

**ORAL ARGUMENT NOT YET SCHEDULED**

No. 18-1189

[Consolidated with No. 18-1194]

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

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COLORADO SYMPHONY ASSOCIATION

*Petitioner/Cross-Respondent*

v.

NATIONAL LABOR RELATIONS BOARD

*Respondent/Cross-Petitioner*

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PETITION FOR REVIEW AND  
CROSS-APPLICATION FOR ENFORCEMENT  
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD  
NLRB CASE NOS. 27-CA-140724, 27-CA-155238, 27-CA-161339, AND  
27-CA-179032

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**PETITIONER'S REPLY BRIEF**

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SHERMAN & HOWARD L.L.C

Patrick R. Scully  
633 17th St., Suite 3000  
Denver, Colorado 80202  
Telephone: (303) 299-8218

Jonathon M. Watson  
633 17th St., Suite 3000  
Denver, Colorado 80202  
Telephone: (303) 299-8286

*Attorneys for Petitioner*

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## **GLOSSARY OF ABBREVIATIONS**

Petitioner relies on, and incorporates herein, the Glossary used in its Opening Brief.

## **STATUTES AND REGULATIONS**

All applicable statutes and regulations were reproduced in Petitioner's Opening Brief.

## **PRELIMINARY STATEMENT**

Petitioner, Colorado Symphony Association ("CSA" or "Petitioner") filed its Opening Brief ("OB") on September 3, 2019 asking the Court to set aside the National Labor Relations Board's ("Board" or "NLRB") July 3, 2018 Decision. On November 15, 2019, the Board's General Counsel ("GC") filed its Answering Brief ("AB"). On November 22, 2019, the Intervenor ("Intervenor") filed its Intervening Brief ("IB"). CSA files this Reply in Support of its Opening Brief ("Reply"). The Board's Decision is not supported by substantial evidence and departs from established precedent without reasoned justification, it must be set aside in its entirety.

## **SUMMARY OF ARGUMENT**

The GC and Intervenor masterfully obscure the significant legal issues by misrepresenting the record, mischaracterizing CSA's Opening Brief, and ignoring the relevant law. The purpose of this strategy is to distract the Court from the one undeniable issue the Board refuses to address: the absence of any legal analysis regarding the Board's finding that AFM violated its duty to bargain in good faith with CSA. The reason for this glaring omission is clear. The Board has never found that an employer is forced to bargain in the face of a union's continued refusal to bargain with that employer.

AFM engaged in continued and unrelenting bullying strategies in order to pressure CSA to sign on to a multi-employer agreement over which CSA was not permitted to bargain. When CSA resisted, AFM delayed bargaining, refused to bargain, and admitted it would never allow CSA to perform commercial work. The undisputed record evidence shows that the Board failed to analyze the effect of the Union's bad faith bargaining conduct. This fact cannot be argued away by simply blaming all wrongful conduct on CSA, as this Court held in *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630 (D.C. Cir. 2017). The Union's bad faith conduct is a relevant consideration and should have been considered by the Board *in the first instance*. The ALJ and the Board refused to do so, and thus, the Board's Order cannot possibly be a product of reasoned decisionmaking.

The GC's and Intervenor's approach of raising new allegations, citing agreements not signed by CSA, and misrepresenting the record is akin to throwing mud at the wall to see what sticks. This tactic, however, is an insufficient distraction from the Board's unsupported Order. The Court should not put its stamp on AFM's successful bad faith bargaining strategy, ratified by the Board, to prevent CSA from performing commercial work.

### ARGUMENT

#### **A. CSA DID NOT WAIVE ANY ARGUMENT THAT ITS AGREEMENT WAS LAWFULLY IMPLEMENTED.**

The GC improperly argues that CSA waived its position that it lawfully implemented its bargaining offer to AFM. GC claims that CSA's unwillingness to re-argue its position on specific media projects performed by CSA employees *after* CSA lawfully implemented its offer is a waiver that the projects were lawfully performed. The GC's argument, however, underscores the very point CSA made in its Opening Brief. That is, every project occurring *after* CSA's lawful implementation of its bargaining offer was lawfully performed. As a matter of law, CSA cannot have unlawfully performed a project if the project was pursuant to its properly implemented agreement. Accordingly, the GC's waiver arguments add nothing of substance to the actual issues in this case.

CSA's Opening Brief focused on the ALJ's failure to analyze the evidence of AFM's bad faith bargaining. During an eight month period, CSA requested to meet

individually with AFM nine separate times, with AFM refusing to meet each time to negotiate an individual contract. The ALJ disregarded the Union's refusal by the unsubstantiated finding AFM "intended to bargain with Respondent for a successor to the IMA (albeit on an improperly delayed timetable)." App. 2955, fn. 42. The law, however, requires AFM to do more than just *intend* to bargain with CSA. Instead, AFM must take cognizable steps to bargain. *See Goodyear*, 312 NLRB 674 fn. 1 (1993) (union "must act with *due diligence* to preserve its request to bargain"; where there was discussion but no agreement on future date for negotiations, "prudence dictates that the Union follow up on its demand.") (emphasis added). The ALJ even found that AFM maintained a "plan to delay bargaining with the CSA until the AFM concluded negotiations with the EMA." App. 2906:35-36. Despite the overwhelming evidence that AFM refused to bargain over a long period of time, the ALJ still found that CSA, *not* AFM, violated the Act. In fact, the ALJ went one step further by approving the Union's bullying tactics.

The GC's attempts to distract the Court by failing to address the ALJ's lack of reasoned legal analysis regarding AFM's refusal to bargain in good faith. The GC obsessively recounts contractual requirements under agreements that CSA has never negotiated and, in most cases, has never seen. The GC erroneously argues that a unilateral implementation of a bargaining proposal can only occur after impasse. *See Serramonte Oldsmobile, Inc. v. N.L.R.B.*, 86 F.3d 227, 235 (D.C. Cir. 1996)

("[a]lthough a negotiating party generally may not unilaterally impose contract terms without first bargaining to impasse, the Board has recognized an exception when, in response to one party's 'diligent and earnest efforts to engage in bargaining,' the other party 'insists on continually avoiding or delaying bargaining.'") (quoting *M & M Contractors*, 262 NLRB 1472, 1476 (1982)). The principle expressed in *Serramonte* is especially true in this case where the Union does not even come to the bargaining table for almost a year. As this Court most recently remarked, "the Board was obligated to engage with evidence that showed that the Company's conduct was lawful." *Windsor Redding Care Ctr., LLC v. NLRB*, 2019 WL 6704931, \*4 (D.C. Cir. Dec. 10, 2019) (citing *David Saxe Productions, LLC v. NLRB*, 888 F.3d 1305, 1312 (D.C. Cir. 2018)). The GC attempts to further distract by asserting new allegations regarding CSA's lawful negotiations with the Local Union's negotiating committee and engages in an irrelevant discussion of "Take the Field." See AB at 20 and 58. These allegations were never alleged to be unlawful in the Complaint and provide no evidence to support the ALJ's baseless findings. Instead, Board Counsel attempts to prejudice the panel's consideration and fill the gaping void of time during which AFM refused to bargain with CSA.

The relevant facts are undisputed. AFM failed and refused to bargain in good faith—over and over and over again. It then sent representatives without authority to bargain, further delayed discussions, and declared away from the table that it

would not bargain with CSA regarding commercial work.<sup>1</sup> Neither the Board nor AFM dispute that AFM never made a substantive proposal to CSA. Rather, at all times AFM insisted that CSA sign the multi-employer IMA, which perpetuated AFM's market division scheme. The ALJ refused to consider this evidence as required by this Court's precedent. *See CitiSteel USA, Inc. v. N.L.R.B.*, 53 F.3d 350, 354 (D.C. Cir. 1995) (the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Without a reasoned decision, the Board's order must be set aside.

**B. CSA'S JUSTIFIED REFUSAL TO PROVIDE INFORMATION DOES NOT SUPPORT AFM'S REFUSAL TO ENGAGE IN BARGAINING.**

It is undisputed that CSA had a legitimate confidentiality interest in the information withheld from AFM. App. 437:2-4; 1175:24-1176:4. When CSA asserted a legitimate confidentiality interest in the requested information, CSA was "entitled to discuss [those] confidentiality concerns regarding the information request with the Union so as to try to develop mutually agreeable protective conditions for its disclosure." *Silver Bros. Co., Inc.*, 312 NLRB 1060, 1062 (1993).

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<sup>1</sup> The GC's attempt to discredit Kern's testimony regarding AFM's declaration that it would not negotiate with CSA over commercial work is improper. The ALJ superficially found that Bartels relayed this information to Kern. Hair later confirmed his unwillingness to negotiate with CSA over commercial work. Finally, Vrisenga, the President of the Local Union, also confirmed AFM's refusal to bargain commercial work with CSA.

CSA addressed this concern with AFM by proposing a Confidentiality Agreement to protect select information prior to producing it to the Union.

The GC focuses on CSA's "insistence" on a monetary damages clause in the confidentiality agreement to argue that such a request was an unreasonable protection. This argument holds no weight when analyzed with the actual record evidence. AFM proposed a change to the remedies clause included in CSA's initial draft of the Confidentiality Agreement. The AFM's proposal, however, also *contemplated money damages* for any breach of the agreement. *See* App. 1173:12-14; 1175:5-8; 1604:25-1606:4; 2914:43-44 (AFM's proposal "arguably still contemplated 'money damages.']"). To sidestep this fact, the GC blatantly misrepresents the record in two ways. First, the GC argues that CSA rejected AFM's proposed changes despite AFM keeping the monetary damages remedy. Second, the GC inexplicably argues that AFM's inclusion of a monetary damages provision was "inadvertent" and an "oversight." The record evidence supports neither of these two excuses.

CSA did not reject AFM's provision because of the remedies provision, but rejected it only because it did not include the *venue selection clause*. App. 2855-2856; 1174:14-23. Thus, the Parties essentially agreed that a monetary damages provision was appropriate in the first instance. Furthermore, there is no record evidence to suggest AFM's inclusion of the monetary damages language was

inadvertent, mistaken, or an oversight. Inexplicably, the Board position proclaims that the *subjective intent* of AFM's first proposal (i.e. that it did not intend to include a monetary damages remedy) can serve as the basis for CSA's bad faith. AFM never communicated that its proposed remedies clause was a mistake, inadvertent, or an oversight. Instead, AFM flatly refused to agree to a monetary damage provision after already accepting a remedies clause which contemplated money damages. By representing that the agreement should include an all-inclusive remedies clause and then, without explanation, refusing to agree to such a provision is the textbook definition of regressive bargaining. Accordingly, AFM could not rely on the presence of such a clause as a basis to reject CSA's proposed confidentiality agreement.

The ALJ, the Board, the GC, and the Intervenor rely almost exclusively on CSA not providing the requested information as the justification to why AFM refused to bargain. Essentially, they argue CSA's refusal to provide the documents without a confidentiality agreement in place excused AFM's duty to bargain in good faith because it allegedly could not make a reasoned bargaining proposal without the information. Any reasonable analysis of the facts, however, shows that this deception to circumvent AFM's duties as an alleged bargaining representative. This approach takes one bad act by AFM (engaging in regressive bargaining over the Confidentiality Agreement) to justify its other bad act of failing to bargain over

commercial work. Put simply, one bad act does not and cannot justify another bad act. *See Shell Oil Co. v. N.L.R.B.*, 457 F.2d 615, 618 (9th Cir. 1972) (the Court found no violation of the Act, stating, “that the Company has behaved in a reasonable and conciliatory manner throughout while the Union has been demanding, arrogant, and intransigent. It would be most anomalous if, under these circumstances, we were to ratify the Board’s determination that the Company, rather than the Union, refused to bargain.”). AFM extended its near yearlong refusal to bargain with this disingenuous argument that it could not bargain without the information requested. The Board is supposed to protect *both* parties during negotiations, not simply accept excuses in furtherance of AFM’s strategy to avoid good faith bargaining over commercial work. AFM’s continuous refusal to negotiate the Agreement in good faith and regressive bargaining tactics regarding the Confidentiality Agreement require the Decision be set aside.

**C. AFM’S ALLEGED JOINT REPRESENTATIVE STATUS WAS VOID *AB INITIO*.**

The GC argues that the Board properly found that AFM was the joint-bargaining representative of CSA’s employees. The undisputed record evidence and Board precedent, however, directly contradict the Board’s findings. It is well-established that “when two labor organizations claim to be the bargaining representatives of the employees in an appropriate unit, there must be clear proof that a majority of the employees in the unit designated both unions to represent them

on a joint basis.” *Leroy Stoves and Motor Co.*, 127 N.L.R.B. 19 (1960). The Board’s “remedial bargaining order cannot issue in favor of joint petitioners unless there is proof that a majority of unit employees designated both unions to represent them on a joint basis.” *B-P Custom Bldg. Products, Inc.*, 251 N.L.R.B. 1337 (1980). The NLRB requires evidence of majority support for *both* alleged representatives or such recognition is void *ab initio*.

The IMA provides no language indicating that AFM made any showing of majority support. App. 1805 (Article II). The IMA does not state that CSA’s recognition was based on a contemporaneous showing, or offer by AFM to show, that the Union had majority support. *Id.* AFM did not hold a representational election nor did it have majority support from employees. App. 941:16-22; 1075:21-1076:9. It is undisputed there were *zero employees* in the purported “unit” at the time of execution. App. 406:6-412:16. Without a showing of majority support, the GC is unable to sustain his burden of proving AFM had lawful 9(a) status, and thus, the IMA was void at signing. *See Nova Plumbing, Inc. v. N.L.R.B.*, 330 F.3d 531 (D.C. Cir. 2003); *Staunton Fuel & Material, Inc.*, 335 NLRB 717 (2001).

The GC relies heavily on CSA position statements to argue that CSA admitted joint representative status. *See* AB at 36-37. A position statement by CSA’s prior counsel, however, has no bearing on whether AFM was a joint representative because regardless of what an employer may agree to, it cannot impose a bargaining

relationship on its employees without majority support. Indeed, relying on position statements is as improper as suggesting that unlawful recognition is proper to uphold simply because of a passage of time. *See Majestic Weaving Co., Inc. of New York*, 147 NLRB 859 (1964) (the Board held that an agreement conditioned upon the union achieving majority status interfered with the employees Section 7 rights).

The GC's further reliance on the Parties' alleged bargaining history, purported recognition provision in the IMA, and the language in the local agreement is similarly unfounded. In relying on the Parties' bargaining history, the GC asserts that the CSA's request to bargain with AFM is evidence that AFM is a joint bargaining representative. Again, this is simply contrary to the law. In *Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031 (D.C. Cir. 2018), this Court rejected the union's reliance on bargaining history, despite the company signing successive agreements that facially appeared to give the union 9(a) status because "[n]one of the usual indicia of majority support – authorization cards or votes – was introduced[, and] apparently does not exist." *Id.* Nor was the Court persuaded by the contract's statement that the union was the "exclusive bargaining representative" because "[t]here is no dispute that the [c]ompany had zero employees at the time it signed on that contract language." *Id.*

The Board attempts to distract from the insufficient language in the IMA, purporting to extend recognition to employees performing media projects by citing

to an unpublished opinion by this court.<sup>2</sup> *Musical Arts Ass'n v. NLRB*, 466 Fed. App'x. 7 (D.C. Cir. 2012). This reliance, however, is misplaced. There was no dispute in that case that the agreed-upon bylaws, which provided joint representative status, were binding on the employer. *Id.* Furthermore, it appears from the Board's decision that there were *in fact* employees in the purported unit at the time of joint recognition. *The Musical Arts Association*, 356 NLRB 1470 (2011). In comparison, there is no language in the IMA to confer joint representative status and there were no employees in the purported unit. To overcome this glaring issue, the GC attempts to bootstrap the DMA's admitted representational status, to show joint representational status for AFM. There is no authority that CSA's recognition of DMA constituted recognition of AFM, a separate union. This approach is wholly insufficient to overcome the undisputed facts which show that the bargaining agreement was void *ab initio*.

The GC dismisses CSA's cited authority by arguing that they have no basis in non-construction cases. *See* AB at 37. In doing so, however, the GC implicitly argues that construction employees have more rights than the CSA's employees. It is well-settled that in the construction industry, an employer and a union may agree to a

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<sup>2</sup> The D.C. Circuit Court rules provide that “[w]hile unpublished dispositions may be cited to the court in accordance with FRAP 32.1 and Circuit Rule 32.1(b)(1), a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.” D.C.CIR. R. 36(d)(2).

contract *without* any employees in the unit. This is not the case in non-construction industries and as the GC aptly points out, CSA is not in the construction industry. Accordingly, an agreement cannot impose recognition on a unit with zero employees because it violates the future employees' Section 7 rights.

Finally, the GC argues, once again, that CSA somehow waived an argument in its Opening Brief. Specifically, the GC asserts that CSA waived any argument that it lawfully withdrew recognition from AFM and that it failed to address the ALJ's finding that it refused AFM's June 2016 information request. Again, this is disingenuous and mischaracterizes CSA's Opening Brief. If, as CSA argues, the IMA was void *ab initio*, CSA cannot have unlawfully withdrawn recognition and had no duty to answer any information request by AFM.

The GC's *post-hoc* attempts to justify the ALJ's misapplication of the law is insufficient to cure the decision in the first instance. *United Food & Commercial Workers Int'l Union, Local 150-A v. NLRB*, 880 F.2d 1422, 1436-37 (D.C. Cir. 1989) (It is not the Court's role to substantiate the Board's findings; "the duty to justify lies exclusively with the Board in the first instance."). The Board's decision finding that the IMA conveyed joint representative status is unsupported by substantial evidence and not the product of reasoned decisionmaking. Accordingly, the Order must be set aside.

**D. AFM’S UNLAWFUL MARKET DIVISION SCHEME CAN ONLY BE ADDRESSED BY A COURT WITH ACTUAL AUTHORITY.**

AFM does not dispute that it engaged in anti-competitive behavior to prevent CSA from competing with recording companies, movie studios, and TV and video game studios, among others. *See* IB at 15; App. 69:13-22; 356:13-25. While this argument was not raised before the Board, the GC is mistaken that CSA may not raise this issue now. *See Noel Canning v. NLRB*, 705 F.3d 490, 496 (D.C. Cir. 2013) (employer’s failure to raise constitutional argument before NLRB did not, under Section 10(e) of the Act, bar employer from raising argument on appeal of the resulting Board order. Such failure was excused as an “extraordinary circumstance” because the Board lacks the very power to act and implicates fundamental separation of powers concerns). Specifically, “an administrative proceeding is not required in a case which must eventually be decided on a controlling legal issue wholly unrelated to the issue before the administrative agency.” *Telecom Plus of Downstate N.Y., Inc. v. Electrical Workers IBEW Local 3*, 719 F.2d 613, 615 (2d Cir. 1983).

This Court has repeatedly held that when an argument is “premised on the Board’s lack of authority to act,” the Court may properly address the argument “no matter when [it was] first raised.” *SSC Mystic Operating Co. v. NLRB*, 801 F.3d 302, 308 (D.C. Cir. 2015). Even the case cited by the GC, *Marquez Bros. Enters., Inc. v. NLRB*, 650 Fed. Appx. 25, 27 (D.C. Cir. 2016), applied the NLRA exhaustion doctrine *only because* the “petitioner’s challenge is not ‘based on the agency’s lack

of authority to take any action at all.” The Board has no authority under the Act to decide claims brought under the Sherman Act nor has the Board *actually* adjudicated an antitrust matter. The GC’s vague references to other laws has no bearing on whether the Board has the actual authority to substantively adjudicate AFM’s market division scheme. Accordingly, this issue is properly before the Court.

As CSA discussed in its Opening Brief, AFM negotiated and maintained commercial agreements with several *for-profit* entities, including record labels, film companies, video game producers, and advertising companies for the purpose of restraining trade in the media market. OB at 64-68; App. 69:13-22; 356:13-25. Intervenor *admits* this scheme in its Brief by stating “these agreements set nationwide standards, preventing AFM-represented musicians and their employers from racing to the bottom by undercutting one another in the national recording markets.” IB at 15. In furtherance of this restraint, AFM refused to give CSA the opportunity to participate in the commercial market *to the detriment of symphony musicians*. Indeed, AFM has employed this scheme to the direct disadvantage of its own alleged members.

AFM imposed direct constraints on CSA’s ability to perform commercial work and its ability to compete in the commercial media markets to prevent CSA from penetrating markets controlled by AFM’s for-profit cohorts. The Board’s acceptance of the IMA directly condones AFM’s market division scheme. The Court

should not tolerate the AFM's violation of the Sherman Act and cannot put its stamp of approval on AFM's blatant and admitted market division scheme.

**E. INTERVENOR'S BRIEF MISREPRESENTS THE RECORD AND ADMITS TO IMPLEMENTING AN ILLEGAL MARKET DIVISION SCHEME.**

Intervenor's brief is nothing more than a misstatement of record evidence in an attempt to mislead the Court. Specifically, Intervenor took the bold approach to suggest, against all evidence, that the IMA does not prevent CSA from doing commercial work. *See* IB at 40-41. The plain language of the IMA, however, clearly prevents CSA from performing commercial work without approval from AFM, which it has never given. Indeed, the AFM has never considered giving CSA approval to do commercial work as evidenced by AFM's refusal to bargain over the work at all. Even the President of the local stated that CSA was not permitted to do commercial work. AFM's attempt to bury the fact that it explicitly prevented CSA from performing commercial work it reserves for its for-profit partners misstates the record and should be disregarded by the Court.

Intervenor's Brief, however, did demonstrate exactly how AFM has strategically and purposefully divided the music industry. The Intervenor described that the purpose of their separate industry divisions is to prevent competition in the commercial markets. IB at 11-13. The barrier set forth in the IMA agreement is thus

an admitted threat to CSA, CSA's employees, and competition in the marketplace. Any argument to the contrary is unsupported by the record evidence.

### **CONCLUSION**

Based on the Petitioner's Opening Brief and the foregoing, the Court should set aside the Board's Decision in its entirety.

Respectfully submitted this 12th day of December, 2019.

SHERMAN & HOWARD L.L.C.

*s/ Patrick R. Scully*

Patrick R. Scully

Jonathon M. Watson

633 Seventeenth Street, Suite 3000

Denver, CO 80202

Telephone: (303) 297-2900

Facsimile: (303) 298-0940

Email: pscully@shermanhoward.com

Email: jwatson@shermanhoward.com

*Attorneys for Petitioner Colorado Symphony  
Association*

**CERTIFICATE OF COMPLIANCE**

This brief complies with the 6,500-word type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(ii) because the brief contains 3,770 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 31(a)(5) and the type style requirements of Fed. R. App. P. 31(a)(6) because the brief has been prepared proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

**CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on this 12th day of December, 2019, I electronically filed the foregoing **PETITIONER'S REPLY BRIEF** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Linda Dreeben, Deputy Associate General Counsel  
Elizabeth Heaney, Attorney  
Greg Lauro, Attorney  
National Labor Relations Board  
1015 Half Street SE, Suite 8100  
Washington, DC 20570  
Appellatecourt@nlrb.gov; Linda.dreeben@nlrb.gov  
Elizabeth.heaney@nlrb.gov; Greg.lauro@nlrb.gov

Abigail V. Carter  
Adam Bellotti  
Bredhoff & Kaiser, P.L.L.C.  
805 15<sup>th</sup> Street, N.W., Suite 100  
Washington, D.C. 20005  
ACarter@bredhoff.com;  
abellotti@bredhoff.com

I further certify that on this 12th day of December, 2019, I electronically served a copy of the above **PETITIONER'S REPLY BRIEF** upon the following:

Paula S. Sawyer, Regional Director *[via email]*  
Michelle Devitt, Esq. *[via email]*  
Counsel for General Counsel  
National Labor Relations Board, Region 27  
Byron Rogers Federal Office Building  
1961 Stout Street, Suite 13-103  
Denver, CO 80294  
Paula.Sawyer@nlrb.gov  
Michelle.Devitt@nlrb.gov

*s/ Laura J. Kostyk*  
\_\_\_\_\_  
Laura J. Kostyk, Legal Secretary