

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**Nos. 99-3129, 99-3265**

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**ADTRANZ, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

This case is before the Court on the petition of ADtranz, Inc. ("the Company") to review an order issued by the National Labor Relations Board ("the Board") against the Company. The Board has cross-applied for enforcement of its order. The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's decision and order issued on February 16, 1999, and is reported at 327 NLRB No. 122. (A 23-

24.)<sup>1</sup> The Board's order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the Company does business within this judicial circuit.

As the Board's unfair labor practice order is based, in part, on findings made in the underlying representation proceeding, the record in that proceeding (Board Case No. 10-RC-14860) is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). See Boire v. Greyhound Corp., 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceeding, but authorizes review of the Board's actions in the representation proceeding for the limited purpose of deciding whether to "enforc[e], modify[] or set[] aside in whole or in part the [unfair labor practice] order of the Board." The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the rulings of the Court. Medina County Publications, 274 NLRB 873, 873 (1985); Deming Division, Crane Co., 225 NLRB 657, 657 n.3 (1976).

The Company filed its petition for review on March 7, 1999. The Board filed its cross-application for enforcement on April 9, 1999. The petition and the cross-application are timely; the Act

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<sup>1</sup>"A" references are to the appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

places no limit on the time for filing actions to review or enforce Board orders.

**STATEMENT OF THE ISSUE PRESENTED**

Whether the Board acted within its discretion in overruling the Company's election objections, and therefore properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

**STATEMENT OF THE CASE**

The Board found (A 23-24) that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union as the certified collective-bargaining representative of its bargaining-unit employees. The Company does not dispute that it refused to bargain, but instead contests the Board's conclusion that the representation election was conducted fairly. The Board's findings in the representation proceeding and the unfair labor practice proceeding, as well as the Board's decision and order, are summarized below.

**I. THE BOARD'S FINDINGS OF FACT**

**A. The Representation Proceeding**

The Company, a Delaware corporation, operates and maintains the automated Guideway Transit System at the Hartsfield-Atlanta International Airport. On October 7, 1997, Teamsters Local 528, affiliated with the International Brotherhood of Teamsters, AFL-CIO ("the Union"), filed a petition with the Board's Atlanta Regional Office to represent the employees at the Company's

facility at that airport. On November 25, following a hearing, the Board's Regional Director issued a decision directing an election among the employees in the following appropriate bargaining unit:

All full-time and regular part-time technicians, field service engineers, plant buyers, and maintenance and parts employees at the Employer's Atlanta Hartsfield facility, but excluding all temporary employees, office clerical employees, guards and supervisors as defined in the Act.

The election was held on December 17, with 35 employees voting for, and 31 against, union representation; there were 3 challenged ballots, a number insufficient to affect the election's results. (A 23, 25, 63.)

On December 24, the Company filed timely objections to conduct that it claimed affected the results of the election. In its objections, the Company alleged, among other things, that the Union or its agents engaged in election misconduct by creating an atmosphere of fear and coercion through acts of vandalism and personal threats. The Company also alleged that a Board agent impermissibly compromised the appearance of Board neutrality by riding into the plant on the morning of the election on a company cart with a union agent and a union election observer; by permitting a union election observer to assist with the assembly of the voting booth; by permitting a union election observer to retain his official observer's badge between the two voting periods; and by misinforming an employee that the challenge to his ballot would be resolved before the ballots were counted and

therefore that the secrecy of his ballot would not be compromised by virtue of the fact that it had been challenged. (A 27-42; 48-49.)

On January 12, 1998, the Regional Director issued an order directing that a hearing be held on the Company's objections. When the hearing opened, on January 20, company counsel asked that the hearing officer recuse himself on the grounds that the hearing concerned allegations of Board agent misconduct by an individual working out of the same Region as the hearing officer. The hearing officer declined to recuse himself and the Company immediately appealed that ruling to the Regional Director. The Regional Director denied the Company's appeal. (A 43, 87-89.)

Following the January 20 hearing, the hearing officer issued a report on objections in which he recommended that the Company's election objections be overruled and that the Union be certified. The Company filed timely exceptions to the hearing officer's report and recommendations, arguing both that its objections should have been sustained and that, in any case, a new hearing was required because the hearing officer who heard and decided the case should have been disqualified because of the appearance of a conflict of interest. (A 25-42.)

On September 17, 1998, the Board (Members Fox, Liebman, and Hurtgen) issued a decision and certification of representative in which it considered the Company's election objections and rejected them based on the rationale and underlying findings of

fact put forth by the hearing officer. The Board accordingly certified the Union as the exclusive bargaining representative of the Company's employees in the unit described above. (A 25-26.)

**B. The Unfair Labor Practice Proceeding**

Following its certification, the Union requested that the Company bargain but the Company refused. The Union then filed an unfair labor practice charge with the Board alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). The Board's General Counsel issued an unfair labor practice complaint based upon the Union's charge. The Company answered, admitting its refusal to bargain, but disputing the propriety of the Union's certification. (A 23.) The General Counsel filed a motion for summary judgment. The Board then issued an order transferring the case and directing the Company to show cause why summary judgment should not be granted. The Company failed to respond. (A 23.)

**II. THE BOARD'S CONCLUSIONS AND ORDER**

On February 16, 1999, the Board (Members Fox, Liebman, and Hurtgen) issued its decision and order, granting the motion for summary judgment and finding that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). In reaching that conclusion, the Board found that the issues the Company raised in the unfair labor practice proceeding were or could have been

litigated in the underlying representation proceeding. Further, the Board found that the Company neither offered to adduce any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances requiring the Board to reexamine the decision made in the representation proceeding.

(A 23.)

The Board's order requires the Company to cease and desist from refusing to bargain with the Union and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the order requires the Company to bargain with the Union upon request, embodying any understanding reached in a signed agreement, and to post copies of a remedial notice. (A 24.)

#### **STATEMENT OF RELATED CASES AND PROCEEDINGS**

This case has not previously been before this Court. Board counsel are not aware of any other related case or proceeding that is completed, pending, or about to be presented to this Court, any other court, or any state or federal agency.

#### **STANDARD OF REVIEW**

Congress "entrusted the Board with a wide degree of discretion" to establish the "procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946). Accord St. Margaret Mem'l Hosp. v. NLRB, 991 F.2d 1146, 1152,

1155 (3d Cir. 1993). Thus, in resolving questions arising during a Board-conducted representation proceeding, the Court's role is limited to determining whether the Board acted within that wide degree of discretion. See St. Margaret, 991 F.2d at 1152, 1155. This Court affords the Board substantial deference in its formulation of policies to govern representation elections, and the Court will uphold the Board's application of those policies to specific elections if supported by substantial evidence. See Cavert Acquisition Co. v. NLRB, 83 F.3d 598, 603, 607 (3d Cir. 1996); St. Margaret, 991 F.2d at 1152; NLRB v. L & J Equipment Co., 745 F.2d 224, 231 n.8 (3d Cir. 1984).

Under Section 10(e) of the Act (29 U.S.C. § 160(e)), the Board's factual findings are conclusive so long as substantial evidence supports them. "Evidence is substantial when reasonable minds might accept it as adequate to support a conclusion." NLRB v. Bakers of Paris, Inc., 929 F.2d 1427, 1433 (9th Cir. 1991). This standard precludes a reviewing court from "displac[ing] the Board's choice between two fairly conflicting views, even though the court might have made a different choice had the matter been before it de novo." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Accord L & J Equipment Co., 745 F.2d at 230.

### **SUMMARY OF ARGUMENT**

The Board reasonably concluded that the Company failed to meet its heavy burden of establishing grounds for upsetting the Union's certification based upon the results of a secret-ballot election. The Company failed to make a case for a new election based upon two minor acts of alleged vandalism that bore no overt or express connection to the election and could not reasonably be perceived as an attempt to influence votes. Heated exchanges between coworkers about the issue of unionization such as occurred here are all but unavoidable and carry no implication of a coercive threat. The Company's allegations of Board agent misconduct amount to quibbling about inconsequential actions by the Board agent that could not possibly have compromised the integrity of the election or the appearance of Board neutrality.

Assigning a Board agent from the same Region to serve as a hearing officer did not deprive the Company of a fair hearing by an impartial fact-finder, did not create the appearance of a debilitating conflict of interest, and violated no applicable and binding Board procedural rule. Board certification proceedings are specifically exempted from the provisions of the Administrative Procedure Act upon which the Company would rely, and the Board's casehandling manual only contains internal guidelines; it does not deprive the Board's regional personnel of the discretion to divert from those guidelines as their professional judgment and particular facts may dictate.

**ARGUMENT**

**THE BOARD ACTED WITHIN ITS DISCRETION IN OVERRULING THE COMPANY'S ELECTION OBJECTIONS, AND THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION**

The Company admittedly has refused to bargain with the Union in order to contest the Board's certification of the Union. Accordingly, unless it prevails in its challenge to the validity of the certification, the Company's refusal to bargain violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)), and the Board's order is entitled to enforcement. NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1949); North American Directory Corp. v. NLRB, 939 F.2d 74, 76 (3d Cir. 1991); NLRB v. ARA Services., Inc., 717 F.2d 57, 59 (3d Cir. 1983) (en banc).

**A. Applicable Principles**

"There is a strong presumption that an election conducted by the [B]oard reflects the employees' true desires regarding representation." Deffenbaugh Industries, Inc. v. NLRB, 122 F.3d 582, 586 (8th Cir. 1997). Accord NLRB v. Coca-Cola Bottling Co. Consolidated, 132 F.3d 1001, 1003 (4th Cir. 1997) ("the outcome of a Board-certified election [is] presumptively valid"); NLRB v. Hood Furniture Mfg. Co., 941 F.2d 325, 328 (5th Cir. 1991) (court recognized the "strong presumption" that "ballots cast under specific [Board] procedural safeguards reflect the true desires of the employees"); Kux Mfg. Co. v. NLRB, 890 F.2d 804, 808 (6th Cir. 1989) (elections held "'under the safeguards provided by

Board procedure [presumptively] reflect the true desires of the participating employees'" (citation omitted)).

Accordingly, the burden is on the objecting party to show that the election should be set aside. See NLRB v. Mattison Machine Works, 365 U.S. 123, 123-24 (1961) (per curiam); NLRB v. Campbell Products Dept., 623 F.2d 876, 879 (3d Cir. 1980); NLRB v. El-Ge Potato Chip Co., 427 F.2d 903, 906-07 (3d Cir. 1970), cert. denied, 401 U.S. 909 (1971). This heavy burden requires the objecting party to demonstrate through specific evidence not only that improprieties occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they resulted in "prejudice to the fairness of the election." Mattison Machine Works, 365 U.S. at 124. Accord Zeiglers Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000, 1005 (3d Cir. 1981) (requiring the objecting party to show "a substantial possibility that the threats affected the outcome of the election").

It is settled, moreover, that the objecting party's burden cannot be met by evidence concerning the subjective reactions of employees at the workplace. The Board properly relies on an objective evaluation of the conduct in question to determine if it fell below acceptable standards and was likely to have had an impermissible impact. Any inquiry into the subjective understanding or reaction of employees is inherently unreliable and has been deemed to be irrelevant by the Board and the courts.

See Molded Acoustical Products, Inc. v. NLRB, 815 F.2d 934, 940 (3d Cir. 1987), and cases cited.

Nor does an objecting party meet its burden merely by showing that the election was not held under perfect "laboratory" conditions. "Although the Board strives to maintain 'laboratory conditions' during representation elections, such conditions are rare, 'and elections are not automatically voided whenever they fall short of perfection.'" NLRB v. Dickinson Press, Inc., 153 F.3d 282, 284 (6th Cir. 1998) (citation omitted). Accord NLRB v. Coca-Cola Bottling Co. Consolidated, 132 F.3d 1001, 1003 (4th Cir. 1997) ("'clinical asepsis is an unattainable goal'" in representation elections (citations omitted)); NLRB v. Lovejoy Industries, Inc., 904 F.2d 397, 402 (7th Cir. 1990) (the Act "does not require the Board to treat employees as if they were bacteria on a petri dish that must be kept free of contamination"); Vitek Electronics, Inc. v. NLRB, 763 F.2d 561, 571 (3d Cir. 1985) ("the goal of 'laboratory conditions' cannot always be satisfied," and therefore "[n]ot every election that fails to achieve perfection should be set aside" (citation omitted)).

**B. The Board Reasonably Overruled the Company's Objections Alleging that the Election Should Be Set Aside Because of Intimidating Conduct**

It is well settled that neither minor acts of vandalism, nor heated or angry exchanges among employees, are likely to have had an impact on how employees vote, and therefore will not ordinarily provide grounds for upsetting the results of an election. This is especially true when such acts are not attributable to either the employer or the union; in such instances, the test is not whether the alleged acts had a possible impact, but rather whether they were so opprobrious that it could reasonably be inferred that a fair election was impossible. See Amalgamated Clothing & Textile Workers Union v. NLRB, 736 F.2d 1559, 1568-69 (D.C. Cir. 1984). Accord NLRB v. Dickinson Press, Inc., 153 F.3d 282, 288 (6th Cir. 1998) (third-party misconduct will invalidate an election only if it created "a general environment of fear and reprisal such as to render a free choice of representation impossible" (citations omitted)); Zeigler's Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000, 1006 (3d Cir. 1981) (same). Tested by these principles, the Board reasonably concluded that the Company's evidence was wholly inadequate to make a case for upsetting the results of the Board's secret-ballot election here.

It is clear to begin with, as the Board found (A 38-39), that an incident in which cat feces was found on the hood of an employee's car had no discernible connection with the election,

much less an impact on it. The Company presented no evidence that anyone associated with the Union was in any way connected with this minor incident, or sought in any way to capitalize on it as a means of coercing or influencing votes. Instead, the Company relies (Br 10-11, 27, 30-31, 37) on the testimony of an employee witness who speculated that the Union must have been responsible for the incident because he had heard that the car's owner, Jacob Seward, had begun wavering in his support for the Union shortly before the incident occurred and because vandalism of that sort was "typical of a union when you get a union comes onto a job" (A 230-235). Manifestly, testimony of this sort cannot be viewed as proof of election misconduct.

No less speculative and probative is the innocuous fact, highlighted by the Company (Br 10, 27-28), that Seward was absent from work on the day of the election and therefore did not vote. Indeed, the Company's broad and illogical leap that Seward's absence somehow helps establish that Seward was intimidated by an act of union misconduct flatly ignores the unrefuted evidence, not missed by the Board (A 40), that Seward was absent from work for the entire week due to a painful sciatica problem (A 91-92).

Equally without substance is the Company's attempt to portray as a serious act of voter intimidation an incident that occurred three weeks before the election and involved damage to an employee's leather coat. The Company presented no evidence establishing a link between this incident and the election, save

for the fact that the person responsible for the damage, employee Tracy Bradley, had asked the coat's owner, Jason Powers, to sign a union card much earlier in the union campaign and had been rebuffed by Powers with a caustic, "Fuck off." The Company's insistence that this evidence establishes that Bradley engaged in a brazen act of voter intimidation ignores Powers' own testimony (A 267-269) that Bradley said nothing to him at any time to indicate that he harbored any animosity towards Powers because of the earlier incident, much less because of Powers' views with respect to unionization, which Powers never claimed he even espoused.

The Company also failed to present any evidence indicating that Bradley ever expressed or exhibited the least bit of intolerance towards any employee, Powers included, because he or she held or espoused views with respect to unionization opposed to his own. The Company also failed to present any evidence to refute Bradley's claim (A 105-108) that the damage caused to Powers' jacket was completely unintended.<sup>2</sup> And, finally, the Company makes no effort to explain why its swift discipline of Bradley for the incident (it suspended Bradley for two days)

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<sup>2</sup> Powers gave an oblique, hearsay description of what happened that fails to indicate that the incident was something other than a prank gone bad--that is, that Bradley was even aware that the jacket was in Powers' locker when some cleaning powder he had spread "bled down into the locker" and onto the jacket. (A 270-271.)

would not have assured employees that there would be no recurrence. (A 342, 345.)

In short, the most that can be said of the Company's evidence is that it makes an extremely tenuous case that the damage to Powers' jacket might have been a purposeful attempt by Bradley to retaliate for Powers' having told him to "fuck off" much earlier in the campaign, when the Union was still soliciting signed authorization cards. (A 96-98, 269, 271.) But, given the complete absence of evidence establishing that the jacket incident was tied in any way to the election or to how Powers or anyone else intended to vote, the Board reasonably concluded (A 40) that the incident did not contribute to the creation of "an atmosphere of fear and violence such as to interfere with employee free choice." See Amalgamated Clothing & Textile Workers Union v. NLRB, 736 F.2d 1559, 1568-1569 (D.C. Cir. 1984) (incident between employees resulting in minor property damage and having no overt connection to election issues inconsequential).

Even more transparent are the Company's attempts to convert two heated exchanges about unionization that occurred at the workplace into implied coercive threats. The Company's own evidence (A 255-257) establishes that, in one instance, nothing more occurred than that employee Raymond Turner was accused of "taking food from [the] mouth" of a coworker's family when he told the coworker, Stan Williams, that he had not yet made up his

mind about how he would vote. Turner admitted (A 258-261) that Williams neither said nor did anything else to inflame the situation and that the other employees present reassured Turner that they thought that Williams had overstepped.

The second exchange the Company proffers as involving objectionable conduct likewise involved nothing more than a heated exchange between coworkers that was devoid of any implication of a coercive threat. Thus, the Company's own witness, employee Bernard McCrary, testified (A 152-153) that he had a telephone conversation with coworker Darrell McKinney on the morning of the election which began with McCrary's informing McKinney that he had decided to abandon his longstanding support for unionization and intended to vote for the Company and serve as the Company's election observer. McCrary further testified (A 153-154) that, when he explained to McKinney that he made this decision because he had problems with the Union's leadership and financial condition,<sup>3</sup> McKinney grew upset and responded that, "Well, you got certain motherfuckers in there that's running Adtranz. And, there's no motherfucking difference in them over there." McCrary testified (A 154-155) that he then ended the conversation by telling McKinney that they were just going over old ground and that he did not want to continue.

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<sup>3</sup> McCrary thus invoked a theme from the Company's election campaign that focused upon the recent financial/political scandal that had enveloped the Union's parent international and its leadership. (A 179, 184, 191-194.)

The Board reasonably concluded (A 39-40) that nothing about either of these exchanges warranted the conclusion that the atmosphere surrounding the election had been tainted. Rather, the exchanges simply served to demonstrate the correctness of this Court's observation that "expressions of temper and passion may reflect the reality that in a contested election friction is inevitable" and that, absent exacerbating circumstances not present here, employees must be "credited with the ability, from experience in the workplace, to give appropriate weight to possibly impulsive statements of fellow employees in the heat of a campaign." NLRB v. ARA Services, Inc., 717 F.2d 57, 66 (1983) (en banc) (threat to "get back at union supporters" not coercive in all the circumstances). Accord Vitek Electronics, Inc. v. NLRB, 763 F.2d 561, 571-72 (3d Cir. 1985) (the same with respect to threat to "hit [antiunion employees] with sticks" in the event of a strike); Tressler Lutheran Home for Children v. NLRB, 677 F.2d 302, 304, 307 (3d Cir. 1982) (the same with respect to threat to "make life miserable" for union opponents).

The Company insists (Br 12, 20-24) that Bradley, Williams, and McKinney should have been found to be union agents and that their conduct therefore should not have been evaluated under the standards applicable to third-party acts. The short answer to this contention is that the Company has provided no persuasive basis for concluding that those three employees interfered with employee free choice, even assuming that they should be deemed

union agents. Accordingly, the Company's attack on the Board's finding that they were not union agents is entirely beside the point.

In any event, that finding was clearly correct. McKinney and Bradley, both of whom were active in the unionization effort, denied that they held any official position in the campaign or even that an official in-house employee committee had ever been established. (A 93-96, 100-106, 172-188.) Both also testified that, while they and other employees drafted and circulated campaign literature to augment the literature that the Union put out, they did so on their own with no authorization or approval from the Union's paid organizer. (A 111-113, 128-131, 177, 188-189, 203.) Furthermore, while the Company insists that McKinney and Bradley were general agents of the Union and were members of an in-house committee, it failed to present a shred of evidence indicating that the Union or anyone else had ever referred to the existence of an in-house committee, or to McKinney or Bradley as an official union spokesman, at any time during the campaign. Furthermore, far from revealing that McKinney was the Union's "conduit for disseminating campaign information and contacting employees," as the Company represents (Br 21), the record evidence shows (A 185-186) that McKinney was actually absent from the workplace during most of the preelection period on disability leave.

Unit employees therefore had no reason to view McKinney or Bradley, and certainly not Williams, as acting as general agents of the Union or as stand-ins for the Union's paid organizer who, as the Board found (A 30), had an active role in the organizing effort. (A 100-103, 173, 178, 184-185, 208-213.) They certainly had no reason to view any of the three as acting for the Union with respect to the very type of heated and impulsive acts that often are unavoidable when employees have strong feelings on the issue of unionization. Indeed, this Court and others have repeatedly declined to find that a general agency relationship had been established with respect to such behavior, even where, unlike here, the employees in question had been held out as members of a formally constituted in-house committee; no such agency finding can properly rest on the mere fact that employees vigorously exercised their protected statutory right to self-organization. See NLRB v. ARA Services, Inc., 717 F.2d 57, 66 (1983) (en banc); NLRB v. Herbert Halperin Distributing Corp., 826 F.2d 287, 291 (4th Cir. 1987); Amalgamated Clothing & Textile Workers Union v. NLRB, 736 F.2d 1559, 1566 (D.C. Cir. 1984).

**C. The Board Reasonably Overruled the Company's Objections Alleging that Board Agent Misconduct Compromised the Integrity of the Election**

In evaluating allegations of Board agent misconduct, "the question the Board must decide . . . is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and the validity of the election." Polymers, Inc.,

174 NLRB 282, 282 (footnote omitted), enforced, 414 F.2d 999 (2d Cir. 1969), cert. denied, 396 U.S. 1010 (1970). The dispositive issue is whether the conduct in question "tends to destroy confidence in the Board's election process, or . . . could reasonably be interpreted as impugning the election standards [the Board] seeks to maintain." Athbro Precision Engineering Corp., 166 NLRB 966, 966 (1967), vacated sub nom., Electrical Workers v. NLRB, 67 LRRM 2361 (D.C. Cir. 1968), acquiesced in, 171 NLRB 21 (1968), enforced, 423 F.2d 573 (1st Cir. 1970). Here, the Board reasonably concluded (A 30-32) that nothing the Board agent did in conducting the election was in any way improper under that test.

The Company's first contention (Br 11, 40, 42) is that the Board agent somehow compromised the appearance of neutrality by riding with union representatives on a company-provided golf cart from the facility's parking lot to the polling area which was approximately a quarter-mile away (A 146). However, the Company's own evidence establishes that it was commonplace for company visitors to utilize the golf cart to enter the facility when that vehicle was available. (A 163-170, 219.) More to the point, a Board election was going to be held that day, and, the Board reasonably concluded (A 32), the employees in the facility had no reason to question the Board agent's neutrality simply because they saw him sharing a ride with union representatives on the company golf cart shortly before the election began. See

Rheem Manufacturing Co., 309 NLRB 459, 462 (1992) (not objectionable for Board agent to walk through the plant with union's election observer), enforced mem., 28 F.3d 1210 (4th Cir. 1994); NLRB v. Michigan Rubber Products, 738 F.2d 111, 114-15 (6th Cir. 1984) (not objectionable for Board agent to allow union's election observer to carry the voting booth to Board agent's car).

Equally meritless are the Company's further claims (Br 11, 41, 42-43) that the integrity of the election somehow was compromised by the Board agent's conduct in allowing the Union's election observer, employee McKinney, to keep his official observer's badge between voting periods,<sup>4</sup> or to assist with the assembly of the voting booth before the voting began. The Company's premise that McKinney might have been able to use the badge to somehow influence votes defies common sense and the Board properly rejected it. Indeed, as the Board pointed out (A 31; 199-200), McKinney left the employer's premises between the voting sessions, keeping the badge in his pocket. There is simply no credible evidence that any eligible voters, other than the Company's election observer, were even aware that McKinney retained the badge between the sessions. Equally important, every voter who cast a ballot would have seen both the Company's

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<sup>4</sup> Unlike the company observer who served only in the morning and accordingly turned in his badge when that session was over, McKinney was also serving in the afternoon and therefore was allowed to keep his. (A 144, 309.)

and the Union's observer wearing the very same badge at the time they went to the ballot box.

Similarly, there was nothing the least bit untoward about the Board's agent's accepting assistance from McKinney with assembling the voting booth during the preelection conference when the three company representatives, including its attorney, who were present made no complaint. (A 224, 346.) The Board agent's actions "amount[ed] to nothing more than delegating inconsequential tasks, which is insufficient to destroy the Board's appearance of neutrality." Kirsch Drapery Hardware, 299 NLRB 363, 363 (1990) (citing U.S. Ecology, Inc. v. NLRB, 772 F.2d 1478 (9th Cir. 1985)).

No less insubstantial is the Company's final claim (Br 11-12, 43) that the Board agent interfered with the election by incorrectly describing the Board's challenged-ballot procedures to an employee, James Remich, whose eligibility had just been challenged by the Union's observer and who expressed concerns about the secrecy of his ballot being compromised. The Board agent did nothing whatever to exacerbate Remich's expressed concerns; rather, according to Remich, he attempted to allay them by telling Remich that the challenge would be resolved before the ballots were opened, leaving Remich with the impression that his ballot would be opened and commingled with all the others if the challenge was overruled. (A 274, 281-284.) Thus, while the Board agent apparently misspoke, it remains the case that nothing

he said could possibly have interfered with Remich's casting an uncoerced vote.

Finally, given its failure in the first instance to show that either the Union or the employees engaged in any objectionable conduct, the Company does not advance its position by repeatedly pointing to (Br 13, 34-37, 40, 41, 44) the Union's close victory margin. The courts have repeatedly refused to give weight to meritless objections--no matter how numerous--just because the vote was close. See, for example, Deffenbaugh Indus., Inc. v. NLRB, 122 F.3d 582, 584, 586 (8th Cir. 1997) (where union won the election by 58 to 50 margin, court held that the "closeness of the election" may be considered, "but it is not the determining factor"); NLRB v. Browning-Ferris Industries of Louisville, Inc., 803 F.2d 345, 349 (7th Cir. 1986) (the closeness of the vote is not sufficient "to raise a presumption that the conduct had an impact on the election results"); NLRB v. ARA Services, Inc., 717 F.2d 57, 60, 69 (3d Cir. 1983) (en banc) (court upheld election where union won by a 30 to 28 margin); NLRB v. Eskimo Radiator Mfg. Co., 688 F.2d 1315, 1319 (9th Cir. 1982) (court upheld election where union won by margin of 73 to 70); NLRB v. Southern Metal Service, Inc., 606 F.2d 512, 515 (5th Cir. 1979) (court upheld election where union won by an 11 to 10 margin); NLRB v. Southern Health Corp., 514 F.2d 1121, 1125 (7th Cir. 1975) ("the mere fact that a vote is close will not compel the conclusion that [the allegedly objectionable conduct] had an

impact on the election results"). After all, a narrow majority is still a majority. Accordingly, the majority's desire for union representation would be frustrated if the Company were allowed to use the close result to transform several truly innocuous incidents into a reason for setting the election aside.

**D. The Board Reasonably Rejected the Company's Claims of Procedural Unfairness**

As this Court has long recognized, the Board enjoys broad latitude in establishing procedures for the resolution of post-election challenges to the validity of a Board-conducted election. See NLRB v. ARA Services, Inc., 717 F.2d 57, 66 (1983) (en banc). As pertains to the instant case, the Board's rules confer upon its regional directors the discretion to select a Board agent to serve as a hearing officer to resolve such challenges; nothing in those rules requires the selection of a hearing officer from another Region where, as here, Board agent misconduct has been alleged. See NLRB Rules and Regulations (Series 8), 29 C.F.R. 102.69(g). Rather, the Board has squarely held that such matters are committed to a regional director's sound discretion. See The Celotex Corp., 266 NLRB 802 n.3 (1983).

The Board, of course, requires that such assignments avoid even the appearance of a disqualifying conflict of interest, but its Regional Director reasonably concluded that no such appearance was evident here. The hearing officer had no pecuniary interest in the outcome of the case and the Company's

allegations raised no question of serious misconduct on his coworker's part. Rather, as just discussed, the Company's allegations amounted to quibbling about several minor judgments, not one of which even called into question the Board agent's integrity or character. There was in this context no "realistic" possibility that the hearing officer would be vulnerable to a corrupting influence such as to overcome the "strong and firm presumption that governmental officials . . . perform their functions without bias." NLRB v. Ohio New and Rebuilt Parts, Inc., 760 F.2d 1443, 1451 (6th Cir. 1985), and cases cited.

The Company's contention (Br 15-19) that it was deprived of a fair hearing and procedural due process is completely without foundation. The hearing officer's tenuous connection with the Board agent whose conduct was placed at issue did not require his recusal under due process or ethical standards. See, for example, Duncan v. Ohio, 446 U.S. 238, 250 (1980) (mayor with limited executive and legislative authority not disqualified from serving as judge in criminal cases where fines would be paid to the city); Matter of Billedeaux, 972 F.2d 104, 106 (5th Cir. 1992) (recusal not required where judge's spouse was a member of a firm that represented defendant in other matters). Furthermore, the hearing officer resolved every credibility

conflict in the Company's favor and made no rulings that exhibited bias.<sup>5</sup>

Finally, the Company's contention (Br 13-15) that the hearing officer's appointment violated provisions of the Administrative Procedure Act and the Board's own casehandling manual is clearly unavailing. Section 554(a)(6) of Title 5, U.S.C. §§ 550, et seq. (the Administrative Procedure Act), specifically exempts from the provisions the Company would rely upon, proceedings involving "the certification of workers," which is precisely the type of procedure involved here. See In re Bel Air Chateau Hospital, Inc., 611 F.2d 1248, 1252-53 (9th Cir. 1979). Furthermore, it is well settled that the Board's casehandling manual is for the Board's internal use only; as the manual itself specifies, it contains no "rulings or directives" and cannot be interpreted as depriving regional office personnel of the discretion to make "departures" from the manual's guidelines as "professional judgment" and "varying circumstances"

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<sup>5</sup> The hearing officer's refusal to grant the Company a subpoena to compel the Board agent's testimony was made at the end of the hearing after counsel representing the Regional Director correctly pointed out that there were no material evidentiary conflicts. In this context, the hearing officer's ruling was consistent with the Board's general policy of declining to permit such agents to testify, absent a showing, not made here, of a compelling need. (A 354-355.) See NLRB Rules and Regulations (Series 8), 29 C.F.R. 118; Frank Invaldi, et al., 305 NLRB 493, 494-495 (1991) ("if agent testifies, such testimony will almost certainly help one party and harm the other" and undermine confidence in agent's neutrality).

may dictate. NLRB Casehandling Manual (Part Two) Representation Proceedings, p. 1 (1989). Accordingly, as this Court has recognized, "the casehandling manual is not binding on the Board." NLRB v. The Cedar Tree Press, 169 F.3d 794, 796 (3d Cir. 1999). Accord KWIK Care LTD., 82 F.3d 1122, 1126 (D.C. Cir. 1996) (the manual "provides nonbinding guidance for the agency's staff members").

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests this Court to enter judgment denying the Company's petition for review and enforcing the Board's order in full.

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RICHARD A. COHEN  
Attorney

National Labor Relations Board  
1099 14th Street, N.W.  
Washington, D.C. 20570  
(202) 273-2995

FREDERICK L. FEINSTEIN  
General Counsel

LINDA SHER  
Associate General Counsel

AILEEN A. ARMSTRONG  
Deputy Associate General Counsel

National Labor Relations Board.

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