

Nos. 15-2565, 15-2877

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

NEWARK PORTFOLIO JV, LLC

PETITIONER/CROSS-RESPONDENT

V.

NATIONAL LABOR RELATIONS BOARD

RESPONDENT/CROSS-PETITIONER

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**ON PETITION FOR REVIEW AND
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AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Newark Portfolio JV, LLC (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Decision and Order of the Board

issued on June 5, 2015, and reported at 362 NLRB No. 108. (JA 52-55.)¹ The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”), by failing and refusing to bargain with Residential Laborers Local 55, Laborers International Union of North America (“the Union”), as the duly certified collective-bargaining representative of a unit of the Company’s employees at its Newark, New Jersey facility. (JA 53.)

The Board had subject-matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). This Court has jurisdiction under Section 10(e) and (f) of the Act because the unfair labor practice occurred in New Jersey.

As the Board’s unfair-labor-practice Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding (Board Case No. 22-RC-081108) is also 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, 477-79 (1964). Under Section 9(d), the Court has jurisdiction to review the

¹ Record references are to the Joint Appendix (“JA”) filed by the Company. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Company’s opening brief.

Board's actions in the representation proceeding solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair labor practice] order of the Board." 29 U.S.C. § 159(d). 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. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

The Company filed its petition for review on June 25, 2015, and the Board cross-applied for enforcement on August 6, 2015. Both filings were timely, as the Act places no time limit on such filings.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably overruled the Company's election objections alleging impermissible electioneering and an anti-Semitic remark and, therefore, properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

STATEMENT OF THE CASE

I. The Initial Representation Proceeding

A. Background

The Company manages two residential apartment buildings in Newark, New Jersey, which are located at 585 and 595 Elizabeth Avenue. (JA 28; 571.) On May 16, 2012, the Union filed a petition with the Board, seeking to represent a

bargaining unit of all full-time and regular part-time superintendents, porters, and maintenance employees at those buildings. (JA 24-25; 548.)

The parties entered into a stipulated election agreement scheduling a Board-conducted secret-ballot election for June 27, 2012, between 8 a.m. and 9 a.m., in the laundry room located near the rear entrance to 595 Elizabeth Avenue. (JA 12, 24; 571-73.) Before the polls opened, the Board agent overseeing the election held a pre-election conference in the laundry room, and observers for the Union and the Company were present. During the conference, the Board agent generally stated that no electioneering would be permitted, but did not designate a specific “no electioneering” area.” (JA 44, 50; 239, 249-250, 268.)

B. On Election Day, the Union Campaigns on the Public Sidewalk in Front of 585 and 595 Elizabeth Avenue

Around 7 a.m. on the day of the election, Superintendent Gregory Philbert walked outside of 585 Elizabeth Avenue in response to tenants’ complaints about people blocking the sidewalk. There were approximately 20-30 people wearing orange “Local 55” t-shirts and standing on the public sidewalk outside the gate in front of 585 and 595 Elizabeth Avenue. They were not company employees. (JA 27; 76-84, 261, 552, 554.) Some of them urged Philbert to “vote yes” and “do the right thing,” and told him “you don’t have no protection, you can be replaced.” They also carried placards with replica paper ballots containing an “X” in the “Yes” box. (JA 28; 83-84.) Union Business Manager Hector Fuentes, who was

standing with the group, told Philbert that he could “get a lot of benefits” with the Union. Philbert did not respond and returned to his apartment. (JA 28; 86-87.)

Around 8 a.m., Philbert left his apartment and walked to 595 Elizabeth Avenue to cast his ballot. (JA 36, 44; 90-91.) The union supporters were still stationed on the public sidewalk outside the gate in front of the building; a handful of them also stood on the steps to the front entrance. (JA 28; 92-93.) Some supporters approached Philbert and repeated the same statements from an hour earlier, urging him to vote for the Union. (JA 28; 94.) Philbert also testified that an older lady in the crowd shouted, “These Jews don’t care about you; they only care about the money,” which he took as a reference to the Company’s owners. (JA 38; 96-99, 144-45.) There was no evidence that anyone else saw this woman, or heard any anti-Semitic remarks. (JA 38-39; 219, 256, 303-04.)

Philbert then walked inside the building and proceeded to the laundry room at the rear of the first-floor hallway. (JA 28; 102-05.) Though Philbert heard chanting while he was in the laundry room, he could not identify any specific statements. No other witnesses testified to hearing chants inside the polling area. (JA 29-30, 37; 105, 158-59.)

Union supporters briefly spoke with other prospective voters as they approached the front of the building, and encouraged them to “vote yes” and “do the right thing.” (JA 30-31; 182-86, 198, 211-12.) The conversations typically

lasted only a few minutes, but in a few instances, lasted between 5-10 minutes.

The union supporters never entered the 595 Elizabeth Avenue building during the polling period, but remained on the public sidewalk. (JA 36, 44, 50; 134, 228-29.)

The Company's election observer never complained to the Board agent about any alleged Union misconduct during the polling period. (JA 44, 50; 232-33.)

C. The Union Wins the Election, and the Company Files Election Objections; the Board Overrules the Objections and Certifies the Union

The Union won the election by a vote of 6 to 4, with no challenged ballots. (JA 12, 24-25; 571-74.) The Company filed two election objections, which alleged that the Union engaged in impermissible electioneering at or near the polling place and that a union agent made an anti-Semitic slur about the Company's owners, thereby interfering with employees' free choice in the election. (JA 575-84.)

The Regional Director for Region 22 directed that a hearing be held on the objections. (JA 25.) After a two-day hearing, the hearing officer issued a report recommending that the Board overrule the Company's objections and certify the Union. (JA 24-41.) The Company timely filed exceptions to the hearing officer's report and recommendation. (JA 585-86.)

As to the allegedly improper electioneering, the hearing officer "accept[ed] as fact that the union representatives and/or agents engaged in the alleged electioneering conversations outside of the facility on the morning of the election."

(JA 35.) However, she found that their conversations outside the front entrance of 585 and 595 Elizabeth Avenue did not occur in “the polling area or a designated area in which to vote,” or while employees were waiting in line to vote. (JA 36.) She also concluded that the alleged statements to voters that they would have less protection without union representation and could be replaced constituted lawful, non-coercive campaigning. (JA 37.) Accordingly, she found that the electioneering was not objectionable. (JA 36-37.) With respect to the alleged anti-Semitic slur, the hearing officer found that, even assuming the slur was made, and that it was uttered by a union agent, the single, isolated remark was not a significant and sustained aspect of the Union’s campaign. She therefore recommended overruling this objection as well. (JA 39-40.)

On February 27, 2013, the Board (Chairman Pearce and Members Griffin and Block) issued a Decision and Certification of Representative, adopting the hearing officer’s findings and recommendations as modified, and certifying the Union as the employees’ collective-bargaining representative. (JA 43-46.)

II. The Subsequent Proceedings

On March 5, 2013, the Union requested by letter that the Company recognize and bargain with it as the unit employees’ exclusive collective-bargaining representative; the Company refused. (JA 53; 588.) Acting on an unfair-labor-practice charge filed by the Union, the Regional Director issued a

complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (JA 52; 587-90.)

On April 17, 2013, the Acting General Counsel filed a motion for summary judgment. (JA 52.) The Company filed a response admitting its refusal to bargain but contesting the validity of the Union's certification. (JA 47, 52.) On May 31, 2013, the same Board panel that certified the Union issued a Decision and Order in the refusal-to-bargain case. (JA 47-49.)

The Company subsequently filed a petition for review in this Court. (JA 596-605.) While its petition was pending, the Supreme Court issued *NLRB v. Noel Canning*, 143 S. Ct. 2550 (2014), which invalidated the January 2012 recess appointments of three Board members, including those of Members Block and Griffin. In response, the Board set aside its Decision and Order, and retained the case on its docket for further action as appropriate. (JA 52; 609-10.) The Board also moved to dismiss the petition for review, and the Court granted the motion. *Newark Portfolio JV, LLC v. NLRB*, Case No. 13-2587 (Motion June 30, 2014; Order July 30, 2014).

On November 12, 2014, after reviewing the hearing officer's report, exceptions, and briefs, a properly constituted Board panel (Chairman Pearce and Members Hirozawa and Schiffer) issued a Decision, Certification of

Representative, and Notice to Show Cause, incorporating by reference the Board's February 27, 2013 Decision and Certification of Representative. (JA 50-51.)

On February 6, 2015, the General Counsel filed a motion to amend the complaint to reflect the Board's November 12, 2014 certification of the Union, and to allege that, on January 15, 2015, the Company had refused to recognize and bargain with the Union. (JA 52 & n.1; 613-21.) After the Board granted the General Counsel's motion, the Company filed an answer to the amended complaint. The General Counsel then moved for summary judgment and the Company filed a response. (JA 52 & n.1.)

III. The Board's Final Decision and Order

On June 5, 2015, the Board (Chairman Pearce and Members Hirozawa and McFerran) issued its Decision and Order, granting the General Counsel's motion for summary judgment, and finding that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act. (JA 52-55.) The Board concluded that all representation issues raised by the Company in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company neither offered any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances, that would require the Board to reexamine its decision to certify the Union. (JA 52-53.)

The Board's Order requires the Company to cease and desist from refusing to bargain with the Union and, in any like or related manner, interfering with, restraining, or coercing employees in exercising their Section 7 rights. (JA 53-54.) It also directs the Company, on request, to bargain with the Union, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (*Id.*)

STATEMENT OF RELATED CASES

As noted above (pp. 7-8), this case has previously been before the Court. Board counsel are not aware of any other related cases or proceedings that are pending, completed, or about to be presented in this or any other court, or in any state or federal agency.

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the employees' duly certified collective-bargaining representative. The Company admits its refusal, but disputes its obligation to bargain based on its election objections, which alleged that the Union engaged in impermissible electioneering at or near the polling place and made an anti-Semitic slur about the Company's owners.

First, the Board reasonably overruled the Company's electioneering objection. To begin, the Company failed to carry its burden of showing that union

agents abrogated the rule established in *Milchem, Inc.*, 170 NLRB 362, 362 (1968), because the Company presented no evidence that union supporters engaged in any prolonged conversations with employees, let alone with those in the polling area or waiting in line to vote. Nor did it establish that the electioneering was otherwise objectionable under the multi-factor test governing electioneering in places other than the immediate polling area or where employees are waiting to vote, as articulated in *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), *enforced*, 703 F.2d 876 (5th Cir. 1983). The credited evidence failed to demonstrate that any coercive statements were made; moreover, the electioneering did not occur in the vicinity of the polling area or in a designated “no electioneering” area, but rather, on a public sidewalk outside of the building. Contrary to the Company’s further claim, the electioneering in front of the building did not contravene the Board agent’s instructions. Therefore, the Board reasonably found that the Company failed to carry its heavy burden of establishing any objectionable electioneering that would warrant a new election.

Second, the Board reasonably overruled the Company’s objection that an anti-Semitic slur allegedly made to an employee required setting aside the election. As the Board explained, the alleged statement was an isolated remark, not a significant and sustained aspect of the Union’s campaign that would reasonably have had an impact on employees’ free choice. Indeed, only one witness testified

that he heard the statement, and he could not identify the woman who allegedly made it. Thus, the Board reasonably found that, even assuming the unidentified woman uttered the slur and that she was a union agent, the fleeting remark did not rise to the level of a sustained inflammatory appeal to racial or religious prejudice, so as to interfere with employees' free choice.

Because the Company has not presented any basis for disturbing the election results, the Court should affirm the Board's decision to overrule the Company's objections and enforce the Board's Order.

STANDARD OF REVIEW

Congress has "entrusted the Board with a wide degree of discretion" to establish "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); accord *St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1152, 1155 (3d Cir. 1993). The law "with respect to the atmosphere to be maintained in an election campaign is Board-made under the lawmaking authority delegated to it by Congress." *NLRB v. ARA Servs., Inc.*, 717 F.2d 57, 66 (3d Cir. 1983). Thus, "courts must ordinarily defer to the Board's policy judgments respecting the conduct which will be deemed so coercive as to interfere with employee free choice." *Id.*

The Board’s factual findings, as well as its “application of [election] procedures and policies to specific elections,” will be upheld if they are supported by substantial evidence on the record as a whole. *St. Margaret Mem’l Hosp.*, 991 F.2d at 1151; *see* 29 U.S.C. § 160(e). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *accord Citizens Publ’g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001). A reviewing court may not displace the Board’s choice between two fairly conflicting views, even if it could justifiably have made a different choice had the matter been before it de novo. *Universal Camera Corp.*, 340 U.S. at 488; *accord Quick v. NLRB*, 245 F.3d 231, 240 (3d Cir. 2001). And the Board’s credibility determinations “should not be reversed” unless they are “inherently incredible or patently unreasonable.” *St. George Warehouse, Inc. v. NLRB*, 420 F.3d 294, 298 (3d Cir. 2005) (internal quotation marks and citations omitted).

ARGUMENT

THE BOARD REASONABLY OVERRULED THE COMPANY’S ELECTION OBJECTIONS, AND THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

Under Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) , it is an unfair labor practice for an employer to refuse to bargain with its employees’ duly

certified collective-bargaining representative.² The Company does not dispute (Br. 4, 14) that it has refused to bargain with the Union, but argues that it had no obligation to do so because the Board erred in overruling its election objections and, thus, improperly certified the Union. Accordingly, if substantial evidence supports the Board's findings in overruling the Company's election objections, the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act, and the Board is entitled to enforcement of its Order. *See, e.g., ARA Servs., Inc.*, 717 F.2d at 69 ("Since both of [the employer's] objections to certification of the Union are without merit, and it tenders no other reason for its refusal to bargain, the Board's order will be enforced in full.").

A. Applicable Principles

The party seeking to set aside a Board-certified election bears the "heavy burden" of demonstrating through specific evidence not only that improprieties occurred, but that "they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996); *see NLRB v. Mattison Machine Works*, 365 U.S. 123, 124 (1961) (per curiam) (burden of proof rests on party

² A violation of Section 8(a)(5) derivatively violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights (29 U.S.C. § 157). *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990).

challenging election results). Indeed, there is a strong presumption that the ballots cast in a Board-conducted election “reflect[] the employees’ true desires concerning union representation.” *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997); see *NLRB v. Coca-Cola Bottling Co. Consol.*, 132 F.3d 1001, 1003 (4th Cir. 1997) (“the outcome of a Board-certified election [is] presumptively valid”).

Moreover, “elections are not automatically voided whenever they fall short of perfection.” *NLRB v. Dickinson Press, Inc.*, 153 F.3d 282, 284 (6th Cir. 1998); accord *ARA Servs., Inc.*, 717 F.2d at 66. After all, Board elections involve “an intensely practical process designed to maximize employee free choice under the very real constraints and conditions that exist in the nation’s workplaces.” *Amalg. Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984). Accordingly, it is settled that “elections must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial, standards.” *Boston Insulated Wire & Cable Co.*, 259 NLRB at 1118 (internal citation and quotation marks omitted).

Furthermore, the Board is given “latitude in its effort to balance the right of the employees to an untrammelled choice, and the right of the parties to wage a free and vigorous campaign.” *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 571 (D.C. Cir. 1970) (citation and internal quotation marks omitted). Thus, the determination of

whether the objecting party has met its burden is “fact-intensive” and thus, “especially suited for Board review.” *Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1377 (D.C. Cir. 1999).

As shown below, the Board reasonably found (JA 43-46, 50-55) that the Company failed to carry its heavy burden of proving that union agents and/or representatives engaged in objectionable electioneering at or near the polling place, or that an isolated anti-Semitic slur allegedly uttered by an unidentified woman compelled the Board to set aside the election results.

B. The Board Reasonably Overruled the Company’s Objection Alleging Impermissible Electioneering

1. The electioneering did not violate the *Milchem* rule

Before the Board, the Company filed an objection (JA 35-36, 575) alleging that the Union engaged in impermissible electioneering at or near the polling place. Accordingly, the Board first examined whether the electioneering contravened the *Milchem* rule, which prohibits prolonged conversations between union agents and employees who are in the polling area or waiting in line to vote. *Milchem, Inc.*, 170 NLRB 362, 362 (1968). The *Milchem* rule, however, “does not . . . apply to conversations with prospective voters unless the voters are . . . in the polling area or in line waiting to vote.” *Harold W. Moore & Son*, 173 NLRB 1258, 1258 (1968). And the Board does not treat “chance, isolated, innocuous comment[s] or

inquir[ies]” as subject to the *Milchem* rule. *Milchem, Inc.*, 170 NLRB at 362-363.

Here, the Board reasonably found that the Company failed to meet its burden of showing that the electioneering was objectionable under *Milchem*. The credited record evidence amply supports the Board’s finding (JA 43-44) that union agents and/or representatives simply “stood on the front steps leading to the building in which the polling site was located, as well as on the public sidewalk.” In contrast, the voting occurred in a laundry room at the rear of the building’s first floor, about 100 feet from the front entrance. (JA 26-27, 43-44.) As the Board found (JA 44), given how far removed the electioneering was from the polling area and the voting line, the Company failed to establish that the electioneering ran afoul of *Milchem*. See *Marvil Int’l Sec. Serv., Inc.*, 173 NLRB 1260, 1260 (1968) (statements made by union representatives as employees entered building where polling area was located did not abrogate *Milchem* “since the conversations did not take place with voters while the latter were in the polling area or on line waiting to vote”).³

Moreover, the Company ignores the Board’s further finding (JA 13) that the electioneering did not contravene *Milchem* because it did not involve prolonged

³ Indeed, even in circumstances where a union electioneered in front of glass-paneled doors only ten feet from the polling area, the Board, with court approval, found that “the voters, once in the corridor, were insulated from the electioneering.” *Boston Insulated Wire & Cable Co.*, 259 NLRB at 1119, enforced, 703 F.2d 876, 881-82 (5th Cir. 1983).

conversations with voters, nor was it directed at employees who were waiting in line to vote. *See Dayton Hudson Dep't Store v. NLRB*, 987 F.2d 359, 363-64 (6th Cir. 1993) (for *Milchem* to apply, conversation must be prolonged and sustained, and must be between party representatives and “voters waiting in line to vote or in the actual polling area”). Union supporters spoke with employees for only a few minutes, and the conversations did not even occur in the building, let alone in the laundry room that served as the polling site. (JA 30-31, 36, 44, 50; 134, 182-83, 190, 228-29.) *See Harold W. Moore & Son*, 173 NLRB at 1258 (electioneering not objectionable where 10-15 minute conversations occurred in parking lot 30 feet from building in which election was taking place, and polling area was another 30 feet from the entrance). Furthermore, there is no evidence that the voting line extended beyond the laundry room or anywhere near the electioneering outside; after all, there were only 10 employees in the unit. (JA 574.)

In short, the Board reasonably found that “[t]he conduct at issue occurred outside of the building, away from the interior room that served as the polling place and from any voters who may have been in line to vote.” (JA 13.)

Accordingly, the Company failed to show any electioneering that breached the *Milchem* rule.

2. The electioneering was not objectionable under *Boston Insulated Wire*

Before the Board, the Company also alleged more generally (JA 37, 575) that union agents and/or representatives made coercive statements and engaged in “intimidating and harassing behavior” that required the Board to set aside the election. If allegedly objectionable conduct is not subject to *Milchem*, the Board applies a multi-factor analysis to determine whether the electioneering is nonetheless objectionable because it “substantially impaired” employees’ free choice. *Boston Insulated Wire & Cable Co.*, 259 NLRB at 1118-19. Specifically, the Board considers: whether the alleged electioneering occurred within or near the polling place and, particularly, within a designated “no electioneering” area; the nature and extent of the electioneering; whether it was conducted by a party to the election; whether a party objected to it; and whether it was contrary to the specific instructions of a Board agent. *Id.* at 1119; accord *Overnite Transp. Co.*, 140 F.3d at 270; *NLRB v. Del Ray Tortilleria, Inc.*, 823 F.2d 1135, 1139 (7th Cir. 1987).⁴

⁴ The Company’s heavy reliance (Br. 16, 32) on the test set forth in *Cedars-Sinai Medical Center*, 342 NLRB 596 (2004), is misplaced. That test prescribes general factors for determining whether a party’s misconduct has a tendency to interfere with the employees’ freedom of choice. *Id.* at 597. The case involved a union’s threatening phone calls to employees, which were disseminated throughout the unit. *Id.* at 597-98. By contrast, the Company’s objections specifically alleged improper electioneering and an anti-Semitic slur, which the Board properly analyzed under the relevant tests articulated in *Milchem*, *Boston Insulated Wire*, and *Sewell Mfg. Co.*, 138 NLRB 66 (1962), as discussed below.

The Board reasonably found (JA 7, 13-14, 44-45) that the Company failed to meet its burden of showing that union agents and/or representatives engaged in electioneering that was otherwise objectionable under *Boston Insulated Wire*. First, the innocuous nature and limited extent of the electioneering support the Board's finding that the conduct was not objectionable. As discussed above (pp. 16-18), the electioneering occurred outdoors, in front of the building, far removed from the polling site and the voting line.⁵ And the electioneering was not directed at employees standing in line to vote, nor could voters hear any specific statements inside the laundry room. (JA 29-30; 105, 158-59.)

Contrary to the Company's contention (Br. 7, 26-30, 32), and as noted above (p. 4-5, 19-20), the electioneering did not occur in a designated "no electioneering" area, nor did union supporters defy the Board agent's instructions by electioneering in front of the building. Rather, the credited evidence shows that the Board agent only stated generally that electioneering would not be permitted, but he did not designate a specific "no electioneering" area. (JA 34, 44, 50; 239, 249-50, 268.) The Company, on the other hand, relies on "unreliable" discredited testimony (JA

⁵ Even assuming that the public sidewalk could somehow be considered near the polling area, it is established that the "[p]resence of a union representative [in the vicinity of the polls], alone, in the absence of evidence of coercion or other objectionable conduct, is insufficient to warrant setting aside an election." *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 121 (6th Cir. 1974), *enforcing*, 199 NLRB 104 (1972).

34, 44; 479), as well as testimony that simply fails to show the establishment of a specific no-electioneering zone. For instance, the Company cites (Br. 7, 27) Superintendent Bonilla’s testimony that the Board agent said “something like” there “should be no electioneering; no campaigning,” but he never claimed that the agent created a no-electioneering zone. (JA 249.)⁶ And to the extent the Company suggests otherwise (Br. 26-27), the Board agent was not required to designate a specific “no electioneering” area during the polling period. Instead, the decision whether to create such a zone is “left to the informed judgment of the Regional Director and his agents conducting the election.” *Marvil Int’l Sec. Serv., Inc.*, 173 NLRB 1260, 1260 (1968).

Furthermore, though the Company claims otherwise (Br. 31), union agents did not make objectionable statements, such as “promises of benefits” and “threats of job loss.” Instead, as the Board reasonably found (37-38, 44, 50), the statements to prospective voters—that they would have “less protection” without union representation and could be replaced—constituted lawful, non-coercive campaigning. As the Board noted, “these types of statements, without more . . . do

⁶ Contrary to the Company’s claim (Br. 26-27), the Board properly relied (JA 44) on *Bally’s Park Place, Inc.*, 265 NLRB 703 (1982), where the Board explained that “[a]bsent designation of a specific no-electioneering area by the Board agent, the area ‘at or near the polls’ is the area for which the Board applies strict rules against electioneering.” *Id.* at 703. Here, the Board agent did not specify a “no electioneering” area, and the electioneering did not occur at or near the polling place. Thus, under *Bally’s Park Place*, the electioneering was not objectionable.

not rise to the level of objectionable conduct since a union is not capable of delivering on a promise of benefit or threat of loss of benefit without the employer's acquiescence." (JA 38, citing *Smith Co.*, 192 NLRB 1098, 1101 (1971) ("Union promises are easily recognized by employees to be dependent on contingencies beyond the Union's control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises or benefits.")). Therefore, this Court should reject the Company's attempt to bolster its argument by incorrectly asserting (Br. 31) that the Union committed "other transgressions."⁷

Additionally, as the Board noted (JA 44-45, 50), the Company's election observer "did not protest the [Union's] conduct during the polling period, when the Board agent might have addressed it." *See Overnite Transp. Co.*, 140 F.3d at 270 (upholding Board decision not to set aside election, partly because employer failed to demonstrate that there was any designated "no electioneering" area, and that any

⁷ The Company erroneously suggests (Br. 32) that the Board should have set aside the election because union supporters held placards with marked replicas of Board ballots. The Company never filed an objection to the replica ballots and may not raise that claim now. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court . . ."). In any event, the replicas were "not forged documents which render[ed] the voters unable to recognize propaganda for what it is," and thus, would not be objectionable. *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 & n.25 (1982); *see SDC Investment, Inc.*, 274 NLRB 556, 557 (1985) (where altered ballot clearly identifies the party responsible for its preparation, use of ballot by that party does not interfere with election).

party objected to union supporters' activities prior to or during election). This factor further supports the Board's finding that the electioneering was not objectionable under *Boston Insulated Wire*. The Company criticizes (Br. 30) the Board's finding as "nothing short of nonsensical," but its argument falls prey to the same attack that it levies against the Board. Its misleading claim that "Board law prohibits parties to an election from entering the polls" (Br. 30) blatantly ignores settled Board policy that parties are entitled to have an equal number of election observers, who "carr[y] out the important functions of challenging voters and generally monitoring the election process," and "assist the Board agent in the conduct of the election." NLRB Casehandling Manual, Part 2, Representation Proceedings, Section 11310.3 (2014). Thus, the Board properly considered the company observer's failure to alert the agent to allegedly objectionable conduct during the polling period.

The Company's cited authorities (Br. 28-29, 33-34) do not aid its argument. As the Company notes, those cases involved either electioneering at or near the polling area,⁸ or a union's refusal to abide by the Board agent's specific

⁸ *Star Expansion Indus. Corp.*, 170 NLRB 364, 364-65 (1968); *Milchem, Inc.*, 170 NLRB at 362; *Claussen Baking Co.*, 134 NLRB 111, 112 (1961).

instructions during the polling period.⁹ But neither condition existed here: no union agents electioneered near the polling area or even inside of the building, or “act[ed] in defiance of [Board agent] directives aimed at specific conduct.” (JA 44, 50.) Thus, the Company’s reliance on those distinguishable cases neglects the credited evidence.¹⁰

In short, the Board reasonably found that the Company failed to meet its heavy burden of establishing that union agents engaged in objectionable electioneering that required setting aside the election.

C. The Board Reasonably Overruled the Company’s Objection Alleging That the Union Made an Anti-Semitic Remark

The Company contends (Br. 19-26) that the Board should have set aside the election results because an unidentified woman allegedly made an anti-Semitic remark to an employee outside the building. To be sure, the Board will set aside

⁹ *Brinks, Inc.*, 331 NLRB 46, 46-47 (2000); *Bio-Med Applications of Puerto Rico, Inc.*, 269 NLRB 827, 829-30 (1984). The Company also errs in relying (Br. 33) on *Jamesway Corp. v. NLRB*, 676 F.2d 63, 69-70 (3d Cir. 1982), which has no bearing on this case, as it concerned a union’s material misrepresentations to employees.

¹⁰ Though the Company continues to suggest otherwise (Br. 33-34), the Board properly distinguished *Bro-Tech Corporation*, 330 NLRB 37 (1999). (JA 36-37.) There, the Board found that a union engaged in objectionable conduct by delivering a nine-hour broadcast using a sound truck parked outside the facility. *Id.* at 38. Here, however, the sole witness who testified that electioneering could be heard inside the laundry room failed to provide “any detailed description” of particular campaign statements. And no other witnesses testified as to “whether the [Union’s] supporters could be heard inside the polling place.” (JA 37; 105, 158-59.)

an election when a party calculatedly embarks on a deliberate, sustained campaign to so inflame employees' racial (or religious) prejudices that they would vote on those grounds alone. *Sewell Mfg. Co.*, 138 NLRB at 71-72. In other words, for such conduct to be objectionable, it must involve a party's "sustained course of conduct, deliberate and calculated in intensity, to appeal to racial prejudice." *Beatrice Grocery Prods.*, 287 NLRB 302, 302 (1987); *see, e.g., YKK (U.S.A.) Inc.*, 269 NLRB 82, 84-85, 90-92 (1984) (finding objectionable union agent's racially inflammatory remarks at two pre-election meetings, coupled with union's dissemination of racially oriented and inflammatory remarks in several handbills, and racially oriented graffiti). On the other hand, "a single sentence reference to the religious background of the employer," while not condoned, is not a basis for setting aside an election. *Sewell Mfg. Co.*, 138 NLRB at 71.

Here, the Board reasonably found that the alleged anti-Semitic slur made to an employee was an isolated remark, not a "significant and sustained aspect of the [Union's] campaign" that would have reasonably impacted employees' free choice. (JA 38-39, 45, 50.) The credited evidence shows that the lone employee who heard the alleged slur could not identify the woman who supposedly uttered it; no other witness testified that they heard the remark or even saw the woman. As the Board explained, given the limited nature of this testimony, "there is insufficient

evidence to conclude that one alleged anti-Semitic remark concerning the [Company's] owners might reasonably have affected the election.” (JA 45.)

Moreover, as the Board also noted, the Company “adduced no evidence suggesting that any religious tensions existed in the workplace or that the [Union] sought to engender conflict through a broader inflammatory campaign theme.” (JA 45, 50.) Thus, the Board reasonably found that, “[e]ven assuming that the remark was made, and further assuming that it was made by a representative of the [Union], there is nothing in the record to suggest that the remark would reasonably have had an impact on the employees’ free choice.” (*Id.*) Despite the Company’s insistence (Br. 24) that a single racial or religious appeal could have a “destructive impact” on employee free choice, that is simply not the case here, as the testimony “does not support the [Company’s] contention that the single, isolated remark destroyed the laboratory conditions necessary for a free and open election.” (JA 39.) In these circumstances, the Board reasonably declined to set aside the election based on that “fleeting remark.” (JA 45, 50.) *Accord Sewell Mfg. Co.*, 138 NLRB at 71.

The Company incorrectly maintains (Br. 22-23) that the Board applied the “wrong standard” in evaluating the alleged slur, but the Company’s argument springs from the faulty premise that the standard used by the Board and insisted upon by the Company are different. In the Company’s view (Br. 22), the proper

standard is “whether the remark . . . had a *tendency to interfere with free choice*.” (Emphasis added.) The standard that the Board applied is “whether the remark *would reasonably have had an impact on employees’ free choice*.” (JA 45, 50.) (Emphasis added.) Both phrasings appropriately focus on the reasonable tendency of a party’s misconduct to interfere with the employees’ free choice.¹¹

Additionally, the Company does not advance its cause by relying on *NLRB v. Silverman’s Men’s Wear, Inc.*, 656 F.2d 53 (3d Cir. 1981), which the Board aptly distinguished here. As the Board observed (JA 45), in that case, unlike the instant one, the Board simply “assumed, without a hearing,” that an anti-Semitic remark, allegedly made by a union officer at a campaign meeting in the presence of approximately 20 employees, “could not warrant setting aside the election, even if proven.” This Court therefore held that, “in concluding that the objection was meritless prior to an evidentiary hearing, the Regional Director effectively deprived the [c]ompany of its right to a considered determination on that issue.” *Id.* at 58. In contrast, here the Board permitted the Company to present testimony about the alleged slur and, after a full hearing, found that it was “insufficient” to establish that the remark, testified to by only one employee, “would reasonably

¹¹ The Company gains no more traction in accusing (Br. 23) the Board of assuming the statement had no actual impact on voters’ free choice. As the Company acknowledges (Br. 22), and as noted above (pp. 25-27), the Board appropriately focused its analysis on the *tendency* of the remark to affect employees’ free choice, not the “actual” impact of the alleged statement.

have had an impact on the employees' free choice," even if made and made by a union representative, as the Board assumed for the purpose of its decision. (JA 45, 50.)

Nor do the Company's other cited cases (Br. 24) invalidate the Board's amply supported findings, as they involved deliberate efforts "to overstress and exacerbate [existing] racial [and religious] feelings by irrelevant, inflammatory appeals." *Sewell Mfg Co.*, 138 NLRB at 71-72. Thus, in *Sewell Mfg Co.* itself, the employer distributed to its employees photographs of interracial couples, including one depicting a white union president with a black woman, along with an article on "race mixing," none of which were "germane to any legitimate issue involved in the election" *Id.* The employer followed up with letters and articles noting the union's support for the NAACP, and its role in "demanding total integration and promoting both class and race warfare." *Id.* at 67-68 (internal citation omitted). In those circumstances, which are drastically different from the instant case, the Board found that the employer's "deliberate, sustained appeal to racial prejudice . . . created conditions which made impossible a reasoned choice of a bargaining representative" *Id.* at 71.

NLRB v. Eurodrive, Inc., 724 F.2d 556 (6th Cir. 1984), is also markedly different from the instant case, contrary to the Company's suggestion (Br. 24.). There, a union representative deliberately played to employees' pre-existing racial

tensions, which stemmed from the pre-election discharge of a white employee for racially harassing the sole black employee. *Id.* at 559. Knowing that this incident had engendered racial hostility, the union representative told the white workers that he would assure the discharged employee's reinstatement. *Id.* In making that promise, he also emphasized the "whites' need for protection," thereby "plac[ing] undue emphasis on a racial issue which [he] must have known would exacerbate pre-existing racial tension among the employees prior to the election." *Id.* at 559-60. On those highly distinguishable facts, the Court found the union representative's conduct objectionable.¹²

Furthermore, the Company overlooks that explicit and arguably inflammatory racial references have been found insufficient to set aside an election where they were not part of a deliberate, sustained appeal to prejudice. Thus, in *NLRB v. Herbert Halperin Dist. Corp.*, the court upheld the Board's finding that union supporters' remarks, including, "you white sons-of bitches, you are all the

¹² *M&M Supermarkets, Inc. v. NLRB*, 818 F.2d 1567 (11th Cir. 1987), which the Company cites (Br. 24), is also inapplicable. That case involved an outspoken employee union advocate who had previously made multiple anti-Semitic statements about the company's owners. *Id.* at 1570 n.3. During a company campaign meeting, he launched into a tirade that "[t]he damn Jews who run this Company are all alike. . . . The Jews ought to remember their roots. . . . Us blacks were out in the cotton field while they, the damned Jews, took their money from the poor hardworking people." *Id.* at 1569-70. In those circumstances, the court determined that such statements were so "inflammatory and derogatory that they inflamed" existing racial and religious tensions about the company owners. *Id.* at 1573.

same, you're scared to take a stand,' 'those goddamn white boys—they're gonna vote no with the [employer] . . ." were not objectionable because "[the] election was waged primarily over money and working conditions," there was no "atmosphere inflamed by racial tension," and the remarks did not "represent a deliberate attempt by the union to divert the employees from legitimate issues by insinuating an irrelevant appeal to race." 826 F.2d 287, 289, 293 (4th Cir. 1987). Likewise, in *NLRB v. Bancroft Mfg. Co.*, the court agreed with the Board that a union organizer's misrepresentations that black employees would lose their jobs if they voted against the union were not objectionable because they were "neither variations on a Union theme nor attempts to incite racial passions." 516 F.2d 436, 440, 442-443 (5th Cir. 1975).

Finally, the Company maintains (15-16, 18, 26) that the alleged anti-Semitic slur "coupled with" the Union's other conduct destroyed "laboratory conditions," but its unfounded assertion misses the mark. Despite its repeated references to the Union's "last-minute tactics" to win the election (Br. 31-32), the Company fails to identify any allegedly objectionable conduct aside from its two objections concerning the electioneering and the religious slur. And each "tactic" listed by the Company (Br. 32) is subsumed within those objections, which the Board fully addressed and properly overruled. (JA 36-38, 50.) Moreover, the Company neglects "the basic truth that union elections are often not conducted under ideal

conditions [and] that there will be minor (and sometimes major, but realistically harmless) infractions by both sides.” *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 571 (D.C. Cir. 1970); *see ARA Servs., Inc.*, 717 F.2d at 66 (“the Board cannot realistically be expected to create a totally frictionless election environment”). In essence, the Company’s rote insistence (Br. 15-16, 18, 26) on the asserted absence of “laboratory conditions” exemplifies its failure to comprehend the realities of representation elections and, ultimately, amounts to nothing more than mere dissatisfaction with the Board’s well-supported findings.

In sum, the Board reasonably found that the Company did not meet its heavy burden of demonstrating that union agents engaged in objectionable electioneering, or that a single alleged anti-Semitic remark required setting aside the election results. Therefore, the Board properly overruled the Company’s objections and determined that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

CONCLUSION

The Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

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November 2015

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

NEWARK PORTFOLIO JV, LLC)	
)	
Petitioner/Cross-Respondent)	Nos. 15-2565 & 15-2877
)	
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	22-CA-100534
)	
Respondent/Cross-Petitioner)	

**COMBINED CERTIFICATIONS REGARDING
BAR MEMBERSHIP, IDENTICAL COMPLIANCE
OF BRIEFS, AND VIRUS CHECK**

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel Nicole Lancia certifies that she is a member in good standing of the New York State bar. She is not required to be a member of this Court’s bar, as she is representing the federal government in this case. Pursuant to Third Circuit L.A.R. 31.1(c), the Board certifies that the hard copies of the brief submitted to the Court and counsel are identical to the brief electronically filed on November 20, 2015. That brief, as indicated in the certificate of compliance attached thereto, contained 7,455 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. The Board certifies that it scanned the electronic copy of the brief for viruses using Symantec Endpoint Protection,

version 12.1.2015.2015, and no virus was detected.

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Dated at Washington, D.C.
this 20th day of November 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,455 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 20th day of November, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dated at Washington, DC
this 20th day of November, 2015