

Nos. 19-1118, 19-1131

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

**DILLON COMPANIES, INC. D/B/A KING SOOPERS
Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner
and**

**UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL
UNION, LOCAL 7
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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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Dillon Cos., Inc. d/b/a King Soopers is the petitioner before the Court and was respondent before the Board. The Board is respondent before the Court; its General Counsel was a party before the Board. United Food & Commercial Workers International Union, Local 7 is an intervenor before the Court and was the charging party before the Board.

B. Rulings Under Review

This case is before the Court on King Soopers' petition to review a Board Order issued on May 23, 2019, and reported at 367 NLRB No. 141. The Board seeks enforcement of that Order.

C. Related Cases

This case was not previously before this Court and or any other court. Board counsel is unaware of any related cases pending in this Court or any other court.

/s/David Habenstreit

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Acting Deputy Associate General Counsel

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

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GLOSSARY

National Labor Relations Board	Board
National Labor Relations Act	Act
Dillon Cos., Inc. d/b/a King Soopers	King Soopers
United Food & Commercial Workers International Union, Local 7	Local 7
King Soopers' Opening Brief	Br.
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**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on Dillon Cos. d/b/a King Soopers' petition to review, and the National Labor Relations Board's cross-application to enforce, a Board Order finding that King Soopers unlawfully refused to bargain with the representative of its employees. (367 NLRB No. 141). The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(a), and the Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f), 29 U.S.C. § 160(e) and (f). The

petition and cross-application were timely, as the Act provides no time limits for such filings.

Because the Board's unfair-labor-practice Order is based partly on findings made in an underlying representation-election proceeding (27-RC-215705), the record in that case is also before the Court pursuant to Section 9(d) of the Act. 29 U.S.C. § 159(d). Section 9(d) authorizes judicial review of the Board's actions in a representation proceeding solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board." *Id.* 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 Court's ruling in the unfair-labor-practice case. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUE

Whether King Soopers' refusal to bargain with the representative of its employees violated the Act turns on the following issue:

Was the Board's finding that a group of deli employees could vote on whether to join an existing bargaining unit of meat-department employees within its discretion and supported by substantial evidence in the record?

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions appear in King Soopers' opening brief.

STATEMENT OF THE CASE

This case involves King Soopers' refusal to bargain in order to challenge the Board's certification of United Food and Commercial Workers Local 7 as the representative of deli employees at store 89. In a representation proceeding, the Board decided that those employees were an appropriate voting group for a self-determination election—the means by which employees can join an existing collective-bargaining unit. After they voted in that election to join an existing unit of meat-department employees at stores 89, 86, and 118, the Board found in an unfair-labor-practice case that King Soopers' refusal to bargain was unlawful. That Order is before the Court, where the legality of King Soopers' refusal turns on the validity of the Board's findings in the representation proceeding. *See NLRB v. Downtown BID Services Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012).

I. STATEMENT OF FACTS

A. King Soopers' Operations and Management

King Soopers is a supermarket chain in the Mountain West, located primarily in Colorado. (App. 1094; App. 914-16.)¹ It operates three stores in the town of Broomfield, Colorado—known as stores 86, 89, and 118. Store 86 was the chain's first presence in Broomfield, followed by 89 and then 118. (App. 1095;

¹ Appendix citations preceding a semicolon are to the Board's findings; cites following a semicolon are to supporting evidence in the record.

App. 51, 262, 914.) The stores contain deli, meat, seafood, produce, bakery, floral, grocery, general merchandise, pharmacy, and front-end (checkout) departments. (App. 1096; App. 505-08.)

King Soopers' corporate office is located in Denver. The stores are divided into 8 administrative districts. Each district has a district manager and merchandising, operations, and human-resources coordinators. Each store has a store manager and 2-3 assistant store managers, as well as department managers for each department. (App. 1094-95; App. 292-93, 314, 436.) The corporate labor-relations department handles promotions, transfers, and seniority for all stores and advises the stores on discipline and dispute resolution. (App. 1094; App. 294, 313-14.)

King Soopers also groups its stores into geographic areas for purposes of seniority and promotions for non-union employees. The administrative districts and geographic areas are not coterminous, and stores within the same geographic area might not be in the same district. All the Broomfield stores are in district 3 but only store 89 is in the same geographic area with stores in Lafayette, Louisville, and Erie. Erie is in district 4; Louisville and Lafayette are in district 3. (App. 1094; App. 290-92, 353-55, 914.)

B. King Soopers' Bargaining Relationship with Local 7

Local 7 represents employees at 101 King Soopers stores in Colorado and Wyoming. (App. 1095; App. 30.) It represents meat-department employees at all of those stores. (App. 1095; App. 30.) Local 7 and King Soopers have 10 collective-bargaining agreements covering meat-department employees, with each contract covering the stores in a particular metropolitan area (Denver, Colorado Springs, Pueblo, Parker, Ft. Collins, Loveland, Greeley, Longmont, Boulder, and Broomfield). (App. 1095; App. 30-31, 978-85.) Each contract provides that, at any new stores that open in the area, employees who are in the job classifications covered by the contract will be part of the bargaining unit. For example, meat-department employees at stores 89 and 118 in Broomfield became part of the unit in place at store 86 when those stores opened. (App. 1095; App. 264, 266, 980-85.)

Local 7 represents deli employees in the same bargaining unit as meat-department employees at 93 of the 101 stores. (App. 1095; App. 33-35.) The exceptions are the 8 stores in the Greeley, Loveland, and Broomfield metropolitan areas. (App. 1095; App. 34-35.) The contracts covering meat-department employees in those stores exclude a variety of job classifications, including deli employees, from their descriptions of the units. (App. 1095; App. 981, 983-84.) Deli employees in 7 of those stores are unrepresented, and in store 86 in

Broomfield are part of a unit with retail employees. Store 86 is the only store with a combined unit of deli and retail employees. (App. 1096; App. 34, 37-38, 540.)

Unlike the meat-department and meat/deli contracts, the collective-bargaining agreement for deli and retail employees in store 86 covers only that one store rather than the metropolitan area and has no after-acquired-stores provision. When stores 89 and 118 opened in Broomfield, their deli employees were not added to the store 86 deli/retail unit. (App. 1096; App. 266, 540.)

C. Deli Employees

Deli employees prepare, handle, and sell meat and related items to customers. They slice meat and cheese to customers' specifications, weigh it, and label it with a price. Other tasks include preparing fried chicken for the deli's hot bar, a process that starts with cooking raw chicken in the department's deep-fryer. They also assemble salads and other prepared "grab-n-go" items, slice meat and cheese for party trays, and use knives to prepare salmon. The deli has a cash register where employees can ring up customers. (App. 1097; App. 35, 83, 104, 108, 170, 182-84.) Deli employees must wear gloves when handling food, including protective slicing gloves when using the slicer or knives, and a hat or hairnet. Aprons are optional. (App. 1098, 1106; App. 104-06, 187-88.) In addition to their customer-service duties, deli employees maintain temperature logs, order product, clean their area and equipment at the end of the day, unload

product from pallets, and stock their area. (App. 1097; App. 103, 168-69, 188, 214-15, 784-88.)

When first hired, deli employees must complete a computerized training course and shadow current employees. Along with the general course that all new employees take, deli employees must complete an additional four-hour course on food safety and how to operate the slicing equipment. Any employee who transfers into the deli would have to complete that same training. (App. 1099; App. 217, 327-28.)

Store 89 has 12 deli employees. (App. 1096; App. 103.) The deli is located next to the meat department; no wall separates the two. Employees from either department can view the other and they see or interact with each other several times a day. (App. 1100; App. 108, 191, 234, 377.) In the back of the deli is a walk-in cooler. On the other side of the wall from the deli cooler is the meat department's cutting room. A swinging door with a window allows access between the two rooms. Deli employees sometimes access the meat cooler to retrieve raw chicken and bring it back to the deli. (App. 1100; App. 213-14, 414, 424.) Deli employees encounter in passing employees from other departments (besides the meat department), such as on their way in or out of work or if the other employees patronize the deli to buy their lunch. (App. 1101; App. 109, 193.)

New product arrives each evening. Deli and meat product arrives together on the same pallet. A meat-department employee informs a deli employee when the pallet arrives and the two usually work together to unload it. (App. 1100; App. 109-10, 168-69, 192, 431-32.) If no deli employee is available, a meat-department employee will unload the entire pallet and either deliver the deli product to the deli cooler or store it in the meat cooler. (App. 1100; App. 192, 237-38.)

On three occasions in 2017, deli employees performed work outside of the department—deli employees covered some front-end shifts during two weeks when the front end was understaffed and one deli employee once worked an overnight stocking shift. (App. 1101; App. 111-12, 193-94, 204-05.) In early 2018, a front-end manager, who previously had worked in the deli, twice covered for a deli employee who called out sick. Otherwise, the deli typically will run shorthanded rather than borrow employees from other departments. (App. 1101; App. 112-13, 194-95, 204, 208.) Even if they did cover in the deli, employees from other departments who lack deli experience would not be allowed to operate the slicers or other equipment for which deli employees receive training. (App. 1106; App. 114-15.)

D. Meat-Department Employees

Meat-department employees wait on customers seeking raw meat or seafood. They retrieve the meat based on customers' orders, weigh it, and label it

with a price. (App. 1096-97; App. 84, 116.) In addition to fulfilling specific customer requests, meat-department employees also cook samples for customers, trim fat off the meat, and prepare cheeseburger patties by mixing cheese in with hamburger meat. (App. 1097; App. 116, 121.) They order product, clean their area, maintain temperature logs, unload product, and stock the meat counter. (App. 1097; App. 85, 216, 231.) Meat-department employees are required to wear gloves when handling food, including slicing gloves when using knives, and hats or hairnets. (App. 1097, 1106; App. 89, 233.) New employees must complete a computerized food-safety course in addition to the general online training for all employees and must shadow current department employees to learn the job. (App. 1099; App. 232-33, 328-29.)

Store 89's meat department is located between the deli and bakery. A wall separates the meat department and the bakery. (App. 1100; App. 108, 141.) Meat-department employees have shared knives and cleaning equipment with the deli. They also go over to the deli to acquire cheese to make the cheeseburgers. (App. 1100; App. 130, 170, 191.)

Under the collective-bargaining agreement, non-unit employees are not allowed to work in the meat department. (App. 1101; App. 41, 985.) Nonetheless, a deli clerk at store 89 worked at the meat counter on two occasions during 2017 to cover for a meat-department employee who was on break. (App. 1101; App. 211.)

E. Retail Employees

The duties of other King Soopers employees vary by department. The bakery department prepares baked products for sale. Most of their products are self-serve, located on the sales floor for customers to retrieve themselves. The exception is specialty cake decorating, which is done behind the counter. Bakery-department employees do not use a fryer or operate a cash register. (App. 1098; App. 118, 152, 161, 371, 955.) Employees in the floral department design and create floral arrangements, fill helium balloons, and use a cash register to check out customers. They use knives and scissors in their work. The job requires a design certificate or two years design experience. (App. 1098-99; App. 118, 120, 930-32.) Front-end employees check out customers and bag groceries. (App. 1105; App. 917.) Grocery-department and produce-department employees stock product and maintain appearances throughout their respective areas. Neither regularly operate cash registers. Produce employees use paring knives and box cutters. (App. 1098; App. 92, 120, 935, 947.) Employees in all departments clean their areas at the end of the day. (App. 1098; App. 216.)

F. Terms and Conditions of Employment at King Soopers

Terms and conditions of employment for unionized meat-department employees at stores 89, 86, and 118 are defined by the Broomfield collective-bargaining agreement. (App. 1103; App. 652-744.) Terms and conditions for non-

union employees at those stores and company-wide are set forth in an employee manual. (App. 1104; App. 276, 768-83.) Promotions and layoffs are based on seniority for both unionized and non-unionized employees, with separate union and non-union seniority lists. (App. 1102-03; App. 288-89, 318-19.) King Soopers' director of labor relations or its vice president for operations must approve any discharge of an employee, union or non-union, with more than 5 years of experience. District managers and store managers review decisions to discharge employees with less than 5 years' tenure and to issue suspensions. (App. 1103; App. 287, 365, 421.) The collective-bargaining agreement contains a grievance procedure for union employees and the employee manual has a dispute-resolution policy for non-union employees, both of which may involve the corporate labor-relations department. The process for union employees also includes binding arbitration. (App. 1103; App. 313-15, 700-02, 783.)

Wage rates for meat-department employees range from \$10.50 to \$21.78 per hour and rates for deli employees range from \$10.50 to \$20.73 per hour. (App. 1103-04; App. 870, 1015.) Wage rates in the retail departments range from \$10.00 or \$10.50 to \$19.41 or \$20.41 per hour. (App. 1104; App. 863-69.) Both union and non-union employees have benefits such as paid sick leave, personal holidays, and paid vacation, but they have different health-insurance plans. (App. 1103-04; App. 776-80, 991-93, 1001-02.) The stores are open 5:00am-midnight, though the

deli and meat departments are open 6:00am-10:00pm. (App. 1096; App. 120, 165-66.) Meat-department employees' shifts are set by management pursuant to the contract, while non-union employees bid for their own shifts each week from a posted list. (App. 1104; App. 261-62, 360-62, 993, 996.) All employees use the same timeclocks, break areas, and restrooms. (App. 1101; App. 174-75.)

II. PROCEDURAL HISTORY

A. The Representation Case: The Board Orders an Election

On March 1, 2018, Local 7 petitioned the Board to represent deli employees at store 89 as part of the existing bargaining unit of meat-department employees at stores 86, 89, and 118. (App. 467.) King Soopers opposed that grouping and argued for an alternative unit of either deli and retail employees at store 89 and stores 13, 129, and 135 (in Lafayette, Louisville, and Erie) or deli and retail employees at store 89. (App. 474, 483.) After a hearing, the Board's Regional Director for Region 27 issued a Decision and Direction of Election ordering an election for the store 89 deli employees to decide whether to join the existing unit. (App. 1092-1111.) The Board (Chairman Ring, Members McFerran and Kaplan) denied King Soopers' request for review of that decision. (App. 1552.)

Deli employees at store 89 voted 10-2 to join the existing bargaining unit. (App. 1458.) The Regional Director thereafter certified Local 7 as their collective-bargaining representative. (App. 1550.)²

B. The Unfair-Labor-Practice Case: King Soopers Refuses To Bargain

Following the election and certification, Local 7 requested that King Soopers bargain over the deli employees' terms and conditions of employment. King Soopers refused. (App. 1623; App. 1575, 1577.) The Board's General Counsel issued an unfair-labor-practice complaint alleging that King Soopers' refusal violated the Act. (App. 1622; App. 1555-59.) King Soopers admitted it refused to bargain, but argued again that the bargaining unit was not appropriate.

III. THE BOARD'S CONCLUSIONS AND ORDER

In a Decision and Order that issued May 23, 2019, the Board (Chairman Ring, Members McFerran and Kaplan) found that King Soopers violated Section 8 (a)(5) and (1) of the Act by refusing to bargain with Local 7 as the representative of store 89's deli employees as part of the existing Broomfield unit. The Order directs King Soopers to cease and desist from that unfair labor practice and to bargain with Local 7 on request, embody any understanding the parties reach in a written agreement, and post a remedial notice. (App. 1622-24.)

² King Soopers also filed objections to the election, which the Board overruled. (App. 1531-49, 1553.) Those objections are not before the Court in this appeal.

STANDARD OF REVIEW

The Court “accord[s] the Board an especially wide degree of discretion on questions of representation.” *Rush University Medical Center v. NLRB*, 833 F.3d 202, 206 (D.C. Cir. 2016) (internal quotation omitted); *see also Agri Processor Co. v. NLRB*, 514 F.3d 1, 8-9 (D.C. Cir. 2008) (Board’s “unit determinations are accorded particular deference by a reviewing court” (internal quotation omitted)). A Board determination in that area is “rarely to be disturbed,” *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800, 805 (1976) (internal quotation omitted), and the Court will do so “only if it is arbitrary or not supported by substantial evidence in the record,” *Rush University*, 833 F.3d at 206 (internal quotation omitted). The wide discretion accorded the Board “reflect[s] Congress’ recognition of the need for flexibility in shaping the bargaining unit to the particular case.” *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985) (internal quotation omitted).

The Board’s factual findings “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *Inova Health System v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015). A finding lacks substantial evidence “only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Inova Health*, 795 F.3d at 80 (internal quotation omitted). The Board’s “interpretation of its own precedent is entitled to

deference.” *Ceridian Corp. v. NLRB*, 435 F.3d 352, 355 (D.C. Cir. 2006) (internal quotation omitted).

SUMMARY OF ARGUMENT

King Soopers admittedly refused to bargain with Local 7 regarding terms and conditions of employment for store 89 deli employees after they voted overwhelmingly to join an existing bargaining unit. Its only defense for that refusal is its contention that the resulting bargaining unit was not appropriate. But the Board properly ordered a self-determination election under the circumstances of this case. Specifically, substantial evidence supports the Board’s finding that both prongs of the longstanding test for a self-determination election were met—store 89 deli employees share a community of interest with the meat-department employees in the existing Broomfield unit and constitute an identifiable, distinct segment of unrepresented employees.

The deli employees in the voting group and the meat-department employees in the existing unit share a community of interest because they have similar functions, skills, training, hours, and wages, many of which are not shared with any other employees. They also have frequent contact and interaction. Likewise, the voting group is easily identifiable because it consists of all employees in a particular administrative department. The voting-group employees also have distinct functions, training, work location, and front-line supervision among

unrepresented employees at their store and do not have substantial integration with unrepresented employees outside of the group.

King Soopers' challenges to the Board's decision rest primarily on a differing view of the facts, which is insufficient to disturb the Board's findings under the applicable standard of review, or on a misunderstanding of the Board's analysis. Even its argument that the Board should have applied the standard in *PCC Structural, Inc.* rather than the established test for self-determination elections is essentially a dispute over the Board's weighing of the evidence, focused on reevaluating the connections in the record between deli and meat employees and deli and retail employees. The argument is also misplaced. *PCC Structural* applies, by its own terms, to a different situation—whether a newly proposed unit is inappropriate unless it contains additional employees rather than, as here, whether currently unrepresented employees can join an indisputably appropriate existing unit. King Soopers' argument ignores the context of self-determination elections and the Board's interpretation of its own precedent—two areas in which the Board receives significant deference.

ARGUMENT

The Board exercised its broad discretion regarding representation matters in allowing 12 deli employees to vote whether to join an existing bargaining unit, and those employees exercised their rights under the Act in selecting union representation. King Soopers therefore had a statutory obligation to bargain with Local 7 regarding those employees as part of the existing unit. King Soopers admittedly refused to do so, and it violates Section 8(a)(5) of the Act for an employer “to refuse to bargain collectively with the representatives of [its] employees.” 29 U.S.C. § 158(a)(5). That refusal was thus unlawful unless King Soopers proves that the election was improper.³

A. A Self-Determination Election Is the Method for Employees To Choose Whether To Join an Existing Bargaining Unit

Employees have the right under the Act to “bargain collectively through representatives of their own choosing.” 29 U.S.C. § 157. Section 9(b) of the Act tasks the Board with deciding whether a unit proposed by employees or a union is “appropriate for the purposes of collective bargaining.” 29 U.S.C. § 159(b). If so,

³ A refusal to bargain in violation of Section 8(a)(5) also derivatively violates Section 8(a)(1), which prohibits employers from “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of” their rights under the Act, 29 U.S.C. § 158(a)(1). *See, e.g., Exxon Chemical Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

the Board will order an election in which employees in the proposed unit choose whether to select union representation. 29 U.S.C. § 159(c)(1).

When a union petitions to add employees to an existing bargaining unit, the Board can order a “self-determination” election, also known as an *Armour-Globe* election. *Rush University Medical Center v. NLRB*, 833 F.3d 202, 205 (D.C. Cir. 2016); *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990); *see generally Armour & Co.*, 40 NLRB 1333, 1335-36 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294, 299-300 (1937). In such an election, employees in the currently unrepresented group covered by the union’s petition vote whether to join the existing unit or remain unrepresented. *NLRB v. Southern Indiana Gas & Electric Co.*, 853 F.2d 580, 582 (7th Cir. 1988). A self-determination election is appropriate if those additional employees share a community of interest with employees in the existing unit and constitute an “identifiable, distinct segment” of the unrepresented employees such that they “constitute an appropriate voting group.” *Rush University*, 833 F.3d at 209; *St. Vincent Charity Medical Center*, 357 NLRB 854, 855 (2011); *Warner-Lambert*, 298 NLRB at 995.

Whether employees share a community of interest is a fact-specific, case-by-case analysis in which “[t]here is no hard and fast definition or an inclusive or exclusive listing of the factors to consider.” *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1190 (D.C. Cir. 2000) (internal quotation omitted); *see also RC*

Aluminum Industries, Inc. v. NLRB, 326 F.3d 235, 240 (D.C. Cir. 2003) (emphasizing that “no particular factor controls”). Among the relevant considerations are “wages, benefits, skills, duties, working conditions, and supervision,” *Agri Processor Co. v. NLRB*, 514 F.3d 1, 9 (D.C. Cir. 2008) (internal quotation omitted), as well as the extent of contact, proximity, and interchange with employees in the existing unit, *Kroger Co.*, 201 NLRB 920, 920 (1973). A petitioned-for voting group constitutes an identifiable, distinct segment if it is “neither an arbitrary nor a random grouping of employees.” *St. Vincent*, 357 NLRB at 855. Factors include whether they share a distinct classification or other administrative grouping, perform the same distinct function, work in the same location, have shared supervision, and lack substantial integration with other unrepresented employees, as well as whether there are other unrepresented employees with the same classification who are not included in the voting group. *Id.* at 855-56; *A. Harris & Co.*, 116 NLRB 1628, 1632 (1956).

A self-determination election can be appropriate regardless of whether the voting group would constitute an appropriate bargaining unit by itself. *NLRB v. Raytheon Co.*, 918 F.2d 249, 252 (1st Cir. 1990); *St. Vincent*, 357 NLRB at 855. Because the election would not result in the voting group as its own separate unit, the question of such a unit’s appropriateness simply is not presented in the self-determination context. *Raytheon*, 918 F.2d at 252.

B. The Board Appropriately Ordered a Self-Determination Election for Store 89 Deli Employees

The Board’s broad discretion in representation matters and the record evidence support the Board’s decision to allow deli employees in store 89 to vote in a self-determination election whether to join the existing Broomfield meat-department unit. King Soopers’ challenge to that decision presents its own take on the facts, but not one that is “so compelling that no reasonable factfinder could ... find to the contrary.” *Inova Health*, 795 F.3d at 80. Its purportedly legal arguments are essentially repackaged challenges to the Board’s fact-based analysis and, in any event, are premised on a misunderstanding of both the Board’s decision and the self-determination-election context.

1. Deli Employees in the Voting Group Share a Community of Interest with Meat-Department Employees in the Existing Unit

a. The record supports the Board’s community-of-interest finding

Substantial evidence in the record supports the Board’s finding (App. 1105-08) that deli employees at store 89 share a community of interest with the meat-department employees in the existing Broomfield bargaining unit. In making that fact-specific determination, the Board surveyed the record and identified relevant factors, including factors that had supported self-determination elections in prior cases.

First, as the Board detailed, meat and deli employees perform similar functions. (App. 1097, 1106.) They both respond to customer orders by handling, weighing, wrapping, and pricing meat for sale. In addition to that on-demand direct customer service, employees in both departments also have some food-preparation duties. Deli employees prepare ready-to-eat products and meat-department employees cook samples and prepare hamburger patties. Both cut or slice meat in advance of selling it to customers. Although deli employees generally deal with cooked food and meat-department employees with raw, deli employees handle raw chicken when preparing fried chicken for the hot bar. Along with interacting with customers, meat and deli employees both keep their areas stocked, maintain temperature logs, unload product, and clean their areas at the end of the day. *Cf. RC Aluminum*, 326 F.3d at 240 (employees performed “same kind of work”); *Warner-Lambert*, 298 NLRB at 995 (comparable skills and duties).

Other shared aspects of deli and meat-department work include similar training and safety practices. Employees in both departments participate in a training regimen of computer courses and shadowing. Further, meat and deli employees must complete an additional food-safety course that is not required of other employees. Although the additional training is not exactly the same for the two departments, it is only “slightly different.” (App. 328.) Employees in both

departments also employ sharp tools in their duties that require extra training. And they adhere to the same safety practices and attire requirements when handling food, including donning slicing gloves when using sharp equipment and wearing a hat or hairnet. (App. 1098-99, 1106.)

Meat and deli employees also interact with each other over the course of the day, as the Board found. (App. 1100, 1107.) Most prominently, they work together in unloading product most evenings. Representatives from both departments coordinate to complete the task of separating their respective items, which arrive together on the same pallet.⁴ In addition, meat and deli employees share some supplies such as knives, mops, and squeegees. Meat-department employees also take cheese from the deli to mix in with their hamburger patties and deli employees take raw chicken from the meat cooler to fry for the hot bar. The meat and deli employees' contact and interaction is facilitated by the fact that the two departments are adjacent and are not separated by a wall. They also can access each other's departments via the swinging door connecting their walk-in

⁴ King Soopers asserts that meat and deli employees separate product together only some of the time (Br. 27), but the testimony it cites for that proposition was manager Brian Jones's description of how often he personally worked with deli employees and he does not always work the closing shift when new product comes in. (App. 236-37.) Other witnesses testified that joint unloading happens "usually" or "normally." (App. 110, 192, 431-32.)

coolers. *Cf. Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 38 (D.C. Cir. 2015) (noting “frequency of contact” as community-of-interest factor).

In addition, meat and deli employees have some similar terms and conditions of employment. Both departments operate the same hours (6:00am-10:00pm), even though the remainder of the store is open 5:00am-midnight.⁵ They have similar wage rates, which start at \$10.50 for both departments and progress upward to either \$20.73 (for deli) or \$21.78 (for meat). Along with most King Soopers employees, they share some of the same benefits and have similar seniority systems. They also have shared supervision for matters like discipline, promotion, and layoff, which are handled or approved at the storewide or corporate level. (App. 1107.) *Cf. Country Ford Trucks*, 229 F.3d at 1187 (shared supervision); *Warner-Lambert*, 298 NLRB at 995 (similar wage rates).

As the Board noted (App. 1107), the degree of interchange does not weigh heavily either way under the circumstances of this case. Even though there is very limited evidence of interchange between meat and deli, there is also minimal evidence of interchange between the deli and any other department. The record contains at most three instances in the year leading up to the hearing of deli

⁵ King Soopers notes that the meat department stops selling product at 9:00pm (Br. 28), but that does not mean that meat-department employees stop working at 9:00pm. The testimony on hours of operation is that both meat and deli (and only meat and deli) close at 10:00pm. (App. 120,)

employees working elsewhere and shows only one retail employee working in the deli.

The facts here are similar to *Kroger Co.*, where the Board found that deli employees could vote on whether to join an existing unit of meat-department employees. 201 NLRB at 920-21. Like in that case, King Soopers' meat and deli employees have similar duties and skills because both "engage in such functions as weighing, pricing, packaging, and stocking." *Id.* at 920. There is "no significant difference in pay." *Id.* The two departments are in close proximity to each other. *Id.* Like at Kroger, there is a degree of common supervision because each department head reports to the same store manager. *Id.* at 920-21. Interchange is not a factor because "there is currently no interchange ... among any of the departments." *Id.* at 920. Other cases reached the same result under similar circumstances. *See, e.g., Lorillard*, 219 NLRB 590, 590 (1975) (ordering self-determination election where voting-group employees and unit employees "frequently perform similar job functions, work the same hours, and have daily contacts"); *Kroger Co.*, 202 NLRB 835, 835-36 (1973) (ordering self-determination election where meat and deli employees "have the same overall supervision and similar duties and rates of pay").

King Soopers identifies some ways in which meat-department employees and deli employees differ (Br. 28-30, 39), but employees need not be identical in

all ways to share a community of interest. For example, the meat and deli employees in *Kroger Co.* did not share a common work area or equipment and some of the meat-department employees were more highly skilled and better paid than the deli employees. 201 NLRB at 920-21. Likewise, some of the bargaining-unit employees in *Warner-Lambert* were licensed, unlike the voting-group employees, 298 NLRB at 995; not all of the unit employees in *Country Ford Trucks* had the same training, 229 F.3d at 1189, and not all of the unit employees in *RC Aluminum* had the same wages and benefits, 326 F.3d at 241.

Moreover, many of the distinguishing terms and conditions that King Soopers mentions (such as health insurance, rotational shifts, and limits on interchange (Br. 26, 29-30)) come from the meat-department employees' collective-bargaining agreement. Differences based on a contract do not render a self-determination election inappropriate, however. The whole purpose of a self-determination election is for employees to decide whether to join an existing bargaining unit, so such elections always will involve a situation where some employees are currently represented and others are currently unrepresented. As the Board has explained, contract-based differences "may reasonably be expected in the *Armour-Globe* context, where the unit employees' terms are the result of collective bargaining," and thus "do not mandate exclusion" of the currently unrepresented employees. *Public Service Co. of Colorado*, 365 NLRB No. 104,

2017 WL 3115256, at *1 n.4 (2017); *see also University of Pittsburgh Medical Center*, 313 NLRB 1341, 1346 (1994) (finding community of interest despite differences where “[m]ost of the ... differences between the [voting group] employees and the unit employees are a result of the collective-bargaining agreement”), *affirmed*, 88 F.3d 1300 (3d Cir. 1996). Indeed, if the fact that the represented employees are governed by a collective-bargaining agreement foreclosed a self-determination election, there rarely would be *any* self-determination elections.

King Soopers also faults the Board for purportedly not addressing whether deli employees at store 89 share a community of interest with meat-department employees in stores 86 and 118 as well as with meat-department employees at store 89. (Br. 38-39, 45.) But the Board did not limit its analysis to factors present only at store 89. Much of the community-of-interest evidence that the Board relied on applies equally to stores 86 and 118 as to store 89. The skills, functions, and equipment of the two departments are set forth in company-wide job descriptions. (App. 319, 784-88, 959-77.) The additional training that both departments require was described by a corporate-level official who oversees all stores. (App. 327-29.) Shared terms and conditions of employment like wage rates and sick leave stem from the company-wide employee manual (for deli) or the Broomfield-wide

collective-bargaining agreement (for meat). Discipline, seniority, and promotions are handled for all stores by the corporate-level labor-relations department.

Although the record evidence on deli employees' proximity and interaction with meat-department employees is specific to meat-department employees at store 89, caselaw never has required a one-to-one connection among all employees in the bargaining unit to find that a community of interest exists. In *Kroger Co.*, for example, the Board ordered a self-determination election for deli employees in 4 stores on whether to join a meat-department unit of 64 stores across 3 states. 201 NLRB at 920. The Board identified the proximity of the deli and meat departments and common store-level supervision as support for its finding even though those factors were particular to individual stores; indeed, the other 60 stores did not have deli departments. *Id.* at 920-21. And the self-determination election in *Raytheon* consisted of 8 employees at 2 facilities in New Hampshire deciding whether to join a statewide unit of 298 employees at multiple facilities in Massachusetts. 918 F.2d at 250.

b. The Board's community-of-interest analysis was complete

King Soopers launches a series of arguments regarding points it claims the Board omitted from its community-of-interest analysis. Each argument is either incorrect or inconsequential in light of the record, precedent, and an accurate reading of the Board's decision.

King Soopers suggests that the Board failed to apply an industry-specific rule regarding grocery-store meat departments. (Br. 40.) But the cases it cites for that purported rule stem from the bygone era when the Board considered meat-department-only units presumptively appropriate as consisting of skilled butchers. *See UFCW, Local 540 v. NLRB*, 519 F.3d 490, 494 (D.C. Cir. 2008) (chronicling history of meat-department bargaining units); *Unishops of Clarkins, Inc.* 171 NLRB 1435, 1437 (1968). The Board subsequently abandoned that approach when grocery-store meat departments began using pre-packaged meat, as King Soopers does (App. 35), and no longer has any industry-specific standard for such departments. *UFCW, Local 540*, 519 F.3d at 494. King Soopers' cases also are distinguishable on their facts. Unlike here, the deli employees in *Ideal Super Markets* required little training, did not slice meat, and had only infrequent contact with meat-department employees; they also interchanged daily with bakery employees and the two departments were contiguous and "operated as a single entity." 171 NLRB 1, 1-2 (1968). Likewise, the meat-department employees in *Unishops* used specialized skills and knowledge that the deli employees lacked. 171 NLRB at 1437.

King Soopers now asks why deli employees at store 118 were not included in the voting group (Br. 42-43), but no party, including King Soopers, argued at the hearing that they should be included. Instead, both Local 7 and King Soopers

stated that they would oppose such a voting group. (App. 309-10.) The Board's unit determinations are not made in the abstract, but in response to the contentions of the parties. Thus, it is not the Board's task to consider all possible units in determining whether the proposed unit is appropriate.⁶ Under those circumstances, the Board had no reason to discuss the status of store 118's deli employees.

In any event, and as the Board explained (App. 1105), a voting group of only store 89's deli employees is consistent with the historical practice in Broomfield of treating each store's deli employees independently. The contract governing store 86's deli/retail unit applies by its terms only to store 86 and does not provide for the automatic inclusion of deli employees from subsequently opened stores in the metropolitan area. A self-determination election limited to store 89 is in keeping with that approach. Finally, the deli employees in store 118 are not "disenfranchised" by the Board's decision (Br. 41), as nothing prevents them from voting at a later time whether to join the existing bargaining unit or otherwise seek union representation; nor have they been included in the unit without having had a chance to vote.

⁶ In making unit determinations, the Board "looks first to the unit sought by the petitioner. If it is appropriate, [the] inquiry ends. If, however, it is inappropriate, the Board will scrutinize the employer's proposal." *Audiovox Communications Corp.*, 323 NLRB 647, 650 (1997). At no point must the Board proceed to examine hypothetical units not proffered by either party.

King Soopers also makes much of the fact that meat and deli employees in Broomfield had not previously shared a bargaining unit. (Br. 48-55.) But the Board did not, as King Soopers asserts, “refuse to address” that history (Br. 50). It acknowledged that Broomfield’s meat-department employees had been represented in a unit without deli employees (App. 1105)—it just did not consider that fact dispositive. What the Board questioned was the relevancy of the parties’ bargaining history in *other* stores—their “overall bargaining history” in “other meat units in the state of Colorado.” (App. 1105 & n.20.)

Moreover, King Soopers’ emphasis on bargaining history is misplaced in the self-determination context. Bargaining history will not foreclose a self-determination election because such an election necessarily involves a change to the existing bargaining relationship. The fact that the employer has a bargaining history with the existing unit without the voting group is inherent and thus does not serve as an obstacle to an election. Unsurprisingly, therefore, the cases King Soopers cites (Br. 49) for the principle that the Board is reluctant to disturb historical bargaining units did not involve self-determination elections, but dealt instead with whether existing units were inappropriate. *See, e.g., Dodge of Naperville*, 796 F.3d at 37 (issue was “whether the historic ... unit became an inappropriate unit” following merger). Unlike in those cases, Local 7 is not “challenging a historical unit” in Broomfield as inappropriate (Br. 49). Any

presumption in favor of an existing unit does not apply in this context. Even outside of the self-determination context, moreover, “other community-of-interest factors could outweigh bargaining history.” *RC Aluminum*, 326 F.3d at 241.

Further, the fact that the Broomfield meat-department contract currently excludes deli employees (Br. 21, 52-54) is of no consequence, because “a contract clause excluding a particular group of employees from its coverage does not bar a union from seeking to represent those employees via a self-determination election.” *UMass Memorial Medical Center*, 349 NLRB 369, 370 (2007). The only exception would be if the union expressly promised not to represent the excluded employees, *id.*, and “such a promise will not be implied from a mere unit exclusion,” *Cessna Aircraft Co.*, 123 NLRB 855, 857 (1959); *accord Peabody Coal Co. v. NLRB*, 725 F.2d 357, 362 (6th Cir. 1984) (same). *Cf. Lexington Health Care Group, LLC*, 328 NLRB 894, 895, 897 (1999) (finding promise where parties entered into signed, written agreement that union would not organize certain employees). There is no evidence of any such promise here. King Soopers identifies nothing apart from the garden-variety exclusion clause in the Broomfield contract, and its suggestion (Br. 53) that the clause was the result of some quid-pro-quo agreement is incorrect. Deli employees were excluded at their own behest

because, at the time, they wanted to remain in their current health-care plan rather than join the union plan. (App. 38.)⁷

Finally, King Soopers' own proposed units do not track bargaining history. Contrary to King Soopers' suggestion (Br. 12-13, 51), there is no historical bargaining unit encompassing stores 89, 13, 129, and 135. Indeed, that geographic area already is divided for collective-bargaining purposes, because deli employees at store 13 in Louisville are covered by the Boulder meat/deli contract. (App. 297.) King Soopers also notes that adding store 89's deli department to the Broomfield unit would be the first time a single store's deli employees joined a multi-store meat-department unit (Br. 15-16, 50-51), but "settled Board and court precedent permit the Board to find different units to be appropriate at ... different locations of the same employer," *Overnite Transportation Co.*, 322 NLRB 723, 724 (1996). Moreover, King Soopers' proposed units are similarly unprecedented. Its proposed deli/retail unit in stores 89, 13, 129, and 135 (Br. 11-12) would constitute the first multi-store deli/retail unit, as the only current deli/retail unit (in store 86) is expressly confined to just one store. And even its proposed one-store deli/retail unit in store 89 (Br. 12) would be only the second combined deli/retail unit among

⁷ Moreover, the exclusion clause is not even particularly focused on deli employees, but covers "store managers, courtesy clerks, office and clerical employees, janitors, parking lot attendants, food clerks, delicatessen employees, warehouse employees, watchmen, guards and professional employees and supervisors." (App. 981.)

all its stores. Nor would combining store 89 deli employees with meat-department employees do any damage to the larger “configuration of units in Colorado and Wyoming” (Br. 52), because 92% of those stores already contain combined deli/meat units. King Soopers’ various bargaining-history arguments thus do not undermine the Board’s community-of-interest finding, which has support in the record evidence and precedent, and was well within the Board’s discretion.

2. The Deli Employees in the Voting Group Are an Identifiable, Distinct Segment of Unrepresented Employees

Substantial evidence likewise supports the Board’s finding that store 89’s deli employees are an identifiable, distinct segment of unrepresented employees. (App. 1552 n.1.) The voting group is easily identifiable because it consists of all deli employees at store 89. The deli is a specific administrative and organizational department within the store. Just as they all work in the same department, all employees in the voting group work in the same location in the store and under the same supervisory structure. They perform the same job duties and must go through the same safety training for those duties. *See St. Vincent*, 357 NLRB at 855 (finding identifiable, distinct segment based on shared function, division, location, and supervision); *Martin Co.*, 162 NLRB 319, 322 (1966) (“specialized functions and ... separate supervision and location”).

By contrast, no other unrepresented employees in the store perform the same duties as deli employees. They do not slice meat or deep-fry anything, and do not

undergo the additional training that enables deli employees to perform those tasks. Bakery employees have less customer interaction than deli employees, for example, and floral-department employees have their own specialized skill set and background requirements. And King Soopers' claim that bakery employees also have additional training (Br. 24) is unsupported in the record, including the passage King Soopers cites for that proposition. Nor do any other employees work the same hours; the deli's 6:00am-10:00pm schedule is unique among unrepresented employees. They thus have a distinct day-to-day work experience from the deli employees.

In light of their shared characteristics and distinguishing features, the voting group is "neither an arbitrary nor a random grouping of employees." *St. Vincent*, 357 NLRB at 855. This case is distinct from *Capital Cities Broadcasting Corp.*, for example, where the Board declined to order a self-determination election for selected employees from two different departments who worked in different locations under different supervisors and who served the same function as other unrepresented employees. 194 NLRB 1063, 1063-64 (1972).

In addition, deli employees and other unrepresented employees "are not integrated, to any substantial degree, ... in the performance of their ordinary duties." *A. Harris & Co.*, 116 NLRB at 1632. The most common interaction with other unrepresented employees is when those employees order lunch from the deli,

which is more akin to a customer relationship than work-related integration. Multiple deli employees testified that contact with such employees otherwise occurs only “in passing” or “just casually.” (App. 109, 193.) By contrast, the record does not support King Soopers’ assertion that deli employees “often” interact with bakery employees. (Br. 26.) King Soopers mentions deli employees making sandwiches for customers using bakery bread, but this occurs only once every few months and, in any event, does not involve any actual interaction between employees because the customer herself brings the bread from bakery to deli. (App. 127-28, 152-53.) Similarly, assembling party trays (Br. 26) occurs only once or twice a week. (App. 109.) Likewise, the isolated instances—three or four times per year—of deli employees filling in for retail or retail employees for deli, pp. 23-24, do not amount to the “frequent and consistent interchange” King Soopers purports to identify. (Br. 39-40.)

The Board’s finding is not undermined by the fact that King Soopers identifies some similarities between deli employees and employees in the retail departments. (Br. 22-30, 39-40.) The Board did not fail to address that evidence as King Soopers alleges (Br. 38), but instead recognized that “some factors ... suggest a shared community of interest between the retail and deli employees” (App. 1105). As King Soopers acknowledges, the question that remains is how to “properly weigh” that evidence (Br. 39)—an area where the Board receives

significant deference. And as detailed above, King Soopers overstates some of the connections between the two groups.

Even so, a bargaining unit can be appropriate even if the employees within it also share some similarities with employees not in the unit. *See Warner-Lambert*, 298 NLRB at 995 (ordering self-determination election where voting group shared a “closer community of interest” with existing unit than with other unrepresented employees). Indeed, the self-determination election was proper even if a deli/retail unit also would be appropriate. So long as the petitioned-for unit is appropriate, it does not matter whether some alternative unit also would be appropriate. *Country Ford Trucks*, 229 F.3d at 1189, 1191. It is well-established that an otherwise appropriate unit need not be “necessarily *the* single most appropriate unit,” *American Hospital Association v. NLRB*, 499 U.S. 606, 610 (1991), and thus the fact that “other potential unit determinations appear equally or more appropriate is insufficient to justify reversal,” *Country Ford Trucks*, 229 F.3d at 1191. For that same reason, the Board properly declined to allow litigation regarding King Soopers’ proposed unit of store 89 deli employees and retail employees at stores 13, 129, and 135 (Br. 12, 51); whether that unit also would have been appropriate does not weigh on the propriety of a self-determination election in Local 7’s proposed unit.

3. The Board’s Self-Determination Analysis Was Consistent with Precedent and the Act

King Soopers attempts to reframe its disagreement on the facts as legal arguments about the proper standard and consistency with the Act. Its arguments find no support even on those terms, however, as they are premised on a misunderstanding of self-determination elections and a cramped view of the Board’s analysis.

King Soopers contends that the Board should have applied *PCC Structural*s, Inc., 365 NLRB No. 160, 2017 WL 6507219 (2017), in deciding whether to order a self-determination election. Though framed as a legal argument, King Soopers’ invocation of *PCC Structural*s is ultimately a repackaged challenge to the Board’s analysis of the facts. The nub of King Soopers’ argument is that deli and meat employees are different and deli and retail employees are similar. (Br. 38-40.) Both issues go to the weight afforded record evidence and both were addressed by the Board as detailed above.

To the extent King Soopers’ argument goes to something further, it errs in contending that *PCC Structural*s is applicable. The standard articulated in *PCC Structural*s applies to a different type of case—whether a proposed new bargaining unit must include additional employees. 2017 WL 6507219, at *1. By its terms, *PCC Structural*s applies “when the employer contends that the smallest appropriate unit must include additional employees.” *Id.*; see also *Boeing Co.*, 368

NLRB No. 67, 2019 WL 4297642 (2019) (standard applies “when a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit”). That situation is never presented in the self-determination context, however, because there always will be a smaller unit (i.e., the existing unit) that already has been found appropriate. The only question is whether additional employees can join that indisputably appropriate unit. Moreover, King Soopers does not contend that the deli/meat unit that Local 7 proposed must also include additional unrepresented employees; rather, it argues for an alternative unit of deli and retail employees without *any* meat-department employees.

The standard for a self-determination election as articulated in cases like *Warner-Lambert* and applied here is a well-established, longstanding test applied by the Board and courts alike, and nothing in *PCC Structural*s purports to change it. Contrary to King Soopers’ characterization, the Board did not hold in *PCC Structural*s that the standard it was articulating “applies in each case” (Br. 37). Instead, it used the “in each case” language in confirming the general point that “the Board [will] undertake an examination of unit appropriateness ‘in each case’ in which a dispute arises,” 2017 WL 6507219, at *12. The Board undertakes such an examination in assessing the propriety of self-determination elections, as the framework in those cases is an appropriateness test. *See, e.g., St. Vincent*, 357 NLRB at 855; *Warner-Lambert*, 298 at 995. Moreover, the Board’s obligation to

evaluate unit appropriateness “in each case” comes from Section 9(b) of the Act, 29 U.S.C. § 159(b), and that provision does not set forth any particular standard for making such determinations. *See Local 1325, Retail Clerks International Association v. NLRB*, 414 F.2d 1194, 1199 (D.C. Cir. 1969) (noting that “Section 9(b) provides remarkably little help as to how the Board is to decide whether a unit is ‘appropriate’”).

The inapplicability of *PCC Structurals* to self-determination elections is driven home by the fact that *PCC Structurals* replaced the standard set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011). *See PCC Structurals*, 2017 WL 6507219, at *1. The Board held on multiple occasions that the *Specialty Healthcare* standard did not apply to self-determination elections. *See, e.g., Kaiser Foundation Hospitals*, 2017 WL 2179707, at *1 n.1 (2017) (“*Specialty Healthcare* ... did not involve a self-determination election, nor did it purport to change the Board’s longstanding standard for determining whether a self-determination election is appropriate.”); *Republic Services of Southern Nevada*, 365 NLRB No. 145, 2017 WL 5476777, at *1 n.1 (2017) (same). In *Rush University*, moreover, this Court conducted a *Warner-Lambert* analysis when evaluating the employer’s argument that the voting group in a self-determination election should include additional employees; it made no mention of *Specialty Healthcare*. 833 F.3d at 209. If *Specialty*

Healthcare did not apply to self-determination elections, neither does its replacement.

Ultimately, the Board’s view of when *PCC Structural*s applies is “entitled to deference” as an “interpretation of its own precedent.” *Ceridian Corp.*, 435 F.3d at 355.⁸ The Board views elections for new units and self-determination elections differently. The Court, too, has recognized that difference, and has held that “the Board did not act arbitrarily by drawing a distinction between the two types of elections.” *Rush University*, 833 F.3d at 207.⁹

King Soopers also invokes (Br. 41-44) the instruction in Section 9(c)(5) of the Act that “the extent to which the employees have organized shall not be controlling” in unit determinations. 29 U.S.C. § 159(c)(5). As the Supreme Court has explained, Section 9(c)(5) prohibits situations “where the unit determined could only be supported on the basis of the extent of organization.” *NLRB v.*

⁸ The Board’s own understanding of the applicability of *PCC Structural*s is further evidenced by the fact that a majority of the Board panel that decided this case (Chairman Ring and Member Kaplan) also joined the decisions in *PCC Structural*s, *Boeing Co.*, or both. Neither found fault with the Regional Director’s analysis in this case or her determination that *PCC Structural*s was not the governing framework.

⁹ In any event, King Soopers has not shown how or if the result in this case would be different under a *PCC Structural*s analysis. Again, King Soopers’ argument is that applying *PCC Structural*s would have required the Board to examine whether meat and deli employees are different and whether retail and deli employees are similar. (Br. 38-39.) And again, the Board addressed those very issues. That King Soopers disagrees with the result of that analysis is not evidence of legal error.

Metropolitan Life Insurance Co., 380 U.S. 438, 441 (1965). The Board's express reliance on the host of community-of-interest and distinct-segment factors discussed above makes clear that the Board's analysis in this case was not so cabined. Moreover, King Soopers' invocation of Section 9(c)(5) is part of its newfound concern that the voting group did not include deli employees from store 118 (Br. 43)—a contention that is meritless for the reasons discussed above, pp. 28-29. There is also no support for King Soopers' surmise that those employees were not included because they would vote against representation (Br. 42), as there is no evidence in the record regarding union views in the store 118 deli department.

The Board's decision to order a self-determination election involved the application of an established framework in an area of broad discretion that relies heavily on weighing record evidence. And substantial evidence supports the finding that the circumstances warranting such an election under that framework were present here. King Soopers' refusal to bargain with the union store 89's deli employees chose in that election was thus unlawful. Those employees overwhelmingly chose to exercise their right to union representation, and the Board's Order finding a violation and requiring that King Soopers bargain gives effect to that choice.

CONCLUSION

The Board respectfully requests that the Court deny King Soopers' petition for review and enforce the Board's Order in full.

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National Labor Relations Board
November 2019

**UNITED STATES COURT OF APPEALS
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)	
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v.)	Board Case No.
)	27-CA-237098
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
)	
UNITED FOOD & COMMERCIAL WORKERS)	
INTERNATIONAL UNION, LOCAL 7)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 9,236 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 November 2019

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 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 that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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