UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DURHAM SCHOOL SERVICES, L.P.,

Employer,

and **Case 15-RC-096096**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 991,

Petitioner.

PETITIONER'S ANSWER TO EMPLOYER'S EXCEPTIONS

Petitioner International Brotherhood of Teamsters, Local Union No. 991 ("Union" or "Petitioner") herein responds to the Employer's Exceptions to the Regional Director's Report and Recommendation. The Board's binding precedents, including several that are squarely on point, require that the Employer's exceptions be overruled *instanter*.

Statement of the Case

Petitioner filed a petition on January 10, 2013 and the Regional Director approved a Stipulated Election Agreement on January 24, 2013. **[Attachment A]**.[1] The objections at issue are the Employer's Objections 1, 2 and 3. Objection 1 was based upon allegations of unlawful conduct in the Petitioner's distribution of literature containing pictures of eligible voters and language misrepresenting them. [Regional Director's Report And Recommendations to the Board, hereafter "R.D. Rep.", p. 2] **[Attachment B]**. Objection 2 was based upon allegations that the Board Agent's handling of the election "destroyed confidence in the Board's election processes and impugned the Board's election standards." [R.D. Rep., p. 5]. Objection 3 was not based on the conduct of the election or on conduct affecting the results of the election. Rather, it

[1] Petitioner's Attachment A is included to correct the record on appeal as the Employer's Brief Attachment A is not a Stipulated Election Agreement relating to this Petitioner in this case.

was a jurisdictional challenge to the Boardôs authority to investigate or conduct a hearing based on the decision of the United States Court of Appeals for the District of Columbia Circuit in *Noel Canning v. NLRB*, No. 12-1115 (January 25, 2013). [R.D. Rep., pp. 12-13]. On March 25, 2013, after an administrative investigation, the Regional Director issued a Report and Recommendation on Objections in which she recommended dismissal of all three of the Employerôs Objections. [R.D. Rep., p. 15]. Based on the administrative investigation, there are no substantial and material factual issues raised by the Employerôs Objections. Consequently, the Regional Director was completely within the authority vested in her pursuant to Board Rule 102.69(d) to issue a Report and Recommendation to dismiss all of the Employerôs Objections without a hearing and, as such, her recommendation should be adopted by the Board.

Argument

In excepting to the Regional Directorôs recommendations, the Employer takes the position that there are material issues of fact regarding Objections 1 and 2 that warrant an evidentiary hearing. [Employerôs Brief, at pp. 5 and 10]. The Employer further contends that Objection 3 should be sustained as a matter of law on constitutional grounds in reliance on *Noel Canning, Inc. et al v. NLRB,* 705 F.3d 490 (D.C. Cir. 2013). However, even crediting the Employerôs version of the facts, the Boardôs precedents show that neither the Unionôs conduct nor the conduct of the election by the Board Agent constitute objectionable conduct sufficient to set aside the results of the election.

In considering whether an election should be set aside based on an employerôs objections, the Board has followed an objective standard and considered several factors. *Taylor Wharton Division Harsco Corporation and Sheet Metal Workersô International Association Local Union # 441, AFL-CIO*, 336 NLRB 157, 158 (2001).

As noted in *Taylor Wharton*:

> é the proper test for evaluating conduct of a party is an objective one--whether it has ñthe tendency to interfere with the employeesô freedom of choice.ò *Cambridge Tool Mfg.*, 316 NLRB 716 (1995). In determining whether a partyôs misconduct has the tendency to interfere with employeesô freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *See, e.g., Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

When considering the Objections in light of this standard, the Election should not be set aside even taking the Employerôs proffered evidence at face value. Moreover, *Noel Canning* is not binding precedent on the Board and should not be considered in the context of a representation proceeding as it is not the basis for objectionable conduct.

A. <u>The Regional Director properly recommended dismissal of Objection 1 and 2 without a hearing and the recommendation should be adopted.</u>

To support its argument that the Regional Director abused her discretion by recommending that Objections 1 and 2 be dismissed without a hearing, Durham argues that the Regional Director did not apply the proper inquiry to determine if a hearing should be directed. [Employerôs Brief, at pp. 5-6]. Before addressing the proper standard, it is important to recognize that the Board is afforded a wide degree of discretion in conducting elections. *Amalgamated Clothing Workers of America v. NLRB*, 424 F.2d 818 (D.C. Cir. 1970) (citing *NLRB v. A.J. Tower Co.,* 329 U.S. 324, 330 (1946); *NLRB v. Capital Transit Co.,* 95 U.S. App.

D.C. 310, 311 (1955)). Moreover, it is well established that an objector has no right to a post-election hearing in a representation proceeding. *Id.* at 828 (citing *International Union of Electrical, Radio & Machine Workers, AFL-CIO v. NLRB,* 135 U.S. App. D.C. 355 (1969) , slip op. at 9; *NLRB v. Golden Age Beverage Co.,* 415 F.2d 26, 32 (5th Cir. 1969)).

As recognized by Durham, a hearing is only conducted when objections raise ñsubstantial and material factual issuesò. *Id.* Otherwise, an administrative investigation is sufficient. Boardôs Rule 102.69(c). As explained in *Winfield Manufacturing*, the policy behind this provision is to ensure that representational issues are expeditiously resolved and certification of bargaining representatives is not delayed in furtherance of the purposes of the Act. *Id.*; s*ee also, NLRB v. Golden Age Beverage Co.,* 415 F.2d 26, 32 (5th Cir. 1969). To insist on a hearing on every representational proceeding would certainly frustrate the purpose of the Act. Instead, a hearing on objections is only required when ñthe objector supplies the Board with specific evidence which prima facie would warrant setting aside the electioné ò *Id.*[2]

1. <u>Objection 1</u>

In support of its contention that an evidentiary hearing was warranted in regards to Objection 1, Durham argues that the Regional Director cannot dismiss objections simply on the basis of ex parte communications that contradict the objectorôs proffer and relies heavily on *Swing Staging, Inc., v. NLRB*, 994 F.2d 859 (D.C.Cir. 1993). [Employerôs Brief, at pp. 5-6]. The Employer mischaracterizes the Regional Directorôs administrative investigation and Report and Recommendation on Objections. The two affidavits submitted by the Employer in support

[2] *See also*, *Park Chevrolet-Geo, Inc. (IAM Local 1414)*, 308 NLRB 1010 fn. 1 (1992) (ñThe Employer did not come forward with evidence that established a prima facie case in support of its objections. The burden is on the objecting party to present evidence that raises substantial and material factual issues. In the absence of such evidence, we cannot conclude that the Regional Director's decision to deny a hearing was unreasonable.ò).

of Objection 1 do not establish prima facie evidence raising substantial and material issues of fact warranting the setting aside of the election.

In Objection 1, Durham alleges that individuals, including agents of Petitioner, engaged in conduct to deceive eligible voters by distributing a flyer shortly before the election that contained pictures of eligible voters and language misrepresenting that the pictured employees, including the Companyôs Observer at the Navarre Customer Service Center, intended to vote in favor of the Union. In support of this objection, Employer submitted the affidavits of April Perez (ñPerezò) and Heidi Gourley (ñGourleyò). [Employerôs Brief, at p. 6]. In her affidavit, Perez admitted that she agreed to allow her picture to be taken by a Union representative and that she signed a piece of paper that the Union representative gave her, but did not read the paper. [Employerôs Brief, at p. 6; Employer Brief, Attachment D].

Taken at face value, Perezôs affidavit leaves a gapping whole in the Employerôs prima facie case. If Perez admits that she did not read a document that she signed and gave to the Union, she cannot testify that she did not give her consent to the Union to use her likeness or advertise her sentiments. If Perez gave consent to the Petitioner, Durham cannot prove fraud or forgery, which is required to sustain this objection. Gourleyôs affidavit merely states that she heard employees discussing April on the flyer. [Employerôs Brief, at p. 6; Employer Brief, Attachment E]. This evidence does not come close to raising a material issue of fact for objectionable conduct.

During the administrative investigation, Petitioner admitted, consistent with the testimony of Perez and Gourley, that it distributed flyers with the pictures of Petitionerôs supporters and indicating their support for the Petitioner. Unlike the administrative investigation in *Swing Staging, Inc.*, upon which Durhamôs Exceptions heavily rely, the Regional Director in

this matter did not conduct any *ex parte* interviews of any witnesses. Further, Petitioner did not submit any witness statements or affidavits to conflict with that of Perez or Gourley. Instead, Petitioner submitted flyers to the Regional Director that Petitioner distributed during the election. These flyers contain pictures of Petitionerôs supporters, and are identical to those produced by Durham during the administrative investigation. [Employer Brief, Attachment H]. Additionally, Petitioner submitted a signed release from Perez, as well as her signature on sheets indicating her support for the Petitioner. [**Attachments C and D**].

Unlike the *ex parte* witness statements involved in *Swing Staging, Inc*., the release executed by Perez is consistent with, and merely supplemental to, the original affidavit of Perez produced by Durham in support of its Objections in which Perez admits to signing a document that she did not read. At no point in that original affidavit did Perez affirmatively state that she only signed one document ï just that she signed a document that she did not read.

In an attempt to raise a material issue of fact, Durham points to the Regional Director citing to four documents allegedly signed by Perez. [Employerôs Brief, at p. 7]. Durham argues this is inconsistent with Perezôs affidavit because it ñé states that she only signed two documentsé ò [Employerôs Brief, at p. 8]. This assertion, however, is a mischaracterization of Perezôs affidavit. At no point in the affidavit does it state: ñI only signed two documents provided to me by the Union.ò [Employer Brief, Attachment D]. Her affidavit only says that the Petitioner asked her to fill out a card and that she signed a piece of paper, but did not read it. Perez never stated the total number of documents that she signed for the Petitioner. Consequently, there is no inconsistency between Perezôs affidavit, the executed release signed by Perez, the other documents signed by Perez, or the findings by the Regional Director. Therefore, there is no material issue of fact for which a hearing should have been conducted.

Any insinuation of a material factual issue of fraud or forgery in Perezôs signature on the releases arising from the Regional Director citing to three or four documents signed by Perez and uncovered during the administrative investigation is a red herring. In taking Durhamôs evidence at face value ï an affidavit admittedly signed by April Perez in which she admitted signing a document from the Petitioner without reading it ï the Regional Director only had to compare the signature on the release to that on the Perez affidavit to determine the two signatures were virtually identical. Consequently, forgery or fraud was not an issue at all, much less a material factual issue in this case.

With no evidence of fraud or forgery produced by the Employer, Objection 1 cannot be sustained. It is well established that the Board applies the long-standing principles developed in *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982) when considering the affect election campaign literature has on the results of an election.

> The Board has applied the *Midland* standard in ruling on election objections alleging that a union has circulated campaign literature using the names or signatures of employees or attributing quotes to them without first receiving their consent.

Enter. Leasing Co.--Southeast, LLC, 357 NLRB No. 159, 2011 NLRB LEXIS 766, at *4 (Dec. 29, 2011) (citing *Somerset Valley Rehab & Nursing Center,* 357 NLRB No. 71 (2011); *BFI Waste Services,* 343 NLRB 254, 254 fn. 2 (2004); *Champaign Residential Services*, 325 NLRB 687, 687 (1998); *Findlay Industries*, 323 NLRB 766, 766 fn. 2 (1997)). Specifically, *Midland* held that the Board ñé will no longer probe into the truth or falsity of the partiesô campaign statements, and that we will not set elections aside on the basis of misleading campaign statements.ò *Midland*, 263 NLRB at 133. Instead, the Board only intervenes ñé in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is.ò *Id.* Further, the Board will not set aside an election because of ñé the substance of

the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is.ò *Id.*

In applying *Midland* in the manner consistent with the numerous cases cited above, it is clear that the Regional Director properly recommended that Objection 1 be dismissed. First, Durham has not, and cannot, present a prima facie case of fraud or forgery in the use of Perezôs likeness in a flyer expressing support for the Petitioner. In her original affidavit, Perez admitted that she signed a document that she has not read. Petitioner produced a release, which authorizes the Petitioner to use the likeness of the individual who signs the release. The signature on that release matches the signature on Perezôs original affidavit. The Regional Director reasonably and correctly concluded that the signature on the release is Perezôs signature and is not a fraud or forgery. Thus, there is no substantial or material issue of fact concerning fraud or forgery to be resolved at a hearing.

Second, even if one assumes that Perez did not in fact support the Petitioner and did not believe that she consented to the use of her likeness in the flyer, absent evidence of fraud or forgery, the flyer is merely sanctioned literature under *Midland* (easily identifiable campaign propaganda). Accordingly, the objection should be, and was properly, dismissed.

2. <u>Objection 2</u>

In Objection 2, Durham alleges a host of election misconduct on the part of the Board Agent conducting the election at the Pace Customer Service Center. [Employerôs Brief, at p. 2]. While included as one objection with numerous subparts, Durhamôs own witness affidavit of Barbara Nelson (ñNelsonò) shows that the numerous separate allegations of Objection 2 are in fact just one isolated moment of the five and a half hour election at one of three polling places. Like Objection 1, in order for hearing to be directed, Durham must produce prima facie evidence

that raises a substantial or material issue of fact that warrants the setting aside of the election. None of the allegations of Objection 2, either alone or in combination, are sufficient to set aside the results of the election. Further, in Objection 2, Durham has not provided any evidence that any voters were actually affected by the alleged Board Agent conduct.

Durham contends that the Regional Director failed to apply the correct legal standard in ruling on Objection 2. [Employer Brief, p. 10]. Durham argues that the standard utilized by the Board in *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967) should be applied in this case to determine if it presented prima facie evidence raising a substantial and material issue of fact.[3] However, Durham recognizes that the standard for reviewing Board Agent conduct applied in *Polymers Inc.*, 174 NLRB 282 (1969) is still relied upon by the Board and is in fact applied more frequently in cases, like this case, involving procedural irregularities. [Employer Brief p. 11]. In these cases, the Board considers whether ñany *reasonable possibility* of irregularity inhered in the conduct of the election.ò *Id.* at 283 (emphasis added). Notwithstanding this recognition, Durham incorrectly asserts that the Regional Director ñclearly failed to apply either standard.ò [Employer Brief p. 11]. In considering the allegations of Objection 2 addressing ballot security, the Regional Director cited and relied upon case law which held that the ñBoard will not set aside an election unless it finds a *reasonable possibility* of a breach of security.ò [R.D. Rep. p. 10] (emphasis added). This language closely tracks the standard developed and applied in *Polymer*.

[3] Ironically, *Athbro* involves alleged objectionable conduct by a Board Agent in which the Regional Director issued a report and recommendation without a hearing. While the Employer contends that ñthere is something inherently unseemly in the Regional Director reviewing the impact of her own employeesô alleged conductò [Employer Brief, p. 13], the Board made no criticism of the Regional Directorôs conduct in issuing a report and recommendation simply on an administrative investigation. Rather, the election was set aside by the Board based on the conduct involved in the objection itself. It was also noted that the election results were extremely close with only a two vote victory for the Union and one challenged ballot, as compared to a 38 vote margin here. In other words, the Board simply disagreed with the Regional Directorôs finding that the objectionable conduct was not sufficient to justify setting aside the election ï not the Regional Directorôs failure to hold a hearing.

Durham alleges that the Board Agent allowed an Employer observer to carry the election booth and ballot box from the polling area to the parking lot to allow a former employee, who was not on the Voter Eligibility List, to vote. Evaluating Durhamôs evidence through Nelsonôs affidavit, the Board has refused to set aside elections under more egregious circumstances, including allegations that the Board agent conducting the election left the polling area with the ballot box unsealed and unattended for five minutes. *See Benavent & Fournier, Inc.* 208 NLRB 636 (1974). Nelson testified that she only left the ballot box for 30 seconds, but there is no testimony that the Board Agent ever left the ballot box unattended during the election. [Employer Brief, Attachment F]. Further, the Board has refused to set aside an election in a similar situation where the Board agent and the observers left the polling area and took the ballot box with them. *See Austill Waxed Paper, Co.*, 169 NLRB 1109 (1968); *see also, Envtl. Maint. Solutions, Inc.*, 355 NLRB 334 (2010). Additionally, Nelson admits that this entire incident occurred in as little as two minutes and as long as three minutes. [Employer Attachment F].

Moreover, there is no allegation that the Employer observer present at the Pace Customer Service Center objected to the Board Agentôs conduct. In fact, the procedure utilized by the NLRB agent to facilitate a vote for this disabled voter at the Pace Customer Service Center was discussed at the pre-election conference attended by representatives and observers of the Employer, who voiced no objections. [Employer Brief, Attachment F]. Taking Nelsonôs affidavit at face value and crediting her testimony that she and the Board Agent carried the voting booth, and assuming an eligible voter witnessed this occurrence, the more logical conclusion would be that voter would believe that the Board Agent favored Durham, not the Petitioner. Consequently, Durham should be estopped from making this objection as it would be benefitting from its own observers misconduct as accurately recognized by the Regional

Director. [R.D. Rep., p. 10].

Durham alleges that the Board Agent failed to seal the ballot box while transporting it outside. Again, taking the affidavit of Nelson at face value, it is not sufficient to set aside the results of the election. If the ballot box was in the presence of the Board Agent and both observers as alleged in the objection and supported by Nelsonôs affidavit, the ballot box was secured ï especially if the reason that the Board Agent and observers were leaving the polling area was to accommodate a disabled voter. [Employer Brief, Attachment F]. There is absolutely no dispute of material fact that the ballot box ever left the Board Agentôs presence and the security of the ballot box was never in question. Durhamôs evidence does not raise a factual issue on this point. It supports the security of the ballot box.

Durham alleges that the Board Agent left the polling area unattended without any notice as to why it was vacant. Again, this is the same isolated incident in which the Board Agent is accused of leaving the polling area to go to the parking lot and not sealing the ballot box. There is no allegation that any voter was denied the opportunity to vote as a result of the Board Agent leaving the polling area without posting a notice. In fact, the Employer would need to submit evidence that the number of employees who were denied an opportunity to vote were sufficient in number to affect the results of the election. *See Versail Mfg*, 212 NLRB 592 (1974). Such a prima facie showing is impossible considering that there were 208 eligible voters and 186 votes cast. [R.D. Rep., p. 1]. The Petitioner won the Election by 38 votes. Even assuming that the remaining 22 eligible voters who did not vote in the election, had voted against the Petitioner, the Petitioner would still have won the Election by 16 votes. With these results, it will be nearly impossible for Durham to establish that this Objection affected the results of the Election by impairing any employee who wanted to vote to be able to vote.

Contrary to Durhamôs position that the Regional Director diminished Nelsonôs testimony, the Regional Director recognized Nelsonôs testimony regarding her assistance in taking the voting booth outside the polling area, the unsealed ballot box and leaving the voting area unattended. [R.D. Rep. pp. 9-10]. In fact, consistent with the standard for holding a hearing on elections relied upon by Durham, the Regional Director assumes Nelsonôs testimony in this regard as correct. [R.D. Rep. p. 10]. The gist of these allegations in Objection 2 is that the election should be set aside due to ballot box security. The Regional Directorôs recognition of the evidence lacking in Nelsonôs affidavit is not a diminishing of her testimony, but rather a failure on the part of Durham to produce prima facie evidence to raise a substantial material issue concerning these allegations of Objection 2.

Even though the Employer contends that it satisfied this burden by ñpoint[ing] to specific events and specific peopleò, the standard requires that those specific events and people actually be relevant to supporting the objection. [Employer Brief p. 12]. In other words, although the Employer pointed to Nelsonôs testimony as the observer to provide evidence to support Objection 2, this specific person could not provide testimony to support a breach in security of the ballot box or even objectionable irregularities. To the contrary, her affidavit supported the ballot box security. Further, the Employer did not point to any other specific people or events to provide prima facie evidence of a material fact which would show the reasonable possibility of a breach of security.[4]

While Durham takes exception to the Regional Director focusing on facts not contained in Nelsonôs affidavit, the burden to produce prima facie evidence sufficient to set aside the

[4] Moreover, the Employerôs own representative, Cal Schmidt, consistent with Nelsonôs affidavit, certified that the secrecy of the ballots was maintained. **[Attachment E].** In cases where similar certifications in the interest of a fair and secret ballot election have been made, and even in the face of Board Agent misconduct, the Board has not found a sufficient basis for setting aside the election. *See Anchor Coupling Co., Inc.*, 171 NLRB 1196 (1968).

election results rests with the Employer. [Employer Brief p. 12]. Without such a showing, Durham is not entitled to the hearing it is requesting. Contrary to Durhamôs contention that the Regional Director was holding it to a preponderance of the evidence standard, the Regional Director was instead taking notice of Durhamôs failure to produce any evidence to support these allegations as objectionable conduct.

Durham alleges that the Board Agent failed to follow the Boardôs challenge procedures with respect to the vote cast by the former employee whose name was not on the Voter Eligibility List. Notably, this is the same former employee who is alleged to have voted in the parking lot. While it is standard procedure for the Board Agent to challenge the vote of any individual not on the Voter Eligibility List, it is undisputed that the Employerôs observer did not challenge the vote.[5] However, taking at face value and assuming as fact that this one ballot was included in the ballot box without challenge, this additional challenge with the other challenges is still not sufficient to affect the results of the election as there were 4 challenged ballots and the Petitioner won the election by 38 votes. [R.D. Rep. p. 1; **Attachment E**].

Durham faults the Regional Directorôs decision concerning the Board agentôs alleged use of her cell phone while the polls were open. Durham complains that:

> Rather than accepting the Employerôs evidence at face value, [the Regional Director] relied upon her ex parte investigation to excuse and diminish the significance of her own agentsô conduct. Thus, instead of accepting Barbara Nelsonôs sworn affidavit asserting that the Board agent was on the phone for 20 minutes between 11:30 and 12:00 and spoke to two different agents, the Regional Director took ñadministrative notice of the Board Agentôs phone record, which reflects one 3 minute call and one 4 minute call to the same Board Agentò and ñcontrary to Nelsonôs contention there were no calls to or from another Board Agent.ò (Report, p. 8). This was highly improper. Board Agent cell phones are not proper subjects for administrative or judicial notice. The Regional Director

[5] While Nelson testified that she and the Union observer checked the eligibility list and advised the Board Agent that the voter was not on the list, she stops short of saying that she made a challenge. [Employer Brief, Attachment F].

could not discount Nelsonôs testimony based on her ex parte investigation. [Employer Brief, p. 12].[6]

This argument is a red herring. While the Regional Director did take administrative notice of the Board Agentôs cell phone records in the ñEvidenceò section of her Report concerning Objection 2 [R.D. Rep. p. 8], there is absolutely no indication in the ñAnalysis and Recommendationò section of her Report concerning Objection 2 that the Regional Director discredited Ms. Nelsonôs statement concerning who the Board Agent called and the duration of any such phone calls because the Board Agentôs cell phone records conflict with Ms. Nelsonôs statement. [R.D. Rep. p. 10 ï 11]. While the Regional Director did question how Ms. Nelson would know the duration of any alleged phone call(s), the Regional Director does not even mention the Board Agentôs cell phone records in the ñAnalysis and Recommendationò section of her Report concerning Objection 2. [R.D. Rep. 9 ï 12]. Moreover, it is clear from a reading of the entire analysis, instead of only the meager cherry-picked portion of the ñEvidenceò quoted by Durham, that the Regional Director primarily bases her recommendation for dismissal on the failure of Durham to demonstrate the existence of a material issue of fact as to whether any alleged phone call(s) had any impact on the election. Specifically, the Regional Director recommends dismissal of that portion of Objection 2 concerning the Board Agentôs use of her cell phone because:

> Nelsonôs affidavit makes no mention of what the Board Agent said during these conversation, how many voters were in the voting area at the time of these conversations, or how she knows how long the conversations lasted. Additionally, *there was no evidence provided that established how these alleged conversations affected the integrity of the election*.

[R.D. Rep. p. 12] (emphasis added).

[6] Consistent with its repeated failures to support its contentions, Durham failed to cite any authority to support its pontification that ñBoard Agent cell phones are not proper subjects for administrative or judicial notice.ò

In other words, the Regional Director recommends dismissal of this portion of Objection 2, not because her investigation revealed evidence conflicting with the Nelson affidavit, but rather because the Nelson affidavit, on its face, did not established a prima facie case.

Durham also includes a ñcatchallò subpart of Objection 2 alleging that the Board Agent ñengaged in other conduct inconsistent with the Boardôs election procedures.ò This is not sufficient notice of the objectionable conduct, but rather a conclusory statement and therefore was properly summarily dismissed. *See Factor Sales***,** 347 NLRB 747 (2006).

B. <u>The Regional Director properly recommended dismissal of Objection 3 and the recommendation should be adopted.</u>

Objection 3 is meritless. It alleges no objectionable conduct by the Petitioner or by a Board Agent that would affect the results of the election or that would affect the ñlaboratory conditionsò leading up to the election. Consequently, it should be dismissed. Even if the merits of the argument raised were considered by the Regional Director, the Regional Director correctly recognized that *Noel Canning v. NLRB*, No 12-1115 (D.C. Cir. January 25, 2012) is not binding precedent on the Board as there is a split among the circuits and the decision is from an individual court with different parties. [R.D. Rep. p. 14].

Even if it were binding precedent, the delegation, pursuant to 29 U.S.C. §153(b), of the Boardôs authority under 29 U.S.C §159 to Region 15 to conduct elections, investigations and hearings is not on a case by case basis. To the contrary, such delegation is made at the time a Regional Director is appointed by the Board at the recommendation of the General Counsel. *Noel Canning* only addressed the recess appointments and subsequent official acts of Terrance Flynn and Sharon Block, which were made on January 4, 2012. The Regional Director of Region 15 was appointed in 2008. Consequently, the delegation of the authority to the Regional Director of Region 15 is not affected by any strained interpretation of *Noel Canning*.

Finally, while Durham contends that it makes said Objection in an effort to preserve the argument for subsequent review, Petitioner submits that Durham waived any defense or objection on this ground when it failed to seek an injunction in U.S. District Court prior to its initial participation in this representation proceeding. Simply participating in the election waived any argument, objection or defense on this ground.

Conclusion

For the reasons stated herein, Durhamôs exceptions fly in the face of settled Board law. They should be overruled forthwith, and Petitioner should be certified as the exclusive bargaining representative of the Employerôs employees.

Respectfully submitted this 19th day of April, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served by electronic mail on this 19th day of April, 2013 on the following persons:

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