

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

**800 RIVER ROAD OPERATING COMPANY, LLC,  
d/b/a WOODCREST HEALTH CARE CENTER**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**1199 SEIU UNITED HEALTHCARE WORKERS EAST**

**Intervenor**

---

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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800 RIVER ROAD OPERATING COMPANY, LLC,	)	
d/b/a WOODCREST HEALTH CARE CENTER	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Nos. 15-1204
	)	15-1281
Respondent/Cross-Petitioner	)	
	)	Board Case No.
and	)	22-CA-097938
	)	
1199 SEIU UNITED HEALTHCARE WORKERS	)	
EAST	)	
	)	
Intervenor	)	

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

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

**A. Parties and Amici:**

1. 800 River Road Operating Company, LLC, was the Respondent before the Board and is the Petitioner and Cross-Respondent before the Court.
2. The Board is the Respondent and Cross-Petitioner before this Court.
3. The 1199 SEIU United Healthcare Workers East was the charging party before the Board, and is the Intervenor before this Court.

**B. Rulings Under Review:**

The Company is seeking review a Decision and Order issued by the Board in case number 22–CA–097938 on June 15, 2015, and reported at 362 NLRB No. 114.

**C. Related Cases:**

None.

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Dated at Washington, DC  
this 5th day of April, 2016

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**Glossary**

800 River Road Operating Company, LLC,  
d/b/a Woodcrest Health Care Center . . . . .Woodcrest

National Labor Relations Board..... Board

Brief of Woodcrest . . . . .Br.

1199 SEIU United Healthcare Workers East...Union

Joint Appendix.....JA

Supplemental Appendix.....SA

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## **STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

This case is before the Court on the petition of 800 River Road Operating Company, LLC d/b/a Woodcrest Health Care Center (“Woodcrest”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against Woodcrest on June 15, 2015, and reported at 362 NLRB No. 114.<sup>1</sup> 1199 SEIU, United Healthcare Workers East (“the Union”) intervened in the case in support of the Board. The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. §§ 151, et seq. The Board’s Order is final under Section 10(e) of the Act, 29 U.S.C. § 160(e). The petition and cross-application were timely as the Act places no time limit on either filing. This Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f).

The Board’s unfair-labor-practice Order is based, in part, on findings made in an underlying representation proceeding, *800 River Road Operating Company*,

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<sup>1</sup> “JA” references are to the joint appendix, “SA” references are to the Board’s supplemental appendix, and “Br.” references are to Woodcrest’s brief. Where applicable, references preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

*LLC, d/b/a Woodcrest Health Care Center*, Board Case No. 22–RC–073078.

Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record before this Court therefore includes the record in that proceeding. Section 9(d) authorizes judicial review of the Board’s actions in a 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 . . . .” 29 U.S.C. § 159(d); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court in the unfair-labor-practice case. *See Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *Medina County Publ’ns*, 274 NLRB 873, 873 (1985).

### **APPLICABLE STATUTORY PROVISIONS**

The relevant statutory provisions and regulations are found in the Addendum to this brief.

### **STATEMENT OF THE ISSUE PRESENTED**

The ultimate issue in this case is whether substantial evidence supports the Board’s finding that Woodcrest violated Section 8(a)(5) and (1) of the Act by refusing to recognize, bargain with, and provide information to the Union.

Woodcrest admits its failure to bargain with the Union, and does not dispute that it

failed to prove the factual allegations underlying its objections to the representation election. Consequently, the only issue before the Court is whether the Board acted within its broad discretion in conducting the representation proceeding and overruling Woodcrest's objections.

### **STATEMENT OF THE CASE**

This unfair-labor-practice case arises from Woodcrest's admitted refusal to bargain with the Union, which the Board certified as the exclusive bargaining representative of a unit of Woodcrest's employees. (JA 149, 148.) In the underlying representation proceeding, Woodcrest filed objections to the election, alleging that four of its supervisors interfered with employee free choice by soliciting authorization cards for, or otherwise actively supporting, the Union. (JA 69.) The Board overruled Woodcrest's objections as lacking any factual basis, rejected Woodcrest's arguments that it did not have a fair opportunity to prove them at the hearing, and held that Woodcrest's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (JA 149-51.) The facts and procedural history relevant to both the representation and unfair-labor-practice proceedings are set forth below.

## **I. FACTS AND PROCEDURAL HISTORY**

### **A. The Representation Proceeding**

#### **1. The Union wins an election to represent non-professional employees at Woodcrest's facility**

Woodcrest operates a rehabilitation and nursing facility in New Jersey. (JA 150, 27; 321.) Lori Senk serves as Woodcrest's Administrator, overseeing both nursing services and facility management with the assistance of several managers and first-line supervisors. (JA 27; 228-29, 275-76.) On January 23, 2012, the Union filed a petition under Section 9(c) of the Act, 29 U.S.C. § 159(c), to become the exclusive bargaining representative of a unit of Woodcrest's non-professional employees on both the nursing and facility-management sides of the business. (Union's Petition.) Woodcrest and the Union executed a Stipulated Election Agreement, in which they agreed to hold a representation election on March 9. (JA 20; Stipulated Election Agreement.) The Board conducted the election on that date, which the Union won by a count of 122 votes for the Union, 81 votes against the Union, and 2 challenged ballots. (JA 20-21; Tally of Ballots.)

#### **2. Woodcrest objects to the election, and the Regional Director orders a hearing on two of its Objections**

On March 16, Woodcrest timely filed 12 Objections to conduct affecting the results of the election. (JA 5; 1-3.) The Board's Acting Regional Director

investigated Woodcrest's allegations and, on April 17, issued a Report on Objections and Notice of Hearing, in which he recommended that the Board overrule Objections 3-12. (JA 4-17.)<sup>2</sup>

In Objections 1 and 2, Woodcrest alleged that four of its supervisors – three nursing supervisors and one facilities manager, each of whom supervised unit employees – had openly supported the Union before the election, thereby interfering with employee free choice. It identified those supervisors as:

- Jane Cordero, who supervises 30-36 nursing employees. (JA 27; 279.)
- Janet Lewis, who supervises 10 or 11 nursing employees. (JA 26; 211-12).
- Bonita Thornton, who supervises approximately 100 nursing employees. (JA 29; 333.)
- Israel Vergel de Dios, who supervised 24 active laundry and housekeeping employees at the time of the election. (JA 26; 172-73.)

Specifically, Woodcrest alleged in Objection 1 that Lewis, Thornton, and Cordero had circulated and solicited union-authorization cards. (JA 5.) In Objection 2, Woodcrest alleged that Vergel de Dios had expressed his opinion to unit

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<sup>2</sup> Woodcrest timely requested that the Board review the recommendation to overrule Objections 3-12. On July 2, 2012, the Board affirmed the Acting Regional Director. (Board's July 2, 2012 Decision and Order.) Woodcrest has waived any arguments regarding those Objections by failing to raise them in its opening brief. *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000).

employees that they needed the protection of the Union, that Cordero had directed unit employees to attend a union meeting, and that Thornton had attended union meetings and advocated for the Union in the presence of unit employees. (JA 6.) The parties stipulated that Cordero, Thornton, Lewis, and Vergel de Dios were all supervisors as defined by Section 2(11) of the Act, 29 U.S.C. § 152(11). (JA 158-59.)

In his Report on Objections, the Acting Regional Director noted that Woodcrest had “provided the names of several supervisory and unit employees whom [it] contends will testify” to the supervisors’ alleged objectionable conduct. (JA 5-6.) He did not name those prospective witnesses. Based on Woodcrest’s representation, the Acting Regional Director determined that Objections 1 and 2 raised genuine factual issues, and directed a hearing to be held before a Hearing Officer. (JA 5-6, 15-16.)

**3. After hearing testimony from ten witnesses, the Hearing Officer limits further witnesses to those with direct knowledge of alleged objectionable conduct; Woodcrest abandons the hearing**

The hearing on Objections 1 and 2 took place over three days, on Thursday May 10, Friday May 11 and Monday May 14. (JA 22.)<sup>3</sup> Over the first day and a half of the hearing, Woodcrest's attorney examined seven witnesses, seeking to adduce testimony proving the alleged objectionable conduct. (JA 23-25.) The Hearing Officer found that none of the witnesses had firsthand knowledge of any supervisor openly expressing support for the Union or soliciting union-authorization cards. (JA 25, 30; 162, 169-70, 206, 209, 220, 221, 224, 230-31, 280, 283, 287-88, 291, 295, 321-22, 325-27, 339, 342-43, SA 1.)

On Friday afternoon, midway through the second day of the hearing, Woodcrest's attorney made an *ex parte* request to subpoena six employees who were supervised by Vergel de Dios. (JA 69; 300-01, 304.) The Hearing Officer stated that he would not hear further testimony from witnesses who did not possess personal knowledge of the alleged objectionable conduct and directed Woodcrest's attorney to make offers of proof respecting the testimony of Woodcrest's remaining witnesses and the six witnesses it sought to subpoena. (JA 69; 300-01,

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<sup>3</sup> The hearing was originally scheduled to begin May 1, but was postponed 10 days at Woodcrest's request. (JA 23.)

306-07, 311.) Woodcrest's attorney represented that three of his four witnesses scheduled for that afternoon, and five more already-subpoenaed witnesses he planned to call on Monday morning, each had personal knowledge of the supervisors' involvement in the union-organizing campaign. (JA 69; 307-08, 313-17.)

The Hearing Officer then heard testimony from three additional witnesses. None of them had firsthand knowledge consistent with Woodcrest's offers of proof. (JA 69; 321-43.) After those three witnesses testified, he denied Woodcrest's request to subpoena six additional witnesses and stated that he would not hear testimony from another eight already subpoenaed witnesses. (JA 69; 344, 346.) He explained that those fourteen witnesses were "exploratory in nature," citing Woodcrest's failure to provide an offer of proof that any of those witnesses had specific, firsthand, factually based knowledge of the alleged objectionable conduct. (JA 69; 344-46.) He stated that he would hear from the five remaining witnesses on Monday, whom Woodcrest had described as having firsthand knowledge of the supervisors' alleged pro-union conduct. (JA 69; 314-17, 346.)

When the hearing resumed on Monday morning, Woodcrest did not present its five scheduled witnesses. Instead, its attorney stated that Woodcrest "refuses to proceed any further with the hearing." (JA 353.) He said that, because of the

Hearing Officer's denial of the six subpoenas and decision not to hear from another eight witnesses, Woodcrest's "position is hopelessly and irrevocably compromised." (JA 354-55.) Woodcrest's attorney also declined to call the five remaining witnesses, who purportedly had direct knowledge of the objections, explaining that "we don't wish to make their work lives more difficult by having them come here and testify." (JA 357.) Woodcrest's representatives and attorney then exited the hearing room. (JA 374.)

The Union moved to dismiss Objections 1 and 2, based on Woodcrest having abandoned its prosecution. (JA 362.) The Hearing Officer declined to rule on the motion, and closed the hearing. (JA 375.) In his report, the Hearing Officer concluded that Woodcrest had not met its burden to establish objectionable conduct, and recommended that the Board overrule Objections 1 and 2. (JA 30.)

**4. The Board overrules Woodcrest's Objections, denies Woodcrest's subsequent motion to reopen the hearing, and certifies the Union**

The Board reviewed the Hearing Officer's Report and overruled Objections 1 and 2 in a January 9, 2013 Decision and Certification of Representative, reported at 359 NLRB No. 48. (JA 69.) The Board found that the Hearing Officer had erred by declining to issue the six additional subpoenas, but that Woodcrest was not prejudiced by that error. (JA 69.) The Board found that the Hearing Officer

acted reasonably when, after hearing testimony from ten witnesses without personal knowledge of the alleged objectionable conduct, he cut off Woodcrest's "manifest fishing expedition." (JA 70.) In light of the Hearing Officer's ruling that he would not allow testimony from any more witnesses without firsthand knowledge, and Woodcrest's admission that it could not make offers of proof as to the six witnesses it sought to subpoena, the Board concluded that the Hearing Officer would not have heard their testimony even if he had issued the subpoenas. (JA 70.)

Three months later, on March 2, 2013, Woodcrest filed a motion with the Board to reopen the record and resume the hearing, proffering a statement it had obtained from a staff nurse, Dawn Sormani. The statement asserted that Sormani had personally observed supervisor Vergel de Dios telling at least four bargaining-unit employees that they should vote in favor of the Union. (JA 71-134.) On May 31, the Board denied Woodcrest's motion, finding that the statement did not qualify as "newly discovered evidence." (JA 135-40.) The Board explained that Woodcrest could have obtained that information from Sormani before the objections hearing had it acted with reasonable diligence. It noted, as Woodcrest itself made clear in its motion, that she had previously cooperated fully in a post-election interview before the objections hearing, during which Woodcrest did not

ask her about Vergel de Dios. The Board further found, and noted that Woodcrest had tacitly conceded, that even if Sormani had credibly testified to the facts in her statement at the objections hearing, her testimony about Vergel de Dios's encouraging a small number of employees to vote for the Union would not have changed the result of the proceedings or demonstrated coercion, particularly given the wide margin of the Union's election victory. (JA 136-38 & n.4.)

### **B. The Unfair-Labor-Practice Proceeding**

On January 18, 2013, the Union requested a meeting with Woodcrest to negotiate a collective-bargaining agreement, and requested that Woodcrest furnish information about the wages and terms and conditions of employment of the bargaining-unit employees. (JA 141-42.) Since January 18, 2013, Woodcrest has admittedly refused to bargain and has failed to furnish the Union with the requested information. (JA 142.) The Acting General Counsel issued a complaint alleging that Woodcrest's refusal to bargain and to provide relevant requested information violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 8(a)(5) and (1), and moved for summary judgment before the Board. On July 10, 2013, a three-member panel of the Board (Chairman Pearce; Members Griffin and Block) granted summary judgment, finding that Woodcrest violated the Act as

alleged. *See 800 River Road Operating Company LLC, d/b/a Woodcrest Health Care Center*, 359 NLRB No. 129.

Woodcrest petitioned this Court for review of that order. *See* D.C. Cir. No. 13-1224. On January 25, 2013, the Court placed the case in abeyance pending resolution of then-pending litigation challenging the recess appointments of Members Griffin and Block. On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held that those appointments were invalid. On June 27, 2014, the Board issued an order setting aside its July 10, 2013 Decision and Order. (JA 145-46.) On the Board's subsequent motion, the Court vacated the Board's July 10, 2013, Decision and Order and remanded the case to the Board.

**C. Representation and Unfair-Labor-Practice Proceedings  
after Remand**

On November 26, 2014, a properly constituted Board panel (Chairman Pearce; Members Hirozawa and Schiffer) issued a Decision, Certification of Representative, and Notice to Show Cause. (JA 147-48.) The Board stated that it had considered Woodcrest's exceptions to the Hearing Officer's Report on Objections *de novo* and found them to be without merit. (JA 147.) In doing so, the Board adopted the reasoning from its January 9, 2013 Decision and Certification of

Representative, which it incorporated by reference. (JA 147.) The Board also considered *de novo* Woodcrest's March 2, 2013 motion to reopen the record based on newly discovered evidence and denied it for the reasons stated in its May 31, 2013 Order denying the motion, which it incorporated by reference. (JA 147-48.)

On January 22, 2015, the Union wrote to Woodcrest requesting to bargain and requesting information necessary for the performance of its representational duties. Woodcrest refused. On February 10, the General Counsel issued an amended unfair-labor-practice complaint adding November 26, 2014, as the date the Board certified the Union, and alleging that Woodcrest's failure to bargain with the Union and to provide the requested information violated Section 8(a)(5) and (1) of the Act. (JA 149 & n.1.) In its answer to the amended complaint and opposition to summary judgment, Woodcrest admitted the factual allegations of the complaint and reiterated its arguments from the underlying representation proceeding.

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

On June 15, 2015, the Board (Chairman Pearce; Members Hirozawa and McFerran) issued a Decision and Order finding that Woodcrest had violated Section 8(a)(5) and (1) as alleged. (JA 150.) In its decision, the Board noted that all representation issues raised by Woodcrest were or could have been litigated in

the prior representation proceeding. (JA 150-51.) To remedy the unfair labor practices, the Board's Order requires Woodcrest to cease and desist from failing and refusing to recognize and bargain with the Union, failing and refusing to furnish the Union with information relevant to its duties as the bargaining representative of the unit employees, and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act. Affirmatively, the Order requires Woodcrest to furnish the information the Union requested in a timely manner, bargain with the Union upon request, and, if an understanding is reached, to embody that understanding in a signed agreement. The Order also requires Woodcrest to post a remedial notice. (JA 151-52.)

### **SUMMARY OF ARGUMENT**

After a majority of Woodcrest's employees voted in favor of representation by the Union, Woodcrest objected to the election. Woodcrest was given substantial leeway at the hearing on objections to examine witnesses over two days. Despite that broad inquiry, which followed an extensive pre-hearing investigation comprising over 100 interviews, Woodcrest was unable to produce any first hand or specific evidence of the alleged objectionable conduct. Longstanding Board and Court precedent prohibits parties from using the Board's process as an exploratory fishing expedition to search for scraps of evidence in the

hopes of overturning an election. Thus, the Hearing Officer's decision, at the end of the second day of testimony, to limit Woodcrest's further witnesses to those who had direct, relevant knowledge was reasonable.

Moreover, Woodcrest has not shown that it was prejudiced by the Hearing Officer's consequent denial of six subpoenas or exclusion of eight already-subpoenaed witnesses. Because Woodcrest was unable to make offers of proof that those fourteen witnesses had personal knowledge of objectionable conduct, it cannot show its case was prejudiced by the exclusion of their testimony. Nor is there any merit to Woodcrest's further contention that the Board otherwise deprived it of the opportunity to prove its objections. That is particularly true in light of Woodcrest's decision to walk out of the hearing rather than calling its remaining five witnesses, whom it alleged had specific, firsthand knowledge of objectionable conduct. Based on this record, the Board acted within its broad discretion in conducting the representation hearing, and Woodcrest had ample opportunity to carry its burden of proof. Accordingly, the Board acted within its broad discretion in overruling Woodcrest's objections to the election and certifying the Union. Therefore, Woodcrest's refusal to bargain with the Union, or to provide relevant requested information, violates Section 8(a)(5) and (1) of the Act.

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT WOODCREST VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE, BARGAIN WITH, AND PROVIDE INFORMATION TO, THE UNION**

Section 7 of the Act grants employees the right to choose a representative and to have that representative bargain with their employer on their behalf. 29 U.S.C. § 157. Employers have a corresponding duty to bargain with their employees’ chosen representatives, and a refusal to bargain violates that duty under Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5).<sup>4</sup> An employer’s duty to bargain in good faith includes the “general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties.”<sup>5</sup> Moreover, a violation of Section 8(a)(5) constitutes a derivative violation of Section 8(a)(1), 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]” of the Act.<sup>6</sup>

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<sup>4</sup> *Brewers & Maltsters v. NLRB*, 414 F.3d 36, 41 (D.C. Cir. 2005); *accord Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1271 (D.C. Cir. 2012).

<sup>5</sup> *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *accord NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Brewers & Maltsters*, 414 F.3d at 45.

<sup>6</sup> *Brewers & Maltsters*, 414 F.3d at 41; *accord Veritas*, 671 F.3d at 1271.

Here, Woodcrest admittedly refused to recognize, bargain with, and provide relevant requested information to the Union, but argues that the election should be set aside on the grounds that four of its supervisors purportedly engaged in objectionable pro-union conduct that impaired its employees' free choice of representative.<sup>7</sup> In its brief to this Court, however, Woodcrest does not dispute that it failed to prove any such conduct occurred, much less materially affected the election results. Indeed, despite its repeated invocation of its supervisors' alleged misdeeds (Br. 6, 23-24, 40-41, 52-54), Woodcrest concedes (Br. 22, 27, 56) that substantial evidence supports the Board's finding (JA 69, 30) that it did not prove any of them actually engaged in objectionable conduct.

Woodcrest's sole defense is its contention that it was not given an adequate opportunity to prove its Objections because of the Hearing Officer's conduct at the objections hearing, including his decision to exclude certain witnesses. Accordingly, the only question before the Court is whether the Board abused its discretion in conducting and reviewing the representation proceedings. As detailed below, the Board's decision is well supported in the record, demonstrably

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<sup>7</sup> See *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004) (describing two-part standard for setting aside election based on objectionable supervisory conduct); *accord Veritas*, 671 F.3d at 1272.

reasonable, and comports with controlling regulations as well as Board and court precedent. Because the Board thus properly exercised its discretion in overruling Woodcrest's Objections, the Union's certification is valid, Woodcrest's failure to bargain or provide information violates Section 8(a)(5) and (1), and the Board is entitled to enforcement of its Order.

**A. The Board Has Broad Discretion in Conducting Representation Proceedings**

“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.”<sup>8</sup> To that end, “Congress has charged the Board, a special and expert body, with the duty of judging the tendency of electoral flaws to distort ‘the employees’ ability to make a free choice.’”<sup>9</sup> Therefore, as this Court has recognized, “the Board has broad discretion to assess the propriety and results of representation elections.”<sup>10</sup>

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<sup>8</sup> *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); accord *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969).

<sup>9</sup> *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 885 (D.C. Cir. 1988) (quoting *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1563-64 (D.C. Cir. 1984)).

<sup>10</sup> *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1074 (D.C. Cir. 2007) (internal quotation marks and citation omitted); accord *Veritas*, 671 F.3d at 1271.

“A party seeking to overturn a Board-administered election bears a heavy burden.”<sup>11</sup> To set aside an election based on objectionable conduct, such as supervisors’ pro-union activities, an objecting party must show “not just that objectionable acts occurred, ‘but also that they interfered with the employees’ exercise of free choice to such an extent that they materially affected the results of the election.’”<sup>12</sup> Moreover, “the objecting party must produce ‘specific evidence’ that the election was improperly conducted.”<sup>13</sup> As this Court has explained, that “burden cannot be met by nebulous and declaratory assertions; only specific evidence of specific events from or about specific people will do.”<sup>14</sup>

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<sup>11</sup> *N.Y. Rehab.*, 506 F.3d at 1077; *accord Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996).

<sup>12</sup> *Harborside*, 343 NLRB at 910 (quoting *Wright Mem’l Hosp. v. NLRB*, 771 F.2d 400, 404 (8th Cir. 1985)); *accord U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 961 (D.C. Cir. 2007); *C.J. Krehbiel Co.*, 844 F.2d at 882; *SNE Enters., Inc.*, 348 NLRB 1041, 1048 (2006).

<sup>13</sup> *Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970); *accord Sitka*, 206 F.3d at 1182; *NLRB v. Media Gen. Operations, Inc.*, 360 F.3d 434, 441 (4th Cir. 2004); *Warren Unilube, Inc. v. NLRB*, 690 F.3d 969, 974 (8th Cir. 2012).

<sup>14</sup> *Sitka*, 206 F.3d at 1182 (internal quotation marks and citation omitted). *Cf. Millard Refrigerated Servs., Inc.*, 345 NLRB 1143, 1144 (2005) (sustaining employer’s objection based on “credited employee . . . testimony that supervisor [] asked him about twice a week how he was going to vote” and that “supervisor . . . was also busy soliciting and collecting cards”).

To carry out its charge from Congress, the Board has established rules and regulations governing representation proceedings. Section 102.69(a), 29 C.F.R. § 102.69(a), of the Board’s Rules and Regulations requires an objecting party to furnish the Regional Director with evidence supporting the objections. And Board Rule 102.69(d), 29 C.F.R. § 102.69(d), provides for a hearing only when the Regional Director finds that the objections raise substantial and material issues of fact. The objecting party may satisfy that standard “by specifically identifying witnesses who would provide *direct rather than hearsay* testimony to support its objections, specifying which witnesses would address which objections.”<sup>15</sup>

Board Rule 102.66, 29 C.F.R. § 102.66, governs hearings in union-representation proceedings. It states that “[a]ny party shall have the right to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party’s contentions and are relevant to the existence of a question of representation.” 29 C.F.R. § 102.66(a). Pursuant to Section 11181 of the Board’s Casehandling Manual, a representation hearing is

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<sup>15</sup> *Transcare NY, Inc.*, 355 NLRB 326, 326 (2010) (emphasis added); *accord City Wide Insulation of Madison, Inc.*, 338 NLRB 793, 795 (2003).

“investigatory, intended to make a full record and nonadversarial.”<sup>16</sup> The hearing officer’s duty under the Board’s Rules is to “inquire fully into all matters and issues necessary to obtain a full and complete record.” 29 C.F.R. § 102.64(a).

Nonetheless, the Board has long made clear that hearing officers must not allow parties to use a representation hearing as a “fishing expedition,” including by calling witnesses on the mere “hope[] examination of these witnesses would elicit evidence to support its claim.”<sup>17</sup> That ban on fishing expeditions is consistent with the structure of the Board’s representation proceedings which, as noted, require an objecting party to identify specific evidence such as firsthand witness accounts to

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<sup>16</sup> *Accord Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 67-68 (D.C. Cir. 2015). An electronic copy of the Board’s Casehandling Manual is available at, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM2-Sept2014.pdf> (last visited February 2, 2016).

<sup>17</sup> *Sears, Roebuck & Co.*, 112 NLRB 559, 569 n.1 (1955); *see Cauthorne Trucking*, 256 NLRB 720, 720 (1981) (“A hearing officer should prevent ‘fishing expeditions’ or other improper examination by the parties.”); *see, e.g., Millsboro Nursing & Rehab. Ctr.*, 327 NLRB 879, 881 n.2 (1999) (agreeing with hearing officer’s decision to quash subpoena because “the record provides no basis on which we may reasonably believe that the desired documents contain evidence of improper payments . . . we agree with the hearing officer that the Employer’s broad request for the production of records is a mere ‘fishing expedition’ . . . not entitled to a subpoena from the Board”); *Burns Sec. Servs.*, 278 NLRB 565, 566 (1986) (upholding hearing officer’s decision to quash subpoenas when employer’s “broad requests for the production of records and testimony [we]re a mere ‘fishing expedition’ not entitled to a subpoena from the Board”).

trigger a hearing on objections at all. That ban has been approved by this Court and others.<sup>18</sup>

When reviewing the Board’s decision in a representation case, this Court “will affirm the Board’s order to bargain unless the Board abused its discretion in overruling [the employer’s] objections in the underlying election proceeding.”<sup>19</sup> Accordingly, the Court reviews a hearing officer’s decision to exclude a witness’ testimony for abuse of discretion.<sup>20</sup> To demonstrate such an abuse of discretion, the party objecting to the exclusion of evidence has the burden to show that it

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<sup>18</sup> See, e.g., *Drukker Commc’ns, Inc. v. NLRB*, 700 F.2d 727, 732 (D.C. Cir. 1983) (noting that “generalized ‘fishing expeditions’ for helpful evidence . . . have uniformly been rejected”) (citation omitted); *NLRB v. Davenport Lutheran Home*, 244 F.3d 660, 663 (8th Cir. 2001) (employer “not entitled to a hearing to engage in a fishing expedition for possible election improprieties”); *Natter Mfg. Corp. v. NLRB*, 580 F.2d 948, 952 n.4 (9th Cir. 1978) (rejecting employer’s argument that, “without a hearing and the concomitant opportunity to subpoena and examine witnesses, it has no effective method of acquiring the evidence the Board demands” because it is not “entitled to a fishing expedition in order to prove its wholly unsubstantiated assertions”).

<sup>19</sup> *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996) (citing *C.J. Krehbiel Co.*, 844 F.2d at 881-82). Cf. *Veritas*, 671 F.3d at 1273 n.1 (“As a technical matter, it might be argued that the Board reviews the ALJ’s ruling for abuse of discretion, and we review the Board’s decision under the arbitrary and capricious standard. But little if anything turns on the wording. The key point is this: When an ALJ’s evidentiary ruling has been upheld by the Board, our review is deferential.” (internal citation omitted)).

<sup>20</sup> *Salem*, 808 F.3d at 67; *Canadian Am. Oil*, 82 F.3d at 475.

suffered prejudice as a result.<sup>21</sup> And a party cannot make that showing if the “excluded evidence would not ‘compel or persuade to a contrary result.’”<sup>22</sup>

**B. The Board Acted Well within Its Discretion in Conducting the Representation Hearing and Overruling Woodcrest’s Objections**

As the Board found (JA 148), the Hearing Officer, having given Woodcrest “significant leeway” to develop a case in support of its election objections, reasonably halted Woodcrest’s “manifest fishing expedition” after two days of testimony. As a review of the hearing demonstrates, and Woodcrest concedes, Woodcrest had failed to prove – or elicit even one firsthand or specific account supporting – the factual predicate of its objections after presenting ten witnesses. It failed to do so despite having specifically identified to the Regional Director witnesses, whom it alleged had material information, in order to trigger the hearing. It failed to do so after representing to the Hearing Officer that some of its witnesses would have material knowledge, which it failed to adduce from their

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<sup>21</sup> *Nova S.E. Univ. v. NLRB*, 807 F.3d 308, 315 (D.C. Cir. 2015) (“To the extent Nova objects to the ALJ’s exclusion of certain . . . evidence . . . it fails to show that it suffered prejudice as a result.”); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1166 (D.C. Cir. 2004) (denying employer’s argument it was denied a fair hearing by the ALJ’s exclusion of evidence because the employer “ha[d] not met its burden of demonstrating prejudice”).

<sup>22</sup> *Salem*, 808 F.3d at 68 (quoting *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 (D.C. Cir. 1999)).

testimony. The Hearing Officer's decision at that point not to hear further "exploratory" witnesses was reasonable and grounded in precedent. He did not impose a novel or insurmountable "vetting" requirement, but merely required assurances that Woodcrest expected further witnesses to have direct, factual knowledge of the alleged misconduct. And, while his denial of certain subpoenas was erroneous, it was harmless error as it did not prejudice Woodcrest. Nor has Woodcrest shown that any other aspect of the hearing, or the representation proceedings considered as a whole, deprived it of the opportunity to present its case.

**1. After two full days of testimony without one direct or specific account of supervisory misconduct, the Board reasonably required offers of proof before hearing further witnesses**

As the Board explained (JA 69), Woodcrest examined seven witnesses, some of whom it had subpoenaed, over the first day and a half of the hearing. Contrary to Woodcrest's representation to the Regional Director (JA 5-6), none of them possessed firsthand knowledge of any supervisor soliciting union-authorization cards or engaging in pro-union conduct. Woodcrest's next three witnesses also had no personal knowledge of such conduct, contrary to its offers of proof to the Hearing Officer. His refusal, after hearing their testimony, to allow

Woodcrest to call further witnesses – admittedly to “explore” their knowledge (JA 300) – was eminently reasonable.

Briefly, three of Woodcrest’s first seven witnesses were former company employees – Loesha Chase, Katherine Frost, and Clarice Gogia – who had ceased their employment with Woodcrest over six months before the January 2012 election petition. (JA 25-28; 160-62, 284, 290.) Chase and Frost testified that they had no knowledge of the Union’s election campaign or of any supervisory involvement in it. (JA 25-26, 28; 162, 169-70, 171, 291-92, 293-95.) Gogia – Woodcrest’s former director of nursing – not only testified that she had no knowledge of the four supervisors supporting the union, but also described them as “helping us to keep the Union out of the building” during the initial organizing drive in 2011. (JA 29; 287-88.)

Three of the four supervisors alleged to have supported the Union also testified. Vergel de Dios, Lewis, and Cordero each specifically denied instructing employees to sign authorization cards. (JA 26-28; JA 224-25, 283, SA 1.) Lewis and Cordero denied telling employees to vote for the Union, and Vergel de Dios testified that, when asked, he told employees “it’s up to you” how to vote. (JA 26-28; 206, 209, 220, 221, 280, 282.) All three stated that they gave Woodcrest’s anti-union fliers to employees. (JA 26-28; 209, 220, 280.) During her testimony,

Woodcrest's Administrator Lorri Senk discussed an anonymous note that had been slipped under her office door. The note listed Cordero's and other employees' names under the title "union insiders." (JA 27; 233-35, 273-74.) Senk could not recall when she received the note, and had no idea who authored it. (JA 27; 233-35, 273-74.) Senk further stated that she learned from nursing supervisor Susan Langdon that Langdon had overheard Cordero speaking to nurse Remi Sajimi about getting employees to attend a union meeting. (JA 230.)

After those seven witnesses testified, Woodcrest's attorney made an *ex parte* request for six additional subpoenas for subordinates of Vergel de Dios, which the Hearing Officer discussed with counsel at length on the record. (JA 300-07.) The Hearing Officer made clear that he did not intend to hear any more witnesses who lacked firsthand knowledge of objectionable conduct, and asked for an offer of proof as to the six putative witnesses' testimony. (JA 69; 300.) Woodcrest's attorney conceded "I do not know them to have factually based knowledge," and said "my purpose is to explore with these people, who in large part I have not spoken to, perhaps I've spoken to one or two, in any event, to explore with them what Israel [Vergel de Dios]'s conduct was during the campaign[.]" (JA 300, 303.) He added, "I acknowledge that the proffer does not constitute an offer of proof . . . because I do not know what they will say, but I think it is perfectly

appropriate for me to proceed in that fashion.” (JA 301.) When the Hearing Officer clarified that the attorney need only state “whether or not they have factually based firsthand knowledge,” Woodcrest’s attorney responded “I believe they have it because they’re members of [Vergel de Dios’] department,” and asserted that he could not give any further detail because many of the employees had exercised their *Johnnie’s Poultry* right not to speak to him.<sup>23</sup> (JA 304.)

Based on the discussion of the subpoenas, the Hearing Officer asked for offers of proof respecting the rest of Woodcrest’s witnesses for the day. Woodcrest’s attorney represented that he expected three of the four – one of whom had invoked her right not to speak to him before the hearing – to have firsthand knowledge of objectionable conduct. (JA 307.) The Hearing Officer reiterated that he did not “intend to listen to witnesses who do not have firsthand, factually based knowledge” of the misconduct alleged in Objections 1 and 2, and asked for offers of proof as to Woodcrest’s remaining witnesses. (JA 311-12.) Woodcrest’s attorney admitted that he could not make such offers as to eight already-

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<sup>23</sup> Pursuant to *Johnnie’s Poultry*, 146 NLRB 770, 774-75 (1964), “where an employer has a legitimate cause to inquire, he may exercise the privilege of interrogating employees on matters involving their Section 7 rights” without violating the Act, when “necessary in preparing the employer’s defense for trial of the case.” The employees’ participation in such interviews is voluntary. *Id.*

subpoenaed witnesses, assertedly because he had not spoken with or “vetted” them. (JA 312-13.) But he did make offers of proof as to five more witnesses whom he also represented he had not “vetted.” (JA 313-14.) For example, he stated that one would testify about a pro-union comment “Ms. Lewis said to her during the campaign,” another would “testify that Ms. Thornton brought authorization cards to the night shift,” and another “will testify that Israel [Vergel de Dios] told employees words to the effect of vote what your heart tells you, as well as vote what is best for you.” (JA 314-17.)

At that point, the Hearing Officer heard from the three scheduled witnesses Woodcrest expected to have firsthand knowledge, Admissions Director Cartney Ezyk, nurse Remi Sajimi, and Thornton, the fourth allegedly pro-union supervisor. Despite Woodcrest’s assurances, none of them did. Ezyk denied having “any knowledge relating to any supervisors having involvement with the union organizing drive,” and stated that he had heard that Lewis was the person to see about signing a union card around September 2011, before her February 2012 promotion to supervisor. (JA 29; 222-23, 321-22.) Sajimi testified, contrary to Senk’s hearsay account, that she had never spoken to Cordero about the Union or observed Cordero or Thornton talking to other employees about the Union. (JA 29; 325-27.) She further denied any knowledge of Lewis or Thornton distributing

union-authorization cards. (JA 29; 325-27.) Finally, Thornton denied advising employees to vote for the Union or soliciting cards and further testified that, when asked, she told employees “as far as I’m concerned, the Union is [] more trouble than it’s worth.” (JA 29; 339, 342-43.)

At the close of testimony that Friday, the Hearing Officer denied the six subpoenas, explaining they “are exploratory in nature . . . or they haven’t been vetted by you, so you’re not able in the offer of proof to be able to assure me that they have specific knowledge, firsthand knowledge, factually based on the objections at hand.” (JA 344-45.) The Hearing Officer further ruled that he would not allow testimony from the eight already-subpoenaed witnesses because they were “also exploratory in nature and in your offer of proof, you’re not able to represent that they’re going to [have] factually based, direct knowledge of the objections.” (JA 346.) The Hearing Officer then stated that he was willing to hear Woodcrest’s remaining five witnesses based on Woodcrest’s offers of proof, stating: “we don’t have names of [the] five remaining witnesses that have been vetted, but we will hear them on Monday. And the assumption is that all five will have factually based, direct knowledge testimony in support.” (JA 346.) Instead of presenting those five witnesses on Monday morning, Woodcrest walked out of

the hearing in protest of the Hearing Officer's earlier rulings denying subpoenas and excluding testimony.

In light of the extensive leeway the Hearing Officer permitted Woodcrest in examining ten witnesses over two days to support its allegations of supervisory misconduct, his exclusion of further testimony in the absence of offers of proof was, as the Board found (JA 70), plainly reasonable. He did not bar Woodcrest from presenting further witnesses – and indeed expressly agreed to hear the five scheduled for Monday. He simply required that Woodcrest make offers of proof that it expected further witnesses to present firsthand or specific testimony material to the contested Objections. That requirement was plainly reasonable in light of Woodcrest's failure to elicit any such testimony from its first ten witnesses and request for eight additional subpoenas. It was also consistent with the Board's and courts' established policy, discussed above (p. 22-23 & nn.17 & 18), barring objecting parties from using Board hearings (or subpoenas) to fish for potential misconduct or flesh out entirely unsubstantiated assertions.

**2. The Board's limitation of further witnesses to those with actual knowledge of alleged objectionable acts is reasonable and consistent with precedent**

There is no merit to Woodcrest's assertion (Br. 46-49) that requiring offers of proof created a "novel requirement" that a party must "vet" witnesses before

examining them at a representation hearing by representing “what their exact testimony would be.” As an initial matter, Woodcrest mischaracterizes the Hearing Officer’s ruling. The Hearing Officer merely requested – only after hearing extensive testimony that did not support Woodcrest’s objections – that Woodcrest “vet” further witnesses in some manner allowing Woodcrest to represent that they appeared to have specific, firsthand knowledge of the sort of misconduct alleged in Objections 1 and 2. Because Woodcrest had to represent that it had that type of evidence to warrant a hearing on its objections in the first place (*see* above, page 20-22), the Hearing Officer’s request to hear it should have been unsurprising. And offers of proof are a standard technique for managing evidentiary hearings and limiting irrelevant testimony or unwarranted exploration.<sup>24</sup>

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<sup>24</sup> *See, e.g., Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 298 (7th Cir. 1983) (“[T]he hearing officer’s refusal to permit [the company] to recall five witnesses and two new witnesses . . . did not constitute a clear abuse of discretion or result in any prejudice to the company” when “there was no offer of proof that they or the two new witnesses would discuss any unexplored evidence of [the alleged objectionable] activities”); *Heartshare Human Servs. of NY, Inc.*, 320 NLRB 1, 1 (1995), *enforced* 108 F.3d 467 (2d Cir. 1997) (In pre-election hearing, employer sought adjournment to collect more evidence relevant to dispute over scope of bargaining unit; Board affirmed hearing officer’s decision to request “offer of proof as to what evidence the employer would provide if its adjournment request

Woodcrest confounds that minimal, threshold showing with its attorney's assertion that in order to "vet" witnesses he would have to undertake pre-hearing interviews with employees wherein he obtained the specifics of their potential testimony in detail – interviews he could not require consistent with the employees' right not to talk to him under *Johnnie's Poultry*. Both the Hearing Officer's statements and Woodcrest's own presentation of its case at the hearing belie that interpretation.

For example, when the Hearing Officer inquired as to whether one of Woodcrest's remaining witnesses, nurse Remi Sajimi had direct, firsthand knowledge of the objections Woodcrest's attorney responded, "Remi [Sajimi] . . . did not talk to any of the lawyers because she exercised her *Poultry* rights." Nonetheless, Woodcrest's attorney proffered that "as I understand it from another witness who has direct knowledge," Sajimi would testify that Jane Cordero told her she would make sure certain employees attended a union meeting. (JA 307-08.) Woodcrest having met the basic threshold showing that Sajimi had relevant personal knowledge, the Hearing Officer then heard her testimony. And she credibly testified that she had no knowledge of Cordero or any other supervisor

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was granted," noting "extensive litigation" over scope of bargaining unit at that point).

engaging in prounion activity. (JA 324-27.) Woodcrest also made offers of proof, which the Hearing Officer explicitly found satisfactory, as to the five unnamed witnesses scheduled to testify on Monday, even though they, like Sajimi, were not “vetted,” according to Woodcrest’s attorney’s definition of that term. (JA 313-14.)

Moreover, contrary to Woodcrest’s insistence that it could not support its objections without a fishing expedition at the hearing, its arguments highlight potential sources of information that it chose not to exploit, and suggest that the information Woodcrest sought simply did not exist. For example, Woodcrest’s asserted “belief that Sajimi was not telling the truth” about her conversation with Cordero was based on information Woodcrest received from “an individual who overheard the conversation” (Br. 15), presumably a reference to Senk’s testimony that nursing supervisor Langdon had reported that conversation. (JA 230, 307.) Yet Woodcrest did not call Langdon to testify. And it ultimately declined to present five scheduled witnesses it asserted had direct knowledge of misconduct. Finally, while some employees invoked their right not to participate in interviews, Woodcrest claimed to have conducted between 100 and 150 employee interviews in the days following the election. (JA 76.) Despite that broad investigation, Woodcrest was unable or unwilling to present any evidence of the alleged objectionable conduct at the hearing.

In other words, there is nothing to Woodcrest's contention that it faced a "catch-22" situation wherein the Hearing Officer's "vetting" requirement, combined with employees' right not to submit to pre-hearing interviews, precluded it from presenting its case (Br. 49) – or allowed employees to "insulate themselves from ever providing testimony in a Board hearing" by refusing pre-hearing interviews (Br. 47).

**3. The Hearing Officer's exclusion of the eight subpoenaed witnesses' testimony was reasonable in the absence of offers of proof; Woodcrest has not shown prejudice**

As the Board found (JA 70), and as just described, the Hearing Officer's imposition of an offer-of-proof requirement after two days of fruitless testimony was well within his discretion. And he reasonably applied that requirement to exclude the eight already-subpoenaed witnesses. To demonstrate that the exclusion constituted an abuse of discretion, Woodcrest must show prejudice. It has not met that burden.

As an initial matter, there is no record evidence to support Woodcrest's bald assertion that the eight "witnesses would have testified that Lewis, Thornton, and Cordero were coercively distributing and soliciting Union authorization cards to and from their subordinates," and that "Cordero and Thornton . . . direct[ed] subordinates to attend Union meetings." (Br. 5-6, 52-53.) To prop up that

contention, Woodcrest cites only the Regional Director's Report on Objections, which merely reflects Woodcrest's representation to the Regional Director before the hearing that it had witnesses who could provide relevant evidence. (JA 5-6.)

Notably, when the Hearing Officer asked for an offer of proof respecting those eight witnesses, Woodcrest's attorney stated on the record that he could not "affirmatively assure" the Hearing Officer that they had any direct knowledge of supervisors' pro-union conduct. (JA 312.) The Hearing Officer's refusal to hear their testimony at that point comports with this Court's holding, in *Salem Hospital*, that the Board had not abused its discretion in excluding evidence after the employer failed to make an offer of proof at the hearing.<sup>25</sup> Nor, contrary to Woodcrest's suggestion (Br. 29), is it inconsistent with the Fourth Circuit's finding in *Singer Sewing Machine Co. v. NLRB*, that the Board improperly excluded certain witnesses after the employer had made an offer of proof describing their expected testimony.<sup>26</sup> In sum, Woodcrest did not assert at the hearing that the eight excluded witnesses would provide materially relevant testimony, and even now cites no evidence to this Court demonstrating that they would. There is thus

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<sup>25</sup> 808 F.3d at 70.

<sup>26</sup> 329 F.2d 200, 205 (4th Cir. 1964).

no basis to find that the Board's failure to hear their testimony prejudiced Woodcrest or otherwise constituted an abuse of discretion.

**4. The Hearing Officer's denial of six additional subpoenas was a harmless error; Woodcrest has not shown prejudice**

Since the Hearing Officer was required to perform the ministerial act of issuing a subpoena upon application, the Board properly found (JA 69) that the Hearing Officer erred in failing to issue the subpoenas Woodcrest sought for six of Vergel de Dios's subordinates.<sup>27</sup> But, as the Board further found (JA 69), the error was harmless. As this Court has recognized, failure to issue a subpoena, like exclusion of testimony, is not grounds for reversing a Board Order if the error was

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<sup>27</sup> See *Lewis v. NLRB*, 357 U.S. 10, 14-15 (1958) (Act requires Board to "issue the subpoena forthwith on application of any party") (internal quotation marks omitted); see also Board Rule 102.66(c), 29 C.F.R. § 102.66(c) ("Applications for subpoenas may be made ex parte. The Regional Director or the hearing officer, as the case may be, shall forthwith grant the subpoenas requested.").

not prejudicial to the requesting party.<sup>28</sup> It is Woodcrest's burden to demonstrate prejudice,<sup>29</sup> and it has not done so.

As the Board noted (JA 70), Woodcrest admitted that it could not make an offer of proof that the six employees it sought to subpoena would have personal knowledge of the facts necessary to prove the Objections. (JA 300-01.)

Accordingly, the Board reasonably found (JA 70) that had the Hearing Officer properly issued the subpoenas, he would have excluded the six employees' testimony for the same reason he refused to hear the eight already-subpoenaed witnesses discussed above. His error in failing to issue the subpoenas was thus harmless.

To the extent Woodcrest argues that its reference to Vergel de Dios' supervision of the six employees, alone, should have been a sufficient offer of proof, it fails to make that case. The record indicates that Vergel de Dios supervised 24 employees and Woodcrest provided no rationale for why the six it

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<sup>28</sup> *SSC Mystic Operating Co., LLC v. NLRB*, 801 F.3d 302, 315 (D.C. Cir. 2015) (“[A]bsent any prejudice we have no basis to reverse the Board with respect to the subpoena.”); *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1153-54 (D.C. Cir. 2000) (finding hearing officer did not abuse his discretion “[b]ecause the company ha[d] not shown that it was prejudiced by the Board’s denial of the subpoena”).

<sup>29</sup> *Exxon Chem.*, 386 F.3d at 1166.

sought to subpoena were particularly likely to have relevant firsthand knowledge. Indeed, when Woodcrest sought for the first (and only) time to introduce direct evidence into the record of Vergel de Dios' alleged misconduct, three months after the hearing closed, the statement it proffered was from a unit nurse – *not* one of his subordinates. (JA 72-73; 138.)

In any event, Woodcrest cannot now show – as it must to prove that it was prejudiced by the exclusion of the six putative witnesses' testimony – that their testimony would have led to a contrary result on its Objections. As with the eight subpoenaed witnesses, there is no evidence in the record to support Woodcrest's assertions that the six employees “would have testified as to Vergel de Dios' objectionable and coercive conduct” or “would have testified that Vergel de Dios coercively supported the Union's organization efforts by, among other ways, telling subordinates they needed the protection of the Union.” (Br. 5-6, 23, 36 n.8, 37, 40.) Woodcrest again cites the Regional Director's Report for that proposition (Br. 40-41), once again to no avail. (JA 5-6.)

Woodcrest's further citation (Br. 36 n.8) to its own declaration (JA 354-55) when abandoning the hearing is also inapposite. Nowhere in his speech did Woodcrest's attorney make an offer of proof that those six witnesses would have firsthand factual knowledge of objectionable conduct. And, to the contrary, when

requesting the six subpoenas, he expressly stated: “my purpose is to explore with these people . . . what Israel’s conduct was during the campaign.” (JA 300-01.)

Moreover, as noted, Woodcrest declined to present evidence it purportedly had, and which did not depend on *ex parte* subpoenas or exploratory witnesses.

(Br. 38-39.) Specifically, Woodcrest had claimed it had already secured witnesses establishing Vergel de Dios’ alleged misconduct weeks before the hearing, when it filed its Objections. (JA 6.) At the hearing, moreover, Woodcrest’s attorney represented that at least one of his five unnamed witnesses scheduled to testify that Monday had direct knowledge of the Vergel de Dios’s alleged misconduct and the Hearing Officer stated his willingness to hear that witness. (*See supra* p. 29-30; JA 314-17.)<sup>30</sup>

Woodcrest’s efforts to demonstrate prejudice by attacking Vergel de Dios’ credibility (Br. 11-13, 38-39, 44) are also unavailing. The Hearing Officer’s determination that Vergel de Dios was credible is entitled to great deference and must be upheld unless it is “hopelessly incredible, self-contradictory, or patently

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<sup>30</sup> Compare *SSC Mystic*, 801 F.3d at 314 (“[Employer] cannot complain that it was prejudiced [by hearing officer’s refusal to enforce subpoena] when it failed to call the only witness whose testimony might have made the [subpoenaed] records relevant.”).

unsupportable.”<sup>31</sup> Far from satisfying that burden, Woodcrest misrepresents the record in claiming, for example, that Vergel de Dios made an “admission that he had already told [his subordinates] how to testify” (Br. 38) and that he “inconsistently testified regarding the amount of communication he had, if any, with his subordinates *about the hearing.*” (Br. 12 (emphasis added) (citing JA 194, 198, 202-03.)) A full review of his testimony reveals that Vergel de Dios was, in each of those passages, either explaining that he had never influenced his staff regarding *how to vote* in the election, or asserting that he had never discussed potential testimony with his subordinates but, rather, that his subordinates had informed him they would tell the truth if they were subpoenaed. (JA 194-95, 197-98, 202-03.)

For that same reason, Woodcrest’s reliance on little more than Vergel de Dios’ “inconsistent” testimony to support its repeated suggestions (Br. 16, 34 n.6, 38, 56) that he would have unduly influenced or “tamper[ed] with” employees’ testimony is both ineffective and irresponsible. And, even if true, Woodcrest counsel’s assertion that employees declined to talk to him until they talked to Vergel de Dios (JA 275-76) does not demonstrate that Vergel de Dios engaged in

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<sup>31</sup> *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (quoting *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005)).

any untoward conduct. Woodcrest's unfounded accusations do not demonstrate prejudice, much less warrant setting aside employees' choice of representative in an election.

Finally, Woodcrest fails to substantiate its argument that the Hearing Officer's refusal to declare Vergel de Dios a hostile witness under Federal Rule of Evidence 611(c) made it "nearly impossible for" it to prove Objection 2, either alone or in combination with the denial of the six subpoenas. (Br. 38-39, 41-46.) As an initial matter, this Court has recognized that "[t]he Federal Rules of Evidence are not 'controlling' in a representation hearing."<sup>32</sup> In any event, Woodcrest has not shown that the failure to treat Vergel de Dios as a hostile witness created prejudice, particularly given Woodcrest's inability to produce any other evidence that he engaged in objectionable conduct.

Moreover, Woodcrest has not shown that Vergel de Dios' conduct at the hearing warranted treatment as a hostile witness. Its attacks on Vergel de Dios' credibility, which it cites (Br. 44, 45 n.9) as necessitating his treatment as a hostile witness, are misguided. As already demonstrated (pages 40-41), Woodcrest misconstrued Vergel de Dios's testimony about whether he had "influenced" his

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<sup>32</sup> *Salem*, 808 F.3d at 63 (quoting 29 C.F.R. § 102.66(a)).

subordinates. And it fails to explain the relevance of the other testimony it cites (Br. 45 n.9), regarding a dispute with inspector Jason Gibbs over an assessment of the Woodcrest facility's cleanliness. (JA 177-82.) Nor does Woodcrest assert that it was not given a fair opportunity to test Vergel de Dios's credibility with respect to the actual issue it had the burden to prove – namely, whether he solicited union-authorization cards or actively supported the Union.<sup>33</sup>

In sum, the record belies Woodcrest's claim that the denial of the subpoenas, either alone or in combination with the failure to treat Vergel de Dios as a hostile witness, "completely destroyed" or "irreparably damaged" its ability to prove its second Objection. (Br. 38-39.)

#### **5. Woodcrest had ample opportunity to prove its Objections at the hearing**

Not having shown prejudice from the Hearing Officer's exclusion of further witnesses absent offers of proof, or from his denial of subpoenas, Woodcrest attacks the Hearing Officer's conduct of the hearing more broadly. But the Company's repeated assertion (Br. 29, 34, 41, 53) that it was deprived of the

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<sup>33</sup> See *Exxon Chem.*, 386 F.3d at 1167 ("Exxon's other objection, that the ALJ prohibited it from adequately testing [a witness]'s credibility, is belied by the record, for the ALJ allowed Exxon to test [the witness]'s credibility on the only issue as to which it was relevant, the section 10(b) claim.").

opportunity to prove its objections fails for essentially the same reasons that each of its more specific challenges fails. The various cases it cites are distinguishable because – unlike here – the parties in those cases provided specific evidence substantiating their arguments that the excluded evidence or testimony would have been directly probative respecting material facts.

In *Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576 (D.C. Cir. 2015), for example, this Court found an employer was prejudiced by the revocation of a subpoena where the employer sought to present evidence that certain employees had acted as union agents when they engaged in objectionable conduct.<sup>34</sup> Notably, before seeking the subpoena, the employer in *Ozark* had “presented evidence” of the objectionable conduct, including witnesses who testified that they had been personally threatened.<sup>35</sup> Accordingly, the Court reasoned that the company was prejudiced by the revocation of its subpoena because “[e]stablishing that [those] employees were acting as union agents was . . . ‘critical’ to the company’s case.”<sup>36</sup> Here, on the other hand, Woodcrest had not

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<sup>34</sup> 779 F.3d at 581-83.

<sup>35</sup> *Id.* at 580 n.5, 581.

<sup>36</sup> *Id.* at 582.

brought forth any specific evidence of objectionable conduct when it asked for the additional subpoenas, much less made an offer of proof that the six additional witnesses would have such evidence. (JA 69). This Court has already distinguished *Ozark* on that very basis.<sup>37</sup>

Moreover, the Court in *Ozark* found that the hearing officer's delay in ruling on the subpoena until the close of the evidence contributed to the prejudice, as an earlier ruling "could have alerted the company of the need to alter its presentation, to decide whether to call additional witnesses."<sup>38</sup> Here, the Hearing Officer's challenged decisions were issued mid-hearing and specifically put Woodcrest on notice that it needed to call its five unnamed witnesses with firsthand knowledge. Having abandoned the hearing rather than present those witnesses, Woodcrest cannot show that it was deprived of an opportunity to present its version of the case. Rather, it chose not to do so.

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<sup>37</sup> See *Salem*, 808 F.3d at 70 ("We are not persuaded by [the employer]'s attempt to align its case with *Ozark*. In *Ozark* we found prejudice based on both the relevant and non-cumulative nature of the evidence sought to be presented . . . [b]y contrast, because [the employer here] failed either to make a proffer or to provide any other specific evidence of potential witnesses' testimony, we cannot determine that the excluded evidence was either relevant or material.").

<sup>38</sup> *Ozark*, 779 F.3d at 582.

As in *Ozark*, the courts in both *Drukker Communications, Inc. v. NLRB* and *Indiana Hosp., Inc. v. NLRB* found exclusion of evidence (through revocation or denial of a subpoena) prejudiced employers that had established facts showing the requested evidence would be probative of key, disputed issues.<sup>39</sup> In *Drukker*, for example, this Court held that the subpoenaed Board agent’s testimony was critical to the employer’s case, which turned on an event he had witnessed, because “his participation . . . [in the event] inform[ed] him fully of the facts and circumstances bearing upon” the issue.<sup>40</sup> Indeed, this Court highlighted that, based on the Board agent’s firsthand knowledge, the employer in *Drukker* had not been engaging in a “fishing expedition[]” for evidence – a litigation strategy the Court noted has been “uniformly been rejected.”<sup>41</sup>

Similarly, in *Indiana Hospital*, the hospital subpoenaed Board call records containing evidence of the content of disputed phone conversations during which Board agents had allegedly given unit employees misinformation before an

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<sup>39</sup> *Drukker*, 700 F.2d 727 (D.C. Cir. 1983); *Indiana Hosp.*, 10 F.3d 151 (3d Cir. 1993).

<sup>40</sup> *Drukker*, 700 F.2d at 732-33.

<sup>41</sup> *Id.* at 732 (citing *J. H. Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 231 (5th Cir. 1973)).

election.<sup>42</sup> In finding that the hospital was prejudiced by the revocation of its subpoena, the Third Circuit noted that the hospital had already produced testimonial evidence that the calls had occurred and that certain employees had reported the misinformation to management afterwards.<sup>43</sup>

Contrary to Woodcrest's representations (Br. 40), the decision in *Inland Steel v. NLRB* is not analogous to this case.<sup>44</sup> The Seventh Circuit there set aside a Board order based not only on the trial examiner's denial of subpoenas, but principally on the court's determination that the employer's right to due-process had been violated based on a combination of other circumstances including one-sided limitations placed on the employer's cross-examination of witnesses and the trial examiner's hostile and coercive examination of the employer's witnesses.<sup>45</sup>

Finally, there is no merit to Woodcrest's argument (Br. 54-55) that a new election is warranted based on its assertion that the alleged objectionable conduct, had it been proven, "could have had" an impact on the election given the total number of employees who report to the four supervisors in question. In light of

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<sup>42</sup> *Indiana Hosp.*, 10 F.3d at 154-55.

<sup>43</sup> *Id.* at 154.

<sup>44</sup> 109 F.2d 9 (7th Cir. 1940).

<sup>45</sup> *Id.* at 14, 18, 19-20.

Woodcrest's failure to present any direct evidence that any one of the four engaged in pro-union activities, much less objectionable conduct likely to have had a material effect on employees' free choice, that argument is speculative and specious.<sup>46</sup> That is all the more true in light of Woodcrest's pre-election campaign against the Union, which three of the four supervisors participated in by distributing anti-union flyers to their subordinates, and the Union's decisive margin victory. (JA 209, 220, 256-72, 280.)

At bottom, Woodcrest had ample opportunity to present its case over the course of the three-day hearing. Its arguments to the contrary are but a hollow attempt to deflect attention from its inability to find evidence of objectionable conduct during its extensive pre-hearing investigation, and from its thwarted effort to conduct an impermissible fishing expedition at the hearing. For the reasons just detailed, the Board acted well within its discretion in conducting the representation proceedings, overruling Woodcrest's objections to the election, and certifying the

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<sup>46</sup> See *Veritas*, 671 F.3d at 1273 (upholding Board's finding of no supervisory taint even though supervisors had "clearly supported the Union" because there was no "indication in the record that the support tended to coerce or interfere with the [employees'] free choice"); *Ne. Iowa Tel. Co.*, 346 NLRB 465, 468 (2006) ("[T]he fact that an employer is pronoun or antiunion will not itself render an election invalid. . . . Th[e] issue is whether a supervisor's pronoun actions have interfered with employees' exercise of their Section 7 right to choose whether or not to be represented."); accord *Harborside*, 343 NLRB at 911.

Union. Consequently, substantial evidence supports the Board's finding that Woodcrest violated Section 8(a)(5) and (1) of the Act by refusing to recognize, bargain with, and provide relevant information to the Union. Therefore, the Board's Order is entitled to enforcement.

## CONCLUSION

The Board respectfully requests that the Court enter a judgment denying Woodcrest's petition for review and enforcing the Board's Order in full.

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National Labor Relations Board  
April 2016

## ADDENDUM

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

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

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

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

It shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title].
- (5) to refuse to bargain collectively with the representatives of his employees . . . .

Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) provides in relevant part:

It shall be an unfair labor practice for an employer—

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

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

- (e) The Board shall have power to petition . . . for the enforcement of such order . . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . .

## Board's Rules and Regulations<sup>1</sup>

Board Rule 102.69(a), 29 C.F.R. § 102.69(a), provides in relevant part:

- (a) Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the Regional Director an original and five copies of objections to the conduct of the election or to conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. A person filing objections by facsimile pursuant to § 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile pursuant to § 102.114(f). The Regional Director will cause a copy of the objections to be served on each of the other parties to the proceeding. Within 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections shall furnish to the Regional Director the evidence available to it to support the objections.

Board Rule 102.66(a), 29 C.F.R. § 102.66(a), provides in relevant part:

- (a) Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-

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<sup>1</sup> Any references to the Board's Rules in this brief and addendum refer to those in effect at the time of the election in this case. *See* 29 C.F.R. §§ 102 *et seq.*, version effective until April 29, 2012; *see also* Press Release, National Labor Relations Board, "NLRB suspends implementation of representation case amendments based on court ruling", *available at*, <https://www.nlr.gov/news-outreach/news-story/nlr-suspends-implementation-representation-case-amendments-based-court> (last visited February 1, 2016) (explaining why those rules were still in effect).

examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

Board Rule 102.64(a), 29 C.F.R. § 102.64(a), provides in relevant part:

- (a) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the Act.

## **SUPPLEMENTAL APPENDIX**

**SUPPLEMENTAL APPENDIX**

**TABLE OF CONTENTS**

Transcript page 125.....SA 1

1 A I told Pat, the legal counsel.  
2 Q Do you know Loesha Chase?  
3 A No.  
4 Q Who is a private duty companion?  
5 A No.  
6 Q Forget the name for a moment. Do you know of a private  
7 duty companion who takes care of the Lippes? You have to answer  
8 audibly, sir.  
9 A No.  
10 Q In January of 2012, did you have any conversation or other  
11 communication with any employees of the center, including but  
12 not limited to your staff, about whether they should sign  
13 authorization cards?  
14 A No.  
15 Q Do you know who Bonita Thornton is?  
16 A No.  
17 Q Do you know who Janet Lewis is?  
18 A I just met Janet here  
19 Q Have you seen Ms Lewis in the facility before?  
20 A Yes I know, I know her by face, but, you know, the  
21 names  
22 Q But you didn't know her name until today?  
23 A I know her name, yeah.  
24 MR. MENDELSON Can I just have one minute?  
25 HEARING OFFICER POMIANOWSKI Sure, off the record.

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

800 RIVER ROAD OPERATING COMPANY, LLC,	*
d/b/a WOODCREST HEALTH CARE CENTER	*
	*
Petitioner/Cross-Respondent	* Nos. 15-1204
	* 15-1281
	*
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 22-CA-097938
	*
Respondent/Cross-Petitioner	*
	*
	*
and	*
	*
1199 SEIU UNITED HEALTHCARE WORKERS EAST	*
	*
Intervenor	*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,582 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.2015 and is virus-free according to that program.

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