Case Nos.: 19-1235 & 19-1259

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVIDSON HOTEL COMPANY, LLC
(CHICAGO MARRIOTT AT MEDICAL DISTRICT/UIC)

Petitioner and Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent and Cross-Petitioner,

UNITE HERE LOCAL 1,

Intervenor for Respondent.

ON PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD

PETITION FOR PANEL REHEARING

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BASIS FOR PANEL REHEARING

Intervenor UNITE HERE Local 1 ("the Union) respectfully requests a panel rehearing on the question of certification of the food and beverage unit. D.C. Cir. Rules 35, 40. The Panel[1] faulted the Regional Director for failing to address the NLRB precedents relied on by Davidson Hotel Company (the "Employer") and for failing to explain the difference between his decision on the Union's first petition (for a unit of food and beverage and housekeeping employees) and its second set of petitions (for separate units of housekeeping employees and food and beverage employees). Slip op. at 5-6. The Panel applied this conclusion to both the housekeeping unit and the food and beverage unit but there are critical differences between these units. The Panel's reasoning does not fit the Regional Director's decision with respect to the food and beverage unit.

The terms and conditions of employment for employees in this unit are vastly different from either housekeeping or front desk employees, and while housekeeping and front desk employees are in the

[1] References to the Panel decision refer to the Opinion for the Court filed by Senior Circuit Judge Randolph.

same operational division, food and beverage employees are in a different one and there has been no interchange with housekeeping employees and very minimal interchange with front desk employees. These facts are not disputed and are seen clearly from Regional Director's decisions on the first and second petitions, which deserve to be read in conjunction since the first decision inspired the second petitions filed immediately thereafter. They show that there was no need for the Regional Director to explicitly distinguish *Ramada Beverly Hills*, 278 N.L.R.B. 691 (1986) and *Atlanta Hilton & Towers*, 273 N.L.R.B. 87 (1984) because they were not analogous to the food and beverage unit petition. Accordingly, the Union requests that the Panel revise its decision and grant the NLRB's cross-application for enforcement with respect to the food and beverage unit.

BACKGROUND

The Union initially petitioned for a unit comprising housekeeping and food and beverage employees, but not front desk employees. The Regional Director found such a unit was not appropriate because the commonalities shared between food and beverage and housekeeping employees were also shared with front desk employees. JA 231. In

light of that determination, he found that two separate units of housekeeping and food and beverage employees would be appropriate. JA 230–31, 232 n.11.

The Union immediately re-filed for elections with these unit configurations, and the Regional Director directed an election in each unit. JA 320, 340. Employees voted in separate elections—one for housekeeping and another for food and beverage—to have the Union represent them in collective bargaining. JA 512. The Regional Director certified, and the NLRB subsequently affirmed, the Union as the representative in each of the units. JA 531–34, 535–38, 542–43. The Employer tested the validity of the certification by refusing to bargain,[2] and the Board granted the NLRB General Counsel's motion for summary judgment, ordering the Employer to bargain with the Union. JA 546–48. The Employer appealed the NLRB's order to this Court.

[2] As the Panel explained, "representation proceedings before the Board are not subject to direct judicial review because they do not result in a final agency order, and an employer seeking review of the record in a representation proceeding must refuse to bargain with the union, and suffer an unfair labor practice charge." Slip op., at 4 (citing *Alois Box Co. v. N.L.R.B*, 216 F.3d 69, 76 (D.C. Cir. 2000).

At oral argument the Employer agreed with the Union and the NLRB General Counsel that the food and beverage unit is appropriate. Oral argument at 12:14–14:50. During an exchange with Judge Randolph, counsel for the Employer initially explained that the Employer was putting forward an alternative argument that if the Court held smaller units appropriate, the front desk employees should join the housekeeping unit. The Employer's counsel explained that front desk workers and housekeeping workers were in the same division and that front desk workers shared a greater community of interest with housekeeping employees than with food and beverage employees. Judge Randolph pressed the issue and asked, "But my question remains, accepting everything you've just said in your alternative argument, does that mean that the food and beverage unit is okay?" The Employer's counsel said, "Yes." Accepting what the Employer's counsel "just said" meant accepting that front desk and housekeeping workers shared more of a community of interest than did front desk and food and beverage employees. The Employer's counsel conceded that the "food and beverage unit is okay." The Panel's decision, however, grants the Employer's petition for review with respect to both unit

certifications.

Relying on *LeMoyne-Owen College v. N.L.R.B.*, 357 F.3d 55 (D.C. Cir. 2004), the Panel held that the NLRB and Regional Director acted arbitrarily because they did not provide a reasoned explanation for their decisions. Slip op. at 5–6. The Panel found that the Regional Director and NLRB did not cite to the precedent cited by the Employer, *id.* at 6–7, and that Regional Director did not explicitly distinguish his prior denial in the latter decisions, *id.* (citing Request for Review, 13-14, 85-86 (Hr'g Tr. Apr. 9 2018)).

ARGUMENT

Neither of the two issues the Panel identified with respect to the NLRB and Regional Director's analyses apply to the food and beverage unit. To determine whether an agency has sufficiently explained itself, this Court, like other circuits, utilizes a pragmatic approach. "If the court itself finds the past decisions involve materially different situations, the agency's burden of explanation about any alleged 'departures' is considerably less." *Hall v. McLaughlin*, 864 F.2d 868, 873 (D.C. Cir. 1989). This Court should only vacate an agency's decision for lack of reasoning when the court is unable to "discern the

path taken by the Board in reaching its decision." *Point Park Univ. v. N.L.R.B.*, 457 F.3d 42, 50 (D.C. Cir. 2006). As long as "the agency's path can be 'discerned,'" this Court is "indulgent toward administrative action . . . even if the opinion 'leaves much to be desired." *Id.* (quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1156 (D.C. Cir. 1969)).

With respect to the food and beverage unit, however, the Regional Director's reasoning—reading his initial and subsequent decisions together—is clear. Similarly, the Regional Director did not need to cite contrary precedent regarding the food and beverage unit because the precedent is readily distinguishable and everyone agreed the food and beverage unit could stand alone.

I. The Regional Director's decisions are consistent, and the prior decision did not need to be explicitly distinguished in the latter decisions.

To determine whether a unit is appropriate the Board engages in a two-part inquiry. *PCC Structurals, Inc.*, 365 N.L.R.B. No. 160, *6–7 (2017). First, it determines whether the petitioned-for unit possesses an internal community of interest. *Id.* Next, it determines whether that interest is distinct enough from the interests of the excluded employees. *Id.* at *9. The Regional Director was clear in his first

decision: the food and beverage and housekeeping employees shared a community of interest, but their interest was not distinct enough to warrant separate bargaining units because their shared interests were also shared with front desk employees. JA 230–31. The Regional Director did not hold that the front desk shared such an overwhelming community of interest with the petitioned-for unit that it must be included. The ruling against exclusion was much more tepid, and its reasoning charted the path for the second set of unit determinations. Although front desk employees needed to be included in a unit comprising both food and beverage and housekeeping employees, the Regional Director did not hold that front desk employees needed to be included in *any* unit for which the Union might petition.

As *PCC Structurals, Inc.*, 365 N.L.R.B. No. 160 at *6–7 requires, the Regional Director first examined whether housekeeping and food and beverage employees shared a community of interest. JA 229–30. While performing the first step of the analysis, he found that the housekeeping and food and beverage employees were quite distinct because they had separate supervision, separate job duties, functions, and responsibilities, different wage structure and tip compliance

requirements, and special licensure requirements. JA 230. Importantly, the Regional Director reasoned that "[w]hile these distinctions in job duties and terms and conditions of employment demonstrate that separate units limited only to housekeeping employees or food and beverage employees would be appropriate, both groups of employees share a community of interest" with respect to subjects like handbooks, locker rooms, and uniform requirements. JA 230. In other words, the unit passed the first test, but not with flying colors.

Those commonalities between the housekeeping and food and beverage workers, however, were also commonalities shared with the front desk department. Therefore, under the Regional Director's reasoning at the second step of the analysis, the housekeeping employees and the food and beverage employees were as distinct from each other as they were from the front desk employees and the only things they had in common were also shared by the front desk employees, so there was no basis for putting the two together but leaving out the third. JA 231. That was the entire basis for his decision. The Regional Director held that the petitioned-for unit's

distinctions did not outweigh similarities only "inasmuch as employees in the petitioned-for group do not themselves share common job functions, duties and responsibilities." JA 231. The Regional Director listed the shared concerns between front desk and the petitioned-for unit not because they meant that only a single unit was appropriate, but to illustrate that the similarities between employees within the petitioned-for unit were also similarities with the front desk. JA 231.

In other words, in weighing the commonalities of the housekeeping and food and beverage employees versus the distinctions separating them from the front desk employees, the commonalities weighed nothing because they were shared with the front desk employees. The Regional Director reiterated his statement that separate units would be appropriate in a footnote reading, "I find that either a unit limited only to housekeeping employees and/or a unit limited only to food and beverage employees would be appropriate." JA 232 n.11.

The subsequent petitions for separate units of housekeeping employees and food and beverage employees solved the problem identified in the Regional Director's first decision. In his decisions

directing elections in these two units, the Regional Director addressed every shared concern between the three groups of employees that he listed in his first decision. JA 336–39. They were insufficient to *require* a single unit comprised of all three groups. The reasoning flows from his first decision: the distinctions he had listed in his earlier decision—supervision, separate job duties, functions, and responsibilities, different wage structure and tip compliance requirements, and special licensure requirements—that worked *against* the unit by dividing the housekeeping and food and beverage employees, now worked *for* the separate units.

As the Regional Director reasoned in the subsequent decisions, those distinctions favored separate units because they become commonalities within the included group (so they pass step one), in addition to being distinctions from excluded group (so they pass step two). JA 334 (listing shared supervision, licensure requirements, working conditions); JA 337 (working toward a common goal is "insufficient to negate the other evidence establishing" a distinct community of interest); JA 338 (sharing similar wage and benefit structures is not dispositive). Crucially, the Regional Director found

that "[t]here is no evidence in the record that food and beverage employees have ever been temporarily or permanently transferred to perform one another's work." JA 338. He also found "limited" interchange between front desk and food and beverage employees when a front desk employee would occasionally take a room service order when a food and beverage employee was unavailable, and concluded that that one instance of interchange was insufficient to outweigh the many distinctions. JA 338. And, unlike housekeeping and front desk employees, food and beverage employees work in an entirely separate division. JA 315, 335.

In contrast, housekeeping and front desk employees are in the same operational division. JA 315. Additionally, the housekeeping department had a higher degree of interchange and interaction with front desk employees than food and beverage employees have with the front desk. JA 317–18 (finding front desk employee assistance with cleaning rooms on rare occasions and bellstaff cleaned lobby, and that front desk employees regularly communicate with the housekeeping supervisor or manager).

Even without directly referring to his first unit decision, the

reasoning throughout the decision directing election in the food and beverage unit is cogent enough that the Court can follow the path created by the first decision into the reasoning of the second set of decisions. *See Point Park Univ. v. N.L.R.B.*, 457 F.3d 42, 50 (D.C. Cir. 2006).

The Panel cited to *Ramada Beverly Hills* as an example of the Board considering a prior unit determination decision. Slip op. at 6 n.3. In *Ramada Beverly Hills*, however, the Board and Regional Director considered a prior unit determination only because it needed to determine "whether the evidence establishes that the units previously found appropriate by the Board . . . due to any changed circumstances, now become inappropriate." *Ramada Beverly Hills*, 278 N.L.R.B. 691, 691 (1986). The Regional Director there had already found the two units to be appropriate three years prior to the union's subsequent petition. *Id.* Because that prior determination would be binding if circumstances were sufficiently similar, the Regional Director needed to examine changes in the employer's operation.

In the instant case, however, the Regional Director's prior determination was that the initial petitioned-for unit was

inappropriate. Had the Union petitioned for the same unit, the Regional Director would, as in *Ramada Beverly Hills*, have been required to determine whether changed circumstances rendered the previously inappropriate unit now appropriate. But that is not what happened. The Union petitioned for a different unit configuration that could stand or fall on its own terms. Nonetheless, the Regional Director incorporated the record of the prior proceedings. JA 324 n.3 ("The parties stipulated that the record in case 13-RC-215790 will be incorporated with the instant record"). As stated above, the prior ruling charted the course for the latter rulings. The Regional Director did not need to explicitly cite the first in his latter opinions because reading them together, the path is readily discernable.

II. The Regional Director and the Board did not need to cite to contrary precedent regarding the food and beverage unit because it is clearly an appropriate unit.

As the Panel explained, to determine whether a unit is appropriate, the Board considers "[m]any factors . . . ranging from organizational structure to the terms and conditions of employment." Slip op. at 3 (citing *PCC Structurals Inc.*, 365 N.L.R.B No. 160 at * 9). With respect to the food and beverage unit, *Ramada Beverly Hills* and

the other precedent to which the Employer cites present "materially different situations." *See Hall*, 864 F.2d at 873. In fact, the Employer told the Regional Director that a food and beverage unit was appropriate; he had no reason to distinguish the cases. JA 294 ("We also believe that this Regional Director could find – And, in fact, it would be, based upon the evidence that has been adduced today, . . . an appropriate unit for the Regional Director to find two separate petitions, one for Food and Beverage division and a separate for a Rooms division . . . That is the Employer's position, that *in either of those functions you could have two functionally integrated units.*") (Emphasis added). Reviewing the record and the decision, "the agency's path can be 'discerned.'" *See Point Park Univ.*, *supra.*

At oral argument, too, the Employer's counsel agreed that the food and beverage unit could stand alone. Oral Argument at 16:10-16:23. That is unsurprising since food and beverage employees are—as the Employer's counsel recognized—quite separate from the housekeeping and front desk departments. Oral argument at 15:25-15:40. Food and beverage employees are in a different division and interact very little with front desk and housekeeping employees. In *Ramada Beverly Hills*,

on the other hand, food and beverage employees shared common day-to-day supervision and were "often assist[ed]" by non-food and beverage employees when serving guests in their rooms, at the pool, and in the banquet area. *Ramada Beverly Hills*, 278 N.L.R.B. at 692–93. *Atlanta Hilton* was also so clearly distinguishable that the Regional Director did not need to cite to it. *See* Slip op. at 6 n.3 ("Davidson also relied on *Atlanta Hilton &* Towers, 273 N.L.R.B. 87 (1984)"). Unlike in the instant case, in *Atlanta Hilton*, it was not uncommon for employees from different departments to substitute for one another. *Atlanta Hilton & Towers*, 273 N.L.R.B. at 89. Crucially, there were also 27 transfers between departments in only two years—a "critical factor" missing in the instant case, as highlighted by the Regional Director. *Id.* at 89; JA 338.

There can be no doubt that a unit consisting of solely food and beverage employees is appropriate. Even if the Regional Director's decision regarding this unit "leaves much to be desired," the path he took can be discerned, and the precedent is not sufficiently analogous to call that path into question. *See Point Park Univ.*, *supra.*

CONCLUSION

For the aforementioned reasons, the Union respectfully requests that the Court grant the cross-petition to enforce the Board's bargaining order with respect to the food and beverage unit.

Dated: December 7, 2020 Respectfully submitted,

/s/Richard Treadwell

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CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the Type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because:

> This brief contains 2,921 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *and*

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

> This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013, font size 14 inch Century Schoolbook typestyle.

Dated: December 7, 2020 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 7, 2020, I electronically filed the foregoing PETITION FOR PANEL REHEARING with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I also certify that the foregoing motion was served on all parties or their counsel of record through the CM/ECF system as all counsel are registered users.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 7th day of December 2020 at San Francisco, California.

/s/ Yien San Juan

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for Local UNITE HERE Local 1 (Intervenor) certifies the following:

A. Parties and Amici

1. Davidson Hotel Company, LLC (Chicago Marriott at Medical District/UIC) was the respondent before the NLRB and is the petitioner/cross-respondent before the Court.

2. The NLRB is the respondent and cross-petitioner before the Court; the NLRB's General Counsel was a party before the NLRB.

3. The labor union UNITE HERE Local 1 was the charging party before the NLRB and has intervened on behalf of the NLRB.

B. Ruling Under Review

This case is before the Court on Davidson's petition for review and the NLRB's cross-application for enforcement of a Decision and Order issued by the Board on November 6, 2019, and reported at 368 NLRB No. 110.

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C. Related Cases

This case has not previously been before the Court. The case was heard on September 10, 2020, and the Court issued a decision on October 23, 2020.

Dated: December 7, 2020 Respectfully submitted,

/s/Richard Treadwell

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CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1 and F.R.A.P. 28(a)(1), Intervenor states that it has no parent corporation and that it has no stock, so there is no publicly held corporation that owns 10% or more of its stock.

Dated: December 7, 2020 Respectfully submitted,

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ADDENDUM

Opinion on Petition for Review

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 10, 2020 Decided October 23, 2020

No. 19-1235

DAVIDSON HOTEL COMPANY, LLC, (CHICAGO MARRIOTT AT MEDICAL DISTRICT/UIC),
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

UNITE HERE LOCAL 1,
INTERVENOR

Consolidated with 19-1259

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Mark W. DeLaquil argued the cause for petitioner. With him on the briefs were *Peter G. Fischer* and *Renee M. Knudsen*.

Kellie Isbell, Senior Attorney, National Labor Relations Board, argued the cause for respondent. With her on the brief were *Usha Dheenan*, Supervisory Attorney, *Peter B. Robb*, General Counsel, *Ruth E. Burdick*, Acting Deputy Associate

General Counsel, and *David Habenstreit*, Assistant General Counsel.

Richard Treadwell argued the cause for intervenor. With him on the brief was *Paul L. More*. *Kristin L. Martin* entered an appearance.

Before: ROGERS and RAO, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* RANDOLPH.

RANDOLPH, *Senior Circuit Judge*: Davidson Hotel Company petitions for review of the National Labor Relations Board's decision that Davidson committed unfair labor practices by refusing to bargain with a union in two Board-certified units. Davidson challenges the Board's certification of the two units. The Board cross-petitions for enforcement of its order. Because the Board did not distinguish its precedents, we grant the petition for review, deny the cross-application for enforcement, and remand to the Board.

The National Labor Relations Act, 29 U.S.C. § 157, protects the right of employees "to bargain collectively through representatives of their own choosing[.]" The Act empowers the Board to "decide in each case . . . the unit appropriate for the purposes of collective bargaining[.]" 29 U.S.C. § 159(b). To make this determination, the Board applies what it calls the community-of-interest standard. *PCC Structurals, Inc.*, 365 N.L.R.B No. 160, *6-7 (2017). First, the Board determines whether the employees in the petitioned-for unit share a community of interest. *Id.*; *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008) (citing *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985)). Second, the Board determines

whether the proposed unit "share[s] a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit[.]" *PCC Structurals, Inc.*, 365 N.L.R.B. at *9. Many factors are considered, ranging from organizational structure to the terms and conditions of employment. *Id.* at *6 (listing the traditional factors); *see also Sundor Brands, Inc. v. NLRB*, 168 F.3d 515, 518 (D.C. Cir. 1999); *United Operations, Inc.*, 338 N.L.R.B. 123, 123 (2002). The Board is not required to pick the *most* appropriate unit – only *an* appropriate one. *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1063 (D.C. Cir. 2009) (quoting *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996)). But the Board's discretion is not unlimited. *NLRB v. Tito Contractors, Inc.*, 847 F.3d 724, 729 (D.C. Cir. 2017).

Davidson operates the Chicago Marriott at Medical District/UIC, a relatively small full-service hotel providing dining, banquet, and other services. Three groups of employees are at issue here: those at the front desk, those in housekeeping, and those handling food and beverage. The union, UNITE HERE Local 1, initially petitioned the Board's Chicago Regional Office to certify a single bargaining unit composed of housekeeping and food and beverage employees. The union's proposed unit did not include the front desk employees. The Regional Director declined to certify the unit. Walking through the traditional community-of-interest factors, the Regional Director found "that the interests of front desk employees . . . are not sufficiently distinct from the interests of employees in the petitioned-for unit to warrant establishment of a separate unit." J.A. 231. In his conclusion, the Regional Director briefly suggested that separate units would be appropriate. J.A. 232, n.11.

Taking the cue, the union filed two new petitions the next day to certify a unit of housekeeping employees and a separate

unit of food and beverage employees. As before, the union excluded the front desk employees. The Regional Director again applied the community-of-interest standard to the newly proposed units. The Regional Director then certified the two units as appropriate and directed elections. Shortly thereafter, the employees in each unit voted in favor of the union.

Davidson complained to the Board that the Regional Director had departed from Board precedents and the precedent set in the first unit decision in this case. Request for Review, 3-4, 13-14, 25-28, NLRB Case No. 13-RC-217487 (Sept. 11, 2018). The Board rejected Davidson's contentions by a 2-1 vote explaining that its petition "raise[d] no substantial issues warranting review." J.A. 542-43. To obtain judicial review of the certifications, Davidson refused to bargain.[1]

The well-worn standard is that the court will "review the Board's factual conclusions for substantial evidence, defer to [the Board's] rules if they are rational and consistent with the Act, and uphold the Board's application of law to facts unless arbitrary or otherwise erroneous." *Dean Transp., Inc.*, 551 F.3d at 1060 (quoting *Harter Tomato Prods. Co. v. NLRB*, 133 F.3d 934, 937 (D.C. Cir. 1998)) (internal quotation marks omitted). "A decision of the Board that departs from established precedent without a reasoned explanation is arbitrary." *NLRB v. Sw. Reg'l Council of Carpenters*, 826 F.3d 460, 464 (D.C. Cir. 2016)

[1] "[R]epresentation proceedings before the Board are not subject to direct judicial review because they do not result in a final agency order, and an employer seeking review of the record in a representation proceeding must refuse to bargain with the union, and suffer an unfair labor practice charge[.]" *Alois Box Co. v. NLRB*, 216 F.3d 69, 76 (D.C. Cir. 2000) (quoting *Wackenhut Corp. v. NLRB*, 178 F.3d 543, 548 (D.C. Cir. 1999)) (internal quotation marks and original brackets omitted).

(quoting *Comau, Inc. v. NLRB*, 671 F.3d 1232, 1236 (D.C. Cir. 2012)) (internal quotation marks omitted).

The Board must explain its reasoning when certifying bargaining units. *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 60-61 (D.C. Cir. 2004). In *LeMoyne-Owen College*, the Board certified a bargaining unit of full-time faculty over the College's objections that the Regional Director had ignored precedent addressing the same facts. *Id.* at 58-60. In granting the College's petition for review and remanding to the Board, this court pointed out that "the Regional Director . . . did not discuss or even mention a single one of the precedents on which the College relied." *Id.* at 60. Neither did the Board in either of its terse orders denying review. *Id.* When "a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument." *Id.* at 61. Rather, the Board must explain its departure. *Id.* "The need for an explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication." *Id.*

Here we face a similar situation. Neither the Regional Director nor the Board distinguished contrary Board precedents or the Regional Director's first decision in this case. *See Ramada Beverly Hills*, 278 N.L.R.B. 691, 691-92 (1986) (explaining differences with a prior decision regarding the same hotel). The previous unit decision by the same Regional Director was sufficiently analogous that it should have been distinguished or otherwise addressed – at least when the Regional Director and Board were presented with the argument that the first decision required rejection of the union's later petitions. *See* Request for Review, 13-14, NLRB Case No. 13-RC-217487 (Sept. 11, 2018); *id.* Ex. 7, 13-14, 85-86 (Hr'g Tr., Apr. 9, 2018). Yet the Regional Director never mentioned the prior decision beyond incorporating the record and stating that

"the petitioned-for unit in the instant case is different[.]" J.A. 305 n.5, 325 n.5. The Regional Director did not explain why the same factors that counseled against excluding the front desk in the first decision did not govern the second petitions as well. *See* J.A. 231 (listing the shared conditions among the employee groups).

We do not say that the Board cannot reach a different conclusion in the second unit determination. But the Board must explain why the balance of those factors differed from the factors considered in the Regional Director's first decision.[2] Otherwise, the court "is left to attempt to discern for itself which factual differences might have been determinative, without guidance from the agency, and to assess whether making such distinctions controlling is rational or arbitrary, again without any agency explanation of why particular factors make a difference." *LeMoyne-Owen College*, 357 F.3d at 61.

In addition, the Board failed to cite – let alone distinguish – a single contrary precedent even though Davidson cited several Board precedents that rejected separate units of hotel employees under similar circumstances.[3] Despite that showing,

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[2] The Board and the union provided some explanation in their briefs in this court, Red Br., 39-41, Green Br., 35-37, and at oral argument, 36:33-37:22 (counsel for the union). But the explanation must come from the Board itself. *See Burlington Truck Lines, Inc v. United States*, 371 U.S. 156, 168-69 (1962); *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 23 (D.C. Cir. 2012).

[3] Davidson relied most heavily on *Ramada Beverly Hills*, 278 N.L.R.B. 691 (1986), in which the Board rejected separate units for hotel employees relying on the same community-of-interest factors. *See* Request for Review, 25-28, NLRB Case No. 13-RC-217487 (Sept. 11, 2018); *id.* Ex. 6, 236-42 (Hr'g Tr., Mar. 14, 2018); *id.* Ex. 7, 89 (Hr'g Tr., Apr. 9, 2018). Davidson also relied on *Atlanta Hilton &*

there is no paragraph, sentence, citation, or footnote that distinguishes these decisions. Under *LeMoyne-Owen College*, this failure is fatal. *See id.*

We should not be understood as requiring the Board to distinguish every case cited to it by a party. *See id.* at 60; *see also Sw. Reg'l Council of Carpenters*, 826 F.3d at 464 (quoting *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013)). To say otherwise would be to hold the Board to a higher standard than we hold ourselves. Nor is there a specific way that the Board must explain its prior decisions. *See, e.g.*, *Hilton Hotel Corp.*, 287 N.L.R.B. 359, 359-60 n.3 (1987) (distinguishing cases in text and footnotes); *W. Lodging Corp.*, 287 N.L.R.B. 1291, 1292 n.1 (1988) (distinguishing cases in a footnote). We simply reiterate that when faced with contrary precedent directly on point, the Board must distinguish it.[4]

For the foregoing reasons, we grant the petition for review, deny the Board's cross-application for enforcement, and remand to the Board for further proceedings consistent with this opinion.

So ordered.

Towers, 273 N.L.R.B. 87 (1984). See *id.* Ex. 6, 236 (Hr'g Tr., Mar. 14, 2018).

[4] Because we grant the petition for review on this ground, we do not address Davidson's other challenges to the Board's decision.