

**No. 20-1031**

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

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THE AMERICAN BOTTLING COMPANY d/b/a KEURIG DR PEPPER,  
*Petitioner/Cross-Respondent,*

v.

NATIONAL LABOR RELATIONS BOARD  
*Respondent/Cross-Petitioner*

AND

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 727,  
*Intervenor,*

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**PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT  
OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD  
[Not Yet Scheduled for Oral Argument]**

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**BRIEF FOR PETITIONER/CROSS-RESPONDENT**

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**CERTIFICATE AS TO PARTIES, RULES, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioner/Cross-Respondent The American Bottling Company d/b/a Keurig Dr Pepper states as follows:

**A. Parties and Amici**

- Petitioner/Cross-Respondent: The American Botting Company d/b/a Keurig Dr Pepper
- Respondent/Cross-Petitioner: National Labor Relations Board
- Intervenor: International Brotherhood of Teamsters, Local 727

**B. Ruling Under Review**

Petitioner seeks review of the February 5, 2020 Decision and Order of the NLRB in Case No. 13-CA-247183, reported at 369 NLRB No. 19 (2020). Its petition for review tests the Union's certification as collective bargaining representative in the underlying representation case, Case No. 13-RC-243320.

**C. Related Cases**

This case has not previously been before this Court. Counsel for Petitioner is unaware of any related cases.

/s/Corey L. Franklin

**CORPORATE DISCLOSURE STATEMENT**

Pursuant Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 28(a)(1), Petitioner The American Bottling Company d/b/a Keurig Dr Pepper hereby states:

(a) The American Bottling Company, a Delaware Corporation, is a subsidiary of Snapple Beverage Corp., a Delaware Corporation and DSP Holdings Inc., a Delaware Corporation. Snapple Beverage Corp. is a wholly-owned subsidiary of DPS Holdings Inc., which is a wholly-owned subsidiary of DPS Americas Beverages, LLC, a Delaware Limited Liability Company, which is a wholly-owned subsidiary of Keurig Dr Pepper Inc., a publically held corporation incorporated in the State of Delaware;

(b) As relevant to this appeal, The American Bottling Company manufactures, bottles, distributes, sells, and supplies carbonated and other beverages in and around the greater Chicago, Illinois metropolitan area.

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## **GLOSSARY**

NLRB or the Board – National Labor Relations Board

NLRA or the Act – National Labor Relations Act

### **STATEMENT OF JURISDICTION**

Under 29 U.S.C. § 160(f)<sup>1</sup>, this Court has jurisdiction over Petitioner's petition for review of the Board's "Decision and Order" dated February 5, 2020. The Board's Decision and Order is a final order within the meaning of Section 10(f) of the National Labor Relations Act, and Petitioner is a party aggrieved by the order. On February 12, 2020, Petitioner timely filed its petition for review with this Court.

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the NLRB's decision in Case No. 13-CA-247183 was based on substantial evidence and not arbitrary, where the NLRB concluded The American Bottling Company d/b/a Keurig Dr Pepper refused the International Brotherhood of Teamsters, Local 727's request to recognize and bargain with it following the Union's certification in Case No. 13-RC-243320, which was based the Regional Director's Decision and Direction of Election concluding that Sales Service Representatives were properly included within the unit, despite The American Bottling Company d/b/a Keurig Dr Pepper's undisputed and uncontroverted evidence that it had definite and imminent plans to eliminate the Sales Service Representative position, thereby contracting the unit and necessitating that the Regional Director dismiss the petition.

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<sup>1</sup> See Petitioner's Statutory Addendum, filed concurrently with this brief.

2. Whether the NLRB erred as matter of law by failing to apply the undisputed factual record to the Board's well-established standards for finding contracting units insofar as the International Brotherhood of Teamsters, Local 727 offered no facts to rebut The American Bottling Company d/b/a Keurig Dr Pepper's uncontroverted evidence that its planned re-routing, and elimination of Sales Service Representatives was both imminent and definite such that the petition should have been dismissed. The underlying Certification of Representation was issued by the NLRB in Case No. 13-RC-243320. In the Decision and Direction of Election in that case, the Regional Director concluded that The American Bottling Company d/b/a Keurig Dr Pepper failed to submit evidence to establish with requisite definiteness its plan to fundamentally alter its business model that would result in the elimination of its Sales Service Representatives positions. The Regional Director ignored, however, the testimony and evidence proffered by the sole witness that established The American Bottling Company d/b/a Keurig Dr Pepper's plan, as well as that The American Bottling Company d/b/a Keurig Dr Pepper would implement its plan by a date certain without deviation or delay. The American Bottling Company d/b/a Keurig Dr Pepper argues under applicable law and regulations that the NLRB's decision to exclude and ignore this competent, substantial, and undisputed evidence was improper and invalid. Accordingly, because the underlying election and certification were invalid, the NLRB's Decision and Order directing The American

Bottling Company d/b/a Keurig Dr Pepper to bargain is also invalid and should not be enforced.

3. Whether the NLRB's decision in Case No. 13-CA-247183 was based on substantial evidence and not arbitrary, where the NLRB concluded that The American Bottling Company d/b/a Keurig Dr Pepper refused the the International Brotherhood of Teamsters Local 727's request to recognize and bargain with it following the International Brotherhood of Teamsters, Local 727's certification in Case No. 13-RC-243320, where the Regional Director permitted 30 Sales Service Representatives to cast ballots without employing the NLRB's challenged ballot procedure, and permitted the International Brotherhood of Teamsters, Local 727 and/or its agents to photograph and/or videotape one or more employee(s) exercising their Section 7 rights at the tally of ballots.

## STATEMENT OF THE CASE

### **I. UNDISPUTED FACTUAL BACKGROUND<sup>2</sup>**

#### **A. Petitioner's Multi-Unit Bargaining Relationship with the Union.**

The American Bottling Company d/b/a Keurig Dr Pepper (“Petitioner”) operates a bottling and distribution facility in Northlake, Illinois that produces and ships beverage products. (Tr. 19:2-19.)<sup>3</sup> [A. 19.] Petitioner maintains a multi-unit collective bargaining relationship with the International Brotherhood of Teamsters, Local 727 (“Union”). (Tr. 70:21-25, 78:2-11.) [A. 70, 78.] One unit is comprised of Petitioner’s drivers, whose terms and conditions of employment are contained in what is known as the “outside contract”. (Tr. 37:14-23, 70:21-25, 78:2-11.) [A. 37, 70, 78.] The other unit is comprised of Petitioner’s employees who work inside its production facility and sales warehouse, whose terms and conditions of employment are contained in what is known as the “inside contract.” (Tr. 78:2-11.) [A. 78.]

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<sup>2</sup> The International Brotherhood of Teamsters, Local 727 did not call any witnesses or introduce any evidence at the hearing. Petitioner’s recitation of facts, therefore, is undisputed and uncontroverted.

<sup>3</sup> References to the transcript for the evidentiary hearing held on June 25, 2019 before the NLRB Regional Director are cited to as (Tr. \_\_) followed by the page number and then the line number.

## **B. Petitioner Alters Its Business Model.**

In 2014, Petitioner created the Sales Service Representative position – a hybrid selling and merchandising<sup>4</sup> position unique to Petitioner’s Chicago market. (Tr. 83:22-25, 84:1-3; Er. Ex. 4.)<sup>5</sup> [A. 83-84; 160.] Sales Service Representative’s sold and merchandised product delivered to Petitioner’s four large format customers. (Tr. 21:1-15; Er. Ex. 4.) [A. 21; 160.] One such customer, Jewel Foods, represents 25 percent of Petitioner’s business and is Petitioner’s largest customer in Chicago. (Tr. 31:8-10, 66:14-25, 67:1-21.) [A. 31, 66, 67.] Sales Service Representatives performed their sales and merchandising duties Monday through Friday, while Merchandisers serviced those four customers on Saturday and Sunday. (Er. Ex. 4.) [A. 160.] The balance of Petitioner’s accounts, other than telephone sales, were sold by Account Managers on geographically contiguous routes, in all channels and segments. (Tr. 21:1-17; Er. Ex. 4.) [A. 21; 160.] This was known as a “hybrid system,” which was unique to Petitioner’s Chicago area market. *Id.*

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<sup>4</sup> “Merchandising” means being responsible for ensuring proper stock of product, product display and organization, and product promotion. (Er. Ex. 1.) [A. 155.]

<sup>5</sup> References to the exhibits entered by Petitioner during the evidentiary hearing held on June 25, 2019 before the NLRB Regional Director are cited to as “(Er. Ex. \_\_)” followed by the exhibit number used at the hearing.

In the fourth quarter of 2017, Petitioner received a national directive to alter its business plan, end its hybrid system in the Chicago market, and move to strict geographic selling. (Tr. 21:18-25, 22:1-2; Er. Ex. 3.) [A. 21-22; 157-159.] This shift meant that Account Managers would now sell to all customers within their assigned geographic area, including the four large format customers for whom Sales Service Representatives had been responsible. (Er. Ex. 3, Er. Ex. 4.) [A. 157-160.] As a result of this new business plan, Petitioner would necessarily eliminate the Sales Service Representative position. (Tr. 21:1-25, 22:1-2; Er. Ex. 3, Er. Ex. 4.) [A. 21-22; 157-160.] Petitioner decided to implement this business plan so as to better serve its customers. (Tr. 21:18-25, 22:1-2.) [A. 21-22.] Upon the elimination of the Sales Service Representative position, Petitioner planned to offer affected employees other positions elsewhere in the company. (Er. Ex. 3, Er. Ex. 4.) [A. 157-160.] This process was referred to as the “Chicago Area Sales/Delivery Re-Route” (“Re-Route”). (Er. Ex. 4.) [A. 160]

The Re-Route was a major change for Petitioner that required an arduous and lengthy process to organize and prepare. (Tr. 34:8-13, 39:1-5, 73:16-25, 74:1-4.) [A. 34, 39, 73-74.] There was substantial planning involved to change Petitioner’s delivery system, and to eliminate the Sales Service Representative position, because it affected Petitioner’s entire system, and affected the Sales, Delivery, and Merchandising functions in their entirety. (Tr. 34:8-13, 38:17-25; 39:1-5.) [A. 34,

38-39.] It took Petitioner many weeks to review all of the accounts involved. (Tr. 38:17-25, 39:1-5.) [A. 38-39.]

Initially, Petitioner planned to complete the Re-Route during the spring of 2018. (Tr. 37:9-13.) [A. 37.] The Re-Route did not occur at this time, however, because Petitioner became occupied with several labor relations matters involving its delivery employees represented by the Union; specifically, contract negotiations, strike preparations, and a strike. (Tr. 37:14-25; Er. Ex. 3.) [A. 37; 157-159.]

In November of 2018, Brad Troutman, Petitioner's Area Director for Chicago, held a meeting to discuss the Re-Route and the elimination of the Sales Service Representatives. (Tr. 16:5-16, 20:1-4; Er. Ex. 3.) [A. 16, 20; 157-159.] This meeting involved the employees affected by the Re-Route. (Tr. 20:1-23.) [A. 20.] Mr. Troutman explained the rationale for the Re-Route, as well as how the Sales Service Representative position would be eliminated. (Er. Ex. 3.) [A. 157-159.] At that time, Mr. Troutman articulated Petitioner's desire to implement the Re-Route in January 2019, or right after the Super Bowl, which is normally the first weekend of February 2019. (Tr. 38:1-13; Er. Ex. 3.) [A. 38; 157-159.] Petitioner did not, however, set this date in stone. (Tr. 37:12-14.) [A. 37.]

**C. The April, 2019 Implementation was Delayed Due to Labor Relations Issues with the Union.**

On March 14, 2019, Mr. Troutman sent an email to Petitioner's Regional Account Managers<sup>6</sup>, explaining that the details of the Re-Route had been finalized. (Tr. 22:10-25, 23:1-3; Er. Ex. 4.) [A. 22-23; 160.] Mr. Troutman communicated that the Re-Route would be implemented effective Monday, April 1, 2019, at which time the Sales Service Representative position would be eliminated. (Tr. 23:4-8, Er. Ex. 4.) [A. 23; 160.] Mr. Troutman expected the Regional Account Managers to communicate this information to their respective customers. (Tr. 44:16-25, 45:1-10.) [A. 44-45.] On March 18, 2019, one such customer, Jewel Foods, communicated to its Store Directors, Assistant Store Directors, and Grocery Operation Specialists that Petitioner's Re-Route would go into effect on April 1, 2019, and provided details about the effect of the Re-Route on its operations. (Er. Ex. 5.) [A. 161.]

On Wednesday, March 20, 2019, at 5:30 a.m., Mr. Troutman met with the Sales Service Representative who, upon implementing the Re-Route, Petitioner would transition to the Merchandiser position.<sup>7</sup> (Tr. 25:8-21, 45:5-14, 46:4-22; Er.

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<sup>6</sup> The Regional Account Managers are the individuals who determine everything that has to do with a particular account. (Tr. 43:22-25, 44:1-3.) [A. 43-44.]

<sup>7</sup> There was no attendance sheet for this meeting, as this was not Petitioner's practice because employees know to attend Petitioner's meetings. (Tr. 50:19-24.) [A. 50.]

Ex. 6.) [A. 25, 45, 46; 162.] During this meeting, Mr. Troutman explained the business changes that were going into effect on April 1, 2019, including how those changes would affect the Sales Service Representatives; primarily the elimination of their positions and their re-assignment to Merchandiser roles. (Tr. 26:1-19; Er. Ex. 8.) [A. 26; 164-165.] Thereafter, affected employees met with their new District Manager and received letters containing the details of their new Merchandiser position. (Tr. 49:9-25, 50:1-18; Er. Ex. 10.) [A. 49-50; 169.] The overwhelming majority of the Sales Service Representatives were transitioning to the Merchandiser role. (Tr. 35:6-8.) [A. 35.]

Similarly, Mr. Troutman met with Account Managers to explain the Re-Route and impact on their jobs.<sup>8</sup> (Er. Ex. 9.) [A. 166-168.] The seven (7) Sales Service Representative moving to the Account Manager role received letters outlining their new role. (Tr. 56:8-18.) [A. 56.] At the conclusion of each meeting, Mr. Troutman announced that the Sales Service Representative position would be eliminated effective April 1, 2019. (Tr. 27:2-22.) [A. 27.] By April 1, 2019, Petitioner had performed all necessary tasks to implement the Re-Route on that date. (Tr. 34:14-16, 84:16-25, 85:1.) [A. 34, 84-85.]

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<sup>8</sup> Consistent with Petitioner's practice, there was not an attendance sheet for this meeting, either. (Tr. 50: 19-24.) [A. 50.]

Implementation, however, was delayed after the Union filed a grievance on behalf of the delivery drivers in response to the Re-Route. (Tr. 71:1-4, 11-17.) [A. 71.] Additionally, in late March 2019, Petitioner was negotiating the “inside contract” with the Union for its employees working in Petitioner’s production facility and sales warehouse. (Tr. 71:1-4, 77:20-25, 78:1-11.) [A. 71, 77-78.] Like the year prior, Petitioner faced the threat of a strike. (Tr. 71:5-10.) [A. 71.] Given these complications, Petitioner decided to postpone the Re-Route in a good faith effort to amicably resolve the collective bargaining agreement negotiations. (Tr. 73:16-25, 74:1-3.) [A. 73-74.] At no time did Petitioner announce that it would no longer implement the Re-Route; instead, Petitioner communicated that the postponement was temporary to allow the parties to conclude their negotiations. (Tr. 73:9-24, 74:1-5.) [A. 73-74.]

**D. Petitioner’s Largest Customer Requests to Delay the Re-Route.**

Shortly after Petitioner was forced to delay its April 1, 2019 implementation, and before Petitioner set a new date for implementation, its largest customer, Jewel Foods, informed Petitioner that if it could not implement the Re-Route by May 1, 2019, Jewel Foods wanted Petitioner to wait until after July 4, 2019 to implement it. (Tr. 78:12-25, 79:1-4.) [A. 78-79.] Jewel Foods did not want the Re-Route to be implemented during this time, historically a busy period, due to a negative past experience with one of Petitioner’s competitors. (Tr. 30:17-25, 31:1-7.) [A. 30-31.]

Since Jewel Foods is Petitioner's largest customer, it consented to Jewel Foods' request to delay implementation of the Re-Route until after July 4, 2019. (Tr. 31:8-14.) [A. 31.]

**E. Petitioner Selects July 21, 2019 to Implementation the Re-Route.**

Upon making the decision to wait until after the July 4th holiday to implement the Re-Route, Petitioner sought to determine the next available date for implementation. (Tr. 31:11-25, 32:1-5.) [A. 31-32.] These changes needed to occur between Petitioner's payroll periods, so the **first** possible date would have been July 7, the Monday following July 4. *Id.* Since July 4 is one of the two busiest weeks of its year, Petitioner determined that it was not in the best interest of its employees or customers to implement on July 7. *Id.* The **next** possible date was July 21, 2019. *Id.* Petitioner selected this date. (Tr. 32:6-9.) [A. 32.]

On June 4, 2019, Brad Allbee, Regional Vice President, confirmed the July 21, 2019 implementation date in an email to several members of Petitioner's senior leadership. (Tr. 77:12-19, 89:18-25, 90:1-25, 91:1-8; Er. Ex. 11.) [A. 77, 89-91; 170.] On June 14, 2019 at 6:00 a.m., Mr. Troutman met with the Sales Service Representative to communicate that Petitioner was going to implement the Re-Route on July 21, 2019. (Tr. 32:12-18; Er. Ex. 12.) [A. 32; 171.] During that meeting, Mr. Troutman reiterated the information he shared with the Sales Service Representative

during their March 20 meeting, including the fact that Petitioner was eliminating the Sales Service Representative position. (Er. Ex. 8, Er. Ex. 12.) [A. 164-165, 171.]

Petitioner completed all preparations necessary to implement the Re-Route on July 21, 2019. (Tr. 34:12-16.) [A. 34.] Following Mr. Troutman's June 14 announcement, there was nothing further to do to implement the Re-Route and eliminate the Sales Service Representative position but wait for the date to finally come. (Tr. 84:16-25; 85:1.) [A. 84-85.]

## **II. PROCEEDINGS BELOW**

On June 21, 2019, the Union filed a Petition to represent all full and part-time Account Managers and Sales Service Representatives at Petitioner's Northlake facility. [A. 149-150.] In response, Petitioner timely filed its Statement of Position, asserting that the proposed unit was inappropriate. [A. 152-154.] Specifically, Petitioner asserted that Sales Service Representatives:

[s]hould be excluded under the contracting unit doctrine, because effective July 21, 2019 all current [Sales Service Representatives] will complete previously scheduled reassignment to other job classifications and the [Sales Service Representative] classification at the Northlake facility will cease to exist. This business plan is definite and has been communicated to affected employees.

*Id.*

On June 25, 2019, the Parties participated in an evidentiary hearing to present evidence as to the appropriate unit, if any. [A. 1-176.] At the hearing, Petitioner

presented evidence and testimony establishing the imminent and definite nature of the Re-Route and unit contraction through the elimination of the Sales Service Representative position. *Id.* This evidence was uncontroverted by the Union, which called no witnesses and offered no evidence. Furthermore, the record lacks any implication or inference that Petitioner's witness, Mr. Troutman, lacked credibility.

On July 3, 2019, the Regional Director issued his Decision and Direction of Election ("Decision") [A. 177-185.] Ignoring Petitioner's undisputed evidence, the Regional Director determined that Petitioner "did not meet its burden to show definite evidence of a contracting unit," and, therefore directed an election in a unit including Sales Service Representatives. [A. 183.]

On July 10, 2019, Petitioner filed a Request for Review of the July 3, 2019 Decision, contending the Regional Director erred in concluding Petitioner failed to satisfy its burden regarding bargaining unit contraction because the evidence demonstrated that Petitioner would implement its business changes and eliminate the Sales Service Representative position on July 21, 2019. [A. 195-210.] After all, Petitioner's evidence and testimony was entirely unrefuted. [A. 204-208.] Petitioner also filed a Motion to Stay, requesting the Board stay the election until such time as a final determination on the Request for Review could be issued. [A. 186-194.] On July 12, 2019, the Motion to Stay was denied. [A. 211.]

The Regional Director directed a representation election on July 12, 2019. [A. 183.] At that time, Petitioner employed 35 Sales Service Representatives and 33 Account Managers. (Bd. Ex. 3.) [A. 99-100; 152-154.] During the pre-election conference, Petitioner's Director of Labor Relations, Michael Kenny informed Christina Ortega, the Board Agent (the "Agent") administering the election, that Petitioner still intended to implement the Re-Route and eliminate the Sales Service Representative position on July 21, 2019. [A. 213-227.] Mr. Kenny also reiterated Petitioner's contention that the Regional Director's Decision was incorrect since he failed to apply the correct legal standard applicable in the context of a unit contraction. [A. 225-226.] For these reasons, Mr. Kenny advised the Agent that Petitioner would challenge the ballots cast by Sales Service Representatives as their inclusion in the bargaining unit was inappropriate. *Id.*

The Agent flatly refused to accept any challenges based on **job classification alone**, evidencing a patent misunderstanding of Petitioner's circumstances. *Id.* Despite her striking refusal to apply the Board's challenged ballot procedure to the Sales Service Representatives ballots, Mr. Kenny informed the Agent that Petitioner's election observer, Kelly Zeller, would nonetheless challenge each and every Sales Service Representative employee who attempted to vote because Petitioner believed their inclusion in the unit was in error. *Id.* At the conclusion of the pre-election conference, Mr. Kenny again reiterated that Petitioner's observer

would challenge the votes of all Sales Service Representatives who sought to vote in the election. *Id.*

During the election, Mr. Zeller attempted to challenge the votes of the Sales Service Representatives who cast ballots. [A. 221-222.] Instead of following the Board's well-established challenged ballot procedure, the Agent permitted each Sales Service Representative to vote and informed Mr. Zeller that the Regional Director had already issued a decision on "this issue." *Id.* It is therefore evident that the Agent believed that the Regional Director's Decision excused her from following the Board's election procedures. Mr. Zeller attempted to challenge the votes of thirty (30) Sales Service Representatives. [A. 217-227.] As 62 ballots were cast in total, 46 for the Union and 16 against the Union, the ballots cast by the Sales Service Representatives that Petitioner's observer sought to challenge were outcome determinative. [A. 212, 213-227.]

Following the election, the Union and/or its agents photographed and/or videotaped the tally of ballots and the employees from both factions who participated. [A. 225-226.] Once she completed the tally, the Agent observed the Union and/or its agents engaging in this conduct. *Id.* Instead of prohibiting this conduct and recognizing its potential deleterious effect on the employees' exercise of their Section 7 rights, the Agent simply informed the Union and/or its agents that they should have not been videotaping the tally of ballots. *Id.* The Agent indicated

she simply forgot to inform those gathered before the tally began that these actions were prohibited. *Id.* In a striking display of indifference, the Agent simply stated “oh well,” as if the Union and/or its agents’ conduct did not really matter. *Id.* Though she took no action, the Agent’s comments exemplify her recognition, in the moment, that the Union’s conduct was antithetical to the employees’ exercise of their Section 7 rights.

On July 19, 2019, Petitioner filed Objections to Election addressing the Agent’s conduct which fell well outside of, and in direct contradiction to, the Board’s established election procedures. [A. 213-227.] On July 21, 2019, consistent with its previously expressed commitment, Petitioner eliminated the Sales Service Representative position. On August 5, 2019, the Regional Director overruled Petitioner’s objections, and incorrectly determined that Petitioner “failed to substantiate its allegation of changed circumstances to the Board agent at the preelection conference.” [A. 228-231.] In light of his ruling, the Regional Director issued a Certification of Representative. [A. 230-231.] On August 19, Petitioner filed a Supplemental Request for Review challenging the Regional’s Director’s Decision on Objections and Certification of Representative. [A. 232-260.] On October 15, 2019, the Board denied Petitioner’s Requests for Review. [A. 263-264.]

### **A. The Proceedings Before the NLRB.**

On August 7, 2019, the Union demanded Petitioner bargain with respect to the improperly certified unit. Because the certified unit was improper, Petitioner refused to recognize or bargain with the Union. On August 26, 2019, the Union filed an unfair labor practice claiming Petitioner violated the Act by refusing to recognize the Union and bargain. [A. 261-262.] On November 25, 2019, the Region issued a Complaint alleging that Petitioner violated the Act. [A. 265-268.] Petitioner timely responded, denying the propriety of the of the election in Case No. 13-RC-243320, and readopting and reasserting its position articulated in the Request for Review, its Objections to Election and Written Offer of Proof, and its Supplemental Request for Review. [A. 269-273.]

Following the General Counsel's Motion for Summary Judgment [A. 274-360] and Petitioner's Response to the Board's Show Cause Order [A. 362-365], wherein it argued that its refusal to bargain was justified because the certified unit was patently improper, the Board issued a Decision and Order on February 5, 2020 ("Order"). [A. 366-368.] The Board concluded Petitioner's argument was not litigable before the Board and granted the General Counsel's Motion for Summary Judgment. *Id.* Petitioner now brings this appeal before the Court to test the propriety of the Certification of Representation.

### **SUMMARY OF THE ARGUMENT**

This a simple and straightforward matter. Despite a wealth of undisputed and un rebutted evidence that the Re-Route would occur on July 21, 2019, less than thirty (30) days from the date of the hearing, the Regional Director decided, in the absence of any evidentiary support, that Petitioner failed to demonstrate that the unit sought by the Union was contracting. The Regional Director's Decision cherry-picked facts from the record to issue a results-driven Decision based on the Regional Director's subjective feelings regarding this matter, not the weight of the uncontroverted evidence. All of the evidence adduced at hearing established that Petitioner was going to eliminate the Sales Service Representative position on July 21, 2019, thus contracting the Union's proposed unit. The Union did not introduce any evidence to contradict Petitioner's position and, as promised, the Petitioner eliminated the Sales Service Representative position on July 21, 2019.

The Regional Director clearly based his Decision on his own subjective feelings, ignoring the record evidence. Thus, the Regional Director's Decision that Board relied upon to determine that Petitioner violated the Act is not supported by substantial evidence and was in fact, arbitrary and capricious. This warrants granting the instant Petition for Review, dismissing the Board's cross-application for enforcement, and vacating the Board's order.

In addition, the Regional Director erred in overruling Petitioner's election objections, concluding the Agent's conduct in direct contravention of the Board's procedures was permissible. Indeed, Petitioner apprised the Agent that even though the Regional Director determined that Sales Service Representatives should be included within the unit, Petitioner was going to eliminate the Sales Service Representatives on July 21, 2019, as promised. While the Regional Director may have viewed the implementation date as still subject to change, the passage of time without any change in its position is a "changed circumstance" that should have prompted the Agent to understand that use of the Board's challenged ballot procedure would be necessary.

During the election, Petitioner attempted to challenge the ballots of all thirty (30) Sales Service Representatives. Instead of following the Board's well-established procedures, the Agent declined to follow those procedures and allow prohibited Sales Service Representatives to vote indiscriminately. As the total number of Sales Service Representatives that the Agent permitted to vote (without challenge) was outcome determinative, the Board should have set aside the election. Again, Petitioner's evidence regarding the conduct of the hearing is undisputed. The Agent's conduct undermined the impartiality of the proceeding. Thus, the Board was compelled to reject the Regional Director's determination which, as discussed in

depth below, was seemingly based solely upon personal preference, not the undisputed evidence adduced the hearing in this matter.

### **STANDING**

Petitioner has standing to seek review of the Board's Decision and Order because it is a final order and Petitioner is a party aggrieved by said order under 29 U.S.C. § 160(f).

### **ARGUMENT**

#### **I. THE BOARD'S BARGAINING UNIT DETERMINATION ARBITRARILY IGNORED SUBSTANTIAL, UNCONTROVERTED RECORD EVIDENCE OF AN IMMINENT FUNDAMENTAL CHANGE IN THE NATURE OF PETITIONER'S BUSINESS IN LESS THAN ONE MONTH AND CONTRACTION OF THE PETITIONED-FOR UNIT.**

##### **A. Standard of Review.**

This Court will not “merely rubberstamp NLRB decisions” *Cleveland Constr. v. NLRB*, 44 F.3d. 1010, 1014 (D.C. Cir 1994) and is “not merely the Board's enforcement arm.” *Randall Warehouse of Ariz., Inc. v. NLRB*, 252 F.3d 445, 448 (D.C. Cir. 2001) (quotation omitted). It is the Court's “responsibility to examine both the Board's findings and reasoning.” *Id.* Indeed, “[a] bargaining unit determination will not stand if it is arbitrary and without substantial evidence.” *Id.* As the Court explained, “[t]his court cannot...sustain a unit determination by the Board where it is based not on the agency's own judgment but on an erroneous view

of the law.” *IBEW, Local Union No. 474 v. NLRB*, 814 F.2d. 697, 707 (D.C. Cir. 1987). The Court’s analysis must consider “not only the evidence supporting the Board’s decision but also whatever in the record fairly detracts from its weight.” *LCF Inc. v. NLRB*, 129 F.3d 1276, 1281 (D.C. Cir. 1997). The Board’s findings “must...be set aside when the record before a Court of Appeals clearly precludes the Board’s decision from being justified by a fair estimate of the **worth of the testimony of witnesses** or its informed judgment on matters within its special competence or both.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951) (emphasis supplied). “Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

**B. Argument on the Merits.**

The Regional Director deviated from Board precedent and erred in his application of well-established Board law to the undisputed and uncontroverted evidence adduced at the hearing. Indeed, from the face of the Decision, it is readily apparent that the Regional Director ignored this evidence to reach the conclusion that Petitioner “fail[ed] to establish [that it] has taken steps to effectuate the targeted change.” [A. 183.] Further highlighting his selective reading of the evidence, the Regional Director articulated his belief that Petitioner’s evidence “reveals a pattern of announcing implementation dates that pass without fruition.” *Id.* The Regional

Director's conclusion, however, is not supported by substantial evidence and is, in fact, arbitrary and capricious.

**1. The Applicable Standard for Contracting Units**

“The Board will not direct an election, and will instead dismiss the petition, when there is definite evidence of a contracting unit...” *Windwalker Grp., LLC*, 2017 NLRB Reg. Dir. Dec. LEXIS 157, \*7-8 (2017) (citing *MJM Studios*, 336 NLRB 1255 (2001); *Hughes Aircraft Co.*, 308 NLRB 82 (1992)). Neither the Board nor this Court have defined a “contracting unit.” Instead, the Board has identified several factors that it will consider “in determining whether there is sufficient evidence of contraction...to warrant dismissal of the petition [which] are: (1) the period of time between the representation hearing and the expected date of cessation; (2) steps taken by the employer to effectuate the change; and (3) whether the employees have been notified.” *Id.* (citing *Hughes*, 308 NLRB at 82-83; *Davey McKee Corp.*, 308 NLRB 839, 840 (1992); *Larson Plywood Co.*, 223 NLRB 1161 (1976)). “An employer contending that an election is inappropriate because a bargaining unit is....contracting in the foreseeable future must present evidence that is more than speculative.” *Perfection Pet Foods, LLC*, 2013 NLRB Reg. Dir. Dec. LEXIS 91, \*19 (2013) (citing *Canterbury of Puerto Rico*, 225 NLRB 309 (1976); *West Penn Hat and Cap Corp.*, 165 NLRB 543 (1967)).

“A mere reduction in the number of employees is insufficient to warrant dismissal of the petition; the Board will also consider whether the reduction is a consequence of a ‘fundamental change in the nature of Petitioner’s business operations.’” *Paramount Petroleum/Alon USA Prop., Inc.*, 2013 NLRB Reg. Dir. Dec. LEXIS 32, \*18 (2013) (quoting *MJM Studios*, 336 NLRB at 1256). A fundamental change is evidenced by, *inter alia*, an employer eliminating aspects of its current business. *MJM Studios*, 336 NLRB at 1256.

The Board has refused to dismiss petitions where the plan to contract the unit is too remote, *see NLRB v. Engineers Constructors, Inc.*, 756 F.2d 464, 467-68 (6th Cir. 1985) (finding it was not an abuse of discretion to order an election where eight months of work remained), where assertions regarding the future of operation was mere speculation, *see Hazard Express, Inc.*, 324 NLRB 989, 990 (1997) (finding speculative the claim that the employer may have to lay off drivers, though no plans to sell or otherwise close its business was in motion), and where, even if there is definitive evidence of a contracting unit, the current employees are substantial and representative of the ultimate component. *See MJM Studios*, 336 NLRB at 1256.

**2. The Board’s Arbitrary Decision Is Not Based on Substantial Evidence**

Here, the undisputed facts establish Petitioner more than satisfied its minimal burden of demonstrating the imminent and definite contraction of the proposed

bargaining unit through the elimination of the Sales Service Representatives. The Regional Director ignored this evidence and issued his results-driven Decision, which the Board rubberstamped. The evidence simply does not support Regional Director's determination that Petitioner "fail[ed] to establish [that it] has taken steps to effectuate the targeted change." Highlighting his selective parsing of the record, the Regional Director articulated his belief that Petitioner's evidence "reveals a pattern of announcing implementation dates that pass without fruition."

When evaluated in light of the undisputed evidence, the Regional Director's conclusions are a departure from Board precedent, unsubstantiated by the record evidence and arbitrary. The **only** conclusion supported by the undisputed record evidence is that Petitioner was going to eliminate the Sales Service Representatives on July 21, 2019, a date certain, and that the previous delays were not attributable to Petitioner, but rather third parties, including the Union. The Board's blind affirmance of the Decision was in error, and warrants reversal by this Court.

First, there were fewer than four weeks between the date of the representation hearing and the Re-Route implementation. Moreover, it is undisputed that at the time of the hearing, Petitioner already had taken all necessary steps to effectuate this change to its business model in the Chicago area. The **only** thing Petitioner had to do was to wait for the designated day to arrive. The unrebutted evidence demonstrated that Petitioner, through Mr. Troutman, informed Sales Service

Representatives of the July 21, 2019 implementation date and the elimination of their position. Despite the Regional Director's unfounded notion to the contrary, Petitioner has no duty or burden to re-issue the details regarding the Re-Route to the Sales Service Representatives. Petitioner already provided them with all salient information about their transition prior to April 1. Petitioner only had to notify employees of the change, an obligation Mr. Troutman satisfied on June 14, 2019, when he informed the Sales Service Representatives of the implementation date. (Er. Exs. 8-9, 12.) [A. 164-168, 171.] No evidence, documentary or testimonial, supports any other conclusion.

There was nothing speculative or tentative about the Re-Route. It was going to, and did in fact, happen exactly as Petitioner said it would. The Union offered no evidence to contradict or otherwise discredit the testimony of Petitioner's representative who stated, **unequivocally**, that Petitioner would implement the Re-Route on July 21, 2019. Under extant Board law, the Regional Director should have credited Mr. Troutman's testimony as fact, instead of interjecting his subjective feelings about the certainty of the Re-Route. *See M.B. Kahn Constr. Co., Inc.*, 2010 NLRB 1050 (1974) (crediting uncontroverted testimony from employer's manager regarding target date for elimination of employees and overall timeliness of project as evidence supporting dismissal of petition). Further buttressing this conclusion is

the fact that Mr. Troutman's testimony conformed to the documentary evidence admitted, without objection, that confirmed the implementation date.

Thus, regardless of whether the Regional Director personally believed the Re-Route would occur, there was **no** evidence to support a determination that the Re-Route would not occur as Petitioner promised. Nothing in the record contradicted Petitioner's position that it planned on implementing the Re-Route on July 21, 2019. Petitioner satisfied its burden to demonstrate the Sales Service Representative position would be eliminated upon implementation of the Re-Route. *See Windwalker*, 2017 NLRB Reg. Dir. Dec. LEXIS at \*7-8. By ignoring all of the record evidence in support of this obvious conclusion, the Regional Director erred, issuing the Decision that flies in the face of this undisputed evidence.

The Board's decision in *M.B. Kahn* highlights the Regional Director's error, and shows what the Regional Director should have done. In *M.B. Kahn*, the employer performed work pursuant to a contract, which it was scheduled to complete by June 1974. *M.B. Kahn*, 210 NLRB at 1050. At the time of the hearing in December 1973, the employer's project manager presented unrefuted evidence the employer anticipated that the proposed unit would contract on March 4, 1974 and April 15, 1974, when the employer would terminate employees based on project-status. *Id.* Because the Union failed to present any contradictory testimony, the Board properly adopted the project manager's undisputed testimony and found, "in

view of the imminent completion of the construction project here involved, no useful purpose would be served by conducting elections in the units found appropriate.” *Id.* The Board, therefore, dismissed the petition.

Petitioner’s evidence in this case far outweighs what the Board relied upon in *M.B. Kahn* to find unit contraction. Here, Petitioner presented undisputed testimony regarding: (1) the fundamental changes being made to Petitioner’s business model through the Re-Route; (2) that preparations for the implementation of the Re-Route on July 21, 2019 were complete; (3) affected employees were provided notification on June 14, 2019 of the impending Re-Route and re-affirmed the changes to the terms and conditions of employment communicated less than three months prior; and (4) that Petitioner had already prepared to transition Sales Service Representatives to new positions effective July 21, 2019. Despite the undisputed nature of this testimony and contrary to the Board’s standard concerning the treatment of such evidence, the Regional Director arbitrarily ignored Mr. Troutman’s testimony, cherry-picking the facts needed to claim Petitioner’s evidence was insufficient to show a definite and imminent contraction of the unit.

To wit, the Regional Director placed particular emphasis on one line in Mr. Allbee’s email to senior leaders communicating that July 21 was the “new *target* date to implement.” [A. 183.] (emphasis in original.) To the Regional Director, this phrase supported his conclusion that the implementation date was simply

“aspirational.” *Id.* Yet, in *M.B. Kahn*, the Board relied upon evidence that the employer “anticipated” reducing its staff on certain target dates, and the employer “expected” to meet those dates. *M.B. Kahn*, 210 NLRB at 1050. Clearly, the language used by the employer in *M.B. Kahn* and upon which the Board relied to find a contracting unit was far more “aspirational” than that used by Petitioner. Moreover, based on a plain reading of this email, it is evident that Mr. Albee used the word “target” as a designation for a fixed date when Re-Route would happen. (Er. Ex. 11.) [A. 170.] There was nothing anticipatory or transient about this date. (*Compare* Er. Ex. 11 [A. 170] *with M.B. Kahn*, 2010 NLRB at 1050). Further, Mr. Troutman testified that the July 21 date for the Re-Route was a “date certain,” which Union did not and could not refute. (Tr. 34:17-23.) [A. 34.]

It was undisputed that Petitioner would eliminate the Sales Service Representatives less than 30 days after the hearing. The unit contraction in this case was significantly more imminent than what occurred in *M.B. Kahn*, 2010 NLRB at 1050. Board law compelled a determination by the Regional Director that the Re-Route was certain and imminent given the substantial weight of the evidence. His failure to do so illustrates the arbitrary nature of the Decision, compelling its reversal.

In an attempt to justify the Decision, the Regional Director cited to the postponement of the Re-Route from April 1 to July 21, 2019 to somehow conclude

that Petitioner's decision was not, in fact, definite. The Regional Director's thinly-veiled implication is that Petitioner had set arbitrary dates for implementation, only to let those dates elapse without action and planned on simply doing so again. The Regional Director's subjective belief in this regard was directly contradicted by the unchallenged record evidence.

It was undisputed that the only reason Petitioner postponed implementation was to address labor relations concerns with the Union (*e.g.*, threatened labor strikes, collective bargaining negotiations, and a grievance related to the Re-Route) and because Petitioner's largest customer requested the postponement until after July 4, 2019. As Mr. Troutman testified, after this postponement, July 21, 2019 was the first date on which the Re-Route could occur. Petitioner did not wait or schedule the Re-Route to occur several months later. The evidence establishes the opposite; the Re-Route was scheduled as soon as possible.

Setting aside all of the other evidence substantiating that the Re-Route was going to be implemented on July 21, 2019, the simple fact that Petitioner selected the first date available after a customer-requested postponement is strong evidence of Petitioner's intent and disabuses any notion that Petitioner would just delay the Re-Route. If the Regional Director's notion were believed and that it was not certain whether Petitioner would implement on July 21, 2019, why would Petitioner select the first available date? Logically, this makes no sense and even less so when taking

into consideration all of the undisputed preparation necessary for Petitioner to execute the Re-Route.

All of the undisputed evidence shows the July 21, 2019 implementation was definite, not speculative or tentative. It occurred as scheduled. This fact is significant, in and of itself – Petitioner did **exactly** what it said it was going to do. If this does not evince certainty, what does? The Regional Director’s Decision can be distilled into a single statement – “I do not believe you.” Yet, the Decision is devoid of a finding that all of the evidence (*i.e.*, Mr. Troutman’s testimony and the documents introduced through him) are not worthy of any credibility. The Regional Director, however, had no right to refuse to accept the Petitioner’s evidence. “[I]t is the settled law that where a witness’s testimony is not contradicted, a trier has **no right to refuse to accept it.**” *NLRB v. Ray Smith Transp. Co.*, 193 F.3d 142, 146 (5th Cir. 1951) (declining to enforce Board order because there was no factual or legal support for the examiner’s findings) (emphasis supplied); *See Be-Lo Stores v. NLRB*, 126 F.3d 268, 287 (4th Cir. 1997) (Board and ALJ were not justified in reaching a conclusion contrary to the employer’s un rebutted evidence regarding reason for employee’s discharge).

The Regional Director created the basis for the Decision out of whole cloth, lacking any support (evidentiary or otherwise), let alone the **substantial** evidence necessary to survive this Court’s scrutiny. “[T]he examiner’s practices of

consistently discrediting the testimony of respondent's witnesses despite the lack of contradictory evidence does not reflect a complete and fair consideration of all the evidence." *NLRB v. Audio Indus., Inc.*, 313 F.2d. 858, 864 (7th Cir. 1963) (denying Board's application for enforcement where trial examiner's findings were unsupported by substantial evidence in the record as a whole.) This is the precise situation in which the Court should reverse the Regional Director's Decision, conclude that the bargaining unit is not appropriate, and set aside the Board's Order. *Teamsters Local Union No. 175 v. NLRB*, 788 F.2d 27, 32 (D.C. Cir. 1986) (reversing the Board's decision which rested on "an irrational hypothetical...which has no relation to the facts of this case and therefore lacks support in substantial evidence."); *LCF*, 129 F.3d at 1282 (setting aside Board's order where the decision "ultimately lack[ed] substantial evidence in the record given the overwhelming record evidence" contrary to the Board's conclusion); *Cleveland*, 44 NLRB at 1017 (vacating Board's adoption of Regional Director's unit determination because of its "silent departure from precedent and its ignoring of evidence").

The Regional Director's partial dismissal of an unrelated unfair labor practice charge highlights the paper-thin reasoning upon which the Decision rests. In Case No. 13-CA-245151, the Union alleged *inter alia* that Petitioner violated the Act when it implemented the Re-Route resulting the elimination fo the Sales Service Representative position. *The Am. Bottling Co. d/b/a Keurig Dr Pepper*, Case No. 13-

CA-245151 (NLRB Oct. 15, 2019), <https://www.nlr.gov/case/13-CA-245151>; *see also The Am. Bottling Co. d/b/a Keurig Dr Pepper*, Case No. 13-CA-252201 (NLRB Jan. 27, 2020), <https://www.nlr.gov/case/13-CA-252201> (Regional Director dismissing charge with identical allegations to Case No. 13-CA-245151, reiterating finding and holding in that case, as confirmed by NLRB Office of Appeals on appeal by the Union on March 20, 2020); *The Am. Bottling Co. d/b/a Keurig Dr Pepper*, Case No. 13-CA-253427 (NLRB Jan. 27, 2020), <https://www.nlr.gov/case/13-CA-253427> (same as previous, as confirmed by NLRB Office of Appeals on appeal by the Union on March 23, 2020).<sup>9</sup> The Regional Director dismissed this claim, **finding sufficient evidence to conclude that Petitioner made the decision to implement the Re-Route before the date of the election**, July 12, 2019. *The Am. Bottling Co. d/b/a Keurig Dr Pepper*, Case No. 13-CA-245151 at p. 1. (emphasis supplied.) Inexplicably, the Regional Director attempted to explain how this conclusion differed from his contradictory finding in the Decision, stating that the latter was based upon “the evidence made available to the Region by the parties during those proceedings.” *Id.* Yet, the evidence did not change from one proceeding to another; the competent, substantial, and undisputed evidence demonstrated that Petitioner

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<sup>9</sup> *See* Petitioner’s Unpublished Dispositions Addendum, filed concurrently with this brief.

was going to implement the Re-Route on July 21, 2019. The only other alternative is that the Regional Director determined that Petitioner made the decision to implement the Re-Route **after** the June 25, 2019 hearing but **before** the July 12, 2019 election. Such a determination makes little, if any sense, given Petitioner's obligations under the Act to maintain laboratory conditions during this critical period. *See Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 598 n.13 (2004) ("As a general rule, the period during which the Board will consider conduct as objectionable (i.e., the 'critical period') is the period between the filing of the petition and the date of the election.") (citation omitted.) Despite his protestations to the contrary, it is clear that this dismissal supports the determination that the Decision is not based on substantial evidence.

In addition to ignoring the record evidence, the Regional Director further failed to determine that the Re-Route was a fundamental change to its business model, a fact which the evidence also established. Selling through Sales Service Representatives was unique to Petitioner's Chicago market, and therefore, not performed in any other market throughout the country. The undisputed evidence showed the Re-Route altered how Petitioner's product was sold and merchandised to its customers. The Re-Route eliminated an entire job classification that Petitioner relied on to sell and merchandise product for its largest customer, who makes up a full quarter of Petitioner's business. No record evidence contradicts these facts. The

only conclusion supported by the record is that Petitioner's elimination of the Sales Service Representatives resulted from a fundamental change its business, further supporting the dismissal of the Petition. *MJM Studios*, 336 NLRB at 1256.

Despite this evidence, the Regional Director determined, without any analysis, that Petitioner's operations would not be fundamentally changed, apparently relying upon *MJM Studios*. Yet, in this regard, that case is distinguishable upon its facts.

In *MJM Studios*, the union filed a petition to represent twenty-seven employees in two job classifications. *Id.* Despite finding that the proposed unit was contracting, the *MJM Studios* Board relied on *Douglas Motors Corporation*, 128 NLRB 307, 308 (1960) and *Yellowstone International Mailing, Inc.*, 332 NLRB No. 35 (2000) to conclude that approximately 52 percent of the petitioned for employees and both job classifications would remain employed despite the contraction, and therefore, a "substantial and representative component" existed to justify the election. *Id.* The remaining employees and classifications was not the only factor the Board considered in making its determination, however. *Id.* The Board also considered that "the evidence does not indicate that any reduction in Petitioner's work force is the result of a 'fundamental change' in Petitioner's operations." *Id.* (citing *Douglas*, 128 NLRB at 108). Thus, it is evident that the lack of fundamental

change was an integral part of the Board's decision to ignore the contracting unit and find that continuing with the election was the proper action

In this case, the Regional Director **did not** analyze whether the planned elimination of the Sales Service Representatives to be a result of a "fundamental change" to Petitioner's business. It is undisputed that the Re-Route changed the fundamental workings of Petitioner's business by altering its Chicago-market business model from a hybrid system to a strict geographic sale system. This change to its business model necessitated the elimination of the Sales Service Representative position. By changing the way Petitioner sells and merchandises its products to its clientele, Petitioner eliminated the position solely responsible for selling its products to its largest Chicago area market client, which alone constituted a change to 25 percent of its business in that market. As the change that necessitated the contraction in the unit was caused by an indisputably fundamental change in the manner Petitioner performs its operations, the Board's holding in *MJM Studios* is inapposite here.

Finally, the Regional Director ordered an election with the Sales Service Representatives included in the unit because "the record fails to show the Reroute implementation date of July 21, 2019 is definite." In so doing, the Regional Director applied the incorrect legal standard. While the Regional Director correctly noted a contracting unit must be based on concrete evidence that the change is definite and

imminent, *Retro Environmental, Inc.*, 364 NLRB No. 70, slip op. at 4 (2016), the Regional Director incorrectly concluded Petitioner had to establish the Re-Route will definitely occur on an exact calendar date.

The Board considered this very “exact calendar date” issue in *St. Thomas-St. John Cable TV*, 309 NLRB 712 (1992). There, the question was whether a temporary employee was eligible to vote. The hearing officer concluded the temporary employee was eligible because as of the eligibility date there was no date certain for the termination of the temporary employee. The Board held the hearing officer applied an incorrect legal standard in requiring a date certain. As the Board found:

The hearing officer has apparently misconstrued the foregoing “date certain” eligibility test for temporary employees. This test does not require a party contesting an employee’s eligibility to prove that the employee’s tenure was certain to expire on an exact calendar date. It is **only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired.** In this case, it is clear that Petitioner retained Lawrence as a temporary employee on August 16, 1991, to complete a specific filing backlog project of several months duration. Although this project lasted 2 to 3 months longer than estimated by Petitioner, its ultimate completion was a sufficiently certain event as of the March 21, 1992 eligibility date.

*Id.* at 713.<sup>10</sup> (emphasis supplied.) Here, similar to the hearing officer in *St. Thomas-St. John Cable TV*, the Regional Director incorrectly concluded there must be proof the Re-Route will occur on an exact calendar date. The correct legal standard instead is whether the Re-Route was “a sufficiently certain event as of the....eligibility date.” *Id.*

The evidence adduced at the hearing established Petitioner would (and ultimately did) implement the Re-Route on July 21, 2019, thereby eliminating the Sales Service Representative position. **No** evidence refuted or rebutted these facts. Had he credited this undisputed evidence, let alone apply it to extant Board precedent, the Regional Director would have found that the proposed unit inappropriate and dismissed the Petition. Even if the Regional Director decided not to dismiss the Petition, he would (and should) have issued a Decision and Direction of Election excluding Sales Service Representatives from the proposed unit (with the possible exception of the seven (7) Sales Service Representatives who become Account Managers effective July 21, 2019). Instead, the Regional Director issued a Decision unsupported by any evidence, let alone evidence substantial enough for this Court to affirm its findings. *See e.g., Cleveland*, 44 F.3d at 1016-17; *LCF* 129

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<sup>10</sup> *St. Thomas-St. John Cable TV* is cited with approval in *MJM Studios*, 336 NLRB 1255 (2001), one of the cases relied upon by the Regional Director in the Decision.

F.3d 1276; *Teamsters*, 788 F.2d at 32. For these reasons, the Court should grant the Petition for Review, deny the Board's cross-application for enforcement, and vacate the Board's adoption of the Regional's Director's Decision.

## **II. THE BOARD ARBITRARILY DEVIATED FROM AND FAILED TO FOLLOW BOARD PRECEDENT BY IGNORING ESTABLISHED ELECTION PROCEDURES**

### **A. Standard.**

Congress vested the Board with the “responsibility to supervise representation elections.” *Service Corp. Int'l v. NLRB*, 495 F.3d 681, 684 (D.C. Cir. 2007); *see also* 29 U.S.C. § 159(c). For this reason, Board decisions regarding representation elections are “entitled to a wide degree of discretion.” *Id.* (quotation and citation omitted.) As this Court has acknowledged, “in reviewing the validity of election results, we ask whether the Board has followed appropriate and fair procedures, and has reached a rational conclusion in addressing any objections to the election.” *Id.* (quotation and citation omitted.) “We will uphold the Board's decision unless upon reviewing the record as a whole, we conclude that the Board's findings are not supported by substantial evidence, or that its interpretation of the Act is not reasonable and consistent with applicable precedent.” *Id.* (quotation and citations omitted).

In each case, “[w]hether [an objecting party's] evidence was sufficient depends upon the Board's substantive criteria for the relevant claim of election

misconduct.” *AOTOP, LLC v. NLRB*, 331 F.3d 100, 103 (D.C. Cir. 2003) (quotation omitted.) Thus, as the Board has noted, “[w]hen [a] party's evidence, even if credited, would not justify setting aside the election under those criteria as a matter of law, there is simply “nothing to hear,” and the Regional Director may resolve the objections on the basis of an administrative investigation. *Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 58 (D.C. Cir. 2016).

**B. The Regional Director Erred by Ignoring the Agent’s Failure to Adhere to the Board’s Established Challenged Ballot Procedure.**

The Regional Director arbitrarily deviated from Board precedent by ignoring the Agent’s failure to apply the Board’s well-established challenged ballot procedure and the Agent’s decision to permit the Union and/or its agent to photograph and/or videotape the tallying of ballots and employees who attended the count. Petitioner’s evidence regarding the Agent’s inappropriate conduct was undisputed. The Regional Director’s decision to permit these procedural and legal violations warrants setting aside the election.

Section 11338.3 of the NLRB Case Handling Manual, Part 2, Representation Proceedings (the “Manual”), outlines the Board’s required procedure for when a party challenges a ballot cast during a representation election. Specifically, the “Challenge Procedure” states:

When a voter is challenged, a small “c” is placed beside his/her name by the checking observer for the challenging party . . . The Board agent

(at the checking table or, in a large election, at a challenge table) fills out the information called for on the stub of a challenged ballot envelope—the voter’s name, job classification, employer, place and date of election, the reason given for the challenge, the identity of the challenger, and the agent’s initials. If time permits, the agent may elicit specific information surrounding the voter’s status, for insertion on the reverse side of the stub, which should be initialed by the voter.

NLRB Case Handling Manual, Part 2, Representation Proceedings, § 11338.3.

This process allows the parties to raise issues during the voting process, while also making it easier for the vote-caster to be identified once the challenge has been resolved. The process permits an expeditious resolution of a challenged voter’s eligibility status **following** the election. *See* NLRB Case Handling Manual, Part 2, Representation Proceedings, § 11338.7. Moreover, pursuant to the NLRB’s Rules and Regulations, when the eligibility of any person to participate in an election is challenged, with good cause, those ballots “of such challenged persons **shall** be impounded.” (emphasis supplied.) 29 C.F.R. § 102.69(6). Indeed, “the Board goes to great lengths to ensure that the manner in which an election was conducted raises no reasonable doubt as to the fairness and validity of the election.” *Fresenius USA Mfg., Inc.*, 352 NLRB 679, 680 (2008) (quoting *Jackel, Inc.*, 293 NLRB 615, 616 (1989)).

Here, the Agent wholly and completely failed to adhere to any of the requirements of the Board’s well-established challenged ballot procedure. Instead, she allowed the challenged voters to cast their ballot as if Petitioner made no

challenge. Not a single challenged ballot form was used, no individual votes were marked as “challenged,” and none of the required information was gathered regarding the individual challenged voters. The Agent’s failure to abide by the challenged ballot procedure was relevant because seven of the thirty (30) Sales Service Representatives whose positions were eliminated transitioned to become Account Managers, which now hold the only available positions within the bargaining unit. Because these employees’ votes were not segregated, the only available remedy is for a new election.

Significantly, there is no evidence the Agent even considered implications of her decision to summarily deny Petitioner’s ability to challenge thirty (30) Sales Service Representative’s ballots. Had she given any consideration to the challenges at the time they were raised, the Agent would have recognized that on June 14, 2019 (and before), Petitioner informed the Sales Service Representatives of the forthcoming elimination of their position on July 21, 2019, and that Petitioner had reiterated its commitment to eliminate the Sales Service Representative position on July 21, 2019 during the pre-election conference.<sup>11</sup> Again, instead of adhering to the challenged ballot process for all Sales Service Representative ballots cast, the

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<sup>11</sup> Indeed, consistent with its assertions to the Agent, Petitioner followed through by eliminating the Sales Service Representative position on July 21, 2019.

Agent's omission have precluded a clear-eyed assessment of the impact of these votes on the election's outcome, there by necessitating a new election. The Agent's unthinking conduct was arbitrary and capricious, and was potentially outcome determinative. *See Fresenius USA Mfg., Inc.*, 352 NLRB at 681 (finding that the outcome determinative irregularities in the election procedure warranted a new election).

The Agent admittedly had notice of the Regional Director's Decision and his conclusion that the Sales Service Representatives were to be included within the bargaining unit. In direct contradiction to this conclusion, at the pre-election conference, Petitioner confirmed to the Agent its intent to eliminate the Sales Service Representative position on July 21, 2019, a date certain, and that it believed the voting unit, as determined by the Regional Director, was improper. At the very least, Petitioner's representations to the Agent should have created reasonable doubt as to whether the Sales Service Representatives should be permitted to vote. If the Regional Director believed the Re-Route was speculative, confirmation seven days out should have been viewed as a change in circumstances. The Agent should have implemented the challenged ballot procedure. Under Section 11338.7 of the Manual, "[i]n **all** situations where reasonable doubt exists concerning whether the prospective voter falls within an included or excluded category or whether changed

circumstances have altered the voter's eligibility status, the challenged ballot procedure should be used." (emphasis supplied.)

The Agent's arbitrary failure to consider whether Petitioner's intentions and plans regarding the Re-Route constituted a change in circumstances given the Regional Director's stated reasoning in his Decision, was highlighted by her declaration before the election even began that she would not consider **any** challenges to ballots cast by Sales Service Representatives. By her own admission, the Agent predetermined the outcome of any challenged ballots, refused to follow well-established Board procedure, and created a barrier to Petitioner's right to a fair and valid election.

Following the election, in his Certification of Representation, the Regional Director similarly failed to consider Petitioner's evidence regarding the Agent's violative conduct. Instead, the Regional Director simply repeated the factually unsupported notion that Petitioner did not "provide detailed evidence the elimination of the Sales Service Representative position was definite and imminent," arguing that Petitioner "had not [implemented the Re-Route] in the past despite three previous dates for the Reroute." Rather than considering the Agent's conduct as a clear failure to apply the Board's established election procedures that undermined the integrity of the election, the Regional Director remained in lock-step with his previous result-driven mindset and chalked Petitioner's evidence up to a "mere[]

reiter[ation]” of its position that it would eliminate the Sales Service Representative position.

This conduct was in error and not supported by substantial evidence. It was contrary to the letter and purpose of the Board’s election procedures. As a result, the election was already administered in an improperly defined unit, without adhering to the basic rules that the Board has developed to ensure fundamental fairness and integrity. For these reasons, the Agent’s conduct warrants setting aside the election.

**C. The Regional Director Erred by Ignoring the Agent’s Allowance of Photography and/or Videotaping of Section 7 Activities.**

It is undisputed that the Agent also permitted the Union and/or its agents to photograph and/or videotape the tallying of ballots, which was attended by dozens of employees. By permitting such conduct, the Agent ostensibly allowed the Union to monitor and surveil the exercise of these employees’ Section 7 rights with impunity. *See* 29 U.S.C. § 157. At no time during the election or after the election did the Union and/or its agents ever provide any assurances to those recorded employees that the photos and/or videos would not be used for future reprisal, nor has the Union at any time during this process provided any explanation, let alone a

valid one, for taking these photographs and/or videos. *See Mike Yurosek & Son*, 292 NLRB 1074 (1989); *Pepsi-Cola Bottling Co.*, 289 NLRB 736, 736-37 (1988).

Not only did the Agent fail to admonish or take an action against the Union's photography/videotaping after learning about it from Petitioner, the Agent failed to stop this conduct despite the fact that **she saw it take place** after she completed tallying the votes. Instead of taking action to preserve and protect the rights of the employees against the Union's potential interference with the employees' Section 7 rights, the Agent casually replied "oh well," and stated that she forgot to inform those gathered before the tally began that such conduct was prohibited. The Agent's blasé attitude toward protecting employees' rights and preventing potential retaliatory conduct by the Union against them constitutes an unacceptable violation of the Act and an arbitrary and capricious failure to act from the Regional Director. Accordingly, by taking no action, the Agent and Regional Director have acquiesced to behavior that necessitates a new election. *Id.*

### **CONCLUSION**

For all of the foregoing reasons, Petitioner's Petition for Review should be granted, the Board's cross-application for enforcement denied, and the Regional Director's Decision and Direction of Election in Case No. 13-RC-243320 set aside.

Dated: September 29, 2020.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this principal brief contains 10,153 words, excluding the parts of the briefs exempted Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. 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 2013 with Times New Roman 14 point font.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 29, 2020, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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