Final Brief Oral Argument Not Yet Scheduled

Nos. 11-1139 & 11-1213

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHYSICIANS & SURGEONS AMBULANCE SERVICE, INC., d/b/a AMERICAN MEDICAL RESPONSE

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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PHYSICIANS & SURGEONS AMBULANCE SERVICE, INC., d/b/a AMERICAN MEDICAL RESPONSE	)	
Petitioner/Cross-Respondent	)	Nos. 11-1139 & 11-1213
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 8-CA-39333

THE BOARD'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Circuit Rule 28(a)(1), the National Labor Relations Board respectfully submits the following Certificate as to Parties, Rulings, and Related Cases:

A. Parties

1. Physicians and Surgeons Ambulance Service, Inc., doing business as American Medical Response, was the Respondent before the Board and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its Acting General Counsel was a party before the Board.

B. Rulings under Review

AMR is seeking review of a Decision and Order issued by the Board in case number 8-CA-39333 on April 29, 2011, and reported at 356 NLRB No. 149.

C. Related Cases

None.

s/Linda Dreeben_____
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Dated at Washington, DC
this 18th day of November 2011

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National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

GLOSSARY

The Act = The National Labor Relations Act (29 U.S.C. §§ 151 *et seq*.)

AMR = Physicians & Surgeons Ambulance Service, Inc., d/b/a American Medical Response

The Board = The National Labor Relations Board

Br. = AMR's Opening Brief

The Union = Teamsters Local 507

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Physicians & Surgeons Ambulance Service, Inc., doing business as American Medical Response (AMR), to review a Decision and Order of the National Labor Relations Board issued on

April 29, 2011, and reported at 356 NLRB No. 149. (A. 1.)[1] The Board found that AMR refused to bargain with Teamsters Local 507 after AMR's employees chose that union to represent them. The Board has cross-applied for enforcement of its Order, which is final with respect to both parties under Section 10(e) and (f) of the National Labor Relations Act, as amended.[2]

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act,[3] which empowers the Board to prevent unfair labor practices. This Court has jurisdiction over the petition and the cross-application for enforcement pursuant to Section 10(e) and (f) of the Act.[4] AMR's petition for review was filed on May 16, 2011. The Board's cross-application was filed on June 10, 2011. Both were timely because the Act places no time limitations on such filings.

The Board's unfair labor practice Order is based in part on findings made in an underlying representation proceeding (Board Case No. 8-RC-17008), in which AMR contested the Board's certification of the Union as the employees' exclusive

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[1] Record references in this final brief are to the Joint Appendix ("A.") filed by AMR. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to AMR's opening brief.

[2] 29 U.S.C. § 160(e) & (f).

[3] 29 U.S.C. § 160(a).

[4] 29 U.S.C. § 160(e) & (f).

collective-bargaining representative. Pursuant to 9(d) of the Act,[5] the record in that proceeding is part of the record before this Court.[6] Section 9(d) authorizes judicial review of the Board's actions in a representation proceeding for the limited purpose of deciding whether to "enforc[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board" but does not give the Court general authority over the representation proceeding. The Board retains authority under Section 9(c) of the Act[7] to resume processing the representation case in a manner consistent with the ruling of the Court in the unfair labor practice case.[8]

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the addendum to this brief.

STATEMENT OF THE ISSUE

After the Union won a representation election, AMR refused to bargain and filed objections alleging that the Board's use and placement of a table-top voting booth compromised the secrecy of the voting process. The single issue before the Court is whether the Board abused its discretion in overruling AMR's objections

[5] 29 U.S.C. § 159(d).

[6] *See Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964).

[7] 29 U.S.C. § 159(c).

[8] *See, e.g., Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *Medina County Publ'ns*, 274 NLRB 873, 873 (1985).

without a hearing. If not, then the Board reasonably found that AMR unlawfully refused to bargain with the Union.

STATEMENT OF THE CASE

The Board found that AMR violated Section 8(a)(5) and (1) of the Act[9] by refusing to bargain with the Union as the certified collective-bargaining representative of the appropriate unit following the representation proceeding described below. (A. 1.) AMR does not dispute that it refused to bargain with the Union. (A. 18.) Instead, it contends that the Board erred in the underlying representation case by overruling its objections to the election and by certifying the Union as the employees' duly elected representative. The Board's findings in the representation proceeding and the unfair labor practice proceeding are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding: The Union Won the Election

1. Background; AMR's operations

AMR, a corporation based in Akron, Ohio, provides ambulance transport services. (A. 1.) In October 2009, the Union filed a petition with the Board seeking to represent paramedics at AMR's Cleveland East and Cleveland West facilities. (A. 70.) AMR and the Union entered into a stipulated election

[9] 29 U.S.C. § 158(a)(5) & (1).

agreement, and the Board conducted a secret-ballot election on November 19, 2009. (A. 30; 69.)

2. Employees voted using the Board's table-top voting booth, without objection from AMR

Pursuant to the stipulated election agreement, the election took place in AMR's Cleveland East facility. (A. 30; 69.) Since at least 2000, each of the Board's regional offices has had access to several different types of voting booths,[10] and the Board agent assigned to conduct this election arrived early to set up the Board's table-top voting booth. (A. 30.) The table-top voting booth includes a table with metal legs, on top of which sits a three-sided partition. (A. 30.) The voter stands behind the partition and marks his ballot on the table. The partition shields the ballot, the hands, and the lower arms and torso of the voter from the view of others. (A. 30.) Depending on the voter's height, his head and upper arms may be visible. (A. 30.) According to AMR, its representative asked the Board agent about the table-top voting booth. The Board agent explained that the table-top voting booth is an alternative to the metal and canvas voting booths that the Board also owns. There is no claim that AMR's representative objected to

[10] *Voting Booths*, NLRB Operations-Management Memo 00-33 (May 3, 2000) ("Field offices now have two additional portable voting booths to choose from for use at representation elections."), available at http://mynlrb.nlrb.gov/link/document.aspx/09031d4580569789.

the use of this voting booth or the location in which the Board agent set it up. (A. 30; 64, 34, 45-49.)

AMR and the Union each had an observer present at the election, and the observers sat with the Board agent at a table four or five feet away from the voting booth. (A. 30.) The observers could see the faces and upper arms of some employees as they voted. (A. 30; 46, 48.) There is no evidence that AMR objected to this arrangement at any time before or during the election, nor is there evidence that anyone observed how any voter marked a ballot. (A. 30.)

3. The Union prevailed in the election, and the Board certified it as the bargaining representative over AMR's objections

With 36 eligible voters casting ballots, the employees voted 19 to 17 in favor of union representation. (A. 30; 57.) AMR filed objections, requesting a hearing and alleging (among other things) that the Board's use of the table-top voting booth did not provide adequate privacy to voters and that its location permitted observers to "silently coerce" voters. (A. 63-65.) The Board's Regional Director conducted an investigation, including reviewing AMR's evidence, and issued a report recommending that the objections be overruled. (A. 53-56.) The Regional Director concluded that AMR's objections failed to raise material issues of fact or law, making a hearing unnecessary. (A. 56.) The Regional Director further determined that AMR's objection about the voting booth had no merit because there was no evidence that the ballot of any voter had been observed. (A. 54-55.)

AMR filed exceptions to the Regional Director's report, in which it again requested a hearing and argued that the Board's voting booth did not afford employees sufficient privacy and was improperly located too close to the observers. (A. 33-52.) In a decision issued on November 30, 2010, the Board (Chairman Liebman and Member Pearce; Member Hayes dissenting) adopted the Regional Director's recommendation. (A. 30-32.) The Board then certified the Union as the employees' exclusive bargaining representative. (A. 30.)

B. The Unfair Labor Practice Proceeding

In January and February 2011, the Union requested by telephone and letter that AMR recognize and bargain with it. AMR refused. (A. 2; 23, 18.) On February 22, 2011, the Board's General Counsel issued a complaint, based on a charge filed by the Union, alleging that AMR's refusal to bargain violated Section 8(a)(5) and (1) of the Act.[11] (A. 21-28.) In its answer, AMR admitted its refusal to bargain but denied that its refusal was unlawful, contending that the Board improperly certified the Union and the election was invalid because the Board's voting booth compromised the secrecy and fairness of the election. (A. 16-20.)

On March 11, 2011, the General Counsel moved for summary judgment. (A. 8-15.) The Board issued an order transferring the case to itself and directed AMR to show cause why the motion should not be granted. In its response, AMR

[11] 29 U.S.C. § 158(a)(5) & (1).

repeated its contentions regarding the Board's use and placement of the table-top voting booth. (A. 4-6.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On April 29, 2011, the Board (Chairman Liebman and Members Pearce and Hayes) issued its Decision and Order in the unfair labor practice case, granting the General Counsel's motion for summary judgment. (A. 1.) The Board found that "[a]ll representation issues raised by [AMR] were or could have been litigated in the prior representation proceeding." (A. 1.) The Board also found that AMR did "not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding." (A. 1.) Accordingly, the Board found that AMR had violated the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees. (A. 2.)

The Board's Order requires AMR to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[12] (A. 2.) Affirmatively, the Board's Order requires AMR, upon request, to bargain with the Union, and, if an understanding is reached, to

[12] 29 U.S.C. § 157.

embody it in a signed agreement. (A. 2.) The Order also requires AMR to post a remedial notice. (A. 2.)

SUMMARY OF ARGUMENT

The Board reasonably exercised its discretion in overruling AMR's election objections, and therefore properly found that AMR violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. In doing so, the Board found that AMR failed to carry its heavy burden of presenting specific evidence showing that the election results have been compromised under the Board's standards.

AMR asserts that the Board's use of a table-top voting booth and its placement near the observer's table compromised the integrity of the election. But when an official NLRB election booth is used, the Board reasonably requires a party to come forward with evidence that someone witnessed how a voter marked a ballot. AMR failed to identify any such evidence, so the Board had no need for a hearing and reasonably overruled the objections. Employees marked their ballots with the requisite privacy, and AMR should respect those votes by bargaining with the Union.

ARGUMENT

The Board Did Not Abuse Its Discretion by Overruling AMR's Election Objections, and Therefore Properly Found that AMR Violated Section 8(a)(5) and (1) of the Act by Refusing to Bargain With the Union

AMR contends that the Board's use of a table-top voting booth and its proximity to the election observers did not afford employees sufficient privacy to assure the secrecy of their votes. But as the Board found, AMR failed to present any evidence that someone witnessed how a voter marked his or her ballot, so the use of the table-top voting booth and its location did not warrant overturning the secret-ballot election.

A. An Employer Must Bargain with a Properly Certified Bargaining Representative

Section 7 of the Act gives employees the right to choose a representative and to have that representative bargain with the employer on their behalf.[13] Employers have the corresponding duty to bargain with their employees' chosen representatives, and a refusal to bargain violates this duty under Section 8(a)(5) and (1) of the Act.[14] AMR admits (A. 18) its refusal to bargain with the Union but argues that it had no legal obligation to do so because the Board erred by

[13] 29 U.S.C. § 157.

[14] 29 U.S.C. § 158(a)(5) and (1). A violation of Section 8(a)(5) of the Act produces a "derivative" violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

overruling its election objections in the underlying representation proceeding and therefore improperly certified the Union. Accordingly, if the Board did not abuse its discretion in overruling those election objections, AMR's actions violated Section 8(a)(5) and (1) of the Act, and the Board is entitled to enforcement of its order.[15]

B. This Court Gives an Especially Wide Degree of Discretion to the Board in Determining Whether an Election Has Been Fairly Conducted

As the Supreme Court has noted, Congress entrusted the Board with the task of conducting representation elections and establishing the "safeguards necessary to insure the fair and free choice of bargaining representatives."[16] On questions that arise in the context of representation elections, this Court "accord[s] the Board an especially 'wide degree of discretion,'" and the Court will only overturn the Board's order to bargain upon finding that the Board abused that wide discretion.[17] Accordingly, a party seeking to overturn a Board election "bears a heavy

[15] *See Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 130 (D.C. Cir. 2004); *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988).

[16] *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946).

[17] *Antelope Valley Bus Co., Inc. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002) (quoting *A.J. Tower*, 329 U.S. at 330); *see also Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1178 (D.C. Cir. 2000).

burden."[18] Indeed, this Court "will not overturn the Board's [election] decision as long as it is merely 'rational and in accord with past precedent.'"[19]

This Court has recognized that the Board's electoral process is not an abstract exercise but is "an intensely practical process designed to maximize employee free choice under the very real constraints and conditions that exist in the nation's workplaces."[20] The Board, in exercising that responsibility, found that AMR failed to demonstrate that the use and placement of the table-top voting booth actually compromised the secrecy of the election. As shown below, the Court should defer to this finding.

[18] *New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1077 (D.C. Cir. 2007); *see also Antelope Valley*, 275 F.3d at 1095 (noting that "it is not the Board that bears the burden of demonstrating the validity of an election; rather it is 'the party challenging the results'" (citation omitted)).

[19] *Sitka*, 206 F.3d at 1178 (quoting *BB&L, Inc. v. NLRB*, 52 F.3d 366, 369 (D.C. Cir. 1995)).

[20] *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984).

C. The Board Acted Within Its Broad Discretion in Finding that the Use and Placement of a Table-Top Voting Booth Did Not Compromise the Secrecy of the Voting Process

1. Where an NLRB voting booth is used, the Board will not set aside an election absent evidence that someone witnessed how a voter marked a ballot

The Board has been conducting secret ballot elections for many decades, and it currently uses several different types of voting booths to ensure the privacy of each employee's vote.[21] In this case, the Board reviewed and applied its case law showing that the standard for reviewing objections related to the secrecy of balloting depends on whether an NLRB voting booth was used. (A. 30-31.) The Board's interpretation of that case law is entitled to deference.[22]

In cases where, as here, an NLRB voting booth is used, the Board will not overturn an election absent evidence that someone actually witnessed how a voter marked a ballot. Suspicions not supported by actual evidence are insufficient to

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[21] *Voting Booths*, NLRB Operations-Management Memo 00-33 (May 3, 2000) ("Field offices now have two additional portable voting booths to choose from for use at representation elections."), available at http://mynlrb.nlrb.gov/link/document.aspx/09031d4580569789.

[22] *Ceridian Corp. v. NLRB*, 435 F.3d 352, 355 (D.C. Cir. 2006) ("[A]n 'agency's interpretation of its own precedent is entitled to deference.'") (quoting *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998)); *see also Boca Airport, Inc. v. FAA*, 389 F.3d 185, 190 (D.C. Cir. 2004).

overturn such an election.[23] Accordingly, in *Avante at Boca Raton, Inc.*,[24] the Board upheld an election where the employer questioned the secrecy of employees' votes. Although AMR wrongly asserts (Br. 20) that *Avante* involved only concerns about the ballot box, the Board correctly noted (A. 30 n.1) that the employer in *Avante* challenged "the voting arrangements in the polling area," claiming observers could see how employees voted. In overruling the objection, the Board relied on the fact that no one testified that their election choice was witnessed, even though one employee did testify that she was worried her vote could be seen.[25]

And in *St. Vincent Hospital, LLC*,[26] the Board upheld an election even though two voters were in the voting booth at the same time. The employer claimed this compromised the secrecy of the election, but the Board disagreed because there was no evidence the two employees "communicated or that either observed how the other was marking his or her ballot."[27]

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[23] *See St. Vincent Hosp., LLC*, 344 NLRB 586, 587 (2005) (refusing to overturn election due to lack of evidence that ballot was observed, even where two voters were in booth at same time).

[24] 323 NLRB 555 (1997).

[25] *Id.* at 558 & n.11.

[26] 344 NLRB 586 (2005).

[27] *Id.* at 587.

AMR claims (Br. 17-18) that *Crown Cork & Seal Co. v. NLRB*[28] requires the application of a different standard. But the employer in that case did not even challenge the secrecy provided by the NLRB voting booth, and the Tenth Circuit fully enforced the Board's order upholding the election.[29] Like this case, in *Crown Cork & Seal* there was no evidence that anyone saw how any voter marked a ballot.[30]

The above cases all involved elections conducted with an official NLRB voting booth. But over the many decades that the Board has been conducting elections, unusual circumstances have occasionally required the use of a makeshift voting booth rather than one of the standard NLRB voting booths.[31] In such cases, the Board has set aside elections based on voters' belief that they could be observed while voting, even in the absence of evidence that their ballots were seen.

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[28] 659 F.2d 127 (10th Cir. 1982).

[29] *Id*. at 131; see A-31 n.4.

[30] *Crown Cork & Seal*, 659 F.2d at 131.

[31] *Fotomat Corp. v. NLRB*, 634 F.2d 320, 324 (6th Cir. 1980) (upholding election where "employees were provided with a three-sided box to shield the ballot"); *Borden, Inc.*, 318 NLRB No. 112 (1995), *enforced*, 95 F.3d 54 (5th Cir. 1996) (upholding election using makeshift voting booth created with heavy cardboard and chairs); *Bekins Moving & Storage Co.*, 279 NLRB 823, 823-24 (1986) (upholding election involving the use of a "three-sided box" on top of a stack of packing cartons).

For example, in *Royal Lumber Co.*,[32] employees voted on a piece of wood propped up on two oil drums. The Board found that "the employees voted under circumstances which at least raise[d] doubts concerning the integrity and secrecy of the election" and stated that "'the improvised voting arrangements were entirely too open and too subject to observation.'"[33] More recently, in *Columbine Cable Co.*,[34] employees voted on a table, without any cover and with their full arms and 80 percent of the ballot exposed. Noting that employees "voted without the privacy and secrecy afforded by a voting booth or a completely private room," the Board overturned the election and ordered a re-run.[35] The Board stated that the circumstances "raise[d] doubts concerning the integrity and secrecy of the election."[36] Similarly, when employees vote by mail rather than in an election with a voting booth, the Board will set aside the results if the mail ballots come into the

[32] 118 NLRB 1015 (1957).

[33] *Id.* at 1017 (quoting *Silvino Giannasca, d/b/a Imperial Reed & Rattan Furniture Co.*, 118 NLRB 911 (1957)).

[34] 351 NLRB 1087 (2007).

[35] *Id.* at 1087.

[36] *Id.* at 1088 (quoting *Royal Lumber, Co.*, 118 NLRB 1015 (1957)).

possession of a third person, even if the ballots are sealed in envelopes and the votes are therefore not observed by anyone.[37]

AMR's brief ignores the standard the Board has chosen to apply and instead discusses (Br. 15-16) cases that did not involve an NLRB voting booth. But the Board's rule – that a party challenging the secrecy of an election involving an NLRB voting booth must demonstrate that someone actually witnessed how a voter marked a ballot – is "'rational and in accord with past precedent,'" and therefore entitled to deference from this Court.[38] The different burdens sensibly account for the greater secrecy afforded voters when a Board-sanctioned booth is used than when voting arrangements are improvised.

2. AMR failed to establish that anyone witnessed how a voter marked his ballot

Because an NLRB voting booth was used in this case, the Board considered whether there was any evidence that the use of the voting booth or its placement resulted in anyone witnessing how a voter marked his or her ballot. (A. 30-31.)

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[37] *Fessler & Bowman, Inc.*, 341 NLRB 932, 933-34 (2004) (where "mail ballots come into the possession of a party to the election, the secrecy of the ballot and integrity of the election process are called into question").

[38] *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1178 (D.C. Cir. 2000) (quoting *BB&L, Inc. v. NLRB*, 52 F.3d 366, 369 (D.C. Cir. 1995)); *Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1381 (D.C. Cir. 1999) ("The Board has considerable discretion to determine whether the circumstances of an election have enabled employees to exercise free choice in casting their ballots.").

Although AMR submitted affidavits from employees who would have preferred more privacy while voting (A. 46, 49), no evidence remotely suggests that anyone saw how any voter marked a ballot. The Board therefore reasonably refused to overturn the election. (A. 30-31.)

Contrary to AMR's claim (Br. 8), there is nothing "experimental" about the Board's decade-long use of a partition on top of a table for voting. Voting booths like the one at issue here are used in political elections all over the country, from Fairfax, Virginia,[39] to Chicago, Illinois,[40] to Pasadena, California.[41] Indeed, as AMR acknowledges (Br. 10), the Board had received no complaints as of 2004 regarding the use of the table-top voting booth at issue in this case,[42] possibly because of the widespread use of such routine voting equipment.

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[39] Cliff Owen, *AP Photo of Republican Primary*, ANCHORAGE DAILY NEWS (Aug. 23, 2011) http://registration.adn.com/2011/08/23/v-gallery2/2027747_a2028368/east-coast-moved-by-59-earthquake.html.

[40] John Gress, *Reuters Photo of General Election*, NY TIMES (Nov. 2, 2004) http://www.nytimes.com/slideshow/2004/11/02/politics/campaign/20041102_VOTE_SLIDESHOW_16.html.

[41] David McNew, *Getty Images Photo of Special Election Voting*, NY TIMES (May 20, 2009) http://www.nytimes.com/2009/05/20/us/20vote.html.

[42] *General Counsel Responses to Questions*, NLRB General Counsel Memo 04-02 (April 22, 2004) ("We are not aware of any complaints or concerns regarding the use of these voting booths."), available at http://mynlrb.nlrb.gov/link/document.aspx/09031d45800e23a2.

And AMR's objections are undermined by its own lack of concern prior to the election about the use or placement of the voting booth. Although AMR's representative asked about the table-top voting booth at the pre-election conference, at no time did he object to its use. He also saw where the Board agent placed the voting booth relative to the observers, but he again failed to object at any time before or during the election or make any of the suggestions about the voting arrangements that AMR makes here (Br. 18). While AMR's failure to object before the election does not constitute a formal waiver, "[its] silence does blunt the force of the argument."[43] AMR had the chance to object to the arrangements before voting took place, and it failed to do so. Even if this Court were to find that the alternate arrangements now proposed by AMR – for instance, the metal/canvas booth or a greater distance between the booth and observers – were preferable, that is not a basis on which to deny enforcement of the Board's order: "This court is without authority to impose upon the NLRB the kind of election procedures that it may deem most appropriate."[44] AMR's objections to the election are completely without merit and should be rejected by this Court.

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[43] *NLRB v. Bayliss Trucking Corp.*, 432 F.2d 1025, 1028 & n.7 (2d Cir. 1970); *see also Rheem Mfg. Co.*, 309 NLRB 459, 460-61 (1992) (rejecting objection to deviations from Board ballot-handling procedures, in part because the employer's observers were aware of the deviations), *subsequent bargaining order enforced mem.*, 28 F.3d 1210 (4th Cir. 1994).

[44] *Antelope Valley Bus Co., Inc. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002).

3. No hearing was warranted

AMR's final unfounded claim is that the Board should have granted a hearing. To be entitled to a post-election hearing, "'the objector must supply the Board with specific evidence which prima facie would warrant setting aside the election.'"[45] AMR has never – not before the Board and not before this Court – identified what evidence it would present at such a hearing that could possibly overturn the election.[46]

Furthermore, AMR did have the opportunity to present testimony through affidavit, and its witnesses stated only that observers could see the facial expressions and arm movements of voters. (A. 46, 48.) From this testimony, AMR asks this Court to presume that the secrecy of the election was compromised. But voting involves marking an "X" in one box or the other, so a voter's arm movements would be the same regardless of how an employee voted. Where AMR has produced no evidence that anyone witnessed how even one voter marked a ballot, the mere closeness of the election does not carry its burden.[47]

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[45] *Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 828 (D.C. Cir. 1970) (quoting *U.S. Rubber Co. v. NLRB*, 373 F.2d 602, 606 (5th Cir. 1967)).

[46] *See NLRB v. Davenport Lutheran Home*, 244 F.3d 660, 663 (8th Cir. 2001) (stating employer "is not entitled to a hearing to engage in a fishing expedition for possible election improprieties").

[47] *See CSC Oil Co. v. NLRB*, 549 F.2d 399, 400 (6th Cir. 1975) (enforcing Board's order on summary judgment despite closeness of election).

Accordingly, AMR has not come close to showing "substantial and material factual issues" warranting a hearing, and its attempt to force the Board to hold a hearing at which nothing useful could be identified serves only to further delay employee rights under the Act and to waste the Agency's resources.[48]

[48] *See NLRB v. Joclin Mfg. Co.*, 314 F.2d 627, 632 (2d Cir. 1963) (finding that the Board's requirement that a party show "substantial and material factual issues" before a hearing is warranted is "not only proper, but necessary to prevent dilatory tactics by employers or unions disappointed in the election returns"); *see also* 29 C.F.R. 102.69(d); *New York Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1077 (D.C. Cir. 2007) (stating employer's "paltry evidentiary offering provides an insufficient basis to show that the Board was required to hold an evidentiary hearing").

CONCLUSION

Employees voted in the privacy of a Board-sanctioned booth that has been in use for at least 10 years. In those circumstances, the Board will not overturn an election absent evidence that someone observed how a voter marked his ballot. Because AMR failed to present such evidence (or even allege that such evidence existed), the Board reasonably refused to overturn the election. Accordingly, the Board respectfully requests the Court enter a judgment enforcing the Board's Order in full and denying AMR's petition for review.

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November 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHYSICIANS & SURGEONS AMBULANCE SERVICE, INC., d/b/a AMERICAN MEDICAL RESPONSE	)	
Petitioner/Cross-Respondent	)	Nos. 11-1139 & 11-1213
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 8-CA-39333

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 4,710 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

s/Linda Dreeben
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Dated at Washington, DC
this 18th day of November 2011

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act,
29 U.S.C. § 151-69 (2000):

Sec. 7. [Sec. 157] 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 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 8(a)(3) [Section 158(a)(3) of this title].

Sec. 8(a). [Sec. 158(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 7 [Section 157 of this title];

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [Section 159(a) of this title].

Sec. 9(c) [Sec. 159(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 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 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 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 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 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.

Sec. 9(d) [Sec. 159(d)] [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to 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 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.

Sec. 10(e). [Sec. 160(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. . . . 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. . . .

Sec. 10(f). [Sec. 160(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 court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner 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; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 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 further certify that all counsel are registered CM/ECF users and will be served through the CM/ECF system.

s/Linda Dreeben
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Dated at Washington, DC
this 18th day of November 2011