No. 14-2072

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

ENTERPRISE LEASING COMPANY-SOUTHEAST, LLC

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

CORRECTED BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ON 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 application of the National Labor Relations Board ("the Board") for enforcement of an Order issued against Enterprise Leasing Company-Southeast, LLC ("the Company") for failing to bargain with the International Brotherhood of Teamsters, Local 391 ("the Union") in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (29

U.S.C. § 158(a)(5) and (1)). The Board issued its Decision and Order on October 2, 2014, which is reported at 361 NLRB No. 63. (A. 470-74.)[1]

The Board had subject matter jurisdiction over the unfair labor practice proceeding pursuant to Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. Because the Board's Order is based, in part, on findings made in an underlying representation proceeding (Board Case No. 11-RC-6746), the record in that proceeding is part of the record before the Court, pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477, 479 (1964). Section 9(d) of the Act does not give the Court general authority over the representation proceeding, but authorizes review of the Board's actions in the representation proceeding for the limited purpose of deciding whether to "enforc[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board . . . ." The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner

[1] On October 3, 2014, the Board issued a correction to its Decision and Order. (A. 475.) "A." references are to pages of the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999) (citing cases.) [2]

The Board's application for enforcement filed on October 8, 2014, was timely because the Act places no time limit on the initiation of enforcement proceedings. The Board's Order is final. The Court has jurisdiction over the case under Section 10(e) of the Act (29 U.S.C. § 160(e)) because the Company committed the unfair labor practice in Raleigh, North Carolina.

STATEMENT OF THE ISSUES

The ultimate issue in this case is whether the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the Board-certified representative of its employees following a

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[2] *Contra NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26-27 (4th Cir. 1996). *Lundy*'s holding that the Board lacks the above-described authority to resume processing the representation case, however, rests on inapposite cases dealing not with Section 9(d)'s limitations on judicial control over representation cases but with Section 10(e)'s limitations on the Board's authority to revisit unfair labor practice issues once they have been considered by a reviewing court. *See Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945) (absent fraud or mistake, the Board is not entitled to have a court's enforcement order vacated so the Board can enter a new remedial order that, in retrospect, it decides is more appropriate); *W.L. Miller Co. v. NLRB*, 988 F.2d 834, 835-38 (8th Cir. 1993) (once a court enforces the Board's order in an unfair labor practice proceeding, the Board lacks authority to reopen the proceeding to award additional relief); *George Banta Co. v. NLRB*, 686 F.2d 10, 16-17 (D.C. Cir. 1982) (rejecting employer's argument that the Board lacked jurisdiction to adjudicate charges of post-strike unfair labor practices while a case against the same employer concerning pre-strike unfair labor practices was pending in court); *Serv. Emps. Local 250 v. NLRB*, 640 F.2d 1042, 1044-45 (9th Cir. 1981) (the Board lacks jurisdiction to adjudicate a union's unfair labor practice claim when an earlier court decision implicitly rejected that claim).

Board conducted election. Resolution of this issue is dependent upon two subsidiary issues:

1. Whether the Board properly considered this case anew and resolved the merits of the unfair labor practice allegations.

2. Whether the Board acted within its wide discretion in overruling the Company's election objections concerning an alleged threat by a union organizer, the Union's use of an employee's photograph on a campaign flyer, and inclement weather that occurred on the first day of the two-day election.

STATEMENT OF THE CASE

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the Board-certified representative of an appropriate unit of its employees at its car-rental facility at the Raleigh-Durham International Airport. (A. 472.) The Company does not dispute (Br. 9) that it refused to bargain with the Union to contest the Board's certification of the Union. Before the Court, the Company contends that the Board lacked jurisdiction to issue its Decision and Order in this case. Thus, if the Court rejects the Company's challenge to the validity of the Board's Order, and upholds the Board's overruling of the Company's election objections, the Order is entitled to enforcement.

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

The Company operates a car-rental facility located at the Raleigh-Durham International Airport. ("the RDU") (A. 329, 334.) On November 9, 2010, the Union filed with the Board a petition for an election seeking to represent a unit of the Company's employees. (A. 1.)

On December 16 and 17, pursuant to a stipulated election agreement, the Board conducted a secret-ballot election. (A. 2-3.) Specifically, the polls were open and employees had the opportunity to vote on December 16 from 7:00 p.m. to 9:00 p.m., and on December 17 from 10:00 a.m. to 12:00 p.m., and again from 3:00 p.m. to 5:00 p.m. (A. 9.)

In a unit of 101 employees, the Union won the election by a vote of 44 to 41, with 2 challenged ballots, an insufficient number to affect the election results. (A. 322; 25, 53.) The Board's Regional Director for Region 11, in response to six election objections filed by the Company alleging that the Union had engaged in conduct that warranted overturning the election, directed a hearing. (A. 13-14, 26-30.)

After the hearing, the Board's hearing officer issued a report on February 7 recommending that the Board overrule all six of the Company's election objections. (A. 226-37.) The Company then filed with the Board exceptions to the

hearing officer's report, but only raised three of the Company's objections, an alleged threat by a union organizer, the Union's alleged misuse of an employee's photograph, and the alleged impact of inclement weather. (A. 242-44.) On December 29, the Board (Chairman Pearce and Member Becker, Member Hayes dissenting, in part) issued its Decision and Certification of Representative adopting the hearing officer's findings and recommendations and certifying the Union as the employees' collective-bargaining representative. (A. 322-26.)

B. The Initial Unfair Labor Practice Proceeding

Following the Board's certification of the Union, the Union requested that the Company begin negotiating for a collective-bargaining agreement, but the Company refused. Based upon the Union's amended unfair labor practice charge, the Board's Acting General Counsel issued a complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (A. 463; 327-33.) In its answer, the Company admitted its refusal to bargain, but disputed the validity of the Board's certification of the Union. (A. 463; 335.)

In light of the Company's admission, the Board's Acting General Counsel moved for summary judgment, and the Board issued a notice to show why the motion should not be granted. (A. 463; 337-46.) The Company filed a combined motion in opposition to summary judgment and to disqualify three Board members

from ruling on the Acting General Counsel's motion for summary judgment because they were recess appointees. (A. 463; 459-62.)

On April 18, 2012, the Board (Chairman Pearce, Members Hayes and Griffin) issued its Decision and Order granting the General Counsel's motion for summary judgment, and finding the Company's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act. (A. 463-65.)

C. The Prior Appeal and the Supreme Court's *Noel Canning* Decision

Following the Board's April 18 Decision and Order, the Board applied to this Court for enforcement. (Case No. 12-1514.) After briefing and oral argument, the Court, on July 17, 2013, denied enforcement and vacated the Board's Order, even though it concluded that substantial evidence supported the Board's unfair labor practice findings. *NLRB v. Enterprise Leasing Company-Southeast, LLC, and Huntington Ingalls Inc. v. NLRB*, 722 F.3d 609, 614-20 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 2902 (2014) (*citing Noel Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir. 2013), *affirmed on other grounds*, 134 S. Ct. 2550 (2014)). The sole basis of the Court's decision denying enforcement of the Board's Order was that because "the President's three January 4, 2012 appointments to the Board were not made during an intersession recess," those appointments "were invalid from their inception." *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609, 660 (2013). The panel majority thus held that the Board's decision "must be vacated"

because, when the Board order issued, "the Board lacked a quorum of three members." *Id*. (citing *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 686-88 (2010) (holding that two-member quorum of a three-member panel delegated all of the Board's powers could not continue to exercise that delegated authority after the third Board member's appointment expired).

The Board filed a petition for rehearing for the limited purpose of requesting that the Court modify its order to include language explicitly remanding the case to the Board for further proceedings consistent with the Court's decision. In its petition, the Board stated that although it was requesting the inclusion of explicit remand language to avoid the possibility of needless litigation concerning the issue, in its view, even without such language, the Court's decision clearly contemplated the possibility of further proceedings before a properly constituted Board. The Court denied the petition without explanation. Thereafter, the Board filed a petition for certiorari on the recess appointment issue.

On June 24, 2014, the Supreme Court issued *NLRB v. Noel Canning*, 134 S. Ct . 2550 (2014), which held that the January 2012 appointments were invalid. The Supreme Court then denied the Board's petition for certiorari.

II. THE BOARD'S DECISION AND ORDER AFTER THE SUPREME COURT'S *NOEL CANNING* DECISION

In an August 15, 2014 letter, the Board's Executive Secretary notified the parties that, in view of the determination that the Board panel that had previously

decided the case was not properly constituted, it would consider the "case anew and . . . issue a decision and order resolving the complaint allegations." (A. 470; 466-67.)[3] On August 26, 2014, the Company filed a letter objecting to any further action by the Board, asserting that absent a remand from the Court, the Board lacked jurisdiction over the case. (A. 470; 468-69.) Thereafter, the Company filed a petition for writ of mandamus or prohibition, which the Court summarily denied. *See In re Enterprise Leasing*, Fourth Circuit Case No. 14-2019, ECF No. 7.

On October 2, 2014, the Board (Chairman Pearce, Members Hirozawa and Johnson) issued its Decision and Order, granting the General Counsel's motion for summary judgment. (A. 470-75.) The Board first found that it could consider the case anew after the Court denied enforcement because "[t]he clear import of the [C]ourt's decision denying enforcement, along with the Supreme Court's *Noel Canning* decision, is that no validly constituted Board has ruled on the General Counsel's motion for summary judgment." (A. 470.) Accordingly, the Board concluded (A. 470) that the General Counsel's motion was "still pending before the Board, and the Board is free to address it." In so finding, the Board noted (A. 470) that consideration of the case anew was consistent with the treatment by the

[3] At that time, the Board was composed of five Presidentially-appointment, Senate-confirmed members, having regained a quorum in August 2013. *See The National Labor Relations Board Has Five Senate Confirmed Members*, NLRB Office of Public Affairs (Aug. 12, 2013), http://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-has-five-senate-confirmed-members.

courts of appeals of other cases in which enforcement was denied for lack of a Board quorum at the time of the original decision.

Addressing the motion for summary judgment, the Board found that "[a]ll representation issues raised by [the Company] were or could have been litigated in the prior representation proceeding." (A. 471.) The Board also found that the Company did "not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding." (A. 471.) Accordingly, the Board granted the motion for summary judgment and found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. (A. 471-72.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (A. 472.) Affirmatively, the Order directs the Company to bargain with the Union upon request, to embody any understanding reached in a signed agreement, and to post and electronically distribute an appropriate remedial notice to employees. (A. 472-73.)

SUMMARY OF ARGUMENT

The Board properly found that the Court's denial of enforcement of the April 2012 Decision and Order did not prevent the Board from deciding this case anew. In denying enforcement, the Court relied solely on its holding that the Board's recess appointments were invalid and therefore the Board was improperly constituted at the time it issued the Decision and Order. Interpreting the Court's mandate as permitting further proceedings in these circumstances fully comports with the treatment in the courts of appeals of other cases in which enforcement was denied for lack of a Board quorum, and with principles governing the reasonable and equitable interpretation of mandates. The Board's view is also supported by the decisions of every court, including this one, that have permitted a properly constituted Board to address the merits of the unfair labor practice allegations in proceedings after *New Process* and *Noel Canning*. The Company's assertion that the now properly constituted Board should be precluded from resolving the underlying unfair labor practice dispute relies on a litany of distinguishable cases and conflicts with both reasonable and equitable principles governing the interpretation of mandates. Accordingly, the Board properly interpreted the Court's mandate and decided this case anew.

The Company admittedly refused to bargain with the Union to challenge the Board's certification which it claims was based on the Board's erroneous

overruling of its election objections. On review, the Court should adhere to its earlier reasoning that the Board did not err in overruling the objections. Such an approach is consistent with the approach taken by other courts of appeals in a similar situation where they reviewed Board decisions they had previously reviewed, but which subsequently were found to have been issued by a Board that lacked a quorum. Moreover, apart from the Court following its earlier reasoning, the Company has the heavy burden of showing that the Board abused its discretion in overruling the objections and in finding that the Company failed to prove that the employees' free choice in the election was materially affected. The Company failed to meet that burden, and the Board's findings are supported by the credited evidence and consistent with law.

First, the Board reasonably overruled the Company's objection alleging that union organizer Jones threatened employee Knowles by telling him not to "burn his bridges." The context of Jones' comment demonstrates that it was merely an innocuous statement and not a physical or otherwise coercive threat. Second, the Board reasonably overruled the Company's objection alleging that the Union wrongly used a photo of employee Henriquez on a campaign flyer. There is no evidence that Henriquez objected to having his photo taken, which was done by a third-party union supporter, no evidence that the Union misrepresented his support for the Union, or even evidence that he objected to the photo's use. He was one of

eight employees depicted on the flyer, and the Union had apparently secured the consent of all others. Third, the Company's objection alleging that inclement weather caused a determinative number of eligible voters to be unable to vote in the election was not demonstrated by the evidence presented. Accordingly, there was no basis warranting overturning the election.

ARGUMENT

I. THE BOARD PROPERLY CONSIDERED THIS CASE ANEW AND RESOLVED THE MERITS OF THE UNFAIR LABOR PRACTICE ALLEGATIONS

As the Board (A. 470) stated, "[t]he threshold issue is whether, in light of the denial of enforcement, the Board may consider this case anew." Following the Court's denial of enforcement, the Board's task was to construe the decision and judgment "in light of the principle that a mandate is to be interpreted reasonably and not in a manner to do injustice." *Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962 (per curiam) (quoting *Wilkinson v. Mass Bonding & Ins. Co.*, 16 F.2d 66, 67 (5th Cir. 1926))*; accord NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 225-28 (1947); *United States v. Bell Petroleum Services, Inc.*, 64 F.3d 202, 204 (5th Cir. 1995); *Phillips Petroleum Corp. v. FERC*, 902 F.2d 795, 798 (10th Cir. 1990); *Little v. United States*, 794 F.2d 484, 489 n.3 (9th Cir. 1986).

In performing this task, the Board was mindful of the instruction that "[i]nterpretation of an appellate mandate entails more than examining the language

of the court's judgment in a vacuum." *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1478 (Fed. Cir. 1998). The Board concluded (A. 470-71) that this Court's decision was not a final resolution of the unfair labor practice issues and should not be interpreted as terminating further proceedings before the Board. As we show below, the Board properly construed the mandate as permitting it to resolve the unfair labor practice allegations. There is no merit to the Company's (Br. 14-36) that the Court's order denying enforcement deprived the Board of jurisdiction to decide this case with a properly constituted Board panel.

It is well established that an appellate mandate is reasonably construed to govern only what "was actually decided." *Exxon*, at 1478. As noted above (p. 7), the sole basis of the Court's denial of enforcement was its conclusion that the appointments of three of the Board members in January 2012 were invalid, and that the Board therefore lacked a quorum when it issued the Order. *Enterprise Leasing*, 722 F.3d at 612-13, 631-60.

As the Board explained (A. 470), the Court's opinion and judgment denying enforcement were not based upon the Court's adversely resolving the unfair labor practice issues raised in the General Counsel's complaint and litigated in the unfair labor practice proceedings. To the contrary, in an effort to resolve this case on non-constitutional grounds, the Court first reviewed the merits of the unfair labor

practice findings, and concluded that substantial evidence supported the Board's findings. *Enterprise Leasing*, 722 F.3d at 614-21, 620-31. Accordingly, the Court reached the constitutional recess appointment issue and—solely on that basis—vacated the Board's order and denied enforcement. 722 F.3d at 660. Because the Court denied enforcement solely on the ground that the order before it had been issued by improperly appointed Board members, the Board reasonably concluded that the Court's mandate was not intended to terminate further proceedings before the Board now that new members have been validly appointed. As the Board found (A. 470), "[t]he clear import" of the Court's decision and the Supreme Court's decision in *Noel Canning* is that "no validly constituted Board has ruled on the General Counsel's motion for summary judgment," and therefore, that motion is "still pending before the Board, and the Board is free to address it."

The Board's conclusion is in accord with the how other circuits construed similar mandates denying enforcement after *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 686-688 (2010), set aside orders issued by a two member Board panel on the ground that the two panel members lacked authority to issue decisions after the term of the third member on the panel had expired. As the Board recognized (A. 471), the decision of the Eighth Circuit in *NLRB v. Whitesell*, 638 F.3d 883 (2011), is the most instructive in calling attention to the difference between denying

enforcement on the merits and denying enforcement because the panel that issued a decision lacked authority to bind the Board.

In *Whitesell*, the Eighth Circuit relied on the Supreme Court's decision in *New Process* to deny enforcement of an order issued by the improperly constituted two-member Board. The court did not remand, but it thereafter denied the employer's mandamus petition to block the Board from considering the case anew, as did the Court in the instant case. Subsequently, in reviewing the new final order issued by a validly constituted Board, the Eighth Circuit squarely held that its prior order denying enforcement did not prevent the properly constituted Board from considering the case. *NLRB v. Whitesell*, 638 F.3d at 888. Responding to virtually the same arguments as the Company makes here, the court explained that its prior denial was based only on the composition of the two-member Board, not the merits of the unfair labor practice issues, and that its order denying enforcement "without reference to remand" did "*not* preclude the Board, now properly constituted, from considering this matter anew and issuing its first valid decision." *Id*. at 889 (emphasis added).

Likewise, as the Board observed (A.471, n.6) and the *Whitesell* court discussed, the Second Circuit in *NLRB v. Domsey Trading Corp.*, 383 F. App'x 46, 47 (2d Cir. 2010), when it denied enforcement of a two-member Board order pursuant to *New Process*, "anticipated further proceedings before the Board and

that a new petition for enforcement would be filed." *Whitesell*, 638 F.3d at 889 (noting that after a validly constituted Board panel reconsidered the case, the Second Circuit reviewed the merits of the Board's decision in *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011)). Accordingly, where, as here, a court determines that no proper Board quorum has decided the merits, a remand need not be explicitly ordered for the Board to consider the case anew because the court's mandate is reasonably construed to permit a properly constituted Board to decide the case. *Whitesell*, 638 F.3d at 889.

The Court's denial of the Board's rehearing petition does not undermine the Board's interpretation of the mandate. As the Board explained (A. 470-71), its petition stated the Board's view that even absent a remand, the Court's decision clearly contemplated the possibility of further proceedings before a properly constituted Board. The Court denied the petition without explanation. Accordingly, relying on cases holding that no inference can be drawn from petitions for rehearing or clarification denied without explanation, the Board reasonably concluded (A. 471, n.4) that the Court's summary denial did not signal an intention to foreclose further Board proceedings. In this respect, as the Board noted (A. 471 n. 5), the Eighth Circuit's decision in *Whitesell* is again instructive. Like this Court, the Eighth Circuit had previously issued a summary denial of a

post-decisional motion by the Board for remand or clarification, but nonetheless read its mandate to allow the Board to decide that case anew.[4]

The Company is wrong when it claims (Br. 14-33) that the Board's construction of this Court's mandate is inconsistent with *NLRB v. Lundy Packing Co*, 81 F.3d 25 (4th Cir. 1996), and similar cases holding that where a court's mandate ends the case, the case is over. *See e.g., Int'l Union of Mine, Mill & Smelter Workers, Local 15 v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335 (1945), *W.L. Miller v. NLRB*, 988 F.2d 834 (8th Cir. 1993), *Service Employees Int'l. Union Local 250 v. NLRB*, 640 F.2d 1042 (9th Cir. 1981). In *Lundy*, this Court held that its order denying enforcement of a Board order without providing for a remand prevented the Board from further processing the case. *Lundy*, 81 F.3d at 26. However, as the Board noted (A. 471 n.7), *Lundy* is distinguishable. In *Lundy*, the Court had initially denied enforcement based on its rejection of the Board's unfair labor practice findings entered by a properly constituted Board. *See*

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[4] The Company's unfounded speculation (Br. 34-35) that the Court denied the Board's petition for rehearing because the Board had belatedly raised the remand issue for the first time on rehearing ignores the teaching of the cases cited by the Board (A. 471 n.4) that no inference can be drawn from a denial without explanation of a motion for rehearing or clarification. *See Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1483 (Fed. Cir. 1998) (motion for clarification); *U.S. v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (petition for rehearing or modification); *Luckey v. Miller*, 929 F.2d 618, 621-22 (11th Cir. 1991) (petition for rehearing en banc).

NLRB v. Lundy Packing Co., 68 F.3d 1577 (4th Cir. 1995). In contrast, as the Board explained here (A. 471 n.7), "decisively, the court's denial of enforcement of the prior order was not a final judgment on the merits of the case." (citing *Whitesell*, 638 F.3d at 889).

All of the other cases cited by the Company are similarly distinguishable because the court, after considering and ruling on the merits, set aside or enforced a final order issued by a properly constituted Board. *See, e.g., Int'l Union of Mine, Mill & Smelter Workers, Local 15 v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945) (absent proof of fraud or mistake, the Board is not entitled to have a court-enforced order vacated almost 2 years later so that it can enter a new remedial order that in retrospect it decides is more appropriate); *W.L. Miller v. NLRB*, 988 F.2d 834, 837 (8th Cir. 1993) (once court enforces Board order on the merits, Board lacks authority to reopen proceeding to award additional relief); *Service Employees Int'l. Union Local 250 v. NLRB*, 640 F.2d 1042, 1045 (9th Cir. 1981) (Board lacks jurisdiction to adjudicate claim, the merits of which were implicitly rejected by earlier court decision).

In short, all the cases the Company relies upon are distinguishable on the ground that in those cases enforcement was denied after an authoritative consideration of the merits. Here, by contrast, the Court denied enforcement because the order before the Court was issued by officials that the Court found to

have been improperly appointed. That distinction makes all the difference. A judicial determination that an order had not been issued by a properly constituted tribunal means that the merits of the case have yet to be authoritatively decided. That is exactly how the Board construed the mandate here. And, as noted above, the Eighth Circuit in *Whitesell* agreed with the Board's construction of its similar mandate.[5]

Unable to square its position with *Whitesell*, the Company unconvincingly attacks (Br. 32-34) that decision. It first claims (Br. 32) that the *Whitesell* court engaged in a mere "cursory analysis" because it did not "distinguish or address relevant authority such as *Eagle-Picher*, *Lundy Packing*, and *SEIU Local 250*—or even Section 10(e) itself."

[5] This view is supported by the common law proposition that "dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." *Costello v. United States*, 365 U.S. 265, 285 (1961); *accord Hughes v. United States*, 71 U.S. (4 Wall) 232, 237 (1866) ("In order that a judgment may constitute a bar to another suit, it must be . . . determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."), *quoted in Costello*, 365 U.S. at 286; *FTC v. Food Town Stores, Inc.*, 547 F.2d 247, 249 (4th Cir. 1977) ("An order has no res judicata significance unless it is a final adjudication of the merits of an issue."); *Madden v. Perry*, 264 F.2d 169, 175 (7th Cir. 1959) ("At common law a dismissal on a ground other than the merits would not constitute res judicata in a later case.").

Although *Whitesell* did not explicitly address *Eagle-Picher* and related cases, it was not required to, given that those cases were distinguishable. In addition, far from "merely lurk[ing] in the record," as the Company claims (Br. 32), those cases were fully presented and briefed to the court (*see NLRB v. Whitesell*, Eighth Cir. Case No. 10-2934, ECF Entry ID 3712382 at *36-38 (employer brief filed 10/12/2010); ECF Entry ID 3723703 at *43-45 (Board brief filed 11/12/2010)) and thus "are to be taken as covered by the court's decision though not mentioned in the opinion." *Com. of Pa. v. Brown*, 373 F.2d 771, 777 (3d Cir. 1967) (citing *Bingham v. United States*, 296 U.S. 211, 218-19 (1935)).

Moreover, the Company is factually incorrect in claiming that the Eighth Circuit omitted to consider Section 10(e) of the Act in its *Whitesell* decision. As the Board noted (A. 471), *Whitesell* specifically relies on Section 10(e):

> In the prior action, the only question presented was whether to enforce the NLRB's order. Relying on the *New Process* decision, we denied the application for enforcement because the prior NLRB decision, reached while there were only two members of the Board, was invalid. On that issue, our decision is final. *See* 29 U.S.C. Section 160(e).

Whitesell, 638 F.3d at 889.

The Company's remaining challenge (Br. 33) to *Whitesell* is that it is inconsistent with the Eight Circuit's prior panel decision in *W.L. Miller*, 988 F.2d 834 (8th Cir. 1993), and therefore not binding precedent even in the Eighth Circuit. *W.L. Miller*, however, is readily distinguishable from *Whitesell* (and the instant

case), because it involved a Board order enforced on its merits. *See* above pp. 18-19. Accordingly, *Whitesell* is inescapably on all fours with this case and stands as precedent in the Eighth Circuit and persuasive authority for this Court.[6]

The Company's primary remaining argument against the Board's authority to decide the case anew (Br. 15-29) is that the so-called "plain language" of Section 10(e) undermines the Board's interpretation of the Court's mandate. The Company's assertion, however, rests on a distinction between denying enforcement and remanding that lacks any basis in the text of Section 10(e). After a court has completed its review of the merits, the plain language of Section 10(e) only gives the court the options to "enter a decree enforcing, modifying and enforcing as so modified or setting aside in whole or in part the order of the Board." 29 U.S.C. Section 160(e). In other words, the plain language of the statute makes no provision for a final decree remanding the case to the Board. *See Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939) (explaining that an order to remand is an

[6] The Company also claims (Br. 34) that the Second Circuit's *Domsey* decision, cited by the *Whitesell* court and the Board here, "has no bearing" because the initial decision in *Domsey* contained language in addition to its denial of enforcement that could be read to contemplate future Board proceedings. However, the relevant similarity shared by *Domsey*, *Whitesell*, and this case is that in each initial court decision, the court's denial of enforcement without explicitly providing for a remand did not preclude further action by the Board.

exercise of a court's equity powers).[7] A court that strictly adhered to the limited options given by the statute's literal language thus would never use the word "remand" but instead explain that its setting aside of the Board's order was without prejudice to the Board's resuming consideration of the case with a properly constituted panel. That, in essence, is what the Eighth Circuit held was the meaning of its *Whitesell* decree. *See* above p. 20, n.5. The same is true here.

Nor is there merit to the Company's argument (Br. 15-19, 22-29) that the Board's actions are inconsistent with the language of Section 10(e) that "[u]pon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final . . . ." Here, as discussed above, p. 21, with respect to *Whitesell*, there is no question that the Court's prior judgment was final with respect to the issue that it decided—that the Board was improperly constituted when it issued the order before the Court. The Company mistakenly construes (Br.

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[7] In concluding that an order to remand is an exercise of a court's equity powers, the Court in *Ford Motor* notes the similarity between the enabling statutes of the Board and the Federal Trade Commission (FTC) regarding their provisions for court review of agency decisions. 305 U.S. at 373. In making its "plain meaning" argument, the Company (Br. 25-26) notes a difference between those enabling statutes, citing *Eagle-Picher*'s observation that the FTC's statute, unlike the Board's, specifically authorizes the FTC to modify its order after it has become final. 325 U.S. at 342. Such a distinction may be meaningful in analyzing the application of the statute to the question at issue in *Eagle-Picher*, which was whether the Board had the authority to modify an order issued by a properly constituted Board that had already been enforced by a court on the merits. However, the difference in the enabling statutes vis-à-vis agency modification after a court has issued its decision is irrelevant in this case, where the decree and judgment contemplate further Board action under the circumstances.

23-29) the Board's interpretation of the Court's mandate as improperly creating a prohibited "implied exception" for "decisions not based on the merits." But all the Board did here was to reasonably construe the Court's "judgment and decree" itself as contemplating further Board action under the circumstances. In this context, the Court's "judgment and decree" enabled the Board to continue processing the case after the Court's mandate relinquished its exclusive jurisdiction. Nothing about the Board's interpretation is inconsistent with the plain language of Section 10(e) cited above.[8]

The Court should also reject the Company's construction of the mandate as precluding further Board proceedings because it would result in injustice. *See Bailey v. Henslee*, 309 F.2d at 844 (mandate is to be interpreted reasonably and not to do injustice). Under the Company's view, the parties—through no fault of their own and unlike every party to have previously come before the Board—would not be entitled to a decision by a properly constituted Board. The Board's interpretation of the Court's mandate avoids injustice to the parties and to the

[8] As shown above, the Board takes no issue with the finality of this Court's denial of enforcement based on the improperly constituted Board. Thus, the Company is also wrong (Br. 30-31) that the Board's position is inconsistent with the separation of powers doctrine. The Company's sole argument is that the separation of powers doctrine precludes "judgments that are subject to later review or alteration by administrative action." Here, however, the Board did not review or alter this Court's decision. To the contrary, the Board has respected this Court's decision, which it has reasonably interpreted to permit a properly constituted Board to make a determination on the merits in the first instance.

employees whose rights are at issue. *See Laclede Gas Co. v. NLRB*, 421 F.2d 610, 617 (8th Cir. 1970) ("[t]he interest of the . . . employees in having the issue resolved on an appropriate theory of law is an important one"); *Cf. NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263-66 (1969) (consequences of Board's internal delay should not fall on victims of unfair labor practices). As the Seventh Circuit recognized under comparable circumstances, "[t]he parties are entitled to a decision on the merits of their case by a properly constituted panel of the NLRB prior to appellate review." *New Process Steel, L.P. v. NLRB*, 08-3517, 2010 WL 4137308, at *1 (7th Cir. Aug. 3, 2010) (remanding *New Process* following the Supreme Court's decision).

As a general rule, an appellate court's finding of legal error does not "foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *accord S. Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 803-06 (1976); *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901). Indeed, cutting off a ruling on the merits of the dispute would be contrary to the great weight of authority of the circuit courts (including this one) establishing the propriety of a properly constituted Board deciding anew unfair labor practice cases that were pending in court when *New Process* issued, including cases that had been argued and even

decided.[9] The Court's citation (722 F.3d at 660) to *New Process Steel, L. P. v. NLRB*, 560 U.S. 674 (2010), in its decision denying enforcement strongly suggests that this Court contemplated this case to be treated similarly to those cases that were denied enforcement following *New Process*.

Moreover, after *Noel Canning*, all of the circuit courts, including another panel of this one, *see, e.g.*, *NLRB v. Nestle Dreyer's Ice Cream Co*., Case No. 12-1783 (4th Cir. July 29, 2014) (vacating and remanding), have found it appropriate for a

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[9] *See, e.g.*, *Allied Mech. Servs. v. NLRB*, Case Nos. 08-1213, 08-1240 (D.C. Cir. Sept. 20, 2010), on remand 356 NLRB No. 1 (2010), *enforced*, 668 F.3d 758 (D.C. Cir. 2012); *Northeastern Land Servs., Ltd. v. NLRB*, Case No. 08-1878 (1st Cir. July 30, 2010), on remand 355 NLRB 1154 (2010), *enforced*, 645 F.3d 475 (1st Cir. 2011); *County Waste of Ulster, LLC v. NLRB*, Case Nos. 09-1038, 09-1646 (2d Cir. July 1, 2010), on remand 355 NLRB 413 (2010), *enforced*, 665 F.3d 48 (2d Cir. 2012); *J.S. Carambola v. NLRB*, Case Nos. 08-4729, 09-1035 (3d Cir. July 1, 2010), on remand 356 NLRB No. 23 (2010), *enforced*, 457 F. App'x 145 (3d Cir. 2012); *Diversified Enters., Inc. v. NLRB*, Case Nos. 09-1464, 09-1537 (4th Cir. July 23, 2010), ECF No. 66, on remand 355 NLRB 492 (2010), *enforced*, 438 F. App'x 244 (4th Cir. 2011); *Bentonite Performance Mineral, LLC v. NLRB*, Case No. 09-60034 (5th Cir. June 22, 2010), on remand 355 NLRB 582 (2010), *enforced*, 456 F. App'x 2 (D.C. Cir. 2012); *Galicks, Inc. v. NLRB*, Case Nos. 09-1972, 09-2141 (6th Cir., June 24, 2010), ECF No. 80, on remand 355 NLRB 366 (2010), *enforced*, 671 F.3d 602 (6th Cir. 2012); *NLRB v. Spurlino Materials, LLC*, Case Nos. 09-2426, 09-2468 (7th Cir., July 8, 2010), ECF No. 28, on remand 355 NLRB 409, *enforced*, 645 F.3d 870 (7th Cir. 2011); *Leiferman Enters., LLC v. NLRB*, Case Nos. 09-3721, 09-3905 (8th Cir. July 8, 2010), on remand 355 NLRB 364 (2010), *enforced*, 649 F.3d 873 (8th Cir. 2011); *NLRB v. Legacy Health Sys.*, Case No. 09-73383 (9th Cir., July 9, 2010), ECF No. 19, on remand 355 NLRB 408 (2010), *enforced*, 662 F.3d 1124 (9th Cir. 2011); *Teamsters Local Union No. 523 v. NLRB*, 624 F.3d 1321 (10th Cir. 2010), on remand 357 NLRB No. 4 (2011), *enforced*, 488 F. App'x 280 (10th Cir. 2012); *CSS Healthcare Servs., Inc. v. NLRB*, Case Nos. 10-10568, 10-10914 (11th Cir. July 16, 2010), on remand 355 NLRB 472 (2010), *enforced*, 419 F. App'x 963 (11th Cir. 2011).

properly constituted Board to resolve unfair labor practice cases that were pending in court when *Noel Canning* issued.[10] The Company's construction of the Court's mandate would unjustly deny the parties a resolution of this case and inexplicably conflict with the resolution of similarly-situated cases. The Company's construction also unjustifiably attributes to the Court an intent to depart from the normal and usual course of judicial proceedings in circumstances where the decision below was rendered by an improperly constituted panel.[11]

In light of the above principles, the Company's remaining claim (Br. 29-30)—that allowing the Board to revisit the case is "unfair" to the Company because it relied on this Court's "favorable judgment" denying enforcement—rings

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[10] *See e.g.*, *Oak Harbor Freight Lines Inc. v. NLRB*, Case Nos. 12-1226, 12-1358, 12-1360 (D.C. Cir. August 1, 2014); *NLRB v. Instituto Socio Economico Comunitario, Inc.*, Case No. 13-1688 (1st Cir. October 3, 2014); *NLRB v. Dover Hospitality Servs., Inc.*, Case No. 13-2307 (2d Cir. July 2, 2014); *NLRB v. Salem Hosp.*, Case No. 12-3632 (3d Cir. July 3, 2014); *Dresser-Rand Co. v. NLRB*, Case No. 12-60638 (5th Cir. July 23, 2014); *Little River Band of Ottowa v. NLRB*, Case Nos. 13-1464, 13-1583 (6th Cir. Aug. 13, 2014); *Contemporary Cars, Inc. v. NLRB*, Case Nos. 12-3764, 13-1066 (7th Cir. Oct. 3, 2014); *Relco Locomotives, Inc. v. NLRB*, Case No. 13-2722 (8th Cir. July 1, 2014); *DirecTV Holdings, LLC v. NLRB*, Case Nos. 12-72526, 12-72639 (9th Cir. July 2, 2014); *Int'l Union of Operating Eng'rs, Local 627 v. NLRB*, Case Nos. 13-9547, 13-9564 (10th Cir. July 2, 2014); *NLRB v. Gaylord Chem. Co.*, Case Nos. 12-15404, 15690 (11th Cir. Aug. 13, 2014).

[11] *See Nguyen v. United States*, 539 U.S. 69, 83 (2003) (remanding case to court of appeals where panel was improperly constituted; "it is appropriate to return these cases to the Ninth Circuit for fresh consideration . . . by a properly constituted panel"); *Flav-O-Rich, Inc. v. NLRB*, 531 F.2d 358, 364 (6th Cir. 1976) (remanding case for "complete consideration by a duly constituted panel of the Board"); *KFC Nat'l Mgmt. Corp. v. NLRB*, 497 F.2d 298, 307 (2d Cir. 1974).

hollow. The Company could have foreseen further proceedings based on this Court's denial of enforcement solely on the ground that the Board was improperly constituted, which distinguishes this case from the litany on which it relies. Moreover, the Company was also well aware that the Board intended to decide the case anew, because the Board said as much in its petition for rehearing. The Company's complaint (Br. 30) that it did not seek *en banc* consideration or Supreme Court review of any portion of the earlier judgment ignores the reality that it can still do so if the Court enforces the Board's order. The Company points to no harm that this wait has caused it that is any different from the wait it would have endured if the improperly constituted Board had simply put off a decision in this case until a properly constituted Board could decide it. And, the Company's citation (Br. 29-30) to concerns that the *Eagle Picher* Court had about allowing a decree to be reopened "years later" are inapplicable here, because, there, a properly constituted Board had already secured a decision on the merits and then later sought to revise it.

In sum, interpreting the Court's mandate as permitting further proceedings before the Board fully comports with principles governing the reasonable and equitable interpretation of mandates. In contrast, the Company's cribbed reading relies on readily distinguishable cases and conflicts with both legal and equitable principles. Therefore, the Board properly considered this case anew.

II. THE BOARD ACTED WITHIN ITS WIDE DISCRETION IN OVERRULING THE COMPANY'S ELECTION OBJECTIONS CONCERNING AN ALLEGED THREAT BY A UNION ORGANIZER, THE UNION'S USE OF AN EMPLOYEE'S PHOTOGRAPH ON A CAMPAIGN FLYER, AND INCLEMENT WEATHER THAT OCCURRED ON THE FIRST DAY OF THE TWO-DAY ELECTION

An employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the duly-certified collective-bargaining representative of a unit of its employees.[12] In the instant case, the Company admits (Br. 9) that the Board certified the Union, but claims that the certification was invalid because the Union engaged in objectionable pre-election misconduct. As we now show, the Company's contentions, however, provide no basis to warrant setting aside the election. *See NLRB v. Media Gen. Operations, Inc.*, 360 F.3d 434, 441, 445-46 (4th Cir. 2004).

Initially, we note that the Company makes the same arguments with respect to its election objections that it previously made to the Court. The Court's prior reasoning provides sufficient basis to find here that the Company's arguments are without merit. *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609, 614-20 (2013). Other circuits have found such summary treatment appropriate in

[12] An employer that violates Section 8(a)(5) of the Act also commits a "derivative" violation of Section 8(a)(1) of the Act, which makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise" of their rights under the Act. 29 U.S.C. § 158(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chemical Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

analogous circumstances following *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 686-688 (2010). *See, e.g.*, *NLRB v. Northeastern Land Servs., Ltd.*, 645 F.3d 475, 478 (1st Cir. 2011); *Sheehy Enterprizes, Inc. v. NLRB*, 431 F. App'x 488, 489 (7th Cir. 2011); *NLRB v. Snell Island SNF LLC*, 451 F. App'x 49, 51 (2d Cir. 2011); *see also*, *Teamsters Local Union No. 523 v. NLRB*, 488 F. App'x 280, 284 (10th Cir. 2012).

In any event, the record shows that the Board did not abuse its discretion in overruling the election objections.

A. Applicable Principles and Standard of Review

"Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). Therefore, this Court "presume[s]" the validity of a Board-supervised election, and will "overturn such an election only if the Board has clearly abused its discretion." *Media Gen.*, 360 F.3d at 441.

A party seeking to have an election set aside "bears a heavy burden" and "must prove by specific evidence not only that campaign improprieties occurred, but also that they prevented a fair election." *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 262 (4th Cir. 2000). Specifically, if the alleged misconduct is made by a party to the election or its agent, the objecting party must show that the conduct

occurred and that it "materially affected" the employees' free choice in the election. *NLRB v. Herbert Halperin Distrib. Corp*., 826 F.2d 287, 290 (4th Cir. 1987). Less weight, however, is accorded the conduct and statements made by third parties because "third parties are not subject to the deterrent of having an election set aside, and third party statements do not have the institutional force of statements made by the employer or the [u]nion." *Id*. Thus, an election will be set aside for third-party misconduct only if "the election was held in a general atmosphere of confusion, violence, and threats of violence, such as might reasonably be expected to generate anxiety and fear of reprisal, to render impossible a rational uncoerced expression of choice as to bargaining representative." *Id*.

When evaluating whether a party has met its heavy burden of demonstrating conduct sufficient to warrant the Board's setting aside an election, this Court is "mindful of the real world environment in which an election takes place." *NLRB v. Coca-Cola Bottling Co.*, 132 F.3d 1001, 1003 (4th Cir. 1997). "Although the Board strives to maintain laboratory conditions in elections, clinical asepsis is an unattainable goal. An election is by its nature a rough and tumble affair, and a certain amount of exaggerations, hyperbole, and appeals to emotion are to be expected." *Id*.; *see Case Farms of North Carolina, Inc. v. NLRB*, 128 F.3d 841, 844 (4th Cir. 1997).

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951). As a result, this Court will not "displace the Board's choice between two conflicting views" of the evidence, even where it "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488; *accord Grinnell Fire Protect. Sys. Co. v. NLRB*, 236 F.3d 187, 195 (4th Cir. 2000).

B. The Board Reasonably Overruled The Election Objection Alleging a Threat By a Union Organizer

The Company claims that the election should be set aside because union organizer Steve Jones threatened employee Damion Knowles in the presence of other employees. (Br. 38-39, A. 13.) The Board overruled the objection, finding that the Company failed to show that Jones' statement to Knowles "reasonably tend[ed] to interfere with employee free choice in the election." (A. 230, 322 n.2.) That conclusion was reasonable.

The credited evidence upon which the Board overruled the objection is undisputed. On June 16, at approximately 6:30 p.m., union organizer Jones arrived at the customer service building for the preelection meeting with the Board agent who would be conducting the 7:00 p.m. session. (A. 228, 229; 80-81, 138, 142-43, 167.) While waiting for the Board agent to arrive, Jones spoke to Knowles, a customer service representative, who was seated behind the counter. (A. 228-29;

73-74, 131-32, 142-43, 167.) Jones, who had met Knowles a few weeks earlier, asked Knowles how his interview had gone for a management position that Knowles had mentioned in that earlier conversation. Knowles replied that the interview went well, and that with more experience he would receive his own store in Dallas, Texas. Jones noted that the Union had members in the Dallas area and asked Knowles if he still had Jones' business card. (A. 229; 76-78, 133-35, 140, 143-44.) After Knowles answered affirmatively, Jones stated, "[w]ell, keep it, you know, you never know, you might need me sometime. You never want to burn any bridges." (A. 229; 134-35, 140-41, 143.) The Board agent then arrived, and the parties left for the pre-election meeting. (A. 143-44, 167.) Employee Gloria Mayo, who was standing nearby, heard "a little bit" of the conversation, but "wasn't paying much attention." (A. 228-29; 108-09.)

On these facts, the Board (A. 229-30) reasonably evaluated Jones' comment to Knowles not to "burn any bridges" in the context of Jones' discussing Knowles' potential move to a management position, and for the undisputed reason that "Knowles may need Jones sometime in the future." Given those circumstances, the Board explained (A. 230) that Jones merely "implie[d] that Knowles should not forsake a good relationship with Jones, even if Knowles is moving into management, because no one knows what the future may bring." Therefore, the Board reasonably found (A. 230) that an employee would not "reasonabl[y]

interpret[] Jones' comment as a threat of physical harm." Indeed, even when a union agent has directly told employees that they "'had to' vote for the union,'" something that Jones did not do here, the Board, with court approval, has found such conduct "innocuous." *AOTOP, LLC v. NLRB*, 331 F.3d 100, 104-05 (D.C. Cir. 2003). Similarly, this Court has held that a union agent did not engage in coercive conduct when he told employees that they should sign a petition stating they would vote for the union to "separate the men from the boys." *Media Gen. Operations*, 360 F.3d at 438.

Moreover, contrary to the Company's contention (Br. 39), the Board also reasonably found (A. 230) that even if, at best, Jones' statement could be viewed as a threat to withhold future union assistance from Knowles, the evidence would still be insufficient. As shown above, the Company was required to show not only that improper conduct occurred, but that the conduct materially impacted the election. Here, the Board found (A. 230) that objectively, it was highly unlikely that a voter who expected to enter a management program at a distant location, and who believed that he had no need for any union representation, would change his vote based on the potential withholding of future union assistance. Nor is there any objective evidence that Jones' comment could have impacted other voters, as only one other disinterested employee was present when Jones made the comment.

Knowles' general testimony (Br. 38, A. 83) that he widely disseminated Jones' statement to other employees is devoid of any specifics.

C. The Board Reasonably Overruled The Objection Alleging That the Union's Use of an Employee's Photograph on a Campaign Flyer Warranted Overturning the Election

Next, the Company claims that the election must be overturned because the Union used a photograph of employee Roberto Henriquez on a campaign flyer that had been taken previously by a third-party union supporter without his prior authorization. (Br. 40-43, A. 13.) The Board (A. 322-24) reasonably overruled the objection.

The credited evidence establishes that prior to the election, Chafik Omerani, an employee and union supporter, took employee Henriquez's photograph in a food court at a mall near their workplace. (A. 233 & n.8; 105-06.) A few days prior to the election, the Union mailed a campaign flyer to all eligible voters with the pictures of eight employees, including Henriquez. (A. 233& n.8, 322; 170, 221-23.) One side of the flyer contained the words, "Yes. Everybody can make the right choice!! To end Unfair treatment & Unfair pay!!" (A. 322; 221.) The words were surrounded by the photographs of the eight employees. (A. 322; 221.) The other side of the flyer had a "Dear Colleagues" note that asked employees to let the Union be their "voice" for better pay, benefits, and treatment. (A. 322; 223.) Prior to the election, the Union also distributed at least one other flyer that

contained pictures of employees, but not Henriquez's picture. (A. 52-53, 201.) Although the Union had a general policy of not using employees' images without their prior consent and had apparently obtained consent from seven of the employees depicted on the flyer (A. 324 & n.5; 109-11), it failed to obtain Henriquez's permission (A. 233 & n.8, 322; 104).

Under the Board's holding in *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982), approved by this Court in *Case Farms of North Carolina, Inc*., 128 F.3d 841 (4th Cir. 1997), the Board will not "probe into the truth or falsity of the parties' campaign statements," and does not "set elections aside on the basis of misleading campaign statements." *Case Farms*, 128 F.3d at 844 (quoting *Midland*, 263 NLRB 127at 133). As this Court explained the Board's *Midland* policy reasonably presumes that employees are "mature individuals" who are generally capable of determining for themselves the extent to which they should rely on partisan election propaganda. *Id*.

On these facts, and the settled principles that the Board will to set aside an election merely because a party to the election has made a misleading statement, the Board (A. 322-23) reasonably found that, at most, "the Union implicitly misrepresent[ing] that Henriquez authorized the use of his image in the flyer," would not warrant overturning the election. Moreover, as the Board explained (A. 322, 324), there is no evidence that the Union in fact misrepresented Henriquez's

support for the Union, or (A. 324) that he objected to the Union's use of his photo on the flyer. Nor, as the Board found (A. 322-23), is there any evidence of pervasive misrepresentations regarding employee authorization for use of photographs, or any claim that this case falls under an exception to *Midland*, which would apply where a party's use of forged documents "render[s] the voters unable to recognize propaganda for what it is." *Midland*, 263 NLRB at 133. Accordingly, the Board reasonably concluded (A. 322-23) that, even assuming that "a reasonable reader of the flyer would understand it to suggest that Henriquez had authorized the use of his image," such a misrepresentation would not serve as a basis for setting aside the election.

The Board's application of its *Midland* rule here is fully consistent with prior Board precedent upholding elections and overruling election objections in circumstances where unions circulated campaign literature that contained the names of employees, or attributed quotes to employees without their consent. *See Somerset Valley Rehab. & Nursing Center*, 357 NLRB No. 71, 2011 WL 4498270, at*1(2011) (overruling objection where a union falsely quoted union supporters as actually stating that they would vote for the union), petition for review pending Case Nos. 12-1031 and 12-1505 (3rd Cir.); *Champaign Residential Servs. Inc.*, 325 NLRB 687, 687 (1998) (overruling objection where two employees did not know that their signatures in support of a union would be shared with others on a flyer);

BFI Waste Servs., 343 NLRB 254, 254 n.2 (2004) (overruling objection where a union arguably misrepresented quotes from two employees); *Findlay Indus. Inc.*, 323 NLRB 766, 766 n.2 (1997) (overruling objection where a union, at most, misrepresented that two employees would vote for it). As the Board explained in *BFI Waste*, which applies with equal force here, it is not condoning a union's representing employees' union views without proper verification, but "simply find[ing] under the circumstances" of a particular case that a union's conduct did not warrant overturning the election, particularly where "the alleged misrepresentations were not 'pervasive.'" 343 NLRB at 254 n.2. Tellingly, the Company does not dispute that the Union's single unauthorized use of employee Henriquez's photo in a union flyer did not warrant overturning the election under the settled principles of *Midland*.

Contrary to the Company's contention (Br. 42) the Union's conduct here is not comparable to the employer conduct that the Board found objectionable in *Sony Corp. of America*, 313 NLRB 420 (1993), and *Allegheny Ludlum Corp*., 333 NLRB 734 (2001), *enforced*, 301 F.3d 167 (3rd Cir. 2002). In *Sony*, the Board found that an employer committed an unfair labor practice when, during a decertification campaign, it tricked 140 employees into having their photos taken and then, without their consent, used the photos in a videotape that represented them as supporting the decertification petition, and many employees vehemently

objected. 313 NLRB at 420, 422-26, 428-29. Similarly, in *Allegheny Ludlum*, the Board found that the employer committed an unfair labor practice by pervasively videotaping its employees for an antiunion video, with little or no safeguards provided to protect employees' decision to participate, an action that led many employees to complain about the employer's conduct. 333 NLRB at 734-35. Here, as the Board explained (A. 324), even assuming those cases involving different allegations and legal theories could be applied here, unlike the employees in the *Sony* and *Allegheny Ludlum* cases, "there is no evidence that Henriquez did not support the Union, that he asked the Union to cease using his image, or even that he did not want the Union to use his image."[13] At most, this case involves a simple failure by the Union to obtain the prior authorization of a single employee for use of his photo on a single flyer, conduct which the Board in its discretion properly found to be insufficient to warrant setting aside the election.

There is also no merit to the Company's suggestion (Br. 42-43) that the Board erred in failing to find that any use of an unauthorized photograph warrants overturning an election. Although the Board in *Allegheny Ludlum* set forth five prerequisites for permissible employer videotaping of employees for a campaign

[13] The employer's duplicitous actions in *Valerie Manor Inc.*, 351 NLRB 1306, 1322 (2007) (Br. 42), render that case inappropriate here. There, the employer engaged in objectionable conduct by taking all of the signatures from a "vote yes" union petition, transferring them to a pro-employer leaflet, and informing employees that the signatories had changed their mind.

video which included assurances that an employee's participation was voluntary (333 NLRB at 733-34), it also explicitly stated that it was not creating a per se rule that "employers must obtain employees' explicit consent before including their images in campaign videotapes." 333 NLRB at 744. Further, *Allegheny Ludlum* stated that its earlier decision in *Sony* had not created such a per se rule. *Id.* Moreover, the test set forth by the Board in *Allegheny Ludlum* was in response not only to pervasive videotaping not present here, but also to its concern that the employer's solicitation of the employees to appear in a videotape constituted an unlawful polling of their union views. *Id*. at 733.

The Company's reliance (Br. 42,43) on *Sprain Brook Manor Nursing Home, LLC*, 348 NLRB 851 (2006), and *Brentwood At Hobart v. NLRB*, 675 F.3d 999 (6th Cir. 2012), as also supporting its notion of a "per se" rule, is equally unavailing. In *Sprain Brook*, the Board declined to overturn an election because the union had purportedly photographed employees without their consent and then used the photographs in its campaign materials. 348 NLRB at 851. The Board in *Sprain Brook* noted that the union had obtained signed consent forms from employees prior to using their photographs (*id.*), but it did not, as the Board stated here (A. 323), "hold that the use of employee photographs without such consent is per se objectionable." Similarly, in *Hobart* the Sixth Circuit merely recited an unremarkable proposition that unauthorized photos "may taint" and election, but

found that the employer waived its claim by failing to present it to the Board. 675 F.3d at 1001, 1005-07.

Finally, the Company mistakenly asserts (Br. 43) that the Board was wrong to apply a different standard to union and employer conduct. As the Board explained (A. 323), while its decision in *Allegheny Ludlum* established rules regarding an employer's use of antiunion material that could constitute an unlawful attempt to solicit employees' views toward the union, "it did not address the issue here—whether a union, which is permitted to question employees about their support for representation, engages in objectionable conduct if it solicits employees to have their photographs appear in campaign literature but includes the image of a single employee who did not so consent."

Moreover, as the Board reasonably noted (A. 323) an employer and a union *are* held to different standards in evaluating the coerciveness of polling. Indeed, as this Court has explained, quoting a sister circuit, "'although pre-election polling by an employer is *per se* objectionable, a union seeking to represent employees has a different relationship to them that makes pre-election polling less coercive.'" *Media Gen. Operations*, 360 F.3d at 441 (quoting *Maremont Corp. v. NLRB*, 177 F.3d 573, 578 (6th Cir. 1999)); *accord Louis-Allis Co. v. NLRB*, 463 F.2d 512, 517 (7th Cir. 1972). As the Fifth Circuit has explained, "[a]n employer in an unorganized plant, with his almost absolute control over employment, wages, and

working conditions, occupies a totally different position in a representation contest than a union, which is merely an outsider seeking entrance to the plant." *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969). Accordingly, the Board did not abuse its discretion in overruling Objection 4.

D. The Board Reasonably Concluded That Inclement Weather Did Not Affect the Election

In Objection 6, the Company claimed that an ice storm on December 16 in the Raleigh-Durham metropolitan area caused a determinative number of eligible voters to not vote in the election held on December 16 and 17. (Br. 43-44, A. 13.) To the contrary, the Board reasonably concluded that the Company failed to show "that the severity of the weather conditions reasonably denied employees an adequate opportunity to vote." (A. 235, 236, 322 n.2.)

At the hearing, the Company presented evidence to support its claim that the ice storm had impacted the election. That evidence showed that on December 16, Wake County, the county where the Raleigh-Durham International Airport and the Company's car rental facility are located, had between 1/8 and 1/10 of an inch of "glaze" from freezing rain, and 1/2 to 1 inch of snow. (A. 235; 49, 55-56, 63-64, 421-22, 426.) That day, some of Wake County's libraries were closed, while others had delayed openings or early closings. (A. 235; 423-24.) In addition, schools and business throughout the metropolitan area were closed or had delayed openings. (A. 235; 426-27.) On December 17, a newspaper article stated that

"[t]he remnants of snowfall and freezing rain that fell on [December 16th] could ice over early [that] morning, creating black ice on some roadways" (A. 275; 428), while another article referred to "patches of black" ice from freezing temperatures "that could affect roadways during the morning rush" (A. 235; 215). On December 17, "[m]ost school systems," including Wake County's, opened on a two-hour delay (A. 275; 428), and the Wake County Register of Deed's Office had a delayed opening (A. 235; 425). The Raleigh-Durham International Airport, and the Company's car rental facility, remained open for regular hours on both days. (A. 235; 54, 65-66, 70.) Neither party requested that the Board postpone the election. (A. 70-71.)

On these facts, the Board reasonably overruled the Company's election objection. As noted, neither the airport nor the Company's car rental facility closed at any time on December 16 or 17 because of the weather. Moreover, as the Board emphasized (A. 236) on December 17, "there is no evidence or reason to believe that any ice [that developed overnight] on the roadways lasted beyond the early morning hours of December 17 and affected the ability of any employee to vote during the 10:00 a.m. to 12:00 p.m. or 3:00 p.m. to 5:00 p.m. polling periods that day." Indeed, as shown, schools in the area merely had, at most, delayed openings on the morning of December 17, and local newspaper articles warned

only of possible icy roads early that morning, but not later when the election was conducted.[14]

There is no merit to the Company's contention (Br. 44) that the Board erred (A. 236) in distinguishing *V.I.P. Limousine*, 274 NLRB 641 (1985), and *Goffstown Track Center*, 354 NLRB 359 (2009), cases in which the Board found that employees were denied the opportunity to vote in an election because of extreme weather occurring during the polling period. In *V.I.P.*, for example, 20 inches of snow fell around the election site in Connecticut during the polling period, "making navigation of the roads extremely difficult, if not impossible." 274 NLRB at 641. Similarly, in *Goffstown*, a "severe and extraordinary," "perhaps unprecedented" ice storm led the Governor of New Hampshire to declare a state of emergency, and caused numerous problems that did not occur here, such as downed power lines that blocked the only roads to the polling place, and the loss of

[14] The Board's reasonable finding is not undermined by Human Resources Manager Jill Trout's testimony (Br. 8; A. 235; 60, 67-69) that on December 16 The Company received about ten "call outs"—that is, phone calls from employees reporting that they would not be coming to work for their scheduled shift—and four "call outs" on December 17. (A. 235; 60.) As the Board noted (A. 235), the Company presented no evidence regarding its normal call-out rate, and thus the meaning of the evidence presented could not be discerned. Moreover, Trout testified that she had no personal knowledge of the reason for the call-outs, nor did she have any knowledge of any employee who did not vote due to the weather. (A. 235; 66-69.) For that matter, The Company has not shown that any of the employees who "called out" on December 16 or 17 were scheduled to work during shifts when the balloting was held. In these circumstances, the Company's claim that the weather precluded a determinative number of employees from voting is mere speculation at best.

heat, electric service, and telephone service to the polling place. 354 NLRB at 359, 360. In addition, the school bus drivers who were to vote in the election had their work cancelled for the day because schools were closed. *Id*.

Here, the Company's car rental facility remained open through the ice storm on December 16. Moreover, there is no evidence that any potential ice that might have developed on the roads overnight was an issue when the polls opened at 10:00 a.m. on December 17. Although the weather might not, as the Company characterizes it (Br. 44), be usual for North Carolina, there is simply no evidence that it impacted the ability of employees to vote in the election, and certainly does not mandate that the Board set aside the election.

Finally, there is no merit to the Company's contention (Br. 44-45) that the Board failed to give proper weight to the close results of the election. Rather, the Board "realize[d] that this case involve[d] a very close election," and it overruled the objections only after it "considered the probability of the events described in each objection," both individually and collectively, regarding their potential impact on the "employees' right to a free and fair choice." (A. 236.) Moreover, while the closeness of an election can be relevant in determining whether *proven* objectionable conduct may have affected the outcome of the election, it is of little value in determining whether objectionable conduct has been proven in the first place. Even assuming some objectionable conduct here—and none was shown—

this Court has often declined to set aside close elections in the absence of proof of significant misconduct. *See NLRB v. VSA, Inc.*, 24 F.3d 588, 590, 596, 598 n. 22 (4th Cir. 1994); *NLRB v. Hydrotherm, Inc.*, 824 F.2d 332, 334, 336-337 (4th Cir. 1987); *Abbott Labs. v. NLRB*, 540 F.2d 662, 664, 665-67 (4th Cir. 1976). Accordingly, the Board did not abuse its discretion by declining to overturn the election based on the closeness of the vote.

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD

May 2015

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-2072 **Caption:** NLRB v. Enterprises Leasing Company-Southeast, LLC

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(s) Linda Dreeben

Attorney for National Labor Relations Board

Dated: 5/6/2015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	
	)	
v.	)	No. 14-2072
	)	
ENTERPRISE LEASING COMPANY-SOUTHEAST, LLC	)	
	)	
	)	Board Case No.
Respondent	)	11-CA-73779

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I hereby certify that on May 6, 2015, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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