

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

INGREDION, INC., d/b/a)	
PENFORD PRODUCTS CO.)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 18-1155 & 18-1244
)	
NATIONAL LABOR RELATIONS BOARD)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
LOCAL 100G, BAKERY, CONFECTIONERY,)	
TOBACCO WORKERS & GRAIN MILLERS)	
INTERNATIONAL UNION, AFL-CIO, CLC)	
Intervenor)	

**OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD TO
INGREDION’S MOTION TO CORRECT THE RECORD**

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board (“the Board”), by its Assistant General Counsel, hereby opposes the motion of Ingredion, Inc., d/b/a Penford Products Co. (“Ingredion”) to correct the record. In support of its opposition, the Board shows as follows:

1. On August 29, 2018, the Board filed with the Court the certified list of documents constituting the administrative record in the underlying agency proceeding. The certified list includes Ingredion’s exceptions to the administrative law judge’s decision. It does not include Ingredion’s separate brief in support of

exceptions, because that document is not part of the administrative record as defined by the Board's Rules and Regulations.

2. Ingedion filed its page proof opening brief with the Court on November 26, 2018, the Board filed its page proof answering brief on February 11, 2019, and Ingedion filed its page proof reply brief on March 12, 2019.

3. On March 15, 2019, counsel for Ingedion sent counsel for the Board a draft of the deferred appendix, which included Ingedion's brief in support of exceptions. In response, counsel for the Board explained that the brief in support of exceptions is not part of the administrative record. Counsel for the Board noted that the Board would not oppose Ingedion moving to lodge that document with the Court, or including it in the deferred appendix as long as it was designated as outside the administrative record.

4. Ingedion insisted that the Board move to amend the certified list to add the brief in support of exceptions, and subsequently filed the present motion.

ARGUMENT

Pursuant to Section 102.46(a)(1)(i)(D) of the Board's Rules and Regulations, a party excepting to an administrative law judge's decision may file either exceptions and a separate brief in support, or a combined document setting forth its exceptions and its supporting arguments. 29 C.F.R. § 102.46(a)(1)(i)(D). Parties are required to identify all issues that they want the Board to consider when

reviewing the administrative law judge’s decision in the *exceptions* document, and a separate brief in support of exceptions “must contain only matter that is included within the scope of the exceptions.” 29 C.F.R. § 102.46(a)(2). If a party files exceptions and a separate brief in support, as Ingredion did here, the separate brief is not part of the administrative record. Section 102.45(b) of the Board’s Rules and Regulations defines the contents of the administrative record in unfair-labor-practice proceedings and specifies that:

The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge’s decision and exceptions, and any cross-exceptions or *answering* briefs as provided in § 102.46, constitutes the record in the case.

29 C.F.R. § 102.45(b) (emphasis added); *cf.* 29 C.F.R. § 102.68 (defining broader record in context of representation proceedings); 29 C.F.R. § 102.69(d) (same). As courts have long recognized, separate briefs in support of a party’s exceptions are not part of the administrative record and, consequently, not part of the record on review. *E.g., A.H. Belo Corp. (WFAA-TV) v. NLRB*, 411 F.2d 959, 967 (5th Cir. 1969) (noting that supporting briefs are “not made part of the record on appeal”).

Contrary to Ingredion (Motion ¶¶ 19-21), Federal Rule of Appellate Procedure 16(a) merely confirms that the record on review is the same as the record “before the agency,” and that there is “no distinction between the record

compiled in the agency proceeding and the record on review.” Fed. R. App. P. 16(a); *id.* (notes of advisory committee); *e.g.*, *NLRB v. Fred Meyer Stores, Inc.*, 466 F. App’x 560, 562 (9th Cir. 2012). As explained above, the brief in support of exceptions is not part of the administrative record before the Board.

In the present case, Ingredion opted to file an exceptions document and a separate brief in support of exceptions. The Board’s Deputy Executive Secretary granted Ingredion’s motion to file an oversized supporting brief not to exceed 75 pages.¹ Along with that oversized supporting brief, Ingredion filed a 257-page exceptions document, enumerating 1,254 exceptions to the administrative law judge’s decision. Ingredion has not included its actual exceptions in the deferred appendix and has not cited them in its briefing to the Court. Any issue not identified in Ingredion’s lengthy exceptions document was never properly raised before the Board. *See* 29 C.F.R. § 102.46(a)(2); *A.H. Belo*, 411 F.2d at 967.

However, in light of the fact that Ingredion has nonetheless cited a portion of its brief in support of exceptions in its reply brief to the Court, the Board does not object to Ingredion lodging that document with the Court. *E.g.*, Order Lodging Document, *Teachers Coll., Columbia Univ. v. NLRB*, Nos. 17-1151 & 17-1184

¹ The Board’s Rules and Regulations normally limit a party’s brief in support of exceptions, or its combined exceptions and supporting arguments, to 50 pages. 29 C.F.R. §§ 102.46(a)(1)(i)(D), 102.46(h).

(D.C. Cir. Mar. 8, 2018), ECF No. 1721190 [Attachment A]. The Board objects to Ingridion designating the document as part of the administrative record.

WHEREFORE, the Board requests that the Court reject Ingridion's motion to correct the record.

Respectfully submitted,

s/ David Habenstreit
David Habenstreit
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National Labor Relations Board
1015 Half Street S.E.
Washington D.C. 20570
(202) 273-2960

Dated at Washington, D.C.
this 22nd day of March, 2019

Attachment A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1151

September Term, 2017

NLRB-02-CA-164870

Filed On: March 8, 2018

Teachers College, Columbia University,

Petitioner

v.

National Labor Relations Board,

Respondent

Local 2110, Technical, Office and
Professional Union, United Auto Workers
AFL-CIO,

Intervenor

Consolidated with 17-1184

BEFORE: Garland, Chief Judge; Edwards and Silberman, Senior Circuit
Judges

ORDER

Upon consideration of petitioner's motion to amend the record with additional document and lodge same with the court, the opposition to petitioner's motion to amend the certified list, and the reply, it is

ORDERED that the motion be granted to the extent that the Teachers College, Columbia University's Brief in support of exceptions to the decision of the Administrative Law Judge be lodged with the court.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

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Petitioner/Cross-Respondent)	Nos. 18-1155, 18-1244
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v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case Nos.
Respondent/Cross-Petitioner)	18-CA-160654
)	18-CA-170682
and)	
)	
LOCAL 100G, BAKERY, CONFECTIONERY,)	
TOBACCO WORKERS & GRAIN MILLERS)	
INTERNATIONAL UNION, AFL-CIO, CLC)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its opposition contains 860 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2016.

s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-2960

Dated at Washington, D.C.
this 22nd day of March, 2019

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LOCAL 100G, BAKERY, CONFECTIONERY,)	
TOBACCO WORKERS & GRAIN MILLERS)	
INTERNATIONAL UNION, AFL-CIO, CLC)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 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 by using the appellate CM/ECF system. I further certify that the foregoing document was served on all 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
(202) 273-2960

Dated at Washington, D.C.
this 22nd day of March, 2019