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**Nos. 20-1031 & 20-1056**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE 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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ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR  
ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR INTERVENOR

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the Intervenor, International Brotherhood of Teamsters, Local 727 certifies the following:

### **A. Parties and Amici**

All parties, intervenors, and amici appearing in this court are listed in the Brief for Respondent/Cross-Petitioner.

### **B. Ruling Under Review**

References to the rulings at issue appear in the Brief for Respondent/Cross-Petitioner.

### **C. Related Cases**

This case has not previously been before this or any other court. This proceeding relies on a representation proceeding before the Board, Case No. 13-RC-243320. Intervenor counsel is not aware of any other related cases.

Dated: September 29, 2020

/s/ Nancy B.G. Lassen  
Nancy B.G. Lassen, Esquire

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26 and Circuit Rule 26.1, Teamsters Local 727 certifies that:

(a) It is an unincorporated labor organization that has no parent companies. No publicly held corporation owns 10 percent or more of Teamsters Local 727.

(b) As relevant to this appeal, Teamsters Local 727 represents employees in various industries throughout Illinois and has been certified by the NLRB as the exclusive representative of a bargaining unit of all full-time and regular part-time Account Managers and Sales Service Representatives (SSRs) employed by the Employer at its facility in Northlake, Illinois.

Dated: September 29, 2020

Respectfully submitted,

WILLIG, WILLIAMS & DAVIDSON

*Attorneys for Intervenor International  
Brotherhood of Teamsters Local 727*

/s/ Nancy B.G. Lassen  
Nancy B.G. Lassen, Esquire

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## **GLOSSARY**

Board or NLRB

The National Labor Relations Board

DDE

Regional Director's Decision and Direction of Election

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

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BRIEF FOR INTERVENOR

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**STATEMENT OF THE ISSUES**

Teamsters Local 727 (the Union) adopts by reference the Statement of the Issues set forth in the Board's brief.

**STATEMENT OF THE CASE**

The Union adopts by reference the Statement of the Case set forth in the Board's brief.

## SUMMARY OF THE ARGUMENT

The Union adopts by reference the Board's defense of its decision and actions in the underlying representation-election proceeding, and limits its argument to the following two points:

1. In its brief, the Company repeatedly characterizes both its evidence and its position regarding the anticipated elimination of the Sales Service Representatives as *uncontroverted*, but this is neither factually accurate nor helpful to the Court's review of the underlying NLRB representation case. In that proceeding, the Company bore the burden to show that its elimination of the Sales Service Representative position, which the Union sought to include in a bargaining unit, was definite and certain. The Company argues that the Regional Director rejected or disregarded its evidence regarding the certainty of its plans, but this relies on a distorted reading of the Regional Director's Decision and Direction of Election, in which he rejected the Company's conclusions but credited, and in fact relied on, its evidence. Similarly, the Company's assertion that its evidence was undisputed overlooks or ignores the Union's active participation in the underlying pre-election hearing, including extensive cross-examination of the Company's sole witness. The Company's characterization of the evidence and its burden in this case notwithstanding, the Regional Director's decision to proceed to an election in

the unit sought, which the Board affirmed, was based on substantial evidence and the proper exercise of his broad discretion.

2. The Board properly overruled the Company's objection to the election results based on its agent's appropriate decision not to permit a classification-wide challenge to the ballots of the Sales Service Representatives. Setting aside the merits of the Company's argument, which the Board addressed in its brief, the number of ballots encompassed by the Company's objection is not "outcome determinative," as the Company contends. Thus, the Board agent's refusal to allow the Company to challenge those ballots should not be a basis for setting aside the Board's representation election or the resulting certification of the Union as the exclusive bargaining representative of the petitioned-for bargaining unit.

### **ARGUMENT**

The Union adopts by reference the Argument set forth in the Board's brief, as supplemented herein.

**I. The Company mischaracterizes the administrative record and fails to acknowledge its burden of proof in the underlying representation proceeding.**

Arguing that the Regional Director and the Board erred in finding its elimination of the Sales Service Representatives was not imminent and definite, the Company repeatedly characterizes both its evidence and its position as

“uncontroverted” or “undisputed.” (Co. Br. 20–37)<sup>1</sup> The Company contends the Regional Director therefore erred by “refusing to accept the Petitioner’s evidence,” which, it argues, the Region “had no right to refuse.” (Co. Br. 30–31) But the Company fails to support this claim by identifying any specific evidence that the Regional Director refused to accept or address in his Decision. Instead, the Company argues that the Regional Director somehow rejected its evidence when he concluded that the Company’s “Re-Route” staffing reorganization, which included the elimination of the Sales Service Representatives, was not definite and imminent. (Co. Br. 29–31) The Company’s characterization of the Regional Director’s decision on this point confuses the issue: the Regional Director did not “refuse to accept” any of the evidence the Company offered, rather he concluded from the evidence presented that the Company did not meet its burden to show “definite evidence of a contracting unit.” (JA 183)

The Regional Director’s comprehensive treatment of the evidence is underscored by his exposition of the Company’s proffered reasons for cancelling the Re-Route implementation scheduled for April 1, 2019. (JA 179–80) These included: (1) the Union’s filing of a grievance over the Re-Route’s impact on

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<sup>1</sup> “Co. Br.” refers to the Company’s Brief. “NLRB Br.” refers to the Board’s brief. “JA” refers to the Joint Appendix filed by the Company.

delivery drivers it already represented; (2) a request from the Company's largest customer; and (3) "the Reroute required the Employer's 'master data' in Texas to change over all the routes," which could not be completed before May 1, 2019.

(JA 179–80) The Company, however, omits this third reason from its discussion of the April 1 implementation date, asserting it was "undisputed that the only reason[s]" for the cancellation were the Union's grievance and the customer request. (Co. Br. 29) Yet, as the Board noted in its brief, the Regional Director found that the Re-Route was not imminent and definite in part because of the Company's failure to produce any evidence confirming that the master data updates had been performed and that the Re-Route could therefore take place.

(NLRB Br. 21; JA 183) Thus, contrary to the Company's characterization of the Regional Director's decision, the record shows that he credited and considered the Company's evidence before rejecting the Company's conclusion that this showed a definite and imminent elimination of the Sales Service Representative position.

The Company also mischaracterized the record when it represented that its evidence was "uncontroverted by the Union, which . . . offered no evidence." (Co. Br. 13) The Union did not call its own witnesses because it had no need to do so; rather, the Union's counsel engaged in a lengthy cross-examination of the Company's sole witness, Brad Troutman, and offered two exhibits into evidence through his testimony. (JA 35–81) This cross examination elicited such facts as

the Company's notice to at least seven of the Sales Service Representatives that they would be retained as Account Managers (JA 52–53, 172–76), a position whose inclusion in the unit the Company does not challenge. The Union's cross examination also highlighted the comparative lack of definite notice of the July 2019 Re-Route implementation date and the Company's history of announcing this change and then postponing it. (JA 37–39, 42–44, 45–56, 66–67, 70–80; NLRB Br. 16–18) Thus, the Company's characterization of the record with respect to both the scope of the evidence and the Union's participation in the representation proceeding is simply inaccurate.

The Company also mistakenly bases its burden-of-proof argument on decisions involving review of the NLRB's adversarial unfair-labor-practice proceedings. (Co. Br. 29–31) Those cases are inapposite here, where the underlying issue is the validity of the NLRB's decision in a representation case. (NLRB Br. 3) Unlike an unfair labor practice hearing, a non-adversarial pre-election hearing is part of the Regional Director's investigation into whether there exists a "question of representation," such as whether a "proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining." 29 C.F.R. § 102.64(a). At such a hearing, "it shall be the duty of the Hearing Officer to inquire fully into all matters and issues necessary to obtain a full and complete record" upon which this determination can be made. 29 C.F.R. § 102.64(b). And

where, as here, a party asserts that employees should be excluded from an appropriate unit based on an impending contraction in the workforce, that party has the burden to show that the change is both definite and imminent. *Retro Environmental, Inc./Green Jobworks, LLC*, 364 NLRB No. 70, slip op. at 4 (Aug. 16, 2016) (requiring “concrete evidence” that employee positions will be eliminated and finding that the employer “failed to meet their burden” of proof).

The Company’s reliance on *NLRB v. Ray Smith Transportation Co.*, 193 NLRB 142 (5th Cir. 1951),<sup>2</sup> exemplifies the problem posed by ignoring this distinction between the Board’s unfair labor practice proceedings and its representation proceedings. (Co. Br. 30) *Ray Smith Transportation* involved review of an NLRB unfair labor practice proceeding relating to the discriminatory discharge of employees. As the court in that case observed, in the unfair labor practice proceeding “the Board was cast in the role of accuser, the examiner in that of judge . . . [and] the burden was upon the Board to prove its charges by competent and credible evidence, and *not upon the [company] to disprove them.*” *Id.* at 142 (emphasis added). Here, by contrast, the Company, not the Board, bore the burden to prove that the elimination of the Sales Service Representative

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<sup>2</sup> We note and correct the Company’s inadvertent citation to the Third Series of the Federal Reporter for this decision.

position was imminent and definite. *Retro Environmental, Inc./Green Jobworks, LLC*, 364 NLRB No. 70, slip op. at 4) (cited, JA 182). Thus, the Company's reliance on evidentiary standards articulated in unfair labor practice cases is misplaced, and only distracts from the salient question: whether substantial evidence supports the Board's conclusion that the Company did not prove that the elimination of the Sales Service Representative position was definite and imminent.

**II. The ballots encompassed by the Company's attempted challenge were not outcome determinative.**

The Union adopts and defers to the Board's argument as to whether the Company's election-day recapitulation of the position it took during the pre-election hearing regarding the elimination of the Sales Service Representative position amounts to changed circumstances requiring the Board Agent to implement the challenged-ballot procedure for this entire classification. (NLRB Br. 32–34) Additionally, however, the number of ballots encompassed by the Company's objection is not “outcome determinative,” as the Company contends. (Co. Br. 15, 42–43)<sup>3</sup> Thus, the Company's objection to the Board agent's refusal to allow the challenge cannot in any case be a basis for setting aside the election.

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<sup>3</sup> In its argument on this point, the Company mistakenly relies on the Board's decision in *Fresenius USA Manufacturing, Inc.*, 352 NLRB 679 (2008). *Fresenius*

In considering whether to set aside an election based on Board agent conduct, the Board “requires more than mere speculative harm.” *J. C. Brock Corp.*, 318 NLRB 403, 404 (1995) (citing *Transportation Unlimited*, 312 NLRB 1162, 1162 (1993)). Before the Board will set aside an election, the irregularity must raise “a reasonable doubt as to the fairness and validity of the election.” *Polymers, Inc.*, 174 NLRB 282, 282 (1969). A relevant consideration in whether to hold a new election is whether the ballots implicated by the agent’s conduct are determinative of the election. *J.C. Brock Corp.*, 318 NLRB at 404 (declining to set aside election results where objectionable conduct “would not have affected the results of the election”).

Although the Company is correct that the number of Sales Service Representatives whose votes it attempted to challenge—30 in all—would have been sufficient to call the election results into question, this argument ignores the Regional Director’s well-founded determination that seven of these individuals were slated to transfer into Account Manager positions with the Re-Route implementation. (JA 182) Implicitly conceding this point, the Company acknowledges these seven individuals were a “possible exception” to the group of

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was decided by a two-member Board whose delegated authority was invalidated by the Supreme Court in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

Sales Service Representatives it contends should have been excluded. (Co. Br. 37)

In fact, it was highly certain that these seven individuals would remain in the bargaining unit, irrespective of the uncertainty surrounding the Re-Route implementation.

In contrast to the uncertainty of the Re-Route timetable, it is clear from the record that these seven individuals would remain in the bargaining unit. Company manager Brad Troutman testified that the seven Sales Service Representatives were slated to become Account Managers and were so notified before the abortive Re-Route implementation scheduled for April 1, 2019. (J.A. 56–59, 172–76, 179) Troutman also orally assured these seven employees that their transfers would still occur with the July 2019 Re-Route if it came to fruition. (JA 59–60) Thus, despite the Company’s repeated cancelling and rescheduling of the Re-Route, these seven employees were consistently told that they would remain in the petitioned-for bargaining unit (albeit with new job titles) when or if the Re-Route occurred.

Even if the Company’s repetition of its pre-election position on the certainty of the Re-Route somehow amounted to changed circumstances justifying the Company’s challenge to the Sales Service Representative Classification, that challenge would not apply to these seven individuals. Such a challenge would therefore encompass only 28 of the 35 Sales Service Representatives—an insufficient number to change the outcome of the election. (JA 178, 212) For this

and the other reasons articulated by the Board, the election results should not be set aside.

### CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

Dated: September 29, 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 29, 2020, I filed the foregoing document with the Clerk of the Court for 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.

Dated: September 29, 2020

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**CERTIFICATE OF COMPLIANCE**

In accordance with the Federal Rules of Appellate Procedure Rules 32(g), I certify that Intervenor's Brief was prepared utilizing Microsoft Word, Times New Roman typeface, size 14. The undersigned further certifies that this motion is proportionally spaced and contains 2,104 words within 11 pages, excluding the parts of the document that are exempted by FRAP Rule 32(f), according to the Word Count function of Microsoft Word. As a member of the D.C. Circuit Bar, I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 29, 2020

/s/ Nancy B.G. Lassen  
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**STATUTORY AND REGULATORY ADDENDUM**

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## STATUTORY AND REGULATORY ADDENDUM

### BOARD REGULATIONS

#### **29 C.F.R. §102.64 Conduct of hearing.**

(a) The primary purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning unit scope, voter eligibility and supervisory status will normally be litigated and resolved by the Regional Director before an election is directed. However, the parties may agree to permit disputed employees to vote subject to challenge, thereby deferring litigation concerning such disputes until after the election. If, upon the record of the hearing, the Regional Director finds that a question of representation exists, the director shall direct an election to resolve the question.

(b) Hearings shall be conducted by a Hearing Officer and shall be open to the public unless otherwise ordered by the Hearing Officer. At any time, a Hearing Officer may be substituted for the Hearing Officer previously presiding. Subject to the provisions of §102.66, it shall be the duty of the Hearing Officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under Section 9(c) of the Act.