FINAL BRIEF **ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED**

Nos. 07-1419 and 07-1459

UNITED STATES COURT of APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE RAYMOND F. KRAVIS CENTER FOR THE PERFORMING ARTS

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties and Amici: The Raymond F. Kravis Center for the Performing Arts was the Respondent before the National Labor Relations Board and is the petitioner herein. The Board is the respondent herein. The International Alliance of Theatrical Stage Employees and Moving Picture Technicians and Allied Crafts of the United States, Its Territories and Canada, IASTE, AFL-CIO, Local 623 was the Charging Party before the Board. The Board's General Counsel was a party before the Board.

B. Rulings under Review: The case under review is a decision and order of the Board issued issued on September 28, 2007, and reported at 351 NLRB No. 19.

C. Related Cases: This case has not previously been before this Court. The Board is not aware of any related cases pending or about to be presented to this Court or any other court.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board

Dated at Washington, D.C.
This 4th day of June 2008

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of The Raymond F. Kravis Center for the Performing Arts ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order against the Company. The International Alliance of Theatrical Stage Employees and Moving Picture Technicians and Allied Crafts of the United States,

Its Territories and Canada, IASTE, AFL-CIO, Local 623 ("Local 623") was the Charging Party before the Board. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which empowers the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that any person aggrieved by a Board order may seek review of the order in this Court.

The Board's Decision and Order issued on September 28, 2007, and is reported at 351 NLRB No. 19. (A 3397-3422.)[1] That order is a final order under Section 10(e) and (f) of the Act. The Company filed its petition for review of the Board's Order on October 16, 2007. The Board filed its cross-application for enforcement on November 13, 2007. Both were timely filed because the Act imposes no time limits on such filings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by implementing changes in terms and conditions of employment, including the refusal to use the hiring hall, without giving notice to the Federal Mediation and Conciliation Service ("FMCS")

[1] "A" refers to the Joint Appendix filed by the Company. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

pursuant to the Act, unlawfully declaring impasse, and withdrawing recognition from Local 623. There are two underlying issues:

a. Whether the Board reasonably rejected the Company's attempt to disclaim its longstanding bargaining relationship with Local 623 as barred under Section 10(b) of the Act and therefore properly determined that the relationship is governed by Section 9(a) of the Act and the Company was not privileged to withdraw recognition from Local 623.

b. Whether the Board reasonably determined that at the time the Company withdrew recognition from Local 623, it lacked a good-faith reasonable doubt or uncertainty of Local 623's majority status to justify its withdrawal.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by bargaining to impasse over a change in the scope of the bargaining unit.

3. Whether substantial evidence supports the Board's finding that Local 500 was the successor to Local 623 and inherited the right to represent the Company's employees.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are contained in an addendum to this brief.

STATEMENT OF THE CASE

Acting on charges filed by Local 623, the Board's General Counsel issued a complaint alleging, as relevant here, that the Company had engaged in numerous acts that violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 3405-06; 9-16.) After a hearing, during which the complaint was amended, the administrative law judge found that the Company violated the Act as alleged by implementing changes in terms and conditions of employment, without giving notice to FMCS, unlawfully declaring impasse, and withdrawing recognition from Local 623. (A 3397-42; 3299-3304.) Applying then-current Board law, the judge found that Local 500 was not a successor to Local 623 because the merger of Local 623 and several other union locals into Local 500 was accomplished without due process safeguards. Accordingly, the judge found that the Company had no bargaining obligation after the date of the merger. The Company, the General Counsel, and Local 623 filed exceptions to the judge's decision.

On review, the Board affirmed the judge's rulings, findings, and conclusions, as modified. (A 3397-3405.) In particular, the Board (A 3401) overruled its prior law and decided to abandon the Board's due process requirement for union affiliations in light of the Supreme Court's decision in *NLRB*

v. Financial Institution Employees of America Local 1182 ("Seattle- First"), 475 U.S. 192 (1986). Accordingly, the Board found, contrary to the judge, that the Company was not relieved of its bargaining obligation merely because the merger was accomplished without a vote by Local 623's membership. (A 3397-3401.) The Board found that because the Company failed to show a lack of substantial continuity between Local 623 and the post-merger Local 500, Local 500 was the successor to Local 623. The Board therefore found that the Company was required to bargain with Local 500 after the merger. (A 3402.) Thereafter, the Company initiated these proceedings with a petition to review the Board's Order, followed by the Board's cross-application for enforcement of its Order.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; Local 623 and the Company Sign an Agreement Establishing Terms and Conditions of Employment for All Stagehands and Providing for an Exclusive Hiring Hall Arrangement

The Company operates a multi-venue performing arts center in Palm Beach, Florida. The concert hall, Dreyfoos Hall, was completed in September 1992 and holds performances primarily from approximately late September through May. (A 3406; 11 par. 2, 17 par. 2, 31, 35-37, 45, 2021-22, 3305.) Prior to opening, the Company contacted Local 623, which represents workers in the theatrical stage industry, seeking workers to install lighting, sound, and fly rail systems. (A 2003-

04, 2014-15, 2024.) Upon opening, the Company entered into a 5-year agreement with Local 623 effective September 1, 1992 to August 31, 1997. (A 3406; 72-81.) Local 623 ratified the contract. (A 2069-71.) The agreement covers the categories of carpenters, electricians, loaders, fly men/riggers, props employees, and wardrobe employees. (A 3415.)

Included in the 1992 agreement were the following provisions. Article I, entitled "Scope and Jurisdiction," stated:

> The scope of this agreement and the areas to which the work jurisdiction of [Local 623] hereunder extends shall be the stage, wings, fly galleries, counterweight galleries, stage facilities, dressing rooms and loading dock when directly related to stage presentations in the Dreyfoos Theater of the [Company], hereinafter called 'Theater.' Jurisdiction may extend to other areas of the [Company] currently under development for activity determined to be of a professional nature.
>
> The parties recognize the value of [Local 623] as a resource for obtaining skilled labor, competent to perform services in a theater through the use of the [Local 623] hiring hall.

(A 3406-07; 72.)

The work jurisdiction of Local 623 included "[a]ll carpentry, electrical, sewing, fitting and related work performed on or in connection with the sets and props, costumes and wardrobe used in the Theater." The work jurisdiction also included the loading and unloading of trucks. (A 3406-07; 72.)

In Article II, entitled "Referral of Workers," the Company "agree[d] that the work described in Article I . . . . shall be performed by qualified workers referred

by [Local 623],” and that “worker referral shall in no way be based upon union membership.” (A 3406-07; 73.) Article III of the agreement, entitled “Heads of Department,” established 5 department heads—carpenter, electrician, property, soundman, and wardrobe—who “will be appointed by [the Company] and are subject to periodic performance evaluations and, if deemed necessary, reassignment.” (A 3407; 74.) The agreement also set forth wages for the different job classifications including department heads, assistants, carloaders, and riggers, and described situations where “all” workers would receive overtime. (A 75-79.) The agreement applied “to all presentations in the Theater whether presented by [the Company] or any other presenter.” (A 75 par. 7.)

A typical show presented by the Company utilized somewhere between 15 and 25 stagehands including the department heads. Large productions such as a traveling Broadway show utilized more than 100 stagehands. (A 3407; 2060-63.)

Local 623’s business agent, John Dermody, operated Local 623’s referral system according to Local 623’s “Work List Procedures.” (A 2010-12, 2163.) Local 623 had a group of about 300 people who were placed on an “A list,” a “B list,” and a “C list.” The “A list” contained about 100 people who Dermody referred to jobs first. Those people had worked at least 2000 hours within the craft and jurisdiction of Local 623 during a preceding 2-year period. The “B list” contained about 30 people who Dermody referred after the “A list” was exhausted.

Those people had worked at least 1000 hours within the craft and jurisdiction of Local 623 during the same period. Those on the "C list," who Dermody referred after the other lists were exhausted, encompassed everyone else who applied and who had shown qualifications for one or more of the job classifications covered. Membership in Local 623 was not a requirement to be on the work list. (A 3047; 2003, 2007-10, 2028-30, 2163, 2568-69, 2609-11.)

The department heads, some of whom were union members, were all referred from the hiring hall and evolved into regular part-time employees who worked every production. During the summer they performed normal maintenance or repair of stage equipment and did some work for a summer camp run by the Company. They were paid under the terms of the collective-bargaining agreement. (A 3407; 2042-51, 2489-90.)

B. The Parties Reach a Successor Agreement that Includes a Non-Exclusive Hiring Hall for the Company's New Venues

On October 29, 1997, the Company provided Local 623 with notice under Section 8(d) of the Act of its "wishes to modify the terms of the existing collective bargaining agreement between [it] and Local 623." (A 2623.) In a letter to the Company during the negotiations, Local 623's attorney referred to Local 623 as "the exclusive bargaining agent of the employees covered by the bargaining agreement between Local 623 and the [Company]." (A 2168.)

On March 4, 1998, the parties, with the assistance of a federal mediator, entered into a successor agreement that was effective from August 1997 to June 30, 2000. (A 3407; 82-95, 2094, 2512.) The agreement contained identical provisions regarding Local 623's work jurisdiction and the referral of workers as the 1992 agreement. (A 3407; 82, 84.) The agreement added a sixth department head position, the head electrician (A 86), and set forth wages and overtime scales for "all" workers. (A 87-90.)

Unlike the first agreement, it did not apply to all performances held at Dreyfoos Hall, but only "set forth the terms and conditions of stage labor" applicable to performances produced at Dreyfoos Hall by the Company, and to those employers who chose to adopt the agreement. (A 3407; 82) Simultaneously, five of the major presenters that used Dreyfoos Hall on a regular basis, such as the Miami City Ballet, also entered into an agreement that adopted the terms of the Company/Local 623 collective-bargaining agreement for the times that they were scheduled to use the hall. (A 3407; 82-83.) The parties acknowledged an intent to have the agreement "serve as a master agreement for terms and conditions of employment of outside presenters," so that the Company and Local 623 could "have a common set of terms and conditions of employment which will benefit both those workers who regularly work at the physical facilities of the Kravis Center, as well as these other employers." (A 84.)

The parties entered into an "Addendum to Collective Bargaining Agreement" to take into account the Rinker Playhouse and Gosman Amphitheater that had opened since the first agreement was reached. (A 94-95.) The addendum stated, "[t]he collective bargaining agreement entered into between [Local 623] and the [Company] . . . sets forth the terms and conditions of employment for workers referred from [Local 623's] hiring hall to the Dreyfoos Theater. . . ." (A 94.) In addition, the Company "recognize[d] the value of the past practice of using [Local 623] as a resource for obtaining skilled labor through [Local 623's] hiring hall," but it retained the right to present "from time to time" programs in Rinker and Gosman that "will, in the sole discretion of [the Company,] utilize personnel, in whole or part, not referred from [Local 623's] hiring hall." (A 94-95.)

After signing the second agreement, the Company used two salaried staff to perform some stagehand work at Rinker. Local 623 filed a grievance and the matter went to arbitration. On May 14, 1999, the arbitrator ruled that the Company was entitled to utilize people at Rinker other than those referred from Local 623. Neither party raised, nor did the arbitrator address, the issue of whether the non-referred employees who worked at the Rinker were covered by the terms of the labor agreement. (A 3407-08; 60-71.) Thereafter, Local 623 continued to dispute the Company's use of non-referred employees to perform some stagehand work at Rinker. (A 3408; 2178-80.)

C. The Company Notifies Local 623 Of An Intent To Terminate the Bargaining Agreement; the Company Does Not Notify FMCS; The Company Proposes Ending Mandatory Jurisdiction By Local 623 At Any Company Venue and Eliminating Department Heads

In an April 27, 2000 letter, Company Attorney Jeffrey Pheterson notified Local 623 that it was terminating "the Collective Bargaining Agreement," and offered to bargain with Local 623 for a "new contract." The Company did not provide any notice to FMCS. (A 3408; 2181.)

The parties held 10 negotiating sessions between May and September 2000. (A 3408; 3034.) Initially, Local 623, represented by Business Agent Dermody and other union members, stated that it would accept the existing language of the 1998–2000 contract with a cost of living increase. (A 3408; 2069, 2134, 2140, 2145, 2546.) At the third session held on June 7, the Company presented a full written contract, thereafter rejected by Local 623, that was entitled, "Contracted Labor Agreement." (A 3408; 2140-47, 2184-95, 2200-04, 2589-90.) A cover letter from Company Attorney Pheterson stated:

> The hiring hall system should continue and calls will be made by the [Company] based on staffing needs. . . . [T]he [Company] desires to hire as direct employees certain additional staff members in a technical/production/building capacity, which will affect the nature of referrals required from the hiring hall. Under the attached proposal . . . there is no mandatory Union jurisdiction to any venue at the [Company]. Also, the departmentalization of workers has been eliminated, with the concomitant restructuring of the crew call system to reflect the necessity to make calls only for Stage Technicians under

> this agreement. As there are no departments, the former position of department head is no longer necessary.

(A 3408; 2140-47, 2184, 2589-90.)

In a July 13 letter to Attorney Pheterson, Business Agent Dermody stated, in part, "[Local 623] believes that the [Company] has directly hired certain employees represented by . . . [Local 623]. . . . The proposed offer you have brought to the table does not preserve any of the hiring hall system. In fact it is designed to use the union employees as a privately owned temp agency. . . ." (A 3409; 2295-96.)

Throughout the negotiations, Attorney Pheterson stated that the Company would hire an in-house group, the "core-group," who would perform some bargaining unit stagehand work, but have no union representation. Specifically, the Company proposed:

- The Company "ha[s] the right to hire permanent employees" (8/7 bargaining session, A 3053, 3057-58) with whom it would have no obligation to negotiate terms and conditions of employment unless they voted to join a union. (A 3058-65, 3087-89.)

- The Company wanted the "in-house crew for the primary events that are going to be occurring," and if those employees it hires are "stage craft" they "have to have a vote" to "go with the union," even if they are already union members. (7/10 bargaining session, A 3048-50, 3052.)

- The Company "want[ed] more flexibility . . . . [T]he ability to have people that are available to do other things[, such as mop floors and do security work,] where everything is not based on contracts." (7/10 bargaining session, A 3048, 3051.)

- The direct hires, an undetermined number of people, would be known as the "core group," and do whatever it takes to put on and run a show, such as lights and sound. (8/7 bargaining session, A 3053, 3055-56, 3074, 3077.)

- Those hired would be running shows and "probably be doing lots of other things as well," and "[t]he decision has been made to hire in-house." (8/7 bargaining session, A 3087, 3090-91.)

- "[T]he decision to create internal positions that have functions that go beyond . . . just the strict technical stage craft type functions i[s] not a negotiable issue." The people in these positions "would be able to do some of the technical functions that were done by referrals in the past" as well as other work. (8/14 bargaining session, A 3100, 3102-03.)

- The core group would not come from Local 623's hiring hall because it was "not consistent with [the Company's] goals." (8/14 bargaining session, A 3100, 3104-05.) It had no duty to bargain over the job description of the core group. (8/14 bargaining session, A 3100-01).

- The Company could eliminate the department head position because there was no elected certified unit. (8/14 bargaining session, A 3100, 3106-07.)

During the meetings, Attorney Pheterson made clear that any agreement would only cover employees referred by Local 623:

- The Company is "negotiat[ing] a hiring hall agreement." (8/7 bargaining session, A 3053, 3057-58.)

- The Company would only "use the hiring hall personnel as needed . . . to fill in," when the core group could not satisfy its needs. (7/10 bargaining session, A 3048-50, 3052.)

- The Company would contact Local 623 when a show "require[d] stage hands above . . . the internal crew at the [Company]." (8/7 bargaining session, A 3053-54.)

- If the Company needed more employees it could use the hiring hall or "outside labor providers" (8/7 bargaining session, A 3053, 3085-86) who would receive whatever rates the provider pays them. (9/9 bargaining session, A 3108, 3113-15.)

At the sixth session on August 7, Matthew Mierzwa, Local 623's attorney, joined its bargaining team. At that session, Local 623 stated that the parties had previously negotiated a collective-bargaining agreement that included a hiring hall. It further stated that in-house staff that performed work covered by Local 623's jurisdiction and hired outside of the hiring hall should be part of any agreement. (8/7 bargaining session, A 3053, 3059-85, 3087, 3092-99.)

Local 623 submitted a full draft contract counterproposal. The counter proposal retained the job duties and job descriptions for the unit previously recognized and retained the concept of an exclusive hiring hall arrangement for all of the venues at Company. It also retained the category of the six department heads that would be appointed by the Company, subject to consultation with Local 623. (A 3409; 2270-77, 2300-22.)

On September 9, the Company made a revised "contract labor" proposal. As with its earlier proposals, it included the elimination of the department head positions; the discretionary use of the hiring hall; the concept that the agreement would apply only to persons referred by Local 623; unfettered discretion to subcontract labor; and the right to use mixed crews. (A 3409; 2270-77, 2313-31.) Local 623 agreed to Company Attorney Pheterson's suggestion that the parties

contact the FMCS for assistance. (9/9 bargaining session, A 3108, 3111-12, 3115-17.)

By letter dated September 11, 2000, Company Attorney Pheterson "declared an impasse in the[] negotiations" and announced that "terms and conditions for hiring hall referrals in the future will be imposed as set forth" in its prior proposal. (A 3409-10; 2333-35.) On September 14, Local 623's attorney responded to Pheterson's September 11 letter. The letter stated, "[the Company's] insistence on the non-exclusive hiring hall and refusal to apply [its] proposal to bargaining unit members not referred by Local 623 was and is illegal. . . ." (A 3409; 2346-47.)

D. Local 623 Files a Representation Petition; the Company Ceases Use of Local 623's Hiring Hall; the Company Notifies the FMCS

On September 18, Local 623 filed an "RC" petition for a Board representation election at all Kravis Center venues—Dreyfoos Hall, Rinker, Gosman, and the Cohen Pavilion (a restaurant and banquet facility). (A 3410; 39-40, 2348-49.) At the representation hearing held on February 8, 2001, Local 623 argued for a voter eligibility formula based on the number of times and hours that individuals had worked at the Company over a 2-year period. The Company argued that Local 623's proposed unit was inappropriate because it had directly hired full-time employees to do the stage work, was using subcontractors to do the

remaining work, and had no intention of hiring anyone from Local 623's hiring hall in the future. (A 3411; 110-13.)

After September 24, 2000, the Company did not request anyone from Local 623's hiring hall except for one occasion when an orchestra directly requested the use of IATSE stagehands, and two instances where the arrangements for their use were made before the Company declared the impasse. (A 3411; 2280-81, 2287-89, 2607-08, 2653 (p. 691).)

Sometime in September, the Company made arrangements to utilize the services of a company called PTT to furnish stagehands. (A 3411-12; 154-57, 188, 191.) Starting in late September or early October 2000, and continuing through June 2001, the Company hired a core group of 23 employees, most with the title "Building & Production Technician," who worked directly for the Company, and whom it cross-trained to perform general building and grounds maintenance, as well as stage functions. The Company had previously directly employed some of those employees in other occupations. (A 3412 n. 3-11; 2636-37, 2649-50 (pp. 644-48).)

On June 13, 2001, Company Attorney Pheterson sent a letter to the FMCS pursuant to Section 8(d)(3) of the Act, the first notice sent by the Company during the negotiations. (A 3413; 3126-27 (pp. 942-47), 2626-27.) The parties had two subsequent meetings but were unable to reach an agreement. Local 623 was

willing to consider a proposal that would permit a core group that would be excluded from the bargaining unit. (A 3413; 3034, 3128-29 (pp. 953-58), 3130-31 (pp. 963-964), 3157-58.)

E. Local 623 Merges With 5 Other Union Locals to Form Local 500

Effective February 1, 2002, six local unions (Locals 316, 545, 623, 646, 827, and 853) merged into one local union chartered as of that date and titled, IATSE Local 500. (A 3414; 2658 (pp. 792-93), 2960-61.) International Union Division Director William E. Gearns, Jr., was the designated representative in charge of Local 500. International Representative Falzarano, who was the president of former Local 646, was in charge of Local 500's day-to-day operations. (A 2687 (p. 803), 2960-61, 3170 (p. 1195), 3175 (pp. 1214-15).)

Prior to the merger, in his role as an international representative, Falzarano had assisted the locals, including Local 623, in their collective-bargaining negotiations. (A 2678 (p. 802), 3175 (pp. 1215-16).) Falzarano was assisted by John Dermody (former business agent of Local 623), Alice Renee (former business agent of Local 646), and Daniel Bonfiglio (former business agent of Local 545). (A 3414; 2960-61.) Former legal counsel for Local 623 became the legal counsel for Local 500. (A 2689 (p. 810).)

At the time of the merger, Local 623 was comprised of about 104 stagehands and other positions in Palm Beach, Martin, and Saint Lucie Counties; Local 316

was comprised of about 67 audiovisual technicians in Dade County; Local 545 was comprised of about 156 stagehands in Dade County; Local 827 was comprised of about 18 ticket takers and treasurers in Dade County; Local 853 was comprised of about 23 wardrobe attendants in Dade County; and Local 646 was comprised of about 158 stagehands and other positions in Broward County. (A 3413-14; 2729, 2734-35, 2743, 2751, 2777, 2788, 2797-99, 2818.)

Upon merging, Local 500 operated under the constitution and bylaws of the International, pending a transition that would give autonomy to Local 500. (A 2688 (pp. 804-05).) Local 500's bylaws were pending endorsement of International President Short and approval by Local 500 members at the time of the hearing before the administrative law judge. (A 2688 (pp. 804-05), 3170-71 (pp. 1196-97), 3178 (pp. 1226-27), 3181 (pp. 1238-39).) Local 500 would elect officers once Local 500's constitution and bylaws were in place. (A 2688 (pp. 804-05).)

After the merger, Local 500 Business Agent Dermody continued to represent the members of former Local 623, and he, as well as other former local business agents, continued to conduct contract administration. Former officers of other locals remained stewards for their former locals. (A 3415; 2493-94, 2657 (p. 718), 2687 (p. 801), 2688 (pp. 804-06), 3166 (p. 1180), 3167-68 (pp. 1184-85), 3169 (p. 1190), 3170 (pp. 1193-94), 3172 (p. 1204), 3180 (pp. 1234-35).)

Each local's hiring list (assuming that a local used a hiring hall) was kept separate, and operated by the respective former business agent in the same manner as before. (A 3414-15; 2686-87 (pp. 798-800), 2688 (p. 804), 3177-78 (pp. 1224-25), 3181 (pp. 1237-38).) Local 500's hiring hall committee was comprised of two representatives from each of the former locals' respective hiring hall committees. (A 3414-15; 2686-87 (pp. 798-800), 2688 (p. 804), 3168 (p. 1185), 3177-78 (pp. 1224-25), 3180-81 (pp. 1237-38), 3187-3204.) As before the merger, there was some employee interchange among the local hiring halls. (A 3415; 2688-89 (pp. 807-08), 3177-78 (pp. 1224-28), 2729, 2792, 2802.) Local 500 had begun to compile a data base of the six former locals with the intent of operating the referral system with a new computer system. Under the planned system, employees would first get calls in the areas covered by their former locals. (A 3415; 2687 (p. 800), 2688 (p. 804), 3168 (p. 1185), 3177-78 (pp. 1224-25), 3182 (p. 1242.)

The merger did not alter contributions by employers into any of the health and welfare, pension, vacation, and annuity funds, which continued as before with the same union trustees. (A 3174 (pp. 1210-11), 3177 (pp. 1222-23), 3179 (p. 1231).) Former Local 623 had its own defined contribution pension plan that was negotiated into its bargaining agreements. The pension fund remained intact after the merger. Former Local 623, as well as some of the other former locals, approached the International about merging into its Health and Welfare Plan. (A

2160-62, 2729, 2780-81, 2789, 2801, 3173 (p. 1206), 3174 (pp. 1210-11), 3177 (pp. 1222-23).)

All of the members of the six locals became members of Local 500. They did not have to pay any initiation or transfer fees. Local 500 averaged out the dues of the larger three locals, resulting in dues of $10 more than Local 623 members had previously paid. The referral fees for use of hiring halls remained the same. (A 3415; 2689-90 (pp. 808-09), 3167 (pp. 1181-82), 3321.)

Local 500 moved into former Local 646's building, the only local that had owned its own building. One other local had rented a building, and the remaining three, including Local 623, had operated out of private homes. (A 2686 (pp. 796-97), 3170 (p. 1196), 3171 (pp. 1221-22), 2729, 2742, 2759, 2777, 2794, 2798, 2960-61.) Local 500 had a new telephone number, but former Local 623 members continued to reach Dermody with the same telephone number as before the merger. The other locals maintained the same telephone numbers, in addition to new 800 toll-free calling numbers. (A 2687 (pp. 800-01).)

For the most part, perhaps only with the exception of the Company, employers having contracts with the various predecessor locals have recognized Local 500 as the successor. (A 3415; 3180 (pp. 1233), 3184-86.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Members Liebman and Kirsanow) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally changing terms and conditions of employment, including the refusal to use the hiring hall, without first giving notice to the FCMS as required by Section 8(d)(3) of the Act; by declaring impasse over a non-mandatory subject of bargaining, specifically, a change in the scope of the bargaining unit; and by withdrawing recognition from Local 623. (A 3397-98.) In disagreement with the judge, the Board found that Local 500 was a successor to Local 623, and that the Company had a bargaining obligation that continued after the merger. (A 3398.)[2] In so finding, the Board overruled its precedent that had required union members to vote, with adequate due process safeguards, on a merger. The Board focused solely on the continuity between Local 623 and the merged Local 500, an issue the judge had not reached. (A 3397-3401.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, "[i]n any like or related manner, interfering with,

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[2] The Board found it unnecessary (A 3398, 3417-18) to pass on the judge's finding that the Company's discharge of the department heads and its refusal to use the hiring hall after declaring impasse also violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)), because "the additional findings would not materially affect the remedy."

coercing, or restraining employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157)." (A 3403-04.) Affirmatively, the Order directs the Company to "restore the terms and conditions of employment that were in effect and applicable to employees in the bargaining unit before [it] unilaterally changed the terms and conditions of employment, . . . including the exclusive use of [Local 623's] hiring hall and restoration of the department head positions." (A 3304.) The Order also directs the Company to make the unit employees whole for any losses suffered by them as result of the Company's unlawful changes, to reinstate the six department heads, to recognize and bargain on request with Local 623, and to post an appropriate notice to employees. (A 3404.)

SUMMARY OF ARGUMENT

It is well settled that a union can achieve the status of a majority collective bargaining representative through either Board certification or voluntary recognition by the employer. In 1992, the Company entered into a voluntary relationship with Local 623, signing two successive collective-bargaining agreements spanning 8 years. Those agreements covered all stagehand workers at the Kravis Center and set forth terms and conditions of employment for those employees.

During bargaining for a third collective-bargaining agreement, at which time Local 623 enjoyed a rebuttable presumption of continued majority support, the

Company declared impasse, withdrew recognition, and unilaterally imposed terms and conditions of employment for its stagehands. The Company's withdrawal of recognition was not based on a good faith doubt or uncertainty that Local 623 no longer had majority support. Instead, the Company challenged 623's majority status based on the origins of the bargaining relationship 8 years earlier.

The Board reasonably rejected the Company's argument as time-barred under Section 10(b) of the Act. Indeed, it is settled that the Act prohibits employers, as here, from challenging an established bargaining relationship based on a claim more than 6 months old that a union lacked majority support at the inception of the bargaining relationship. Additionally, the Company's claims that the statutory bar should not apply are foreclosed by the Company's concessions in its arguments before the Board that it was time-barred from asserting that Local 623 had never established majority status.

The Company seeks to describe its agreements with Local 623 in a variety of ways to avoid the application of Section 9(a) bargaining obligations. The Company's arguments are unsupported by the facts. Moreover, the Company's implicit argument that it had a prehire agreement similar to those allowed under Section 8(f) of the Act fails because the Company is not in the construction industry.

The Board was fully warranted in finding that the Company bargained to impasse over a change in the scope of the bargaining unit, a permissive subject of bargaining. The Company declared impasse over its proposal to essentially divide the stagehands into two groups: those directly hired by the Company who would not be covered by a collective-bargaining agreement, and those the Company hired, at its sole discretion, through Local 623's hiring hall who would be covered by a collective-bargaining agreement.

Substantial evidence supports the Board's finding that the Company's bargaining obligation continued after the merger of Local 623 and several other local unions to form Local 500. The Board reasonably found that Local 500 was the successor to Local 623 based on the substantial continuity between the pre-merger Local 623 and post-merger Local 500. Specifically, the evidence did not demonstrate that the changes resulting from the merger were so dramatic as to raise a question concerning representation. Therefore, the Company had a continuing obligation to bargain with Local 500 as the successor to Local 623.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY IMPLEMENTING CHANGES IN TERMS AND CONDITIONS OF EMPLOYMENT, INCLUDING THE REFUSAL TO USE THE HIRING HALL, WITHOUT GIVING NOTICE TO THE FEDERAL MEDIATION AND CONCILIATION SERVICE PURSUANT TO THE ACT, UNLAWFULLY DECLARING IMPASSE, AND WITHDRAWING RECOGNITION FROM LOCAL 623

A. Introduction

The Company began its longstanding relationship with Local 623 in 1992 when it opened a new concert hall and needed stagehands to perform the backstage work for its productions. The Company entered into a 5-year collective bargaining agreement with Local 623 which provided for an exclusive hiring hall arrangement under which the Company used employees referred by Local 623 to perform stagehand work for all productions at Dreyfoos Hall. When that agreement expired, the parties entered into a 2-year successor agreement, which again included the exclusive hiring hall arrangement at Dreyfoos Hall, but provided that the Company could use other sources of labor, in addition to the hiring hall, for stagehand work at its two newly-opened venues. In April 2000, the Company notified Local 623 that it was terminating the agreement, and began negotiating with Local 623 for a third contract. The Company's proposals sought, in the judge's view, "to reduce to a minimum, Local 623's role in providing stagehands

to the Kravis Center and to, de facto, render nugatory, Local 623's role as the employees' representative in negotiating the terms and conditions of employment for those people whom the [Company] decided to utilize to do stagehand functions." (A 3416.) As demonstrated below, the Board properly rejected the Company's claim that it was free to walk away from its collective-bargaining obligations, finding that the parties' longstanding bargaining relationship was governed by Section 9(a) of the Act and the Company's argument to the contrary was barred by the statute of limitations in Section 10(b) of the Act (29 U.S.C. § 160(b)). Moreover, the Board properly rejected the Company's unsupported argument that its withdrawal of recognition was justified because that it had a good faith reasonable doubt about Local 623's majority status. If, as shown below, the Company had a continuing obligation to bargain with Local 623, then the Company's actions violated Section 8(a)(5) and (1) of the Act.[3]

B. Standard of Review

This Court has recognized that the Board bears "primary responsibility for developing and applying national labor policy." *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1459 (1997) (quoting *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990)). If the Board is to fulfill its statutory

[3] A violation of Section 8(a)(5) constitutes a derivative violation of Section 8(a)(1). *See Brewers & Maltsers, Local Union No. 6 v. NLRB*, 414 F.3d 36, 41 (D.C. Cir. 2005).

role, it "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978). *Accord Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 788 (1996). It is also established that "[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board." *NLRB v. Weingarten, Inc.* 420 U.S. 251, 266 (1975). In doing so, the Board uses its cumulative experience to determine whether existing analytical models are responsive to actual conditions. *Id*.

Accordingly, the Board's legal rules are accorded considerable deference "as long as [they are] rational and consistent with the Act, regardless [of] whether the Board's rule departs from its prior policy and whether [the Court thinks] a different rule would be preferable." *Lee Lumber & Building Materials Corp. v. NLRB*, 117 F.3d at 1459 (citing *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. at 786-88). *Accord Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 and n.11 (1984) (where statute is "silent or ambiguous" on the issue, the Board's interpretation of the Act should be affirmed if "based on a permissible construction of the [Act]," even if that construction was not "the only one [the Board] permissibly could have adopted [,]" and even if it was not the one "the Court would have reached if the question initially had arisen in a judicial proceeding").

Under Section 10(e) of the Act (29 U.S.C. § 160(e)), the Board's factual findings are conclusive if supported by substantial evidence on the record as a whole; a reviewing court "may [not] displace the Board's choice between two fairly conflicting views even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *See Leach Corp. v. NLRB*, 54 F.3d 802, 806 (D.C. Cir. 1995).

C. The Board Reasonably Rejected the Company's Attempt to Disclaim Its Longstanding Bargaining Relationship with Local 623 as Barred Under Section 10(b) of the Act and Therefore Properly Determined that the Relationship is Governed by Section 9(a) of the Act

1. Applicable Principles

Section 8(a)(5) of the Act (29 U.S.C. §158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a) [of the Act (29 U.S.C. §159(a)]." Under Section 9(a), a union may attain the status of a majority collective-bargaining representative through either Board certification or voluntary recognition by an employer. *See Exxel/Atmos, Inc. v. NLRB*, 28 F.2d 1243, 1247 (D.C. Cir. 1994); *NLRB v. Creative Food Design, Ltd.*, 852 F.2d 1295, 1299 (D.C. Cir. 1988). A union is "entitled to a presumption of majority support during and after the contract period, and the agreement need not expressly reflect the union's

majority status." *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 520 (5th Cir. 2007). The existence of a prior contract, lawful on its face, raises a dual presumption of majority—a presumption that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract. *See Shamrock Dairy, Inc*., 124 NLRB 494, 495-96 (1959), *enforced* 280 F.2d 665 (D.C. Cir. 1960); *Pioneer Inn Associates v. NLRB*, 578 F.2d 835, 837 (9th Cir. 1978); *Henry Bierce Co*., 328 NLRB 646, 658 (1999), remanded on other grounds, 23 F.3d 1101 (6th Cir. 1994).

Outside the construction industry, in the case of voluntary recognition, both parties to a Section 9(a) bargaining relationship violate the Act if the union actually lacked majority status to begin with. Thus, an employer violates Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) by granting recognition, and a union violates Section 8(b)(1)(A) (29 U.S.C. § 158 (b)(1)(A)) by accepting it, if the union does not in fact have majority support, even if the parties believe in good faith that such majority support exists. *International Ladies' Garment Workers v. NLRB*, 366 U.S. 731, 738-39 (1961). However, the legitimacy of that relationship can only be challenged if a proper charge is filed within the Act's statute of limitations period, which is fixed under Section 10(b) of the Act (29 U.S.C. § 160(b)) at 6 months from the time recognition was extended. *Local Lodge No. 1424, Int'l Assn. of*

Machinists, AFL-CIO (Bryan Mfg.) v. NLRB, 362 U.S. 411, 416-17, 419 (1960) ("*Bryan*").

At the conclusion of a collective-bargaining agreement, an incumbent union enjoys a rebuttable presumption of continued majority support. *See Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 361 (1998); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1458 (D.C. Cir. 1997). Under the standard in effect for this case, the employer may overcome the presumption and lawfully withdraw recognition from an incumbent union, if it shows either that the union has in fact lost majority support, or that it has a reasonable, objectively based good faith belief that the union no longer enjoys majority support. *See Allentown Mack Sales*, 522 U.S. at 361, 366; *Pacific Bell v. NLRB*, 259 F.3d 719, 722-23 (D.C. Cir. 2001).[4]

Although the Act creates an exception to the Section 9(a) majority-choice paradigm, to qualify for that Section 8(f) exception (29 U.S.C. § 158(f)) the employer and the union must be engaged primarily in the construction industry.

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[4] In *Levitz Furniture Co.*, 333 NLRB 717 (2001), the Board modified the *Allentown Mack* standard by holding that an employer cannot unilaterally withdraw recognition unless the union had actually lost majority support. In that case, however, the Board stated that the *Allentown Mack* standard would apply to all cases pending before the Board prior to its *Levitz* decision. Since the charges in this case were filed before *Levitz*, the Board did not apply that standard here. (A 3398 n.7.) No issue concerning the Board's *Levitz* decision is presented in this case.

The exception derives from the peculiar challenges that work in that industry present—employees move from jobsite to jobsite, and employer to employer, as projects they work on are completed and others are sought. Those concerns led Congress to authorize construction industry employers to enter into prehire agreements that confer exclusive recognition on a union before any employee has even been hired. The Section 8(f) relationship is terminable at will once a current agreement expires, unless in the interim the union has converted the relationship into a Section 9(a) relationship by coming forward with an offer of proof that it has secured majority support from the employees and the employer has accepted that proof. *See John Deklewa & Sons*, 282 NLRB 1375, 1378-80 (1987), *enforced sub nom., Int'l. Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988).

2. The Company is Barred By Section 10(b) of the Act From Challenging Local 623's Majority Status Based on the Origins of the Parties Relationship

Local 623 and the Company have been parties to successive collective-bargaining agreements since 1992. Eight years after the Company first approached Local 623 for stagehand labor, and two collective-bargaining agreements later, the Company now challenges the origins of the relationship, claiming that it is not founded on majority representation. The Board (A 3398) reasonably rejected the Company's claim as "time barred," finding the parties' relationship is governed by

Section 9(a). Indeed, it is precisely this kind of destabilizing conduct that Section 10(b) sought to prohibit.

The Supreme Court in *Bryan* held that maintenance and enforcement of a contract more than 6 months after recognition of a minority party union did not violate the Act, relying in part on the legislative history indicating that Congress specifically intended Section 10(b) to apply to agreements with minority unions in order to stabilize bargaining relationships. *Bryan*, 362 U.S. at 425-26, 428. Not only does the 6 month statute of limitations in Section 10(b) promote stability in labor relationships, but also protects parties from confronting allegations about "past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused[.]" *Bryan*, 362 U.S. at 419.

The Board and the courts have agreed that the principles underlying Section 10(b) and *Bryan* preclude an employer, as here, from seeking to escape an established 9(a) bargaining relationship based upon a claim more than 6 months old that its employees' exclusive representative lacked majority status in the first instance. *See for example, Pick-Mt. Laurel Corp. v. NLRB*, 625 F.2d 476, 483-84 (3d Cir. 1980) ("*Bryan* decision precludes [employer] from relying on the illegal prehire agreement, in and of itself, to defend its refusal to bargain."). *See also NLRB v. Marin Operating, Inc.*, 822 F.2d 890, 893-94 (9th Cir. 1987) (employer

time-barred from showing that the recognition of the union 12 years earlier was unlawful); *Sewell-Allen Big Star, Inc.*, 294 NLRB 312, 313 (1989), *enforced mem.*, 943 F.2d 52 (6th Cir. 1991) (employer time-barred from challenging union majority 7 months after a union merger); *Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493, 501 (5th Cir. 1972) (employer's "confession" that it had recognized a minority union 14 years earlier is an untimely attack on the union's majority).[5]

Additionally, although the Company attempts (Br 39-47, 49) to escape the Section 10(b) time limitations, its arguments are fatally undermined by its concessions to the Board in its "Brief in Support of Exceptions" ("Br SE") that Section 10(b) precluded the arguments it now raises to this Court.[6] Before the Board, the Company (Br SE 26) "acknowledge[ed]" that Section 10(b) precluded consideration of its claim that Local 623 had never established majority status. Thus, the Company's brief to the Board conceded (Br SE 26) that regardless of whether Local 623 had established majority status, "it could not challenge the [f]irst [a]greement after the expiration of the [Section] 10(b) period." The

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[5] Thus, contrary to the Company's assertions (Br 19, 44, 43-47), and as the Board noted (A 3398), *Bryan* applies both to complaints as well as a refusal-to-bargain defense that a bargaining relationship was unlawfully established. *See, for example*, *North Bros. Ford, Inc.*, 220 NLRB 1021, 1021-22 (1975), citing *Bryan*, 362 U.S. 411 (1960).

[6] The Board has lodged the Company's "Brief In Support of Exceptions" with this Court.

Company further conceded (Br SE 26-27) that Section 10(b) would ordinarily have precluded it from relying on the 1998 second agreement to challenge Local 623's majority status. However, before the Board, the Company asserted (Br SE 26-27) that Local 623's filing of the election petition in September 2000 created a question concerning representation that "resurrected the 10(b) period in which [the Company] had the right to challenge the nature of the collective bargaining relationship." The Board rejected this argument on solid legal grounds (A 3399 n.10, 14),[7] and the Company has waived that argument before this Court by failing to raise it in its opening brief. *See Ross Stores, Inc. v. NLRB*, 235 F.3d 669, 680 n.2 (D.C. Cir. 2001) (issue not raised in opening brief is waived); *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (same).

Moreover, the Section 10(b) policy considerations which seek to avoid forcing parties to confront stale allegations concerning the basis of established relationships is amply demonstrated in this case. The Company offers no testimony regarding the origins of the first collective-bargaining agreement. Its argument (Br 19-20, 21, 25, 29, 42, 43, 45, 46, 48, 49) consists of speculation that the absence of evidence that Local 623 demonstrated majority support when the parties signed the first agreement means that Local 623 did not in fact possess majority support at that time, or at any time thereafter. The Company's own lack

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[7] *See General Box Co.*, 82 NLRB 678 (1949) (permitting an already recognized union to seek Board certification).

of evidence serves only to underscore the propriety of the Board's judicially approved rule barring such stale claims.

In light of the clear statutory policy of Section 10(b), the Company is precluded from challenging the origins of its bargaining relationship with Local 623. "When there has been no change in the employer, application of the six month rule in the context of the presumption of continued majority status arising from voluntary recognition clearly carries out the congressional policy of protecting existing relationships." *Pick-Mt. Laurel Corp. v. NLRB*, 625 F.2d 476, 484 (3d Cir. 1980). Because the Company is barred from such a challenge, the Board reasonably found that Local 623 is entitled to a continuing presumption of majority support and, upon expiration of the contract, the 9(a) relationship evidenced by the parties' successive collective-bargaining agreements continued.

D. The Board Reasonably Determined that at the Time that the Company Withdrew Recognition from Local 623, It Lacked a Good-Faith Reasonable Doubt or Uncertainty of Local 623's Majority Status to Justify Its Withdrawal

As shown above, pp. 28-30, as a longstanding incumbent union whose bargaining relationship is governed by Section 9(a) of the Act, Local 623 is entitled to a continuing presumption of majority status. Here, as the Board explained (A 3398), the Company did not "contend that it withdrew recognition from Local 623 because it had a good-faith doubt or uncertainty that [Local 623] no longer had majority support," but argued a "good faith doubt" that Local 623

did not represent the majority of its stagehands when the relationship began. The Company (Br 47-49) repeats these arguments to this Court.

As discussed above, the Company is time-barred from challenging Local 623's majority status based on the origins of the bargaining relationship. Having made no attempt to rebut the continuing presumption of majority support with evidence that Local 623 had lost the support of a majority of employees who had recently worked for it on a recurring basis and who would be members of the bargaining unit, the Board reasonably found (A 3398) that the Company had a continuing obligation to recognize and bargain with Local 623.

E. The Company's Attempts to Evade Section 10(b) of the Act Are Unavailing

The Company raises a series of evolving, alternative arguments to describe its relationship with Local 623 in its quest to escape its collective-bargaining obligations. None of them withstand scrutiny.

As an initial matter, the Company's claim (Br 39)—that the Board conceded that "in this case the presumption [of majority support] is purely a legal fiction"—is erroneous. The Board recognized (A 3406, 3415) the Company's voluntary recognition of Local 623, stating that the parties' agreement "was made without either an election or a demonstration by Local 623 that it represented a majority of the employees who were going to be covered by the agreement." As fully

described above, the Board found that the parties had a Section 9(a) relationship based on 8 years of being parties to collective-bargaining agreements.

Although the Company repeatedly suggests that this Court conduct its analysis by ignoring the Section 9(a) relationship between the parties—suggesting, for example (Br 27), "once section 9(a) status disappears," or referring to (Br 17, 25, 39, 48) "a legal fiction" of Section 9(a)—there is no basis for the Company's contention that its relationship with Local 623 was something other than a classic collective-bargaining relationship under Section 9(a) of the Act. The reality is that, beginning in 1992, the Company and Local 623 were parties to a series of collective-bargaining agreements that established the terms and conditions of employment for the employees performing stage work at the Kravis Center. Those agreements contained the range of provisions one would expect to find in any collective-bargaining agreement—including descriptions of the covered stagehand positions, wage provisions that apply to "all" employees, and dues checkoff and annuity provisions—and none that provided even the slightest suggestion that the parties were involved in anything like the type of vendee-vendor relationship the Company would make of it. Moreover, the parties conducted themselves in a manner consistent with statutory representation, including use of the Federal Mediation and Conciliation Service under Section 8(d) of the Act after the expiration of the 1992 agreement.

Although the Company has abandoned any express argument that the agreements are 8(f) agreements, its brief is infused with traditional concepts of 8(f) including non-majority recognition, the employer's ability to walk away at the end of the contract, and the lack of evidence of majority support. For example, the Company grants its willingness to assume "for purposes of this case only" (Br 24 n.4) that it had an obligation to honor the 1998 agreement, citing as support two cases addressing 8(f) contracts. Indeed, the supporting cases on which it primarily relies are cases dealing with 8(f) relationships.

However, the Company's reliance (Br 40-42) on Section 8(f) cases that examine whether there was sufficient evidence to establish that a bargaining relationship in the construction industry had converted from a Section 8(f) relationship into a Section 9(a) relationship have no relevance here. *See for example, Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003); *Automatic Sprinkler Systems, Inc. v. NLRB*, 163 F.3d 209, 218 n.6 (4th Cir. 1998). Indeed, the Company does not dispute the Board's finding (A 3406 n.1) that the parties' collective-bargaining relationship did not qualify for treatment as a Section 8(f) relationship because the Company is not in "the construction or building industry." As a non-construction industry contract, "the agreement need not expressly reflect [Local 623's] majority status" to establish that the parties have a Section 9(a) bargaining agreement. *Strand Theatre*, 493 F.3d at 520.

In its attempt to remove itself from 9(a) obligations, the Company next claims (Br 18, 32-36) that its successive collective-bargaining agreements are comparable to a "members-only" agreement. Irrespective of whether an employer's limited recognition of a minority union for purposes of representing only its own members is even permissible,[8] as the judge found (A 3415), there is no "hint in either the contracts, or in practice that, the bargaining unit was contemplated to be a member's only arrangement." To the contrary, as the judge noted (A 3415; 2029), "because Florida is a right-to-work State, many of the people referred from [Local 623's] hiring hall were not members." Thus, as a practical matter, the hiring hall arrangement was not limited to a "members-only" arrangement.

Moreover, the Company's suggestion (Br 32-36) that the bargaining relationship is like a members-only unit because all employees in the bargaining unit come from the hiring hall, is equally unavailing. As the Company recognizes (Br 31), and the Board found (A 3415), "there is nothing in the contracts themselves that purport to describe or limit the bargaining unit only to those people who got jobs through a hiring hall." To the contrary, as the Board explained (A

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[8] *See Retail Clerks, Locals 128 and 633 v. Lion Dry Goods, Inc*., 369 U.S. 17, 29 (1962) (" 'Members only' contracts have long been recognized") citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236-39 (1938)); *Don Mendenhall*, 194 NLRB 1109, 1110 (1972)).

3415), the unit included the department heads "whose employment did not depend upon referrals from Local 623's hiring hall." Moreover, the collective-bargaining provisions contained wage and overtime provisions that applied to "all" employees. *See A&M Trucking, Inc.*, 314 NLRB 991, 991-92 (1994) (memorandum that contained no explicit recognition clause or unit description was not a members-only unit where language indicated that terms applied to all employees not just union members).

There is no merit to the Company's contention (Br 42-43) that the Board's "valid policy goal" of industrial stability is outweighed by the policy of "employee freedom of choice." As the Supreme Court has recognized, "[t]he underlying purpose of [the Act] is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954). That is particular true here, where the Company can only speculate 8 years after the fact that Local 623 did not have majority support when the original collective-bargaining agreement was signed. Moreover, after the Company began questioning the continued role of Local 623, its own unfair labor practices precluded Local 623 from following through on a petition for an election which would have given the employees a fair opportunity to express their desires concerning continuing representation by an incumbent union.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY BARGAINING TO IMPASSE OVER A CHANGE IN THE SCOPE OF THE BARGAINING UNIT

A. Applicable Principles and Standard of Review

Section 8(d) of the Act (29 U.S.C. § 158(d)) requires the parties to meet and bargain over "wages, hours, and other terms and conditions of employment," which constitute "mandatory subjects of bargaining." *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971); *The Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400-01 (D.C. Cir. 1988).[9] On such matters, "neither party is legally obligated to yield." *NLRB v. Wooster Div., Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). *Accord Idaho Statesman*, 836 F.2d at 1400. The parties to a collective-bargaining relationship also are free to bargain over any other lawful subject and reach agreement on these, the "permissive" subjects of bargaining. *See Borg-Warner Corp.*, 356 U.S. at 349; *Idaho Statesman*, 836 F.2d

[9] Section 8(d)(3) of the Act (29 U.S.C. § 158(d)(3)) requires a party terminating a agreement to give notice to the FMCS within 30 days of the termination notice to the other parties. Here, since the Company was the party who first gave notice of termination, it had the burden of complying with Section 8(d)(3). *See NLRB v. Weathercraft Co.*, 832 F.2d 1229, 1231 (10th Cir. 1987) and cases cited. Yet, it is undisputed that the Company did not submit notice to the FMCS until over 1 year after it first gave notice to terminate the agreement, and 9 months after it declared impasse and unilaterally implemented terms and conditions of employment. If, as the Board found, the parties bargaining relationship was governed by Section 9(a) of the Act, the Company does not dispute the Board's finding (A 3416) that the failure to give timely notice and the subsequent unilateral changes violated Section 8(a)(5) of the Act.

at 1400. An employer's insistence, however, to impasse on a permissive subject of bargaining amounts to a refusal to bargain over subjects "'that are within the scope of mandatory bargaining,'" and violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). *Idaho Statesman*, 836 F.2d at 1400 (quoting *Borg-Warner Corp.*, 356 U.S. at 349).

The scope of the bargaining unit represented by a union is a permissive subject of bargaining. *See Idaho Statesman*, 836 F.2d at 1400-01. That is true "regardless [of] whether the recognized unit has been certified by the Board" under Section 9 of the Act (*Idaho Statesman*, 836 F.2d at 1400), because "the duty to bargain depends on neither a Board election nor certification" (*Hess Oil & Chemical Corp. v. NLRB*, 415 F.2d 440, 445 (5th Cir. 1969)). "If it were a mandatory subject, an employer could use its bargaining power to restrict (or extend) the scope of union representation in derogation of employees' guaranteed right to representatives of their own choosing." *Idaho Statesman*, 836 F.2d at 1400-01. The scope of a bargaining unit, in this context, has been defined as "what employees the unit represents" (*Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 474 (D.C. Cir. 1998)) or "the identity of the employees over whose wages, hours, and other conditions of employment [an employer is] prepared to bargain with the [u]nion" (*Idaho Statesman*, 836 F.2d at 1405).

Here, it is undisputed that the Company declared impasse after the parties failed to agree to the Company's proposal to hire an in-house nonunion staff to perform stagehand work and to apply any negotiated collective-bargaining agreement only to those referred from Local 623's hiring hall. The Company does not dispute that the scope of the bargaining unit is a permissive subject of bargaining. Where the "Board's construction of the statute is 'reasonably defensible,' and the Board's determination is supported by substantial evidence, [the Court will] ordinarily defer to the Board's application of 'the general provisions of the Act to the complexities of industrial life.'" *Boise Cascade Corp.*, 860 F.2d at 474 (internal citations omitted). The controlling issue, therefore, is whether substantial evidence supports the Board's finding that the Company's proposals sought to alter the scope of bargaining unit. *See Idaho Statesman,* 836 F.2d at 1401. Under the substantial evidence standard a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 478 (1951). *Accord Idaho Statesman,* 836 F.2d at 1401.

B. Substantial Evidence Supports the Board's Finding that the Company Unlawfully Declared Impasse over Proposals that Constituted an Insistence on Changing the Scope of the Unit

Beginning in 1992, the Company twice entered into collective bargaining agreements with Local 623. These bargaining agreements covered all workers performing stagehand work at the Kravis Center. The agreements defined the stagehands' specific work as, among other things, carpentry, electrical, and sewing. Both agreements set forth wages and hours and overtime provisions for "all" employees. Those employees included the company-appointed department heads at Dreyfoos Hall, assistants, carloaders, and riggers. The parties agreed in both the 1992 and 1998 agreements to use Local 623's hiring hall as the exclusive source for labor at Dreyfoos Hall, and in the latter agreement, as a non-exclusive source of labor at Rinker and Gosman.

During negotiations for a third contract in the Summer of 2000, the Company sought to "radically change the way it hired stagehands and its relationship to Local 623," in effect to "render nugatory" Local 623's role in negotiating terms and conditions of employment for those people who did stagehand work. (A 3416.) The Company's demand to diminish, if not eliminate, Local 623's role in negotiating terms and conditions of employment for stagehands was unwavering from its first contract proposal on June 7, through its declaration of impasse on September 11.

Thus, the Company remained firm in its intent to eliminate the 6 department heads and bring those jobs in-house. These proposed in-house employees or "core group" would work full time and perform some stagehand work without union representation unless they chose to join a union. Moreover, Company Attorney Pheterson was adamant that the Company would not negotiate over its decision to create internal positions of a "core group" who "would be able to do some of the technical functions that were done by referrals in the past." (8/14 bargaining session, A 3100, 3102-03.) As Pheterson explained, the Company "want[ed] more flexibility . . . . where everything is not based on contracts" (7/10 bargaining session, A 3048, 3057). The Company also remained unwavering in its demands to use Local 623's hiring hall at its sole discretion, to only apply any contract to those referred from the hiring hall, and to subcontract at its sole discretion.

As the Board found (A 3416), some of what the Company sought to change would not have constituted unlawful demands in a different context. For example, the Company had the right to insist on eliminating the department head positions, creating core positions, and having a non-exclusive hiring hall arrangement. That is because both the exclusivity of a hiring hall (*Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1113 (D.C. Cir. 1986), and the subcontracting of bargaining unit work (*International Paper Co. v. NLRB*, 115 F.3d 1045, 1048-49 (D.C Cir. 1997)) are mandatory subjects of bargaining that the Company could

bargain over to impasse. The Company went too far, however, when it sought to unilaterally change the scope of the bargaining unit that included all stagehands at the Company and insisted to impasse on that change.

The Board found (A 3417) that the Company forced Local 623 to "accept a fundamental change in the scope of the bargaining unit and to relinquish any rights to bargain about stagehands hired directly by the [Company]." Thus, the Company sought to change the stagehand bargaining unit by insisting that any employee hired as a stagehand in the future would not be covered by a collective-bargaining agreement unless referred by Local 623. The Company insisted that its newly formed "core group" would be assigned to do stagehand work on a regular basis. As the Board found (A 3417), the Company insisted on carving up the unit of stagehands into two groups: one that Local 623 referred and one that the Company hired directly. In these circumstances, the Board was fully warranted in finding (A 21) that the Company's proposals sought to change the scope of the bargaining unit. *See Idaho Statesman*, 836 F.2d at 1403-05 (proposal that had the effect of excluding certain trainees from the bargaining unit was unlawful, while proposal that had no effect on unit scope was lawful).

The Company claims (Br 49-50) that the change in the scope of the bargaining unit is consistent with the existing bargaining unit because the bargaining unit never included non-referred stagehands. That argument is, by the

Company's own admission (Br 49-50), a reiteration of the Company's earlier claim that the parties had simply entered into a hiring hall arrangement, not an agreement governed by Section 9(a) of the Act.[10] As shown above, there is no merit to the Company's claim.

In any event, the Company's attempts to characterize its arrangement with Local 623 as limited only to a hiring hall arrangement is undermined by both the collective-bargaining agreements and the surrounding circumstances. The bargaining agreements do not, as the Board found (A 3415) and the Company concedes (Br 31), explicitly exclude non-referred workers to any of the Company's facilities. Moreover, the contract language that recognizes Local 623's hiring hall as a valuable source for employees at Dreyfoos Hall, does not state that Local 623's jurisdiction only applied to those it referred. To the contrary, the references in the work week and wage schedule articles to "all" workers suggests otherwise.

The Company's reliance (Br 37) on the arbitration finding that the addendum to the second contract provided for a non-exclusive hiring hall at Rinker and Gosman does not advance its claim that the impasse was not unlawful. In that arbitration, neither party raised the issue of whether the contract terms would apply to such hires. Nor did the arbitrator address the issue. At best, the arbitration

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[10] Once again, this claim seems to refer to traditional 8(f) concepts of hiring halls in the construction industry that are inapplicable to the performance of theatre work done by the stagehands here.

award left open the applicability of the contract terms to such hires at Rinker and Gosman. Certainly, there is a strong argument that the agreement's terms applied to those workers who did stagehand work at Rinker and Gosman given the Company's express desire in the second bargaining agreement to "have a common set of terms and conditions of employment" for workers "who regularly work at the physical facilities of [the Company]." (A 84.)

Contrary to the Company's suggestion (Br 20, 37-38, 50), Local 623 did *not* concede that the second agreement did not apply to outside hires at Gosman and Rinker. Rather, during the negotiations for the third bargaining agreement, Local 623 expressed the position "that the [Company] has directly hired certain employees represented by . . . [Local 623]" (A 2295), that it had negotiated a collective-bargaining agreement that had a hiring hall component (8/7 bargaining session, A 3053, 3059-61), and that the Company's "refusal to apply [its] proposal to bargaining unit members not referred by Local 623 was and is illegal. . . ." (A 3410; 2347).

Finally, there is no merit to the Company' suggestion (Br 29-30) that its proposals only concerned work assignments and jurisdiction, two mandatory subjects of bargaining, over which the Company could bargain to impasse and make unilateral changes. As this Court has recognized, the concepts of jurisdiction (the "type of work the members of the union are to perform") and scope ("what

employees the unit represents") "are not always easy to distinguish in practice. . . . Nevertheless, whatever the difficulty, it is clear that an employer may not, 'under the guise of the transfer of unit work . . . alter the composition of the bargaining unit.'" *Boise Cascade*, 860 F.2d at 474-755 (citation omitted).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT LOCAL 500 WAS THE SUCCESSOR TO LOCAL 623 AND THEREFORE THE COMPANY WAS REQUIRED TO RECOGNIZE AND BARGAIN WITH IT AS THE REPRESENTATIVE OF THE COMPANY'S EMPLOYEES

The Company contends (Br 50-59) that even if it acted unlawfully by withdrawing recognition from Local 623 and unilaterally implementing changes, its bargaining obligation ended following Local 623's merger with other local unions to form Local 500, because of a lack of continuity between the pre- and post-merger union. Substantial evidence supports the Board's finding that the evidence failed to show that the merger resulted in organizational changes that were so dramatic that Local 500 lacked substantial continuity with Local 623. Therefore, Local 500 is the successor to Local 623 and the Company was required to recognize and bargain with Local 500 and was not free to withdraw recognition.

Moreover, if the Court enforces the Board's finding that the Company unlawfully withdrew recognition from Local 623, and that its bargaining obligation did not end with Local 623's merger (see below), then the Board is entitled to summary enforcement of its remedy requiring the Company to bargain with Local

500 because the Company's opening brief does not dispute the Board's conclusion (A 3402-04) that a bargaining order is the proper remedy. *See Ross Stores, Inc. v. NLRB*, 235 F.3d 669, 680 n.2 (D.C. Cir. 2001) (issue not raised in opening brief is waived); *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990).

A. Applicable Principles

Because "'[t]he industrial stability sought by the Act would unnecessarily be disrupted if every union organization adjustment were to result in displacement of the employer-bargaining representative relationship,'" a change in union structure will not affect Local 623's status as a representative of the unit employees "unless the Board finds that the affiliation raises a question of representation" under Section 9(a) of the Act. *NLRB v. Financial Institution Employees of America Local 1182 ("Seattle- First")*, 475 U.S. 192, 202-203 (1986) (citations omitted). *Accord News/Sun Sentinel v. NLRB*, 890 F.2d 430, 432 (D.C. Cir. 1989).

In this case, the Board revised its traditional two-prong test, which examined both the continuity of representation and "due process" when a union's representation status was challenged following a union merger or affiliation. In light of the Supreme Court's decision in *Seattle-First*, the Board (A 3399-3401) expressly abandoned the "due process" prong of its test, which required that union members must have an opportunity to vote, with adequate due process safeguards, on union affiliation. The Board found (A 3300) that the lack of a membership vote

concerning union affiliation is insufficient to raise a question concerning representation as discussed in *Seattle-First*. The Board (A 3301) reaffirmed the continuity-of-representation prong of its test, holding that when there is a union merger or affiliation "an employer's obligation to recognize and bargain with an incumbent union continues unless the changes resulting from the merger or affiliation are so significant as to alter the identity of the bargaining representative."[11] *See Seattle-First*, 475 U.S. at 202.

The Board examines the organizational and structural changes resulting from the affiliation and compares the pre- and post-affiliation representative to determine whether the changes are "'sufficiently dramatic'" so as to alter "the fundamental character of the representing organization." *Western Commercial Transport, Inc.*, 288 NLRB 214, 218 (1988), *quoting Seattle-First*, 475 U.S. at 206. *Accord News/Sun Sentinel v. NLRB*, 890 F.2d at 432.

In making this determination, the Board, with court approval, examines a range of factors, including maintenance of the same bargaining unit membership; continued leadership responsibilities by the existing union officials; the perpetuation of membership rights and duties; and the continuation of the manner in which contract negotiations, administration, and grievance processing are

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[11] The Company (Br 51) does not challenge the Board's decision to abandon the due process prong of its inquiry.

effectuated. *See, for example, News/Sun Sentinel v. NLRB*, 890 F.2d at 432; *May Dept. Stores, Co. v. NLRB*, 897 F.2d 221, 228 (7th Cir. 1990); *NLRB v. Commercial Letter, Inc.*, 496 F.2d 35, 39-40 (8th Cir. 1974). In assessing continuity questions, the Board "considers the totality of the circumstances, eschewing the tendency toward a 'mechanistic approach' or the use of a 'strict checklist.'" *Mike Basil Chevrolet*, 331 NLRB 1044 (2000)(citation omitted). *Accord May Dept. Stores Co. v. NLRB*, 897 F.2d at 228; *Yates Indus.*, 264 NLRB 1237, 1249 (1982).

"The Company, as the party seeking such displacement, has the burden of proving its claim of discontinuity." *News/Sun Sentinel v. NLRB*, 890 F.2d at 432. *Accord May Dept. Stores Co. v. NLRB*, 897 F.2d at 228. Whether the Board's continuity requirements have been satisfied in a particular case are factual issues that the Board determines in the first instance. Accordingly, the Board's finding that a newly affiliated union is entitled to continuing recognition must be accepted so long as it is supported by substantial evidence on the record as a whole. *See News/Sun Sentinel v. NLRB*, 890 F.2d at 432.

B. The Company Failed to Show that Local 623's Merger With Other Locals Resulted in Significant Changes that Altered the Identity of the Bargaining Representative

The record amply supports the Board's finding (A 3402) "that the evidence does not show that there was a lack of continuity of representation between Local 623 and Local 500." As fully set out in the facts at pp. 17 to 20, the totality of the circumstances show that Local 500 is the successor to Local 623.

As the Board found (A 3402), there was no substantial change in the fee structure. To the contrary, members of Local 623 became members of Local 500 without having to pay any initiation or transfer fees, and the referral fees remained unchanged. The only change in fees, an adjustment to post-merger dues to reflect the average dues of several of the former locals, resulted in only a $10 increase for members of former Local 623. Such an increase, as the Board explained (A 3402) "is not evidence of discontinuity." *See CPS Chemical Co*., 324 NLRB 1018, 1022 (1997), *enforced* 160 F.3d 150 (3d Cir. 1998).

Moreover, the Board found (A 3402) there was no change in the hiring hall system which was "administered in the same manner as it had been before the merger." There was no change in members' status concerning their place on the work list, their date of hire, or their date of membership. Members continued to work in their local areas and the reciprocity practices continued as before. (A 3402 n.33) In addition, two members who had served on Local 623's hiring hall/referral

committee, including former Local 623 Business Agent Dermody, served on Local 500's referral committee. Although Local 500 planned to upgrade the computer system and have one hiring hall list, members would continue to get referred to the same geographic locations as previously. In these circumstances, the Company is in no position to claim (Br 58) that the Board's finding of continuity has no record support, or for it to speculate that such similarities are "impossible."

Additionally, the union officials of Local 623 continued to represent their members in similar capacities after the merger. As the Board found (A 3402), "[f]ormer Local 623 business agent John Dermody continue[d] to serve in that role" with Local 500. Among other responsibilities, he negotiated contracts, handled grievances, and serviced unit members. Moreover, former Local 623 members continued to contact Dermody using the same phone number. Given Dermody's role in serving former Local 623 members, and his role in the hiring hall, the Company's claim (Br 59) that Dermody played a limited role is specious. Indeed, Dermody explained (A 2688 (p. 804)) that his role in Local 500 "transcended" his role in former Local 623.

Importantly, the post-merger union evidenced continuity in its dealings with the employer. As the Board found (A 3402), International Representative Louis Falzarano, who was in charge of Local 500's day-to-day operations at the time of the hearing, had, both before and after the merger, assisted Local 623 with

organizing and contract negotiations. Employers continued to make benefit contributions to Local 623's vacation and pension funds as they had before the merger. Moreover, these independent trust funds were jointly administered by the same pre-merger Local 623 representatives and employers.

In sum, these factors fully warranted the Board's finding (A 3402) that the "merger did not result in such a dramatic change to Local 623 as to raise a question concerning representation." Therefore, the Company was required to recognize and bargain with Local 500 as the representative of its employees.

Although, as the Company sets forth, there are some changes for the former Local 623 members due to the merger, none of those changes undermine the Board's finding that the merger did not result in dramatic changes that were so significant as to alter the identity of the bargaining representative.

For example, although, as the Company notes (Br 56), there is some difference in size between Local 623 and Local 500, that factor is insufficient given the continuing similarities. *See News/Sun Sentinel v. NLRB*, 890 F.2d at 433. Moreover, notwithstanding the Company's suggestion (Br 59) that the comingling of assets from poorer locals somehow changed the control that employees had over the funds, there is no evidence that employees represented by Local 500 had fewer union resources that could be committed to their representational needs than formerly available to them under pre-merger Local 623. *See Sullivan Brothers*

Printers, Inc. v. NLRB, 99 F.3d 1217, 1229 (1st Cir. 1996) (transfer and commingling of assets does not defeat finding of continuity). To the contrary, members of former Local 623 were arguably in a better representational position given Dermody's concern that the ongoing dispute with the Company had "almost devastated" Local 623 financially. (A 2729, 2790.)

Nor does the Company (Br 56-57) advance its position by relying on the International's control over Local 500. The Company's brief ignores that such control was temporary and that Local 500 would eventually operate with autonomy. Indeed, at the time of the hearing, a scant 6 months after the merger, Local 500 had already drafted a constitution and bylaws that were awaiting approval by International President Thomas Short, to be followed by a membership vote to approve them and a subsequent election of officers.

These circumstances bear little relevance to those found in *Quality Inn Waikiki*, 297 NLRB 497, 502 (1989), upon which the Company relies (Br 54-55). There, a question concerning representation existed where following a trusteeship, the local union representing 500 employees was merged with a local representing 10,000 employees. The dramatic changes cited by the Board included suspension of all the local union's employees. Moreover, the smaller local was originally formed because the larger local was not affording equal representation to the same

employees who, as a result of the organizational change, were once again represented by the larger local.

Finally, although the Company asserts (Br 51) that it does not raise an objection to the Board's determination that "due process" no longer constitutes a separate part of the test, it nonetheless suggests that "the internal procedure followed by the union" should be evaluated, not on due process grounds, but "to assess how the perceptions of the employees might be affected." Such analysis of the internal workings of a union offers little in assessing whether there is substantial continuity in representation. Indeed, in *Seattle-First* the Supreme Court rejected this type of meddling in union affairs. Rather, as the Board noted (A 3400), the essential holding in *Seattle-First* was that "the Board cannot discontinue an employer's obligation to recognize a union based on the union's affiliating with another union unless the Board determines that the affiliation raises a question concerning representation." Here the Board concluded that the affiliation did not raise such a question and the Company's arguments do not suggest any.[12]

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[12] While some locals had concerns about the impact of the merger on their respective memberships, the Company's suggestion (Br 12-14) that there was wholesale opposition distorts the record. To the contrary, two unions were in favor (A 2729, 2748, 2792), two had mixed feelings, as they recognized the benefits (A 2729, 2739-40, 2809), and two simply favored a different merger configuration (A 2729, 2762, 2844-45, 2937-38). Likewise, the Company distorts the facts in referring (Br 12) to critical comments at the merger hearing by "leaders of the locals." The cited comments came from only one local whose leaders felt it was

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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being unfairly portrayed. That concern was quickly diffused with the explanation that any problems were not a reflection on the ability of the local's officers, but rather a structure that prevented local officers from working to the best of their abilities. (A 2729, 2920-30.) As another local officer explained, the process could have been better, but the local was not against the merger. (A 2729, 2933-35.)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE RAYMOND P. KRAVIS CENTER FOR THE PERFORMING ARTS, INCORPORATED	*	
Petitioner	*	
v.	*	Nos. 07-1419 & 07-1459
NATIONAL LABOR RELATIONS BOARD	*	Board No. 12-CA-21361
Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,633 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 4th day of June, 2008

STATUTORY ADDENDUM

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act,
29 U.S.C. § 151-69 (2000):

RIGHTS OF EMPLOYEES

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

(b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [of subsection (a)(3) of this section] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(d) [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective- bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . .

* * *

(f) [Agreements covering employees in the building and construction industry] It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsection (a)(3) of this section]: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [section 159(c) or 159(e) of this title].

* * *

REPRESENTATIVES AND ELECTIONS

Sec. 9 [§ 159.] (a) [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

* * *

(c) **[Hearings on questions affecting commerce; rules and regulations]** (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

* * *

(b) [Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable] Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six- month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code [section 2072 of title 28].

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: *Provided*, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section

8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

* * *

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court

for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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THE RAYMOND P. KRAVIS CENTER FOR THE PERFORMING ARTS, INCORPORATED	*	
Petitioner	*	
v.	*	Nos. 07-1419 & 07-1459
NATIONAL LABOR RELATIONS BOARD	*	Board No. 12-CA-21361
Respondent	*	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date has hand delivered to the Clerk of the Court the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by regular mail upon the following counsel at the addresses listed below:

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Dated at Washington, D.C.
this 4th day of June, 2008