

**Nos. 11-2004, 11-2132**

---

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

**ASHLAND FACILITY OPERATIONS, LLC, d/b/a ASHLAND NURSING  
& REHABILITATION CENTER**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 400**

**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**

---

**RUTH E. BURDICK**  
*Supervisory Attorney*

**HEATHER S. BEARD**  
*Attorney*

*National Labor Relations Board*  
1099 14th Street, N.W.  
Washington, D.C. 20570  
(202) 273-7958  
(202) 273-1788

**LAFE E. SOLOMON**  
*Acting General Counsel*

**CELESTE J. MATTINA**  
*Deputy General Counsel*

**JOHN H. FERGUSON**  
*Associate General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*

*National Labor Relations Board*

---

## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of subject matter and appellate jurisdiction .....	2
Statement of issues presented .....	4
Statement of the case.....	4
I. Statement of the facts.....	5
A. The representation proceeding .....	5
B. The unfair labor practice proceeding .....	8
II. The Board’s conclusion and order .....	9
Summary of argument.....	10
Argument.....	11
The Board acted within its broad discretion in overruling the Center’s election objections and therefore, the Center’s refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act .....	11
A. The Board enjoys broad discretion in the conduct of elections and an employer challenging an election bears a heavy burden .....	12
B. In assessing election objections, the Board gives less weight to the conduct of third parties than to party conduct, and does not probe into the truth or falsity of campaign statements.....	14
C. The Board properly focuses its assessment on conduct occurring during the “critical period” between the date the union files its election petition and the date the election is held .....	15
D. The Board acted within its broad discretion in overruling the Center’s objection alleging third-party misconduct both before and during the critical period .....	16

**TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
1. Facts relevant to the Center’s objections .....	17
(a) Background.....	17
(b) The employees contact the Virginia NAACP, and its Executive Director, Khalfani, contacts the Center .....	18
(c) Khalfani accuses the Center of racial discrimination, and union vice-president Pinkard meets with employees.....	19
(d) The press reports the statements; in June, Khalfani’s involvement with the employees ends .....	20
(e) In late September, the Union files its representation petition; the Center then holds 18 meetings with employees.....	20
(f) The Hanover County chapter of the NAACP encourages employees to vote for the Union .....	21
2. The Center failed to establish that Khalfani’s statements, made months before the critical period, had the requisite significant impact on the election to warrant setting it aside .....	22
3. The Center also failed to establish that any objectionable conduct occurred during the critical period.....	24
4. The Center’s claim that the Court should overturn the election because the Board did not find that Khalfani and the Virginia NAACP were agents of the union is without merit, as is its related due process claim.....	30
5. The Center is wrong in claiming that the organizing campaign constituted an improper appeal to racial prejudice .....	36
Conclusion .....	40

**TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
Request for Oral Argument.....	41

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Alladin Plastics, Inc.</i> , 182 NLRB 64 (1970) .....	28,29
<i>Amalgamated Clothing &amp; Textile Wkrs. v. NLRB</i> , 736 F.2d 1559 (D.C. Cir. 1984) .....	15,16
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964) .....	3
<i>Bridgeport Fittings, Inc. v. NLRB</i> , 877 F.2d 180 (2d Cir. 1989) .....	16,24
<i>Brightview Care Center</i> , 292 NLRB 352 (1989) .....	29,39
<i>Case Farms of North Carolina, Inc. v. NLRB</i> , 128 F.3d 841 (4th Cir. 1997) .....	13,15,29
<i>Catherine's Inc.</i> , 316 NLRB 186 (1995) .....	27
<i>Coca-Cola Bottling Co.</i> , 273 NLRB 444 (1984) .....	25
<i>Columbia Tanning Corp.</i> , 238 NLRB 899 (1978) .....	26
<i>CSC Oil Co. v. NLRB</i> , 549 F.2d 399 (6th Cir. 1977) .....	40
<i>Desert Hospital v. NLRB</i> , 91 F.3d 187 (D.C. Cir. 1996) .....	35

## TABLE OF AUTHORITIES

<b>Cases – Cont’d</b>	<b>Page(s)</b>
<i>Dresser Industrial, Inc.</i> , 242 NLRB 74 (1979) .....	24
<i>Elizabethtown Gas Co. v. NLRB</i> , 212 F.3d 257 (4th Cir. 2000) .....	13,40
<i>Exxon Chemical Co. v. NLRB</i> , 386 F.3d 1160 (D.C. Cir. 2004) .....	12
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999) .....	3
<i>George Banta Co. v. NLRB</i> , 686 F.2d 10 (D.C. Cir. 1982) .....	4
<i>Gibson's Discount Ctr.</i> , 214 NLRB 221 (1974) .....	24
<i>Grinnell Fire Protect. System Co. v. NLRB</i> , 226 F.3d 187 (4th Cir. 2000) .....	14
<i>Ideal Electric Manufacturing Co.</i> , 134 NLRB 1275 .....	15,16
<i>Kentucky Tennessee Clay Co.</i> , 295 F.3d 436 (4th Cir. 2002) .....	33
<i>Kitchen Fresh, Inc. v. NLRB</i> , 716 F.2d 351 (6th Cir. 1983) .....	34
<i>Kux Manufacturing Co. v. NLRB</i> , 890 F.2d 804 (6th Cir. 1989) .....	32
<i>Lyons Restaurants</i> , 234 NLRB 178 (1978) .....	24

**TABLE OF AUTHORITIES**

<b>Cases – Cont’d</b>	<b>Page(s)</b>
<i>M &amp; M Supermarkets v. NLRB</i> , 818 F.2d 1567 (11th Cir. 1987) .....	38
<i>Medina County Publ'ns, Inc.</i> , 274 NLRB 873 (1985) .....	3
<i>Metco Products, Inc. v. NLRB</i> , 884 F.2d 156 (4th Cir. 1989) .....	31,32
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	12
<i>Midland National Life Insurance Co.</i> , 263 NLRB 127 (1982) .....	15,29,38,39
<i>Mine Workers v. Eagle-Picher Mining &amp; Smelting Co.</i> , 325 U.S. 335 (1945).....	3
<i>NLRB v. A.J. Tower Co.</i> , 329 U.S. 324 (1946).....	12
<i>NLRB v. Coca-Cola Bottling Co.</i> , 132 F.3d 1001 (4th Cir. 1997) .....	13
<i>NLRB v. Columbia Cable</i> , 856 F.2d 636 (4th Cir. 1988) .....	12
<i>NLRB v. Herbert Halperin Distributing Corp.</i> , 826 F.2d 287 (4th Cir. 1987) .....	14,27,34,36
<i>NLRB v. Lawrence Typographical Union No. 570</i> , 376 F.2d 643 (10th Cir. 1967) .....	16
<i>NLRB v. Lundy Packing Co.</i> , 81 F.3d 25 (4th Cir. 1996) .....	3

**TABLE OF AUTHORITIES**

<b>Cases – Cont’d</b>	<b>Page(s)</b>
<i>NLRB v. Maryland Ambulance Services</i> , 192 F.3d 430 (4th Cir. 1999) .....	12
<i>NLRB v. Mine Workers Local 1058</i> , 957 F.2d 149 (4th Cir. 1992) .....	33
<i>NLRB v. Schapiro &amp; Whitehouse, Inc.</i> , 356 F.2d 675 (4th Cir. 1966) .....	38
<i>NLRB v. Semco Printing Ctr., Inc.</i> , 721 F.2d 886 (2d Cir. 1983).....	15,16,24
<i>Phoenix Mechanical, Inc.</i> , 303 NLRB 888 (1991) .....	29
<i>River Walk Manor</i> , 293 NLRB 383 (1989) .....	3
<i>Schneider Mills, Inc. v. NLRB</i> , 390 F.2d 375 (4th Cir. 1968) .....	38
<i>Service Employees Local 250 v. NLRB</i> , 640 F.2d 1042 (9th Cir. 1981) .....	4
<i>Sewell Manufacturing Co.</i> , 138 NLRB 66 (1962) .....	36,38,39
<i>Shepherd Tissue, Inc.</i> , 326 NLRB 369 (1998) .....	39
<i>Skyline Builders, Inc.</i> , 340 NLRB 109 (2003) .....	35

## TABLE OF AUTHORITIES

<b>Cases – Cont’d</b>	<b>Page(s)</b>
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	13,14
<i>W.L. Miller Co. v. NLRB</i> , 988 F.2d 834 (8th Cir. 1993) .....	3
<i>WXGI, Inc. v. NLRB</i> , 243 F.3d 933 (4th Cir. 2001) .....	14
<i>Willis Shaw Frozen Food Express, Inc.</i> , 209 NLRB 267 (1974) .....	24
<i>Zartic Inc.</i> , 315 NLRB 495 (1994) .....	37
<b>Statutes:</b>	<b>Page(s)</b>
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157) .....	9,16
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2,4,8,9,11,12
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2,4,8,9,11,12
Section 9(c) (29 U.S.C. § 159(c)) .....	3
Section 9(d)(29 U.S.C. § 159(d)).....	3
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(f) (29 U.S.C. § 160(f)) .....	2
Section 10(e) (29 U.S.C. § 160(e)) .....	2,3,13
<b>Miscellaneous:</b>	
Restatement (Second) of Agency, § 26, at 100 (1958).....	31

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

---

**Nos. 11-2004, 11-2132**

---

**ASHLAND FACILITY OPERATIONS, LLC, d/b/a ASHLAND NURSING  
& REHABILITATION CENTER**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL  
UNION, LOCAL 400**

**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**

---

**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court upon the petition of Ashland Facility Operations, LLC, d/b/a Ashland Nursing & Rehabilitation Center (“the Center”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, an Order of the Board. The Board’s Decision and Order issued on September 16, 2011, and is reported at 257 NLRB No. 90. (A 727-32.)<sup>1</sup> The Board found that the Center violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”), by failing and refusing to bargain with United Food and Commercial Workers International Union, Local 400 (“the Union”). The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce.

The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the Board’s Order is final and the Center is located in Ashland, Virginia. The Center filed its petition for review on September 20, 2011. The Board filed its cross-application for enforcement on October 20, 2011. The petition and cross-application are timely

---

<sup>1</sup> “A” references are to the joint appendix, and “Br.” references are to the Center’s brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

because the Act places no time limitations on such filings. The Union, the Charging Party before the Board, has intervened in support of the Board.

Because the Board's unfair labor practice order is based, in part, on findings made in the underlying representation proceeding (Board Case No. 5-RC-16580), the record in that proceeding is part of the record before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Under Section 9(d), the Court has jurisdiction to review the Board's actions in the representation proceeding for the limited purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair labor practice] order of the Board . . . ." 29 U.S.C. § 159(d). The Board retains the 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 this Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999); *River Walk Manor*, 293 NLRB 383, 383 (1989); *Medina County Publ'ns, Inc.*, 274 NLRB 873, 873 (1985). *Contra NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26-27 (4th Cir. 1996).<sup>2</sup>

---

<sup>2</sup> *Lundy's* holding that the Board lacks the above-described authority to resume processing the representation case rests on inapposite cases dealing not with Section 9(d)'s limitations on judicial control over representation cases, but with Section 10(e)'s limitations on the Board's authority to revisit unfair labor practice issues once they have been considered by a reviewing court. *See Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945) (absent fraud or mistake, the Board is not entitled to have a court's enforcement order vacated so the Board can enter a new remedial order that, in retrospect, it decides is more appropriate); *W.L. Miller Co. v. NLRB*, 988 F.2d 834, 835-38 (8th Cir. 1993) (once

## STATEMENT OF THE ISSUES

The ultimate issue in this case is whether the Board reasonably found that the Center violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union after the Board certified the Union as the representative of a unit of the Center's employees following a Board-supervised election. The subsidiary issues are whether the Board acted within its broad discretion in finding that the Center failed to prove that any objectionable conduct occurred during the "critical period" between the time the Union filed its election petition and the date of the election, and that the Company also failed to prove its claim that certain earlier statements made by a third-party, the Executive Director of the Virginia NAACP, months before the critical period, warranted overturning the election.

## STATEMENT OF THE CASE

The Company does not dispute its refusal to bargain with the Union. Instead, it contends that the Board abused its discretion in the underlying representation case by overruling the Company's objections to the election and by

---

a court enforces the Board's order in an unfair labor practice proceeding, the Board lacks authority to reopen the proceeding in order to award additional relief); *George Banta Co. v. NLRB*, 686 F.2d 10, 16-17 (D.C. Cir. 1982) (rejecting an employer's argument that the Board lacked jurisdiction to adjudicate charges of post-strike unfair labor practices while a case against the same employer concerning pre-strike unfair labor practices was pending in court); *Service Employees Local 250 v. NLRB*, 640 F.2d 1042, 1044-45 (9th Cir. 1981) (the Board lacks jurisdiction to adjudicate a union's unfair labor practice claim when an earlier court decision implicitly rejected that claim).

certifying the Union as the duly elected representative of its employees.

Summaries of the Board's findings of fact, the procedural history of the representation and unfair labor practice proceedings, and the Board's Decision and Order, are below. Other facts relevant to the Company's election objections are discussed in the Argument.

## **I. STATEMENT OF THE FACTS**

### **A. The Representation Proceeding**

The Center is a 190-bed skilled nursing facility located just north of Richmond, Virginia. (A 597; A 716.) The nursing staff works around the clock in three shifts. (A 597; A 143.) On September 21, 2010, the Union filed a petition to represent a unit of the Center's employees consisting of certified nursing assistants ("CNAs"), aides, and maintenance employees. (A 595; A 1, 4.) The unit is approximately 73 percent African-American. (A 595; A 150.) The three primary union representatives responsible for the organizing campaign were Jim Hepner, Lloyd Baker, and Eric Schlein. (A 379, 389.)

After the Union filed its petition, the Center held six mandatory meetings per shift, for three shifts, for a total of 18 meetings with the employees. (A 601; A 175.) In these meetings, the Center's Executive Director, Gregory Ashley, discussed the Union's organizing campaign and urged employees not to vote for union representation. (*Id.*)

On November 3, 2010, pursuant to a stipulated election agreement, the Board conducted a secret-ballot election among the unit employees. (A 595; A 1.) The Union won the election with 31 votes for the Union, 28 votes against the Union, and one challenged ballot. (*Id.*)

On November 10, the Center filed with the Board three objections to the election. (A 595-96; A 2-3.) The Center's first objection was that "the Union's campaign was based in whole or in substantial part on unlawful appeals to racial prejudice," specifically that "the Union circulated an endorsement from a local NAACP chapter without revealing that the chapter's board included an individual who was on the Union's payroll." (*Id.*) The Center's second and third respective objections—later abandoned—were that the Union had spread false rumors among employees on election day, and that supervisors had engaged in unlawful pro-union conduct. (*Id.*)

The Board's Regional Director directed that a hearing be held on the issues raised by the Center's first and second objections.<sup>3</sup> (A 596; A 5.) On December 15 and 16, an administrative law judge held a hearing on those issues. (A 596; A 24-205.) At the hearing, the Center almost exclusively focused on statements made by the Executive Director of the Virginia NAACP months prior to the

---

<sup>3</sup> In a separate decision, the Regional Director recommended overruling the Center's later-abandoned third objection. (A 596, 602.)

Union's filing of the representation petition, arguing that those statements warranted overturning the election. (*Id.*)

After taking testimony and briefs, the administrative law judge concluded that the Center's evidence regarding the alleged statements was "unspecific and not attributable to the Union." (A 595-604.) Moreover, the judge found "no evidence that employees who voted for representation would not have done so" but for the alleged statements, and thus the election had not been affected. (A 602, n.14; A 603.) The judge also found (A 602) that the Center abandoned its second objection and, in any event, that the objection had no merit. Accordingly, on January 3, 2011, the judge issued a decision recommending that the Board overrule the Center's first and second objections and certify the Union. (A 603.)

On May 31, 2011, the Board (then-Chairman Liebman and Members Pearce and Hayes) issued a Decision and Certification of Representative adopting the administrative law judge's recommendations and certifying the Union as the exclusive collective-bargaining representative of the employees. (A 555-56.) In doing so, the Board "emphasize[d] that the [Center] has failed to prove that any objectionable conduct occurred during the critical period," and that similarly the alleged third-party conduct "which occurred at a relatively remote time prior to

that period had such a significant impact on the election as would warrant setting it aside.” (A 555-56.)<sup>4</sup>

### **B. The Unfair Labor Practice Proceeding**

On June 6, 2011, the Union requested that the Center bargain with it as the certified bargaining representative of the employees. (A 740; A 706.) In a June 24 letter, the Center informed the Union that it refused to recognize and bargain with the Union. (A 740, n.6; A 711.)

Based on the Center’s refusal to bargain, the Union filed a charge with the Board’s Regional Office. (A 739; A 712.) On July 14, the Acting General Counsel issued a complaint alleging that the Center violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. In response, the Center filed an answer admitting its refusal to bargain, but contesting the Board’s certification of the Union. (A 739; A 716.)

On August 4, the Acting General Counsel filed with the Board a motion for summary judgment. On August 8, the Board issued an order transferring proceedings to the Board and a notice to show cause why the motion should not be

---

<sup>4</sup> Member Pearce would have additionally found that “even if the statements at issue had a significant impact on the election and could be attributed to the Union or its agents, they would not warrant setting aside the election . . . because the statements were protests against alleged race-based mistreatment and unfair working conditions.” (A 556.) Then-Chairman Liebman found that “[i]n the particular circumstances of this case,” it was “unnecessary” for her to rely “on the additional finding described by Member Pearce.” (*Id.*)

granted. The Center filed a response, again admitting its refusal to bargain but contesting the Board's certification of the Union. (A 739.)

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

On September 16, 2011, the Board (Chairman Pearce and Members Becker and Hayes) issued a 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 739-41.) 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 and that the Center had neither offered to adduce any newly discovered evidence, nor shown any special circumstances that would require the Board to reexamine its decision to certify the Union. (A 739-41.)

The Board's Order requires the Center to cease and desist from failing and refusing to recognize and bargain with the Union and from, in any like or related manner, interfering with, restraining, or coercing its employees' exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (A 740.) Affirmatively, the Board's Order directs the Center to bargain with the Union upon request, to embody any understanding reached in a signed agreement, and to physically post and electronically distribute a remedial notice. (A 740-41.)

## SUMMARY OF ARGUMENT

The Board acted within its broad discretion in concluding that, under all of the circumstances surrounding the election, the Center failed to meet the heavy burden necessary to overturn the employees' vote for union representation. Specifically, the Center failed to establish that certain statements made by a third party, King Salim Khalfani, Executive Director of the Virginia NAACP, more than 3 months before the Union filed its representation petition, warranted setting aside the election. The Center further failed to establish that these pre-petition statements were attributable to the Union, or were made or had any significant effect on the unit during the "critical period" between the date the Union filed the petition and the date of the election. Contrary to the Company's contentions, an anodyne two-line letter of support for the Union from a different NAACP branch which the Union provided to employees, and testimony concerning vague comments made by unnamed employees discussing Khalfani's statements and disagreeing among themselves on their truth or meaning, simply did not constitute objectionable conduct that would render a free election impossible.

The Center also failed to prove its assertion that the Board should have found Khalfani and the Virginia NAACP to be agents of the Union, and that consequently, the Board should have given more weight to Khalfani's statements. The Center simply comes nowhere near establishing the requisite agency

relationship, which requires at least a showing that employees significantly associated the Union with Khalfani and the Virginia NAACP. In any event, the Center's agency argument would only be viable if it had proved, which it has not, that the statements materially affected the election. Similarly, the Center has also failed to establish that it was denied due process at the hearing.

Finally, the Center's assertion that the election should be overturned because Khalfani's statements constituted unlawful "racially inflammatory appeals," as that term is specifically used in Board law, fails both factually and legally. Again, the Center failed to prove that the Union was responsible for any of Khalfani's statements. Nor has it shown that those statements, made months before the opening of the critical period for the election, were in any way comparable to the racially inflammatory appeals found unlawful in the cases upon which it relies. Accordingly, this Court should uphold the Board's conclusion that the Company has unlawfully refused to bargain with the Union, and enforce its Order in full.

### **ARGUMENT**

#### **THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN OVERRULING THE CENTER'S ELECTION OBJECTIONS AND THEREFORE, THE CENTER'S REFUSAL TO BARGAIN WITH THE UNION VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT**

An employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C.

§ 158(a)(5) and (1)) by refusing to bargain with the duly certified collective-

bargaining representative of an appropriate unit of its employees.<sup>5</sup> In the instant case, the Center admits (Br. 3) that the Board certified the Union, but claims (Br. 21) that the certification is invalid because the Union engaged in objectionable pre-election misconduct. As we now show, the Center's contentions have no merit, and the Board's Order therefore should be enforced.

**A. The Board Enjoys Broad Discretion in the Conduct of Elections and an Employer Challenging an Election Bears a Heavy Burden**

“The Board’s determination that an election has properly resulted in a vote for union representation is discretionary and entitled to great deference.” *NLRB v. Columbia Cable*, 856 F.2d 636, 638 (4th Cir. 1988); *see NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946) (“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.”). Accordingly, this Court treats the results of a Board-supervised election as “presumptively valid” and will overturn an election “only where the Board has clearly abused its discretion.” *NLRB v. Maryland Ambulance Servs.*, 192 F.3d 430, 433 (4th Cir.

---

<sup>5</sup> 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 “interfere with, restrain, or coerce employees in the exercise” of their rights under 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).

1999); *see Case Farms of North Carolina, Inc. v. NLRB*, 128 F.3d 841, 844 (4th Cir. 1997).

A party seeking to have an election set aside “bears a heavy burden” and “must prove by specific evidence not only that campaign improprieties occurred, but also that they prevented a fair election.” *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 262 (4th Cir. 2000). When evaluating whether a party has met that burden, this Court is “mindful of the real world environment in which an election takes place.” *NLRB v. Coca-Cola Bottling Co.*, 132 F.3d 1001, 1003 (4th Cir. 1997). Although the Board “strives to maintain ‘laboratory conditions’ in elections, clinical asepsis is an unattainable goal.” *Id.* (internal quotation marks and citations omitted). “An election is by its nature a rough and tumble affair, and a certain amount of exaggerations, hyperbole, and appeals to emotion are to be expected.” *Id.* (internal quotation marks omitted); *see Case Farms*, 128 F.3d at 844 (“The Board has recognized . . . that elections do not occur in a laboratory where controlled or artificial conditions may be established and that, accordingly, the actual facts must be assessed in light of the realistic standards of human conduct.”) (internal quotation marks and brackets omitted).

The Board’s decision will often turn on factual findings, which are conclusive if supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act (29 U.S.C. § 160 (e)); *Universal Camera Corp. v. NLRB*,

340 U.S. 474, 493 (1951); *WXGI, Inc. v. NLRB*, 243 F.3d 933, 840 (4th Cir. 2001).

As a result, this Court will not “displace the Board’s choice between two conflicting views” of the evidence, even where it “would justifiably have made a different choice had the matter been before it de novo.” *Universal Camera* at 488; accord *Grinnell Fire Protect. Sys. Co. v. NLRB*, 226 F.3d 187, 195 (4th Cir. 2000).

**B. In Assessing Election Objections, the Board Gives Less Weight to the Conduct of Third Parties Than to Party Conduct, and Does Not Probe Into the Truth or Falsity of Campaign Statements**

When it is alleged that a party to a Board election has engaged in objectionable conduct, the objecting party that contends the election should be overturned must show that the alleged misconduct occurred and that it “materially affected” the employees’ free choice in the election. *NLRB v. Herbert Halperin Distrib. Corp.*, 826 F.2d 287, 290 (4th Cir. 1987). Less weight, however, is accorded the conduct and statements made by third parties. *Id.* As this Court has explained, “third parties are not subject to the deterrent of having an election set aside, and third party statements do not have the institutional force of statements made by the employer or the Union.” *Id.* Thus, an election will be set aside for third-party misconduct only if “the election was held in a general atmosphere of confusion, violence, and threats of violence, such as might reasonably be expected to generate anxiety and fear of reprisal, to render impossible a rational uncoerced expression of choice as to bargaining representative.” *Id.*

This Court has also observed that the “tension between the ideal and reality” in election campaigns “is evidenced by the Board’s policy towards misrepresentations in campaign messages.” *Case Farms*, 128 F.3d at 844. Under that policy, the Board does not “probe into the truth or falsity of the parties’ campaign statements,” and does not “set elections aside on the basis of misleading campaign statements.” *Id.* (quoting *Midland Nat’l Life Ins. Co.*, 263 NLRB 127, 133 (1982)). As this Court has explained, the Board’s *Midland* policy is based on the presumption that employees are “mature individuals” who are generally capable of determining for themselves the extent to which they should rely on partisan election propaganda. *Id.*

**C. The Board Properly Focuses Its Assessment on Conduct Occurring During the “Critical Period” Between the Date the Union Files Its Election Petition and the Date the Election Is Held**

Moreover, courts have approved the Board’s focus on conduct taking place during the “critical period” when assessing alleged election misconduct. The critical period begins on the date the union files its representation petition and runs until the election is complete. *Ideal Elec. Mfg. Co.*, 134 NLRB 1275, 1278; *accord NLRB v. Semco Printing Ctr., Inc.*, 721 F.2d 886, 893 n.5 (2d Cir. 1983). Courts have approved this rule as “a convenient device to limit the inquiry period near the election when improper acts are most likely to affect the employees’ freedom of choice.” *Amalgamated Clothing & Textile Wkrs. v. NLRB*, 736 F.2d 1559, 1567

(D.C. Cir. 1984). “The purpose of this rule, according to the Board, is to eliminate from post-election consideration conduct too remote to have prevented the free choice guaranteed by Section 7 of the Act.” *NLRB v. Lawrence Typographical Union No. 570*, 376 F.2d 643, 652 (10th Cir. 1967)).

With few exceptions, conduct occurring before the critical period cannot serve as the basis for setting aside an election. *See Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 186 (2d Cir. 1989); *Ideal Elec.*, 134 NLRB at 1278. Indeed, departures from the “critical period” rule are rare and limited to “clearly proscribed conduct likely to have had a significant impact on voting.” *Semco Printing*, 721 F.2d at 893. *See also Amalgamated Clothing*, 736 F.2d at 1567 (noting the appropriateness of this rule “[a]bsent extremely unusual circumstances”).

As we now show, the Center failed to meet its heavy burden of demonstrating that the Board’s decision to overrule the Center’s election objections should be reversed.

**D. The Board Acted Within Its Broad Discretion In Overruling the Center’s Objection Alleging Third-Party Misconduct Both Before and During the Critical Period**

The Center primarily objects to statements made by Virginia NAACP Executive Director Khalfani more than three months before the critical period, asserting that those statements were “racially inflammatory appeals,” as that term is used in Board law, and that his statements “saturated” the unit during the critical

period making a fair election impossible. As the administrative law judge correctly noted (A 596), the Center is faced with two hurdles from the outset. First, “generally only activity during the critical period may provide a basis for overturning election results,” and Khalfani’s statements took place well before that period (A 596.) Second, “the Union or individuals who are clearly its agents” did not make the allegedly objectionable statements. (A 596.) The Center has failed to clear either hurdle. As shown below, the Board properly found (A 599) that the Center failed to demonstrate that Khalfani’s statements significantly impacted the election, let alone that his statements “poisoned the atmosphere so much that a fair election was impossible.” (Br. 21, 27-30, 39-46).

## **1. Facts relevant to the Center’s objections**

### **(a) Background**

In February 2010, Carmen Sanderson, an African-American certified nursing assistant (“CNA”), alleged that someone had stolen \$200-\$250 from her purse. (A 597; A 189.) In response, Nancy Taylor, a Caucasian licensed practical nurse (“LPN”) who was also the shift supervisor at that time, and Levita Page, an African-American charge nurse, paged six employees: four CNAs and two LPNs, five of whom were African-American and one of whom was Caucasian. (A 597; A 190-91.) Taylor and Page ordered these employees to empty their purses for inspection of the contents. They also ordered one nurse to remove her shoes, and

required one or two others to remove outer garments, such as jackets or sweatshirts. (A 597; A 188, A 196-97.)

Upon learning of Taylor's and Page's actions, the Center immediately suspended them and later terminated them. (A 597; A 194.) Shortly thereafter, Charles Nelson, who at the time was the Center's Executive Director, met with, and apologized to, the employees whom Taylor and Page had searched. (A 597; A 364.)

**(b) The employees contact the Virginia NAACP, and its Executive Director, Khalfani, contacts the Center**

Subsequently, most or all of the six employees contacted the Virginia NAACP. (A 597; A 10.) On April 22, Executive Director Khalfani wrote to Nelson, stating that the six employees, whom he called "the Ashland Six," were ordered to remove their shoes and jackets and to dump everything out at a nurses' station in front of residents, visitors and other staff. (*Id.*) He also claimed that only African-American employees were targeted and that a white LPN was not searched. Khalfani's letter also stated that during snowstorms the prior February, some employees had been told they could not leave the facility and were told to get some blankets and to sleep on the floor, rather than returning home for the evening. (*Id.*) The Center's attorney, Sharon Goodwyn, called Khalfani three times asking to speak with him about his letter, but he did not return her calls. (A 597; A 56.)

(c) **Khalfani accuses the Center of racial discrimination, and Union Vice-President Pinkard meets with employees**

On May 10, Khalfani held a press conference which was attended by most of the six employees. At the press conference, the employees claimed that they were targeted for mistreatment by the Center because of their skin color, and publicly and illegally strip-searched, ridiculed, and later harassed. (A 597; A 56-60, 209.) They also stated that during snowstorms earlier that year, the Center would not let employees leave at the end of their shifts, because the Center did not want the weather to prevent them from coming into work the next day. (*Id.*) They further stated that the Center told employees to get some blankets and sleep on the floor, and that they had to eat out of snack machines. (*Id.*) Khalfani then stated that, “human beings should not be treated like chattel enslaved captives. What we have here is a cesspool of inhumanity that needs to be told and fixed.” (A 598; A 56-60, 209.)

Around this time, Khalfani contacted Union Vice-President Ken Pinkard, one of 32 individuals on the executive board of the Virginia NAACP, and asked him to meet with the employees who had complained to Khalfani. (A 598; A 86-88.) Thereafter, Khalfani sent an e-mail to three of the employees, stating that “my folks from [the Union]” asked to meet with them the following Sunday. (A 598; A

85.) Shortly thereafter, Pinkard met with Khalfani and some of the complaining employees. (A 598; A 87-88.)

**(d) The press reports the statements; in June, Khalfani's involvement with the employees ends**

The May 12-18 edition of *The Richmond Voice* (A 209) reported the nurses' allegations at the press conference along with Khalfani's statements. (A 598; A 209.) At least six copies of this edition of the paper circulated at the Center's facility after its publication. (A 598; A 358.) Also around that same time, Khalfani repeated his statements on several television and radio shows broadcast in the Richmond area. (A 598; A 70-75.) In June, however, most or all of the six employees retained an attorney, and had no further dealings with Khalfani. (A 598; A 100-01.)

**(e) In late September, the Union files its representation petition; the Center then holds 18 meetings with employees**

Three months later, on September 21, the Union filed its petition to represent the Center's employees. Thereafter, the Center held 18 meetings with bargaining unit employees, urging them not to vote for union representation. (A 601; A 175.) In these meetings, some employees told then-Executive Director Ashley that prior to his arrival at the Center, employees "were subject to strip searches and other outrageous treatment . . . forced to lay on the floor, [ ] weren't offered any beds, and [ ] were told they couldn't leave the building, couldn't go home." (A 601; A

147.) Some employees also “indicated that the facility didn’t provide them any meals during the storm periods . . . [so] they were forced to eat out of the vending machines.” (*Id.*) Not all employees attending the meetings, however, agreed regarding what happened, and the matters were discussed. (*Id.*)

Employee discussions of these issues also took place outside of the 18 meetings that the Center called to discuss unionization. For instance, Dietary Supervisor Donna Howard heard that “within the two-week [time] frame of the election,” a number of unspecified employees “still were” talking at times about the earlier alleged “slave-like conditions.” (A 600-01.) Howard also observed that “different CNAs were trying to convince each other one way or the other.” *Id.* Around this time, CNA Phyllis Wilson saw a post on the Facebook page of employee Marcia Walker saying the Center was “firing all the sisters.” (A 600, n.10; A 135.)

**(f) The Hanover County chapter of the NAACP encourages employees to vote for the Union**

On October 27, at Pinkard’s request, Elizabeth Waddy, the President of the Hanover County Chapter of the NAACP, wrote a two-line letter to unit employees encouraging them to vote in favor of the Union.<sup>6</sup> (A 598; A 36, 44, 206.) The letter stated, “Dear Health Care Caregivers: The Hanover County Branch of the NAACP supports [the Union] in representing the Caregivers at [the Center].

---

<sup>6</sup> Waddy is also on the Executive Board of the Virginia NAACP. (A 598; A 43.)

VOTE YES!!” (A 206.) The Union sent this letter to all employees who would be voting in the election. (A 598; A 97.)

**2. The Center failed to establish that Khalfani’s statements, made months before the critical period, had the requisite significant impact on the election to warrant setting it aside**

The Board properly found (A 555-56) that the Center failed to establish that Khalfani’s pre-critical period statements significantly impacted the election. As the administrative law judge found (A 602, n.14), “[t]here is absolutely no evidence that employees who voted for union representation would not have done so but for the allegations regarding strip-searching and slave-like treatment.” (*Id.*) Indeed, the Center had “ample opportunity to acquaint employees with the truth, or at least its version of what had transpired with regard to the so-called Ashland Six and the treatment of employees during the 2009-10 snowstorms.” (A 599.) The judge properly noted (A 599) that because Khalfani’s statements occurred “months before the representation petition was filed,” the Center not only had “the opportunity to set the record straight,” but also actually “availed itself of this opportunity by holding six meetings for each shift (18 total) during the critical period.” Thus, the “employees had ample opportunity to decide what they believed and to vote on the basis of the information they received.” (A 599.) Accordingly, the Board properly rejected (A 599) the Center’s unsupported argument that Khalfani’s statements significantly impacted the election.

The Center has not provided any factual or legal grounds to topple the Board's finding. For example, the record belies the Center's unsupported assertion (Br. 43, 45) that Khalfani's statements "saturated" the facility or were "rampant." Although media coverage of Khalfani's statements reached employees at the facility months before the critical period, there was only vague testimony that unnamed employees at unspecified times ever referenced these statements. Further, the Center cites no evidence to support its even more hyperbolic assertions (Br. 49, 53) that Khalfani's allegations "metastasized" throughout the unit and, incredibly, that "the racial appeal was the main reason Black employees felt they had to vote for the Union." To the contrary, as noted above, the judge found that "[t]here is absolutely no evidence that employees who voted for union representation would not have done so but for the allegations regarding strip-searching and slave-like treatment." (A 602, n.14.)<sup>7</sup>

Further, Khalfani's statements are not at all comparable to the rare circumstances under which the Board and courts have found conduct prior to the critical period to be independently objectionable. Indeed, examples of conduct

---

<sup>7</sup> To the extent the Center is relying on testimony of employees Howard and Wilson, cited in its Facts section (Br. 8-9), such reliance is misplaced. First, as the Board found (A 600-01), Howard and Wilson's testimony was vague as to time and identity of employees. Moreover, the Center ignores Howard and Executive Director Ashley's testimony that there was disagreement among employees about these issues. Accordingly, the Center has not demonstrated that the only reason employees voted for the Union was because of Khalfani's allegations.

serious enough to impact the election include acts of violence and threats, such as in *Willis Shaw Frozen Food Express, Inc.*, 209 NLRB 267, 268 (1974), which involved “a series of abhorrent acts,” including shootings, stabbings, and assaults; or cases in which a union’s solicitation of authorization cards was based on threats of job loss or unlawful promises of benefits. *See Semco Printing*, 721 F.2d at 893 (discussing *Lyons Rests.*, 234 NLRB 178, 179 (1978) (union warned employees that if they did not join the union they would not work for the employer); *Gibson’s Discount Ctr.*, 214 NLRB 221, 221-22 (1974) (union solicited authorization cards with an unlawful promise to waive union initiation fees). Such extreme conduct committed by a party to the election is wholly absent here. Accordingly, the Center has provided no basis for the Court to disturb the Board’s finding that Khalfani’s statements do not warrant overturning the election.

**3. The Center also failed to establish that any objectionable conduct occurred during the critical period**

The Board properly found (A 555-56) that during the critical period, neither the innocuous Hanover County NAACP’s endorsement, nor the vague statements of unnamed employees discussing Khalfani’s statements at unidentified times constituted objectionable conduct. To be sure, unobjectionable pre-petition misconduct may be relevant to the assessment of post-petition conduct if it “adds meaning and dimension to related post-petition conduct.” *Dresser Indus.*, 242 NLRB 74, 74 (1979); *accord Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180,

186-87 (2d Cir. 1989). However, the Board reasonably concluded (A 599, 555-56) that nothing that occurred during the critical period, even in light of Khalfani's pre-critical period statements, came anywhere close to meeting the high standard required to overturn the election.

First, the Board reasonably rejected (A 598) the Center's claim, repeated in its brief (Br. 35-36), that the Union was reminding the employees of Khalfani's earlier statements by distributing the Hanover County NAACP's endorsement letter to employees. The unremarkable two-line letter (A 206) stated merely that the Hanover County branch of the NAACP supported the Union, and asked employees to vote yes. In light of well-settled law that a "racial remark involving the employer-employee relationship must be so inflammatory as to make a fair election impossible in order to find it objectionable" (citing *Coca-Cola Bottling Co.*, 273 NLRB 444, 445 (1984)), the administrative law judge reasonably concluded that "[a] two-line letter telling employees to vote in favor of the Union does not come close to meeting this standard."

The Center also baldly speculates (Br. 15-16, 34, 35-36) that the endorsement "reinforced the racially inflammatory nature of its campaign," because the Hanover branch of the NAACP is a local branch of the Virginia NAACP, and presumably because President Waddy of the Hanover Branch is one of many individuals on the 32-member board of the Virginia NAACP. However,

the Center points to no evidence that employees linked the Hanover County endorsement to any of Khalfani's months-earlier statements.

Moreover, the administrative law judge correctly (A 603) distinguished the Hanover County endorsement letter here from the letter in *Columbia Tanning Corp.*, 238 NLRB 899 (1978), a case the Center repeatedly relies on (Br 31, 35, 37, 38). In *Columbia Tanning Corp.*, the objectionable letter suggested that the Board itself endorsed the Union, a situation raising entirely different concerns and implicating the Board's ability to conduct fair elections. Thus, the judge reasonably concluded (A 603) that *Columbia Tanning Corp.* "has no relevance to the endorsement of [the Union] in this case by the Hanover County branch of the NAACP."

The Board also considered, and rejected as insufficient (A 599), the Center's evidence regarding the only other alleged objectionable conduct during the critical period—that is, that unnamed employees allegedly had spread rumors regarding strip-searching and working in slave-like conditions. Besides the point that such evidence lacks the necessary degree of specificity, an election will be set aside for such third-party conduct only if "the election was held in a general atmosphere of confusion, violence, and threats of violence, such as might

reasonably be expected to generate anxiety and fear of reprisal.” *Herbert Halperin*, 826 F.2d at 290.<sup>8</sup>

The Board properly applied this standard here. As a threshold matter, the Center’s three witnesses failed to identify any of the employees allegedly spreading rumors about the strip-searching and slave-like conditions.<sup>9</sup> Moreover, the Center’s repeated assertions (Br. 29, 30, 45) that such rumors were widespread during the critical period flies in the face of the administrative law judge’s finding that the Center failed to make clear “how recurrent or persistent were comments about strip-searching and slave-like treatment.” The judge reasonably analyzed (A 600) this testimony and properly concluded that its unspecific nature as to both “the identity of [the] speakers and the time period in which [the statements] were made,” was a “factor in [ ] finding that the [Center’s] objections should be overruled.” *See Catherine’s Inc.*, 316 NLRB 186 (1995).

---

<sup>8</sup> The Center does not contend (Br. 53) that these unnamed employees were agents of the Union, but it does assert (Br. 30-37) that Khalfani (and the Virginia NAACP) were agents of the Union. We address the Center’s agency claim, and its resulting contention that the Board should apply the higher agency standard as opposed to the third-party standard, in Section 4, at pp. 30-36, below.

<sup>9</sup> Although CNA Wilson testified to the name of one employee—Marcia Walker—Wilson did not state that Walker spread any rumors regarding Khalfani’s earlier statements. Instead, she testified only that a post on Walker’s Facebook page stated generally that the Center “was firing all the sisters.” (A 135.)

Another critical factor that the Board relied on in rejecting the Center's claim that those vague rumors rendered a fair election impossible is that the Center had ample opportunity to respond to them, both before and during the critical period. As the Board recognizes, evidence about the employer's ability to respond to rumors during a campaign is relevant to evaluating the impact that such rumors have. *See Alladin Plastics, Inc.*, 182 NLRB 64, 64 (1970). Here, the Center wholly ignores the Board's well-supported finding—based on the testimony of the Center's own witnesses—that the Center had the opportunity to set the record straight, and availed itself of this opportunity, by holding 18 meetings with employees during the critical period.

Moreover, the fact that employees might have widely discussed and disagreed about claims of unfair treatment could equally be viewed as nothing more than a healthy dialogue about workplace issues prior to an election. Indeed, the Center's witnesses themselves acknowledged that there were different points of view about these rumors among the employees. For example, Executive Director Ashley stated that "there was some disagreement among the employees"; employee Howard stated that "different CNAs were trying to convince each other one way or the other"; and employee Wilson stated that "[a] lot of them was very negative about the situation, but then there was some that was positive about it." (A 599-601.)

Such an atmosphere is a far cry from the “general atmosphere of fear and coercion” making free choice “impossible,” and is consistent with other Board cases finding third-party rumors insufficient to warrant overturning the majority vote of employees. *See Alladin Plastics, Inc.*, 182 NLRB 64, 64 (1970) (third-party rumor that employer “bought off” Board agent insufficient to overturn election); *Phoenix Mech., Inc.*, 303 NLRB 888, 889 (1991) (third-party rumor that vote for one union was, in actuality, a vote for a different union, insufficient to overturn election).<sup>10</sup> In this context, the Board reasonably found (A 603) that the statements made “by unidentified employees, apparently in the course of casual conversation among employees,” were not “a valid basis for sustaining the Center’s objection” (citing *Brightview Care Center*, 292 NLRB 352 (1989)).<sup>11</sup>

---

<sup>10</sup> The Center’s protest (Br. 12-15) that these third-party rumors were untrue is irrelevant. As the administrative law judge correctly noted (A 602, n.14), under *Midland Nat’l Life Ins. Co.*, 263 NLRB 127 (1982)—which this Court approved in *Case Farms of North Carolina, Inc. v. NLRB*, 128 F.3d 841, 844 (4th Cir. 1997)—the Board does not probe into the truth or falsity of allegedly misleading campaign statements.

<sup>11</sup> The Center incredibly claims (Br. 30, 31) that the administrative law judge failed to consider Khalfani’s pre-petition statements in assessing the alleged objectionable conduct. Of course, as exhaustively demonstrated above, the Board considered all of the conduct at issue, including the pre-petition conduct, in assessing the objections.

**4. The Center’s claim that the Court should overturn the election because the Board did not find that Khalfani and the Virginia NAACP were agents of the Union is without merit, as is its related due process claim**

The Center protests (Br. 17-21, 30-38) that the Board should have given Khalfani’s statements greater weight, claiming that he and the Virginia NAACP were not third parties, but were agents of the Union. As we show below, the Center utterly failed to prove those claims. In any event, even if the Center could succeed in its agency claim, there is no evidence that Khalfani’s statements met the standard necessary for overturning an election—that is, that his statements “materially affected” the election results. Finally, the Center’s due process claim—that the Board prevented it from proving that Khalfani and the Virginia NAACP were agents of the Union—is also without merit.

The Board reasonably rejected (A 596, 599) the Center’s weakly-asserted claim that the Union should be held responsible for Khalfani’s statements. Indeed, the administrative law judge noted (A 596) that even after the hearing, it was “not clear as to whether the [Center] contends that Khalfani is or was an agent of the Union within the meaning of the Act.” In its brief before the court, however, the Center has now changed course and contends (Br. 30-37, 32) that Khalfani and the NAACP “was indeed” the Union’s agent, “or at the very least its close ally,” and, “at times was even acting at the direction and control of the Union.” Despite its

attempts to belatedly expand its agency argument, the Center's claims remain legally and factually flawed.

To begin, the Center's assertion (Br. 32-35) that Khalfani and the Virginia NAACP were *actual* agents of the Union is misplaced. Whether an agency relationship exists under the Act is to be determined under the common law of agency. *Metco Prods., Inc. v. NLRB*, 884 F.2d 156, 159 (4th Cir. 1989). Actual authority is created in a putative agent by the principal's "written or spoken words or other conduct which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." RESTATEMENT (SECOND) OF AGENCY, § 26, at 100 (1958). Under this standard, Khalfani and the NAACP could be found to be acting under actual authority only if the Union's words or conduct reasonably caused them to believe that the Union wanted them to act on the Union's behalf.

On its own terms, the Center's claim is insufficient under that standard. Specifically, the Center does not even argue that the Union instructed Khalfani or the Virginia NAACP to speak on its behalf, or that Khalfani understood that authority to be in his power when he spoke about the employees' allegations. Instead, the Center baldly speculates (Br. 33-34) about the entities' relationship. For example, the Center tries to make hay (Br. 33-34) of the unremarkable facts that the NAACP and the Union were generally allies in a number of causes, and

that Pinkard, one of 32 members of the Virginia NAACP's Board, was the Vice President of the Union and met with employees after *Khalfani* asked *him* to do so. Such evidence is woefully insufficient to demonstrate that Khalfani or the Virginia NAACP believed that the Union authorized Khalfani or the NAACP to act on the Union's behalf.<sup>12</sup>

The Center then shifts gears and claims (Br. 35-36) that even if Khalfani and the Virginia NAACP were not actual agents of the Union, they were nonetheless agents of the Union under the theory of apparent authority. However, to establish apparent authority, the Center would need to demonstrate that “the union placed the [individual] in a position where he appears to act as his representative . . . .” *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 809 (6th Cir. 1989) (citation omitted) (emphasis in original); see *Metco Prods., Inc.*, 884 F.2d at 159 (apparent authority can be created only “by written or spoken word, or any other conduct of the principal”). Thus, the Center had the burden of showing that the Union intended employees to believe that Khalfani and the Virginia NAACP was its agent, or at least that the Union should have known that its “conduct [was] likely to cause such

---

<sup>12</sup> Even the Center's evidence that the Union had coordinated with other Virginia NAACP executive board members in the past (Br. 34) does not demonstrate the requisite agency relationship because there is no evidence whatsoever that Khalfani had reason to believe that the Union was authorizing him to act specifically with regard to his comments about the Center's treatment of employees.

belief.” *NLRB v. Mine Workers Local 1058*, 957 F.2d 149, 152 (4th Cir. 1992).

The Center has provided no such proof.

Indeed, even under a case cited (Br. 32-33) by the Center in its brief, *Kentucky Tennessee Clay Co.*, 295 F.3d 436 (4th Cir. 2002), the Center has come up short. In *Kentucky Tennessee Clay*, this Court stated, as the Center correctly notes (Br. 32), that the final inquiry in an agency analysis is “whether the amount of association between the Union and the employee organizers is significant enough to justify charging the Union with the conduct.” *Kentucky Tennessee Clay Co.*, 295 F.3d at 442. In that case, the two individuals found to be agents were, as the Center acknowledges (Br. 32), “instrumental in every step in the campaign process.” *Id.* at 443. Here, there is no such evidence that Khalfani, or even Executive Board Member Pinkard, met this standard. Three professional union organizers whom the Center has not claimed were associated with Khalfani or the Virginia NAACP ran the day-to-day organizing campaign at Ashland. (A 379, 389.) Moreover, there is no evidence that during the campaign, employees associated Pinkard with any of Khalfani’s statements. Accordingly, the Center has utterly failed to establish that the Union is responsible for Khalfani’s statements.<sup>13</sup>

---

<sup>13</sup> The Center’s remaining assertions (Br. 12, 35, 46 n.12) that the Union should be held responsible for Khalfani’s statements because the Union did not “disavow” them, and because after the election the Union allegedly “credited” the Virginia NAACP for the Union’s campaign, are wholly misplaced. First, the Union was not required to disavow Khalfani’s statements given the paucity of evidence that it was

In any event, and importantly, under any agency standard, the Center would still have to demonstrate that Khalfani's statements "materially affected" the election results. *Herbert Halperin*, 826 F.2d at 290. However, given the Center's failure to impugn the Board's finding (A 602 n.14) that "[t]here is absolutely no evidence that employees who voted for union representation would not have done so but for the allegations regarding strip-searching and slave-like treatment," it has not met this standard.

The Center also makes a last-ditch claim (Br. 19-21, 53-55) that the Board denied it due process during the hearing by preventing it from proving its agency claim. To be sure, prior to the hearing, the Center had subpoenaed documents regarding the relationship between the Union and the Virginia NAACP. However, the administrative law judge was well within his discretion in limiting (A 118-22) the relevant dates called for in the subpoena, and the Center has presented no argument to the contrary.

---

associated with his statements. *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 355 (6th Cir. 1983). Moreover, the administrative law judge properly found (A 5, n.8) that post-election statements have no bearing on whether objections concerning conduct at the time of an election should be sustained or overruled. In any event, even if such statements did have bearing here, they were innocuous. Indeed, the Center points (Br. 12) only to the Union's post-election statement that, "[a]fter meeting with Virginia State NAACP officials, a union organizing campaign emerged," a statement which is a far cry from "crediting" the Virginia NAACP with the success of the Union campaign.

Moreover, the Center's additional complaint, that the administrative law judge held the record open for Khalfani to respond to the subpoena but improperly decided the case before receiving anything from him, ignores what happened. The judge unremarkably asked both Khalfani and the Union to immediately provide him with any responsive documents not provided at the hearing, and stated he would allow the record to be re-opened after the hearing so any new evidence might be submitted. (A 116-18, 348-49.) The Center does not allege that the judge received such documents from Khalfani and refused to include them. Nor did the Center even petition the General Counsel for an order compelling further production, despite claiming (A 116-17) that it would do so. Under these circumstances, the judge was not required to seek enforcement of the subpoena sua sponte, see *Skyline Builders, Inc.*, 340 NLRB 109, 109 (2003), and he did not otherwise abuse his discretion.

In any event, the Company has failed to demonstrate that it suffered any prejudice. See *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996) (failure to show prejudice refutes claim of denial of due process based on ruling preventing party from presenting additional evidence). As demonstrated above, even if the Center had proven that Khalfani and the Virginia NAACP were agents of the Union, the Center would still be unable to meet the standard necessary for setting aside the election—that is, that the alleged misconduct “materially affected” the

election results. To the contrary, the Board found (A 602 n.14) that “[t]here is absolutely no evidence that employees who voted for union representation would not have done so but for the allegations regarding strip-searching and slave-like treatment.” *See Herbert Halperin*, 826 F.2d at 290 (party conduct must “materially affect” election to overturn results).

**5. The Center is wrong in claiming that the organizing campaign constituted an improper appeal to racial prejudice**

The Center’s repeated and hyperbolic accusations of unlawful “racially inflammatory appeals” are both factually and legally deficient. To be sure, the Board will set aside an election when “a party embarks on a campaign which seeks to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals.” *See Sewell Mfg. Co.*, 138 NLRB 66, 72 (1962). However, as a threshold matter, and as exhaustively demonstrated above, the Center failed to establish that either Khalfani or the Virginia NAACP were a “party” to the election or were union agents. Accordingly, the Center’s reliance on the *Sewell* line of precedent—which primarily addresses a party’s own involvement in a campaign—is a stretch from the start.

Perhaps recognizing this, the Center refers (Br. 39-43) to “the Virginia NAACP’s campaign” when referencing what it claims are the unlawful racial appeals, and attempts to link the Union to that “campaign” by asserting (Br. 46)

that the Union “cynically capitalized on the Virginia NAACP’s racial propaganda.” To the contrary, as shown at pp. 30-34, the Board properly found, as a factual matter, that the Center failed to prove that the Union adopted or otherwise improperly referenced Khalfani’s or the Virginia NAACP’s statements, either before or during the critical period. As such, the Center’s argument is based on a view of the facts rejected by the Board and therefore must fail.

Even assuming that the Union could be sufficiently linked to the statements made by Khalfani or the Virginia NAACP, the Board reasonably found (A 603) that such statements would nonetheless be insufficient because they were not comparable to statements in cases where the Board has overturned elections on the basis of inflammatory racial appeals.<sup>14</sup> For example, the Board persuasively distinguished (A 603) two of the main cases that the Center continues to rely on in its brief (Br. 31, 37-39, 41-43, 50-52), noting that in both cases, unlike here, the objectionable statements took place “within the critical period,” and were “far more inflammatory” than the statements made by Khalfani. Indeed, in *Zartic Inc.*, 315 NLRB 495 (1994), the union, during the critical period, falsely connected the

---

<sup>14</sup> The Center fails to assail the judge’s additional finding (A 601-02) that “it is not clear that the allegations regarding mistreatment during the winter storms were exclusively or even predominantly made as examples of racial prejudice,” noting that the Center’s Executive Director “did not testify that the complaints he heard on this subject at the meetings he conducted were limited to African-American employees.” (A 602; A 147, 150.)

employer with the Ku Klux Klan in an already highly-charged atmosphere of racial tension. And, in *M & M Supermarkets v. NLRB*, 818 F.2d 1567 (11th Cir. 1987), an outspoken union advocate, again during the critical period, verbally attacked Jews in general, conduct which was referred to by the administrative law judge (A 603) as an attack “worthy of Joseph Goebbels.”<sup>15</sup>

The Center’s additional reliance (Br. 41, 42) on *Schneider Mills, Inc. v. NLRB*, 390 F.2d 375 (4th Cir. 1968), and *NLRB v. Schapiro & Whitehouse, Inc.*, 356 F.2d 675 (4th Cir. 1966), is also misplaced. Both of those cases involved actions taken directly by the union itself during the critical period. Of course, that is not the case here.

Moreover, the Center’s assertion (Br. 47-49) that the Board ignored long-standing Board precedent and failed to apply the proper legal test to this case is without merit. In that vein, the Center’s primary claim (Br. 47-49) is that the Board should have applied the *Sewell* test rather than *Midland*’s ordinary campaign misrepresentation test. That contention, however, ignores a crucial step in the requisite analysis of *Sewell*, which requires that the party alleging the unlawful conduct must first demonstrate that the party at issue embarked on a racially

---

<sup>15</sup> Although *M & M Supermarkets* involved a third-party union advocate, rather than a party, it is still clearly distinct from the instant case given that the statements in *M & M*, unlike here, took place during the critical period. *M & M Supermarkets*, 818 F.2d at 1569-70.

inflammatory campaign before the truthfulness of the statements must be assessed. *See Sewell*, 138 NLRB at 72. Given that the Center failed to meet even “its initial burden of demonstrating [that] prima facie case,” the Board was not required to analyze the truthfulness of Khalfani’s statements. *See Brightview Care Ctr.*, 292 NLRB 352, 352-53 (1989) (finding that third-party prejudicial remarks “do not constitute the kind of gratuitous campaign appeal to prejudice proscribed in *Sewell* and its progeny”). Thus, the Center has cited no counter-authority requiring the Board to depart from its longstanding *Midland* test.

Finally, the Board’s finding (A 595-603) that the Center failed to prove that Khalfani’s statements were objectionable is otherwise consistent with Board precedent. For example, in *Shepherd Tissue, Inc.*, 326 NLRB 369 (1998), a case cited by the administrative law judge (A 599), the Board found unobjectionable a statement that “blacks have been wrongly touched by whites for 300 years,” and observed that such a statement “merely placed these matters into a historical setting well understood by all, blacks in particular.” *Id.* at 374. That observation could be made here as well regarding the use of the words “chattel” and “slavery.” Moreover, *Shepherd*’s related statement that there was “no evidence that [the remark at issue] caused one employee to alter how they were going to vote” (*id.*),

is equally true here. Accordingly, this Court should uphold the Board's overruling of the Center's election objections.<sup>16</sup>

### CONCLUSION

The Center has failed to demonstrate that the Board abused its discretion in overruling the Center's election objections and certifying the Union as the employees' bargaining representative. Thus, there is no basis to disturb the Board's conclusions, and its finding that the Center violated the Act by failing to bargain with the Union should be upheld. Therefore, the Board respectfully requests that the Court deny the Center's petition for review and enforce the Board's Order in full.

---

<sup>16</sup> The Center also suggests (Br. 49) that the close results of the election boost its claim that the election should be overturned. It is well settled that "there is, however, simply no presumption against the validity of a closely contested election." *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 261, 268 (4th Cir. 2000); *see CSC Oil Co. v. NLRB*, 549 F.2d 399, 400 (6th Cir. 1977) (upholding election that union won by a single vote, even though employer had raised numerous unmeritorious objections).

## REQUEST FOR ORAL ARGUMENT

The Board believes that oral argument might be of assistance to the Court. If the Court wishes to hold oral argument, the Board believes that 10 minutes per side would be sufficient.

/s/ Ruth E. Burdick  
RUTH E. BURDICK  
*Supervisory Attorney*

/s/ Heather S. Beard  
HEATHER S. BEARD  
*Attorney*  
National Labor Relations Board  
1099 14th Street, N.W.  
Washington, D.C. 20570  
(202) 273-7958  
(202) 273-1788

LAFE E. SOLOMON  
*Acting General Counsel*

CELESTE J. MATTINA  
*Deputy General Counsel*

JOHN H. FERGUSON  
*Associate General Counsel*

LINDA DREEBEN  
*Deputy Associate General Counsel*

National Labor Relations Board

January 2012

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

No. \_\_\_\_\_ **Caption:** \_\_\_\_\_

**CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)**  
Certificate of Compliance With Type-Volume Limitation,  
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

*[Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines; Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines; any Reply or Amicus Brief may not exceed 7,000 words or 650 lines; line count may be used only with monospaced type]*

this brief contains \_\_\_\_\_ *[state the number of]* words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

this brief uses a monospaced typeface and contains \_\_\_\_\_ *[state the number of]* lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

*[14-point font must be used with proportional typeface, such as Times New Roman or CG Times; 12-point font must be used with monospaced typeface, such as Courier or Courier New]*

this brief has been prepared in a proportionally spaced typeface using \_\_\_\_\_ *[state name and version of word processing program]* in \_\_\_\_\_ *[state font size and name of the type style]*; or

this brief has been prepared in a monospaced typeface using \_\_\_\_\_ *[state name and version of word processing program]* with \_\_\_\_\_ *[state number of characters per inch and name of type style]*.

(s) \_\_\_\_\_

Attorney for \_\_\_\_\_

Dated: \_\_\_\_\_

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

ASHLAND FACILITY OPERATIONS, LLC, )  
d/b/a ASHLAND NURSING & )  
REHABILITATION CENTER )  
)  
Petitioner/Cross-Respondent )  
)  
v. ) Nos. 11-2004  
) 11-2131  
NATIONAL LABOR RELATIONS BOARD )  
)  
Respondent/Cross-Petitioner )  
) Board Case No.  
and ) 5-CA-60739  
)  
)  
UNITED FOOD AND COMMERCIAL )  
WORKERS INTERNATIONAL UNION, )  
LOCAL 400 )  
)  
Intervenor )

**CERTIFICATE OF SERVICE**

I hereby certify that on January 17, 2012 I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

James Phillip Naughton  
HUNTON & WILLIAMS, LLP  
Suite 1000  
SunTrust Center  
500 East Main Street  
P. O. Box 3889  
Norfolk, VA 23514-0000

Kimberlee W. DeWitt  
HUNTON & WILLIAMS, LLP  
East Tower  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, VA 23219-4074

John Andrew Durkalski  
BUTSAVAGE & ASSOCIATES, PC  
Suite 301  
1920 L Street, NW  
Washington, DC 20036-0000

/s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
NATIONAL LABOR RELATIONS BOARD  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 17th day of January 2012