

No. 20-1032 (consolidated with 20-1069)

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

**ALASKA COMMUNICATIONS SYSTEMS HOLDINGS, INC.,
*Petitioner/Cross-Respondent,***

v.

**NATIONAL LABOR RELATIONS BOARD,
*Respondent/Cross-Petitioner.***

**PETITION FOR REVIEW
FROM THE NATIONAL LABOR RELATIONS BOARD
[Not Yet Scheduled for Oral Argument]**

REPLY BRIEF FOR PETITIONER/CROSS-RESPONDENT

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GLOSSARY

BoardNational Labor Relations Board

NLRA or ActNational Labor Relations Act

INTRODUCTION

The Board's Response brief displays a blasé and clinical detachment to the actions of the Regional Director, bordering on insouciance. The Regional Director's decision, rubber-stamped by the National Labor Relations Board, denied Alaska Communications Systems Holdings, Inc.'s ("Alaska Communications" or the "Company") its rights to due process.

The Regional Director utilized his power to create, out of whole cloth, a bargaining unit acceptable for a self-determination election, without affording Alaska Communications the ability to defend itself on the key issues he relied upon in creating that unit. Once the Regional Director gerrymandered the voting pool, he misapplied the facts to shift the clear weight of evidence regarding the community of interest factors towards the bargaining unit he created. This Reply responds chiefly to the most egregious examples of the Board's acquiescence to the Regional Director's actions.

The Board focuses this Court on its power to "examine the alternative units suggested by the parties," and rightly notes that it "has discretion to select an appropriate unit that is different from the

alternative proposals of the parties.” (Resp. Br. p. 19). Alaska Communications may agree with the Board that the unit it created could be “an” appropriate unit in theory. But, we do not live or litigate in the realm of the theoretical. The issues brought forward at the beginning of the hearing by the Union, and confirmed throughout the proceedings by the Hearing Officer, revolved around whether the petitioned-for unit was appropriate for inclusion into the existing Alaska unit. The answer, by the Regional Director’s own admission, was “no.” The power to create an alternate unit cannot exist without proper notice and due process.

Had the Union, or the Hearing Officer notified Company counsel of the possible inclusion of the two Alaska-based employees at any meaningful time prior to the close of the proceedings, Alaska Communications would have had the opportunity to put forth facts and case law supporting its position in full. Further, it could have revised its position or amended its strategy as it related to the hearing, with minimal prejudice to its position.

Even after the hearing, the Regional Director had several avenues to remedy this oversight prior to the issuance of the Decision and

Direction of Election. He could have reopened the record and directed the parties to put forth additional evidence on these employees. He could have requested that the parties file supplemental briefs specifically addressing these employees. The unavoidable fact is that he did not and Alaska Communications has been unfairly prejudiced because of it.

Once this Court reviews the Regional Director's actions at the hearing, it is imperative to review the Regional Director's analysis of the underlying facts. It is true the Regional Director has broad discretion to determine appropriate units, but "broad discretion" cannot be a shield the Regional Director uses to avoid a thorough and consistent analysis. Boiling this case down to, "those people in Alaska fix communications equipment just like those people in Oregon" does an injustice to the Company as outlined in both its primary brief and in more detail below.

If this Court condones the actions of the Regional Director in this case as lawful, the hearing procedure itself is meaningless. It becomes nothing more than a show trial where the parties throw information upon a wall, without any notion about what the Regional Director will

find relevant or useful, and without any idea what issue the Regional Director will address or find dispositive.

ARGUMENT

I. THE BOARD DEPRIVED THE COMPANY OF DUE PROCESS.

The Board deprived the Company of due process and an opportunity to be heard, because it failed to follow its precedent and procedure; because it failed to allow the Company to submit evidence on the dispositive issue of the hearing; and, because the 2014 Rules as applied fail both steps of the *Chevron* analysis.

A. The Regional Director Failed to Adhere to the NLRB Rules and Regulations.

Section II.A of the Board's brief claims that it did not violate NLRB Rules & Regulations Section 102.60–67, which were in place at the time of the hearing, because the Company entered evidence regarding two Alaska-based Cable Systems Group employees and because the Company's brief discussed the two Alaska-based Cable Systems Employees. That argument fails because, as discussed below, the Company did not have any notice or ability to enter relevant evidence

regarding the Alaska-based Cable Systems employees and the issue that the Regional Director considered dispositive.

No dispute exists that NLRB Rules and Regulations bar parties from “raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position.” 29 C.F.R. § 102.66(d). Here, the Board concedes that point. (Resp. Br. p. 41).

The Board only claims that the Company noted the exclusion of the Alaska-based employees at hearing, on brief after the filing of its Statement of Position, and the Union did not change its position until the conclusion of the hearing. The Board argues that as a result it did not violate Sections 102.60–67. All of these facts highlight the very failure to follow precedent and procedure.

Following the Statement of Position and the Union having the ability to respond to the Company’s position, according to Section 102.66(b), the Union needed to amend the petition, respond to the position statement, or state that it would proceed in an alternative unit. Here, the Union did not do that. Section 102.66(d) says that those

failures preclude pursuit of the other issues. The Board argues otherwise.

Here, the Hearing Officer even articulated the unit issue in dispute at the hearing, stating, “the Regional Director has directed that the following issues will be litigated in this proceeding. Number one, **the issue regarding the community of interest with the petitioned-for unit and the existing unit. . . .**” JA 4 (emphasis added). The petitioned-for unit did not include the Alaska-based employees. Furthermore, the Hearing Officer did not state that the parties would litigate the more expansive issues of what is the appropriate unit or what is an appropriate unit. Rather, the Hearing Officer identified a narrow issue for the parties: the community of interest with the petitioned-for unit and the existing unit.

When the hearing commenced, the Company proceeded to point out the issues between the petitioned-for unit, which excluded the Alaska-based Cable Systems Group employees, and the existing unit. The Company highlighted the obvious that the Regional Director similarly identified multiple times in his Decision and Direction of

Election: the exclusion of the Alaska-based employees rendered the petitioned-for unit inappropriate. (JA405).

The Board argues it, “had an ample evidentiary basis in finding the petitioned-for unit to be too narrow and directing an election among all Cable Systems Group employees.” (Resp. Br. p. 45). Indeed, the Board advances that “[a] minor expansion of the unit is not unusual and is well within the Board’s discretion.” (*Id.*). While the Board cites *Fleming Foods, Inc.*, 313 NLRB 948, 949 (1994), to support its position, again, as discussed in the Company’s opening brief, that case stands for the proposition that the Board can determine a unit larger than the one petitioned-for, when appropriate, and when both parties have fully briefed and articulated the merits of their positions.

While the Board argues, “the unit issue was briefed here,” that statement is inaccurate. (Resp. Br. p. 45). The parties briefed “the issue regarding the community of interest with the petitioned-for unit and the existing unit.” The parties did not brief the issue regarding the appropriateness of including the Alaska-based employees in the unit. The Company merely highlighted during the hearing and on brief that excluding the Alaska-based employees from the unit plainly made the

petitioned-for unit inappropriate, a conclusion with which the Regional Director agreed.

The Company did not address at hearing whether inclusion of the full Cable System Group was proper. For example, the Company did not provide evidence regarding the appropriateness of the full Cable Systems Group. Significantly, the Board makes no claim to the contrary. Similarly, the Company did not argue the appropriateness of the full Cable Systems Group in its post-hearing brief. Again, the Board does not assert otherwise. The Hearing Officer articulated a narrow issue and the Company responded. While the Board may argue that it is “charged under Section 9(b) of the Act with the power to define the appropriate bargaining unit,” subsequent to enacting 9(b), the Board instituted Rules that it needed to follow when the parties disputed the appropriateness of an issue. (Resp. Br. p. 45).

Here, the Regional Director identified the issue after the Company entered its Statement of Position and the Union, having failed to change its position or state it would potentially proceed in an alternative unit (as required by Section 102.66(b)), was “precluded” under Rule 102.66(d) from “presenting argument concerning” whether the Alaska-

based employees could belong to the petitioned-for unit. In response to the Company highlighting that their exclusion created an inappropriate unit, the Union could have challenged that contention. Section 102.66(d) did not allow the Union to make a wholesale change to its petitioned-for unit, which goes beyond contesting the issue raised in the Company's position statement. Because the Regional Director not only made that wholesale change to the unit, but also did it unilaterally and without any notice to the Company, the Regional Director's decision prejudiced Alaska Communications. Even though the Company had the ability to brief *an issue* related to the Alaska-based Cable Systems Group employees, the Board did not notify the Company of the dispositive issue that would decide the case, which means the Board failed to comply with Section 102.66(a)–(d). The failure to identify the determinative issue of the hearing renders the Regional Director's and the Board's decision void. This Court must not let such an error stand.

B. The Board's Contention that the Company Had Notice of the Regional Director's Decision to Amend the Issues Outlined at the Hearing and the Opportunity to Address it is Neither Supported by the Record Nor Common Sense.

The Board argues that it did not deprive the Company of due process because it entered evidence regarding the Alaska-based Cable Systems Group employees and because the Board gets to determine the unit. That argument fails because, as described below, the Board only gets to determine the unit once parties have the opportunity to enter evidence on the issues that will determine the appropriate unit. Here, that did not happen.

As an initial matter, the Board agrees with the Company's description of "the procedure employed by the Board to narrow the issues." (Resp. Br. p. 47). The Board argues, however, that the Company uses a "sleight of hand" by "hyper-specific framing" of the issue at hearing. *Id.*) The Board specifically concedes, "at the outset of the hearing, however, there was no doubt that that the purpose was to resolve whether a **community of interest existed between the proposed unit and the existing unit.**" (*Id.*) (Emphasis added). The Board tries to detract from the significance of that fact, stating the representation hearing is not adversarial, but a fact-finding hearing and claims that the Company never was precluded from introducing

evidence at the hearing pertaining to the two Alaska-based employees. Herein lies the problem with the Board's position.

The Board cannot say what evidence the Company would or would not have entered during the hearing had it been in a position to address an alternative unit. The Board points out that on multiple occasions the Company entered evidence regarding the Alaska-based Cable Systems Group employees. That evidence clearly demonstrated that their exclusion made the petitioned-for unit inappropriate. The Company entered evidence regarding the petitioned-for unit and specifically demonstrated a fatal flaw in that unit after the Hearing Officer, the Union, and the Company agreed about the scope of the hearing. The Company had no need to enter evidence regarding any other issue. Nor did the Company have any need to argue any other positions. Indeed, the Hearing Officer specifically said at the outset of the hearing “[t]he Regional Director has directed that the following issues will be litigated in this proceeding. Number one, the issue regarding the community of interest with the petitioned-for unit and the existing unit” JA 4. At no point did the Company present evidence about the lack of a community of interest between the entire Cable Systems Group and the

existing unit because it was never put on notice that this was an issue.

At no point during the hearing did the Hearing Officer specifically state that the Region will consider or the parties will litigate any of the following issues:

- Whether the petitioned-for unit should include the Alaska-based employees?
- If the petitioned-for unit included the Alaska-based employees, does the Cable Systems Group have a community of interest with the existing unit? Or,
- What is an appropriate unit?

Rather, the Hearing Officer only articulated the issue as “resolve whether a community of interest existed between the proposed unit and the existing unit.” (JA 4). Consequently, the Company pointed out the obvious flaw in the petitioned-for unit and did not enter evidence on any other issue or question. Indeed, no need existed. In fact, because the Regional Director only identified the single issue regarding the community of interest, the Company had no need to submit evidence on any other subject as Section 102.64(a) states “[t]he purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists **if a proper petition has been filed concerning a unit appropriate for the**

purposes of collective bargaining” (Emphasis added). The Company submitted evidence to show that the petition did not “concern[] a unit appropriate for the purposes of collective bargaining.” (*Id.*) The Regional Director agreed the petitioned-for unit did not concern a unit appropriate for collective bargaining.

The Regional Director’s decision to consider something other than the petitioned-for unit deprived the Company of due process because it deviated from the rule process set forth in Section 102.60–67 of the Rules and consequently did not identify all issues or unit iterations the Company needed to consider. Without identifying all the issues, the Board cannot reasonably claim that the Company received its right under Section 102.66(a) of the Rules “to appear at any hearing in person, by counsel [. . .] to introduce into the record evidence of the significant facts that support the party’s contentions and are relevant to the existence of question of representation.” Failure to identify any other issue on which the Regional Direction would determine that a question of representation existed denied Alaska Communications of notice of an opportunity to be heard on the issue the Regional Director would ultimately consider dispositive. This Court must refuse to enforce

the Board's decision on a novel issue not raised in the Petition, other pre-hearing filings, or at the outset of the hearing as directed by the Section 102.60–67 of the NLRB's Rules and Regulations and the NLRB Hearing Officers Bench Book.

C. The Board's Decision Exceeds the Deference the Court Typically Affords It.

The Company's opening brief, in an attempt to provide context to the many failures of the 2014 Rules, identified oft-discussed issues surrounding the Rules. For example, the 2014 Rules infringed on free speech rights, deprived parties of due process, and failed to protect employee privacy rights. The heart of the Company's argument, however, addressed the Regional Director's application of the 2014 Rules in this case, which allowed the Regional Director to, in essence, create a unit out of thin air.

Here, the Board attempts to distract from the substance of the Company's arguments by focusing on a few contextual lines in the Company's opening brief and then quickly claim that Board took evidence regarding *an issue* and because it can determine *an appropriate* bargaining unit, the Board behaved appropriately. Indeed, the Board argues that the Company's as applied arguments fail

because “the determination of an appropriate unit is entirely consistent with the language of the statute. . . .” and further states “the Board only departed from the petitioned-for unit to add two individuals who, according to the Company, were indispensable to an appropriate unit.” (Resp. Br. p. 55). Again, this gets to the crux of the as applied question.

The 2014 Rules outline the procedure to decide the issue for the hearing, outline how the parties will know the issue at hearing, and have the parties litigate the issue(s) for hearing. This ensures conformance to *Chevron* standards. Section 9(c) mandates a full hearing. The NLRB Hearing Officers Guide states “[h]ave the parties agree on the issues for litigation,” which did not involve anything regarding including the Alaska-based Cable Systems employees. GUIDE FOR HEARING OFFICERS IN NLRB REPRESENTATION AND SECTION 10(K) PROCEEDINGS, § II.A.13. In addition, the script reads that the Hearing Officers should then state, “[i]t is my understanding that the issues to be litigated today are. . . .” *Id.* The Hearing Officer almost followed the script verbatim in articulating the issue. As mentioned time, and time again, the Hearing Officer never articulated the issue for hearing being anything beyond whether

Oregon based Cable Systems Group employees should join the Alaska bargaining unit. The Company answered the question posed by the Hearing Officer, and as was appropriate, did not address issues the Hearing Officer could have identified. The Company does not dispute that the Board can determine the unit, but the Board can decide the issue of the appropriate unit only if it has properly articulated to the parties that the issue is before the Board. Failure to identify the issue to be decided up front violates step one of the *Chevron* analysis.

The Board's failure to recognize that point continues as it defends its failure to comply with step two of the *Chevron* analysis. An action qualifies as arbitrary and capricious when it decides an issue Congress did not intend it to consider, failed to consider an important aspect of a problem, or offers an explanation that runs counter to evidence before the agency. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 US 29, 43 (1983). Here, the Board essentially claims because the Regional Director can decide the appropriate unit, it need not identify what question exactly the parties must answer to determine whether the Union presents an appropriate unit. The Fifth Amendment precludes government decisions that would

otherwise deprive a party of liberty or property and “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Here, the Board and the rules under which it administered this petition deprived the Company of “the opportunity to be heard ‘at a meaningful time and in a meaningful manner’” because it said the parties were litigating “whether a community of interest existed between the proposed unit [which explicitly excluded the Alaska-based Cable Systems employees] and the existing unit.” JA 4. When evidence demonstrated that the answer to that question was no, the Board then considered whether it should add the Alaska-based Cable Systems Group employees to the petitioned-for unit and whether with such an addition the revised unit shared a community of interest with the Alaska unit. Without offering the Company the opportunity to address those issues, the Board deprived it of “the opportunity to be heard ‘at a meaningful time and in a meaningful manner’ ” on the determinative issue regarding the petition. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Finally, the Board's contention that if "the Board had instead dismissed the Union's petition, it could have failed to fulfill Congress's mandate that it make unit determinations 'in order to ensure employees the fullest freedom in exercising the rights' guaranteed by the Act," completely ignores basic NLRB procedure. The moment the Board dismissed the petition because it constituted an inappropriate unit, the Union could have refiled the petition with a different unit and the Region would have processed that petition.

Simply put, as applied, the 2014 Rules fail to meet the *Chevron* requirements.

II. THE BOARD'S CATEGORIZATION OF ITS DECISION AS A NUANCED ATTEMPT TO SYTHESIZE THE RECORD EVIDENCE IS MISPLACED.

Throughout the Board's brief, it highlights aspects of the record to show considerable evidence supported the Regional Director's finding on community of interest. The procedural concerns documented above bleed into the factual analysis. While there are serious issues with all of the Regional Director's findings, as outlined in the Company's opening brief, key areas of the Board's Response brief deserve additional attention.

It is imperative to keep in mind that the Union did not seek an employer-wide or system-wide unit. The presumptions and evidentiary burden to define the unit fell upon the Union at the hearing, which in turn informed the Company's strategy.

The Board focuses on whether the community of interest shared by one group is "separate and distinct" from that shared with the other group, and as compared to excluded locations. *Laboratory Corp.*, 341 NLRB 1079, 1082 (2004). The multi-location assessment utilizes a variant of the community of interest test, examining the following factors: geographic proximity; functional integration of business operations, including employee interchange; centralized control of management and supervision; employees' skills, duties, and working conditions; and bargaining history. *Exemplar, Inc.*, 363 NLRB No. 157, slip op. at 2 (2016).

The Board's review of the record glosses over significant problems with the Regional Director's conclusions on geographic proximity, employee interchange and integration, and common supervision.

A. The Board's Geographic Proximity Analysis is Inconsistent with Precedent and Common Sense.

The Board repeatedly ignores or attempts to minimize the geographic impediments to this unit. The Board's analogy that this unit is really just two groups of employees working on the same project, like those on an assembly line, highlights the issues in this case. The Alaska and Oregon groups are not two different sets of employees working on different parts of an assembly line of communications, creating a finished product. But, even if that were the case, the Court should consider the implications of this position.

Company X owns facilities in Massachusetts where they work on car parts sent to its facility in Omaha, Nebraska, where other unionized company employees assemble the car for customer use. The Board wants this Court to hold that those two groups can be part of a single bargaining unit. Now, assume that the union in Nebraska has no representatives, no offices, and no presence in Massachusetts, whatsoever. Now assume that the plant in Massachusetts calls the plant in Nebraska occasionally to determine whether the parts it makes work properly in the finished cars and the plant in Nebraska calls back to identify issues with the parts. Finally, assume the Company has two non-union employees in Nebraska, who unload the parts when they

arrive from Massachusetts, tied to the Massachusetts group because handling the parts is intrinsic to their job. They do not build cars with the Omaha employees.

Understanding the basic geography of the issue, the Regional Director, without specifically requesting either side's position on these two Nebraska employees during a multi-day hearing, takes those two non-union employees and combines them with the employees in Massachusetts to facilitate a single, cross-nation bargaining unit. In fact, the Hearing Officer specifically defined the issues to exclude the two Nebraska employees as the Union never sought to represent them in their petition.

The Regional Director did something similar to this hypothetical fact pattern and pursued a course that no one has found a case to support. He incorporated employees at a facility in Oregon, working on separate equipment, with separate direct supervisors, two states, Canada, and 2,500 miles apart (about 1,000 miles further apart than Nebraska and Massachusetts), with employees working all over Alaska.

While the Board cites to no cases supporting such a geographically broad group, or even one close in size, it attempts, unsuccessfully, to

distinguish the Company's cases. For example, the Company cited to several cases highlighting that large distances between facilities have been factors in denying a party's request for large, geographically disperse units. *See Black & Decker Mfg. Co.*, 147 NLRB 825 (1964) *Verizon Wireless*, 341 NLRB 483, 485 (2004); *Van Lear Equip. Inc.*, 336 NLRB 1059, 1063 (2001); *New Britain Transp. Co.*, 330 NLRB 397 (1999); *D & L Transp., Inc.*, 324 NLRB 160 (1997.)

The Board pointed out that in most of those cases, smaller, single-location units were appropriate, despite one party or the other's attempt to expand the unit to a multi-location unit. (Resp. Br. p. 22-3). This is exactly the opposite of what the Board did in the underlying case, here. It expanded the existing unit to a larger multi-location unit across several states and several thousand miles with minimal evidence of a shared community of interest.

As the Company's Network Map demonstrates, the corporate network operations in Alaska are noticeably set apart from the Cable Systems Network.

ALASKA COMMUNICATIONS NETWORK MAP

NORTHWEST CONNECTION



- ☆ Network Operations Control Center & Remote Data Hoisting Center
- Local Voice & Data Switch Site
- △ MPLS / Carrier Ethernet Locations
- Fiber Optic Cable
- Microwave Links

Updated on 6/19/2015. This map is a geographical representation and coverage shown is approximate. Depiction includes both owned and leased assets.

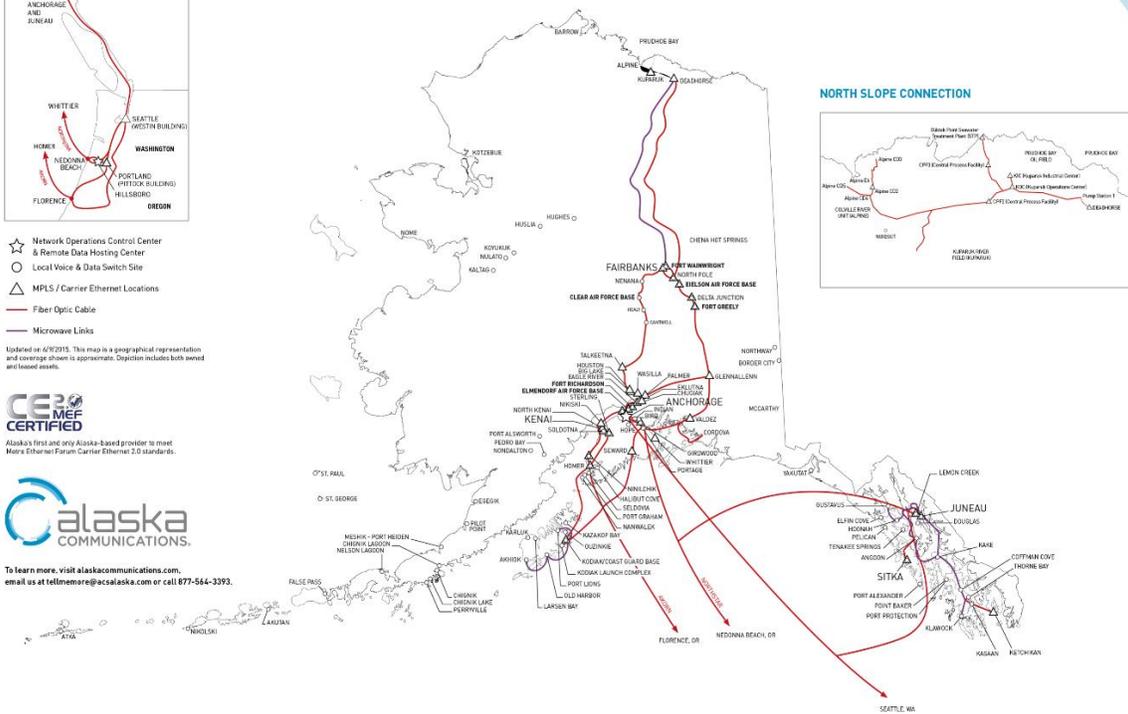
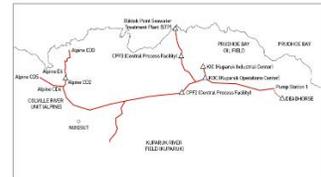


Alaska's first and only Alaska-based provider to meet Metro Ethernet Forum Carrier Ethernet 2.0 standards.



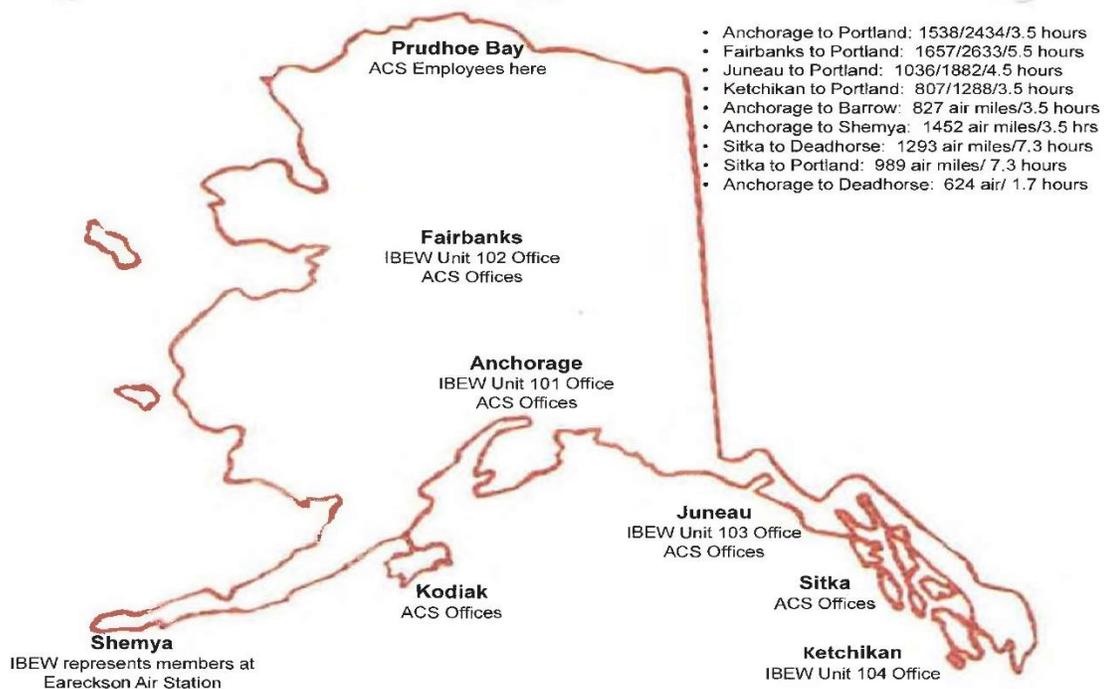
To learn more, visit alaskacommunications.com.
email us at tellmemore@alaskacomm.com or call 877-564-3393.

NORTH SLOPE CONNECTION



(SA140).

Likewise, the Union represents the existing bargaining unit through Local Halls located exclusively in Alaska:



(JA575).

As you can see from the above, the entire representational apparatus exists in Alaska. The Union, therefore, will need to send individuals on a three and a half to four hour plane ride to either Alaska or Oregon for grievance hearings, arbitrations, and other necessary interactions as their representative.

The geographic expansion and lack of resources in Oregon creates a doubt as to whether the Union can adequately represent the Oregon employees' interests. For the Board to find that this factor "marginally"

weighs against a shared community of interest throws the efficacy of the entire process in doubt and supports the reversal of the Board's decision without further analysis.

B. The Board's Description of Interchange and Integration Strains Credulity and Ignores the Record Evidence.

“Based on evidence of modest interchange and contact between the Cable Systems Group and the Alaska unit, the Board concluded that this factor neither supports nor detracts from finding a community of interest.” (Resp. Br. p. 26). No statement better encapsulates the Board's determination to pigeonhole the facts into the conclusion it sought more than this one. Additionally, the Board argued the two groups were “more functionally integrated than not.” (Resp. Br. p. 34).

The Board identifies two employees who have transferred between the two units in the past five years. (Resp. Br. p. 26). The record lacks any other evidence of permanent interchange and fails to note the retraining that was required for the two employees that transferred. The Board also points out that Oregon employees sometimes travel to Alaska to train where they will come into contact with the unionized employees. (Resp. Br. p. 27). The Board glosses over the fact that the

Company's corporate headquarters are located in Alaska. Bringing employees to Alaska for training makes sense. No evidence exists that unionized Alaska-based employees traveled to Oregon for training.

To be clear, two employee transfers between the two groups in five years and the fact that the Company has employees located in Oregon who occasionally travel to its headquarters in Alaska for training represents all the evidence produced by the Union in favor of interchange.

Lacking any evidence of substantive interchange or integration, the Board points to the Company's citation to *Hilander Foods*, 348 NLRB 1200 (2006) and *Red Lobster*, 300 NLRB 908 (1990) to bolster its own arguments. The Board states that the single-unit locations were appropriate in both cases, but that the Board declined to determine the appropriateness of broader units. (Resp. Br. p. 28). In both those cases, there was little to no interchange between the employees at the multiple locations, making the larger, multi-location units inappropriate or, at the very least, less appropriate than the single location unit. To say that the Board's determination that the smaller unit was appropriate does not somehow implicate its position on the other, larger, multi-site

facilities and is disingenuous at best.

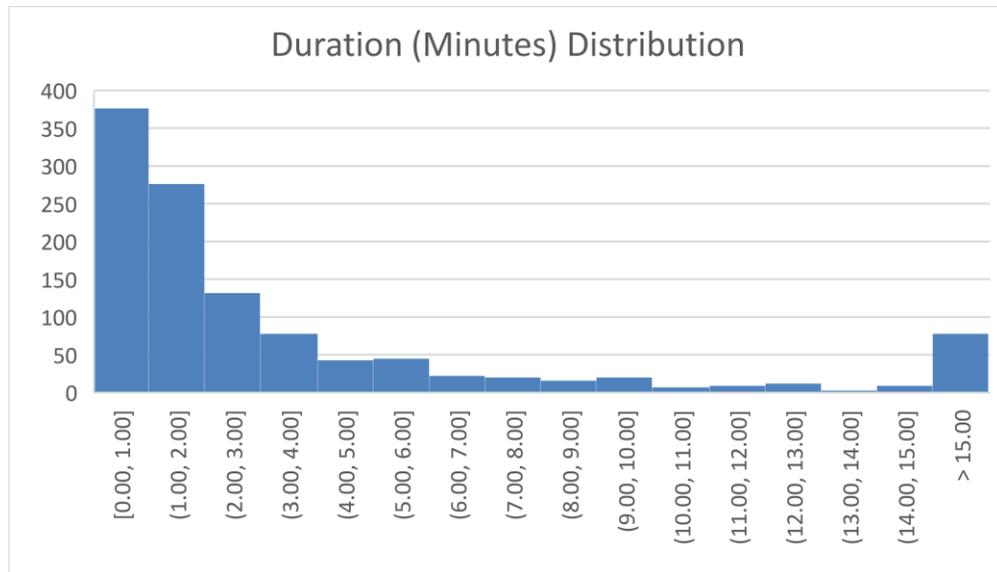
The Board also believes that *NLRB v. Tito Contractors, Inc.*, 847 F.3d 724 (D.C. Cir. 2017) is not appropriate because “Unlike *Tito*, there is no concern about the Board’s ignoring evidence here.” (Resp. Br. p. 28). With this point, the Company respectfully, yet vehemently disagrees. The Board calling its examination of the above evidence “nuanced” does not make it so. The evidence itself was so light in favor of the finding a community of interest that the Regional Director had to create a new standard – “temporary interchange” – that the Board specifically denounced in an otherwise pro forma dismissal of the Company’s Request for Review. (JA440).

Finally, the Board relies upon on the amount of telephonic contact between the two groups to highlight its “nuanced” approach while ignoring the record evidence regarding those contacts. (Resp. Br. p. 34-5). Had it reviewed the record carefully it would have seen that these calls support the Oregon employees’ exclusivity, not their inclusivity with the Alaska-based employees.

These groups call each other because they cannot access the other group’s network. (JA45-47). Multiple Oregon employees testified to

limited interactions with bargaining unit employees. (JA17, JA27-28, JA115). In-person contact, in particular, very rarely occurs. (SA592, SA593, SA597-599, JA166-167).

Interactions between the groups occur primarily via landline telephone calls (SA070, JA133, JA192, JA224), and the Company produced the past year's call logs for incoming and outgoing calls. (JA508-552) (JA168). Compilation of the logs reveals several interesting statistics. For example, over the past year, the number of calls between the groups each month ranged from 58 to 126, or about 2-4 calls per day. (JA553). Even more strikingly, the median duration of those calls was only 1.58 minutes. (*Id.*). The calls overwhelmingly skew towards short durations, as illustrated in the following histogram and table:



(JA558).

<u>Range</u>	<u>Number of Calls</u>	<u>% in Range of All Calls</u>	<u>% Below Range Max. of All Calls</u>
0-1 Minutes	376	32.8%	32.8%
1-2 Minutes	276	24.1%	56.9%
2-3 Minutes	132	11.5%	68.4%
3-4 Minutes	82	7.2%	75.6%

(JA508-552). In other words, about 1/3 of all calls lasted less than one minute, more than half lasted less than two minutes, more than 2/3 lasted less than three minutes, and more than 3/4 lasted less than four minutes.

Furthermore, the total duration of all calls during the year was 5,004.5 minutes. If each of the nine Hillsboro employees worked four ten-hour shifts per week, for 50 weeks of the year, then those employees worked a total of 18,000 hours, or 1.08 million minutes. The calls between the two groups, then, accounted for less than five-tenths of a percentage point of the total time worked by Hillsboro employees during the year. Such minimal contact between the two groups, particularly where employees accomplish that contact primarily via telephone, weighs heavily against any assertion of a shared community of interest. *Michigan Bell Tel. Co.*, 192 NLRB 1212 (1971) (relying on fact that employees at other sites only communicated via telephone calls to find absence of community of interests).

Incredibly, the Board believes that this “balanced approach” appropriately led the Regional Director to find that these factors overall weighed in favor of a shared community of interest. The burden of proof on showing a “community of interest” fell upon the union and it failed to make a *prima facie* case. If these facts do not support a negative inference on interchange, what facts would? Nevertheless, the Board’s

position on this point seems to be that if any interchange at all between the two groups exists, then it is at least a tie.

C. The Board's Assertion that Two of the Petitioned-For Employees Were Found to be Statutory Supervisors Yet Don't Exercise Sufficient Supervisory Authority is Not Defensible.

The Board asserts that common supervision “weighs strongly in favor of a community of interest is amply supported by the record.” (Resp. Br. p. 29). That conclusion effectively ignores that the two employees directly responsible for the Union's own petitioned-for unit were ultimately identified as supervisors under the NLRA.

As part of the underlying case, the Regional Director found that two employees Jeffrey Holmes and Anatoliy Pavlenko were statutory supervisors, yet turned around and ignored their supervisory status to determine that other, regional leaders had actual supervisory authority over the petitioned-for unit.

The Board's position makes it impossible for any organization with a reporting structure that eventually leads to a common supervisor between bargaining unit and non-bargaining unit employees to win on this factor. The record supports that Holmes and Pavlenko supervise these employees to the point that they met the statutory definition of a

supervisory employee. Neither the Regional Director nor the Board had any reason to dismiss the fact that Holmes and Pavlenko directly supervise the particular Oregon employees at issue. Getting assistance with personnel matters from the next level supervisor or Human Resources does not negate their supervisory authority. In today's day and age, in a litigious society, almost no supervisor has independent control over a subordinate's job without the need to discuss decisions with either a direct supervisor or Human Resources. Further, the fact that one of the two supervisors here was relatively new in the role, led to more oversight than would be typical.

Unrebutted record evidence establishes Holmes for example, receives and reviews resumes and decides whom to interview. (SA629) (SA608-609, SA622-625). He, along with Brewer, interviews the applicants, but Holmes ultimately decides whom the Company hires. (SA602-603). His decision-making process involves assessments of qualifications, his perception of interview performances, anticipated personal compatibility with existing employees, and trainability. (SA622-625). He utilizes this process because he has "learned through experience with bad hires." (SA623).

Brewer also buttressed this point. When asked, “[s]o what role does Jeff [Holmes] play at that point in making a decision, regarding whether or not somebody's going to be hired?” Brewer replied, “[h]e has the final say-so.” (SA604).

Holmes has actually exercised his hiring authority multiple times. *See also* (SA629) (SA609-614) (describing Holmes hiring former employee Nathan Seabury). Additionally, while the Jackson, LeCompte, Wangen, and Seabury hires occurred a number of years ago, very recently Holmes exercised this same authority to hire Alan Daniels (“Daniels”). (SA610-611). Holmes explained he reviewed Daniels’ resume, scheduled the interview, interviewed him, brought him for a group interview, collected feedback, and made the decision to hire him. (SA610). When Holmes told Brewer, “I want him,” Brewer responded, “Okay.” (SA610). Brewer testified similarly and confirmed Daniels’ hiring process occurred “[t]he same as it has in the past” (SA626-627), and that he would not have hired Daniels without Holmes’ approval. (JA207, SA605-606).

Just as Holmes fills the supervisory role at the Hillsboro Network Operations Center, the record evidence makes clear Pavlenko serves in

that role for the Operations and Maintenance group. (SA041, SA101, SA103). Both Holmes (SA615) and Pavlenko (SA601) confirmed the two men hold the same supervisory position. Pavlenko's position, however, did not exist until September 2017, and the Company has not hired anyone into the Group since that time. (SA595, SA601, JA213, SA628).

Multiple other factors provide additional support for the supervisory status of both Holmes and Pavlenko. Consider, for example, the testimony of Jackson, who stated, "My direct supervisor is Jeff Holmes." (JA16). Holmes also approves travel, vacation, shift coverages, and timesheets for Cable Systems employees. (JA557) (JA25, JA58, JA79 JA121, JA193-195, JA207-210, JA214, JA224-225, JA255-258, JA265-270, JA286-287, JA309, JA318-319). Furthermore, these supervisors run staff meetings, assign job duties, approve overtime, evaluate and coach employees, and decide work allocations. (JA26, 258, JA207-209, JA246, JA271, JA282-283, JA285). Holmes further testified that he disciplined Seabury in the past. (JA272-274). Multiple documents also show he approves procedures for the Hillsboro Network Operations Center, and has only done so in a supervisory position. (JA448-490) (JA226-235, JA249-250). Additionally, Holmes

recommended three employees for promotion, resulting in each employee receiving the recommended promotion with no further review. (JA236-237, JA277-278).

Due to his relatively short time in the position, Pavlenko has not had the opportunity to exercise the same authority as Holmes. Nonetheless, when such an opportunity arises, Pavlenko fills the same role Holmes does. For example, Pavlenko also approves leave without oversight. (JA559) (JA25, JA58, JA79, JA121, JA193-195, JA207-210, JA214, JA265-268, JA309, JA318-319). Pavlenko's direction to Anderson in RX-42 to obtain coverage for his leave, and Senior Manager, Network Engineer Greg Tooke's confirmation of Pavlenko's supervisory responsibilities, further demonstrate his supervisory capacity.

CONCLUSION

The Board's Response brief fails to adequately explain the Regional Director's actions or provide substantial evidence that these employees shared an appropriate community of interest with the existing unit and for all the reasons outlined in its primary brief and

above, the Court should grant the Company's appeal and deny enforcement of the Board's order.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this principal brief contains 6,146 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with Century Schoolbook 14 point font.

/s/ Matthew J. Kelley _____

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system to be served on the following registered participants: David Habenstreit, Usha Deenan, and Brady Francisco-FitzMaurice.

/s/ Matthew J. Kelley

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