provide equivalent (or any) information to the Company regarding the Union's evidence and witnesses. Had the Acting Regional Director granted the Company's request in full, the Union would have had the Company's statement of position one day prior to the pre-election hearing, which is the amount of time called for under the Rules when applied in due course. This ruling unquestionably resulted in prejudicial error, and warrants Board review.

6. <u>The Region's Denial of an "Appropriate" Hearing Guaranteed by Section 9(c) of the Act and in Violation of the Company's Due Process Rights Guaranteed by the Constitution</u>.

The Region denied the Company the "appropriate" hearing guaranteed by Section 9(c) of the Act and the due process guaranteed by the Constitution as a result of the conditions under which the hearing was conducted. There was no practical or legal justification for the Hearing

Officer's decision to begin the hearing over an hour late for reasons unexplained, or her decision to virtually confine the parties to the building for the duration of the hearing, effectively precluding counsel even from taking a meaningful lunch break.

Moreover, the Final Rule provides that hearings "shall continue from day to day until completed." *See* 29 C.F.R. §102.64(c). Thus, nothing in the Final Rule requires the completion of the hearing in a single calendar day. Nevertheless, the Hearing Officer repeatedly refused requested adjournments to complete live witness testimony the following morning, and instead required the parties to present live testimony until about 7:00 p.m., nearly two hours beyond the end of the normal business day.

Additionally, the Final Rule expressly provides for the filing of post-hearing briefs upon "special permission" from the Acting Regional Director. *See* 29 C.F.R. §102.66(h). The Acting Regional Director summarily denied the Company's request without explanation. (Tr., at 328:24-25).

Finally, the Final Rule provides that "any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument." *See* 29 C.F.R. §102.66(h). But, despite the fact that the nine-and-a-half-hour hearing resulted in over 350 pages of witness testimony concerning a number of facts and issues of which the Company had no prior notice,[10] the Hearing Officer denied the Company's request for adjournment until the next morning to permit it reasonable time to prepare closing argument. Instead, she permitted only 30 minutes for the Company to prepare its closing argument. The Hearing Officer's conduct and arbitrary denial of the Company's requests indicate the existence of bias by the Region that is particularly

[10] Unlike the Company, as a result of the events described in Section A(5), above, the Union had full notice of the anticipated issues and evidence the Company intended to present at hearing as a result of its receipt of the Company's statement of position on the Friday before the Monday hearing. This allowed the Union to prepare both its rebuttal to those issues and an appropriate closing argument.

evident given the fact that the Acting Regional Director's Decision and Direction of Election did not issue for over two weeks following the close of the hearing. An overnight adjournment (i.e., until the next morning) to permit Company counsel to review the evidence and to prepare meaningful oral argument was clearly warranted. The Hearing Officer's arbitrary denial of that request violated the Board's own rules, as well as the Company's right to an "appropriate hearing" under Section 9(c) of the Act, and represented an intentional denial of due process.

B. Board Review Is Appropriate Because the Region's Determination as to the Appropriate Bargaining Unit Resulted in Prejudicial Error.

UPS Freight also seeks review of the Region's determination that the Union's petitioned-for voting (and bargaining) unit comprised of "all regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania" is appropriate. Section 9(a) of the Act permits employees to form a bargaining unit "appropriate" for collective bargaining purposes. *See* 29 U.S.C. § 159(a). To determine the appropriateness of a proposed bargaining unit, the National Labor Relations Board ("NLRB" or "the Board") first assesses whether the employees in the petitioned-for unit are identifiable "readily as a group who share a community of interest." *See A.S.V., Inc.*, 360 NLRB No. 138, slip op. at 14-15 (2014) (citing *United Operations, Inc.*, 338 NLRB 123 (2002)). In so doing, the Board considers whether the employees: (1) are organized into a separate department; (2) have distinct job functions and perform distinct work; (3) are functionally integrated with the Employer's other employees; (4) have frequent contact with other employees; (5) interchange with other employees; (6) have distinct terms and conditions of employment; and (7) are separately supervised. *Id*.

In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), one of its most controversial decisions to date, the NLRB overturned 20 years of precedent by

permitting bargaining units to be petitioned-for and certified even when larger and "more appropriate" bargaining units exist in the employer's workforce. *See id*. (finding that "[b]ecause a proposed unit need only be an appropriate unit and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate.").[11] Nevertheless, even under *Specialty Healthcare* and its progeny, the Board has recognized that a petitioned-for unit will be deemed inappropriate where ***"the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit . . ."*** *See Id.,* at 11. (emphasis added).

The Company has maintained throughout these proceedings that the unit is inappropriate because it excludes the regular drivers (full-time and part-time) ("Road Drivers") employed by the Company at eight other distribution facilities, which the evidence proves to share an overwhelming community of interest with the employees sought to be represented by the Union. Specifically, the evidence demonstrates that UPS Freight is party to a national contract with Advance Auto Parts ("AAP"), under which it performs operations relating to the distribution of AAP parts and other supplies from nine distribution centers to regional AAP stores around the country. (Tr., at 21-24). The distribution centers comprising the Company's AAP operation are located in Kutztown, PA, Enfield, CT ("Enfield facility"), Lakeland, FL ("Florida facility"), Salina, KS ("Kansas facility"), Gastonia, NC (Gastonia facility"), Delaware, OH ("Delaware facility"), Roanoke, VA ("Virginia facility"), Hazelhurst, MS ("Hazelhurst facility"), and

[11] *Specialty Healthcare* was wrongly decided and should be overturned for all of the reasons stated in the dissents of Member Miscimarra in *Macy's, Inc*., 361 NLRB No. 4, slip op. at 22-33 (2014) and Member Johnson in *DPI Secuprint*, 362 NLRB No. 172, slip op. at 9-19 (2015). *See also NLRB v. Lundy Packing Co*., 68 F.3d 1577, 1581-82 (4th Cir. 1995). These dissents are fully incorporated into this request for review by reference, and the Company expressly preserves its right to rely upon them throughout the course of these proceedings in asserting that the Board's traditional community of interest standards should apply.

Thomson, GA ("Thomson facility") (collectively the "AAP distribution facilities"). (Tr., at 23). UPS Freight considers the nine AAP distribution facilities part of a single integrated customer service initiative set up just for AAP. (Tr., at 24-25).

The Company has a single centralized management team (Regional Operations Manager, AAP Manager, Operational Support Supervisor, Support Manager) that is responsible for overseeing the Company's contractual and operational relationship with AAP, including the provision of services by Road Drivers from all of the Company's AAP distribution facilities. (Tr., at 25-31). The Company has centralized Human Resources and Employee Relations functions that are responsible for all nine AAP distribution facilities. (Tr., at 78-79).

All Road Drivers employed by the Company at the nine AAP distribution facilities have the same job title. (Tr., at 36, 39). All Road Drivers use, and are trained on, the same equipment – tractor trailers (either sleeper cabs or day cabs). (Tr., at 36, 39). UPS Freight Road Drivers working under the AAP contract do the same work, and do not perform work, or make deliveries, for any other UPS Freight customer besides AAP. (Tr., at 38-39). All Road Drivers are evaluated under the same Company performance criteria, including accident frequency, safety and efficiency indicia such as "hard brakes" and "overspeed," miles per gallon on tractors, and delivery performance. (Tr., at 48-51). All Road Drivers are employed under the same UPS Freight policies. (Tr., at 46-47, 72). All Road Drivers receive roughly the same rates of pay. (Tr., at 75-76, 116-118). All Road Drivers are entitled to the same benefit plans. (Tr., at 105). All Road Drivers receive substantially the same training/orientation, as well as specialized training from AAP regarding hazards and operational matters relevant to working in one of its distribution centers. (Tr., at 45-48).

All Road Drivers at the Company's AAP distribution facilities have access to a centralized job database and are eligible to apply for driving jobs at any of the other AAP distribution facilities. (Tr., at 51-52). Road Drivers have, in fact, permanently transferred from one AAP distribution facility to another in the past. (Tr, at 52-56; Emp. Exh. 1). In the past several years, 27 UPS Freight Road Drivers assigned to one AAP distribution center have been transferred to a different AAP distribution center within the system. (Tr., at 52; Emp. Exh. 1). There is significant driver interchange between locations. (Tr., at 56-61). Recently, six Road Drivers have been temporarily assigned to the AAP Kutztown distribution center from other AAP distribution facilities (3 from the Florida facility, 3 from the Hazlehurst facility) to assist with a shortage of available Road Drivers. (Tr., at 56-66). Over the past 3 years, 117 Road Drivers have been temporarily transferred to the Company's other AAP distribution facilities to perform work for a total of 413 weeks. (Tr., at 60; Emp. Exh. 2). In that same time period, 44 Road Drivers have been temporarily transferred to the AAP Kutztown distribution center from the Company's other AAP distribution facilities to perform work for a total of 163 weeks. (Tr., at 65-66; Emp. Exh. 2).

This evidence establishes that an overwhelming community of interest is shared by the Road Drivers employed at all of the Company's AAP distribution facilities. Accordingly, the Company has maintained throughout these proceedings that the Union's petitioned-for unit is clearly inappropriate and should have been rejected by the Region in favor of the bargaining unit comprised of the regular drivers (full-time and part-time) employed by the Company at its eight other distribution facilities. The Acting Regional Director rejected the Company's position in his Decision and Direction of Election, and found in his Supplemental Decision on Objections to Election and Certification of Representative that the issue was not a proper subject of an election

objection, but, rather, was "an issue that can be considered in a Request for Review." (CofR, at 8). The Company maintains that the Acting Regional Director's finding that the Union's petitioned-for unit is appropriate resulted in prejudicial error inasmuch as the Union cannot demonstrate the requisite showing of interest in the appropriate unit proposed by the Company.

C. UPS Freight's Objection to a Voting Unit That Includes Certified Safety Instructors and Dispatchers

UPS Freight requests Board review to consider the appropriateness of the inclusion of certified safety instructors and dispatchers in the voting unit, as proposed in the Union's motion to amend the petition for election, is appropriate. At the time of the representation hearing, the Company employed two employees at its Kutztown distribution center, Frank Cappetta ("Mr. Cappetta") and Carl David ("Mr. David), who served in these roles. Although Mr. Cappetta was originally hired as a Road Driver, he primarily (roughly 80% of his work time) performed duties related to the position of dispatcher. (Tr., at 219). Mr. David was also hired as a Road Driver, but performed functions as a certified safety instructor and assisted Mr. Cappetta with dispatch functions. (Tr., at 149, 190-191).

The Company maintains, as it has throughout these proceedings, that both Mr. Cappetta and Mr. David should have been excluded from the unit and deemed ineligible to participate in any election resulting from the Union's petition since they do not "regularly perform duties similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit." *Berea Publishing Co*., 140 NLRB 516, 519 (1963). The Hearing Officer, however, refused to take evidence on these issues at the representation hearing. (D&D, at 13).[12]

[12] Although the Hearing Officer excluded evidence as to the issue of Cappetta's and David's inclusion in the unit, the record contains significant testimony relating to Cappetta's primary duties due to

Subsequently, in both the RD Decision and the Certification of Representative, the Acting Regional Director refused to consider their inclusion or exclusion from the unit. According to the Regional Director, "[a]s a threshold matter, the certified safety instructors and dispatchers are neither included, nor excluded. Beyond that, this assertion also is not a proper subject for Objection. Issues of exclusion or inclusion may be examined in a Request for Review." (CofR, at 8).

Given the Acting Regional Director's refusal to consider the issue, the Company maintains that Board review is appropriate. Even if their votes are determined not to have materially affected the results of the vote, Mr. Cappetta and Mr. David, and any other employee who now, or in the future, regularly perform duties as a dispatcher and/or certified safety instructor, should be excluded from the bargaining unit since the positions require functions that are, at best, incompatible, and at worst, antagonistic, to those performed by the Road Drivers employed by the Company.

D. Board Review is Appropriate Because There Are Compelling Reasons for Reconsideration of the Final Rule.

The Union's petition was processed in accordance with the procedures set forth by the Board in the Final Rule, which became effective April 14, 2015. The Final Rule is intended to "remove unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation case procedures, codify best practices, and make them more transparent and uniform across regions." *See NLRB Guidance Memorandum on Representation Case Procedure Changes*, Memorandum GC 15-06 (April 6, 2015). According to the Board, the Final Rule provides "targeted solutions to discrete, specifically identified problems to enable the Board

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inquiries concerning his supervisory status. The evidence concerning David's job functions, however, is incomplete as a result of the Hearing Officer's ruling.

to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation." *Id*.

The reality, however, is that the Final Rule enacted comprehensive (and entirely unnecessary) modifications to the Board election process. Viewed as a whole, those modifications severely and unfairly abbreviate the pre-election period, burden employers with new and onerous administrative tasks upon pain of waiver, severely restrict employers in the exercise of their statutory right to communicate their views on unions, and all but eliminate formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit. Specifically, the Final Rule incorporates, among others, the following modifications:

- The Final Rule requires employers to post a notice of election within 2 business days after service of the notice of hearing and prior to any determination by the Board that the petition has sufficient merit to justify an election. *See* 29 C.F.R. §102.63(a).

- The Final Rule severely abbreviates the time between the filing of the union petition and the first day of a hearing, except in limited cases shown to be sufficiently "complex" to warrant delay for a limited additional time period or under undefined "special circumstances" and/or "extraordinary circumstances." *See* 29 C.F.R. §102.63(a).

- The Final Rule requires employers, during the critical initial days following the filing of a petition for election, to prepare and file a burdensome written "statement of position" addressing, *inter alia*, the basis for any employer contention that the petitioned-for unit is inappropriate, the basis for any employer contention for excluding individual employees from the petitioned-for unit, and the basis for all other issues the employer intends to raise at the hearing, upon risk of waiving employers' legal rights to contest any omitted issues at the hearing. *See* 29 C.F.R. §§102.63(b); 102.66(d).

- The Final Rule requires employers to prepare and include with the statement of position a list of all employees in the petitioned-for unit, including their work location, shifts, and job classifications, as well as a second list (together with the above described additional information) of all individuals in any alternative unit contended for by the employer; and a third list (together with the above described additional information) of all individuals who the employer contends should be excluded from the petitioned-for unit. *See* 29 C.F.R. §102.63(b).

- The Final Rule contemplates that the pre-election hearing required under Section 9(c) of the Act be conducted solely "to determine if a question of representation exists," and provides that "disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit," which have traditionally been deemed necessary and appropriate issues for pre-election consideration, "ordinarily need not be litigated or resolved before an election is conducted." *See* 29 C.F.R. §102.64(a).

- Relatedly, the Final Rule limits the parties' right to introduce evidence at the Section 9(c) hearing solely to that which is "relevant to the existence of a question of representation." *See* 29 C.F.R. §102.66(a).

- The Final Rule requires parties to prepare and present "offers of proof" at the outset of the Section 9(c) hearing, and authorizes Regional Directors to bar the parties from entering evidence into the record if such offers of proof are deemed to be insufficient to sustain the proponent's position. *See* 29 C.F.R. §102.66(c). Employers are further precluded from introducing evidence into the record on issues that were not previously addressed in the newly-required statement of position. *Id.*

- The Final Rule precludes employers from presenting post-hearing briefs and from reviewing a record transcript prior to stating their post-hearing positions, except upon special permission from, and addressing only subjects permitted by, the Regional Director. *See* 29 C.F.R. §102.66(h).

- The Final Rule requires employers to disclose to unions unprecedented personal and private information pertaining to employees, including home phone numbers and personal email addresses. *See* 29 C.F.R. §102.67(1). The Final Rule drastically shortens the time in which such information must be prepared and provided by employers and requires such personal disclosures even as to employees whose eligibility to vote has been contested and not yet determined.

For the reasons articulated by the Plaintiffs in *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015), *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D. Tex. 2015), and *Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D. D.C. 2015), compelling reasons exist for the Board to reconsider application of the Final Rule. UPS Freight incorporates by reference each and every objection to the Final Rule raised by the Plaintiffs in those proceedings such that those objections and arguments shall be deemed to be set forth fully herein. The relevant filings are attached to this request as Exhibit D. Additionally,

among other harms, the procedural modifications imposed by the Final Rule warrant reconsideration of it for the following reasons:

1. The Final Rule Severely Hinders an Employer's Ability and Opportunity to Effectively Respond to a Petition for Election.

The Final Rule severely hinders an employer's ability and opportunity to investigate all issues related to the petition, unfairly burden employers with onerous administrative tasks upon pain of waiver, all but eliminates formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit, and prejudices an employer's ability to respond to a union's organizing campaign in violation of the United States Constitution and Section 8(c) of the NLRA.

Despite these obvious harms, the Company attempted, in good faith, to investigate and to preserve its rights in these proceedings to the best of its ability given the considerable time limitations, and attempted in good faith to comply with the procedural requirements imposed by the Final Rule despite their obvious prejudicial impact. For these reasons, and for the others set forth herein, the Company maintains that its submission of its Statement of Position and its other efforts to comply with the Final Rule throughout these proceedings cannot be deemed a waiver of its request for review of the Final Rule, and respectfully asserts that the Region's processing of the Union's petition in accordance with the Final Rule rendered it unable to ascertain all facts and issues necessary to effectively protect its rights, and the rights of its employees, in the instant proceeding.

2. The Final Rule Severely Hinders an Employer's Ability and Opportunity to Respond to a Union's Organizing Campaign in Violation of Section 8(c).

Section 8(c) of the Act provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor

practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." Consistent with Section 8(c), "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969). The Final Rule, however, severely infringes upon an employer's Section 8(c) rights in several respects.

a. <u>The Final Rule Violates the Section 8(c) Policy of Encouraging Uninhibited Debate</u>.

By unfairly reducing the critical period between the filing of the petition for election and the election itself, the Final Rule effectively deprives an employer of adequate time to present its views in a meaningful manner to employees. Such a result is inconsistent with the policies reflected in Section 8(c) favoring uninhibited, robust, and wide-open debate.

This is particularly true given the Final Rule's imposition of additional and unilateral obligations, including: (1) the compelled posting of an election notice within 2 business days after service of the notice of hearing; (2) the expectation that the hearing is to be opened within 8 days after the service of the notice of hearing; (3) the requirement that the employer prepare and file a comprehensive Statement of Position addressing the issues it wishes to litigate at the hearing, among other information, upon risk of waiving its legal rights to contest any issue not presented in the statement; (4) the requirement that the employer prepare and present written "offers of proof" in support of its position at the hearing; and (5) the requirement that an employer prepare and provide to the labor representative "a list of full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters." These obligations, all of which must be satisfied during a now-abbreviated critical period, preoccupy and avert an employer from the exercise of its lawful rights under Section

8(c), and, when viewed as a whole, rendered it unable to effectively respond to a union's organizing campaign.

The practical impact of these modifications serve to effectively eliminate any meaningful opportunity for an employer to lawfully communicate with its employees concerning campaign issues during the pre-election timeframe the Board has traditionally referred to as the "critical period" – "a period during which the representation choice is imminent and speech bearing on that choice takes on heightened importance." *See* 79 Fed. Reg. at 74,439-40 & n.591 (Dec. 15, 2015)(dissent) (citing *Goodyear Tire & Rubber Co*., 138 NLRB 453 (1962); *E.L.C. Elec., Inc*., 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc*., 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir; 2012); *NLRB v. Curwood Inc*., 397 F.3d 548, 553 (7th Cir. 2005). Such a result is not only contrary to the spirit and intent of the Act, but contravene the express rights granted to both an employer and its employees by the Act.

b. <u>The Final Rule Improperly Compels Employer Speech</u>.

Additionally, the unfairly shortened "critical period" contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively compells it to address the issue of unionization prior to the filing of a petition in violation of Section 8(c) and the Constitution. The time between the filing of a petition and the conduct of the election has long been referenced as the "critical period" for a reason. As noted in the dissent to the Final Rule, the critical period is the point in time during which "the representation choice is imminent and speech bearing on that choice takes on heightened importance." *See* 79 Fed. Reg. at 74,439-40 & n.591 (Dec. 15, 2015)(dissent) (citing *Goodyear Tire & Rubber Co*., 138 NLRB 453 (1962); *E.L.C. Elec., Inc*., 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc*., 710 F.3d

308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir; 2012); *NLRB v. Curwood Inc*., 397 F.3d 548, 553 (7th Cir. 2005)).

For this reason alone, an employer's ability to make general, pre-petition statements concerning its position on unionization, based on general observations at a time when no organizing efforts are taking place, is no substitute for post-petition speech. The benefit of the critical period is that it permits an employer to identify and understand the issues fueling the organizing effort and address them in a specific manner during the campaign, while at the same time lawfully educating its workforce on the lawful changes that would necessarily take place in the event of unionization, such as the collective bargaining process and the impact it might have on their terms and conditions of employment. The artificially abbreviated critical period imposed by the Final Rule's modifications severely and unreasonably restrict the employer's ability to respond to union campaign efforts or to provide a lawful, management-sided perspective on the changes that could result from representation.

In reality, the unfairly shortened critical period contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively ***compel*** an employer to address the issue of unionization ***prior*** to the filing of a petition – and quite possibly prior to the onset of any organizing efforts – for fear that it will not have adequate opportunity to do so once a petition is filed. The danger inherent in such compelled speech is obvious. While there undoubtedly are circumstances where preemptive, pre-petition discussions with employees will serve to further an employer's position with respect to unionization, it is also likely that, by addressing the issue of unionization prior to the filing of a petition, and at a time when organizing efforts may not yet have occurred, an employer will scatter a seed it does not intend to sow. Employers were not forced to make that choice prior to the implementation of the Final

Rule. The First Amendment, which protects "both the right to speak freely and the right to refrain from speaking at all," *see Wooley v. Maynard*, 430 U.S. 705, 714 (1977), preserves the employer's right to decide when and how to address the issue of unionization with its employees, or to refrain from doing so at all. An employer's right to refrain from such speech is directly, and prejudicially, implicated by the Final Rule.

3. <u>The Final Rule Also Hinders Employees in the Full Exercise of the Rights Guaranteed Them Under Section 7 of the Act</u>.

Finally, the Final Rule severely restricts an employer's rights under Section 8(c) by eliminating any meaningful opportunity to lawfully communicate with employees concerning the issues raised by a union campaign ***during*** the pre-election timeframe. These Section 8(c) violations necessarily result in the frustration of the rights of those employees participating in the election. Indeed, as Board Members Miscimarra and Johnson noted in their dissent to the Final Rule: "[T]he inescapable impression created by the Final Rule's overriding emphasis on speed is to *require employees to vote as quickly as possible* – at the time determined exclusively by the petitioning union – *at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues*." 79 Fed. Reg. 74,460 (emphasis added).

The harm identified in the dissent's analysis of the Final Rule's emphasis on the unfairly abbreviated critical period is precisely the harm that must be avoided here. The Board's newly-enacted election process permits the Union to act at its leisure (and in secret) in disseminating information to employees in support of its organizing efforts, and to file its petition at a time when it is confident it has secured sufficient support to prevail in the election (or, as here, at a time when the Company is materially prejudiced due to significant seasonal operational obligations). The prior election processes provided an employer – even one with no previous

notice of the union's efforts – with an opportunity to address the relevant issues with its workforce and to meaningfully communicate its response to the union's efforts. The Final Rule, however, unreasonably restricts the Company's opportunity ***to respond***. The undesirable, but likely, result is an election decided by uninformed voters.

Such a result flies directly in the face of rights the Act was intended to protect. By its terms, Section 7 of the Act provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, ***and shall also have the right to refrain from any or all of such activities*** . . . ." 29 U.S.C. §157 (emphasis added). But, the right to refrain is only meaningful if the employees have full access to information concerning the consequences of representation before the election. The modifications to the election process imposed by the Board's adoption of the Final Rule ensure that they do not.

4. <u>Conclusion</u>

Based on the foregoing, there are compelling reasons for the Board to reconsider the application of the Final Rule in this proceeding, and in all others. The procedural modifications imposed by the new Rule severely hinder an employer's ability and opportunity to investigate all issues related to the petition, burden any employer with onerous administrative tasks upon pain of waiver, all but eliminate formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit, and prejudice an employer's ability to respond to a union's organizing campaign in violation of the United States Constitution and Section 8(c) of the Act. Additionally, the unfairly shortened "critical period" contemplated by the Final Rule, and the administrative obligations imposed upon the employer

during that time, effectively compel an employer to address the issue of unionization prior to the filing of a petition in violation of Section 8(c) and the Constitution. Finally, the Final Rule hinders employees in the full exercise of the rights guaranteed them under Section 7 of the Act. For these reasons, and others set forth in the filings included in Exhibit D, the Company respectfully requests that the Board grant review for the purpose of reconsidering application of the Final Rule.

E. Board Review is Appropriate Because There Are Compelling Reasons for Reconsideration of General Counsel Memorandum 15-06.

Compelling reasons also exist for the Board to reconsider application of General Counsel Memorandum 15-06, entitled "Guidance Memorandum on Representation Case Procedure Changes." The application of certain principles in that memorandum even further restrict and interfere with an employer's right to fully investigate and respond to a union's petitioned-for representation. For example, the memorandum allows a Regional Director to decline to hold a pre-election hearing on subjects crucial to the viability to the union's petitioned-for unit, including whether supervisory participation in union organizing tainted the showing of interest (an objection the Company raised throughout this matter) despite its acknowledgement that "a petition filed by a supervisor cannot raise a valid question concerning representation." *See* GC Memorandum 15-06 at 18. (emphasis added). GC Memo 15-06 was intended to describe "the changes made by the final rule and provide guidance to Agency personnel, parties, practitioners, and other stakeholders on how the final rule will impact representation case processing from the initial processing through certification." *Id.*, at 2. Thus, UPS Freight incorporates by reference the grounds set forth in Section A, *supra*, in support of this request.

V. CONCLUSION

Based on the foregoing, compelling reasons exist for Board review of the issues raised by the Company herein. Accordingly, the Company respectfully requests that the Board grant this request, and requests that the Union's petition be dismissed and the election be overturned as a result of the Region's denial of the due process guaranteed the Company under both the Act and the U.S. Constitution, supervisory taint by Frank Cappetta, and the Region's improper determination with respect to the appropriate scope of the voting unit.

Furthermore, to the extent the Board determines that remand of this matter is appropriate for any reason, including but not limited to the investigation and determination of Mr. Cappetta's supervisory status, the existence of supervisory taint, and the exclusion of the dispatcher and/or certified safety instructor position from the voting unit, among other issues raised herein, or for the purpose of revisiting any of the pre-election processes or conducting a re-run election, the Company requests that this proceeding be referred to a different Region to begin anew in another Region that is not tainted by the conflict of interest and other evidence of a lack of impartiality alleged at Region. As explained in this request, the Company maintains that the entirety of this proceeding has been tainted. Any further processing of this matter at the regional level on remand should be conducted by another Region.

Respectfully submitted,

UPS GROUND FREIGHT, INC.
/s/ Kurt G. Larkin

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Special Appeal and Request for Review was served by electronic mail this 1st day of April, 2016 on the following:

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EXHIBIT A

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NLRB Regional Director In Philly Suspended For 30 Days

By **Matt Fair**

Law360, Philadelphia (March 28, 2016, 6:59 PM ET) -- The National Labor Relations Board confirmed Monday that its regional director in Philadelphia, who has faced criticism for his ties to the pro-union Peggy Browning Fund, was suspended without pay for 30 days at the end of December.

NLRB spokeswoman Jessica Kahanek told Law360 that Dennis Walsh, who was named as Region 4 director in January 2013, was suspended beginning Dec. 13, but she declined to comment on the circumstances that led to the agency's action.

Walsh did not immediately return a message seeking comment.

Walsh faced criticism in July from employment lawyer Wally Zimolong, the head of the Philadelphia-based Zimolong LLC, for his dual roles as director of the NLRB and chair of the Peggy Browning Fund, whose mission, according to its website, is "to educate and inspire the next generation of law students to become advocates for workplace justice."

Zimolong raised concerns in a letter to members of Pennsylvania's congressional delegation that Walsh's potential to solicit donations from unions having business before the NLRB was "at best an implicit conflict of interest that shakes the public trust, and at worst a violation of federal laws."

He cited an annual workers' rights conference put together by the group with workshops aimed at helping to organize low-wage workers.

"In short, Mr. Walsh is the chairman of a union activist organization whose stated goal is to organize workers, and at the same time [he is] asked to be a neutral investigator of labor unions that violate labor laws and employers that allegedly violate union rights," Zimolong's letter said.

He also pointed to the fact that other members of the group's board included the general counsel for the United Steelworkers of America and an associate general counsel for the American Federation of State, County, and Municipal Employees.

He said that Walsh's role with the Peggy Browning Fund could be viewed as a violation of the Hatch Act barring employees of executive agencies from taking an active role in soliciting political contributions.

"The [fund] has a clear political purpose," Zimolong's letter said.

Zimolong told Law360 on Monday that he had no information about any potential action

that may have been sparked by his letter.

While news releases cite Walsh as the fund's chair as recently as June, the group's website currently lists Richard Brean, United Steelworkers general counsel, as chair.

Officials with the fund did not immediately return messages seeking comment on Monday.

--Editing by Kelly Duncan.

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NLRB Official's Conflict of Interest And Possible Illegal Conduct Exposed In Letter

By: WorkPlaceReport (Diary) | June 17th, 2015 at 10:00 PM |

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In what seems to be more evidence of the National Labor Relations Board's pro-union leanings, a recent letter to members of Pennsylvania's congressional delegation details what appears to be certain conflicts of interest by the regional director of the National Labor Relations Board (NLRB) office in Philadelphia, including fundraising from unions and pro-union law firms.

As a long-time union advocate, former NLRB member Dennis Walsh was appointed to head the NLRB's Philadelphia office as reginal director in 2013.

As director of the NLRB's Region 4, Walsh and his office are "responsible for enforcement of the nation's primary labor law covering private sector employees in the jurisdiction of Region 4, which serves 22 counties in eastern Pennsylvania, 8 counties in southern New Jersey, and 1 county in Delaware."

In spite of his role with the NLRB, however, Walsh's service as chairman of the pro-union Peggy Browning Fund (PBF) is what raises questions about his "impartiality," according to Philadelphia labor lawyer Wally Zimolong.

> *Mr. Walsh's role as chairman of a union funded pro-union/worker's rights organization known as the Peggy Browning Fund ("PBF") and his potential solicitation of donations from labor organizations having business before the NLRB Region 4 is at best an implicit conflict of interest that shakes the public trust and at worst a violation of federal laws, 5 U.S.C. § 7321, et. seq. (the "Hatch Act") and 26 C.F.R. Part 2635.*

According to its website, the "mission of the Peggy Browning Fund (PBF) is to educate and inspire the next generation of law students to become advocates for workplace justice."

"THE PBF is a union activist organization funded solely with donations from organized labor," writes Zimolong. "Indeed, the PBF website's 'Latest News' section includes a headline stating 'United Steelworkers and Peggy Browning Fund – A Close Relationship.' The PBF's signature event is a 'Worker's Rights Conference.' One of the stated goals of the Conference is 'organizing low wage workers.'"

In addition to Walsh, who serves as the PBF's chairman, the PBF's board of directors includes union presidents and is advised by union staffers from the AFL-CIO, AFSCME and others.

As Walsh and his agency hears cases involving labor unions, "Mr. Walsh has been involved with hundreds of matters involving unions that he has a relationship with through PBF," notes Zimolong.

> *Moreover, Mr. Walsh's mere affiliation with a partisan organization, like the PBF, raises questions regarding his impartiality. Mr. Walsh's affiliation with the PBF fails squarely within the type of relationship that Section 502 states is impermissible. However, it does not appear that Mr. Walsh has every notified the NLRB ethics officer about this conflict of interest, has ever recused himself from any matters involving unions that he maintains a relationship with through the PBF, and appears to be acting in blatant violation of federal law.*

The revelations about Walsh and his seeming conflicts of interest come at a time when the House Appropriations Committee is considering decreasing the NLRB's 2016 budget by 27 percent.

Letter Regarding NLRB Regional Director Dennis Walsh

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June 4, 2015

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Congressman Patrick Meehan
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Congressman Ryan Costello
United States House of Representatives
6th Congressional District of Pennsylvania
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West Chester, PA 19382

Re: National Labor Relations Board, Region 4, Director Dennis P. Walsh

Dear Senator Toomey, Representatives Fitzpatrick, Meehan, and Costello:

As an attorney that represents small businesses through Southeastern Pennsylvania that are subject to the National Labor Relations Act (the "NLRA") and investigation and prosecution by the National Labor Relations Board (the "NLRB"), I write with grave concern about the impartiality of NLRB Region 4 Director Dennis P. Walsh. Mr. Walsh's role as chairman of a union funded pro-union/worker's rights organization known as the Peggy Browning Fund ("PBF") and his potential solicitation of donations from labor organizations having business before the NLRB Region 4 is at best an implicit conflict of interest that shakes the public trust and at worst a violation of federal laws, 5 U.S.C. § 7321, et. seq. (the "Hatch Act") and 26 C.F.R. Part 2635.

A. **The Role of the NLRB**

The NLRB has a profound impact on almost any private industry employer in Southeastern Pennsylvania. The NLRB is charged with enforcing federal labor law embodied in the NLRA. The law applies equally to both unions and employers. The NLRB describes itself as "is an independent federal agency created to enforce the National Labor Relations Act. Headquartered in Washington DC, it has regional offices across the country where employees, employers and unions can file charges alleging illegal behavior, or file petitions seeking an election regarding

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"Truth isn't mean. It's truth."
Andrew Breitbart (1969-2012)

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EXHIBIT B

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June 4, 2015

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Re: National Labor Relations Board, Region 4, Director Dennis P. Walsh

Dear Senator Toomey, Representatives Fitzpatrick, Meehan, and Costello:

As an attorney that represents small businesses through Southeastern Pennsylvania that are subject to the National Labor Relations Act (the "NLRA") and investigation and prosecution by the National Labor Relations Board (the "NLRB"), I write with grave concern about the impartiality of NLRB Region 4 Director Dennis P. Walsh. Mr. Walsh's role as chairman of a union funded pro-union/worker's rights organization known as the Peggy Browning Fund ("PBF") and his potential solicitation of donations from labor organizations having business before the NLRB Region 4 is at best an implicit conflict of interest that shakes the public trust and at worst a violation of federal laws, 5 U.S.C. § 7321, et. seq. (the "Hatch Act") and 26 C.F.R. Part 2635.

A. The Role of the NLRB

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union representation." http://www.nlrb.gov/resources/faq/nlrb/what-national-labor-relations-boards-role

NLRB Region 4, based in Philadelphia, has jurisdiction over labor law matters occurring in Eastern Pennsylvania - including the counties of Philadelphia, Berks, Bucks, Chester, Delaware, Montgomery, and Lehigh - and Southern New Jersey. Among other things, the NLRB Regional offices investigate and prosecute unfair labor practices committed by unions and employers and conducts elections that determine whether a private employer will become unionized. Thus, the NLRB is charged with investigating things, such as, threats made by labor unions against private employers, coercive tactics against employers by labor unions, and coercive and threatening tactics labor unions use to pressure an employee to vote in favor of union representation.

Each NLRB Regional Director exercises substantial quasi-judicial and quasi-prosecutorial powers delegated to them by Congress. 29 U.S.C. § 159. Those powers include having the final say regarding whether to charge a union with an unfair labor practice, conducting fair union representation elections, and certifying the results of a union election. Accordingly, NLRB Regional Directors hold great power over private industry employers.

B. Region 4 Director Dennis P. Walsh's Role as Chairman of the PBF.

The NLRB Region 4 Director is Dennis P. Walsh. However, in additional to acting as the Region 4 Director, he serves as the chairman of the PBF.
https://www.peggybrowningfund.org/about-us/board-of-directors

THE PBF is a union activist organization funded solely with donations from organized labor. Indeed, the PBF website's "Latest News" section includes a headline stating "United Steelworkers and Peggy Browning Fund – A Close Relationship." The PBF's signature event is a "Worker's Rights Conference." One of the stated goals of the Conference is "organizing low wage workers." The conference discusses "the plight of low wage workers in America" and includes a working session on organizing workers in the fast food industry. The Conference also includes workshops on organizing "janitors, healthcare workers, taxi drivers, and a broad range of skilled professionals." Finally, the Conference has a workshop aimed at "the types of attacks that ***conservative legislatures and governors*** have undertaken against public sector unions. . .[t]he workshop will highlight the litigation strategies and efforts to fight back against these attacks." A complete syllabus of the Conference can at https://www.peggybrowningfund.org/workers-rights-conference/at-the-conference In short, Mr. Walsh is the Chairman of a union activist organization whose stated goal is to organize workers and at the same time is he asked to be a neutral investigator of labor unions that violate labor law and employers that allegedly violate union rights. He is also charged with conduct fair and impartial elections involving employers that unions seek to unionize.

Moreover, Mr. Walsh's fellow Board Members are representatives of labor unions that bring cases before the NLRB. Fellow Board Members include:

- General Counsel for the United Steelworkers of American;

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- Associate General Counsel for the American Federation of State, County, and Municipal Employees ("AFSCME);
- General Counsel of Change to Win (an organization headed by James Hoffa);
- General Counsel to the AFL-CIO; and
- Members of the SEUI's legal department.

A full list of the PBF's Board members is available at https://www.peggybrowningfund.org/about-us/board-of-directors

Finally, in March 2014, Mr. Walsh served on the host committee for the PFB's Philadelphia Awards Reception that honored International Brotherhood of Electrical Workers Local Union 98's ("Local 98") general counsel Pasquale Bianculli, Esquire, and where Local 98 was the lead sponsor, other sponsors included Laborers' Local Union 57, the Pennsylvania AFL-CIO, Plumbers Local 690, SEIU Healthcare PA, UFCW Local 1776, and USW District 10. In March 2015, Mr. Walsh again served on the host committed for the PFB's Philadelphia Awards Reception that honored Plumbers Local 690's business manager John Kane. Local 98 also acted as the chief sponsor for that event. Local 98 and Local 690 have dozens of matters pending before NLRB Region 4 and, thus, Mr. Walsh is called upon to investigate the conduct of Local 98 and Local 690.

C. Mr. Walsh's Chairmanship with the PBF Raises Ethical Questions.

1. Mr. Walsh's chairmanship requires disclosure to the NLRB.

5 C.F.R. § 2635.502 requires Mr. Walsh to refrain from participating in any matters involving, at a minimum, Local Union 98, Plumbers Local 690, the United Steelworkers, and the SEIU. 5 C.F.R. § 2635.502 states:

> (a) Consideration of appearances by the employee. Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or ***knows that a person with whom he has a covered relationship is or represents a party to such matter***, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.
>
> > (1) In considering whether a relationship would cause a reasonable person to question his impartiality, an employee may seek the assistance of his supervisor, an agency ethics official or the agency designee.
> >
> > (2) An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.

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Section 502 defines a "covered relationship" to include:

> (v) An organization, other than a political party described in 26 U.S.C. 527(e), in which the employee is an active participant. Participation is active if, for example, it involves service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, or participation in directing the activities of the organization. In other cases, significant time devoted to promoting specific programs of the organization, including coordination of fundraising efforts, is an indication of active participation. Payment of dues or the donation or solicitation of financial support does not, in itself, constitute active participation.

Finally, Section 502 provides the following example of what would be a relationship preventing an executive agency employee from participating in certain matters.

> Example 5: An employee of the Internal Revenue Service is a member of a private organization whose purpose is to restore a Victorian-era railroad station and she chairs its annual fundraising drive. Under the circumstances, the employee would be correct in concluding that her active membership in the organization would be likely to cause a reasonable person to question her impartiality if she were to participate in an IRS determination regarding the tax-exempt status of the organization.

Mr. Walsh has served as Region 4 Chairman since 2013. Upon information and belief, Mr. Walsh has been involved with hundreds of matters involving unions that he has a relationship with through PBF. Moreover, Mr. Walsh's mere affiliation with a partisan organization, like the PBF, raises questions regarding his impartiality. Mr. Walsh's affiliation with the PBF fails squarely within the type of relationship that Section 502 states is impermissible. However, it does not appear that Mr. Walsh has every notified the NLRB ethics officer about this conflict of interest, has ever recused himself from any matters involving unions that he maintains a relationship with through the PBF, and appears to be acting in blatant violation of federal law.

2. <u>Mr. Walsh's chairmanship is a potential violation of the Hatch Act.</u>

Under the Hatch Act, executive agency employees, like Mr. Walsh, are prohibited from taking an active role in soliciting political contributions. 5 U.S.C. § 7323(a)(2). The Hatch Act defines "political contributions" to include "any gift, subscription, loan, advance, or deposit of money or anything of value, **<u>for any political purpose</u>**." The PFB has a clear political purpose. Indeed, its signature event includes a seminar on how to combat "attacks that **<u>conservative legislatures and governors</u>** have undertaken against public sector unions." Accordingly, if Mr. Walsh solicits contributions to the PBF it potentially is a violation of the Hatch Act.

Maintaining integrity and fairness in government is of the utmost importance. Employers throughout Southeastern Pennsylvania need to know that they are receiving just, fair, and impartial treatment by NLRB Region 4. However, Mr. Walsh's relationship with the PFB raises serious questions as to whether Southeastern Pennsylvania employers can receive the treatment they deserve. Accordingly, we ask that your respective offices work to assure that Southeastern Pennsylvania employers receive fair, just, and impartial treatment when appearing before the NLRB Region 4.

ZIMOLONG LLC

Sincerely,

ZIMOLONG, LLC

Wally Zimolong, Esquire

cc: National Labor Relations Board, Office of Inspector General (*via email*)

EXHIBIT C

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January 7, 2016

Mr. Harold A. Maier
Acting Regional Director, Region Four
National Labor Relations Board
615 Chestnut Street, Suite 710
Philadelphia, PA 19106-4413

Re: UPS Ground Freight, Inc., Case 04-RC-165805

Dear Mr. Maier:

This letter is a follow up to our conference call held with you, Kathleen O'Neill and another staff member this afternoon at 3:30 p.m. During the call, UPS Ground Freight, Inc. (the "Company") made a revised proposal for conducting a manual ballot. The Company proposes a single polling time at the Advance Auto Parts Kutztown, PA distribution center, from 2:00 a.m. to 8:00 a.m. on a Wednesday to be determined in the Regional Director's discretion. The Company represents that all employees in the bargaining unit scheduled to work on election day will be present in the facility during the proposed period. The Company will delay all dispatch times on election day so that the starting times of eligible voters will begin during that period. In other words, employees would vote before they leave the facility to begin their shift.[1]

The Company's proposal eliminates any concern that the voting group would be "scattered" within the meaning of Board precedent. Under *San Diego Gas & Elec.*, 325 NLRB 1143 (1998), the Board considers employees to be scattered where, among other factors not present here: (i) they work over a wide geographic area, or (ii) their work schedules vary

[1] In response to an inquiry from one of your colleagues as to whether a continuous six-hour polling period would be uncomfortable for the Board agent conducting the election, we assured you that the Company is amenable an intermission of some reasonable length to allow the Board agent an appropriate break during the polling period. Despite our repeated requests, you declined to offer any suggestion regarding how long of a break you thought would be appropriate.

significantly so that they are not present at a common location at common times. Neither of these circumstances is present under the Company's revised proposal. All of the employees in the unit report to the same facility, so they are not assigned over a wide geographic area. Moreover, since all drivers would be voting before they leave the building, there is no concern they would not be present at a common location at common times. In this circumstance, the only possible reason for denying a manual ballot would be the efficient use of Board resources. However, the Board has made clear that "Regional Directors should not order mail ballot elections based solely on budgetary concerns." *San Diego Gas & Elec.*, 325 NLRB at 1145, n.8 (citing *Willamette Industries*, 322 NLRB 856 (1997)). Thus, the Company asserts that the Region should revise the Decision and Direction of Election and order a manual ballot.

You expressed doubt regarding the Regional Director's authority to revise the election details following issuance of a Decision and Direction of Election. You also intimated that it was too late for the Company to make this proposal now. To the contrary, it is well-within the Regional Director's broad discretion in conducting representation proceedings to revise the election details at any point. The Board has recognized election details may be worked out after the issuance of the Decision and Direction. *See* NLRB Casehandling Manual ¶11301.3 ("a determination may not be possible until, for example, after a decision and direction of election has issued"). Moreover, the Region is authorized to refuse to allow litigation regarding the facts or circumstances relevant to election details. *See* NLRB Casehandling Manual ¶11301.4 ("[T]here is no requirement that parties be permitted to litigate the election arrangements in the hearing . . . the arrangements as to the type of election may be resolved administratively and the parties so notified by letter separate from the decision and direction of election").

Accordingly, we disagree that the close of a pre-election evidentiary hearing is the last point at which a party may make a proposal regarding election details. Frankly, any refusal by the Region to consider this proposal now would be because it simply does not want to consider it, not because it is precluded from doing so. In this regard, we respectfully suggest the rapidly approaching deadline for dispatching the mail ballots is not sufficient justification for refusing to revise the election details, particularly where the compressed timeframe is of the Board's own making and the mail ballot decision was the Region's decision.

At the conclusion of our call, you indicated the Region was not inclined to change the election details. We would note the Board employs an abuse of discretion standard in determining whether to overturn the decision to conduct a mail ballot, and the standard "encompasses whether the Regional Director acted within the guidelines that [the Board has] outlined in directing a mail ballot election." *San Diego Gas & Elec.*, 325 NLRB at 1144, n.4. The Company's current proposal eliminates any reasonable contention the voting group is

"scattered" under Board precedent. Thus, proceeding with a mail ballot at this point would run afoul of the guidelines set forth in *San Diego Gas*.

The Company asks that you promptly reconsider your decision, accept the Company's revised proposal, order that a manual ballot be conducted at the Kutztown facility between 2:00 a.m. and 8:00 a.m. on a Wednesday of the Region's choosing, and amend the Decision and Direction of Election to reflect the same.

Respectfully Submitted,

/s/ Kurt G. Larkin
Kurt G. Larkin
Counsel for UPS Ground Freight, Inc.

cc. Dennis P. Walsh
Kathleen O'Neill
Jeremy Meyer, Esq.
James P. Naughton, Esq.

Johnson, Hilary

From: Larkin, Kurt G.
Sent: Monday, January 11, 2016 10:31 AM
To: Hunter, Diane
Subject: FW: 04-RC-165805-Letter

From: NLRBRegion4@nlrb.gov [mailto:e-Service@nlrb.gov]
Sent: Thursday, January 07, 2016 5:01 PM
To: Larkin, Kurt G.
Subject: RE: 04-RC-165805-Letter

Confirmation Number: 1000047388

You have successfully accomplished the steps for E-Filing document(s) with NLRB Region 04, Philadelphia, Pennsylvania. This E-mail notes the official date and time of the receipt of your submission. Please save this E-mail for future reference.

Date Submitted:	1/7/2016 4:54:53 PM (GMT-05:00) Eastern Time (US & Canada)
Regional, Subregional Or Resident Office:	Region 04, Philadelphia, Pennsylvania
Case Name:	UPS Ground Freight, Inc.
Case Number:	04-RC-165805
Filing Party:	Employer
Name:	Larkin, Kurt G
Email:	klarkin@hunton.com
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Attachments:	Letter: Larkin Letter to Region 4 (Case 4-RC-165805).pdf

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****
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****

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ASSOCIATED BUILDERS AND CONTRACTORS OF TEXAS, INC. 823 Congress, Suite 230 Austin, TX 78701, ASSOCIATED BUILDERS AND CONTRACTORS, INC. CENTRAL TEXAS CHAPTER 2600 Longhorn Blvd., Suite 105 Austin, TX 78758, and NATIONAL FEDERATION OF INDEPENDENT BUSINESS/ TEXAS 400 W. 15TH St., #804 Austin, TX 78701 Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD, 1099 14th St., N.W. Washington, D.C. 20570 Defendant.	Case No. 1:15-cv-00026 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. Plaintiffs ASSOCIATED BUILDERS AND CONTRACTORS OF TEXAS, INC. ("ABC OF TEXAS"), ASSOCIATED BUILDERS AND CONTRACTORS, INC., CENTRAL TEXAS CHAPTER ("ABC CENTRAL TEXAS") and NATIONAL FEDERATION OF INDEPENDENT BUSINESS/TEXAS ("NFIB/TEXAS") (collectively "THE PLAINTIFFS"), seek declaratory and injunctive relief against the Defendant NATIONAL LABOR RELATIONS BOARD ("DEFENDANT" OR "THE BOARD"), for violating Federal law.

2. This civil action seeks judicial review of the Board's issuance of a new rule entitled "Representation – Case Procedures; Final Rule," 29 C.F.R. Parts 101 102, and 103, 79 Fed. Reg. 74308 (Dec. 15, 2014) (hereafter the "new Rule") (attached hereto). The new Rule revises and supersedes longstanding regulations implementing Section 9 of the National Labor Relations Act, as amended (the "Act"), pursuant to which the Board conducts union representation elections among employees of employers covered by the Act.

3. As further explained below, the new Rule makes sweeping changes in pre-election and post-election procedures that depart from the plain language and legislative history of the Act and exceed the Board's statutory authority. The evident purpose of the changes is to achieve the impermissible pro-union objective of accelerating the election process to such an extent that employers will be unable to respond effectively to union organizing campaigns. The new Rule achieves this result by preventing employers in most cases from exercising their statutory rights to appropriate hearings regarding voting eligibility, and by shortening the election period so that employers have no meaningful opportunity to lawfully communicate with affected employees about their electoral rights. As stated in the strongly dissenting opinion of Board Members Miscimarra and Johnson: "[T]he inescapable impression created by the Final Rule's overriding emphasis on speed is to require employees to vote as quickly as possible – at the time determined exclusively by the petitioning union – at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues." 79 Fed. Reg. 74,460.

4. The Board also has provided no adequate justification for overruling many decades of Board and judicial precedent that preserved a careful balance of employer, employee, and union rights in the election process. The Board's failure to provide an adequate justification

supported by substantial evidence in the record renders the new rule arbitrary and capricious and an abuse of discretion, all in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

5. The new Rule will have a deeply destabilizing and harmful impact on many of Plaintiffs' member employers and their employees in Texas (and elsewhere). If the Board's new rule is allowed to go into effect as scheduled on April 14, 2015, Plaintiffs' member employers will be deprived of their rights to appropriate hearings and due process relating to the conduct of pre-election and post-election proceedings. Plaintiffs' members will also lose their statutorily protected rights to communicate with their own workers on union-election-related issues.

6. Absent judicial intervention, the new Rule is scheduled to go into effect on April 14, 2015. For the reasons more fully set forth below, the Rule should be declared unlawful and set aside prior to its effective date.

JURISDICTION AND VENUE

7. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §1331 (Federal question jurisdiction) and the Administrative Procedure Act, 5 U.S.C. § 702 ("[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof").

8. Venue is proper in this Court under 28 U.S.C. § 1391(e) because ABC of Texas and ABC Central Texas are corporations residing within the Western District of Texas. In addition, all of the Plaintiffs have members that are incorporated and reside in this District, and the new Rule will adversely impact Plaintiffs and their members in this District. This Court is authorized to grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 701-706, for violations of, *inter alia*, the APA, 5 U.S.C. § 706.

PARTIES

9. Plaintiff ABC of Texas, a Texas corporation headquartered in Austin, is a trade association representing seven chapters and more than 1500 member construction contractors and related employers in Texas. ABC of Texas advocates on behalf of its chapters and members in support of free enterprise and the Merit Shop philosophy, which holds that work in the construction industry should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC Central Texas, a Texas corporation headquartered in Austin, is one of the chapter members of ABC of Texas and itself represents more than 200 merit shop construction contractors and related employers in Texas. Plaintiffs are affiliated with Associated Builders and Contractors, Inc., a national trade association representing more than 21,000 chapter members. ABC and many of its members filed comments opposing the new Rule prior to its issuance.

10. Plaintiff NFIB/Texas represents approximately 24,000 Texas employers from its office located in Austin. NFIB Texas is the state's leading small business advocacy organization. NFIB nationally is the leading advocate of small business owners representing hundreds of thousands of small business owners throughout the country. NFIB and many of its members filed comments opposing the new Rule prior to its issuance.

11. Plaintiffs have standing to pursue this action on behalf of their members under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) Plaintiffs' members would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes; and (3)

neither the claims asserted nor the relief requested requires the participation of Plaintiffs' individual members.

12. Plaintiffs' members would otherwise have standing to sue in their own right because they will suffer imminent harm under the new Rule, both legal and practical, unless the Rule is declared unlawful and enjoined by this Court. *Inter alia*, Plaintiffs' members will be required to spend many hours and many dollars in efforts to prepare in advance for union petitions, and will be compelled to participate in an invalid administrative process, because they will not have sufficient time or opportunity to respond to such petitions under the new Rule.

13. The interests at stake are germane to Plaintiffs' principles, which include the mission of protecting the rights of their members to freedom from unlawful government interference with the operation of their businesses and to communicate with their employees regarding their rights to refrain from supporting unionization.

14. The claims asserted and relief requested by Plaintiffs do not require participation of Plaintiffs' members, because Plaintiffs' Complaint is a facial challenge to the new Rule based upon the Rule's unlawful departure from the statutory authority delegated by Congress under the Act. The Complaint also challenges the arbitrary and capricious nature of the new Rule, based upon the absence of substantial evidence supporting the Rule in the Administrative Record and the failure of the Department to provide adequate explanation of its reversal of four decades of policy implementing the Act's requirements. The Complaint is entirely based on principles of law and the Administrative Record and thus requires no individual employer participation.

15. The Defendant Board is an independent federal agency charged with administration and enforcement of the Act. The Board has been delegated rulemaking authority

to carry out these functions, but is required to exercise such rulemaking authority in a manner consistent with the Act and is subject to suit and judicial review under the provisions of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq*. (the "APA").

STATUTORY AND REGULATORY FRAMEWORK PRIOR TO THE NEW RULE

16. In Section 9 of the Act, 29 U.S.C. 159, Congress spelled out the means by which employees of private sector employers should be allowed to designate unions as their exclusive collective bargaining representatives or to refrain from that action.

17. Section 9(a) allows unions to represent employees in collective bargaining provided that they are "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes…." Section 9(b) provides that it is the Board's obligation to "decide in each case" the "unit appropriate for purposes of collective bargaining, "in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act." Section 9(c) provides that when a petition for a representation election is filed, the Board must investigate the petition and "shall provide for an appropriate hearing upon due notice" before the election is held. This provision also states that "[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto."

18. Congress amended the Act in 1947 (the "Taft-Hartley amendments") because of concerns that the Board had adopted election procedures that were not sufficiently neutral to preserve employee freedom of choice with regard to union representation, including an early attempt by the Board to eliminate pre-election hearings. See S. Rep. 80-105, 80th Cong. at 3, reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947.

19. One of the Taft-Hartley Amendments was the enactment of Section 8(c) of the Act, which protects the right of employers to engage in protected speech prior to an election. The Supreme Court has characterized Section 8(c) as reflecting a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes." *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2009).

20. Congress further amended the Act in the Labor Management Reporting and Disclosure Act ("LMRDA") of 1959. At that time, Congress rejected legislative efforts to shorten the time period for holding elections, and specifically rejected a bill that would have deferred voter eligibility issues to post-election hearings. Senator John F. Kennedy, then-chair of the Conference Committee, repeatedly stated that at least 30 days were required between the petition's filing and the election in order to "safeguard against rushing employees into an election where they are unfamiliar with the issues." 105 Cong. Rec. 5361 (1959), reprinted in 2 LMRDA Hist. 1024.

21. Pursuant to the foregoing statutory requirements, the Board has for decades adhered to a balanced set of pre-election procedures that have allowed employers sufficient time and opportunity to raise issues affecting the conduct of elections in appropriate pre-election hearings. *See* 29 C.F.R. 102.60, *et seq*. Such issues have included questions regarding the appropriateness of the requested bargaining unit as well as the eligibility of certain categories of employees to vote in the election. *Id.* at 102.66. Following such hearings, employers have been allowed 25 days to request review of regional director decisions by the Board prior to any tally of ballots in an election. *Id.* at 102.67.

22. The foregoing procedures of the Board have worked effectively and in a timely but balanced manner to allow the full exercise of free choice by employees with regard to

unionization, while at the same time preserving employer due process and free speech rights, consistent with the protections of the Act. Thus, the Board has consistently met or improved upon its time targets to conduct elections over the last decade: elections have been conducted within a median of 38 days from the filing of union petitions, bettering the Board's time targets of 42 days from petition to election. In addition, more than 90% of all petitions do not currently require pre-election litigation under the Board's procedures but are resolved by agreement of the parties. Unions are not prejudiced by the operation of the current procedures, as they have won a substantial majority of elections conducted under the Board's current rules.

THE BOARD'S NEW RULE

23. The Board's new Rule is "[m]assive in scale and unforgiving in its effect." 79 Fed. Reg. at 74430 (dissenting opinion). The Rule's primary purpose and effect are to accelerate the timetable of union representation elections, in particular by shortening the time allowed for employers to contest the appropriateness of the petition in pre-election hearings, and in some instances disallowing such hearings altogether on such fundamental questions as who is eligible to vote.

24. Specific provisions of the new Rule that Plaintiffs contend below violate the Act and/or the APA include the following:

a. The new Rule improperly shortens the time between the filing of the union petition and the first day of a hearing, except for cases shown to be sufficiently "complex" as to be delayed for a limited additional time period under undefined "special circumstances" and/or "extraordinary circumstances." *See* Section 102.63(a) of the new Rule.

b. The new Rule imposes an unprecedented new requirement that employers must first file a written "statement of position" providing a long list of burdensome information prior to exercising their statutory right to a pre-election hearing. Section 102.63(b). Such information must for the first time include, *inter alia*, a list of all employees, work location, shifts, and job classifications of all individuals in the petitioned-for unit, as well as a second list of all such employees (together with the above described additional information) for all individuals in any alternative unit contended for by the employer; and a third list of all such employees (together

with the above described additional information) for all individuals who the employer contends should be excluded from the petitioned-for unit. *Id.*

c. The above required statement of position must also for the first time state in writing, *inter alia*, the basis for any employer contention that the petitioned-for unit is inappropriate, the basis for any employer contention for excluding any individual employees from the petitioned-for unit, and the basis for all other issues the employer intends to raise at the hearing. *Id. See also* Section 102.66(d). No comparable requirement is imposed on union petitioners. All of the above information must be provided, upon risk of waiving employers' legal rights to contest such issues at the hearing, in a length of time that is inadequate for many employers to meaningfully understand and exercise their legal rights.

d. The new Rule improperly limits the purpose of a hearing conducted under Section 9(c) of the Act as being solely "to determine if a question of representation exists." *See* Section 102.64(a). For the first time, the Rule asserts that "disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted." *Id.*

e. The new Rule also for the first time limits the right of parties in such hearings to introduce into the record evidence to that which is "relevant to the existence of a question of representation" thereby excluding other issues contemplated by Section 9(c) of the Act. *See* Section 102.66(a).

f. The new Rule also for the first time requires parties to make "offers of proof" at the outset of any hearing, and authorizes Regional Directors to bar the parties from entering evidence into the record if such offers of proof are deemed to be insufficient to sustain the proponent's position. Section 102.66(c). Employers are further precluded from introducing evidence into the record that is not previously encompasses by various aspects of the newly required Statement of Position. *Id.*

g. The new Rule for the first time denies employers the opportunity to present post-hearing briefs and to review a hearing transcript prior to stating their post-hearing positions on the record, except upon special permission of the Regional Director and addressing only subjects permitted by the Regional Director. Section 102.66(h).

h. The new Rule requires employers to disclose to unions unprecedented personal and private information pertaining to employees, including home phone numbers and personal email addresses. See Section 102.67(l). The Rule drastically shortens the time in which such information must be prepared and provided by employers and requires such personal disclosures even as to employees whose eligibility to vote has been contested and not yet determined.

i. The new Rule for the first time eliminates the longstanding requirement that election ballots be impounded while any request for review of the Regional Director's decision is pending at the Board and eliminates the previous 25-day waiting period for review filings which previously allowed the Board time to consider such requests for review prior to the vote. *See* Section 101.21(d), removed and reserved.

j. The new Rule for the first time eliminates the right of employers to obtain mandatory Board review of post-election disputes if they enter into stipulated election agreements prior to the election instead of exercising their right to a pre-election hearing. See Section 102.62(b) and 102.69.

25. Due to the length of the new Rule (182 pages of the Federal Register), the foregoing summary of significant and unprecedented changes which Plaintiffs seek to challenge in this Complaint is necessarily a non-exclusive list.

CLAIMS FOR RELIEF

COUNT I – The New Rule Exceeds The Board's Statutory Authority Under Section 9 of the Act, In Violation of the APA.

26. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 25 of this Complaint, as though fully set forth below.

27. As noted above, Section 9(b) of the Act, 29 U.S.C. 159(b) requires the Board to "decide in each case … the unit appropriate for collective bargaining…." Section 9(c) further provides that when a petition for a representation election is filed, the Board must investigate the petition and "shall provide for an appropriate hearing upon due notice" before the election is held. This provision also states "[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto."

28. Legislative history of the Act including rejected amendments to the Act in 1947 and 1959 confirms that the Act requires the Board to allow employers the right to adequately prepare for, present evidence at and otherwise fairly litigate issues of unit appropriateness and voter eligibility in appropriate pre-election hearings, and that the Board must decide "in each case" the unit that is appropriate for the purposes of collective bargaining based on all the evidence submitted. Congress further rejected efforts to expedite the election process in the manner now adopted in the new Rule.

29. The new Rule, by the provisions summarized above and in other ways, violates each of the foregoing statutory provisions and Congressional intent. Specifically, the new Rule impermissibly restricts employers' ability to prepare for, present evidence and fairly litigate issues of unit appropriateness and voter eligibility in petitioned-for bargaining units.

30. The new Rule further vests excessive authority in Hearing Officers and excessively derogates the Board's own decision-making authority, both of which violate the foregoing provisions of the Act and Congressional intent and exceeding statutory authority within the meaning of the Administrative Procedure Act.

COUNT II – The New Rule Violates The Act and The APA By Failing To Assure To Employees The Fullest Freedom In Exercising The Rights Guaranteed By [The] Act.

31. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Complaint, as though fully set forth below.

32. As noted above, Section 9(b) of the Act requires the Board to "assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act." The new Rule violates this provision, inter alia, by compelling the invasion of privacy rights of the employees of Plaintiffs' member employers by disclosure of their names and job duties to a petitioning union prior to any determination that the petition is supported by a sufficient showing of interest to proceed to an election in an appropriate bargaining unit.

33. The new Rule further violates the Act and the privacy rights of employees by compelling employers to disclose unprecedented personal information, including personal phone numbers and email addresses, about all employees who are deemed to be part of an appropriate bargaining unit, and additional employees whose status has not been determined prior to a direction of election.

COUNT III – The New Rule Violates The Act And The APA By Interfering With Protected Speech During Representation Election Campaigns.

34. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 33 of this Complaint, as though fully set forth below.

35. Section 8(c) of the Act, 29 U.S.C. 158(c) protects the free speech rights of employees, employers, and unions, consistent with similar guarantees afforded by the First Amendment. As noted above, the Supreme Court has characterized Section 8(c) as favoring uninhibited, robust, and wide-open debate in labor disputes. *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008). This right only has meaning if there is enough time for parties to communicate with employees about their choice of representation.

36. The new Rule interferes with these protected rights because it is intended to, and inevitably will, substantially shorten the time between the filing of a representation petition and the date of the election, thereby curtailing the ability of parties to exercise their rights to engage in protected speech.

COUNT IV – The New Rule Is Arbitrary And Capricious And An Abuse of Agency Discretion Within The Meaning Of The APA

37. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 36 of this Complaint, as though fully set forth below.

38. By reversing decades of policy and precedent without adequate justification, the Defendants have acted in an arbitrary and capricious manner in violation of the APA, and the new Rule should be set aside on this additional ground pursuant to 5 U.S.C. § 706.

PRAYER FOR RELIEF

Wherefore, the Plaintiffs respectfully request this Court to enter judgment in their favor and:

1. Declare that the provisions of the new Rule described above violate the Act and the APA;

2. Vacate and set aside the provisions of the new Rule shown to be unlawful in this Complaint and any related provisions that cannot be lawfully severed therefrom;

3. Declare that the new Rule is arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law;

4. Issue an injunction vacating the new Rule and barring the Board from enforcing or applying the challenged portions of the Department's new Rule, together with any other provisions of the Rule that incorporate or otherwise rely on the challenged provisions found to be unlawful.

5. Award Plaintiffs their costs of litigation, including reasonable attorneys' fees; and

6. Grant Plaintiffs such other relief as may be necessary and appropriate.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BAKER DC, LLC AND SHANNON W. COTTON, MICHAEL A. MURPHY, AND JORGE E. GONZALEZ VILLAREAL **1110 Vermont Avenue, NW** **Washington, D.C. 20005,** **Plaintiff,** **v.** **NATIONAL LABOR RELATIONS BOARD** **1099 Fourteenth Street, NW** **Washington, D.C. 20570,** **Defendant.**	**Case No. 15-cv-00571-ABJ**

AMENDED COMPLAINT

1. On April 14, 2015, the National Labor Relations Board ("the Board") put into effect a new Rule entitled "Representation – Case Procedures; Final Rule," 29 C.F.R. Parts 101, 102, and 103, 79 Fed. Reg. 74308 (Dec. 15, 2014) (hereafter the "new Rule").

2. The new Rule went into effect notwithstanding a pending legal challenge filed in this district by a broad coalition of trade associations representing millions of businesses throughout the country, who have alleged that the new Rule violates the National Labor Relations Act ("the Act") and the Administrative Procedure Act (the "APA").[1]

3. On April 15, 2015, the United Construction Workers Local Union No. 202-Metropolitan Regional Council of Carpenters ("the Union") filed a petition with the National

[1] *See Chamber of Commerce of the United States of America, et al v. NLRB, Case No. 15-cv-00009-ABJ.* Dispositive cross-motions have been filed in that case and have been fully briefed by the parties.

Labor Relations Board (the "Board") seeking to represent employees of Baker DC, LLC ("Baker") working as carpenters and laborers on construction sites in the Washington, D.C. metropolitan area. The Board has indicated to Baker its intent to process the petition in all respects under the new Rule.

4. Among other dramatic changes to the representation election process, the new Rule:

a. Requires employers to post a notice of election constituting compelled speech prior to any determination by the Board that the petition has sufficient merit to require an election to be held;

b. Requires employers to file a burdensome written Statement of Position prior to any hearing being held, upon penalty of precluding employers from presenting evidence at the hearing on any issue not addressed in the Statement, contrary to the rights given to employers to present such evidence in Section 9 of the Act;

c. Requires employers to disclose to a petitioning union confidential information about employees inside and outside the petitioned-for unit prior to any hearing being held, upon the same unlawful penalty;

d. Postpones evidence taking and litigation over critical issues of voter eligibility until *after* an election takes place;

e. Requires employers to turn over employees' highly personal and private information such as personal phone numbers and e-mail addresses to labor organizations within two business days after a decision and direction of election is issued;.

f. Sharply limits the opportunity for employers to seek pre-election Board review, and a stay of the election, by eliminating a 25-day automatic waiting period for such review; and

g. Eliminates employers' automatic right to post-election Board review (post-election review would now be discretionary).

5. Because the new Rule offends the First and Fifth Amendments of the Constitution of the United States, contravenes clear Congressional requirements, and is arbitrary and capricious, it should be held unlawful and set aside.

JURISDICTION AND VENUE

6. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises under and concerns provisions of the Act, the Administrative Procedure Act ("the APA"), and the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

7. Venue is proper in this Court under 28 U.S.C. § 1391(b) because (i) the Board resides in the District of Columbia; (ii) a substantial part of the events giving rise to this claim including hearings and other actions taken by the Board in promulgating the new Rule—occurred in the District of Columbia; and (iii) Baker is headquartered and does business in the District of Columbia.

PARTIES

8. The Board is an independent federal agency in the Executive Branch and is subject to the APA. The Board's headquarters are located at 1099 Fourteenth Street, NW, Washington, D.C. 20570.

9. Baker is a concrete contractor operating in the greater Washington DC area from its headquarters location at 1100 Vermont Ave., N.W., Washington, D.C. 20005. Baker

specializes in commercial "cast in place" concrete construction, restoration, retrofit, specialty underpinning work, and blast fortification.

10. Baker employs employees who are covered by the Act and are subject to the Board's rules regarding union organizing, to the extent that such rules are consistent with the Act. Baker's employees are not currently covered by a union. Plaintiffs Cotton, Murphy, and Gonzalez Villlareal are employed by Baker. There are several hundred other employees employed by Baker who are similarly situated. As noted above, the Union filed a petition with the Board on April 15, 2015 seeking to represent Baker's employees working as carpenters and laborers on construction sites in the Washington, D.C. metropolitan area.

STANDING AND RIPENESS

11. The Board has indicated to Baker its intent to process the petition in all respects under the new Rule. Accordingly, Baker and its co-Plaintiff employees will imminently suffer concrete and substantial injury in fact, including **irreparable harm,** as a result of the new Rule. Such harm includes but is not limited to the following:

a. Compelled infringement of Plaintiffs' free speech rights due to the newly required posting of a notice of election on or before April 17, 2015, (two business days after receipt of the Notice of Petition from the Board);

b. Unprecedented compelled pre-hearing disclosure of the names and locations of Baker's employees' to an outside third party (the Union), upon penalty of being precluded from presenting evidence relating to the voting eligibility and appropriate unit of such employees, in direct violation of the Section 9(c)(1) of the Act;.

c. Compelled filing by Baker of a newly required pre-hearing Statement of Position upon penalty of being precluded from presenting evidence relating to any issue not addressed in the Statement, in further violation of Section 9.

d. Preclusion of Baker from presenting evidence on voter eligibility issues in violation of Congressional intent to allow all such evidence to be presented under the Taft-Hartley Act.

e. Unprecedented compelled post-hearing disclosure of private and personal phone numbers and e-mail addresses of Baker's employees, within the impracticable deadline of 2 business days following the Board's direction of election.

f. Infringement of Plaintiffs' free speech rights during the unlawfully abbreviated election campaign.

CLAIMS FOR RELIEF

COUNT I: The New Rule Exceeds The Board's Authority Delegated By Congress By Imposing Unprecedented Disclosure Requirements On Baker, Including Compelled Disclosure Of Confidential, Personal and Private Information Regarding Their Employees.

12. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further alleges as follows:

13. Section 7 of the Act gives employees the right to "form, join, or assist" unions; to bargain collectively with their employer; or to refrain from engaging in such activities.

14. Section 9(b) of the Act provides that the Board shall "assure to employees the fullest freedom in exercising the rights guaranteed by" the Act.

15. Section 9(c)(1) of the Act, enacted as one of the Taft-Hartley amendments of 1947, requires that the Board conduct an "appropriate hearing" with regard to all "questions concerning representation." As was made clear by Senator Robert Taft, chief sponsor of the Taft-Hartley Act, Congress intended by this language to require the Board to hold such hearings in order to "decide questions of unit and eligibility to vote." 93 Cong. Rec. 6858, 6860 (June 12, 1947).

16. Nothing in the Act authorizes the Board to require employers to disclose the confidential names and work locations of their employees prior to a determination that a petition merits a direction of election after an appropriate hearing, upon penalty of being precluded from presenting evidence regarding the voting eligibility or unit appropriateness of such employees. Section 102.63(b) of the new Rule nevertheless requires Baker and similarly situated employers to make such a disclosure upon penalty of otherwise being precluded from presenting evidence that Section 9(c)(1) guarantees to employers the right to present.

17. Nothing in the Act authorizes the Board to require employers to disclose the personal and private phone numbers and personal email addresses of their employees within two business days after a direction of election is issues, or at any other time. Section 102.62 of the new Rule nevertheless requires such post-hearing disclosures, exceeding the Board's authority under the Act and constituting a gross invasion of employer and employee privacy contrary to the intent of Congress.

Count II: The New Rule Impermissibly Restricts Baker's Right To Present Evidence On Questions Concerning Representation At An Appropriate Hearing In Violation Of Section 9 and the Fifth Amendment to the U.S. Constitution.

18. Section 9 of the Act states that the Board "shall decide in each case" the unit that is appropriate for the purposes of collective bargaining. 29 U.S.C. § 159(b). Section 9(c) of the Act further provides that, when a petition for a representation election is filed, the Board must investigate that petition and "shall provide for an appropriate hearing upon due notice" before the election is held. 29 U.S.C. § 159(c)(1). The same provision provides that "[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto."

19. The new Rule violates the Act's requirement of an "appropriate" pre-election

hearing by restricting Baker's ability to present evidence and litigate issues of voter eligibility or inclusion in the putative bargaining unit. In particular, the requirement that Baker file a written Statement of Position on each and every potential that could arise during a hearing, at a time when no pre-hearing discovery is permissible, upon penalty of precluding Baker from presenting evidence on unit and voter eligibility issues as expressly permitted by the Act, violates Section 9 and Congressional intent.

20. The new Rule also conflicts with Section 9(c)(1)'s requirement that the Board's hearing officers "shall not make any recommendations with respect" to the hearings they conduct. The new Rule effectively vests hearing officers with decision-making authority regarding the evidence that will be admitted and the issues that will be litigated at the pre-election hearing.

21. By authorizing hearing officers to prevent employers from litigating issues as to the eligibility of certain employees to vote in the election, and by limiting the available time for the Baker to communicate about the election and for Plaintiff employees to decide whether to vote for or against union representation, the new Rule fails to assure employees the "fullest freedom" in exercising their rights under Section 7 of the Act and is otherwise contrary to Section 9(b) of the Act.

22. The new Rule also deprives Baker of due process in NLRB representation case proceedings, in violation of the Fifth Amendment, by preventing Baker from litigating issues of voter eligibility and inclusion at the pre-election hearing, and then denying Baker the right to seek any Board review of those issues, whether pre- or post-election, by making all Board review discretionary.

Count III: The New Rule Violates Plaintiffs' First Amendment and Statutory Rights of Free Speech.

23. Section 8(c) of the Act protects an employer's freedom of speech: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisals or force or promise of benefit." 29 U.S.C. § 158(c). Section 8(c) "implements the First Amendment" to the United States Constitution and "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board." *Chamber of Commerce v. Brown,* 554 U.S. 60, 67-68 (2008); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

24. Notwithstanding these requirements, the new Rule violates Plaintiffs' free speech rights by compelling Baker to engage in certain speech prior to the Board making any determination that an election will be held on the Union petition. Specifically, the new Rule requires Baker to post a new mandatory workplace notice to be posted within two days after the filing of a representation petition. In the present case, because Baker received the Board's Notice of Petition on April 15, 2015, the new Rule unlawfully requires Baker to post the mandatory new notice by April 17, 2015. The new Rule violates the D.C. Circuit's holding in *National Association of Manufacturers v. NLRB*, 717 F. 3d 947, 955 (D.C. Cir. 2013), overruled on other ground by *American Meat Inst. v. U.S Dept. of Agriculture*, 760 F. 3d 18 (D.C. Cir. 2014) (*en banc*).

25. By enacting Section 8(c), Congress further directed that employers be given sufficient opportunity to meaningfully express their views in the election process. Specifically, Congress determined that employers, such as Baker, must have the opportunity to effectively

communicate with their employees on the subjects of union organizing and collective bargaining. *Chamber of Commerce v. Brown*, *supra*, 554 U.S. at 67–68 (2008) (Section 8(c) reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide open debate in labor disputes." (internal quotation omitted)); *Nat'l Ass'n of Manufacturers v. NLRB*, 717 F.3d 947, 955 (D.C. Cir. 2013) (Section 8(c) "serves a labor law function of allowing employers to present an alternative view and information that a union would not present." (citation omitted)).

26. The new Rule impermissibly curtails Plaintiffs' right to communicate with each other by substantially shortening the period between an election petition and the holding of an election, and the new Rule impermissibly limits Plaintiffs' ability to exercise its rights under Section 8(c) of the Act and the First Amendment.

COUNT IV: The Board's Actions Are Arbitrary and Capricious

27. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further alleges as follows:

28. "The APA commands reviewing courts to 'hold unlawful and set aside' agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (citing 5 U.S.C. § 706(2)(A)). The APA also requires courts to hold unlawful and set aside agency action that is not in accordance with procedure required by law. 5 U.S.C. § 706(2)(D).

29. The new Rule is overly broad in changing election procedures in a manner impacting all cases, as the alleged "problems" identified by the Board to justify the new Rule exist only in a small fraction of cases.

30. The new Rule seeks to arbitrarily expedite the election process, even though the data show that the Board already conducts elections below its established time targets in more

than 90 percent of cases.

31. The new Rule introduces no new time targets for representation elections, further undermining the rational basis for radically altering procedures that have met the Board's established time targets for many years.

32. The new Rule promotes speed in holding elections at the expense of all other statutory goals and requirements, including but not limited to Baker's free speech rights and the opportunity for a full and informed debate before an election.

33. The new Rule also mandates, for the first time in the Board's history, that Baker gives its employees' personal phone numbers and email addresses to labor organizations. The Board acknowledged that "the privacy, identity theft, and other risks may be greater than the Board has estimated," but nonetheless concluded, without adequate justification and concern for employee rights, that these "risks are worth taking." 79 Fed. Reg. at 74,342.

34. The new Rule's elimination of mandatory Board review of post-election disputes, during a period of dramatically reduced case loads, is arbitrary and capricious given the Board's statutory obligation to oversee the election process.

35. The new Rule's elimination of mandatory Board review of post-election disputes, during a period of dramatically reduced case loads, is arbitrary and capricious given the Board's statutory obligation to oversee the election process.

36. The new Rule concludes that it will reduce election-related litigation, despite available evidence that the new Rule's sweeping changes will reduce the high rate of election agreements, and will result in more, not less, litigation overall, including more litigation in federal court. As the dissenting Board Members explained: "An employer will now be forced to litigate in an unfair labor practice case, before the Board and in Federal court, issues that are

currently reviewed by the Board in a post-election appeal as a matter of right. Given the process an employer must go through to have a Federal court of appeals review any disputed issue regarding an election, there is often substantial delay in the final resolution of the representation case." 79 Fed. Reg. at 74,451.

37. Based on the above, the Board failed to meaningfully consider numerous legal, policy, and economic factors, or to articulate a rational basis for rejecting them.

38. The Board's actions in adopting the new Rule are arbitrary and capricious, and the new Rule was enacted without observance of the necessary procedures required by law. 5 U.S.C. § 706(2)(A)-(D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court enter judgment in its favor and:

1. Vacate and set aside the new Rule;
2. Declare that the new Rule is contrary to the First and Fifth Amendments to the Constitution of the United States and to the Act, and in excess of the Board's statutory jurisdiction and authority;
3. Declare that the Board violated the APA in issuing the new Rule;
4. Declare that the new Rule is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;
5. Enjoin and restrain the Board, its agents, employees, successors, and all persons acting in concert or participating with the Board from enforcing, applying, or implementing (or requiring others to enforce, apply, or implement) the new Rule;
6. Award Plaintiffs their costs of litigation, including reasonable attorney's fees; and
7. Grant Plaintiffs such other relief as may be necessary and appropriate or as the Court deems just and proper.

Dated: April 21, 2015

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, 1615 H Street, NW Washington, D.C. 20062 and COALITION FOR A DEMOCRATIC WORKPLACE, 901 7th Street NW, 2nd Floor Washington, D.C. 20001 and NATIONAL ASSOCIATION OF MANUFACTURERS, 733 10th Street NW, Suite 700 Washington, D.C. 20001 and NATIONAL RETAIL FEDERATION 1101 New York Ave NW Washington, D.C. 20005 and SOCIETY FOR HUMAN RESOURCE MANAGEMENT 1800 Duke Street Alexandria, VA 22314 Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD 1099 14th Street NW Washington, D.C. 20570 Defendant.	Case No. 1:15-cv-9 **COMPLAINT**

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INTRODUCTION

1. For nearly 80 years, the National Labor Relations Board ("NLRB" or "Board") has conducted workplace elections so that workers can decide if they want to be represented by a union for purposes of collective bargaining. Like political elections, representation elections offer all participants in the process—the union, the employer, and the employees—a critical opportunity to engage in protected, lawful speech about how workers should vote in the election.

2. Congress's overarching "policy judgment . . . favoring uninhibited, robust, and wide-open debate in labor disputes"—including the "freewheeling use of the written and spoken word" (*Chamber of Commerce v. Brown*, 554 U.S. 60, 67–68 (2008))—is so central to the representation election process that Congress expressly guaranteed an employer's right to engage in speech concerning unionization (so long as that speech, of course, "contains no threat of reprisal or force or promise of benefit"). 29 U.S.C. § 158(c).

3. The Board's recently issued "ambush" election rule (the "Final Rule") implements sweeping changes to the NLRB's representation election process that, as the dissenting Board Members explained, impermissibly "limits the right of all parties to engage in protected speech at precisely the time when their free speech rights are most important." 79 Fed. Reg. 74,308, 74,439 (Dec. 15, 2014). By rapidly (and needlessly) accelerating the election process, the Final Rule "improperly shortens the time needed for employees to understand relevant issues, compelling them to 'vote now, understand later.'" *Id.* at 74,430.

4. In doing so, the Final Rule is "contrary to common sense, contrary to the [National Labor Relations] Act and its legislative history, and contrary to other legal requirements directed to the preservation of employee free choice, all of which focus on guaranteeing enough time for making important decisions." *Id.* at 74,430-31. And the Final

Rule is "fundamentally unfair and will predictably deny parties due process by unreasonably altering long established Board norms for adequate notice and opportunity to introduce relevant evidence and address election-related issues." *Id.* at 74,431.

5. Although the Final Rule does not provide any guidelines about the time frame in which elections will be conducted, the changes implemented in the Final Rule would allow elections to be held in as little as 14 days after the employer is first notified of the election petition. Under the NLRB's current procedures, the Board expects that elections will be held within a median of 42 days from the filing of a petition, and that 90 percent of elections will be held within 56 days of the filing of a petition.

6. Among other dramatic changes to the representation election process, the Final Rule:

a. Postpones evidence taking and litigation over critical issues of voter eligibility until *after* an election takes place;

b. Sharply limits the opportunity for employers to seek pre-election Board review, and a stay of the election, by eliminating a 25-day automatic waiting period for such review;

c. Eliminates employers' automatic right to post-election Board review (post-election review would now be discretionary); and

d. Requires employers to turn over employees' highly personal information such as home and cell phone numbers and e-mail addresses to labor organizations to aid unions in their election campaign efforts.

7. Moreover, as the dissenting Board Members point out, the Final Rule "leaves unanswered the most fundamental question regarding any agency rulemaking, which is whether

and why rulemaking is necessary." 79 Fed. Reg. at 74,431. The Board already handles election requests quickly, with over 95 percent of elections occurring in less than two months (and with over 90 percent of elections generating no pre-election litigation, above the Board's stated goal of 85 percent). Indeed, for several years, the Board has surpassed its own internal time target for handling elections—a feat its prior General Counsel has described as "outstanding." And unions already win more than two-thirds of all representation elections—so the Board's massive modifications to the election process cannot be justified or explained by any legitimate concern about employer "coercion" during the current pre-election period.

8. Because the Final Rule offends the First and Fifth Amendments to the Constitution of the United States, contravenes clear congressional requirements, and is arbitrary and capricious, it should be held unlawful and set aside.

JURISDICTION AND VENUE

9. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises under and concerns provisions of the National Labor Relations Act ("NLRA"), the Administrative Procedure Act ("APA"), and the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

10. Venue is proper in this Court under 28 U.S.C. § 1391(b) because (i) the NLRB resides in the District of Columbia; (ii) a substantial part of the events giving rise to this claim—including hearings and other actions taken by the Board in promulgating the Final Rule—occurred in the District of Columbia; and (iii) the Chamber, CDW, NAM, and NRF are headquartered or maintain offices in the District of Columbia, and SHRM does business in the District of Columbia.

PARTIES

11. Plaintiff Chamber of Commerce of the United States of America ("Chamber") is a

non-profit organization created and existing under the laws of the District of Columbia. The Chamber's headquarters are located at 1615 H Street, NW, Washington, D.C. The Chamber is the world's largest federation of businesses and associations, directly representing 300,000 members and indirectly representing more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region of the country. Of particular relevance here, the Chamber represents the interests of its member-employers in employment and labor-relations matters—including matters arising under the NLRA—before courts, Congress, the Executive Branch, and regulatory agencies of the federal government. The Chamber is authorized to bring this action on behalf of its member companies.

12. Plaintiff Coalition for a Democratic Workplace ("CDW") represents millions of businesses of all sizes. CDW's membership includes hundreds of employer associations, individual employers, and other organizations that together employ tens of millions of individuals working in every industry and every region of the country. CDW is authorized to bring this action on behalf of itself, its members, and its member companies.

13. Plaintiff National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM is authorized to bring this action on behalf of itself, its members, and its member companies.

14. Plaintiff National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main

Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—a total of 42 million working Americans. NRF is authorized to bring this action on behalf of itself, its members, and its member companies.

15. Plaintiff Society for Human Resource Management ("SHRM") is the world's largest membership organization devoted to human resource management. Representing more than 275,000 members in over 90,000 companies, SHRM is the leading provider of resources to serve the needs of human resource professionals and advance the professional practice of human resource management. SHRM members represent their employer companies on a myriad of human resource issues, including labor relations matters. SHRM is authorized to bring this action on behalf of itself and its members.

16. Plaintiffs collectively represent millions of employers and human resource professionals in companies covered by the NLRA and subject to the Final Rule. These employers, in turn, employ millions of employees who are covered by the NLRA and entitled to organize and petition the NLRB to hold a representation election pursuant to the Final Rule's expedited procedures. The vast majority of these employees are not currently represented by a union. There are, however, active union organizing campaigns involving employees of many of the businesses represented by Plaintiffs. The Plaintiffs' members expect that these employees, or the unions that seek to represent them, will file election petitions soon after the Final Rule becomes effective on April 14, 2015, and all subsequent elections will be governed by the Final Rule's expedited procedures.

17. These injuries that the Plaintiffs' members will incur as a result of the Final Rule include less time for employers to communicate with workers about the election, in derogation of

employers' free speech rights under Section 8(c) of the NLRA, the First Amendment, and the clear congressional intent for a full and informed debate before workers cast their votes; less time for employers to investigate whether it is even appropriate for the NLRB to hold an election in the petitioned-for bargaining unit; less time for employers to determine whether other employees should be included or excluded from the petitioned-for bargaining unit; less time for employers to determine whether individuals encompassed by the petition are actually eligible to vote in the election; less time to prepare for a pre-election hearing and file a binding position statement under penalty of issue waiver; and less time for employers to negotiate an election agreement that would obviate the need for a pre-election hearing. Many of Plaintiffs' members will incur additional costs in order to prepare for the shortened, and inadequate, time to respond to an election petition under the Final Rule.

18. In addition, the Final Rule will restrict employers' ability to litigate issues of eligibility and inclusion at the pre-election hearing, even if those issues are timely raised; sharply limit employers' opportunity to seek Board review of a Regional Director's decision before the election; and eliminates mandatory Board review of post-election disputes, making such review discretionary only. In these circumstances, if the union wins the election, the employer may be denied any Board review of the Regional Director's decision and the employer's only recourse for judicial review will be to subject itself to an unfair labor practice proceeding by refusing to bargain with the union.

19. Therefore, in the absence of relief from this Court, many of the Plaintiffs' members will suffer concrete and particularized injuries as a result of the Final Rule soon after it becomes effective.

20. Defendant NLRB is an independent federal agency in the Executive Branch and is

subject to the APA. The NLRB's headquarters are located at 1099 14th Street, NW, Washington, D.C.

21. The Board consists of a Chairman and four Members.

22. Mark G. Pearce, in his official capacity, is Chairman of the Board.

23. Kent Y. Hirozawa, in his official capacity, is a Member of the Board.

24. Philip A. Miscimarra, in his official capacity, is a Member of the Board.

25. Harry I. Johnson III, in his official capacity, is a Member of the Board.

26. Nancy Schiffer, in her previous official capacity, was a Member of the Board until her term expired on December 16, 2014.

27. Richard F. Griffin, Jr., in his official capacity, is the NLRB's General Counsel.

FACTS

28. For nearly 80 years, the Board has conducted workplace elections so that workers can decide whether they want to be represented by a union for purposes of collective bargaining.

29. In the last ten years, the Board has conducted elections within a median of 38 days from the filing of the petition—well below the Board's time target of 42 days.

30. By comparison, in 1960 the median time from petition to the Board's *direction* of an election was 82 days, with even more time elapsing before the election actually occurred. 76 Fed. Reg. at 36,814, n.16.

31. By 1975, however, the Board had succeeded in reducing the time between petition and election. That year, only 20.1 percent of all elections occurred more than 60 days after a petition was filed—and this percentage later decreased to 16.5 percent by 1985. *Id.* at 36,814, n.19.

32. In the past two years, the Board has beat its own time targets for conducting representation elections, deciding pre-election issues at the regional level, and closing pending

representation cases:

a. In 2013, 94.3 percent of all elections occurred within a 56-day period after the filing of the petition, which was better than the Board's stated goal of 90 percent. That rate improved to 95.7 percent in 2014, again well above the 90 percent goal.

b. In 2013, regional directors issued 159 pre-election decisions in a median of 32 days after the petition, below the 45-day target.

c. In 2014, 88.1 percent of all NLRB representation cases were "closed" within 100 days of the petition being filed. That rate exceeded the agency's stated goal of 85.3 percent for 2014.

33. The speed with which the Board conducted elections in 2013 and 2014 under its existing procedures is consistent with the trend over the past five decades of reducing the time period between the filing of the petition and the election.

34. The number of representation cases processed by the Board has also dropped substantially:

a. In 1959, there were 9,347 representation case filings, 8,840 case closings, and 2,230 cases pending at the end of the year. The Board itself decided 1,880 cases. 79 Fed. Reg. at 74,450.

b. In fiscal year 2013, only 1,986 representation petitions were filed, almost the same number as the year before, and reflecting a decline of about 80 percent over the last 50 years. *Id.*

35. As of October 1, 2014, there were only 48 representation cases pending at the Board—well below the caseload 50 years ago. *Id.*

36. In fiscal year 2014, the Board itself decided only 43 representation cases, down

from 1,880 cases in 1959.

37. Under the Board's current election procedures, there is no pre-election litigation in more than 90 percent of representation cases because the parties negotiate and enter into an election agreement. 79 Fed Reg. at 74,387.

38. In 2013, labor organizations won 64.1 percent of the representation elections conducted by the Board.

39. Nonetheless, in June 2011, the Board proposed unprecedented and sweeping changes to its procedures for conducting representation elections designed to further reduce the time between an election petition being filed and the holding of an election. 76 Fed. Reg. 36,812 (June 22, 2011) (Notice of Proposed Rulemaking) ("the Proposed Rule").

40. Less than 30 days after publishing the Proposed Rule, the Board held a two-day hearing at which nearly 70 witnesses testified, with each witness having approximately 5 minutes to speak. Many witnesses testified against the Proposed Rule.

41. When the comment period for the Proposed Rule closed, the Board had received more than 65,000 comments—many of them, like Plaintiffs' comments, opposed to the Proposed Rule.

42. About two months after the comment period closed, the Board announced that it would hold a public meeting less than two weeks later during which the Board's Members would vote on a resolution concerning a modified rule.

43. At the meeting, the Board adopted the resolution it had released only the day before, including certain changes that differed from those set forth in the 2011 Proposed Rule.

44. Sometime the next month—in December 2011—Board Chairman Mark Pearce and then-Member Craig Becker voted to approve the rule as modified. The final rule issued on

December 22, 2011 ("2011 Final Rule"). Then-Member Hayes did not participate in the vote, but subsequently published a dissent.

45. Plaintiffs Chamber and CDW filed a complaint asking this Court to invalidate the 2011 Final Rule.

46. In May 2012, this Court did so on the ground that the Board, with only two Members voting, lacked a statutory quorum when it approved the 2011 Final Rule. *Chamber of Commerce of the U.S. v. NLRB*, 879 F. Supp. 2d 18, 28-30 (D.D.C. 2012). The Court did not "reach—and expresse[d] no opinion on—Plaintiffs' other procedural and substantive challenges to the rule." *Id.* at 30.

47. The Board appealed the Court's decision to the U.S. Court of Appeals for the District of Columbia Circuit, but later voluntarily sought and obtained dismissal of its own appeal. 2013 WL 6801164 (D.C. Cir. 2013).

48. The Board issued a second Notice of Proposed Rulemaking ("2014 Proposed Rule") on February 6, 2014, under the same docket number as the 2011 Proposed Rule and containing the same proposals on workplace elections. 79 Fed. Reg. 7,318.

49. In doing so, the Board remarked that the 2014 Proposed Rule was "in essence, a reissuance of the proposed rule of June 22, 2011." *Id.*

50. Except for Chairman Pearce, none of the Members on the Board when it issued the 2014 Proposed Rule served on the Board or otherwise participated in the 2011 rulemaking process.

51. The Board provided for a 60-day comment period for the 2014 Proposed Rule. The Board told commentators that it was not necessary to "resubmit any comment or repeat any argument that has already been made." *Id.* at 7,319.

52. Plaintiffs all filed comments on the 2014 Proposed Rule.

53. On April 10-11, 2014, the Board held a public hearing on the 2014 Proposed Rule.

54. Plaintiffs CDW, NAM, SHRM, and the Chamber participated, through their respective representatives, at the public hearing.

55. On December 12, 2014, the Board announced that a majority of its Members had voted to adopt a final rule, which would be published in the Federal Register on December 15, 2014 and take effect on April 14, 2015. Members Phillip A. Miscimarra and Harry I. Johnson III dissented.

56. The Final Rule was published in the Federal Register on December 15, 2014. 79 Fed. Reg. 74,308.

57. The Final Rule largely adopted the changes outlined in the 2014 Proposed Rule, with some modifications. Nonetheless, as the dissenting Board members remarked, "the Rule's primary purpose and effect remain the same: Initial representation elections must occur as soon as possible." 79 Fed. Reg. at 74,430.

58. The dissenting Board Members expressed concern that "[w]e still do not understand the reason for embarking on the path our colleagues have taken." 79 Fed. Reg. at 74,434. They wrote that "the Final Rule manifest[s] a relentless zeal for slashing time from every stage of the current pre-election procedure in fulfillment of the requirement that an election be scheduled 'at the earliest date practicable,' but the Final Rule's keystone device to achieve this objective is to have elections occur *before* addressing important election-related issues." *Id.* at 74,432.

59. "Unfortunately," the dissenting Board Members explained, "the inescapable

impression created by the Final Rule's overriding emphasis on speed is to require employees to vote as quickly as possible—at the time determined exclusively by the petitioning union—at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues." *Id.* at 74,460.

CLAIMS FOR RELIEF

COUNT I
(The Final Rule Is Not in Accordance With the NLRA, Exceeds the Board's Statutory Authority, and Violates the First and Fifth Amendments of the Constitution of the United States)

60. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further allege as follows:

61. Section 7 of the NLRA gives employees the right to "form, join, or assist" unions; to bargain collectively with their employer; or to refrain from engaging in such activities.

62. Section 6 of the NLRA authorizes the Board to promulgate "rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156.

63. Section 9(b) of the NLRA provides that "in order to assure to employees the fullest freedom in exercising the rights guaranteed by" the NLRA, the Board "shall decide in each case" the unit that is appropriate for the purposes of collective bargaining. 29 U.S.C. § 159(b).

64. Section 9(c) of the NLRA provides that, when a petition for a representation election is filed, the Board must investigate that petition and "shall provide for an appropriate hearing upon due notice" before the election is held. 29 U.S.C. § 159(c)(1). The same provision provides that "[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto."

65. The Final Rule violates the Act's requirement of an "appropriate" pre-election

hearing by restricting the employer's ability to present evidence and litigate issues of voter eligibility or inclusion in the putative bargaining unit.

66. The Final Rule also conflicts with Section 9(c)(1)'s requirement that the Board's hearing officers "shall not make any recommendations with respect" to the hearings they conduct. The Final Rule effectively vests hearing officers with decision-making authority regarding the evidence that will be admitted and the issues that will be litigated at the pre-election hearing.

67. By authorizing hearing officers to prevent employers from litigating issues as to the eligibility of certain employees to vote in the election, and by limiting the available time for the employer to communicate about the election and for employees to decide whether to vote for or against union representation, the Final Rule fails to assure employees the "fullest freedom" in exercising their rights under Section 7 of the NLRA and is otherwise contrary to Section 9(b) of the NLRA.

68. Section 8(c) of the NLRA protects an employer's freedom of speech: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisals or force or promise of benefit." 29 U.S.C. § 158(c). Section 8(c) "merely implements the First Amendment" to the United States Constitution and "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

69. By these provisions, Congress directed that employers would be given sufficient opportunity to meaningfully express their views in the election process. Specifically, Congress

determined that employers must have the opportunity to effectively communicate with their employees on the subjects of union organizing and collective bargaining. *See Chamber of Commerce v. Brown,* 554 U.S. 60, 67–68 (2008) (Section 8(c) reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide open debate in labor disputes." (internal quotation omitted)); *Nat'l Ass'n of Manufacturers v. NLRB*, 717 F.3d 947, 955 (D.C. Cir. 2013) (Section 8(c) "serves a labor law function of allowing employers to present an alternative view and information that a union would not present." (citation omitted)).

70. The Final Rule impermissibly curtails an employer's right to communicate with its employees by substantially shortening the period between an election petition and the holding of an election, and the Final Rule impermissibly limits employers' ability to exercise their rights under Section 8(c) and the First Amendment.

71. The Final Rule further violates the Free Speech Clause of the First Amendment by compelling employers to engage in certain speech during the election process, specifically a new mandatory workplace notice to be posted after the filing of a representation petition.

72. The Final Rule also deprives employers of due process in NLRB representation case proceedings, in violation of the Fifth Amendment, by preventing employers from litigating issues of voter eligibility and inclusion at the pre-election hearing, and then denying the employer the right to seek any Board review of those issues, whether pre- or post-election, by making all Board review discretionary.

73. The Board's actions are not in accordance with law, contrary to constitutional rights, and in excess of the Board's statutory jurisdiction and authority and in violation of 5 U.S.C. § 706(2)(A)-(C).

74. Unless vacated, held unlawful, and set aside, the Final Rule will adversely affect

the rights of Plaintiffs and their members.

COUNT II
(The Board's Actions Are Arbitrary and Capricious)

75. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further allege as follows:

76. "The APA commands reviewing courts to 'hold unlawful and set aside' agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (citing 5 U.S.C. § 706(2)(A)).

77. The APA also requires courts to hold unlawful and set aside agency action that is not in accordance with procedure required by law. 5 U.S.C. § 706(2)(D).

78. The Final Rule is overly broad in changing election procedures in a manner impacting all cases, as the alleged "problems" identified by the Board to justify the Final Rule exist only in a small fraction of cases.

79. The Final Rule seeks to arbitrarily expedite the election process, even though the data show that the Board already conducts elections below its established time targets in more than 90 percent of cases.

80. The Final Rule introduces no new time targets for representation elections, further undermining the rational basis for radically altering procedures that have met the agency's established time targets for many years.

81. The Final Rule promotes speed in holding elections at the expense of all other statutory goals and requirements, including but not limited to employer free speech rights and the opportunity for a full and informed debate before an election.

82. The Final Rule also mandates, for the first time in the Board's history, that

employers give their employees' personal phone numbers and email addresses to labor organizations. The Board acknowledged that "the privacy, identity theft, and other risks may be greater than the Board has estimated," but nonetheless concluded, without adequate justification and concern for employee rights, that these "risks are worth taking." 79 Fed. Reg. at 74,342.

83. The Final Rule's elimination of mandatory Board review of post-election disputes, during a period of dramatically reduced case loads, is arbitrary and capricious given the Board's statutory obligation to oversee the election process.

84. The Final Rule concludes that it will reduce election-related litigation, despite available evidence that the Final Rule's sweeping changes will reduce the high rate of election agreements, and will result in more, not less, litigation overall, including more litigation in federal court. As the dissenting Board Members explained: "An employer will now be forced to litigate in an unfair labor practice case, before the Board and in Federal court, issues that are currently reviewed by the Board in a post-election appeal as a matter of right. Given the process an employer must go through to have a Federal court of appeals review any disputed issue regarding an election, there is often substantial delay in the final resolution of the representation case." 79 Fed. Reg. at 74,451.

85. Based on the above, the Board failed to meaningfully consider numerous legal, policy, and economic factors, or to articulate a rational basis for rejecting them.

86. The Board's actions in adopting the Final Rule are arbitrary and capricious, and the Final Rule was enacted without observance of procedure required by law. 5 U.S.C. § 706(2)(A)-(D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court enter judgment in their favor and:

1. Vacate and set aside the Final Rule;
2. Declare that the Final Rule is contrary to the First and Fifth Amendments to the Constitution of the United States and to the NLRA, and in excess of the Board's statutory jurisdiction and authority;
3. Declare that Defendant violated the APA in issuing the Final Rule;
4. Declare that the Final Rule is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;
5. Enjoin and restrain Defendant, its agents, employees, successors, and all persons acting in concert or participating with Defendant from enforcing, applying, or implementing (or requiring others to enforce, apply, or implement) the Final Rule;
6. Award Plaintiffs their costs of litigation, including reasonable attorney's fees; and
7. Grant Plaintiffs such other relief as may be necessary and appropriate or as the Court deems just and proper.

Dated: January 5, 2015

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al., Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD Defendant.	Case No. 1:15-cv-00009-ABJ Judge Amy Berman Jackson

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, National Association of Manufacturers, National Retail Federation, and Society for Human Resource Management, by and through undersigned counsel, respectfully move this Court to enter summary judgment in Plaintiffs' favor. The grounds for this motion are set forth in the accompanying memorandum of points and authorities. In accordance with Local Civil Rule 7(c), a Proposed Order is attached as Exhibit 1. Plaintiffs also respectfully request oral argument.

Dated: February 4, 2015

Respectfully submitted,

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FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al., Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD Defendant.	Case No. 1:15-cv-00009-ABJ Judge Amy Berman Jackson

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

For nearly 80 years, the National Labor Relations Board has conducted workplace elections for union representation. Union elections provide all participants in the process—the union, the employer, and the employees—a critical opportunity to engage in protected speech. Congress's overarching "policy judgment . . . favoring uninhibited, robust, and wide-open debate in labor disputes"—including the "freewheeling use of the written and spoken word," *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008)—is so central to the union election process that Congress expressly guaranteed an employer's right to engage in speech concerning unionization, 29 U.S.C. § 158(c) (so long as that speech, of course, "contains no threat of reprisal or force or promise of benefit").

The Board's "ambush" or "quickie" election rule (the "Final Rule") makes sweeping changes to the election process that, as the dissenting Board Members put it, impermissibly "limit[ ] the right of all parties to engage in protected speech at precisely the time when their free speech rights are most important." Representation—Case Procedures, 79 Fed. Reg. 74,308, 74,439 (Dec. 15, 2014) (Members Miscimarra & Johnson, dissenting ("dissent")). It "improperly shortens the time needed for employees to understand relevant issues, compelling them to 'vote now, understand later.'" *Id.* at 74,430.

It also sharply curtails the statutorily mandated pre-election review of issues critical to the election process—as well as limits the taking of evidence necessary for meaningful post-election review. In these ways and others, the Final Rule is "contrary to the [National Labor Relations] Act and its legislative history, and contrary to other legal requirements directed to the preservation of employee free choice, all of which focus on guaranteeing enough time for making important decisions." *Id.* at 74,430-31.

Even if the Board's choices were permissible under the National Labor Relations Act ("NLRA"), which they are not, they are invalid under the Administrative Procedure Act ("APA"). The administrative record demonstrates a gaping disconnect between the problem the Board purported to address and the solution it adopted. The vast majority of elections go forward with no "delay" at all—and the Final Rule "does not even identify, much less eliminate, the reasons responsible for those few cases that have excessive delays." *Id.* at 74,431. Although the Board's goal of eliminating "unnecessary" litigation may be laudable, the available evidence demonstrates that the Final Rule will have the opposite effect. *Id.* at 74,449-50. And the Board declined to adopt—without a reasoned explanation—common-sense protections against the invasion of employee privacy threatened by new mandatory disclosures of personal information.

In addition to violating the NLRA and the APA, the Final Rule also runs afoul of the First Amendment's prohibition against compelled speech by impermissibly co-opting employers to deliver the government's own preferred message. The Board's mandatory disclosures on behalf of those filing petitions do not involve commercial speech but, instead, serve the interests of those seeking union representation. Such compulsion is unconstitutional.

For all these reasons, summary judgment should be granted to plaintiffs and the Final Rule vacated and set aside.

BACKGROUND

Congress has authorized the Board to conduct workplace elections regarding union representation provided certain conditions are satisfied. Section 6 of the NLRA authorizes the Board to promulgate "rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156. The Board's regulations setting forth the election procedures at

issue in this case—the Final Rule—consume, in total, almost 200 pages in the Federal Register and are codified at 29 C.F.R. part 102, subpart C.[1]

I. Plaintiffs

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and associations, directly representing 300,000 members and indirectly representing more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region of the country.

The Coalition for a Democratic Workplace ("CDW") represents millions of businesses of all sizes. Its membership includes hundreds of employer associations, individual employers, and other organizations that together employ tens of millions of individuals working in every industry and every region of the country.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women throughout the country.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—a total of 42 million working Americans.

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[1] Because this case is governed by Local Civil Rule 7(h)(2), such that any facts will be derived solely from the administrative record (and from judicial notice), Plaintiffs are not required to submit a Rule 7(h)(1) Statement of Material Facts As To Which There Is No Genuine Dispute. Because the Board has not yet filed the administrative record, Plaintiffs have attached for the Court's convenience, as Exhibits 2-11, their comments, which are part of the administrative record.

The Society for Human Resource Management ("SHRM") is the world's largest membership organization devoted to human resource management, representing more than 275,000 members in over 90,000 companies.

Plaintiffs collectively represent millions of employers and human resource professionals in companies covered by the NLRA and subject to the Final Rule. *See* Exhibit 2 (Chamber 2011 comments) at 1; Exhibit 3 (CDW 2011 comments) at 2; Exhibit 4 (NAM 2011 comments) at 1-2; Exhibit 5 (NRF 2011 comments) at 1; Exhibit 6 (SHRM 2011 comments) at 13-14. These employers, in turn, employ millions of employees who are not currently represented by a union but are covered by the NLRA and thus entitled to petition the Board to hold a representation election in accordance with the Final Rule's expedited procedures. *Id.* Unions have, in recent years, filed petitions for elections involving employees at many of the businesses represented by plaintiffs.[2] Particularly given the recent history of union election petitions involving many of the plaintiffs' member companies, it is likely that election petitions will be filed involving employees at many of these companies once the Final Rule becomes effective on April 14, 2015.

As a result of the forthcoming application of the Board's Final Rule to these petitions and elections, Plaintiffs' members will suffer the following injuries, among others:

- Less time for employers to communicate with workers about the election, in derogation of employers' free speech rights under § 8(c) of the NLRA, the First Amendment, and the clear congressional intent for a full and informed debate before workers cast their votes, 79 Fed. Reg. at 74,318-19 (citing Chamber, NAM, NRF, and SHRM comments);
- Less time for employers to investigate whether it is even appropriate for the NLRB to hold an election in the petitioned-for bargaining unit, *id.* at 74,369-73;

[2] Monthly reports of elections are publicly available on the NLRB's website. *See* NLRB, Election Reports, http://www.nlrb.gov/reports-guidance/reports/election-reports (last visited Feb. 4, 2015).

- Less time for employers to determine whether other employees should be included or excluded from the petitioned-for bargaining unit, and whether they are even eligible to vote, *id.*;
- Less time to prepare for a pre-election hearing and file a binding position statement under penalty of issue waiver, *id.*; and
- Less time for employers to negotiate a stipulated election agreement that would obviate the need for a pre-election hearing. *Id.* at 74,375 (citing CDW comments).

Plaintiffs' members also will incur economic costs before election petitions are filed because of the shortened, and inadequate, time to respond once an election petition is filed under the Final Rule. *See* Exhibit 2 (Chamber 2011 comments) at 56-57 (noting economic costs); Exhibit 4 (NAM 2011 Comments) at 24 (same); Exhibit 5 (NRF 2011 Comments) at 1-2 (same). The Board, in the Final Rule, recognized and estimated that employers will incur additional post-petition costs as well, including the new notice of petition, statement of position, voter lists, and costs related to the expedited timeline for the election process. 79 Fed. Reg. at 74,461-66.

II. Representation Election Procedures

Under long-established procedures—outlined by Board rules and regulations in 29 C.F.R. Parts 101, 102, and 103—the election process begins when an employee, union, or employer files a petition for an election with the Board. 29 C.F.R. § 101.17. The petition is filed with one of the Board's many regional offices throughout the country. *Id.* To conduct an election (and certify the results thereof), the Board, through its regional offices, initially assigns the petition to a regional staff member for a preliminary investigation. *Id.* § 101.18(a). If the petition presents reasonable cause to believe that a "question of representation" exists—that is, the regional director finds a sufficient basis to spend taxpayer resources to consider holding an election—the

regional office will proceed to hold an "appropriate" hearing concerning the petition. 29 U.S.C. § 159(c)(1). The hearing provides an opportunity for the parties to present evidence on issues that will affect the election, such as whether the employees are covered by the NLRA, whether the collective bargaining unit defined in the petition is an appropriate one, and whether certain individuals or groups of individuals would be eligible to vote in the election, or be included in the putative bargaining unit, or both. 29 C.F.R. §§ 102.64(a) & 102.66(a).

This pre-election hearing, which usually occurs within 7 to 14 days after the petition is filed, is conducted "before a hearing officer who normally is an attorney or field examiner attached to the Regional Office." *Id.* § 101.20(c). The hearing officer does not have authority to make "any recommendations" with respect to the issues presented in the hearing. 29 U.S.C. § 159(c)(1). The hearing officer only "insure[s] that the record contains a full statement of the pertinent facts as may be necessary for determination of the case." 29 C.F.R. § 101.20(c). All parties "are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions." *Id.* The record developed at the hearing is the basis for all subsequent decision-making on these issues. *Id.* § 101.21(b).

When the hearing concludes, the hearing officer does not render any decision or make any recommendations. The evidentiary record is presented to the regional director, who decides the issues in dispute before the election occurs. *Id.* The parties may file post-hearing briefs with the regional director on these issues. *Id.*

Although § 3(b) of the Act authorizes the Board "to delegate to its regional directors its powers" to "investigate and provide for hearings," to "determine whether a question of representation exists," and to "direct an election" and "certify the results thereof," it also provides an opportunity to request Board review (before the election is held) of any action taken

by regional directors. 29 U.S.C. § 153(b). Therefore, if the regional director decides to hold an election based on the evidence introduced at the pre-election hearing, the election is set for a date at least 25 to 30 days after the regional director's decision, to allow the Board sufficient time to consider a party's request to review that decision. 29 C.F.R. § 101.21(d).

After the election is held as scheduled by the regional director, the election results will be certified only after any post-election hearing and resolution of challenges and objections. *Id.* § 102.69(b)-(h). The parties are entitled to seek post-election Board review of the resolution of challenges and objections, unless restricted in some manner by an election agreement. *Id.* § 102.69(c), (e), (f). If the union wins the majority of valid votes cast in the election, the employer is obligated to engage in collective bargaining with the union over wages, hours, and other terms and conditions of employment for the employees in the bargaining unit. *See* 29 U.S.C. § 158(a)(5).

Over the last ten years, under the procedures described above, elections have occurred within a median of 38 days from the filing of the petition—below the Board's internal target of 42 days.[3] In 2013, nearly 95 percent of all elections occurred within 56 days from the filing of the petition—better than the Board's internal target of 90 percent.[4] That rate improved to 95.7 percent in 2014.[5] And the vast majority of elections—90 percent—go forward without any pre-election litigation at all because the parties negotiate some form of election agreement. 79 Fed. Reg. at 74,375.

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[3] NLRB, Summary of Operations, 2002-2012 Reports, http://www.nlrb.gov/reports-guidance/reports/summary-operations (last visited Feb. 4, 2015).

[4] NLRB, FY 2013 Performance & Accountability Report, http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/NLRB2013par.pdf, at 38 (lasted visited Feb. 4, 2015).

[5] NLRB, Summary of Operations, FY2014 Performance and Accountability Report, http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/13682%20NLRB%202014%20PAR%20v5%20-%20508.pdf, at 41 (last visited Feb. 4, 2015).

Historically, a majority of elections result in union representation. For example, unions won 71 percent of about 1,600 elections in 2011, 59 percent of about 1,550 elections in 2012, 60 percent of about 1,450 elections in 2013, and 63 percent of about 1,450 elections in 2014.[6]

III. In 2011, The Board Made Changes To The Election Rules, Which Were Set Aside By This Court

In 2011, the Board proposed sweeping changes to the election process intended to drastically reduce the time between petition and election. Representation—Case Procedures, 76 Fed. Reg. 36,812, 36,812-47 (June 22, 2011). Dissenting Member Hayes criticized the changes as not rationally related to any systemic problem of procedural delay, and criticized the Board for engaging in an illicit attempt to enshrine by "administrative fiat in lieu of Congressional action . . . organized labor's much sought-after 'quickie election,' a procedure under which elections will be held in 10 to 21 days from the filing of the petition." *Id.* at 36,831 (Member Hayes, dissenting). In the dissent's view, "the principal purpose for this radical manipulation of our election process [wa]s to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining.'" *Id.*

Less than a month after publishing the proposed rule, the Board held a two-day hearing at which nearly 70 witnesses testified (with each witness having about 5 minutes to speak). Representation—Case Procedures, 76 Fed. Reg. 80,142 (Dec. 22, 2011). Many witnesses testified against the proposed rule. *Id.* When the comment period closed, the Board had received more than 65,000 comments—many of them, like those submitted by plaintiffs here, opposed the proposed rule and offered alternatives for the Board to consider. *Id.* at 80,140.

On November 18, 2011, the Board announced that it would hold a public meeting on November 30, 2011, during which the Board would vote on a resolution concerning a modified

[6] NLRB, Election Reports, http://www.nlrb.gov/reports-guidance/reports/election-reports (last visited Feb. 4, 2015).

rule.[7] The Board issued the resolution the day before the hearing. Board Resolution No. 2011-1.[8] At the meeting, the Board adopted the resolution, including changes (immaterial to the instant litigation) to the proposed rule. *Chamber of Commerce of the United States v. NLRB*, 879 F. Supp. 2d 18, 22-23 (D.D.C. 2012). At some point within the next month, Board Chairman Pearce and then-Member Becker voted to approve the rule as modified. *Id.* at 23-24. The final rule issued on December 22, 2011 ("2011 Final Rule"). 76 Fed. Reg. at 80,138. Then-Member Hayes did not participate in the vote, but subsequently published a dissent. *Chamber of Commerce*, 879 F. Supp. 2d at 23-24; *see also* Representation, Case Procedures, 77 Fed. Reg. 25,548-75 (Apr. 30, 2012) (Member Hayes, dissenting).

Two of the plaintiffs in the instant litigation, Chamber and CDW, challenged the 2011 Final Rule in this Court. *Chamber of Commerce*, 879 F. Supp. 2d at 21. In May 2012, the Court set aside the 2011 Final Rule on the ground that the Board lacked a statutory quorum when it approved the rule. *Id.* at 28-30. The Court did not "reach—and expresse[d] no opinion on—Plaintiffs' other procedural and substantive challenges to the rule." *Id.* at 30. The Board appealed the decision, but subsequently sought and obtained voluntary dismissal of its own appeal. *Chamber of Commerce of the United States v. NLRB*, No. 12-5250, 2013 WL 6801164, at *1 (D.C. Cir. Dec. 9, 2013).

IV. In 2014, The Board Issued The Final Election Rule Challenged Here

In February 2014, the Board issued a second Notice of Proposed Rulemaking ("2014 Proposed Rule") under the same docket number as the 2011 Proposed Rule and containing the same proposals on elections. Representation—Case Procedures, 79 Fed. Reg. 7318 (Feb. 6,

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[7] NLRB, NLRB Sets Vote on Portions of Proposed Election Rule (Nov. 18, 2011), http://www.nlrb.gov/news-outreach/news-story/nlrb-sets-vote-portions-proposed-election-rule (last visited Feb. 4, 2015).

[8] NLRB, Board Chairman Releases Details of Election Proposal for Wednesday Vote (Nov. 29, 2011), http://www.nlrb.gov/news-outreach/news-story/board-chairman-releases-details-election-proposal-wednesday-vote (last visited Feb. 4, 2015).

2014). In doing so, the Board remarked that the 2014 Proposed Rule was "in essence, a reissuance of the proposed rule of June 22, 2011." *Id.*

Among other changes, the Board proposed:

- To require employers to post a workplace notice immediately after a petition is filed;
- To require employers to disclose to unions the personal information of employees including personal telephone numbers and email addresses;
- To severely limit the scope of pre-election hearings to focus solely on whether there is a "question of representation," meaning:
    - Hearing officers could exclude evidence unrelated to the basic question of whether the Board should hold an election; and
    - The parties would not have the right to present evidence on important issues affecting the election, such as whether certain employees or groups of employees are eligible to vote in the election;
- To eliminate the mandatory 25-30 day period between the regional director's decision to hold an election and the election itself; and
- To eliminate post-election Board review as a matter of right and make it solely at the Board's discretion.

Id. at 7318-37.

The Board provided for a 60-day comment period and informed commenters that it was not necessary to "resubmit any comment or repeat any argument that has already been made." *Id.* at 7319. To ensure that the Board understood the ramifications of its proposed actions, however, many commenters who previously submitted comments (like plaintiffs) did so again, highlighting the disconnect between the proposed changes and the Board's election-handling

performance in recent years, and recommending that the Board focus instead on the small subset of cases actually delayed under current procedures. *See, e.g.*, 79 Fed. Reg. at 74,315-17, 74,419; *see also* Exhibits 2-11 (copies of plaintiffs' 2011 & 2014 comments). Commenters asserted that the proposed changes conflict with the NLRA, particularly with §§ 3, 8(c), and 9. *Id.* at 74,318-19, 74,385-86, 74,395. Commenters expressed further concern that the proposed changes, contrary to the Board's stated goal of reducing election-related litigation, would actually increase it by reducing the time and incentives to enter election agreements. *Id.* at 74,324, 74,334, 74,388, 74,408-09. Under the Board's current procedures, there is no pre-election litigation in more than 90 percent of cases because the parties enter into an election agreement. *Id.* at 74,375.

Commenters offered various alternatives to the changes proposed by the Board. To address privacy concerns raised by the mandatory release of employee personal information, commenters proposed offering employees an opt-out procedure (an "unsubscribe" option for election-related texts and emails), imposing penalties for misuse of the information, and requiring the lists containing the information to be destroyed after the election. *Id.* at 74,341-42, 74,346, 74,358-60.

The Board announced its adoption of the Final Rule on December 12, 2014, and published it in the Federal Register three days later.[9] Members Miscimarra and Johnson submitted a lengthy dissent highlighting the numerous, serious flaws they perceived in the Final Rule. *Id.* at 74,430 (dissent). Expressing regret that the Board declined to pursue a more targeted approach that could have garnered broad, bipartisan support without creating a conflict with the Board's statutory mandate, the dissent argued that the Rule's "election now, hearing later" and "vote now, understand later" approach violates both the NLRA and the APA. *Id.*

[9] NLRB, NLRB Issues Final Rule to Modernize Representation-Case Procedures (Dec. 12, 2014), http://www.nlrb.gov/news-outreach/news-story/nlrb-issues-final-rule-modernize-representation-case-procedures (last visited Feb. 4, 2015).

Specifically, the dissent identified conflicts with the NLRA that are created by the Final Rule's quest for "quickie elections"; curtailment of robust debate and free speech; limitations on the scope of pre-election hearings and the type of evidence that may be taken in those hearings; allowance of *ultra vires* decision-making and recommendations by hearing officers; and imposition of unequal burdens on employers. The dissent further argued that even if the Final Rule did not conflict with the NLRA, it was still arbitrary and capricious under the APA given the lack of a coherent rationale; the conflict between the Board's determinations and the actual evidence before it; and the Board's failure to meaningfully address evidence that reducing the opportunity for pre-election and post-election Board review would result in more litigation, not less, and jeopardize the stipulated-election agreements that govern 90 percent of Board-conducted elections. *Id.* at 74,434-52.

The dissent further argued that the Final Rule implicates serious constitutional concerns by infringing on protected speech and raising due process concerns. *Id.* at 74,431-36. The dissent noted the "great care" the Board has taken in the past "to avoid interpreting and applying [NLRA § 8(c)] in a manner that raises serious constitutional concerns regarding free speech infringement." *Id.* at 74,440 (citing *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797, 807-11 (2010)). The dissent echoed the employee-privacy concerns raised by the commenters, *id.* at 74,452-55, and lamented that the Board's insistence on pursuing the course adopted in the Final Rule made consensus impossible on reforms the dissenting members might also have embraced. *Id.* at 74,431. In the dissent's view, the Final Rule was so flawed in so many respects that they "must dissent from the Final Rule including all its parts." *Id.*

The Rule is set to take effect on April 14, 2015. *Id.* at 74,308.

STANDARD OF REVIEW

The Final Rule is agency action subject to judicial review under the APA, 5 U.S.C. § 706. Under § 706, a reviewing court must "'hold unlawful and set aside' agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting 5 U.S.C. § 706(2)(A)). A court must also invalidate any agency action that is "contrary to constitutional right," 5 U.S.C. § 706(2)(B), "in excess of statutory jurisdiction, authority, or limitations," *id.* § 706(2)(C), or that fails to "observ[e] … procedures required by law," *id.* § 706(2)(D).

"[W]hen a party seeks review of agency action under the APA . . . [t]he 'entire case' on review is a question of law" and may be resolved on a motion for summary judgment. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). The Court's review is generally confined to the administrative record before the Board when it issued the Final Rule. *See, e.g.*, *Brodie v. U.S. Dep't of Health & Human Servs.*, 796 F. Supp. 2d 145, 150 (D.D.C. 2011). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Id.* Where a plaintiff prevails on its APA challenge, vacating the agency action and remanding to the agency is the standard remedy. *See, e.g.*, *Am. Bioscience, Inc.*, 269 F.3d at 1084; *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 163 (D.D.C. 2002) ("As a general matter, an agency action that violates the APA must be set aside.").

ARGUMENT

I. The Final Rule Is Contrary To §§ 3, 8, And 9 Of The NLRA.

Where, as here, an APA challenge "involves an agency's interpretation of its governing statute, *Chevron*'s familiar framework applies." *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567

F.3d 659, 663 (D.C. Cir. 2009) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Under that framework a reviewing court first asks if the statute itself resolves the issue—and if so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 (footnote omitted). An agency interpretation fails that standard if it "runs counter to the unambiguously expressed intent of Congress" as expressed through the Act's "text, legislative history, and structure as well as its purpose." *Shays v. FEC*, 414 F.3d 76, 96, 105 (D.C. Cir. 2005). If the statute is ambiguous—that is, if the congressional mandate is susceptible of more than one interpretation—then a reviewing court considers whether the agency's interpretation of the statute is a reasonable one. *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1049 (D.C. Cir. 1997).

Under *Chevron*, a reviewing court has "a duty to conduct an 'independent examination' of the statute in question looking not only 'to the particular statutory language at issue,' but also to 'the language and design of the statute as a whole.'" *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1, 9 n.4 (D.C. Cir. 2011) (quoting *Martini v. Fed. Nat'l Mortg. Ass'n*, 178 F.3d 1336, 1345-46 (D.C. Cir. 1999)). "For this purpose the court 'must first exhaust the traditional tools of statutory construction.'" *Office of Commc'n, Inc. of United Church of Christ v. FCC*, 327 F.3d 1222, 1224 (D.C. Cir. 2003) (quoting *Bell Atl.*, 131 F.3d at 1047). "The traditional tools include examination of the statute's text, legislative history, and structure, as well as its purpose." *Bell Atl.*, 131 F.3d at 1047 (internal citations omitted); *see also Hammontree v. NLRB*, 894 F.2d 438, 444 (D.C. Cir. 1990). It is a cardinal principle of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly

contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fl. Gulf Coast Build. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

In this case, the Final Rule fails the *Chevron* analysis because it creates a process for handing representation elections that is irreconcilable with §§ 3, 8, and 9 of the Act. First, the Final Rule improperly limits pre-election hearings by allowing hearing officers to exclude evidence regarding fundamental issues affecting the election, such as whether certain employees or groups of employees are eligible to vote in the election. The exclusion of this evidence prevents effective pre-election consideration of those issues by the regional director or the Board in violation of §§ 3(b) and 9(c)(1) of the NLRA, and undermines effective post-election review of any sort as well.

Most fundamentally, the Final Rule violates § 9(c)(1)'s requirement of an "appropriate" pre-election hearing by creating a "quickie election" process that resembles legislative proposals Congress considered and rejected in amending the Act in 1947 and 1959. The Rule's operative premise—speed at all costs—is squarely contradicted by legislative history indicating that Congress believed that there should be a period of at least 30 days between the petition and the election in order to ensure that employees are adequately informed before they cast their votes. In all events, an "appropriate hearing" must be one that conforms with the Fifth Amendment's guarantee of due process, and the system left in place by the Final Rule fails on that score.

Second, the Final Rule improperly truncates informed debate regarding union representation, contrary to §§ 8(c) and 9(b) of the Act—statutory text that reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes." *Brown*, 554 U.S. at 67-68 (internal quotation marks and citation omitted). Depriving the parties of adequate time for that debate, the new Rule rushes them into

an uninformed election. Indeed, the Final Rule subverts the Act's primary purpose—to permit sufficient time and information to "assure . . . the *fullest* freedom in exercising the rights guaranteed by [the] Act," 29 U.S.C. § 159(b) (emphasis added)—and improperly interferes with the free speech rights protected under § 8(c) of the Act, 29 U.S.C. § 158(c), and guaranteed by the First Amendment. At a minimum, the agency's interpretation of its statutory mandate is constitutionally suspect and should thus be avoided.

A. The Final Rule Violates The NLRA By Undermining The Statutorily Guaranteed "Appropriate Hearing."

The Final Rule severely restricts the scope of the pre-election hearing required by the NLRA. Under the Final Rule, the hearing officers who preside over pre-election hearings are advised to exclude evidence on fundamental issues affecting the election, including supervisory status and other issues of voter eligibility or inclusion. *See* 29 C.F.R. § 102.64(a) ("Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted."); *id.* § 102.66(a) (a party's indisputable right to introduce at the pre-election hearing is now limited to "the existence of a question of representation"). This contradicts the fundamental understanding—recognized by the Supreme Court, Congress, and the Board itself—that Congress required an "appropriate hearing" to give interested parties a full and adequate opportunity to present their evidence on *all* substantial issues. By allowing the exclusion of evidence on important election issues of voter eligibility, inclusion, and supervisory status, the Final Rule fails to provide an "appropriate" pre-election hearing for all employers as required under § 9(c)(1) of the NLRA, thus precluding the creation of an adequate record for decision-making or subsequent review.

1. Congress has already spoken to the issue of an "appropriate" pre-election hearing.

Section 9(c)(1) establishes the process that must be followed after a representation petition is filed, including the requirement of an "appropriate" pre-election hearing and an adequate "record of such hearing" to permit resolution by the Board of election-related issues:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . 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 thereto.

29 U.S.C. § 159(c)(1) (emphases added). Section 9(c)(1) necessarily requires "an appropriate hearing upon due notice" *before* an election, because the hearing provides the basis for the Board to determine whether and how an election shall occur. *Id.* The right to a pre-election hearing is reinforced by § 9(c)(4), which only permits "the waiving of hearings by stipulation." *Id.* § 159(c)(4).

Congress further intended that hearing officers who preside over pre-election hearings perform only an evidence-gathering function, not a decision-making function. Under §§ 4(a) and 9(c)(1) of the NLRA, Board members (or, under the delegation authority set forth in § 3(b), regional directors) are exclusively responsible for all decision-making in representation cases. Indeed, § 9(c)(1) prohibits hearing officers from having *any* decision-making authority—they cannot even make "any recommendations." *Id.* § 159(c)(1). Moreover, "[t]he Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts."

29 U.S.C. § 154(a). The Act thus vests all decision-making authority on election-related issues exclusively in Board members (or regional directors by delegation).

What is more, the pre-election hearing record provides the sole basis for the following key decisions (among others):

- Whether the Board's jurisdictional standards and other prerequisites for an election are satisfied;
- What constitutes the "appropriate bargaining unit" for purposes of the election; and
- Whether particular individuals are eligible to vote, whether such issues require resolution before any election, and if so how they should be resolved.

29 U.S.C. §§ 153(b), 159(c)(1).

And the NLRA requires that "any interested person" have a *pre-election* opportunity to seek Board review of "*any action* of a regional director" delegated under § 3(b). 29 U.S.C. § 153(b) (emphasis added). This pre-election review is the only mechanism for the Board to order a "stay of *any action* taken by the regional director." *Id.* For the Board to review "any action" of a regional director and decide whether to issue a stay of the election, there necessarily must be record evidence on the issues that are subject to review—in particular, issues of voter eligibility, inclusion, and supervisory status. Even if the regional director decides to defer a decision on voter eligibility issues until after the election, there still must be an evidentiary record concerning those issues for the Board to consider in reviewing the propriety of the regional director's decision to defer resolution of those issues—a decision that may well affect the validity of the entire election. *See Barre-Nat'l, Inc.*, 316 NLRB 877, 878 n.9 (1995) (noting that the right to present evidence at a pre-election hearing is distinct from the issue whether the regional director or Board makes a pre-election decision based on that evidence).

The statutory conflict between the NLRA and the Final Rule is further evidenced by the Rule rendering superfluous a provision of the statute that authorizes an expedited election procedure. *See* 29 U.S.C. § 158(b)(7)(C). The § 8(b)(7) exception applies when a union engages in so-called "recognitional picketing"—picketing intended to force the employer to recognize a union as the bargaining representative of its employees—and an employer files an unfair labor practice charge as a result. *Id.* Under the Board's implementing regulations for that statutory provision, where there is recognitional picketing "the Director may, *without a prior hearing*, direct that an election be held in an appropriate unit of employees" and "fix[] the basis of eligibility of voters . . . ." 29 C.F.R. § 101.23(b) (emphasis added). Section 8(b)(7)(C) was "designed to shield employers and employees from the adverse effects of prolonged recognitional or organizational picketing and to provide a procedure whereby the representation issue that gave rise to the picketing could be resolved as quickly as possible." *Teamsters Local Union No. 115 (Vila-Barr Co.)*, 157 NLRB 588, 589 (1966).

But as the Board has explained, when Congress created that expedited election procedure, it also "rejected efforts . . . to dispense generally with preelection hearings" in all other representation cases. *Int'l Hod Carriers Bldg. & Common Laborers Union of Am.*, 135 NLRB 1153, 1154, 1157 (1962) ("The expedited election procedure is applicable, of course, only in a Section 8(b)(7)(C) proceeding."). The Final Rule would effectively implement an expedited procedure for *all* § 9(c) cases—rendering superfluous the statutorily provided expedited process in cases of recognitional picketing.

The history of amendments to the NLRA's text further confirms the importance, and required scope, of the pre-election hearing. From the beginning, Congress attached importance to the development of an adequate record in election hearings, including evidence pertaining to

election issues generally. *See, e.g.*, 79 Fed. Reg. at 7343 n.100 (citing S. Rep. No. 74-573, at 14 (1935), reprinted in 2 NLRB, Legislative History of the NLRA, 1935, at 2314 (hereinafter "NLRA Hist.")) (in representation cases the "entire election procedure becomes part of the record," providing a "guarantee against arbitrary action by the Board" (internal quotation marks omitted)); H.R. Rep. No. 74-1147, at 23 (1935), reprinted in 2 NLRA Hist. at 3073 ("The hearing required to be held in any [representation] investigation provides an appropriate safeguard and opportunity to be heard."). But as the Supreme Court explained, the NLRA as originally enacted in 1935 did not require the Board to hold elections at all, much less to hold pre-election hearings. *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 707 (1945). The Board thus held a number of "prehearing elections"—*i.e.*, elections conducted before a hearing was held to determine the scope of the bargaining unit and the eligibility of certain employees to vote in the election.[10] The Board's rules and regulations in effect at the time entitled parties to a pre-election hearing only if "substantial issues" were raised. *See NLRB v. S. W. Evans & Son*, 181 F.2d 427, 430 (3d Cir. 1950). Such issues concerned the "[bargaining] unit, eligibility to vote, and timeliness of the election." *Id.* at 430.

In 1947, Congress amended the Act to make pre-election hearings mandatory by adding §§ 9(c)(1) and (4) to the Act. 29 U.S.C. §§ 159(c)(1) & (4). These require the Board to conduct the "appropriate hearing" *before* any election, and permit "the waiving of hearings" *only* "by stipulation" of all parties. *Id.*; *see also S. W. Evans*, 181 F.2d at 429 (noting that the amended Act now makes mandatory a pre-election hearing"); *Utica Mut. Ins. Co. v. Vincent*, 375 F.2d

[10] *See, e.g.*, H.R. Rep. No. 86-741, at 24 (1959), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 782 (1974) (hereinafter "LMRDA Hist.") ("During the last 19 months of the Wagner Act . . . a form of prehearing election was used by the NLRB."); S. Rep. No. 86-187, at 30 (1959), *reprinted in* 1 LMRDA Hist. 426 (the practice of holding prehearing elections "was tried in the last year and a half prior to passage of the Taft-Hartley Act, but it was eliminated in that [A]ct").

129, 133-34 (2d Cir. 1967) (noting that "under the amendment the hearing must invariably precede the election").

The purpose of pre-election hearings, as reflected in the legislative history of the 1947 amendments, is to collect evidence concerning all of the issues relevant to the election—including the eligibility of employees to vote in the election:

> Obviously, ***there can be no choice of representatives and no bargaining unless units for such purposes are first determined.*** And employees themselves cannot choose these units, because ***the units must be determined before it can be known what employees are eligible to participate in a choice of any kind.***
>
> This provision is similar to section 2 of 1934 amendments to the Railway Labor Act (48 Stat. 1185), which states that—In the conduct of any election for the purpose herein indicated the Board shall designate ***who may participate in the election*** and establish the rules to govern the election.

S. Rep. No. 74-573, at 14 (1935), *reprinted in* 2 NLRA Hist. 2313 (emphases added); *see also* 76 Fed. Reg. at 80,165 n.116 (citing 93 Cong. Rec. 7002 (1947), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1625 (supplemental analysis of LMRA by Senator Taft—the principal sponsor of the 1947 amendments)) (noting that the House rejected a provision authorizing pre-election hearings). Congress thus intended that issues of voter eligibility and inclusion would *not* be litigated separately (and post-election) from issues concerning the appropriateness of the bargaining unit.

When it amended the Act again in 1959, Congress once more rejected proposals to permit the Board to conduct elections with no pre-election hearing. *See* H.R. Rep. No. 86-741, at 24-25 (1959), *reprinted in* 1 LMRDA Hist. 782-83. Conference Committee members who opposed the proposals for pre-hearing elections regarded them as improperly effectuating "quickie elections," and insisted on leaving unchanged the conventional role played by pre-election hearings. 105 Cong. Rec. A8062 (1959) (conf. report), *reprinted in* 2 LMRDA Hist. 1813 (opposing "pre-

hearing or so-called quickie election" and stating that the "right to a hearing is a sacred right"). As an alternative to scaling back pre-election hearings, Congress adopted the language in § 3(b) of the Act authorizing the Board to delegate its election responsibilities to regional directors, subject to each party's right to seek pre-election Board review regarding "any action" by regional directors, including the right to seek a Board-ordered "stay" of any election. 29 U.S.C. § 153(b). The ranking House conferee, Chairman Barden, described the approach as follows:

> The conferees adopted a provision that there should be some consideration given to expediting the handling of some of the representation cases. Therefore, the Board is authorized, but not commanded, to delegate to the regional directors certain powers which it has under section 9 of the act.
>
> Upon an appeal to the Board by any interested party the Board would have the authority to review and stay any action of a regional director, delegated to him under section 9. But the hearings have not been dispensed with. *There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out.* The right to a formal hearing before an election can be directed is preserved without limitation or qualification.

105 Cong. Rec. 16,629 (1959), *reprinted in* 2 LMRDA Hist. 1714 (emphasis added), *describing* H.R. Rep. No. 86-1147, at 1 (1959) (conf. report), *reprinted in* 1 LMRDA Hist. 934. Chairman Barden expressed opposition to any "so-called quicky election," again stating that "[t]he right to a hearing is a sacred right . . . ." 105 Cong. Rec. A8062 (1959) (conf. report), *reprinted in* 2 LMRDA Hist. 1813.

The failure of the proposed reform underscores the conflict between the Final Rule and congressional intent concerning the election process. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" (quoting *NLRB v. Bell Aerospace Co.*, 416

U.S. 267, 275 (1974))). The Board is attempting to implement, through rulemaking, the very type of expedited election process that Congress rejected. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137-39 (2000). This attempt cannot survive *Chevron* scrutiny.

2. The Final Rule deprives employers of an appropriate hearing, as the Board has previously recognized.

The Final Rule should be set aside because it eviscerates the pre-election hearing and takes numerous steps to slash the time between the petition and election—thereby adopting the very type of expedited election system that Congress has repeatedly rejected. By authorizing regional directors and hearing officers to reject evidence on the scope of the bargaining unit for voter eligibility and inclusion purposes, the Final Rule makes the taking of evidence useless for all of the decision-making required under §§ 3 and 9 (except on the narrow issue whether an election of some kind is required under the Act). Significantly, the Final Rule suggests that evidence pertaining to voter eligibility should be excluded from the pre-election hearing even if the relevant issues affect a substantial portion of the bargaining unit. 29 C.F.R. § 102.64(a).

This approach is "not in accordance" with the Act, 5 U.S.C. § 706(2)(A), since it is contrary to the requirement in § 9(c)(1) that in all cases, absent stipulation otherwise, an "appropriate hearing" must be conducted before the election. Congress provided that an "appropriate hearing" must include the "full and adequate opportunity" to present evidence on *all* issues related to the election and disputed by the parties: "We think the statutory purpose . . . is to provide for a hearing in which interested parties shall have full and adequate opportunity to present their objections." *Inland Empire*, 325 U.S. at 708; *see also S. W. Evans*, 181 F.2d at 430 (parties entitled to pre-election hearing to present substantial issues related to the election). And when the pre-election hearing is bypassed, the foreseeable result will be more post-election

litigation and more elections set aside after the fact. *See* 79 Fed. Reg. at 74,445 (dissent); *see also infra* 33-40.

The Final Rule's shortcoming here is confirmed by its rejection of over 60 years of agency practice under the § 9(c)(1) framework adopted by Congress in 1947. The Board reaffirmed, during the Clinton Administration and with all members agreeing, that § 9(c) limits its authority to narrow the scope of pre-election hearings. Specifically, the Board recognized that § 9(c) provides a *statutory* right to introduce evidence on issues of voter eligibility and inclusion at the pre-election hearing. *See Barre-Nat'l, Inc.*, 316 NLRB 877; *see also N. Manchester Foundry, Inc.*, 328 NLRB 372 (1999) (affirming requirement to allow evidence-taking at pre-election hearing). All of the participating Board members held that § 9(c) of the Act itself—not just the Board's then-existing regulations—require the Board to permit parties to present evidence in support of their positions at a pre-election hearing.

For example, in *Barre-National*, the regional director instructed the hearing officer to refuse to allow the employer to present evidence at a hearing regarding the supervisory status of a group of employees that constituted eight to nine percent of the potential bargaining unit. 316 NLRB at 877. Instead, the regional director permitted only an offer of proof by the employer and—similar to what the Final Rule would accomplish—permitted the employees to vote subject to challenge, leaving the evidence gathering and resolution of the supervisory issue to the post-election challenge procedure.

The Board held that the regional director erred by refusing to allow the employer to present this evidence. According to the Board, the pre-election hearing "did not meet the requirements *of the Act* and the Board's Rules and Statements of Procedure." *Id.* at 878 (emphasis added); *see also N. Manchester Foundry*, 328 NLRB at 372-73 (holding that pre-

election hearing "did not meet the requirements *of the Act*, or of the Board's Rules" because the hearing officer "precluded the employer from presenting witnesses and introducing evidence in support of its contention that certain individuals were not eligible voters" (emphasis added)).

The Board cannot discharge its § 3(b) authority over all representation cases—to effectively decide whether issues of voter eligibility require pre-election resolution, how they should be resolved, or whether there should be a stay of the election pending resolution of such matters—without an adequate hearing record at the regional office level, including all evidence that reasonably bears on those issues. And if the Board's delegate admits evidence only on, for example, *whether* an appropriate bargaining unit exists, but excludes evidence of *who* may be in the bargaining unit or eligible to vote in the election, the review promised by statute becomes illusory and the election results themselves suspect.

Even if Congress left the definition of an "appropriate hearing" to the Board's unfettered discretion—which it did not—avoiding due process concerns would supply an additional reason to reject the Board's interpretation of the NLRA to permit the evisceration of the pre-election hearing that must take place absent an election agreement. *Cf. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) ("[I]n the absence of a clear expression of Congress' intent . . . we decline to construe the [NLRA] in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.").

The Fifth Amendment precludes government decisions that would otherwise deprive a party of liberty or property and "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Here, as the dissent

explains, the "private interests affected by this extraordinary government action are substantial" and include "the potential deprivation in every election proceeding of the statutorily assured right of parties to full pre-hearing litigation [and] the fundamental right of an employer . . . to ensure that a certified union truly represents a majority of employees in an appropriate bargaining unit." 79 Fed. Reg. at 74,451 (dissent). At the least, the hearing left in place by the Final Rule—a hearing that allows exclusion of evidence on important questions before an election—raises serious constitutional questions and should therefore be rejected.

For these reasons, the Final Rule is irreconcilable with the statutory scheme established by Congress and should be vacated.

B. The Final Rule Conflicts With The NLRA By Impermissibly Limiting Robust Debate And Depriving Employees Of An Informed Election.

The Final Rule also conflicts with § 8(c) of the NLRA, a critical piece of the NLRA's election scheme. Section 8(c) protects the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form," provided there is no "threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). The § 8(c) free-speech guarantee reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes." *Brown*, 554 U.S. at 67-68 (internal quotation marks and citation omitted). Robust debate is thus indispensable to the procedure for free and fair elections established by the NLRA.

Consistent with § 8(c), "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The time during the critical pre-election "campaign" period is when employers can provide information to their employees regarding the election and the consequences of unionization. *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 955

(D.C. Cir. 2013) (hereinafter "*NAM*"), *overrruled on other ground by Am. Meat Inst. v. United States, Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc) (noting that § 8(c) "serves a labor law function of allowing employers to present an alternative view and information that a union would not present." (internal quotation marks and citation omitted)).

The Act does not just protect the free speech rights of employers. The NLRA also gives employees the right "to bargain collectively through representatives of their own choosing . . . and to refrain from . . . such activit[y] . . . ." 29 U.S.C. § 157. Section 9(b) provides that "[t]he Board shall decide in each case whether, in order to assure *to employees* the *fullest freedom* in exercising the rights guaranteed by [the Act], the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b) (emphases added). The "fullest freedom" requirement is reinforced by the protection of free speech rights in § 8(c). *Gissel Packing Co.*, 395 U.S. at 617.

But these rights are meaningful only if the parties have sufficient time to engage in free speech *before* an election. *See* 79 Fed. Reg. at 74,438 (dissent) ("[The right to engage in protected speech before an election] only has meaning if there is sufficient time for the parties to communicate with employees about the choice of representation."); *cf. Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976), *superseded by statute on other ground as stated in McConnell v. FEC*, 124 S. Ct. 619 (2003) ("Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."). An election can affect workers for years to come. This is exactly why Congress and the courts guarantee, and protect, employer free speech rights in the labor relations setting. *NAM*, 717 F.3d at 955.

It is impossible to square Congress's policy judgment in favor of *robust* debate with the Board's directive that regional directors schedule elections *as quickly as possible*, regardless of other statutory objectives and requirements that do not support the fastest possible NLRA elections. When elections can take place in as little as two weeks from the filing of the petition, parties "will have too little time[,] measured by any reasonable standard," for robust debate to occur. 79 Fed. Reg. at 74,439 (dissent).

The Board's curtailment of debate mirrors the sort that courts have routinely rejected when applied to political electioneering. *Id.* at 74,439 n.588 (dissent) (citing *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating state ban on election-day newspaper editorials); *Emineth v. Jaeger*, 901 F. Supp. 2d 1138 (D. N.D. 2012) (enjoining state ban on all electioneering on election day); *Curry v. Prince George's Cnty., Md.*, 33 F. Supp. 2d 447, 454-55 (D. Md. 1999) (invalidating county ban on display of political signage for all but 45 days before and 10 days after a political election)). This is especially true where, as (regrettably) here, the government seeks to privilege some speech based on its content. *See* 79 Fed. Reg. at 74,440 (dissent) ("It is apparent from the statements of numerous commentators supporting the Rule that . . . the Final Rule will specifically disadvantage anti-union speech more than pro-union speech," by depriving employers of sufficient time to express their views against unionization, "and will correspondingly enhance a petitioning union's chances of electoral success."). The Board was never meant to have the power to suppress debate, much less to the advantage of one side.

The Board's stated justification for impinging on § 8(c) rights revolves around the idea that employers still have time to speak, either before an election petition is filed or during the limited time between the filing of the petition and the election. *Id.* at 74,319. This explanation does not withstand scrutiny. An employer's ability to make general, pre-petition observations

about unions is no substitute for post-petition speech. It is the filing of the petition that "initiates what the Board and the courts consider the 'critical period' prior to the election, a period during which the representation choice is imminent and speech bearing on that choice takes on heightened importance." *Id.* at 74,439-40 & n.591 (dissent) (citing *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962); *E.L.C. Elec., Inc.*, 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc.*, 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir. 2012); *NLRB v. Curwood Inc.*, 397 F.3d 548, 553 (7th Cir. 2005)).

Moreover, the legislative history of the 1959 amendments demonstrates that Congress believed that at least 30 days between petition and election was necessary to adequately assure employees the statutorily guaranteed "fullest freedom" in choosing whether to be represented by a union. As explained by then Senator John F. Kennedy, Jr., who chaired the Conference Committee, a 30-day period before an election is a necessary "safeguard against rushing employees into an election where they are unfamiliar with the issues." 105 Cong. Rec. 5361 (1959), *reprinted in* 2 LMRDA Hist. 1024 (emphasis added). Senator Kennedy stated "there should be at least a 30-day interval between the request for an election and the holding of the election," and he opposed an amendment that failed to provide "at least 30 days in which both parties can present their viewpoints." *Id.* at 5770, *reprinted in* 2 LMRDA Hist. 1085; *see also* H.R. Rep. No. 86-741, at 25 (1959), *reprinted in* 1 LMRDA Hist. 783 (30-day period was designed to "guard[] against 'quickie' elections").

Notably, until now, the Board's own procedures, consistent with congressional intent, have required the interval between petition and election to be longer than 30 days (absent stipulation by the parties). Under those procedures, at least 7 days were required before the pre-

election hearing, 76 Fed. Reg. at 80,139; an additional 7 days elapsed before the filing of post-hearing briefs, *id.* at 80,140; and regional directors were instructed not to schedule an election sooner than 25-30 days after directing an election. *Id.* These rules resulted in a pre-election period of at least 39 days from the filing of a petition (again, excluding situations where the parties voluntarily agreed to a shorter pre-election period).

Congress's rejection of pre-hearing election proposals based on opposition to "quickie elections" demonstrates that Congress believed a minimum period of 30 days after the filing of a petition was necessary for employers and employees to enjoy the "fullest freedom" in connection with representation elections. Indeed, Congress specifically rejected proposals to expedite the Board's pre-election procedures based on concerns that elections would take place *too quickly* to satisfy the Act's objective of giving employees (and employers) "the fullest freedom in exercising the rights guaranteed by [the] Act." 29 U.S.C. § 159(b); *see* 105 Cong. Rec. 16,629 (1959), *reprinted in* 2 LMRDA Hist. 1714, *describing* H.R. Rep. No. 86-741, at 1 (1959), *reprinted in* 1 LMRDA Hist. 934 ("There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out."). The Final Rule's deliberate attempt to reduce the time for free speech and debate to much less than 30 days—potentially cutting that minimum time in half—thus contravenes clear congressional intent. The Board does not have "general authority to define national labor policy by balancing the competing interests of labor and management." *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965); *see Hammontree*, 894 F.2d at 441 (rejecting the Board's argument that in light of "competing" objectives it has discretion to disregard one of Congress' goals).

As the dissent explains, the Board's rationale for limiting the opportunity for free speech is "the hallmark characteristic associated with *every* infringement on free speech: the government

simply determines the speech is not necessary." 79 Fed. Reg. at 74,440 (dissent). But Congress has already made a specific, contrary policy judgment in favor of robust debate. The Final Rule cannot be reconciled with—and, indeed, thwarts—that legislative judgment. Furthermore, the Rule's impingement on free speech unacceptably creates "serious constitutional difficulties" with the First Amendment that cannot stand. *See AFL-CIO v. FEC*, 333 F.3d 168, 175-79 (D.C. Cir. 2003). For these reasons, too, the Final Rule conflicts with the NLRA and should be set aside.

II. The Final Rule Is Arbitrary And Capricious In Violation Of The APA.

Even if the Final Rule were consistent with the NLRA, which it is not, it would still violate the APA because it is arbitrary and capricious. Agency action is arbitrary and capricious when the agency has not engaged in "reasoned decision-making"—that is, the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to . . . the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Moreover, the "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014).

The hundreds of pages in the Board's Final Rule contain remarkably little logic or sound explanation for the sweeping changes made by the Final Rule—which "leaves unanswered the most fundamental question regarding any agency rulemaking, which is whether and why rulemaking is necessary." 79 Fed. Reg. at 74,431 (dissent).

All available evidence indicates that the vast majority of election cases go forward with no "delay" at all—and the Final Rule "does not even identify, much less eliminate, the reasons responsible for those few cases that have excessive delays." *Id.* As for the Board's goal of

eliminating "unnecessary" litigation in the representation-election process, the available evidence demonstrates instead that the Final Rule will have the opposite effect. *Id.* at 74,449-50 (dissent). As the dissent sums up, "the available data do not provide a rational basis for the Final Rule's wholesale reformulation of election procedures." *Id.* at 74,434. Indeed, the record squarely contradicts the purported reasons for the Final Rule. Because the Board has thus "offered an explanation for its decision that runs counter to the evidence," *State Farm*, 463 U.S. at 43, the Final Rule must be set aside. *See Chevron*, 467 U.S. at 842-43; *Sorenson*, 755 F.3d at 709-10.

A. The Final Rule Unnecessarily Abandons Established Procedures For Unexplained Reasons, Despite The Board's Undisputed Success In Timely Conducting Elections.

In light of all available objective data regarding the Board's election-related performance measures, the Final Rule is best characterized as a "solution in search of a problem." 79 Fed. Reg. at 74,449 (dissent). Most glaringly, the Board did not find the "problem"—significant delays, characterized as more than 56 days from petition to election—in more than a fraction of all cases. To the contrary, the evidence shows that significant delays occur in less than 6 percent of elections. *Id.* at 74,434. And only about one-tenth of those elections, or 0.6 percent of all elections, involve delays related to the procedures the Rule eviscerates: the pre-election hearing or regional director decision-making before the election. 79 Fed. Reg. at 7349 (Members Miscimarra & Johnson, dissenting from Notice of Proposed Rulemaking). As the dissent from the Final Rule put it, "[t]hese relatively few cases do not provide a rational basis for rewriting the procedures governing *all* elections." 79 Fed. Reg. at 74,456 (dissent).

Recent D.C. Circuit precedent demonstrates why the Board acted arbitrarily and capriciously here. In *Sorenson*, the FCC sought to implement a new rule mandating sales charges on phones manufactured for the hearing impaired. 755 F.3d at 707. According to the FCC, the new rule was intended to deter fraudulent acquisition and use of the equipment—fraud

that could artificially drain the fund created to finance use of the devices. *Id.* The problem was that "the agency offer[ed] no evidence suggesting there [wa]s fraud to deter." *Id.* Insofar as the agency could point only to a speculative problem it sought to resolve, actions taken to remedy that problem were arbitrary and capricious. *Id.* at 709. So too here, the Final Rule is a solution in search of problem that cannot withstand even deferential reasonableness review. In the D.C. Circuit's words, the Board cannot create a rule to "defeat a bogeyman whose existence was never verified." *Id.* at 710.

There is simply no rational connection between the Board's massive overhaul of the entire election process for *all* cases and the narrow subset of election cases in which a significant delay occurs. The Final Rule thus epitomizes arbitrary and capricious agency action. This Court should vacate it.

B. Contrary To The Board's Stated Goals, The Final Rule Will Trigger *More* Election-Related Litigation.

Worse still, the available evidence here actually contradicts the Board's stated rationale for its action. *See State Farm*, 463 U.S. at 43 ("Normally, the agency rule would be arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency."). The lone tangible goal articulated by the Final Rule is that "[d]uplicative and unnecessary litigation is eliminated." 79 Fed. Reg. at 74,308. But even if *some* litigation is eliminated, the Board failed to consider that the *total amount* of election-related litigation will only increase under the Final Rule. *See id.* at 74,435 (dissent) ("our colleagues do not adequately address the likelihood that the *overall* time needed to resolve post-election issues *will increase*, as will the number of rerun elections"). That is because (1) the Final Rule sharply reduces the ability of and incentives for parties to enter into stipulated or consent election agreements, and (2) the Final Rule's elimination of the 25 to 30-day waiting

period for the Board to grant pre-election review of a regional director's decision, together with the elimination of mandatory post-election review and the exclusion of relevant evidence necessary for any meaningful review, will lead to an increase federal-court litigation that can take years to resolve.

1. The Final Rule undermines the incentive for the parties to negotiate election agreements, a critical litigation-reducing component of representation elections.

Under the election procedures that the Final Rule would displace, there is no pre-election litigation in 90 percent of cases because the parties negotiate an election agreement. *Id.* at 74,375. The high number of stipulated elections, in turn, has enabled the Board to conduct elections within a median of 38 days after the petition. *Id.* at 74,341 (dissent). That is likely why the Board's own Casehandling Manual directs Board agents to make every effort to secure an election agreement as early as possible in the process.[11]

The Board admits that existing procedures lead to election agreements in an overwhelming majority of cases. *Id.* at 74,318. And the Board acknowledges that "the bargaining units and election details agreed upon in the more than 90 percent of representation elections that are currently conducted without pre-election litigation are unquestionably influenced by the parties' expectations concerning what would transpire if either side insisted upon pre-election litigation." *Id.* at 74,387. But the Final Rule eliminates the very incentives and expectations that drive the parties toward election agreements.

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[11] *See, e.g.*, Casehandling Manual, Part Two, § 11008 (Noting, as part of the Board's initial communication, "it should be emphasized that it is the Agency's policy to make every effort to secure an election agreement . . . ."); *id.* § 11084.2 ("[E]fforts to dispose of a case by agreement should begin during the first contacts with the parties, and continue at all stages thereafter . . . ."); *see also* Report of Best Practices Committee: Representation Cases (December 1997) at 8 ("[T]he Committee concludes that the best practice is to keep the lines of communication open with the parties . . . and be tenacious in pursuing an agreement, as well as in narrowing the issues in the event a hearing is necessary . . . .").

For example, the Final Rule provides no guidance on when an election will be scheduled if an employer enters into an election agreement with the union, despite many calls from commenters for the Board to provide this guidance. *Id.* at 74,324. This information is essential in negotiating an election agreement. Under existing procedures, the time target for an election is well known and clearly communicated to all parties and the general public.[12] Employers are well aware of the 42-day target for holding an election and are routinely told that, if they enter into an election agreement, there is discretion to negotiate an election date anywhere within that 42-day period. The ability to negotiate a mutually acceptable date, within that known time target, is a significant incentive to enter into an election agreement.

Furthermore, without the failsafe of mandatory post-election review, employers will be more reluctant to enter into binding election agreements. *See id.* at 74,450 ("[M]aking Board review of post-election disputes discretionary is likely to discourage parties from entering into stipulated election agreements, *the principal mechanism for shortening the pre-election timeline*, thereby resulting in an increase in pre- and post-election litigation." (emphasis added)).

The Board acknowledges as much, but speculates that "[a]ny short term difficulties in reaching election agreements[ ] should dissipate quickly, as they have in the past when prior time targets have been adjusted." *Id.* at 74,324. Changes effected by the Final Rule, however, are so sweeping and unprecedented that the Board's reliance on the "past" rings hollow. *See id.* at 74,450 (dissent) ("It [is] natural that the elimination of the right to agree to mandatory post-election Board review will adversely affect the parties' willingness to compromise on pre-election issues."). The Board is introducing a scheme that fundamentally changes the hearing process envisioned by Congress. And whatever deference may be due to some predictive

[12] *See, e.g.*, GC Mem. 11-09, at 18-19 (Mar. 16, 2011); GC Mem. 07-04, at 10 (Apr. 4, 2007); GC Mem. 06-04, at 8 (Mar. 21, 2006); GC Mem. 04-02, at 2 (Apr. 22, 2004).

judgments of agencies, courts are required to step in when those predictions defy logic and the available evidence. *Sorenson*, 755 F.3d at 710 ("But unlike its counterpart, the [agency's new] Rule did not want for evidence; instead, there was contrary evidence questioning its efficacy and necessity. The Commission left these serious concerns unaddressed. Accordingly, its decision to implement the [new] Rule was arbitrary and capricious."). Removing an essential litigation-reducing tool will necessarily cause pre- and post-election litigation increases in these cases—an arbitrary and capricious result that this Court should refuse to countenance. *Id.*

The Board's failure to adequately address these concerns, especially given the contradictions between the stated objectives of the Final Rule and the actual evidence before the Board, underscores the conflict between the agency's action and the outcome.

2. The Final Rule will increase federal-court litigation.

In severely curtailing the opportunity for Board review—*i.e.*, by removing the 25-30 day waiting period (thus shrinking the time for pre-election review) and by making mandatory post-election review discretionary—the Final Rule will force more employers to turn to the federal courts for the review that is denied by the Board. To be clear, the NLRA does not permit direct judicial review of representation decisions. *AFL v. NLRB*, 308 U.S. 401, 405, 409-11 (1940). As a consequence, an employer may seek judicial review only indirectly—after an election has been held and the results certified—by refusing to bargain with the union, at which point the Board can prosecute an unfair labor practice complaint that will result in a final, appealable Board order. *See, e.g.*, *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 709 (2001). In seeking review of that order in a court of appeals, the employer can then challenge the Board's (or regional director's) determinations in the underlying representation case.

Under the Board's current election system, "in only very few cases do employers refuse to bargain in order to test the validity of the certification. From FY 2008 to FY 2013, between 8

and 13 test of certification cases were filed each year in the U.S. Circuit Courts of Appeals." 79 Fed. Reg. at 74,344 n.176. That is not surprising, given the opportunities for Board review under the current system. But the Final Rule's severe curtailment of those opportunities likely will lead to an increase in "test of certification" cases in federal court—and even a slight increase in these cases will necessarily trigger more litigation, as the dissent explains. *Id.* at 74,451 (dissent) ("The elimination of mandatory post-election Board review is also likely to cause an increase in 'test of certification' cases where employers engage in post-certification refusals to bargain as the only means of obtaining review of the Board's certification.").

In *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004), the D.C. Circuit made clear that an agency acts arbitrarily and capriciously if it counts the benefits of a rule without accounting for the offsetting costs. *Id.* at 1217-19 ("That analysis, then, assumes away the exact effect that the agency attempted to use it to justify. The agency's reliance on the cost-benefit analysis to justify this increase is therefore circular, and the rationality of that explanation is correspondingly doubtful."). The D.C. Circuit reaffirmed that same precept in *Chamber of Commerce v. SEC*, 412 F.3d 133, 142-44 (D.C. Cir. 2005) ("And, as we have just seen, uncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure."). Here, the Final Rule pursues quicker elections at all costs, including the likelihood of increased post-election litigation that will delay the resolution of the ultimate question in an election: whether the union properly represents a particular group of employees. That selective focus on purported benefits while ignoring offsetting costs is arbitrary and capricious. *See Pub. Citizen*, 374 F.3d at 1217-19.

3. The potential to moot litigation involving some voter eligibility issues cannot justify increasing litigation concerning the validity of the election itself.

According to the Board, a party that, under the current system, would have litigated a supervisory status issue before an election may decide not to litigate that issue post-election under the Final Rule if the margin of victory for the union makes those voters irrelevant to the outcome. 79 Fed. Reg. at 74,387. In this light, the Board advocates that under its "vote now, hearing later" model for voter eligibility and inclusion disputes—including supervisory status—only 15 percent of deferred issues "will ever have to be addressed." *Id.* at 74,387 n.370. But that proposition fails to consider that deferring voter eligibility and inclusion issues can taint the entire election, no matter how the vote tally comes out.

For example, as commenters explained, employees whose supervisory status is in doubt may engage in conduct that will later require overturning the election.[13] *Id.* at 74,388, 74,408. There is no shortage of cases in which the Board has ruled that objectionable conduct by low-level or first-line supervisors materially affected an election.[14] Thus, deferring resolution of issues of supervisory status will not serve to reduce litigation, as the Final Rule purportedly seeks to do. It will result in the Board having to set aside more elections. And there is little point to reducing pre-election litigation if the results of the election must ultimately be set aside.

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[13] *See SNE Enters.*, 348 NLRB 1041, 1043-44 (2006) (setting aside election result even though supervisors who engaged in pro-union conduct had been eligible voters in three prior Board elections, stating that it does not matter "that the supervisors here engaged in the conduct prior to the time when they were adjudicated to be supervisors"); *Harborside Healthcare, Inc.*, 343 NLRB 906, 911(2004) ("The essential point . . . is that employees should be free from coercive or interfering tactics by individuals who are supervisors, even if the employer or union believes that the individual is not a supervisor.").

[14] *See Harborside Healthcare*, 343 NLRB at 911-14 (comments by first-level supervisor encouraging nursing assistants to vote for the union and solicitation of union authorization cards interfered with the nursing assistants' free choice and materially affected the outcome of the election); *Barton Nelson, Inc.*, 318 NLRB 712, 712-13 (1995) (personal distribution of anti-union hats by shift supervisors directly to large number of employees in the petitioned-for unit was objectionable conduct requiring setting aside an election); *Cmty. Action Comm'n of Fayette Cnty., Inc.*, 338 NLRB 664, 667 (2002) (setting aside an election where a supervisor responded to an employee's question about rumors that she would not get her job back after the annual summer layoff by stating that if the union won she might not have a job).

Indeed, the Final Rule would put employers "on the horns of a difficult dilemma." *See Barre-Nat'l, Inc.*, 316 NLRB at 880 (Member Cohen, dissenting). As the dissent here points out, "[m]any employers will be placed in an untenable situation regarding such individuals based on uncertainty about whether they could speak as agents of the employer or whether their individual actions—though not directed by the employer—could later become grounds for overturning the election." 79 Fed. Reg. at 74,438 n.581 (dissent). Furthermore, "[w]here employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or character from the proposed bargaining unit, the employees have effectively been denied the right to make an informed choice in the representation election." *NLRB v. Beverly Health & Rehab. Servs., Inc.*, 120 F.3d 262, 1997 WL 457524, at *4 (4th Cir. Aug. 12, 1997) (unpublished table decision).[15]

Thus, the Final Rule would not only shift litigation from the pre-election phase to the post-election phase, it also would transfer the litigation from the Board to the federal courts, by making the circuitous path of a "certification test" case the only guaranteed opportunity for review of a regional director's decision. Worse still, the chances that a new election will need to be held, months or years after the first, will also increase if crucial issues of eligibility and inclusion are deferred until after the election. For these reasons, the Final Rule is entirely counter-productive. The Board's elaborate efforts to shirk its statutory obligations to conduct an "appropriate" pre-election hearing and to review the decisions of its regional directors will not

[15] *See also NLRB v. Parsons Sch. of Design*, 793 F.2d 503, 507-08 (2d Cir. 1986) (finding a post-election change in unit size of about 10 percent denied employees the right to an informed vote); *NLRB v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1302 (9th Cir. 1985) (holding that a unit reduction from 17 employees in two classifications to 11 employees in one classification required a new election); *Hamilton Test Sys., New York, Inc. v. NLRB*, 743 F.2d 136, 140-41 (2d Cir. 1984) (ruling that reduction of unit by 50 percent and removal of two classifications rendered election results void).

reduce litigation; it will only move it to federal court and delay the ultimate resolution of the representation case. Where, as here, an agency's explanation of facts runs counter to the actual evidence before it and cannot answer the comments raised during the rulemaking process, the agency's action should be set aside. *See State Farm*, 463 U.S. at 43; *Sorenson*, 755 F.3d at 710.

C. The Final Rule's Mandatory Disclosures of Employees' Personal Information Is Arbitrary and Disregards Substantial Privacy Concerns.

The Final Rule mandates disclosure of all potential voters' personal telephone numbers and email addresses. The Rule accomplishes that result by requiring employers to provide labor organizations "a list of full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ('cell') telephone numbers) of all eligible voters." 29 C.F.R. §§ 102.62(d) & 102.67(l). Not only has the Board imposed these new and intrusive disclosure obligations, it has also failed to provide any "opt-out" procedure for employees, 79 Fed. Reg. at 74,346, 74,453 (dissent), and failed to provide any meaningful penalty for misuse of the personal information.

Under the existing system, employers are required to provide unions only with employees' home addresses per the Board's 1966 decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1939-40 (1966). The Board points to technological developments in support of its expanded disclosure requirements, but does not explain why those requirements are necessary. Though commenters pointed out the privacy danger of disclosing email addresses, 79 Fed. Reg. at 74,341-42, the Board's only response was that disclosing home addresses is even more dangerous.[16] But no one can reasonably question that technology brings greater risks when employees' personal data is compromised.

[16] The Board also discounted the point that home phone numbers are not required under *Excelsior* even though they existed at the time of that decision. 79 Fed. Reg. at 74,338-39.

Even worse, while acknowledging that "the privacy, identity theft, and other risks may be greater than the Board has estimated," the Board nonetheless asserted—without any reasoning or analysis—that those "risks are worth taking." 79 Fed. Reg. at 74,341-42. That conclusory statement is insufficient to satisfy the reasoned decision-making requirement of the APA. *See Pub. Citizen*, 374 F.3d at 1217 ("The agency may of course think that [the] effects [of its Rule] are not problematic (or are outweighed by other considerations, like cost), but if so it was incumbent on it to say so in the rule *and to explain why*." (emphasis added)); *cf. Comcast Corp. v. FCC*, 579 F.3d 1, 7 (D.C. Cir. 2009) ("That a problem is difficult may indicate a need to make some simplifying assumptions, but it does not justify ignoring altogether a variable so clearly relevant and likely to affect" the agency's rule. (citation omitted)). At the same time, the Board inexplicably declined to put in place common-sense privacy protections—like those suggested by the National Association of Manufacturers and the Chamber—that would require unions to destroy the personal contact information after a period of time. 79 Fed. Reg. at 74,360.

The Board gave those concerns even shorter shrift by declining to announce penalties for misusing the information. Although the Final Rule provides that "[p]arties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters," the Rule stops short of announcing a penalty, saying only that "should such misuse of the list occur, the Board will provide an appropriate remedy." *Id.* at 74,344. The APA's reasoned-analysis standard—though a deferential one—requires more than an agency's *ipse dixit* assurances that its decision is for the best, especially in the face of serious privacy and safety concerns. *See Sorenson*, 755 F.3d at 709; *Pub. Citizen*, 374 F.3d at 1217. The Rule should be set aside for that reason, too.

III. The Final Rule Unconstitutionally Compels Employer Speech.

Quite apart from the conflict discussed above with § 8(c)'s free-speech guarantees, the Final Rule also violates the First Amendment by compelling employer speech through a mandatory post-petition notice that must be posted in the employer's workplace within two business days after the employer receives notice that a petition has been filed. 79 Fed. Reg. at 74,309 (dissent). In essence, the Board is commandeering employers to disseminate a message the employer may not support or agree with, simply because someone filed a petition with the government—a petition that may not even provide a valid basis to proceed to an election.

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This principle applies to individuals and corporations alike; thus, "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Ca.*, 475 U.S. 1, 16 (1986) (plurality opinion). A regulation compelling speech is therefore generally subject to strict scrutiny, and can survive only if it is a "narrowly tailored means of serving a compelling state interest." *Id.* at 19.

Here, the Rule compels employers to post workplace notices after a petition is filed with the Board, but before the Board has even determined that an election should occur. 79 Fed. Reg. at 74,309 ("When a petition is filed, the employer must post and distribute to employees a Board notice about the petition and the potential for an election to follow."). By forcing employers to post a notice that facilitates a union's organizing campaign, the Rule conscripts employers in speech that they may not want to make. That compelled speech implicates employers' First Amendment rights just as surely as a law requiring the employer to post notices of political campaign meetings.

Nor can it be argued that the government may compel employers' speech as a form of commercial speech regulation. Under the commercial speech doctrine, the government's "power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 499 (1996) (citation omitted). The Supreme Court has thus held that the government can require commercial speech to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). And under Supreme Court precedent, it can include compelled disclosures about the efficacy, safety, and quality of the advertiser's product. *See, e.g.*, *Zauderer v. Office of Disciplinary Council for Supreme Court of Ohio*, 471 U.S. 626, 637-40 (1985); *Am. Meat Inst.*, 760 F.3d at 22.

But the Final Rule's mandate that employers must post workplace notices after a petition is filed with the Board has nothing to do with regulating a commercial transaction. Under *Zauderer* and its progeny, compelled disclosure may be permissible to convey "purely factual and uncontroversial" information—but such disclosures may be required only if they regulate commercial messages. *See Zauderer*, 471 U.S. at 651; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 59 U.S. 229, 249-50 (2010).

Where, as here, the government seeks to co-opt a speaker's message not to regulate a commercial transaction but, rather, to assist a union in its campaign to organize employees, the regulation is presumptively unconstitutional. Indeed, this case is all but controlled by *Pacific Gas & Elec. Co.* In that case, the challenged law required a commercial actor (a power company), in a commercial setting (the posting of its bills to consumers), to disseminate the message of other groups with competing policy goals. *Pac. Gas & Elec. Co.*, 475 U.S. at 4-7.

The Supreme Court held that the law could not survive strict scrutiny without once suggesting that a different standard should apply merely because the speech of a commercial actor was being regulated. *Id.* at 19-21; *see also Wooley*, 430 U.S. at 714-16 (prohibiting government from compelling speech when the message favored another party). The *Zauderer* exception is thus just as inapplicable here as it would be in other First Amendment contexts. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994).

Indeed, while the D.C. Circuit did not have occasion to address directly the validity of the Final Rule's election-notice requirement in *NAM*, 717 F.3d at 959 n.19, it did hold in that case that *Zauderer* was inapplicable in a materially indistinguishable context. Specifically, the Board in *NAM* argued that it could compel employers to post a notice of employee rights, notwithstanding NLRA § 8(c), because the notice was a compelled commercial disclosure, subject to less scrutiny under *Zauderer*. *Id.* at n.18. The D.C. Circuit rejected that argument, however, because there was no suggestion that the notice was intended or needed to regulate a commercial transaction. *Id.*[17]

Because the Final Rule's notice requirement is not a regulation of a commercial transaction, and instead compels speech in support of a union's organizing campaign, it is subject to strict scrutiny—a burden it cannot satisfy.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to plaintiffs and vacate the Final Rule.

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[17] Although the en banc D.C. Circuit recently abrogated *NAM* to the extent that it held that *Zauderer* applied only to disclosure requirements intended to prevent customer deception, the Court did not attempt to expand *Zauderer* beyond the context of commercial transactions. *See Am. Meat Inst.*, 760 F.3d at 20-22 (noting that the Court was addressing "commercial speech" and merely holding *Zauderer* is not limited to cases where the government is seeking to prevent deception in commercial transactions).

Dated: February 4, 2015

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPS GROUND FREIGHT, INC.,

Employer

and **Case 04-RC-165805**

TEAMSTERS LOCAL 773,

Petitioner.

_____/

MOTION FOR LEAVE TO FILE CORRECTED REQUEST FOR REVIEW

Pursuant to Sections 102.67(c) and 102.69(c)(2) of the National Labor Relations Board's Rules & Regulations, 29 C.F.R. §§102.67(c); 102.69(c)(2), UPS Ground Freight Inc., ("UPS Freight" or the "Company"), filed its Request for Review of the Acting Regional Director's January 5, 2016 Decision and Direction of Election and his March 11, 2016 Decision on Objections to Election and Certification of Representative on Friday, April 1, 2016.

On Monday, April 4, 2016, a representative from the National Labor Relations Board informed my office that the Request for Review was accepted as timely filed but required a table of contents and table of authority because it exceeded 20 pages in length. Upon creating the table of contents, it was discovered that the heading numbering scheme was incorrect. Therefore, the Company respectfully requests that it be granted leave to file a corrected Request for Review for the sole purpose of correcting the numbering of headings in the Request for Review. The Company represents that no other changes will be made nor will new arguments be presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion for Leave to File Corrected Request for Review was served by electronic mail this 5th day of April, 2016 on the following:

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April 5, 2016

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Re: UPS Ground Freight, Inc.
Case 04-RC-165805

Dear Counsel:

This will acknowledge receipt of your Motion for Leave to File Corrected Request for Review filed on April 5, 2016 in the subject case. The motion is granted. Accordingly, the corrected Request for Review will be forwarded to the Board for consideration once it has been filed.

Very truly yours,

/s/ Farah Z. Qureshi
Associate Executive Secretary

cc: Parties

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPS GROUND FREIGHT, INC.,

Employer

and **Case 04-RC-165805**

TEAMSTERS LOCAL 773,

Petitioner

_____/

CORRECTED

REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S DECISION

AND DIRECTION OF ELECTION

AND DECISION ON OBJECTIONS TO ELECTION

AND CERTIFICATION OF REPRESENTATIVE

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPS GROUND FREIGHT, INC.,

Employer

and **Case 04-RC-165805**

TEAMSTERS LOCAL 773,

Petitioner

_____/

CORRECTED
REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION AND DECISION ON OBJECTIONS TO ELECTION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to Sections 102.67(c) and 102.69(c)(2) of the National Labor Relations Board's Rules & Regulations, 29 C.F.R. §§102.67(c); 102.69(c)(2), UPS Ground Freight Inc., ("UPS Freight" or the "Company"), submits the following Request for Review of the Acting Regional Director's January 5, 2016 Decision and Direction of Election ("RD Decision")[1], and his March 11, 2016 Decision on Objections to Election and Certification of Representative ("Certification of Representative")[2], and states the following in support:

I. PRELIMINARY STATEMENT

The National Labor Relations Board ("NLRB" or "the Board") is an independent federal agency created to enforce the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. §§ 151-169, which, by its terms, applies equally to both unions and employers. The Board has

[1] The Acting Regional Director's Decision and Direction of Election will be cited in this request as "(D&D, at ___)."

[2] The Acting Regional Director's Decision on Objections to Election and Certification of Representative will be cited in this request as "(CofR, at __)."

authorized regional offices across the country to exercise its jurisdiction over matters involving labor relations. Region 4, which maintains jurisdiction over eastern Pennsylvania and southern New Jersey, has, at all times, governed these proceedings, and has exercised the authority granted it by the Board to evaluate the Union's petition for election and accompanying showing of interest, to oversee the pre-election process and representation hearing, to direct and conduct the election, to perform the tally of the ballots, and to consider and resolve the parties' objections to the election, among other duties.

Dennis P. Walsh ("Mr. Walsh") was selected by the Board on January 29, 2013, to serve as Regional Director of Region 4, and has maintained that role at all relevant times during these proceedings. By any reasonable account, Mr. Walsh has been vested with substantial quasi-judicial and quasi-prosecutorial authority over all matters within Region 4's jurisdiction. As the Board is undoubtedly aware, Mr. Walsh was suspended without pay for a period of 30 days at the end of December following the filing of the Union's petition for election in this matter. Although the grounds for his suspension have not been made public by the Region, reports have recently surfaced that raise serious questions regarding the impartiality with which the Region has been exercising its authority. (Exh. A).

While serving as Regional Director of Region 4, Mr. Walsh allegedly is also serving as chairman of the Peggy Browning Fund ("PBF"), an organization whose stated mission "is to educate and inspire the next generation of law students to become advocates for workplace justice." Despite this seemingly benign description, PBF is widely known to have strongly pro-union, anti-employer leanings. Indeed, in a letter recently submitted to members of Pennsylvania's congressional delegation (Exh. B), PBF is described as "a union activist organization funded solely with donations from organized labor," whose signature event is a

"worker's rights conference" aimed at "organizing low wage workers." (Id.). The letter characterizes Mr. Walsh as "the chairman of a union activist organization whose stated goal is to organize workers, and at the same time asked to be a neutral investigator of labor unions that violate labor laws and employers that allegedly violate union rights," and alleges significant conflicts of interests as well as numerous ethical and legal violations. (Id).

The allegations levied against Mr. Walsh raise substantial questions concerning his impartiality, and, by association, the impartiality of the Region itself. The Company maintains that, for the reasons stated herein, Board review of the issues raised in this request is appropriate on their merits. As well, given the allegations regarding Mr. Walsh, and the appearance of culpability raised by his recent disciplinary suspension[3], the Company urges the Board to view its request for review with an eye towards the possibility that all of the Region's actions in this matter have been systematically tainted by a partiality instilled from the top down.

II. BACKGROUND

UPS Freight, headquartered in Richmond, Virginia, provides transportation and delivery services for a variety of customers across the United States, including commercial customers. One of those customers is Advance Auto Parts ("AAP"), a national auto parts retailer. Under its contract with AAP, UPS Freight delivers AAP products from nine AAP distribution centers to AAP retail stores nationwide. The Company employs truck drivers (called "Road Drivers") to drive tractor trailers on delivery routes from each distribution center to the retail stores serviced by that center.

[3] The Company has only learned of the disciplinary action taken against Mr. Walsh as a result of the apparent undisclosed conflict of interest in the past few days, and intends to file an appropriate request under the Freedom of Information Act in order to obtain additional information concerning these matters. Accordingly, the Company reserves the right to file a supplemental brief on this issue, and to take other action, as necessary, to preserve its rights under both the Act and the United States Constitution.

On December 10, 2015, the International Brotherhood of Teamsters Local 773 ("the Union"), filed a petition for election ("the Union's petition") seeking to represent a unit of all regular full-time and part-time drivers employed by UPS Ground Freight, Inc. ("UPS Freight" or "the Company") at its facility located at 9755 Commerce Circle in Kutztown, Pennsylvania ("Kutztown distribution center"). The Union's petition was processed in accordance with the procedures set forth by the Board in its new election rule entitled "Representation – Case Procedures; Final Rule," 29 C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74439 ("the Final Rule"), which became effective April 14, 2015, and in accordance with guidance set forth in General Counsel Memorandum 15-06 entitled "Guidance Memorandum on Representation Case Procedure Changes."

In accordance with the requirements set forth in the Final Rule, the Company submitted its timely statement of position[4] on December 18, 2015. A representation hearing[5] was conducted by the Region on December 21, 2015. During that hearing, the Union moved to amend its petitioned-for unit to include all "certified safety instructors and dispatchers employed by UPS Ground Freight, Inc. at its Kutztown, Pennsylvania facility." (Tr., at 8-10). Its motion was subsequently granted in the RD Decision. (D&D, at 1, n. 2). Following the issuance of the RD Decision (and over the Company's strong objection), the Region conducted the election by mail ballot. A tally of ballots conducted on February 1, 2016, resulted in the Region's determination that a majority of the employees in the petitioned-for voting unit cast votes in favor of representation.

[4] The Company's Statement of Position will be cited in this request as "(SOP, at __)."

[5] The transcript of the December 21, 2015 representation hearing will be cited in this request as "(Tr, at __)."

Following the election, on February 9, 2016 and February 16, 2016, respectively, the Company filed its Objections to the Result of the Election[6] and accompanying offer of proof[7] setting forth, in sum, the following challenges that the Company advances herein:

A. The Region's decisions and arbitrary treatment of the Company's position throughout these proceedings, including its refusal to address significant issues relating to the supervisory status of employee Frank Cappetta and the potential that his conduct tainted the showing of interest, its conduct of the election by mail ballot and refusal to consider the Company's revised election proposal, and its administration of the pre-election process, the election, and the post-election process, resulted in a patently unfair and prejudicial process that contravened the Company's rights under the Act and its right to due process under both the Act and the Constitution.

B. The approved voting unit comprised of "all regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania who were employed during the payroll period ending January 2, 2016," was inappropriate because it excludes the regular drivers (full-time and part-time) employed by the Company at its eight other distribution facilities, which the evidence proved share an overwhelming community of interest with the employees sought to be represented by the Union.

C. The approved voting unit is inappropriate to the extent it includes certified safety instructors and dispatchers, as proposed by the Union at the representation hearing, since the employees performing the duties associated with these positions do not "regularly perform duties similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit."

D. The imposition of the Final Rule in this proceeding, and the Region's arbitrary and unfair interpretation and enforcement of its provisions throughout, resulted in significant prejudice to UPS Freight's statutory rights and materially affected the results of the election to the Company's detriment.

E. The application of the guidance set forth in General Counsel Memorandum 15-06 further restricted and interfered with the Company's right to fully investigate and respond to the representation petition.

These objections, which the Company now sets forth in support of this request for review, are consistent with the positions maintained by the Company throughout these

[6] The Company's election objection will be cited in this request as "(Obj., at __)."
[7] The Company's offer of proof in support of its election objections will be cited at "(Offer, at __)."

proceedings, as set forth both in the Company's statement of position and its election objections, and are supported by substantial evidence contained in the transcript of the December 21, 2016 representation hearing and submitted by the Company in its offer of proof. The Company incorporates fully by reference the arguments and evidence set forth in these filings and transcripts such that they shall be deemed to be set forth fully herein.

III. STANDARD OF REVIEW

Section 102.67(c) of the Board's Rules and Regulations authorizes the Board to grant a request for review upon one or more of the following grounds:

1. That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

2. That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

3. That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

4. That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. §102.67(c).

IV. ARGUMENT

Upon the Board's stated standards, compelling reasons exist for the Board to grant review of the following issues:

A. Board Review is Appropriate Since the Region's Decisions on Substantial Factual Issues, and Prejudicial and Arbitrary Treatment of the Company's Position Throughout These Proceedings, Resulted in Prejudicial Error Adversely Affecting the Company's Rights.

UPS Freight seeks review as a result of the Region's arbitrary interpretation and enforcement of the Final Rule in this proceeding, which resulted in a patently unfair and prejudicial process that contravened the Company's rights under the Act and its right to due

process under both the Act and the Constitution. At a minimum, the Region's following decisions, and otherwise arbitrary and prejudicial treatment of the Company's position, warrant review, particularly given the dark shadow cast over these proceedings as a result of the afore-mentioned accusations against Mr. Walsh and the disciplinary suspension that appears to have resulted from them:

1. The Region's Disregard of the Company's Position with Respect to Frank Cappetta's Supervisory Status.

Perhaps the most significant evidence of the Region's arbitrary and prejudicial treatment of the Company's rights in this proceeding lies with its consistent and blatant refusal to address the Company's position that Mr. Cappetta is a statutory supervisor within the meaning of Section 2(11) of the Act.

Since the outset of these proceedings, the Company has steadfastly asserted Mr. Cappetta's supervisory status. Mr. Cappetta's supervisory status under Section 2(11) is significant, and even vital, to the Company's rights in these proceedings for three reasons. First, and most obviously, it dictates his eligibility to vote in the election. Next, and more importantly, Board law makes clear that "an employer is entitled to the undivided loyalty of its representatives." *See NLRB v. Yeshiva University*, 444 U.S. 672, 682, 100 S. Ct. 856, 63 L. Ed. 2d 115 (1980). To this point, the Company has consistently maintained that a determination of Mr. Cappetta's supervisory status was necessary prior to the election to provide UPS Freight fair notice of whether it could expect and require Mr. Cappetta to advocate and support the Company's position during the campaign. Finally, and most significantly, the Company has maintained since the onset of these proceedings that Mr. Cappetta's supervisory status is relevant to the viability of the Union's petition, and ultimately to the results of the election, to the extent it is supported by a showing of interest based on "tainted" cards solicited by him. *See Harborside*

Healthcare, Inc., 343 NLRB 906, 911 (2004) (finding that "solicitations [of union authorization cards by supervisors] are inherently coercive absent mitigating circumstances.").

a. <u>The Company Presented Substantial Evidence of Mr. Cappetta's Supervisory Status.</u>

The record evidence shows that Mr. Cappetta is a statutory supervisor. The Company elicited substantial evidence, both at the representation hearing and in its offer of proof, to support its position, all of which was literally ignored by the Region throughout this proceeding. Specifically, the testimony elicited at the hearing demonstrates that, although he performed duties as a dispatcher, certified safety instructor, and (very infrequently) Road Driver, about 80% of Mr. Cappetta's work hours during the past year were devoted to the functions associated with his dispatcher duties. (Tr., at 219, 265. 290). In this position, Mr. Cappetta, among other duties, regularly coordinated routes and assigned drivers to those routes (Tr., at 125, 127, 129, 135), coordinated with the Company's customer to determine the number of routes required each day (Tr., at 126-127), identified and resolved "split routes" and "overloads" (Tr., at 136-137), regularly assigned coverage for absences resulting from sick days, vacation days, and other leaves of absence (Tr., at 138, 141-142), was authorized to contact third party temporary labor providers and to schedule temporary drivers as needed (Tr., at 139-141), scheduled vacation and coordinated employee absences with payroll (Tr., at 142), established his own schedule, hours of work, and break times and duration (Tr., at 146-147, 157), held meetings with multiple drivers at a time (Tr., at 157), received and decided complaints from AAP concerning deliveries (Tr., at 169-170), and received and resolved complaints from drivers concerning their assigned routes (Tr., at 129). Importantly, Mr. Cappetta decided which drivers to assign by exercising his independent judgment. (Tr., at 272; 281-82; 310-11).

Additionally, the evidence and testimony demonstrates that Mr. Cappetta evaluated driver applicants and made recommendations concerning new hires (Tr., at 174), administered pre-hire road tests and evaluated employee performance in the completion of the test, evaluated and supervised driver pre-trip and post-trip tasks, and performed driver skill assessments related to driver qualifications, among other tasks (Tr., at 172-174). Additionally, beginning in at least October 2015, Mr. Cappetta physically occupied the site manager's office at the Kutztown distribution center. (Tr., at 187-189).

In addition to the evidence adduced at the hearing, UPS Freight submitted an offer of proof asserting that the new on-site manager at the AAP Kutztown distribution center, Jeremiah Andrefski ("Andrefski"), would testify that, in January 2016, Mr. Cappetta told him: "No offense to you Jeremiah, but I can run this place by myself. I've done it before." (Offer, at 7). This comment is particularly noteworthy given that the conversation occurred after the December 21, 2015 Representation Hearing, during which Mr. Cappetta repeatedly denied performing supervisory functions or that he ran that Kutztown operation. Additionally, the Company offered proof that Andrefski and Matt DiBiase ("DiBiase"), the Operations Supervisor of UPS Freight's Advance Auto Parts Kutztown distribution center, would testify that Road Drivers could not refuse dispatch assignments made by the dispatcher without good cause, and that the penalty for a Road Driver refusing one of Mr. Cappetta's assignments (without good cause) would be disciplinary action up to and including discharge. (Offer, at 8).

Accordingly, the evidence presented at the Representation Hearing, and through the Company's offer of proof, established that Mr. Cappetta performed a number of the supervisory functions contemplated by Section 2(11) (each independently sufficient) with the requisite

independent judgment that was not merely routine or clerical in nature in the interest of the Company. As a result, Mr. Cappetta should have been deemed a statutory supervisor.

b. <u>The Company Presented Substantial Evidence of Supervisory Taint by Mr. Cappetta, and Formally Requested That the Region Conduct an Administrative Investigation.</u>

Furthermore, the Company presented significant evidence to support its position that Mr. Cappetta likely engaged in solicitation efforts and other conduct in support of the Union that had the result of tainting the showing of interest supporting the Union's petition for election, the election campaign, and the vote itself. Indeed, the Company informed the Region prior to the representation hearing, and again in its offer of proof, that Tammy Cadman ("Ms. Cadman"), a former temporary administrative assistant at the AAP Kutztown distribution center employed in the same position on a permanent basis at the Company's Salina, Kansas distribution center, would testify that, in the weeks prior to the filing of the Union's petition for election, Mr. Cappetta approached her and asked her, "Do you know what's going on here?" Ms. Cadman replied that she did not, to which Cappetta replied: "We're going to try to get a union at this location, you may want to share that with your drivers." Ms. Cadman interpreted Cappetta's comment to mean that he was organizing the Kutztown workplace and also that he wanted her to encourage the Road Drivers at UPSF's Salina, Kansas facility to unionize when she returned to that facility following her temporary assignment at Kutztown.

The Company formally requested that the Region conduct an administrative investigation and that a formal check of the cards be conducted by the Acting Regional Director to ascertain Mr. Cappetta's participation as a witness to the card signings for the purpose of evaluating the validity of the showing of interest supporting the Union's petition. (SOP, at 14; CofR, at 6). The Region, therefore, had an obligation to investigate the matter promptly and fully to determine the validity of the showing of interest. *See Perdue Farms, Inc.*, 328 N.L.R.B. 909, 911 (1999)

("Once presented with evidence that gives the Acting Regional Director reasonable cause to believe that the showing of interest may have been invalidated . . . further administrative investigation should be made provided the allegations of invalidity are accompanied by supporting evidence.").

Additionally, the Company offered proof that Matt DiBiase ("Mr. DiBiase"), the Operations Supervisor of UPS Freight's Advance Auto Parts Kutztown distribution center, would testify that, on January 8, 2016, he and the Company's Implementation Supervisor, Monte Copeland, were entering the Kutztown facility having just returned from lunch, and heard a phone ringing in the office. Mr. Cappetta's personal phone was sitting in plain sight, unattended, next to his company laptop. Mr. Cappetta was not in the immediate area at the time. When Mr. DiBiase glanced down at the phone (simply because it was ringing), its display reflected an incoming call from Union Organizer/Trustee Brian Taylor. Mr. DiBiase's anticipated testimony supports a reasonable belief that further investigation or evidence obtained through litigation would provide further proof of Mr. Cappetta's involvement in the Union's initial organizing efforts, as well as its pre-election campaign. The date of Taylor's call to Mr. Cappetta – January 8, 2016 – is particularly noteworthy as it shows that Mr. Cappetta remained in contact with the Union after the representation hearing and during the critical period prior to the date the mail ballots were mailed to eligible voters.

c. The Region's Treatment of Mr. Cappetta's Supervisory Status Evinces a Disdain for the Company's Rights Under the Act and the Constitution.

Despite the substantial evidence presented by the Company concerning Mr. Cappetta's supervisory authority, and the compelling evidence elicited concerning the potential taint by him, the Region simply refused to address the issue of Mr. Cappetta's supervisory status, for any reason, prior to the election (D&D, at 13), and has provided nothing more than lip service to the

issue since (CofR, at 6-8). In addressing the Company's contention that Mr. Cappetta was a statutory supervisor, and therefore ineligible to vote, the Acting Regional Director stated in the RD Decision as follows:

> Although the Hearing Officer received evidence concerning the supervisory status of Frank Cappetta, the Employer's contention that Cappetta is a supervisor and should be excluded from the unit concerns his eligibility to vote, and I conclude that this issue need not be resolved before the election because resolution of the issue would not significantly change the size or character of the unit. Accordingly, I shall not address the Employer's arguments concerning the exclusion of Cappetta . . . from the unit, and [he] may vote under challenge.[8]

(D&D, at 13). The Acting Regional Director's treatment of the Company's position with respect to supervisory taint was equally indifferent. According to the Acting Regional Director:

> The Employer's allegations of supervisory taint of the [Union's] showing of interest will be investigated administratively. The Board has long held that it is inappropriate to litigate such matters in representation proceedings, and accordingly I will not consider that issue in this Decision.

(*Id*.).

In addressing these same issues in response to the Company's objections, the Acting Regional Director was more verbose, but nevertheless unresponsive. According to the Acting Regional Director:

> [T]he Employer contends that the Region's failure to address Frank Cappetta's supervisory status denied the Employer the opportunity to know what it could expect or require from Cappetta during the campaign. This argument is without merit. As the Board held in issuing the Final Rule, uncertainty as to the supervisory status of employees is inevitable. 79 Fed. Reg. at 74389. A decision as to Cappetta's supervisory status could not have provided the Employer the certainty it sought. Consequently, I find that the Employer was not prejudiced by the fact that Cappetta's supervisory status was not the subject of a preliminary decision prior to the election. *See* GC 15-06 at 18. In the event, **the Employer treated him as a unit employee and the Region determined that he was not a supervisor within the meaning of Section 2(11).** Under the Final Rule, because questions of supervisory status do not directly impact on whether or not there is a

[8] The Acting Regional Director also addressed the Company's purported assertion that employee Carl David should also be deemed ineligible to vote as a result of his supervisory status. The Company has never alleged that Mr. David was a Section 2(11) supervisor, and does not advance that position herein.

> question concerning representation, regional directors may decide not to permit litigation of supervisory status prior to the election. Accordingly, [the Company's objection] is overruled.

(CofR, at 6). In addressing the Company's objections relating to his prior refusal to consider the issue of supervisory taint, the Acting Regional Director stated:

> [T]he Employer contends that the Region refused to address whether the Petition was tainted based on Frank Cappetta's involvement. I find no merit to this Objection. The Employer submitted a request to investigate an allegation of taint on December 21, 2015. **The Region conducted an investigation and determined that Cappetta was not a supervisor within the meaning of Section 2(11) of the Act.** Crucially, the Employer had ample opportunity to present evidence on Cappetta's supervisory status at the pre-election hearing. The Employer was not prevented from putting on its supervisory-status case. According it a second bite at the apple would serve no purpose. **Since the investigation (including the record of the pre-election hearing) did not demonstrate that Cappetta was a supervisor, his involvement did not taint the Petition.** The Employer was informed of the findings of the Region's investigation concerning taint prior to the ballot count. Thus, there is no evidence that the Employer was prejudiced by the manner in which the issue of taint was resolved. Accordingly, [the Company's objection] is overruled.

(CofR, at 6). The Acting Regional Director found further that:

> [T]he Employer contends that the conduct of the election and its results were tainted by the involvement of purported statutory supervisor Frank Cappetta in the election campaign and in securing the showing of interest. As noted in discussing [the objection above], **the Region conducted an investigation on this issue, which included evidence offered by the Employer during the hearing, and determined that Cappetta is not a statutory supervisor; therefore, the Region found that there was no taint**. Accordingly, Objection 6 is overruled.

(*Id*.).

The above-referenced quotes represent the entirety of the Region's treatment of these substantial factual issues. On the face of the Acting Regional Director's decisions, it is clear that he made no investigative findings, no factual findings, offered no applicable legal standards, and provided no reasoned analysis **at all** regarding Mr. Cappetta's supervisory authority. He simply proclaimed that he was not a supervisor. And, although the Region was obligated to investigate

the Company's allegations of supervisory taint, and the Acting Regional Director expressly stated that the Region had done so, there is no evidence that an investigation actually occurred. Indeed, his "investigation" was his finding, without any factual or legal analysis, that Mr. Cappetta was not a supervisor within the meaning of the Act.

Indeed, the Company offered proof in support of its election objections that Willie Johnson, Kaliek Thomas, Ken Rose, Tim Hertzog, Gene Knappenberger, Don Roush, and Chris Camuso, all of whom are Road Drivers in the proposed bargaining unit, would testify that no one from the NLRB attempted to contact them at any time since the filing of the petition. (Offer, at 10). Given the relatively small size of the petitioned-for unit, it stands to reason that any investigation by the Region would have included interviews with bargaining unit members to determine whether, and how, Cappetta participated in the card signing process and/or the Union's pre-election campaign. The fact that these employees were not interviewed tends to establish that the Region did not make any meaningful effort to interview any bargaining unit members.

Additionally, the Company offered proof in support of its election objections that Tammy Cadman, the former temporary administrative assistant at the AAP Kutztown distribution center who was told by Cappetta that he was organizing the Kutztown facility, discussed *supra*, would also testify that she was never contacted by the Region despite the asserted fact that she had witnessed conduct evincing taint. (Offer, at 10). There is also no indication in the record that the Region conducted the card check formally requested by the Company. It is ironic that the Acting Regional Director chides the Company for seeking what he terms " a second bite of the apple." (CofR. at 6). The record makes abundantly clear that the Company never got a first bite.

Section 120.67(c) of the Board's Rules and Regulations authorizes the Board to grant review if a regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party. The Acting Regional Director's decision with respect to the Company's position that Mr. Cappetta was a statutory supervisor – undoubtedly a substantial factual issue given its significance to the issue of taint – is not just erroneous, **it is nonexistent**. The Region effectively punted the ball on the issue before the election, but never returned to the issue after the election. In so doing, the Region left unanswered significant factual issues directly implicating the Company's right to the undivided loyalty of its representatives, *see NLRB v. Yeshiva University*, 444 U.S. 672, 682, 100 S. Ct. 856, 63 L. Ed. 2d 115 (1980), and its employees' right to election conditions free from conduct the Board has repeatedly found to be inherently coercive. *See Harborside Healthcare, Inc*., 343 NLRB 906 (2004); *Madison Square Garden CT, LLC*, 350 NLRB 117, 122 (2005); *Reeves Bros*., 277 NLRB 1568, 1568 n.1 (1986); *Sarah Neuman Nursing Home*, 270 NLRB 663, 663 n.2 (1984); *A.T.I. Warehouse, Inc*., 169 NLRB 580, 580 (1968); *Heck's, Inc*., 61 LRRM 1128 (1966); *Dejana Industries, Inc*., 336 NLRB 1202 (2001); *National Gypsum Co*., 215 NLRB 74 (1974); *Southeastern Newspapers, Inc*., 129 NLRB 311 (1960); *The Toledo Stamping & Manufacturing. Co*., 55 NLRB 865, 867 (1944),

Any finding – by the Region, the full Board, or a federal court – that Mr. Cappetta is a supervisor would necessarily invalidate the election result in this case, particularly given the Region's apparent failure to follow up on the Acting Regional Director's promise in the RD Decision that the Region would investigate the issue of supervisory taint. The casual manner in which the Region appears to have disposed of the question of Cappetta's supervisory status suggests it may never have intended to investigate the taint claim. This presents yet another

problem for the Region: if the Acting Regional Director had already decided when he issued the Decision and Direction that the Region would not investigate the Company's taint allegations, it could only be because he had determined Cappetta was not a supervisor. In that case, why omit that finding from the Decision and Direction, particularly when doing so kept the Company in the dark about Cappetta's status and prevented it from knowing how to deal with him during the campaign? The Region's handling of these issues suggests it abandoned its role as neutral referee and took sides. This only further illustrates that it has denied the Company's rights to due process and a fair hearing.

2. The Acting Regional Director's Decision to Hold a Mail Ballot Election.

The Acting Regional Director's decision to hold a mail ballot election, as opposed to the traditional Board practice of conducting a manual ballot election, should also be reviewed since it plainly departed from Board precedent and represented an abuse of discretion. The Board has long held that the manual ballot election procedure is presumptively appropriate. *See Nouveau Elevator Industries, Inc*., 326 NLRB 470, 471 (1998) (denying mail ballot election where voting group consisted of over 1,600 employees employed at various sites throughout New York City metropolitan region and assigned a "myriad of schedules, including being on-call 24 hours a day"); *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998) (The Board's "longstanding policy, to which we adhere, has been that representation elections should as a general rule be conducted manually, either at the workplace or at some other appropriate location."); *see also* NLRB Casehandling Manual (Part Two) Representation Proceedings §11301.2 ("The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually").

When deciding whether to conduct a manual or mail ballot election, a Regional Director should consider: (i) whether eligible voters are "scattered" because of their job duties over a

wide geographic area; (ii) whether eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times, and (iii) whether there is a work stoppage (i.e., strike or walkout) in progress. *San Diego Gas,* at 1145. Voters may be deemed to be scattered "where they work in different geographic areas, work in the same areas but travel on the road, work different shifts, or work combinations of full-time and part-time schedules." *Id*. at 1145, n. 7. However, "the mere fact that employees may work multiple shifts, thereby necessitating more than one voting session during the course of the workday, is not in and of itself a sufficient basis for directing a mail ballot election." *Id*. The evidence presented demonstrated that the voting group in this case was not "scattered" under the standards imposed by existing Board law. Indeed, the Road Drivers who participated in the election start and finish their routes at the same terminal, and their participation in a manual ballot election could easily have been accommodated as a result.

Thus, the Acting Regional Director plainly erred in deciding that a single-site, one-day election in two polling periods over approximately 14 hours was inconsistent with the Board's longstanding policy favoring manual ballot elections, and his decision constituted an abuse of discretion. The Acting Regional Director's decision to hold a mail ballot election, as opposed to the prudent and traditional Board practice of conducting a manual ballot election, further abridged the Company's ability to exercise its 8(c) right to speak to employees in that it precluded the Company's ability to make group presentations from the date ballots were mailed to the voting group (nearly two weeks before the date of the vote count), unfairly burdened the Company with onerous administrative tasks upon pain of waiver, prejudiced the Company's ability respond to the Union's organizing campaign in violation of the United States Constitution and Section 8(c) of Act, and needlessly subjected employees to the potential harms that the

Board's preferred method of manual ballot voting was intended to limit, including the loss of secrecy and integrity in the voting process, as well as the prospect of interference and/or coercion.

3. <u>The Acting Regional Director's Refusal to Consider the Company's Revised Election Proposal.</u>

The Acting Regional Director's refusal to consider the Company's revised election proposal following its objection to his erroneous calculations of the Company's original election proposal represented further arbitrary denial of the Company's rights and interests during the pre-election process. The Company's original proposal at the Representation Hearing called for a one-day, single-site election with the polls to be open for a total of four hours over a 14-hour period, to be conducted at a site about an hour's drive from the Region 4 offices in Philadelphia. During a conference call on January 7, 2016 to discuss the Company's objection to the Acting Regional Director's erroneous interpretation of that proposal, counsel for the Company made a revised election proposal offering a single polling time, from 2:00 a.m. to 8:00 a.m., on a Wednesday of the Acting Regional Director's choosing. (Exh. C). The polling times assured that all employees would have ample opportunity to vote either before they left the terminal on their route or when they returned at the end of their route. In short, UPS Freight's revised proposal eliminated all potential concerns raised by the Acting Regional Director. (Id.).

Nevertheless, the Acting Regional Director refused to consider the revised proposal, stating that, under the Final Rule, "determinations on election arrangements are now expected to be made at the time the Decision and Direction of Election issues." The Acting Regional Director offered no citation to where in the new rules this "expectation" may be found. Inexplicably, the Acting Regional Director also expressed doubt that he had the authority to modify his original decision on the balloting method. (Exh. C). Obviously, it is well within his

broad discretion to revise the election details at any point in the proceedings. The Board recognizes that election details may be worked out by the parties after the issuance of a Decision and Direction of Election. *See* NLRB Casehandling Manual (Part Two) Representation Proceedings §11301.3 ("a determination may not be possible until, for example, after a decision and direction of election has issued"). Thus, any suggestion by the Region that the Company is limited to the proposal it made at the hearing is without merit and the Acting Regional Director's assertion that he is unable to revisit the election details following issuance of the RD Decision is incorrect. The Region's refusal to reconsider this point prejudiced UPS Freight for all of the reasons set forth in Section C(6) above.

4. The Region's Denial of UPS Freight's Request for the Issuance of Subpoena *Duces Tecum*.

The Region's denial of UPS Freight's Request for the Issuance of Subpoena *Duces Tecum* prejudiced the Company in the preparation of its election objections. Specifically, on February 2, 2016, the Company requested that the Region issue several subpoenas *duces tecum*. The Company requested document subpoenas in order to obtain relevant cell phone records of Mr. Cappetta and Union organizer Brian Taylor (and, perhaps, others at the Union) during the period relevant to this proceeding. For the reasons stated previously in Section A(1), *supra*, the Company had reason to believe that a review of those records would show frequent contact between Mr. Cappetta and the Union, which would further support UPS Freight's contention that Mr. Cappetta was a key figure in the Union's organizing campaign and that his participation in the campaign tainted both the Union's original showing of interest and the results of the election itself. The Region denied the Company's request on the grounds that no "currently outstanding Notice of Hearing" had been issued.

The Region's denial, which was based on portions of the Casehandling Manual that have not been updated since passage of the Final Rule, is yet another example of the prejudice imposed by the Final Rule, and by its application of the Final Rule in this proceeding. Indeed, Section 102.69(c) of the Final Rule authorizes the conduct of a hearing on objections and challenges to the election if, among other grounds, "the regional director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing." Thus, the Final Rule authorizes the Region to decline to hold a post-election hearing if the evidence included in the offer of proof is not sufficient. As such, the Final Rule places an additional and unfair burden on an employer to present all of the evidence it intends to introduce at the hearing in its offer of proof. This is particularly the case since the Casehandling Manual arguably does not provide for the issuance of investigative subpoenas in the absence of a direction of hearing by the Region.

The Company requested subpoenas to further its efforts to compile information relevant to the issue of supervisory taint. The subpoenas were necessary as a result of the Region's comprehensive failure, as set forth in Section A(1), above, to investigate the issue administratively, or to otherwise permit the Company to litigate the matter during the pre-election process. But, its requests were denied by the Region based on policy and procedure that pre-dates the Final Rule and fails to contemplate the administrative processes and deadlines imposed by it. The Region's ruling violated the Company's due process rights by denying it the means to obtain the very evidence that is required under the Final Rule to obtain an post-election evidentiary hearing. Under these circumstances, the Region's subsequent decision not to grant a hearing on the question of supervisory taint based on the Company's "lack" of evidence

presented in its offer of proof indisputably violated the Company's right to a fair hearing under the Act and to due process under the U.S. Constitution.

5. The Acting Regional Director's Partial Denial of the Company's Motion To Postpone Representation Hearing and for Extension of Time to File Statement of Position.

The hardships imposed upon the Company by the unfairly shortened "critical period" prescribed by the Final Rule, discussed *supra*, were exacerbated by the Acting Regional Director's partial denial of the Company's Motion To Postpone Representation Hearing And For Extension Of Time To File Statement Of Position. The Union's petition was filed in the midst of the holiday season, which presented significant logistical difficulties to the Company given the nature of its business. Moreover, although the Union's petition purported to implicate only a limited number of employees at a single location, the potential scope of the appropriate unit was significantly greater[9] and required investigation of factors involving nearly three hundred employees at nine locations in the same number of states. The natural logistical challenges of gathering evidence in support of the Company's position on the unit were further complicated both by the dispersion of employees during the holiday season and the operational demands on the Company. For these reasons, the Company requested a two-day extension of time to file its statement of position (from Thursday, December 17, 2015 until Monday, December 21, 2015), and also requested that the Representation Hearing be postponed from Friday, December 18, 2015 until Tuesday, December 22, 2015.

The Company's requests were consistent with the provisions of Section 102.63 of the Board's Rules and Regulations, which expressly authorizes the Acting Regional Director to extend the time for filing and serving the Statement of Position, and to postpone the

[9] The factual and legal grounds supporting a company-wide unit, as opposed to the single-site unit proposed in the Union's petition, are set forth fully in Attachment B to the Company's Statement of Position, filed with the Region on December 18, 2015 (SOP, Attachment B), and in Section B, *infra*.

Representation Hearing, for up to 2 business days. And, given the facts and the gravity of the issues involved, the Company clearly presented "special circumstances" warranting the relief requested. *See* Rules and Regulations of the National Labor Relations Board, §§102.63(a); (b)(1). The Acting Regional Director, however, only partially "granted" the Company's motion, ordering that the Company's statement of position be filed by 12:00 PM on Friday, December 18, 2015, and that the hearing be conducted at 10:00 AM on Monday, December 21, 2015. The Acting Regional Director's arbitrary denial of the full extension requested by the Company prejudiced the Company in its preparation of the statement of position and for the hearing. Moreover, the Acting Regional Director's partial "granting" of the Company's motion directly aided the Union in its preparation for the Representation Hearing by giving the Union access to the Company's statement of position, and thus the issues and facts the Company intended to raise at the hearing, for an entire weekend prior to the hearing. Of course, the Region did not provide equivalent (or any) information to the Company regarding the Union's evidence and witnesses. Had the Acting Regional Director granted the Company's request in full, the Union would have had the Company's statement of position one day prior to the pre-election hearing, which is the amount of time called for under the Rules when applied in due course. This ruling unquestionably resulted in prejudicial error, and warrants Board review.

6. <u>The Region's Denial of an "Appropriate" Hearing Guaranteed by Section 9(c) of the Act and in Violation of the Company's Due Process Rights Guaranteed by the Constitution.</u>

The Region denied the Company the "appropriate" hearing guaranteed by Section 9(c) of the Act and the due process guaranteed by the Constitution as a result of the conditions under which the hearing was conducted. There was no practical or legal justification for the Hearing Officer's decision to begin the hearing over an hour late for reasons unexplained, or her decision

to virtually confine the parties to the building for the duration of the hearing, effectively precluding counsel even from taking a meaningful lunch break.

Moreover, the Final Rule provides that hearings "shall continue from day to day until completed." *See* 29 C.F.R. §102.64(c). Thus, nothing in the Final Rule requires the completion of the hearing in a single calendar day. Nevertheless, the Hearing Officer repeatedly refused requested adjournments to complete live witness testimony the following morning, and instead required the parties to present live testimony until about 7:00 p.m., nearly two hours beyond the end of the normal business day.

Additionally, the Final Rule expressly provides for the filing of post-hearing briefs upon "special permission" from the Acting Regional Director. *See* 29 C.F.R. §102.66(h). The Acting Regional Director summarily denied the Company's request without explanation. (Tr., at 328:24-25).

Finally, the Final Rule provides that "any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument." *See* 29 C.F.R. §102.66(h). But, despite the fact that the nine-and-a-half-hour hearing resulted in over 350 pages of witness testimony concerning a number of facts and issues of which the Company had no prior notice,[10] the Hearing Officer denied the Company's request for adjournment until the next morning to permit it reasonable time to prepare closing argument. Instead, she permitted only 30 minutes for the Company to prepare its closing argument. The Hearing Officer's conduct and arbitrary denial of the Company's requests indicate the existence of bias by the Region that is particularly evident given the fact that the Acting Regional Director's Decision and Direction of Election did

[10] Unlike the Company, as a result of the events described in Section A(5), above, the Union had full notice of the anticipated issues and evidence the Company intended to present at hearing as a result of its receipt of the Company's statement of position on the Friday before the Monday hearing. This allowed the Union to prepare both its rebuttal to those issues and an appropriate closing argument.

not issue for over two weeks following the close of the hearing. An overnight adjournment (i.e., until the next morning) to permit Company counsel to review the evidence and to prepare meaningful oral argument was clearly warranted. The Hearing Officer's arbitrary denial of that request violated the Board's own rules, as well as the Company's right to an "appropriate hearing" under Section 9(c) of the Act, and represented an intentional denial of due process.

B. Board Review Is Appropriate Because the Region's Determination as to the Appropriate Bargaining Unit Resulted in Prejudicial Error.

UPS Freight also seeks review of the Region's determination that the Union's petitioned-for voting (and bargaining) unit comprised of "all regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania" is appropriate. Section 9(a) of the Act permits employees to form a bargaining unit "appropriate" for collective bargaining purposes. *See* 29 U.S.C. § 159(a). To determine the appropriateness of a proposed bargaining unit, the National Labor Relations Board ("NLRB" or "the Board") first assesses whether the employees in the petitioned-for unit are identifiable "readily as a group who share a community of interest." *See A.S.V., Inc*., 360 NLRB No. 138, slip op. at 14-15 (2014) (citing *United Operations, Inc*., 338 NLRB 123 (2002)). In so doing, the Board considers whether the employees: (1) are organized into a separate department; (2) have distinct job functions and perform distinct work; (3) are functionally integrated with the Employer's other employees; (4) have frequent contact with other employees; (5) interchange with other employees; (6) have distinct terms and conditions of employment; and (7) are separately supervised. *Id*.

In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), one of its most controversial decisions to date, the NLRB overturned 20 years of precedent by permitting bargaining units to be petitioned-for and certified even when larger and "more

appropriate" bargaining units exist in the employer's workforce. *See id*. (finding that "[b]ecause a proposed unit need only be an appropriate unit and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate.").[11] Nevertheless, even under *Specialty Healthcare* and its progeny, the Board has recognized that a petitioned-for unit will be deemed inappropriate where ***"the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit . . ."*** *See Id.,* at 11. (emphasis added).

The Company has maintained throughout these proceedings that the unit is inappropriate because it excludes the regular drivers (full-time and part-time) ("Road Drivers") employed by the Company at eight other distribution facilities, which the evidence proves to share an overwhelming community of interest with the employees sought to be represented by the Union. Specifically, the evidence demonstrates that UPS Freight is party to a national contract with Advance Auto Parts ("AAP"), under which it performs operations relating to the distribution of AAP parts and other supplies from nine distribution centers to regional AAP stores around the country. (Tr., at 21-24). The distribution centers comprising the Company's AAP operation are located in Kutztown, PA, Enfield, CT ("Enfield facility"), Lakeland, FL ("Florida facility"), Salina, KS ("Kansas facility"), Gastonia, NC (Gastonia facility"), Delaware, OH ("Delaware facility"), Roanoke, VA ("Virginia facility"), Hazelhurst, MS ("Hazelhurst facility"), and

[11] *Specialty Healthcare* was wrongly decided and should be overturned for all of the reasons stated in the dissents of Member Miscimarra in *Macy's, Inc*., 361 NLRB No. 4, slip op. at 22-33 (2014) and Member Johnson in *DPI Secuprint*, 362 NLRB No. 172, slip op. at 9-19 (2015). *See also NLRB v. Lundy Packing Co*., 68 F.3d 1577, 1581-82 (4th Cir. 1995). These dissents are fully incorporated into this request for review by reference, and the Company expressly preserves its right to rely upon them throughout the course of these proceedings in asserting that the Board's traditional community of interest standards should apply.

Thomson, GA ("Thomson facility") (collectively the "AAP distribution facilities"). (Tr., at 23). UPS Freight considers the nine AAP distribution facilities part of a single integrated customer service initiative set up just for AAP. (Tr., at 24-25).

The Company has a single centralized management team (Regional Operations Manager, AAP Manager, Operational Support Supervisor, Support Manager) that is responsible for overseeing the Company's contractual and operational relationship with AAP, including the provision of services by Road Drivers from all of the Company's AAP distribution facilities. (Tr., at 25-31). The Company has centralized Human Resources and Employee Relations functions that are responsible for all nine AAP distribution facilities. (Tr., at 78-79).

All Road Drivers employed by the Company at the nine AAP distribution facilities have the same job title. (Tr., at 36, 39). All Road Drivers use, and are trained on, the same equipment – tractor trailers (either sleeper cabs or day cabs). (Tr., at 36, 39). UPS Freight Road Drivers working under the AAP contract do the same work, and do not perform work, or make deliveries, for any other UPS Freight customer besides AAP. (Tr., at 38-39). All Road Drivers are evaluated under the same Company performance criteria, including accident frequency, safety and efficiency indicia such as "hard brakes" and "overspeed," miles per gallon on tractors, and delivery performance. (Tr., at 48-51). All Road Drivers are employed under the same UPS Freight policies. (Tr., at 46-47, 72). All Road Drivers receive roughly the same rates of pay. (Tr., at 75-76, 116-118). All Road Drivers are entitled to the same benefit plans. (Tr., at 105). All Road Drivers receive substantially the same training/orientation, as well as specialized training from AAP regarding hazards and operational matters relevant to working in one of its distribution centers. (Tr., at 45-48).

All Road Drivers at the Company's AAP distribution facilities have access to a centralized job database and are eligible to apply for driving jobs at any of the other AAP distribution facilities. (Tr., at 51-52). Road Drivers have, in fact, permanently transferred from one AAP distribution facility to another in the past. (Tr, at 52-56; Emp. Exh. 1). In the past several years, 27 UPS Freight Road Drivers assigned to one AAP distribution center have been transferred to a different AAP distribution center within the system. (Tr., at 52; Emp. Exh. 1). There is significant driver interchange between locations. (Tr., at 56-61). Recently, six Road Drivers have been temporarily assigned to the AAP Kutztown distribution center from other AAP distribution facilities (3 from the Florida facility, 3 from the Hazlehurst facility) to assist with a shortage of available Road Drivers. (Tr., at 56-66). Over the past 3 years, 117 Road Drivers have been temporarily transferred to the Company's other AAP distribution facilities to perform work for a total of 413 weeks. (Tr., at 60; Emp. Exh. 2). In that same time period, 44 Road Drivers have been temporarily transferred to the AAP Kutztown distribution center from the Company's other AAP distribution facilities to perform work for a total of 163 weeks. (Tr., at 65-66; Emp. Exh. 2).

This evidence establishes that an overwhelming community of interest is shared by the Road Drivers employed at all of the Company's AAP distribution facilities. Accordingly, the Company has maintained throughout these proceedings that the Union's petitioned-for unit is clearly inappropriate and should have been rejected by the Region in favor of the bargaining unit comprised of the regular drivers (full-time and part-time) employed by the Company at its eight other distribution facilities. The Acting Regional Director rejected the Company's position in his Decision and Direction of Election, and found in his Supplemental Decision on Objections to Election and Certification of Representative that the issue was not a proper subject of an election

objection, but, rather, was "an issue that can be considered in a Request for Review." (CofR, at 8). The Company maintains that the Acting Regional Director's finding that the Union's petitioned-for unit is appropriate resulted in prejudicial error inasmuch as the Union cannot demonstrate the requisite showing of interest in the appropriate unit proposed by the Company.

C. UPS Freight's Objection to a Voting Unit That Includes Certified Safety Instructors and Dispatchers

UPS Freight requests Board review to consider the appropriateness of the inclusion of certified safety instructors and dispatchers in the voting unit, as proposed in the Union's motion to amend the petition for election, is appropriate. At the time of the representation hearing, the Company employed two employees at its Kutztown distribution center, Frank Cappetta ("Mr. Cappetta") and Carl David ("Mr. David), who served in these roles. Although Mr. Cappetta was originally hired as a Road Driver, he primarily (roughly 80% of his work time) performed duties related to the position of dispatcher. (Tr., at 219). Mr. David was also hired as a Road Driver, but performed functions as a certified safety instructor and assisted Mr. Cappetta with dispatch functions. (Tr., at 149, 190-191).

The Company maintains, as it has throughout these proceedings, that both Mr. Cappetta and Mr. David should have been excluded from the unit and deemed ineligible to participate in any election resulting from the Union's petition since they do not "regularly perform duties similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit." *Berea Publishing Co*., 140 NLRB 516, 519 (1963). The Hearing Officer, however, refused to take evidence on these issues at the representation hearing. (D&D, at 13).[12]

[12] Although the Hearing Officer excluded evidence as to the issue of Cappetta's and David's inclusion in the unit, the record contains significant testimony relating to Cappetta's primary duties due to

Subsequently, in both the RD Decision and the Certification of Representative, the Acting Regional Director refused to consider their inclusion or exclusion from the unit. According to the Regional Director, "[a]s a threshold matter, the certified safety instructors and dispatchers are neither included, nor excluded. Beyond that, this assertion also is not a proper subject for Objection. Issues of exclusion or inclusion may be examined in a Request for Review." (CofR, at 8).

Given the Acting Regional Director's refusal to consider the issue, the Company maintains that Board review is appropriate. Even if their votes are determined not to have materially affected the results of the vote, Mr. Cappetta and Mr. David, and any other employee who now, or in the future, regularly perform duties as a dispatcher and/or certified safety instructor, should be excluded from the bargaining unit since the positions require functions that are, at best, incompatible, and at worst, antagonistic, to those performed by the Road Drivers employed by the Company.

D. <u>Board Review is Appropriate Because There Are Compelling Reasons for Reconsideration of the Final Rule.</u>

The Union's petition was processed in accordance with the procedures set forth by the Board in the Final Rule, which became effective April 14, 2015. The Final Rule is intended to "remove unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation case procedures, codify best practices, and make them more transparent and uniform across regions." *See NLRB Guidance Memorandum on Representation Case Procedure Changes*, Memorandum GC 15-06 (April 6, 2015). According to the Board, the Final Rule provides "targeted solutions to discrete, specifically identified problems to enable the Board

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inquiries concerning his supervisory status. The evidence concerning David's job functions, however, is incomplete as a result of the Hearing Officer's ruling.

to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation." *Id*.

The reality, however, is that the Final Rule enacted comprehensive (and entirely unnecessary) modifications to the Board election process. Viewed as a whole, those modifications severely and unfairly abbreviate the pre-election period, burden employers with new and onerous administrative tasks upon pain of waiver, severely restrict employers in the exercise of their statutory right to communicate their views on unions, and all but eliminate formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit. Specifically, the Final Rule incorporates, among others, the following modifications:

- The Final Rule requires employers to post a notice of election within 2 business days after service of the notice of hearing and prior to any determination by the Board that the petition has sufficient merit to justify an election. *See* 29 C.F.R. §102.63(a).

- The Final Rule severely abbreviates the time between the filing of the union petition and the first day of a hearing, except in limited cases shown to be sufficiently "complex" to warrant delay for a limited additional time period or under undefined "special circumstances" and/or "extraordinary circumstances." *See* 29 C.F.R. §102.63(a).

- The Final Rule requires employers, during the critical initial days following the filing of a petition for election, to prepare and file a burdensome written "statement of position" addressing, *inter alia*, the basis for any employer contention that the petitioned-for unit is inappropriate, the basis for any employer contention for excluding individual employees from the petitioned-for unit, and the basis for all other issues the employer intends to raise at the hearing, upon risk of waiving employers' legal rights to contest any omitted issues at the hearing. *See* 29 C.F.R. §§102.63(b); 102.66(d).

- The Final Rule requires employers to prepare and include with the statement of position a list of all employees in the petitioned-for unit, including their work location, shifts, and job classifications, as well as a second list (together with the above described additional information) of all individuals in any alternative unit contended for by the employer; and a third list (together with the above described additional information) of all individuals who the employer contends should be excluded from the petitioned-for unit. *See* 29 C.F.R. §102.63(b).

- The Final Rule contemplates that the pre-election hearing required under Section 9(c) of the Act be conducted solely "to determine if a question of representation exists," and provides that "disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit," which have traditionally been deemed necessary and appropriate issues for pre-election consideration, "ordinarily need not be litigated or resolved before an election is conducted." *See* 29 C.F.R. §102.64(a).

- Relatedly, the Final Rule limits the parties' right to introduce evidence at the Section 9(c) hearing solely to that which is "relevant to the existence of a question of representation." *See* 29 C.F.R. §102.66(a).

- The Final Rule requires parties to prepare and present "offers of proof" at the outset of the Section 9(c) hearing, and authorizes Regional Directors to bar the parties from entering evidence into the record if such offers of proof are deemed to be insufficient to sustain the proponent's position. *See* 29 C.F.R. §102.66(c). Employers are further precluded from introducing evidence into the record on issues that were not previously addressed in the newly-required statement of position. *Id.*

- The Final Rule precludes employers from presenting post-hearing briefs and from reviewing a record transcript prior to stating their post-hearing positions, except upon special permission from, and addressing only subjects permitted by, the Regional Director. *See* 29 C.F.R. §102.66(h).

- The Final Rule requires employers to disclose to unions unprecedented personal and private information pertaining to employees, including home phone numbers and personal email addresses. *See* 29 C.F.R. §102.67(1). The Final Rule drastically shortens the time in which such information must be prepared and provided by employers and requires such personal disclosures even as to employees whose eligibility to vote has been contested and not yet determined.

For the reasons articulated by the Plaintiffs in *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015), *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D. Tex. 2015), and *Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D. D.C. 2015), compelling reasons exist for the Board to reconsider application of the Final Rule. UPS Freight incorporates by reference each and every objection to the Final Rule raised by the Plaintiffs in those proceedings such that those objections and arguments shall be deemed to be set forth fully herein. The relevant filings are attached to this request as Exhibit D. Additionally,

among other harms, the procedural modifications imposed by the Final Rule warrant reconsideration of it for the following reasons:

1. The Final Rule Severely Hinders an Employer's Ability and Opportunity to Effectively Respond to a Petition for Election.

The Final Rule severely hinders an employer's ability and opportunity to investigate all issues related to the petition, unfairly burden employers with onerous administrative tasks upon pain of waiver, all but eliminates formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit, and prejudices an employer's ability to respond to a union's organizing campaign in violation of the United States Constitution and Section 8(c) of the NLRA.

Despite these obvious harms, the Company attempted, in good faith, to investigate and to preserve its rights in these proceedings to the best of its ability given the considerable time limitations, and attempted in good faith to comply with the procedural requirements imposed by the Final Rule despite their obvious prejudicial impact. For these reasons, and for the others set forth herein, the Company maintains that its submission of its Statement of Position and its other efforts to comply with the Final Rule throughout these proceedings cannot be deemed a waiver of its request for review of the Final Rule, and respectfully asserts that the Region's processing of the Union's petition in accordance with the Final Rule rendered it unable to ascertain all facts and issues necessary to effectively protect its rights, and the rights of its employees, in the instant proceeding.

2. The Final Rule Severely Hinders an Employer's Ability and Opportunity to Respond to a Union's Organizing Campaign in Violation of Section 8(c).

Section 8(c) of the Act provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of

reprisal or force or promise of benefit." Consistent with Section 8(c), "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969). The Final Rule, however, severely infringes upon an employer's Section 8(c) rights in several respects.

a. <u>The Final Rule Violates the Section 8(c) Policy of Encouraging Uninhibited Debate.</u>

By unfairly reducing the critical period between the filing of the petition for election and the election itself, the Final Rule effectively deprives an employer of adequate time to present its views in a meaningful manner to employees. Such a result is inconsistent with the policies reflected in Section 8(c) favoring uninhibited, robust, and wide-open debate.

This is particularly true given the Final Rule's imposition of additional and unilateral obligations, including: (1) the compelled posting of an election notice within 2 business days after service of the notice of hearing; (2) the expectation that the hearing is to be opened within 8 days after the service of the notice of hearing; (3) the requirement that the employer prepare and file a comprehensive Statement of Position addressing the issues it wishes to litigate at the hearing, among other information, upon risk of waiving its legal rights to contest any issue not presented in the statement; (4) the requirement that the employer prepare and present written "offers of proof" in support of its position at the hearing; and (5) the requirement that an employer prepare and provide to the labor representative "a list of full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters." These obligations, all of which must be satisfied during a now-abbreviated critical period, preoccupy and avert an employer from the exercise of its lawful rights under Section

8(c), and, when viewed as a whole, rendered it unable to effectively respond to a union's organizing campaign.

The practical impact of these modifications serve to effectively eliminate any meaningful opportunity for an employer to lawfully communicate with its employees concerning campaign issues during the pre-election timeframe the Board has traditionally referred to as the "critical period" – "a period during which the representation choice is imminent and speech bearing on that choice takes on heightened importance." *See* 79 Fed. Reg. at 74,439-40 & n.591 (Dec. 15, 2015)(dissent) (citing *Goodyear Tire & Rubber Co*., 138 NLRB 453 (1962); *E.L.C. Elec., Inc*., 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc*., 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir; 2012); *NLRB v. Curwood Inc*., 397 F.3d 548, 553 (7th Cir. 2005). Such a result is not only contrary to the spirit and intent of the Act, but contravene the express rights granted to both an employer and its employees by the Act.

b. <u>The Final Rule Improperly Compels Employer Speech.</u>

Additionally, the unfairly shortened "critical period" contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively compells it to address the issue of unionization prior to the filing of a petition in violation of Section 8(c) and the Constitution. The time between the filing of a petition and the conduct of the election has long been referenced as the "critical period" for a reason. As noted in the dissent to the Final Rule, the critical period is the point in time during which "the representation choice is imminent and speech bearing on that choice takes on heightened importance." *See* 79 Fed. Reg. at 74,439-40 & n.591 (Dec. 15, 2015)(dissent) (citing *Goodyear Tire & Rubber Co*., 138 NLRB 453 (1962); *E.L.C. Elec., Inc*., 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc*., 710 F.3d

308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir; 2012); *NLRB v. Curwood Inc*., 397 F.3d 548, 553 (7th Cir. 2005)).

For this reason alone, an employer's ability to make general, pre-petition statements concerning its position on unionization, based on general observations at a time when no organizing efforts are taking place, is no substitute for post-petition speech. The benefit of the critical period is that it permits an employer to identify and understand the issues fueling the organizing effort and address them in a specific manner during the campaign, while at the same time lawfully educating its workforce on the lawful changes that would necessarily take place in the event of unionization, such as the collective bargaining process and the impact it might have on their terms and conditions of employment. The artificially abbreviated critical period imposed by the Final Rule's modifications severely and unreasonably restrict the employer's ability to respond to union campaign efforts or to provide a lawful, management-sided perspective on the changes that could result from representation.

In reality, the unfairly shortened critical period contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively ***compel*** an employer to address the issue of unionization ***prior*** to the filing of a petition – and quite possibly prior to the onset of any organizing efforts – for fear that it will not have adequate opportunity to do so once a petition is filed. The danger inherent in such compelled speech is obvious. While there undoubtedly are circumstances where preemptive, pre-petition discussions with employees will serve to further an employer's position with respect to unionization, it is also likely that, by addressing the issue of unionization prior to the filing of a petition, and at a time when organizing efforts may not yet have occurred, an employer will scatter a seed it does not intend to sow. Employers were not forced to make that choice prior to the implementation of the Final

Rule. The First Amendment, which protects "both the right to speak freely and the right to refrain from speaking at all," *see Wooley v. Maynard*, 430 U.S. 705, 714 (1977), preserves the employer's right to decide when and how to address the issue of unionization with its employees, or to refrain from doing so at all. An employer's right to refrain from such speech is directly, and prejudicially, implicated by the Final Rule.

3. <u>The Final Rule Also Hinders Employees in the Full Exercise of the Rights Guaranteed Them Under Section 7 of the Act.</u>

Finally, the Final Rule severely restricts an employer's rights under Section 8(c) by eliminating any meaningful opportunity to lawfully communicate with employees concerning the issues raised by a union campaign ***during*** the pre-election timeframe. These Section 8(c) violations necessarily result in the frustration of the rights of those employees participating in the election. Indeed, as Board Members Miscimarra and Johnson noted in their dissent to the Final Rule: "[T]he inescapable impression created by the Final Rule's overriding emphasis on speed is to *require employees to vote as quickly as possible* – at the time determined exclusively by the petitioning union – *at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues*." 79 Fed. Reg. 74,460 (emphasis added).

The harm identified in the dissent's analysis of the Final Rule's emphasis on the unfairly abbreviated critical period is precisely the harm that must be avoided here. The Board's newly-enacted election process permits the Union to act at its leisure (and in secret) in disseminating information to employees in support of its organizing efforts, and to file its petition at a time when it is confident it has secured sufficient support to prevail in the election (or, as here, at a time when the Company is materially prejudiced due to significant seasonal operational obligations). The prior election processes provided an employer – even one with no previous

notice of the union's efforts – with an opportunity to address the relevant issues with its workforce and to meaningfully communicate its response to the union's efforts. The Final Rule, however, unreasonably restricts the Company's opportunity ***to respond***. The undesirable, but likely, result is an election decided by uninformed voters.

Such a result flies directly in the face of rights the Act was intended to protect. By its terms, Section 7 of the Act provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, ***and shall also have the right to refrain from any or all of such activities*** . . . ." 29 U.S.C. §157 (emphasis added). But, the right to refrain is only meaningful if the employees have full access to information concerning the consequences of representation before the election. The modifications to the election process imposed by the Board's adoption of the Final Rule ensure that they do not.

4. <u>Conclusion.</u>

Based on the foregoing, there are compelling reasons for the Board to reconsider the application of the Final Rule in this proceeding, and in all others. The procedural modifications imposed by the new Rule severely hinder an employer's ability and opportunity to investigate all issues related to the petition, burden any employer with onerous administrative tasks upon pain of waiver, all but eliminate formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit, and prejudice an employer's ability to respond to a union's organizing campaign in violation of the United States Constitution and Section 8(c) of the Act. Additionally, the unfairly shortened "critical period" contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively compel an employer to address the issue of unionization prior to the

filing of a petition in violation of Section 8(c) and the Constitution. Finally, the Final Rule hinders employees in the full exercise of the rights guaranteed them under Section 7 of the Act. For these reasons, and others set forth in the filings included in Exhibit D, the Company respectfully requests that the Board grant review for the purpose of reconsidering application of the Final Rule.

E. Board Review Is Appropriate Because There Are Compelling Reasons for Reconsideration of General Counsel Memorandum 15-06.

Compelling reasons also exist for the Board to reconsider application of General Counsel Memorandum 15-06, entitled "Guidance Memorandum on Representation Case Procedure Changes." The application of certain principles in that memorandum even further restrict and interfere with an employer's right to fully investigate and respond to a union's petitioned-for representation. For example, the memorandum allows a Regional Director to decline to hold a pre-election hearing on subjects crucial to the viability to the union's petitioned-for unit, including whether supervisory participation in union organizing tainted the showing of interest (an objection the Company raised throughout this matter) despite its acknowledgement that "a petition filed by a supervisor cannot raise a valid question concerning representation." *See* GC Memorandum 15-06 at 18. (emphasis added). GC Memo 15-06 was intended to describe "the changes made by the final rule and provide guidance to Agency personnel, parties, practitioners, and other stakeholders on how the final rule will impact representation case processing from the initial processing through certification." *Id.*, at 2. Thus, UPS Freight incorporates by reference the grounds set forth in Section A, *supra*, in support of this request.

V. CONCLUSION

Based on the foregoing, compelling reasons exist for Board review of the issues raised by the Company herein. Accordingly, the Company respectfully requests that the Board grant this

request, and requests that the Union's petition be dismissed and the election be overturned as a result of the Region's denial of the due process guaranteed the Company under both the Act and the U.S. Constitution, supervisory taint by Frank Cappetta, and the Region's improper determination with respect to the appropriate scope of the voting unit.

Furthermore, to the extent the Board determines that remand of this matter is appropriate for any reason, including but not limited to the investigation and determination of Mr. Cappetta's supervisory status, the existence of supervisory taint, and the exclusion of the dispatcher and/or certified safety instructor position from the voting unit, among other issues raised herein, or for the purpose of revisiting any of the pre-election processes or conducting a re-run election, the Company requests that this proceeding be referred to a different Region to begin anew in another Region that is not tainted by the conflict of interest and other evidence of a lack of impartiality alleged at Region. As explained in this request, the Company maintains that the entirety of this proceeding has been tainted. Any further processing of this matter at the regional level on remand should be conducted by another Region.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Corrected Special Appeal and Request for Review was served by electronic mail this 5th day of April, 2016 on the following:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPS GROUND FREIGHT, INC.

Employer,

and **Case No. 04-RC-165805**

TEAMSTERS LOCAL 773,

Petitioner.

PETITIONER'S RESPONSE TO EMPLOYER'S REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION AND DECISION ON OBJECTIONS TO ELECTION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to Section 102.67(f) of the National Labor Relation Board's Rules and Regulations, Petitioner, Teamsters Local 773 (the "Union") submits the following Response to the Request for Review of Acting Regional Director's Decision and Direction of Election and Decision on Objections to Election and Certification of Representative ("Request for Review") that was filed by the Employer UPS Ground Freight, Inc. (the "Employer"). For the following reasons, the Union submits that the Request for Review should be denied.

1. Regional Director Walsh's Alleged Bias Does Not Justify Board Review

In its preliminary statement, the Employer suggests that "all of the Region's actions in this matter have been systematically tainted" by the alleged pro-union bias of Regional Director Dennis Walsh. The bias accusation is not a grounds for review from the Board for the following reasons.

a. The Employer Has Waived Its Bias Argument

Any objections to an election must be filed within seven days of the tally of ballots. 29 C.F.R. §102.69(a). On February 9, 2016, the Employer filed objections to the election. There was no mention in its objections of the alleged biases of Regional Director Dennis Walsh.

Although the Employer states that it "reserves the right to file a supplemental brief" on its claim that Walsh's alleged biases affected the outcome of the election (Request for Review, p. 3, n. 3), the Employer cannot raise an issue that it did not cite in the Objections it filed within the seven day deadline. Parties do not have the right to amend their objections or to file further objections after the expiration of the filing deadline. *Rhone-Poulenc, Inc*., 271 NLRB 1008 (1984); *Burns Security Services*, 256 NLRB 959 (1981). Accordingly, the Employer's attempt to raise a new objection concerning Walsh's alleged bias at this late a date must be rejected.

b. Walsh Was Not Involved In Any Of The Objected-To Decisions

Decision and Direction of Election dated January 5, 2016 ("DDE") and the Supplemental Regional Director's Decision on Objections to Election and Certification of Representative dated March 11, 2016 ("DOE") were each issued by Acting Regional Director Harry A. Maier, not Walsh. Similarly, the January 11, 2016 letter denying the Employer's request to reconsider the decision to conduct a mail ballot was also issued by Maier. During the December 21, 2015 representation hearing, Hearing Officer Kathleen O'Neill periodically consulted with the "Acting Regional Director," i.e. Maier, and not Walsh. None of the decisions for which the Employer now seeks Board review were decisions made by Walsh. Accordingly, any allegation of bias on the part of Walsh is inapplicable to this case.

2. Employer Has No Grounds For Review Of The Supervisory Taint Issue

It is well established that the issue of "supervisory taint" is resolved through an administrative investigation, and not through a representation or objections hearing. *Lampcraft Industries*, 127 NLRB 92, n. 2 (1960). Thus, in a normal supervisory-taint issue, an employer only has the right to provide its evidence of supervisory taint to the Region. There is no written decision, nor do the parties have the right to appeal the Region's administrative determination.

In this case, at the Employer's insistence, the hearing officer took testimony on Mr. Cappetta's supervisory status during the representation hearing.[1] The Region also took additional evidence during its administrative investigation. Neither the Union nor Employer knows what evidence the Region reviewed as part of that investigation. The Employer cannot credibly argue that it was not thoroughly investigated.[2] Accordingly, the Employer raises no basis for Board Review of the Region's decision on the supervisory-taint issue.

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[1] The Employer argues that the Region denied it an "appropriate hearing" because the Hearing Officer began the hearing "over an hour late for reasons unexplained[.]" Request for Review, p. 22. On the contrary, the Hearing Officer was prepared to begin the hearing close to the scheduled 10:00 a.m. start time. After she informed the parties that she would only take evidence on the multi-location unit issue, and that Mr. Cappetta would be interviewed privately with a Board Agent as part of the Region's investigation of the supervisory-taint issue, the Employer objected and insisted that it have the right to examine Mr. Cappetta in the courtroom about his supervisory status. Because Mr. Cappetta was in the building, the Acting Regional Director granted the Employer's request and the Hearing Officer permitted testimony on the supervisory issue during the representation hearing. The delay the Employer now complains about was of its own making as the Acting Regional Director considered the Employer's request that it be permitted to take Mr. Cappetta's testimony notwithstanding the normal practice in an administrative investigation.

[2] The fact that seven drivers may have told the Employer that they were not interviewed by the Region as part of that investigation is immaterial. Request for Review, p. 14. First, employees who were interviewed by the Region might not admit to the Employer that they provided information as part of the administrative investigation. Second, in a unit of thirty-two drivers, evidence that seven drivers were not contacted does not mean that a sufficient number of drivers were not contacted to adequately investigate the taint allegation.

3. The Board Should Not Review the Decision To Order A Mail Ballot Election

a. Employer Cannot Raise This Issue in a Second Request For Review

This is the second time the Employer has sought a Request for Review over the Acting Regional Director's decision to conduct a mail ballot election. On January 11, 2016, just after the Decision and Direction of Election issued, the Employer filed a Special Appeal and Request for Review of Acting Regional Director's Decision to Direct a Mail Ballot Election dated January 11, 2016. On January 29, 2016, the Board denied that request, finding that it "raises no substantial issues warranting review."

Section 102.67(i)(1) of the National Labor Relations Board's Rules and Regulations states:

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

(Emphasis added) The current Request for Review of the Acting Regional Director's decision to hold a mail ballot election is concerns the same issue raised by Employer in its January 11, 2016 Request for Review. It should therefore not be considered.

b. Voter Turnout Supports The Acting Regional Director's Decision To Order A Mail Ballot Election

There is one difference between the Employer's prior argument against a mail ballot election and its current argument. Previously, the Employer claimed that a manual ballot was necessary by noting that a manual ballot is favored over a mail in ballot because, historically,

mail ballots had a lower turn-out rate.[3] Thus, the Employer noted, the Board prefers manual ballots because they increase employee participation in the vote.

However, in this mail ballot election, there were thirty-two (32) eligible voters and thirty (30) cast a vote. Clearly, the Employer's concerns that a mail ballot would produce a low voter turnout did not come to pass. Not surprisingly, the instant Request for Review makes no mention of the argument that a mail in ballot produces lower voter turnout than a manual ballot.

The Acting Regional Director reasonably concluded that a mail-in-ballot was a better use of the Region's resources than the Employer's proposal to hold two polling periods over the course of fourteen overnight hours, or the Employer's alternative proposal to have a single six-hour overnight polling period for a unit of only thirty-two employees. Such a determination was well within the Acting Regional Director's discretion. Additionally and importantly, that decision was borne out by the high level of participation in this election, notwithstanding the Employer's claims that turnout would be low in an election conducted by mail.

4. The Acting Regional Director's Denial Of Employer's Subpoena Requests Was Based On Established Board Rules

The Employer acknowledges that the Region was following the Casehandling Manual when it denied the Employer's request for two Subpoena *Duces Tecum* because no hearing had been scheduled. Nevertheless, the Employer argues that the Region should have disregarded the

[3] See e.g. November 25, 2015 letter from Kurt Larkin to Acting Regional Director Harry Maier ("As you know, statistics show that voter turnout in mail ballots is often significantly lower than in traditional manual ballots. So the Region's decision to hold a mail ballot is likely to result in suppressed voter turnout, which is contrary to the purposes of the Act."); Employer's Special Appeal and Request for Review of Acting Regional Director's Decision to Direct a Mail Ballot Election dated January 11, 2016, p. 10 (noting "the widely recognized fact that mail ballots disenfranchise a larger number of voters than manual ballots.")

Casehandling Manual because, the Employer claims, the Manual is out of date in light of the new representation procedures. Request for Review, p. 20.

That argument is simply nonsense. The new rules made no change to the Board's policy of investigating supervisory taint issues administratively. On the contrary, the General Counsel's memorandum outlining the changes in the Representation procedures specifically noted that the Board would continue that policy under the new rules. GC Memo 15-06, p. 18. As such, the Regional Director properly continued to follow the preexisting policy of not permitting a party to subpoena records in aid of an administrative investigation when there is no hearing pending. The Employer's request for review of the Region's decision to deny its subpoena request should be denied.

5. The Acting Regional Director's Procedural Decisions Before And During the Representation Hearing Were Valid Exercises Of His Discretion

In Part IV.A.5 and 6 of the Request for Review, the Employer claims it was prejudiced by various decisions made by the Region in preparation for and during the representation hearing. The Rules give broad discretion to the regional director and hearing officer in deciding various procedural issues, including whether and the extent of any extensions of the deadline for an employer's position statement, whether and for how many days to postpone a representation hearing, whether to continue a hearing to a second day, whether to break for lunch, the time provided to the parties to prepare their closing statement, and whether the parties close orally or through briefs. Now, the Employer claims that any time the Acting Regional Director or Hearing Officer exercised such discretion and did not give the Employer exactly what it wanted, there was a gross violation of the Employer's rights. On its face, the Employer's arguments are

nonsense.[4] If the Region has discretion, it can exercise that discretion. The fact that some (but by no means all) of those discretionary decisions did not go the Employer's way does not pose any threat to the Employer's constitutional or statutory rights.

6. A Single Location Unit Is Appropriate

Through its Request for Review, the Employer seeks to re-litigate the appropriateness of the unit. For the reasons set forth in the Acting Regional Directors DDE, those arguments should be rejected. It is worth noting, however, that the Employer's argument ignores much of the Acting Regional Director's reasoning. The Employer attacks the Acting Regional Director's reliance on *Speciality Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), when, in fact, the Acting Regional Director considered the multi-facility unit issue under both the *Specialty Healthcare* and traditional standards. See DDE, p. 4 ("The Board did not indicate in *Specialty Heathcare* whether the analytical framework set forth in that case is intended to apply to a multi-facility issue…. Because of the uncertainty regarding the Board's intentions in this area, I will analyze the multi-facility issue using both the traditional and the *Specialty Healthcare* standards.")

The Employer's Request for Review also completely ignores many of the factors that the Acting Regional Director considered that favored a single unit under his analysis of the issue

[4] Perhaps the most absurd of its arguments is when the Employer claims that the Acting Regional Director violated its rights by only partially granting its request for a two-day postponement of the deadline for its statement of position and the representation hearing. Originally the hearing was scheduled for Friday, December 18, with the statement of position due on Thursday, December 17. The Employer requested a two-day extension on both, and the Regional Director partially granted that request with a one-day extension. As a result, the position statement was due on Friday, December 18 and the hearing took place on Monday, December 21. The Employer complains that *because of its own postponement request*, the Union was granted an unfair advantage because it had the entire weekend to review the Employer's position statement and prepare for the hearing. Request for Review, pp. 21-22.

using the traditional standard. While the Employer raises the fact that drivers have transferred between facilities (Request for Review, p. 27), the Employer does not address the fact that the rates of interchange were far below the number normally required for a single unit. DDE, pp. 9-11. The Employer also makes no mention at all of the large distances between the nine distribution centers it seeks to include in a single unit. DDE, p. 11. Each of those factors were found by the Acting Regional Director to either "clearly favor" the petitioned-for unit, or was deemed to "not weigh in favor of rebutting the single-facility presumption." DDE, p. 11. Accordingly, the request to review the appropriateness of a single location unit should be denied.

7. Inclusion Of Certified Safety Instructors And Dispatchers Are Not Determinative And Are Therefore Not An Issue For The Request For Review

The election results were twenty-seven votes in favor of the Union, one vote against, with two challenged ballots, the ballots of Frank Cappetta and Carl David. Although hired as Road Drivers, Mr. Cappetta is also both a dispatcher and is certified as a safety instructor. Likewise, Mr. David was hired as a road driver but also works as a certified safety instructor. The Employer contests that certified safety instructors and dispatchers should be excluded from the unit, which is why it challenged their ballots.

Because the two challenged votes were not determinative, they were not opened. Also because there was no ruling on the inclusion or exclusion of those positions, the Certification states that "[t]he dispatchers and certified safety instructors are neither included in nor excluded from the bargaining unit covered by this certification, inasmuch as I directed that they vote subject to challenge and resolution of their inclusion or exclusion was unnecessary because their ballots were not determinative of the election results." DOE, p. 9 n. 5. Such certification language is consistent with the Board's practice. Casehandling Manual, Section 11474; Part X of

General Counsel Memorandum 15-06. The Employer provides no compelling reason to depart from the Board's standard practice in this case and thus no review should be granted on this issue.

8. The Employer's Challenges To The New Representation Rules Have Already Been Rejected By The Courts

The Employer includes several arguments challenging the Representation Rules that became effective on April 14, 2015, as well as General Counsel Memorandum 15-06. In doing so, the Employer repeats the arguments made in *Chamber of Commerce v. NLRB*, 1:15-cv-00009 (D.D.C. 2015); *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D.Tex. 2015), and *Baker DC, LLC v. NLRB*, 1:15-cv-571 (D.D.C. 2015), either by reiterating those arguments in the text of its Request for Review, or by incorporating the Pleadings and Briefs from those cases into its Request for Review by reference. Request for Review, Exhibit D. Although the Employer attached 103 pages of pleadings and briefs from those cases to its Request for Review, left unmentioned is the fact that in each case, the court rejected those challenges to the new representation rules. *Chamber of Commerce of United States of Am. v. Nat'l Labor Relations Bd.*, 118 F. Supp. 3d 171 (D.D.C. 2015)[5]; *Associated Builders & Contractors of Texas, Inc. v. N.L.R.B.*, No. 1-15-CV-026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015). Furthermore, the Board has already held that it will not entertain a Request for Review on the basis of those arguments. *Pulau Corp. & Teamsters, Chauffeurs, Warehousemen, Indus. & Allied Workers of Am., Local 166, Int'l Bhd. of Teamsters, Petitioner*, 363 NLRB No. 8

[5] The two D.C. cases were consolidated. *Chamber of Commerce*, 118 F. Supp. 3d at 177.

(Sept. 16, 2015). Accordingly, the Employer's requests for review concerning the Board's new representation procedures should be rejected.

CONCLUSION

For the foregoing reasons, and for the reasons set forth by the Acting Regional Director in the January 5, 2016 Decision and Direction of Election and the March 11, 2016 Supplemental Regional Director's Decision on Objections to Election and Certification of Representative, the Union respectfully requests that the Board deny the Employer's Request for Review of those decisions.

Respectfully submitted,

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Dated: April 8, 2016

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Union's Response to Employer's Request for Review of Acting Regional Director's Decision and Direction of Election and Decision on Objections to Election and Certification of Representative to be served upon the following by U.S. Mail, postage prepaid, on the date indicated below:

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_/s/ Jeremy E. Meyer_____
Jeremy E. Meyer, Esquire

Date: April 8, 2016

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UPS Ground Freight, Inc. *and* Teamsters Local 773, petitioner. Case 04–RC–165805.

July 27, 2017

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

The Employer's request for review of the Acting Regional Director's Decision and Direction of Election and Supplemental Decision on Objections to Election and Certification of Representative is granted as to the supervisory status of dispatcher Frank Cappetta. On review, and for the reasons explained below, we find that Cappetta was not a statutory supervisor. In all other respects, the Employer's request for review is denied as it raises no substantial issues warranting review.[1]

We agree with the Acting Regional Director that the Employer has not provided sufficient evidence to support its contention of objectionable prounion supervisory conduct by dispatcher Frank Cappetta. The Employer has failed to establish either that Cappetta was a statutory supervisor or that he engaged in conduct that would be objectionable if he were a supervisor.

The Employer asserts that Cappetta possessed the authority to assign and to hire, or effectively recommended hiring, new drivers. Although Cappetta's supervisory status was litigated at the preelection hearing, the Acting Regional Director did not address that evidence in his Supplemental Decision. Accordingly, we have reviewed the evidence adduced at the pre-election hearing and find, in agreement with the Acting Regional Director, that the Employer has failed to satisfy its burden of establishing that Cappetta was a statutory supervisor.

"[T]he burden of proving supervisory status rests on the party asserting that such status exists." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006) (quoting *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003)); accord *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–713 (2001). To establish that Cappetta was a supervisor under Section 2(11) of the Act, the Employer must show that (1) Cappetta held the authority to engage in at least one of the 12 supervisory functions listed in Section 2(11) of the Act; (2) his exercise of such authority was not of a merely routine or clerical nature but required the use of independent judgment; and (3) his authority was held in the interest of the employer. See, e.g., *NLRB v. Kentucky River*, 532 U.S. at 711–713; *Oakwood Healthcare*, 348 NLRB at 687. The Employer can prove that Cappetta possessed the requisite supervisory authority either by demonstrating that he actually performed a supervisory function or by showing that he effectively recommended the same. *Oakwood Healthcare*, supra. Further, "to exercise 'independent judgment' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. at 692–693. A judgment is not independent if it is "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. at 693. Mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

Authority to Assign

In *Oakwood Healthcare*, the Board addressed the meaning of the term *assign* as that term is used in Section 2(11) of the Act. The Board explained that *assign* means "the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties" as opposed to ad hoc instructions that the employee perform a discrete task. *Oakwood*, 348 NLRB at 689. To demonstrate that a putative supervisor possesses authority to assign, there must be evidence that he or she "has the ability to *require* that

[1] In denying review, we agree with the Acting Regional Director that the Employer has failed to rebut the presumption that the petitioned-for single-facility unit of road drivers at the Employer's Kutztown, Pennsylvania facility is appropriate. See e.g. *Hilander Foods*, 348 NLRB 1200, 1200 (2006); *J&L Plate*, 310 NLRB 429, 429 (1993). We do not reach the question of whether the Board's test in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. *Kindred Nursing Center East, LLC v. NLRB,* 727 F.3d 552 (6th Cir. 2013), applies in the circumstances of this case.

In addition to alleging that Cappetta was involved in objectionable conduct, the Employer argues that Cappetta was engaged in conduct that tainted the showing of interest. We find that the Acting Regional Director properly resolved this allegation by administrative investigation. See *Winn-Dixie Stores, Inc.,* 124 NLRB 908 (1959).

We disagree with the dissent that review is warranted of the Hearing Officer's and Acting Regional Director's procedural rulings, which were well within their discretion to make. The rulings were not demonstrably unfair, and in any event, no prejudice has been shown. We also decline our colleague's invitation to relitigate the merits of the Board's Rule on Representation-Case Procedures, 79 FR 74308 (December 15, 2014). The time for extensive policy debate over the provisions of the rule has come and gone – the Board's rule was lawfully enacted, see *Associated Builders and Contractors of Texas, Inc. v. NLRB,* 826 F.3d 215 (5th Cir. 2016), and both we and our dissenting colleague are bound to faithfully apply it. The rule is not susceptible to alteration in an individual adjudication.

a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken." *Golden Crest Healthcare Center*, 348 NLRB at 729 (emphasis in original).

In this case, the record shows that during the year prior to the hearing, Cappetta spent approximately 80 percent of his time as a dispatcher, 10 percent as a safety instructor, and 10 percent as a road driver. In his role as dispatcher, Cappetta received an email each day from Advance Auto Parts, the Employer's sole customer, providing him with the dispatch schedule. The schedule detailed the routes to be driven and the stops to be made on those routes. Based on that information, Cappetta assigned drivers to routes. However, the majority of drivers are permanently assigned to a route, so Cappetta only assigned drivers to routes that did not have permanent drivers. In doing so, he relied primarily on driver preference, although he sometimes considered a driver's skills. For example, if Cappetta knew a driver was an experienced city driver, Cappetta would assign him to a New York City route. In the event that Cappetta assigned a driver to route the driver deemed undesirable, and the driver sought to reject it, Cappetta could switch the driver to another route if one was available. If another route was not available, Cappetta was required to direct the driver to a management official for resolution of the dispute. In addition, although Cappetta was involved in reassigning routes when there were "call outs" such as sick leave or vacations, drivers were required to contact a manager to report an absence. Similarly, while Cappetta recorded the drivers' vacation and sick leave requests in a daytime planner for scheduling purposes, he was not authorized to approve the requests but was instead required to refer them to a management official.

On days that there were more routes to be assigned than drivers, it was necessary to obtain temporary drivers from a third-party provider. The record establishes that to do so, Cappetta was required to notify the Kutztown facility's operations supervisor, who would then contact a third-party provider. From July to October 2015, the Kutztown facility did not have an operations manager or supervisor. During part of this time, Cappetta was required to secure a higher-level manager's approval before contacting a third-party provider to obtain temporary drivers. At some point, however, Cappetta was authorized to contact the providers without prior approval when temporary drivers were required. That authority was rescinded when the Employer hired an operations supervisor for the Kutztown facility.

Notwithstanding its contrary assertions, the Employer has failed to adduce evidence sufficient to establish that Cappetta's responsibilities as a dispatcher met the *Oakwood Healthcare* definition of the term *assign*. Cappetta did not prepare the drivers' daily work schedules or determine the routes to be driven or the stops to be made. Neither did Cappetta assign drivers to the majority of routes, which were well established and had permanent drivers. Although Cappetta was responsible for ensuring that all scheduled routes were covered, he did not have the authority to *require* a driver to accept a particular route. Rather, if a driver sought to reject a route and another route was unavailable, Cappetta was required to refer the driver to management.

Further, even assuming arguendo that Cappetta possessed authority to require drivers to accept the routes he assigned, he exercised no meaningful discretion in determining which routes to assign. In the limited circumstances in which it could be said that Cappetta assigned a driver to a route based on the driver's skills there is no evidence that Cappetta exercised judgment involving a degree of discretion that was more than routine. Drivers' established skill sets were largely determinative of what routes they would be assigned. For example, a driver with city-driving experienced would be assigned urban routes. See, e.g., *Shaw, Inc.*, 350 NLRB 354, 355 (2007) (designating employees to perform specific tasks "based on an employee's trade or known skills" in a way that is "essentially self-evident" does not entail the exercise of independent judgment); *Volair Contractors, Inc.*, 341 NLRB 673, 675 fn. 10 (2004) ("Assigning work to employees on the basis of their known job skills does not require the use of independent judgment.").[2] Accordingly, we find that there is insufficient evidence to establish that Cappetta exercised independent judgment in the assignment of significant overall duties to the Employer's Kutztown drivers. See *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075–1076 (1985) (dispatcher was not a supervisor because he did not exercise independent judgment in assigning work, he did not make initial route assignments, his direction of drivers involved no more than providing them with information from customers, and the act of issuing trailer numbers to drivers was simply ministerial or clerical); *St. Petersburg Limousine Service*, 223 NLRB 209, 210 (1976) (dispatchers did not exercise independent judgment in assigning vehicles and

[2] Nor did obtaining drivers from a third-party provider during the time the Kutztown facility was without an operations manager require the exercise of independent judgment. Rather, the evidence reflects that Cappetta simply followed instructions he had previously been given when prior management approval was required. Moreover, Cappetta's authority to obtain drivers from a third party was temporary, and it was rescinded prior to the hearing in this case.

directing drivers pursuant to company policies and a collective-bargaining agreement).

Authority to Hire

In addition to his responsibilities as a dispatcher, Cappetta also spent approximately 10 percent of his time working as a certified safety instructor. In this capacity, he was responsible for administering road and back-up tests to potential new hires, as well as performing semi-annual safety tests for current drivers, known as space and visibility rides. The record shows that in conducting these evaluations, Cappetta simply completed the appropriate forms and provided them to management. If a potential new hire failed one of the required tests, he or she could not be hired. Other than performing the requisite tests, Cappetta was not involved in the hiring process.

Based on this evidence, we find that Cappetta's role in conducting driver tests and reporting the results does not establish that he possessed authority to hire or to effectively recommend hiring, as the Employer contends. It is undisputed that the tests Cappetta administered are designed to determine the competence of potential new hires, and after administering a test he simply reported to management whether a driver had passed or failed. It was the test results, not a recommendation from Cappetta, that management used in deciding whether an applicant should be hired. On similar facts, the Board has found that administering tests to an applicant and reporting the results to management does not constitute effective recommendation to hire. See *Hogan Manufacturing*, 305 NLRB 806, 807 (1991) (conducting welding tests and reporting results to employer did not constitute recommendation to hire); *Pacific Beach Corp.*, 344 NLRB 1160, 1161–1162 (2005) (finding employee who conducted diving tests for prospective employees and reported the results was not a supervisor where employee's supervisor made the final decision to hire). In these circumstances, we find that the Employer has failed to sustain its burden of establishing that Cappetta possessed the authority to hire or to effectively recommend hiring.

Alleged Prounion Conduct

Even assuming for the sake of argument that Cappetta was a supervisor within the meaning of the Act, the Employer has failed to offer any evidence to show that Cappetta engaged in objectionable conduct. See *Harborside Healthcare,* 343 NLRB 906 (2004). To the contrary, the only instances of prounion conduct the Employer cites involve allegations that a union organizer called Cappetta's cell phone and that Cappetta made a prounion statement to a nonunit employee. Even if proven, such conduct would not be objectionable. See *Northeast Iowa Telephone Co.,* 346 NLRB 465 (2006) (even assuming prounion managers were supervisors, their attendance at union meetings and comments indicating that union could help resolve issues were not objectionable). For this additional reason, we find that the Acting Regional Director correctly overruled the Employer's objections insofar as they allege objectionable prounion supervisory conduct by Cappetta.

Dated, Washington, D.C. July 27, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting in part.

This representation-election case requires resolution of complex issues. The Union, Teamsters Local 773, filed a petition seeking to represent drivers, dispatchers and safety instructors at a distribution center located in Kutztown, Pennsylvania. However, the Employer, UPS Ground Freight (UPS), operates nine distribution centers that employ drivers, dispatchers and/or safety instructors, and all nine distribution centers—and their employees—are involved in work for its sole customer, Advance Auto Parts.[1] The disputed issues, which were the subject of a pre-election hearing, include (1) whether the Kutztown facility constitutes an appropriate single-facility bargaining unit, or whether an appropriate unit must include all nine of the UPS distribution centers; (2) whether the appropriate-bargaining-unit issue should be resolved by applying the Board's traditional "community of interest" criteria or the Board's decision in *Specialty Healthcare*;[2] (3) whether an allegedly prounion employee, Frank Cappetta, was a supervisor within the meaning of Section 2(11) of the Act and thus ineligible to vote; (4) if so,

[1] The nine distribution centers are located in Kutztown, PA; Enfield, CT; Lakeland, FL; Salina, KS; Gastonia, NC; Delaware, OH; Roanoke, VA; Hazlehurst, MS; and Thomson, GA. At all nine facilities, the UPS drivers and other employees are responsible for the delivery of Advance Auto Parts (Advance) products to retail stores operated by Advance within designated geographical areas.

[2] *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. *Kindred Nursing Center East, LLC v. NLRB,* 727 F.3d 552 (6th Cir. 2013). I have expressed my disagreement with the *Specialty Healthcare* standard. See *Macy's, Inc.*, 361 NLRB No. 4, slip op. 25–32 (2014) (Member Miscimarra, dissenting), enfd. 824 F.3d 557 (5th Cir. 2016).

whether Cappetta engaged in prounion supervisory conduct sufficient to taint the showing of interest and invalidate the election; (5) whether Cappetta and a second individual, Carl David, were dual-function employees who should be excluded from the unit on this basis; (6) whether the Acting Regional Director abused his discretion by directing a mail ballot election rather than a conventional manual election; and (7) whether procedural rulings by the Hearing Officer who presided over the pre-election hearing and/or by the Acting Regional Director, pursuant to the Board's Election Rule,[3] were contrary to Section 9(c) of the Act and violated the Employer's due process rights.[4]

I believe the Board should grant review regarding this last set of issues—involving procedural rulings resulting from application of the Election Rule—because substantial issues exist regarding the impact of the procedural rulings on the other issues being litigated. Moreover, in my view, these issues are serious enough to warrant Board evaluation of the challenged procedural rulings *and* corresponding provisions in the Election Rule. Indeed, given the expansive scope of the Election Rule, which took effect more than 2 years ago, it is timely for the Board to evaluate its practical impact, and this case provides an opportunity to do just that. Based on the record presently before the Board, I concur with my colleagues' disposition of the other issues listed above.[5] However, it is difficult to have confidence in the resolution of these other issues because the record presently before the Board was obviously affected by challenged procedural rulings that my colleagues decline to review.

To a significant degree, the request for review at issue here involves concerns similar to those I raised in *European Imports, Inc*., 365 NLRB No. 41, slip op. at 1–4 (2017) (Acting Chairman Miscimarra, dissenting). Like *European Imports*, this case "illustrates the downside associated with the Rule's 'preoccupation with speed between petition-filing and the election,'" which is reflected in the fact that the Election Rule "adopts a single-minded standard regarding what date should be selected when Regional Directors schedule an election: every election must be scheduled for 'the *earliest date practicable*. . . .'"[6]

In *European Imports*, the final election notice afforded many employees as few as *three days' notice* that they were eligible voters and would potentially be represented by a union, depending on the outcome of the election. That is not the problem in this case. The petition was filed on December 10, 2015; the election was conducted using mail ballots (which the Region deposited in the

[3] Representation-Case Procedures, 79 Fed. Reg. 74308 (December 15, 2014) (Election Rule).

[4] Sec. 9(c) of the Act states that, if the investigation of a representation petition reveals that reasonable cause exists to believe there is a question of representation, there must be "an appropriate hearing upon due notice," and the official who conducts the hearing "shall not make any recommendations with respect thereto." If it is found that a question of representation exists, Sec. 9(c) further states that the Board "shall direct an election by secret ballot and shall certify the results thereof." Although the Act makes the Board responsible for representation hearings, the Board has delegated to its regional directors—pursuant to Sec. 3(b) of the Act—its powers over representation elections. Nevertheless, Sec. 3(b) ensures the right of parties to request Board review of "any action of a regional director delegated to him [by the Board]."

Apart from its contention that the Election Rule violates Sec. 9(c) and constitutes a denial of due process as applied to this case, the Employer also contends that the Election Rule should be reconsidered by the Board. Together with former Member Johnson, I have previously expressed my disagreement with the Election Rule. 79 Fed. Reg. at 74430–74460 (dissenting views of Members Miscimarra and Johnson). The Employer also raises certain other challenges involving procedural and substantive rulings. These additional disputed rulings include, among others, the Acting Regional Director's failure to hold a hearing regarding the Employer's postelection objections; the denial of the Employer's request to issue subpoenas in the absence of a pending hearing; and the Acting Regional Director's failure to provide any analysis in support of his determinations regarding supervisor status under Sec. 2(11) of the Act. My colleagues grant review as to the latter issue only. Consistent with the analysis set forth herein, I believe the Board should grant review as to all these rulings based on the importance of determining whether the Region's reliance on the Election Rule deprived the Employer of a reasonable opportunity to address relevant issues, arguments, and authority and to assemble and introduce witness testimony and documentary evidence in support of its position.

[5] I do not, however, reach or pass on whether Cappetta is a statutory supervisor because his ballot was not outcome-determinative (the tally of ballots showed 27 votes for and 1 vote against the Union, with 2 challenged ballots), and the record presently before the Board does not establish that conduct by Cappetta would be objectionable even if he were found to be a supervisor under Sec. 2(11) of the Act. Also, in finding that the Acting Regional Director correctly overruled the Employer's objection challenging the denial of its request for subpoenas, I would rely solely on the Employer's failure to establish a prima facie case in support of its objections. Absent a prima facie case, a hearing was not warranted, and "[a] party's right to subpoena attaches only after the Board determines that there exist substantial and material factual issues that warrant a hearing." See *Park Chevrolet-Geo, Inc.*, 308 NLRB 1010, 1010 fn. 1 (1992).

[6] *European Imports*, supra, slip op. at 1, quoting Election Rule, 79 Fed. Reg. at 74436 (dissenting views of Members Miscimarra and Johnson), and Board's Rules and Regulations Sec. 102.67(b), 79 Fed. Reg. at 74485 ("The regional director shall schedule the election for the earliest date practicable consistent with these rules.") (emphasis added). The Board majority in the Election Rule refused to take any position regarding what constitutes an appropriate overall period for a post-petition election campaign—i.e., an appropriate minimum and maximum period of time between petition-filing and election. The Election Rule's failure to provide *any* guidance regarding the "speed" issue, instead requiring Regional Directors to hold every election at "the earliest date practicable," Board's Rules and Regulations Sec. 102.67(b), 79 Fed. Reg. at 74485, was a substantial reason that former Member Johnson and I could not support the Rule. See 79 Fed. Reg. at 74435–74436, 74459 (dissenting views of Members Miscimarra and Johnson).

mail on January 11, 2016); and the ballots had to be received by the Region no later than January 29, 2016.[7] Consequently, there were 50 days between petition-filing and the deadline for returning ballots.[8] This case involves a different set of problems that result from the Election Rule's preoccupation with having elections occur on the "earliest date practicable." The Hearing Officer and/or Acting Regional Director made numerous procedural rulings, each based on the Election Rule, and I believe the Employer's request for review raises substantial issues warranting review to determine whether the disputed rulings were unfair, arbitrary, contrary to the Act, and a denial of due process. Some examples include the following:

- *Accelerated Procedures During Employer's Busiest Time of Year*. The petition, hearing, and election spanned the year-end holiday season, arguably one of the busiest periods of the year for the Employer and its employees, since the Employer's business involves the delivery of products to retail stores.
- *Required Position Statement on the Seventh Day*. Again, the representation petition was filed on December 10, 2015, and under the Election Rule the non-petitioning party (here, the Employer) was required to file and serve a comprehensive Statement of Position no later than noon on December 17, 2015 (the seventh day after petition-filing). The Election Rule imposes no requirement on the petitioning party (here, the Union) to file a Statement of Position before the hearing.
- *Required Hearing on the Eighth Day*. Under the Election Rule, the hearing was to commence on December 18, 2015 (the eighth day after petition-filing).
- *Denial (in Part) of Requested Extensions*. Considering the complexity of the issues and the timing of the petition, the Employer sought a very modest extension of these deadlines, requesting an additional two business days to file the Statement of Position (from Thursday, December 17 to Monday, December 21),[9] and an additional two business days until the hearing commenced (from Friday, December 18 to Tuesday, December 22). In spite of the reasonableness of these requests, the circumstances that warranted granting them, and the fact that the Election Rule allows such requests to be granted for "special circumstances,"[10] the Acting Regional Director denied the requests and approved only a one-business-day extension of both the Statement of Position (making it due at 10:00 a.m. Friday, December 18) and the hearing (to commence Monday, December 21, only four days before Christmas).
- *Refusal to Carry Over Hearing to Second Day.* The Election Rule provides that the hearing, once commenced, "shall continue from day to day until completed."[11] However, toward the end of the first (and only) day of the hearing, the Hearing Officer denied the Employer's request to adjourn the hearing until the following day. Hearing testimony continued until approximately 7:00 p.m., at which point the Employer requested an adjournment so the parties could prepare overnight for oral arguments to be presented the following morning, and this request was denied.
- *Limited Preparation Time for Oral Arguments*. The Election Rule provides that "any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument."[12] When the Hearing Officer denied the Employer's request to adjourn the day-long hearing at approximately 7:00 p.m., she gave the parties only 30 minutes to prepare their oral arguments, notwithstanding the Employer's objection that this was insufficient given the complexity of the case and the parties' inability to refer to a hearing transcript.[13]

[7] The ballots were to be counted on February 1, 2016.

[8] There were 32 days between petition-filing and the mailing of ballots.

[9] The requested 2-business-day extension of the statement of position deadline would have made the Statement of Position due on Monday, December 21 (4 calendar days after December 17), because Saturday and Sunday (December 19 and 20) were not business days. The Election Rule permits postponements longer than 2 business days only under "extraordinary circumstances." Id.

[10] See Board's Rules and Regulations Sec. 102.63(b)(1), (2), and (3), 79 Fed. Reg. at 74481–74482.

[11] Board's Rules and Regulations Sec. 102.64(c), 79 Fed. Reg. at 74482.

[12] Board's Rules and Regulations Sec. 102.66(h), 79 Fed. Reg. at 74484.

[13] The oral argument made by the Employer's counsel focused entirely on the procedural limitations that, according to counsel, were unfair, contrary to the Act and a denial of due process. In its entirety, the Employer's oral argument consisted of the following:

> Madam Hearing Examiner, . . . we have requested to file post-hearing briefs; that request was summarily denied. We have requested to present oral argument tomorrow morning after an overnight recess to allow us to prepare; that request was also denied.
>
> As everyone knows, the Union saw our written proffer and summary of evidence as set forth in our extensive position statement on Friday, presumably by midday. We did not have that opportunity, and the first the Employer heard of the Union's evidence was this afternoon when it was put into the record at the hearing.

- *Refusal to Permit Post-Hearing Briefs*. The Election Rule all but eliminated post-hearing briefs, stating that they may be filed "only upon special permission of the regional director and within the time and addressing the subjects permitted by the regional director."[14] Here, in addition to denying the Employer's request that the pre-election hearing be continued to the following day, thereby providing the Employer more time to prepare a closing argument, the Acting Regional Director denied the Employer's request for special permission to file a post-hearing brief.

It is important for the Board to promptly resolve election-related issues, and I completely support having the Board conduct elections in a timely manner.[15] Indeed, the Board has long done so: before the Election Rule was adopted, it adhered to a well-known target of having elections take place within a median of 42 days after petition-filing, and the Board had an enviable track record of conducting more than 90 percent of elections within 56 days after petition filing.[16] Here, as previously noted, the deadline for returning mail ballots was 50 days after petition filing. Therefore, the application of the Election Rule to this case did not result in an election timeframe that was tighter than the Board's pre-Election Rule benchmarks. Even so, two aspects of the Election Rule's impact on this case remain noteworthy.

First, this case demonstrates that the Election Rule's extensive changes to the Board's preelection procedures inevitably draw parties into a game of "hurry up and wait." The petition here was filed on December 10, 2015, and the deadline for returning mail ballots was January 29, 2016 (which, as noted above, was 50 days after petition filing). Yet, *more than 17 additional months have now passed*, and the parties still have not obtained any definitive resolution of issues arising from the election. As the Board's decision reflects, this delay was at least in part due to the need to address important issues that were not resolved in the Regional Director's Supplemental Decision. Worse, because my colleagues deny review on most issues the Employer raises, the parties here—and most parties in other election cases[17]—will *never* obtain a definitive resolution from the Board as to the issues the Board does not address, and any meaningful postelection review will only be available in the courts, which defeats the purpose of mandating that elections occur on the "earliest date practicable." Former Member Johnson and I predicted this outcome in our Election Rule dissenting views, where we stated:

We have had no fair opportunity to review the transcript, to prepare a brief or make argument based on application of the law to the facts. We've been here since before 10:00 a.m. when the hearing was supposed to convene. It's now after 7:00 p.m. Except for a 30-minute lunch recess, we've been at it now for close to 9–1/2 hours. We are being denied a fair hearing. This is not a fair opportunity to make a closing argument. It is a denial of due process. And I second my colleague's comments about the nature of that deliberate denial of due process.

Giving us 30 minutes to "prepare" a closing argument is not a fair substitute for the type of preparation we've been denied. We're not going to allow the Regional Director to claim that we were given an opportunity to make reasonable or meaningful oral argument under the circumstances. It is a sham and it's a denial of due process.

So I will reiterate the comment we're being denied a fair hearing. We're being denied a fair opportunity to make argument based on a review of the transcript, and an opportunity to sit down and think about how to apply the law to the facts; so we're not given a fair opportunity.

So all I can say at this point is that we reiterate all of the objections we've made. We reiterate the points we made in of statement of position [sic]. And we rely on the evidence and the arguments made in case today. And it would be meaningless to try to make further oral argument under the circumstances. So that's all we have to say. We're not going to . . . play the game by claiming that this constitutes any fair or meaningful opportunity to make closing argument.

Thank you very much.

[14] Board's Rules and Regulations Secs. 101.30(c), 102.66(h), 79 Fed. Reg. 74477, 74484. See also 79 Fed. Reg. 74401–74403. Prior to the Election Rule's adoption, the Board's regular practice was to permit parties to file posthearing briefs, which in the overwhelming majority of cases were due 7 days after the hearing's conclusion. See 79 Fed. Reg. 74401 ("[U]nder [prior] §§ 102.67(a) and 101.21(b), in nearly all cases parties [were] afforded a right to file briefs at any time up to 7 days after the close of the hearing, with permissive extensions granted by hearing officers of up to 14 additional days."). The Election Rule ostensibly continued to permit posthearing briefs by vesting "the regional director with discretion to grant a request to file a post-hearing brief in amended § 102.66(h)." Id. However, the reality is that regional directors—who are required by the Election Rule to schedule elections at the "earliest date practicable" (Board's Rules and Regulations Sec. 102.67(b), 79 Fed. Reg. at 74485)—now routinely dispense with posthearing briefing, as happened here.

[15] See 79 Fed. Reg. at 74459 (dissenting views of Members Miscimarra and Johnson) (favoring a minimum period of 30 or 35 days and, with few exceptions, a maximum period of 60 days after petition-filing for all elections).

[16] 79 Fed. Reg. at 74434 (dissenting views of Members Miscimarra and Johnson).

[17] Board review of preelection disputes has long been discretionary, but the Election Rule made Board review of postelection disputes discretionary in all cases—both where elections are conducted pursuant to a regional director's decision and direction of election and where they are conducted pursuant to a stipulated election agreement—except where objections or ballot challenges are consolidated with unfair labor practice charges for hearing before an administrative law judge. Board's Rules and Regulations Sec. 102.62(b), 79 Fed. Reg. at 74479; Board's Rules and Regulations Sec. 102.69(c)(2), 79 Fed. Reg. 74487. Previously, parties were guaranteed Board review of postelection disputes if they entered into a Stipulated Election Agreement. See 79 Fed. Reg. at 74449–74450 (dissenting views of Members Miscimarra and Johnson).

> [T]he Final Rule makes elections occur more quickly—by eliminating time for reasonable preparation, by adopting new, accelerated pleading requirements [the Statement of Position] applicable only to employers, by dispensing with post-hearing briefs, and by deferring until following the election evidence regarding issues as fundamental as who can vote, for example—but our colleagues do not adequately address the likelihood that *the overall time needed to resolve postelection issues will increase, as will the number of rerun elections.*[18]

Second, the more serious problem caused by the Election Rule's procedural shortcuts involves the risk that, as here, they may produce an outcome that is unfair, arbitrary, contrary to the Act, and a denial of due process. The election in this case involves complex factual and legal issues, including a question that the Board has not previously addressed (whether the *Specialty Healthcare* "overwhelming community of interest" standard applies in determining whether a party has rebutted the presumptive appropriateness of a petitioned-for single-facility bargaining unit). At some point, at least in certain cases, a party's substantive rights to litigate its case in Board proceedings are infringed upon by (i) dramatically accelerating litigation timetables; (ii) denying reasonable requests for modest extensions of time; (iii) giving the party a mere 7 days (extended here by one business day) to prepare a comprehensive Statement of Position; (iv) giving the party a mere 8 days (also extended here by one business day) to prepare and present testimony and documentary evidence in a hearing; (v) requiring a party to participate in the hearing for an extended period of time, on a single day, beyond normal business hours; (vi) denying a party's request to adjourn the hearing, at roughly 7 p.m., in order to permit the party to prepare its oral argument overnight; and (vii) giving a party a mere 30 minutes, at the end of a long hearing day, to prepare its oral argument. I do not prejudge these matters, but they are important enough, in my opinion, to warrant Board review.

Accordingly, as to the above issues, I respectfully dissent.

Dated, Washington, D.C. July 27, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

[18] Election Rule, 79 Fed. Reg. at 74434–74435 (Members Miscimarra and Johnson, dissenting) (emphasis added).

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C.3512

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
04-CA-205359	8/30/17

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
UPS Ground Freight, Inc.

b. Tel. No. 610-285-5380

c. Cell No.

f. Fax No.

d. Address *(Street, city, state, and ZIP code)*
9755 Commerce Circle
Kutztown, PA 19530

e. Employer Representative
Matthew DiBiase

g. e-Mail

h. Number of workers employed
15

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Trucking concern

j. Identify principal product or service
Freight

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
Since on or about August 24, 2017, the employer has refused to bargain with the union.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Teamsters Local Union 773

4a. Address *(Street and number, city, state, and ZIP code)*
3614 Lehigh Street, Suite A
Whitehall, PA 18052

4b. Tel. No. 610-434-4451M

4c. Cell No.

4d. Fax No.

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)* IBT

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Thomas H. Kohn
(signature of representative or person making charge)

Thomas H. Kohn Attorney
(Print/type name and title or office, if any)

Address 123 S. Broad Street, Suite 2020, Philadelphia, PA 19109

8/29/17
(date)

Tel. No. 215-875-3129

Office, if any, Cell No.

Fax No. 215-790-0668

e-Mail

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 4
615 CHESTNUT ST
STE 710
PHILADELPHIA, PA 19106-4413

Agency Website
www nlrb gov
Telephone (215)597-7601
Fax (215)597-7658

September 13, 2017

Kurt G. Larkin, Esquire
Hunton & Williams,LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219

Thomas H. Kohn, Esquire
Markowitz & Richman
123 South Broad Street, Suite 2020
Philadelphia, PA 19109-1025

Re: UPS Ground Freight, Inc.
Case 04-CA-205359

Gentlemen:

Attached is a copy of the **Complaint** and Notice of Hearing that issued today pursuant to my direction It is the policy of the General Counsel of the National Labor Relations Board to encourage settlement of unfair labor practices short of litigation wherever possible. Be assured that this Regional Office fully supports such settlement policy and will be available to discuss settlement of this case at any time prior to the formal hearing, which is scheduled to commence on January 29, 2018.

The trial attorney assigned to this matter will contact you in the near future to discuss the possibility of settlement and the arrangement of a settlement conference with our settlement coordinator, Regional Attorney Richard P Heller In the meantime, please also feel free to contact the trial attorney or Mr. Heller anytime regarding settlement of this matter. You can contact Mr. Heller by email at Richard Heller@nlrb gov If we have not already done so, we will supply you with a copy of a proposed Settlement Agreement setting forth the terms and conditions upon which the matter can be resolved, thereby avoiding costly and time-consuming litigation. We invite you to give this matter your most serious and informed attention well in advance of the hearing

Very truly yours,

Harold A. Maier

HAROLD A. MAIER[1]
Acting Regional Director

Enclosures

[1] Regional Director Dennis P. Walsh is recused from this matter.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

UPS GROUND FREIGHT, INC.

and **Case 04-CA-205359**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 773

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by International Brotherhood of Teamsters Local 773 (the Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that UPS Ground Freight, Inc. (Respondent) has violated the Act as described below.

1. The charge in this proceeding was filed by the Union on August 30, 2017, and a copy was served on Respondent by U.S. mail on August 30, 2017.

2. (a) At all material times Respondent has been a corporation with an office and place of business in Kutztown, Pennsylvania (the Facility), and has been engaged in the nationwide distribution of freight.

(b) During the past 12 months, in conducting its operations described above in paragraph 2(a), Respondent purchased and received at the Facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

4. At all material times, Respondent's Legal Counsel has been an agent of Respondent within the meaning of Section 2(13) of the Act.

5. (a) The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED: All regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania.
>
> EXCLUDED: All other employees, guards, and supervisors as defined in the Act.

(b) On March 11, 2016, the Union was certified as the collective-bargaining representative of the Unit.

(c) At all material times since March 11, 2016, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

6. About August 22, 2017, the Union, by e-mail to Respondent's Legal Counsel, requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

7. About August 24, 2017, Respondent, by letter from Respondent's Legal Counsel, stated that it would not recognize or bargain with the Union as the exclusive collective-bargaining representative of the Unit.

8. Since about August 24, 2017, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

9. By the conduct described above in paragraphs 7 and 8, Respondent has been refusing to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

10. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for Respondent's unfair labor practices alleged above in paragraphs 7 through 9, the General Counsel seeks an Order requiring Respondent to bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate unit. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this**

office on or before September 27, 2017, or postmarked on or before September 26, 2017. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT at 10:00 a.m. on January 29, 2018, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board at 615 Chestnut Street, Suite 710, Philadelphia, Pennsylvania. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Signed at Philadelphia, Pennsylvania this 13th day of September, 2017.

HAROLD A. MAIER[1]
Acting Regional Director, Fourth Region
National Labor Relations Board

[1] Regional Director Dennis P. Walsh is recused from this matter.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

UPS GROUND FREIGHT, INC.

and **Case 04-CA-205359**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 773

UPS GROUND FREIGHT, INC.'S
ANSWER AND DEFENSES TO COMPLAINT

Pursuant to Sections 102.20 and 102.21 of the Rules and Regulations of the National Labor Relations Board, UPS Ground Freight, Inc. ("UPS Freight" or "the Company"), by undersigned counsel, submits its Answer and Defenses in response to the Complaint and Notice of Hearing, dated September 13, 2017 ("Complaint"). UPS Freight denies that it has committed any violation of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("the Act"), including but not limited to the purported unfair labor practices alleged in the Complaint, and therefore denies all allegations not expressly admitted herein. The Company further responds to the corresponding numbered paragraphs and other allegations contained in the Complaint as follows:

1. UPS Freight admits that the charge in this proceeding was filed by the International Brotherhood of Teamsters Local 773 ("the Union") and served on the Company on August 30, 2017, but denies any allegation, express or implied, in Paragraph 1 of the Complaint or in the underlying charge that the Company engaged in any unlawful conduct under the Act.

2. UPS Freight admits the allegations contained in Paragraph 2 of the Complaint and its subparts (a) through (c).

3. Upon information and belief, UPS Freight admits the allegations contained in Paragraph 3 of the Complaint.

4. UPS Freight denies the allegations contained in Paragraph 4 of the Complaint since the phrase "at all material times" is vague and unclear.

5(a). UPS Freight denies the allegations contained in Paragraph 5(a) of the Complaint.

5(b). UPS Freight admits that, by decision issued on March 11, 2016, the Acting Regional Director of Region 4, Harold A. Meier, certified the Union as the collective-bargaining representative of the bargaining unit ("Unit") described in Paragraph 5(a) of the Complaint, but denies any allegation in Paragraph 5(b), express or implied, that the Unit constitutes an appropriate bargaining unit under the Act, that the election resulting in the Unit's certification (including the pre-election, election, and post-election administrative processes conducted by the Region) was lawful and/or appropriate, or that the Region's certification of the Union was lawful and/or appropriate.

5(c). UPS Freight denies the allegations contained in Paragraph 5(c) of the Complaint.

6. UPS Freight admits the allegations contained in Paragraph 6 of the Complaint, but denies any allegation in Paragraph 6, express or implied, that the Union's August 22, 2017 e-mail represents a request for bargaining from which a timely charge could issue, or that the Company has, in any way, committed a violation of the Act in the manner in which it responded to the Union's request.

7. UPS Freight admits the allegations contained in Paragraph 7 of the Complaint, but denies any allegation in Paragraph 7, express or implied, that the Company engaged in any unlawful conduct under the Act.

8. UPS Freight denies the allegations contained in Paragraph 8 of the Complaint.

9. UPS Freight denies the allegations contained in Paragraph 9 of the Complaint.

10. UPS Freight denies the allegations contained in Paragraph 10 of the Complaint.

11. UPS Freight denies that it has engaged in any unfair labor practice alleged in the Complaint, and further denies that the General Counsel and/or Union is entitled to any relief whatsoever, including but not limited to the relief specifically requested in the "WHEREFORE" section of the Complaint following paragraph 10.

AFFIRMATIVE AND OTHER DEFENSES

Without waiving or excusing the burden of proof of the General Counsel, or admitting that UPS Freight has any burden of proof, the Company hereby asserts the following affirmative or other defenses:

FIRST DEFENSE

The Complaint should be dismissed because UPS Freight did not take any action in violation of the Act and has acted at all times in accordance with the Act and applicable NLRB precedent.

SECOND DEFENSE

The Complaint should be dismissed in part because certain allegations, even if true, do not violate the Act.

THIRD DEFENSE

Any relief sought should be denied as inconsistent with the Act and unwarranted under the circumstances.

FOURTH DEFENSE

The Complaint should be dismissed as untimely pursuant to 29 USCA §160(b), since the underlying charge was filed more than six months after the Company's February 23, 2017

correspondence declining to recognize or bargain with the Union and over 18 months after the Union's initial request to bargain, which occurred on February 16, 2016.

FIFTH DEFENSE

Some or all of the allegations in the Complaint are barred by the applicable statute of limitations.

SIXTH DEFENSE

The Region is barred from litigating the Complaint by the doctrine of laches as a result of the Union's delay in filing the underlying ULP charge.

SEVENTH DEFENSE

The Complaint should be dismissed because of the Region's unconstitutional, unlawful and arbitrary interpretation, enforcement, and application of the election rule entitled "Representation – Case Procedures; Final Rule," 29 C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74439 ("the Final Rule"), and of the guidance set forth in General Counsel Memorandum 15-06 entitled "Guidance Memorandum on Representation Case Procedure Changes" ("GC Memo 15-06"), in *UPS Ground Freight, Inc. and Teamsters Local 773*, Case 04–RC–165805 (Dec. 10, 2015), including but not limited to its: (i) application of accelerated pre-election procedures during UPS Freight's busiest time of year; (ii) requirement that UPS Freight submit a comprehensive position statement prior to the Representation Hearing while imposing no such requirements on the petitioning party, and the accelerated scheduling of the Representation Hearing; (iii) partial denial of UPS Freight's request for extension of the deadline for the filing of its position statement and the postponement of the Representation Hearing; (iv) refusal to carry over the Representation Hearing to a second day; (v) refusal to provide adequate time to prepare oral arguments at the conclusion of the Representation Hearing; (vi) refusal to permit UPS Freight to submit post-hearing briefs; (vii) denial of UPS Freight's Request for the Issuance of

Subpoena Duces Tecum; summary denial of UPS Freight's election objections and denial of its request for a hearing on such objections; and (viii) conduct of the election by mail ballot and refusal to consider the Company's revised election proposal, resulted in patently unlawful, unfair and prejudicial pre-election, election, and post-election processes that denied UPS Freight an "appropriate" hearing guaranteed by Section 9(c) of the Act. All of these actions contravened the Company's (and its employees') substantive and due process rights under the Act, the Administrative Procedures Act of 1946, and the United States Constitution, and culminated in the certification of a bargaining unit that is neither appropriate nor lawful and to which the Company has no bargaining obligation. These matters have been addressed by the Company throughout the election proceedings, as set forth in the Company's statement of position, election objections, and post-election request for review, and are supported by substantial evidence contained in the transcript of the December 21, 2016 Representation Hearing and submitted by the Company in its offer of proof. The Company fully incorporates by reference the arguments and evidence in these filings and transcripts as if fully set forth herein.

EIGHTH DEFENSE

The Complaint should be dismissed because of the Region's unconstitutional and unlawful decisions and arbitrary treatment of the legal and procedural issues raised by the Company throughout the proceedings in *UPS Ground Freight, Inc. and Teamsters Local 773*, Case 04–RC–165805 (Dec. 10, 2015), including but not limited to: (i) whether the Kutztown facility constitutes an appropriate single-facility bargaining unit, or whether an appropriate unit must include all nine of the UPS distribution centers; (ii) whether the appropriate bargaining-unit issue should be resolved by applying the Board's traditional "community of interest" criteria or the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934,

940 (2011); (iii) whether an allegedly pro-union employee, Frank Cappetta ("Cappetta"), was a supervisor within the meaning of Section 2(11) of the Act and thus ineligible to vote and, if so, whether Cappetta engaged in pro-union supervisory conduct sufficient to fatally taint the Union's showing of interest and invalidate the election; (iv) whether the Region should have decided the foregoing challenges prior to the conduct of the election, inasmuch as its failure to decide Cappetta's supervisory status before the vote unlawfully deprived the Company of the opportunity to know whether it could lawfully treat Cappetta as a supervisor under the Act during the election campaign, or could lawfully interrogate Cappetta regarding the nature and extent of his attempts to obtain union authorization cards from his co-workers and whether those actions tainted the showing of interest; (v) whether Cappetta and a second individual, Carl David ("David"), were dual-function employees who should be excluded from the unit on this basis; and (vi) whether the Region's unconstitutional and unlawful interpretation, enforcement, and application of the Final Rule and GC Memo 15-06 resulted in a patently unfair and prejudicial process. All of these actions contravened the Company's (and its employees') substantive and due process rights under the Act, the Administrative Procedures Act of 1946, and the Constitution. These matters have been addressed by the Company throughout the election proceedings, as set forth in the Company's statement of position, election objections, and post-election request for review, and are supported by substantial evidence contained in the transcript of the December 21, 2016 Representation Hearing and submitted by the Company in its offer of proof. The Company incorporates fully by reference the arguments and evidence in these filings and transcripts as if fully set forth herein.

NINTH DEFENSE

The Complaint should be dismissed because the National Labor Relations Board's ("NLRB") denial of the Company's request for review of the legal and procedural issues raised by UPS Freight during the pre-election, election, and post-election proceedings, as set forth in *UPS Ground Freight, Inc. and Teamsters Local 773*, Case 04–RC–165805 (July 27, 2017), and as described above, denied the Company an opportunity to have these issues resolved by the NLRB and further contravened the Company's (and its employees') substantive and due process rights under the Act, Administrative Procedures Act of 1946, and the Constitution.

TENTH DEFENSE

The Complaint should be dismissed because the Region's approved voting unit comprised of "all regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania who were employed during the payroll period ending January 2, 2016," is inappropriate because it excludes the regular drivers (full-time and part-time) employed by the Company at its eight other distribution facilities serving the same customer, which the evidence proved share an overwhelming community of interest with the employees sought to be represented by the Union and constituted the only appropriate bargaining unit, but which the Union failed to petition for. These matters have been addressed by the Company throughout the election proceedings, as set forth in the Company's statement of position, election objections, and post-election request for review, and are supported by substantial evidence contained in the transcript of the December 21, 2016 Representation Hearing and submitted by the Company in its offer of proof. The Company incorporates fully by reference the arguments and evidence in these filings and transcripts as if fully set forth herein

ELEVENTH DEFENSE

The Complaint should be dismissed because the Region's approved voting unit is inappropriate to the extent it includes certified safety instructors and dispatchers, as proposed by the Union at the representation hearing, since the employees performing the duties associated with these positions do not "regularly perform duties similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit." These matters have been addressed by the Company throughout the election proceedings, as set forth in the Company's statement of position, election objections, and post-election request for review, and are supported by substantial evidence contained in the transcript of the December 21, 2016 Representation Hearing and submitted by the Company in its offer of proof. The Company incorporates fully by reference the arguments and evidence in these filings and transcripts as if fully set forth herein.

TWELFTH DEFENSE

The Complaint should be dismissed, or alternatively should be transferred to another Region for further processing, due to the existing conflict of interest and appearance of a lack of impartiality existing at Region 4 in view of the NLRB's determination that its Regional Director, Dennis P. Walsh ("Mr. Walsh"), had engaged in conduct constituting a conflict of interest and other improper conduct, and who was suspended without pay by the NLRB for a period of 30 days at or about the end of December 2015, following the filing of the Union's petition for election. The NLRB's determinations of impropriety regarding the Regional Director of Region 4 create substantial questions concerning not only his own impartiality, but also the impartiality of Region 4 and the appearance of impropriety that exists by virtue of allowing Region 4 to take any action in this matter.

THIRTEENTH DEFENSE

UPS Freight asserts that some or all of the issues raised in the Complaint are not substantially justified, and therefore seeks the recovery of all allowable fees and expenses pursuant to Board Rules and Regulations and all other applicable laws.

UPS Freight reserves the right to assert additional defenses during the course of this action as circumstances may warrant.

WHEREFORE, UPS Freight respectfully requests that, upon final disposition of this Complaint, the Administrative Law Judge and the National Labor Relations Board find that the Complaint should be dismissed, that the Company did not violate the Act in any of the ways alleged in the Complaint or otherwise, order that UPS Freight be awarded reimbursement of all allowable fees and expenses incurred in this proceeding, and grant such other and further relief, at law or in equity, to which the Company shows itself to be justly entitled.

Respectfully submitted this 27th day of September, 2017.

UPS GROUND FREIGHT, INC.

By: /s/ Kurt G. Larkin

Kurt G. Larkin, Esq.
Brian C. Ussery, Esq.
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
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James P. Naughton, Esq.
Hunton & Williams LLP
500 East Main Street
Suite 1000
Norfolk, VA 23510
Telephone: (757) 640-5300
Email: jnaughton@hunton.com

CERTIFICATE OF SERVICE

I certify that on this 27th day of September, 2017, I caused the foregoing to be electronically filed with the National Labor Relations Board at http://nlrb.gov and a copy of same to be served by U.S. Mail on the following parties of record:

Harold A. Meier
Acting Regional Director, Region 4
National Labor Relations Board
615 Chestnut Street, Suite 710
Philadelphia, PA 19106-4413

Thomas H. Kohn, Esq.
Markowitz & Richman
123 South Broad Street, Suite 2020
Philadelphia, PA 19109-1025

/s/ Kurt G. Larkin
Counsel for UPS Ground Freight, Inc.

22749.000209 EMF_US 66779576v3

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 4
615 Chestnut St Ste 710
Philadelphia, PA 19106-4413

Agency Website: www.nlrb.gov
Telephone: (215)597-7601
Fax: (215)597-7658

Agent's Direct Dial: (215)597-4310

October 12, 2017

Gary W. Shinners, Executive Secretary
National Labor Relations Board
Office of Executive Secretary
1015 Half Street SE
Washington, DC 20570-0001

EFILED

Re: UPS Ground Freight, Inc.
Case 04-CA-205359

Dear Mr. Shinners:

Enclosed please find Counsel for the General Counsel's Motion for Summary Judgment with Exhibits and Memorandum in Support of Motion for Summary Judgment in the above-referenced case. Copies of the Motion and Memorandum have been served on the parties named below by e-mail.

Very truly yours,

Christy E. Bergstresser
Counsel for the General Counsel

Enclosure

Kurt G. Larkin, Esquire, Hunton & Williams (klarkin@hunton.com)
Brian C. Ussery, Esquire, Hunton & Williams (bussery@hunton.com)
James P. Naughton, Esquire, Hunton & Williams (jnaughton@hunton.com)
Thomas H. Kohn, Esquire, Markowitz & Richman (tkohn@markowitzandrichman.com)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

UPS GROUND FREIGHT, INC.

Case 04-CA-205359

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 773

MOTION FOR SUMMARY JUDGMENT

Pursuant to Sections 102.24 and 102.50 of the Rules and Regulations of the National Labor Relations Board (the Board), in order to effectuate the purposes of the National Labor Relations Act (the Act) and to avoid unnecessary costs or delay, Counsel for the General Counsel respectfully moves to transfer this case to the Board and moves for Summary Judgment. UPS Ground Freight, Inc. (Respondent) has refused to bargain with International Brotherhood of Teamsters Local 773 (the Union) in order to test the Board's recent certification of the Union as the exclusive collective-bargaining representative of Respondent's drivers at its Kutztown, Pennsylvania facility. This case presents no genuine issues as to any material fact and the General Counsel is entitled to judgment as a matter of law. In support of this Motion, Counsel for the General Counsel states the following:

1. On December 10, 2015, the Union filed a petition pursuant to Section 9(c) of the Act in Case 04-RC-165805, seeking to represent certain employees of Respondent (Exhibit 1).

2. On December 15, 2015, Respondent filed a Motion to Postpone Representation Hearing and for Extension of Time to File Statement of Position (Exhibit 2). On December 16, 2015, Acting Regional Director for the Fourth Region of the National Labor Relations Board

Harold A. Maier (the Acting Regional Director),[1] issued an Order Rescheduling Hearing Granted In-Part (Exhibit 3). Respondent filed its Statement of Position on December 18, 2015 (Exhibit 4).

3. A representation hearing was conducted on December 21, 2015. On January 5, 2016, the Acting Regional Director issued a Decision and Direction of Election (Exhibit 5), with an Erratum issued on January 7, 2016 (Exhibit 6), that directed a mail ballot election and found the following unit of Respondent's employees (the Unit) to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania, excluding all other employees, guards, and supervisors as defined in the Act.

4. On January 11, 2016, Respondent filed a Special Request for Review of Acting Regional Director's Decision to Direct a Mail Ballot Election in Case 04-RC-165805 (Exhibit 7). On January 12, 2016, the Union filed its opposition to Respondent's Special Request (Exhibit 8). On January 29, 2016, the Board issued an Order denying the Special Request for Review of Acting Regional Director's Decision to Direct a Mail Ballot Election (Exhibit 9).

5. A mail ballot election in Case 04-RC-165805 commenced on January 11, 2016 and concluded on January 29, 2016 for Respondent's employees in the Unit. On February 1, 2016, after the conclusion of the voting period, the Acting Regional Director issued a Tally of Ballots showing 27 votes cast for the Union, 1 vote cast against the Union, and 2 non-determinative challenged ballots (Exhibit 10).

6. On February 2, 2016, Respondent requested the issuance of a subpoena duces tecum (Exhibit 11), which the Acting Regional Director denied by Order dated February 3, 2016

[1] Regional Director Dennis P. Walsh is recused from this matter.

(Exhibit 12). On February 9, Respondent filed objections to conduct affecting the results of the election (Exhibit 13) and an offer of proof in support of its objections (Exhibit 14).

7. On March 11, 2016, the Acting Regional Director issued a Supplemental Regional Director's Decision on Objections to Election and Certification of Representative (Exhibit 15) overruling the objections in their entirety and certifying the Union as the representative of the Unit.

8. On April 1, 2016, Respondent filed a Request for Review of Acting Regional Director's Decision and Direction of Election and Decision on Objections to Election and Certification of Representative, and on April 8, 2016, Respondent filed a Corrected Request for Review (Exhibit 16), to which the Union filed a timely response (Exhibit 17).

9. While the Request for Review was pending, on February 24, 2017, the Union filed a charge in Case 04-CA-193781, alleging that Respondent violated Section 8(a)(1) and (5) on February 22, 2017, by refusing to bargain with the Union (Exhibit 18). On April 18, 2017, the Region notified Respondent via email to its Legal Counsel that Case 04-CA-193781 would be held in abeyance pending the Board's decision on the Request for Review (Exhibit 19).

10. On July 27, 2017, the Board issued a Decision on Review and Order granting Respondent's Request for Review only as to the supervisory status of Frank Cappetta (Exhibit 20). On review of the supervisory issue, the Board agreed with the Acting Regional Director's determination that Cappetta was not a statutory supervisor. The Board denied the remainder of the Request for Review in all other respects (Exhibit 20).[2]

11. By email dated August 22, 2017, Brian A. Taylor, the Union's Business Agent/Organizer, requested that Respondent schedule negotiations with the Union (Exhibit 21).

[2] Chairman Miscimarra, dissented as to one of the seven issues decided by the Board; specifically, as to the majority's decision to deny Respondent's request for review as to the procedural issues raised in the Request for Review.

Respondent's Attorney replied by letter dated August 24, 2017, that Respondent was "not in a position to recognize or bargain with Local 773 at this time" because, among other things, it believed the bargaining unit was not lawfully certified (Exhibit 22).

12. On August 30, 2017, the Union filed the charge in this proceeding, Case 04-CA-205359, alleging that Respondent has been violating 8(a)(1) and (5) of the Act by refusing to bargain with the Union (Exhibit 23). On September 13, 2017, the Acting Regional Director issued a Complaint and Notice of Hearing in this matter alleging, inter alia, that Respondent has been refusing to recognize and bargain collectively with the Union as the exclusive collective bargaining representative of the Unit in violation of Section 8(a)(1) and (5) of the Act (Exhibit 24).

13. Respondent filed its Answer to the Complaint on September 27, 2017 (Exhibit 25). The Answer, inter alia, admits that the Acting Regional Director certified the Union as the collective-bargaining representative of the Unit, but denies the appropriateness of the Unit. The Answer also admits that the Union sent an email on August 22, 2017 requesting bargaining, but denies that the email "represents a request for bargaining from which a timely charge could issue . . ." The Answer admits that Respondent stated its refusal to recognize and bargain with the Union by letter dated August 24, 2017.[3]

14. In its Answer, Respondent denies any obligation to recognize and bargain with the Union. These denials are based on thirteen Affirmative Defenses. None of the Affirmative Defenses raise any material issues requiring a hearing. Respondent's Affirmative Defenses 4 through 6 argue that the charge was untimely and barred by Section 10(b) of the Act and the

[3] Respondent's Answer denies the 2(13) Agency status of its Legal Counsel based on the phrasing of the Complaint paragraph as "at all material times." There can be no doubt that Respondent's Legal Counsel, in sending the August 24, 2017 letter, clearly on behalf of Respondent, was acting as an Agent of Respondent. Respondent admits that the letter was issued, and does not contest its validity.

doctrine of laches. Respondent's Affirmative Defenses 7 through 12 restate the arguments found in Respondent's Request for Review and accompanying brief in Case 04-RC-165805 and assert that the Board did not properly decide that case. Respondent's Affirmative Defenses 1 through 3 and 13, merely assert that Respondent did not violate the Act.

15. For the reasons set forth in the attached Memorandum in Support of Motion for Summary Judgment, it is submitted that Respondent has raised no question of fact requiring a hearing, and, as a matter of law, Respondent has no valid defense to the Complaint.

NOW, THEREFORE, the undersigned Counsel for the General Counsel respectfully moves that: (1) the Complaint and this proceeding be transferred to and continued before the Board; (2) the Board find the allegations of the Complaint to be true; (3) the Board issue a Decision and Order based on such findings requiring Respondent, inter alia, to recognize and bargain collectively with the Union as the exclusive collective bargaining representative of the Unit; and (4) the Board grant such other and further relief as may be appropriate.

Signed at Philadelphia, Pennsylvania, this 12th day of October 2017.

Christy E. Bergstresser
Counsel for the General Counsel
National Labor Relations Board
Region Four
215-597-4310

Exhibit 18

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3512
DO NOT WRITE IN THIS SPACE

Case	Date Filed
04-CA-193781	2-24-17

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
UPS Freight Truckload

b. Tel. No. (610) 285-5380

c. Cell No.

f. Fax No. (610) 285-5384

d. Address *(Street, city, state, and ZIP code)*
9755 Commerce Circle
Kutztown, PA 19530

e. Employer Representative
Raymond Copeland

g. e-Mail

h. Number of workers employed

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Warehouse

j. Identify principal product or service
Package Delivery

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
Throughout the six-month period preceding the date of this charge, and specifically on February 22, 2017, the Employer, through its agents and representatives, violated the Act by refusing to bargain over the terms and conditions of employment of bargaining unit employees.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
International Brotherhood of Teamsters, Local Union No. 773

4a. Address *(Street and number, city, state, and ZIP code)*
3614 Lehigh Street
Suite A
Whitehall, PA 18052

4b. Tel. No. 610-434-4451

4c. Cell No.

4d. Fax No. 610-770-9581

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
International Brotherhood of Teamsters

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By *(signature of representative or person making charge)*

Jeremy E. Meyer, Esquire
(Print/type name and title or office, if any)

Tel. No. 215-735-9099

Office, if any, Cell No.

Fax No. 215-640-3201

e-Mail
jmeyer@cjtlaw.org

Address Constitution Place, 325 Chestnut St. Ste 200, Phila., PA 19106

02-23-2017
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit 19

From: O"Neill, Kathleen
To: "Larkin, Kurt G."
Subject: 04-CA-193781 UPS Freight
Date: Tuesday, April 18, 2017 3:53:00 PM

We have decided to hold the subject case in abeyance pending the decision in the Request for Review.

Kathleen O'Neill
Field Examiner
National Labor Relations Board
615 Chestnut Steet
Suite 710
Philadelphia, PA 19106

(215) 597- 7645 office
(202) 374-0799 cell

Exhibit 21

[redacted]

Get Outlook for iOS

From: Brian Taylor <btaylor@teamster773.org>
Sent: Tuesday, August 22, 2017 3:49:18 PM
To: Larkin, Kurt G.
Cc: O'Neill, Kathleen; Quintes D. Taglioli
Subject: Bargaining

Mr. Larkin,

In light of the recent decision by the NLRB regarding UPS Freight, and as the exclusive bargaining representative for the drivers at UPS Truckload in Kutztown Pa, we would like to start negotiations as promptly as possible, and would appreciate hearing from you as to when you are available to begin negotiations.

If you are not the person who will be negotiating this contract, please forward me the contact information for the person responsible for negotiating this contract.

I can be reached by phone at 484-714-5414, or email at btaylor@teamster773.org

I look forward to meeting with you.

Brian A. Taylor
Business Agent/Organizer
Teamster Local 773
484-714-5414 cell
610-841-3281 office
Btaylor@teamster773.org

Exhibit 22

HUNTON& WILLIAMS

HUNTON & WILLIAMS LLP
RIVERFRONT PLAZA, EAST TOWER
951 EAST BYRD STREET
RICHMOND, VIRGINIA 23219-4074

TEL 804 • 788 • 8200
FAX 804 • 788 • 8218

KURT G. LARKIN
DIRECT DIAL: 804-788-8776
EMAIL: klarkin@hunton.com

FILE NO: 22749.001962

August 24, 2017

By electronic mail

Brian Taylor
Business Agent/Organizer
Teamsters Local 773

Re: Teamsters Local 773 & UPS Freight (Kutztown)

Dear Mr. Taylor,

I am writing in response to your e-mail dated August 22, 2017 in which you requested that UPS Freight agree to bargain with Teamsters Local 773 over the terms and conditions of employment of the Company's Kutztown, PA-based Road Drivers.

As you pointed out in your e-mail, the NLRB recently denied UPS Freight's Request for Review of Region 4's Decision & Direction of Election in Case 4-RC-165805, as well as the Region's Order overruling the Company's objections to the conduct of that election. The Company has decided to seek further legal review of the Board's ruling. Among other things, the Company believes the election was invalid and the bargaining unit was not lawfully certified. The Company further believes the NLRB's new representation case rules, and their application in this case, are/were unlawful.

Given the Company's decision to pursue additional legal review, UPS Freight is not in a position to recognize or bargain with Local 773 at this time. I am sure you know that the UPS family of companies collectively enjoy a history of over seventy-five years of cordial labor relations with the Teamsters Union. Thus, the Company's decision on this matter should not be seen as reflecting anything other than its concern that the Board's rulings in the case are contrary to law and harmful to the best interests of all concerned.

Please do not hesitate to contact me if you would like to discuss this matter further.

Sincerely,

Kurt G. Larkin

cc: Quintes D. Taglioli

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

UPS GROUND FREIGHT, INC.

Case 04-CA-205359

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 773

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This memorandum is submitted by Counsel for the General Counsel in support of the Motion for Summary Judgment (the Motion) filed on this date.

A. FACTS

The essential facts and supporting exhibits are described in the Motion in this matter. On December 10, 2015, International Brotherhood of Teamsters Local 773 (the Union), filed a petition in case 04-RC-165805, seeking to represent a unit of drivers employed by UPS Ground Freight Inc. (Respondent), at its Kutztown, Pennsylvania facility. At the pre-election representation hearing, Respondent raised five substantive and three procedural issues, including: (1) whether the petitioned-for single-facility unit of drivers at Respondent's Kutztown, Pennsylvania facility was an appropriate unit; (2) whether two of Respondent's employees, Carl David and Frank Cappetta, shared a community of interest with the petitioned-for unit of drivers; (3) whether *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), was improperly decided; (4) whether Respondent's employee Frank Cappetta was a supervisor within the meaning of Section 2(11) of the Act; and (5) whether the petition was tainted because of Cappetta's alleged involvement in obtaining the showing of interest.

Procedurally, Respondent also contended that it was granted only a one-workday postponement of hearing from December 18, 2015 to December 21, 2017, although it requested a two-workday postponement; that it had inadequate time to prepare for the hearing under the Board's representation case rules; and that the Region's denial of its request to prepare overnight for oral argument was a denial of due process.

In a Decision and Direction of Election dated January 5, 2016, Acting Regional Director of the Fourth Region of the National Labor Relations Board (the Board), Harold A. Maier (the Acting Regional Director),[1] concluded that the petitioned-for single-facility unit of road drivers at Respondent's Kutztown, Pennsylvania facility was appropriate, rejected Respondent's procedural arguments, and declined to rule on the remaining assertions. The Acting Regional Director directed a mail ballot election.

On January 11, 2016, Respondent filed a Special Request for Review of the Acting Regional Director's Decision to Direct a Mail Ballot Election, arguing that the Board should overturn the decision to hold a mail ballot election, and requesting the Board to order the Region to impound the ballots pending its disposition of the Special Appeal. On January 29, the Board denied Respondent's Special Request for Review, finding that it raised no substantial issues warranting review, and denied the request for expedited review and impoundment of ballots.

A mail ballot election was conducted from January 11, 2016 through January 29, 2016. On February 1, at the conclusion of the voting period, the ballots were commingled and counted. The Union prevailed by an overwhelming vote of 27 to 1, with 2 non-determinative challenged ballots. Respondent filed timely Objections to the Election. On March 11, 2016, the Acting Regional Director issued a Supplemental Regional Director's Decision on Objections to Election

[1] Regional Director Dennis P. Walsh is recused from this matter.

and Certification of Representative, overruling the Objections and certifying the Union as the representative of the bargaining unit.

Respondent disputed the Region's determination and filed a timely Request for Review to the Board. In its Request, Respondent raised multiple issues including: that the Region disregarded the Company's position with respect to Cappetta's supervisory status; the Region's decision to hold a mail ballot election; the Region's refusal to consider Respondent's revised election proposal; the Region's denial of Respondent's request for a subpoena duces tecum; the Region's partial denial of Respondent's Motion to Postpone Representation Hearing and for Extension of time to File Statement of Position; the Region's denial of an appropriate hearing, including, the Hearing Officer's decisions regarding the scheduling of the hearing; the Region's determination as to the appropriate bargaining unit; Respondent's objection to a voting unit that included certified safety instructors and dispatchers; and multiple arguments in support of reconsideration of the Representation-Case Procedures, Final Rule, 29 C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74439 (Final Rule) and the General Counsel's Memorandum 15-06, Guidance Memorandum on Representation Cases Procedural Changes Effective April 14, 2015.

In its Decision and Order of July 27, 2017, the Board granted Respondent's Request for Review only as to the supervisory status of Frank Cappetta. The Board, contrary to Respondent, found that Cappetta was not a statutory supervisor. 365 NLRB No. 113. The Board denied the remainder of the Request for Review, finding it raised no substantial issues warranting review. Chairman Miscimarra dissented as to only one of the seven disputed issues; specifically, that the majority refused to grant review as to the procedural rulings resulting from the application of the Final Representation Case Rule and reaffirmed concerns he previously raised in the *European Imports, Inc*. case. 365 NLRB No. 41, slip op. at 1–4 (2017) (Acting Chairman Miscimarra,

dissenting).[2] 365 NLRB No. 113, slip op. at 3-7. After the Board issued its Decision and Order, by email dated August 22, 2017, the Union requested Respondent schedule bargaining. By email dated August 24, Respondent refused.

The charge in this case alleges that Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union. The Acting Regional Director found merit to the charge and issued a Complaint on September 13, 2017, alleging, inter alia, that the refusal to bargain was unlawful. On September 27, 2017, Respondent submitted its Answer.

The Answer admits the critical allegations in this case: that the Acting Regional Director certified the Union as the collective-bargaining representative of the Unit; that the Union sent an August 22, 2017 email requesting bargaining; and that Respondent stated its refusal to recognize and bargain with the Union by letter dated August 24, 2017.[3] Respondent, in its Answer, denies the appropriateness of the certified unit along with any duty to recognize and bargain with the Union. Respondent's Answer also raised thirteen defenses: Affirmative Defenses 1 through 3 assert summarily that Respondent did not violate the Act; 4 through 6 argue that the charge was not filed in a timely manner under Section 10(b) of the Act and that the doctrine of laches bars the Complaint; 7 through 12 reargue Respondent's contentions in Case 04-RC-165805 that the Board has previously rejected; and 13 requests fees and expenses.

B. ISSUE

Should the Board grant the Motion for Summary Judgment and order Respondent to recognize and bargain with the certified bargaining representative where Respondent is merely contesting the validity of the findings and conclusions made in the prior representation

[2] Chairman Miscimarra declined to reach or pass on whether Cappetta is a statutory supervisor.
[3] Respondent's Answer denies the 2(13) Agency status of its Legal Counsel based on the phrasing of the Complaint paragraph as "at all material times." There can be no doubt that Respondent's Legal Counsel, in sending the August 24, 2017 letter, clearly on behalf of Respondent, was acting as an Agent of Respondent. Respondent admits that the letter was issued, and does not contest its validity.

proceeding and where Respondent has failed to raise any issues warranting relitigation or any evidentiary hearing?

C. ARGUMENT

Summary judgment is appropriate where, as here, a respondent does not raise a genuine issue of material fact. *Nick & Bob Partners*, 345 NLRB 1092, 1093 (2005). Respondent does not dispute that the Board certified the Union as exclusive collective-bargaining representative of the employees in the Unit. Nor can there be any dispute that the Union demanded recognition and bargaining by letter dated August 22, 2017.[4] In its Answer, Respondent admits that it stated in its August 24, 2017 letter that it would not recognize or bargain with the Union as the exclusive collective-bargaining representative of the Unit.

Respondent urges that the Complaint is time barred both by Section 10(b) and the doctrine of laches. The facts do not support Respondent's assertion. Respondent admitted in its Answer that the charge was filed and served on Respondent on August 30, 2017, less than six months after the Union's August 22, 2017 request to bargain, and admits its subsequent refusal to bargain. Respondent's argument that it previously declined to bargain with the Union on February 23, 2017 misses the point. At that time, Respondent was in the processes of contesting the election and the Union's certification, a process that ended only when the Board issued its July 27, 2017 Decision and Order and Respondent's review options before the Board were exhausted. While review was pending by the Board, the Union did not have unequivocal notice that Respondent would ultimately refuse to bargain. Moreover, Respondent fails to mention in

[4] To the extent that Respondent, in its Answer, denies this allegation, the Union's August 22, 2017 email unequivocally requested bargaining. The email states, in relevant part:

> In light of the recent decision by the NLRB regarding UPS Freight, and as the exclusive bargaining representative for the drivers at UPS Truckload in Kutztown Pa, we would like to start negotiations as promptly as possible, and would appreciate hearing from you as to when you are available to begin negotiations. . . .

its Answer that the Union filed the charge in case 04-CA-193781 on February 24, 2017, alleging an 8(a)(5) and (1) failure and refusal to bargain.

The Section 10(b) statute of limitations period does not begin to run until the charging party receives "clear and unequivocal notice," either actual or constructive, that an unfair labor practice has occurred. See e.g., *Leach Corp*., 312 NLRB 990, 991 (1993), enforced, 54 F.3d 802 (D.C. Cir.1995); *Christopher Street Owners Corp*., 286 NLRB 253 (1987) (10(b) period does not begin to run until it becomes clear that the employer is refusing to recognize to bargain with the union). Until the Board issued the July 27, 2017 Decision and Order, any prior refusal to bargain from Respondent was not an unequivocal, indefinite refusal. See e.g *R.G. Burns Electric Inc.*, 326 NLRB 440 (1998) (stating that for 10(b) purposes a party is not required to file a charge based upon mere suspicion); *Stanford Realty Associates, Inc*., 306 NLRB 1061, 1065 (1992) (finding that Section 10(b) period did not begin to run when employer did not "unequivocally refuse" to sign contract or recognize union, but instead responded such that union "could reasonably believe" that employer simply needed more time to consider the matter). Moreover, a refusal to bargain allegation is not ripe when an employer has merely failed to respond to a union's request that it do so. See e.g. *Waste Management of Utah*, 310 NLRB 883, 886 (1993) (union not charged with knowledge of employer's position regarding demand for bargaining until a time within the 10(b) period when employer revealed where it stood not by an unequivocal statement by rather by its conduct generally); see *also Stanford Realty Associates*, 306 NLRB 1061, 1065 (1992). Additionally, the Board and the courts have long held that the defense of laches does not lie against the Board as an agency of the United States Government. *Garda Cl Atl., Inc. & United Fed'n of Special Police & Sec. Officers, Inc.*, 365 NLRB No. 108, slip op. at 3 (July 24, 2017); *Entergy Mississippi, Inc*., 361 NLRB No. 89, slip op. at 2 fn. 5

(2014), affd. in relevant part 810 F.3d 287, 298-299 (5th Cir. 2015), citing *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969). Accordingly, Respondent's timeliness arguments do not raise any issue of material fact and should be dismissed.

Respondent's Answer also reasserts the same arguments raised in its Request for Review of Acting Regional Director's Decision of Election and Decision on Objections to the Election and Certification of Representative. In the Request for Review, Respondent contested, inter alia; the Acting Regional Director's findings and conclusions in his Decision and Direction of Election and Supplemental Decision and Direction of Election; the Hearing Officer and Acting Regional Director's procedural rulings; the impartiality of Region Four of the National Labor Relations Board, and the validity and application of the Board's Final Rule on Representation-Case Procedures. The Board, in its July 27 Order, considered and rejected Respondent's arguments. Thus, all of the arguments raised by Respondent concerning the Union's certification have been previously considered and rejected by the Board.

Respondent continues to deny the Union's status as bargaining representative even in the face of the Board's determination. It is well-settled that issues raised, litigated, and decided in a prior representation case may not be relitigated in a subsequent unfair labor practice proceeding, and that the findings on those issues are binding on the parties, absent newly discovered or previously unavailable evidence or special circumstances. *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141-143 (1971); *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 161-162 (1941); *Winchell Co.*, 305 NLRB 903, 903 (1991). Respondent has not presented, nor offered to adduce at hearing, newly discovered, previously unavailable evidence or special circumstances that warrant relitigation of the representation case. Further, the representation case does not warrant reconsideration simply because the Board's composition has changed since the issuance of the

representation decision. See e.g. *Pointe Enterprises, Inc.*, 223 NLRB 822, 825 (1976) (finding "no merit in [r]espondent's contention that reconsideration should be granted because of the change in composition of the Board, especially since Sec. 3(b) of the Act provides for regular changes in the composition of the Board and contemplates the Board's functioning as a continuing restitution"); Cf. *Sub-Zero Freezer Co., Inc*., 271 NLRB 47 (1984) (the Board made a limited exception from its rule against relitigation of representation cases where pre-election conduct was so egregious that the union did not attain the status of bargaining representative from a free and fair election). The extreme conduct in *Sub-Zero Co.*, which caused the Board to depart from its well established rule, included multiple threats of violence and property damage to non-union supporters shortly before the election. Id. at 47. The Board also noted the closeness of the election, where the union won only by two votes, as a basis for its decision. Id. In contrast, here, there is no evidence of any threats of violence or property damage by any Union official or supporter. Respondent's complaints are largely procedural in nature, and even the assertion of supervisory taint certainly does not, if established, rise to the level of threats of violence and destruction of property. Further, Respondent's employees voted overwhelmingly in favor of the Union, with 27 votes in favor of Union representation, one vote against, and two challenges. The facts here do not warrant the extreme remedy of religitation.

In January 2016, Respondent's employees overwhelmingly selected the Union as their bargaining representative by vote in a secret ballot election, and Respondent has since delayed in bargaining with the Union for twenty-months since that election. Since Respondent is attempting to relitigate the issues it raised in the representation proceeding, it is submitted that no factual issues exist before the Board in connection with Respondent's test of the certification. Accordingly, Summary Judgment is appropriate and should be granted.

Signed at Philadelphia, Pennsylvania, this 12th day of October 2017.

Christy E. Bergstresser
Counsel for the General Counsel
National Labor Relations Board
Region Four
215-597-4310

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPS GROUND FREIGHT, INC.

and **Case 04-CA-205359**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 773

ORDER TRANSFERRING PROCEEDING TO THE BOARD
and
NOTICE TO SHOW CAUSE

On October 12, 2017, the General Counsel filed with the National Labor Relations Board a Motion for Summary Judgment and Memorandum in Support, on the ground that the Respondent is attempting to relitigate the issues in Case 04-RC-165805. Having duly considered the matter,

IT IS ORDERED that the above-entitled proceeding be transferred to and continued before the Board in Washington, D.C., and that the hearing scheduled for January 29, 2018 be postponed indefinitely.

NOTICE IS GIVEN that cause be shown, in writing, filed with the Board in Washington, D.C., on or before October 31, 2017 (with affidavit of service on the parties to these proceedings), why the General Counsel's Motion should not be granted. Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C., October 17, 2017.

By direction of the Board:

Roxanne Rothschild

Deputy Executive Secretary

Confirmation Number	1000170953
Date Submitted	10/23/2017 3:25:35 PM (UTC-05:00) Eastern Time (US & Canada)
Case Name	UPS Ground Freight, Inc.
Case Number	04-CA-205359
Filing Party	Charged Party / Respondent
Name	Larkin, Kurt G
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Original Due Date	10/31/2017
Date Requested	11/14/2017

Reason for Extension of Time	UPS Ground Freight, Inc. respectfully requests an extension, until Nov. 14, 2017, to respond to the Region's Motion for Summary Judgment. Pursuant to the Board's Notice to Show Cause, the Company's current deadline as Oct. 31, 2017. This case raises a host of significant and unsettled legal issues, especially with respect to the Company's challenges to Region's application of the NLRB's Final Election Rule. As a result, this case requires consideration of many more legal issues than the "average" technical refusal to bargain case. As well, counsel for the Company, Jim Naughton and Kurt Larkin, are currently litigating an unrelated matter that requires them both to be out of the office for a significant period of time between Oct. 24, 2017, and Nov. 10, 2017. Given the complex nature of this case and the existing scheduling conflicts, the Company will be hard-pressed to adequately brief, and preserve its arguments on, the many issues presented by the Region's motion in the time currently provided. A two-week extension would allow the Company a more reasonable period of time in which to brief a case of substantial importance to the parties, and will work no prejudice against the Region or the Union. Prior to filing this motion, counsel for UPS Freight contacted Christy Bergstresser, counsel for Region 4, who indicated that the Region does not oppose the two-week extension requested by the Company.
What Document is Due	Opposition to Motion for Summary Judgment

Parties Served	Thomas H. Kohn, Esq. Markowitz & Richman 123 South Broad Street, Suite 2020 Philadelphia, PA 19109-1025 tkohn@markowitzandrichman.com Christy E. Bergstresser Field Attorney NLRB, Region Four 615 Chestnut Street, Suite 710 Philadelphia, PA 19106-4413 Christy.Bergstresser@NLRB.gov

United States Government

OFFICE OF THE EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET SE
WASHINGTON, DC 20570

October 23, 2017

Re: UPS Ground Freight, Inc.
Case 04-CA-205359

EXTENSION OF TIME TO FILE
RESPONSE TO NOTICE TO SHOW CAUSE

The request for an extension of time in the above-referenced case is granted. The due date for the receipt in Washington, D.C. of responses to the Board's notice to show cause why the General Counsel's motion for summary judgment should not be granted is extended to **November 14, 2017.** This extension of time for filing responses to the Board's notice to show cause applies to all parties.

/s/ Roxanne L. Rothschild
Deputy Executive Secretary

cc: Parties
Region

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

UPS GROUND FREIGHT, INC.

and **Case 04-CA-205359**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 773

UPS GROUND FREIGHT, INC.'S CORRECTED OPPOSITION TO COUNSEL FOR THE GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT, RESPONSE TO BOARD'S NOTICE TO SHOW CAUSE, AND CROSS-MOTION FOR SUMMARY JUDGMENT

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

UPS GROUND FREIGHT, INC.

and **Case 04-CA-205359**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 773

UPS GROUND FREIGHT, INC.'S CORRECTED OPPOSITION TO COUNSEL FOR THE GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT, RESPONSE TO BOARD'S NOTICE TO SHOW CAUSE, AND CROSS-MOTION FOR SUMMARY JUDGMENT

UPS Ground Freight, Inc. ("UPSF" or "the Company"), pursuant to Section 102.24(b) of the Board's Rules and Regulations and Statements of Standard Procedures, Series 8, as amended, submits the following Opposition to Counsel for the General Counsel's Motion for Summary Judgment, Response to the Board's Notice to Show Cause, and Cross-Motion for Summary Judgment, which has been revised to comply with page limit and formatting requirements.

PRELIMINARY STATEMENT

UPSF, headquartered in Richmond, Virginia, provides transportation and delivery services for a variety of customers across the United States. One of those customers is Advance Auto Parts ("AAP"), a national auto parts retailer. Under its contract with AAP, UPSF delivers AAP products from nine AAP distribution centers to AAP retail stores across the eastern United States. The Company employs truck drivers (called "Road Drivers") to drive tractor trailers on delivery routes from each distribution center to the retail stores serviced by that center.

This case involves allegations that UPSF violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the International Brotherhood of Teamsters Local 773 ("the Union")

after it was certified by Region 4 ("the Region") of the National Labor Relations Board ("NLRB" or "the Board") as the bargaining representative of a unit of employees comprised of "all full-time and part-time drivers" employed by UPSF at its AAP distribution center located in Kutztown, Pennsylvania. *See UPS Ground Freight, Inc. and Teamsters Local 773*, Case 04-RC-165805 (Dec. 10, 2015) ("the R-Case").

From the outset of the R-Case, UPSF objected to the appropriateness of the requested unit and notion that it should be obligated to recognize the Union as representative of that unit.[1] While a multitude of rationales support the Company's position, the most alarming involves the prejudicial and unlawful manner in which the Region conducted the proceedings in accordance with the election rule entitled "Representation – Case Procedures; Final Rule," 29 C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74439 ("the Final Rule"). On its face, the Final Rule is unlawful. Its directives, which are further informed by General Counsel Memorandum 15-06 ("GC Memo 15-06"), have created an election process that deprives an employer of an appropriate and fair hearing, unfairly limits an employer's ability and opportunity to meaningfully respond to a union petition and any resulting organizing campaign, and frustrates the rights of the employees participating in an election. For these reasons alone, the Final Rule is unlawful as written, and any election administered in accordance with it is invalid.

Additionally, the Region's arbitrary and prejudicial application of the Final Rule's discretionary aspects during the R-Case plainly violated UPSF's rights. The R-Case presented many complex issues, including: (1) whether UPSF's Kutztown facility constituted an

[1] The Company's legal and procedural challenges in the R-Case are memorialized in the transcript of the December 21, 2015 representation hearing, its Statement of Position, its Objections to the Result of the Election and accompanying offer of proof, and its Request for Review of the Acting Regional Director's Decision and Direction of Election and Decision on Objections to Election and Certification of Representative. The Company incorporates by reference the arguments and evidence set forth in these documents.

appropriate single-facility bargaining unit, or whether the only appropriate unit must include the eight additional UPSF distribution centers providing service to AAP; (2) whether the unit determination should be resolved by applying the Board's traditional "community of interest" criteria or the standards adopted in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011); (3) whether an allegedly pro-union employee, Frank Cappetta ("Cappetta"), was a supervisor under Section 2(11) of the Act and thus ineligible to vote; (4) whether Cappetta engaged in pro-union supervisory conduct sufficient to taint the showing of interest and invalidate the election; and (5) whether Cappetta and a second employee, Carl David ("David"), were dual-function employees who should be excluded from the unit on this basis. These issues deserved a full and fair hearing. The manner in which the Region administered the Final Rule, however, precluded the Company from adequately addressing these issues prior to the election, and all but ensured that it had no meaningful opportunity to do so after the election.

Specifically, UPSF's ability to advance its legal position with respect to these issues was severely prejudiced by numerous adverse rulings made by the Hearing Officer and Acting Regional Director ("ARD") during the R-Case proceedings, including: (1) the application of the Final Rule's accelerated pre-election procedures during UPSF's busiest time of year; (2) the ARD's partial denial of UPSF's request for an extension of the deadline for the filing of its position statement and the postponement of the representation hearing; (3) the adverse procedural rulings by the Hearing Officer and ARD during the representation hearing, including the refusal to carry over the hearing to the next day, the denial of the Company's request to submit post-hearing briefs, and the provision of limited preparation time for oral arguments; (4) the ARD's failure to rule on Cappetta's supervisory status, and apparent failure to adequately investigate and address the issue of supervisory taint, prior to the election; (5) the ARD's refusal

to consider the Company's revised election proposal following the representation hearing; (6) the ARD's refusal to hold a hearing to address the Company's post-election objections and his denial of UPSF's request to issue subpoenas in the absence of a hearing; and (7) the ARD's failure to address the Company's position that Cappetta and David should be excluded from the unit and deemed ineligible to vote as a result of their status as dual-function employees - an issue that remains unresolved to this day and clouds the scope of the certified unit.

The Region's justification for nearly all of these rulings emanated from the Final Rule's overriding emphasis on speed. The obvious (and unlawful) problem, however, is that the Region's preoccupation with haste virtually eliminated UPSF's ability to prepare and introduce witness testimony and documentary evidence addressing the complex issues presented by the R-Case, or to develop arguments and authority in support of its position. The Region's arbitrary and capricious application of the Final Rule resulted in an evidentiary record that, despite the Company's best efforts, was predictably incomplete – a condition that infected nearly every substantive ruling made by the Region (and the Board on review) and all but ensured that the vast majority of the Company's procedural and legal challenges to the petition and election process were neither addressed nor resolved by the Region prior to the election, if at all.[2]

[2] The Region's arbitrary and prejudicial treatment of the procedural and legal issues raised by the Company throughout the R-Case is underscored by the appearance of impropriety existing at Region 4 as a result of the conduct of its Regional Director, Dennis P. Walsh ("Mr. Walsh"), during the months leading up to the election. Specifically, in November 2015, approximately one month prior to the filing of the Union's petition in the R-Case, the Office of the Inspector General ("OIG") issued a determination that Mr. Walsh violated the Standards of Ethical Conduct for Employees of the Executive Branch as a result of his involvement as Chairman of the Board of Directors of the Peggy Browning Fund - an undeniably political organization with the stated agenda of promoting the interests of labor over the interests of management. Mr. Walsh was suspended without pay by the NLRB for a period of 30 days at or about the end of December 2015, shortly after the Union's petition was filed. Significantly, every single substantive ruling by the Region during the R-Case – from the denial of the full measure of a modest extension of time for the Company to submit its statement of position to the

Given the paltry evidentiary record, it was unsurprising (but nonetheless, error) that the Board refused to grant review on virtually all of the challenges presented in the Company's request for review. And on the single issue for which the NLRB did grant review – the question of Cappetta's supervisory status – the Board found that the Company failed to present sufficient evidence in support of its position. The Board's ruling on this point only highlights the significant harm done to the Company by the Region's application of the Final Rule. Its blind focus on speed deprived UPSF of the opportunity to present its case, and consequently robbed the Company of an adequate record necessary to support its position.

This is precisely the harm predicted by Board Chairman Miscimarra and former Member Johnson in their dissent to the Final Rule: "[T]he inescapable impression created by the Final Rule's overriding emphasis on speed is to require employees to vote as quickly as possible – at the time determined exclusively by the petitioning union – **at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues**." 79 Fed. Reg. 74,460 (emphasis added). Chairman Miscimarra's misgivings about the Final Rule were played out in spades here.

All of these same reasons establish that General Counsel's Motion for Summary Judgment should be denied and the Region's Complaint should be dismissed. Simply put, the R-Case proceedings were patently unlawful. The manner in which the Region administered the election process yielded an outcome that should be set aside as arbitrary and capricious under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A) ("The reviewing court shall hold

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ultimate denial of its election objections – resulted in detriment to one party: UPSF. The appearance of potential bias by Mr. Walsh – in favor of unions, and against employers – raises substantial questions concerning not only his impartiality, but also the impartiality of the Region he oversees. As a result, the fairness of the entire election process in the underlying R-Case is called into question.

unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"); *City of Kansas City v. Dep't of Hous. & Urban Dev.,* 923 F.2d 188, 189 (D.C. Cir. 1991) (even "assuming[] arguendo" that the agency had ample statutory authority, its action was devoid of "reasoned decision-making," and was therefore arbitrary and capricious). As well, the R-Case proceedings violated the Company's substantive and due process rights under the National Labor Relations Act (the "Act"), the Administrative Procedure Act, and the U.S. Constitution. The end result was the certification of a bargaining unit to which UPSF has no lawful bargaining obligation.

BACKGROUND FACTS[3] AND PROCEDURAL HISTORY

On December 10, 2015, the Union filed a petition for election (the "Petition") seeking to represent a unit of all regular full-time and part-time drivers employed by UPSF at its facility located at 9755 Commerce Circle in Kutztown, Pennsylvania ("Kutztown Distribution Center"). The Petition was processed in accordance with the procedures set forth in the Final Rule, which became effective April 14, 2015.

Although the Petition purported to implicate only a limited number of employees at a single location, the Company's initial investigation of the Petition revealed that the potential scope of the appropriate unit was significantly greater, and required investigation of factors involving nearly three hundred employees at nine locations in the same number of states. The Petition also raised additional complex issues, including the appropriate standards to be utilized in determining the lawful scope of the unit, and whether the Petition had been tainted as a result of pro-union supervisory conduct, among others. The natural logistical challenges of preparing

[3] Aside from the allegations expressly admitted in UPSF's Answer and Defenses to the Region's Complaint in this case, the Company disputes and expressly denies any statement in Counsel for the General Counsel's Motion that purports to be an alleged undisputed material fact.

the Company's case concerning these issues was complicated by a number of additional factors. For instance, the Petition was filed during the holiday season. Not only was the Company's ability to interview witnesses and gather evidence in response to the Petition complicated by the normal dispersion of employees during that time, the holiday season is the busiest time of year for UPSF due to the nature of its business. As well, the Company was in the process of transitioning to a new, customer-imposed delivery schedule at the time the Union filed the Petition. These logistical and operational issues posed considerable challenges that added to the already-significant burden the Company faced in responding to the complex issues raised by the Petition.

Accordingly, on December 15, 2015, UPSF filed a motion seeking a two-day extension of time to file its Statement of Position (from Thursday, December 17, 2015, until Monday, December 21, 2015), and requesting that the representation hearing be postponed from Friday, December 18, 2015, until Tuesday, December 22, 2015. The ARD partially "granted" the motion, ordering that the Company's Statement of Position be filed by 12:00 PM on Friday, December 18, 2015, and that the representation hearing be conducted at 10:00 AM on Monday, December 21, 2015. Significantly, the ARD's denial of the full extension requested by the Company provided the Union access to the Company's statement of position, and thus the issues and facts the Company intended to raise at the hearing, for nearly a full four days in advance of the representation hearing.

Following the ARD's ruling, the Company submitted its timely Statement of Position,[4] in which it raised the following challenges in response to the Petition: (1) the petitioned-for unit was not appropriate because it excluded the regular drivers (full-time and part-time) employed

[4] The Company's Statement of Position will be cited as "(SOP, at __)."

by the Company at eight other distribution facilities, who share an overwhelming community of interest with the employees sought to be represented by the Union (SOP, at Att. B); (2) Cappetta was a statutory supervisor ineligible to vote in the petitioned-for election (SOP, at Att. D); (3) Cappetta and David were ineligible to vote in the petitioned-for election because they were dual function employees that did not share a community of interest with the drivers comprising the putative unit (*Id.*); (4) the Union's Showing of Interest was tainted by supervisory participation and solicitation by Cappetta (SOP, at Att. E); and (5) the Final Rule unlawfully prejudiced the Company in its ability to respond to the Petition and organizing campaign, and severely restricted both the Company's rights under Section 8(c) and the rights of its employees under Section 7 (*Id.*).

The representation hearing took place on December 21, 2015.[5] During the hearing, which began over an hour late for reasons unexplained, the Hearing Officer confined the parties to the building, effectively precluding counsel from taking a meaningful lunch break. (Tr., at 332). For the reasons stated above, the Company was already disadvantaged in its ability and opportunity to prepare an evidentiary record adequate to address the numerous complex issues raised in the Petition. The Company's ability to do so was further impacted by the Hearing Officer's exclusion of evidence concerning the Company's contention that employees Cappetta and David were dual-function employees ineligible to vote. (Tr., at 13). Additionally, the Hearing Officer repeatedly refused to permit the Company adjournments to complete live witness testimony the following morning. Instead, the Hearing Officer required the parties to present live testimony until almost 7:00 p.m., nearly two hours beyond the end of the normal business day. (Tr., at 332). The Hearing Officer also denied the Company's request for

[5] The transcript of the December 21, 2015 representation hearing will be cited as "(Tr, at __)."

adjournment until the next morning to permit it reasonable time to prepare closing argument, and instead permitted only 30 minutes for the Company to prepare its closing argument. (Tr., at 329-332). As well, the ARD, without explanation, summarily denied the Company's request to submit post-hearing briefs. (Tr., at 328). At the hearing, the Union moved to amend its petitioned-for unit to include all "certified safety instructors and dispatchers employed by UPS Ground Freight, Inc. at its Kutztown, Pennsylvania facility." (Tr., at 8-10). The Union also requested that the election be conducted by mail ballot, a request to which the Company strenuously objected.[6] (Tr., at 315).

On January 5, 2016, the ARD issued his Decision and Direction of Election.[7] The ARD granted the Union's motion to amend the petitioned-for bargaining unit. (D&D, at 1, n. 2). He concluded that the Hearing Officer properly excluded evidence as to the dual-function status of Cappetta and David, but refused to address any of the other issues raised by the Company, and concluded that the Company was not prejudiced by either the Hearing Officer's or his own procedural rulings during the representation hearing. (D&D, at 13-14). Finally, despite the Company's objections, the ARD ordered that the election be conducted by mail ballot in order to alleviate concerns that the eligible voters were "scattered" and therefore could not be present at the same place and time for the purpose of a manual ballot election. (D&D, at 15-16). Significantly, the ARD's direction of the mail ballot election was based on an erroneous interpretation of the Company's election proposal.

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[6] There is no question that if the ARD had granted the Company the full, two-day extension it requested, or even if the Hearing Officer had allowed the hearing to adjourn at the end of the day on the 21st and to resume the following morning, UPSF would have presented additional evidence (and, possibly, additional witnesses) on some or all of the disputed issues in the case.

[7] The ARD's Decision and Direction of Election will be cited as "(D&D, at __)."

During a conference call on January 7, 2016, to discuss the Company's objection to the ARD's erroneous interpretation of its proposal, counsel for the Company made a revised election proposal offering a single polling time, from 2:00 a.m. to 8:00 a.m., on a Wednesday of the ARD's choosing. Although the Company provided assurances that it would delay all driver dispatch times on election day so that all eligible employees would have opportunity to vote before leaving the facility to begin their shift (thereby eliminating concerns that the eligible voters would be scattered at the time of the election), the ARD maintained that he lacked the discretion and authority to revise the election details after the Decision and Direction of Election issued, and refused to consider the Company's revised proposal for a manual ballot election.

On January 11, 2016, UPSF submitted a Special Appeal and Request for Review to the Board, seeking review of the ARD's decision denying the Company's request for a manual ballot election. The Board denied the Company's request.

Between January 11, 2016, and January 29, 2016, the Region conducted the election by mail ballot. A tally of ballots on February 1, 2016, resulted in the Region's determination that a majority of the employees in the petitioned-for voting unit cast votes in favor of representation.

On February 2, 2016, pursuant to Section 102.31 of the Board's Rules and Regulations, UPSF requested the issuance of five subpoenas *duces tecum*. The Company made this request to obtain evidence to support the offer of proof the Final Rule now requires of a party objecting to the conduct of a Board representation election. By order that same day, the ARD denied the Company's request, ruling that the Board's rules did not allow for the issuance of a subpoena in the absence of a scheduled hearing.

On February 9, 2016 and February 16, 2016, respectively, the Company filed its Objections to the Result of the Election[8] and accompanying offer of proof.[9] Though constrained by the aforementioned operation and application of the Final Rule by the Region in the R-Case, and by the Region's refusal to allow the Company to subpoena evidence to include in its offer of proof, the Company set forth the following objections:

A. The Region's decisions and arbitrary treatment of the Company's position throughout the election proceedings, including its refusal to address the supervisory status of Cappetta and the potential that his conduct tainted the showing of interest, its conduct of the election by mail ballot and refusal to consider the Company's revised election proposal, and its administration of the pre-election process, the election, and the post-election process, resulted in a patently prejudicial process that contravened the Company's rights under the Act and its right to due process under both the Act and the Constitution.

B. The approved unit of "all regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania who were employed during the payroll period ending January 2, 2016," was inappropriate because it excludes the regular drivers (full-time and part-time) employed by the Company at its eight other distribution facilities, which the evidence proved share an overwhelming community of interest with the employees sought to be represented by the Union.

C. The approved unit was inappropriate to the extent it included certified safety instructors and dispatchers, since the employees performing the duties associated with those positions did not "regularly perform duties similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit."

D. The Final Rule, and the Region's arbitrary and unfair application of its provisions throughout the election proceedings, resulted in significant prejudice to UPSF's statutory rights and materially affected the results of the election to the Company's detriment.

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[8] The Company's Objections to the Result of the Election will be cited as "(Obj., at ___)."

[9] The Company's offer of proof in support of its election objections will be cited as "(Offer, at ___)."

E. The application of GC Memo 15-06 further restricted and interfered with the Company's right to fully investigate and respond to the representation petition.

On March 11, 2016, the ARD issued a Supplemental Regional Director's Decision on Objections to the Election overruling the Company's objections and certifying the Union as the bargaining unit representative. [10]

UPSF subsequently filed a request for review to the Board, advancing all of the challenges and objections it presented during the election proceedings, as set forth both in the Company's statement of position and its election objections.[11]

By Decision on Review and Order dated July 27, 2017, the NLRB granted review only as to Cappetta's supervisory status, and rejected the Company's contention that Cappetta was a statutory supervisor under Section 2(11). The Board denied review of the remaining issues presented by UPSF, concluding that they raised no substantial issues warranting review. *See UPS Ground Freight, Inc. and Teamsters Local 773*, 365 NLRB No. 113 (July 27, 2017). Chairman Miscimarra issued a dissent opining that the Board should have granted review of the Company's challenges to the Region's numerous adverse procedural rulings during the R-Case, and to the corresponding provisions in the Final Rule. *Id*., at *3-7 (Miscimarra, dissent). Although Chairman Miscimarra concurred with the Board's disposition of the other issues raised by the Company's request, including Cappetta's supervisory status, he noted that "it is difficult to have confidence in the resolution of these other issues because the record presently before the Board was obviously affected by challenged procedural rulings that my colleagues decline to review. *Id*., at *4.

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[10] The ARD's Supplemental Decision on Objections to Election and Certification of Representative will be cited as ("CoR, at ___").

[11] The Company's Request for Review will be cited as "(RoR, at ___)."

The charge in this proceeding was filed by the Union, and served on the Company, on August 30, 2017. The Union alleges that the Company violated Sections 8(a)(1) and (5) of the Act by refusing to recognize and bargain collectively with the Union since August 24, 2017.

The ARD found merit to the charge and issued the Complaint in this action on September 13, 2017. The Company timely submitted its Answer & Defenses on September 27, 2017.

On October 12, 2017, General Counsel filed a motion requesting that the Board grant summary judgment in its favor and order UPSF to recognize and bargain with the Union. General Counsel alleges that the Company is merely contesting the validity of the findings and conclusions advanced in the R-Case, and has failed to raise any issues warranting relitigation or an evidentiary hearing.

On October 17, 2017, the NLRB's Deputy Executive Secretary issued an Order Transferring Proceeding to the Board and Notice to Show Cause directing that this case be transferred to and continued before the Board in Washington, D.C., and giving notice to the Company that cause be shown as to why the General Counsel's Motion should not be granted. The matter is now properly before the Board.

ARGUMENT

I. The Final Rule Is Unlawful On Its Face.

As a threshold matter, the Board should deny General Counsel's Motion for Summary Judgment because the Final Rule, and by extension any election administered under it, is unlawful and invalid. *See e.g.,* 5 U.S.C. § 706(2)(A), (C); *see also Massachusetts v. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996) ("[T]he judiciary, not the agency, is the final authority on issues of statutory construction," and must therefore set aside "any administrative constructions" of the statute that violate "clear congressional intent.") (internal quotation marks citation omitted).

The Final Rule, which governed the Region's administration of the election process during the R-Case, was intended to "remove unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation case procedures, codify best practices, and make them more transparent and uniform across regions." *See* GC Memo 15-06. According to the Board, the Final Rule provides "targeted solutions to discrete, specifically identified problems to enable the Board to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation." *Id*.

The reality, however, is that the Final Rule enacted comprehensive (and entirely unnecessary) modifications to the Board election process that severely and unfairly abbreviate the pre-election period, burden employers with onerous administrative tasks upon pain of waiver, severely restrict the statutory right of employers to communicate their views on unions, and all but eliminate formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit. *See* 29 C.F.R. §§102.63; 102.64; 102.66; and 102.67. The impact of these modifications is not merely prejudicial, it is unlawful. [12]

The fundamental injustice advanced by the Final Rule lies in its "overriding emphasis on speed." Indeed, as Board Chairman Miscimarra and former Member Johnson noted in their dissent to the Final Rule: "[T]he inescapable impression created by the Final Rule's overriding emphasis on speed is to require employees to vote as quickly as possible – at the time determined exclusively by the petitioning union – **<u>at the expense of employees and employers who</u>**

[12] In addition to the grounds set forth herein, UPSF incorporates by reference each and every objection to the Final Rule raised by the Plaintiffs in *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015), *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D. Tex. 2015), and *Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D.D.C. 2015), such that those objections and arguments shall be deemed to be set forth fully herein.

predictably will have insufficient time to understand and address relevant issues." 79 Fed. Reg. 74,460 (emphasis added). The inevitable result is an election process more focused on haste than on substance and accuracy, and that violates the Act, the Administrative Procedure Act, 5 U.S.C. § 706(2)(A),(C), and the First and Fifth Amendment to the Constitution in a number of respects.

A. The Final Rule Violates The Employer's Right To A Fair And Appropriate Hearing.

The Final Rule's "overriding emphasis on speed" effectively eliminates an employer's opportunity to obtain a fair and appropriate hearing. Although the Final Rule provides for a representation hearing following the filing of an election petition, as contemplated by Section 9(c), it prescribes that the hearing occur within a mere 8 days after the notice of hearing is served upon the employer. *See* 29 C.F.R. §102.63(a). The Final Rule also burdens the employer with unilateral obligations in advance of the representation hearing, including a comprehensive Statement of Position supported by a written offer of proof addressing, among other things, all of the issues it wishes to litigate at the hearing upon risk of waiving any issue not presented in the statement.

Thus, even assuming that the now-abbreviated pre-hearing period provides sufficient opportunity for an employer to adequately identify the issues relevant to the election (which UPSF does not concede), the pre-hearing obligations imposed by the Final Rule deny the employer adequate time to develop the testimony and evidence necessary to address those issues. And, while the Final Rule allows for postponement of the hearing upon a showing of "special" or "extraordinary" circumstances, such a postponement is wholly discretionary, something UPSF learned firsthand during the R-Case. The sum of these processes denies an employer a "fair" and "appropriate" hearing guaranteed by the 5th Amendment and Section 9(c) of the Act.

The Final Rule also violates both the 5th Amendment and Section 9(c) by limiting the scope of the issues addressed at the representation hearing to those which are "relevant to the existence of a question of representation." Given the Final Rule's "overriding emphasis on speed," the purpose of this limitation is obvious. It permits a Region to proceed directly to an election once it has identified what it deems to be the appropriate scope of a unit. This objective places the cart before the horse, however, by rushing to an election before potentially dispositive issues are even heard.

This very harm is laid out in GC Memo 15-06. The memo acknowledges that "a petition filed by a supervisor cannot raise a valid question concerning representation," but it directs that "[a]llegations of supervisory taint of the petition or showing of interest are normally determined through an administrative investigation conducted by the regional director **independent of the pre-election hearing**." *See* GC Memo 15-06, at 18 (emphasis added). In fact, GC Memo 15-06 further directs that, even if a party asserts that pro-union conduct by a supervisor tainted the petition or the showing of interest, a regional director may decide not to permit litigation of supervisory status **at any time prior to the election**.

The harms implicated by this guidance cannot be overstated. By permitting (and even encouraging) the Region to ignore supervisory taint until after the election, the Final Rule disregards the employees' Section 7 right to election conditions free from conduct the Board has repeatedly found to be inherently coercive. *See e.g., Harborside Healthcare, Inc.*, 343 NLRB 906 (2004); *Madison Square Garden CT, LLC*, 350 NLRB 117, 122 (2005); *Reeves Bros.*, 277 NLRB 1568, 1568 n.1 (1986); *Sarah Neuman Nursing Home*, 270 NLRB 663, 663 n.2 (1984). Moreover, supervisory taint is fundamental to the viability of a petition. The fact that the Final Rule permits the Region to conduct an election upon a potentially invalid petition without first

giving an employer an opportunity to litigate the issue at hearing is the ***very*** harm Section 9(c) seeks to avoid.

B. The Final Rule Deprives An Employer Of Meaningful Communication With Its Employees, And Deprives Employees Of An Informed Election.

The Final Rule's overriding emphasis on speed also interferes with an employer's right and opportunity to meaningfully communicate with its employees during the election process. Those rights are governed by Section 8(c) of the Act, which states that: "The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. §158(c). The policies reflected in Section 8(c) favor uninhibited, robust, and wide-open debate. *See e.g., Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008); *Healthcare Assn. of N.Y. State v. Pataki*, 471 F.3d 87, 98-99 (2nd Cir. 2006) (Section 8(c) allows employers "to present an alternative view and information that a union would not present."). And, consistent with Section 8(c), "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969).

The Final Rule disregards this precedent by artificially abbreviating the period of time between the filing of a petition and the conduct of the election. As well, the Final Rule imposes numerous unilateral obligations on an employer during the critical period, including: 1) the posting of an election notice within 2 business days after the notice of hearing is served; (2) the expectation that the hearing begins within 8 days after the notice of hearing is served; (3) the requirement that the employer prepare and file a comprehensive Statement of Position addressing the issues it wishes to litigate at the hearing, among other information, upon risk of waiving its legal rights to contest any issue not presented in the statement; (4) the requirement that the

employer prepare and present written "offers of proof" in support of its position at the hearing; and (5) the requirement that an employer prepare and provide to the labor representative "a list of full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters."

Together, these modifications violate an employer's rights under Section 8(c). The period of time between the filing of a petition and the conduct of the election has long been called the "critical period" for a reason - it is the point in time in which "the representation choice is imminent and **speech bearing on that choice takes on heightened importance**." *See* 79 Fed. Reg. at 74,439-40 & n.591 (Dec. 15, 2015) (dissent) (citing *Goodyear Tire & Rubber Co*., 138 NLRB 453 (1962); *E.L.C. Elec., Inc*., 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc*., 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir; 2012); *NLRB v. Curwood Inc*., 397 F.3d 548, 553 (7th Cir. 2005)) (emphasis added). The critical period traditionally permitted an employer to identify the issues fueling the organizing effort, and to address them in a specific manner during the campaign, while at the same time educating its workforce on the changes that would necessarily occur in the event of unionization. For this reason alone, pre-petition statements concerning an employer's position on unionization, based on general observations at a time when no organizing efforts are taking place, are no substitute for post-petition speech. Now, however, an employer's ability to respond to union campaign efforts, and to provide a lawful, management-sided response to the union's argument in favor of unionization, are severely and unreasonably restricted due to the limited duration of the critical period and the onerous administrative burdens unilaterally imposed on the employer throughout it. Plainly put, the modifications imposed by

the Final Rule ensure an employer has neither the time nor the opportunity to engage in meaningful communication with its employees at the time when the representation choice is imminent.

The end result is detrimental to both an employer and its employees. The harms inherent in the Final Rule were expressly identified in the dissenting analysis, which predicted that the accelerated election process prescribed by the Final Rule would occur "at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues." 79 Fed. Reg. 74,460 (emphasis added). Significantly, the Final Rule permits the Union to act at its leisure (and in secret) in disseminating information to employees in support of its organizing efforts, and to file its petition at a time when it is confident it has secured sufficient support to prevail in the election. The prior election processes provided an employer – even one with no previous notice of the union's efforts – with an opportunity to address the relevant issues with its workforce and to meaningfully communicate a lawful response to a union's organizing efforts. The Final Rule, however, unreasonably restricts the Company's opportunity **to respond**.[13] The undesirable, but likely, result is an election decided by uninformed voters.

[13] It follows that the shortened critical period contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively **compel** an employer to address the issue of unionization **prior** to the filing of a petition – and quite possibly prior to the onset of any organizing efforts – for fear that it will not have adequate opportunity to do so once a petition is filed. The danger inherent in such compelled speech is obvious. While there undoubtedly are circumstances where preemptive, pre-petition discussions with employees will serve to further an employer's position with respect to unionization, it is also just as likely that, by addressing the issue of unionization prior to the filing of a petition, at a time when organizing efforts may not yet have occurred, an employer will scatter a seed it does not intend to sow. Employers were not forced to make that choice prior to the implementation of the Final Rule. The First Amendment, which protects "both the right to speak freely and the right to refrain from speaking at all," *see Wooley v. Maynard*, 430 U.S. 705, 714 (1977), preserves the employer's right to decide when and how to address the issue of unionization with its employees, or to refrain from doing so at all. *See also Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Ca.*, 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes within it

Such a result flies directly in the face of rights the Act was intended to protect. By its terms, Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, **and shall also have the right to refrain from any or all of such activities** . . . ." 29 U.S.C. §157 (emphasis added). The right to refrain is only meaningful if the employees have pre-election access to information from both sides concerning the consequences of representation. The modifications to the election process imposed by the Final Rule ensure that they do not.

II. The Region's Application Of The Final Rule Violated The Company's Substantive And Due Process Rights Under The Act, The Administrative Procedure Act, And The Constitution.

The Region's arbitrary and prejudicial application of the Final Rule throughout the R-Case contravened the Company's (and its employees') substantive and due process rights under the Act, the Administrative Procedure Act of 1946, 5 U.S.C. §706(2)(A), and the U.S. Constitution. Focused intently (as the Final Rule commands) on speeding along the R-Case as quickly as possible, the Region issued numerous arbitrary and prejudicial procedural rulings against the Company that denied it sufficient time and/or opportunity to respond to the Petition. The Region also refused to address in a meaningful manner a number of substantive issues raised by the Company. These actions rendered the election result invalid and require dismissal of the Union's charge in this case. *See e.g., Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (finding that a reviewing court must determine whether an agency has

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the choice of what not to say."). An employer's right to refrain from such speech is directly, and prejudicially, implicated by the Final Rule.

"examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.").

A. The Region's Application Of The Final Rule's Accelerated Pre-Election Procedures

As the Company noted in Section I, *supra*[14], the accelerated pre-election procedures prescribed by the Final Rule pose significant hardships on an employer. These hardships were on full display in the R-Case. The Petition was filed in the midst of the holiday season, which presented significant challenges to the Company given the nature of its business and the increased operational demands during the holidays. Moreover, although the Union's petition purported to implicate only a limited number of employees at a single location, the potential scope of the appropriate unit was significantly greater and called for review of facts and circumstances involving nearly three hundred employees at nine locations in the same number of states. The natural logistical challenges of gathering evidence in support of the Company's position on the unit were further complicated both by the dispersion of employees (including potential management witnesses) during the holiday season and the operational demands on the Company resulting from its transition to a new, customer-imposed delivery schedule at the time the Union filed the petition.

For all these reasons, the application of the Final Rule to the R-Case was materially detrimental to the Company. The Petition posed a number of complex issues. Indeed, the bargaining unit determination, alone, required the Company to develop evidence on multiple, complex factors including: (1) central control of over daily operation and labor relations, including the extent of local autonomy; (2) similarity of employee skills, functions, and working

[14]The Company incorporates fully by reference the arguments set forth in Section I such that they shall be deemed to be set forth fully here in support of this argument.

conditions; (3) the degree of employee interchange among locations; (4) the distance between locations; and (5) bargaining history, if any exists. *See e.g., J&L Plate, Inc.*, 310 NLRB 429 (1993); *Trane*, 339 NLRB 866 (2003). The Company's burden was further complicated by the unsettled nature of Board law concerning the application of its decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011) to the multi-facility bargaining unit proposed by the Company. If applicable, *Specialty Healthcare* imposed the additional burden of demonstrating that the employees in its proposed unit "share an overwhelming community of interest with those in the petitioned-for unit." *Id.*, at *10-13.

Given the scope of the unit proposed by the Company as appropriate: a system-wide unit of all nine AAP distribution centers, there was no reasonable way the Company could fully identify all of the relevant supporting evidence, select and prepare relevant witnesses and documents, and distill its arguments into a presentable form in the limited time provided by the Final Rule. To do so required review of literally thousands of potentially relevant documents, and the questioning of multiple witnesses at each of the proposed locations comprising the unit. Many of the employees needed to assist the Company in identifying and gathering evidence, or who possessed relevant evidence themselves, were unavailable due to operational demands or personal holiday obligations. This presented an insurmountable task for UPSF given the restrictions imposed by the Final Rule.

The same is true of the Company's burden of proof concerning Cappetta's supervisory status and his potential interference with the employees' card-signing drive. In order to prove that Cappetta was a statutory supervisor, the Company had the burden of demonstrating that: (1) he had the authority to engage in at least one of 12 supervisory functions set forth in Section 2(11); (2) his authority was not merely routine or clerical but required the use of independent

judgment; and (3) his authority was held in the interest of the employer. *See e.g., NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-713 (2001); *Oakwood Healthcare*, 348 NLRB 686, 687 (2006).

The majority of evidence concerning Cappetta's supervisory authority existed in the eyewitness testimony of members of UPSF management, members of AAP management with whom Cappetta interacted in the performance of his duties, or other hourly employees. Interviewing all of these sources before the hearing was not realistic given the Final Rule's timeframes. Moreover, the evidence relating to Cappetta's assistance with the Union's organizing efforts was by no means readily available to the Company. Thus, the operational demands of the holiday season for both companies, coupled with the typical dispersion of employees during the holidays, turned the already-overwhelming task of trying to identify, collect, and process the available evidence into one that simply could not be completed within the restricted timeframes prescribed by the Final Rule, particularly given the Company's simultaneous obligation to complete the statement of position under pain of waiver.

B. The ARD's Partial Denial of the Company's Motion To Postpone Representation Hearing And For Extension Of Time To File Statement Of Position

In an effort to alleviate the prejudicial impact the Final Rule imposed upon its ability to respond to the Petition, UPSF requested a modest, two-day extension of time to file its statement of position (from Thursday, December 17, 2015 until Monday, December 21, 2015), and requested that the representation hearing be postponed from Friday, December 18, 2015 until Tuesday, December 22, 2015.[15] Significantly, Section 102.63 of the Board's Rules and

[15] Even if the Company had been given the full two-day extension it asked for, it could not have adequately prepared for the hearing. Although the Final Rule contemplates a longer extension upon a showing of "extraordinary circumstances," *see* 29 C.F.R. §102.63(a), such relief clearly was not available to the Company given the Region's summary denial of the

Regulations expressly authorized the ARD to extend the time for filing and serving the Statement of Position, and to postpone the representation hearing, for up to 2 business days. Given the scope and gravity of the facts and issues involved, the Company clearly presented "special circumstances" warranting the relief requested. *See* 29 C.F.R. §§102.63(a); (b)(1).

Without explanation, the ARD only partially "granted" the Company's motion, ordering that the Company's statement of position be filed by 12:00 PM on Friday, December 18, 2015, and that the hearing be conducted at 10:00 AM on Monday, December 21, 2015. His decision not only prejudiced the Company in its preparation of the statement of position and for the hearing, it directly aided the Union by giving it access to the Company's statement of position, and thus the issues and facts the Company intended to raise at the hearing, for almost four full days prior to the hearing. Had the ARD granted the Company's request in full, the Union would have had the Company's statement of position one day prior to the pre-election hearing, which is the amount of time prescribed by the Final Rule when applied in due course.

Of course, the Final Rule, as written, does not require that the Union provide any information regarding its legal position and anticipated evidence and witnesses to UPSF. Therefore, the Company was already at a disadvantage with respect to its ability to address the Union's case. The ARD's ruling only enhanced the Union's advantage and unquestionably prejudiced the Company's ability to develop the evidence and legal support needed to advance its position in response to the Petition.

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limited extension/postponement the Company requested under the less burdensome showing of "special circumstances." This raises the question of whether the Region's interpretation and application of the limited extensions provided under the Final Rule not only had the effect, but the purpose, of placing the Company at a disadvantage in its efforts to prepare for the hearing, particularly given the prejudice visited on the Company as a result of the Region's partial "grant" of the relief requested.

C. **The Region's Procedural And Evidentiary Rulings At The Representation Hearing**

The Company was further prejudiced by the numerous arbitrary and adverse procedural rulings made by the Hearing Officer and ARD during the representation hearing. Section 9(c) provides for an "appropriate" hearing upon due notice if the Board determines, upon investigation, that reasonable cause to believe that a question of representation affecting commerce exists. *See* 29 U.S.C. § 159(c). The Region's procedural rulings, however, resulted in a representation hearing that fell far short of this stated mark.

For instance, nothing in the Final Rule requires the completion of the hearing in a single calendar day. *See* 29 C.F.R. §102.64(c) (hearings "shall continue from day to day until completed"). Nevertheless, the Hearing Officer refused the Company's repeated requests for adjournment, and instead required the parties to present live witness testimony until about 7:00 p.m., nearly two hours beyond the end of the normal business day. (Tr., at 332). The Company requested adjournment to prepare additional evidence and witness testimony. The denial of the opportunity to continue the hearing on a second day foreclosed this possibility.

The Final Rule also expressly provides for the filing of post-hearing briefs upon "special permission" from the ARD. *See* 29 C.F.R. §102.66(h). The many complex issues presented in this case plainly warranted the filing of briefs, particularly after the Hearing Officer denied the Company's request to continue the hearing to a second day and foreclosing its right to present additional evidence. But the ARD summarily denied the Company's request, without explanation. (Tr., at 328).

Finally, the Final Rule provides that "any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument." *See* 29 C.F.R. §102.66(h). Once it became clear the Hearing Officer was not going to allow the hearing to continue to a second day, and that the ARD was not going to allow briefs, the Company's only remaining opportunity to meaningfully summarize the evidentiary record was through its closing argument. Adjourning to allow the parties the night to prepare closing arguments would have been more than reasonable. However, the Hearing Officer denied the Company's request and permitted only 30 minutes for the Company to prepare and deliver its closing argument that evening. (Tr., at 329-332). Thus, at the end of an evidentiary hearing that was not permitted to be continued to a second day, without the benefit of evidence the Company would have submitted had it been allowed to continue the hearing, without the benefit of a transcript, and having been denied the opportunity to submit a brief, the Company was given half-an-hour to sum up its case and deliver its argument.

The Hearing Officer's and ARD's denials of the Company's requests were more than arbitrary; they were extremely prejudicial. The Union had full notice of the issues and evidence the Company intended to present at hearing, and nearly four full days to prepare to address them due to the ARD's partial denial of the Company's motion for extension and postponement. In contrast, the Company had no prior notice of the Union's anticipated evidence and legal theories. As well, the nine-and-a-half-hour hearing resulted in over 350 pages of witness testimony concerning a number of facts and issues of which the Company received no prior notice.

The adjournments requested by the Company, or alternatively the opportunity to submit post-hearing briefs, were clearly justified. The requested adjournments would have amounted to nothing more than a few hours' recess – a reasonable duration given the complexity of the issues

and the volume of evidence presented – and would have permitted the Company time to digest the evidence and testimony presented by the Union for which the Company had no prior notice, and to prepare its own evidence in defense of the petition and to rebut the Union's arguments. The same is true of the requested opportunity to prepare post-hearing briefs, which was clearly within the ARD's discretion under the Final Rule.

The only plausible justification for denying the Company's requests is the Final Rule's focus on expeditious administration of the election. But even viewed in that light, the Region's denial of the Company's request demonstrates an obvious bias underscored by the fact that the ARD's Decision and Direction of Election did not issue for over two weeks following the close of the hearing. The Region's game of "hurry up and wait" was not only arbitrary and capricious in view of the Board's own rules, it violated the Company's right to an "appropriate hearing" under Section 9(c) of the Act and represented an intentional denial of due process under the Administrative Procedure Act and the Constitution.

D. <u>The Region's Disregard of Cappetta's Supervisory Status and Possible Taint.</u>

Perhaps the most glaring evidence of the Region's arbitrary and prejudicial treatment of the Company's rights lies with its refusal to address UPSF's position that Cappetta was a statutory supervisor. This issue was critical to the Company's rights for three reasons. <u>First</u>, and most obviously, it dictated his eligibility to vote in the election. <u>Next</u>, and more importantly, Board law makes clear that "an employer is entitled to the undivided loyalty of its representatives." *See NLRB v. Yeshiva University*, 444 U.S. 672, 682, 100 S. Ct. 856, 63 L. Ed. 2d 115 (1980). It follows that a determination of Cappetta's supervisory status was necessary prior to the election in order to provide UPSF fair notice of whether it could expect and require Cappetta to advocate and support the Company's position during the campaign. If, as UPSF suspected, Cappetta spearheaded the employees' card-signing efforts, having the legal right to

demand that he support the Company in further employee communications could very-well have been outcome determinative. Finally, Cappetta's supervisory status was relevant to the viability of the Union's petition, and ultimately to the result of the election, to the extent it was supported by a showing of interest based on "tainted" cards he directly solicited. *See Harborside Healthcare, Inc.*, 343 NLRB 906, 911 (2004) (finding that "solicitations [of union authorization cards by supervisors] are inherently coercive absent mitigating circumstances."). The Region, however, completely dropped the ball with respect to these three issues. Indeed, the Region failed to address the issue of Cappetta's supervisory status, for any reason, prior to the election (D&D, at 13), and provided nothing more than lip service to the issue thereafter.

UPSF submitted substantial evidence, both at the representation hearing and in its offer of proof, to support its position that Cappetta was a statutory supervisor, all of which was literally ignored by the Region.[16] Additionally, the Company presented significant evidence to support its position that Cappetta likely engaged in solicitation efforts and other conduct in support of the Union that tainted the showing of interest supporting the Union's petition for election, the election campaign, and the vote itself.

The Company informed the Region prior to the representation hearing, and again in its offer of proof, that Tammy Cadman ("Cadman"), a former temporary administrative assistant at the AAP Kutztown distribution center employed in the same position on a permanent basis at the Company's Salina, Kansas distribution center, would testify that, in the weeks prior to the filing of the Petition, Cappetta approached her and asked her, "Do you know what's going on here?" Cadman replied that she did not, to which Cappetta replied: "We're going to try to get a union at this location, you may want to share that with your drivers." Cadman interpreted Cappetta's

[16] The specific evidence presented by the Company in support of Cappetta's supervisory status is set forth in Section IV.A, below.

comment to mean that he was organizing the Kutztown workplace and that he wanted her to encourage the Road Drivers at UPSF's Salina, Kansas facility to unionize when she returned to that facility following her temporary assignment at Kutztown.

The Company also offered proof that Matt DiBiase ("DiBiase"), the Operations Supervisor at Kutztown, would testify that, on January 8, 2016, he and the Company's Implementation Supervisor, Monte Copeland, were returning to the Kutztown facility after lunch and heard a phone ringing in the office. Cappetta's personal phone was sitting in plain sight, unattended, next to his company laptop. Cappetta was not in the immediate area at the time. When DiBiase glanced down at the phone (simply because it was ringing), its display reflected an incoming call from Union Organizer/Trustee Brian Taylor.

DiBiase's anticipated testimony supports a reasonable belief that further investigation or evidence obtained through litigation would have provided further proof of Cappetta's involvement in the Union's initial organizing efforts, as well as its pre-election campaign. The date of Taylor's call to Cappetta – January 8, 2016 – is particularly noteworthy as it shows that Cappetta remained in contact with the Union <u>after the representation hearing and during the critical period prior to the date the mail ballots were mailed to eligible voters</u>. The Company requested that the Region conduct an administrative investigation and that a formal check of the cards be conducted by the ARD to ascertain Cappetta's participation as a witness to the card signings for the purpose of evaluating the validity of the showing of interest supporting the Petition. (SOP, at 14; CoR, at 6). The Region, therefore, had an obligation to investigate the matter promptly and fully to determine the validity of the showing of interest. *See Perdue Farms, Inc*., 328 N.L.R.B. 909, 911 (1999) ("Once presented with evidence that gives . . . reasonable cause to believe that the showing of interest may have been invalidated . . . further administrative

investigation should be made provided the allegations of invalidity are accompanied by supporting evidence.”).

In dismissing the Company’s contention that Cappetta was a statutory supervisor, and therefore ineligible to vote, the ARD stated in the Decision and Direction of Election that:

> Although the Hearing Officer received evidence concerning the supervisory status of Frank Cappetta, the Employer’s contention that Cappetta is a supervisor and should be excluded from the unit concerns his eligibility to vote, and I conclude that this issue need not be resolved before the election because resolution of the issue would not significantly change the size or character of the unit. Accordingly, I shall not address the Employer’s arguments concerning the exclusion of Cappetta . . . from the unit, and [he] may vote under challenge.[17]

(D&D, at 13). The ARD’s treatment of the allegations of supervisory taint was equally indifferent. According to the ARD:

> The Employer’s allegations of supervisory taint of the [Union’s] showing of interest will be investigated administratively. The Board has long held that it is inappropriate to litigate such matters in representation proceedings, and accordingly I will not consider that issue in this Decision.

(*Id*.)

The ARD then relied on the Final Rule as justification to support his rejection of the Company’s related election objections:

> [T]he Employer contends that the Region’s failure to address Frank Cappetta’s supervisory status denied the Employer the opportunity to know what it could expect or require from Cappetta during the campaign. This argument is without merit. As the Board held in issuing the Final Rule, uncertainty as to the supervisory status of employees is inevitable. 79 Fed. Reg. at 74389. A decision as to Cappetta’s supervisory status could not have provided the Employer the certainty it sought. Consequently, I find that the Employer was not prejudiced by the fact that Cappetta’s supervisory status was not the subject of a preliminary decision prior to the election. *See* GC 15-06 at 18. In the event, the Employer treated him as a unit employee and the Region determined that he was not a

[17] The ARD also addressed the Company’s purported assertion that employee David should also be deemed ineligible to vote as a result of his supervisory status. The Company has never alleged that Mr. David was a Section 2(11) supervisor, and does not advance that position here.

> supervisor within the meaning of Section 2(11). Under the Final Rule, because questions of supervisory status do not directly impact on whether or not there is a question concerning representation, regional directors may decide not to permit litigation of supervisory status prior to the election. Accordingly, [the Company's objection] is overruled.

(CoR, at 6). In addressing the Company's objection to his prior refusal to consider the issue of supervisory taint, the ARD stated:

> [T]he Employer contends that the Region refused to address whether the Petition was tainted based on Frank Cappetta's involvement. I find no merit to this Objection. The Employer submitted a request to investigate an allegation of taint on December 21, 2015. **The Region conducted an investigation and determined that Cappetta was not a supervisor within the meaning of Section 2(11) of the Act.** Crucially, the Employer had ample opportunity to present evidence on Cappetta's supervisory status at the pre-election hearing. The Employer was not prevented from putting on its supervisory-status case. According it a second bite at the apple would serve no purpose. **Since the investigation (including the record of the pre-election hearing) did not demonstrate that Cappetta was a supervisor, his involvement did not taint the Petition.** The Employer was informed of the findings of the Region's investigation concerning taint prior to the ballot count. Thus, there is no evidence that the Employer was prejudiced by the manner in which the issue of taint was resolved. Accordingly, [the Company's objection] is overruled.

(*Id*.). Finally, the ARD found that:

> [T]he Employer contends that the conduct of the election and its results were tainted by the involvement of purported statutory supervisor Frank Cappetta in the election campaign and in securing the showing of interest. As noted in discussing [the objection above], **the Region conducted an investigation on this issue, which included evidence offered by the Employer during the hearing, and determined that Cappetta is not a statutory supervisor; therefore, the Region found that there was no taint**. Accordingly, Objection 6 is overruled.

(*Id*.).

These quotes represent the entirety of the Region's treatment of these substantial (and potentially dispositive) factual issues. The ARD made no investigative findings, no factual findings, offered no applicable legal standards, and provided no reasoned analysis **at all** regarding Cappetta's supervisory authority. He simply proclaimed that he was not a supervisor.

And although the Region was obligated to investigate the Company's allegations of supervisory taint, there is no evidence that an investigation actually occurred.

Indeed, the Company offered proof that Willie Johnson, Kaliek Thomas, Ken Rose, Tim Hertzog, Gene Knappenberger, Don Roush, and Chris Camuso, all of whom are Road Drivers in the proposed bargaining unit, would testify that no one from the NLRB attempted to contact them at any time after the filing of the petition. (Offer at 10). Given the relatively small size of the petitioned-for unit, it stands to reason that any investigation by the Region should have included interviews with bargaining unit members to determine whether, and how, Cappetta participated in the card signing process and/or the Union's pre-election campaign. The fact that these employees were not interviewed tends to establish that the Region did not make any meaningful effort to do so.

Additionally, the Company offered proof that Cadman would also testify that she was never contacted by the Region despite the asserted fact that she had witnessed conduct evincing Cappetta's involvement in the organizing campaign. (Offer at 10). There is also no indication in the record that the Region conducted the card check formally requested by the Company. It's ironic that the ARD chided the Company for seeking what he termed "a second bite of the apple." (CoR, at 6). The record makes abundantly clear that the Company never got a first bite.

The supposed purpose for prohibiting litigation of supervisory taint during the pre-election process is to protect the identity of the employees who signed cards or otherwise indicated their support of the union. For this reason, an employer is prohibited from eliciting evidence of taint during the representation hearing and from utilizing the Board's subpoena powers to obtain the authorization cards signed by the employees. Under the Final Rule, however, the representation hearing is the only opportunity an employer has to obtain testimony

from witnesses, under oath, during the election proceedings. Since the Company is precluded from inquiring about the circumstances under which the Union obtained its showing of interest, the onus is on the Region to investigate timely raised allegations of taint. When the Region fails to do so, as was evident in the R-Case, the issue is left unresolved.[18]

For this very reason, the election process must include a mechanism by which an employer has an opportunity to address this issue. The Board has made clear that supervisory participation in the card solicitations and other conduct on behalf of the union "has an inherent tendency to interfere with the employee's freedom to choose," *see Harborside Healthcare, Inc.*, 343 NLRB 906, 911 (2004), and has, as a result, adopted a bright line approach of deeming any election obtained through a tainted showing of interest void *ab initio*. *See Dejana Industries, Inc.*, 336 N.L.R.B. 1202 (2001). Failure by the Region to investigate upon receipt of evidence that such conduct may have occurred results not only in a violation of the Company's rights, but also of employees' Section 7 rights. And, since the Final Rule prohibits an employer from eliciting evidence and sworn testimony concerning supervisory taint at the representation hearing (*see* Section I.A, *supra*), and all but precludes an employer from compelling production of relevant evidence via the Board's subpoena authority (see Section II.F, *infra*), the only mechanism to address this serious concern is administrative investigation by the Region. All signs indicate that never occurred in the R-Case.

[18] As set forth in Section I.A, above, the simple fact that the Final Rule permits (and even encourages) the Region to conduct an election upon a potentially invalid petition without first giving an employer an opportunity to litigate the issue of supervisory taint at hearing is a violation of the employer's right to an appropriate representation hearing guaranteed by Section 9(c) of the Act. The Company incorporates fully by reference the arguments set forth in Section I.A such that they shall be deemed to be set forth fully here in support of this argument.

The ARD's decision with respect to Cappetta's supervisory status is not just erroneous, **it is nonexistent**. The Region effectively punted on the issue before the election, and never returned to the issue subsequently. In so doing, the Region left unanswered significant issues concerning the Company's right to the undivided loyalty of its representatives, *see NLRB v. Yeshiva University*, 444 U.S. 672, 682, 100 S. Ct. 856, 63 L. Ed. 2d 115 (1980), and the employees' right to election conditions free from coercion. *See Harborside Healthcare, Inc.*, 343 NLRB 906 (2004); *Madison Square Garden CT, LLC*, 350 NLRB 117, 122 (2005); *Reeves Bros.*, 277 NLRB 1568, 1568 n.1 (1986); *Sarah Neuman Nursing Home*, 270 NLRB 663, 663 n.2 (1984); *A.T.I. Warehouse, Inc.*, 169 NLRB 580, 580 (1968); *Heck's, Inc.*, 61 LRRM 1128 (1966); *Dejana Industries, Inc.*, 336 NLRB 1202 (2001); *National Gypsum Co.*, 215 NLRB 74 (1974); *Southeastern Newspapers, Inc.*, 129 NLRB 311 (1960); *The Toledo Stamping & Manufacturing. Co.*, 55 NLRB 865, 867 (1944).

E. The ARD's Refusal to Consider the Company's Revised Election Proposal.

The ARD's refusal to consider the Company's revised election proposal following his erroneous calculations of the Company's original proposal is yet another arbitrary denial of the Company's rights and interests. The Company's original proposal at the representation hearing called for a one-day, single-site election with the polls to be open for a total of four hours over a 14-hour period. (Tr., 316-322). During a conference call on January 7, 2016, to discuss the Company's objection to the ARD's erroneous interpretation of that proposal (D&D, at 15-16), counsel for the Company made a revised election proposal offering a single polling time, from 2:00 a.m. to 8:00 a.m., on a Wednesday of the ARD's choosing. The polling times assured that all employees would have ample opportunity to vote either before they left the terminal on their route or when they returned at the end of their route. In short, UPSF's revised proposal eliminated any possibility that voters might be "scattered" on election day.

Nevertheless, the ARD refused to consider the revised proposal, stating that, under the Final Rule, "determinations on election arrangements are now expected to be made at the time the Decision and Direction of Election issues." The ARD offered no cite to where this "expectation" may be found. Inexplicably, the ARD also expressed doubt that he had authority to modify his original decision on the balloting method. It is well within the ARD's broad discretion to revise election details at any point in the proceedings. The Board recognizes that election details may be worked out by the parties after the issuance of a Decision and Direction of Election. *See* NLRB Casehandling Manual (Part Two) Representation Proceedings §11301.3 ("a determination may not be possible until, for example, after a decision and direction of election has issued"). Thus, any suggestion that UPSF was limited to the proposal it made at the hearing is incorrect, and the ARD's claim that he was not authorized to revisit the election details following issuance of the Decision and Direction was in error.

The Region's refusal to reconsider this point further affected UPSF's ability to communicate effectively with its employees during the critical period before the vote. The Act permits an employer to conduct employee assemblies to address the campaign issues until 24 hours prior to a scheduled manual ballot election. *See Peerless Plywood Co*., 107 NLRB 427 (1953). The rules applicable to a mail ballot election, however, prohibit mass campaign meetings from the time period beginning 24 hours before the ballots are mailed until the election is closed. *See Guardsmark, LLC*, 363 NLRB No. 103 (Jan. 29, 2016). The ARD's refusal to reconsider his own erroneous interpretation of the Company's election proposal foreclosed the Company's right to have group employee communications for the final 18 days of the critical period. This was clearly reflected in the outcome of the vote.

F. The Region's Denial of UPSF's Requested Subpoenas.

The Region's denial of UPSF's Request for the Issuance of Subpoena *Duces Tecum* prejudiced the Company in the preparation of its election objections. Specifically, on February 2, 2016, the Company requested that the Region issue document subpoenas to obtain cell phone records of Cappetta and Union organizer Brian Taylor (and, perhaps, others at the Union) during the period relevant to this proceeding. For the reasons stated previously, the Company had reason to believe that a review of those records would show frequent contact between Cappetta and the Union, which would further support UPSF's contention that Cappetta was a key figure in the Union's organizing campaign and that his participation in the campaign tainted the Union's showing of interest and the results of the election. Relying on the Board's Casehandling Manual, which predates the Final Rule and has not been revised to reflect the Board's new processes, the Region denied the Company's request on the grounds that no "currently outstanding Notice of Hearing" had been issued.

The Region's denial is yet another example of both the prejudice imposed by the Final Rule and by the Region's application of it in the R-Case. Section 102.69(c) of the Final Rule authorizes the conduct of a hearing on objections and challenges to the election if, among other grounds, "the regional director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing." Stated differently, the Final Rule authorizes the Region to decline to hold a post-election hearing if the evidence included in the offer of proof is not sufficient. It follows that the Final Rule requires an employer to present all of the evidence it intends to introduce at the hearing in its offer of proof in order to justify the hearing.

But the Casehandling Manual does not provide for the issuance of investigative subpoenas in the absence of a direction of hearing by the Region. The employer therefore is

currently prohibited from utilizing the Board's subpoena process to obtain the very evidence the Final Rule now demands the employer present in order to justify a hearing in the first place. The result is a circular conundrum: the Company was denied a hearing because it did not present sufficient evidence, but its ability to identify and present sufficient evidence was compromised since one of the primary means with which to do so (i.e., the Board's subpoena power) is unavailable until the hearing is granted.

The harms caused by this conundrum were further amplified here since the Company's need for the subpoenas was the result of the Region's apparent failure to investigate the issue of supervisory taint administratively (see II.D, *supra*), or to otherwise permit the Company to litigate the matter during the pre-election process (see I.A, *supra*). By denying the Company the opportunity to subpoena information relevant to supervisory taint, the Region foreclosed the only mechanism available to the Company to address the issue. Under these circumstances, the Region's subsequent decision not to grant a hearing on the question of supervisory taint based on the Company's "lack" of evidence presented in its offer of proof plainly violated the Company's right to a fair hearing under the Act and to due process under the U.S. Constitution.

G. The Region's Failure To Address The Inclusion Of Certified Safety Instructors and Dispatchers In The Unit

The ARD's failure to address the Company's position that Cappetta and David should be excluded from the unit further prejudiced the Company. The Hearing Officer excluded evidence on this issue at the representation hearing. Nevertheless, the evidence that appears in the record established that Cappetta primarily performed dispatcher duties, that David was primarily employed as a certified safety instructor and assisted Cappetta with his dispatch duties. (Tr., at 149, 190-191, 219). The evidence also demonstrated that neither had, for some time, performed duties sufficiently similar to those performed by the putative bargaining unit members (i.e., road

driving) to establish the requisite community of interest, and, more importantly, that both performed significant functions that were, at best, incompatible, and at worst, antagonistic, to those performed by the Road Drivers employed by the Company. (*Id.*).

As a result, both Cappetta and David, and any other employee who now, or in the future, regularly perform duties as a dispatcher or certified safety instructor, should have been excluded from the unit and deemed ineligible to participate in the election. Instead, the ARD, in apparent reliance on the Section 102.64(a) of the Final Rule, determined that the issue "need not be resolved before the election." (D&D, at 13).

The real harm that resulted from the ARD's determination – and indeed as a result of the Region's application of the Final Rule to address this issue – is that the inclusion of the dispatcher and certified safety instructor positions in the unit **has never been resolved**. Significantly, this is not an issue that simply fell through the cracks. The Union moved to amend its petition for the express purpose of including these employees in the unit, and the Region granted that request in its Decision and Direction of Election. (Tr., at 8-10). Since day one of the R-Case, the Company has steadfastly argued for their exclusion, and it specifically advanced that position in its Statement of Position (SOP, at Att. D), at the representation hearing (Tr., at 11), in its election objections (Obj, at 11), and its request for review by the Board (RoR, at 28-29). But, in its haste to move to election and certification per the Final Rule, the Region never took evidence on the issue, never analyzed the issue, and never ruled (D&D, at 13; CoR, at 8), and the Board refused review of the issue. UPSF has yet to receive formal resolution of whether Cappetta and David (or future dispatchers and certified safety instructors) are included in the unit.

The fact that this issue is left unresolved after the Region's certification of the unit (and the Board's review), and nearly two full years after the election, illustrates the significant harms inherent in the Final Rule. Influenced by the Final Rule's overriding emphasis on speed, the Region allowed the R-Case to reach its conclusion without ever addressing an issue as fundamental as whether an employee holding a position among the class of positions petitioned for by the Union is appropriately included in the certified unit. As a result of the Region's (and the Board's) failure to address this issue, the Company is still in the dark as to the appropriate contours of the putative unit and the scope of its bargaining obligation with respect to these employees (in the event such an obligation exists).

This failure, alone, is dispositive of General Counsel's motion for summary judgment. The Union has made repeated requests to bargain on behalf of the unit. The Company's refusal to engage in negotiations is the purported violation upon which this case has been filed. But the Board's failure to address the inclusion or exclusion of the dispatchers and safety instructors has left the parties unclear as to the scope of UPSF's bargaining obligation, even assuming that one lawfully exists. Without resolution of this issue, the question of whether the Company has unlawfully refused to bargain with the Union is not yet ripe, and the Company cannot be deemed to have violated the Act.[19]

[19] The fact that this issue has not been addressed not only harms the Company's interests, but also those of its employees, who have been denied a complete understanding of the scope and character of the unit at issue in the election. *See e.g., NLRB v. Beverly Health & Rehab. Servs., Inc.*, 120 F. 3d 262 (4th Cir. 1997) ("Where employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope than or character from the proposed bargaining unit, the employees have effectively been denied the right to make an informed choice in the representation election.").

This is precisely the harm identified by Chairman Miscimarra in his dissent to the Board's Decision on Review and Order in the R-Case. According to Chairman Miscimarra:

> [T]his case demonstrates that the Election Rule's extensive changes to the Board's preelection procedures inevitably draw parties into a game of "hurry up and wait." The petition here was filed on December 10, 2015, and the deadline for returning mail ballots was January 29, 2016 (which, as noted above, was 50 days after petition filing). Yet, more than 17 additional months have now passed, and the parties still have not obtained any definitive resolution of issues arising from the election. As the Board's decision reflects, this delay was at least in part due to the need to address important issues that were not resolved in the Regional Directors Supplemental Decision. **Worse, because my colleagues deny review on most issues the Employer raises, the parties here--and most parties in other election cases--will never obtain a definitive resolution from the Board as to the issues the Board does not address, and any meaningful postelection review will only be available in the courts, which defeats the purpose of mandating that elections occur on the "earliest date practicable."**

UPS Ground Freight, Inc. & Teamsters Local 773, Petitioner, 365 NLRB No. 113 (July 27, 2017) (emphasis added). As Chairman Miscimarra predicted, the R-Case is a prime example that the Final Rule's emphasis on speed ignores too many issues of substance, and ultimately results in an election process that fails to render an acceptable (or workable) outcome.

III. The Region's Arbitrary And Capricious Application Of The Final Rule Infects All Of The Decisions Addressing The Substantive Issues In The R-Case.

The sum of all the Region's conduct during the R-Case proceedings, as evidenced by the Region's numerous procedural rulings adverse to the Company described in Section II, above, drastically compromised UPSF's ability and opportunity to prepare and introduce witness testimony and documentary evidence addressing the complex issues presented by the Petition, and to develop arguments and authority in support of its position. The predictable result is an evidentiary record in the R-Case that was incomplete despite the Company's best efforts. This procedural failing infected every substantive ruling rendered in both the R-Case and the Board's review of it. Plainly stated, the R-Case process administered by the Region ensured that the Company did not have an adequate opportunity to develop evidentiary support for its relative

positions. As a result, any finding by the Region or the Board rejecting a position advanced by the Company due to a purported lack of evidentiary support is fundamentally tainted.

IV. The Region's Disposition Of The Substantive Issues Presented By The Company Resulted In Plain Error.

Hamstrung though it was by the Region's prejudicial application of the Final Rule, the Company contends there is sufficient evidence in the record as it presently stands to establish the Region's and the Board's substantive rulings were in error.[20]

A. The Region's Determination That Cappetta Was Not A Section 2(11) Supervisor Was Plain Error.

For instance, despite the severe limitations the Region's many rulings described above had on its ability to put on a case, the Company still elicited substantial evidence proving that Cappetta was, in fact, a statutory supervisor.

The testimony elicited at the hearing demonstrated that about 80% of Cappetta's work hours during the year prior to the election were devoted to his dispatcher duties. (Tr., at 219, 265, 290). Cappetta regularly coordinated routes and assigned drivers to those routes (Tr., at 125, 127, 129, 135), coordinated with AAP to determine the number of routes required each day (Tr., at 126-127), identified and resolved "split routes" and "overloads," regularly assigned coverage for driver absences (Tr., at 138, 141-142), was authorized to contact outside providers to schedule temporary drivers as needed (Tr., at 139-141), scheduled vacation and coordinated employee absences with payroll (Tr., at 142), set his own schedule (Tr., at 146-147, 157), held meetings

[20] The evidence UPSF presented to the Region concerning the possible supervisory taint by Cappetta, and the evidence supporting Cappetta's and David's exclusion from the unit as a result of their dual-function status, has previously been set forth in Section II.D and II.G, respectively. To avoid repetition, UPSF will not readdress those arguments in this Section, but maintains that it met its evidentiary burdens with respect to both of those substantive issues, or, alternatively, that the Region's arbitrary procedural rulings throughout the R-Case, as described in Sections II and III, above, deprived it of the opportunity to fully develop its evidentiary record concerning those issues.

with multiple drivers at a time (Tr., at 157), received and decided complaints from AAP concerning deliveries (Tr., at 169-170), and received and resolved complaints from drivers concerning their assigned routes (Tr., at 129). Importantly, Cappetta decided which drivers to assign by exercising his independent judgment. (Tr., at 272; 281-82; 310-11).

Additionally, the evidence demonstrated that Cappetta evaluated driver applicants and made recommendations concerning hires (Tr., at 174), administered pre-hire road tests and evaluated employee performance in the test, evaluated and supervised driver pre-trip and post-trip tasks, and performed driver skill assessments related to driver qualifications, among other tasks (Tr., at 172-174). Beginning in at least October 2015, Cappetta physically occupied the site manager's office at the Kutztown distribution center. (Tr., at 187-189).

UPSF also offered proof that the new on-site manager at the AAP Kutztown distribution center, Jeremiah Andrefski ("Andrefski"), would testify that, in January 2016, Cappetta told him: "No offense to you Jeremiah, but I can run this place by myself. I've done it before." (Offer, at 7). Significantly, this comment occurred after the representation hearing, during which Cappetta repeatedly denied performing supervisory functions or that he ran the Kutztown operation. Additionally, the Company offered proof that Andrefski and DiBiase, the Operations Supervisor at the Kutztown distribution center, would testify that Road Drivers could not refuse dispatch assignments made by the dispatcher without good cause, and that the penalty refusing one of Cappetta's assignments (without good cause) would be disciplinary action up to and including discharge. (Offer, at 8).

Accordingly, the evidence established that Cappetta performed a number of the supervisory functions contemplated by Section 2(11) (each independently sufficient) with the requisite independent judgment that was not merely routine or clerical in nature in the interest of the Company. As a result, Cappetta should have been deemed a statutory supervisor under relevant Board precedent.

B. The Region's Decision To Hold A Mail Ballot Election In The R-Case Departed From Longstanding Board Precedent.

The ARD's decision to hold a mail ballot election departed from Board precedent and represented an abuse of discretion in the manner in which the Region conducted the R-Case. The Board has long held that the manual ballot election procedure is presumptively appropriate. *See Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) (denying mail ballot election where voting group consisted of over 1,600 employees employed at various sites throughout New York City metropolitan region and assigned a "myriad of schedules, including being on-call 24 hours a day"); *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998) (The Board's "longstanding policy, to which we adhere, has been that representation elections should as a general rule be conducted manually, either at the workplace or at some other appropriate location."); *see also* NLRB Casehandling Manual (Part Two) Representation Proceedings §11301.2 ("The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually").

When deciding whether to conduct a manual or mail ballot election, a Regional Director should consider: (1) whether eligible voters are "scattered" because of their job duties over a wide geographic area; (2) whether eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times, and (3) whether there is a work stoppage (i.e., strike or walkout) in progress. *San Diego Gas,* at

1145. Voters may be deemed to be scattered "where they work in different geographic areas, work in the same areas but travel on the road, work different shifts, or work combinations of full-time and part-time schedules." *Id*. at 1145, n. 7. However, "the mere fact that employees may work multiple shifts, thereby necessitating more than one voting session during the course of the workday, is not in and of itself a sufficient basis for directing a mail ballot election." *Id*.

The evidence presented during the R-Case demonstrated that the voting group in this case was not "scattered" under the standards imposed by existing Board law. Indeed, the Road Drivers who participated in the election start and finish their routes at the same terminal, and their participation in a manual ballot election could easily have been accommodated as a result.

Thus, the ARD plainly erred in deciding that a single-site, one-day election in two polling periods over approximately 14 hours was inconsistent with the Board's longstanding policy favoring manual ballot elections. The ARD's decision to hold a mail ballot election, as opposed to a manual ballot election, further abridged the Company's ability to exercise its 8(c) rights by unnecessarily limiting the Company's ability to make group presentations from the date ballots were mailed (nearly two weeks before the date of the vote count), and needlessly subjected employees to the potential harms that the Board's preferred method of manual ballot voting was intended to limit, including the loss of secrecy and integrity in the voting process and the prospect of interference and/or coercion.

C. <u>The Region's Determination As To The Appropriate Bargaining Unit Resulted In Prejudicial Error.</u>

Finally, General Counsel's motion should be denied because the R-Case resulted in the certification of a bargaining unit that is not appropriate under the Act. Section 9(a) permits employees to form a bargaining unit "appropriate" for collective bargaining purposes. *See* 29 U.S.C. § 159(a). To determine the appropriateness of a proposed bargaining unit, the Board first

assesses whether the employees in the petitioned-for unit are identifiable "readily as a group who share a community of interest." *See A.S.V., Inc*., 360 NLRB No. 138, slip op. at 14-15 (2014) (citing *United Operations, Inc*., 338 NLRB 123 (2002)). In so doing, the Board considers whether the employees: (1) are organized into a separate department; (2) have distinct job functions and perform distinct work; (3) are functionally integrated with the Employer's other employees; (4) have frequent contact with other employees; (5) interchange with other employees; (6) have distinct terms and conditions of employment; and (7) are separately supervised. *Id*.

In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), however, the NLRB overturned 20 years of precedent by permitting bargaining units to be petitioned-for and certified even when larger and "more appropriate" bargaining units exist in the employer's workforce.[21] Nevertheless, even under *Specialty Healthcare* and its progeny, the Board has recognized that a petitioned-for unit will be deemed inappropriate where **"the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit . . ."** *See Id.,* at 11. (emphasis added).

The unit proposed by the Union was inappropriate because it excluded the regular drivers (full-time and part-time) employed by the Company at its eight other AAP distribution facilities, which the evidence proved share an overwhelming community of interest with the employees

[21] *Specialty Healthcare* was wrongly decided and should be overturned for all of the reasons stated in the dissents of Member Miscimarra in *Macy's, Inc*., 361 NLRB No. 4, slip op. at 22-33 (2014) and Member Johnson in *DPI Secuprint*, 362 NLRB No. 172, slip op. at 9-19 (2015). *See also NLRB v. Lundy Packing Co*., 68 F.3d 1577, 1581-82 (4th Cir. 1995). These dissents are fully incorporated into this response by reference, and the Company expressly preserves its right to rely upon them throughout the course of these proceedings in asserting that the Board's traditional community of interest standards should apply.

sought to be represented by the Union. Specifically, the evidence demonstrated that UPSF is party to a national contract with AAP, under which it performs operations relating to the distribution of AAP parts and other supplies from nine distribution centers to regional AAP stores around the country. (Tr., at 21-24). The distribution centers comprising the Company's AAP operation are located in Kutztown, PA, Enfield, CT ("Enfield facility"), Lakeland, FL ("Florida facility"), Salina, KS ("Kansas facility"), Gastonia, NC (Gastonia facility"), Delaware, OH ("Delaware facility"), Roanoke, VA ("Virginia facility"), Hazelhurst, MS ("Hazelhurst facility"), and Thomson, GA ("Thomson facility") (collectively the "AAP distribution facilities"). (Tr., at 23). UPSF considers the nine AAP distribution facilities part of a single integrated customer service initiative set up just for AAP. (Tr., at 24-25).

The Company has a single centralized management team (Regional Operations Manager, AAP Manager, Operational Support Supervisor, Support Manager) that is responsible for overseeing the Company's contractual and operational relationship with AAP, including the provision of services by Road Drivers from all of the Company's AAP distribution facilities. (Tr., at 25-31). The Company has centralized Human Resources and Employee Relations functions that are responsible for all nine AAP distribution facilities. (Tr., at 78-79).

All Road Drivers at the nine AAP distribution facilities have the same job title. (Tr., at 36, 39). All Road Drivers use, and are trained on, the same equipment – tractor trailers (either sleeper cabs or day cabs). (Tr., at 36, 39). Road Drivers working under the AAP contract do the same work, and do not perform work, or make deliveries, for any other UPSF customer besides AAP. (Tr., at 38-39). All Road Drivers are evaluated under the same Company performance criteria, including accident frequency, safety and efficiency indicia such as "hard brakes" and "overspeed," miles per gallon on tractors, and delivery performance. (Tr., at 48-51). All Road

Drivers are employed under the same UPSF policies. (Tr., at 46-47, 72). All Road Drivers receive roughly the same rates of pay. (Tr., at 75-76, 116-118). All Road Drivers are entitled to the same benefit plans. (Tr., at 105). All Road Drivers receive substantially the same training/orientation, as well as specialized training from AAP regarding hazards and operational matters relevant to working in one of its distribution centers. (Tr., at 45-48).

All Road Drivers at the Company's AAP distribution facilities have access to a centralized job database and are eligible to apply for driving jobs at any of the other AAP distribution facilities. (Tr., at 51-52). Road Drivers have, in fact, permanently transferred from one AAP distribution facility to another in the past. (Tr, at 52-56; Emp. Exh. 1). In the past several years, 27 UPSF Road Drivers assigned to one AAP distribution center have been transferred to a different AAP distribution center within the system. (Tr., at 52; Emp. Exh. 1). There is significant driver interchange between locations. (Tr., at 56-61). In the months prior to the filing of the Petition, six Road Drivers were temporarily assigned to the AAP Kutztown distribution center from other AAP distribution facilities (3 from the Florida facility, 3 from the Hazlehurst facility) to assist with a shortage of available Road Drivers. (Tr., at 56-66). In the 3 years prior, 117 Road Drivers were temporarily transferred to the Company's other AAP distribution facilities to perform work for a total of 413 weeks. (Tr., at 60; Emp. Exh. 2). In that same time period, 44 Road Drivers were temporarily transferred to the AAP Kutztown distribution center from the Company's other AAP distribution facilities to perform work for a total of 163 weeks. (Tr., at 65-66; Emp. Exh. 2).

This evidence establishes that an overwhelming community of interest is shared by the Road Drivers employed at all of the Company's AAP distribution facilities. Accordingly, the Union's petitioned-for unit should have been rejected by the Region in favor of a bargaining unit

comprised of the regular drivers (full-time and part-time) employed by the Company at its eight other distribution facilities. The ARD rejected the Company's position in his Decision and Direction of Election, and subsequently certified the single-facility unit proposed by the Union. As a result, the R-Case culminated in the certification of a bargaining unit that is neither appropriate nor lawful.

V. The Board Committed Error In Its Review Of The R-Case Proceedings.

Given the many procedural and legal errors committed by the Region during its processing of the R-Case, the Board gravely erred by denying the Company's request for review of these issues. As noted by Chairman Miscimarra in his dissent, "substantial issues exist regarding the impact of the procedural rulings on the other issues being litigated. Moreover, in my view, these issues are serious enough to warrant Board evaluation of the challenged procedural rulings *and* corresponding provisions in the Election Rule." *UPS Ground Freight, Inc., and Teamsters Local 773*, Case 04-RC-165805, *4 (Dec. 10, 2015) (Miscimarra, dissent) (emphasis in original).

The Board majority, however, failed to heed Chairman Miscimarra's call to examine UPSF's challenges to the Final Rule and the manner in which the Region's handling of the R-Case infringed on the Company's right to a fair hearing. Regardless, the legal and procedural flaws in the Final Rule and the Region's application of it here should nullify any obligation on UPSF to recognize and bargain with the Union, and therefore nullify the viability of the Union's charge.

Finally, the Board's attempt to "clean up" the supervisory issue on review likewise fails. The Board did review the Company's challenge to Cappetta's supervisory status, but as stated refused to review any of the Company's other challenges, including those concerning the manner in which the Region hamstrung the Company's ability to make a record by arbitrarily enforcing

the Final Rule. The Board's decision to ignore these challenges means it reviewed the 2(11) issue in an unrealistic evidentiary vacuum. As stated throughout, consideration of the viability of the Union's petition and the Company's substantive objections to it first requires that the Board acknowledge, and at least attempt to address, the Region's procedural missteps, which infected the entire proceeding and guaranteed that the evidentiary record was incomplete. It is impossible for the Board to meaningfully address any disputed evidentiary issue—including the 2(11) issue—without first resolving UPSF's objections to the manner in which the Region enforced the Final Rule during the proceedings. Consequently, the Board's ruling on review that Cappetta is, in fact, a supervisor, was a hollow exercise that should not be countenanced by the Board in its analysis of the parties' corresponding motions for summary judgment.

CONCLUSION

The Region's handling of the R-Case frustrated the Company's due process rights and foreclosed the chance of a valid election. The Final Rule, in both form and application, deprived UPSF of a reasonable opportunity to develop relevant issues, arguments, and authority, and to present testimonial and documentary evidence in support of its position. The Region's arbitrary and capricious handling of the pre-election, election, and post-election process undermined the Company's substantive and due process rights under the Act, the Administrative Procedures Act, and the Constitution, and resulted in the certification of an inappropriate unit. For all these reasons, the Company has no bargaining obligation and therefore has not violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union. Accordingly, Counsel for the General Counsel's motion should be denied, the Company's cross-motion should be granted, and the Complaint in this case should be dismissed with prejudice.

Respectfully submitted this 20th day of November, 2017.

UPS GROUND FREIGHT, INC.

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CERTIFICATE OF SERVICE

I certify that on this 20th day of November, 2017, I caused the foregoing to be electronically filed with the National Labor Relations Board at http://nlrb.gov and a copy of same to be served by electronic mail on the following parties of record:

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UPS Ground Freight, Inc. *and* International Brotherhood of Teamsters Local 773. Case 04–CA–205359

June 1, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS PEARCE AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on August 30, 2017, by International Brotherhood of Teamsters Local 773 (the Union), the General Counsel issued the complaint on September 13, 2017, alleging that UPS Ground Freight, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 04–RC–165805. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On October 12, 2017, the General Counsel filed a Motion for Summary Judgment. On October 17, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On November 20, 2017, the Respondent filed a Corrected Opposition to the Motion for Summary Judgment, Response to the Notice to Show Cause, and Cross-Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain,[1] but contests the validity of the Union's certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the unit is not appropriate under the Act because it should have included employees at additional locations and it should have excluded certain other employees, that the Board's Final Rule regarding the Board's election processes is unlawful, and that the Region's application of the Board's Final Rule was unconstitutional, unlawful, and arbitrary.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding.[2] The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor has it shown any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.

In its answer to the complaint and in its opposition to the Motion for Summary Judgment, the Respondent raises a number of additional arguments in support of its contention that the complaint should be dismissed. For the following reasons, we find that these arguments do not raise any material issues warranting the reexamination of the representation case or the denial of summary judgment.

First, we find no merit to the Respondent's argument that the complaint is barred by Section 10(b) of the Act because the August 30, 2017 charge was filed more than 6 months after the Respondent's February 23, 2017 refusal to bargain with the Union. The Board has held that even where there was an initial request and refusal to bargain outside of the 10(b) period, a respondent's later refusal to bargain after a subsequent bargaining request made during the certification year constitutes an independent unfair labor practice for 10(b) purposes. Thus, in *Bentson Contracting Co*., 298 NLRB 199 (1990), enf. denied on other grounds, but affd. in pert. part 941 F.2d 1262, 1264–1265 fn. 2 (D.C. Cir. 1991), the Board held that, as a matter of law, successive refusals to bargain during the certification year are separate unfair labor practices based on the obligation to bargain that was established, both factually and legally, by the Board's certification, and cannot be deemed "merely reiterations of an initial refusal to bargain." 298 NLRB at 200. In *Bentson*, the Board held that the fact that there may have been a separate earlier refusal to bargain "is simply irrel-

[1] Although the Respondent denied the allegations in par. 4 of the complaint regarding the Sec. 2(13) agency status of its legal counsel, based on its assertion that the phrase "at all material times" is vague, the Respondent admitted the allegations in par. 7 of the complaint that about August 24, 2017, by letter from its legal counsel, the Respondent stated that it would not recognize or bargain with the Union. Accordingly, we find that the Respondent's denial of par. 4 does not raise any issue warranting a hearing.

[2] One of the arguments reiterated by the Respondent in its Opposition to the Motion for Summary Judgment is that *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Center East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), was wrongly decided and should be overruled. However, in its July 27, 2017 Decision on Review and Order, the Board did not rely on *Specialty Healthcare* in denying review of the Acting Regional Director's finding that the petitioned-for unit was appropriate. *UPS Ground Freight, Inc.*, 365 NLRB No. 113, slip op. at 1 fn. 1 (2017). Accordingly, *Specialty Healthcare* is not applicable in this case.

evant for the purpose of the 10(b) limitation." Id. See also *St. Francis Healthcare Centre*, 325 NLRB 905, 905 fn. 2 (1998), enf. denied on other grounds 212 F.3d 945 (6th Cir. 2000). Here, there is no dispute that the charge in this case was filed and served on the Respondent on August 30, 2017, less than 6 months after the Respondent's August 24, 2017 clear refusal to bargain following the issuance of the Board's July 27, 2017 Decision on Review and Order (365 NLRB No. 113), in which it ruled on the Respondent's request for review of the Acting Regional Director's Decision and Direction of Election and Supplemental Decision on Objections to Election and Certification of Representative. Because the August 24, 2017 refusal to bargain occurred during the certification year, we find no merit to the Respondent's argument that the complaint is time-barred because the charge was filed more than 6 months after the Respondent's earlier February 23, 2017 refusal to bargain.

Moreover, even assuming arguendo that the February 23, 2017 refusal to bargain was relevant to the 10(b) analysis, the Board has held that the 10(b) period does not begin to run until the charging party receives "clear and unequivocal notice," either actual or constructive, that an unfair labor practice has occurred. *Leach Corp*., 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995); *Christopher Street Owners Corp*., 286 NLRB 253 (1987) (10(b) period does not begin to run until it becomes clear that the employer is refusing to recognize and bargain with the union), enfd. 847 F.2d 835 (2d Cir. 1988). Here, until the Board issued its July 27, 2017 Decision on Review and Order, it was not certain that the Respondent's refusal to bargain constituted an unfair labor practice. See, e.g., *Land-O-Sun Dairies, LLC*, 357 NLRB 755, 756 (2011) (finding, in a unit clarification context, that the earliest date on which the union could have had clear and unequivocal notice of the unlawful conduct was the date the Board denied the respondent's request for review). Thus, any prior refusal to bargain did not constitute clear and unequivocal notice that an unfair labor practice had occurred. Accordingly, we find that the August 30, 2017 charge was timely filed and not barred by Section 10(b) of the Act.

Second, we find the Respondent's argument that the complaint is barred by the doctrine of laches to be similarly meritless. The Board and the courts have long held that the defense of laches does not lie against the Board as an agency of the United States Government. *Garda CL Atlantic, Inc.*, 365 NLRB No. 108, slip op. at 1, fn. 1 (2017); *Entergy Mississippi, Inc*., 361 NLRB 892, 893 fn. 5 (2014) (citing *NLRB v. J. H. Rutter-Rex Mfg. Co*., 396 U.S. 258 (1969)), affd. in relevant part 810 F.3d 287, 298–299 (5th Cir. 2015).

Third, we reject the Respondent's assertion that this case should be dismissed or transferred to a different Region because of an appearance of partiality and a conflict of interest in Region 4 resulting from misconduct by the Regional Director. The Respondent argues that the Region's partiality is evident because "every single substantive ruling by the Region" in the representation case resulted in "detriment" to the Respondent. We find no merit in these contentions. The Board has held that the resolution of all issues in favor of one party is insufficient to support a finding of bias or prejudice. *Teamsters Local 722 (Kasper Trucking)*, 314 NLRB 1016, 1030 (1994), enfd. 57 F.3d 1073 (7th Cir. 1995); *Penn Color, Inc.*, 261 NLRB 395, 395 fn. 1 (1982), enfd. 716 F.2d 891 (3d Cir. 1983); *Dimensions in Metal, Inc.*, 258 NLRB 563, 563 fn. 1 (1981). Further, the Respondent has not shown that the Regional Director's misconduct had any impact on the Region's rulings in this case. The Regional Director was recused from acting in this matter and there is no indication that he had any involvement in the processing of this case. The Respondent's unsubstantiated claim that the Regional Director's misconduct tainted the rulings made by the Region and called into question the entire election process is insufficient to raise a reasonable doubt as to the fairness and validity of the election. See, e.g., *Polymers, Inc.*, 174 NLRB 282, 282 (1969) ("The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election"). Accordingly, we find that the Respondent has failed to establish that the motion should be denied on this basis.

We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment and deny the Respondent's Cross-Motion for Summary Judgment.[3]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in

[3] Chairman Ring did not participate in the underlying representation proceeding. He agrees with his colleagues that the Respondent has not raised any litigable issue in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

Kutztown, Pennsylvania (the facility), and has been engaged in the nationwide distribution of freight.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its operations described above, purchased and received at the facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held by mail ballot from January 11 through January 29, 2016, the Union was certified on March 11, 2016,[4] as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> INCLUDED: All regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania.
>
> EXCLUDED: All other employees, guards, and supervisors as defined in the Act.[5]

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About August 22, 2017, the Union, by email to the Respondent's legal counsel, requested that the Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the unit. About August 24, 2017, the Respondent's legal counsel, by letter, stated that the Respondent would not recognize or bargain with the Union. Since about August 24, 2017, the Respondent has failed and refused to recognize or bargain with the Union.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since August 24, 2017, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); accord *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, UPS Ground Freight, Inc., Kutztown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Teamsters Local 773 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

---

[4] On July 27, 2017, the Board granted the Respondent's request for review with respect to the supervisory status of dispatcher Frank Cappetta, but denied the request for review in all other respects. On review, the Board found that Cappetta was not a statutory supervisor. 365 NLRB No. 113 (2017).

[5] In the certification, the Regional Director stated that "dispatchers and certified safety inspectors are neither included in nor excluded from the bargaining unit." We reject the Respondent's argument that it could not have violated the Act because it is not clear whether dispatchers and certified safety inspectors are part of the unit description. Any doubts as to the unit description could have been resolved through discussions with the Union, and, that failing, through a unit clarification petition. See, e.g. *New York Law Publishing* Co., 336 NLRB No. 93, slip op. at 2 (2001) (not reported in Board volume).

INCLUDED: All regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania.

EXCLUDED: All other employees, guards, and supervisors as defined in the Act.[6]

(b) Within 14 days after service by the Region, post at its facility in Kutztown, Pennsylvania, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Acting Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 24, 2017.

(c) Within 21 days after service by the Region, file with the Acting Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 1, 2018

John F. Ring, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

[6] Dispatchers and certified safety instructors are neither included in nor excluded from the bargaining unit.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Teamsters Local 773 (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

INCLUDED: All regular full-time and part-time road drivers employed by us at our facility located at 9755 Commerce Circle, Kutztown, Pennsylvania.

EXCLUDED: All other employees, guards, and supervisors as defined in the Act.*

* Dispatchers and certified safety instructors are neither included in nor excluded from the bargaining unit.

UPS GROUND FREIGHT, INC.

The Board's decision can be found at www.nlrb.gov/case/04-CA-205359 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UPS GROUND FREIGHT, INC.	)	
	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1161, 18-1182
	)	
	)	
v.	)	Board Case No.
	)	04-CA-205359
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

AMENDED CERTIFIED LIST OF THE
NATIONAL LABOR RELATIONS BOARD

Pursuant to authority delegated in Section 102.115 of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. § 102.115, I certify that the list set forth in the attached Index, consisting of three volumes, fully describes all documents, transcripts of testimony, exhibits, and other material constituting the record before the Board in UPS Ground Freight, Inc., Case No. 04-CA-205359, which took official notice of the record in Case No. 04-RC-165805.

Farah Z. Qureshi

Farah Z. Qureshi
Associate Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-1949

August 14, 2018

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[1] Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 23, 24, 25 were detached from the motion for summary judgment and placed in chronological order in the volume of pleadings.

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v.	)	Board Case No.
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NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2018, I filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for District of Columbia Circuit by using CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 14th day of August 2018

CERTIFICATE OF SERVICE

I, Kurt G. Larkin, counsel for Petitioner/Cross-Respondent and a member of the Bar of this Court, certify that on January 23, 2019, I caused a copy of the foregoing Joint Appendix to be filed with the Clerk through the Court's electronic filing system which will send notification of such filing to counsel below. I further certify that in accordance with Local Rules 30(a) and 32(d)(3) and (4), I will file within two (2) business days seven (7) paper copies with the Clerk and one (1) paper copy on counsel below.

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