

Nos. 12-1017, 12-1104

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

MANHATTAN CENTER STUDIOS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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v.)	Nos. 12-1017
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)	
)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties: Manhattan Center Studios, Inc. (“MCS”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. The Theatrical State Employees Local No. One, I.A.T.S.E., AFL-CIO, CLC (“the Union”), was the charging party before the Board. The Board’s General Counsel was also a party before the Board.

B. Rulings Under Review: This case is before the Court on MCS’s petition for review and the Board’s cross-application for enforcement of a Decision

and Order issued by the Board on December 14, 2011 and reported at 357 NLRB No. 139 (2011).

C. Related Cases: This case was previously before this Court on MCS's petition to review and the Board's cross-application to enforce the Board's September 28, 2004 Decision and Order requiring MCS to bargain with the Union. *See* 342 NLRB 1264 (2004). On June 23, 2006, this Court remanded the case to the Board for further proceedings consistent with the Court's opinion. *See Manhattan Center Studios, Inc. v. NLRB*, 452 F.3d 813 (D.C. Cir. 2006).

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Dated at Washington, D.C.
this 13th day of June 2012

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GLOSSARY

“MCS”	Manhattan Center Studios
“Board”	National Labor Relations Board
“Act”	National Labor Relations Act (29 U.S.C. §§ 151, et seq.)
“Union”	Theatrical State Employees Local No. One, I.A.T.S.E., AFL-CIO, CLC
“Br.”	MCS’s opening brief to this Court
“A”	Joint Appendix

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Manhattan Center Studios, Inc. (“MCS”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Board’s Supplemental Decision and Order finding that MCS unlawfully refused to bargain with the Theatrical Stage Employees Local No. 1, I.A.T.S.E., AFL-CIO, CLC (“the Union”). The Board’s

Supplemental Decision and Order, which issued on December 14, 2011 and is reported at 357 NLRB No. 139, is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). (A. 135-40.)¹ The Board issued its Order after accepting this Court's remand, which instructed the Board to clarify its standard for determining when the record can be reopened in a representation case to receive newly discovered evidence. *See Manhattan Ctr. Studios*, 452 F.3d 813, 821 (D.C. Cir. 2006). (A. 117-126.)

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review of Board orders may be filed in this Court.

MCS filed its petition for review on January 9, 2012. The Board filed its cross-application for enforcement on February 17, 2012. The petition for review and the cross-application for enforcement are timely; the Act contains no time limit on the institution of proceedings to review or enforce Board orders.

The record in the Board's underlying representation proceeding (Case No. 2-

¹ Record references in this final brief are as follows: "A." references are to the Appendix submitted by MCS. "Br." refers to MCS's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

RC-22677) is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)) because the Board's Order is based, in part, on findings made in that proceeding. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceeding but authorizes review of the Board's actions there for the limited purpose of deciding whether to enforce, modify, or set aside, in whole or in part, the Board's unfair labor practice order. 29 U.S.C. § 159(d); *Saint-Gobain Indus. Ceramics, Inc. v. NLRB*, 310 F.3d 778, 781 (D.C. Cir. 2002). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of this Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999); *River Walk Manor*, 293 NLRB 383, 383 (1989).

STATEMENT OF THE ISSUE PRESENTED

After the Union won a representation election and the Board certified it as the unit employees' bargaining representative, MCS refused to bargain with and provide information to the Union, claiming that it had "newly discovered" evidence that an asserted supervisor engaged in unlawful pro-union conduct during the campaign that rendered the Board's certification invalid. Absent the discovery of new evidence that could not have been uncovered through reasonable diligence, an employer in a proceeding alleging a refusal to bargain with a newly-certified

union is not entitled to litigate issues that were or could have been addressed in the prior representation proceeding. The primary issue before the Court is whether the Board abused its discretion in refusing to reopen the record to admit MCS's proffered newly discovered evidence where MCS did not exercise reasonable diligence and failed to move promptly to reopen the record upon the discovery of the evidence.

RELEVANT STATUTORY PROVISIONS

The pertinent statutory provisions are contained in the attached Addendum.

STATEMENT OF THE FACTS AND OF THE CASE

I. THE EARLIER PROCEEDINGS

A. The Representation Proceeding

MCS rents its facility, located in New York City, to various clients to use as a venue for theatrical and musical productions. (A. 135.) On December 24, 2002, the Union filed an election petition with the Board seeking to represent a collective-bargaining unit of MCS's stagehands and production staff. (A. 8.)

On February 19, 2003, after the parties entered into a stipulated election agreement, the Board held a secret-ballot election among the seven bargaining-unit employees. (A. 135; 9-10.) The tally showed that five employees voted in favor of union representation, and one voted against union representation, with one nondeterminative challenged ballot. (A. 135; A. 11.)

A party must file any objections to the conduct of the election or to conduct potentially affecting the election “[w]ithin 7 days after the tally of ballots ha[d] been prepared.” Board’s Rules and Regulations § 102.69(a) (29 C.F.R. § 102.69(a)). MCS did not file objections within the prescribed 7-day period. (A. 135.) Therefore, on February 27, 2003 the Board certified the Union as the unit employees’ bargaining representative. (A. 135; 12.)

B. The Unfair Labor Practice Proceeding

In a March 7, 2003 letter, the Union requested that MCS bargain with the Union, and that MCS provide the Union certain relevant information. (A. 135; 13.) On March 20, 2003, MCS refused both requests. (A. 135; 14.) In doing so, MCS asserted, for the first time, and without further elaboration, that the Union’s certification was invalid because “an MCS supervisor was improperly involved in organizational activities at MCS on behalf of [the Union].” (A. 14.)

The Union filed an unfair labor practice charge, and the Regional Director issued a complaint against MCS alleging that MCS had violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing the Union’s requests to bargain and to provide information. (A. 135; 15, 23-26.) In its answer to the complaint, MCS admitted its refusal to bargain but claimed it had no duty to do so because the Union’s certification was invalid. MCS stated, again without further elaboration, that the “election petition was tainted by unfair labor practices,

including improper supervisory involvement in the organizing campaign.”

(A. 135; 28-30.)

The General Counsel subsequently filed a motion for summary judgment, and the Board issued a notice to show cause. (A. 135; 32-37.) On September 22 and 23, 2003, MCS responded by filing a first amended answer and an opposition to the motion. (A. 51-73.) In those filings, MCS defended its refusal to bargain by asserting that it had newly discovered evidence that an alleged supervisor engaged in improper prounion conduct during the union organizing campaign. (A. 135; 53.) MCS further alleged, for the first time, that the Union made improper promises of job opportunities to unit employees. (A. 53.)

In support of these assertions, MCS submitted an affidavit from non-unit employee Michael Spony, a mechanic in MCS’s maintenance department, and a written declaration from Chief Executive Officer Russell Arnold. (A. 16-17, 57-60.) Spony’s affidavit states that during the Fall of 2002, he heard rumors among his coworkers that Gustavo Garces, an asserted supervisor of the unit employees, was trying to bring the Union to MCS. (A. 135; 16.) Around November 2002, more than a month before the election petition was filed, Spony and Garces had a conversation outside the entrance to MCS’s opera house. (A. 135; 16.) Spony asked Garces if the rumors that he was trying to bring the Union into MCS were true. (A. 135; 16.) Garces allegedly answered, “Yeah, and I don’t care who knows

– I’m trying to bring the [U]nion in.” (A. 135; 16.) According to Spony, Garces told Spony that he was bringing the “union card” into the workplace and taking the card around for the employees to sign. (A. 135; 16.) MCS discharged Garces in February 2003, sometime after the February 19, 2003 election. (A. 58.)

MCS relied on the Arnold declaration to support its claim that the Union made improper promises of job opportunities and union cards to supervisors and employees. Arnold asserts that, “upon information and belief,” before the election, the Union “may” have improperly promised Garces, as well as unit employees, job opportunities and union cards. (A. 59-60.) Arnold also stated that Garces’s “boasted” and “bragged” to Spony that he had “spearheaded” the Union’s campaign. (A. 58-59.)

C. The Board’s Conclusions and Order

On September 24, 2004, based on the foregoing facts, the Board (Chairman Battista and Members Walsh and Meisburg) granted the General Counsel’s motion for summary judgment and found that MCS violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing the Union’s request to bargain and by failing to provide the Union with its requested information. (A. 84-87, 135-36.) In granting summary judgment, the Board noted that MCS “did not file any objections to the conduct of the election” within the required 7-day period. (A. 84.) Therefore, the representation proceeding had closed and could be

“reopened to litigate [election impropriety] issues only if [MCS] could establish that it has newly discovered evidence.” (A. 84.)

The Board, citing *APL Logistics, Inc.*, 341 NLRB 955 (2004), stated that “[n]ewly discovered evidence is evidence of facts in existence at the time of [the proceeding in question], which could not be discovered by reasonable diligence.” (A. 84.) The Board found that MCS did not meet the above standard because it “failed to present any information indicating that prior to the expiration of time in which to file objections to the election, it engaged in an attempt to uncover any improprieties in that proceeding.” (A. 85.) The Board concluded that MCS did not establish that the evidence at issue “could not have been discovered earlier through the exercise of reasonable diligence.” (A. 85.) Thus, the Board found that MCS did not raise any representation issues properly litigable in this unfair labor practice proceeding. (A. 85.) Accordingly, the Board issued an order requiring MCS, among other things, to bargain with the Union on request and to furnish the Union the information that it requested. (A. 86.)

D. This Court’s Decision

On review, the Court (Circuit Judges Griffith and Williams, Judge Henderson dissenting) denied enforcement of the Board’s Order and remanded for further proceedings “consistent with [its] opinion.” (A. 118-26.) In explaining its remand order, the Court stated that the Board “has been less than clear in applying

its newly discovered evidence standard.” (A. 121.) According to the Court, “Board precedent includes at least two formulations of the due/reasonable diligence standard” to determine if a party was “excusably ignorant” of the newly discovered evidence such that the party could not have discovered and brought the evidence to the Board’s attention during the 7-day period for filing objections.

(A. 119-20.) The Court termed these two formulations the “conducted investigation” version and the “hypothetical investigation” version. (A. 120-01.)

The Court defined the “conducted investigation” version as the standard used “if the moving party asserts its [actual] due diligence to establish that subsequently discovered facts constitute new evidence.” In such a situation, the party must show “facts indicating that it ‘acted with reasonable diligence to uncover and introduce the evidence.’” (A. 121.) In defining the “hypothetical investigation” version, the Court explained its application to “circumstances where due diligence was not exercised, in which case the Board asks whether the exercise of due diligence would have timely uncovered the evidence.” (A. 121.)

Regarding this case, the Court charged that the Board’s decision “confused the two [standards], treating them as if they were the same.” (A. 123.)

Accordingly, rather than determine which standard the Board applied in this case, the Court remanded the case to the Board, listing four questions that it wanted the Board to answer:

(1) the relationship between the “conducted investigation” and “hypothetical investigation” iterations of the due diligence standard, (2) which iteration it is applying here and why it chose that iteration under the facts of this case, (3) if the Board is applying the “conducted investigation” iteration of the standard, whether there is a minimum level of investigation in the absence of notice of a violation or, alternatively, whether that standard requires specific inquiries in the absence of some notice of misconduct, and, if so, what these inquiries must be and how they are to be conducted without engaging in coercive and unlawful interrogation or interfering with the election in violation of § 8(a)(1) or § 8(b)(1), and (4) if the Board is applying the “hypothetical investigation” iteration, how a party in MCS’s position – that is an employer without notice – shows that the information sought to be admitted as new could not have been discovered in the exercise of due diligence.

(A. 125.)

II. THE BOARD’S SUPPLEMENTAL DECISION AND ORDER

The Board accepted the Court’s remand and issued a notice to show cause; MCS filed a response.² (A. 127-34.) After considering the issues that this Court raised, the Board affirmed its prior decision and found that MCS violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and furnish it with

² The Board’s notice asked MCS to show cause why the motion for summary judgment should not be granted because MCS failed to show that it conducted an investigation of potential election irregularities before the deadline for filing objections; failed to show that the “newly discovered evidence” could not have been timely discovered through due diligence; failed to demonstrate that if adduced and credited, the “newly discovered evidence” would have required a different result under then-current law; and failed to file a motion to reopen the record in accordance with applicable Board Rules and Regulations or otherwise exercise due diligence in presenting the evidence. (A. 128-29.)

requested information. (A. 135.) In doing so, the Board treated MCS's defense of supervisory taint contained in its first amended answer as a motion to reopen the representation case proceeding. (A. 136.) The Board refused to reopen the record to accept MCS's proffered "newly discovered" evidence, explaining that MCS failed to establish the following requirements:

(1) that the evidence existed but was unavailable to the party before the close of the proceeding; (2) that the evidence would have changed the result of the proceeding; and (3) that it moved promptly upon discovery of the evidence.

(A. 137.) *See also* 29 CFR § 102.65(e)(1).

In addition to its ruling refusing to reopen the record, the Board answered the Court's four questions concerning the Board's reasonable diligence standard.

(A. 138-39.) Significantly, the Board found that MCS's failure to promptly present the evidence to the Board served as an independent reason not to reopen the record in the representation proceeding. (A. 140.) The Board then affirmed its original Decision and Order, requiring MCS to bargain with the Union and to provide the requested information. (A. 140.)

SUMMARY OF ARGUMENT

The Board properly rejected MCS's belated challenge to the Union's certification based on newly discovered evidence of supervisory taint because MCS fell far short of meeting the requirements necessary to warrant the exceptional remedy of reopening a closed representation case. In responding to the

Court's first two questions asking whether the Board applies two different reasonable diligence standards for determining whether a party was excusably ignorant of newly discovered evidence, the Board clarified that it applies a single standard. This standard required MCS to show that even if it had exercised reasonable diligence, it would not have discovered this evidence in time to file election objections.

Applying that standard, the Board found that the asserted supervisor was available to MCS for questioning, openly boasted and bragged about his behavior in front of an MCS facility to a nonunit employee on speaking terms with MCS's chief executive officer, and cavalierly stated that he did not care who knew of his behavior or if he lost his job because of it. With this flagrant behavior, the Board properly concluded that MCS could have, with reasonable diligence, discovered this information.

Second, MCS failed to show that its proffered evidence, consisting of speculative and unsubstantiated claims, would have compelled a different election result. Additionally, because MCS inexplicably took 6 months after its refusal to bargain with the Union to provide the Board with evidence supporting its claim of alleged supervisory taint, the Board found that MCS's failure to act promptly provided independent grounds for the Board's refusal to reopen the record.

Finally, the Board fully responded to the Court's remand, notwithstanding MCS's complaints to the contrary. It clearly answered the first two questions, explaining that it applies only a single reasonable diligence standard and clarifying how the two separate analyses that the Court's original opinion identified fit within that single framework. Regarding the Board's responses to this Court's two remaining questions, the Board's explanation that it applies a single standard for reasonable diligence necessarily limited its response to the Court's third question, which assumed the Board applied a standard that it did not. In responding to the Court's last question, which expressed concerns as to how a party with no notice of misconduct can show reasonable diligence, the Board explained that notice, or the lack thereof, is not determinative, but is only one factor in determining whether the party's actions during the objections period constituted reasonable diligence. Given the variety of circumstances that can arise under any particular case, the Board refused to create a blanket exemption from the reasonable diligence requirement for parties, like MCS, who claim to have no notice of the misconduct.

STANDARD OF REVIEW

Because “Congress has entrusted to the Board considerable latitude in resolving disputes concerning representation,” *Harlan No. 4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir. 1974), the Board is entitled to a “wide degree of discretion” in resolving issues related to representation elections. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). Therefore, the scope of this Court’s review is “narrow.” *Veritas Health Serv., Inc. v. NLRB*, 671 F.3d 1267, 1271 (D.C. Cir. 2012).

Where the Board is interpreting its regulations for reopening the record, this Court “must defer to the Board’s interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent with the regulations.” *Parkwood Dev. Ctr. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008). This Court “must uphold the judgment of the Board unless, upon reviewing the record as a whole, [it] conclude[s] that the Board’s findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case.” *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011).

ARGUMENT

THE BOARD PROPERLY FOUND THAT MCS VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH AND PROVIDE INFORMATION TO THE UNION

A. Introduction

This case presents the rare situation where an employer failed to file any objections to a union's election victory before the close of the underlying representation proceeding, but thereafter seeks to avoid bargaining with the certified union, claiming that it has newly discovered evidence that invalidates the election. The Board, much like courts considering a motion for post-judgment relief under Rule 60(b) of the Federal Rules of Civil Procedure, has an institutional interest in finality and considers a request to reopen the record in order to overturn a union's certification to be "extraordinary." *See* 29 C.F.R. § 102.65(e)(1); *Wadell v. Hendry Cnty. Sheriff's Office*, 329 F.3d 1300, 1309 (11th Cir. 2003) ("A motion for a new trial [based on newly discovered evidence] is an extraordinary motion[.]"). To that end, the Board has established a high bar for reopening a representation proceeding after a union has been certified. This policy is firmly grounded in the need for finality in union elections to avoid delaying the employees' choice of representation and otherwise undermining the Act's policy of facilitating industrial peace through collective bargaining.

Here, MCS claims (Br. 15) that it took no action to contest the election because it “had no reason to believe that misconduct had occurred” and thought that its employees had made “an uncoerced decision” in choosing union representation. However, within weeks of the Union’s certification, MCS learned that an asserted supervisor, well before the election, purportedly had boasted that he was helping to bring the Union to MCS and did not care who knew about his activity. MCS also heard that the rumor had moved well outside the smaller production department to a maintenance employee. Even assuming that MCS was previously ignorant of this otherwise widely-known rumor, rather than immediately avail itself of the opportunity to request a reopening of the representation record (which would inform the Board that its certification was fatally flawed), MCS opted to keep silent. After MCS received the Union’s request for bargaining, it simply refused to bargain, claiming that the election suffered from an unspecified supervisory taint and forcing the Union to file an unfair labor practice charge. Only after this case reached the Board on summary judgment did MCS let the Board know that there could have been a problem.

Thereafter, as this case wound its way through the Board process, MCS, seemingly indifferent to the fact that its employees were waiting for a definitive resolution regarding their union representation, provided only the barest of evidence to support its claim that the election was invalid. The Board, on its own,

determined that it would treat MCS's refusal to bargain due to alleged supervisory taint as a motion to reopen the representation proceeding and rejected the motion as insufficient. This Court, however, remanded the case to the Board for clarification of its standard for newly discovered evidence, particularly on the analysis for determining whether a party has acted with reasonable diligence.

On remand, the Board again found that MCS failed to justify reopening the representation proceeding. The Board clarified that it has a single standard for determining whether a party was excusably ignorant of allegedly new evidence requiring the party to "show that, with reasonable diligence, the evidence could not have been discovered in time to take appropriate and timely action in the representation proceeding." (A. 137.) MCS's failure to show that, had it conducted an investigation with reasonable diligence, it would not have uncovered the information, and its subsequent refusal to bring that possibly damaging information to the Board for 6 months while it simply refused to abide by the Board's certification order, preclude reopening the record here.

B. MCS Failed To Meet the Requirements Necessary To Reopen the Record

It is established Board policy that, in the absence of newly discovered or previously unavailable evidence or special circumstances, parties may not litigate in an unfair labor practice case issues that were or could have been litigated in a prior related representation proceeding. *See Pittsburgh Plate Glass Co. v. NLRB*,

313 U.S. 146, 162 (1941). *See also Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 829-30 (D.C. Cir. 1970). Thus, having failed to complain about the election results before the representation case closed, MCS's ability to challenge the validity of the election is entirely dependent upon its legal right to introduce newly discovered evidence relating to election conduct. A party seeking to introduce new evidence after the record of a representation proceeding has been closed must establish (1) that the evidence existed but was unavailable to the party before the close of the proceeding; (2) that the evidence would have changed the result of the proceeding; and (3) that it moved promptly upon the discovery of the evidence. *See* 29 C.F.R. § 102.65(e)(1) and (e)(2). The Board properly found that MCS failed to meet any of the above requirements, and therefore, refused to allow MCS a hearing on its defense. If the Board prevails on any one of these three findings, the Court should enforce the Board's Order.

1. MCS failed to show that it had newly discovered evidence that was unavailable before the close of the representation proceeding

In order to establish that the evidence regarding Garces's union involvement was unavailable before the close of the proceeding, MCS had to show that it was "excusably ignorant" of the evidence at the time that it was required to act. *Superior Protection, Inc.*, 341 NLRB 614, 614 (2004). To determine excusable ignorance, the Board asks whether the moving party has established that the

evidence “could not be discovered by reasonable diligence” within the required 7-day period following the election. *APL Logistics*, 341 NLRB 994, 994 (2004).

a. The Board applies a single reasonable diligence standard

On remand, the Board explained its reasonable diligence standard, answering in the negative this Court’s first question—whether the Board applies both a “hypothetical investigation” standard and a “conducted investigation” standard. (A. 121, 125.) The Board clarified that it “has never applied more than one standard for determining whether a party was excusably ignorant of evidence that it seeks to add to the record of a closed representation proceeding.” (A. 138.) Accordingly, the Board emphasized that “[t]here is but a single standard for establishing excusable ignorance: the proponent of the evidence must show that, with reasonable diligence, the evidence could not have been discovered in time to take appropriate and timely action in the representation proceeding.” (A. 138.)

The announcement of a single standard was not a departure from any precedent that appeared to apply a different, or a “conducted investigation,” standard. Rather, the Board explained that any appearance of two versions of its standard resulted from the Board’s failure to show its “analytical steps.” (A. 139.) Because the Board’s standard requires a “highly fact-intensive” inquiry that “admits of as many variations as the circumstances presented by the facts of the various cases,” the Board, when presented with claims of newly discovered

evidence, often addressed the context within which the evidence was presented without first setting forth the applicable standard. (A. 138-39.)

As the Board further explained, while only one standard exists for “excusable ignorance,” the Board allows a party to meet that standard by showing that it conducted an investigation and did not discover the evidence within the time allowed for filing objections. (A. 137-38.) Therefore, in those cases where the Board appeared to be applying a “conducted investigation” standard, the Board was applying its single standard in the factual context “when a party introduces evidence of an actual unsuccessful search for evidence of objectionable conduct,” which in turn required the Board to “determine whether the party’s investigative conduct exhibited reasonable diligence.” (A. 138.) Thus, the Board was not creating a second standard, but instead was applying the “analysis demanded by the facts advanced.” (A. 139.) *Compare Fitel/Lucent Tech., Inc.*, 326 NLRB 46, 46 n.1 (1998) (requiring employer to show it acted with diligence to uncover evidence where employer asserted it had undertaken such a search but could not timely discover the evidence), *with Jason Empire, Inc.*, 212 NLRB 137, 138 (1974), *enforced*, 518 F.2d 7 (10th Cir. 1975) (finding that non-investigating employer “failed to show that with due diligence it could not have uncovered the evidence in time to file timely objections”).

b. MCS did not show that it could not have discovered its proffered evidence with reasonable diligence

Responding to the Court's second question, the Board explained that, in this case, it "applied the single reasonable diligence standard, which the Court referred to as addressing a 'hypothetical investigation.'" (A. 139.) Applying this standard, the Board properly concluded that, had MCS engaged in a hypothetical investigation with reasonable diligence, MCS would have uncovered evidence of Garces's asserted prounion supervisory conduct.

Specifically, the Board relied on the following uncontroverted facts to conclude that MCS had not shown excusable ignorance. The Board noted that the belated evidence MCS sought to introduce was a conversation that took place "well over 2 months prior to the February 19, 2003 election." (A. 138.) MCS therefore certainly had time to learn of Garces's involvement. Arnold's declaration and Spony's affidavit belie MCS's assertion (Br. 26) that Garces was a "covert perpetrator." Rather, Arnold's declaration shows just the opposite, stating that Garces "boasted" and "bragged" to Spony about "spearhead[ing]" the campaign. (A. 58-59.) Indeed, taking Spony's affidavit as true, Garces brazenly stated that he did not care who knew of his activity or whether his support for the Union caused him to lose his job. (A. 16.) Of course, given Garces's bluster, it is not surprising that non-unit employee Spony heard rumors among his co-workers that Garces was leading the Union's organizing effort. The fact that Garces

exposed his behavior to a non-unit employee who was evidently on speaking terms with MCS's chief officer (A. 138) demonstrates that Garces was less than careful about his activity.

Moreover, supervisory taint is a "well-known and common basis for objection." (A. 138.) As the only asserted primary supervisor in the "very small" unit at issue, had MCS conducted an investigation, Garces would logically have been the first person that MCS would have contacted. (A. 138.) Garces was certainly available, as MCS did not discharge Garces until after the election. (A. 138.) While this Court suggested (A. 123) that questioning Garces "probably would have been futile," and MCS surmises that, if questioned, Garces would have lied, MCS's own proffer runs counter to these assumptions. Accepting Spony's account, Garces expressly stated that he "[didn't] care who [knew]" of his involvement in the campaign or that he "could be fired for his actions." (A. 17.) Had MCS asked Garces—even if it received a lie in response—this might well have been a different case.

Additionally, MCS could have questioned its other "presumptively loyal" (Br. 28) supervisors, who—given Spony's statement that rumors were openly swirling—would likely have heard them, including MCS's Technical Director. In any event, MCS simply did not provide any evidence that approaching Garces, or any other supervisor, would not have yielded reliable information. Consequently,

the open and nonconfidential nature of Garces's pronouncement contradicts any likelihood that MCS, "with reasonable diligence and without questioning any employees in the voting unit, could not have discovered Garces's activity in time to file a timely objection." (A. 138.)

The Board also held that "a movant may prove that the proffered evidence could not have been discovered in a timely manner even with reasonable diligence by establishing that it did in fact act with reasonable diligence . . . and that despite those efforts it failed to discover the proffered evidence." (A. 137.) Here, it is undisputed that MCS did not "offe[r] evidence that it made efforts of any kind to uncover evidence" of such conduct prior to the deadline for filing objections. (A. 138.) Therefore, the Board found that MCS's failure *actually* to conduct a search during that 7-day window "foreclose[d] that avenue of establishing excusable ignorance of the proffered evidence." (A. 137-38.)

MCS repeatedly states that it had no reason to suspect misconduct (Br. 15, 16, 19, 21), and it faults the Board for requiring employers who lack knowledge of misconduct to engage in a "scavenger hunt" or a "snipe hunt." MCS misrepresents the Board's conclusion and demonstrates the logical fallacy of its arguments. The Board does not require a "scavenger hunt" from an employer who claims to be excusably ignorant. However, in that situation, the employer must demonstrate why "the evidence could not have been discovered in time to take appropriate and

timely action in the representation proceeding.” (A. 138.) The Board simply acknowledged that, in light of MCS’s evidence, with rumors swirling both in and out of the unit in November about who was bringing the Union into the facility, including Garces’s boastful statements to an employee outside the affected unit, a reasonably diligent employer, particularly one that cultivated a “culture of loyalty” (Br. 26) among its supervisors, would likely have uncovered evidence of the claimed unlawful conduct. MCS failed to show how it could not have uncovered this evidence.

Moreover, MCS provides only a conclusory allegation (Br. 21) that it had no reason to suspect or investigate any misconduct. At the very least, MCS needed to offer “a convincing explanation as to why [it] could not have offered the crucial evidence at an earlier stage in the proceedings.” *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 19-20 (1st. Cir. 2002) (applying Federal Rule 60(b)(2)). MCS offers only a declaration in which its chief executive officer makes the bare assertion that prior to his conversation with Spony, he “had not previously known of Garces’s role.” (A. 57.) The Board properly refused to accept that statement, unaccompanied by any explanation regarding his ignorance, as such conclusory statements are simply insufficient to meet the reasonable diligence standard. *See APL Logistics, Inc.*, 341 NLRB 994, 994 (2004) (employer failed to establish “excusable ignorance” by offering “nothing beyond its bare assertion to establish that the proffered evidence

is newly discovered and previously unavailable”), *enforced*, 142 F. App’x 869 (6th Cir. 2005); *Fitel/Lucent Tech., Inc.*, 326 NLRB 46, 46 n.1 (1998) (an assertion that employer simply did not discover evidence timely “falls short of requisite showing” for proving “excusable ignorance”); *Teamsters Local Union 911*, 275 NLRB 980, 981 (1985) (employer’s statement that he “did not learn” new information until “after Board issued its decision” insufficient to establish excusable ignorance), *enforced*, 794 F.2d 682 (9th Cir. 1986); *Owen Lee Floor Serv., Inc.*, 250 NLRB 651, 651 n.2 (1980) (because employer offered “no facts” other than a “bare contention” that it could not timely discover evidence, Board found employer was not “excusably ignorant”). MCS faults (Br. 19-21) the Board for relying on these cases, claiming that they are “inapposite,” but its argument overstates its thin evidence.

MCS also complains (Br. 21-22) that, while the parties in the cases cited above had the chance to litigate issues at a hearing, MCS was not afforded the same opportunity. That argument simply misses the boat—that the parties had a hearing is irrelevant. What *is* relevant is the fact that, in each case, the parties attempted to introduce a new bit of evidence after the close of the hearing, and the Board required each of them, like MCS, to show excusable ignorance. And, like MCS, the parties in those cases could not meet their burden, and the Board rejected the proffered newly discovered evidence. Thus, for the reasons described above,

those cases are consistent with the Board's view that conclusory allegations without a showing of why the evidence could not have been discovered earlier with reasonable diligence will not suffice to prove excusable ignorance.

In deciding whether to reopen the record and consider newly discovered evidence, the Board properly finds guidance in Rule 60(b)(2) of the Federal Rules of Civil Procedure, "which requires a showing that the proffered evidence, 'with reasonable diligence, could not have been discovered in time' to take the required action." (A.137 (quoting Fed. R. Civ. P. 60(b)(2)).) In determining whether to grant post-judgment relief under Rule 60(b)(2), a court is guided by the maxim that "[i]t is for the public good that there be an end of litigation." *Waddell v. Henry Cty. Sheriff's Office*, 329 F.3d 1300, 1309 (11th Cir. 2003). Likewise, the Board, in considering the extraordinary relief of reopening a record to admit evidence that may possibly overturn an election, is guided by a similar need for "prompt and definitive resolution of questions concerning representation." (A. 139.)

MCS therefore misses the mark with its contention (Br. 23) that Fed. R. Civ. P. 60(b)(6), and not Fed. R. Civ. P. 60(b)(2), should guide the Board in interpreting its regulations regarding the receipt of newly discovered evidence. Rule 60(b)(6) allows for relief from judgment for "any other reason that justifies relief;" whereas Rule 60(b)(2) allows for relief based on "newly discovered evidence that could not have been discovered in time to move for a new trial." *See* Fed. R. Civ. P. 60(b)(2)

and (6). Moreover, it is well settled that “[c]ourts should apply Rule 60(b)(6) only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule.” *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989); *see also East Brooks Books, Inc. v. City of Memphis*, 633 F.3d 459, 465 (6th Cir. 2011) (requiring “something more” than one of the grounds contained in subsections (1) through (5) to be shown for relief under subsection (6)). MCS’s attempt to introduce evidence regarding supervisory taint is therefore most comparable to Rule 60(b)(2).

MCS goes on to argue (Br. 24) that Rule 60(b)(2) is circumscribed by a “rule of reason” that would have permitted the introduction of the newly discovered evidence. In support of its assertion, MCS relies on cases (Br. 24) that are exceptional in terms of the unavailability of the evidence. That very exceptionality, however, actually bolsters the Board’s finding that MCS’s claims, supported by one broad and nonspecific affidavit and one similar declaration given to the Board over 6 months after the Union’s certification, do not establish excusable ignorance sufficient to reopen the representation proceeding.

For example, *United States v. Walus*, 616 F.2d 283 (7th Cir. 1980), involved an attempt to revoke the citizenship status of an alleged member of the Gestapo during World War II. This evidence consisted of information over 35 years old that spanned two continents, including a country that was “behind the iron

curtain.” *Id.* at 302-04. The court noted that the defendant supported his claim of newly discovered evidence with a detailed affidavit, setting forth his “costly and extensive” search for the evidence. *Id.* at 303. The court also observed the “extreme difficulty of resurrecting stale evidence from other parts of the world.” *Id.* at 304. Based on those unique facts, the court, applying Rule 60(b)(2), granted the defendant’s motion for reconsideration based on newly discovered evidence.

Similar exceptional circumstances were present in *Branca v. Security Benefit Life Ins. Co.*, 789 F.2d 1511 (11th Cir. 1986), which involved an action to recover life insurance policy proceeds. In that case, the party seeking to introduce new evidence had been unable to secure evidence regarding the death of a family member in Argentina because the party feared that the investigation would cause the ruling military junta to physically harm the party’s family. *Id.* at 1512-13. The court found that such “extreme circumstances” rendered the evidence unavailable to the party and granted the party’s Rule 60(b)(2) motion. *Id.* at 1513.

MCS implausibly claims (Br. 24) that it was “even more excusably ignorant” than the parties in *Walus* and *Branca*. These circumstances are in no way comparable. MCS could talk to Garces at any time prior to his discharge without having to span another continent to investigate a half-century old incident or risk harm from an oppressive military regime. It merely had to be aware of a supervisor who made no secret of his union support and did not care if MCS

caught and fired him. In making this dubious argument, it is MCS, and not the Board, that is “jettison[ing] reaso[n.]” (Br. 25)

2. MCS has failed to show that the proffered evidence materially affected the election results

In addition to proving that it was excusably ignorant of the proffered evidence, a party seeking to reopen the record must also show that the proffered evidence would have changed the result of the proceeding. *See* 29 C.F.R. § 102.65(e). By definition, objectionable conduct is conduct “affecting the results of the election.” 29 C.F.R. § 102.69(a). This Court will set aside a representation election ““only if the petitioning party demonstrates that the conduct complained of interfered with the employees’ exercise of free choice to such an extent that it materially affected the election.”” *Veritas Health Serv. v. NLRB*, 671 F.3d 1267, 1271 (D.C. Cir. 2012) (quoting *U-Haul Co. of Nevada v. NLRB*, 490 F.3d 957, 961 (D.C. Cir. 2007)). There is a “strong presumption” that ballots cast under Board procedural safeguards reflect the true desires of the employees; that is, the election is presumed to be fair and regular, unless proven otherwise. *Selkirk Metalbestos, North Am., Eljer Mfg., Inc. v. NLRB*, 116 F.3d 782, 787 (5th Cir. 1987). Thus, the objecting party bears the “heavy burden” of showing that misconduct warrants overturning the election. *Id.* A party raising objections to an election ““must supply the Board with specific evidence which *prima facie* would warrant setting aside the election.”” *Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d

818, 828 (D.C. Cir. 1970) (quoting *United States Rubber Co. v. NLRB*, 373 F.2d 602, 606 (5th Cir. 1967)). This burden is not met by “nebulous assertions, wholly unspecified,” but by “specific evidence of specific events from or about specific people.” *Id.*

As the Board found (A. 139), MCS’s proffered newly discovered evidence does not establish that Garces’s actions constituted objectionable conduct. The speculative evidence regarding the extent of Garces’s solicitation is insufficient to show that his conduct affected the election. According to Spony’s affidavit, Garces told him that “he had brought the union card into the workplace and was taking the card around for employees to sign up for the union.” (A. 16.) The affidavit contains no other supporting information regarding the nature, extent, success, and context of Garces’s alleged actions. As the Board noted (A. 139-40), MCS’s description of Garces’s conduct could easily be read to “encompass [Garces] giving cards to one employee to circulate among the others.”

MCS (Br. 36) makes much of the supposed effect that Garces’s conduct had on the election results. Under MCS’s analysis, a clear union victory of five votes for, one vote against, union representation, suddenly becomes a union loss, by a margin of three to four due to Garces possibly – or not – handing the union card to one unit employee. Such accounting, however, is pure conjecture. *See Mid-Wilshire Healthcare Ctr.*, 349 NLRB 1372, 1373 (2007) (finding supervisor’s

conduct did not affect election results where employer failed to show that supervisor's conduct affected enough voters to change outcome).³

MCS claims (Br. 38 n.6) that the Board erred in granting summary judgment because Spony's affidavit raised "issues of fact that should have been addressed at a hearing." Asking for a hearing required MCS to "state what evidence it would produce to establish that the conclusions were incorrect" and to set forth "any material facts which would be developed at a hearing." *Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 829 (D.C. Cir. 1970). While an adversarial hearing must be held at some point in the process where genuinely contested factual issues are properly raised, a hearing is not required where no such issues exist. *Id.* at 830 (refusing to hear evidence relating to representation issue and granting summary judgment in related unfair labor practice proceeding where

³ MCS argues (Br. 36-37) that under *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), which the Board decided after it issued its first decision in this case, Garces's solicitation was "inherently coercive" conduct that materially affected the election. In *Harborside Healthcare*, the Board adopted a rule that supervisory solicitation is inherently coercive absent mitigating circumstances. *Id.* at 906. Although the Board did not apply *Harborside Healthcare* to this case, it is unclear whether MCS would have met its burden of proving objectionable conduct. In order to prove that the solicitation affected the election results, *Harborside* requires a party to provide specific facts showing whether the conduct was widespread or isolated, when it occurred, the extent to which the conduct was known, and whether it had a lingering effect on employees. *Id.* at 909. MCS's proffered evidence fails to address any of those questions.

employer offered no new previously unavailable evidence and gave the Board “nothing to hear”).

MCS’s evidence, consisting of vague assertions, was insufficient to show that Garces’s solicitations materially affected the election results. For example, MCS did not state who Garces supervised, how many other supervisors were in the unit or workplace, and whom he solicited. Such evidence was certainly at MCS’s disposal (or at least MCS has not shown why it was unavailable), and MCS, trying to reopen the record, had the burden of presenting such evidence. *Id.* at 829. As shown above, having failed to demonstrate any disputed material issues, MCS gave the Board “nothing to hear,” and the Board properly refused to further delay bargaining by holding a hearing on MCS’s claim of supervisory taint. *Id.* See also *F.W. Boelter, Co.*, 241 NLRB 567, 568 n.3 (1979) (finding summary judgment appropriate and refusing to admit newly discovered evidence, noting that employer’s factual assertions are merely based on information and belief and that it has failed to submit any evidence in support of its assertions), *enforced*, 624 F.2d 1105 (7th Cir. 1980).

MCS claims (Br. 38) that Garces’s conduct was so “widespread” that it “clearly interfered” with the employees’ freedom of choice. If Garces’s conduct was in fact “widespread,” then it was incumbent upon MCS to show the Board such evidence, which it decidedly did not do. Indeed, MCS’s characterization of

Garces's behavior as "widespread" contradicts its previous assertions that Garces's conduct was unknown to it, rendering MCS unable to file timely objections. In short, MCS presents an incompatible argument: the evidence was too difficult to discover, but sufficiently egregious enough to warrant a hearing.

3. MCS failed to move to reopen the record promptly upon discovery of its proffered evidence

In order to succeed in reopening the representation case record, the Board's Rules and Regulations require a party to show that it "moved promptly on the discovery of the evidence sought to be adduced." *See* 29 C.F.R. § 102.65(e)(2). If the Board's policy of expeditious resolution of questions relating to the establishment of a bargaining relationship is to have any effect, a party must strictly adhere to the Board's rules and regulations. *Heritage Nursing Ctr., Inc.*, 207 NLRB 826, 827 (1973). MCS offers no reason for its lengthy delay -- 6 months after its refusal to bargain -- and its behavior is directly at odds with the Board's well-settled policy of "expeditiously resolving questions concerning representation." (A. 140.) Therefore, the Board properly found that MCS's failure to move promptly after discovery of its evidence provides sufficient basis, "independent[] of the reasons discussed above," for refusing to reopen the record. (A. 140.)

When MCS refused to bargain with the Union, its March 20, 2003 letter to the Union provided only a hint of its reasons, stating that "an MCS supervisor was

improperly involved in organizational activities at MCS on behalf of [the Union].”

(A. 14.) MCS characterizes (Br. 39) the above statement as an “explicit explanation” that should have alerted the Board as to the basis for its refusal to bargain. However, MCS’s statement is anything but explicit. MCS did not present any details or facts regarding the identity of the supervisor, the timing of his actions, and the extent of his solicitation, despite its knowledge of Garces’s alleged activity.

In any event, though MCS told the Union the reason for its refusal, it did not alert the Board to the existence of a possible basis for objections until over 14 weeks later, in its June 13, 2003 answer to the General Counsel’s complaint. Even then, MCS’s answer did not contain specific information and stated only that the “election petition was tainted by unfair labor practices, including improper supervisory involvement in the organizing campaign.” (A. 30.) MCS then waited another 3 months, until September 23, 2003, to submit anything resembling a motion to reopen the record. At that time, MCS attached Spony’s affidavit and Arnold’s declaration to its response opposing the Board’s summary judgment motion, and it filed a first amended answer. (A. 61-73.) In those filings, MCS asserted, for the first time, a new and unsubstantiated claim of improper promises of job benefits in addition to its previous nonspecific allegations of “improper supervisory involvement.” In total, MCS inexplicably waited over 27 weeks from

the date of certification before offering any newly discovered evidence to the Board. (A. 140.) During that time, it never once took the initiative to ask the Board to reopen the representation case record, choosing instead to let the Board's unfair labor practice machinery grind on.

MCS attacks the Board's finding regarding promptness on several grounds, but its attacks fall far short of proving that the Board abused its discretion in finding that MCS failed to act promptly upon discovering its proffered evidence. First, MCS suggests that the Board exceeded the scope of remand by basing its decision on promptness, an issue that it did not consider in its first decision. As a general proposition, however, this Court has held that "[an] administrative tribunal is free on remand to reach the same result on different grounds." *City of Charlottesville v. FERC*, 774 F.2d 1205, 1212-13, (D.C. Cir. 1985) (quoting *Chicago & N.W. Transp. Co. v. United States*, 574 F.2d 926, 930 n. 5 (7th Cir.1978)). On remand, the Board was "bound to deal with the problem afresh" and was not under any constraints other than to have "further proceedings consistent with [this Court's] opinion." *SEC v. Chenery Corp.*, 332 U.S. 194, 200-01 (1947). Therefore, the Board, in determining whether to reopen the record, could properly consider grounds other than MCS's failure to show reasonable diligence.

MCS next claims (Br. 39-40) that it alerted the Board to Garces's improper union activity on May 12, when it submitted a position statement to the Region's investigating officer and attached Spony's affidavit. MCS's position statement, however, was never before *the Board* for consideration and is not part of the record.⁴ (A. 1-7.) Put simply, providing a document to the General Counsel during the investigation of an unfair labor practice charge, and providing a document to the Board, are not one and the same because what happens in the investigative stage is not before the Board when it adjudicates a case. The only papers that MCS provided to the Board were attached to its September 23, 2003 opposition to summary judgment (filed 6 months after refusing to bargain); it did not include the position statement. Consequently, the Board, when considering whether MCS acted promptly upon discovery of the evidence, did not have MCS's position statement and was unaware of when MCS first gave Spony's affidavit to the investigators. The Board cannot consider evidence not before it. MCS, therefore, errs in supporting its argument with nonrecord evidence.

MCS also criticizes (Br. 40) the Board for not explaining how much delay is acceptable. This accusation ignores the extreme length of time between when MCS allegedly became aware of Garces's conduct and when it finally informed the

⁴ With the filing of this brief, the Board is filing a motion to strike the inclusion of the position statement in the Joint Appendix filed by MCS because it was not part of the record before the Board.

Board. The Board did not know Garces's identity or any specifics regarding his involvement in the union campaign for approximately 6 months after MCS learned of this information. No reasonable interpretation of the Board's Rules and Regulations would find that MCS "moved promptly" in its disclosure. *See Heritage Nursing Ctr., Inc.*, 207 NLRB 826, 827 (1973) (rejecting proffered evidence as newly discovered where employer failed to explain why it could not have disclosed the evidence to the Board at the time of discovery rather than waiting until it had filed the answer to the complaint, nearly 7 months after the election); *see also* A. 140 (Member Hayes, concurring) ("[B]y any reasonable interpretation of the Board's Rules, [MCS] did not promptly come forward with its newly discovered evidences relative to a claim of previously unalleged objectionable conduct in the underlying representation proceeding.").

MCS points out (Br. 40 n.8) that Fed. R. Civ. P. 60(b)(2), which applies the same "reasonable diligence" standard as the Board, places a 1-year time limitation on a party coming forward with new evidence. MCS's suggestion that the Board apply a similar time limit demonstrates MCS's disregard for the purpose behind the Board's Rules and Regulations. The expeditious resolution of representation questions is critical to the Act's policy of encouraging collective bargaining. A year-long time limit would unduly delay resolution of the question concerning

representation and unjustifiably deny unit employees their right to have their election choice implemented through the appropriate certification.

Moreover, in the absence of employer unfair labor practices, representation resolutions are binding upon the parties, not for all time, but “for only 1 year” if no contract is reached, and “for no more than an additional 3 years” if the parties reach agreement.⁵ (A. 139.) MCS’s suggested approach would leave this representation year under a cloud of uncertainty in direct opposition to the statutory policy of definitive resolution of representation questions.

The policy reasons for expeditious resolution of representation issues are two-fold. First, such a rule prevents an employer from holding back evidence bearing on representation, causing the Board to make an erroneous determination on a less than complete record and requiring another election. *See NLRB v. Air Control Prod. of St. Petersburg, Inc.*, 335 F.2d 245, 252 (5th Cir. 1964).

Therefore, requiring an employer to prove that its alleged newly discovered

⁵ Where, as here, a union is recognized as the collective-bargaining representative of a unit of employees, that union is entitled to a presumption that it enjoys the support of a majority of the represented employees. *See Mar-Jac Poultry, Co.*, 136 NLRB 785, 786 (1962). (“[A]bsent unusual circumstances, an employer will be required to honor a certification for a period of 1 year.”) That presumption is conclusive during the term of any collective-bargaining agreement (up to 3 years) to which the union is a party. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996).

evidence meets the standard in order to litigate a representation issue in an unfair labor practice proceeding reduces “administrative and judicial waste.” *Id.*

Second, and more important, “the Board has the duty of implementing the statutory policy in favor of collective bargaining, and thus of expediting resolution of ‘questions preliminary to the establishment of the bargaining relationship.’” *Int’l Union of Elec., Radio, & Mach. Workers, AFL-CIO*, 418 F.2d 1191, 1196-97 (D.C. Cir. 1969) (quoting *NLRB v. O.K. Van Storage*, 297 F.2d 74, 76 (5th Cir. 1961)). Allowing an employer to raise issues during the unfair labor practice stage (after a bargaining request has been made) that could have been raised in the representation stage (post election) -- particularly MCS’s suggested 1-year delay period -- creates “an interminable delay” that thwarts the policy of encouraging collective bargaining. *Air Control Prod.*, 335 F.2d at 252. *See also Neuhoff Bros. Packers, Inc.*, 154 NLRB 438, 439-40 (1965) (permitting employer to relitigate representation issues “would place a premium upon the withholding of evidence in representation proceedings and encourage practices designed to cause protracted delay”), *enforced*, 362 F.2d 372 (5th Cir. 1966). Therefore, in the absence of newly discovered evidence of which it was “excusably ignorant,” MCS cannot further delay collective bargaining by litigating a claim of supervisory taint in this unfair labor practice proceeding.

C. The Board Sufficiently and Reasonably Answered the Court's Questions

Following the Court's guidance on remand, the Board addressed the Court's four questions regarding the Board's reasonable diligence standard. In doing so, the Board used its precedent and the context of this case to guide its response. As explained above (pp. 19-20), the Board, in answering the Court's first two questions, clarified (A. 139) that it applies "only one standard" to determine reasonable diligence, that MCS did not meet that standard, and that MCS's failure to endeavor to uncover any evidence limited the ways it could meet the standard. The answer to the first two questions necessarily limited the Board's response to the Court's third question, which assumed the existence of two standards, as well as the applicability of the "conducted investigation" standard to this case. Finally, responding to the Court's fourth question, the Board explained that MCS's lack of notice of facts supporting a potential objection did not justify its failure to exercise reasonable diligence. Contrary to MCS, the Board properly answered the Court's remand.

1. The Board's single standard for determining excusable ignorance requires a party to show that even with reasonable diligence it could not have uncovered the evidence

Responding to the Court's first two questions, the Board explained that, while its precedent may have created the appearance of two standards, the Board

applies a single standard for establishing excusable ignorance. That standard requires the proponent of the evidence to show that “with reasonable diligence, the evidence could not have been discovered in time to take appropriate and timely action in the representation proceeding.” (A. 138.) While the Board does not apply a separate “conducted investigation” standard, it does allow a party to meet its single standard by showing that “it did in fact act with reasonable diligence to uncover evidence of objectionable conduct and that despite those efforts it failed to discover the proffered evidence.” (A. 137.) Thus, when the Board appeared to apply two different standards, it was merely applying its single standard to a context “when a party introduced evidence of an actual unsuccessful search for evidence of objectionable conduct.” (A. 138.)

MCS criticizes (Br. 19, 29) the Board’s standard for imposing an affirmative duty on employers, with or without notice of impropriety, to look for misconduct. MCS claims (Br. 29-30) that the imposition of such a duty without providing guidance regarding what type of search to undertake is arbitrary. MCS misreads the Board’s decision. While the 7-day window “requires parties to act promptly in unearthing and reporting to the Region any potentially unobjectionable conduct,” the Board’s hypothetical standard does not require an employer or a union to affirmatively police for potential campaign misconduct. *See Rhone-Poulenc, Inc.*, 271 NLRB 1008, 1008 (1984), *enforced* 789 F.2d 188 (3d Cir. 1985). However,

the duty that the Board's standard does place on parties seeking to reopen the record is to show that even if it had acted with reasonable diligence, it could not have discovered this information. Thus, under the hypothetical standard, an employer that claims no notice of allegedly objectionable conduct could demonstrate that, even if it had engaged in prophylactic reasonable diligence, it would not have uncovered the conduct because, for instance, the impropriety was so hidden or the witnesses unavailable. (A. 139.)

This case provides an apt example of an employer that could not reasonably claim that it had no way of discovering whether improprieties had occurred. MCS offers no explanation for why, given Garces's alleged open boasting and the circulating rumors in a small facility that reached even non-unit employees, it could not discover this evidence in time to bring it to the Board's attention. The basis of the Board's finding that MCS was not reasonably diligent is not MCS's failure to investigate what it did not know; rather, the Board faults MCS for failing to show that, given the context within which Garces's alleged misconduct occurred, it would not have been able to discover this conduct. Thus, as this case makes clear, an employer cannot meet the standard with a bare assertion, as MCS did here, that it simply "had not previously known" of the offending behavior, when the facts it seeks to admit show that the offender was proclaiming his

misdeeds to those around him and the rumors of his behavior were known to non-unit employees. (A. 57.)

Therefore, contrary to MCS's assertions (Br. 21), the Board is not placing the duty on employers, or unions, "to assume the existence of the unseen" and to "identify invisible miscreants within seven days." Such hyperbolic statements misconstrue what the Board requires, which is for the party claiming misconduct after the objections period has closed to affirmatively show why, acting with reasonable diligence, it could not have discovered the belated evidence that it now seeks to proffer in its effort to invalidate the union's certification.

2. The Board's previous answers necessarily responded to the Court's questions regarding the "conducted investigation" standard

The Court's third question posed several inquiries that arise solely in the context of what the Court termed the "conducted investigation" standard. (A. 125.) The Court asked whether, in the absence of notice, "there is a minimum level of investigation" or whether the Board requires "specific inquiries," and if so, "what those inquiries must be and how they are to be conducted without engaging in coercive and unlawful investigation or interfering with the Act." (A. 125.) MCS criticizes (Br. 22) the Board's answer to this question, claiming it failed to obey the "Court's explicit instruction" to delineate what a party must do to establish

reasonable diligence. However, the Board's answer to the Court's first two questions necessarily restricted its response to these queries.

The Court asked those questions based on the assumption that the Board applied a "conducted investigation" standard to claims of newly discovered evidence. As the Board made clear (A. 137-39), it does not apply such a standard and does not require a party to undertake a search to discover possible misconduct to meet the reasonable diligence standard. However, as discussed above, while the Board does not apply a separate "conducted investigation" iteration of its reasonable diligence standard, it does allow a party to meet that standard by establishing that it did in fact act with diligence to uncover the conduct and, despite those efforts, it failed to discover the evidence. (A. 137-38.) Here the Board did not address the parameters of whether MCS met its duty of reasonable diligence when conducting an investigation because those facts were not before it. (A. 137-38.) Simply put, the Board could not speak to the propriety of MCS's investigation because there was no such investigation to examine.

The Board responded to the Court's concerns about coercive interrogations of employees, noting that it does not require an employer who has no notice of misconduct to question employees in order to prove reasonable diligence. However, the Board does not rule out such inquiries as an investigative option, and permits such questioning, explaining that "a party need not question employees in

a way that might arguably constitute interference with rights protected by the Act or objectionable conduct, in order to be found to have exercised reasonable diligence.” (A. 139.)

MCS faults (Br. 33) the Board’s answer, arguing that an employer who questions employees without first possessing a concrete reason for the interrogation runs the risk of violating the Act. However, “conclusory allegations” regarding “how difficult it is for an employer to communicate with its employees once a union is elected because of the employees’ fear of reprisal [and] the employer’s fear that it will be held to have committed an unfair labor practice for questioning employees concerning their union affiliation” does not excuse an employer from exercising reasonable diligence. *Skyline Corp. v. NLRB*, 613 F.2d 1328, 1336-37 (5th Cir. 1980). The employer, even with no notice of misconduct, can question employees as long as those questions do not interfere with the employees’ rights under the Act. An employer can certainly question employees who want to cooperate with an investigation. More importantly, a reasonable employer would avail themselves first of accessible and available witnesses – their supervisors – before undertaking questioning of their employees. Applying those principles here, MCS could have questioned Garces and other supervisors without running afoul of the Act.

3. Lack of notice does not excuse a party from the obligation to prove reasonable diligence

The Court's final question to the Board asked how a party "without notice shows that the information sought to be admitted as new could not have been discovered in the exercise of due diligence." (A. 125.) The Board responded by explaining that notice, or the lack thereof, was "just one of many factors for the Board to consider" when determining reasonable diligence. (A. 139.) In recognition of this fact, the Board did not create a different reasonable diligence standard, or an exception for having to comply with the standard, for those employers with no notice. Instead, the Board explained that lack of notice does not absolve an employer of proving excusable ignorance, as "there are many facts that a party exercising reasonable diligence would discover even in the absence of notice of those facts." (A. 139.) Moreover, as the Board recognized, "[w]hether evidence could not have been discovered even through the exercise of reasonable diligence depends on the circumstances of the particular case." (A. 139.) The Board's refusal to develop a bright line exemption to the duty to prove excusable ignorance for those employers with no notice embraces the reality that demonstrating "excusable ignorance" turns on "the nature of the evidence, the number of persons with knowledge of the evidence and their relationship to the party, and how well known the potential objection is[.]" (A. 139.) The Board

therefore properly recognized that the malleability of each situation in which a party claims excusable ignorance demands an equally flexible test.

An application of these factors to this case demonstrates the efficacy of the Board's standard even in a situation where the employer lacks notice of the underlying misconduct. Here, the evidence involved a common form of election objection, supervisory taint, and the alleged supervisor was responsible for a small group of employees. MCS's proffered information consists of a non-unit employee's report that the objectionable conduct was the subject of an open claim made at the employer's place of business, accompanied by a brazen boast of not caring who knew about the asserted supervisor's involvement. (A. 16, 58.) The Board examined the proffered evidence and concluded that, in light of the nature of the evidence presented, MCS failed to demonstrate that even reasonable diligence—which, here, could have “entail[ed] making inquiry of available witnesses, such as asserted supervisor Garces” (A. 139)—would not have uncovered the supervisory prouion conduct.

Further, binding the Board to a no-notice exemption for proving excusable ignorance thwarts the Board's strong statutory interest in the prompt and definitive resolution of questions concerning representation. Allowing a party to file new objections for an indefinite period “leaves open to continual questioning the validity of a Board certification . . . and would create uncertainty and a lack of

finality” to the Board’s election procedures. *Reichart Furniture Co.*, 236 NLRB 1698, 1698 (1978). The Board’s application of the reasonable diligence standard prevents a recalcitrant employer from coming forward months after the election with information regarding alleged previously hidden misconduct, thereby defeating any hope of productive bargaining. Finally, as the Board pointed out (A. 139), the Board’s certification, unlike a court judgment, does not bind the parties for all time. Rather, as noted earlier (p. 38), in the absence of employer unfair labor practices, a Board certification of a representative will bar a new election for only 1 year if no contract is agreed to, and for no more than an additional 3 years if an agreement is reached. As the Board aptly explained (A. 139), “[t]he provisional and perishable nature of the Board’s decisions in representation proceedings heightens the importance of finality.”

CONCLUSION

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

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June 2012

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

MANHATTAN CENTER STUDIOS, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 12-1017, 12-1104
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	2-CA-35394

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,840 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

s/ Linda Dreeben
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Dated at Washington, DC
this 13th day of June, 2012

STATUTORY ADDENDUM

Except for the following, all applicable statutes and regulations are contained in the Petitioner/Cross-Respondent's opening brief.

Relevant provisions of the National Labor Relations Act as amended

(29 U.S.C. §§ 151 et. seq.):

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. 9 [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.

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.

Relevant Portions of the Federal Rules of Civil Procedure:

Rule 60. Relief from a Judgment or Order

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

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)	

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, DC
this 13th day of June, 2012