Nos. 11-1107, 11-1127

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERITAS HEALTH SERVICES, INC.,
d/b/a CHINO VALLEY MEDICAL CENTER

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED NURSES ASSOCIATION OF CALIFORNIA/UNION OF HEALTH CARE PROFESSIONALS, NUHHCE, AFSCME, AFL-CIO

Intervenor

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

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PPG INDUSTRIES, INC.	*	
	*	
Petitioner	*	No. 11-1119
	*	
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	33-CB-04317
	*	
Respondent	*	
	*	
and	*	
	*	
UNITED STEEL, PAPER ANDFORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICEWORKERS INTERNATIONAL UNION	*	
	*	
Intervenor	*	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

A. ***Parties, Intervenors, and Amici*:** Veritas Health Services, d/b/a Chino Valley Medical Center ("the Center") is the petitioner/cross-respondent before this Court. The National Labor Relations Board ("the Board") is the respondent/cross-petitioner before this Court. The United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO ("the Union") moved to intervene on behalf of the Board. The Center and the Union appeared

before the Board in Case 31-RC-8795. The Center and the Board's General Counsel appeared before the Board in Case 31-CA-30105.

B. ***Ruling Under Review:*** The case involves the Center's petition to review and the Board's cross-application for enforcement of a Decision and Order the Board issued on April 12, 2011, reported at 356 NLRB No. 137, as well as the Board's underlying unpublished Order in Case 31-RC-8795, issued on January 25, 2011.

C. ***Related Cases:*** The ruling under review has not previously been before this Court or any other court. A related case, *Veritas Health Services, Inc. d/b/a Chino Valley Medical Center and United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO*, docketed as Case nos. 31-CA-29713, et al., is currently pending before the Board.

/s/ Linda Dreeben
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Dated at Washington, DC
this 21st day of September, 2011

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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 JURISDICTION

This case is before the Court on the petition of Veritas Health Services, Inc., d/b/a Chino Valley Medical Center ("the Center"), to review and set aside, and on

the cross-application to enforce, an Order of the National Labor Relations Board ("the Board") issued against the Center. The Board's Decision and Order, issued on April 12, 2011, and reported at 356 NLRB No. 137 is a final order with respect to all parties under Section 10(e) and (f) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(e) and (f)) ("the Act"). (A. 1399-1401.)[1] The United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO ("the Union") was the charging party before the Board and has intervened in support of the Board.

The Board had jurisdiction over the unfair labor practice proceeding under Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

Because the Board's Order in the unfair labor practice proceeding is based, in part, on findings made in the representation proceeding (Case 31-RC-8795), the record in the latter proceeding is part of the record before this Court in accord with Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.,* 376 U.S. 473, 477-79 (1964). However, Section 9(d) authorizes review of the Board's actions in the representation proceeding only for the limited purpose of deciding

[1] "A." references are to the parties' joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

whether to enforce, modify, or set aside the Board's unfair labor practice order (29 U.S.C. § 159(d)). 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. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999); *Medina County Publ'ns*, 274 NLRB 873 (1985).

The Company filed its petition for review on April 14, 2011. The Board filed its cross-application for enforcement on May 3, 2011. Section 10(e) and (f) of the Act place no time limits on the filing of petitions for review or applications for enforcement of Board orders.

STATEMENT OF THE ISSUE PRESENTED

The ultimate issue is whether the Board reasonably found that the Center violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union as the duly certified representative of a unit of the Center's employees. The subsidiary issues are:

A. Whether the Board's finding that the charge and relief charge nurses did not engage in objectionable prounion conduct is reasonable and supported by substantial evidence.

B. Whether the Board properly limited the production of certain documents and prohibited the introduction of evidence relating to communications exclusively between Union representatives and charge and relief charge

nurses as well as documents and evidence relating to the identity of unit employees who signed authorization cards and attended union meetings because the evidence was irrelevant as to the effect of the supervisors' prounion conduct and was protected from disclosure.

C. Whether the Board properly determined that the Union's unfair labor practice charge was timely under Section 10(b) of the Act, when the Center admits that it was filed within nine days of the Board's certification of the Union, within eight days of the Union's bargaining request, and the day after the Center refused to bargain.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are found in the Addendum to this brief.

STATEMENT OF THE CASE

On February 22, 2010, the Union filed a petition for a representation election among certain nurses employed at the Center's facility in Chino, California. (A. 68.) On March 5, 2010, the Union and the Center entered into a Stipulated Election Agreement. (A. 695-97.) On that same day, the parties also entered into a Stipulation Regarding Supervisory Status and Voter Ineligibility ("2010 Supervisory Status Stipulation"), pursuant to which the Union and the Center

agreed that charge and relief charge nurses regularly performed supervisory duties and were Section 2(11) supervisors. (A. 698-99.)

The Board conducted an election on April 1 and 2, 2010, and the Union won by a vote of 72 to 39, with 4 challenged ballots and 1 void ballot. (A. 1193.) The Center filed 29 objections to the election. (A. 1032-35.) After a hearing, an administrative law judge issued a report recommending that the objections be overruled and the Union certified. (A. 1192-205.) The Center filed exceptions with the Board. (A. 1206-12.) The Board (Members Becker, Pearce and Hayes) adopted the administrative law judge's findings and recommendations and certified the Union in a unit of full-time, regular part-time and regular per diem registered nurses ("RNs") in certain departments of the Center. (A. 1315-17.) Thereafter the Union requested bargaining. (A. 1340-48.)

The Union subsequently filed a charge (A. 1319), and the General Counsel issued a complaint, alleging that the Center had 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. (A. 1320-26.) In its answer, the Center admitted its refusal to recognize or bargain with the Union but did so to challenge the validity of the Board's certification. (A. 1328.) The answer also raised procedural defenses. The General Counsel filed a motion for summary judgment. (A. 1332-50.) In its response, the Center repeated its procedural arguments. (A. 1352-98.)

The Board (Members Becker, Pearce, and Hayes) granted the General Counsel's motion for summary judgment, finding that the Center, by refusing to bargain with the Union as the certified bargaining representative of an appropriate unit of the Center's employees violated Section 8(a)(5) and (1) of the Act. (A 1400.) The Center filed a petition for review, and the Board filed a cross-application for enforcement.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

Following the election, which the Union won by a 33-vote margin, the Center filed 29 objections alleging, in part, that supervisors assisted, supported, and campaigned for the Union, encouraged employees to engage in the same conduct, and engaged in this conduct at the Union's behest.[2] An administrative law judge heard evidence and made findings. The Board adopted the judge's findings as follows.

[2] The Center withdrew seven of its 29 objections after the hearing and, on appeal to this Court, abandoned three objections relating to a prounion flyer that the Board rejected. (A. 1193.) Accordingly, this brief does not address the issue of the prounion flyer.

1. The Union Commences an Organizing Campaign, Holds Informational Meetings, Establishes an Organizing Committee, and Holds Authorization Card Signing Meetings

In late 2009 and early 2010, the Union began an organizing drive to represent the RNs at the Center. (A. 1197-99; 198.) Kyle Serrette was the Union's organizing director, the same responsibility he shouldered during a campaign in 2008.[3] (A. 1196; 197.) Ronald Magsino, a full-time RN in the Center's emergency department, was also a Union organizer during the organizational drive. (A. 1196; 48, 319.) Serrette knew which Center employees were charge and relief charge nurses. (A. 1196; 198.)

On January 15 and 22, 2010, the Union held informational meetings at a Denny's restaurant. (A. 1196; 570-71, 573-82, 584-86.) At these meetings, Serrette delivered presentations intended to educate the nurses about the Union as an organization and about the benefits of representation. (A. 1196; 144-45, 149, 204-05.) The Union urged its contacts—which included some charge and relief charge nurses—to encourage all nurses to attend, regardless of unit status. (ALJ 1196; 52-53, 145, 203-05.) According to Serrette, the Union thought everyone

[3] In May 2008, the Board conducted an election in the same unit involving the same parties. (A. 1192.) The Union lost the election and filed objections. (A. 1192.) Following a hearing, the administrative law judge found the Union's objections meritorious and recommended that a new election be ordered. (A. 1192.) The Center filed exceptions with the Board. (A. 1192.) On February 2, 2010, while the Center's exceptions were pending, the Union withdrew its objections to the 2008 election. (A. 709.) The Board certified those results on February 18, 2010. (A. 709-10.)

should learn about the Union and about the rights and benefits that attach with representation. (A. 1196; 204-05.) RNs and charge and relief charge nurses attended these informational presentations. (A. 1196-99; 144, 205-07; 346, 456-57, 469-70, 570-71, 575, 582, 584-86.)

Also in mid-January, the Union established an organizational committee comprised of RNs and charge and relief charge nurses. (A. 1196; 245, 247.) Serrette communicated with these committee members about organizational matters. (A. 1196; 77-78, 81, 156, 200-01, 203, 208, 211, 218-20, 223-24, 226, 234, 247, 255, 315-16, 346, 363, 457, 473.) Specifically, he identified union supporters, solicited and relayed information about employee lists and schedules, encouraged committee members to continue their organizing efforts, and coordinated meetings and presentations. (A. 1196-99; 77-78, 81, 200-01, 203-04, 208, 211, 218-20, 223-24, 226, 234, 285, 315-16, 346, 363, 457, 473.) The specific conduct of the charge and relief charge nurses is detailed in Section 2 below.

During the last week of January 2010, the Union conducted meetings at a Hampton Inn, which involved further presentations and the signing of authorization cards. (A. 1196; 78-82.) The Union pressed its contacts to bring RNs and charge and relief charge nurses to the hotel. (A. 1197; –81, 203-04, 315-16, 347.) As was the case with the informational meetings at Denny's, all types of

nurses attended the Hampton Inn meetings. (A. 1198-200; 79-80, 169-71, 226, 313, 356, 366-67, 463-64, 469.) In addition, during this period and prior to March 5, 2010, 11 charge and relief charge nurses signed a petition seeking inclusion in the unit and presented the petition to the Center.[4] (A. 1193; 542-43.)

2. Several Charge and Relief Charge Nurses Engage In Lawful Prounion Conduct During the Union's Organizing Campaign; Other Charge and Relief Charge Nurses Do Not Engage In Any Prounion Conduct

During the organizing campaign, charge and relief charge nurses engaged in the following conduct:

a. Dolly Casas

Dolly Casas, a night-shift charge nurse in the intensive care unit, neither signed an authorization card nor spoke to any unit employees about the Union. (A. 1198; 178.)

b. Liezle Castro

Liezle Castro, a charge nurse in medical/surgical, met with Serrette at Denny's and signed an authorization card on January 29, 2010. (A. 1198; 205, 361, 560.) Magsino asked Castro to notify employees that they could sign

[4] The petition, entitled "WE ARE CHARGE RNs WE ARE NOT MANAGERS," stated, in relevant part: "We . . . do not consider ourselves managers and we do not have management level responsibilities, such as the ability to hire or fire. We ask that [the] administration recognize that we are not managers by allowing us to have a voice and a vote in the nurses' process to form a union." (A. 1193; 542.)

authorization cards at the hotel, though it is unknown if she did so. (A. 1198; 77, 218-19.)

c. Rhoda DeLeon

Rhoda DeLeon, a night-shift charge nurse in medical/surgical, talked to Magsino twice about the Union—once at Denny's and once at the nursing station in the Center. (A. 1198; 82, 83, 363.) At Denny's, DeLeon primarily listened to a presentation about the Union that Serrette conducted. (A. 83.) At the nursing station, Magsino asked DeLeon if any of the nurses had questions about the Union, to which DeLeon replied that they were fine. (A. 1198; 84.)

On January 22, 2010, DeLeon brought with her to the hotel an unspecified number of unidentified coworkers, including some RNs, during the authorization card drive. (A. 1198; 224.) On January 27, 2010, DeLeon signed an authorization card. (A. 1193; 561.)

d. John Del Valle

John Del Valle, a night-shift charge nurse, initially informed RNs that, in his 17 years of employment, he never felt the need for a union. (A. 1198; 365-66.) At Magsino's request, however, Del Valle attended the January 28, 2010 meeting at the Hampton Inn and, while there, signed an authorization card. (A. 1198; 366, 562.) Del Valle did not sign the card in the presence of any RNs, never saw any

RNs at the hotel, and never informed any RNs that he had signed the card. (A. 1198; 367-68.)

e. Lucia Susie Eiley

Lucia Susie Eiley, a relief charge nurse in the emergency department, met once with Serrette at Denny's to learn about the Union, after Magsino encouraged her to do so. (A. 1197; 142-43.) Magsino and two RNs were also present at Denny's. (A. 1197; 144.) At the meeting, Serrette asked Eiley to help bring other employees to hear the Union's pitch. (A. 1197; 145.) Eiley did not remember initiating discussions with anyone to encourage them to attend the Union's presentation; rather, she responded to general inquiries about the Union by directing employees to Serrette. (A. 1197; 146-47, 155.)

Eiley also attended two meetings at the Hampton Inn. (A. 1197; 147-48.) The first meeting involved another presentation by Serrette. (A. 1197; 148-49.) At the second meeting, with six non-emergency department RNs present, Eiley signed an authorization card. (A. 1197; 151.). Eiley informed three RNs of her decision to sign a card. (A. 1197; 155-56.)

f. Cheryl Gilliatt

Cheryl Gilliatt, a relief charge nurse in the emergency department, met with Serrette at Magsino's request in late January or early February 2010. (A. 1197; 84, 307-08.) Gilliatt and RNs often discussed the Union, the meetings, and who

planned to attend the meetings. (A. 1197; 308-09.) Gilliatt also spoke favorably about the Union on at least six occasions and expressly stated she supported the Union. (A. 1197; 107, 308-09.) For instance, after an RN complained about employment changes and recent cuts, Gilliatt responded, "Yeah, we need the Union; I support the Union." (A. 1197; 57, 107.) She also encouraged the RNs to learn more about the Union. (A. 1197; 308-10.)

Further, Gilliatt told 10 RNs who worked in both the emergency and radiology departments that they needed to go to the hotel and sign authorization cards. (A. 1197-98; 311-12.) At various times, Gilliatt stated such things as: "Are you going to go and sign cards? Are you going to go to the hotel?", "You need to attend after work today. When is your schedule?", "Have you signed a card? When are you planning on going? You only have until Sunday. You need to go and sign the card", and "Serrette said he wanted 100%." (A. 1198; 310, 316, 328-29.) On January 27, 2010, Gilliatt signed an authorization card at a hotel meeting that eight RNs attended. (A. 1193, 1198; 313, 316, 563.) Gilliatt agreed to help contact RNs from the radiology department who had not yet attended a meeting at the hotel to encourage their attendance. (A. 1198; 315-16.)

g. Xiuying Huang

Xiuying Hung, a charge nurse, attended a single meeting at Denny's. (A. 1198; 205-06.)

h. Teresa Hower

Teresa Hower, a charge nurse in telemetry, told another telemetry nurse in January 2010, that the Union was coming back and that there was an organizing drive in progress. (A. 1198; 183.)

i. Samantha Jones

Samantha Jones, a day-shift charge nurse in the emergency department, attended a meeting with Serrette when no other employees were present and thereafter signed an authorization card on January 30, 2010. (A. 1193, 1198; 168, 169, 171, 173, 565.) As soon as she learned from the Center that she would be ineligible to vote in the election, she did not talk about the Union again. (A. 1198; 173-74.)

j. Angelica Silva

Angelica Silva, a relief charge nurse in telemetry, attended four union meetings where RNs were also present. (A. 1198; 342-43, 344.) She talked with RNs about the Union and about the meetings she had attended. (A. 1198; 343.) Silva told RNs that she thought unions were beneficial, citing a specific example relating to medical benefits for herself and her father. (A. 1198; 343, 345.) Silva notified six RNs via text message about the time and location of the authorization card meetings. (A. 1198; 348-49.) On January 30, 2010, Silva signed an authorization card at a meeting that eight RNs also attended. (A. 1198; 355, 566.)

k. Laurel Smith

Laurel Smith, a night-shift charge nurse in the emergency department, attended a single meeting at Denny's and signed an authorization card at the hotel on January 28, 2010.[5] (A. 1199; 50, 157, 205, 367, 567.)

l. Dulce Suzon

Dulce Suzon, a night-shift charge nurse in medical/surgical, agreed to serve on the organizational committee on January 18, 2010, and signed an authorization card on January 25, 2010. (A. 1199; 244-45, 454, 568.)

m. Bienvenido Trinidad III

Bienvenido Trinidad, a night-shift relief charge nurse in medical/surgical, attended one meeting at Denny's with five night-shift RNs from his department. (A. 1199; 453-54, 456.) At that meeting, the group decided that Trinidad would be the "point person," which meant that he should "talk[] to people and attend[] the meetings [he] was told about." (A. 1199; 458.) Trinidad, however, was largely unable to fulfill the "point person" commitment due to personal obligations. (A. 1199; 458-59.) He did, however, speak with RNs about the Union, notifying them of the dates and location of meetings where authorization cards could be signed. (A. 1199; 470-71.)

[5] Although the administrative law judge's report lists Smith's signature date as January 30, Smith signed the authorization card on January 28. (A. 567.)

On January 25, 2010, Trinidad attended a meeting at the Hampton Inn and signed an authorization card while the same five coworkers from the Denny's meeting and Serrette were present. (A. 1199; 463-64, 466, 569.)

3. The Union Petitions for an Election

On February 22, 2010, the Union, after having obtained a sufficient number of signed authorization cards, petitioned for an election. (A. 1193; 1028.) Among the authorization cards were 11 cards signed by charge and relief charge nurses.[6] (A. 1193; 560-569.) As it did in 2008, the Center opposed the inclusion of the charge and relief charge nurses in the unit. (A. 1193.) The Union initially maintained that the charge and relief charge nurses were properly included in the unit because they lacked sufficient supervisory responsibility to bring them within the scope of Section 2(11) of the Act. (A. 1193.)

4. The Union and the Center Reach an Agreement as to the Appropriate Unit, Execute a Stipulation Regarding the Supervisory Status of Charge and Relief Charge Nurses, and Execute a Stipulated Election Agreement

On March 5, 2010, the Union and the Center resolved the appropriate unit dispute and executed the 2010 Supervisory Status Stipulation. (A. 1193; 698-99.) The Union and the Center agreed that 22 charge and relief charge nurses employed at the Center (including the 11 who signed authorization cards) were ineligible to

[6] Eiley testified that she signed an authorization card (A. 151), but her signed card is not part of the record.

vote because they qualified as supervisors under Section 2(11) of the Act. (A. 1193; 699.) The 2010 Supervisory Status Stipulation included 15 charge and relief charge nurses who were specifically included in a similar stipulation that the Union and Center executed in 2008. (A. 1194; 703-05.) Among the charge and relief charge nurses who had *not* been included in the 2008 stipulation were Eiley, Gilliatt, Johnson, Silva, and Trinidad. (A. 1194; 699-704.)

On that same day, the Union and the Center executed a Stipulated Election Agreement. (A. 1193; 695-97.) The Union and the Center agreed that the appropriate unit consisted of:

> All full-time, regular part-time and regular per diem registered nurses employed by the [Center] at its 5451 Walnut Avenue, Chino, California facility in the departments: Emergency Services, Critical Care Services/Intensive Care Unit, Surgery, Post-Anesthesia Care Unit, Outpatient Services, Gastrointestinal Laboratory, Cardiovascular Catheterization Laboratory, Radiology, Telemetry/Direct Observation Unit and Medical/Surgical.

(A. 1192-93; 697.)

5. The Union and the Center Take Steps in Response to the 2010 Supervisory Status Stipulation; the Union Continues Its Campaign; the Center Launches a Vigorous Antiunion Campaign

On March 5, 2010, immediately following execution of the 2010 Supervisory Status Stipulation, the Center issued a memorandum to all its RNs indicating the date, time and place of the election. (A. 1194; 663.) The

memorandum also announced that all charge nurses and seven relief charge nurses were ineligible to vote and advised the RNs that the "election is by secret ballot . . . . You are free to vote against the Union even if you signed a union card or previously pledged support." (A. 1194; 663.) It also explicitly urged RNs to vote against the Union, exhorting them, "When the time comes [to vote] on April 1 and 2, we ask you to again **VOTE NO!**" (A. 1194-95; 663) (emphasis in original). In addition to issuing the memorandum, the Center held a meeting for all stipulated-supervisory charge and relief charge nurses to notify them that they were excluded from the unit as Section 2(11) supervisors and would not be allowed to vote. (A. 1194; 60-61.)

After signing the 2010 Supervisory Status Stipulation, the Union immediately removed the stipulated charge and relief charge nurses from the committee roster. (A. 1194; 245.) There were no instances of prounion conduct in relation to the RNs by any of the stipulated supervisors after March 5, 2010. (A. 1194.)

On March 15, 2010, the Center promoted Gilliatt to Interim Manager of the Emergency Department. (A. 1198; 320.) In that position, she attended management meetings and briefings and reversed her stance on the Union, becoming vocally antiunion. (A. 1198; 320-21.) She verbally expressed her antiunion position to at least 20 or 30 emergency department RNs and explicitly

encouraged emergency department RNs to vote against the Union. (A. 1198; 321-24.)

In mid-March 2010, the Center promoted Silva to Director of Medical-Surgical in the Telemetry Department. (A. 1198; 355.) In her managerial position, Silva also had a change of heart regarding the Union and decided that the Union, in fact, would not benefit the Center's nurses. (A. 1199; 356-57.) Silva relayed her antiunion position to about four RNs, two of whom were in telemetry. (A. 1199; 357.)

During the week of the election, the Union created and distributed a flyer with photographs of employees holding placards that read: "I'm Voting Yes!". (A. 1194; 123-24, 130, 549-50.) The Center countered with an individually addressed letter to all RNs drafted on Center letterhead urging them to vote against the Union ("Vote No Letter"). (A. 1194; 325-26, 328, 653.) Seven managerial employees—including Silva and Gilliatt—signed the Vote No Letter. The letter provided, in pertinent part:

> It's very important that you vote and please remember your vote is secret. . . .
> We've already seen the union's misrepresentation, bullying tactics and the divisiveness that has resulted.
> We the Chino Family enjoy our relationship and hope to maintain a union free environment. Please vote no on Thursday, April 1 and Friday, April 2, 2010.

(A. 1194-95; 653.) The Center intended its directors to distribute the letter to all eligible voters. (A. 1198; 327-28.) Gilliatt, who personally signed more than 100 copies of the Vote No Letter, distributed the letter to at least six emergency department RNs, and Silva distributed it to an unspecified number of RNs. (A. 1198-99; 326-28, 359-60.) The Center also distributed multiple antiunion flyers with a "Vote No" message. (A. 1196; 126, 661-62, 664-77.)

6. The Union Overwhelmingly Wins the Election

The Board conducted the election on April 1 and 2, 2010. Of the approximate 125 eligible voters, 116 cast ballots. (A. 1193.) The Union won the election by a margin of 72 to 39, with 4 challenged ballots and 1 void ballot. (A. 1193.)

7. The Board's Certification of Representative

On January 25, 2011, the Board (Members Becker, Pearce, and Hayes) found, in agreement with the administrative law judge, that none of the conduct described above constituted objectionable conduct sufficient to overturn the results of the election. (A. 1315-17.) Accordingly, the Board overruled the Center's objections and certified the Union. (A. 1315-17.)

B. The Unfair Labor Practice Proceeding

On January 26, 2011, the Union, by letter, requested that the Center commence bargaining. (A. 1340-48.) On February 2, 2011, the Center refused.

(A. 1349.) On February 3, 2011, the Union filed an unfair labor practice charge (A. 1319), and the Board's General Counsel issued a complaint. (A. 1320-26.) In its answer, the Company admitted its refusal to bargain, but asserted, among other things, that the Board's certification of representative was "invalid." (A. 1328.)

In light of the Center's admission, the General Counsel moved for summary judgment. (A. 1332-38.) The Board issued a Notice to Show Cause why the motion for summary judgment should not be granted. (A. 1351.) In its response, the Center asserted the same arguments set forth in its exceptions. (A. 1352-63.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Members Becker, Pearce, and Hayes) issued its Decision and Order granting the General Counsel's motion for summary judgment and finding that the Center'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)). (A. 1399-1401.) In so doing, the Board concluded that all representation issues raised by the Center in the unfair labor practice proceeding were, or could have been, litigated in the underlying representation proceeding. (A. 1399.) The Center also failed to produce any newly discovered evidence or show any special circumstances that would require the Board to reexamine its certification. (A. 1399.) Lastly, the Board rejected that the Center's claim that the Union's unfair labor practice charge was untimely.

The Board ordered 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 their rights under Section 7 of the Act. (A. 1400.) Affirmatively, the Board's Order directs the Center to bargain, upon request, with the Union, to embody any understanding reached in a signed agreement, and to post copies of a remedial notice. (A. 1400-01.)

SUMMARY OF ARGUMENT

1. The Board acted within its broad discretion in overruling the Center's objections to the election. The Center failed to show that any charge or relief charge nurse engaged in prounion conduct that interfered with employee free choice so as to have materially affected the election result. In reaching its conclusion that the supervisors' prounion conduct did not warrant overturning the Union's victory, the Board faithfully applied the analysis established in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004) ("*Harborside*"). It first examined whether the conduct had a reasonable tendency to coerce or interfere with the employees' exercise of free choice in the election, and then examined whether the conduct interfered with the freedom of choice to the extent that it materially affected the results of the election.

Substantial evidence supports the Board's express finding that the charge and relief nurses, with the possible exception of Gilliatt, did not engage in

solicitation. Although various supervisors expressed prounion sympathies and general support for the Union, suggested to RNs that they meet with union representatives, informed RNs of locations, dates and times of meetings, attended meetings about the benefits of unionization with RNs, and signed authorization cards in the presence of RNs, this conduct—alone or collectively—did not constitute unlawful solicitation or coercive conduct. The Board properly determined that the supervisors' conduct amounted to nothing more than unassertive prounion conduct that did not tend to coerce or interfere with the RNs' exercise of free choice in the election.

Moreover, the Board found, even assuming that the Center had demonstrated that the charge and relief charge nurses had engaged in objectionable conduct, the Center failed to establish that the conduct materially affected the outcome of the election. The Union prevailed in the election by a 33-vote margin. After the charge and relief nurses were stipulated as supervisors, none engaged in a single incident of prounion conduct for the month leading up to the election. Significantly, the two supervisors who were most active during the organizational campaign unequivocally recanted their support for the Union in discussions with employees and assisted in the Center's campaign against the Union by personally signing and distributing the Center's Vote No Letter. Under these circumstances,

the Board properly determined that the Center had failed to show that the conduct at issue materially affected the election.

Additionally, the Board separately evaluated Gilliatt's conduct, the most active prounion supervisor, and found her conduct did not warrant setting aside the election. No evidence was adduced that Gilliatt furnished the RNs with authorization cards, watched them sign cards, retrieved signed cards, or was informed as to which RNs signed cards. However, ample evidence established that her conduct could not have materially affected the outcome of the election. The evidence demonstrated that Gilliatt's prounion involvement ended at least four weeks before the election after the Union and the Center executed the 2010 Supervisory Status Stipulation and was not widespread in that she encouraged a maximum of ten RNs to sign authorization cards. Additionally, after her promotion to a managerial position, Gilliatt enthusiastically joined the Center's vigorous campaign against the Union by personally signing over 100 copies of the Center's Vote No Letter and hand-delivering it to her supervisees. She also urged employees in her chain of command to vote against the Union. Given this abundant evidence, the Board found it unnecessary to pass on whether Gilliatt's conduct constituted "solicitation" under *Harborside*, because her unambiguous repudiation mitigated any coercive effect from her earlier prounion conduct.

2. The Board did not abuse its discretion by limiting the production of certain documents, requiring redaction of employee names, and prohibiting certain lines of questioning. The Center sought to adduce both documentary and testimonial evidence with regard to communications exclusively between the Union and the charge and relief charge nurses. The Board deemed this evidence irrelevant, however, because the Center based its election objections on the allegation that the supervisors' prounion conduct was coercive and materially affected the outcome of the election. The interactions between the Union and the supervisors, unknown to eligible voters, could not have reasonably tended to interfere with employees' free and uncoerced choice in a material way. Here, the Center was free to question the charge nurses about their contacts, interactions, and conduct. Therefore, the Center had a reasonable opportunity to carry its burden to demonstrate unlawful prounion supervisory conduct.

Likewise, the Board reasonably ordered and directed the redaction of employee names from certain documents and prohibited the Center from obtaining employee names through witness testimony at the hearing. The Center sought the names of RNs present at card signings and documents related to RNs who signed authorization cards or who were active in the organizing drive. The Board properly balanced the Center's interest in testing the credibility of the charge and relief charge nurses and the RNs' interest in confidentiality when signing

authorization cards and attending union meetings, and struck the balance in favor of protecting employee confidentiality.

3. The Board considered and rejected the Center's specious contention that Section 10(b) of the Act barred the complaint because it was based on conduct occurring more than six months prior to the Union's filing of the charge with the Board. It is undisputed that the Board certified the Union as the exclusive bargaining representative of an appropriate unit of the Center's employees on January 25, 2011; that the Union requested bargaining the following day; that the Center admittedly refused to bargain with the Union on February 2, 2011; and that the Union filed a charge on February 3, 2011. Because the allegations in the complaint clearly fell within the six-month statutory period, the Board properly rejected the Center's Section 10(b) defense.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE CENTER VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION AS THE DULY CERTIFIED REPRESENTATIVE OF THE CENTER'S EMPLOYEES

Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) makes it an unfair labor practice for an employer to refuse to bargain with the duly certified bargaining representative of an appropriate unit of its employees.[7] The Center

[7] An employer that violates Section 8(a)(5) of the Act also commits a "derivative" violation of Section 8(a)(1) of the Act, which makes it unlawful for an employer to

admitted in its answer to the complaint, and does not deny here, that it refused to bargain after the Board certified the Union. If, as we show below, the certification was proper, the refusal to bargain violated Section 8(a)(5) and (1) of the Act.

A. General Principles and Standard of Review

The Board is entitled to "a wide degree of discretion" in resolving issues related to representation elections. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). *Accord C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988) ("The Board is entrusted with a wide degree of discretion in conducting representation elections. The scope of our review is narrow."). "The case for [judicial] deference is stron[g], as Congress has charged the Board, a special and expert body, with the duty of judging the tendency of electoral flaws to distort the employees' ability to make a free choice." *C.J. Krehbiel*, 844 F.2d at 885 (internal quotations omitted). While election proceedings should be conducted in "laboratory . . . conditions as nearly ideal as possible," *General Shoe Corp.*, 77 NLRB 124, 127 (1948), this "noble ideal . . . must be applied flexibly." *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1562

"interfere with, restrain, or coerce employees" in the exercise of rights guaranteed in Section 7 of [the Act]." 29 U.S.C. § 158(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chemical Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004). Section 7 of the Act (29 U.S.C. § 157) grants employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection . . . ."

(D.C. Cir. 1984). Judicial deference to the Board's election proceedings, therefore, flows from the pragmatic recognition

> that union elections are often not conducted under ideal conditions, that there will be minor (and sometimes major, but realistically harmless) infractions by both sides, and that the Board must be given some latitude in its effort to balance the right of the employees to an untrammeled choice, and the right of the parties to wage a free and vigorous campaign.

NLRB v. Mar Salle, Inc., 425 F.2d 566, 571 (D.C. Cir. 1970) (quotation marks omitted).

The Board's order is entitled to enforcement unless the Board abused its discretion in overruling the objections to the election. *See Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996). The Board's underlying factual findings are conclusive if supported by substantial evidence on the record as a whole. *See Amalgamated Clothing & Textile Workers*, 736 F.2d at 1562-63. This requirement is satisfied if "it would have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998).

There is a strong "presumption . . . that ballots cast under the safeguards provided by Board procedures reflect the true desires of the participating employees." *NLRB v. Zelrich Co.*, 344 F.2d 1011, 1015 (5th Cir. 1965). A party seeking to overturn an election must therefore make a two-part showing: the alleged misconduct occurred and it "interfered with the employees' exercise of free

choice to such an extent that it materially affected the election." *C.J. Krehbiel*, 844 F.2d at 882. This requirement imposes "a heavy burden." *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996).

The Center here relies on the 19 objections it filed relating to prounion supervisory conduct that occurred before the filing of the election petition, an evidentiary challenge cast as a due process claim, and an affirmative defense that the underlying charge (filed within one day of the Center's admitted refusal to bargain) was time-barred. We show below that the Board acted within its wide discretion in overruling these objections.

B. Substantial Evidence Supports the Board's Finding that Charge and Relief Charge Nurses Did Not Engage In Objectionable Prounion Conduct

The Board recently clarified its standard for setting aside an election on the basis of prounion supervisory conduct during a representation election. *See Harborside*, 343 NLRB at 911. Several Board decisions preceding *Harborside* suggested that an employer could only establish objectionable prounion supervisory conduct with an attendant showing of threats or promises. In *Harborside*, the Board explicitly disavowed these decisions and clarified that prounion supervisory conduct may be objectionable in the absence of explicit threats or promises. *See id*. at 911. The Board emphasized, however, that it was

"by no means suggesting that supervisory prounion speech, without more, is objectionable." *Id*.

The Board in *Harborside* then restated the standard for an employer to challenge the results of an election on the basis of objectionable prounion conduct. The Board makes a two-prong inquiry:

> (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.
>
> (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Id. at 909. *Harborside*, therefore, makes clear that although express threats are not necessary, an employer first must demonstrate coercion or interference with employee free choice to sustain a finding of objectionable conduct.

While the Board's holding in *Harborside* largely reaffirmed established precedent, the Board "reversed its prior law concerning supervisory solicitations of authorization cards." *Madison Square Garden*, 350 NLRB 117, 120 (2007). Under *Harborside*, solicitation constitutes "inherently coercive" conduct that, "absent mitigating circumstances," will satisfy the first prong of the test. *See*

Harborside, 343 NLRB at 911. The Board explained that when a supervisor solicits authorization cards from employees, that supervisor may then identify which employees support the union and, by process of elimination, which employees do not. *See id.* "When a supervisor asks that a card be signed, the employee will reasonably be concerned that the 'right' response will be viewed with favor, and a 'wrong' response with disfavor." *Id*.

1. Substantial Evidence Supports the Board's Finding that the Conduct of the Charge and Relief Charge Nurses Did Not Coerce or Interfere with Employees' Exercise of Free Choice

The Board concluded that the Center failed to carry its burden to show objectionable conduct under the first prong of *Harborside*. Specifically, the Board found that none of the charge and relief charge nurses' conduct "constituted inherently coercive card solicitation" or reasonably tended to coerce or interfere with the RNs' exercise of free choice in the election.[8] (A. 1202.) As we show below, this finding is reasonable and supported by substantial evidence.

Under the first factor of the first prong of the *Harborside* analysis, the Board examined the nature and degree of supervisory authority that the charge and relief charge nurses possess. The Board quickly disposed of this factor because the Union and the Center had stipulated that the charge and relief charge nurses were

[8] Relief charge nurse Gilliatt's conduct is separately discussed in Section 2.b.

Section 2(11) supervisors. As such, the Board assumed that the charge and relief charge nurses exercised meaningful authority over the RNs even in the absence of record evidence establishing such authority. (A. 1201.)

The Board then proceeded to the second factor of the first prong—the nature, extent and context of the alleged conduct. Here, as discussed in more detail above (pp. 9-15), the charge and relief charge nurses engaged in minimal prounion conduct. They attended union meetings where RNs were also present, spoke favorably about the Union to RNs, informed RNs of when and where union meetings were scheduled, and signed authorization cards, some in the presence of RNs.[9]

Long-standing Board precedent establishes that supervisory support for a union during a campaign does not necessarily invalidate an election, a tenet undisturbed by *Harborside*. "[J]ust as an employer, through its supervisors, can speak against representation (see Section 8(c)), a supervisor can also speak in favor of the union." *Harborside*, 343 NLRB at 911. When that conduct goes beyond

[9] Notably, the record does not identify the chain of command of any of the charge and relief charge nurses with respect to the RNs with whom they had contact. Whether the charge and relief charge nurses had actual authority over the RNs with whom they interacted is a significant factor. *See Glen's Mkt.*, 344 NLRB 294, 295 (2005) (supervisors' solicitation of authorization cards from employees and requesting employees to distribute cards to other employees not objectionable because of lack of evidence that the two supervisors involved "had supervisory authority over the employees toward whom their conduct was directed").

encouragement and expressions of prounion sentiment, and has elements of coercion, the Board has found that conduct objectionable.

Indeed, *Harborside* exemplifies when the nature, extent, and context surrounding prounion supervisory conduct tends to interfere with and coerce employee free choice. In *Harborside*, the supervisor repeatedly and explicitly threatened employees with job loss if the union lost the election, held aggressive discussions on the job with "numerous" employees in which she repeatedly referenced "job security" and the need to "count on" these employees to vote for the union, directed one supervisee that attendance at union meeting was mandatory, solicited authorization cards from a dozen employees, pressured one employee to wear a union pin, "badger[ed]" one employee about the union, and solicited signatures on a union petition from at least three employees. *See Harborside*, 343 NLRB at 907-08. The Board determined that this "harassing, pressuring, and badgering" conduct represented "continuous, pervasive, and aggressive campaigning on behalf of the union," that would "reasonably tend to chill the employees she supervised from expressing opposition to the union." *Id*. at 913.

The Board recently clarified, post-*Harborside*, the nature, extent and context of prounion supervisory conduct that does not cross the line into objectionable conduct. *See Northeast Iowa Tel. Co.*, 346 NLRB 465, 467 (2006). In *Northeast*

Iowa, two managers "attended meetings held in employees' homes, spoke at those meetings along with the other attendees, signed authorization cards in front of other employees, and mentioned some of the potential issues that a union could help resolve." *Id.* at 467. The Board characterized this prounion conduct as "limited at best." *Id.* In reaching this conclusion, the Board compared the nature, extent and context of this unassertive conduct with that of the supervisor in *Harborside* and determined that this "limited" conduct differed "markedly" from that in *Harborside*. *Id.*

The limited and unassertive conduct engaged in by the charge and relief charge nurses here falls squarely within the permissible and unobjectionable activities the Board recently sanctioned in *Northeast Iowa*. Like the supervisors in *Northeast Iowa*, the charge and relief charge nurses engaged in such limited conduct as signing authorization cards (some in the presence of employees) and attending union meetings. Some of the charge and relief charge nurses also highlighted benefits of representation and offered personal opinions about union representation. Further, several charge and relief charge nurses informed RNs of union meetings and invited them to attend. Indeed, *Harborside* suggests such invitations, standing alone, are not impermissible. "[The supervisor] went beyond merely inviting [a nonsupervisory employee] to union meetings." *Harborside*, 343

NLRB at 912. This limited prounion conduct stands in stark contrast to the pervasive, objectionable conduct in *Harborside*.

In sum, none of the individual or collective prounion conduct remotely approaches pervasive or coercive conduct that interfered with the RNs' Section 7 rights. The record lacks any evidence that the charge and relief charge nurses' conduct was anything other than limited, unassertive, and nonthreatening conduct in the weeks preceding the filing of the Union's petition.[10] Under these circumstances, the Board properly determined that the Center failed to demonstrate that the supervisors' prounion conduct was objectionable. Rather, substantial evidence supports the Board's conclusion that the nature, extent and context of the conduct did not rise to the level of interfering with employees' exercise of free choice.

[10] Although the Center challenges the conduct of the charge and relief charge nurses in the period before the filing of the petition—and therefore before the critical period of the election—the Center does not claim that the petition failed to include the requisite showing of interest. Rather, it limits its challenge to the residual effect of the supervisors' conduct.

2. Substantial Evidence Supports the Board's Finding that, Even Assuming that the Charge and Relief Charge Nurses Engaged in Objectionable Conduct, There Was No Material Effect on the Election

a. Assuming the charge and relief charge nurses engaged in objectionable conduct, several factors demonstrate their conduct had no material effect on the election

Even if the Center was able to show that the conduct here was objectionable, *Harborside* requires that the Center also satisfy the second prong before setting aside election results—that is, the objectionable conduct interfered with free choice to the extent that it materially affected the outcome of the election. The Board found that, even assuming the charge and relief charge nurses engaged in objectionable conduct, it did not materially affect the outcome of the election. As we show, this conclusion is reasonable and supported by substantial evidence.

As outlined above (p. 30), in assessing whether conduct has materially affected an election, the Board considers several factors: the margin of victory, whether the conduct was widespread, the timing of the conduct, the extent to which the conduct was known, and the lingering effect of the conduct. *See Harborside*, 343 NLRB at 908. Here, the Union won the election by a 33-vote margin. The supervisors' prounion conduct occurred prior to the filing of the Union's petition. No supervisor engaged in prounion conduct after the Union and the Center executed the Supervisory Status Stipulation on March 5, "leaving supervisory

prounion silence in the several weeks before the election."[11] (A. 1202.) Lastly, to the extent that there could be any lingering effect from supervisory conduct, the Board relied on the fact that during the weeks before the election, the two "most active supervisory union proponents"—Silva and Gilliatt—engaged in unequivocal conduct that expressed their personal opposition to the Union. (A. 1202.) Specifically, both orally recanted their prounion stance to some RNs and also signed the No Vote Letter that the Center distributed to all RNs.

The Board also determined that the Center's "vigorous antiunion campaign" further supported the finding of no material effect. (A. 1202.) Under Board precedent, mitigation of prounion conduct will often be found where the employer itself has launched an effective, clear, and well publicized campaign that plainly counters that of the offending supervisor. *See Northeast Iowa*, 346 NLRB at 467-68; *SNE Enters., Inc.*, 348 NLRB at 1043; *Madison Square Garden*, 350 NLRB at

[11] The Center attacks (Br. 37-39) this finding as inconsistent with Board precedent and irrelevant to whether there was unlawful supervisory authorization card solicitation. The Center's argument misses the mark. In examining the material effect on the election, the Board found the passage of time relevant only to the extent that it mitigated the effect of any coercive conduct given that the supervisors ceased all support for the Union once the election date was established and their status defined. Moreover, the Center conducted a vigorous campaign for several weeks leading up to the election and some supervisors switched sides. Indeed, the Center tacitly recognizes that continued support by supervisors is a relevant consideration by citing cases that rely, in part, on this factor. *See, e.g., Madison Square Garden*, 350 NLRB at 122 (continued campaigning for employer ensured employees remained aware of their supervisors' partisan interests)*; SNE Enters., Inc.*, 348 NLRB 1041, 1043 (2006) (noting that supervisors campaigned for four or five months).

122. Here, there can be no question that the Center made its antiunion message clear and known to all eligible voters. It drafted the Vote No Letter on its letterhead and directed its managers to distribute the letter to all RNs during the week of the election. The letter explicitly reminded RNs that their vote was secret, accused the Union of bullying and divisive tactics, expressed the Center's hope to remain union free, and then directly called on RNs to vote against the Union. Seven managers, including the two charge and relief charge nurses who were most active during the Union's organizational campaign (Gilliatt and Silva), personally signed and distributed the Vote No Letter and urged RNs to vote against the Union. Under these circumstances, the Board reasonably determined that the relevant factors militated against a finding that the supervisors' conduct had a material effect on the election.

b. Even assuming Gilliatt engaged in objectionable conduct, her unambiguous repudiation of union support ensured that her prior prounion support had no material effect on the election

As discussed above (pp. 11-12), Gilliatt supported the Union's organizing campaign in January. To that end, she spoke favorably about the Union on six occasions and encouraged RNs to learn more about the Union. She told 10 RNs that everyone needed to sign authorization cards, and she signed a card on January 27. However, there was no evidence "that Gilliatt furnished [RNs] with

authorization cards, watched them sign cards, retrieved signed cards, or was informed as to which [RNs] had signed cards." (A. 1316 n.1, 1203.)

The Board reasonably found that it was unnecessary to pass on whether Gilliatt's conduct was solicitation because any coercive effect from her prounion conduct prior to the Union's filing of its petition for a representation election on February 22, was mitigated by her unambiguous repudiation of her prounion opinions in the weeks immediately before the election.[12] As discussed in more detail above (pp. 18-19), the Center waged a widespread and "vigorous" antiunion campaign. (A. 1202.) In the midst of this campaign, it promoted Gilliatt to a managerial position. Immediately thereafter, Gilliatt enthusiastically joined the Center's campaign, and "in a complete *volte face*" personally informed a number of RNs that she no longer supported the Union. (A. 1203.) Additionally, she personally signed over 100 copies of the Vote No Letter and hand-delivered it to RNs under her supervision the week before the election. She directly approached as many as 30 RNs and told them that she no longer supported the Union, going above and beyond the Center's call to distribute the Vote No Letter. Her repudiation was both public and unambiguous and occurred in the weeks

[12] Although the judge assumed for purposes of analysis that Gilliatt's conduct was "solicitation" (A. 1203), the Board found it unnecessary to pass whether Gilliatt's urging RNs to sign authorization cards constituted "solicitation" within the meaning of *Harborside* in light of her obvious repudiation of any prounion conduct that could be deemed to be objectionable. (A. 1316 n.1.)

immediately preceding the election. In contrast, Gilliatt's earlier prounion conduct involved statements to only 10 RNs and occurred before the Union filed its petition and six weeks before the election took place. Under these circumstances, substantial evidence supports the Board's finding that Gilliatt's conduct could not have materially affected the outcome of the election. Therefore, the Board did not abuse its discretion in refusing to set aside the Union's victory.

3. The Center's Arguments Are Without Merit

a. The Center misstates the record evidence and the Board's findings and urges this Court to rely on irrelevant evidence

The Center's arguments (Br. 33-39) are incorrectly premised on its repeated claim that "the record evidence clearly establishes that Charge Nurses solicited authorization cards on behalf of the Union." (Br. 33.) As shown above, the Board expressly found to the contrary with regard to the charge and relief nurses. These findings of fact are conclusive unless the Center can show that they are unsupported by substantial evidence. *See Amalgamated Clothing & Textile Workers*, 736 F.2d at 1562-563. While the Center presses this Court to reach a contrary finding, the record evidence solidly demonstrates that "a reasonable jury [could] reach the Board's conclusion." *Allentown Mack*, 522 U.S. at 366-67. Indeed, "[i]t is not necessary that [this Court] agree that the Board reached the best

outcome in order to sustain its decision." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). As such, the Center's argument must fail.

As to Gilliatt, the Center's argument (Br. 33-39) that the Board erred in finding she did not engage in solicitation misstates the Board's decision. The Board made no such finding. Rather, as discussed above (pp. 37-39), because the record evidence so overwhelmingly supported a finding that she "unambiguously repudiated" her prounion conduct, the Board found it unnecessary to examine whether her conduct constituted "solicitation." (A. 1202.) As such, the Center's challenges to the claimed finding of no solicitation are simply inapplicable.

The Center refers (Br. 8-17) this Court to its "Statement of Facts" to support its contention that the record evidence reveals objectionable supervisory solicitation. A close review, however, shows that the Center simply directs this Court to irrelevant evidence and relies on hearsay statements rejected by the judge. For instance, the Center's reliance on Union-initiated conduct with charge and relief nurses is simple misdirection;[13] such conduct is wholly irrelevant to whether supervisors engaged in prounion conduct that had a reasonable tendency to coerce employees and that materially affected the results of the election. Further, the

[13] For example, the Center argues (Br. 12) that "Serrette asked [Trinidad] to recruit employees to attend" and "[Magsino] directed [Castro] to recruit employees to card signing meetings at the Hampton Inn." It also argues (Br. 14-15) that Serrette and Magsino "stayed in constant contact with the Charge Nurses to encourage them to concentrate their [recruiting efforts]."

Center's attempt (Br. 10-12) to "confirm other instances in which Charge Nurses provided information to the Union about sympathies of eligible voters" (Br. 10) relies nearly exclusively on hearsay statements from internal Union documents that the judge refused to consider.[14] (A. 237.) Reliance on this type of evidence is particularly troubling when most of the conduct the Center cites involved charge and relief charge nurses who were witnesses at the hearing, including Castro, Casas, Eiley, and Silva. The Center had ample opportunity to elicit testimony from these witnesses directly. It is most telling, therefore, that the Center now relies on unsubstantiated hearsay statements rather than the sworn testimony of the witnesses themselves.

b. The cases cited by the Center are inapposite

The Center cites (Br. 29-32) several cases to support its attack on the Board's decision, none of which is persuasive in light of the significantly different facts at issue. In *Chinese Daily News*, 344 NLRB 1071, 1071-72 (2005), a supervisor engaged in classic, objectionable solicitation. He attended a union

[14] All page references in the Appendix from 570-86, corresponding to Tabs 24-39, are internal Union documents containing hearsay statements. At the hearing, the judge refused to admit these documents as business records. (A. 236-38, 241.) "[A]lthough I have received these exhibits, on all of these exhibits, it does not mean that I am receiving them for the truth of the matter asserted. Where there is obvious hearsay, I am not going to draw an inference that that means that this notation said that somebody said that [a charge nurse] has been talking to others to get them pro on the Union. . . . I will not infer that that actually happened unless you have got some evidence on it." (A. 237.)

organizing meeting where authorization cards were distributed, later watched seven supervisees sign authorization cards and then collected the cards. 344 NLRB at 1071-72. The closeness of the election, which the union won by fifteen votes, with seven challenged ballots, contributed to the finding of a material effect. *See id.* at 1072.

In contrast, here, the vote margin was substantial, with only a few challenged ballots. Further, there was no evidence of any antiunion campaign or mitigating measures to counter the supervisor's prounion conduct in *Chinese Daily News*. In this case, the Center waged a vigorous antiunion campaign, significant time passed between the prounion conduct and the election, and Gilliatt unambiguously and publicly switched sides.

The Center also cites (Br. 30-31) *Madison Square Garden*, 350 NLRB 117 (2007), for the proposition that elections are set aside even where supervisory card solicitation ceases two months before an election and where an employer openly opposes a union's organizational efforts. However, in *Madison Square Garden*, while solicitation ceased with the filing of the representation petition, supervisors continued a prounion campaign until election day. Additionally, although the employer stipulated that it openly opposed the union's efforts, several supervisors continued to engage publicly in unequivocal prounion conduct. The prounion supervisors' ongoing campaign and outright refusal to support the employer's

position, stand in marked contrast to this case where the charge and relief charge nurses stopped activity following their exclusion from the unit and the most active prounion supervisors did an about face and fully supported the Center's vigorous efforts to defeat the Union.

The Center's reliance (Br. 31-32) on *SNE Enterprises, Inc.*, 348 NLRB 1041 (2006), another factually distinguishable case, is unpersuasive. In *SNE Enterprises*, two supervisors directly solicited cards from at least 24 subordinates and 11 other unit employees and collected completed cards from at least 16 employees. *See id.* at 1041. Applying *Harborside*, the Board found this solicitation coercive and found that it materially affected the outcome of the election. Although the supervisors who had campaigned for the union for four or five months ceased after their status as supervisors was settled, none of them disavowed their conduct. *See id.* at 1043. Importantly, the union won the election by a vote of 87-82, with 3 challenged votes. As the Board stated, the narrow margin of victory meant that "it would have taken potentially only one employee to be coerced into voting for the union for the solicitations to have materially affected the outcome of the election." *Id.* at 1044. In short, the facts in *SNE Enterprises* paint a far different picture than the facts here.

Finally, the Center relies on *Millard Refrigeration Services*, 345 NLRB 1143 (2005). Like the cases discussed above, *Millard* is decidedly off point. In *Millard*,

4 supervisors directly solicited authorization cards, one of whom solicited cards from at least 13 of his subordinates. Another supervisor collected two cards from voting employees, while yet another made threats such as "Either vote for the union or I'll make your life a living hell." *Id.* at 1144-146. Even a cursory review of the record in the present case establishes that it bears no resemblance to *Millard*.

c. The Board properly applied its precedent

The Center next asserts (Br. 34-38) that the Board's decision "misappl[ies] established Board law" because it improperly invoked the "threatening or intimidating" standard for evaluating the conduct of the charge and relief charge nurses. The Center's argument is flawed. Contrary to the Center's claim, the Board did not "resurrect[] the very standard rejected in *Harborside*" (Br. 34) and did not require the presence of a threat in order to find objectionable conduct. Likewise, *Harborside* did not find, as the Center suggests, that a supervisor's conduct—favoring either the union or the employer—is automatic grounds for overturning an election. Rather, *Harborside* announced that, "absent mitigating circumstances," supervisory solicitation of authorization cards is inherently coercive and does not require evidence of threatening or intimidating circumstances. The inquiry, however, does not end at this point. Thereafter, the Board examines whether the conduct materially affected the results of the election.

Here, the Board first concluded that the charge and relief charge nurses' conduct was *not* solicitation, but then examined whether their conduct was otherwise objectionable. The Board concluded that the conduct did not have a reasonable tendency to interfere with employee free choice. The Board could have ended the inquiry there. However, the Board, continued its analysis, assumed the conduct was objectionable under *Harborside* and determined that, even so, it did not materially affect the outcome of the election.

The Center next argues (Br. 36-37) that the Board's finding that the charge and relief charge nurses' conduct had no material effect on the election was "flawed" because, although Gilliatt and Silva subsequently opposed the Union, "at least ten . . . charge nurses who were involved in solicitation and card signing activities did not do so." (Br. 36-37.) The Board's analysis does not require the forceful repudiation Gilliatt and Silva displayed. Rather, as discussed above, the Board considers a number of factors in its analysis of the effect of the objectionable conduct on the election. Here, the Board, even assuming the charge and relief charge nurses engaged in objectionable conduct, considered these factors and, as shown above, determined that substantial evidence warranted a finding that the alleged objectionable conduct did not warrant overturning the results of the election.

d. The role of the Union has no bearing on whether charge and relief charge nurses engaged in objectionable conduct

The Center, having failed to show that the supervisors engaged in objectionable conduct, attempts (Br. 39-50) to bolster its argument by emphasizing that the Union encouraged charge and relief charge nurses to assist with the organizational campaign. The Center recites (Br. 40-42, 48-49) various conduct by Union officials that purports to demonstrate destruction of the necessary laboratory conditions.[15] The argument is specious at best.

The Board must ensure that, during a representation election, employees enjoy a true free choice. To this end, the Board proscribes conduct that may have the tendency to coerce or intimidate employees in the exercise of their Section 7 rights. Here, there is no evidence that the Union itself engaged in any conduct with employees that constitutes proscribed conduct. However, the Center invites this Court to expand proscribed conduct to include the encouragement of others to engage in conduct that may have the tendency to coerce or intimidate employees. This Court must decline that invitation. It is of no moment whether a union

[15] The Center also asserts (Br. 42-47) in this section of its brief that certain factual findings are contrary to the record. The Center relies (Br. 43, 47) exclusively on hearsay statements (*see* note 14, *supra*) in taking issue with whether charge and relief charge nurses engaged in prounion conduct after the March 5 stipulation and in arguing that Casas talked to eligible voters. The Center also argues (Br. 45-46) that the record supports a finding that Gilliatt watched eligible voters sign cards and that her conduct was "widespread." As demonstrated in detail above (pp. 36-38), the Board's contrary findings are supported by substantial evidence.

engages in a relentless pursuit to curry favor with supervisors and to press them to assist in an organizational or election drive. The relevant inquiry is whether the supervisors took action that resulted in interference with the employees' free choice. The action of the Union here, while perhaps curious, is irrelevant to the inquiry.

C. The Center Has Failed to Show that the Board Abused Its Discretion by Limiting the Production of Certain Documents, Redacting Employee Names, and Prohibiting the Center from Questioning Witnesses About Communications Between Union Representatives and the Charge and Relief Charge Nurses and About the Identity of Unit Employees

The Center presents two challenges to the Board's evidentiary rulings. First, the Center argues (Br. 53-58) that the Board improperly revoked those portions of the subpoena that requested communications between charge and relief charge nurses and Union representatives and prohibited the Center from questioning witnesses about communications between the Union and the charge and relief charge nurses. Second, the Center contends (Br. 53-58) that the Board improperly required the redaction of employee names from certain documents and disallowed questions seeking the identity of RNs. The Center's evidentiary challenges, which it attempts to cast as due process claims, are without merit and the Board properly rejected them.

First, with respect to the communications between the Union and the charge and relief charge nurses, the judge

> declined to receive evidence of interactions solely between union representatives and supervisory charge and relief charge nurses since such interactions, unknown to eligible voters, could not reasonably tend to interfere with employees' free and uncoerced election choice in any material way.

(A. 1196 n.7.) As discussed above (pp. 46-47), the communications between union representatives and charge and relief charge nurses have no bearing on whether prounion supervisory conduct tainted the election. Thus, the Board correctly concluded that the requests and the line of inquiry were unlikely to produce evidence that would be relevant under the applicable legal standards.[16] Therefore, the Board reasonably "limited the [Center] to evidence of union-related interactions between supervisory charge/relief nurses and nonsupervisory unit employees." (A. 1196 n.7.) This ruling is entirely appropriate.

The Center also claims (Br. 54) that it should have been allowed to question witnesses about the identity of unit employees who attended Union meetings and signed authorization cards. Specifically, the Center alleges (Br. 56) that it sought

[16] The Center's subpoenas cast a wide net. (A. 527-31, 625-29, 965-69, 981-85, 997-1001, 1013-17.) They sought, for example, "[a]ny and all documents relating to communications during the relevant time period between [the subpoenaed individual] and any Charge Nurse employed by the [Center] relating in any way to the Union's organizing efforts involving personnel employed by the [Center]" and "[a]ny and all documents relating to organizing activity by the Union during the relevant period and directed at organizing any personnel employed by the [Center]." (A. 529.)

the identification of employees to discredit the testimony of charge and relief charge nurses. The Center's claim of entitlement flies in the face of the Board's longstanding and "overriding concern" with the confidentiality interests of employees. *See National Tel. Directory Corp.*, 319 NLRB 420, 421 (1995); *Wright Elec., Inc.*, 327 NLRB 1194, 1195 (1999), *enforced* 200 F.3d 1162 (8th Cir. 2000); *Manor Care*, 356 NLRB No. 39 (2010). Employers may not surveil or interrogate employees to obtain information related to which employees signed cards or attended meetings. *See National Tel. Directory.*, 319 NLRB at 421. It follows, therefore, that employers may not obtain the same information through a judge sanctioned production order.

Indeed, the Board has always kept authorization cards confidential during representation cases, and the courts have denied disclosure of authorization cards under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). *See National Tel. Directory*, 319 NLRB at 422*; Midvale Co.*, 114 NLRB 372, 374 (1955); *Madeira Nursing Ctr. v. NLRB*, 615 F.2d 728 (6th Cir. 1980); *Pacific Molasses v. NLRB*, 577 F.2d 1172 (5th Cir. 1978); *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977). The interest in maintaining confidentiality stems from the recognition that employees must be able to "to sign an authorization card with confidence that the card will not be presented to the employer, because it is entirely plausible that employees would be chilled when asked to sign a union card

if they knew the employer could see who signed." *National Tel. Directory*, 319 NLRB at 421 (citing *Committee on Masonic Homes*, 556 F.2d at 221) (internal quotations omitted).

In *National Telephone Directory*, in circumstances similar to this case, the employer sought the names of unit employees who signed cards and attended union meetings and defended its request on the ground of being able to "test the credibility" of witnesses. *See National Tel. Directory*, 319 NLRB at 421. The Board, relying on *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), balanced the employees' interest in confidentiality against the employer's interest in conducting a full cross-examination. *See National Tel. Directory*, 319 NLRB at 421. In *Robbins Tire*, the Supreme Court held that investigatory affidavits are protected from disclosure under FOIA because disclosure creates a risk that recipients of the affidavits would intimidate employees "to make them change their testimony or not testify at all." *Robbins Tire*, 437 U.S. at 239. The Supreme Court speculated that potential witnesses might "be reluctant to give statements to NLRB investigators at all" without assurances of confidentiality because of the "all too familiar unwillingness [of employees] to 'get too involved' [in formal proceedings] unless absolutely necessary." *Id*. at 240-41. In *National Telephone Directory*, the Board agreed that the possibility of intimidation of employees "by employers seeking to learn the identity of employees engaged in organizing" was serious and

concluded that "the policies of the Act are best effectuated by prohibiting the [employer] from obtaining on cross-examination the names of the employees who attended union meetings and signed authorization cards." *National Tel. Directory*, 319 NRLB at 421. Thus, under well-established precedent, the Board did not abuse its discretion by prohibiting the Center from obtaining the names of bargaining unit employees who signed authorization cards and engaged in organizing conduct.

There is similarly no merit to the Center's plaint (Br. 56-57) that it was prohibited from using the objections hearing as a discovery tool to find something that "could have led to evidence of direct union solicitation by supervisory charge/relief nurses." (A. 1196 n.7.) Relying on *Manhattan Center Studios v. NLRB*, 452 F.3d 813 (D.C. Cir. 2006), the Center alleges (Br. 57) that it was unable, in advance of the hearing, to obtain information about the supervisors' involvement in the organizing campaign. However, unlike the employer in *Manhattan Center Studios* who was unaware of the supervisor's prounion conduct at the time of the election, the evidence in this case amply demonstrates that the Center was well aware of the charge and relief charge nurses' activity before the election, and well before the objections hearing. Several charge and relief charge nurses signed a petition submitted to the Center requesting permission to be included in the unit. Additionally, the Center appears to have communicated freely

with its former prounion supervisors, Gilliatt and Silva, who began working on the Center's behalf to defeat the Union. Thus, the record does not support the Center's claim that the denial of its subpoenas prejudiced its ability to present its case.

D. The Board Properly Determined that the Union's Charge Was Timely

The Center asserts (Br. 58-59) that the Board failed to address its defense that Section 10(b) of the Act—which prohibits a complaint based on unfair labor practices occurring more than six months prior to the filing of the charge with the Board—barred the complaint. The Center's claim borders on the frivolous.

On January 25, 2011, the Board issued the certification of representation, recognizing the Union as the exclusive representative. The next day, the Union sent a letter to the Center requesting bargaining. On February 2, 2011, the Center responded that it would not bargain with the Union because it intended to challenge the certification. On February 3, 2011, the Union filed a charge claiming that the Center had refused to bargain, and the General Counsel issued a complaint. In its answer, the Center *admitted* all of the foregoing. (A. 1328.) Under these circumstances, the Center's claim of timeliness is baseless and must be rejected.

The Center argues (Br. 58-59) that the Board did not consider its timeliness defense because "the Board's decision states that because the Union's charge was filed within 6 months of the Employer's February 2, ***2011*** letter, the Section 10(b) limitations period did not apply." (Br. 58) (emphasis in original). The Center

misstates the Board's decision. The Board did not reference any letter. Rather, the Board referenced the Center's admitted, continuing refusal to bargain: "However, the record shows that the charge was filed on February 3, 2011, which is within 6 months of the [Center's] February 2, 2011 refusal to bargain." (A. 1399 n.1.)

The Center's references to its response to the Union's April 2010 bargaining request are further misdirection by the Center. Any bargaining requests or refusals to bargain that occur prior to the Board's certification of the Union are irrelevant because the duty to bargain had not yet attached. However, once the duty to bargain attached on January 25, 2011, when the Board certified the Union, and the Union requested bargaining, the Center's admitted refusal was the subject of a timely complaint. There can be no question, given these facts, that the Board properly rejected the Center's Section 10(b) defense and the Center's claim otherwise is baseless.

The Board properly overruled the Center's objections. The Center has therefore violated Section 8(a)(5) and (1) of the Act by refusing to bargain. Accordingly, the Board is entitled to full enforcement of its Order.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Center's petition for review, grant the Board's cross-application for enforcement, and enter a judgment enforcing in full the Board's Order in this matter.

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NATIONAL LABOR RELATIONS BOARD
September 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERITAS HEALTH SERVICES, INC., d/b/a CHINO VALLEY MEDICAL CENTER	)	
Petitioner/Cross-Respondent	)	Nos. 11-1107, 11-1127
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 31-CA-30105
and	)	
UNITED NURSES ASSOCIATION OF CALIFORNIA/UNION OF HEALTH CARE PROFESSIONALS, NUHHCE, AFSCME, AFL-CIO	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11,185 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 21st day of September 2011

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Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2011, I electronically filed the foregoing 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 certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 21st day of September, 2011

STATUTORY ADDENDUM

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 151, et. seq., are excerpted below:

Section 2 of the Act (29 U.S.C. § 152): Definitions

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 7 of the Act (29 U.S.C. § 157): Rights of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the Act (29 U.S.C. § 158). Unfair Labor Practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(c) Expression of views without threat of reprisal or force or promise of benefit.

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Section 9 of the Act (29 U.S.C. § 159). Representatives and Elections.

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of

representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 10(c) section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting

aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 10 of the Act (29 U.S.C. § 160). Prevention of Unfair Labor Practices.

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

(b) Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as

practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code section 2072 of title 28.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .