United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

March 10, 2016

VIA ECF

Patricia S. Connor
Clerk, United States Court of Appeals
for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
Richmond, VA 23129-3517

Re: *Nestle-Dreyers Ice Cream Co. v. NLRB*, 4th Cir. Nos. 14-2222 & 14-2339
Oral argument held October 28, 2015

Dear Ms. Connor:

Under FRAP Rule 28(j), the National Labor Relations Board ("the Board") submits for the Court's information the decision issued on March 7, 2016, in *FedEx Freight, Inc. v. NLRB*, 8th Cir. Nos. 15-1848, et al. In that decision, the U.S. Court of Appeals for the Eighth Circuit upheld the Board's *Specialty Healthcare* standard (357 NLRB No. 83 (2011)) for determining whether a proposed bargaining unit is an appropriate unit under Section 9 of the National Labor Relations Act (29 U.S.C. § 159) ("the Act").

Rejecting challenges to the *Specialty Healthcare* standard identical to those raised by Nestle here (Br. 18-34, 36-58), the court held that "the first step in the analysis described by *Specialty Healthcare*, in which the Board analyzes the union's proposed bargaining unit under the traditional community of interest test, is not a departure from the Board's precedent and is consistent with the requirements of [S]ection 9(b) of the Act." Slip op. at 10. Likewise, the court found no infirmity in the second step of the *Specialty Healthcare* analysis, under which the party seeking to add employees to a unit that has been found appropriate must show an "overwhelming community of interest" between the excluded and included employees. Slip op. at 11-15. The court held, in agreement with the Sixth Circuit (*Kindred Nursing Ctrs. East,*

LLC v. NLRB, 727 F.3d 552, 561 (2013)), that this overwhelming community of interest standard "'is not new'"—indeed, it is supported by Board and court precedent—and does not give controlling weight to the extent of organization in violation of Section 9(c)(5) of the Act (29 U.S.C. § 159(c)(5)). *Id*.

Finally, addressing a procedural challenge identical to that raised by Nestle here (Br. 45, 58), the court held that there was no impropriety in the Board's choice to clarify its unit-determination framework in the context of the *Specialty Healthcare* adjudication: "[t]he Board clarified the state of the law in a reasoned opinion that cited its own precedent and relevant appellate decisions," and its "decision to proceed by adjudication was not an abuse of discretion." Slip op. at 16.

Very truly yours,

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-2960

cc: Berbard J. Bobber
Matthew Ginsburg