Nos. 19-1105, 19-1126

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FP HOLDINGS, L.P., D/B/A PALMS CASINO RESORT
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Applicant

and

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, AFFILIATED WITH UNITE HERE INTERNATIONAL UNION, AFL-CIO
Intervenor

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FP HOLDINGS, L.P., D/B/A PALMS CASINO RESORT	)	
Petitioner/Cross-Respondent	)	Nos. 19-1105, 19-1126
v.	)	Board Case No. 28-CA 224729
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Applicant	)	
and	)	
LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, AFFILIATED WITH UNITE HERE INTERNATIONAL UNION, AFL-CIO	)	
Intervenor	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

FP Holdings, L.P., d/b/a Palms Casino Resort ("the Company") was the respondent before the Board in the underlying proceeding (Board Case No. 28-CA-224729). The Company is the Petitioner/Cross-Respondent in Case Nos. 19-1105, and 19-1126. Local Joint Executive Board of Las Vegas, affiliated with UNITE HERE International Union ("the Union"), was the charging party before the Board in the underlying proceeding, and has intervened on the side

of the Board in Case No. 19- 1126.

The Board's General Counsel was a party before the Board in the underlying proceeding. The Board is the Respondent/Cross-Petitioner in Case Nos. Nos. 19-1105, and 19-1126. There are no *amici curiae*.

B. Rulings Under Review

The matter under review is a Decision and Order of the Board, issued against the Company on May 13, 2019, and reported at 367 NLRB No. 127.

C. Related Cases

There are no related cases.

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

Dated at Washington, D.C.
this 1st day of October 2019

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GLOSSARY

"the Act"	The National Labor Relations Act
"Board"	The National Labor Relations Board
"Br."	The Company's Opening Brief
"Company"	FP Holdings, L.P., d/b/a Palms Casino Resort
"JA"	Joint Appendix
"Union"	Local Joint Executive Board of Las Vegas, affiliated with UNITE HERE International Union

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Intervenor

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition for review filed by FP Holdings, L.P., d/b/a Palms Casino Resort ("the Company"), and on the cross-application for

enforcement filed by the National Labor Relations Board ("the Board"), of a Decision and Order issued by the Board against the Company. Local Joint Executive Board of Las Vegas, affiliated with UNITE HERE International Union ("the Union"), has intervened in support of the Board. The Board's Decision and Order issued on May 13, 2019 and is reported at 367 NLRB No. 127. (JA 228-31.)[1]

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended ("the Act"), 29 U.S.C. §§151, 160(a). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. §160(e) and (f), which provides that review of Board orders may be sought in this Court and, in that circumstance, for the Board to cross-apply for enforcement. The Company filed its petition for review on May 15, 2019. The Board filed its cross-application for enforcement on June 11, 2019. Both were timely; the Act places no time limit on the institution of proceedings to review or enforce Board orders. The Board's order is final under Section 10(e) and (f) of the Act, 29 U.S.C. §160(e) and (f).

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

The record in the underlying representation (election) proceeding before the Board (Board Case No. 28-RC-217964) also is before the Court pursuant to Section 9(d) of the Act, 29 U.S.C. §159(d), because the Board's order is based, in part, on findings made in that proceeding. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964); *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996). Section 9(d) does not give the Court general authority over the representation proceeding; rather, it authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to enforce, modify, or set aside, in whole or in part, the Board's unfair labor practice order. *See* 29 U.S.C. § 159(d); *see also Boire*, 376 U.S. at 476-80. The Board retains authority under Section 9(c) of the Act, 29 U.S.C. §159(c), to resume processing the representation case in a manner consistent with the ruling of this Court. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUE

The ultimate issue in this case is whether substantial evidence supported the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. §158(a)(5) and (1), by refusing to bargain with the Union after the Board certified the Union to represent certain of the Company's employees following a Board-supervised election. The Company admits that it has refused to bargain with the Union, but challenges the validity of the Union's certification.

Accordingly, the issue before the Court is whether the Board abused its discretion in finding it appropriate to direct an election when the Company employed a substantial and representative complement of its reasonably foreseeable future workforce in the petitioned-for unit.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF THE CASE

The Board found that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. §158(a)(5) and (1), by refusing to bargain with the Union as the certified collective-bargaining representative of an appropriate unit of the Company's employees. The Company admits that it refused to bargain. In its defense, the Company contends that the Union was improperly certified because the Board erred by directing an election won by the Union. The factual background and procedural history of the case before the Board are set forth below.

I. THE BOARD'S FINDINGS OF FACT

A. The Representation/Election Proceeding

1. The Company's Expansion and Staffing Plans

The Company operates the Palms Casino Resort in Las Vegas, Nevada, providing food, lodging, entertainment, and gaming. (JA 229; 130-31.) Since

approximately October 2016, the Company has been undergoing upgrades and renovations that it expected to continue through the third quarter of 2019. (JA 163; 106-09.) Specifically, the Company projected that by the end of 2019, it would open new restaurants, a bar, a spa and salon; add suites and guestrooms; expand its casino and its catering space; and renovate its team member dining room. (JA 164; 106-08.)

As of the hearing in this case, there were approximately 831 employees in the petitioned-for unit. (JA 165; 94-96, 130-61.)[2] By the end of the third quarter of 2019, the Company anticipated having hired approximately 273 new employees occupying positions that would be included in the petitioned-for unit. (JA 163; 46, 69-70, 109-19.) Broken down by quarter, the Company's plan was to hire approximately: 100 new employees during the second quarter of 2018, 33 during the third quarter, 29 during the fourth quarter, 86 during the first quarter of 2019, and 25 during the third quarter of 2019. (JA 163-64; 109.)[3]

[2] The 831 figure excludes 14 employees who were claimed to be temporary or supervisory. They were permitted to vote subject to challenge in the election and are not at issue before the Court. (JA 162; 128.)

[3] There is no evidence in the record reflecting the number of new employees the Company expected to hire during the second quarter of 2019. (JA 164 n.4; JA 109.)

The 831 employees occupied approximately 31 job classifications included in the petitioned-for unit. (JA 164; 92-95, 137-61.) By the end of third quarter of 2019, the Company planned to add 5 new job classifications to the bargaining unit. (JA 164; 29-32, 70.)[4] The employees who would occupy those new job classifications are subject to the same and/or similar terms and conditions of employment and working conditions as the employees in the petitioned-for unit. (JA 164; 71-74.)

[4] Those classifications included: Steakhouse Captains, VIP Beverage Attendants, Bakers 1, Bakers 2, and Bakers 3.

2. Procedural History

On April 6, 2018, the Union filed an election petition seeking to represent a unit of full-time and regular part-time employees employed by the Company. (JA 120.)[5] The Company asserted that the petition should be dismissed as premature because the Company had not yet hired a substantial and representative complement of employees in the petitioned-for unit. (JA 228; JA 130-35.) A hearing officer of the Board's Regional Office held a hearing on April 16, 2018, and the parties orally argued their respective positions. (JA 229; 6-105.) Based on

[5] The bargaining unit involved was (as amended):

> **Included:** All full-time and regular part-time Banquet Servers, Bakers, Bar/Beverage Porters, Bartenders, Banquet Bartenders, Banquet Porters, Beverage Servers, Bus Persons, Cooks, Cooks Helpers, Food Servers, Assistant Food Servers, Guest Room Attendants, Host/Cashiers, House Persons, Kitchen Workers, Lead Porters, Lead Banquet Porters, Mini Bar Attendants, Porters, Room Runners, Service Bartenders, Sprinters, Status Board, Specialty Cooks, Stove Persons, Team Member Dining Room Attendants, Uniform Room Attendants, Utility Porters, VIP Bartenders, and VIP Bar Hosts employed by the Employer at its facility in Las Vegas, Nevada.
>
> **Excluded:** All other employees employed by the Employer, including Banquet Captains, Bell Persons, Butlers, Valet Parkers, Housekeeping Supervisors, Gaming Employees (including, but not limited to Dealers, Slot Attendants, Cage, and Cashiers), Drivers, Front Desk Employees, Engineering and Maintenance Employees, Lifeguards, Spa & Salon workers, Temporary Pool Food & Beverage workers, Office Clerical Employees, Confidential Employees and all Guards, Managers and Supervisors as defined by the Act.

that record, on April 23, the Regional Director issued a decision finding that the Company had a substantial and representative complement of employees and directing an election. (JA 168.) At the representation election held on April 27 and 28, the Union won by a tally of 511-98. The Union was certified on May 9 as the exclusive collective-bargaining representative of the bargaining unit. (JA 228-29; 173, 207.) On May 21, the Company filed a Request for Review of the Regional Director's decision, which the Board denied on August 16. (JA 183.) The Union continues to be the exclusive collective-bargaining representative of the unit employees. (JA 229; 173.)

B. The Unfair Labor Practice Case

On May 16, 2018, the Union requested that the Company recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit. (JA 229; 188, 203.) Since May 17, the Company has failed and refused to do so. (JA 229; 188, 203.) On August 1, the Union filed the underlying unfair labor practice charge alleging that the Company failed to recognize the Union and bargain.[6] (JA 228; 184-85.) Pursuant to that charge, the

[6] The charge and complaint also alleged a refusal to provide information. However, on January 29, 2019, the Board granted the General Counsel's unopposed Motion to Sever and Remand Refusal to Provide Information Allegations. (JA 228 n.2.) Accordingly, the information allegations are not before the Court.

Board's General Counsel issued a complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. §158(a)(5) and (1). (JA 228; 186-90.) The General Counsel then moved for summary judgment. (JA 228; 206-18.) The Board issued a notice to show cause why summary judgment should not be granted. (JA 228; 219.) The Company opposed summary judgment based on the arguments it asserted in the representation case. (JA 228; 220-27.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On May 13, 2019, the Board (Members McFerran, Kaplan, and Emanuel) issued its Decision and Order granting summary judgment and finding that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. §158(a)(5) and (1). (JA 228-30.) In so doing, the Board concluded that all issues raised by the Company in the unfair labor practice proceeding were, or could have been, litigated in the underlying representation proceeding and that the Company had neither offered to adduce any newly discovered evidence, nor shown any special circumstances that would require the Board to reexamine its decision to certify the Union. (JA 228.)

The Board's Order requires the Company to cease and desist from refusing to recognize and bargain with the Union and from, in any like or related manner, interfering with its employees' exercise of their rights under Section 7 of the Act, 29 U.S.C. §157. (JA 229.) Affirmatively, the Board's Order directs the Company

to bargain with the Union upon request, to embody any understanding reached in a signed agreement, and to post and electronically distribute copies of a remedial notice. (JA 228-30.)

SUMMARY OF ARGUMENT

Per its long-standing precedent regarding expanding bargaining units, the Board generally considers that if at least 30 percent of its future employee complement is employed in at least 50 percent of eventual job classifications, then it is appropriate to direct an election. Here, the complement of employees at the time of the hearing was overwhelmingly substantial and representative with 75 percent of the eventual workforce employed in 86 percent of eventual job classifications. Thus, the Board properly held an election in April 2018 rather than waiting well over a year until the Company's renovations were finished.

The Company has not met its burden of demonstrating that the Board abused its wide discretion in directing the election when it did. Legally, the Company cannot show that the Board abused its discretion by not addressing each of the nine factors compiled from past substantial-and-representative-complement cases in *Toto Industries (Atlanta),* 323 NLRB 645, 645 (1997). An examination of such cases shows that the Board does not address every factor in each case. Instead, factors relevant to the case are addressed and the Board consistently hews to the its guideline of requiring at least 30 percent of its future employee complement in at

least 50 percent of eventual job classifications be present to hold an election. Thus, the Board did not depart from its precedent in this case. Factually, the Company fails to show how, even if all the factors were applied, the outcome here would change as to the finding of a substantial and representative complement. Because the election and Union's certification were valid, the Company's refusal to bargain with the Union was unlawful.

STANDARD OF REVIEW

This Court's "review of the Board's factual conclusions is 'highly deferential.'" *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) (citation omitted). Those findings of fact are "conclusive" if supported by substantial evidence considered on the record as a whole. 29 U.S.C. §160(e). Thus, "[i]f there is substantial evidence to support the Board's conclusions, [the Court] will uphold the Board's decision even if [the Court] would have reached a different result had [it] considered the question *de novo*." *Perdue Farms*, 144 F.3d at 834-35 (citation and quotation marks omitted).

More specifically, the Board has "broad discretion in its administration of representation elections, and the party challenging the Board-certified results of an election carries a heavy burden." *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996). The Board exercises a similarly "wide degree of discretion in establishing the procedures and safeguards necessary to insure the fair and free

choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). Generally, courts recognize and defer to the Board's expertise in conducting elections. *See e.g., C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 885 (D.C. Cir. 1988) (regarding objections to conduct of election, "Congress has charged the Board, a special and expert body, with the duty of judging the tendency of electoral flaws to distort the employees' ability to make a free choice"); *NLRB v. Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (2d Cir. 1970) (regarding lack of absentee or at-home voting for ill employees, "the conduct of representation elections is the very archetype of a purely administrative function, with no quasi about it, concerning which courts should not interfere save for the most glaring discrimination or abuse").

Finally, courts review the Board's "substantial and representative" methodology for abuse of discretion. *NLRB v. AAA Alternator Rebuilders, Inc.*, 980 F.2d 1395, 1397–400 (11th Cir. 1993) ("we hold that the Board did not abuse its discretion in the methodology it followed to address the 'substantial and representative' issue"); s*ee also Bituma Corp. v. NLRB*, 23 F.3d 1432, 1435 (8th Cir. 1994) (concluding that the Board did not abuse its discretion in directing an immediate election when employee complement was substantial and representative).

ARGUMENT

THE COMPANY HAS NOT SHOWN THAT THE BOARD ABUSED ITS DISCRETION BY DIRECTING AN ELECTION AND, THEREAFTER, CERTIFYING THE UNION; IT THEREFORE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

An employer violates Section 8(a)(5) and (1) of the Act, 29 U.S.C. §158(a)(5) and (1), by refusing to recognize and bargain with the duly certified collective-bargaining representative of the employees in an appropriate bargaining unit.[7] *AOTOP, LLC v. NLRB*, 331 F.3d 100, 102-03 (D.C. Cir. 2003). It is undisputed that the Company refused to bargain with the Union. In its defense, the Company contends that the Board erred by directing an election won by the Union.

An employer cannot obtain direct judicial review of the Board's decisions in representation (election) cases. The employer must refuse to bargain with the union to bring the validity of the union's certification before the Court. *AOTOP*, 331 F.3d at 103. Accordingly, if, as we show, the Board acted within its broad discretion in directing an election and certifying the Union as the employees' collective-bargaining representative, the Company's refusal to bargain with the Union was unlawful.

[7] A violation of Section 8(a)(5) constitutes a "derivative" violation of Section 8(a)(1). *See e.g. Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 250 (D.C. Cir. 1991).

A. The Board Did Not Abuse Its Discretion in Directing an Election Because at the Time of the Hearing the Company Employed a Substantial and Representative Complement of Its Reasonably Foreseeable Future Workforce

As discussed above, the Board enjoys broad discretion in its administration of representation elections, and the party challenging the Board-certified results of an election carries a heavy burden. *Kwik Care*, 82 F.3d at 1126. In determining whether to direct an election where an employer plans to expand its operations and workforce, the Board applies its well-established and judicially approved principle that an immediate election is appropriate when the present workforce constitutes a "substantial and representative" complement of the employer's "reasonably foreseeable future workforce." *NLRB v. Deutsche Post Global Mail, Ltd.*, 315 F.3d 813, 815 (7th Cir. 2003). *See also Bituma*, 23 F.3d at 1435-36; *AAA Alternator Rebuilders*, 980 F.2d at 1397-98. That principle has two objectives, as explained by the Board in *Toto*, both premised on employees' rights to select a bargaining representative, if they so desire, and to ensure employee participation therein. Those two objectives are:

> current employees should not be deprived of the right to select or reject a bargaining representative simply because the Employer plans an expansion in the near future. The Board, however, does not desire to impose a bargaining representative on a number of employees hired in the immediate future, based upon the vote of a few currently employed individuals.

Toto, 323 NLRB at 645.

The substantial and representative complement standard ensures the proper balance between the objective of ensuring maximum employee participation in selecting a bargaining agent against the goal of permitting employees to be represented as quickly as possible. *Id.* In striking that balance, the Board, with court approval, generally finds that if approximately 30 percent of the eventual employee complement is employed, and 50 percent of the eventual job classifications is filled, then the employee complement is substantial and representative, and an election is appropriate. *See e.g.*, *Deutsche Post*, 315 F.3d at 816 (recognizing Board's "general trend that election is appropriate if current employees are 30 percent of the projected workforce and 50 percent of the eventual job classifications are filled"); *NLRB v. Asbury Graphite Mills, Inc.*, 832 F.2d 40, 43 (3d Cir. 1987) (affirming Board order for an immediate election where vote included 13 of a projected 30 to 40 employees).

The Board has also discussed other factors as relevant in some past cases to assess the employee complement. *Toto*, 323 NLRB at 645 ("a case-by-case approach is utilized, analyzing the relevant factors of each case"). In *Toto*, the Board compiled various factors that it had considered in past cases when determining whether a complement was substantial and representative. *Id.* (citing cases). Overall, however, during the last seven decades, the Board has generally relied on the percentages of employees and job classifications employed at the time

of a pre-election hearing when evaluating workforce complements. *See e.g. General Motors Corp.*, 82 NLRB 876, 877-78 (1949); *American Brass Co.*, 120 NLRB 1276, 1280-81 (1958); *General Cable Corp.*, 173 NLRB 251, 251-52 (1968); *Gerlach Meat Co.*, 192 NLRB 559, 559 (1971); *Witteman Steel Mills, Inc.*, 253 NLRB 320, 320-21 (1980); *Toto*, 323 NLRB at 645-46 (1997); *MJM Studios of New York, Inc.*, 336 NLRB 1255, 1256-57 (2001). On limited occasions, the Board has also discussed other factors such as the nature of the industry, when relevant. *See e.g. Clement-Blythe Co.*, 182 NLRB 502 (1970), *enforced*, 1971 WL 2966 (4th Cir. 1971) (according special consideration to construction industry and recognizing need to accommodate fluctuating nature and unpredictable duration of construction activities).

Here, the Board first laid out the facts including the history of the employer and its plans for expansion, and the number of employees and job classifications employed at the time of the hearing. (JA 163-66; 130-61.) The relevant facts are not in dispute and the Board took the Company's factual representations as true. (JA 166) ("Based on these estimates provided by the Employer…."). Then, the Board set forth the relevant legal authority including *Toto* and adhered to the overarching guideline in finding that the record showed that the Company employed "more than 30 percent of the eventual employee complement…in more than 50 percent of the anticipated job classifications." JA 166-67; 109-19, 130-61. Thus,

the Board found that the Company employed a substantial and representative complement. JA 167. The Company has not shown that, by adhering to its longstanding standard regarding substantial and representative complement, the Board abused its "broad discretion in its administration of representation elections." *Kwik Care*, 82 F.3d at 1126.

B. The Company's arguments lack merit

The Company cannot show, either legally or factually, that the Board abused its discretion in ordering the election. Initially, the Company misinterprets *Toto* regarding the Board's assessment of substantial and representative complement. Additionally, the Company does not explain how, even if all the considerations listed in *Toto* were addressed here, the substantial and representative complement finding would change on this record. As we show, the Company's arguments do not provide the Court with a basis to reverse the Board's substantial and representative complement findings.

First, the Company mischaracterizes how the Board assesses whether a substantial and representative complement of the future workforce exists. In *Toto*, the Board included a list of considerations that contributed to the Board's assessment of a substantial and representative complement in prior cases. *Toto*, 323 NLRB at 645 ("Factors used to determine whether the employee complement is sufficiently substantial and representative to order an immediate election in an

expanding unit include ….” (citing cases)). That list offers optional factors for the Board to consider based on certain past cases’ circumstances; it is not a multifactor test in the sense of requiring an analysis of each factor in every case. Rather, in each case, the Board may discuss some of the considerations, but not others, according to their relevance. As *Toto* stated, “a case-by-case approach is utilized, analyzing the *relevant* factors of each case.” 323 NLRB at 645 (emphasis added).

Even in *Toto*, the Board did not apply all of the factors in its own compiled list, only those that were relevant. Specifically, the Board concluded that the present complement then, about 50-60 percent of the prospective total complement, was substantial and representative—given that there would be no new classifications. *Id.* at 645-46 (not discussing certainty of expansion or nature of industry). The Company misinterprets *Toto* when it asserts that the Board must discuss all of the listed factors in every case. Indeed, the Company has not identified, and Board counsel have not found, any case in which the Board has applied all nine considerations listed in *Toto*.

Post-*Toto*, the Board has continued to apply selectively some, not all, of the nine considerations enumerated in *Toto*. For example, in *Yellowstone Int’l Mailing, Inc.*, three years after *Toto*, the Board reiterated that, in general, it finds an existing complement of employees to be substantial and representative when approximately 30 percent of the eventual employee complement is employed in 50

percent of the anticipated job classifications. 332 NLRB 386, 386 (2000). The Board did not apply, or even list, all nine considerations enumerated in *Toto* when it found that 38 percent of the ultimate projected workforce employed in 100 percent of the ultimate job classifications constituted a substantial and representative complement of proposed workforce. *Id*. at 387 (not discussing size of employee complement eligible to vote, rate of expansion, or nature of industry). The Seventh Circuit agreed with the Board that there was a substantial and representative complement making an election appropriate. *See Deutsche Post*, 315 F.3d at 814-17 (affirming *Yellowstone*, 332 NLRB 386 (2000)).

Even in the cases the Company cites, the Board emphasized numeric factors. For example, in *K-P Hydraulics Co.* (Br. 11-13), the Board dismissed the election petition where the work force constituted only 28 percent of the eventual employee complement employed in just 31 percent of the eventual job classifications. 219 NLRB 138, 138-39 (1975). In doing so, the only factors it addressed were the number of workers and classifications employed at the time of the hearing and the anticipated number of workers and classifications by the time full production was expected to be achieved. *Id*. (not applying the size of the employee complement who are eligible to vote, the certainty of the expansion, or the nature of the industry).

The Company also relies on *Some Industries, Inc.* (Br. 12), where the factors the Board addressed were the existing complement of workers and classifications at the time of the hearing and the anticipated complement in the near future. 204 NLRB 1142, 1143 (1973). There, the Board found that although the present complement was substantial in size, it was not representative because only 9 out of the future 19–24 (less than 50 percent) job classifications were employed. *Id*. (not applying certainty of expansion or nature of industry).[8]

In sum, the Company's claims are not consistent with how the Board has analyzed substantial and representative complement issues. Accepting the Company's view of overturning the election in this case, where 75 percent of the eventual workforce was employed in 86 percent of eventual job classifications, would contravene the well-established, judicially approved standard using the 30 percent/50 percent guideposts. *See Deutsche Post*, 315 F.3d at 816. The Company's capricious request that the Board march through every factor compiled

[8] Indeed, *Some Industries* based its conclusion on a numerical analysis, thus clashing with the Company's view (Br. 13) that the Board must discuss a prescribed list of factors. Other Board cases further undermine the Company's view as they similarly relied on a numerical analysis as here. *See Stouffer's Cincinnati Inn*, 225 NLRB 1196, 1201 n.1 (1976); *Frolic Footwear, Inc*., 180 NLRB 188, 189 (1969). *Cf. MJM Studios of New York, Inc*., 336 NLRB at 1256-57 (2001) (relying on *Yellowstone*, 332 NLRB 386 (2000), and applying same numerical analysis to contracting, not expanding, unit).

in *Toto* is just a distraction from the fact that this case easily meets the overall standard; thus, it does not warrant overturning the Board's decision.

Second, on the facts, the Company contends that the Board "failed to properly analyze the effect of the forecasted renovations on the composition of the petitioned-for unit" (Br. 13). In this regard, the Company asserts that the Board erred in analyzing whether the complement was substantial (thus causing future employees to be disenfranchised), and whether the expansion was immediate or remote. *Id*. Besides those bare assertions, the Company does not specify what evidence the Board allegedly ignored.

Third, with respect to the claimed disenfranchising effect of the Board's decision (Br. 9, 11, 13, 14), the Company essentially asks the Court to substitute the Company's judgment about employee rights for that of the Board. It, however, ignores that the long-standing overarching standard applied here reflects the Board's policy choice in striking the balance between ensuring maximum employee participation in a representation election and permitting employees to be represented as quickly as possible. *Toto,* 323 NLRB at 645. The Court accords deference to such a Board policy. *UFCW Local 150-A v. NLRB*, 880 F.2d 1422, 1429 (D.C. Cir. 1989) (Where the Board's "interpretation of what the Act requires is reasonable, in light of the purposes of the Act and the controlling precedent of the Supreme Court, courts should respect the Board's policy choices." (citations

omitted)). Here, the evidence of a substantial and representative complement was far beyond of what the Board would normally find sufficient. As explained above, at the time of the hearing, the Company employed far more than 30 percent of the eventual employee complement—75 percent (831 out of 1104)—and far more than 50 percent of the eventual job classifications—86 percent (31 out of 36). The Company therefore can hardly claim that the relevant complement was not substantial or representative such that the Board was required to postpone the election to await the full complement of employees.

Fourth, regarding the Company's claim (Br. 13) that the election was premature because its expansion plans were "immediate, definitive, and scheduled to be completed in the near term…[,]" the record shows otherwise. The record shows that the Company would not have reached its full complement of employees until the third quarter of 2019—over 17 months after the April 16, 2018 hearing. (JA 163-64; 109.) In comparison, the Board, in *Yellowstone*, finding a substantial complement, noted that even if the employer's projected expansion would take place within the next two quarters, the then current workforce (113 employees) constituted 38 percent of the ultimate projected workforce of approximately 300 employees. 332 NLRB at 386. Thus, if 6 months for a full complement in *Yellowstone* was not immediate enough to postpone an election, waiting for a full complement for over 17 months here would not be in line with Board cases. *Id.*

See also Gerlach Meat, 192 NLRB at 559 (election was appropriate when the present complement constituted 35 percent of the future complement working in 50 percent of the classifications projected for the next 9 months).

Lastly, other than the Company's four claims discussed above, which the Board considered, the Company fails to point to any factor that would warrant a different outcome. By failing to raise such arguments in its opening brief, the Company has waived any other possible substantive argument as to any of the *Toto* considerations not specifically discussed. *See, e.g., Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n. 4 (D.C.Cir.1990) (arguments not raised in opening brief are waived); *see also* FED. R. APP. P. 28(a)(8).

In conclusion, the Company fails to show that the Board abused its discretion by not addressing each of the nine factors compiled in *Toto*, and it fails to show how, even if all the factors were applied, the Board's decision would change as to the finding of substantial and representative complement. The Company's implausible argument appears calculated merely to delay bargaining after the Union's overwhelming election victory.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Company's petition for review and enforce the Board's order in full.

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October 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FP HOLDINGS, L.P., D/B/A PALMS CASINO RESORT	)	
Petitioner/Cross-Respondent	)	Nos. 19-1105, 19-1126
v.	)	Board Case No. 28-CA-224729
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Applicant	)	
and	)	
LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, AFFILIATED WITH UNITE HERE INTERNATIONAL UNION, AFL-CIO	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 5,103 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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Dated at Washington, DC
this 1st day of October, 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Applicant	)	
and	)	
LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, AFFILIATED WITH UNITE HERE INTERNATIONAL UNION, AFL-CIO	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

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this 1st day of October 2019

ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FP HOLDINGS, L.P., D/B/A PALMS CASINO RESORT	)	
Petitioner/Cross-Respondent	)	Nos. 19-1105, 19-1126
v.	)	Board Case No. 28-CA 224729
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Applicant	)	
and	)	
LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, AFFILIATED WITH UNITE HERE INTERNATIONAL UNION, AFL-CIO	)	
Intervenor	)	

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act, 29 U.S.C. §§ 151-69 (2000):

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];
>
> ***
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

***

Sec. 9. [§ 159]

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--
(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

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

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

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

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such

investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

***

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the

record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.