

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 04-1400

MANHATTAN CENTER STUDIOS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on the petition of Manhattan Center Studios, Inc. (“MCS”), to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board order issued against MCS.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which

authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Decision and Order issued on September 24, 2004 and is reported at 342 NLRB No. 131. (A 79.)¹ The Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

MCS filed its petition for review on November 19, 2004 and the Board filed its cross-application for enforcement on December 9, 2004. Both were timely; the Act places no time limit on the institution of proceedings to review or enforce Board orders. This Court has jurisdiction over both under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review of Board orders may be filed in this Court.

On January 14, 2005, the Board moved for summary entry of a judgment denying MCS' petition for review and enforcing the Board's Order in full. MCS opposed the Board's motion, and the Board filed a reply. On April 29, 2005, the Court denied the Board's motion and ordered the clerk to calendar the case for presentation to the merits panel.

The record in the Board's underlying representation proceeding (Case No. 2-RC-22677) is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)) because the Board's order is based, in part, on findings made in that

¹ "A" refers to the joint appendix. "Br" refers to MCS' brief. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

proceeding. *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 there for the limited purpose of deciding whether to enforce, modify, or set aside, in whole or in part, the Board's unfair labor practice order. 29 U.S.C. § 159(d); *Saint-Gobain Industrial Ceramics, Inc. v. NLRB*, 310 F.3d 778, 781 (D.C. Cir. 2002). 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 ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999); *River Walk Manor*, 293 NLRB 383, 383 (1989).

RELEVANT STATUTORY PROVISIONS

The pertinent statutory provisions are included in the addendum to this brief.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board properly found that MCS violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the certified collective-bargaining representative of its employees.

The subsidiary issue is whether the Board abused its discretion in finding that MCS failed to establish that it had “newly discovered” evidence that would warrant the reopening of the representation proceeding to consider its untimely election objections. More specifically, whether the Board properly rejected the

alleged “newly discovered” evidence because MCS failed to present any evidence that it acted with “reasonable diligence” to uncover and timely introduce the evidence, which was in existence at the time of the representation proceeding.

STATEMENT OF THE CASE

The Board found that MCS 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 Theatrical Stage Employees Local No. One, I.A.T.S.E., AFL-CIO, CLC (“the Union”), as the certified collective-bargaining representative of an appropriate unit of MCS’ employees. (A 81.) MCS does not contest (Br 7-8) the Board’s finding that it refused to bargain with the Union, but instead disputes the Board’s conclusion that the Union was properly certified.² In support of this contention, MCS claims that it has “newly discovered” evidence that would compel the Board to revoke the Union’s certification—namely, that its supervisor unlawfully participated in the union organizing campaign, and that the Union improperly promised employees job opportunities and union cards.

On the basis of these claims, MCS—which did not file any timely objections to the election—sought to reopen the representation proceeding to consider these two untimely objections to the Board’s election. The Board declined, concluding

² Contrary to MCS’ claim (Br 5 n.1), it is well-established that a Section 8(a)(5) refusal-to-bargain unfair labor practice results in a “derivative violation” of Section 8(a)(1). *See Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309 & n.5 (D.C. Cir. 2003).

under settled principles that MCS' evidence was not newly discovered. This proceeding followed.

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

MCS provides clients with event spaces and multimedia production services at its facilities in New York, New York. (A 80.) On December 24, 2002, the Union filed an election petition with the Board seeking to represent a collective-bargaining unit of MCS' "stagehands" and related craft and technical employees. (A 7.)

MCS and the Union entered into a stipulated election agreement, and on February 19, 2003, the Board conducted a secret-ballot election among the seven bargaining-unit employees. (A 80; 8-9.) The Union prevailed by a 5-1 vote with 1 nondeterminative challenged ballot. (A 80; 10.)

MCS did not file objections to the conduct of the election or to conduct potentially affecting the election "[w]ithin 7 days after the tally of ballots ha[d] been prepared," the time limit proscribed by the Board's rules. *See* Board's Rules and Regulations § 102.69(a) (29 C.F.R. § 102.69(a)). (A 79.) Thus, in the absence of objections, the Board certified the Union as the unit employees' bargaining representative on February 27, 2003. (A 79-80; 11.)

B. The Unfair Labor Practice Proceeding

By letter dated March 7, 2003, the Union requested that MCS meet and bargain with it and provide relevant information regarding unit employees' terms and conditions of employment. (A 80; 12.) By letter dated March 20, 2003, MCS refused both of the Union's requests, asserting, for the first time, that the Union's certification was invalid due to improper supervisory involvement in the Union's organizational campaign. (A 80; 13, 54 at ¶ 14.)

Based on the Union's unfair labor practice charge, the Board's General Counsel issued a complaint alleging that MCS had violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing the Union's requests to bargain and to provide information following the Union's valid certification. (A 79; 17-21.) In its answer to the complaint, MCS admitted those refusals but claimed that the Union's certification must be revoked because its "election petition was tainted by unfair labor practices, including improper supervisory involvement in the organizing campaign." (A 79; 25.)

The General Counsel filed a motion for summary judgment, and the Board issued a notice to show cause why the motion should not be granted. (A 79; 27-31.) In its response, MCS defended its refusal to bargain by claiming that it had newly discovered evidence that an alleged supervisor engaged in improper prounion conduct during the union organizing campaign. (A 79; 56-57, 47-48.)

MCS also alleged, for the first time, that the certification was improper because “the Union sought to influence the election outcome by unlawful promise and/or issuance of union cards to bargaining unit members.” (A 79; 48, 57.)

As the only support for its defense to the unfair labor practice complaint, MCS offered a written declaration from Chief Executive Officer Russell Arnold and an affidavit from non-unit employee Michael Spony. (A 79; 15, 52.) The Spony affidavit asserts that in the fall of 2002, rumors were circulating among co-workers that Gustavo Garces, an alleged supervisor of the unit employees, was trying to bring the Union in to represent MCS’ production employees. (A 79; 15 at ¶ 3.) Around November 2002, more than a month before the petition was filed, Spony asked Garces if the rumors were true, and Garces allegedly answered, “Yeah, I don’t care who knows – I’m trying to bring the union in.” (A 79; 15 at ¶ 4-5.) Garces allegedly claimed that he was bringing “the union card” into the workplace and taking it around for employees to sign. (A 79; 15 at ¶ 6.) The Company discharged Garces in February 2003, sometime after the February 19, 2003 election. (A 79 n.1; 53 at ¶ 5.)

In support of its claim that the Union made improper promises of job opportunities and union cards to supervisors and employees, MCS relied on the Arnold declaration. Arnold asserts that, “upon information and belief,” before the

election the Union “may” have improperly promised Garces as well as unit employees job opportunities and union cards. (A 79 n.1; 54-5 at ¶ 16.)

II. THE BOARD’S CONCLUSIONS AND ORDER

The Board granted the motion for summary judgment on September 24, 2004 and found that MCS had violated the Act by refusing to bargain with the Union. (A 81.) The Board found that MCS had failed to file timely objections to the conduct of the election, and that its affirmative defenses were attempts to raise objections well beyond the 7-day time period provided for in the Board’s rules. (A 79.) However, the Board acknowledged that the underlying representation proceeding could be reopened to litigate those objections but only if MCS established that it had newly discovered evidence, which was in existence at the time of the representation proceeding and could not have been discovered by reasonable diligence. (A 79.)

Assuming the truth of the Spony affidavit and the Arnold declaration, the Board found that MCS “has failed to present any information indicating that prior to the expiration of time in which to file objections to the election, it engaged in an attempt to uncover any potential improprieties in that proceeding. Thus, [MCS] has failed to establish that the evidence at issue could not have been discovered earlier through the exercise of reasonable diligence.” (A 80.) Accordingly, the

Board found that MCS did not raise any representation issue properly litigable in this unfair labor practice proceeding. (A 80.)

The Board's order requires MCS to cease and desist from the unfair labor practices found 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). (A 81.) Affirmatively, the Board's order requires MCS to bargain with the Union on request, to furnish the Union the relevant information it requested, and to post a remedial notice. (A 81.)

SUMMARY OF ARGUMENT

It is undisputed that, after the Board's certification of the Union's election victory in a seven-member bargaining unit, MCS sought to avoid its bargaining obligation by claiming that newly discovered evidence allowed it to raise belated objections to conduct affecting the results of the election. However, under settled principles, in order to establish newly discovered evidence warranting the reopening of a representation proceeding, a party must show that it acted with reasonable diligence to uncover and timely introduce the evidence. MCS failed to present any evidence to show that it exercised reasonable diligence. Accordingly, the Board did not abuse its discretion in refusing to reopen the representation proceeding to hear the belated objections.

MCS' legal arguments to the contrary fail, because they misrepresent the Board's standard for establishing newly discovered evidence. Moreover, MCS' factual allegations undermine any claim of reasonable diligence. MCS claims that it remained oblivious to the alleged misconduct of its own supervisor in the months before the election, despite the small size of the bargaining unit, the alleged "rumors" circulating among employees, and the supervisor's alleged admission that he did not care who knew about his conduct.

ARGUMENT

THE BOARD ACTED WITHIN ITS DISCRETION IN REJECTING MCS' CLAIM THAT IT HAD "NEWLY DISCOVERED" EVIDENCE WARRANTING THE REOPENING OF THE REPRESENTATION PROCEEDING AND THEREFORE PROPERLY FOUND THAT MCS VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION AS THE CERTIFIED REPRESENTATIVE OF ITS EMPLOYEES

A. Applicable Principles and Standard of Review

An employer's refusal to bargain with its employees' duly certified representative, or to provide that representative with relevant information, violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). *See NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967). *Accord Crowley Marine Servs., Inc. v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000).

MCS admits (Br 7-8, A 24) that it refused to bargain with, or provide information to, the Union. However, MCS challenges the Board's certification of the Union, claiming that the Board should not have found that MCS' belated election objections—specifically, supervisory involvement in the organizing campaign and union promises of employment—do not constitute newly discovered evidence that warrant reopening the representation proceeding.

Therefore, the broad issue presented is whether the Board abused its discretion in finding that MCS failed to establish that it had newly discovered evidence that would warrant reopening the representation proceeding to consider

its untimely objections to the election. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331-32 (1946) (Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees); *NLRB v. Cutter Dodge, Inc.*, 825 F.2d 1375, 1380 (9th Cir. 1987) (“The Board's decision on [a motion to reopen the record] will not be set aside unless shown to constitute an abuse of discretion.”). *See also Amalgamated Clothing Workers of America v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970). The narrow, determinative issue is whether, in examining MCS’ claim of newly discovered evidence, the Board acted within its discretion in finding that MCS failed to present any evidence that it acted with reasonable diligence to uncover and timely introduce the evidence that was in existence at the time of the representation proceeding. If the Board did so, MCS’s refusal to bargain and provide information violated 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. *See Pearson Education, Inc. v. NLRB*, 373 F.3d 127, 130 (D.C. Cir. 2004); *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 881-82 (D.C. Cir. 1988).

B. MCS Has Failed to Establish “Newly Discovered” Evidence That Warrants Reopening the Representation Proceeding to Consider its Untimely Election Objections

The Board rejected MCS’ claim that it be allowed to challenge the Union’s certification because of newly discovered evidence that its own supervisor was

involved in the union campaign and the Union “may” have promised employees job opportunities and union cards. The Board refused to consider these belated election objections because MCS simply failed to present any evidence that its allegedly newly discovered evidence “could not have been discovered earlier through the exercise of reasonable diligence.” (A 79.)

The Board’s requirement that a party seeking to reopen a representation proceeding show that it exercised “reasonable diligence” to uncover existing evidence is consistent with the Board’s rules governing the procedure in representation proceedings. The Board’s well-established time limit for filing election objections requires that a party file its objections within 7 days of the tally of ballots. Board’s Rules and Regulations § 102.69(a) (29 C.F.R. § 102.69(a)). The Board’s rule says nothing about whether an employer or union must police potential campaign misconduct, but this 7-day window implicitly encourages the parties to be vigilant throughout the campaign. *See Rhone-Poulenc, Inc.*, 271 NLRB 1008, 1008 (1984), *enforced*, 789 F.2d 188 (3d Cir. 1985) (“The Board’s time limitation on filing requires parties to act promptly in unearthing and reporting to the Region any potentially objectionable conduct.”). It is eminently reasonable for the Board to require a party seeking to file objections beyond this established time limit to show that, notwithstanding this vigilance, it was unable to detect the alleged misconduct earlier.

Indeed, the Board's rules, and its decision here, are well-supported by the long-standing policy favoring finality in the outcome of Board elections. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331-32 (1946) (discussing the importance of finality in Board elections). The Board requires "strict adherence" to its procedures, and has consistently rejected attempts to file new objections beyond the time limit allowed in its regulations. *Heritage Nursing Center, Inc.*, 207 NLRB 826, 827 (1973) ("[T]o achieve certainty in procedural matters it is essential that the parties be held to a strict adherence to the Board's rules and regulations"); *Jason/Empire, Inc.*, 212 NLRB 137, 138 (1974), *enforced*, 518 F.2d 7 (10th Cir. 1975) (same). To do otherwise "would leave open to continual questioning the validity of a Board certification, once properly issued, and necessarily would create uncertainty and a lack of finality in [the Board's] election procedures." *Reichart Furniture Co.*, 236 NLRB 1698, 1698 (1978). Thus, a valid election, once held, must normally be given conclusive effect for a reasonable period if the statutory scheme for the ascertainment of representatives and for the effectuation of collective bargaining is to have any "stabilizing effect." *Reichart Furniture Co.*, 236 NLRB at 1698.

The Board's refusal to consider MCS' claims is fully consistent with its standard for reopening representation proceedings only upon a demonstrated showing of newly discovered evidence. It is settled that a party may not litigate in

an unfair labor practice proceeding issues, such as election objections, that could have been raised in a prior representation proceeding, unless the party can show that it has newly discovered evidence. *See Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 161-62 (1941); *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1151 (D.C. Cir. 2000); *Dickerson Florida, Inc.*, 272 NLRB 63 (1984).

For over 20 years, the Board has consistently defined newly discovered evidence as:

[E]vidence which was in existence at the time of the hearing [or representation proceeding], and of which the movant was excusably ignorant. A motion seeking to introduce evidence as newly discovered must also show facts from which it can be determined that the movant acted with reasonable diligence to uncover and introduce the evidence.

Int'l Brotherhood of Teamsters, Local Union No. 657, 342 NLRB No. 59, 2004 WL 1736974, at *4 (2004) (citing *Owen Lee Floor Service, Inc.*, 250 NLRB 651 n.2 (1980), *enforced*, 659 F.2d 1082 (6th Cir. 1981)). *See also Labor Ready, Inc.*, 330 NLRB 1024, 1024 (2000); *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46, 46 n.1 (1998); *Winchell Co.*, 305 NLRB 903, n.1 (1991), *enforced*, 977 F.2d 570 (3d Cir. 1992); *Seder Foods Corp.*, 286 NLRB 215, 216 (1987); *Nabco Corp.*, 266 NLRB 687, 687 (1983).

Consistent with this standard, here, the Board, quoting *APL Logistics, Inc.*, 341 NLRB No. 132, 2004 WL 1174586 (2004), stated that newly discovered evidence is “evidence of facts in existence at the time of the proceeding in

question, which could not be discovered by reasonable diligence.” (A 79.)³

Applying these principles to the undisputed facts, the Board declined to find newly discovered evidence. Simply put, the Board found that MCS failed to allege *any* facts that would support a finding of reasonable diligence. (A 80.) The Board will not reopen a representation proceeding where, as here, a party offers nothing beyond its “bare assertion” to establish that evidence is “newly discovered.” *APL Logistics, Inc.*, 341 NLRB No. 132, 2004 WL 1174586, at *2 (2004), *enforced*, *NLRB v. APL Logistics*, No. 04-1910, slip op. (6th Cir. July 7, 2005).

MCS “failed to present any information indicating that prior to the expiration of time in which to file objections to the election, it engaged in an attempt to uncover any potential improprieties in that proceeding.” (A 80.) The Arnold declaration gives no reason why the evidence of supervisor Garces’ prounion conduct could not have been discovered in time to file timely election objections. Instead, Arnold merely asserts only that MCS “had previously been unaware” and “had not previously known” of Garces’ role in the Union’s organizing drive and election campaign. (A 52 at ¶¶ 2-3.)

MCS offers no explanation why, in a bargaining unit of only seven employees, it could not have discovered earlier that its own supervisor was

³ Contrary to MCS’ claim (Br 14), the Board’s order in *APL Logistics* was recently enforced by the Sixth Circuit. *See NLRB v. APL Logistics*, No. 04-1910, slip op. (6th Cir. July 7, 2005).

“spearheading” the union campaign, especially given MCS’ own assertion that rumors about Garces’ involvement were circulating among its employees months before the election. (A 15 at ¶¶ 3-4, 53 at ¶¶ 7-8.) In its opposition to the motion for summary judgment before the Board, MCS baldly claimed merely that it was “unsurprising” that no employee came forward with this information until after Garces was discharged in February 2003, sometime after the February 19 election. (A 67.) In short, MCS proffered no evidence that it made even “some effort” to obtain the evidence; to establish reasonable diligence, “more is necessary than the failure of witnesses to come forward voluntarily.” *Local 911, AFL-CIO*, 275 NLRB 980, 981 (1985) (reopening hearing based on newly discovered evidence of perjury as to material fact), *enforced*, 794 F.2d 682 (9th Cir. 1986).⁴ *See also Local 812 AFL-CIO v. NLRB*, 937 F.2d 684, 688 (D.C. Cir. 1991) (no newly discovered evidence where union failed to “ma[k]e some effort to obtain the evidence”). *Compare Int’l Union of Electrical, Radio and Machine Workers*,

⁴ It is well-settled that the failure of witnesses to come forward voluntarily does not satisfy the standard for newly discovered evidence. *Dickerson Florida, Inc.*, 272 NLRB 63, 63 (1984) (no newly discovered evidence where an employee “recently advised” company of union misconduct, because employer had not shown that the evidence was “not previously discoverable through the exercise of due diligence”); *Skyline Corp. v. NLRB*, 613 F.2d 1328, 1336-7 (5th Cir. 1980) (no newly discovered evidence where the only support for claim of “due diligence” was employee’s claim that he was “reluctant” to discuss the union with the employer before he became a supervisor).

Local 745, 268 NLRB 308 (1983), *enforced*, 759 F.2d 533 (6th Cir. 1985); *Inland Container Corp.*, 273 NLRB 1856, 1857 (1985) (same).

Likewise, MCS offered no explanation why it could not have earlier discovered that the Union was making unlawful promises of union cards and job opportunities. Indeed, MCS' cursory defense of this claim (Br 8, 17)—that the Union “may” have improperly promised employees union cards because “upon information and belief” employees have been “called to work on other Union jobs”—is inadequate to warrant the reopening of the representation proceeding. MCS did not even claim that it exercised any reasonable diligence to uncover improper union conduct during the months-long union campaign, let alone allege facts that would lead to such a finding. *See Jason/Empire, Inc.*, 212 NLRB 137, 139 (1974), *enforced*, 518 F.2d 7 (10th Cir. 1975) (employer failed to show that, with due diligence, it could not have uncovered evidence of union's pre-election offer to waive initiation fees in time to file timely objections). Moreover, the Board will reject purported newly discovered evidence where, as here, a party's factual assertions are merely based on information and belief. *F.W. Boelter Co., Inc.*, 241 NLRB 567, 568 n.3 (1979), *enforced mem.*, 624 F.2d 1105 (7th Cir. 1980). In the face of MCS' allegations, the Board did not abuse its discretion in rejecting MCS' untimely objections, because MCS did not establish that it

exercised reasonable diligence in uncovering the alleged supervisor and union misconduct.

MCS mounts several attacks on the Board's reasonable diligence requirement for presenting newly discovered evidence, all of which are inaccurate representations of the Board's well-established test. First, MCS erroneously argues (Br 14) that the *APL Logistics* reasonable diligence test, relied on by the Board here, failed to cite to any authority and is "inexplicable and contrary to the weight of Board precedent." Contrary to MCS' claims, in *APL Logistics* the Board relied on two earlier cases, both of which were cited by MCS (Br 11-12) as examples of the Board's proper standard. *See APL Logistics*, 341 NLRB No. 132, 2004 WL 1174586, at *1 & n.1 (2004) (citing *Seder Foods Corp.*, 286 NLRB 215, 216 (1987), and *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 363-64 (5th Cir. 1978)). As such, the *APL Logistics* language is not contrary to Board precedent.

Next, MCS' claim (Br 13-14) that the Board here has "re-formulat[ed]" its established test is belied by similar language in scores of Board cases where, as here, the Board found that a party failed to demonstrate reasonable diligence during the representation proceeding. *See, e.g. Dickerson Florida, Inc.*, 272 NLRB 63, 63 (1984) (party "has not demonstrated that facts of the [alleged unlawful conduct] were not previously discoverable through the exercise of due diligence"); *Prudential Insurance Co.*, 215 NLRB 66, 67 (1974) (there was "no showing that,

with due diligence, the [employer] could not have uncovered the evidence in time to file timely objections”), *enforced*, 529 F.2d 66 (6th Cir. 1976); *Jason/Empire, Inc.*, 212 NLRB 137, 138 (1974), *enforced*, 518 F.2d 7 (10th Cir. 1974) (party “failed to show that with due diligence it could not have uncovered the evidence in time to file timely objections”). To the extent that certain cases emphasize the reasonable diligence aspect of the full standard set out above, they simply reflect the different facts presented and evidence proffered—not, as MCS claims (Br 14), a new “truncated” test.

Indeed, while MCS attacks the Board for a revision in the standard for newly discovered evidence, MCS has consistently misstated or muddled the applicable standard throughout the history of this case. Thus, in its opposition to the motion for summary judgment before the Board, MCS failed to define any standard for newly discovered evidence—merely claiming (A 64, 67) that its proffered evidence was “not previously available,” and it was “entitled to litigate” its new objections. In its brief to this Court, MCS sets forth various erroneous tests, claiming alternatively that the Board requires that a party act promptly only on “new information [it] had reason to know about” (Br 15), or that a party must show “that it was excusably ignorant and that it acted with reasonable diligence to introduce”—not uncover—“the new evidence.” (Br 13) Finally, MCS abandons the test for assessing newly discovered evidence altogether, claiming (Br 16) that

“[u]nder Board precedent, a party is entitled to litigate representation issues concerning coercive pre-election conduct if the party has obtained newly discovered evidence or did not otherwise have an opportunity to litigate the issues in the prior representation proceeding.” MCS’ various permutations of the Board’s established test do not advance its claim of newly discovered evidence and highlight its failure to comport with the Board’s established standard.

Notwithstanding the myriad ways it describes the Board’s test, MCS agrees (Br 9, 11, 13) with the part of the Board’s standard (A 79-80) that is dispositive here: in order to establish newly discovered evidence, a party must provide facts demonstrating reasonable diligence in uncovering and introducing such evidence. *See NLRB v. Jacob E. Decker and Sons*, 569 F.2d 357, 363-64 & 365 (5th Cir. 1978) (“facts implying reasonable diligence must be provided” by the party alleging that the evidence is newly discovered). As discussed above, MCS failed to allege *any* facts that would support a finding of reasonable diligence. On the contrary, the facts alleged by MCS, and accepted by the Board as true, amply demonstrate that MCS failed to exercise any diligence to keep itself informed about any potential improprieties during the union campaign.

Thus, notwithstanding the “rumors” circulating among employees, and the supervisor’s open claim that he “d[id]n’t care who knows . . . I’m trying to bring the union in,” MCS failed to uncover that its own supervisor was “spearheading”

the organizing campaign. (A 79; 53-54 at ¶¶ 7-9, 15-16 at ¶¶ 3-7.) Indeed, assuming the accuracy of his affidavit, this information was so well known that it prompted Michael Spony, a non-unit employee in a different department, to question the supervisor about his actions. (A 15-16 at ¶¶ 3-7.) Nevertheless, notwithstanding MCS' claims (Br 7, 17; A 53-54, 67) that its own supervisor acted in a "leadership" role in the months before the election, MCS allegedly remained oblivious to this alleged misconduct during the entire course of the organizing campaign.⁵

MCS distorts the Board's decision here by claiming (Br 9, 15) that the Board has imposed an "absurdly unfair" and "unworkable" requirement that a party show that it engaged in a "free-ranging" investigation or "scavenger hunt" to discover improprieties in the election process. There is no question that MCS could have met with its supervisors during the course of the union campaign in order to determine whether any objectionable conduct had occurred.⁶ This is particularly

⁵ Before the Court, MCS contradicts itself by claiming (Br 12) that the supervisor "acted in secret" and engaged in "surreptitious activities." MCS' new claims are contrary to the substance of its untimely election objections, and suggest another belated attempt by MCS to justify its failure to uncover the alleged evidence. More importantly, MCS did not make these claims in its pleadings before the Board, and thus the Board did not consider them in rendering its decision.

⁶ Indeed, the Board has also allowed management representatives to conduct post-election interviews of employees for purposes of seeking information in support of objections, provided they follow the guidelines set forth in *Johnnie's Poultry Co.*, 146 NLRB 770, 774-76 (1964). *W.T. Grant Co.*, 185 NLRB 88, n.1 (1970). See also *Sumona Corp.*, 220 NLRB 877, 879-80 (1975) (interview of unit employee 2

true given the seven-employee unit involved here. MCS does not claim that it did so. Nor does MCS claim that any employee, supervisor, or union representative lied. Instead, it speciously asserts (Br 12) that “[n]either Garces nor the Union nor any of the unit employees voluntarily would have disclosed Garces’ misconduct to MCS.” *Compare Int’l Union of Electrical, Radio and Machine Workers, Local 745*, 268 NLRB 308 (1983), *enforced*, 759 F.2d 533 (6th Cir. 1985) (reopening hearing based on newly discovered evidence of perjury as to material fact); *Inland Container Corp.*, 273 NLRB 1856, 1857 (1985) (same). In any event, reasonable diligence is not established by “conclusory allegations” about how difficult it is for an employer to communicate with its employees once a union is elected because of employees’ fear of reprisal from the union and other employees, and the employer’s fear that it will be held to have committed an unfair labor practice for questioning employees about their union affiliation. *Skyline Corp. v. NLRB*, 613 F.2d 1328, 1336-7 (5th Cir. 1980).

MCS’ claim (Br 2, 9) that the Board has “denied” it a hearing on pre-election misconduct is disingenuous. Contrary to MCS’ suggestion (Br 15, n.4 & n.5), there is no requirement that the Board grant a hearing on late-filed objections

days after the election was not unlawful where “it was for the purpose of seeking information in support of objections, pertained to conduct by Union rather than employees, was conducted in an atmosphere free of antiunion tension, and was prefaced by [management representative’s] explanation of its purpose and assurance that participation was ‘on a voluntary basis with no reprisals whatsoever’”).

merely because a party, due to its failure to file any timely objections, did not previously participate in a hearing. *See Jason/Empire, Inc.*, 212 NLRB 137 (1974), *enforced*, 518 F.2d 7 (10th Cir. 1974) (rejecting untimely election objections where employer failed to file any timely objections and thus was not granted hearing). MCS had a right to an investigation and determination on its election objections, but waived that right by failing to file objections within the Board's deadline. *See Board Rules & Regulations* § 102.67(f) (29 C.F.R. § 102.67(f)) ("The parties may, at any time, waive their right to review. Failure to request review shall preclude such parties from relitigating, in a subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding."); *Board Rules & Regulations* § 102.69(b) (29 C.F.R. § 102.69(b)) ("If no objections are filed within the time set forth above . . . the Regional Director shall forthwith issue to parties a certification of the representative.").

Finally, MCS' arguments (Br 16-18) regarding the merits of its election objections are irrelevant here. The sole issue before the Court is whether the Board abused its discretion in finding that MCS failed to prove it had newly discovered evidence warranting a reopening of the representation proceeding. The merits of

the belated objections are not before this Court.⁷ Section 9(d) of the Act (29 U.S.C. § 159(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 enforce, modify, or set aside in whole or in part the unfair labor practice order of the Board. 29 U.S.C. § 159(d); *Saint-Gobain Industrial Ceramics, Inc. v. NLRB*, 310 F.3d 778, 781 (D.C. Cir. 2002). The Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with the rulings of the court. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999); *River Walk Manor*, 293 NLRB 383, 383 (1989). Thus, if this Court finds that the Board abused its discretion in failing to reopen the representation proceeding, the proper remedy is to remand the case to the Board to take the appropriate action.

⁷ The Board (A 80 n.3) expressly declined to reach the issue of whether MCS had established that the evidence, if adduced and credited, would have required a different result.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny MCS' petition and enforce the Board's order in full.

JILL A. GRIFFIN
Supervisory Attorney

STACY G. ZIMMERMAN
Attorney

National Labor Relations Board
1099 14th Street NW
Washington, D.C. 20570
(202) 273-2949
(202) 273-2947

ARTHUR F. ROSENFELD
Acting General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

MARGERY E. LIEBER
Acting Associate General Counsel

AILEEN A. ARMSTRONG
Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

JULY 2005