

Nos. 11-1883 and 11-2058

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

RUAN TRANSPORT CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

USHA DHEENAN
Supervisory Attorney

NICOLE LANCIA
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2948
(202) 273-2987

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

National Labor Relations Board

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of the issue presented	3
Statement of the case.....	4
Statement of facts.....	4
I. The representation proceeding.....	4
II. The unfair-labor-practice proceeding.....	7
III. The Board’s conclusions and order	8
Summary of argument.....	9
Standard of review	11
Argument.....	13
The Board acted within its discretion in interpreting the challenged ballot as a vote for Local 705 and certifying Local 705, and therefore properly found that the Company’s admitted refusal to bargain violated Section 8(a)(5) and (1) of the Act	13
A. Applicable principles: The Board seeks to effectuate voter intent when it is clear.....	14
B. The Board reasonably concluded that the ballot markings expressed the voter’s intent to select Local 705.....	16
C. Contrary to the Company’s assertions, the Board did not improperly speculate as to the voter’s intent or depart from its precedent in interpreting the challenged ballot.....	21

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
D. The Court should reject the Company’s due process claim, as it is based entirely on an unfounded suspicion that the Hearing Officer and Board did not review the original ballot	25
1. Administrative agencies are afforded a presumption of regularity in their decision making.....	26
2. The Company has not met its burden because the Hearing Officer and Board stated that they reviewed the record, which undeniably includes the original ballot, and the Company has not presented any evidence to the contrary.....	28
Conclusion	33

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Abtex Beverage Corp.</i> , 237 NLRB 1271 (1978)	16,19
<i>American Cable & Radio Corp.</i> , 107 NLRB 1090 (1954)	16
<i>Amalgamated Clothing Workers of America v. NLRB</i> , 365 F.2d 898 (D.C. Cir. 1966)	31
<i>Arthur Sarnow Candy Co. & Lily Popcorn, Inc.</i> , 311 NLRB 1137 (1993)	25
<i>Bishop Mugavero Center for Geriatric Care, Inc.</i> , 322 NLRB 209 (1996)	15,23,25
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964)	3
<i>Braniff Airways, Inc. v. Civil Aeronautics Board</i> , 379 F.2d 453 (D.C. Cir. 1967)	26,30
<i>Brooks Brothers, Inc.</i> , 316 NLRB 176 (1995)	15,16,20,23,24
<i>Caribe Industrial & Electrical Supply, Inc.</i> , 216 NLRB 168 (1975)	23,25
<i>Clearwater Transport, Inc. v. NLRB</i> , 133 F.3d 1004 (7th Cir. 1998)	12,14,31
<i>Cross Pointe Paper Corp. v. NLRB</i> , 89 F.3d 447 (7th Cir. 1996)	14
<i>Desert Hospital v. NLRB</i> , 91 F.3d 187 (D.C. Cir. 1996)	26

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999)	3
<i>Friends of Iwo Jima v. National Capital Planning Commission</i> , 176 F.3d 768 (4th Cir. 1999)	26
<i>Gifford-Hill & Co.</i> , 181 NLRB 729 (1970)	16,21
<i>Hercules, Inc. v. EPA</i> , 598 F.2d 91 (D.C. Cir. 1978)	27
<i>Hydro Conduit Corp.</i> , 260 NLRB 1352 (1982)	15
<i>International Telephone & Telegraph v. NLRB</i> , 294 F.2d 393 (9th Cir. 1961)	13
<i>J.L.P. Vending Co.</i> , 218 NLRB 794 (1975), <i>enforced</i> , 547 F.2d 1161 (3d Cir. 1977)	16,22
<i>K-Mart Corp. v. NLRB</i> , 125 F.3d 572 (7th Cir. 1997)	15
<i>Lemoyne-Owen College v. NLRB</i> , 357 F.3d 55 (D.C. Cir. 2004)	23
<i>Medina County Publications</i> , 274 NLRB 873 (1985)	3
<i>Mediplex of Connecticut, Inc.</i> , 319 NLRB 281 (1995)	16,21
<i>Mercy College</i> , 212 NLRB 925 (1974)	15,23,24

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	13,14
<i>Miller v. French</i> , 530 U.S. 327 (2000).....	26
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972).....	26
<i>NLRB v. A.J. Tower Co.</i> , 329 U.S. 324 (1946).....	11,14
<i>NLRB v. AmeriCold Logistics, Inc.</i> , 214 F.3d 935 (7th Cir. 2000)	12,13,15,22,31
<i>NLRB v. Biles Coleman Lumber Co.</i> , 98 F.2d 16 (9th Cir. 1938)	26
<i>NLRB v. Chicago Tribune Co.</i> , 943 F.2d 791 (7th Cir. 1991)	11
<i>NLRB v. Deutsch Post Global Mail, Ltd.</i> , 315 F.3d 813 (7th Cir. 2003)	12
<i>NLRB v. Donnelly Garment Co.</i> , 330 U.S. 219 (1947).....	27
<i>NLRB v. Erie Brush & Manufacturing Corp.</i> , 406 F.3d 795 (7th Cir. 2005)	11
<i>NLRB v. Jasper Chair Co.</i> , 138 F.2d 756 (7th Cir. 1943)	26,27
<i>NLRB v. Martz Chevrolet, Inc.</i> , 505 F.2d 968 (7th Cir. 1974)	15

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>NLRB v. Mattison Machine Works</i> , 365 U.S. 123 (1961).....	12
<i>NLRB v. Newly Weds Foods, Inc.</i> , 758 F.2d 4, 12 (1st Cir. 1985).....	16
<i>NLRB v. Olson Bodies, Inc.</i> , 420 F.2d 1187 (2d Cir. 1970).....	12
<i>NLRB v. Precise Castings, Inc.</i> , 915 F.2d 1160 (7th Cir. 1990)	15
<i>NLRB v. Southern Health Corp.</i> , 514 F.2d 1121 (7th Cir. 1975)	12
<i>NLRB v. Whitinsville Spinning Ring Co.</i> , 199 F.2d 585 (1st Cir. 1952).....	16
<i>Overnite Transport Co. v. NLRB</i> , 104 F.3d 109 (7th Cir. 1997)	11
<i>Pace University v. NLRB</i> , 514 F.3d 19 (D.C. Cir. 2008).....	31,34
<i>Sadler Brothers Trucking & Leasing Co.</i> , 225 NLRB 194 (1976)	23, 24
<i>TCI West, Inc. v. NLRB</i> , 145 F.3d 1113 (9th Cir. 1998)	22
<i>U.S. v. Chemical Foundation, Inc.</i> , 272 U.S. 1 (1926).....	26
<i>United States v. Morgan</i> 313 U.S. 409 (1941).....	27

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Uniroyal Tech. Corp. v. NLRB</i> , 98 F.3d 993 (7th Cir. 1996)	14
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474.....	12
<i>Wackenhut Corp. v. NLRB</i> , 666 F.2d 464 (11th Cir. 1982)	15,16,18,19,21
<i>Wilson Athletic Goods Manufacturing Co. v. NLRB</i> , 164 F.2d 637 (7th Cir. 1947)	22
<i>Yellow Freight System, Inc. v. Martin</i> , 983 F.2d 1195 (2d Cir. 1993).....	26
 Statutes:	 Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	14
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	14
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	13
Section 9(c) (29 U.S.C. § 159(c))	3
Section 9(d) (29 U.S.C. § 159(d))	3
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2,12
Section 10(f) (29 U.S.C. § 160(f))	2

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

Nos. 11-1883 and 11-2058

RUAN TRANSPORT CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Ruan Transport Corporation (“the Company”) to review, and the cross-application of the Board (“the Board”) to enforce, the Board’s Decision and Order issued against the Company. The unfair-labor-practice case involves the Company’s refusal to bargain with its employees’ union because it believes the Board improperly certified the election results by

misinterpreting a ballot cast for Teamsters Local 705 (“Local 705”), affiliated with the International Brotherhood of Teamsters.

The Board’s Decision and Order issued on April 13, 2011 and is reported at 356 NLRB No. 139. (J.A. 139-41.)¹ The Board found that the Company unlawfully refused to bargain with Local 705 after the Board certified it as the employees’ exclusive bargaining representative, and ordered the Company to do so. The Company petitioned for review on April 14, 2011, and the Board cross-applied for enforcement on May 9, 2011. Both filings are timely; the National Labor Relations Act (“the Act”) places no time limit on such filings.

The Board had subject matter jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the Act, which authorizes the Board to prevent unfair labor practices affecting commerce.² The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act.³ This Court has

¹ “J.A.” references are to the Joint Appendix filed by the Company. “Bd. Ex. 2” refers to the original challenged ballot submitted with the agency record to the Court. “Br.” references are to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

² 29 U.S.C. §§ 151, 160(a).

³ 29 U.S.C. § 160(e) and (f).

jurisdiction under the same sections of the Act because the unfair labor practices occurred in Franklin Park, Illinois.⁴

As the Board's unfair-labor-practice Order is based partly on findings made in the underlying representation (election) proceeding, the record in that case (*Ruan Transport Corp.*, Board Case No. 13-RC-21909) is also before the Court pursuant to Section 9(d) of the Act.⁵ Section 9(d) authorizes judicial review of the Board's actions in a representation proceeding solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board," but does not give the Court general authority over the representation proceeding.⁶ The Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with the Court's ruling in the unfair-labor-practice case.⁷

STATEMENT OF THE ISSUE PRESENTED

The ultimate issue is whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 705.

⁴ *Id.*

⁵ 29 U.S.C. § 159(d); *see Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964).

⁶ 29 U.S.C. § 159(d).

⁷ 29 U.S.C. § 159(c); *see, e.g., Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *Medina County Publ'ns*, 274 NLRB 873, 873 (1985).

The Board based this determination on its findings in the underlying representation proceeding, particularly that the dispositive challenged ballot manifested the voter's intent to select Local 705. Therefore, the subsidiary issue is whether the Board abused its discretion in interpreting the dispositive ballot as a vote for Local 705 and certifying Local 705 as employees' collective-bargaining representative.

STATEMENT OF THE CASE

The Board found (J.A. 139) that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 705 as the certified collective-bargaining representative of an appropriate unit of company employees. The Company admits its refusal to bargain (Br. 6), but contests the validity of Local 705's certification based on the Board's review and disposition of the determinative ballot in the representation case. The Board's findings in the representation and unfair-labor-practice proceedings, as well as its Conclusions and Order, are summarized below.

STATEMENT OF FACTS

I. The Representation Proceeding

The Company operates a truck transportation group that specializes in contract carriage arrangements and handles all product transportation needs for each of its customers. (J.A. 139; 3-4, 35.) On February 1, 2010,⁸ Local 705

⁸ All dates are in 2010 unless otherwise indicated.

petitioned the Board for certification as the representative of an appropriate unit of the Company's truck drivers and warehouse spotters/drivers at its Castle Metal facility. (J.A. 139; 1.) On March 5, the Board's Regional Director issued a Decision and Direction of Election ordering an election for that unit; based on a prior voluntary recognition agreement between the Company and Local 710, he directed that Local 710 appear on the election ballots as an intervenor, if it submitted an appropriate showing of interest. (J.A. 44; 3-11.)

On April 1, the Board conducted an election. (J.A. 44, 139.) The tally of ballots for that election showed 12 votes for Local 705 and 11 votes for Local 710, and the Board challenged two ballots, which were determinative. (J.A. 12, 106.) On April 15, the Regional Director issued a Report on Challenged Ballots and Notice of Hearing on the two challenged ballots affecting the results of the April 1 election, ordering a hearing on the issues raised by those ballots. (J.A. 106.) On April 28, the Company, Local 705, and Local 710 stipulated that the April 1 election was valid and that one of the two ballots should be opened and counted. Consequently, the Regional Director issued a revised tally of ballots showing that each local union received 12 votes. (J.A. 13-16.)

That tie necessitated a run-off election by mail ballot, which began on May 14. (J.A. 44 n.1.) The mail ballots were printed on hot pink paper.⁹ (J.A. 44 n.1, 49; 26, Bd. Ex. 2.) The tally of ballots issued June 2 for the runoff election reflects that Local 705 and Local 710 each received 14 votes, and the Company challenged two ballots, a sufficient number to affect the results. (J.A. 44, 139; 17, 18 n.2.) One challenge—the only one at issue here¹⁰—involved a ballot with markings in the boxes designated for both Local 705 and Local 710 (Bd. Ex. 2). The Company argued that the voter’s intent was unclear and that the ballot should therefore be voided. (J.A. 44; 40.) The Regional Director concluded that the challenges raised substantial and material issues, and issued a notice of hearing, which was held on June 21. (J.A. 18-20.)

On August 6, the Hearing Officer issued her Report on Challenges recommending that the Company’s challenge to the double-marked ballot be overruled and that the Regional Director issue a revised tally of ballots counting the disputed ballot as a vote for Local 705. As the Hearing Officer noted, the ballot instructed voters to mark an “X” in the square designated for the

⁹ The Board varies ballot colors and does not disclose the color for a particular election to parties before the polls open. *See* NLRB Casehandling Manual, Part Two-Representation Proceedings § 11306.5, available at <http://www.nlr.gov/sites/default/files/documents/44/chm2.pdf>.

¹⁰ The hearing officer sustained the Company’s other challenge concerning one voter’s eligibility, and the Board adopted that finding pro forma. (J.A. 83 n.1.)

representative of their choice. (J.A. 49; Bd. Ex. 2.) However, she found that the voter marked an “X” in both boxes using a black ink pen and colored over the “X” in the Local 710 box with a purple highlighter, rendering that “X” barely visible against the hot pink background. Accordingly, the Hearing Officer concluded that the voter attempted to obliterate his or her choice of Local 710. (J.A. 49-52.)

Thereafter, the Company and Local 710 filed exceptions to the Hearing Officer’s Report. (J.A. 83; 58-78.)

On November 30, the Board (Members Becker, Pearce, and Hayes) issued its Decision and Certification of Representative based on a review of the record, exceptions, and briefs, adopting the Hearing Officer’s findings and recommendations, and certifying Local 705 as unit employees’ exclusive bargaining representative. (J.A. 83-84.)

II. The Unfair-Labor-Practice Proceeding

Following its certification, on December 21, Local 705 requested bargaining with the Company. On January 19, 2011, the Company informed Local 705 that it would not recognize and bargain with Local 705 because “it disputes the validity of the certification that the NLRB issued in this case.” (J.A. 140; 86, 108.) On January 28, 2011, Local 705 filed an unfair-labor-practice charge and, on February 8, 2011, the Board’s General Counsel issued a complaint alleging that the Company’s refusal to bargain violated Section 8(a)(5) and (1) of the Act.

(J.A. 139.) The Company answered the complaint, admitting its refusal to bargain, but disputing the propriety of Local 705's certification. (J.A. 139; 101.)

On March 2, 2011, the General Counsel filed a motion for summary judgment with the Board. (J.A. 139; 105.) The Board issued an order transferring the case to itself and directing the Company to show cause why the Board should not grant summary judgment. (J.A. 139; 113.) The Company responded, reiterating its opposition to Local 705's certification as the exclusive collective-bargaining representative. (J.A. 139; 105-12, 125-29.) The Company also filed a motion to supplement the unfair-labor-practice case record with the original ballot and other documents from the representation proceeding, but stated that it did not seek to introduce new evidence or re-litigate the representation case. (J.A. 139; 115-16, 117-24.)

III. The Board's Conclusions and Order

On April 13, 2011, the Board (Members Becker, Pearce, and Hayes) issued a Decision and Order granting the General Counsel's motion for summary judgment. The Board found that all issues the Company raised in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding. It also found that the Company neither offered to adduce any newly discovered and previously unavailable evidence, nor alleged any special circumstances requiring the Board to reexamine its decision to certify Local 705.

The Board denied the motion to supplement the record and took official notice of the “record” in the representation proceeding. Accordingly, the Board concluded that the Company’s refusal to bargain with Local 705 violated Section 8(a)(5) and (1) of the Act. (J.A. 139-40.)

The Board’s remedial Order requires the Company to cease and desist from failing and refusing to bargain with Local 705 and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board’s Order directs the Company to bargain upon request with Local 705, embody in a signed agreement any understanding reached, and post paper copies of a remedial notice to employees at its Franklin Park, Illinois facility; the Company must also distribute the notice electronically if it customarily communicates with its employees that way. (J.A. 140-41.)

SUMMARY OF ARGUMENT

The Board reasonably concluded that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 705 because the Company failed to show that the Board improperly certified that union’s election victory. The Board acted within its broad discretion in finding that the disputed ballot reflected the voter’s attempt to obliterate his or her marking in the Local 710 box and intent to vote for Local 705. The Company has not proven otherwise.

The Board properly interpreted the ballot as a vote for Local 705. The Hearing Officer thoroughly examined the ballot, noting the voter's placement of a distinct "X" in the Local 705 box and his or her attempt to cover the Local 710 "X" with purple highlighting. Based on these markings and consistent with the Board's prior determinations of voter intent, the Hearing Officer correctly found that the voter intended to obliterate the Local 710 markings and choose Local 705. The Board therefore properly certified Local 705.

The Company's challenges to the Board's certification of Local 705 sprout from unfounded assumptions and suspicions. First, the Company asserts that the Hearing Officer "engaged in pure speculation" as to the voter's intent because her report included language such as "appears" and "attempt to obliterate." This claim ignores Board and appellate case law describing double-marked ballots in a similar manner and disregards the Board's duty to interpret ballots without being able to question voters about their intent, preserving the integrity of secret-ballot elections.

Second, the Company erroneously contends that the Board departed from its precedent on ballot interpretations. However, the Company's cited cases miss the mark, as they either concern ambiguous ballots with heavily shaded and blackened squares or do not involve attempted obliterations or erasures at all, unlike this case.

Finally, the Company argues that the Board denied it due process, claiming that the Hearing Officer only viewed a black-and-white photocopy of the ballot

and that the Board failed to review the original ballot. However, this allegation is spun from whole cloth. Without even a shred of evidence to support its accusation, the Company has not rebutted the “presumption of regularity” generally accorded all agency decisions. Indeed, contrary to the Company’s speculation, the Hearing Officer’s Report described the “pink ballot” and “purple highlighting,” which would be impossible to discern from a black-and-white photocopy, and the Board stated that it “reviewed the record in light of the exceptions and briefs.” Thus, absent any evidence to the contrary, this Court must accept the Board’s assurances that it reviewed the record, which indisputably includes the original ballot.

STANDARD OF REVIEW

This Court’s “review of the Board’s decision to certify a collective bargaining agent following an election is extremely limited.”¹¹ As the Supreme Court long ago recognized in *NLRB v. A.J. Tower Co.*: “Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives by employees.”¹² Such wide discretion is warranted in light of the

¹¹ *NLRB v. Chicago Tribune Co.*, 943 F.2d 791, 794 (7th Cir. 1991); accord *NLRB v. Erie Brush & Mfg. Corp.*, 406 F.3d 795, 801 (7th Cir. 2005); *Overnite Transp. Co. v. NLRB*, 104 F.3d 109, 112 (7th Cir. 1997).

¹² 329 U.S. 324, 330 (1946).

Board’s presumptive “experience and expertise in labor elections.”¹³ The results of a Board-conducted secret-ballot election should not lightly be set aside, and the burden of proving otherwise is on the objecting party.¹⁴ The Second Circuit has stated that “the conduct of representation elections is the very archetype of a purely administrative function, with no quasi about it, concerning which courts should not interfere save for the most glaring discrimination or abuse.”¹⁵

This Court “give[s] deference to the Board’s interpretation of a ballot and will reverse only for abuse of discretion.”¹⁶ Moreover, the Court will “presume the validity of a Board-supervised election and will affirm the Board’s certification of a union if that decision is supported by substantial evidence.”¹⁷ As such, the Board’s underlying factual findings are “conclusive” if supported by substantial evidence.¹⁸ Thus, even if the reviewing court disagrees with the Board’s action in

¹³ *NLRB v. S. Health Corp.*, 514 F.2d 1121, 1123 (7th Cir. 1975).

¹⁴ *NLRB v. Mattison Mach. Works*, 365 U.S. 123, 124 (1961).

¹⁵ *NLRB v. Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (2d Cir. 1970).

¹⁶ *NLRB v. AmeriCold Logistics, Inc.*, 214 F.3d 935, 939 (7th Cir. 2000).

¹⁷ *AmeriCold Logistics, Inc.*, 214 F.3d at 937; *accord Clearwater Transp., Inc. v. NLRB*, 133 F.3d 1004, 1008 (7th Cir. 1998).

¹⁸ 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *NLRB v. Deutsch Post Global Mail, Ltd.*, 315 F.3d 813, 815 (7th Cir. 2003).

an election case, it must affirm the Board's decision if a reasonable person could have reached the same conclusion as the Board.¹⁹

ARGUMENT

THE BOARD ACTED WITHIN ITS DISCRETION IN INTERPRETING THE CHALLENGED BALLOT AS A VOTE FOR LOCAL 705 AND CERTIFYING LOCAL 705, AND THEREFORE PROPERLY FOUND THAT THE COMPANY'S ADMITTED REFUSAL TO BARGAIN VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

As this Court explained: "Refusing to bargain is the only way for an employer to get judicial review of an NLRB decision upholding an election and certifying a union."²⁰ The Company admits (Br. 6) that it refused to bargain to contest Local 705's certification as the employees' exclusive bargaining representative. However, unless the Company prevails in its challenge to the election, its refusal to bargain violates Section 8(a)(5) and (1) of the Act. Under Section 8(a)(5) of the Act, it is an unfair labor practice for an employer to refuse to bargain in good faith with the representative of its employees.²¹ A violation of

¹⁹ See *AmeriCold Logistics, Inc.*, 214 F.3d at 940 (enforcing Board order directing employer to bargain with union following election because Board's conclusion that ballot must be voided was "not at all unreasonable"); *Int'l Tel. & Tel. Corp. v. NLRB*, 294 F.2d 393, 395 (9th Cir. 1961) (finding no abuse of discretion, despite disagreement with Board's action).

²⁰ *AmeriCold Logistics, Inc.*, 214 F.3d at 937.

²¹ 29 U.S.C. § 158(a)(5); see *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Section 8(a)(5) also results in a derivative violation of Section 8(a)(1),²² which makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights.²³ Accordingly, if the Board acted within its discretion in interpreting the challenged ballot as a vote for Local 705 and subsequently certifying it, the Company’s refusal to bargain violated the Act and the Court must enforce the Board’s Order.²⁴ As shown below, the Board did not abuse its discretion in interpreting the ballot, and there is no merit to the Company’s contentions that the Board improperly speculated as to the voter’s intent, departed from its precedent on ballot interpretations, or denied the Company due process.

A. Applicable Principles: The Board Seeks To Effectuate Voter Intent When It Is Clear

The results of a Board-supervised and certified election are presumptively valid.²⁵ The Board “possesses discretion to set the rules for conducting elections and to determine what procedures suffice to protect the employees’ right to

²² *Metro. Edison Co.*, 460 U.S. at 698 n.4.

²³ 29 U.S.C. § 158(a)(1); 29 U.S.C. § 157 (guaranteeing employees the right “to self-organization, to form, join, or assist labor organizations [and] to bargain collectively through representatives of their own choosing . . .”).

²⁴ *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Cross Pointe Paper Corp. v. NLRB*, 89 F.3d 447, 449 (7th Cir. 1996).

²⁵ *Uniroyal Tech. Corp. v. NLRB*, 98 F.3d 993, 997 (7th Cir. 1996); *accord Clearwater Transp., Inc. v. NLRB*, 133 F.3d 1004, 1008 (7th Cir. 1998).

choose.”²⁶ Moreover, “[r]erunning elections, or litigating about their validity, may frustrate indefinitely the implementation of the employees’ legitimate selection. Choosing how much imperfection to accept is for the Board.”²⁷

In conducting elections, the Board has a longstanding policy of attempting to effectuate the voter’s intent whenever possible.²⁸ As this Court noted in *NLRB v. AmeriCold Logistics, Inc.*: “The Board’s policy—and the rule in this circuit—is to count ballots when the voters’ intent is clear, despite irregularities in the manner in which the ballots have been marked.”²⁹ The Board voids ballots on which a voter marked both boxes and either mark alone would be sufficient to indicate the voter’s intent.³⁰ In contrast, where, as here, the voter attempted to erase or obliterate the markings in one box, the Board has consistently validated such ballots, finding that the voter clearly indicated his or her final choice by leaving

²⁶ *NLRB v. Precise Castings, Inc.*, 915 F.2d 1160, 1162 (7th Cir. 1990); accord *K-Mart Corp. v. NLRB*, 125 F.3d 572, 573 (7th Cir. 1997) (recognizing the Board’s “discretion and expertise in assessing the impact of conditions surrounding an election”).

²⁷ *Precise Castings, Inc.*, 915 F.2d at 1164.

²⁸ *Hydro Conduit Corp.*, 260 NLRB 1352, 1352 (1982); see *Wackenhut Corp. v. NLRB*, 666 F.2d 464, 467 (11th Cir. 1982).

²⁹ 214 F.3d 935, 939 (7th Cir. 2000); accord *NLRB v. Martz Chevrolet, Inc.*, 505 F.2d 968, 971 (7th Cir. 1974); *Brooks Brothers, Inc.*, 316 NLRB 176, 176 (1995).

³⁰ See, e.g., *Bishop Mugavero Ctr. for Geriatric Care, Inc.*, 322 NLRB 209, 209 (1996); *Mercy College*, 212 NLRB 925, 925 (1974).

alone the remaining mark in the other box.³¹ Courts that have considered the issue agree with this reasoning.³²

Referring to the Board's practice of giving effect to voter intent whenever possible, then-Judge Breyer, writing for the First Circuit, appropriately stated in *NLRB v. Newly Weds Foods, Inc.*: "[O]ne glance at the ballot is worth a thousand words."³³ Here, one glance at the ballot should lead the Court to conclude that the Board acted reasonably in interpreting it as a vote for Local 705.

B. The Board Reasonably Concluded that the Ballot Markings Expressed the Voter's Intent to Select Local 705

The Board did not abuse its discretion in adopting the Hearing Officer's finding that the anonymous voter intended to cast a ballot for Local 705 and attempted to obliterate his or her vote for Local 710. (J.A. 83-84; 51-52.) The

³¹ See, e.g., *Mediplex of Conn., Inc.*, 319 NLRB 281, 300 (1995); *Brooks Brothers, Inc.*, 316 NLRB at 176; *Abtex Beverage Corp.*, 237 NLRB 1271, 1271 (1978); *J.L.P. Vending Co.*, 218 NLRB 794, 794-95 (1975), *enforced*, 547 F.2d 1161 (3d Cir. 1977); *Gifford-Hill & Co.*, 181 NLRB 729, 729 (1970); *Am. Cable & Radio Corp.*, 107 NLRB 1090, 1092 (1954).

³² See, e.g., *Wackenhut Corp. v. NLRB*, 666 F.2d 464, 468 (11th Cir. 1982) (where a voter attempts to erase or scratch out one option, "the obvious inference is that the voter began to make a mark in one box, and either changed his mind or realized that he was not marking the box of his choice"); see also *NLRB v. Whitinsville Spinning Ring Co.*, 199 F.2d 585, 588-89 (1st Cir. 1952) (validating ballot that appeared to have erasure in "Yes" box and had a clear "X" in "No" box).

³³ 758 F.2d 4, 12 (1st Cir. 1985) (finding Board did not abuse discretion in declaring void an ambiguous ballot); see *Abtex Beverage Corp.*, 237 NLRB at 1271 ("a reference to the ballot quickly demonstrates" the voter's intent).

Hearing Officer thoroughly examined the determinative challenged ballot and properly interpreted it as a vote for Local 705, in accordance with the Board's policy of validating double-marked ballots when the voter's intent is clear.

First, in analyzing the disputed ballot, the Hearing Officer accurately described it as follows (J.A. 49, 52 (emphasis added)):

At the hearing, [the Regional Attorney] . . . presented the *pink ballot* in question, which I entered as Board Exhibit 2. At the top of this ballot, the Region printed the following instructions in English: "This ballot is to determine the collective bargaining representative, if any, for the unit in which you are employed. Mark an "X" in the square of your choice." . . . [T]he voter marked an "X" using a black ink pen in both boxes. Moreover, the voter shaded over the "X" that he placed in the 710 box with a purple highlighter. This colored marker covers the entire box, rendering the "X" barely visible to the naked eye. In contrast, the 705 box merely contains a solid "X" in black ink.

....

Even though the voter placed markings in both boxes, his use of a purple highlighter to color over the "X" in the Local 710 box nearly obliterated this mark. When first examining the ballot, the "X" in this box is not visible to the naked eye, especially when compared to the "X" in the Local 705 box. In addition, it appears that *the voter emphasized his selection for Local 705 by ensuring that the mark in this box is a dark black "X."* Therefore, although these markings indicate that the voter changed his mind, his intent to cast a ballot for Local 705 is clear.

....

I rely on the fact that *the purple highlighting appears to be the voter's attempt to obliterate his selection for [Local 710] (even if it does not match the color of the*

ballot), thus resolving ambiguity regarding the voter's intent. Furthermore, there is a *complete, heavily marked "X" in the box designated for [Local 705]*.

This detailed description recognizes that the voter: (1) used a non-erasable black ink pen to mark an "X" in the Local 705 and Local 710 boxes; (2) covered the Local 710 "X" with a purple highlighter (attempting to obliterate that "X" by returning the square to the original ballot color), such that an initial glance at the ballot shows that it is barely visible in comparison with the Local 705 "X"; and (3) left a dark, distinct, and heavily marked "X" in the Local 705 box, emphasizing that choice. (J.A. 49, 52; Bd. Ex. 2.) Upon viewing the ballot (Bd. Ex. 2), this Court should defer to the Board's reasonable conclusion that the voter intended to choose Local 705.

The Board's validation of this ballot comports with its policy of counting double-marked ballots that clearly express the voter's intent. As the Eleventh Circuit explained in *Wackenhut Corp. v. NLRB*:

[T]he Board has found [double-marked] ballots to be a sufficiently clear expression of the voter's intent to be counted as valid. One such situation involves ballots with markings in or near two squares, but on which an attempt has been made to erase or obliterate one of the markings. In such a case, the obvious inference is that the voter began to make a mark in one box, and either changed his mind or realized that he was not marking the box of his choice. Accordingly, he tried to erase that mark to indicate that it did not represent his final or real choice and to indicate that the remaining, unerased mark

did. Such ballots are therefore counted as valid, whether for or against representation.³⁴

Like the situation described in *Wackenhut*, in this case, the voter made markings in both the Local 705 and Local 710 boxes and attempted to obliterate one of those markings—the Local 710 “X.” Thus, by coloring over that “X” with purple highlighter and attempting to obliterate that mark, the voter sought to indicate that it did not represent his or her “final or real choice” and “that the remaining, unerased mark did.”³⁵ The voter further indicated his or her choice of Local 705 by leaving a typical “X” without any additional marks.

Furthermore, the Board’s interpretation is supported by prior Board decisions on double-marked ballots with attempted obliterations or erasures.³⁶ For example, *Abtex Beverage Corp.* involved a ballot with “X’s” in the “Yes” and “No” boxes, for and against union representation, where the “X” in the “No” box had been “scratched over with circular markings.”³⁷ That Board counted the ballot as a “Yes” vote because it was “reasonable to infer from the marking in the ‘No’ box that the voter, having used a pen, could not erase his mark and attempted to

³⁴ 666 F.2d at 468.

³⁵ *See id.*

³⁶ *See supra* note 31.

³⁷ 237 NLRB at 1271.

obliterate the mark therein.”³⁸ Similarly, in *Brooks Brothers, Inc.*, the Board counted a ballot as a vote against the union because “the voter effectively and clearly obliterated the ‘X’ in the ‘yes’ box by scratching over it with additional pencil markings, leaving an unmistakable ‘X’ in the ‘no’ box.”³⁹ Likewise, the Board in *Mediplex of Connecticut, Inc.* found that the voter expressed a clear intent to vote “No,” as the ballot contained a lightly marked “X” in the “Yes” box with “smudges caused by an inadequate eraser,” while the “X” in the “No” box was “heavy, clear, more intense, and contain[ed] a double line on one leg of the ‘X.’”⁴⁰

Consistent with those cases, here, the Board properly recognized that the voter, having used a black pen, could not erase the “X” for Local 710 and found that he or she tried to obliterate it against the hot pink background, coloring in that square with a purple highlighter and leaving an untouched “X” for Local 705. (J.A. 49, 52.) As such, the Board reasonably interpreted the ballot as a vote for Local 705 and, thus, properly certified Local 705 as the employees’ bargaining representative. (J.A. 83-84.)

³⁸ *Id.*

³⁹ 316 NLRB 176, 176 (1995).

⁴⁰ 319 NLRB 281, 300 (1995).

C. Contrary to the Company’s Assertions, the Board Did Not Improperly Speculate as to the Voter’s Intent or Depart From Its Precedent in Interpreting the Challenged Ballot

The Company erroneously argues (Br. 9, 11, 18) that the Board “engaged in pure speculation” by concluding that the voter intended to choose Local 705 and, in doing so, “arbitrarily disregard[ed]” its precedent on double-marked ballots.

These arguments fail.

The Company’s first assertion (Br. 11-12)—that the Board improperly speculated as to the voter’s intent—rests solely on its parsing of the Hearing Officer’s Report. But the Hearing Officer’s use of language like “appears,” “attempt to obliterate,” and “changed his mind” (J.A. 49, 52) does not indicate that the resulting conclusion was speculative. Indeed, the Board and courts of appeals have described ballots in a similar manner.⁴¹ Such language merely acknowledges the Board’s inability to question voters about their intent. The Board ensures that employees can freely choose a bargaining representative by protecting voters’

⁴¹ See, e.g., *Wackenhut Corp. v. NLRB*, 666 F.2d 464, 468 (11th Cir. 1982) (noting that when voter attempts to erase one option, “the obvious inference is that the voter . . . either *changed his mind* or realized that he was not marking the box of his choice”); *Mediplex of Conn., Inc.*, 319 NLRB at 300 (validating ballot based on “smudged *attempted erasure* which was *probably* caused by the worn eraser head on the voting pencil”); *Gifford-Hill & Co.*, 181 NLRB 729, 729 (1970) (“It is reasonable to infer from the marking in the “yes” box that the voter, lacking an eraser, *attempted to blur* with his pencil the slant mark he had made. . . . We find the voter clearly expressed his intent to vote no.”) (emphasis added for each citation).

identities⁴² and prohibiting voters from testifying about their ballots after the election.⁴³ Since the Board may not question voters about their ballots, it must draw on its expertise to review and interpret irregular markings and determine whether the voter's intent is clear; such assessments, though to some extent subjective, are not arbitrary or speculative.⁴⁴

Moreover, in accusing the Board of “arbitrary speculation and guesswork,” the Company itself hypothesizes (Br. 12) possible “explanations for what the voter intended,” suggesting that the voter made a mistake or that someone other than the voter could have marked the ballot. But as this Court once recognized: “All of this is speculation.”⁴⁵ The Company also overstates (Br. 12) the fact that the voter, in this mail-in-ballot election, could have contacted the Board to return the ballot for

⁴² *Wilson Athletic Goods Mfg. Co. v. NLRB*, 164 F.2d 637, 640 (7th Cir. 1947) (“[T]he Board has discharged its full duty if it provides an election, surrounded with the usual safeguards, where the employee is permitted to cast a ballot in secrecy and have it counted as cast.”).

⁴³ *See id.* (allowing voters to testify after an election about their intent in marking ballots “would destroy the stability which an election was devised to produce”).

⁴⁴ *See TCI West, Inc. v. NLRB*, 145 F.3d 1113, 1116 (9th Cir. 1998) (recognizing that Board policy of giving effect to voter's intent whenever possible involves “subjective determinations” but is not arbitrary); *J.L.P. Vending Co.*, 218 NLRB 794, 794 (1975) (engaging in subjective determination and noting that voter's attempted erasure of single diagonal line in “No” box and “placement of several heavy lines in the ‘Yes’ box for emphasis” made clear the voter's intended choice).

⁴⁵ *NLRB v. AmeriCold Logistics, Inc.*, 214 F.3d 935, 939-40 (7th Cir. 2000) (rejecting company's suggestions of plausible interpretations of ambiguous ballot).

a new one. In interpreting irregularly marked ballots, the Board has deemed it “unnecessary to consider that alternative courses of action were available to the voter, i.e., erasing the initial mark with the erasers provided or returning the ballot to the Board agent. . . .”⁴⁶ Thus, the Court should disregard the Company’s effort to create ambiguity where none exists, including its inaccurate reproduction of the Local 710 box (Br. 14) on the disputed ballot, which is already in this Court’s possession. (Bd. Ex. 2.) It shows dark purple dots on top of an “X” against a light purple background; the actual Local 710 box has solid purple highlighting over a black “X” marked on hot pink paper, creating a drastically different visual effect than that depicted by the Company’s illustration.

Next, the Company argues (Br. 9, 17-18) that the Board abused its discretion by inexplicably departing from its policy on voter intent determinations and precedent on ballot interpretations. As an initial matter, the Board is “by no means required to distinguish every precedent cited to it by an aggrieved party.”⁴⁷ Nevertheless, the Company’s cited cases⁴⁸ do not aid its argument. (Br. 12, 17-18.)

⁴⁶ *Brooks Brothers, Inc.*, 316 NLRB at 176 n.4.

⁴⁷ *Lemoyne-Owen College v. NLRB*, 357 F.3d 55, 60-61 (D.C. Cir. 2004).

⁴⁸ *E.g.*, *Bishop Mugavero Ctr. for Geriatric Care, Inc.*, 322 NLRB 209 (1996); *Arthur Sarnow Candy Co. & Lily Popcorn, Inc.*, 311 NLRB 1137 (1993); *Sadler Bros. Trucking & Leasing Co.*, 225 NLRB 194 (1976); *Caribe Indus. & Elec. Supply, Co.*, 216 NLRB 168 (1975); *Mercy College*, 212 NLRB 925 (1974).

For example, in *Mercy College*, the Board declared void an ambiguous double-marked ballot with heavy shading over a discernible “X” in the “No” box and a standard “X” in the “Yes” box because “the markings in either of the designated squares, absent the marking in the other square,” would clearly indicate the voter’s intent.⁴⁹ Similarly, the Board in *Sadler Bros. Trucking & Leasing Co.* invalidated a ballot on which the voter “blackened in” the “Yes” square and placed an “X” in the “No” square, finding the voter’s intent unclear.⁵⁰ Both cases are distinguishable because the Board’s conclusions there relied primarily on its findings that the shaded and blackened squares did not adequately evidence the voters’ attempts to obliterate those choices.⁵¹ Here, the voter did not heavily shade or blacken the Local 710 square to fill it in, nor did the voter use a black-ink pen to cover it; rather, the voter sought to color that square with a purple highlighter, roughly matching the original ballot color and demonstrating that Local 710 was not his or her intended final choice. (Bd. Ex. 2.)

⁴⁹ 212 NLRB at 925. The Board has since questioned the continuing validity of *Mercy College*. See, e.g., *Brooks Brothers, Inc.*, 316 NLRB at 176 n.4.

⁵⁰ 225 NLRB at 196 & n.5 (citing *Mercy College*, 212 NLRB 925, 925 (1974)).

⁵¹ See *Sadler Bros. Trucking & Leasing Co.*, 225 NLRB at 196 (rejecting argument that voter attempted to erase marking); *Mercy College*, 212 NLRB at 925 (rejecting finding that it was reasonable to infer attempted obliteration from heavy shading).

The Company also improperly relies (Br. 12, 18) on *Bishop Mugavero Center for Geriatric Care, Inc.*,⁵² *Arthur Sarnow Candy Co. & Lily Popcorn, Inc.*,⁵³ and *Caribe Indus. & Elec. Supply, Inc.*⁵⁴ in asserting that the Board here deviated from precedent. Unlike this case, none of those cases involved attempted erasures or obliterations.⁵⁵

Thus, the Board did not improperly speculate about the anonymous voter's intent or "stray" (Br. 9) from settled law in interpreting the challenged ballot.

D. The Court Should Reject the Company's Due Process Claim, as it is Based Entirely on an Unfounded Suspicion that the Hearing Officer and Board Did Not Review the Original Ballot

The Company's due process argument (Br. 12-16) hinges on its unfounded accusation that the Hearing Officer and Board failed to review the original challenged ballot and to adequately consider the evidence. The Company's assertions find no basis in reality, and the Court should reject them.

⁵² 322 NLRB 209 (1996).

⁵³ 311 NLRB 1137 (1993).

⁵⁴ 216 NLRB 168 (1975).

⁵⁵ *Bishop Mugavero Ctr. for Geriatric Care, Inc.*, 322 NLRB at 209 (voter intent unclear because ballot contained "X" in "No" box and diagonal line in "Yes" box); *Arthur Sarnow Candy Co. & Lily Popcorn, Inc.*, 311 NLRB at 1138 (voiding ballot because voter checked all three boxes on ballot and wrote "Yes" at the top, and noting that no party argued ballot should have been validated); *Caribe Indus. & Elec. Supply, Inc.*, 216 NLRB at 168 (voter intent unclear because voter marked a vertical line in the "No" square and distinct, complete "X" in "Yes" square).

1. Administrative agencies are afforded a presumption of regularity in their decisionmaking

Due process “principally serves to protect the personal rights of litigants to a full and fair hearing.”⁵⁶ No fixed procedure is required to satisfy this requirement, as “due process is flexible and calls for such procedural protections as the particular situation demands.”⁵⁷ The party claiming a violation bears the burden of proving that it was denied due process and that such denial was prejudicial.⁵⁸

Bare allegations that administrative agencies, including the Board, did not review the record do not establish a due process violation.⁵⁹ Courts accord agency decisionmakers a “presumption of regularity,” under which they presume that, absent “clear evidence to the contrary,” agency officials execute their adjudicatory responsibilities fairly.⁶⁰ The presumption “can be overcome, and further

⁵⁶ *Miller v. French*, 530 U.S. 327, 350 (2000).

⁵⁷ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

⁵⁸ See *Friends of Iwo Jima v. Nat’l Capital Planning Comm’n*, 176 F.3d 768, 774 (4th Cir. 1999); *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996).

⁵⁹ See *NLRB v. Biles Coleman Lumber Co.*, 98 F.2d 16, 17 (9th Cir. 1938) (“This leaves the bare allegation that the Board has not read ‘all of the testimony in the case, or read or examined all of the exhibits filed.’ This is not an allegation of denial of due process.”); see also *Yellow Freight Sys., Inc. v. Martin*, 983 F.2d 1195, 1201 (2d Cir. 1993) (“mere bald assertion” of impropriety insufficient for court to inquire into administrative process).

⁶⁰ *U.S. v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); accord *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967); *NLRB v. Jasper Chair Co.*, 138 F.2d 756, 758 (7th Cir. 1943).

explication can be required . . . , only upon a strong showing of bad faith or improper behavior.”⁶¹ This burden is not easily met.

Indeed, the Supreme Court and courts of appeals have disfavored arguments that agencies have not properly executed their administrative duties, including adequately reviewing the records before them. In *United States v. Morgan*, the Supreme Court concluded that the appellate court erred in permitting the Secretary of Agriculture to be deposed regarding the process by which he reached his decision, including the extent to which he studied the record and consulted with subordinates.⁶² Likewise, in *NLRB v. Donnelly Garment Co.*, the Supreme Court held that, absent evidence to the contrary, courts must take at face value the Board’s assurances that it adequately considered the record.⁶³ And in *NLRB v. Jasper Chair Co.*, this Court rejected the exact argument the Company now raises, stating: “[W]here the Board declares that it has considered ‘the entire record in the case,’ it cannot be said that the Board did not consider the evidence, and we must accord its decision the presumption of regularity to which it is entitled.”⁶⁴

⁶¹ *Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978).

⁶² 313 U.S. 409, 422 (1941).

⁶³ 330 U.S. 219, 229-30 (1947) (rejecting argument that Board failed to consider additional evidence upon remand where Board assigned case to the same judge and, in turn, issued virtually the same order as it had the first time).

⁶⁴ 138 F.2d 756, 758 (7th Cir. 1943).

2. The Company has not met its burden because the Hearing Officer and Board stated that they reviewed the record, which undeniably includes the original ballot, and the Company has not presented any evidence to the contrary

The Company mainly argues (Br. 13-16) that the Court should not presume that the Board adequately reviewed the record based on the Hearing Officer's attachment to her report of a black-and-white photocopy of the original ballot and on statements in the Board's decision. But this claim rests entirely on hypotheticals and mere suspicions. For example, it conjectures (Br. 13) that "if the Board never saw the Ballot, this Court would be the first judicial body to inspect the evidence in the Record" and explains (Br. 14) that the "Report's incorrect description and poor copy of the Ballot caused [the Company] to *suspect*" that the Hearing Officer only reviewed a photocopy (emphasis added). Merely asserting (Br. 16) that the Court should not presume adequate review by Board ignores the basic function of a presumption—the point is presumed unless rebutted. As shown below, the Company's speculations about the Hearing Officer's and Board's review of the record fail to rebut the presumption of regularity in the Board's deliberative process.

First, as discussed earlier,⁶⁵ the Hearing Officer's Report contains a detailed, accurate description of the ballot and its markings, which could not have been

⁶⁵ See *supra* at 17-18.

possible by viewing a black-and-white photocopy. (J.A. 44-53.) The Hearing Officer discussed the color of the ballot and the voter's pen and highlighter markings, the difficulty in seeing the Local 710 "X" especially when compared to the Local 705 "X," and the voter's attempt to obliterate the Local 710 "X" with a purple highlighter "even if it does not match the color of the ballot." (J.A. 49-52.) Thus, in pursuing its due process claim, the Company disregards descriptive language that plainly indicates the Hearing Officer's review of the original ballot.

Therefore, the only remaining basis for the Company's trumped-up allegations that the Hearing Officer did not review the actual ballot is that she attached only a standard black-and-white photocopy to her report. This fact does not prove that the Hearing Officer did not consult the original ballot and is not a basis on which to deny employees their chosen representation. Obviously, the Hearing Officer could not attach the original ballot to her report and, as the Company itself observed (J.A. 66-67 n.1, 120), attaching a color copy would also be insufficient because it would inaccurately capture the hue of the original ballot. Thus, even with a better photocopy, the Company likely would still claim that the Hearing Officer examined only a "poor copy" (Br. 14), not the original ballot.

Second, in its Decision and Certification of Representative (J.A. 83-84), the Board stated that it "reviewed the record in light of the exceptions and briefs," which indisputably includes the *original* challenged ballot (Bd. Ex. 2), and that it

considered the Company's arguments for voiding it. In adopting the Hearing Officer's findings, the Board wrote: "We agree with the hearing officer that Board's Exhibit 2, a ballot challenged on the basis that it had been irregularly marked, should be counted because it clearly expresses the voter's intent to cast a vote for [Local 705]." (J.A. 84.) Thus, contrary to the Company's belief (Br. 14), the Board stated what documents it reviewed—the record (including a reference to the specific exhibit with the original ballot), exceptions and briefs—and certified Local 705 upon finding clear voter intent. (J.A. 83-84.)

The Company relies on supposition to impugn the Board's decision, contending (Br. 14) that the Board inadequately reviewed the ballot because it did not independently describe it in adopting the Hearing Officer's findings. Yet the Company provides no factual support or "clear evidence to the contrary" that would warrant disregarding the Board's declaration that it considered the record, nor any legal authority requiring the Board to rewrite findings that it adopts. As the D.C. Circuit cautioned, courts "cannot allow the recital by an administrative agency that it has considered the evidence and rendered a decision according to its responsibilities to be overcome by speculative allegations."⁶⁶ Since the Company's brief "is replete with such accusations and hypotheticals, but there is

⁶⁶ *Braniff Airways, Inc.*, 379 F.2d at 462.

no evidence in the record to establish that they are true,”⁶⁷ this Court should not disturb the Board’s findings.⁶⁸

Furthermore, contrary to the Company’s assertion (Br. 14-16), the Board did not deprive the Company of due process in denying its motion to supplement the record in the unfair-labor-practice case with the original ballot. The record in the representation case included the original ballot; that record, in turn, is included in the record in the unfair-labor-practice case (which was forwarded in its entirety to the Court).⁶⁹ In its motion, the Company conceded that it did not seek to introduce new or previously unavailable evidence. (J.A. 119.) Thus, the Board rejected the motion, explaining (J.A. 139 n.1) that it “does not redetermine representation issues in unfair labor practice proceedings unless a party presents previously unavailable evidence or alleges other special circumstances that warrant reconsideration.”⁷⁰ The Board also took official notice of the “record” in the

⁶⁷ *Clearwater Transp., Inc. v. NLRB*, 133 F.3d 1004, 1011 (7th Cir. 1998).

⁶⁸ *See NLRB v. AmeriCold Logistics, Inc.*, 214 F.3d 935, 939 (7th Cir. 2000) (“We are unpersuaded by the conjecture and surmise that fills the company’s brief. . .”).

⁶⁹ *See Amalgamated Clothing Workers of Am. v. NLRB*, 365 F.2d 898, 903 (D.C. Cir. 1966) (“refusal-to-bargain unfair labor proceeding addresses a charge ‘based on the record made at the earlier representation proceeding’”).

⁷⁰ *See generally Pace University v. NLRB*, 514 F.3d 19, 23-24 (D.C. Cir. 2008) (recognizing that Board policy allowing relitigation of representation issue only where there is newly discovered evidence or other special circumstances aims to “avoid[] undue and unnecessary delay in representation elections”).

representation case, and found that all representation issues were or could have been litigated in that proceeding. (J.A. 139.)

Consequently, supplementing the unfair-labor-practice-case record was unnecessary because there was no new evidence: the original ballot was already in the representation-case record and, therefore, in the unfair-labor-practice case record. Also, the Company failed to demonstrate that its meritless and unsupported speculation that the Board did not review the original ballot constitutes a special circumstance warranting reconsideration and supplementing the record.⁷¹ Therefore, the Board's denial of the motion to supplement the record does not demonstrate that the Board deprived the Company of due process.

In sum, the Board did not abuse its discretion in interpreting the challenged ballot as a vote for Local 705, consistent with its policy and settled precedent on the issue, and the Company's baseless assertions are without merit. It is time for the Company to honor its employees' choice and bargain with Local 705.

⁷¹ *See id.* at 24 (court will not disturb Board's application of its "nonrelitigation rule" absent an abuse of discretion).

CONCLUSION

After a Board-conducted run-off election between Local 705 and Local 710, the Board reviewed and reasonably validated a determinative challenged ballot as a vote for Local 705, certifying Local 705 based on that finding. By refusing to bargain with Local 705, the Company violated Section 8(a)(5) and (1) of the Act. Accordingly, the Board respectfully requests that the Court deny the petition for review and enforce the Board's Order in full.

s/ Usha Dheenan
USHA DHEENAN
Supervisory Attorney

s/ Nicole Lancia
NICOLE LANCIA
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570
(202) 273-2948
(202) 273-2987

LAFE E. SOLOMON

Acting General Counsel

CELESTE J. MATTINA

Acting Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

AUGUST 2011

h:\acb\final\7th Cir. No.11-1883-Ruan-finalbrief-udnl

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RUAN TRANSPORT CORPORATION	*
	*
Petitioner/Cross-Respondent	* Nos. 11-1883
	* 11-2058
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 13-CA-46555
	*
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 7,915 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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

Dated at Washington, DC
this 18th day of August, 2011

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RUAN TRANSPORT CORPORATION	*
	*
Petitioner/Cross-Respondent	* Nos. 11-1883
	* 11-2058
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 13-CA-46555
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2011, 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 that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

Frederick L. Schwartz, Attorney
Allison List Kheel, Attorney
LITTLER MENDELSON, P.C.
Suite 1000
321 N. Clark Street
Chicago, IL 60654

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

Dated at Washington, DC
this 18th day of August, 2011