Last term the Supreme Court reversed the D.C. Circuit’s earlier decision in this case, which held that the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) was unconstitutional because it delegated regulatory powers to Amtrak, a private entity. The Supreme Court found instead that Amtrak was an agency of government, but the Court remanded the case to the D.C. Circuit to consider other constitutional issues: Does it violate due process for an entity to make law when, economically speaking, it has skin in the game? Does it violate the Appointments Clause for Congress to vest appointment power of a principal officer in the Surface Transportation Board? And is a government corporation whose board is only partially comprised of members appointed by the President constitutionally eligible to exercise regulatory power? The D.C. Circuit declined to answer the last question, but it answered the first two questions in the affirmative, again finding the PRIIA unconstitutional.

The touchstone of Due Process is fairness, the court said. The specific fairness question here is whether an economically self-interested entity may exercise regulatory authority over its rivals. As the D.C. Circuit noted, the Supreme Court has addressed this question only once, in Carter v. Carter Coal Co., 298 U.S. 238 (1936). Carter Coal involved a challenge to the Bituminous Coal Conservation Act, which prohibited anyone from purchasing bituminous coal from any mine that did not comply with certain wage and hour requirements. But neither the Act itself nor any federal agency articulated those requirements. Rather, the Act delegated the authority to determine them to “the producers of more than two-thirds of the ... tonnage production for the preceding calendar year” and “more than one-half the mine workers employed.” Put simply, the Act endowed these majority producers and employers with the authority to set wage and hour requirements the minority producers and employers had to comply with or else forfeit all their customers. The Supreme Court found this arrangement unconstitutional, saying “[t]his is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.” The D.C. Circuit read Carter Coal as not limited to delegations of authority to private entities in competition with those they would regulate but to a delegation of authority to any entity with financial interests different from those it would regulate. The court said, “[w]e conclude, as did the Supreme Court in 1936, that the due process of law is violated when a self-interested entity is ‘intrusted with the power to regulate the business ... of a competitor.’ ‘[A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property’ and transgresses ‘the very nature of [governmental function].’”

The court then considered whether indeed Amtrak was (1) a self-interested entity (2) with regulatory authority over its competitors. Notwithstanding that Amtrak might be an agency of government for constitutional purposes, the court found that it was an economically self-interested entity because Amtrak is statutorily obligated to be operated and managed as a for-profit corporation. The court also found that it had regulatory authority over its competitors, because the freight operators are competitors with Amtrak for use of the rails, a scarce commodity, and Amtrak participates in the development of “metrics and standards” which these
freight operators are required to incorporate into their agreements with Amtrak “to the extent practicable.” The court rejected the government’s arguments that, because neither Amtrak nor the metrics and standards directly regulate the freight operators’ conduct, Amtrak does not have regulatory authority over its competitors.

The court warned that the “government’s increasing reliance on public-private partnerships portends an even more ill-fitting accommodation between the exercise of regulatory power and concerns about fairness and accountability. . . . Make no mistake; our decision today does not foreclose Congress from tapping into whatever creative spark spawned the Amtrak experiment in public-private enterprise. But the Due Process Clause of the Fifth Amendment puts Congress to a choice: its chartered entities may either compete, as market participants, or regulate, as official bodies. After all, ‘[t]he difference between producing ... and regulating ... production is, of course, fundamental.’ To do both is an affront to ‘the very nature of things,’ especially due process.”

The second constitutional question was whether the Appointments Clause is violated by the PRIIA’s provision requiring that, in the event Amtrak and FRA cannot agree, either party “may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration.” The statute does not specify whether the arbitrator is a private individual or a public individual. The D.C. Circuit did not need to resolve that interpretive question, because it found the provision unconstitutional in either case. If the appointed arbitrator was a private individual, his appointment would be unconstitutional, because, as its prior opinion detailed, private entities cannot wield the coercive power of government. Inasmuch as the Supreme Court reversed on other grounds (finding Amtrak a public entity, not a private entity), the D.C. Circuit said that it stood by its earlier analysis. If the appointment was of a public individual, the appointment would still be unconstitutional because the arbitrator would be a principal officer who could only be appointed by the President with the advice and consent of the Senate. Because the arbitrator resolves disputes over the metrics and standards through binding arbitration, which becomes the final agency decision on behalf of Amtrak and the FRA, the arbitrator exercises “significant authority pursuant to the statutes of the United States” and must be an “officer of the United States.” The real question is whether the arbitrator is a principal officer or an inferior officer. If the latter, the appointment method would be valid, because the Surface Transportation Board should be considered a “department” within the meaning of the Appointments Clause. See Free Enter. Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 511 (2010) (defining a department as “a freestanding component of the Executive Branch, not subordinate to or contained within any other such component”). In answering this question, the court relied on the Supreme Court’s test in Edmond v. United States, 520 U.S. 651 (1997), which the D.C. Circuit said “identified the dispositive feature as whether an officer is ‘directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.’” Here, the arbitrator would not be directed or supervised by anyone, nor would his decisions be reviewable by anyone. Consequently, the arbitrator would have to be a principal officer appointed by the President with the advice and consent of the Senate.

One can predict fairly confidently that this will not be the end of this case and that the Supreme Court will have to deal with Amtrak once again.
Exelon Generation Company filed an application with the NRC to renew the 40-year operating license of its Limerick nuclear power plant for an additional 20 years. The NRDC sought to intervene in the license proceedings. The NRC, however, found that under its regulations NRDC did not qualify for intervention because NRDC wished to raise issues in the adjudication that had already been decided in an earlier rulemaking resulting in the so-called Rule (L). Consequently, NRDC filed a petition for a waiver of that rule, a procedure provided by NRC regulations, which would allow it to intervene. Again, however, the NRC denied NRDC’s request, finding that it did not meet the requirements for the grant of a waiver. NRDC appealed both of the NRC’s decisions.

The substance of NRDC’s issues was that since the time of the original licensing of the Limerick plant allegedly “new and significant” information had been developed relating to severe accident mitigation alternatives (SAMAs). NRDC wished to bring this information into the re-licensing proceeding and to have it considered in the environmental impact statement required under the National Environmental Protection Act (NEPA). However, there had been a full analysis of SAMAs for the Limerick plant at the time of its licensing, and the NRC’s Rule (L) did not require re-analysis of SAMAs as part of re-licensing. Nevertheless, the NRC regulations still required the applicant to report any “new and significant information regarding the environmental impacts” of the license renewal. The NRC concluded that NRDC’s new information was not specific to the Limerick plant but was generic and therefore was precluded by Rule (L) from being considered in the re-licensing adjudication. The D.C. Circuit noted that it is well established that an agency can decide issues generically in a rulemaking and then preclude their consideration in subsequent adjudications. See, e.g., United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). Here, the court indicated that there were two independent reasons why it should show significant deference to the NRC. First, it said, “[o]ur general posture of deference toward agency decision-making is particularly marked with regards to NRC actions because ‘the [AEA] is hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends.’” Second, it said, “to the extent NRC's technical judgment is before the court, we ‘must generally be at [our] most deferential.’” As a result, it found that the NRC was entirely reasonable to determine generically when SAMAs needed to be considered in re-licensing proceedings.

The court then turned to the NRC’s denial of NRDC’s waiver petition. Under the NRC’s rules a waiver can be granted only if the petition demonstrates “special circumstances” exist, and prior NRC precedent has established four criteria for determining if there are special circumstances. The NRC denied the petition on the basis of the third criterion – that the circumstances are "unique" to the facility rather than common to a large class of facilities. Here, the court said, “[t]he Commission's determination is entitled to deference as long as it was not arbitrary and capricious,” and the NRC’s decision that NRDC’s information was not unique to the Limerick facility was a “reasonable determination . . . entitled to deference from this court.”
The court expressed some sympathy with NRDC’s plight, because, being unable to intervene in the adjudication, it would not be able to obtain judicial review of the re-licensing decision. It did, however, take some solace in the fact that NRDC could petition NRC to change its rule and that the NRC – and the plants themselves – are constantly evaluating new mitigation alternatives through channels other than the relicensing process.

**National Labor Relations Act; Effect of Lack of Quorum; Deference; Waiver of Claims.**


When the NLRB lost a quorum to do business in 2012, and the Supreme Court held that President Obama’s purported recess appointments were unconstitutional, Regional Directors continued to direct representation elections as usual under delegations of authority made when the NLRB had a quorum. In two earlier cases, *UC Health v. NLRB*, 803 F.3d 669 (D.C.Cir.2015) and *SSC Mystic Operating Co. v. NLRB*, 801 F.3d 302 (D.C.Cir.2015), the D.C. Circuit had deferred to the NLRB’s interpretation of the NLRA to uphold the authority of the Regional Directors with respect to representation elections, at least when their actions were “subject to eventual review by the Board.” In the *Hospital of Barstow* case, however, the parties agreed that the Regional Director’s actions would be final, and the question was whether this difference should change the conclusion of the earlier cases.

The case arose when the union the Regional Director had certified filed an unfair labor practice charge against the hospital. Before the Board the hospital argued that the Regional Director lacked authority to certify the union in the first place. The Board rejected that argument, saying that the hospital had waived the right to challenge the certification by entering into negotiations with the union. The initial question, therefore, was whether the hospital had waived this claim. The court, relying on its two earlier opinions, said that, while ordinarily persons cannot challenge certifications if they enter into bargaining, it had “consistently held ... that challenges to the composition of an agency can be raised on review even when they are not raised before the agency.” This teed up the question of the Regional Director’s authority to certify the union.

The court noted that in its earlier cases it had found that the statutory quorum provision was silent on the interpretive issue of the Regional Directors’ continuing authority, so it had pursuant to *Chevron* deferred to the Board’s reasonable interpretation in those cases. Here the Board had not addressed the authority question, having dismissed the claim on waiver grounds. The D.C. Circuit declined to decide this question in the first instance, saying that its “general practice in these sorts of situations is to remand the proceeding to enable the agency to interpret the statute in the first instance.”

**Medicare Reimbursement; Auer Deference; Deference to Technical Regulatory Programs.**


Via Christi Health Center sought an upward adjustment of the capital-asset depreciation reimbursement paid to its predecessor hospitals under a since-curtailed Medicare regulation. As a
general matter, the Secretary of the Department of Health and Human Services reimburses Medicare providers for their reasonable costs actually incurred, including an appropriate share of depreciation on buildings or equipment used to supply Medicare services. The depreciation allowance is ordinarily based on the Secretary's estimates of assets' useful life, but certain providers may claim a Medicare-reimbursable share of supplemental losses incurred in qualifying pre-December 1997 transactions. Via Christi contended that the transaction that led to its formation – the 1995 consolidation of St. Francis and St. Joseph Hospitals – was such a qualifying sale. Via Christi then argued that it received St. Francis's and St. Joseph's assets at a lower value, i.e., more depreciated, than was reflected in the Secretary's earlier depreciation reimbursements. As the hospitals' successor-in-interest, Via Christi thus sought additional reimbursements to cover the proportional Medicare share of the depreciation. Via Christi sought reimbursements relating to each of its predecessor hospitals, and the Secretary denied both claims on the ground that the 1995 consolidation was not a bona fide sale qualifying for adjusted depreciation under the regulations. The Secretary concluded that: (1) The parties neither engaged in arm's-length bargaining nor exchanged reasonable consideration, so the loss did not arise from a bona fide sale; and (2) the transaction was between related parties. The Tenth Circuit sustained the Secretary's denial of Via Christi's claim for $9.7 million relating to St. Joseph's assets. In this case, relating to St. Francis's assets, the district court sustained the Secretary's denial of Via Christi's claim for a $59 million depreciation adjustment, and the D.C. Circuit affirmed.

In prior cases, *Pinnacle Health Hosps. v. Sebelius*, 681 F.3d 424, 427 (D.C.Cir.2012), and *St. Luke's Hosp. v. Sebelius*, 611 F.3d 900, 905-06 (D.C.Cir.2010), the D.C. Circuit had upheld part of the Secretary's definition of a bona fide sale. Here it upheld the rest of that definition, finding that “because the bona fide sales rule ‘is a creature of the Secretary's own regulations, [her] interpretation of it is ... controlling unless plainly erroneous or inconsistent with the regulation,’” citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Moreover, the court said that it owed “heightened deference to the Secretary's interpretation of a 'complex and highly technical regulatory program' such as Medicare,” citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

Via Christi also argued that there was a lack of substantial evidence to support a finding that there was not arms-length bargaining, but reviewing the evidence, the court found the Secretary’s conclusion was justified.
*** State of West Virginia v. Environmental Protection Agency, No. 15-1363 (D.C. Cir. May 16, 2016)***

In August, 2015, EPA adopted its Clean Power Plan final rule, which sets carbon emission standards for power plants. It was, of course, immediately challenged, and the petitioners sought a stay of the rule from the D.C. Circuit, which the court denied. The petitioners then sought a stay from the Supreme Court, which by a 5-4 vote granted the stay, an action that was almost unprecedented. The D.C. Circuit had scheduled oral argument in the case in June, but on May 16 it took the unusual step of ordering *sua sponte* the case to be considered en banc and rescheduled oral argument for September 27.


Shortly after Congress passed a law requiring the Federal Aviation Administration (FAA) to adopt a comprehensive plan and implementing regulations regarding the use of drones, the Electronic Privacy Information Center (EPIC) petitioned the FAA to promulgate drone-specific privacy regulations. Two and a half years later (and before any proposed rules for the use of drones had been published) the FAA sent EPIC a letter stating that it was denying EPIC’s petition for rulemaking. The Federal Aviation Act requires persons seeking review of an FAA order to file their petition for review within 60 days of the order, 49 U.S.C. § 46110(a), but EPIC did not file its petition for review of the denial of its petition for rulemaking until 125 days after the letter. Consequently, the D.C. Circuit said that its review was time-barred. EPIC sought to invoke the statutory exception to the time limit when there are “reasonable grounds” to justify an untimely petition. Here, EPIC maintained that the letter was misleading, because it was ambiguous as to whether the FAA was in fact denying the petition absolutely or only denying it as a separate rulemaking because the FAA would include it in the FAA’s upcoming drone rulemaking. The court acknowledged that the letter was indeed ambiguous, but this ambiguity did not affirmatively mislead EPIC. Thus, there were not “reasonable grounds;” instead, in light of the ambiguity, EPIC should have filed a protective petition for review within 60 days.

Alternatively, EPIC maintained that the actual denial of its petition did not occur until the FAA published its proposed drone rule, in which the FAA had said, “privacy concerns have been raised about [drone] operations . . . [but] these issues are beyond the scope of this rulemaking,” and its petition for review was within 60 days of the publication of the proposed rule. The court noted that it could only review final agency actions, and notices of proposed rulemakings are not final agency actions. EPIC then made the novel, but losing, argument that here the notice of proposed rulemaking was the agency’s final decision, because any final rule would have to be the logical outgrowth of the proposed rule, and the FAA’s categorical rejection of considering privacy issues in the rulemaking meant the final rule could not adopt privacy rules. The court’s response was curt: “To allow review of an agency's intention *vel non* – as expressed only in an NPRM – . . . would upset our settled law that [w]e do not have authority to review proposed agency rules.”

The ACLU made an FOIA request to the CIA seeking a copy of the full report created by the Senate Select Committee on Intelligence relating to the program of detention and interrogation formerly run by the CIA, which the committee had provided to the agency. The CIA denied the request on the ground that the record was not an “agency record.” The D.C. Circuit affirmed the district court’s dismissal of the challenge to the withholding of the document. Under D.C. Circuit precedent, when a congressional document is in the possession of an agency, the test as to whether that document is an “agency record” “turns on whether Congress manifested a clear intent to control the document.” The court also said that Congress may manifest an intent to retain control over documents either when the documents are created or when the documents are transmitted to an agency. However, an expression first made after an FOIA request has been filed is a “post-hoc objection” and is to be given no weight. In the instant case, there was a post-hoc objection from the committee, but there was also a letter contemporaneous with the committee’s transmission to the CIA of the draft report. That letter expressly declared that the all documents provided by the committee to the CIA, including “any final . . . reports” remained committee documents and were not agency records for purposes of the FOIA. The fact that the committee later expressed the hope that the agency would use the full report to guide future programs did not change the status of the report as a congressional document.


The American Freedom Law Center and its co-founder (and employee) challenge two actions by the Department of Health and Human Services to implement the Affordable Care Act. The two actions were a "Transitional Policy," which permitted health insurance companies to temporarily continue providing health insurance plans that did not comply with ACA requirements, and a "Hardship Exemption," which permitted some individuals whose policies were cancelled for noncompliance to avoid the penalty under the individual mandate. Both, plaintiffs claimed, were "unlawful executive actions" issued by "executive fiat." Their case was dismissed by the district court for lack of standing. The D.C. Circuit affirmed that decision.

The plaintiffs claimed that the Transitional Policy would raise their health insurance premiums. The court assumed for the sake of argument that their health insurance premiums would increase, but it said that plaintiffs had failed to show that the Transitional Policy would cause it. It noted that the plaintiff’s insurer had ascribed both increases and decreases in its rates to effects of the Transitional Policy, so that it was purely speculative to say that any increases in the future would be the result of the Policy.

The plaintiff employee argued that the Hardship Exemption denied him equal protection because he could not benefit from the exemption from the individual mandate while others could. The court pointed out that he was not subject to the individual mandate in any case, because he was insured by his employer’s plan, such that an exemption would not do him any good. Hence he had no injury. Finally, the employer argued that the Transitional Policy deprived it of equal protection because only some individuals were able to benefit from the Transitional Policy (namely, those individuals whose plan was issued by a health insurance company that
took advantage of the Policy). But, it was not HHS that prevented the employer from benefiting from the Transitional Policy; it was the employer’s insurer, which chose not to take advantage of it.

**National Labor Relations Act; Authority to Re-Issue Order When Quorum is Established.**


When President Obama assertedly made recess appointments to enable the NLRB to function, decisions by the Board were challenged as unlawful because the appointments were not valid. In *Noel Canning v. NLRB*, 705 F.3d 490 (D.C.Cir.2013), the D.C. Circuit agreed and granted the petition to vacate the Board’s decision in that case. In *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the Supreme Court affirmed the D.C. Circuit, albeit on different reasoning. Later, when the NLRB was lawfully reconstituted, it essentially re-issued the decision against Noel Canning. Noel Canning then challenged that decision on the grounds that once the decision against it had been vacated, that was the end of the matter, and the Board cannot take up the same case again.

The D.C. Circuit disagreed. It noted that the Fourth, Seventh, and Eighth Circuits had faced the same issue and had all found that the Board, once lawfully constituted, did have the authority to re-issue the decisions that had been made by the improperly constituted Board. The court said:

> When a court affirms or rejects an agency's decision on the merits, parties to the litigation have important interests in the finality of that decision. Those interests are absent when a court rules only that an administrative body never had a quorum to issue a decision in the first place. In fact, far from promoting finality, Noel Canning's interpretation of this Court's mandate in [our earlier decision] actually "deprives the employees" and the company itself "from having [the case] resolved on the merits once and for all by this court."

**National Labor Relations Act; Issue Exhaustion; Substantial Evidence.**


Durham took issue with a union representation election, alleging that the union had circulated misleading propaganda and that an NLRB representative had engaged in improper conduct. Its challenge to the election was rebuffed by the Board without a hearing, and Durham refused to bargain, causing the union to file an unfair labor practice charge with the Board. Durham defended on the basis of its claims regarding the election, and the Board found for the union on the basis of the Board’s previous decision. Durham petitioned for review, and the D.C. Circuit affirmed the Board’s decision as supported by substantial evidence.

Longstanding Board precedent, accepted by a number of circuits, including the D.C. Circuit, establish that the Board does not probe into the truth or falsity of the parties' campaign statements, and that elections will not be set aside on the basis of misleading campaign statements. The Board, however, does intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Here, Durham
did not allege any forgery and its attempts to minimize the effect of that precedent were waived, because it did not raise them before the Board.

Durham’s second objection, that a Board representative acted improperly, was limited to a claim that the representative had “carried the election booth and the ballot box to the Employer's parking lot in order to permit a disabled employee to cast a ballot.” Not only was this not sufficient to overturn the election, but it was also not enough to justify requiring an evidentiary hearing into possible inappropriate behavior by the Board representative. The court said: “The case law is clear that Petitioner must rely on its proffered evidence to support a request for an evidentiary hearing. And only if that evidence raises issues of fact sufficient to support Petitioner's prima facie case is a hearing then warranted to address issues concerning the fairness and validity of the election.”
A Ph.D. student made an FOIA request to the Department of Defense for reports about its use of polygraph examinations, as well as related documents about those examinations. The Department responded with respect to one batch of the student’s requests by requiring her to pay about $900 to conduct the search, and with respect to another batch the Department conducted a search but denied the request because the records were exempt from disclosure under FOIA Exemption (7)(E).

The FOIA does not require an “educational institution” to pay search costs associated with a request, and the government, consistent with OMB guidelines, has long treated teachers at educational institutions when engaged in work related activity as covered by this exemption from having to pay search costs. However, the OMB Guidelines and the Department of Defense deny the exemption to students. In this case of first impression, the D.C. Circuit noted that the government did not request deference to OMB’s guidelines, “presumably because OMB is not the only agency that administers FOIA.” [While OMB may not be the only agency that administers FOIA, the FOIA says that agencies must conform to the OMB Guidelines as to the schedule of fees and perhaps to the guidelines for determining when fees should be waived or reduced. Editor’s note] Turning to the text of the FOIA, the court said that it was ambiguous whether either teachers or students should be considered as an “educational institution,” but the purposes of the FOIA strongly favored an interpretation that teachers engaged in their teaching, public service, or scholarly activities would qualify as an educational institution. With that established, the court found it difficult to comprehend why students would not also qualify. It said:

we see no good basis in the text or context of FOIA to draw a line here between the teachers and students within the educational institution. The Guideline’s ipse dixit distinction of students from teachers is entirely unexplained and unpersuasive. The Guideline says that a geology teacher seeking information about soil erosion to support her research is entitled to reduced fees. But why not the geology student seeking the same information for the same reason? Crickets. [For those not familiar with the expression “Crickets,” it is an internet chat term that means “no one is responding to my question; please speak up, people.”] The court allowed that agencies may assure themselves that the student is seeking the records to further coursework or other school-sponsored activities, but here that was clear so the student was entitled to exemption from search fees.

As to the batch of records claimed as law enforcement records, the government said that polygraphs are used to test the credibility of witnesses and criminal defendants as well as to “screen applicants for security clearances so that they may be deemed suitable for work in critical law enforcement, defense, and intelligence collection roles.” An earlier D.C. Circuit case had held that “[b]ackground investigations conducted to assess an applicant’s qualification, such as ... clearance and investigatory processes, inherently relate to law enforcement.” Morley v. CIA, 508 F.3d 1108, 1128-29 (D.C.Cir.2007). Thus, these records were law enforcement records. In order to be exempt from release, however, law enforcement records must meet one of six
requirements. Here the government said that release would disclose law enforcement techniques and procedures that could reasonably be expected to risk circumvention of the law. The court concluded that indeed release of reports relating to polygraph examinations would meet this requirement and upheld the denial of release.


IronTiger Logistics is a company that ships trucks from manufacturers to retailers around the country. IronTiger, however, does not contract with the manufacturers; another company, TruckMovers, contracts with the manufacturers and then assigns to a number of subcontractors, including IronTiger, the actual deliveries. The union at IronTiger, believing that IronTiger was itself contracting out deliveries and thus avoiding using its union drivers, sought information on what deliveries had been assigned to it. IronTiger responded, but the union, apparently believing that TruckMovers was discriminating against IronTiger in favor of its own non-union drivers, made another request to IronTiger, this time for information regarding TruckMovers’ personnel as well as further and extremely detailed information regarding IronTiger’s deliveries. IronTiger refused to provide this information, saying it was not relevant to any matter properly involved in IronTiger and the union’s bargaining agreement. The union complained to the NLRB, which held that IronTiger had violated sections 8(a)(5) and 8(a)(1) of the NLRA by not providing the information, because, even though the Board found the information ultimately irrelevant, it was “presumptively relevant” and therefore needed to be supplied.

Before the D.C. Circuit, the company objected to the Board’s “rule” that a company must respond in a timely fashion to a union’s request for presumptively relevant information, even if it should turn out that the information is irrelevant. In other words, according to the Board, the burden switches to a company to respond to a union’s request for presumptively relevant information. The court noted that it had previously approved the Board’s policy holding that some information is so central to the core of the employer-employee relationship that it is deemed presumptively relevant. And, although it had previously held only that an employer must timely respond to a union’s request for relevant information, it found no basis to quarrel with the Board’s extension in this case, to the proposition that an employer must timely respond to a request for presumptively relevant information. This is the sort of legal and policy determination to which the courts are obliged to defer, it said.

Nevertheless, the court said that any information regarding TruckMovers’ personnel was “obviously irrelevant,” hence not even presumptively relevant. So there should have been no obligation to provide that information. Moreover, with respect to the burdensome information requested regarding IronTiger’s deliveries, the company said it was simply harassment on the part of the union. The court concluded that the company’s complaint may have been justified, but neither the ALJ nor the Board ever squarely responded to Petitioner’s contention. The court, therefore, remanded the case for the Board to consider both the Petitioner’s defense and the implication of a rule that would permit a union to harass an employer by repeated and burdensome requests for irrelevant information only because it can be said it somehow relates to
bargaining unit employees – without even a union’s statement of its need.


The NLRB determined that HTH Corporation committed a host of severe and pervasive unfair labor practices, which HTH did not dispute. HTH did, however, petition for review of five extraordinary remedies imposed by the Board, three of them adopted by the Board sua sponte and two of them recommended by the ALJ but then modified by the Board. Because the company had failed to file a motion for reconsideration with the Board, the D.C. Circuit held that it lacked jurisdiction to consider the company’s objections to all but two of the challenged remedies. As to those two, it upheld one (notice-reading) and vacated the other (attorney’s fees).

Section 10(e) of the NLRA provides that “[n]o objection that has not been urged before the Board ... shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). Here, HTH did not seek reconsideration of any of the extraordinary remedies ordered by the Board. It argued that the remedies were patently *ultra vires*, and case law supports allowing judicial review if a remedy is truly, patently *ultra vires*, but the court said that the Board’s remedial authority is broad and that authority was not patently exceeded under D.C. Circuit precedents, particularly considering the company’s history of severe and pervasive unfair labor practices. Nor did the mere fact that the Board acted sua sponte constitute an “extraordinary circumstance.”

However, HTH had objected to the Board concerning the ALJ’s order that a high ranking HTH officer read a lengthy notice drafted by the Board, in which the officers were to say that “we” have violated the National Labor Relations Act and the employees’ rights, and to state 15 specific assurances in the form, “We will” adhere to specified NLRA obligations and remedy various breaches, or “We will not” violate the Act in a wide range of specified ways. HTH’s objection was that this requirement was extraordinary and that extraordinary remedies were unwarranted because there had been no showing that traditional remedies were insufficient to address the unfair labor practices. Although the ALJ’s notice-reading requirement was altered by the Board to allow HTH the option of having a Board agent make the reading, and HTH had not filed for reconsideration in light of the Board’s alteration, the majority of the court believed the general objection that HTH had made was sufficient to preserve this issue for judicial review. On this point, Judge Henderson dissented, believing that the Board was barred from reviewing the notice-reading requirement by Section 10(e).

On the merits of the challenge to the notice reading, the court noted that the history of the D.C. Circuit’s consideration of this issue has been long and complex, but displaying two patterns: first, succeeding panels manifest no detectable obligation to heed prior panels; second, the degree of deference to the Board steadily increases. Judge Williams, after language indicating a distaste for an order requiring the company officer to make the reading (analogizing it to the system of “criticism-self-criticism” devised by Stalin and adopted by Mao), concluded that “[g]iven the company’s long history of unlawful practices and the severe violations the
Board found in this case, we uphold the Board’s exercise of discretion in ordering notice-reading in the modified form, i.e., with the company having the option of punting the task to a Board employee.” Judge Rogers agreed with Judge Williams that the court had jurisdiction to review the notice-reading requirement, and she agreed that the Board’s order should be upheld, but she appeared to indicate that this conclusion did not depend on giving HTH the option of having a Board agent make the reading. The Board’s discretion in cases involving such egregious violations was broad enough to require the notice-reading requirement even by the company officer.

Another of the extraordinary remedies ordered by the Board was awarding attorney fees and other litigation expenses to the Board’s General Counsel and the union, and HTH argued to the court that the Board does not have the legal authority to make such an award. One of the “extraordinary circumstances” justifying review despite the failure to bring an issue before Board for consideration is when it would be patently futile to raise the issue. Here, the Board has a long history of asserting its authority to make awards of litigation expenses, so the court found it would have been futile for HTH to have raised it here.

On the merits, the court pointed out that it has its own precedent that the Board has no authority to shift litigation expenses under the section 10(c) of the Act, which authorizes the Board “to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act].” The Board argued that, like federal courts, it has the “inherent authority to control and maintain the integrity of its own proceedings through an application of the bad-faith exception to the American Rule.” The court responded, however, that “as a creature of statute the Board has only those powers conferred upon it by Congress. . . . Therefore, unlike a federal court, the Board may apply the bad-faith exception to the American rule only if some provision or provisions of the Act explicitly or implicitly grant it power to do so.” Consequently, it asked whether section 10(c) implicitly authorizes shifting litigation expenses because it would further “effectuate the policies of [the Act].” However, it found that nothing in section 10(c) grants the Board punitive powers and application of the American rule’s bad-faith exception is punitive. Moreover, both the Supreme Court and the D.C. Circuit have held that the Board does not have punitive powers. Consequently, the court overturned the award of litigation expenses.


ManorCare raised two objections to the results of a union election. First, it said that threats of violence had been made by some supporting the union so that the election was not valid. Second, it said that, because the Regional Director who oversaw the election had been appointed by the Board at a time when it lacked a quorum, the Regional Director had no authority to oversee the election.

On the first point, the Board’s regional director had ordered a hearing. The hearing officer concluded that indeed there had been threats made and that those threats were so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. This was especially so, because the outcome of the election was a vote of 34-32 in
favor of the union, such that even a single person’s change of vote would have changed the
outcome. The union appealed the hearing officer’s decision to the Board, which rejected the
hearing officer’s findings about the threatening statements. The D.C. Circuit reversed the Board
on this point. It said that its review of the Board’s findings are under a deferential standard, but
that it would reverse a Board decision if it is not “reasonable and consistent with applicable
precedent.” Here the court found the Board had not followed its precedent regarding what is
necessary to render a free election impossible because of a “general atmosphere of fear and
reprisal.” Under the Board’s precedents, there are six factors used to determine whether a threat
is serious and likely to intimidate voters: “[1] the nature of the threat itself ... [2] whether the
threat encompassed the entire bargaining unit; [3] whether reports of the threat were
disseminated widely within the unit; [4] whether the person making the threat was capable of
carrying it out; ... [5] whether it is likely that the employees acted in fear of his capability of
carrying it out; and [6] whether the threat was ‘rejuvenated’ at or near the time of the election.”
The court assessed the facts regarding the threats and found that each of these factors supported
the conclusion that they created a general atmosphere of fear and reprisal, especially given the
close outcome of the election. While the Board had cited to its precedent, the court said that it
did not apply all the factors to the facts and with respect to those factors it did address, the
Board’s application was inconsistent, without explanation, with its prior cases. Judge Srinivasan
concurred in the judgment on this point, but he would have remanded the case to the Board to
perhaps be able to explain how its decision was consistent with its precedent, rather than finding,
as the majority did, that the Board could not have reached the decision it did.

On the second issue, the court said that ManorCare had waived the ability to challenge
the lawfulness of the Regional Director’s conduct of the election, because it had not raised the
issue before the Board in its challenge to the representation election. The court noted that
challenges to the Board’s actions based on the agency’s lack of authority may ordinarily be
raised for the first time on appeal. Here, however, the challenge was not to the agency’s
authority, because the Board was properly constituted at all time relevant to ManorCare’s
election. Instead it was a challenge to the Regional Director’s initial appointment. Such a
challenge may be forfeited, the court said, citing to United States v. L.A. Tucker Truck Lines,
Inc., 344 U.S. 33, 37 (1952). [Compare this outcome to that in Hospital of Barstow, Inc. v.
N.L.R.B.,--- F.3d ----, 2016 WL 1720366 (D.C. Cir. April 29, 2016), reported in the May 4
dition of Recent Decisions of the D.C. Circuit related to Administrative Law, in which the court
held that a claim that a Regional Director lacked authority to administer and certify an election
because he was appointed by the Board when it lacked a quorum – the same claim as present
here – was able to be raised for the first time on appeal. In that case, however, the Board was not
yet properly constituted at the time the election took place and the Regional Director certified the
results.]

Telephone Rate Regulation; Auer Deference; Canon against Surplusage; Chenery II

Great Lakes Comnet provides telephone connections between AT&T’s long-distance 1-
800 calls and a local exchange, sort of a middleman. For this service Comnet charges AT&T a
fee, but AT&T believed the fee it was charged violated the FCC’s benchmark rates for
competitive local exchange carriers or CLECs, and it complained to the FCC. The FCC found
that indeed Comnet had charged a rate in excess of what was allowed, and Comnet appealed to
the D.C. Circuit.

Comnet argued first that it was not a CLEC at all and therefore not subject to the rate
regulation. The regulatory definition of a CLEC is someone who “provides some or all of
the interstate exchange access services used to send traffic to or from an end user.” Comnet said
that because it did not provide any services directly to an end user, it could not be a CLEC. The
Commission said that it provided some of the services necessary to get traffic to an end user, and
this was what the definition covered. The court cited to Auer v. Robbins, 519 U.S. 452 (1997),
for the proposition that courts are to defer to an agency’s “reading of its own regulations unless
that reading is ‘plainly erroneous or inconsistent with the regulations.’” Here the agency’s
“reading of its own regulation” occurred at the time that it amended the regulation to add “some
or all,” when it said the change was precisely for purpose of subjecting intermediate carriers to
CLEC benchmark rate regulation. Consequently, the court said, “given the clarity of the
regulatory text and history, the Commission’s conclusion that intermediate carriers like Great
Lakes qualify as CLECs was hardly ‘plainly erroneous.’” Comnet argued that the canon of
statutory construction against surplusage, that a court should “give effect . . . to every clause and
word” in a statute, counseled against the FCC’s interpretation. Because all “interstate exchange
access services” provide services that eventually end up with end users, under the FCC’s
interpretation the words “to or from an end user” would be unnecessary. The court responded
that this was a regulation, not a statute [??], and in any case the Supreme Court has cautioned
that the canon “is not an absolute rule.” Here the canon was not enough to outweigh the clarity of
the text and history of the regulation.

Comnet also argued that it qualified for an exemption from the benchmark rate regulation
as a “rural CLEC,” “a CLEC that does not serve (i.e., terminate traffic to or originate traffic
from) any end users” in an urban area. Great Lakes believed it qualified for the rural CLEC
exemption because it serves no urban end users. The Commission had rejected this argument on
two grounds. First, it said that Comnet maintained “transport facilities” in Chicago, an urban
area. This, the court pointed out, was irrelevant under the regulation, which refers to end users in
an urban area, not transport facilities. The second ground was that the 1-800 calls could
originate from anywhere in the nation, which would assuredly include urban areas. The D.C.
Circuit indicated that this reason might “well have merit,” but the Commission’s order, in
advancing this reason, had introduced it with the word “Moreover.” As a result, the court said it
was unable to determine whether the Commission believed this rationale was independently
sufficient. Finally, at oral argument the Commission’s lawyer advanced still another basis for
excluding Great Lakes from the exemption: that intermediate carriers may not qualify for the
rural exemption under any circumstances. This too might have merit, the court said, but it had
not been the explanation given by the agency in the order, and courts “may not accept appellate
counsel’s post hoc rationalizations for agency action.” Accordingly, the court remanded the case
to the agency for further explanation.