



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**

Appellate and Supreme Court Litigation Branch  
Washington, D.C. 20570

March 15, 2019

**VIA CM/ECF**

Mark J. Langer  
Clerk of Court, U.S. Court of Appeals  
for the District of Columbia Circuit  
333 Constitution Ave., N.W.  
Washington, D.C. 20001

Re: *UPS Ground Freight, Inc. v. NLRB*,  
Nos. 18-1161 & 18-1182  
Oral argument scheduled Mar. 21, 2019

Dear Mr. Langer:

The National Labor Relations Board (“the Board”) submits the following response to the March 6 letter filed by UPS Ground Freight, Inc. (“the Company”) pursuant to Fed. R. App. P. 28(j). The Company claims as supplemental authority a brief filed by the Solicitor General in a pending Supreme Court case—Brief for the Respondent, *Kisor v. Wilkie*, No. 18-15 (U.S. Feb. 25, 2019)—urging the Supreme Court to clarify and narrow existing precedent regarding the deference owed to agencies’ interpretations of their own regulations. *See Auer v. Robbins*, 519 U.S. 452 (1997).

As explained in the Board’s brief (p. 43), the issues raised in the Company’s letter are inapposite. First, there is no material dispute over an interpretation of the Board’s regulations and thus the question of *Auer* deference is not presented—both parties agree that the relevant regulatory provisions grant regional directors discretion to make certain rulings, and the issue before the Court is whether the Regional Director abused his discretion. Second, the Board’s regional directors exercise delegated authority from the Board in deciding representation questions. Congress specifically amended the statute in order to afford regional directors the ability to decide representation questions subject to only discretionary Board review and the same standards of judicial review. *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 138-43 & n.12 (1971); *see* 29 U.S.C. § 153(b). Third, in partially denying review in this case, the Board itself considered the Regional

Director’s rulings and expressly found that they were “well within [his] discretion.” (JA.1025 n.1.)

In any event, a brief in a pending case urging a change to the law is not a proper authority and does not bind the Board or this Court. Moreover, the Solicitor General’s brief takes no position on the Board’s regional directors. Indeed, in suggesting otherwise, the Company’s letter misleadingly truncates the quoted sentence from the Solicitor General’s brief, which contrasts “low-level employees” with, “for example, the presidentially appointed officers who lead the agency *or their delegates.*” Brief for the Respondent at 34, *Kisor v. Wilkie*, No. 18-15 (U.S. Feb. 25, 2019) (emphasis added).

Very truly yours,

s/David Habenstreit  
David Habenstreit  
Assistant General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570

cc: all counsel (via CM/ECF)

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

UPS GROUND FREIGHT, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Nos. 18-1161 &
	)	18-1182
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 773	)	Board No. 04-CA-205359
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 417 words of proportionally spaced, 14-point type, and that the word processing system used was Microsoft Word 2016.

Dated at Washington, D.C.  
this 15th day of March, 2019

/s/David Habenstreit  
David Habenstreit  
Assistant General Counsel  
National Labor Relations Board  
1015 Half Street, S.E.  
Washington, D.C. 20570

**UNITED STATES COURT OF APPEALS  
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	)	18-1182
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	)	
and	)	
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 773	)	Board No. 04-CA-205359
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on March 15, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

/s/David Habenstreit  
David Habenstreit  
Assistant General Counsel  
National Labor Relations Board  
1015 Half Street, S.E.  
Washington, D.C. 20570

Dated at Washington, D.C.  
this 15th day of March, 2019