UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMBASSADOR SERVICES, INC.	Cases Nos. 12-CA-26758, 12-CA-26759, 12-CA-26832
AMERICAN BAPTIST HOMES OF THE WEST d/b/a PIEDMONT GARDENS	Case No. 32-CA-063475
BANNER HEALTH SYSTEM d/b/a BANNER ESTRELLA MEDICAL CENTER	Case No. 28-CA-23438
COSTCO WHOLESALE CORPORATION	Case No. 34-CA-12421
DIRECTV U.S. DIRECTTV HOLDINGS LLC	Case No. 21-CA-39546
FRED MEYER STORES, INC.,	Case No. 36-CA-10555
FRESENIUS USA MANUFACTURING, INC.,	Case No. 2-CA-39518
IRON TIGER LOGISTICS, INC.	Case No. 16-CA-27543
SODEXO AMERICA LLC	Case Nos. 21-CA-39086 21-CA-39109 21-CA-39328 21-CA-39403
SUPPLY TECHNOLOGIES, LLC,	Case No. 18-CA-19587

MOTION OF THE COALITION FOR A DEMOCRATIC WORKPLACE

REQUESTING THE BOARD TO INVITE *AMICUS CURIAE* BRIEFS IN TEN CASES REMANDED PURSUANT TO *NOEL CANNING*

I. GROUNDS FOR THE MOTION

The undersigned attorneys represent the Coalition for a Democratic Workplace ("CDW"), which consists of over 600 organizations representing millions of businesses employing hundreds of millions of employees nationwide in nearly every industry. We are writing on behalf of the CDW to ask the Board to invite *amicus* briefs from interested parties in at least ten of the cases that have been remanded to the Board in the aftermath of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). The ten cases in which we are asking the Board to invite *amicus* briefs are as follows:

Ambassador Services, Inc., Case Nos. 12-CA-26758, 26759, 26832

American Baptist Homes of the West, Case No. 32-CA-063475

Banner Health System, Case No. 28-CA-23438

Costco Wholesale Corporation, Case No. 34-CA-12421

DirecTV U.S. DirecTV Holding, LLC, Case No. 21-CA-39546

Fred Meyer Stores, Inc., Case No. 36-CA- 10555

Fresenius USA Manufacturing, Inc., Case No. 2-CA-39518

Iron Tiger Logistics, Inc., Case No. 16-CA-27543

Sodexo America, LLC, Case Nos. 21-CA-39086, 39109, 39328, 39403

Supply Technologies, LLC, Case No. 18-CA-19587

Each of the foregoing decisions was issued by a Board that included one or more invalidly appointed "recess" members, in violation of the Supreme Court's holding in *Noel Canning* (hereafter the "recess" Board). The "recess" Board's initial decisions in each of these cases significantly modified, expanded upon or overruled past precedent, establishing new principles of labor law. The decisions impacted critical workplace issues affecting millions of

employers and employees across many different industries. The issues raised by the decisions, as specified in greater detail below, include the application of Section 7 to social media, confidentiality of workplace investigations and witness statements, the need to harmonize Board rulings with other state and federal laws governing the workplace, employee and union access to employers' premises, the enforceability of arbitration requirements encouraged by the Federal Arbitration Act, and employer responses to union information requests.

Because the "recess" Board's initial decisions in the foregoing cases were rendered through the *ad hoc* adjudication process, there was little or no advance indication to the public that the Board was considering significant changes to existing law or restatements of important labor policies, prior to issuance of the decisions themselves. As a result, the "recess" Board did not have the benefit of *amicus* participation from organizations representing the broader business or labor community or academia, in any of these proceedings.

During the past year, however, the current Board has taken the welcome step of inviting *amicus* briefs in a number of cases where the Board announced that it was considering potentially significant changes in law or policy. *See, e.g., Northwestern University*, Case No. 13-RC-121359; *Browning Ferris Industries*, Case No. 32-RC-109684; and *Purple Communications, Inc*., Case Nos. 21-CA-095141, 21-RC-091531, 21-RC-091584. By publicly announcing the potential policy changes being considered, and then issuing invitations for *amicus* briefs on such issues, the Board has insured that the broader views of business, labor and academia could be considered and addressed, beyond the narrow interests of the immediate parties to each case.

The same principle should apply here under the highly unusual circumstances created by the mass remand of cases by the courts of appeals under *Noel Canning.* In the ten above

captioned cases, the "recess" Board's decisions that are now being reconsidered by the current Board all announced significant changes in law or policy. As in the more recent cases where similar changes have been considered by the current Board, the Board would benefit from hearing the broader views of business, labor and academia as to the legality and impact of the changes advocated by the "recess" Board. [1]

As an alternative to the Board's issuance of invitations to file *amicus* briefs to the broader business and labor community, CDW requests leave to file as an *amicus* in each of the above referenced cases. As noted above, CDW itself represents a broad spectrum of business organizations who can apprise the Board of the impact of these decisions on their labor relations.

II. SUMMARY OF THE REMANDED CASES IN WHICH AN INVITATION FOR *AMICI* BRIEFING IS REQUESTED.

A. *American Baptist Homes of the West d/b/a Piedmont Gardens*, 359 NLRB No. 46 (2012).

In this case, the recess majority, Griffin and Block, held that the employer violated the Act by failing to provide a union with the names and job titles of employees who witnessed alleged work misconduct resulting in an employee's termination. The majority found that the employer did not establish a legitimate and substantial confidentiality interest in the witnesses' names and job titles. Member Hayes dissented. The recess Board overturned 34 year old precedent exempting witness statements from an employer's general duty to provide relevant information. See *Anheuser-Busch,* 237 NLRB 982 (1978). The majority rejected *Anheuser-Busch's* bright-line rule and the underlying premise that witness statements are fundamentally

[1] The foregoing list of cases is not intended to be an exclusive list of remanded Board rulings that are important to the business community. CDW encourages the Board to invite *amicus* filings prior to reaffirming any remanded decision that modified or overturned previous Board precedent.

different from other types of information.

If the "recess" Board's holding is reaffirmed by the current Board, employers will be left without guidance on what fact specific situations the Board will find sufficient to deny disclosure under the new balancing test. This case also creates an unnecessary burden on employers' ability to comply with other federal labor and employment laws. The Board should invite *amicus* briefs in this case to receive the broader views of interested parties regarding the impact of the holding on the process of conducting fair workplace investigations.

B. *Ambassador Services, Inc.*, 358 NLRB No. 130 (September 14, 2012).

Recess Board members Griffin and Block, Member Hayes dissenting, found a stevedoring company violated the Act by maintaining a work rule that prohibited "walking off the job and/or leaving the premises during work hours without permission." The ALJ found that the rule was justified by the business necessity of ensuring that supervisors knew where employees were at all times. He further concluded that no employee would reasonably read the rule as nullifying the right to strike. The "recess" Board reversed the ALJ and found that employees would reasonably construe the rule prohibiting "walking off the job" as prohibiting protected "walk outs." The recess Board thereby improperly narrowed the precedent upholding such policies in *Wilshire at Lakewood*, 343 NLRB 141 (2004), *revd. on other grounds Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007). The Board should invite *amici* to address the impact of the recess Board's holding on the rights of employers to promulgate reasonable rules about breaks, shifts, and job abandonment, all of which are necessary to maintain productive and secure workplace environments, regardless of the industry involved.

C. *Banner Estrella Medical Center d/b/a Banner Health System*, 358 NLRB No. 93 (July 20, 2012).

In this case, recess Members Richard Griffin and Sharon Block, Member Hayes dissenting, found an employer's routine advice to employees not to discuss ongoing employee investigations unlawful. The majority placed a new burden on the employer "to first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up" before requiring confidentiality. This holding ignores the realities of workplace investigations and interferes with employers' ability to comply with federal and state laws requiring confidential investigation of workplace misconduct. The Board should invite *amici* to address the need for confidentiality in workplace investigations and the impracticality of requiring individualized showings of need under the restrictive holding of the recess Board, as well as the unreasonable burdens involved in complying with the foregoing holding while maintaining compliance with the legal requirements imposed by other federal agencies.

D. *Costco Wholesale Corporation*, 358 NLRB No. 106 (September 7, 2012).

The recess Board panel, Pearce, Griffin and Block, reversed the ALJ and held that the company's social media policy prohibiting statements that "damage the Company " or "damage any person's reputation" violated the Act. The Board found that employees would reasonably conclude that the rule prohibited them from making statements critical of the employer or its agents. In light of the proliferation of social media policies, and the confusing series of Board and General Counsel decisions pertaining to their enforcement, the Board should invite *amicus* briefs in this case in order to fully reassess the validity of social media policies and to provide clear guidance consistent with the Act. The holding in this case represented a departure from

previous precedent finding that employers have legitimate rights to adopt rules establishing a civil and decent work place and that rules prohibiting improper conduct tending to damage or discredit an employer's reputation were lawful. See *Palms Hotel & Casino*, 344 NLRB 1363 (2005); *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) *enf.* 203 F.3d 52 (D.C. Cir. 1999); *Tradesmen International*, 338 NLRB 460 (2002).

E. *DirectTV U.S. DirecTV Holdings LLC*, 359 NLRB No. 54 (Jan. 25, 2013).

The recess Board panel, Pearce, Griffin and Block, held that rules prohibiting employees from contacting the media, commenting to the media about DirectTV, and responding to law enforcement inquiries without first contacting DirectTV's security department, were unlawful because employees would reasonably construe the rules as prohibiting Section 7 activity. The Board improperly found that the rules encompassed protected employee communications concerning labor disputes to the media and contact with law enforcement officials regarding wages, hours and working conditions. The recess Board also found unlawful employer policies prohibiting employees from discussing details about their job, company business, work projects, employee information, and employee records. The Board should invite *amici* to file briefs in order to gain a better understanding of how such commonplace policies serve legitimate business interests without infringing on any reasonable employees' Section 7 rights.

F. Fred Meyer Stores, Inc., 359 NLRB No. 34 (2012).

In this case, the recess majority of Pearce and Griffin, with Member Hayes dissenting, held that a retail store unlawfully changed a past practice of allowing non-employee union representatives to have short conversations with employees on the selling floor when the employees were not assisting store customers. The union activities in question significantly

exceeded past practice and constituted trespass in violation of the employer's property rights, in violation of the Supreme Court's holding in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The Board should invite *amici* to address the impact of the recess Board's holding on retail employers, as well as the practical applications of such a holding on other industries and the infringement on employer property rights protected by *Lechmere*.

G. *Fresenius USA Manufacturing*, 358 NLRB No. 138 (Sept. 19, 2012).

Recess Members Griffin and Block, Member Hayes dissenting, in this case reversed the Administrative Law Judge ("ALJ") and held that the employer violated the NLRA when it suspended and terminated the employee for writing offensive and threatening newsletter comments and lying during the investigation of his misconduct. Expanding the Board's previous application of *Atlantic Steel,* the majority found the employee's use of vulgar language protected merely because his outrageous comments concerned union activity, a decertification election. *Atlantic Steel Co.,* 245 NLRB 814, 816 (1979). The Board should invite *amicus* briefs in this case in order to learn from the business community how the ability to discipline and discharge employees for egregious workplace conduct such as occurred in this case directly relates to the legitimate business interests in providing a safe workplace and complying with federal and state anti-discrimination and harassment laws. Complying with the recess Board's new requirements in this case will leave many employers open to potential liability under other relevant labor and employment laws, which the Board is obligated to take into account in rendering its decisions under the NLRA.

H. Iron Tiger Logistics, Inc., 359 NLRB No. 13 (October 23, 2012).

The recess majority, Pearce and Block, held that the employer in this case was required to respond in a timely fashion to the union's request for information that was not relevant to a grievance. Member Hayes dissented, citing Supreme Court precedent in *NLRB v. Truitt Manufacturing,* "while it might be preferable for a party to explain its refusal to provide information which is irrelevant to the statutory bargaining, it is not a violation of the statutory duty to bargain in good faith to fail to do so." See *NLRB v. Truitt Manufacturing*, 351 U.S. 149 (1956). He noted that the Board had never previously found an independent statutory duty to respond to a request for presumptively relevant information, where that presumption was rebutted in litigation. The Board should invite *amici* briefing of the burdensome impact of this holding on the business community, which will now be faced with the requirement to respond to multiple information requests that are not relevant to a union's performance of its responsibilities as the exclusive collective-bargaining representative.

I. *Sodexo America LLC*, 358 NLRB No. 79 (July 3, 2012).

This decision invalidated an employer rule restricting off-duty access to its hospital because it discriminatorily allowed access for "hospital-related business." The recess Board reversed the ALJ's decision, which relied on 36 year old precedent in *Tri-County Medical Center,* 222 NLRB 1089 (1976). In *Tri-County Medical Center,* the Board held that an employer's rule barring an employee's off-duty access to the facility was valid if it limits access solely to the interior of the facility, is clearly disseminated to all employees, and applies to off-duty access for all purposes, not just for union activity. The recess Board instead found the employer's policy provided management with too much discretion to permit, or not permit,

employees to enter its facility. Member Hayes dissented and agreed with the ALJ that the rule was valid under *Tri-County Medical Center.* The Board should invite *amici* to address the impact of this holding on employers' reasonable workplace access restrictions and whether the recess Board's holding needlessly interferes with patient care.

J. *Supply Technologies, LLC*, 359 NLRB No. 38 (Dec. 14, 2012).

The recess majority, Griffin and Block, with Member Hayes dissenting, found that a non-union employer's mandatory arbitration policy violated the Act by requiring arbitration of any federal, state or local statutory claims, without expressly designating NLRB complaints as exempt from the program. The opinion asserted without support that the policy would cause reasonable employees to believe that they were prohibited from filing unfair labor practice charges. This decision completely ignores relevant federal and Supreme Court case law requiring arbitration agreements to be enforced as written and elevates the NLRA over the Federal Arbitration Act's strong federal policy favoring arbitration. See *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 350 (5th Cir. 2013); *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011); *American Express Corp. v. Italian Colors Restaurant,* 133 S. Ct. 2304 (2013). The Board should invite *amici* to address the broader impact of this decision on arbitration policies and the reasonable expectations of employees with regard to the enforcement of such policies.

III. CONCLUSION

For the reasons set forth above, the CDW respectfully requests that the Board invite *amicus* briefs in each of the above cases in order to obtain a greater understanding of the impact of the recess Board's previous changes in labor policy on the broader interests of business and labor and the rule of law. Alternatively, CDW itself requests leave to file *amicus* briefs in each of the cited cases within 30 days after issuance of a ruling on this Motion.

Maurice Baskin
Michael J. Lotito
Elizabeth D. Parry
LITTLER MENDELSON, P.C., P.C.
1150 17th Street, NW, Suite 900
Washington, DC 20036
T: 202-772-2526
mbaskin@littler.com

Attorneys for the Movant
Coalition for a Democratic Workplace