

Nos. 19-1118 and 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 for Respondent.*

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On Petition for Review of a Decision and Order  
of the National Labor Relations Board  
and Cross-Application for Enforcement

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BRIEF OF INTERVENOR  
UNITED FOOD & COMMERCIAL WORKERS  
INTERNATIONAL UNION, LOCAL 7

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CERTIFICATE AS TO PARTIES,  
RULINGS, AND RELATED CASES

- A. Parties and Amici. All parties, intervenors, and amici appearing before the National Labor Relations Board and in this Court are listed in the Brief for the National Labor Relations Board.
- B. Ruling Under Review. References to the rulings at issue appear in the Brief for the National Labor Relations Board.
- C. Related Cases. This case has not previously been before this Court or any other court. Counsel for intervenor is not aware of any related case currently pending in this Court or any other court.

Respectfully submitted,

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\* Authorities upon which we chiefly rely are marked with an asterisk

## GLOSSARY

App.      Appendix

NLRB      National Labor Relations Board

Pet. Br.    Brief of Petitioner

## STANDARD OF REVIEW

In this case, the National Labor Relations Board conducted “an election to add unrepresented employees to a preexisting bargaining unit, as opposed to an election to create a new bargaining unit.” *Rush University Medical Center v. NLRB*, 833 F.3d 202, 204 (D.C. Cir. 2016). This Court “accord[s] the Board an especially wide degree of discretion on [such] questions of representation.” *Id.* at 206 (quotation marks and citations omitted).

## SUMMARY OF ARGUMENT

Local No. 7 of the United Food and Commercial Workers, AFL-CIO, represents employees working at King Soopers grocery stores located throughout Colorado. Local 7 negotiates two basic pattern agreements with King Soopers – a “meat” agreement covering employees in the meat and delicatessen departments and a “clerks” agreement covering all the other employees. App. 30-31.<sup>1</sup> At more than

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<sup>1</sup> The pattern “meat” agreement is included in the Appendix. App. 978-1047. The recognition clauses in the pattern agreement are broken down by metropolitan geographical areas, because new stores are brought under the agreement on that basis as the union attains majority support. App. 980-85. However, the substantive terms of the agreement are uniform across all areas. App. 985-1041

90% of the King Soopers stores both meat and delicatessen employees are covered by the “meat” agreement. App. 1095, 1105. *See also id.* at 35.<sup>2</sup> This case concerns an election conducted by the National Labor Relations Board in which deli employees at one store, who were not covered by the “meat” agreement, voted to join the “meat” unit at their store. App. 1104-08.

An election of the sort at issue here is known as “an *Armour-Globe* self-determination election.” App. 1092, citing *Armour & Co.*, 40 NLRB 1333 (1942), and *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937). There are two factors in deciding whether “[a] self-determination election is the proper method by which a union may add unrepresented employees to the contractual unit”: first, “the extent to which the employees to be included share a community of interest with unit employees;” and, second, “whether the employees to be added constitute an identifiable, distinct segment so as to constitute an appropriate voting group.” App. 1093, quoting *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990). The Board found that both factors were satisfied here,

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<sup>2</sup> At one store, there is a stand-alone “Clerks and Deli” agreement. App. 537. *See id.* at 37-38, 265.

because “the petitioned-for employees have a requisite community of interest with the meat unit and are a distinct, identifiable segment of the work force so as to constitute an appropriate voting group.” App. 1093.

Remarkably, King Soopers contests neither of the relevant findings with regard to whether the deli employees constituted an “appropriate voting group” for purposes of a “self-determination election” to join the “meat” unit. Instead, the company argues that the deli employees standing alone do not constitute an appropriate “bargaining unit.” Pet. Br. 35-41. However, as the Board has repeatedly explained, “a self-determination election may be appropriate regardless of whether the petitioned-for employees may be found to be a separate appropriate unit.” App. 1093 (citing NLRB decisions).

Under the long-established standards for self-determination elections, the Board correctly determined that the deli employees in question shared a community of interest with the meat department employees at their store and that they constituted an appropriate voting group for purposes of voting in a self-determination election.

## ARGUMENT

“The Board has consistently, for over 50 years, construed the Act to permit self-determination elections ‘in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act].’ 29 U.S.C. § 159(b).” *NLRB v. Raytheon Co.*, 918 F.2d 249, 254 (1st Cir. 1990). The Board has long held that “a self-determination election is the proper method by which an incumbent union . . . may add unrepresented employees to its existing unit.” *St. Vincent Charity Medical Center*, 357 NLRB 854, 855 (2011).

A self-determination election differs from an ordinary representation election in the following, highly pertinent, respects:

“An *Armour Globe* self-determination election permits employees sharing a community of interest with an already represented unit of employees to vote whether to join that unit. *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942). See also *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990). Although the Board will [in an ordinary representation case] determine first whether the petitioned-for employees constitute a separate appropriate unit, the Board has also held

that a self-determination election is the proper method by which a union may add unrepresented employees to an existing unit, if those employees share a community of interest with unit employees and constitute an identifiable, distinct segment so as to comprise an appropriate voting group. *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990).” *Unisys Corp.*, 354 NLRB 825, 829 (2009).<sup>3</sup>

Given the nature of an *Armour-Globe* self-determination election, there need be “no separate finding that the group of employees who [a]re voting to join a unit [i]s, by itself, an appropriate unit.” *Raytheon Co.*, 918 F.2d at 252. Indeed, the Board has frequently “found that, although the voting unit was not appropriate by itself, the employees were nevertheless entitled to a self-determination election in which a vote for the union would be treated as a vote for inclusion in the existing bargaining unit.” *Ibid.* (citing examples).

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<sup>3</sup> *Unisys Corp.* is not a binding NLRB precedent, because it was issued at a time when the Board lacked a quorum. *See New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). We rely on Chairman Liebman and Member Schaumber’s description as a succinct and uncontroversial statement of the law reflected in the precedents they cite.

In defining an appropriate voting group, the question is whether the employees constitute “an identifiable group with distinct interests [so] that they constitute an appropriate voting group apart from other unrepresented [employees].” *The Martin Co.*, 162 NLRB 319, 322 (1966). The Board focuses on whether the “employees are a distinct and homogenous group,” *Industrial Rayon Corp.*, 87 NLRB 4, 6 (1949), in order “to prevent injustice being done to minority groups by gerrymandering practices which would require the arbitrary inclusion of such groups in a larger unit wherein they would have no effective voice to secure the benefits of collective bargaining,” *Great Lakes Pipe Line Co.*, 92 NLRB 583, 585 (1950). To ensure that the voters have an “effective voice,” *ibid.*, it is not uncommon for the Board to identify several different voting groups for a single set of *Armour Globe* elections. *See, e.g., Raytheon Co.*, 918 F.2d at 250 (two voting groups); *The Maryland Drydock Co.*, 50 NLRB 363, 368-69 (1943) (five voting groups); *Armour & Co.*, 40 NLRB at 1336 (three voting groups).

At the same time, “an arbitrary segment of the unrepresented employees” would “not constitute an appropriate voting group.” *Capital Cities Broadcasting Corp.*, 194 NLRB 1063, 1064 (1972). In that

regard, the determinative question is whether the employees constituting the proposed voting group have such a strong identity of interests with similarly situated excluded employees as to “destroy[] the identity of the separate employee group.” *Industrial Rayon Corp.*, 87 NLRB at 6.

A. The Delicatessen Employees Constituted an Appropriate Voting Group.

In declining to review the Regional Director’s Decision and Direction of Election, the Board (Chairman Ring and Members McFerran and Kaplan) specifically found that “the deli employees are an ‘identifiable, distinct segment’ within the meaning of *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990).” App. 1552 n. 1. “In this regard,” the Board observed, “the deli employees are organized in a separate department, occupy separate classifications, perform distinct duties, have specialized training regarding those duties, work together in a distinct location, and there is no contention that there are additional employees in this department who are not included in the petitioned-for voting group.” *Ibid.*

King Soopers contests none of the specific factual findings underlying the Board’s determination that “the deli employees are an

‘identifiable, distinct segment’ within the meaning of *Warner-Lambert Co.*” App. 1552 n. 1. Indeed, as the Board observed, “[a]t the hearing, the parties stipulated that the petitioned-for deli employees are a ‘readily identifiable group.’” *Ibid. See id.* at 180-81 & 310-12.

Instead, King Soopers argues that the deli employees constitute “an inappropriate ‘micro-unit’” contrary to the Board’s standard for determining a bargaining unit as a whole. Pet. Br. 32 & 35-38. However, the Board has not found that the deli employees, standing alone, constitute a bargaining unit. What the Board found was that those employees constituted an appropriate voting group for the purpose deciding whether to join the pre-existing meat bargaining unit at their store. It is well-established that “[t]he petitioned-for employees [in such a group] need not constitute a separate appropriate unit by themselves in order to be added to an existing unit.” *St. Vincent*, 357 NLRB at 855. A unit comprised of meat *and* deli employees hardly constitutes a “micro-unit.” That is, in fact, the normal unit configuration at King Soopers stores. App. 1095, 1105. *See also id.* at 35.

King Soopers has not suggested any other group of employees that

should have been allowed to participate in the self-determination election. Given the undeniable fact that the deli employees in question are a “readily identifiable group,” App. 1552 n. 1, if the company had identified other employees that share a sufficient community of interest with the meat department employees, the Board would have simply constituted *additional* voting groups. *See, e.g., Raytheon Co.*, 918 F.2d at 250 (two voting groups); *The Maryland Drydock Co.*, 50 NLRB at 368-69 (five voting groups); *Armour & Co.*, 40 NLRB at 1336 (three voting groups). The deli employees would still have been allowed to vote, as a separate group, to join the meat department employees in a single bargaining unit. And, the result of the election would have been the same with respect to that group of employees.

B. The Delicatessen Employees Share a Community of Interest with the Meat Department Employees.

In “determin[ing] that there is a requisite community of interest to conduct a self-determination election in the petitioned-for voting group,” the Regional Director relied on record evidence that “the meat and deli employees have regular contact, are in close proximity, have the same hours, require additional food handling training than other employees, and perform some similar functions.” App. 1107. These ties

between the deli and meat employees no doubt explain why the two departments are included in the same bargaining unit at almost every King Soopers store. App. 1095, 1105. *See also id.* at 35.

King Soopers denies none of the factual predicates for the Board's determination that the deli and meat employees share sufficient interests to be placed together in the same bargaining unit. The company does, however, cite fifty year-old precedents to suggest that deli employees and meat employees cannot be included in the same unit as a matter of law. Pet. Br. 40. Those precedents are explained by the fact that "[t]he NLRB previously found meat department units were presumptively appropriate because meat cutters exercised a broad range of traditional meat cutting skills. Specifically, meat cutters exercised specialized butchering skills in cutting 'carcass meat.'" *Kmart Corp. v. NLRB*, 174 F.3d 834, 838 (7th Cir. 1999)(citations omitted). "[A]s the retail meat industry evolved in the 1980's, fewer meat departments in retail settings handled carcass meat; more handled 'boxed meat,' which arrived at the meat department in shipping boxes and was already broken down into subprimal (smaller) pieces." *Ibid.* Accordingly, "the NLRB ruled that, in meat departments handling

primarily boxed meat, as opposed to carcass meat, it would apply a traditional ‘community of interest’ analysis.” *Ibid.*

The meat department at the Kings Soopers store in this case is a perfect example of that evolution. “The meat department employees’ main function is to safely trim, display, and sell raw meat, and also to display and handle prepacked fresh and frozen meat products to customers.” App. 1096-97. “Meat department employees use filet knives to trim fat; a meat tenderizer; ice machine; and a meat slicer.” App. 1097.

“Like the meat department, the deli . . . employees’ function is to handle, prepare, cook, and sell ready-to-eat food to customers.” *Ibid.*

“The deli employees use numerous tools and equipment including three meat slicers to slice cooked meat to the customer’s specification.” *Ibid.*

“[M]eat and deli employees use knives” and both “must wear hair restraints.” App. 1098.

Given their similar job functions, both “deli and meat department employees engage in on-the-job training . . . to learn how to operate equipment in their departments.” App. 1099. “The deli and meat employees receive additional computer based training relating to safe

food-handling procedures.” *Ibid.* As a result, “the equipment and processes [in the meat and deli departments] cannot be operated by employees outside of the[se] departments without specific training and shadowing.” App. 1106.<sup>4</sup>

King Soopers does *not* argue that meat and deli employees lack a sufficient community of interest to be included in the same bargaining unit. The company could hardly sustain that argument, given the similar function and processes of the two departments, and given the two groups being in the same unit at over 90% of the King Soopers stores. App. 1095, 1105. *See also id.* at 35. Rather, the company complains that allowing the deli employees in this case to join the existing meat unit at their store would alter the configuration of that unit. Pet. Br. 48-53. But the whole point of conducting a self-determination election is to alter the configuration of an existing bargaining unit by adding a group of employees through NLRB processes. *See St. Vincent Charity Medical Center*, 357 NLRB at 855

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<sup>4</sup> “The deli and meat departments are immediately adjacent to one another.” App. 1100. And, both departments have the same hours operation, which differ from those of the store generally. App. 1097.

("[A] self-determination election is the proper method by which an incumbent union . . . may add unrepresented employees to its existing unit.").

King Soopers' argument reduces to the proposition that no self-determination election at all could have been conducted among the group of employees in question. Instead, the company asserts, those employees should have sought to form an entirely different bargaining unit composed of deli and other nonmeat groups of employees. Pet. Br. 37. King Soopers and Local 7 have agreed to such a "Clerks & Deli" unit at one store, and, no doubt, they could have agreed to do so again at the store in question. App. 37-38 & 537-40. But the record shows that it is much more common for deli employees to be covered by the "meat" agreement. App. 1095-96 And that is all the self-determination election here accomplished.

As the First Circuit has remarked, "The Board has consistently . . . construed the Act to permit self-determination elections 'in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act].'" *Raytheon Co.*, 918 F.2d at 254. The choice of the employees at issue in this case – by an overwhelming margin – was

to be included in a unit with meat department employees. King Soopers has presented no reason that the Board should have refused to honor the employees' choice.

### CONCLUSION

The decision and order of the National Labor Relations Board should be enforced.

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Date: November 4, 2019

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2019, the foregoing Brief for Intervenor United Food & Commercial Workers International Union, Local 7, was served on all parties or their counsel of record through the CM/ECF system.

/s/ James B. Coppess