

**Nos. 12-1240, 12-1311**

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

**SANDS BETHWORKS GAMING, LLC**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

---

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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

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Petitioner/Cross-Respondent	)	Nos. 12-1240, 12-1311
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	4-CA-76289

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

**A. Parties, Intervenors, and Amici:** Sands Bethworks Gaming, LLC was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Law Enforcement Employees Benevolent Association was the charging party before the Board. The Board’s General Counsel was also a party before the Board.

**B. Rulings Under Review:** This case is before the Court on Sands’ petition for review and the Board’s cross-application for enforcement of a Decision and Order issued by the Board on May 30, 2012 and reported at 358 NLRB No. 49.

**C. Related Cases:** The ruling under review has not previously been before this Court or any other court. However, in *Noel Canning v. NLRB*, D.C.

Cir. Nos. 12-1115 & 12-1153, the parties have fully briefed the recess appointment issue and presented oral argument on December 5, 2012.

In the following cases filed in this Circuit, parties have raised the recess appointment issue in their preliminary issue statements, and the Court has set a briefing schedule:

*Aerotek, Inc. v. NLRB*, D.C. Cir. No. 12-1271,

*Fresenius USA Mfg. v. NLRB*, D.C. Cir. Nos. 12-1413 & 12-1426,

*Kimberly Stewart v. NLRB*, D.C. Cir. No. 12-1338,

*Milum Textile Services Co. v. NLRB*, D.C. Cir. Nos. 12-1235 & 12-1275,

*Vision of Elk River, Inc. v. NLRB*, D.C. Cir. No. 12-1403.

Further, in the following cases, parties have raised the recess appointments issue in their preliminary issue statements, but this Court has not yet set a briefing schedule:

*Fort Dearborn Co. v. NLRB*, D.C. Cir. No. 12-1430,

*KAG West, LLC v. NLRB*, D.C. Cir. No. 12-1391,

*Keck Hosp. of USC v. NLRB*, D.C. Cir. No. 12-1413, consolidated with

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*Meredith Corp. v. NLRB*, D. C. Cir. No. 12-1287,

*Spartan Mining Co. & Alpha Appalachia Holdings, Inc. v. NLRB*, D.C. Cir.

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*The Finley Hosp. v. NLRB*, D.C. Cir. No. 12-1421.

In the following cases filed in other circuit courts, parties have raised and briefed the recess appointment issue:

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*Richards, et al. v. NLRB, John Lugo, et al. v. NLRB*, 7th Cir. Nos. 12-1973,  
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Dated at Washington, D.C.  
this 14th day of December 2012

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**Respondent/Cross-Petitioner**

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Sands Bethworks Gaming, LLC to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against Sands. The Board found that Sands violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with the Law Enforcement Employees

Benevolent Association, the union that a unit of Sands' security guards selected in a Board-conducted, secret-ballot election by a vote of 51-35.

The Board's Decision and Order issued on May 30, 2012, and is reported at 358 NLRB No. 49.<sup>1</sup> (A. 903-05.) The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of Act, 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The Court has jurisdiction over this proceeding pursuant to Section 10(f), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement.

Because the Board's Order is based, in part, on findings made in the underlying representation proceeding, the record in that proceeding 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), however, does not give the Court general authority over the representation proceeding, but instead authorizes review of the Board's actions in that proceeding for the limited purpose

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<sup>1</sup> "A." refers to the parties' Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

of deciding whether to “enforc[e], modify[] or set[] aside in whole or in part the [unfair labor practice] order of the Board.” The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the rulings of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

Sands filed its petition for review on June 1, 2012, and the Board cross-applied for enforcement on July 19, 2012. The petition and the cross-application are timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

### **RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS**

Relevant provisions are reproduced in the Addendum to this brief.

### **STATEMENT OF THE ISSUES**

1. Whether a 20-day period in which the Senate had ordered that “no business” be conducted constituted a “Recess of the Senate” under the Constitution’s Recess Appointments Clause.

2. Whether the Board properly exercised its wide discretion over unit determinations to find that the locksmith is not a guard and thus is properly excluded from the guard unit.

3. Whether the Board abused its discretion by overruling Sands' election objections that claimed that the Union is impermissibly affiliated with non-guard unions and had conferred benefits on four employees to influence their votes in the election.

4. Whether the Board properly determined that Sands did not raise substantial and material issues warranting a hearing on its newly asserted claim that the Union transferred bargaining responsibilities to a local union.

### **STATEMENT OF THE CASE**

Section 9(b)(3) of the Act provides that “no labor organization shall be certified [by the Board] as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.” 29 U.S.C. § 159(b)(3). The purpose of this provision was to prevent guards, who are charged with enforcing rules to protect the employer's property, from facing divided loyalties if placed in a unit with other employees who have no such duty. *Wackenhut Corp. v. NLRB*, 178 F.3d 543, 546 (D.C. Cir. 1999). To find a union unqualified to represent a guard unit under Section 9(b)(3), however, the Board requires definitive evidence that the union admits non-guards to membership, or is affiliated with a non-guard union, to avoid wrongly removing

guards and their unions from many of the Act's intended protections. *Burns Int'l Sec. Servs., Inc.*, 278 NLRB 565, 568 (1986).

This case involves Sands' refusal to bargain to test the Board's certification of the Union after Sands' security guards voted in favor of union representation in a Board-conducted election. The Board found that Sands' refusal to bargain violated Section 8(a)(5) and (1) of the Act and ordered Sands to recognize and bargain with the Union. (A. 903-05.) Sands does not dispute that it has refused to bargain. (A. 881.)

On review before the Court, Sands contends that the Board erred by excluding the locksmith from the unit, by failing to set aside the election on the basis of its objections (that the Union is affiliated with non-guard unions and conferred benefits on employees), and by failing to order a hearing to determine whether the Union transferred its bargaining responsibilities on the basis of the evidence proffered in its opposition to summary judgment. The Board's findings in the representation and unfair labor practice proceedings, as well as the Decision and Order under review, are summarized below.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. Background: Sands' Operations; Guard and Locksmith Duties**

Sands opened its casino in Bethlehem, Pennsylvania in 2009, and an adjacent hotel in 2011. (A. 350, 354-55, 848 n.5; 37.) The facility's 95 security guards work in the security department, which also includes 6 shift supervisors, 3 shift managers, 1 administrative manager, 1 locksmith, and 1 director. (A. 357; 52-53.)

Guards work in three shifts, 7 days a week, 365 days per year. (A. 357; 36.) Their duties include monitoring and enforcing casino policies; patrolling and inspecting the casino for "undesirable persons"; transporting money, chips, and dice within the casino; monitoring suspicious persons; checking patrons' identification; and, sometimes, dealing with unruly patrons. (A. 36-37, 46-47, 81, 146.) The guards report to a shift supervisor and wear uniforms (either a long-sleeve or polo shirt) with the Sands logo. (A. 357; 39, 44-45, 49.) Sands prefers that guards have prior law enforcement experience. (A. 357; 51, 145.)

The locksmith works the day shift Monday through Friday and reports directly to the Director of Security. (A. 357; 34, 37, 49.) The locksmith maintains and repairs locks in the casino (including locks on the slot machines, chip cage, and cash boxes) and controls the key stock for making keys. (A. 356-57; 73, 78, 80, 89, 147.) If a lock within the casino were to malfunction, only the locksmith

could repair it. (A. 357; 79-82, 96, 110-13.) The locksmith's uniform, a polo shirt, says "locksmith." (A. 357; 44.) The locksmith must have three years of experience in installing, repairing, and maintaining commercial hardware, and law enforcement experience is not needed. (A. 356; 147.)

**B. The Representation Proceeding: The Union Organizes Guards at Sands and Wins a Board-Conducted, Secret-Ballot Election to Represent Them**

Kenneth Wynder, a security supervisor for the New York Mets, founded the Union in 2002. (A. 351; 384.) The Union's only offices are in New York, about three hours' drive from Sands. (A. 352 n.6.) During the organizational campaign, the Union held two organizing meetings at a union hall belonging to United Steelworkers Local 2599 in Bethlehem. (A. 352; 20-21.) A member of Local 2599 arranged for the Union to use the hall without charge. (A. 352, 354.) Local 2599's representatives did not attend the meetings, and the only contact between Local 2599 and the Union's officials was a brief conversation on the date of the second meeting. (A. 354; 21.) The Union provided its own refreshments for the meetings. (A. 352; 21.)

The Union filed a petition on May 10, 2011, seeking to represent a unit of approximately 92 security guards at Sands. (A. 8.) At the pre-election hearing, Sands presented evidence in support of its claim that the Union was disqualified from representing the guards under Section 9(b)(3) of the Act, arguing that it is

affiliated with the Putnam Nurses' Association ("PNA") and Local 2599. Sands also argued that the locksmith should be included in the unit. (A. 350.) Following the hearing, the Board's Regional Director issued a Decision and Direction of Election. (A. 350-62.) The Regional Director found that PNA, an organization without any members, is not a labor organization under the Act, and, therefore, the Union cannot be improperly affiliated with it. (A. 353.) She further found that the Union was not affiliated with Local 2599, which represents non-guard members, on the basis of its "mere use" of Local 2599's union hall, and because the only contact between the Union's president and Local 2599's president at the second meeting was brief. (A. 354.) In addition, the Regional Director excluded the locksmith from the unit after finding that the locksmith is not a guard within the meaning of the Act. (A. 359.) The Board denied Sands' Request for Review and ordered an election. (A. 367.)

Nine weeks before the election, Peter Luck, the Union's Sergeant-at-Arms and membership coordinator, obtained 100 free tickets to a baseball game from the New York Mets' Community Outreach Department for his Boy Scout Troop. (A. 853; 512, 526-27, 570.) His son had also requested and received tickets the prior year for an Eagle Scout project. (A. 571-72, 526-27.) Unsurprisingly, when the Mets give tickets to community groups, they prefer that those tickets are used and the seats filled. (A. 853; 523-24, 528.) Luck had extra tickets and gave four

tickets to guard George Bonser, a strong union supporter, with no limitations on their use. (A. 853; 474, 527-28.) Bonser, who was not a baseball fan, gave the four tickets to guard Ryan Kocher, who gave two of the tickets to Bob Bernhardt, a third guard. (A. 853-54; 471-72.) Bernhardt gave the tickets to a friend and did not attend the game. (A. 854 & n.14.) Kocher took his girlfriend to the game. (A. 854.)

The election was held on July 21, 2011, in two sessions, from 1:00 p.m. to 4:00 p.m., and from 10:00 p.m. until midnight. (A. 492.) Peter Luck and union election observer Richard Fenstermacher decided to have dinner together between the voting sessions. (A. 853; 531.) Fenstermacher suggested they eat at the food court. Luck preferred Emeril's Chop House. (A. 853; 531-32.) When Fenstermacher stated that he did not have enough cash, Luck offered to pay for the dinner with Fenstermacher reimbursing him later. (A. 853; 532.) Luck charged the cost of the dinner, \$168.61, to his personal credit card. (A. 853; 389, 393, 532.) Fenstermacher reimbursed Luck \$70 the next time they saw each other in September. (A. 853; 532.)

The Union won the resulting election, 51 to 35. (A. 369.) Sands filed seven objections to the election, claiming that (1) the Union was directly or indirectly affiliated with non-guard unions, (2) the Union held captive audience meetings with employees within 24 hours of the election, (3) the Union promised or

conferred benefits in order to influence employees' votes, (4) the Union altered working conditions of employees in order to influence the outcome of the election, (5) the Union used an unauthorized election observer, (6) the Union threatened and intimidated voters with unspecified reprisals, and (7) the Union engaged in other acts which destroyed the laboratory conditions of the election. (A. 370-71.) After the Region's investigation, Sands withdrew objections 4, 6, and 7.<sup>2</sup> (A. 845.)

The Regional Director ordered a hearing on the remaining objections (objections 1, 2, 3, and 5). (A. 374.) She held, however, that Sands would be allowed to present evidence on the Union's affiliation with non-guard unions (objection 1) "only to the extent that [Sands] can demonstrate that [the] presented evidence is newly discovered or was previously unavailable as of the date of the representation hearing." (A. 373.) The Regional Director noted that Sands did not claim that its evidence—that two union supporters were officers of Local 2599 or that the Union held meetings at the Local 2599 hall—was newly discovered or previously unavailable and that "it is clear that it is neither." (A. 373 n.2.)

In compliance with the Regional Director's instructions, the hearing officer rejected Sands' attempt to subpoena documents from Local 2599 and rejected certain testimony Sands offered to prove that two of the Union's supporters were

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<sup>2</sup> Before this Court, Sands raises only objections 1 and 3—that the Union is affiliated with non-guard unions and that the Union conferred benefits on voters.

officers of that union. (A. 846-47.) Sands appealed those rulings to the Regional Director who denied the appeal. (A. 841-43; 838-40.) Sands did not appeal the Regional Director's denial to the Board. (A. 848.)

The hearing officer issued a report recommending that Sands' objections to the election be dismissed. (A. 844-59.) The Board agreed with the hearing officer's recommendations, finding that he properly rejected evidence of affiliation that was not newly discovered or previously unavailable, and found that, even considered in the light most favorable to Sands, "the evidence would not have been sufficient to warrant a finding that the [Union] was indirectly affiliated" with Local 2599. (A. 874 n.3.) The Board found that the tickets and dinner provided by the Union were received by too few employees to have affected the results of the election. (A. 874 n.3.) Accordingly, the Board certified the Union as the guards' collective-bargaining representative. (A. 873-75.)

**C. The Unfair Labor Practice Proceeding: Sands Refuses To Bargain with the Union**

On March 2, 2012, the Union requested that Sands bargain, but Sands refused. (A. 878.) On March 19, the Regional Director issued a complaint, alleging that Sands' refusal to bargain violated Section 8(a)(5) and (1) of the Act. (A. 877-79.) In its answer, Sands admitted that the Union requested bargaining, and that it refused to bargain. It denied, however, that its refusal was unlawful, contending that the Board was not properly constituted, that the certified

bargaining unit was inappropriate, that the Board denied Sands due process by not allowing Sands to present certain evidence on its affiliation claim in the post-election hearing, and that the Union impermissibly represents or seeks to represent non-guard employees. (A. 881-82.)

On April 5, the General Counsel filed with the Board a motion for summary judgment. (A. 883-87.) The Board issued an order transferring the case and directing Sands to show cause why the motion should not be granted. In its response, Sands requested a hearing to determine whether the Union is affiliated with non-guard unions and whether the Union delegated its bargaining responsibilities to a local union. (A. 891-92.)

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

In its Decision and Order, the Board (Chairman Pearce and Members Hayes and Griffin) found that “[a]ll representation issues raised by [Sands] were or could have been litigated in the prior representation proceeding.” (A. 903.) The Board also found that Sands did “not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.” (A. 903.) In response to Sands’ claims that the Union impermissibly delegated its responsibilities to a local union, the Board found that there was “no indication that any entity other than the certified Union has requested, or will

request, recognition and bargaining.” (A. 903.) Accordingly, the Board found that Sands violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees. (A. 904.)

The Board’s Order requires Sands to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (A. 904.) Affirmatively, the Board’s Order requires Sands, upon request, to bargain with the Union, to post a remedial notice, and to distribute the notice electronically. (A. 904.)

### **SUMMARY OF THE ARGUMENT**

1. Sands challenges the Board’s authority to issue its May 30, 2012, Order, contending that the Board lacked a quorum because the President’s recess appointments of three of the five Board Members acting at the time of that order were invalid. Sands’ claim is mistaken. The President made these appointments on January 4, 2012, during a 20-day period in which the Senate had declared itself closed for business—a period that constitutes a “Recess of the Senate” within the meaning of the Recess Appointments Clause. U.S. Const. art. II, § 2, cl. 3. The term “Recess of the Senate” has a well-understood meaning long employed by both the Legislative and Executive Branches: it refers to a break from the Senate’s

usual business. The Senate regarded its 20-day January break as functionally indistinguishable from other breaks at which it is indisputably on recess.

Sands is incorrect that the Senate opined that it was not on recess within the meaning of that Clause. In fact, the Senate issued orders that declared the January break to be a “recess” and structured the Senate’s affairs based on that understanding. Even if the Senate had so opined, however, the Senate cannot transform a 20-day recess into a series of short non-recess periods—thereby blocking the President from exercising his constitutional appointment authority—by having a lone Senator gavel in for a few seconds every three or four days for what the Senate itself formally designated “*pro forma* sessions only, with no business conducted.”

Moreover, Sands’ position would frustrate the constitutional design that ensures the continuous availability of a mechanism for filling vacant offices. It would also upend the established constitutional balance of power between the Senate and the President with respect to presidential appointments. The Constitution requires Senators to either stay in session and available to conduct business, thereby precluding the President’s use of his recess appointment power, or suspend business (presumably to leave the Capitol), thereby allowing the President to make recess appointments of limited duration. Sands’ position, if

adopted, would upset this balance by allowing the Senate to declare itself on recess, while escaping the consequences of that declaration.

2. The Board certified the Union after it won a Board-conducted, secret-ballot election to represent a unit of Sands' guards. Sands admits that it refused to bargain with the Union after the election, but contends that this refusal was not unlawful because the Board erred in certifying the Union. All of its claims fail.

a. The Board did not abuse the wide discretion it has to make unit determinations. Indeed, the Court does not have to reach this issue because the vote of the locksmith would be nondeterminative. In any event, substantial evidence supports the Board's finding that the locksmith, who repairs and maintains locks, is not a guard, and therefore may not be in the same unit as security officers who patrol the casino and enforce casino procedures against employees and patrons. None of the evidence provided by Sands shows that the Board abused its discretion in making this determination.

b. The Board did not abuse its discretion by rejecting Sands' argument that the Union is affiliated with two non-guard unions (PNA and Local 2599). Substantial evidence supports the Board's finding that the Union is not affiliated with PNA. PNA is not a labor organization under the Act because it has no members and no collective-bargaining relationships. Sands' evidence that the organization's website remained viewable is not sufficient to establish that it is a

viable labor organization. Because PNA is not a labor organization, the Union cannot be impermissibly affiliated with it.

Next, contrary to Sands' claim, the Board did not deny Sands due process at the post-election hearing by permitting it only to introduce newly discovered evidence pertaining to its affiliation claim. As the Board explained, even if the proffered evidence had been admitted, it would be insufficient to prove an unlawful affiliation. Thus, the Board properly determined that, even considered in the light most favorable to Sands, the evidence submitted at the pre-election hearing, together with the evidence proffered by Sands at the post-election hearing, would not support a finding that the Union was affiliated with Local 2599.

Nor did the Board abuse its discretion in overruling Sands' objection that the Union conferred benefits on employees prior to the election. The Board assumed the facts as alleged by Sands and found that the baseball tickets and dinner provided by the Union to a total of four employees did not affect the results of the election. The tickets, provided to three employees nine weeks before the election, had no restriction on their use and would not reasonably be interpreted as an inducement to vote for the Union. Only one employee received dinner from the Union. The Board did not abuse its discretion by finding that, in a unit of 92 guards where the Union won 51 to 35, the alleged misconduct involving four employees could not have affected the results of the election.

c. Sands' contention that the Board erred by not ordering a hearing on its claim that the Union transferred its responsibilities to a local union is similarly flawed. There is no dispute that *the Union* requested bargaining and Sands refused. Any speculation that the Union intended to transfer its responsibilities to a local is exactly that, speculation, as Sands presented no evidence that such a transfer occurred. Thus, Sands failed to show that the Board abused its discretion in refusing to order a hearing on the issue.

## **ARGUMENT**

### **I. MEMBERS GRIFFIN, BLOCK AND FLYNN HELD VALID RECESS APPOINTMENTS WHEN THE BOARD ISSUED ITS MAY 30, 2012, ORDER**

Sands is incorrect that the Board lacked a quorum when it issued the May 30, 2012, order. Br. 25-32. On January 3, 2012, the first day of its current annual Session, the Senate adjourned itself and remained closed for business for nearly three weeks, until January 23. Under the terms of the Senate's own adjournment order, it could not provide advice or consent on Presidential nominations during that 20-day period.<sup>3</sup> Messages from the President were neither laid before the Senate nor considered. The Senate considered no bills and passed no legislation.

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<sup>3</sup> The President had nominated Terence Flynn to be a Board Member in January 2011. 157 Cong. Rec. S69 (daily ed. Jan. 5, 2011). Sharon Block and Richard Griffin were nominated in December 2011. 157 Cong. Rec. S8691 (daily ed. Dec. 15, 2011).

No speeches were made, no debates held. And although the Senate punctuated this 20-day break in business with periodic *pro forma* sessions that involved a single Senator and lasted for literally seconds, it ordered that “no business” would be conducted at those times.

At the start of this lengthy Senate absence, the Board’s membership fell below the statutorily mandated quorum when Craig Becker’s recess appointment term ended at noon on January 3, 2012, leaving the Board unable to carry out significant portions of its congressionally mandated mission. *See New Process Steel v. NLRB*, 130 S. Ct. 2635, 2645 (2010). Accordingly, the President exercised his constitutional power to fill vacancies “during the Recess of the Senate,” U.S. Const. art. II, § 2, cl. 3, by appointing three members to the Board.

These appointments were valid because the Senate was plainly in “Recess” at the time under any reasonable understanding of the term. Sands’ argument to the contrary is rooted in a misunderstanding of the meaning and purpose of the Recess Appointments Clause that—if adopted by this Court—would frustrate the purpose of the Clause and substantially alter the longstanding balance of constitutional powers between the President and the Senate.

**A. Under the Well-Established Understanding of the Recess Appointments Clause, the Senate Was on Recess Between January 3 and January 23**

1. The Recess Appointments Clause confers on the President the “Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. Const. art. II, § 2, cl. 3. This Clause reflects the Constitution’s careful balancing of powers required of our democracy. The Constitution confers on the President the power to make appointments and, with respect to principal officers, ordinarily conditions such an appointment on the advice and consent of the Senate. *Id.* art. II, § 2, cl. 2. But the Framers also created a second appointment process in recognition of the practical reality that the Senate could not (and should not) be “oblig[ated] . . . to be continually in session for the appointment of officers,” and the need that there always be available a mechanism for filling offices. *The Federalist No. 67*, at 410 (Clinton Rossiter ed., 1961) (Alexander Hamilton); *see also id.* (noting the possibility of vacancies “which it might be necessary for the public service to fill without delay”).<sup>4</sup> The Framers therefore provided for the President to make appointments of limited duration when the Senate is on recess. The provision for

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<sup>4</sup> 5 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 242 (Jonathan Elliot, ed., 2d ed. 1836) (Elliot’s Debates) (Charles Cotesworth Pinckney) (expressing concern that Senators would settle where government business was conducted).

recess appointments frees Senators to return to their constituents (and families) instead of maintaining “continual residence . . . at the seat of government,” as might otherwise have been required to ensure appointments could be made.<sup>5</sup> This provision reflects the constitutional design and the Framers’ understanding that the President alone is “perpetually acting for the public,” even in Congress’s absence, because the Constitution obligates the President at all times to “take Care that the Laws be faithfully executed.”<sup>6</sup>

2. Sands’ argument that the Senate was not on recess on January 4 rests on a misconception of the meaning of “Recess.” The Supreme Court has repeatedly stressed that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition.” *United States v. Sprague*, 282 U.S. 716, 731 (1931). Accordingly, the meaning of a constitutional term “excludes secret or technical meanings that would not have been known to ordinary citizens

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<sup>5</sup> 3 Elliot’s Debates 409-10 (James Madison); *see also, e.g.*, 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1551, at 410 (1833) (explaining undesirability of requiring the Senate to “be perpetually in session, in order to provide for the appointment of officers”).

<sup>6</sup> 4 Elliot’s Debates 135-36 (Archibald Maclaine) (explaining that the power “to make temporary appointments . . . can be vested nowhere but in the executive”); U.S. Const. art II, § 3.

in the founding generation.” *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

At the Founding, like today, “recess” was used in common parlance to mean a “[r]emission or suspension of business or procedure,” II N. Webster, *American Dictionary of the English Language* 51 (1828), or a “period of cessation from usual work.” *Oxford English Dictionary* 322-23 (2d ed. 1989) (citing sources from 1642, 1671, and 1706). The plain meaning of “Recess” as used in the Recess Appointments Clause is thus a break by the Senate from its usual business, such as those periods when Senators would return to their respective States as the Framers anticipated.

The settled understandings of the Executive Branch and the Senate of the term “Recess” are consistent with that plain meaning. The Executive Branch has long maintained the view that the Clause authorizes appointments when the Senate is not open to conduct business and thus unable to provide advice and consent on Presidential nominations. Attorney General Daugherty explained in 1921 that the relevant inquiry is a functional one that looks to whether the Senate is present and open for business:

[T]he essential inquiry . . . is this: Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?

33 Op. Att’y Gen. 20, 21-22, 25 (1921); *see also* 13 Op. O.L.C. 271, 272 (1989) (reaffirming this test).

The Legislative Branch has long maintained a similar view of the President’s recess appointment power. In a seminal report issued over a century ago, the Senate Judiciary Committee expressed an understanding of the term “Recess” that looks to whether the Senate is closed for its usual business:

It was evidently intended by the framers of the Constitution that [the word “recess”] should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. It means, in our judgment, . . . the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments. . . . [The Recess Appointments Clause’s] sole purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.

S. Rep. No. 58-4389, at 2 (1905) (emphasis omitted). Attorney General Daugherty relied on this Senate definition in 1921, 33 Op. Att’y Gen. at 24, and the Senate’s parliamentary precedents continue to cite this report as an authoritative source “on what constitutes a ‘Recess of the Senate.’” *See* Floyd M. Riddick & Alan S. Frumin, *Riddick’s Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 947 & n.46 (1992) [hereinafter “Riddick’s Senate Procedure”].

3. The President properly determined that the Senate’s 20-day break between January 3 and January 23, 2012, fits squarely within the well-established understanding of the term “Recess.” By its own order, the Senate had provided by unanimous consent that it would not conduct business during this entire period.

The relevant text of the Senate order provided:

Madam President, I ask unanimous consent . . . that the second session of the 112th Congress convene on Tuesday, January 3, at 12 p.m. for a *pro forma* session only, with no business conducted, and that following the *pro forma* session the Senate adjourn and convene for *pro forma* sessions only, with no business conducted on the following dates and times, and that following each *pro forma* session the Senate adjourn until the following *pro forma* session: [listing dates and times] 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).<sup>7</sup>

Orders like this one, adopted by unanimous consent, “are the equivalent of ‘binding contracts’ that can only be changed or modified by unanimous consent.”

Walter Oleszek, Cong. Res. Serv., *The Rise of Unanimous Consent Agreements*, in *SENATE OF THE UNITED STATES: COMMITTEES, RULES AND PROCEDURES* 213, 213-14 (J. Cattler & C. Rice, eds. 2008); *see also* Riddick’s Senate Procedure at

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<sup>7</sup> This order also provided for an earlier period of extended absence punctuated by *pro forma* sessions for the final weeks of the First Session of the 112th Congress. *Id.* On January 3, 2012, that Session ended and the Second Session began, per the Twentieth Amendment. *See* U.S. Const. amend. XX, § 2; 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012). We assume for purposes of argument that there were two adjacent intrasession recesses, one on either side of this transition. In all events, it is clear that the Senate was no longer functionally conducting the business of the First Session well before January 3, 2012.

1311 (“A unanimous consent agreement changes all Senate rules and precedents that are contrary to the terms of the agreement, and creates a situation on the Senate floor very different from that which exists in the absence of such agreement.”). Thus, the Senate could have conducted business during its January 2012 break only if it reached subsequent agreement to do so by unanimous consent. Moreover, even if a majority of Senators had wanted to conduct business during the January break, a single Senator could have prevented the Senate from doing so by objecting. *See* United States Senate, Senate Legislative Process, at [http://www.senate.gov/legislative/common/briefing/Senate\\_legislative\\_process.htm](http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm) (“A single objection (‘I object’) blocks a unanimous consent request.”). This was a crucial feature of the Senate’s order because it thereby gave Senators firm assurance that they could leave the Capitol without concern that the Senate would conduct business in their absence.

Indeed, the Senate itself specifically and repeatedly referred to the January break as a “recess or adjournment,” and arranged its affairs based on that understanding. For example, at the same time as it adopted the no-business order described above, the Senate made special arrangements for certain appointments during the January “recess or adjournment”:

[N]otwithstanding *the upcoming recess or adjournment of the Senate*, the President of the Senate, the President pro tempore, and the majority and minority leaders [are] authorized to make appointments to commissions, committees, boards,

conferences, or interparliamentary conferences authorized by the law, by concurrent action of the two Houses, or by order of the Senate.

157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (emphasis added); *see also ibid.* (providing that “*notwithstanding the Senate’s recess*, committees be authorized to report legislative and executive matters” (emphasis added)). The Senate has taken similar steps before long recesses that are not punctuated by *pro forma* sessions,<sup>8</sup> which indicates that the Senate viewed its January 2012 recess as equivalent to such recesses.

That the Senate was in recess during this extended period in January is further underscored by the fact that messages from the President and the House of Representatives were not laid before the Senate nor entered into the Congressional Record until January 23, 2012, when the Senate returned from its recess. *See* 158 Cong. Rec. S37 (daily ed. Jan. 23, 2012) (laying before the Senate a report from the President “received during adjournment of the Senate on January 12, 2012”); *id.* (laying before the Senate a message from the House received “on January 18, 2012”). Thus, any nomination sent by the President to the Senate during this 20-day break would not even have been formally presented to the Senate during this

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<sup>8</sup> *See, e.g.*, 156 Cong. Rec. S6974 (daily ed. Aug. 5, 2010) (providing for appointment authority before an intrasession recess expected to last for thirty-nine days); 153 Cong. Rec. S10991 (daily ed. Aug. 3, 2007) (same, recess of thirty-two days).

time. The Senate also specifically identified January 23 as the next date it would vote on a pending nomination. 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011).

As the Supreme Court has explained, it is “essential . . . that each branch be able to rely upon definite and formal notice of action by another” and warned against the “uncertainty and confusion” of requiring the President to “determin[e] through unofficial channels” the meaning of a Senate communication. *United States v. Smith*, 286 U.S. 6, 35-36 (1932). The Senate here declared it would conduct “no business” between January 3 and 23, and referred to the January break as a “recess.” Thus, given the Senate’s declared and actual break from business over this 20-day period, the President plainly possessed the authority to exercise his recess appointment power.

4. Sands fails to address the longstanding interpretation of the Constitution’s text by the Senate and Executive Branch. It does not claim that the Senate was conducting regular business at any point during the January break. Nor does it suggest that a 20-day break in business is too short to constitute a recess for purposes of the recess appointment power. Instead, Sands mistakenly asserts (Br. 26-31) that intermittent and fleeting *pro forma* sessions held pursuant to a Senate order that no business be conducted transformed this 20-day period from a “Recess of the Senate” into a series of three-day breaks.

Sands' logic fails, however, because the *pro forma* sessions were not designed to permit the Senate to do business, but rather to ensure that business was *not* done, *i.e.*, that “no business” would be conducted under the Senate’s own prescription. Indeed, the very label of “pro forma” that the Senate used confirms that these sessions were only a “matter of form,” rather than indicating any substantive availability of the Senate. The *pro forma* session on January 6 was typical. A virtually empty Senate Chamber was gavelled into *pro forma* session by Senator Jim Webb of Virginia. No prayer was said and the Pledge of Allegiance was not recited, as typically occurs during regular daily Senate sessions.<sup>9</sup> Instead, an assistant bill clerk read a two-sentence letter directing Senator Webb to “perform the duties of the Chair,” and Senator Webb immediately adjourned the Senate until January 10, 2012. The day’s “session” lasted 29 seconds. As far as the video reveals, no other Senator was present. *See* 158 Cong. Rec. S3 (Jan. 6, 2012); *Senate Session 2012-01-06*, <http://www.youtube.com/watch?v=teEtsd1wd4c>.<sup>10</sup> These sessions allowed the Senate to assume compliance with

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<sup>9</sup> Compare 158 Cong. Rec. S3-11 (daily eds. Jan. 6-20, 2012) with 157 Cong. Rec. S8745 (daily ed. Dec. 17, 2011); *see also id.* at S8783-84 (daily ed. Dec. 17, 2011) (making clear that “the prayer and pledge” would be required only during the January 23, 2012, session).

<sup>10</sup> *See also* 158 Cong. Rec. S11 (daily ed. Jan. 20, 2012) (29-second *pro forma* session); *id.* at S9 (daily ed. Jan. 17, 2012) (28 seconds); *id.* at S7 (daily ed. Jan. 13, 2012) (30 seconds); *id.* at S5 (daily ed. Jan. 10, 2012) (28 seconds).

the constitutional requirement that it not adjourn for more than three days without concurrence of the House,<sup>11</sup> a matter irrelevant for the Recess Appointments Clause analysis. *See infra* p. 38.

The mere fact that *pro forma* sessions occurred does not alter the fact that the Senate broke from business for a continuous 20-day period; the *pro forma* sessions were merely the mechanism used to facilitate that break. Historically, when the Senate wanted to take a break from regular business over an extended period of time—that is, to be on recess—it followed a process in which the two Houses of Congress pass a concurrent resolution of adjournment authorizing the Senate to cease business over that time.<sup>12</sup> Since 2007, however, the Senate has, instead, regularly used *pro forma* sessions to allow for recesses from business during times when it traditionally would have obtained a concurrent adjournment resolution, like the winter and summer holidays.<sup>13</sup>

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<sup>11</sup> U.S. Const., art. I, § 5, cl. 4.

<sup>12</sup> Congress regards the concurrent resolution process as satisfying the Adjournment Clause, which provides that “[n]either House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days.” U.S. Const., art. I, § 5, cl. 4; *see* John Sullivan, *Constitution, Jefferson’s Manual and Rules of the House of Representatives*, 112th Congress, H. Doc. No. 111-157, at 38, 202 (2011).

<sup>13</sup> The Senate had previously, on isolated occasions, used *pro forma* sessions over short periods when it was unable to reach agreement with the House on a concurrent adjournment resolution. *See, e.g.*, 148 Cong. Rec. 21,138 (Oct. 17, 2002). The Senate’s *regular* use of *pro forma* sessions in lieu of concurrent

This procedural innovation does not alter the application of the Recess Appointments Clause. For purposes of determining if the Senate is out on recess, the adjournment orders providing for *pro forma* sessions are indistinguishable from concurrent adjournment resolutions: both allow the Senate to cease business for an extended and continuous period, thereby enabling Senators to return to their respective States without concern that business could be conducted in their absence. The only difference is that one Senator remains in the Capitol to gavel in and out the *pro forma* sessions, but no other Senator need attend and “no business [may be] conducted.” That single difference does not affect whether the Senate is on “Recess” as the term has long been understood. The 1905 Senate Report makes clear that there cannot be a “constructive session,” any more than there can be a “constructive recess.” S. Rep. No. 58-4389, at 2. The core inquiry remains focused on whether “the members of the Senate owe ... [a] duty of attendance? Is its Chamber empty? Is the Senate absent so that it can not receive communications

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adjournment resolutions to allow for extended recesses, however, commenced at the end of 2007, and has continued frequently since. *See* 148 Cong. Rec. 21,138 (Oct. 17, 2002); *see generally* Congressional Directory for the 112th Congress 536-38 (2011) [hereinafter “Congressional Directory”]. Indeed, since August 2008, the Senate has, on five different occasions, used *pro forma* sessions to permit breaks in business in excess of thirty days. *See* 158 Cong. Rec. S5955 (daily ed. Aug. 2, 2012) (describing breaks of 31, 34, 43, 46 and 47 days punctuated by *pro forma* sessions).

from the President or participate as a body in making appointments?” 33 Op. Att’y Gen. at 25; *accord* S. Rep. No. 58-4389, at 2.

Under this well-established standard, the Senate was on recess from January 3 to January 23. The *pro forma* sessions were part and parcel of the Senate’s 20-day recess—its ongoing “suspension” of the Senate’s usual “business or procedure,” II Webster, *supra* at 51—not an interruption of that recess. To conclude otherwise would “give the word ‘recess’ a technical and not a practical construction,” would “disregard substance for form,” 33 Op. Att’y Gen. at 22, and would flout the Supreme Court’s admonition to exclude “secret or technical meanings that would not have been known to ordinary citizens in the founding generation” when interpreting constitutional terms. *Heller*, 554 U.S. at 577.<sup>14</sup>

## **B. Sands’ Countervailing Arguments Are Meritless**

1. Sands suggests that the Senate determined that it was *not* on recess on January 4, urging that “the Senate itself did not purport to take any recess at all.” Br. 28. Based on that view of the Senate’s actions, Sands suggests (Br. 28-29) that

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<sup>14</sup> Even if this Court were to conclude that the only recess of the Senate relevant to these January 4, 2012 appointments occurred between January 3 and 6, that three-day break would support the President’s recess appointments in the circumstances of this case. That three-day break was not akin to a long-weekend recess between Senate working sessions. Rather, that recess was followed by a *pro forma* session at which no business was conducted, and was situated within an extended period—January 3 to 23, 2012—of Senate absence and announced inactivity.

under the Rules of Proceedings Clause, U.S. Const. art. I, § 5, cl. 2, this Court lacks the power to second-guess the Senate’s determination.

The Rules of Proceedings Clause does not aid Sands here. As an initial matter, the Senate’s decision to engage in *pro forma* sessions does not constitute a Senate determination that its 20-day January break was not a recess for purposes of the Recess Appointments Clause. The Senate as a body passed no contemporaneous rule or resolution setting forth the conclusion that the Senate was not on recess for purposes of the Clause. Indeed, as noted above, the only formal statements from the Senate were its order that there would be “no business conducted” during its *pro forma* sessions and the other orders declaring its January break to be a “recess.”<sup>15</sup> And, as explained, the recess appointments here are entirely consistent with the Senate’s own longstanding interpretation of the Recess Appointments Clause.

Apart from Sands’ failure to point to a “Rule” defining the January break not to be a recess, the Rules of Proceedings Clause in any event provides the Senate with authority only to establish rules governing the Senate’s “*internal* matters.”

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<sup>15</sup> Individual Senators’ statements regarding whether *pro forma* sessions preclude recess appointments do not constitute a Senate determination on that score. *Cf. Raines v. Byrd*, 521 U.S. 811, 829 (1997) (distinguishing between Members of Congress asserting their individual interests and those “authorized to represent their respective Houses of Congress”); 2 U.S.C. § 288b(c) (authorizing the Senate Legal Counsel to assert the Senate’s interest in litigation as *amicus curiae* only upon a resolution adopted by the Senate).

*INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (emphasis added); *see also id.* (noting that the Clause “only empowers Congress to bind itself”). The Senate’s exercise of that authority cannot unilaterally control the interpretation of the Constitution or determine the consequences of the Senate’s action on the authority of a coordinate Branch, as Sands suggests (Br. 28-29). The Supreme Court has made clear that Congress “may not by its rules ignore constitutional restraints.” *United States v. Ballin*, 144 U.S. 1, 5 (1892).<sup>16</sup> Thus, although Congress may generally “determine the Rules of its Proceedings,” that constitutional provision does not control here, where the President’s Article II appointment powers are at issue rather than just matters internal to the Senate or Legislative Branch.

Sands’ reliance (Br. 29) on *United States v. Ballin* is misplaced. In *Ballin*, the question before the Court—whether the House possessed a quorum when it passed certain legislation—was answered conclusively by the contemporaneous congressional journal entries. 144 U.S. at 2-3. In that context, the Court stated that the journal “must be assumed to speak the truth.” *Id.* at 4. In contrast, the congressional journals here do not establish that Senate was not on recess under the

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<sup>16</sup> Congressional rules are thus subject to judicial review when they affect interests outside of the Legislative Branch. *See United States v. Smith*, 286 U.S. 6, 33 (1932) (“As the construction to be given the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one.”); *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1983) (“Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity.”).

Recess Appointments Clause on January 4. To the contrary, the journal entries *reinforce* the conclusion that the Senate was on recess, by highlighting that the Senate was not engaged in any business.

Sands’ reliance on the Rules of Proceedings Clause is particularly inapt because the recess appointments here were an exercise of Executive authority under Article II, not Legislative power under Article I, and the President’s determination that the predicate for the exercise of his authority (that the Senate was in “Recess”) was satisfied is therefore entitled to a measure of deference. *See Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004) (en banc) (noting that “when the President is acting under the color of express authority of the United States Constitution, we start with a presumption that his acts are constitutional”); *United States v. Allocco*, 305 F.2d 704, 713 (2d Cir. 1962) (before making a recess appointment, “the President must in the first instance decide whether he acts in accordance with his constitutional powers”). Indeed, in 1980, the Comptroller General—an officer of the Legislative Branch—affirmed the President’s authority to make recess appointments to a newly created federal agency during an intrasession recess, relying on the Attorney General’s opinion that “the President is necessarily vested with a large, though not unlimited, discretion to determine when there is a real and genuine recess which makes it impossible for him to receive the

advice and consent of the Senate.” *See In re John D. Dingell*, B-201035, 1980 WL 14539, at \*3 (Comp. Gen. Dec. 4, 1980) (citing 33 Op. Att’y Gen. 20 (1921)).<sup>17</sup>

2. Even assuming the Senate had made the formal determination that Sands suggests, allowing such a unilateral legislative determination to disable the President from acting under the Recess Appointments Clause would frustrate the Constitution’s design to ensure the existence of a mechanism for filling offices at all times, and would upend a long-standing balance of powers between the Senate and President. The Supreme Court has repeatedly condemned congressional action that “disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.” *See Morrison v. Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks,

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<sup>17</sup> This view has long historical roots in the Senate. In 1814, Senators from opposing political parties agreed that President Madison was owed deference in his exercise of the recess appointment power. *See* 26 Annals of Cong. 697 (Mar. 3, 1814) (Sen. Bibb) (observing that the Recess Appointments Clause “delegates to the President *exclusively* the power to fill up *all* vacancies which happen during the recess of the Senate” and that “where a discretionary power is granted to do a particular act, in the happening of certain events, that the party to whom the power is delegated is necessarily constituted the judge whether the events have happened, and whether it is proper to exercise the authority with which he is clothed”); 26 Annals of Cong. 707-08 (April 1, 1814) (Sen. Horsey) (“[S]o far as respects the exercise of the qualified power of appointment, lodged by the Constitution with the Executive, . . . the Senate have no right to meddle with it.”). These Senators’ view prevailed against a movement to censure the President’s use of his recess appointment authority. *See* Irving Brant, *JAMES MADISON: COMMANDER IN CHIEF 1812-1836*, at 242-43 (1961) (explaining that the effort to censure the President “collapsed when [Horsey] cited seventeen diplomatic offices created and filled by former Executives while the Senate was in recess”).

alterations, and citations omitted). Accepting Sands' position would do just that, by allowing the Senate to effectively eliminate the President's recess appointment power.

The constitutional structure requires the Senate to make a choice: either the Senate can remain "continually in session for the appointment of officers," *Federalist No. 67*, and so have the continuing capacity to perform its function of advice and consent; or it can "suspen[d] . . . business," II Webster, *supra* at 51, and allow its members to return to their States free from the obligation to conduct business during that time, whereupon the President can exercise his authority to make temporary appointments to vacant positions. This view is evidenced by past compromises between the President and the Senate over recess appointments.<sup>18</sup> For example, in 2004, the political Branches reached a compromise "allowing confirmation of dozens of President Bush's judicial nominees" in exchange for the President's "agree[ment] not to invoke his constitutional power to make recess appointments while Congress [was] away." Jesse Holland, Associated Press, *Deal made on judicial recess appointments*, May 19, 2004. These political accommodations allowed both Branches to vindicate their respective institutional

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<sup>18</sup> See generally Patrick Hein, Comment, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 Cal. L. Rev. 235, 253-55 (2008) (describing various political confrontations over recess appointments culminating in negotiated agreements between the Senate and the President).

prerogatives: they gave the President assurance that the Senate would act on his nominations, while freeing the Senators to cease business and return to their respective States without losing the opportunity to provide “advice and consent.”

Under Sands’ view, however, the Senate would have had little, if any, incentive to so compromise, because the Senate always possessed the unilateral authority to divest the President of his recess appointment power through the simple expedient of holding fleeting *pro forma* sessions over any period of time. Indeed, under Sands’ logic, early Presidents could not have made recess appointments during the Senators’ months-long absences from Washington if only the Senate had one Member gavel in an empty chamber every few days.

History provides no support for that view of the Constitution. To the contrary, the Senate had never before 2007 (when it began providing for *pro forma* session during absences that it historically would have taken per a concurrent resolution of adjournment) even arguably purported to claim or exercise the power to simultaneously be in session for Recess Appointments Clause purposes and officially away for purposes of conducting business. That historical record “suggests an assumed *absence* of such power.” *Printz v. United States*, 521 U.S. 898, 907-08 (1997). Indeed, senatorial “prolonged reticence” to assert that the President’s recess appointment power could be so easily nullified “would be

amazing if such [an ability] were not understood to be constitutionally proscribed.”

*Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

The separation-of-powers concerns raised by Sands’ position are vividly illustrated by this case. If, as Sands urges, the Senate could prevent the President from filling vacancies on the Board while simultaneously being absent to act on nominations, there would have been a vacuum of appointment authority and the Board would have been unable to carry out significant portions of its statutory mission during the Senate’s entire absence, thus preventing the execution of a duly passed Act of Congress and the performance of the function of an office “established by Law,” U.S. Const. art. II, § 2, cl. 2. Such a result would undermine the constitutional balance of powers, which ensures that all Branches can carry out their duties, including the President’s duty to “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3.

In contrast, giving effect to the President’s recess appointments here leaves in place the established constitutional framework and the accumulation of interests based on it. A mechanism for making appointments remained available while the Senate was closed for business. The President’s recess appointments are only temporary, “expir[ing] at the End of [the Senate’s] next Session.” U.S. Const. art. II, § 2, cl. 3. The Senate retains authority to vote on the Board nominations, which remain pending before it. More broadly, the Senate has the choice it has always

had between remaining continuously in session to conduct business, thereby removing the constitutional predicate for the President's recess appointment power, or ceasing to conduct business (and being free to leave the Capitol) knowing that the President may make temporary appointments during that period.

Indeed, since the recess appointments at issue here, the President and Senate have resumed the traditional means of using the political process to reach inter-Branch accommodation regarding nominations. In April 2012, the Senate agreed "to approve a slate of nominees," while the President "promis[ed] not to use his recess powers." Stephen Dinan, *The Washington Times*, *Congress puts Obama recess power to the test*, Apr. 1, 2012. That arrangement is the sort of compromise that the political Branches have often reached, and reflects a longstanding inter-Branch balance of power. This Court should not upset that balance.

3. Sands' reliance on two other constitutional provisions is equally misplaced. First, Sands misconstrues (Br. 27-30) the relevance of the Adjournment Clause, U.S. Const. art. I, § 5, cl. 4. That Clause provides that "[n]either House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days." U.S. Const. art. I, § 5, cl. 4. Sands argues (Br. 28-30) that because "the House of Representatives never consented to any Senate adjournment of more than three days" during the January break, the

Senate could not have been on recess for purposes of the Recess Appointments Clause.

This Court is not presented with the question whether the Senate complied with the Adjournment Clause, and need not decide that issue. Sands provides no basis in the text or structure of the Constitution for equating Article I's Adjournment Clause with Article II's Recess Appointments Clause. As with any other constitutional provision, the requirements of each Clause must be interpreted based on their separate text, history, and purpose.

Moreover, the Adjournment Clause relates primarily, if not exclusively, to the internal operations and obligations of the Legislative Branch. With respect to internal matters, Congress's view as to whether *pro forma* sessions satisfy the requirements of the Adjournment Clause may be entitled to some weight, and each respective House has the ability to respond to (or overlook) any potential violation of that Clause.<sup>19</sup> In contrast, the Recess Appointments Clause defines the scope of a Presidential power, and that Clause's interpretation has ramifications far beyond the Legislative Branch. The Senate's *pro forma* sessions did not eliminate the

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<sup>19</sup> The Senate has at least once previously violated the Adjournment Clause, and the only apparent recourse was to the House. *See* Riddick's Senate Procedure at 15 (noting that "in one instance the Senate adjourned for more than 3 days from Saturday, June 3, 1916 until Thursday, June 8, by unanimous consent, without the concurrence of the House of Representatives, and it was called to the attention of the House membership but nothing further was ever done about it").

President's recess appointment power, whatever their effect with respect to other constitutional provisions.

Even if this Court were forced to squarely confront the Adjournment Clause issue—which, again, it need not do—it would have to determine whether the Senate “adjourn[ed] for more than three days” within the meaning of that clause, and, if the Senate did so adjourn, whether it was “without the Consent of the other,” *i.e.*, the House of Representatives. U.S. Const. art. I, § 5, cl. 4. Accepting *arguendo* Sands’ unexplained contention that whether the President exceeded his authority under the Recess Appointments Clause necessarily turns on whether the Senate complied with the Adjournment Clause, the better view is that the Senate did adjourn for more than three days within the meaning of the Adjournment Clause. The basic purpose of the Adjournment Clause is to furnish each House of Congress with the ability to ensure the simultaneous presence of both Houses of Congress so that they can conduct legislative business, by forcing each House to get the consent of the other before departing. *See* Thomas Jefferson, Constitutionality of Residence Bill of 1790, 17 Papers of Thomas Jefferson 195-96 (July 17, 1790) (explaining the Adjournment Clause was “necessary therefore to keep [the houses of Congress] together by restraining their natural right of deciding on separate times and places, and by requiring a concurrence of will.”). As explained above, the Senate rendered itself unavailable to do business between

January 3 to 23, 2012. Assuming the Senate thus had “adjourn[ed]” within the meaning of the Adjournment Clause, the question whether there was a violation of the Clause then would depend on whether the House of Representatives “Consent[ed]” to the Senate order providing for its January recess; any such consent by the House would mean that there was no violation of the Adjournment Clause by the Senate. That, however, would be an issue for resolution by the House of Representatives or between the two Houses, not for this (or any) Court. Here, the House was aware that the Senate adopted an order to not conduct business during the January break. Rather than objecting to that order, the House adopted its own corresponding resolution permitting the Speaker to “dispense with organizational and legislative business” over roughly that same period of time (January 3 to January 17). *See* H. Res. 493, 112th Cong. (2011). Whatever the implications of that course of events for purposes of the relationship between the two Houses under the Adjournment Clause, the Senate’s declared and actual break in business between January 3rd and 23rd was a “Recess of the Senate” for purposes of the President’s authority under the Recess Appointments Clause.

Second, Sands mistakenly invokes (Br. 26, 29) the Twentieth Amendment, which provides that “[t]he Congress shall assemble at least once in every year,” and that “such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.” U.S. Const., amend. XX, § 2. Sands

suggests that because the Senate held a *pro forma* session on January 3, 2012, in an effort to comply with this provision, such sessions must interrupt the 20-day recess under the Recess Appointments Clause.

Whether the *pro forma* session held on January 3 satisfied the Twentieth Amendment's assembly requirement is not squarely presented in this case because the relevant recess here began after the January 3 *pro forma* session, continuing until January 23. In any event, Sands' suggestion again inappropriately equates two different constitutional provisions. Like the Adjournment Clause, the Twentieth Amendment relates primarily to the internal operations and obligations of the Legislative Branch, and in that context, a congressional determination about the effects of the *pro forma* session might hold more sway than it would here, where the powers of a coordinate Branch are concerned.

To the extent that Sands suggests that the January 3 *pro forma* session was necessary to begin the annual Session of Congress, it is mistaken. The transition from one annual Session to the next occurred by operation of the Twentieth Amendment's requirement that the annual "meeting" of Congress "begin at noon on the 3d day of January," unless a different date is set by a law presented for the President's signature. Thus the annual "meeting," or annual Session of Congress, begins at noon on January 3 whether or not Congress in fact "assemble[s]" on this date—to hold otherwise would vitiate the Twentieth Amendment's requirement

that the starting date may only be changed by law (rather than unilateral action of Congress or one of its Houses), subject to the corresponding requirement of presentment to the President.<sup>20</sup> The fact that the 1st Session of the 112th Congress ended (and the 2nd Session of that Congress began) at noon on January 3, 2012, therefore does not depend on any *pro forma* session.

4. Sands further urges (Br. 29-30) that the Senate was not out on recess during its January break because it had previously passed legislation by unanimous consent during a December session originally intended to be *pro forma* with no business conducted. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing bill to extend payroll tax cut). That fact, however, does not alter the character of the January 2012 recess, during which the Senate passed no legislation. Thus, this Court need not address whether the actual passage of legislation would interrupt an ongoing recess.

In any event, Sands' reliance on the theoretical possibility that the Senate *could* have vitiated its order that no business would be conducted and passed legislation (although only by unanimous consent<sup>21</sup>) provides no basis for

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<sup>20</sup> Congress sometimes has enacted legislation to vary the date of its first annual meeting, *see, e.g.*, Pub. L. No. 111-289 (2010); Pub. L. No. 79-289 (1945), but it did not do so here.

<sup>21</sup> Because the Senate in its December 17th order provided by unanimous consent that there would be “no business conducted” during the *pro forma*

distinguishing the January 2012 recess from the many other recesses that Sands would concede constitute recesses for purposes of the Recess Appointments Clause. Indeed, Sands' logic would place virtually *all* recesses outside the scope of the Clause. Concurrent resolutions of adjournment typically allow Congress to reconvene before a recess's scheduled end if the public interest warrants it. The Senate in fact has previously exercised that authority to pass legislation during what were undisputedly Recesses of the Senate. *See, e.g.*, 156 Cong. Rec. S6995-99 (daily ed. Aug. 12, 2010) (recalling the Senate during a recess scheduled by concurrent resolution<sup>22</sup> to pass border security legislation by unanimous consent). That possibility does not alter the fact that the Senate had gone away on recess. Indeed, before the recess appointment at issue in *Evans*, the Senate recessed per a resolution providing for the possibility of reassembly. *See* H.R. Con. Res. 361, 108th Cong. (2004); 150 Cong. Rec. 2145 (2004). The *en banc* Eleventh Circuit nonetheless upheld the constitutionality of that recess appointment. *Evans*, 387 F.3d at 1221-22.

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sessions, it could conduct business only by unanimous consent. *See* Oleszek, *The Rise of Unanimous Consent Agreements*, *supra*, at 213, 213-14.

<sup>22</sup> 156 Cong. Rec. S6990 (daily ed. Aug. 5, 2010).

**II. BECAUSE THE LOCKSMITH'S VOTE IS NONDETERMINATIVE, THE COURT DOES NOT NEED TO REACH THE ISSUE OF HIS EXCLUSION FROM THE UNIT; IN ANY EVENT, SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE LOCKSMITH IS NOT A GUARD UNDER THE ACT**

Sands claims (Br. 45-51) that its locksmith is a guard and should be included in the guard unit. The Court does not need to reach this issue because the locksmith's vote is nondeterminative. *See Glen Manor Home for the Jewish Aged v. NLRB*, 474 F.2d 1145, 1150 (6th Cir. 1973) (declining to rule on the status of certain voters where "their inclusion or exclusion will not affect the Union's majority status within the unit"). Thus, as the First Circuit explained, "[a]n employer cannot avoid an obligation to bargain with respect to an entire unit of employees by arguing that some employees were improperly included, unless the inclusion of the contested employees would affect the unit's majority status." *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 391 (1st Cir. 1985); accord *Walla Walla Union-Bulletin v. NLRB*, 631 F.2d 609, 614-15 (9th Cir. 1980); *NLRB v. Hoerner-Waldorf Corp.*, 525 F.2d 805, 807 n.2, 808 (8th Cir. 1975).

In any event, substantial evidence supports the Board's exclusion of the locksmith from the unit in this case. Based on the evidence presented at the pre-election hearing, the Board determined that the locksmith, who maintains and repairs locks, does not perform traditional guard duties. Because guard units

cannot include non-guards, 29 U.S.C. § 159(b)(3), the Board excluded the locksmith from the unit.

Section 9(b) of the Act “vests in the Board authority to determine ‘the unit appropriate for the purposes of collective bargaining.’” *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996) (citing 29 U.S.C. § 159(b)). The Board’s bargaining unit determinations “involve[] of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed.” *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)). Thus, this Court will not overturn the Board’s determination “unless it is arbitrary or not supported by substantial evidence in the record.” *Id.* (citation omitted).

Substantial evidence supports the Board’s finding that Sands’ locksmith does not perform guard duties. (A. 359, 367.) Guard responsibilities are “typically associated with traditional police and plant security functions” and include “enforcement of rules directed at other employees; the possession of authority to compel compliance with those rules; training in security procedures; weapons training and possession; participation in security rounds or patrols; the monitor and control of access to the employer’s premises; and wearing guard-type uniforms or displaying other indicia of guard status.” *Boeing Co.*, 328 NLRB 128, 130 (1999) (collecting cases).

The evidence here showed that the locksmith provides “lock services,” not guard services (see pp. 6-7 above). (A. 356; 147.) His position responsibilities include opening locks; utilizing key cutting machines and other common locksmith tools; installing, repairing, and maintaining access control and electro-magnetic locking systems; using computer programs for keying and specification writing; maintaining and repairing safes; and stamping codes on keys. (A. 356; 147.) The locksmith must have three years’ experience in installing, repairing, and maintaining all types of commercial hardware.

Unlike the locksmith, the guards do perform traditional security functions. They patrol and inspect assigned areas “on the lookout for undesirable persons whose presence on the property is not considered to be in the best interest of the hotel/casino management or its guests”; monitor suspicious persons and “trespass undesirables and troublemakers”; assist in the enforcement of casino procedures, as well as federal, state, and local laws; oversee the transportation and exchange of the casino’s money; and investigate all unusual incidents or accidents in the casino. In addition, they “maintain[] a visible and accessible profile among casino guests and team members to create a sense of security.” (A. 146.) The locksmith performs none of these duties.<sup>23</sup>

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<sup>23</sup> Though Sands claims (Br. 47) that the locksmith can “cover a security station,” it provided no evidence that the locksmith had ever done so. Guards cannot fill in for the locksmith. (A. 357.)

Moreover, the terms and conditions of employment are very different for the locksmith and the guards. Sands has a single locksmith who works the day shift, Monday through Friday, while the 92 security officers work 7 days per week, around the clock. (A. 357.) The locksmith reports directly to the Director of Security, but the guards report to one of six shift supervisors. (A. 357.) The locksmith's starting wage at \$18 per hour is 50 percent higher than the guards' \$12 starting wage. (A. 357.)

Under these circumstances, the Board properly determined that the locksmith is not a guard. *See Hilton Hotel Corp.*, 287 NLRB 359, 362 (1987) (finding locksmith belonged in engineering unit even though he worked in security department and wore security uniform because he performed no security duties and instead was "responsible for repairing locks, making keys, installing dead bolts and new locks, rekeying old locks and installing doors, including all door hardware."). The locksmith does not perform traditional security duties such as enforcing casino rules against other employees or patrons, compelling compliance with those rules, patrolling the premises, or evicting unruly patrons. *See Deluxe Gen., Inc.*, 241 NLRB 229, 229 (1979) (finding whistlers and flagmen not to be guards because there was no evidence that they "enforce rules against employees or other persons to protect the Employer's property"); *Am. Dist. Tel. Co.*, 160 NLRB 1130, 1138 (1966) (finding servicemen who "merely. . . work[] on ADT's protective

equipment” are not guards because they do not “enforce rules to protect property or the safety of persons on customers’ premises”). Accordingly, the Board’s unit determination—that the locksmith should be excluded from the unit of guards—is supported by substantial evidence and should be upheld by this Court. *See Country Ford Trucks*, 229 F.3d at 1189.<sup>24</sup>

### **III. THE BOARD DID NOT ABUSE ITS DISCRETION BY OVERRULING SANDS’ CLAIMS THAT THE UNION IS IMPERMISSIBLY AFFILIATED WITH NON-GUARD UNIONS AND CONFERRED BENEFITS ON FOUR EMPLOYEES TO INFLUENCE THEIR VOTES IN THE ELECTION**

In its attempt to overturn the Board-conducted election in this case, Sands “bears a heavy burden.” *New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1077 (D.C. Cir. 2007) (citation omitted). Sands claims that the Board erred by overruling its objections to the election. But it fails to meet its heavy burden of demonstrating that, as it claims, the Union is directly or indirectly affiliated with non-guard unions, or that it impermissibly provided Mets tickets to three employees and dinner to a fourth, materially affecting employee free choice in the election.

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<sup>24</sup> Sands’ contention (Br. 50) that the locksmith shares a community of interest with the guards is irrelevant. Section 9(b)(3) of the Act is clear: “[A] unit containing both guard and nonguard employees is inappropriate for any purpose.” *The William J. Burns Int’l Detective Agency, Inc.*, 134 NLRB 451, 452 (1961). As the locksmith is not a guard, the Board cannot include that position in the guard unit.

### **A. Applicable Principles**

As the Supreme Court has noted, Congress, in enacting Section 9 of the Act, entrusted the Board with the task of conducting representation elections and establishing the “safeguards necessary to insure the fair and free choice of bargaining representatives.” *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946). Thus, on questions that arise in the context of representation elections, this Court “accord[s] the Board an especially ‘wide degree of discretion,’” and the Court will only overturn the Board’s order to bargain upon holding that the Board abused that wide discretion. *Antelope Valley Bus Co., Inc. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002) (quoting *A.J. Tower*, 329 U.S. at 330). More specifically, where alleged misconduct is attributable to a party, the Board, with judicial approval, will set aside the election only if the misconduct “reasonably tend[ed] to interfere with the employees’ free and uncoerced choice in the election.” *Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1383 (D.C. Cir. 1999).

This Court’s “review of the Board’s factual conclusions is ‘highly deferential.’” *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) (quoting *LCF, Inc. v. NLRB*, 129 F.3d 1276, 1281 (D.C. Cir. 1997)). The Board’s findings of fact are “conclusive” if supported by substantial evidence considered on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). Thus, as the Supreme Court has cautioned, a

reviewing court may not “displace the Board’s choice between two fairly conflicting views of the facts, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488; *accord Perdue Farms*, 144 F.3d at 834.

**B. The Board Did Not Abuse Its Discretion by Finding that the Union Is Not Directly or Indirectly Affiliated with Non-Guard Unions**

Guards and guard unions are treated differently under the Act from other employees and their unions. Section 9(b)(3) of the Act defines a guard as “any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer’s premises.” 29 U.S.C. § 159(b)(3). *See Wackenhut Corp. v. NLRB*, 178 F.3d 543, 546 (D.C. Cir. 1999). In enacting that provision, Congress was specifically concerned with potential divided loyalties during strikes if guards and other employees were in the same union. The guards’ obligations to the employer “would be incompatible with their obligations to the Union which, since it represents [other] employees, authorizes and directs the strike.” *The Univ. of Chicago*, 272 NLRB 873, 875 (1984) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 146 F.2d 718, 722 (6th Cir. 1944)). *See Wackenhut*, 178 F.3d at 546.

To prevent such divided loyalties, Section 9(b)(3) of the Act prohibits the Board from certifying a union as the representative of a unit of guards if the union

admits non-guards to membership or is affiliated with an organization that admits non-guards to membership. 29 U.S.C. § 159(b)(3). In addition, the Board will not certify a union to represent guard employees when that union is affiliated, directly or indirectly, with a labor organization that admits to membership non-guard employees. *See, e.g., Brinks, Inc.*, 274 NLRB 970, 970-71 (1985); *Stewart-Warner Corp.*, 273 NLRB 1736, 1737 (1985); *Int'l Harvester Co.*, 145 NLRB 1747, 1749-51 (1964); *Mack Mfg. Corp.*, 107 NLRB 209, 212 (1954). The touchstone for a finding of indirect affiliation is whether “the extent and duration of [the guard union’s] dependence upon [the nonguard union] indicates a lack of freedom and independence in formulating its own policies and deciding its own course of action.” *Lee Adjustment Ctr.*, 325 NLRB 375, 376 (1998) (quoting *Wells Fargo Guard Servs.*, 236 NLRB 1196, 1197 (1978), and *Magnavox Co.*, 97 NLRB 1111, 1113 (1952)). The noncertifiability of a guard union must be shown by “definitive evidence.” *Burns Int'l Sec. Servs., Inc.*, 278 NLRB 565, 568 (1986).

Sands claims (Br. 32-33, 42) that the Union cannot be certified under Section 9(b)(3) because it is directly or indirectly affiliated with non-guard unions. Specifically, Sands argues that the Union is directly affiliated with PNA, a nurses union founded by the Union’s president, and that the Board denied Sands due process by refusing to allow it to introduce additional evidence during the post-election objections hearing to establish the Union’s indirect affiliation with Local

2599. As shown below, substantial evidence supports the Board's finding that PNA is not a labor organization, and the Board did not deny Sands due process by refusing to allow it to present irrelevant and previously available evidence that was insufficient to prove affiliation.

**1. Substantial evidence supports the Board's finding that PNA is not a labor organization**

Sands claims (Br. 42-44) that the Union cannot be certified under Section 9(b)(3) of the Act because it is directly affiliated with PNA, a nurses union. But substantial evidence supports the Board's finding that PNA is not a labor organization within the meaning of the Act. Because PNA is not a labor organization, the Board properly determined that the Union cannot be improperly affiliated with it.

Section 2(5) of the Act defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5). *See Aldo Plastics Mfg. Corp.*, 136 NLRB 850, 851 (1962). A bona fide labor organization would have, for example, bylaws, members, elections for officers, meetings, and collective-bargaining agreements with employers. *Id.* at 852.

Substantial evidence shows that PNA does not meet this test. (A. 352-53.) As the Board explained, PNA “never materialized” as a union. (A. 351; 11.) It has no members, no bylaws, no constitution, and does not deal with any employer regarding terms and conditions of employment. (A. 353; 25.) And no employee ever signed an authorization card for PNA. (A. 351-52; 11-13.) All PNA has is a website that its founder, Wynder, failed to take down after his attempt to organize Putnam Hospital’s nurses failed. (A. 353; 12-13.) Without more, the website is “insufficient to show that PNA is or ever has been a functioning labor organization.” (A. 353.) Thus, the Board reasonably concluded, based on the evidence presented, that PNA is not a labor organization.

Sands’ claim (Br. 44) that the Union cannot be certified because of its affiliation with PNA fails because Section 9(b)(3) of the Act forbids certification of guard unions that are affiliated with “an organization which admits to membership, employees other than guards.” Never having had employee members or bargaining relationships with employers, PNA is nothing more than a failed attempt at a union.<sup>25</sup> Because PNA, lacking both members and collective-

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<sup>25</sup> Thus this case is unlike *Hershey Chocolate Corp.*, 121 NLRB 901 (1958) cited in Sands’ brief (Br. 43). In that case, which involved a union schism, the Board discussed its test for determining whether a union, which once had both members and collective-bargaining agreements, had become defunct.

bargaining relationships, does not implicate Congress' concern about divided loyalties, the Board properly rejected Sands' affiliation claims.

**2. The Board did not deny Sands due process by refusing to allow it to present previously litigated and irrelevant evidence**

Sands claims (Br. 32-39) that the Board erred by not allowing Sands a second bite at the apple on the issue of the Union's affiliation with Local 2599 so that it could present additional evidence at the post-election hearing that two union supporters, George Bonser and Richard Fenstermacher, were officers of Local 2599 prior to 2009, and thus, that the Union was affiliated with Local 2599. Absent a showing that a party's post-election objections raise "substantial and material factual issues," the Board is not required to conduct a hearing. Moreover, the Board has considerable discretion in making procedural and evidentiary rulings. *See Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 789 F.2d 9, 14 (D.C. Cir. 1986) ("a decision to reopen the record is within the Board's discretion"); *accord May Dep't Stores Co. v. NLRB*, 897 F.2d 221, 230 (7th Cir. 1990) (Board's ruling on motion to reopen record "will only be disturbed by [the Court] if the [moving party] establishes an abuse of discretion"). The party challenging them must prove prejudice. *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1166 (D.C. Cir. 2004) (employer failed to demonstrate prejudice from ALJ's exclusion of evidence); *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996)

(employer “failed to show that any prejudice resulted from its inability to present the additional evidence at the hearing”).

The Board did not deny Sands due process in rejecting its request to introduce more evidence at the post-election objections hearing because the Board considered Sands’ proffer and, viewing it in the light most favorable to the company, found it insufficient to prove Sands’ claims of union affiliation with Local 2599. In addition, even on the merits of the evidentiary question, Sands’ claims were heard and rejected in the pre-election hearing, and Sands did not “offer to adduce at a hearing any newly discovered and previously unavailable evidence.” (A. 903.) Accordingly, the Board did not abuse its discretion.

First, there was no due process violation because, even viewing the evidence “in the light most favorable” to Sands, the Board concluded that it “would not have been sufficient to warrant a finding” that the Union was affiliated with Local 2599. (A. 874 n.3.) As the Board explained, the “new” evidence Sands proffered consisted of mostly irrelevant photos and Facebook postings by Bonser showing at most, “comity, mutual sympathy, or common purpose.”<sup>26</sup> (A. 874 n.3.) Mutual

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<sup>26</sup> This evidence included surveillance photos of an employee wearing a Local 2599 t-shirt, union campaign materials referencing the “hallowed ground” on which the casino sits, photos of wristbands distributed to patrons, photos of Bonser wearing a Local 2599 shirt to a family picnic and to the hospital to visit his newborn grandchild, and Facebook comments by Bonser expressing regret that he was no longer a Local 2599 officer, and support for Local 2599’s efforts to organize local nurses. (A. 850 n.8.)

sympathy is not enough to establish affiliation between unions. And, Sands' new evidence about the relationship between the Union and Local 2599 also failed to prove affiliation. At most, the uncontradicted testimony shows that Bonser and Fenstermacher were Local 2599 officers until 2009 but not thereafter. And they were never officers of the Union. (A. 850; 396, 442, 446.) Indeed, Fenstermacher retired from Sands before the September 2011 objections hearing. (A. 856; 545.) Nor was there evidence that the Union received financial support from Local 2599 or that Local 2599 officers had any relationship with the Union. (A. 850.) Thus, this case is unlike those in which the Board has found evidence of affiliation.<sup>27</sup>

The Board properly concluded that “[t]he proffered evidence would not establish that [the Union] was materially dependent on . . . Local 2599 or had a lack of freedom and independence in formulating its own policies and deciding its own course of action.” (A. 874 n.3.)

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<sup>27</sup> See, e.g., *Stewart-Warner Corp.*, 273 NLRB 1736, 1737 (1985) (finding affiliation where non-guard union drafted election petition, solicited employee signatures on the petition, and provided continuous advice and assistance to guard union); *Armored Transport of Calif., Inc.*, 269 NLRB 683, 683-84 (1984) (refusing to certify individuals as collective-bargaining representative of guards because they were concurrently business agents employed by the Teamsters); *Mack Mfg. Corp.*, 107 NLRB 209, 211-12 (1953) (finding affiliation where non-guard union organized most of the guards and told employer guards would report grievances to it); *The Magnavox Co.*, 97 NLRB 1111, 1112 (1952) (finding affiliation where guard union was “continuously dependent upon [non-guard union] and its officers for material aid as well as advice and guidance”).

In any event, on the merits of the evidentiary claim itself, Sands had a full opportunity in two hearings to present evidence to prove the Union's affiliation with Local 2599, and therefore suffered no denial of due process. (See pp. 7-11 above.) In the pre-election hearing in May 2011, Sands sought to prove affiliation with evidence that Sands employees arranged to have two meetings with the Union at the Local 2599 hall. The Regional Director found, and the Board agreed, that the evidence Sands proffered did not prove affiliation. (A. 352-54, 367.) And at the post-election objections hearing in September 2011, Sands had another opportunity to present evidence of affiliation. Because Sands had already litigated this issue in the pre-election hearing, the Regional Director allowed evidence of affiliation "only to the extent" that the evidence was "newly discovered or was previously unavailable as of the date of the representation hearing." (A. 373.) She further noted that Sands did not claim that its evidence that Bonser and Fenstermacher were officers of Local 2599, or that the Union held meetings at the Local 2599 hall, was newly discovered or previously unavailable and that "it is clear that it is neither." (A. 373.)

Despite the Regional Director's clear instructions, Sands nevertheless subpoenaed records from Local 2599 and attempted to present evidence that Bonser and Fenstermacher were officers of Local 2599 prior to 2009. (A. 846-47.) The hearing officer rejected this evidence and granted Local 2599's petition to

revoke the subpoena on two grounds. (A. 841-43, 847-50.) First, following the Regional Director's directive, the hearing officer rejected some evidence—Local 2599's bylaws and LM-2 reports, Bonser and Fenstermacher's employment applications, and a letter that USW sent to the employer in 2007—because it was either in Sands' possession or available at the time of the pre-election hearing. (A. 849.) The hearing officer explicitly found that “it is clear that [Bonser and Fenstermacher] did not hide their affiliation with [Local 2599] . . . and [Sands] could reasonably have found that both had prior affiliations with Local 2599.” (A. 849.) Indeed, both men indicated on their 2009 employment applications that they had previously worked for Local 2599, and their employment applications were in Sands' possession prior to the pre-election hearing in May 2011. (A. 849; 604, 612.) Sands suggests (Br. 36) that they “fraudulent[ly] conceal[ed]” their association with Local 2599, but the employment applications asked for their prior employment history, which they provided. (A. 604, 612.) Bonser even listed as a reference the president of Steelworkers Organization of Active Retirees. (A. 608.)

Second, the hearing officer rejected evidence consisting “primarily of Facebook photos and Facebook comments by employees” because, as noted above, it was not relevant and because it “at best” amounted “to nothing more than statements of mutual sympathy and common purpose.” (A. 850). However, affiliation “requires a substantive bond that binds the two unions in management

and policy, so that the guards' union cannot determine its own course without approval of the nonguard union." *Wackenhut Corp. v. NLRB*, 178 F.3d 543, 554 (D.C. Cir. 1999). Thus, the Board properly excluded this evidence. Finally, Sands mistakenly argues (Br. 34) that the Board's rule against relitigation<sup>28</sup> does not apply in guard cases, and it should, therefore, be allowed to relitigate the issue. As this Court has explained, the rule against relitigation does apply in guard cases, and the Board is entitled to determine, in a guard case, that an employer "was too late with its proffer." *Wackenhut*, 178 F.3d at 552; *see also id.* at 553 & n.10. *See Coin Devices Corp.*, 325 NLRB 489 (1998). The fact that the evidence ostensibly goes toward a guard union's fitness for certification does not prevent the Board from ruling that the presentation of such evidence is untimely under the Board's rules. *Wackenhut*, 178 F.3d at 552. *See Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1182 (D.C. Cir. 2000) (the Board "need not afford a party objecting to a representation hearing more than one opportunity to litigate any particular issue") (citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941)).

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<sup>28</sup> Under the Board's rule against relitigation, 29 C.F.R. §102.67(f), parties challenging a certification by refusing to bargain are not allowed to relitigate in the unfair labor practice case any issues that were or could have been litigated in the prior representation proceeding. *See Pace Univ. v. NLRB*, 514 F.3d 19, 23-25 (D.C. Cir. 2008).

**C. The Board Did Not Abuse Its Discretion by Finding that the Union's Provision of Four Mets Tickets and One Dinner in a Unit of 92 Guards Did Not Influence the Election**

Sands claims (Br. 51-53) that, by providing four Mets tickets to three employees and paying for one employee's dinner, the Union conferred benefits to influence employee votes, and this conduct interfered with the election. The Board did not abuse its discretion by finding that conduct insufficient to influence employee votes or otherwise affect the results of the election. (A. 874 n.3.)

Where alleged election misconduct is attributable to a party, the Board, with judicial approval, will set aside the election only if the misconduct "reasonably tended to interfere with the employees' free and uncoerced choice in the election." *Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1383 (D.C. Cir. 1999). The Board will not set aside an election, however, where the alleged misconduct is de minimus. *Bon Appetit Mgmt. Co.*, 334 NLRB 1042, 1044 (2001). In making that determination, the Board considers "the number of violations, their severity, the extent of dissemination, and the size of the unit," as well as "closeness of the election, proximity of the conduct to the election date, [and the] number of unit employees affected." *Id.* (citations omitted).

In assessing the issue, the Board assumed the truth of the facts alleged by Sands but concluded that the Union's conduct "would not warrant setting aside the election." (A. 874 n.3.) First, of the 92 unit employees, only three had access to

the tickets and only two used the tickets, an insufficient number to affect the election results. Where the alleged misconduct affects only a few employees in a unit with a large margin of victory, the Board will find that the conduct is de minimus and will not overturn the election. *See S.F.D.H. Associates, L.P.*, 330 NLRB 638, 638 (2000). *Compare Chicagoland Television News, Inc.*, 330 NLRB 630, 630-31 (2000) (finding not objectionable employer's election-day party attended by six employees on work time because de minimus), *with Owens-Illinois, Inc.*, 271 NLRB 1235, 1235-36 (1984) (finding objectionable union's gift of jackets to 16 employees, where jackets given to 5 or 6 employees who had not yet voted and those votes would have affected the results of the election), and *Broward County Health Corp.*, 320 NLRB 212, 213 (1995) (finding objectionable employer's promise of two hours' pay, transportation, and child care during the election for all employees not scheduled to work on election day). In addition, the employees received the tickets nine weeks before the election, too far in advance to give employees the perception that the tickets were in exchange for a pro-union vote. (A. 874 n.3.) Sands does not allege, and there is no evidence, that the Union attached any condition to the guards' use of the tickets. (A. 874 n.3.)

Next, Sands' objected to the Union's membership coordinator paying for the election observer's dinner. Again, assuming the truth of the facts as alleged, only one voter received the dinner. Considered cumulatively, the four voters who

received benefits from the Union were not enough to affect the results of the election, and thus the Board properly overruled the objection. (A. 874 n.3.)

**IV. THE BOARD PROPERLY DETERMINED THAT SANDS DID NOT RAISE SUBSTANTIAL AND MATERIAL ISSUES WARRANTING A HEARING ON ITS NEWLY ASSERTED CLAIM THAT THE UNION TRANSFERRED BARGAINING RESPONSIBILITIES TO A LOCAL UNION**

In its response to the notice to show cause, Sands, relying on cursory evidence, claimed that the Board should hold a hearing to determine whether the Union impermissibly transferred its bargaining responsibilities to an organization called “Local 777.” (A. 903.) As the Board found, however, *the Union* requested bargaining, Sands admittedly refused to bargain with *the Union*, and Sands provided no evidence that any other labor organization ever demanded bargaining. The Board thus properly rejected Sands’ claim.

The Board has considerable discretion in making such procedural and evidentiary rulings. *See Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 789 F.2d 9, 14 (D.C. Cir. 1986) (“a decision to reopen the record is within the Board’s discretion”); *accord May Dep’t Stores Co. v. NLRB*, 897 F.2d 221, 230 (7th Cir. 1990) (Board’s ruling on motion to reopen record “will only be disturbed by [the Court] if the [moving party] establishes an abuse of discretion”). Moreover, as shown, absent a showing that a party’s proffer of evidence raises substantial and

material factual issues, the Board is not required to conduct a hearing. *See AOTOP, L.L.C. v. NLRB*, 331 F.3d 100, 103 (D.C. Cir. 2003).

Sands offered only minimal evidence in support of its allegation. First, Sands offered hearsay evidence without affidavits of two statements by Bonser: that he was president of the Union (A. 890) and that the Union would be “eliminated from the bargaining process” (A. 889). Next, Sands offered copies of pages from a website entitled LEEBA Local 777. (A. 899-902.) The website claimed that the “employees of the Sands Resort and Casino of Bethlehem, PA . . . comprise Local 777 of LEEBA [the Union].” (A. 899, 901.) Other evidence from the website included a page asking workers to purchase products made by unionized companies (A. 901) and a login page (A. 902). But as the Board found, Sands admitted that the Union requested bargaining on March 2, 2012, and Sands refused to bargain with the Union. (A. 903; 878, 881.) Indeed, Sands provided no evidence that any labor organization other than the Union had or would request bargaining.

Because Sands failed to show that the Union is not “presently willing and able to represent the employees,” *Royal Iolani Apartment Owners*, 292 NLRB 107, 111 (1988) (finding that purported schism in union does not relieve employer of duty to bargain with incumbent union) (quoting *Loree Footwear Corp.*, 197 NLRB 360, 360 (1972)), it is obligated to bargain with the Union as the certified

representative of its guards. *See Brooks v. NLRB*, 348 U.S. 96, 103 (1954) (holding that employer must continue to bargain with certified union during certification year and petition the Board if it has doubts as to union's continued majority). Thus, the Board did not abuse its discretion by determining that Sands failed to "establish[] that a genuine issue of material fact exists warranting a hearing," and declining to order a hearing on this issue. (A. 903.)<sup>29</sup>

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<sup>29</sup> In any event, unions may organize locals to assist with collective-bargaining duties, but the employer remains obligated to bargain with the certified union. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. NLRB*, 394 F.2d 757, 761 (D.C. Cir. 1968) (employer must bargain with certified union, not uncertified local, though local, with employee approval can negotiate, bargain, or make proposals). A transfer of responsibility from one union to another does not affect terms of contract or disturb the bargaining relationship. *See Deill Constr. Co., Inc. & Laborers Local No. 1290*, 196 NLRB 780, 782 (1972).

## CONCLUSION

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

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December 2012

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

SANDS BETHWORKS GAMING, LLC	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 12-1240, 12-1311
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	4-CA-76289
	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 15,929 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

s/ Linda Dreeben  
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Dated at Washington, DC  
this 14th day of December, 2012

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

SANDS BETHWORKS GAMING, LLC	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 12-1240, 12-1311
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v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	4-CA-76289
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on December 14, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

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this 14th day of December, 2012

## **ADDENDUM**

**CONSTITUTIONAL, STATUTORY, AND REGULATORY ADDENDUM**

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## U.S. CONSTITUTION

### **Article I, Section 5, cl. 2**

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

### **Article I, Section 5, cl. 4**

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

### **Article II, Section 2, cl. 2**

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments

### **Article II, Section 2, cl. 3**

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

### **Article II, Section 3**

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

### **Amendment XX, Section 2**

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

## **NATIONAL LABOR RELATIONS ACT**

### **Section 2(5) of the Act (29 U.S.C. § 152(5)) provides:**

The term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

### **Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

**Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:**

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \*

(5) to refuse to bargain collectively with the representatives of his employees . . . .

**Section 9 of the Act (29 U.S.C. § 159) provides in relevant part:**

\* \* \*

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative

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

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

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

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

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

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

**Section 10 of the Act, 29 U.S.C. 160, provides in relevant part:**

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

\* \* \*

(e) The Board shall have power to petition . . . for the enforcement of such order . . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

\* \* \*

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

## THE BOARD'S RULES AND REGULATIONS

**29 C.F.R. § 102.67 Proceedings before the Regional Director; further hearing; briefs; action by the Regional Director; appeals from action by the Regional Director; statement in opposition to appeal; transfer of case to the Board; proceedings before the Board; Board action**

\* \* \*

(f) Waiver; denial of request. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.