

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

THE COMMITTEE TO PRESERVE THE)	
RELIGIOUS RIGHT TO ORGANIZE)	
)	
Petitioner)	
)	
v.)	No. 19-1102
)	
NATIONAL LABOR RELATIONS)	
BOARD)	
)	
Respondent)	

**RESPONSE OF THE NATIONAL LABOR RELATIONS
BOARD TO THE PETITIONER’S MOTION TO FILE A
SUPPLEMENTAL DECLARATION IN SUPPORT OF ITS
OPPOSITION TO THE BOARD’S MOTION TO DISMISS**

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”) does not oppose the motion of the Committee to Preserve the Religious Right to Organize (“the Committee”) to file a Supplemental Declaration in support of its opposition to the Board’s motion to dismiss for lack of jurisdiction. The Board, however, submits that the Supplemental Declaration suffers from the same shortcomings as the Committee’s previous declaration (*see* July 24, 2019 Declaration), and does not establish that the Committee has the requisite statutory and constitutional standing to appeal the Board’s order dismissing the complaint allegations against Hobby Lobby Stores, Inc.

1. The Supplemental Declaration is limited to addressing just one of the numerous deficiencies to the Committee’s claim of associational standing. As explained in the Board’s motion to dismiss and reply, the Committee must “specifically identify” at least one of its members that has standing in her own right and demonstrate that the Board’s Order causes that member an Article III injury-in-fact. (*See* Mot. 6-7, Reply 9.) To meet that requirement, the Committee proffers the vague assertion that an unidentified current Hobby Lobby employee working in a Hobby Lobby store at an undisclosed location in California “is aware of workplace issues that she and other [unidentified] employees have concerning their working conditions” and that they are “required under the arbitration agreement to use [that] agreement to resolve or correct” those issues. (Supplemental Declaration 1.) The Supplemental Declaration further asserts that this member “wishes” that the Committee would pursue this case to void the arbitration agreement. (*Id.*) Those assertions fail to show that this unnamed member has standing in her own right.¹

¹ The Committee does not identify the current employee, citing that she “fears for her job.” (Supplemental Declaration 1.) This concern, however, does not give the Committee license to ignore basic requirements necessary to establish standing, including the requirement to identify members with the requisite harm and to present specific facts about that harm. The unsupported assertion by Committee counsel that he can “competently testify” about these matters is decidedly insufficient. (Reply 10.)

To begin, the Supplemental Declaration is again, like the Committee’s first declaration, signed only by counsel for the Committee. As the Board has explained, “mere allegations” or “representations of counsel” will not suffice to establish standing. (Mot. 7, Reply 10.) The Committee also fails to assert that this employee was a Committee member when it filed its petition for review—a crucial omission, *see* Reply 9. Notably, the Committee’s previous declaration listed other members of the Committee, including unnamed former Hobby Lobby employees, unnamed employees of other employers, and unnamed unions (*see* July 24, 2019 Declaration 1), but it did not then mention this current employee as a member. That omission creates a reasonable inference that the current employee was not a member at the time the Committee filed its petition for review and is instead a member that the Committee recruited post-petition in the hopes of establishing standing.²

² Notably, the stipulated facts in this case provide that Hobby Lobby employees must enter into the arbitration agreement in order to obtain employment. *See Hobby Lobby Stores, Inc.*, 363 NLRB No. 195, slip op. 6-7 (2016). The employees receive a copy of that agreement in the employee handbook and sign an acknowledgment that they are bound by its terms. *Id.* The signed agreement is then placed in the employee’s personnel file. *Id.* Despite those uncontested facts, the Declaration fails to even offer this threshold evidence—that the unnamed employee has signed the arbitration agreement—and it is questionable whether Committee counsel can attest to personal knowledge of the contents of the employee’s personnel file.

2. The Committee makes no attempt to address the other blatant deficiencies concerning its claim of standing that the Board raised in its motion and reply. It offers no proof that it is the type of organization that would qualify as a “membership association” for purposes of this Court’s associational standing analysis. (Reply 8.) The Committee is also noticeably silent regarding the facts of the members discussed in its first declaration, keeping their identities as equally anonymous and unknown as the facts surrounding the alleged injuries that the Committee claims gives rise to its associational standing. Thus, while the Board does not oppose the Committee’s motion to file the Supplemental Declaration, the Board submits that the Committee’s filing fails to correct the numerous deficiencies regarding the Committee’s claim of statutory and constitutional standing.

WHEREFORE, the Board respectfully requests that the Court grant the Board’s motion to dismiss.

/s/ David Habenstreit
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Dated at Washington, DC
this 27th day of September 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 865 words of proportionally spaced, 14-point type, and that the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
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v.)	Board Case No.
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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2019, 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/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 27th day of September 2019