

ORAL ARGUMENT NOT YET SCHEDULED

Case No. 20-1061 (consolidated with Nos. 20-1060, 20-1134)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Keith Purvis,

Petitioner,

v.

National Labor Relations Board,

Respondent.

—————
**On Petition for Review of a Decision
and Order of the National Labor Relations Board**

—————
REPLY BRIEF OF PETITIONER KEITH PURVIS

—————
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GLOSSARY OF ABBREVIATIONS

Administrative Law Judge	(“ALJ”)
Administrative Law Judge’s Decision	(“ALJ Dec.”)
Collective Bargaining Agreement	(“CBA”)
Joint Appendix	(“JA”)
National Labor Relations Act	(“NLRA” or “Act”)
National Labor Relations Board	(“NLRB” or “Board”)
National Labor Relations Board Decision	(“Board Dec.”)
Transcript of the July 2017 hearing	(“Tr.”)
Unfair Labor Practice	(“ULP”)
International Association of Machinists	(“IAM” or “Union”)

SUMMARY OF ARGUMENT

1. *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017), controls the results of this case. In *Scomas*, this Court held a bargaining order could not be imposed on an employer that withdrew recognition in good-faith, based on a facially valid majority decertification petition, when the union surreptitiously collected a counter-petition restoring majority support. *Id.* at 1157. Elections—not bargaining orders—are the preferred remedy in these situations.

Here, Leggett & Platt (“Leggett”), received a facially valid majority petition from its employees stating they no longer want to be represented by the IAM. Had the IAM disclosed the existence of its counter-petition, rather than letting Leggett act at its peril, Purvis could have filed for an election, as his petition still had the support of 47% of the bargaining unit. Purvis Br. 10. Despite this, the Board imposed a bargaining order rather than hold an election.

The Board raises several arguments, all of which misunderstand or were expressly rejected in *Scomas*.

The Board misunderstands *Scomas* in several ways. First, the Board supports its bargaining order based on the IAM’s history of existence at Leggett. NLRB Br. 44-45. How long the IAM has represented employees at Leggett is irrelevant under *Scomas*. Second, the Board claims a bargaining order can be justified because Leggett helped solicit *one* signature on a completely separate decertification petition

circulated months after the first was collected. NLRB Br. 45. But, a bargaining order is completely unjustified based on this unconnected and after-the-fact incident. Finally, the Board makes the false claim the IAM did not withhold evidence of its counter-petition. NLRB Br. 46-47. The record shows the IAM engaged in the same gamesmanship this Court decried in *Scomas*.

The Board also advances arguments that were rejected by *Scomas*. The Board argues its bargaining order is justified because Leggett's withdrawal was illegal under *Levitz Furniture Co.*, 333 NLRB 717 (2001). NLRB Br. 48-49. This Court rejected that argument, noting the Board's position "makes no sense." *Scomas*, 849 F.3d at 1158. A bargaining order is an inappropriate remedy if the petition is still supported by more than the 30% of employees. Three years after *Scomas*, the Board takes the same nonsensical position. The Board's insistence on a bargaining order has denied the employees at Leggett a secret ballot election for nearly four years. The Board's arguments simply reaffirm the wisdom of *Scomas*. The Court should decline to enforce the bargaining order and allow Purvis' requested election to proceed.

2. As Judge Millet found in *Veritas Health Serv. v. NLRB*, 895 F.3d 69, 89 (D.C. Cir. 2018) (Millet J., concurring), the Board has never articulated *any* standards by which intervention should be granted or denied in cases such as this. The Board now claims its intervention standard is whether a proposed intervenor can add additional

facts that may affect the outcome of the case. NLRB Br. 50. Even assuming this is a proper “standard,” it has not been consistently applied as the Board has granted employees intervention in cases based on their statutory interest in the proceedings, not on their possession of outcome-determinative facts.

Moreover, the Board’s claim that Purvis had nothing to add to the record in this case is wrong. Purvis’ testimony was essential at trial for authenticating the petition under *Levitz*, and the *lack* of his testimony led to a faulty credibility resolution. The ALJ found Leggett impermissibly aided the second petition because a supervisor directed one employee to speak with Purvis for the sole purpose of signing the second petition. *Leggett & Platt*, 367 NLRB No. 51, slip op. at *12 (ALJ Dec.) (J.A. ____). The ALJ specifically wrote: “I find Respondent’s failure to question Purvis about this matter—or do anything else to corroborate Day’s testimony—is a telling omission that undermines Day’s credibility regarding his motive for directing Roseberry over to meet with Purvis on the day in question.” *Id.* Had Purvis been allowed to participate, this question could have been resolved differently. *See, e.g., Ozark Auto. Distributors, Inc. v. NLRB*, 779 F.3d 576, 583 (D.C. Cir. 2015), citing *Shaklee Corp. v. Gunnell*, 748 F.2d 548, 550 (10th Cir. 1984) (“It is not possible to determine here whether the outcome would have been different had [intervention] been permitted.”).

Regardless, the Board's position that it only cares about factual issues in granting intervention is belied by its decision in *Novelis Corp.*, 364 NLRB No. 101 (Aug. 26, 2016). There, the Board upheld a limited intervention by employees who opposed a bargaining order. The intervention was so limited the employees were only able to cross-examine witnesses and file a post-hearing brief (*See* Addendum 3-6). If the Board is correct about its standard, *Novelis Corp.* was wrongly decided. Rather, it is proof of Judge Millet's point that the Board's intervention standard is arbitrary, capricious, and indeterminate.

Finally, while the Board claims that Purvis can vindicate his rights through its election process (NLRB Br. 55), that avenue is illusory. Purvis filed for an election and the IAM's gamesmanship in this case has blocked the election. Whether or not a bargaining order is imposed in this case determines whether or not his petition is processed. The Court should grant Purvis' intervention.

ARGUMENT

I. The Board cannot justify a bargaining order under *Scomas*.¹

Bargaining orders are penalties for employer misconduct. But they are not favored precisely because they preclude representation options for employees. *Scomas* has already explained this. In *Scomas*, this Court found a bargaining order could not be imposed on an employer that committed an “unintentional” violation of the Act when it withdrew recognition in “good faith [based] on a facially valid decertification petition.” 849 F.3d at 1157. There, the employer’s withdrawal was made in good-faith, as shown by the fact that: (1) the employer verified the petition signatures were authentic; and (2) the union withheld information it had persuaded some employees to revoke their signatures from the petition. *Id.*

Further, *Scomas* noted the Board must balance the deterrent effect of a bargaining order with “ascertainable employee free choice.” *Id.* (quoting *Caterair Int’l v. NLRB*,

¹ As an initial matter, the Board claims Purvis’ arguments concerning the bargaining order should be ignored unless he is granted intervention. NLRB Br. 44 n.3. As pointed out in his opening brief (Purvis Br. 16), Section 10(f), 29 U.S.C. § 160(f), grants Purvis standing to challenge the bargaining order independent of the question of intervention. This Court has ruled non-parties have the right to appeal Board orders if they are “persons aggrieved,” as long as they have suffered “an adverse effect in fact.” *Retail Clerks Union v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965). The bargaining order imposes IAM representation on Purvis and prevents his decertification election from being held. This is sufficient injury-in-fact to confer standing. *See, e.g., Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1286-87 (11th Cir. 2010) (employee challenging forced union representation “has a cognizable associational interest”).

22 F.3d 1114, 1122 (D.C. Cir. 1994)). The Board's opposition to an election as an alternative remedy in *Scomas* "made no sense" given the decertification petition was still supported by more than 30% of the bargaining unit—the number of employees needed to call for an election. 849 F.3d at 1158.

Realizing *Scomas* compels a reversal of the bargaining order in this case, the Board tries in vain to distinguish it. It cannot do so.

First, the Board employs a non-sequitur, arguing it does not matter "the employees themselves initiated the decertification effort here—as they did in *Scomas*." NLRB Br. 44. Yet, this was the central concern of this Court in *Scomas*, which found the bargaining order could not be justified because "as far as the record reflects, the genesis of the employees' discontent was not *Scomas*' conduct." 849 F.3d at 1157. Given the decertification petition was not the product of *Scomas*' encouragement or conduct, "there is no taint to dissipate," and "the only conceivable function of the order then is to punish *Scomas*." *Id.* The same is true here.

The Board cannot point to any conduct by Leggett that encouraged Purvis' first decertification petition. This should end the inquiry under *Scomas*. Instead, the Board relies on a red herring: the IAM deserves a special privilege because it has been certified for more than 50 years and was attempting to negotiate a successor agreement. NLRB Br. 41, 44. The question under *Scomas* is not *why* the employees want to decertify the union (or if the employees have what the Board deems a good

reason), but whether a bargaining order is justified when: (1) the employer had no hand in promoting the petition; and (2) the union concealed its regained majority support prior to withdrawal.² Given Leggett's employees acted on their own accord, the Board cannot distinguish *Scomas* on this basis.

Second, the Board claims this case differs from *Scomas* because Leggett arguably aided Purvis' second decertification petition. As explained in Purvis' opening brief, (Purvis Br. 42-43), this alleged conduct does not support a bargaining order. Even if proven correct, at most it evinces a need to strike a single name from the second petition. The Board itself concedes it is not imposing a bargaining order for the alleged aid given to the second petition, but only that it "provides additional support" for a bargaining order because of the withdrawal. NLRB Br. 49. But, it is unclear why aiding in the solicitation of a single signature on a separate petition, weeks after a withdrawal, bears any relation to the initial withdrawal of recognition. The Board

² In this way, the Board tries to have its cake and eat it too. It justifies a bargaining order on the basis the IAM had a long tradition of existence at Leggett and it deemed the IAM was doing a sufficient job at representing the employees. NLRB Br. 41, 45. Yet, a substantial portion of the employees disagreed and signed two petitions stating they no longer wanted the IAM's representation. However, the employees were prevented from intervening and the ALJ specifically noted their subjective views concerning the IAM were irrelevant. Tr. 34-35. Yet, hypocritically, the Board's subjective views about the IAM's "value" carried weight. In putting forward these contentions, the Board forgets "unions exist at the pleasure of the employees they represent. Unions represent employees; employees do not exist to ensure the survival or success of unions." *MGM Grand Hotel, Inc.*, 329 NLRB 464, 475 (1999) (Member Brame, dissenting).

never attempts to explain why this one disputed action should cancel out the uncoerced preferences of the hundreds of employees who signed both decertification petitions, when more apt remedies like an election are available. *See Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000) (Board must balance employees' Section 7 rights and consider alternative remedies).

Third, the Board discounts the IAM's withholding of evidence concerning its counter-petition. NLRB Br. 45-46.³ The Board claims *ipse dixit* that the IAM did not engage in "similar (or worse)" conduct compared to the union in *Scomas*. NLRB Br. 45. The Board, however, never acknowledges what occurred in *Scomas*. There, the lead union organizer "said nothing of the petition, let alone that he intended to persuade the petitioners to revoke their signatures. And even after six petitioners revoked their signatures at [the union organizer's behest] . . . [he] did not tell *Scomas*." *Scomas*, 849 F.3d at 1157. Here, the IAM "said nothing of the petition," did not tell Leggett it "intended to persuade the petitioners to revoke their signatures," and even after collecting revocation signatures it "did not tell" Leggett. *Id.* This is identical conduct.

³ The Board also claims the IAM's failure to notify Leggett of its petition does not matter because *Levitz* does not require a union to be straightforward about the counterevidence it possesses. NLRB Br. 44. That argument has no force in this Court because *Scomas* is clear a bargaining order cannot be imposed where a union concealed evidence of regained majority support.

Admittedly, there is one difference that occurred in this case—the IAM sent Leggett a letter stating it did “not believe” Leggett’s claims it had lost majority support. (Joint Ex. 6) (J.A. ____). But, as pointed out in Purvis’ opening brief, this is gamesmanship—a mere claim it “thinks” the employer is bluffing. *Scomas*, 849 F.3d at 1158 (Henderson, J., concurring) (noting labor relations are not “a poker game in which players enjoy an absolute right to always conceal their cards until played”); *Johnson Controls, Inc.*, 368 NLRB No. 20, slip op. at *28-29 (July 3, 2019) (union cannot be rewarded for playing a game of “gotcha”). Rather than being transparent about the counter-signatures it possessed, the IAM played its cards close to its vest precisely to file an unfair labor practice charge and thereby use the blocking charge rules to prevent an election from occurring. A stated disbelief about Purvis’ majority petition should not have given Leggett pause because it had already undertaken an intense review process to verify the petition as an authentic display of majority support. (Tr. 237-38). Nor does it change the fact that Leggett acted in good-faith based on the facially valid majority petition. Like the employer in *Scomas*, Leggett “may have been incautious with respect to *Levitz* and insufficiently wary of Union gamesmanship. But nothing about its conduct was flagrant.” 849 F.3d at 1157.⁴

⁴ In a similar vein, the Board argues this case differs from *Johnson Controls*, 368 NLRB No. 20, because the Board was not “faced with the present facts of this case.” NLRB Br. 48. But, the Board is talking out of both sides of its mouth. As explained in Purvis’ opening brief (Purvis Br. 41), the case against a bargaining order here is

Fourth, the Board manufactures a distinction with *Scomas* because the IAM immediately filed an unfair labor practice charge challenging the withdrawal of recognition, (NLRB Br. 47-48), whereas in *Scomas* the union waited six days to file the charge. This is a distinction without a difference. It is not the timing of the charge that matters, but the result that blocks a decertification election. The union in *Scomas* was chided for resorting to the unfair labor practice process as a way to benefit from its gamesmanship and to “delay the election.” 849 F.3d at 1159 (Henderson, J., concurring). Here, once the IAM filed the unfair labor practice charge the die was cast and there was no way an election would be held because of the NLRB’s blocking charge policy. *Id.* (explaining “a union can and often does file a ULP charge—a blocking charge—to forestall or delay the election.”) (Henderson, J., concurring) (citation and footnotes omitted). The Board ignores the fact Purvis’ requested election has languished for nearly four years because the IAM’s charges are blocking an election. Judge Henderson put it best in her concurrence:

much stronger than in *Johnson Controls*. There, the union sent a letter to the employer prior to withdrawal stating it “ha[d] credible evidence that it retained majority support and was happy to meet to compare evidence.” *Johnson Controls*, 368 NLRB No. 20, slip op. at *3. Despite this, the Board still acknowledged *Scomas* applied and “the enforceability of an affirmative bargaining order issued under preexisting law would be in serious doubt.” *Id.*, slip op. at *11. While the legal rule of *Johnson Controls* may or may not apply here, the Board cannot change what *Scomas* actually stands for.

Had the union's lead organizer, Lian Alan, had any concern for the wishes of unit employees, he would have notified Scomas as soon as he collected the revocation signatures so that, in keeping with the decertification petition, the Board could conduct an election [H]is refusal to do so reflects that he deliberately let Scomas act "at its peril" positioning the union to pursue a ULP charge and delay the election. It was a neat trick, really.

Id. at 1159-60 (Henderson, J. concurring) (citation and footnotes omitted).

Fifth, the Board admits that a bargaining order interferes with employee free choice but claims: "this is not error." NLRB Br. 49. But, *Scomas* rejected the identical argument as making "no sense" 849 F.3d at 1158. In reality, a bargaining order "gives no credence whatsoever to employee free choice." *Id.* at 1157. In *Scomas*, an election would have been the appropriate remedy because "at least 42% (23/54) of the unit employees supported an election." *Id.* Here, 47% of the employees continued to support the first decertification petition. Purvis Br. at 10. The Board's bargaining order "handcuffs [Leggett's] employees to the Union for no good record-based reason." *Scomas*, 849 F.3d at 1158.

Lastly, the Board accuses Leggett of hypocrisy (NLRB Br. 49) because it withdrew recognition and did not seek an election. But this was true of the company in *Scomas*. What the Board ignores is Leggett acted in good faith based on a facially valid majority petition. It took steps to validate Purvis' majority petition as authentic, taking care to compare signatures on the petition to employee records. (Tr. 237-38). Instead, the Board is engaging in hypocrisy by ignoring that this case has languished

for nearly four years because the IAM refused to disclose its petition prior to Leggett's withdrawal. It is "jarring to say that an employer acting on a facially valid decertification petition 'refuses' to bargain with a union, that, unbeknownst to the employer, has covertly collected enough revocation signatures to restore majority status." *Scomas*, 849 F.3d at 1158 (Henderson J., concurring). The IAM's gamesmanship, as in *Scomas*, should not defeat Purvis' and the employees' request for an election.

The Board's attempt to distinguish *Scomas* fails. The bargaining order cannot be enforced, and the case should be remanded for the Board to fashion an alternative remedy that could include the holding of an election.

II. The Board improperly denied Purvis' intervention.

A. To the extent the Board possesses any intervention standards, they were misapplied in this case.

The Board's brief is a rehash of the same irreconcilable, conflicting intervention decisions that Judge Millet highlighted in *Veritas Health*, 895 F.3d at 89. There, Judge Millet expressed "concerns about the Board's continued failure to establish any sensible, consistent standard for granting and denying intervention in agency proceedings." *Id.* at 89. She noted that the "Board's persistent failure to put any meat on the regulation's bare bones leaves individual intervention decisions at the risk of arbitrary and inconsistent resolution." *Id.* She admonished the Board for its failure "to formulate objective and reliable standards for intervention in its proceedings,"

finding the Board's current intervention rule "generic," "amorphous," and "indeterminate." *Id.*

The Board's brief here continues to apply an ad hoc intervention standard that fails reasoned decision-making under the APA. First, the Board claims that its standard for assessing intervention is "readily discernable." NLRB Br. 50.⁵ Its claimed standard is whether the parties "seeking intervention proffers any additional facts which might affect the outcome of the unfair labor practices alleged in th[e] case." *United Dairy Farmers Co-Op Ass'n*, 242 NLRB 1026, 1045 n.3 (1979). It then claims the Board "routinely" denies intervention by individual employees if their participation would not affect the outcome of the unfair labor practice proceedings. NLRB Br. 51.

The Board blindly presupposes Purvis' participation could not have any effect on this case. But, this is contradicted by the ALJ's decision itself. The ALJ credited Roseberry's recollection of events because no one at the trial questioned Purvis about his interactions with Stephen Day. *Leggett & Platt*, 367 NLRB No. 51, slip op. at *12 (ALJ Dec.). And Roseberry's testimony was the lynchpin upon which the

⁵ If the Board's standard is so readily discernible, it is not apparent in the ALJ's oral decision denying intervention. The ALJ denied intervention on the basis Purvis had no interest in the proceeding. He believed the proper avenue for Purvis to pursue was the election process. (Tr. 34). And while the ALJ emphasized he would not allow subjective testimony about *why* the employees disliked the Union, Purvis made clear he was not attempting to offer facts outside of what was required to authenticate the petition under *Levitz*. (Tr. 34-35).

ALJ held Leggett impermissibly aided Purvis' second decertification petition. *Id.* The Board "support[s]" its bargaining order on the basis of these findings. NLRB Br. 49. The ALJ's decision to make an unfair labor practice finding without hearing relevant testimony from one the named parties to the conversation is a dereliction of the duty to find all of the relevant facts. Purvis' participation could have changed the entire outcome of this case. *See, e.g., Ozark Auto. Distributors*, 779 F.3d at 583 (D.C. Cir. 2015), citing *Shaklee Corp.*, 748 F.2d at 550 ("It is not possible to determine here whether the outcome would have been different had [intervention] been permitted.").

In this way, the case is similar to *New England Confectionary Co.*, 356 NLRB 432 (2010), which also concerned the question of whether an employer provided unlawful assistance to a decertification petitioner. There, intervention was granted to allow an employee to help defend his petition from similar allegations. This case alone refutes the "readily discernable standard" that Judge Millet could not find in *Veritas* and that is not present here.

Moreover, the Board ignores the crucial role petitioners play under *Levitz*. *Levitz* is not a case of independent unfair labor practices that have no connection to employee representation preferences. *Levitz* is at bottom a case about determining, with objective evidence, what the employees' preferences were at the time of withdrawal.

The *Levitz* standard requires a petition must be “authenticated” at trial, even if the General Counsel does not specifically challenge the validity of the petition. *See Latino Express, Inc.*, 360 NLRB 911, 925 (2014) (“[W]here an employer relies on an employee petition for evidence of the union’s loss of majority support, it is the Respondent’s obligation to authenticate the petition signatures on which it relies.”); *see also Ambassador Servs., Inc.*, 358 NLRB 1172 (2012) (signatures on the petition “may be authenticated by the testimony of the signer, a witness to the signature, delivery to the solicitor of the card, or by handwriting exemplars.”). Under *Levitz* the whole proceeding revolves around what the petitioners wanted and whether they actually signed the petition the employer relies on. In order to authenticate the petition, employers are generally required to call the employees as witnesses who collected or signed the petition to verify their signatures. That is what occurred in this case.⁶

Intervention is necessary because employers often fail to protect employee interests during unfair labor practice litigation. Employee petitioners offer evidence that may affect the outcome of the case. Recent Board cases are replete with

⁶ Contrary to the Board’s claim (NLRB Br. 55), the authentication of the petition was an issue at trial because authentication is an affirmative defense under *Levitz*. Had Leggett not gone through the onerous steps of verifying the signatures at trial, the petition would have been declared invalid. The Board also ignores the General Counsel vigorously challenged the authenticity of several of the signatures on the petition, even claiming one of the signatures was forged. *Leggett & Platt*, 367 NLRB No. 51, slip op. at *8 n.12 (ALJ Dec.).

examples of employees being denied intervention even when they could have personally authenticated the petition. *See, e.g., Veritas Health Serv., Inc.*, 363 NLRB No. 108 (Feb. 4, 2016) (employer failed to authenticate withdrawal petition at hearing despite the fact petitioner was denied intervention); *Arlington Metals Corp.*, 368 NLRB No. 74 (Sept. 13, 2019) (employer failed to authenticate petition during ALJ trial despite the fact that petitioner was denied intervention). Employers often fail in this regard because individual employees' NLRA Section 7 rights frequently diverge from their employer's pecuniary and litigation interests. Here, Purvis made clear to the ALJ that he was attempting to participate in the trial to help authenticate the petition. The Board ignores this critical *Levitz* factor.

B. The Board's intervention "standard" is contradicted by *Novelis* and other cases.

The Board's position that it has a clear and readily ascertainable intervention standard is further undermined by other Board cases. The Board's brief ignores intervention having been granted to employees merely because they have a statutory interest in opposing bargaining orders. For example, in *Novelis Corp.*, 364 NLRB No. 101, the Board denied a challenge to a limited intervention by employees who were seeking to oppose a bargaining order. The Board wrongly claims that *Novelis* "concerned fact or law *beyond* loss of majority support." NLRB Br. 53. This is not true. In *Novelis*, the employees were granted a limited intervention only to *oppose* the NLRA Section 8(a)(5) bargaining order. (See Addendum 3-6). The ALJ granted

employees an intervention so limited they were not permitted to call witnesses at the trial—their only rights were to cross-examine witnesses and file a post-hearing brief opposing a bargaining order. *Id.* The Board upheld this intervention as a proper exercise of the ALJ’s discretion. The Board cannot reconcile its newly-stated standard with the result in *Novelis*.

Several other cases relied upon by the Board contain sparse—if any—discussion of the factors warranting intervention. For example, *NLRB v. Todd Co.*, 173 F.2d 705, 707 (2d Cir. 1949), *Tenneco Auto Inc.*, 357 NLRB 953, 967 n.1 (2011), and *Sanson Hosiery Mills Inc.*, 92 NLRB 1102, 1107 (1950) are cases where no party appealed the ALJ’s orders denying intervention. The Board places reliance on these never appealed decisions, but brushes off more recent ALJ decisions granting intervention in nearly identical cases. *See Johnson Controls, Inc.*, 368 NLRB No. 20; *Renaissance Hotel Operating Co.*, Case 28-CA-113793 (ALJ Order granting Motion to Intervene, July 18, 2014); *Ave. Dental*, Case 19-CA-236385 (ALJ Order granting Motion to Intervene, Sept. 30, 2019).

Oughton v. NLRB, 118 F.2d 486, 496 (3d Cir. 1940) (en banc) is similarly distinguishable. There, employees opposed to the union sought to intervene based on a hastily created petition circulated the day of the NLRB hearing. *Id.* at 490 (“The verification of this petition bears the date of March 9, 1939, which was the date of the opening of the hearing before the trial examiner.”). In contrast, Purvis seeks

intervention to protect the employee petition that was the sole basis for Leggett's withdrawal and to prevent a bargaining order from stopping his requested election.

Finally, the Board tries to sweep under the rug many of its cases granting intervention to employees in similar circumstances, such as *Gary Steel Products Corp.*, 144 NLRB 1160, 1160 n.1 (1963), *Sagamore Shirt Co.*, 153 NLRB 309, 311, 322 (1965), and *J.P. Stevens & Co.*, 179 NLRB 254, 254 n.1 (1969). The Board attempts to distinguish these cases because they pre-date *Levitz*. Regardless, the Board overlooks the fact that petitioners are often in the best position to authenticate their own petition under the *Levitz* standard, *see supra* pp. 14-15 (discussing the need for petitioners to authenticate the petition at trial). And in any event, this case concerns questions beyond loss of majority support—it also concerns whether Purvis received impermissible aid from the employer in collecting a single signature on his second petition, something he denies and was in a position to refute had he been allowed to participate.

C. Purvis has an interest in the unfair labor practice proceedings and in opposing a bargaining order.

The bargaining order in this case prevents Purvis' pending decertification election from being held. Purvis Br. at 10-11. The bargaining order imposes IAM representation on Purvis and his colleagues for at least six months, and even longer if the IAM and Leggett agree to a collective bargaining agreement. Purvis Br. at 27-28. Given there is a significant question whether the IAM remains the majority

representative, the bargaining order tramples on Purvis' NLRA Section 7 right to refrain from unionization. *Mulhall*, 618 F.3d at 1286–87 (an employee suffers injury-in-fact when forced to be represented by a union he opposes); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (employees represented by an exclusive bargaining representative suffer a “corresponding reduction in the individual rights of the employees so represented”); *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961) (imposing a minority union on employees unlawful under the NLRA).⁷

The Board would limit Purvis to the election process to vindicate his rights. NLRB Br. 54-55. This is an illusory option because of the IAM's gamesmanship and the Board's blocking charge policy. See *NLRB v. Minute Maid Corp.*, 283 F.2d 705, 710 (5th Cir. 1960) (criticizing the blocking charge policy); *Surratt v. NLRB*, 463 F.2d 378 (5th Cir. 1972) (rejecting application of the blocking charge policy).

Here, the Board obscures that the election process—which would normally go forward as 47% of the employees still supported the petition—is blocked solely by the IAM's concealment of a counter petition. This is exactly what happened in

⁷ On this point, the Board is wrong to rely on *Lopez v. NLRB*, 655 F. App'x. 859 (D.C. Cir. 2016). There, the Court did not reject a “similar claim” to Purvis'. In *Lopez*, the Court ruled an employee's petition for review was moot because during the pendency of the appeal the respondent employer and Board signed a settlement agreement ending the case. Lopez had no standing to intervene because the case was over. *Id.* That decision has no bearing on Purvis' interest in this live case.

Scomas. There Judge Henderson noted a “call for an election . . . is no cure-all” because of the Board’s blocking charge policy. *Scomas*, 849 F.3d at 1158 (Henderson, J., concurring); *see also T-Mobile v. NLRB*, 717 Fed. App’x. 1, 2018 WL 1599407 (D.C. Cir. Mar. 27, 2018) (Sentelle, J., dissenting) (noting that application of the blocking charge policy causes “unfair prejudice”). As long as the Board’s bargaining order remains in place, an election will not occur. The Board concedes intervention is proper when “there is no other forum to vindicate” the employee’s interest. NLRB Br. 54 n. 6. *See Wash. Gas Light Co.*, 302 NLRB 425 (1991). This is true here. Allowing Purvis to participate in this matter to oppose a bargaining order is essentially indistinguishable from what occurred in *Novelis Corp.*, 364 NLRB No. 101.

CONCLUSION

The Board's decision denying Purvis' intervention is arbitrary and capricious, and it is time for the Board to promulgate objective standards for when intervention will be granted or denied. Moreover, the Board's bargaining order is erroneous under *Scomas*. The Board's Decision and Order must be reversed, Purvis' Petition for Review granted, and the case remanded for Purvis' intervention to be granted and a prompt secret-ballot election held.

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Date: August 28, 2020

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2020, 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 further certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system, as they are registered users.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 5,095 words in accordance with the MS Word count, is typed in 14-point Times New Roman typeface and is in compliance with the type-volume limitations of FRAP 32(a)(7)(B) and (C) and this Court's briefing order.

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Date: August 28, 2020

Addendum

ADDENDUM TABLE OF CONTENTS

Transcript of Oral Decision Granting Intervention
in *Novelis Corp.*, 364 NLRB No. 101 (Aug. 26, 2016)Addendum 1

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of:

NOVELIS CORPORATION,

Respondent,

and

UNITED STEEL, PAPER AND
 FORESTRY, RUBBER MANUFACTURING,
 ENGERGY, ALLIED INDUSTRIAL AND
 SERVICE WORKERS, INTERNATIONAL
 UNION, AFL-CIO,

Charging Party.

Case No. 3-CA-121293
 3-CA-121579
 3-CA-122766
 3-CA-123346
 3-CA-123526
 3-CA-127024
 3-CA-126738
 3-CA-120447

Place: Syracuse, New York
Date: July 16, 2014
Pages: 1 through 94
Volume: 1

OFFICIAL REPORTERS

BURKE COURT REPORTING, LLC

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 Wayne, NJ 07470
 (973) 692-0660

BEFORE THE
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3-CA-120447

The above-entitled matter came on for hearing pursuant to Notice, before THE HONORABLE MICHAEL ROSAS, Administrative Law Judge, at the James M. Hanley Federal Building, 100 South Clinton Street, Room 843, Syracuse, New York, on Wednesday, July 16, 2014 at 10:00 p.m.

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1 that -- under those circumstances arguably they would have
2 *Taylor Bros.* case to rely on. But it's, again, from what
3 they've submitted there's no indication that these individuals
4 had signed such cards or have information to present disputing
5 their validity.

6 MR. ERON: If I may speak to that, Your Honor?

7 It is the nature of this proceeding, even with the Federal
8 Court 10(j) action pending, that none of the evidence that the
9 General Counsel or the Union reports to rely on, including the
10 names of the employees or the cards themselves, have been
11 showcased yet. So to hold my clients to a standard of having
12 to identify with such specificity, when the evidence hasn't
13 been presented, is inappropriate.

14 JUDGE ROSAS: Okay. Based upon what has been argued and
15 what I have before me, what I'm going to do is grant limited
16 intervention as follows:

17 I'm not -- I agree in part also with the Charging Party
18 that I don't -- I don't see anything definitive from your
19 standpoint that should permit you to participate fully in this
20 proceeding, and that includes the calling of witnesses at this
21 time.

22 You would in any event -- I align you with the Respondent,
23 similar to the way align charging parties with the General
24 Counsel. I often times have them do the questioning; the
25 Charging Party after the General Counsel and before the

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1 Respondent for that reason is, you know, believe that, you
2 know, the nature of what's going on is that they're united in
3 interest. You are more united in interest with the Respondent
4 than you are with anyone else.

5 We have a ways to go on this, but you're going to follow
6 them. And they're going to call witnesses, obviously.

7 I will revisit that question of whether or not I will
8 permit you to call any witnesses upon the completion of their
9 case, okay.

10 In addition, with respect to cross-examination of any
11 witnesses relating to the 8(a)(5) portion of this case, only,
12 okay, I will allow you, as of often do with the Charging Party,
13 okay, because I don't need the same questions asked by people
14 that are united in interest. Everybody's entitled to, you
15 know, have their seat at the table, but I don't always give the
16 Charging Party full breadth, okay, because I don't need to hear
17 the whole thing rehashed, okay.

18 So you'll be on the Respondent's side of the table. When
19 a witness testifies on an 8(a)(5) issue, and should there be
20 something that I find has not been addressed by the Respondent,
21 that is pertinent to the proceeding I will permit you to
22 follow-up, okay?

23 MR. ERON: I understand, Your Honor.

24 JUDGE ROSAS: So you're an analogous situation to the
25 Charging Party and in those respects.

1 With respect to the 8(a)(5), you're permitted to file a
2 brief, okay, post-trial brief for sure. But at this time I'm
3 not going to guarantee you that I'm going to permit you to call
4 any witnesses, okay, because I just -- I just don't have a
5 sense of anything measurable here of what we're talking about,
6 okay. So.

7 MR. ERON: I understand, Your Honor. And I would like to
8 reserve the opportunity to raise that question again --

9 JUDGE ROSAS: Well, yeah. I just laid it out for you.
10 That's what's going to happen.

11 MR. ERON: Okay.

12 JUDGE ROSAS: Okay. All right.

13 MR. MANZOLILLO: Your Honor, just so I understand, so
14 their right to file a brief is limited to the 8(a)(5) issue, as
15 well?

16 JUDGE ROSAS: That is correct. That is correct.

17 MR. LaCLAIR: Thank you.

18 JUDGE ROSAS: That is correct, because that is the only
19 basis that I see here based on what's been articulated with
20 respect to the substantial interests that are protectable on
21 the part of these employees that there might be some concern
22 about. Okay.

23 MS. LESLIE: Your Honor, I'm sorry, just further
24 clarification; and is it limited to the issue of the
25 authentic -- to the cards?

1 JUDGE ROSAS: The 8(a)(5) charge.

2 MS. LESLIE: Okay. But specifically to whether the cards
3 themselves are authentic?

4 JUDGE ROSAS: Well, let's put it this way, the --

5 MS. LESLIE: Because that's --

6 JUDGE ROSAS: -- the essence of my --

7 MS. LESLIE: -- not what I heard them articulate.

8 JUDGE ROSAS: The essence of my ruling is the concern
9 that, you know, employees who have a protectable interest in
10 opposing a bargaining order be able to participate, okay. So
11 I'm not going to --

12 I mean, we can -- as I become more educated with the proof
13 that's coming into this case, I can give you maybe some more
14 definition, but I don't want to give you anything more general
15 than that at this point.

16 MS. LESLIE: Okay.

17 JUDGE ROSAS: Because I'm not going to know what I'm
18 talking about.

19 MS. LESLIE: Okay, Your Honor.

20 JUDGE ROSAS: Okay, because I need to start hearing people
21 testify at some point today. Hopefully.

22 Okay, so that's the general framework that we're going to
23 be dealing with as far as your involvement is concerned, okay?

24 All right, is there anything else before we get to the
25 subpoenas?