Nos. 13-1954, 13-2079

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), COUNCIL 31, AFL-CIO

Intervenor

v.

HEARTLAND HUMAN SERVICES

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF CONTENTS

Headings **Page(s)**

Headings – Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases – Cont'd: **Page(s)**

Cases – Cont'd: **Page(s)**

Cases – Cont'd: **Page(s)**

Statutes: **Page(s)**

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

Regulations: **Page(s)**

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The jurisdictional statement of Heartland Human Services ("Heartland") is not complete and not correct. This case is before the Court on an application of the National Labor Relations Board ("the Board") to enforce, and Heartland's cross-petition to review, an Order finding that Heartland committed certain unfair labor practices. The Board had jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Decision and Order was issued on March 18, 2013, and is reported at 359 NLRB No. 76. (A. 226-30.)[1] The Court has jurisdiction over the case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the Order is final, and the unfair labor practices occurred in Effingham, Illinois.

On May 3, 2013, the Board filed an application for enforcement that was timely because the Act places no time limit on such filings. On May 9, 2013, the Court granted the motion for leave to intervene filed by the American Federation

[1] "A." refers to the Appendix, consisting of the Volume of Pleadings, filed by Heartland on November 4, 2013.

of State, County, and Municipal Employees, Council 31 ("the Union"). On May 17, 2013, Heartland filed its cross-petition for review.[2]

STATEMENT OF THE ISSUE

The sole issue is whether the Board reasonably applied its long-standing rule that an employer must maintain the status quo until the results of a decertification election are certified and therefore found that Heartland violated the Act by refusing to meet with and provide information to the Union, by withdrawing recognition from the Union, and by advising employees of that withdrawal before the Board completed the decertification process and certified the election results.

STATEMENT OF THE CASE

This case involves two distinct Board proceedings. Only one of those proceedings, the one involving the unfair labor practices, is presently before the Court. The initial proceeding, not currently reviewable, raises the question whether the Union maintains majority support, which triggered a Board-conducted decertification election. A Hearing Officer reviewed the Union's objections to the employer's conduct surrounding the election, which originally showed a one-vote margin of victory for the Union with one challenged ballot, and found that Heartland's conduct was sufficiently coercive to affect employee free choice. The

[2] Heartland filed a cross-petition for review, not a cross-application for enforcement. Further, as discussed more fully below (pp. 14-18), this Court only has jurisdiction over the unfair labor practice case, not the decertification proceeding.

Hearing Officer therefore recommended that the Board set aside the first election and direct a rerun election. Heartland filed exceptions with the Board. The Board issued a non-final order denying the exceptions, adopting the Hearing Officer's recommendation, and ordering a second election. As explained below (pp. 14-18), that proceeding is not currently before the Court.

The second proceeding, the focus of this appeal, involves Heartland's actions before the Board completed the decertification election and certification process. In the wake of the Union's ostensible one-vote victory, and while the decertification process was proceeding, Heartland began its march toward withdrawing recognition from the Union. First, it refused to furnish the Union with necessary and relevant information. Next, it refused to schedule dates to bargain with the Union despite repeated requests. Then, it declined to attend a contractually-mandated labor-management meeting. Finally, at a time when the Hearing Officer had issued a report finding Heartland engaged in coercive conduct sufficient to warrant a rerun election, Heartland withdrew recognition and advised employees it was withdrawing recognition because it believed the uncertified election results demonstrated a lack of majority support for the Union. Notably, Heartland contests not a single one of these facts.

On the basis of unfair labor practice charges filed by the Union, the then-Acting General Counsel issued a complaint alleging that Heartland violated

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by advising employees that, because of the decertification election, Heartland believed that the Union no longer enjoyed majority support and would take action on the basis of this belief. It also alleged that Heartland violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to meet with and provide information to the Union and by withdrawing recognition.

Heartland admitted the factual allegations, but asserted as an affirmative defense that the results of the decertification election privileged its conduct and that the Board erroneously set aside the election. The then-Acting General Counsel moved for summary judgment, which Heartland contested on the ground that a genuine issue of material fact existed as to whether the Union had lost majority support. On review, the Board applied its long-standing rule that an employer must maintain the status quo after a decertification election and may not withdraw recognition until the Board completes the decertification process and certifies the election results. Accordingly, in light of the uncontested facts, the Board granted the motion for summary judgment. (A. 226.)

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Board Conducts a Decertification Election, Which the Union Wins 19-18, with One Challenged Ballot

Heartland provides residential and out-patient mental health and substance abuse services in Effingham, Illinois. Since February 1, 2006, the Union has been

the collective-bargaining representative of 40 employees at the institution. The parties' most recent collective-bargaining agreement was effective from August 21, 2009 through August 20, 2011.[3] (A. 199.)

On August 22, 2011, a unit employee filed with the Board a decertification petition alleging that a substantial number of employees no longer supported the Union and seeking an election. (A. 1.) Heartland and the Union entered into a Stipulated Election Agreement, and the Board conducted an election on June 4, 2012. (A. 4, 199.) The tally of ballots showed 19 votes for the Union, 18 votes against, and 1 challenged ballot, a number sufficient to affect the results. (A. 12, 199.)

B. The Union Files Multiple Objections to Conduct Affecting the Election; Heartland Begins Its Refusal to Recognize and Bargain with the Union Despite the Ongoing Board Proceeding

On June 11, 2012, the Union filed multiple objections to conduct affecting the election, claiming that Heartland engaged in conduct that coerced employees and destroyed the laboratory conditions of the election such that a rerun election was necessary. (A. 89.) Among the Union's objections were allegations that Heartland made a widely-disseminated threat to contact the Federal Bureau of Investigation concerning a work-place incident involving an ardent union supporter

[3] In its brief (Br. 8), Heartland admits it withdrew recognition once before in 2011, while bargaining a successor agreement. However, that withdrawal is not the subject of this appeal.

and that Heartland interrogated employees about their union affiliation. (A. 108-12, 116-23.) While reviewing the Union's objections, the Board withheld certification of the election results. In late June and early July, a Hearing Officer conducted a three-day hearing on the Union's objections and the challenged ballot. (A. 91.)

Around July 9 and 16, the Union asked Heartland to furnish it with certain relevant information concerning employees in the unit. Heartland refused to provide the requested information. On July 16, the Union also requested that Heartland provide dates to bargain; Heartland again refused. (A. 199-200.)

C. The Hearing Officer Recommends that the Challenged Ballot Be Counted and Orders a New Election if the Revised Tally of Ballots Shows that the Union Lost the Election in Light of Heartland's Objectionable Pre-Election Conduct; Heartland Withdraws Recognition and Advises Employees of Its Withdrawal

On July 18, the Hearing Officer issued a report recommending that the challenged ballot be opened and counted, and sustaining three of the Union's objections. The Hearing Officer found that Heartland's pre-election conduct was coercive and grossly negligent, had prejudicial effect, and involved a "severe" threat that created "a general atmosphere of fear and reprisal." (A. 102, 103, 110, 121-22.) The Hearing Officer recommended (A. 129-30) that, if the revised tally of ballots disclosed that a majority of valid votes had not been cast for the Union, the Board conduct a rerun election in light of Heartland's coercive conduct.

Less than one week later, on July 23, Heartland unilaterally refused to attend a labor-management meeting that was scheduled pursuant to the parties' collective-bargaining agreement. On July 31, Heartland withdrew recognition from the Union as the exclusive collective-bargaining representative of the unit. On August 8, Executive Director Jeff Bloemker issued a memorandum stating that, in light of the election, Heartland believed that a majority of employees did not want it to recognize the Union as their exclusive representative and that it would take appropriate measures to support its view. (A. 199-200.)

D. The Board Sets Aside the June 4 Election and Orders a New Election

On August 9, Heartland filed timely exceptions to the Hearing Officer's report. (A. 133-40.) On September 28, the Board issued a Decision and Direction, adopting the Hearing Officer's report, findings, and recommendations and directing a rerun election if the Union did not receive a majority of the valid votes cast after the challenged ballot was counted. (A. 182.) On October 12, after the challenged ballot was opened and counted, the revised tally of ballots showed that the Union did not receive a majority. (A. 184.) Because of Heartland's objectionable pre-election conduct, the Board set aside the election and ordered a new one. (A. 183.)

E. The Unfair Labor Practice Proceeding

On August 22 and September 28, the Union filed an unfair labor practice charge and an amended charge alleging that Heartland violated Section 8(a)(1), (3), and (5) of the Act by: refusing to furnish necessary and relevant information, to schedule bargaining with the Union, and to attend a contractually-mandated labor-management meeting; unilaterally withdrawing recognition; and advising employees that Heartland believed that a majority of employees no longer wanted the Union to act as their exclusive representative and Heartland would take measures to support that belief. (A. 185-87.)

On the basis of the Union's charge, the then-Acting General Counsel issued a complaint. (A. 188-95.) In its answer, Heartland admitted the "crucial factual allegations" (A. 226), but denied the legal conclusions in the complaint. Heartland asserted as an affirmative defense that it was not required to recognize or bargain collectively and in good faith with the Union "because it ha[d] a reasonable belief that the Union does not enjoy a majority support of the employees in the collective-bargaining unit . . . based exclusively on the Union's loss of the June 4, 2012 representation election and the Hearing Officer's and Board's erroneous orders for a rerun election . . . ." (A. 200.)

The then-Acting General Counsel filed a motion for summary judgment on the ground that there was no genuine issue of material fact as to the complaint's

allegations, and that the Board should find, as a matter of law, that Heartland has violated Section 8(a)(1) of the Act by advising its employees that it would withdraw recognition from the Union, and Section 8(a)(5) and (1) of the Act by, among other things, withdrawing recognition from the Union. (A. 203-17.)

The Board issued a Notice to Show Cause why the motion for summary judgment should not be granted. (A. 218.) Heartland filed a response asserting that a genuine issue of material fact existed concerning whether the Union lost majority support. (A. 222-25.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce and Members Griffin and Block) found that, as a matter of law, Heartland could not rebut the Union's presumption of majority status by relying on contested decertification election results. The Board, without exception, requires an employer to treat the incumbent union as the employees' bargaining representative until a final determination is made that the union is no longer the employees' representative. Therefore, the Union's majority status did not present a genuine issue of material fact because no final certification had issued in the decertification case. Accordingly, the Board granted the then-Acting General Counsel's motion for summary judgment and found Heartland violated Section 8(a) (1) of the Act by advising employees that it believed a majority of employees did not support the Union and would take appropriate measures to

support that determination. The Board found further that Heartland violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with requested information that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit; by failing and refusing to attend a scheduled labor-management meeting, without prior notice to the Union and without affording the Union an opportunity to bargain over this conduct; by failing and refusing to schedule dates to bargain with the Union; and by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit.

The Board ordered Heartland to cease and desist from the conduct found unlawful, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board ordered Heartland to post a remedial notice and to read that notice aloud to its employees. The Board also ordered Heartland to: furnish the Union with the information it requested; upon request, attend a scheduled labor-management meeting and provide dates to the Union for bargaining; and recognize and bargain on request with the Union as the exclusive collective-bargaining representative of the unit employees on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

SUMMARY OF ARGUMENT

Heartland's main challenge – that the Board improperly sustained the Union's objections to conduct affecting the election and thus should not have set aside the election and directed a new one – is not currently subject to judicial review. The Board has issued a non-final order adopting the finding of objectionable pre-election conduct and ordering a new election. It has not yet certified the results of the rerun election, nor has Heartland refused to bargain based on that order in an effort to obtain judicial review of the representation certification. As such, there is no final order that would allow for review of the election objections. This Court therefore must reject Heartland's invitation to entertain its premature challenge to the objections.

In the unfair labor practice proceeding, the Board reasonably construed the Act to find that Heartland could not rely on uncertified election results and therefore violated Section 8(a) (1) of the Act by advising employees that it was withdrawing recognition from the Union and Section 8(a)(5) and (1) of the Act by withdrawing recognition and refusing to recognize and bargain with the Union. Under long-standing Board precedent, after a decertification election, an employer must maintain the status quo and cannot withdraw recognition before the Board has completed the decertification election process and certified that the union has lost the election. This well-settled precedent is grounded in the Board's interest in

promoting stability in labor-management relations and balancing the employees' right to free choice. By requiring employers to wait for the Board's decertification process to be completed and the results of the election certified, the Board is accorded the full opportunity to ensure that the tally of ballots truly reflects employees' free choice. This process protects the employer, the employees, and the Union, and advances the Act's goals. Additionally, it imposes only minimal burdens on the parties by requiring that they maintain the existing relationship until the Board completes its process. Here, Heartland willfully flouted this long-standing rule by withdrawing recognition when the Board's decertification process was still ongoing and, more egregiously, when the uncertified results showed the Union with a one-vote margin of victory.

ARGUMENT

THE BOARD REASONABLY FOUND THAT HEARTLAND VIOLATED SECTION 8(a)(1) OF THE ACT BY ADVISING EMPLOYEES IT WAS WITHDRAWING RECOGNITION AND VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION AND REFUSING TO ATTEND MEETINGS WITH AND PROVIDE INFORMATION TO THE UNION

The sole issue before the Court is whether the Board reasonably found, consistent with its long-standing rule, that Heartland had an obligation to maintain the status quo and continue to deal with the incumbent Union until the decertification process was complete and the election results certified. The Board

found Heartland violated Section 8(a)(1) of the Act by advising employees it was withdrawing recognition and Section 8(a)(5) and (1) by withdrawing recognition and refusing to meet with and provide information to the Union, while the results of the decertification election were uncertain and the Board process was ongoing. The Board reasonably rejected (A. 228) Heartland's defense that the uncertified election results—as well as its disagreement with the Board's findings that Heartland had engaged in objectionable pre-election conduct—privileged it to question the Union's majority status and withdraw recognition. As discussed below, the Board's order regarding the election objections is not a final order subject to judicial review.[4]

A. Heartland's Objections to the Election Are Not Properly Before this Court

The Board, in ruling on the Union's objections and directing a second election in the decertification case, has not yet issued a final order. Accordingly, Heartland errantly devotes much of its brief (Br. 25-37) to challenging the Board's findings regarding these objections. For the reasons we explain more fully below, Heartland's objections are not properly before the Court because the Board has not certified the results of the decertification election and, therefore, the events here have not triggered an employer's exclusive means to obtain judicial review of

[4] Under Section 10(f) of the Act, judicial review attaches only to final orders of the Board. 29 U.S.C. § 160(f).

election objections—refusing to bargain once the Board certifies the union. *NLRB v. Americold Logistics, Inc.*, 214 F.3d 935, 937 (7th Cir. 2000) (describing multi-step process to obtain judicial review). Heartland will have an opportunity for full judicial review of the objections if the Board subsequently certifies that the Union won the second election and, thereafter, Heartland refuses to bargain. Until such time, however, review is simply unavailable.

The Board's regulations prescribe the process when a question concerning representation is presented—from the petition for a decertification election to final certification of election results. The decertification process begins, as it did here, with the filing of a decertification election petition alleging that a certified union no longer enjoys majority support. 29 C.F.R. § 102.60(a); A. 1. After resolving election logistics, the Board conducts an election and prepares a tally of ballots. See 29 C.F.R. §§ 102.62, 102.63-102.68, § 102.69(a). Here, the Board conducted a decertification election on June 4, 2012, and the tally of ballots showed 19 votes for Union representation and 18 against, with one challenged ballot. (A. 12.)

Consistent with Board regulations, within seven days, a party may file objections to the election or to conduct affecting the results of the election, which triggers a Board investigation and, if necessary, a hearing on the objections. 29 C.F.R. § 102.69(a), (d). Here, the Union filed several objections and a Hearing Officer held a hearing on those objections and on the challenged ballot. (A. 89-

91.) Thereafter, consistent with Board process, the Hearing Officer issued a report recommending that the challenged ballot be opened and counted, and if the result was a tie, that the Board set aside the election based on Heartland's objectionable conduct and order a rerun election. 29 C.F.R. § 102.69(d); A. 129-30. Heartland exercised its right to file exceptions to the Hearing Officer's report with the Board. 29 C.F.R. § 102.69(e); A. 133-40. Consistent with its regulations, the Board examined Heartland's exceptions and the Hearing Officer's report to evaluate whether to overrule or adopt the the Hearing Officer's report and recommendations. 29 C.F.R. §§ 102.69(c)(2), 102.69(g)(3). Here, the Board adopted the Hearing Officer's report, directed that the challenged ballot be opened and counted, and ordered a rerun election if the tally of ballots showed a tie. (A. 183.) Accordingly, the Board never certified the results of the June 4 election. It will not issue a certification until after the rerun election.

Heartland will be entitled to a review of the objections to the first election only after the following events occur. First, the Union must win the new election and be certified by the Board as the bargaining agent for the employees in question. Then, Heartland must refuse to bargain with the Union to challenge the Union's certification. Finally, in a subsequent unfair labor proceeding, the Board must adjudge Heartland to be in violation of Section 8(a)(5) of the Act and order it to bargain with the Union as certified. *Daniel Const. Co. v. NLRB*, 341 F.2d 805,

810 (4th Cir. 1965); *see, e.g., Pearson Educ., Inc. v. NLRB*, 373 F.3d 127 (D.C. 2004) (reviewing employer's objections to the *first* election only after an uncontested second, rerun election resulted in the Board re-certifying the union and directing the employer to bargain). It is only after the Board finds that Heartland unlawfully refused to bargain following the issuance of the election certification that there is a final order appropriate for court review. In defending against the determination of the unlawful refusal to bargain, Heartland can challenge the Board's finding as to the election objections. This "labyrinthian chain of events" triggers judicial review and allows the court to decide the "real issue" of whether the Board properly found that the union "won the election fair and square." *Americold Logistics*, 214 F.3d at 937.

It is thus clear that Heartland's objections are not properly before this Court. It is beyond cavil that a Board order certifying the results of an election—which has not yet issued in this case—is not subject to judicial review because the Board's order does not constitute a final order. *Boire v. Greyhound Corp.*, 376 U.S. 473, 479 (1964); *NLRB v. E.A. Sween Co.*, 640 F.3d 781, 784 (7th Cir. 2011). Instead, refusing to bargain is the only way to get judicial review of a Board order certifying a union. *Boire*, 376 U.S. at 476-77; *Ruan Transp. Corp. v. NLRB*, 674 F.3d 672, 674 (7th Cir. 2012). Heartland is not denied its day in court on the objections that it raised to the Board's determinations in the representation

proceeding; it is merely precluded from raising those objections on *this* day in court. *See Pearson*, 373 F.3d at 129.

B. The Board Acted Consistent with Its Precedent and Found that Heartland Violated the Act

1. Standard of Review

The Supreme Court has recognized that "Congress made a conscious decision" to delegate to the Board "the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979); *accord Int'l Union of Operating Eng'rs, Local 150 v. NLRB*, 325 F.3d 818, 828 (7th Cir. 2003) (recognizing appropriateness of deferential standard of review given Board's "broad authority to develop and oversee national labor policy"). Courts must "give the greatest latitude to the Board when its decision reflects its 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200, 201-02 (1991) (citing *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 267 (1975)). For this reason, this Court reviews decisions of the NLRB deferentially, *Multi-Ad Servs., Inc. v. NLRB*, 255 F.3d 363, 370-71 (7th Cir. 2001), and "[i]f the Board adopts a rule that is rational and consistent with the Act . . . then the rule is entitled to deference." *Litton*, 501 U.S. at 200; *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. NLRB*, 544 F.3d 841, 848-49 (7th Cir. 2008). This

deference attaches "even if [the Court] would have formulated a different rule." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990).

Further, with respect to elections, "[t]he Board has wide discretion to set rules and procedural safeguards to protect employees' freedom to choose bargaining representatives. *NLRB v. Precise Castings, Inc.*, 915 F.2d 1160, 1162 (7th Cir. 1990) (citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324 (1946))." *NLRB v. Mickey's Linen & Towel Supply, Inc*., 460 F.3d 840, 842 (7th Cir. 2006).

2. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees employees 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)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of [those] rights." Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of [its] employees . . . ."

The principles governing an employer's refusal to recognize and bargain with an incumbent union are well settled. The Board, in furtherance of its "overriding policy" to promote industrial peace, and with court approval, rigidly

circumscribes the circumstances under which an employer may withdraw recognition from an incumbent union without running afoul of Section 8(a)(5) and (1) of the Act. *Levitz Furniture Co.*, 333 NLRB 717, 724-25 (2001); *SFO Good-Nite Inn v. NLRB*, 700 F.3d 1, 6 (D.C. Cir. 2012) (discussing *Levitz*).

An incumbent collective-bargaining representative enjoys a conclusive presumption of majority status during the term of a collective-bargaining agreement of three years or fewer. *Brooks v. NLRB*, 348 U.S. 96, 101-04 (1954); *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1139 (7th Cir. 1974). Thereafter, the presumption becomes rebuttable. *Curtin Matheson*, 494 U.S. at 775-78; *Rock-Tenn Co. v. NLRB*, 69 F.3d 803, 808 (7th Cir. 1995). An employer must justify a withdrawal of recognition and refusal to bargain with an incumbent union by showing, with objective evidence, an actual loss of majority support.[5] *Levitz*, 333 NLRB at 725; *accord SFO Good-Nite Inn*, 700 F.3d at 6. An employer can make such a showing through a Board-conducted decertification election. *Levitz*, 333 NLRB at 725-26.

[5] Although the appropriate standard for withdrawal of recognition—actual loss of majority support—is not an issue in this case, Heartland erroneously suggests (Br. 39) that the standard is an employer's good faith reasonable doubt about the union's majority support.

3. The Board Requires the Parties to Maintain the Status Quo Until It Certifies the Results of a Decertification Election

Following a decertification election, under long-established Board law, "election results are not final until the certification is issued." *W. A. Krueger*, 299 NLRB 914, 915 (1990) (reaffirming *Presbyterian Hosp.*, 241 NLRB 996, 998 (1979)). That is to say, an incumbent union remains the statutory representative of the employees and the collective-bargaining agreement remains effective at least until the Board certifies the results of the decertification election. *Krueger*, 299 NLRB at 915 (describing *Presbyterian Hospital*). Because an employer must maintain the status quo while the Board completes the review of a decertification election, such as the challenged ballot and objections raised here, any unilateral changes made before the Board's final determination violate Section 8(a)(5). *Id.* The Board's rule requiring maintenance of the status quo until certification issues "promotes stability and certainty during the transition period when, due to the existence of objections or determinative challenges, the employees' choice of representative is in doubt." *Id*. Indeed, the Board concluded that the rule to maintain the status quo imposes no "new obligation or burden on the parties involved. The employees have only to continue the relationship with the union that they earlier chose and the employer need only continue to recognize the union until the union's status is resolved. We believe this is not a heavy burden and is a small price to pay for stability in labor relations." *Id.* (footnote omitted).

Further, as here, preliminary election results are not always determinative, and thus those results cannot be "reliable evidence of employee sentiment." *Id.* at 916. As the Board noted when formulating this rule, so long as objections are pending or could be filed, it is unknown whether "the tally of ballots reflects *uncoerced* employee sentiment." *Id.* (emphasis in original). Here, although the first tally showed that the Union won the election, the Board subsequently determined that Heartland had engaged in multiple instances of coercive conduct that affected employee free choice. The uncertainty of the vote tally and the subsequent finding that employees were subject to objectionable election conduct prior to the election underscores the reasons the Board insists on the status quo until it certifies that the election results accurately reflect uncoerced employee sentiment.[6]

In addition to promoting stability in labor relations and ensuring that the election results reflect the uncoerced choice of the majority, the Board's requirement that an employer maintain the status quo until the decertification election results are certified is consistent with the Act. Under Section 9(e)(1), the Board must conduct a secret-ballot election and certify the results before rescinding a union's authority as the representative of the employees in a unit. 29

[6] For this reason, the Board has concluded that its rule does not implicate employees' rights to express their desire regarding representation, which only an uncoerced majority of the ballots can express. *Krueger*, 299 NLRB at 916.

U.S.C. § 159(e)(1). According to the Board, "[i]mplicit [in this statutory provision] is the right of either party to have its objections heard before the finality of certification." *Albert Van Luit & Co.*, 234 NLRB 1087, 1087 (1978), *enforced*, 597 F.2d 681 (9th Cir. 1979).

Moreover, in fashioning the rule in *Krueger*, the Board was cognizant of preserving the union's incumbent status, and the relationships between the employees, the employer and the union, until the certification demonstrated that an uncoerced majority of employees no longer supported the union. Heartland dramatically, and perhaps irrevocably, altered the status quo, and its decision "to proceed with impunity until the issuance of a certification" will likely undermine the Union's status. *Krueger*, 299 NLRB at 915. As the Board has cautioned, unilateral changes made between a contested, set-aside election and a second, rerun election tend "to undermine an incumbent union's future effectiveness and status in employees' eyes" in the same way "as bypassing the bargaining representative under other circumstances. . . . '[Bypassing the union is] inherently divisive [and subverts] the cooperation necessary to sustain a responsible and meaningful union leadership.'" *Id.* at 917, quoting *NLRB v. Gen. Elec. Co.*, 418 F.2d 736, 755 (2d Cir. 1969). Here, the Board reasonably applied its rule that the Act does not countenance such damage based on uncertified election results and determined the

more prudent course is to maintain the status quo and stable labor-management relations until certification of uncoerced election results.

Finally, the rule in *Krueger* mirrors policy considerations applicable in other contexts, where the Board, with court approval, requires an employer's continued recognition of an incumbent union despite some evidence that arguably might call a union's majority status into question. For example, an employer may not withdraw from bargaining or refuse to execute a contract with the incumbent union merely because a challenging union files a representation petition. *NLRB v. Katz Delicatessen of Houston St., Inc.*, 80 F.3d 755, 768 (2d Cir. 1996) (emphasizing rule "rooted in Board's concern for stability in labor relations and preserving the integrity of the election process"); *RCA Del Caribe, Inc.*, 262 NLRB 963, 965 (1982) (explaining that this approach "affords maximum protection to the complementary statutory policies of furthering stability in industrial relations and of ensuring employee free choice"). Similarly, just as an employer cannot withdraw recognition during the initial certification year, it cannot rely on an employee decertification petition secured during that certification year to withdraw recognition after the certification year has ended. *United Supermarkets, Inc.*, 287 NLRB 119, 120 (1987), *enforced*, 862 F.2d 549 (5th Cir. 1989); *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1075-77 (D.C. Cir. 2002). Rather, an employer must continue to bargain even after the end of the certification year, unless employees

present a new decertification petition. In recognizing that the rule could force employees to accept a union they wish to decertify, the D.C. Circuit explained "that is the inevitable by-product of the Board's striking the balance between stability and employee free choice, as it frequently must do." *Chelsea*, 285 F.3d at 1077.

The rule to maintain the status quo articulated in *Krueger*, and relied on by the Board here (A. 226), strikes the balance between stability in labor relations and employee free choice and constitutes a reasonable interpretation of the Act. *NLRB v. Teamster Gen. Local Union No. 200*, 723 F.3d 778, 783 (7th Cir. 2013). Although the Board acknowledged that its rule "may be an imperfect solution to a difficult problem" it also stated that it "strongly believes that [its] primary mission is best effectuated by maintaining the presumption of majority status until election results issue." *Krueger*, 299 NLRB at 917. The Board's rule constitutes a thoughtful and well-reasoned approach to a representation issue uniquely reserved to the Board's expertise and to which the courts owe considerable deference. As such, the Board properly determined that Heartland violated the Act when it withdrew recognition from the Union and engaged in other conduct amounting to a refusal to bargain with the Union.

C. Heartland's Challenges to the Board's Decision Are Meritless

Heartland first claims (Br. 39) that summary judgment is inappropriate because a genuine issue of material fact exists as to whether the Union lost majority support. Heartland's claim misses the mark. The only relevant material facts are whether Heartland withdrew recognition and refused to provide information and meet with the Union before the Board completed the decertification process. These facts are uncontested. Under the Board's well-established rule that Heartland had an obligation to maintain the status quo, Heartland admittedly violated the Act, and summary judgment is appropriate.[7]

Heartland's reliance on (Br. 38-39) *Advertisers Manufacturing Co. v. NLRB*, 677 F.2d 544, 547 (7th Cir. 1982), *overruled on other grounds, Mosey Manufacturing Co. v. NLRB*, 701 F.2d 610, 614 (7th Cir. 1983), is decidedly off the mark. *Advertisers Manufacturing* involved a straight-forward "test-of-certification" case—where the employer sought review of the Board's decision

[7] Heartland's reliance on initial decertification election results that showed that the Union had not, in fact, lost majority support is particularly troubling—the results at the time of withdrawal were 19-18 *in favor* of the Union. This initial tally did not include the challenged ballot cast by employee Beagle, which, after it was counted, evened the tally at 19-19. While Heartland may have believed that it knew Beagle's union views, Heartland had proposed during contract negotiations to *exclude* Beagle from the unit. (A. 37.) Further, as Heartland notes (Br. 9-12), Beagle's name was not consistently on the list of eligible voters that Heartland itself prepared. At best, it is disingenuous for Heartland to justify its withdrawal by relying on the final ballot of an individual whom it sought to remove from the unit and on whose unit status it waivered.

regarding the election objections after the certification process was complete, and the employer refused to bargain with the union after the Board certified the union following an initial representation election. As such, it stands in stark contrast, both procedurally and factually, from the current case and presents no precedential barrier to enforcing the Board's order.[8]

Heartland erroneously relies on (Br. 38) *Mike O'Connor Chevrolet-Buick-GMC*, 209 NLRB 701 (1974), *enforcement denied on other grounds*, 512 F.2d 684 (8th Cir. 1975), arguing that an employer should be entitled to "make unilateral changes following a representation election and before election objections are resolved, but do[ ] so at its peril." However, unlike *Mike O'Connor*, which involved an initial certification, the election at issue here involves an incumbent union and therefore changes in an existing relationship. In *Krueger*, the Board expressly rejected applying the *Mike O'Connor* exception and allowing an employer to "act at its peril" in a decertification context. As the Board noted, "an

[8] Likewise, in the only other in-circuit authority that is arguably related to the present case, *Weather Shield Manufacturing, Inc.*, 292 NLRB 1 (1988), *enforcement denied*, 890 F.2d 52 (7th Cir. 1989), this Court did not expressly address or discuss the issue now squarely presented – whether an employer must maintain the status quo until the Board has the opportunity to certify the decertification election results. In *Weather Shield*, the Board determined that the employer had committed certain unfair labor practices, which were also the basis of the union's decertification election objections, and directed the employer to bargain. This Court, relying heavily on the credibility determinations of the administrative law judge, reversed the Board and found the employer had not engaged in unlawful conduct. The Court did not address the rule in *Krueger*, and therefore *Weather Shield* offers little insight into resolution of the present case.

employer in an organizational campaign has no preexisting obligation to bargain with the Union. The status quo for such an employer is to act unilaterally." *Krueger*, 299 NLRB at 916.

Additionally, the Board distinguishes unilateral changes made *before* an initial certification issues from those made in the decertification context where there is an incumbent union in place. "In the initial organizational context . . . the employees have not yet developed expectations of the union's ability to represent them. Thus, the fact that the union was unable to prevent the employer from making unilateral changes is not likely to have as lasting an effect on the employees' view of the effectiveness of their as yet uncertified bargaining representative." *Id.* at 917. Here, the Union has represented the employees since 2006, and has engendered certain expectations regarding its role as representative. Further, the Board has cautioned that an employer's immediate withdrawal in the face of meritorious objections would diminish, "perhaps beyond repair," the union's "chances of prevailing in a rerun election." *Id.*

The Board fully considered its decision to require maintenance of the status quo in the decertification context and, consistent with its congressional grant of authority, determined in its expert judgment that the stability fomented by the rule outweighed any drawbacks. *Id.* The Board reasoned that preserving the status quo until it resolves the union's status promotes stability and labor peace more

effectively than "bargaining after the fact over changes made on the assumption that the union no longer plays a role in setting terms and conditions of employment." *Id*. Indeed, as discussed above, the Board concluded that allowing the relationships to continue until the union's status is resolved, maintains stability in labor relations.

This Court should reject Heartland's invitation (Br. 40-41) to follow the Fifth Circuit's approach, which declines to adopt the Board's rule in *Krueger* and makes no distinction between initial representation and decertification elections. *NLRB v. Arkema*, 710 F.3d 308 (5th Cir. 2013) (re-affirming *Dow Chemical Co. v. NLRB*, 677 F.2d 544 (5th Cir. 1981) and *Selkirk Metalbestos, Inc. v. NLRB*, 116 F.3d 782 (5th Cir. 1997)). As the Board pointed out in *Krueger*, there is a substantial distinction between the rules applied to the two types of elections and the "basis is the difference in the relationships among the employer, the employees, and the union at the time the two types of petitions are filed." 299 NLRB at 917. As fully described above, the Board properly exercised its authority under the Act to strike a balance that protects employee free choice, only minimally burdens the parties, and provides for stability in bargaining relationships until the decertification process is complete. The Fifth Circuit case law fails to accord the Board proper deference, and improperly substitutes its judgment for that of the Board. This Court should adopt the Board's rule in *Krueger*, which

represents a reasoned approach to a representational issue on which the Board's deserves deference.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter judgment enforcing the Board's Order in full.

Respectfully submitted,

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NOVEMBER 2013

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 13-1954
	*	13-2079
and	*	
	*	Board Case No.
AMERICAN FEDERATION STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME,) COUNCIL 31, AFL-CIO	*	14-CA-87886
	*	
	*	
Intervenor	*	
	*	
v.	*	
	*	
HEARTLAND HUMAN SERVICES	*	
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 6,764 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 8th day of November, 2013

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	*	
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	*	
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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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

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this 8th day of November, 2013

Statutory and Regulatory Addendum

29 U.S.C. § 151

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise

by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(a)(1)

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

29 U.S.C. § 158(a)(3)

It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has

reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

29 U.S.C. § 158(a)(5)

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 160(a)

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 U.S.C. § 160(e)

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused

because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

29 U.S.C. § 160(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 any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 C.F.R. § 102.60(a)

Petition for certification or decertification; who may file; where to file; withdrawal. A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of section 9(c) of the Act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of section 9(c) of the Act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalty of perjury, that its contents are true and correct (see 28 U.S.C. Sec. 1746). One original of the petition shall be filed. A person filing a petition by facsimile pursuant to § 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. Except as provided in § 102.72, such petitions shall be filed with the Regional Director for the Region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more Regions, with the Regional Director for any of such Regions. Prior to the transfer of the case to the Board, pursuant to § 102.67, the petition may be withdrawn only with the consent of the Regional Director with whom such petition was filed. After the transfer of the case to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the Regional Director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

29 C.F.R. § 102.62

Election agreements. (a) Consent election agreements with final regional director determinations of post-election disputes. Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the Regional Director, enter into an agreement providing for the waiver of a hearing and for an election and further providing that post- election disputes will be resolved by the regional director. Such agreement, referred to as a consent-election agreement, shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be conducted

under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the Regional Director in conducting elections pursuant to sections 102.69 and 102.70 except that the rulings and determinations by the Regional Director of the results thereof shall be final, and the Regional Director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, provided further that rulings or determinations by the Regional Director in respect to any amendment of such certification shall also be final.

(b) *Stipulated election agreements with discretionary board review.* Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter into an agreement providing for a waiver of hearing and for an election as described in paragraph (a) of this section and further providing that the parties may request Board review of the Regional Director's postelection disputes. Such agreement, referred to as a stipulated election agreement, shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the Regional Director. The method of conducting such election and the postelection procedure shall be consistent with that followed by the Regional Director in conducting elections pursuant to sections 102.69 and 102.70.

(c) *Full consent election agreements with final Regional Director determinations of pre- and postelection disputes.* Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter into an agreement, referred to as a full consent election agreement, providing that pre- and postelection disputes will be resolved by the regional director. Such agreement provides for a hearing pursuant to Sections 102.63, 102.64, 102.65, 102.66 and 102.67 to determine if a question concerning representation exists.. Upon the conclusion of such a hearing, the Regional Director shall issue a decision. The rulings and determinations by the Regional Director thereunder shall be final, with the same force and effect, in that case, as if issued by the Board. Any election ordered by the Regional Director shall be conducted under the direction and supervision of the Regional

Director. The method of conducting such election shall be consistent with the method followed by the Regional Director in conducting elections pursuant to Sections 102.69 and 102.70, except that the rulings and determinations by the Regional Director of the results thereof shall be final, and the Regional Director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, provided further that rulings or determinations by the Regional Director in respect to any amendment of such certification shall also be final.

29 C.F.R. § 102.63

Investigation of petition by Regional Director; notice of hearing; service of notice; withdrawal of notice.—(a) After a petition has been filed under section 102.61(a), (b), or (c), if no agreement such as that provided in section 102.62 is entered into and if it appears to the Regional Director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the Act will be effectuated, and that an election will reflect the free choice of employees in the appropriate unit, the Regional Director shall prepare and cause to be served on the parties and on any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the Regional Director on his own motion.

(b) After a petition has been filed under section 102.61(d) or (e), the Regional Director shall conduct an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served on the parties and on any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the Regional Director on his own motion. All hearing and posthearing procedure under this subsection (b) shall be in conformance with sections 102.64 through 102.68 whenever applicable, *except* where the unit or certification involved arises out of an agreement as provided in section 102.62(a), the Regional Director's action shall be final, and the provisions for review of Regional Director's decisions by the

Board shall not apply. Dismissals of petitions without a hearing shall not be governed by section 102.71. The Regional Director's dismissal shall be by decision, and a request for review therefrom may be obtained under section 102.67, except where an agreement under section 102.62(a) is involved.

29 C.F.R. § 102.69(a)

Election procedure; tally of ballots; objections; certification by the Regional Director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the Regional Director, whose decision shall be final, have its name removed from the ballot: Provided, however, That in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the Regional Director, disclaiming any representation interest among the employees in the unit. Any party may be represented by observers of its own selection, subject to such limitations as the Regional Director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the Regional Director an original and five copies of objections to the conduct of the election or to conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. A person filing objections by facsimile pursuant to §102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile pursuant to §102.114(f). The Regional Director will cause a copy of the objections to be served on each of the other parties to the proceeding. Within 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections shall furnish to the Regional Director the evidence available to it to support the objections.

29 C.F.R. § 102.69(c)(2)

If a consent election has been held pursuant to section 102.62(b), the Regional Director shall prepare and cause to be served on the parties a report on challenged ballots or on objections, or on both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C. Within 14 days from the date of issuance of the report on challenged ballots or on objections, or on both, any party may file with the Board in Washington, D.C., exceptions to such report, with supporting documents as permitted by section 102.69(g)(3) and/or a supporting brief if desired. Within 7 days from the last date on which exceptions and any supporting documents and/or supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief, with supporting documents as permitted by section 102.69(g)(3) if desired, with the Board in Washington, D.C. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases.

29 C.F.R. § 102.69(d)

In issuing a report on objections or on challenged ballots, or on both, following proceedings under section 102.62(b) or 102.67, or in issuing a decision on objections or on challenged ballots, or on both, following proceedings under section 102.67, the Regional Director may act on the basis of an administrative investigation or upon the record of a hearing before a hearing officer. Such hearing shall be conducted with respect to those objections or challenges which the Regional Director concludes raise substantial and material factual issues.

29 C.F.R. § 102.69(e)

Any hearing pursuant to this section shall be conducted in accordance with the provisions of sections 102.64, 102.65, and 102.66, insofar as applicable, except that, upon the close of such hearing, the hearing officer shall, if directed by the Regional Director, prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. In any case in which the Regional Director has directed that a report be prepared and served, any party may, within 14 days from the date of issuance of such report, file with the Regional Director the original and one copy, which may be a carbon copy, of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served

on the other parties and a statement of service filed with the Regional Director. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy, which may be a carbon copy, shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director. If no exceptions are filed to such report, the Regional Director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

29 C.F.R. § 102.69(g)(3)

In a proceeding pursuant to this section in which no hearing is held, a party filing exceptions to a Regional Director's report on objections or on challenges, a request for review of a Regional Director's decision on objections or on challenges, or any opposition thereto may support its submission to the Board by appending thereto copies of documentary evidence, including copies of any affidavits, it has timely submitted to the Regional Director and which were not included in the report or decision. Documentary evidence so appended shall thereupon become part of the record in the proceeding. Failure to timely submit such documentary evidence to the Regional Director, or to append that evidence to its submission to the Board in the representation proceeding as provided above, shall preclude a party from relying on such evidence in any subsequent related unfair labor practice proceeding.