

Nos. 12-1031 & 12-1505

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

1621 ROUTE 22 WEST OPERATING COMPANY, LLC
d/b/a SOMERSET VALLEY REHABILITATION AND
NURSING CENTER

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

1199 SEIU UNITED HEALTHCARE WORKERS
EAST, NEW JERSEY REGION

Intervenor

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JILL A. GRIFFIN
Supervisory Attorney

DANIEL A. BLITZ
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-1722

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	1
Statement of the issue presented	4
I. The Board’s findings of fact and statement of the case	4
A. The representation proceeding.....	4
1. The Union petitions to represent a unit of employees	4
2. After obtaining prepublication releases, the Union distributes campaign materials	4
3. On election day, the union reminds its supporters to vote	7
4. The Board agent used a Board-sanctioned table-top voting booth for the election, without objection from the parties the union wins the election and Somerset files objections seeking to overturn the result.....	8
5. The Board overrules Somerset’s objections and certifies the union as the unit employees’ bargaining representative.....	11
B. The unfair labor practice proceeding	12
II. The Board’s conclusions and order	13
Statement of related cases and proceedings.....	14
Standard of review	14
Summary of argument.....	16

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
Argument.....	18
I. The Board reasonably overruled Somerset’s election objections, and therefore properly found that Somerset unlawfully refused to bargain with the union and provide it with requested information.....	18
A. Applicable principles	19
B. The Board reasonably overruled Somerset’s allegation that the union’s campaign propaganda was objectionable	21
1. Applicable principles	21
2. The Board reasonably rejected Somerset’s claim that the words “I’m voting yes” on the campaign flyer constituted “pervasive misrepresentations” or “artful deceptions”	23
C. The Board reasonably overruled Somerset’s allegation that the union engaged in “improper electioneering”	31
1. The Board reasonably rejected Somerset’s contention that the Union engaged in objectionable election-day electioneering under <i>Milchem</i> or <i>Boston Insulated Wire</i>	31
2. The Board reasonably found that the union’s conduct was not objectionable under <i>Peerless Plywood</i>	36
D. The Board reasonably overruled Somerset’s allegation that the election should be set aside because the Board-sanctioned voting booth did not provide enough privacy	38

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
1. Applicable principles	38
2. The Board reasonably rejected Somerset’s claim that employees’ privacy was compromised	40
E. Member Becker reasonably determined that he had no duty to recuse himself	46
1. Introduction and standard of review	46
2. Somerset’s recusal request was untimely; in any event, Member Becker reasonably declined to recuse himself	49
F. The Board’s decision was properly issued	54
Conclusion	61

TABLE OF AUTHORITIES

Cases	Page(s)
<i>NLRB v. Acme Indus. Co.</i> , 385 U.S. 432 (1967)	19
<i>Adolph Coors Co. v. FTC</i> , 497 F.2d 1178 (10th Cir. 1974)	51
<i>Allegheny Ludlum Corp.</i> , 333 NLRB 734 (2001)	28
<i>Amalgamated Clothing & Textile Workers Union v. NLRB</i> , 736 F.2d 1559 (D.C. Cir. 1984)	20,39
<i>Atkins v. United States</i> , 556 F.2d 1028 (Ct. Cl. 1977)	59
<i>Avante at Boca Raton, Inc.</i> , 323 NLRB 555 (1997)	40
<i>BFI Waste Services</i> , 343 NLRB 254 n.2 (2004)	24,25
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964)	3
<i>Boston Insulated Wire & Cable Co.</i> , 259 NLRB at 1118-19	33
<i>Boston Insulated Wire & Cable Systems, Inc. v. NLRB</i> , 703 F.2d 876 (5th Cir. 1983)	32
<i>Braniff Airways, Inc. v. Civil Aeronautics Bd.</i> , 379 F.2d 453 (D.C. Cir. 1967)	58

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Bricklayers, Local #5-N.J.</i> , 337 NLRB 168 (2001).....	55
<i>Cable Car Advertisers, Inc.</i> , 336 NLRB 927 & n.1 (2001), <i>enforced</i> , 53 F. App'x 467 (9th Cir. 2002)	56
<i>Cavert Acquisition Co. v. NLRB</i> , 83 F.3d 598 (3d Cir. 1996)	19
<i>Ceridian Corp. v. NLRB</i> , 435 F.3d 352 (D.C. Cir. 2006).....	40
<i>Certainteed Corp. v. NLRB</i> , 714 F.2d 1042 (11th Cir. 1983).....	22
<i>Chamber of Commerce of the United States v. NLRB</i> , 2012 WL 1664028 (D.D.C. May 14, 2012)	58
<i>Champaign Residential Services, Inc.</i> , 325 NLRB 687 (1998).....	24
<i>C.J. Krehbiel Co. v. NLRB</i> , 844 F.2d 880 (D.C. Cir. 1988).....	20
<i>Columbine Cable Company, Inc.</i> , 351 NLRB 1087 (2007).....	45
<i>Deffenbaugh Indus., Inc. v. NLRB</i> , 122 F.3d 582 (8th Cir. 1997).....	20
<i>E&J Gallo Winery v. Gallo Cattle Co.</i> , 967 F.2d 1280	50

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Exxon Chemical Co. v. NLRB</i> , 386 F.3d 1160 (D.C. Cir. 2004).....	45
<i>Family Serv. Agency v. NLRB</i> , 163 F.3d 1369 (D.C. Cir. 1999).....	20
<i>Freund Baking Co.</i> , 330 NLRB 17 & n.3 (1999).....	3
<i>G. Heileman Brewing Co.</i> , 290 NLRB 991 & n.1 (1988).....	56
<i>Gormac Custom Mfg.</i> , 335 NLRB 1192 (2001).....	24,27
<i>Imperial Reed & Rattan Furniture Co.</i> , 118 NLRB 911 (2007).....	45
<i>In re Kensington Ltd.</i> , 368 F.3d 289 (3d Cir. 2004).....	50
<i>Kwik Care Ltd. v. NLRB</i> , 82 F.3d 1122 (D.C. Cir. 1996).....	20
<i>Marquette Cement Mfg. Co. v. Federal Trade Commission</i> , 147 F.2d 589 (7th Cir. 1945).....	59
<i>McDonnell Douglas Corp.</i> , 324 NLRB 1202 & n.4 (1997).....	56
<i>Metro Health Foundation, Inc.</i> , 338 NLRB 802 (2003)	19

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Metropolitan Council of NAACP Branches v. FCC</i> , 46 F.3d 1154 (D.C. Cir. 1995).....	47
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 n.4 (1983)	19
<i>Midland National Life Insurance Co.</i> , 263 NLRB 127 (1982).....	21,22,23,24
<i>Milchem, Inc.</i> , 170 NLRB 362 (1968).....	34,35,36
<i>New Process Steel, L.P. v. NLRB</i> , 130 S. Ct 2635 (2010).....	54,55,56,57, 58
<i>North American Directory Corp. v. NLRB</i> , 939 F.2d 64 78-79 (3d Cir. 1991)	22
<i>NLRB v. Acme Indus. Co.</i> , 385 U.S. 432 (1967)	19
<i>NLRB v. A.J. Tower Co.</i> , 329 U.S. 324 (1946)	14,39
<i>NLRB v. ARA Servs., Inc.</i> , 717 F.2d 57 (3d Cir. 1983)	15,19
<i>NLRB v. Bayliss Trucking Corp.</i> , 432 F.2d 1025 & n.7 (2d Cir. 1970).....	41
<i>NLRB v. Browning-Ferris Indus. of</i> Pa., 691 F.2d 1117 (3d Cir. 1982)	18

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>NLRB v. Buitoni Foods Corp.</i> , 298 F.2d 169 (3d Cir. 1962)	15
<i>NLRB v. Cedar Tree Press, Inc.</i> 169 F.3d 794 (3d Cir. 1999).....	44
<i>NLRB v. Dickinson Press, Inc.</i> , 153 F.3d 282 (6th Cir. 1998).....	20
<i>NLRB v. L&J Equipment Co.</i> , 745 F.2d 224 (3d Cir. 1984)	15
<i>NLRB v. Mattison Machine Works</i> , 365 U.S. 123 (1961)	20
<i>NLRB v. Regency Grande Nursing and Rehab. Ctr.</i> ,, 441 Fed. App'x 948 (3d Cir. 2011).....	46
<i>NLRB v. Regency Grande Nursing and Rehab. Ctr.</i> ,, 453 Fed. App'x 193 (3d Cir. 2011).....	46
<i>NLRB v. Regency Grande Nursing and Rehab. Ctr.</i> ,, 462 Fed. App'x 183 (3d Cir. 2012).....	46
<i>NLRB v. Rhone-Poulenc, Inc.</i> , 789 F.2d 188 (3d Cir. 1986)	22, 24
<i>Pacific Bell Tel. Co.</i> , 344 NLRB 243 & n.1 (2005).....	55

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Physicians & Surgeons Ambulance Service, Inc.</i> , 356 NLRB No. 42, slip op. at 1 (2010) <i>enforced</i> , 2012 WL 1449166 (D.C. Cir.)	39,40,45,46
<i>Polymers, Inc.</i> , 174 NLRB 282 (1969).....	39
<i>Power v. FLRA</i> , 146 F.3d 995 (D.C. Cir. 1998).....	50
<i>Reno Hilton Resorts v. NLRB</i> , 196 F.3d 1275 n.10 (D.C. Cir. 1999)	45
<i>Royal Lumber Co.</i> , 118 NLRB 1015 (1957).....	45
<i>Schurze Communications, Inc. v FCC</i> , 982 F.2d 1057 (7th Cir. 1992).....	50
<i>Service Employees Local 121RN (Pomona Valley Hospital Medical Center)</i> , 355 NLRB No. 40, slip op. at 5 (2010)	46,47,48,51, 52,53
<i>Siteman v. City of Allentown</i> , 695 A.2d 888 (Pa. Cmwlth. 1997) (court	59
<i>Sprain Brook Manor Nursing Home, LLC</i> , 348 NLRB 851 (2006).....	25
<i>St. George Warehouse, Inc. v. NLRB</i> , 420 F.3d 294 (3d Cir. 2005)	15
<i>St. Margaret Mem'l Hosp. v. NLRB</i> , 991 F.2d 1146 (3d Cir. 1993)	14, 23

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>St. Vincent Hosp., LLC</i> , 344 NLRB 586 (2005).....	40
<i>Trencor, Inc. v. NLRB</i> , 110 F.3d 268 & n.12 (5th Cir. 1997).....	22
<i>U.S. v. Chem. Found., Inc.</i> , 272 U.S. 1 (1926)	58
<i>U-Haul Co. of Nevada, Inc. v. NLRB</i> , 490 F.3d 957 (D.C. Cir. 2007).....	21,22
<i>United States v. Rosenberg</i> , 806 F.2d 1169, 1173 (3d Cir. 1986).....	50
<i>United States v. Will</i> , 449 U.S. 200 (1980)	59
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 44, 488 (1951).....	15
<i>Valley v. Rapides Parish School Board</i> , 118 F.3d 1047 (5th Cir. 1997).....	59
<i>Van Dorn Plastic Machinery Co. v. NLRB</i> , 736 F.2d 343 (6th Cir. 1984).....	22
<i>Virginia Concrete Corp.</i> , 338 NLRB 1182 (2003).....	37
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 665 (1982).....	54

Statutes: **Page(s)**

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

Section 3(b) (29 U.S.C. § 153(b))..... 17,55,56,57,58
Section 7 (29 U.S.C. § 157) 19
Section 8(a)(1) (29 U.S.C. § 158(a)(1))..... 2,4,14,18,19
Section 8(a)(5) (29 U.S.C. § 158(a)(5))..... 2,4,14,19
Section 9(c) (29 U.S.C. § 159(c)) 3
Section 9(d) (29 U.S.C. §159 (d))..... 3
Section 10(a) (29 U.S.C. § 160(a)) 2
Section 10(e) (29 U.S.C. § 160(e)) 3,54
Section 10(f) (29 U.S.C. § 160(f)) 3
Section 10(j) (29 U.S.C. § 160(j))..... 14

Rules:

Fed. R. App. P. 28(a)(9)(A) 18

Regulations:

5 C.F.R. § 2635.101(b)(14)..... 48,51,52
5 C.F.R. § 2635.502(a)..... 47
5 C.F.R. § 2635,502(b)(iv)..... 47
5 C.F.R. § 2635.101(b)(8).....48

Executive Order

Exec. Order No. 13,490 (Jan. 21, 2009).....48

Other Authorities:

*Annotation, Construction and Application of Rule of Necessity Providing that
Administrative or Quasi-Judicial Officer is Not Disqualified to Determine a*

Matter Because of Bias or Personal Interest if Case Cannot be Heard Otherwise,
28 A.L.R. 6th 175 (2007) 59

The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?
24 Hofstra L. Rev. 817 (1996)..... 59

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

Nos. 12-1031 & 12-1505

**1621 ROUTE 22 WEST OPERATING COMPANY, LLC
d/b/a SOMERSET VALLEY REHABILITATION AND
NURSING CENTER**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**1199 SEIU UNITED HEALTHCARE WORKERS
EAST, NEW JERSEY REGION**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of 1621 Route 22 West Operating Company, LLC doing business as Somerset Valley Rehabilitation and Nursing Center (“Somerset”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Decision and Order of the Board issued on December 30, 2011, and reported at 357 NLRB No. 153. (A.4-7.)¹ In its Decision and Order, the Board found that Somerset violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”) by failing and refusing to recognize, bargain with, and provide information to, 1199 SEIU United Healthcare Workers East, New Jersey Region (“the Union”) as the collective-bargaining representative of Somerset’s employees. (A.4-7.) The Union has intervened on the side of the Board.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Order is a final order with respect to all parties under Section 10(e) and (f) of the

¹“A.” refers to the Joint Appendix filed by the Company. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to the Company’s opening brief.

Act (29 U.S.C. § 160(e) and (f)). This Court has jurisdiction pursuant to Section 10(e) and (f) of the Act because the unfair labor practices occurred in New Jersey.

As the Board's Order is based, in part, on findings made in an underlying representation proceeding (Board Case No. 22-RC-13139), the record there is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159 (d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) authorizes judicial review of the Board's actions in a representation proceeding for the limited purpose of deciding whether to "enforce[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 (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of the Court in the unfair labor practice case. *See, e.g., Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999).

Somerset filed its petition for review on January 9, 2012; the Board filed its cross-application for enforcement on February 27, 2012. Both filings were timely.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably overruled Somerset's election objections and therefore properly found that Somerset violated Section 8(a)(5) and (1) of the Act by refusing to recognize, bargain with, and provide information to, the Union as the certified representative of Somerset's employees.

I. THE BOARD'S FINDINGS OF FACT AND STATEMENT OF THE CASE

A. The Representation Proceeding

1. The Union petitions to represent a unit of Somerset's employees

Somerset operates a rehabilitation and nursing facility in New Jersey. (A.5;A.231,300.) On July 22, 2010, the Union filed a petition with the Board, seeking to represent a bargaining unit of all full-time and regular part-time and per diem non-professional employees. (A.149.) The parties entered into a stipulated election agreement scheduling a Board-conducted secret-ballot election for September 2, 2010. (A.10;A.152-55.)

2. After obtaining prepublication releases, the Union distributes campaign materials

As part of its campaign, the Union produced and distributed a flyer and two videos. Union organizer Brian Walsh followed the Union's customary prepublication steps by obtaining employees' consent to use their names, images, and statements in campaign materials. He contacted employees in the proposed

unit, explained that the Union was making a campaign flyer, and asked participants to sign a release form. He made sure that employees read the release forms and understood how the Union would use them, explaining to employees that the Union would make a flyer similar to the one the Union ultimately distributed. He also explained that the flyer would be part of a Union mailing. (A.10-11,16-18;A.267-72,270-71,277,279,343.)

The release form states “RELEASE” on top, and gives the Union “permission to use pictures made of [the employee] and comments made by [the employee] on this date in video tapes, printed material, digital and online media, advertisements, and any other material. . . .” (A.16-18;*see, e.g.*,A.669.) It also provides spaces for employees to answer two questions. The first question asked employees to “[s]peak from the heart—[h]ow does having a union improve your life and/or the life of your family[.] Be specific.” The second question asked employees, “[h]ow does having a union help you provide better [patient] care? Be very specific.” (A.10,16-18;*see, e.g.*,A. 669.)

Walsh obtained signed release forms from approximately 49 employees. (A.10,17-18;A.669-733.) Many employees answered the questions. (A.10-11,17;A.278,669 670,672-83.) Walsh and another union organizer took photographs and videos of these employees to use in two campaign videos and a

flyer. (A.18;A.268,279-80,816.) The videos feature testimonials from approximately 16 employees. (A16;A.816.)

The Union distributed the flyer to employees in August.

(A.10,16;A.276,666-68.) The cover shows two group photographs of employees with the words “At Somerset We’re Voting Yes for 1199SEIU!” between them.

(A.10,16;A.666.) Inside, the flyer displays a box with the words “Our Opportunity to Vote Yes is Here!” along with details about the upcoming election.

(A.16;A.667.) The box also features photographs of individual employees with the employee’s name and statement supporting the Union. (A.10,16;A.667.) Above and below are the names of additional employees and their statements of support.

(A.10,16;A.667.) When the flyer is fully opened, it contains the words, “We’re voting yes for 1199SEIU” in the center of the page and shows additional photographs of employees and their names and statements. (A.10,16;A.668.)

More than 45 employees offered statements in support of the Union in the flyer. (A.10-11,16;A.278,347-48,667-68.) Most of the statements are substantially similar or identical to employees’ responses on the release forms or statements on the videos. (A.18-19,24-25;A.348,677-733,816.)

3. On election day, the Union reminds its supporters to vote

On the afternoon of election day, while the polls were open, Union organizer Walsh texted approximately nine off-duty employees stating, “this is Brian from

1199 reminding you to go vote YES!!! Election ends at 4!!! [W]e are winning keep it up!!!” (A.43,48;A.282-83,287,734.) Walsh based his statement that the Union was “winning” on his interpretation of the Union’s polling of support before the election. (A.43,52;A.288-9.)

Walsh was not at Somerset’s facility when he sent messages to employees, and he did not know whether employees had already voted when he sent the messages. The three employees who testified that they received the text message saw it only after they had voted. No employee received a message from Walsh while waiting in line to vote. (A.44,50; A.295-97,525-26532,706,726,734.) Walsh sent several text messages *after* the polls had closed to let employees know that the Union had won the election and that there would be a party at a nearby restaurant. (A.44;A.623.)

Similarly, Union organizer Venette called approximately seven employees on election day reminding them to vote. (A.45, 50;A.535.) Venette was not at Somerset’s facility when he made these calls. These employees were scheduled to work in the evening, after the polls had closed, and had previously indicated to Union agents that they planned to vote at the afternoon session. When Venette called them, he did not know whether they had actually voted. (A.45;A.537-38,542,545.)

Venette spoke to just one of the employees he called. That employee, Tracy Thomas, was not at Somerset's facility during the call. Venette left voicemail messages for the six others. (A.45;A.538,615-16.) One employee, Keisha Rice, who had already voted, listened to the voicemail while she was at her other job. (A.46,49,50;A.573.)

There is no evidence that any employee listened to voicemails or answered a call from either union organizer while they were waiting to vote at the facility. (A.50.)

4. The Board agent used a Board-sanctioned table-top voting booth for the election, without objection from the parties; the Union wins the election and Somerset files objections seeking to overturn the result

Pursuant to the stipulated election agreement, there were two voting sessions, one in the morning and one in the afternoon at Somerset's facility. Although the Board agent was 10 minutes late, the Board agent and the parties had ample time to prepare for the election. The Board agent conducted the election in Somerset's conference room using the Board's three-sided "table-top" voting booth, which she had brought with her. Neither the Union's nor Somerset's representatives objected to its use. (A.63,70;A.293-94,330,340,332-33,801-07.)

The "table-top" voting booth is made out of corrugated cardboard, and may be characterized as a stand-alone shield. It can be placed in a base or on a table surface. (A.70&n.23,83-84;A.801-07.) The voting booth—the dimensions of

which are described in the hearing officer's report (A.70; A.308-09)—shields voters' lower arms and hands as they mark their ballots. (A.83;A.801-07.) The Board agent did not use the base. (A.70;A.330,332.)

During the morning session, without objection from the parties, the Board agent situated the voting booth on a table surface at the end of a counter by the windows, just before a raised shelf at the end of the counter. (A.61,63,70;A.293-94,370,372,396,473,747-48,808-11.) There was a small television located on the raised-shelf at the end of the counter, or on one side of the voting booth. (A.82-83;A.338,740-41,808.) The ballot box was at the other side of the counter. (A.70;A.445.)

For the afternoon session, without objection from the parties, a conference table was placed parallel to the above-mentioned counter. (A.334,336,812-14,751-53.) The Board agent placed the voting booth at the end of the table that was closest to the windows at the back wall. (A.355,751-53,812-14.)

During both sessions, the two observers (Shannon Napolitano for the Union and Sheena Orozco for the Company (A.305,375)) and the Board agent sat at a conference table located to the right of the room, viewed from the doorway. This conference table was parallel to the counter and, in the afternoon, it was parallel to the second conference table that had been added. (A.70;A.375,737-38.) The observers sat to the right, with their backs to the right wall of the room. The Board

agent sat at the far end, near the windows and facing the door. During the morning session, the booth was sometimes slightly angled toward the conference table where the Board agent and observers sat, and, during that session, its position shifted slightly. During the afternoon session, the opening of the voting booth faced the back wall and the windows. (A.71;A.306,375,751-53.) Because the room had no clock, union observer Napolitano, without objection, placed her cell phone on the table so observers could use it as a clock. She did not make or receive any phone calls during the voting periods. (A.67; A.451-52,521.)

When employees voted in the morning, they essentially had their backs angled slightly to the observers and Board agent; in the afternoon, voters' backs faced the back wall. (A.70;A.812-14.) Portions of their arms outside of the booth were visible, along with portions of their backs and shoulders. (A.80;A.377.) There was no evidence that any individual saw how any voter marked a ballot. (A.84.) The election proceeded without disruptions and without any objections from the parties or the observers. (A.83,85-86.)

The Union won the election, 38 to 28 with 5 challenged ballots. (A.10;A.156.) Subsequently, Somerset filed 14 objections to the election, seeking to have the results set aside. (A.157-60,175-90.)

5. The Board overrules Somerset's objections and certifies the Union as the unit employees' bargaining representative

On January 19, 2011, following an 11-day hearing, a hearing officer issued a report recommending that the Board overrule all of Somerset's objections and certify the Union. (A.13-94.) Somerset filed exceptions to portions of the report. (A.175-90.) The Board (Chairman Liebman and Member Becker; Member Hayes, dissenting) issued a Decision and Certification of Representative on August 26, 2011, adopting the hearing officer's findings and recommendations, and certifying the Union as the exclusive bargaining representative of the unit employees.² (A.10-12.)

On September 9, 2011, Somerset filed a motion for reconsideration of the Board's decision. (A.191-201.) Somerset argued that the Board erroneously failed to find merit in certain objections. (A.191-92,196-99.) Somerset also argued that Member Becker should have recused himself from the case. (A.191,193-95.) On November 16, 2011, the Board (Chairman Pearce, Members Becker and Hayes) denied Somerset's motion.³ (A.95-97.) Member Becker issued a separate statement rejecting Somerset's recusal argument. (A.98-99.)

² Member Pearce was recused and did not participate in this case. (A.240 n.1.)

³ Chairman Pearce, who was recused, was a member of the panel, but did not participate in deciding the merits of Somerset's motion. (A.96 n.2.)

B. The Unfair Labor Practice Proceeding

On August 30, 2011, the Union requested that Somerset bargain.

(A.221,236,238.) Somerset refused, asserting that the Union did not make a valid request. (A.214.) The next day, the Union requested information, specifically the name, job title, date of hire, regular hours of work, hourly rate of pay, and home address for all unit employees, as well as daily work schedules for August 2011.

(A.236.) Somerset did not respond. (A.4-5;A.221.)

Acting on a charge filed by the Union (A.203), and while Somerset's motion for reconsideration was pending, the Board's Acting General Counsel issued a complaint alleging that Somerset violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain, and provide requested information. (A.4;A.208-12.) In its answer, Somerset denied the allegations. (A.4;A.214.) Somerset further stated that it "specifically reserves and does not waive its right to refuse to bargain to test certification" in the event the Board denied its motion for reconsideration of the Decision and Certification of Representative. (A.4;A.215.)

The Board's Acting General Counsel filed a motion for summary judgment, and the Board issued a notice to show cause why the motion should not be granted. (A.4;A.217-26,254.) Somerset filed a response, claiming that the Union did not make "a valid or effective request to bargain" because it sent its request directly to

Somerset rather than its attorney, and that the matter warranted a hearing.

(A.4;A.258.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On December 30, 2011, the Board (Chairman Pearce and Members Becker and Hayes) issued a Decision and Order granting the motion for summary judgment and finding that Somerset's refusal to bargain was unlawful.⁴ (A.4-7.) The Board concluded that Somerset's assertion that the Union's request for bargaining was invalid did not raise a genuine issue of material fact warranting a hearing and rejected Somerset's claims. (A.4.) Moreover, the Board found that, because Somerset refused to bargain with the Union, it was clear that Somerset was testing the Union's certification. (A.4-5.)

The Board concluded that all representation issues raised by Somerset in the unfair labor practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that Somerset neither offered to adduce any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances that would require the Board to reexamine its representation decision. (A.5.) The Board also found that there were no factual

⁴ Chairman Pearce, who was recused, was a member of the panel, but did not participate in deciding the merits of the proceeding. (A.4 n.1.)

issues warranting a hearing with respect to the Union's request for information.

(A.5.)

The Board's Order requires Somerset to cease and desist from refusing to bargain with the Union and, 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; and to take certain affirmative remedial actions. (A.6-7.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. Board counsel are not aware of any related case or proceeding that is pending, completed, or about to be presented in this or any other court, or in any state or federal agency. On April 25, 2012, the Court issued an order consolidating the instant case for "disposition only" with Third Circuit Case Nos. 12-2122 and 12-2726, involving Somerset's appeal of a temporary injunction issued under 29 U.S.C. § 160(j) in a separate unfair labor practice case.

STANDARD OF REVIEW

The Board has a "wide degree of discretion" to establish "the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). *Accord St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1152, 1155 (3d Cir. 1993). The law "with respect to the atmosphere to be maintained in an

election campaign is Board-made under the lawmaking authority delegated to it by Congress.” *NLRB v. ARA Servs., Inc.*, 717 F.2d 57, 66 (3d Cir. 1983) (en banc). Thus, “courts must ordinarily defer to the Board’s policy judgments respecting the conduct which will be deemed so coercive as to interfere with employee free choice.” *Id.*

The Board’s factual findings in a representation case are “conclusive” if supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *NLRB v. L&J Equipment Co.*, 745 F.2d 224, 230 (3d Cir. 1984). A court may not displace the Board’s choice between two fairly conflicting views, even if it could justifiably have made a different choice had the matter been before it *de novo*. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Further, it is settled that the Board’s credibility determinations “should not be reversed unless inherently incredible or patently unreasonable.” *St. George Warehouse, Inc. v. NLRB*, 420 F.3d 294, 298 (3d Cir. 2005); *see also NLRB v. Buitoni Foods Corp.*, 298 F.2d 169, 171 (3d Cir. 1962).

SUMMARY OF ARGUMENT

Somerset violated the Act by refusing to bargain with, and provide information to, the Union as the elected representative of its employees. Somerset does not dispute that it refused to recognize the Union, but claims the Board erred in certifying the Union. There is no credible evidence to support Somerset's objections.

First, contrary to Somerset's claim that the Union's campaign flyer was objectionable because it allegedly contained "artful deceptions" or "pervasive misrepresentations," the credited evidence establishes that the Union thoroughly verified the employees' support for the Union, including obtaining release forms and seeking individual written responses supporting the Union. The flyer produced as a result of these voluntary contributions is readily identifiable as campaign propaganda.

The Board also reasonably rejected Somerset's argument that the Union engaged in objectionable election-day electioneering by sending text and voicemail messages to union supporters to remind them to vote, because, under governing legal principles, there was nothing improper about the Union's effort to remind its supporters to vote. Further, contrary to Somerset's related claim, there was no evidence that the text messages, voicemails, or phone calls amounted to a prohibited type of electioneering or "mass employee" captive audience speech.

Somerset's claim that the Board-sanctioned voting booth used for the secret-ballot election did not provide voters with sufficient privacy is founded on discredited evidence that Somerset's election observer could see how employees voted. Applying precedent that was directly on point, the Board found that the election was fairly conducted, with the appropriate level of privacy.

Somerset raises two equally unavailing procedural arguments. First, it claims that Member Becker should have recused himself from participating in the underlying representation case based on his past employment with the Service Employees International Union. However, not only was Somerset's recusal argument untimely, but Member Becker followed recusal principles this Court has already approved.

In its final attempt to overturn the election, Somerset argues that the Board "did not have a valid quorum to act" because, after its delegation to the three-member panel, one member recused himself from the merits. Contrary to Somerset's claim, the Board's delegation of the unfair labor practice case to a three member panel is consistent with the text of Section 3(b) and the Board's longstanding practice. Therefore, the Order is valid.

ARGUMENT**THE BOARD REASONABLY OVERRULED SOMERSET'S ELECTION OBJECTIONS, AND THEREFORE PROPERLY FOUND THAT SOMERSET UNLAWFULLY REFUSED TO BARGAIN WITH THE UNION AND PROVIDE IT WITH REQUESTED INFORMATION**

Before this Court, Somerset raises three arguments in support of its effort to overturn the election: first, the Union distributed campaign literature containing “pervasive misrepresentations” (Br.28-36); second, the Union improperly electioneered through phone calls, text messages, and voicemails to voters on election day (Br.36-41); and, third, the Board-approved voting booth did not provide voters with adequate privacy (Br.41-48). The record evidence does not support these claims.⁵

⁵ Although Somerset devotes over a full page of its facts (Br.17-18) to discussing—in sections entitled “[o]ther improper electioneering” and “[e]lection irregularities cast doubt on the secrecy of the election”—claims it raised in its objections, it has not presented *argument* in its opening brief on those matters, thereby waiving them. *See NLRB v. Browning-Ferris Indus. of Pa.*, 691 F.2d 1117, 1125 (3d Cir. 1982); Fed. R. App. P. 28(a)(9)(A).

In any event, as it does throughout its brief, Somerset mischaracterizes the record evidence regarding these abandoned matters. For example, contrary to Somerset’s claim (Br. 18), the Board *did not find* that there was a “circus-like atmosphere” during the election or any behavior, such as alleged dancing, that was loud or disruptive. (A.67-68.) The Board *did not find* that the Board agent conducting the election was inattentive. (A.68.) Likewise, Somerset’s discussion of union observer’s Napolitano’s cell phone use during the election is inaccurate. Napolitano merely used her cell phone as a clock during the election, without objection from the Board agent or anyone else. (A.67;A.567.) Further, Somerset claims that employee Jacques, a roving observer for the Union asked employees

A. Applicable Principles

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. Employers must bargain with their employees' chosen representative, and a refusal to bargain violates this duty under Section 8(a)(5) and (1) of the Act.⁶ Likewise, employers must provide presumptively relevant information, like the Union sought here, concerning the terms and conditions of employment of unit employees. *See, e.g., NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967); *Metro Health Foundation, Inc.*, 338 NLRB 802 (2003).

Somerset does not dispute that it has refused to bargain with, and provide information to, the Union but argues that it had no obligation to do so because the Board erred in overruling its election objections, and therefore improperly certified the Union. Accordingly, if the Board did not abuse its discretion in overruling Somerset's election objections, Somerset's actions violated the Act, and the Board is entitled to enforcement of its Order. *See, e.g., NLRB v. ARA Servs., Inc.*, 717 F.2d 57, 69 (3d Cir. 1983) (en banc); *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 600-01, 610 (3d Cir. 1996).

Grey and Carpio if they had voted, and asked Carpio how he had voted. As the Board found, these matters were unobjectionable. (A.42.)

⁶ A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

There is a strong presumption that an election conducted under safeguards provided by Board procedures reflects employees' true desires. *See, e.g., Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997). The party seeking to set aside a Board-conducted election bears a "heavy burden." *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996); *see also NLRB v. Mattison Machine Works*, 365 U.S. 123, 124 (1961) (per curiam). The objecting party must demonstrate through specific evidence not only that improprieties occurred, but also that "they interfered with the employees' exercise of free choice to such an extent that they materially affected" the secret-ballot election results. *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988).

The determination whether the objecting party has carried its burden is "fact-intensive" and thus "especially suited for Board review." *Family Serv. Agency v. NLRB*, 163 F.3d 1369, 1377 (D.C. Cir. 1999). Further, "elections are not automatically voided whenever they fall short of perfection." *NLRB v. Dickinson Press, Inc.*, 153 F.3d 282, 284 (6th Cir. 1998). The Board's electoral process 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." *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984).

B. The Board Reasonably Overruled Somerset's Allegation That the Union's Campaign Propaganda was Objectionable

Somerset alleged that the Union published and distributed “pro-Union literature . . . containing employee photographs and statements purportedly made by employees that were obtained by deceit or misrepresentation and/or without permission” (A.15.) In support of its claim, Somerset contends that the campaign flyer contained statements—“I’m voting yes” and “We’re voting yes”—that the named or photographed employees they did not make or authorize. (A.10.) According to Somerset, such statements were “pervasive misrepresentations” (Br.28,30) by the Union requiring the election to be set aside. The Board properly found, however, that the flyer was unobjectionable campaign propaganda.

1. Applicable principles

The Board does not entertain post-election challenges based upon allegations that misrepresentations of material fact prevented employees from making a free and untrammelled choice in an election. *Midland National Life Insurance Co.*, 263 NLRB 127, 129-32 (1982) (“*Midland*”). In *Midland*, the Board determined that it would treat employees as mature individuals capable of identifying campaign propaganda for what it is. *Id.* at 132. Consequently, the Board does not examine election campaign propaganda for “truth or falsity.” *Id.* at 133. However, the Board will “intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is.” *Id.* See also *U-*

Haul Co. of Nevada, Inc. v. NLRB, 490 F.3d 957, 962 (D.C. Cir. 2007). Even if forgery is shown, an objecting party must show that it had such a tendency to mislead employees on a material issue as to deprive them of free choice. See *North American Directory Corp. v. NLRB*, 939 F.2d 74, 78-79 (3d Cir. 1991).

In *NLRB v. Rhone-Poulenc, Inc.*, 789 F.2d 188, 191 (3d Cir. 1986), this Court approved the Board's adoption of the *Midland* rule as "consistent with both the [Act] and the rule governing elections and . . . entitled to the Court's deference." Other circuits have approved the Board's *Midland* rule. See *Trencor, Inc. v. NLRB*, 110 F.3d 268, 275-76 & n.12 (5th Cir. 1997) (collecting cases). Indeed, "no area is more within the expertise of the Board than the proper limits of campaign propaganda and the impact of employer and union statements upon the employees' exercise of free choice." *Certainreed Corp. v. NLRB*, 714 F.2d 1042, 1047 (11th Cir. 1983).

In *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984) ("*Van Dorn*"), the Sixth Circuit accepted *Midland* in principle and did not overturn the election results; the Court stated, though, that an election could also be set aside "where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected."

Here, the Board, applying principles from *Midland* and *Van Dorn*, found the Union's conduct was unobjectionable and it did not materially affect the election.⁷

2. The Board reasonably rejected Somerset's claim that the words "I'm voting yes" on the campaign flyer constituted "pervasive misrepresentations" or "artful deceptions"

The Board reasonably found that the flyer was unobjectionable campaign propaganda. As a preliminary matter, Somerset admits (Br.4) that this is campaign literature and does not challenge the Board's finding that the flyer was not a "forged document[] which render[ed] the voters unable to recognize propaganda for what is." (A.10.) This is hardly surprising, because, as the Board explained, (A. 26), this type of campaign propaganda is "precisely" the type of material employees may judge for themselves.

Instead, Somerset reprises its argument that the flyer contained "pervasive misrepresentations," or "artful deception[s]" (Br.30) requiring the election to be set aside. Somerset's primary argument is that the flyer's attribution of "I'm voting yes" to certain named or photographed employees, and the inclusion of the language "We're voting yes" was a "pervasive misrepresentation" or "artful

⁷ Although Somerset cites (Br.28) to *St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1159 (3d Cir. 1993), in its discussion of "courts . . . carv[ing] out an exception to" *Midland*, in that case this Court simply referenced *Van Dorn*. 991 F.2d at 1158. The *St. Margaret* Court explicitly applied *Midland* in analyzing the objection at issue, and recognized that the Third Circuit had approved the Board's *Midland* rule in *NLRB v. Rhone-Poulenc, Inc.*, 789 F.2d 188, 191 (3d Cir. 1986).

deception,” because employees did not expressly authorize the use of *those exact words*. (Br.30)

The Board reasonably found that Somerset’s argument was without merit. (A.10-11,23-28.) As the Board explained (A.10-11,23-28), because the Union had received clear and sufficient evidence of the employees’ support, its insertion of the words “I’m voting yes” into employees’ statements—and the use of the words “We’re voting yes” next to group photographs—did not amount to misrepresentation or deception, regardless of whether employees expressly authorized attribution of those specific words. At bottom, the Board stated, “voting yes” was a logical reflection of employees’ stated support for the Union in the releases they signed. (A. 10-11, citing *Gormac Custom Mfg.*, 335 NLRB 1192, 1200-01 (2001)); *see also Champaign Residential Services, Inc.*, 325 NLRB 687, 687 (1998).

In analyzing Somerset’s argument, the Board explained that in *BFI Waste Services*, 343 NLRB 254, 254 n.2 (2004), in which the Board found that, notwithstanding *Midland*, it refused to “condone the creation and attribution of quotes to employees . . . where the union makes no prepublication effort to verify that the quotes fairly represent[ed] the views of the quoted employees.” In contrast, here the Board emphasized (A.11) that the Union’s prepublication

verification effort rendered the concerns expressed in *BFI Waste Services* “inapposite.”

Indeed, substantial evidence supports the Board’s finding that the “Union made precisely the sort of prepublication effort to verify announced [in *BFI Waste Services*].” (A11.) Thus, based on the credited facts, the Board reasonably found that the Union did exactly what employees who signed the forms, provided answers to questions, and stated their sincere support for the Union in videos, would have understood the Union was going to do: use their names, images, and words in a campaign flyer to persuade potential voters. (A.11,25.)

Interactions between the Union and employees provide solid evidence that the Union verified employees’ support before publishing the flyer. First, the Union obtained signed release forms from more than 45 employees, explicitly authorizing the Union to use their names, images, and statements in campaign literature. *See Sprain Brook Manor Nursing Home, LLC*, 348 NLRB 851, 851 (2006). Although one employee whose name appears on the flyer—Miguel Roque—did not recall signing a release form, it is undisputed that he told other employees he was going to vote for the Union, and he is accurately quoted on the flyer.⁸ (A.11,24-25;A.564.)

⁸ Somerset did not present any witnesses at the hearing, besides Roque, who testified that they did not sign a release form. Although it claims (Br.31) that employees Claudine Hunter and Hector Gonzalez—who were apparently named on

Second, the employees' answers to questions on the release forms demonstrated their support for the Union. In response to questions about how the Union could improve their lives and help provide patient care, the employees described how the Union would improve their work lives. (A.11,25.) On the campaign flyer, the words "I'm voting yes" preceded the employees' stated reasons from those forms for supporting the Union. For example, employee Keisha Rice wrote on her form, "[b]etter benefits, better staffing that is also better for the patients here in the facility." (A.715.) She is quoted on the flyer as stating, "I'm voting yes for better benefits and better staffing." (A.668.) Employee Sharon Smith wrote on her form, "better job security, better pay." She is quoted on the flyer as stating, "I'm voting yes for better pay and better job security. (A.668,725.) Employee Victor Fonka wrote on his form, "better job security and peace of mind. Makes me feel appreciated for the work I do." He is quoted on the flyer as stating, "I'm voting yes for better job security and peace of mind and to feel appreciated for the work I do." (A. 697,690.) Employee Tracey Thomas stated on her form, "more job security, better benefits" and "less worrying about job security."

the mailing address portion of the flyer (A.666-68)—did not sign a release form, this contention is unsupported. The record is silent about whether these two employees gave the Union permission to use their names in its materials. (A.21 n.4.) As the objecting party, Somerset had the burden of presenting documentary or testimonial evidence in support of its argument concerning the "pervasive" nature of the misrepresentation.

(A.728.) She is quoted on the flyer as stating, “I’m voting yes so I don’t have to worry about job security.” (A.668.) The Board noted that several employees’ expressions of support for the Union in the videos were an additional source for the comments on the flyer. (A.11,29.) Thus, contrary to Somerset’s claim, the Union made a sound verification effort before using employees’ support in campaign propaganda.

Additionally, and significantly, the Board explained (A.11) that Somerset overlooked the context in which the words appeared. Voters could interpret the words “I’m voting yes” as an expression of the named employees’ support for the Union in this type of campaign propaganda. (A.11.) As the Board observed (A.11), no reasonable employee would think that the words “We’re voting yes!” next to a picture of a group of employees meant that the employees got together and literally exclaimed, “We’re voting yes!” A reasonable reader would understand those words as characterizing the pro-union sentiments of the employees as a whole. As such, they were not a misrepresentation at all, much less a substantial one. (A.11,25-28.) *See Gormac Custom Mfg.*, 335 NLRB at 1192. Thus, as the Board found, there was also no “artful deception.”

On review, Somerset primarily argues (Br.32-33) that the Board erred in finding that the Union made sufficient prepublication verification efforts. Somerset asserts (Br.32-33) that the answers to questions on the release forms were

an inadequate measure of employees' support for the Union, claiming the questions "could have been answered by people who did not necessarily intend to vote for the union." (Br.33.) Somerset is wrong. The questions were not theoretical ones designed to ascertain the views of disinterested individuals regarding the merits of unionization. Instead, they were part of a release form allowing names and photos to be used on union propaganda.

Somerset raises a related argument that "people who did not necessarily intend to vote for the union" could have signed the forms and answered the questions. (Br.33.) The argument is an irrelevant because how employees actually voted in the election is a different matter entirely from the contents of the flyer. The Board reasonably rejected Somerset's argument (Br. 34-36), which was utterly unsupported by any evidence. As the Board noted (A.11 n.5), employees cast their votes in private and "remained free, at any time, to announce to their fellow employees that they had changed their minds and no longer supported representation."⁹

Somerset also contends that the Board was not justified in relying on the release forms and answers to the questions because "the releases were specifically limited to purported expressions of support for the Union" only on "*the date the*

⁹ Somerset's reliance (Br.29-30,36) on *Allegheny Ludlum Corp.*, 333 NLRB 734 (2001), is misplaced. That case involved an employer's polling employees by systematically soliciting them to participate in a campaign video.

release was signed.” (Br.33 (emphasis supplied).) This argument defies logic. The release states that an employee is consenting to having his or her statements used by the Union in a variety of media. (A.28.) Clearly, this contemplated future use by the Union. Somerset’s argument suggesting a continuing obligation to verify the employee’s stated support is not supported in fact or law.

There is no merit to Somerset’s assertion that “none” (Br.31&n.6) of the quotations on the flyer matched what was written on the release forms. The Board found that most of the quotations were substantially similar or virtually identical to answers on the release forms and statements on the videos. (A.24;*see, e.g.*, A.707,710,715-17,722,728,816.) That the Union may have used *part of* an employee’s answer in a quotation instead of the *entire* answer is hardly “deceitful” or a “misrepresentation.”

Somerset attacks (Br.31,34) the validity of some quotes, principally arguing that employee and union supporter Jillian Jacques “fabricated” (Br.34) certain statements on employees’ release forms.¹⁰ Union supporter Jacques spoke to certain co-workers who had signed release forms, asking how they wanted to respond to the form’s questions. Based on these conversations, Jacques wrote some answers on the forms for these employees. (A.21;A.410,413-14,416,418.)

¹⁰ There is no evidence that Jacques acted as an agent of the Union when she completed answers on release forms for other employees.

The flyer only included one response that Jacques had written without having previously spoken to an employee. That response was attributed to Maria Berrios, who had otherwise indicated her support for the Union in the release form she completed in Spanish and in videotaped statements. (A.24;A.675,816) The flyer stated that Maria Berrios was interested in “educational opportunities.” The Board reasonably determined that this single response was a minor inconsistency, because it was undisputed that Berrios supported the Union. (A.22; A.816.)

Finally, there is no merit to Somerset’s claim (Br.31) that employees “Dande, Rice, and Mora . . . never told anyone associated with the Union that they were voting yes” or authorized the Union to publish the statement that they were voting “yes,” does not advance its argument. It is undisputed that these employees signed release forms. (A.19-20.) Similarly, although the Board found that the flyer did not accurately quote Mora, there is no evidence regarding who wrote the answers on Mora’s release form. (A.20.) In any event, this minor discrepancy does not detract from the Board’s finding that the flyer did not contain “pervasive misrepresentations” materially affecting the election results. Likewise, Somerset’s claim (Br.31) that the signatures or answers on a few of the release forms were “unreliable” because of alleged “handwriting” or “pen” discrepancies is equally meritless. Once again, Somerset offers unsubstantiated speculation. Somerset did not establish that any of the release forms had been forged. All of the employees

who testified, except for Roque, who otherwise indicated his support for the Union, confirmed their signature on the release form. *Cf. NLRB v. Gissel Packing Co.*, 395 U.S. 575, 606 (1969) (explaining that employees who sign authorization cards should be bound by the clear language of what they sign).

C. The Board Reasonably Overruled Somerset’s Allegation That the Union Engaged In “Improper Electioneering”

Somerset alleges that union organizers Walsh’s and Venette’s text messages, voicemails, and phone calls reminding employees to vote on election day amounted to improper “conversations” or electioneering “at or near” the polling area. Somerset also asserts that the messages were a type of impermissible “mass assembly,” captive-audience speech. The Board rejected these arguments, finding the short get-out-the-vote messages here were far from improper.

1. The Board reasonably rejected Somerset’s contention that the Union engaged in objectionable election-day electioneering under *Milchem* or *Boston Insulated Wire*

In *Milchem, Inc.*, 170 NLRB 362, 362 (1968), the Board held that it will set aside an election on a showing of “prolonged conversations between representatives of any party to the election and voters waiting to cast ballots” As the Board explained, “[t]he final minutes before an employee casts his ballot should be his own, as free from interference as possible.” *Id.* *Milchem* applies “only when the objectionable conversations were prolonged and the

conversations occurred at the polling place itself or while employees were waiting in line.” *Boston Insulated Wire & Cable Systems, Inc. v. NLRB*, 703 F.2d 876, 881 (5th Cir. 1983) (citations omitted).

In rejecting Somerset’s argument that the Union violated *Milchem*, the Board found (A.50,52) no evidence that Walsh or Venette contacted any voter who was actually waiting to vote, let alone that they had any sort of conversation with prospective voters while they were waiting to vote in the polling area. Somerset does not seriously challenge the Board’s finding. Instead, it speculates that conversations between the Union agents and voters “could have” (Br.40-41) occurred while employees were waiting to vote in the polling area. Baseless speculations cannot replace the credibility-based Board finding that such conversations did not occur. (A.50,52.)

Somerset’s attempt to bolster its objection by relying on *Boston Insulated Wire* and related cases is unavailing. (Br.36-37.) In assessing claims of improper election-day electioneering that does not take place in the polling area or where employees are waiting in line to vote, the Board “makes a judgment, based on all the facts and circumstances, whether the electioneering substantially impaired the exercise of free choice so as to require the holding of a new election.” *Boston Insulated Wire & Cable Sys. Inc. v. NLRB*, 703 F.2d at 881. The Board’s totality-of-the-circumstances analysis considers whether the alleged electioneering

occurred within or near the polling place; whether it was conducted by a party to the election; whether it occurred within a designated no-electioneering area; whether it was contrary to the specific instructions of a Board agent; and the extent and nature of the alleged electioneering. *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118-19 (1982).

There is no evidence that any of the factors under the *Boston Insulated Wire* totality-of-the-circumstances analysis support a finding that the Union's conduct was objectionable. (A.50,52.) As a baseline matter, there is no evidence that the Union's phone calls and text messaging took place "at or near" the polling place prior to employees' voting, or that any employee received a message in such an area prior to voting. *See Boston Insulated Wire & Cable Co.*, 259 NLRB at 1118-19. Although Somerset broadly claims (Br.37) that "texts and phone calls . . . occurred while employees were in the workplace and sometimes near the polling place," it exaggerates the record evidence. For example, it could hardly be said that an employee driving to the facility was "at or near" the polling place. Likewise, while the evidence established that three employees saw Walsh's text message while they were at "the workplace," these employees had already voted. (A.50.) Somerset does not cite any additional evidence in support of its claim.

Next, there is no evidence that the Union agents' activity occurred within a designated "no electioneering" area or that it was "contrary to the instructions of

the Board agent” supervising the election. (*Id.*) Finally, the Board found that the remaining factor—the “nature and extent” of the activity—did not support Somerset’s argument that the messages substantially impaired employees’ free choice. Somerset, seemingly relying on cell phone records, cites the *number* of calls and messages in support of its argument. (Br.37.) The fundamental flaw in Somerset’s argument is that the mere fact that union organizers made calls and sent text messages throughout the day on election day (and not only during voting hours) is hardly grounds for setting aside the election.

The Board explained (A.50) that although there were numerous messages reminding employees to vote, the evidence did not establish that Walsh and Venette knew whether employees had already voted, or where voters were, when they sent text messages or called. There was no evidence that any voter waiting to vote received a call or message at or near the polling place. Additionally, the cell phone records do not contain any evidence about the content of the text messages Walsh sent to employees during the morning, or whether employees read them (A.36,50.) Walsh sent nine messages to employees during the afternoon voting session, but just three saw the text message, and that was after they had voted. (A.36,50;A.569.) The phone records also do not say anything about whether an employee answered a call, what the call was about, or whether and when an

employee accessed a voicemail. The mere number of calls and messages, then, cannot be viewed in isolation, as Somerset suggests. (A.50.)

Next, the Company makes (Br.37) several unsupported claims that the “nature” of the messaging was improper. These contentions are meritless. First, the hearing officer credited Walsh, based on her “careful” analysis of his demeanor and testimony (A.48), that his statement that the Union “was winning” was based on the Union’s polling of employee support before the election, and not on tallying how employees were actually voting. (A.40,43,52,59;A.289.) Somerset claims (Br.37) that the Board erred in crediting Walsh’s testimony; but the Company ignores that Walsh unequivocally answered “no” when he was asked whether this statement was based on his keeping track of voters. (A.289.) He explained in detail the grounds for his belief that, based on preelection information, the Union would win. (*Id.*) The Board was fully justified in crediting this testimony.

Second, the hearing officer, crediting Walsh and Venette, found that there was no evidence that they told employees they knew whether they had voted. (A.40.) Indeed, Venette called one employee to remind her to vote in the afternoon; however, she had already voted in the morning session. (A.37,40.) And neither Walsh nor Venette knew where voters were when they called or messaged them. (A.40.) Third, Walsh’s reminder to employees to vote “yes” is hardly

objectionable, because he was targeting union supporters. Finally, there is no credible evidence that Walsh or Venette asked employees how they had voted.

On review, Somerset presses its own discredited script, speculating again about what “could” have happened or what would have made “sense.” (Br.38.) Tellingly, Somerset does not even reference the heavy burden it must meet to overcome the Board’s credibility findings. *See.* p.15 Here, the hearing officer explicitly stated (A.48) that she considered witnesses’ demeanor and carefully listened to their testimony. The Company has provided no reason for disturbing her credibility-based findings, which show no objectionable electioneering under either *Milchem* or *Boston Insulated Wire*.

2. The Board reasonably found that the Union’s conduct was not objectionable under *Peerless Plywood*

In *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953), the Board established a limited election safeguard concerning preelection speeches, holding that “employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for an election.” The Board cautioned, however, that this rule will not “prohibit the use of any other legitimate campaign propaganda or media.” *Id.* at 430.

The Board reasonably rejected Somerset’s contention that the union agents’ activity constituted a type of prohibited “captive audience” speech under *Peerless*

Plywood. (A.51-52.) Somerset argues (Br.39-40) that the “barrage of text messages was certain to induce the type of ‘mass psychology’ that the *Peerless* rule was designed to prevent.” The Board rejected Somerset’s hyperbolic claim.

Contrary to Somerset’s characterization (Br.40), there was not a “barrage” of messages to a “massed assembly” of employees at work within 24 hours of the election. (A.51.) To the contrary, as the Board found, “the *only* evidence that employees were together when receiving a message from the Union on the day of the election was that Pratts and Mabliangan were together when Pratts received a text message from Walsh.” (A.51 (emphasis supplied).) Mabliangan did not receive a text message. (A.51.) Moreover, at the time they read the message, both had already voted. (A.38; A.706,724,736).

The Board noted (A.51) that the instant case “was akin” to *Virginia Concrete Corp.*, 338 NLRB 1182 (2003), in which the Board found that an employer’s text message to unit drivers’ mobile devices in their vehicles within 24 hours of the election did not violate *Peerless Plywood*. As the Board explained (A.51), the text message at issue in *Virginia Concrete* was analogous to permissible campaign literature, and unlike a group meeting, employees were not held “captive.” They could delete it or scroll past it, and were not required to leave it on the screen. This is “precisely the nature of the text messages and the phone

calls and voicemails sent by the [Union] on the day of the election” here. (A.51.)

The text messages therefore did not constitute objectionable conduct.

D. The Board Reasonably Overruled Somerset’s Allegation that the Election Should be Set Aside Because the Board-Sanctioned Voting Booth Did Not Provide Enough Privacy

Somerset claims that because the Board-sanctioned voting booth did not provide voters with adequate privacy, the election should be set aside. (A.69.) The Board reasonably rejected this claim. After evaluating the credited evidence under the appropriate standard, the Board found that the election was conducted fairly and with the appropriate level of privacy. Simply put, there was no credible evidence that anyone observed how a voter marked his or her ballot.

1. Applicable principles

The Board has conducted secret ballot elections for over 75 years. In a typical election, such as this one, voters mark a ballot with an “X” in the square of their choice (“yes” or “no”) and deposit their ballots in a ballot box. (A.804.) The Board currently uses several different types of voting booths to ensure the privacy of each employee’s vote. *See* 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://www.nlr.gov/publications/operations-management-memos> (last visited Jul.16, 2012).¹¹ The Board has described its “table-top” voting booth as follows:

Unlike the Board’s standard metal booth, which is a stand-alone cubicle with curtains that shield voters from head to lower torso, the Board’s alternative table-top booth shields voters’ lower arms and hands as they mark their ballots within the hollow confines of the booth.

Physicians & Surgeons Ambulance Service, Inc., 356 NLRB No. 42, slip op. at 1 (2010), *enforced*, 2012 WL 1449166 (D.C. Cir. Apr. 25, 2012) (unpublished judgment).

The Board has a “wide degree of discretion in establishing the procedure and safeguards necessary to insure the free and fair choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). And the Board’s election process is “an intensely practical exercise designed to maximize employee free choice under the very real constraints and conditions that exist in the nation’s workplaces.” *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1564 (D.C. Cir. 1984).

In *Polymers, Inc.*, 174 NLRB 282, 282 (1969), the Board held that in cases involving challenges to how an election was conducted, the central issue “is whether the manner in which the election was conducted raises a reasonable doubt

¹¹ As of 2004, the Board had not received any complaints regarding the use of its alternative voting booths, including the table-top one. *General Counsel Responses to Questions*, NLRB General Counsel Memo 04-02 (April 22, 2004).

as to the fairness and validity of the election.” With respect to allegations regarding voting booths, the Board has unequivocally confirmed that, under the *Polymers* standard, it will not overturn an election in which an NLRB-sanctioned voting booth is used (as was the case here) absent evidence that someone actually witnessed how a voter marked his or her ballot. Under this standard, suspicions not supported by actual evidence are insufficient. *Physicians & Surgeons Ambulance Service*, 356 NLRB No. 42, slip op. at 1 (2010); accord *St. Vincent Hosp., LLC*, 344 NLRB 586, 587 (2005); *Avante at Boca Raton, Inc.*, 323 NLRB 555 (1997). The Board’s interpretation of its own precedent is entitled to deference, *see, e.g., Ceridian Corp. v. NLRB*, 435 F.3d 352, 355 (D.C. Cir. 2006), as the District of Columbia Circuit recognized in endorsing the Board’s use of the table-top voting booth at issue here. *Physicians & Surgeons Ambulance Service, Inc. v. NLRB*, 2012 WL 1449166 (Apr.25, 2012), at *1-*2.

2. The Board reasonably rejected Somerset’s unsupported claim that employees’ privacy was compromised

The Board reasonably found that Somerset failed to demonstrate that the use and placement of the Board’s table-top voting booth compromised the secrecy of the election. The Board based its finding on its reasonable application of its own precedent and its careful consideration of credited witnesses’ testimony, which did not demonstrate that anyone saw how a voter marked a ballot. (A.84.)

Significantly, as the Board found (A.84), *Physicians & Surgeons* was “directly on point and controlling in the instant case.” Thus, in *Physicians & Surgeons*, the Board rejected the employer’s argument that the Board agent’s use of the Board’s table-top voting booth was objectionable, finding that there was no evidence that anyone saw how a voter marked his ballot. Virtually the same circumstances are present here. As in *Physicians & Surgeons*, the parties did not object to the use of the table-top voting booth placed on a counter (and later a table). (A.84;A.333.) Indeed, the Board agent specifically asked if the parties were okay with the placement of the voting booth, and the parties answered affirmatively. (*Id.*) The Company’s silence about these important matters does not constitute a binding “waiver,” but its failure to object at the time certainly “does blunt the force of its argument,” pursued after-the-fact, that the voting booth was inadequate. *NLRB v. Bayliss Trucking Corp.*, 432 F.2d 1025, 1028 & n.7 (2d Cir. 1970).

With respect to the position of the voting booth, the Board reasonably noted (A.84) that the observers and Board agent were seated several feet away from the voting booth. (A.809.) Indeed, they were even further from the voting booth than the observers in *Physicians & Surgeons*. (A.84.)

As the Board recognized, under the *Physicians & Surgeons* analysis, the key issue is whether credible evidence established that anyone saw how a voter marked

his or her ballot.¹² (A.84.) The Board reasonably focused, first, on the testimony of voters and observers. As the Board found (A.84), voters' testimony did not establish that anyone reasonably thought their ballot had been seen. Thus, voters offered nothing more than "vague impressions about the privacy of the voting booth," which are not a sufficient basis for setting aside the election. (A.85.) More significantly, as the Board stated (A.85), the *only* Somerset witness who asserted that ballots were actually seen was its discredited observer, Orozco. During a series of leading questions by Somerset's attorney, Orozco testified that she could see voters' hands through the bottom notches of the booth, and noticed which side of the ballot a voter's hand was on. (A.81.) She also claimed that she could see voters' movements reflected in a small television in the corner of the room. (A.73, 75.)

The hearing officer, affirmed by the Board, had ample reasons for discrediting Orozco's testimony, finding that Orozco simply was "not [a] believable" witness. (A.81.) As a baseline matter, Orozco never testified that she saw how any particular voter actually marked his or her ballot. She testified instead about the alleged lack of privacy in the booth, hand movements, and being able to see through the notches on the booth. Her testimony was fraught with

¹² Somerset does not argue that anyone observed a voter's ballot before being deposited into the ballot box. Its argument is limited to the voting booth.

contradictions. Indeed, Orozco’s testimony was fatally imprecise because she offered no details about the ballots she allegedly saw, including the number of ballots or whose ballots they were. (A.81.) Further, all of her testimony was in response to leading questions—she offered no independent testimony about these matters. And although she claimed she could see through the notches on the booth, the Board explained that the physical dimensions and location of the booth and Orozco’s position at the conference table—along with her inconsistent testimony about where the booth was located—rendered her claim utterly implausible.

(A.81.)

Moreover, as the Board observed, her testimony on cross-examination was “extremely inconsistent.” (A.81.) Significantly, despite allegedly seeing through the notches on the booth, Orozco admitted that she did not even “look” at or pay any attention to the voting booth during the morning session. (A.465-66.) Finally, despite her claim of employee complaints about privacy, Orozco could not identify a single employee who allegedly complained. (A.468.) Significantly, as the Board noted, Orozco never raised any concerns with the Board agent. (A.82;A,466.)

The Board also discredited her testimony and the testimony of other witnesses that they could see the reflection of voters’ hands in the small television screen. The Board reasonably explained that this testimony was implausible, given the arrangement of the conference room, and noted that, in any event, there

was no claim that anyone could see how a voter actually marked a ballot. In sum, the Board reasonably found that there was no credible evidence—from Orozco or anyone else—that anyone actually saw how a voter marked his or her ballot.

Somerset’s remaining arguments are without merit. (Br.41-49.) Somerset first argues that the voting booth did not comply with standards set forth in the Board’s Casehandling Manual and Rules and Regulations. These documents simply establish that the Board agent conducting an election should ensure that voters mark their ballots in the secrecy of a “voting booth.” They do not specify that any particular type of voting booth must be used. Indeed, Section 11304.3 of the Board’s Casehandling Manual (Part Two, Representation Proceedings) states that a voting booth may be cardboard. And, as noted above, the Board has used “table-top” voting booths for several years, and such booths provide voters with a private compartment for marking their ballots. Moreover, Somerset overlooks that the Casehandling Manual is not binding authority. *See, e.g., NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794, 796 (3d Cir. 1999). Somerset argues (Br.42) that the “cardboard shield” used in the election was not a “booth” because the Board agent did not use it with the base that came in the voting kit. In support of its argument, Somerset claims (Br.42) that the hearing officer “erroneously excluded” exhibits (A.786-800) regarding the “voting kit, including how the booth was actually designed to be used.” The hearing officer’s decision to exclude such evidence was

reasonable. She properly rejected the exhibits as “too speculative,” because the base was not used in the election and was therefore not relevant to the analysis.¹³ (A.70n.22;A.607-08.)

As a final matter, Somerset argues at length (Br.43-48) that the Board should have applied its line of precedent where a non-Board sanctioned voting booth was used. The Board reasonably rejected that argument. (A.85.) Contrary to Somerset’s claim, the Board agent used a Board-sanctioned voting booth. The Board agent brought it to the election and it bore the Board’s seal. (A.340.) Thus, the cases on which Somerset relies, such as *Columbine Cable Company, Inc.*, 351 NLRB 1087 (2007), are distinguishable, because those cases involved makeshift voting mechanisms (such as wooden boards propped together) not Board-sanctioned voting booths. *See, e.g., Royal Lumber Co.*, 118 NLRB 1015, 1017 (1957); *Imperial Reed & Rattan Furniture Co.*, 118 NLRB 911, 912-13 (2007). As the Board stated in *Physicians & Surgeons*, and the District of Columbia Circuit affirmed, in cases where a Board-sanctioned voting booth has been used, the Board has never set aside an election absent evidence that someone witnessed how a voter

¹³ Accordingly, the Court should ignore the Company’s references to these rejected exhibits. (Br.19,42.) Insofar as the Company suggests (Br.42 n.7) that the Board erred in excluding the items, it has failed to demonstrate that the Board’s decision was an abuse of discretion and that it was prejudiced by it. *See, e.g., Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999); *Exxon Chemical Co. v. NLRB*, 386 F.3d 1160, 1166 (D.C. Cir. 2004).

actually marked his ballot. 342 NLRB No. 42, slip op. at 2, *enforced*, 2012 WL 1449166 (Apr.25, 2012) In the absence of any evidence that anyone witnessed how voters marked their ballots, the Board correctly overruled Somerset's election objection.

E. Member Becker Reasonably Determined that He Had No Duty to Recuse Himself

1. Introduction and standard of review

Somerset asks this Court (Br.50) to deny enforcement of the Board's Order because Member Becker refused to recuse himself from participating in the underlying representation case based on his past employment with the Service Employees International Union ("SEIU"). First, as both the full Board and Member Becker noted, Somerset did not move for recusal until after the Board issued the underlying representation-case decision and certified the Union. (A 3-4.) Further, consistent with the principles he announced in *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB No. 40, slip op. at 5 (2010), *enforced*, 440 F. App'x 524 (9th Cir. 2011), Member Becker properly participated in the underlying representation case. This Court has already considered and approved these principles—and Member Becker's application of them—in previous cases involving the same union at issue here. *See NLRB v. Regency Grande Nursing and Rehab. Ctr.*, 462 F. App'x 183 (3d Cir. 2012); *NLRB v. Regency Grande Nursing and Rehab. Ctr.*, 453 F. App'x 193 (3d Cir. 2011);

NLRB v. Regency Grande Nursing and Rehab. Ctr., 441 Fed. App'x 948 (3d Cir. 2011). The Court should respect Member Becker's principled decision under the "deferential, abuse of discretion standard" courts use to review such judgments. *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164 (D.C. Cir. 1995).

In *Pomona Valley*, Member Becker explained the principles he would apply in evaluating recusal requests based on his prior representation of labor organizations that might appear before the Board. The key aspects of these principles are as follows.

Prior to his appointment to the Board, Member Becker served as counsel to the SEIU. *Pomona Valley*, 355 NLRB No. 40, slip op. at 9. He resigned that position on April 4, 2010, before he was sworn in as a Board Member. *Id.* In *Pomona Valley*, Member Becker decided that, during his first two years as a Board Member, he would recuse himself from all cases in which the SEIU is a party. He based that decision on both longstanding federal ethics laws and an executive order President Obama issued. *Id.* at 5. Relevant to Member Becker's analysis, the regulations specifically prohibit executive branch employees from participating in any matter where "a person with whom he has a covered relationship is or represents a party." 5 C.F.R. § 2635.502(a). An employee has a "covered relationship" with any person he worked for in the past year. 5 C.F.R. §

2635.502(b)(iv). These regulations, prohibiting decision makers from sitting on cases involving parties they represented in the prior year, complement the government's broader rules requiring employees to "act impartially and not give preferential treatment to any private organization" (5 C.F.R. § 2635.101(b)(8)) and to "avoid any actions creating the appearance that they are violating the law." 5 C.F.R. § 2635.10(b)(14).

Further, pursuant to Executive Order 13490, every executive branch appointee must pledge not to participate in any matter involving any person the appointee has worked for in the past *two* years. Exec. Order No. 13,490 (Jan. 21, 2009). Following both the regulations and the executive order, Member Becker stated he would not participate in any case involving the SEIU for his first two years as a Board member.

Member Becker applied the same regulations and executive order to cases in which a party is one of SEIU's more than 150 affiliated locals—"separate and distinct legal entities" whose autonomy is guaranteed by federal law. *See Pomona Valley*, 355 NLRB No. 40, slip op. at 9, and authorities cited. He noted that "[a]lthough the relationship between international unions and affiliated local unions is often cooperative, it sometimes results in conflict between the distinct organizations." *Id.* (citations omitted). Consequently, Member Becker explained, he would recuse himself from cases involving such local unions if he had actually

represented the local during the two years before he became a Board Member, or if an employee of his former employer, for example, in-house counsel at the SEIU itself, represented the local union. *Id.*

2. Somerset's recusal request was untimely; in any event, Member Becker reasonably declined to recuse himself

After the hearing officer recommended overruling Somerset's election objections, Somerset filed exceptions but did not seek Member Becker's recusal. Only after the Board issued its decision certifying the Union, Somerset moved for reconsideration. (A.191-200.) Somerset argued, for the first time, that Member Becker should have recused himself because of his prior employment as counsel to the SEIU, the international union with which the Union was affiliated. (A.95-96.) The Board denied Somerset's motion. (A.97.)

In his separate statement addressing Somerset's recusal argument, Member Becker explained why he was not required to recuse himself (A.99-100.) As an initial matter, he found Somerset's recusal argument untimely, because even though it knew or should reasonably have known that he might participate in the case, it waited until *after* the decision had issued to raise its recusal argument. Member Becker emphasized that it is a well-established Board practice that all Board Members, even those not initially assigned to a panel, may participate in the adjudication of a case. (A.98) (citing authorities). Thus, Somerset should have known that he might participate.

Member Becker stated that by waiting until after the decision was issued, Somerset was, in effect, hedging its bets. As he noted, courts have rejected this wait-and-see approach. (A. 98-99) (citing *Schurze Communications, Inc. v FCC*, 982 F.2d 1057, 1060 (7th Cir. 1992); *E&J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295-96 (9th Cir. 1992); *Power v. FLRA*, 146 F.3d 995, 1002 (D.C. Cir. 1998)).¹⁴ Notably, in *In re Kensington Ltd.*, 368 F.3d 289, 314-15 (3d Cir. 2004), this Court cited *E&J Gallo Winery* with approval, and observed that a post-decision recusal motion is untimely if a party knew, or reasonably should have known, about the potential recusal matter. *See also United States v. Rosenberg*, 806 F.2d 1169, 1173 & n.3 (3d Cir. 1986). Here, although Somerset claims (Br. 52) that it “did not know” that Member Becker would have participated in the case, given well-established Board practice, Somerset reasonably should have known that Member Becker might participate.¹⁵ Thus, its recusal argument is untimely.

¹⁴ Although the statutory standards applicable to Article III judges do not apply to executive branch employees, Member Becker noted (A.99 n.4) his observation in *Pomona Valley*, 355 NLRB No. 40, slip op. at 6, that those standards and their construction by the courts offer useful guidance.

¹⁵ Somerset tries to salvage its failure to request Member Becker’s recusal prior to the issuance of the decision by asserting that it was “reasonable” for it to assume that he would have “sua sponte” recused himself. (Br.52.) As Member Becker explained, however, he was not required to recuse himself under the standards he publicly set forth in *Pomona Valley*.

In any event, as Member Becker explained, the argument lacked merit. Local labor organizations affiliated with the SEIU are separate and distinct legal entities from the International. Member Becker was not required to recuse himself from cases simply because, as here, a local union affiliated with SEIU, was a party. Moreover, Member Becker did not represent this Union at any time between April 5, 2008 and April 5, 2010. As such, he provided an unassailable basis for his decision to not recuse himself, consistent with the standards set out in *Pomona Valley*.

On review, Somerset does not assert that Member Becker had an actual conflict of interest. Instead, Somerset baldly asserts (Br. 51) that it was “highly likely” that he would have had “dealings” with the Union in his role as counsel with SEIU. This baseless speculation provides no grounds for disqualification. *See Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1189 (10th Cir. 1974) (no reason to disqualify agency attorney where his affidavit stated that upon leaving the FTC’s staff, he did not discuss the merits of the case with any commissioners or trial staff).

Indeed, as discussed, this Court has already rejected arguments the Member Becker should be recused from cases involving the union here. *See* p.46. Somerset claims that here, unlike the other cases involving this union, there is an alleged appearance of impropriety under 5 C.F.R. § 2635.101(b)(14)—as opposed to an

actual conflict under that section—that Member Becker failed to address.

Somerset is wrong. At bottom, Somerset argues (Br.51) that because the Union has a large membership and contributed a large amount of per capita taxes to the SEIU, there arose “such an appearance of loss of impartiality” that Member Becker should have recused himself under the appearance of impropriety standard. As Somerset acknowledges, the relevant regulation states that whether “particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.” (Br. 50, quoting 5 C.F.R§ 2635.101(b)(14)). Applying that standard, there is no merit to Somerset’s argument.

First, there is no basis for Somerset’s claim that Member Becker failed to consider this argument. In the instant case, Member Becker referred to the standards he enunciated in *Pomona Valley*, as well as Part 2635 of the Code of Federal Regulations. In *Pomona Valley*, Member Becker both quoted the regulations governing appearances of impropriety, 355 NLRB No. 40, slip. op. at 5, and concluded his discussion by applying that regulatory standard, expressly assessing his decision to participate in certain classes of cases from “the ‘perspective of a reasonable person with knowledge of the relevant facts.’” *Id.*, slip op. at 13 (quoting 5 CFR § 2635.101(b)(14)). Applying that standard, Member Becker concluded that such a reasonable person would be able to “distinguish

between the roles [Member Becker] played as an advocate and a scholar in the past and the position [he holds] as a Member of the NLRB.” *Pomona Valley*, 355 NLRB No. 40, slip op. at 13. He further explained that he understood the difference between those two roles and would “faithfully discharge” his duties as a Board Member. *Ibid.* Accordingly, the standards set forth by Member Becker take into account the appearance-of-impropriety standard, and his indisputably correct finding that his participation was consistent with *Pomona Valley* obviated the need for further express discussion of the issue.

Somerset’s broadly over-inclusive argument about unions’ contributions to the SEIU fails to present an appearance of impropriety that would require Member Becker’s recusal from this case. Member Becker has publicly stated and explained the basis for the strict ethical standards he used to evaluate requests for recusal from cases involving SEIU locals and faithfully applied those standards here. Despite Somerset’s belated efforts to change the outcome of the Union’s certification, no reasonable person would construe Member Becker’s participation as creating an appearance of impropriety solely on the basis of the per capita contributions that locals provide to the SEIU, a separate legal entity, where neither

Member Becker nor his staff had represented the local in the two years prior to his taking office.¹⁶

F. The Board's Decision Was Properly Issued

As an afterthought to its merits arguments, Somerset argues (Br.54-57) the Board's December 30, 2011 Order is invalid, claiming that the Board "did not have a valid quorum to act" when it issued the decision because its delegation to the three-member panel, where one member was recused, was invalid. Contrary to that claim, the Board's delegation of the case to a three member panel is consistent with the text of Section 3(b) and the Board's longstanding practice, which was recognized approvingly by the Supreme Court in *New Process Steel, L.P. v. NLRB*, 130 S. Ct 2635 (2010) ("*New Process*").

Section 3(b) of the Act sets forth the delegation and quorum requirements under which the Board operates. In relevant part, Section 3(b) states:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times,

¹⁶ In its brief, for the first time, Somerset argues (Br.50, 52), that Member Becker should have recused himself under the appearance of impropriety standard because he cast the "deciding vote" in a "split decision." (Br.52). Even if the breakdown of the Board's vote were relevant, Somerset failed to raise this matter in its motion for reconsideration, and the Court is jurisdictionally barred from considering it. See Section 10(e) of the Act; *Woelke & Romero Framing, Inc.*, 456 U.S. 645, 665-66 (1982).

constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

By its terms, as the Supreme Court found, the delegation clause in the first sentence authorizes the Board to delegate any or all of its authority to a three-member group. The group quorum provision provides that two members shall constitute a quorum of any such three-member group. *See New Process*, 130 S. Ct at 2640.

At the time the Board issued its December 30, 2011 decision, it had three sitting members—Chairman Pearce, Member Becker and Member Hayes. Those three members delegated the Board’s authority to decide this case to a three-member delegee group consisting of themselves. (A.4 (“Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.”).) Chairman Pearce, noting his recusal, stated that he was a “member of the present panel but did not participate in deciding the merits of the proceeding.” (*Id.* at 4 n.1.) Accordingly, Members Becker and Hayes, acting as a two-member quorum of that delegee group pursuant to Section 3(b), decided the merits of the case and issued the Order. (*Id.*)

In so proceeding, the Board followed its longstanding practice when the Board has three sitting members, one of whom is recused from a particular matter. *See, e.g., Pacific Bell Tel. Co.*, 344 NLRB 243, 243 & n.1 (2005); *Bricklayers*,

Local #5-N.J., 337 NLRB 168, 168 & n.4 (2001); *Cable Car Advertisers, Inc.*, 336 NLRB 927, 927 & n.1 (2001), *enforced*, 53 F. App'x 467 (9th Cir. 2002); *McDonnell Douglas Corp.*, 324 NLRB 1202, 1202 & n.4 (1997); *G. Heileman Brewing Co.*, 290 NLRB 991, 991 & n.1 (1988), *enforced*, 879 F.2d 1526 (7th Cir. 1989). Each of those decisions issued when the Board had only three sitting members.¹⁷ And in each case, the recused member was part of the panel but noted his or her nonparticipation on the merits, and the decision was issued by a two-member quorum of the delegee group.

Somerset challenges the Board's longstanding practice, arguing that it is contrary to the Supreme Court's decision in *New Process*. Somerset is incorrect. In *New Process*, the Supreme Court held that when the Board delegates its powers to a three-member group, two members of the group cannot exercise that delegated authority "once the group's (and the Board's) membership falls to two," because Section 3(b) requires that the three-member "delegee group maintain a membership of three in order to exercise the delegated authority of the Board." 130 S. Ct. at 2638, 2644.

The Court, however, approvingly recognized the Board's practice of issuing decisions with a two-member quorum of a three-member delegee group when the

¹⁷ See *Board Members Since 1935*, National Labor Relations Board (last viewed Jul. 11, 2012), available at <http://www.nlr.gov/who-we-are/board/board-members-1935>.

third member was recused. The Court contrasted the situation before it—where the third member (of the group and the Board) leaves the Board—with the Board’s “longstanding” practice where a member of the delegee group is recused. *Id.* at 2644. As the Court stated, “the Board has throughout its history allowed two members of a three-member group to issue decisions when one member of a group was disqualified from a case. . . .” *New Process*, 130 S. Ct at 2641. The Court explained that, while Section 3(b) requires the Board’s powers to be vested at all times in a group of at least three sitting Board members, the delegation clause of Section 3(b) “still operates to allow the Board to act in panels of three, and the group quorum provision still operates to allow any panel to issue a decision by only two members if one member is disqualified,” and that so reading the statutory language gives effect to all provisions of Section 3(b). *Id.* at 2640, 2644. Thus, as the Board noted, the Supreme Court in *New Process* left “undisturbed” the practice of proceeding in this manner. (A.4 n.1.)

Somerset nonetheless argues (Br.56-57) that the Board’s “delegation decision was invalid,” because Chairman Pearce was recused and “could not have participated” in the vote to delegate the unfair labor practice case to the panel. To the extent Somerset is suggesting that Chairman Pearce did not actually participate in the delegation, such a claim is contrary to the Board’s statement that it delegated its authority in this proceeding to the panel, and to Chairman Pearce’s

statement that he was a member of the present panel. Somerset provides no basis for looking behind those statements. *See generally U.S. v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (“The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”); *accord Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967).

Nor did Chairman Pearce’s recusal bar him from participating in the unfair labor practice proceeding for the limited purpose of delegating the case to a three-member delegee group of which he is a member but not a participant in the decision on the merits. His limited participation here is no different in principle from those of the recused Board members in the cases cited above pp.55-56, which reflect the Board’s longstanding practice where it has only three sitting members, one of whom is recused in a particular case.¹⁸

Construing Section 3(b) as permitting Chairman Pearce’s limited participation in the unfair labor practice proceeding is consistent with the common

¹⁸ *Chamber of Commerce of the United States v. NLRB*, 2012 WL 1664028 (D.D.C. May 14, 2012), upon which the Company relies (Br. 56), is inapposite. That case did not involve the Board’s longstanding panel delegation procedure approved in *New Process* and followed here. Rather the different issue presented and decided there was whether the third member needed to constitute a three-member quorum was either present for a vote on the merits or participated in deciding the merits.

law “rule of necessity.”¹⁹ That rule enables an otherwise-recused member of a body to participate in the decision on the merits, in order to achieve a quorum. Thus, the rule of necessity may “require[] an adjudicatory body (judges, boards, commissions, etc.) with *sole or exclusive* authority to hear a matter to do so even if the members of that body have prejudged the results of a particular hearing.” *Valley v. Rapides Parish School Board*, 118 F.3d 1047, 1052 (5th Cir. 1997). *See also United States v. Will*, 449 U.S. 200, 213 (1980) (in the context of judges’ class-action suit challenging compensation, rule of necessity allows a judge, normally disqualified because he has a conflict of interest, to hear a case when “the case cannot be heard otherwise”); *Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F.2d 589, 593-94 (7th Cir. 1945) (“rule of necessity” applied to administrative agency with sole power to decide case); *Siteman v. City of Allentown*, 695 A.2d 888, 892 (Pa. Cmwlth. 1997) (court vacated a city council resolution passed without a quorum, but remanded in order for council to apply rule of necessity and reconsider the case with quorum, including the recused members).

¹⁹ *See United States v. Will*, 449 U.S. 200, 213-216 (1980); *Atkins v. United States*, 556 F.2d 1028, 1036-38 (Ct. Cl. 1977); Thomas McKevitt, *The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?*, 24 Hofstra L. Rev. 817, 820, 827 (1996); Annotation, *Construction and Application of Rule of Necessity Providing that Administrative or Quasi-Judicial Officer is Not Disqualified to Determine a Matter Because of Bias or Personal Interest if Case Cannot be Heard Otherwise*, 28 A.L.R. 6th 175 (2007) (summarizing cases).

While the common law rule permits a disqualified adjudicator to participate in a decision on the merits, in this instance Chairman Pearce's participation was more limited and tailored to procedures set out in Section 3(b). Thus, by participating only in the delegation of the case to the three-member panel, while not participating in the decision on the merits, Chairman Pearce enabled the Board to issue a decision, by a two-member quorum, as permitted by Section 3(b) of the Act.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

s/ Jill A. Griffin
JILL A. GRIFFIN
Supervisory Attorney

s/ Daniel A. Blitz
DANIEL A. BLITZ
Attorney

National Labor Relations Board
1099 14th St., NW
Washington, DC 20570
(202) 273-2949
(202) 273-1722

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

July 2012

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

1621 ROUTE 22 WEST OPERATING COMPANY, *
LLC d/b/a SOMERSET VALLEY REHABILITAION *
& NURSING CENTER *

Petitioner/Cross-Respondent * Nos. 12-1031

* 12-1505

v. *

* Board Case No.

NATIONAL LABOR RELATIONS BOARD * 22-CA-64426

Respondent/Cross-Petitioner *

and *

1199 SEIU UNITED HEALTHCARE WORKERS *
EAST, NEW JERSEY REGION *

Intervenor *

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,645 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007. Board counsel further certifies that the electronic version of the Board’s brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 11.0.7000.975 and is virus-free according to that program.

/s Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1099 14th Street, NW

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC
this 25th day of July 2012

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

1621 ROUTE 22 WEST OPERATING COMPANY, *
LLC d/b/a SOMERSET VALLEY REHABILITAION *
AND NURSING CENTER *

Petitioner/Cross-Respondent * Nos. 12-1031

* 12-1505

v. *

* Board Case No.

NATIONAL LABOR RELATIONS BOARD * 22-CA-64426

Respondent/Cross-Petitioner *

and *

1199 SEIU UNITED HEALTHCARE WORKERS *
EAST, NEW JERSEY REGION *

Intervenor *

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third 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:

Rosemary Alito
George P. Barbatsuly
K&L Gates
One Newark Center
10th Floor
Newark, NJ 07102
Jonathan E. Kaplan
Tanja L. Thompson
Littler Mendelson
3725 Champion Hills Drive
Suite 3000
Memphis, TN 38125

Ellen Dichner
Gladstein, Reif & Meginniss
817 Broadway, 6th Floor
New York, NY 10003

/s Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 25th day of July 2012