

Nos. 16-1074 & 16-1116

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

DURHAM SCHOOL SERVICES, L.P.

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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FOR THE DISTRICT OF COLUMBIA CIRCUIT

DURHAM SCHOOL SERVICES, L.P.)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 16-1074 & 16-1116
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	32-CA-165556
)	
Respondent/Cross-Petitioner)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Durham School Services, L.P. was the Respondent before the Board in the above-captioned case and is the Petitioner/Cross-Respondent in this court proceeding. The Board’s General Counsel was a party before the Board. Teamsters Local 853, International Brotherhood of Teamsters, Change to Win was the charging party before the Board.

B. Rulings Under Review

The case under review is a Decision and Order of the Board issued on February 19, 2016 and reported at 363 NLRB No. 129. The Decision and Order relies on findings made by the Board and Board officials in an earlier representation proceeding (Board Case 32-RC-150090). The findings in the

representation proceeding are contained in an unpublished Hearing Officer's Report issued on June 30, 2015; an unpublished Regional Director's Decision and Certification of Representative issued on July 29, 2015; and an unpublished Board order issued November 4, 2015, denying review of the Regional Director's Decision and Certification of Representative.

C. Related Cases

This case has not previously been before this Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

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Dated at Washington, D.C.
this 29th day of September 2016

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GLOSSARY

Act	National Labor Relations Act (29 U.S.C. §§ 151 et seq.)
Board	National Labor Relations Board
Br.	Opening brief of Petitioner/Cross-Respondent Durham School Services, L.P.
Company	Durham School Services, L.P.
Final rule	Final rule establishing new NLRB election procedures, published as <i>Representation—Case Procedures</i> , 79 Fed. Reg. 74,308 (Dec. 15, 2014).
JA	Joint Appendix
NLRB	National Labor Relations Board
Union	Teamsters Local 853, International Brotherhood of Teamsters, Change to Win

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Durham School Services, L.P. (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board” or “NLRB”) to enforce, a Board Decision and Order issued against the Company on February 19, 2016, and reported at 363 NLRB No.

129. (JA 588-90.)¹ In its Decision and Order, 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 refusing to recognize and bargain with Teamsters Local 853, International Brotherhood of Teamsters, Change to Win (“the Union”) as the duly certified collective-bargaining representative of an appropriate unit of employees at the Company’s Hayward and Livermore, California facilities. (JA 589.)

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. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which allows an aggrieved party to obtain review of a Board order in this Circuit, and allows the Board to cross-apply for enforcement.

As the Board’s unfair labor practice Order is based, in part, on findings made in an underlying representation (election) proceeding, the record in that proceeding (Board Case No. 32-RC-150090) 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

¹ Record references in this final brief are to the Joint Appendix (“JA”) filed by the Company on September 16, 2016. 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.

U.S. 473, 477-79 (1964). Under Section 9(d), the Court has jurisdiction to review the 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 February 26, 2016. The Board filed its cross-application for enforcement on April 14, 2016. These filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board acted within its discretion in overruling the Company's election objections and certifying the Union, and therefore properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. THE REPRESENTATION PROCEEDING

A. Factual Background

1. The Company's operations and staff

The Company provides transportation services to school districts, busing children with special needs to and from school. (JA 425; JA 30, 220.) In the conduct of its business, the Company employs not only drivers who directly interact with the children, but also office personnel—routers, dispatchers, payroll assistants, and administrative staff—who support the work of the drivers and perform basic administrative functions. (JA 425; JA 31, 78-81.) The Union represents the Company's drivers for purposes of collective bargaining. (JA 425; JA 31, 101, 179, 343-70.) The present case involves the Union's effort to organize and represent the above-described office personnel ("the office employees") at the Company's Hayward and Livermore, California facilities. (JA 422-23, 425, 489; JA 10-17.)

The Hayward and Livermore facilities are both under the management of General Manager Ron Mahler. (JA 425; JA 172-74, 242.) Below Mahler, at the Hayward facility, are three supervisors: Operations Supervisor Sandra Wilson, Safety Supervisor Eileen Noonan, and Maintenance Supervisor Jeremy Escobar. (JA 425; JA 73, 174-75.) At the Livermore facility, a small satellite office, there is

just one site supervisor (Roxanne Liete) who reports to Mahler. (JA 425; JA 80, 174.)

Below the supervisors at Hayward and Livermore are seven office employees: one payroll assistant (Darlene Corley); one administrative assistant (Shirley Myers); three routers (Susan Robbins, Candace Comandao, and Sherry Head) who plan the drivers' routes based on school schedules and specific children's needs; and two dispatchers (Adela Garcia and Michelle Dorton) who make sure that all routes are covered and the drivers are running on schedule. (JA 425; JA 78-81, 187-90, 203, 252-53.) As a function of their work, Dispatchers Garcia and Dorton must do all that they can to ensure that the drivers are at certain stops by certain times, and they must assist the drivers in addressing problems that arise along their routes. (JA 425; JA 83-86, 187-90.)

Garcia works from 5:30 a.m. to 2:30 p.m. and is the only dispatcher in the early morning hours; Dorton works from 10:30 a.m. to 7:00 p.m. and is the only dispatcher in the evening. (JA 77, 79, 107, 250-51.) Both Garcia and Dorton are directly supervised by Operations Supervisor Wilson, who works from 5:45 a.m. to 4:00 p.m. (JA 76-77, 93, 243.)

2. Dispatcher Michelle Dorton's role in the dispatch office

Although Dorton is paid slightly less than Garcia per hour, she is the more experienced "head" dispatcher and accordingly advises Garcia and others on

matters relating to dispatch. (JA 427-28; JA 103, 176, 187, 197.) For example, Dorton may advise Garcia to “[m]ake sure [certain] buses are in,” “check the binder,” or “call[] that parent.” (JA 427; JA 231-32.) Dorton similarly has suggested tasks—like answering the phone or “get[ting] things off the printer”—to a driver, Paula Moncado, who was assigned to temporary light duty in the dispatch office between January and May 2015. (JA 427; JA 86-87, 99-100, 106-08.) Likewise, in the same time period, Dorton provided general guidance to Moncado and one other person temporarily assigned to assist in dispatch, on how to perform the work of that office. (JA 427; JA 86-87, 120.)

On one occasion, Dorton confronted Moncado and another employee about their having a personal conversation while on the clock, prompting the two to return to work. (JA 427; JA 109-10.) On another, Dorton criticized Moncado for asking how she should handle specific calls, leading Moncado to declare that she “d[id] not even need to be here,” and to leave work. (JA 427; JA 110-12.) Moncado faced no discipline for her conduct in either incident. (JA 427; JA 130-33.)

Generally, drivers like Moncado can submit requests for leave to Dorton, and while Moncado was assigned to dispatch she would clear her schedule with Dorton. (JA 427; JA 103-06, 110, 113-14.) However, Wilson, not Dorton, authorized any leave in writing. (JA 427; JA 104-06.)

3. The Union's organizing campaign and the Company's counter-campaign

The Union made an initial unsuccessful attempt to organize the Hayward and Livermore office employees in 2014 and eventually resumed its efforts in March 2015. (JA 422-23, 489; JA 138, 152-53.) As part of the 2015 campaign, Union Organizer Rodney Smith reached out to a few union supporters among the office employees, including Dorton, to arrange informational meetings with all of the office employees. (JA 424, 429-30; JA 167-68.) Smith eventually held such a meeting on April 8, 2015, at which he explained the benefits of unionization and the process of securing union representation, answered employee questions, and distributed authorization cards for employees to sign in order to show their interest in union representation. (JA 429; JA 142, 164-66, 269-71.) Another union organizer, Steve Bender, held a similar informational meeting with employees on April 30, 2015. (JA 429-30; JA 142, 205-09.) Dorton openly supported the union organizers' efforts by encouraging fellow office employees to attend the organizers' meetings, telling employees that the Union was necessary to "secure our jobs," and offering an authorization card to at least one fellow employee. (JA 424, 430; JA 138-39, 223-24, 230, 238.)

The Company, meanwhile, countered the Union's campaign by holding at least three mandatory meetings with employees in late April or early May 2015, at which managers discouraged employees from pursuing union representation and

maintained that the employees did not need a third party to represent them. (JA 431; JA 210-13, 279-87.) General Manager Mahler, Operations Supervisor Wilson, and Site Supervisor Liete—who, together, are in charge of the office employees at the Hayward and Livermore facilities—were present to convey the Company's anti-union stance at these meetings. (JA 425, 431; JA 280.)

B. Procedural History

On May 8, 2015, pursuant to a Stipulated Election Agreement, the Board held a secret-ballot election among the employees in the proposed bargaining unit. (JA 489, 588; JA 15-18.) The tally of ballots showed four votes for the Union, two votes against the Union, and one non-determinative challenged ballot. (JA 489; JA 18.) The Company filed objections to this election result, alleging that a purported pro-union supervisor (Dorton) and others acting on behalf of the Union had interfered with employee free choice in the election. (JA 489; JA 19-21.)

Pursuant to an order of the Board's Regional Director for Region 32, a hearing was held on the objections over five days in June 2015. (JA 423; JA 29-301.) Thereafter, the hearing officer issued a report recommending that the Board overrule all of the Company's objections and certify the Union. (JA 422-36.)

The Company filed exceptions to portions of the hearing officer's report and recommendations, and also objected, for the first time, to certain aspects of the

Board's new representation-case procedures.² (JA 489, 495-97; JA 437-40.) The Regional Director issued a Decision and Certification of Representative on July 29, 2015, adopting the hearing officer's rulings, findings, and recommendations, and certifying the Union as the employees' collective-bargaining representative. (JA 489-501.) In his decision, the Regional Director specifically rejected the Company's objections to the Board's new representation-case procedures as untimely and, in any event, without merit. (JA 497-500.) Thereafter, the Company sought Board review of the Regional Director's Decision and Certification of Representative. (JA 553; JA 502-51.) On November 4, 2015, the Board (Members Hirozawa and McFerran, Member Miscimarra dissenting) denied the Company's request, finding that the Company had failed to raise substantial issues warranting review and agreeing with the Regional Director that the Company had untimely raised its objections to the Board's new representation-case procedures. (JA 553.)

II. THE UNFAIR LABOR PRACTICE PROCEEDING

By letter dated November 5, 2015, the Union requested that the Company recognize and bargain with the Union as the exclusive collective-bargaining

² The Board announced amendments to its representation-case procedures on December 15, 2014, and those amendments took effect on April 14, 2015. *See Representation–Case Procedures*, 79 Fed. Reg. 74,308, 74,308. The Addendum to this brief contains relevant portions of the Board's Rules and Regulations as amended and in effect at all times material to this case.

representative of employees in the certified unit. (JA 589; JA 561-62.) The Company refused. (JA 589; JA 563.) Acting on an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (JA 588; JA 555-64.)

The General Counsel then filed a motion for summary judgment, and the Board issued a notice to show cause. (JA 588; JA 571-80.) In response, the Company did not deny that it refused to bargain with the Union, but claimed that it had no duty to do so because the Board had erred in overruling its election objections and certifying the Union. (JA 588; JA 581-86.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On February 19, 2016, the Board (Members Miscimarra, 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 (29 U.S.C. § 158(a)(5) and (1)). (JA 588-90.) 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 588.)

The Board's Order requires the Company to cease and desist from refusing to bargain with the Union, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights (29 U.S.C. § 157). (JA 589.) Affirmatively, the Board's Order 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. (JA 589-90.)

SUMMARY OF ARGUMENT

The Company has admittedly refused to recognize and bargain with the Union in order to challenge the Union's certification as the representative of the Company's Hayward and Livermore office employees, who voted for union representation in a Board-conducted representation election. The Company bases its challenge to the Union's certification on its timely objections to the Union's election victory, and several additional, undisputedly untimely objections to the Board's conduct of the election in accordance with its new representation-case procedures.

1. The Board properly overruled the Company's objections alleging that Dispatcher Michelle Dorton was a supervisor and that her pre-election advocacy for the Union tainted the election result. As the Board found, the Company failed

to prove the basic premise of its relevant objections: that Dorton supervised the bargaining-unit employees and therefore had the power to coerce or intimidate them into voting for the Union. Further, the Board found that even assuming Dorton had some supervisory authority over the drivers outside the bargaining unit, her pro-union conduct would not reasonably have coerced or interfered with employee free choice in the election. In so finding, the Board applied relevant precedent under which a supervisor's advocacy for a union is not objectionable where it is directed at employees over whom the supervisor has no authority.

2. The Board also properly overruled the Company's objections alleging that the Union, through its agents or representatives, injected the issue of race or racist motivations into the pre-election campaign by suggesting that the Company would challenge the ballots of two African-American voters, including Dorton, based on their race. The Company presented no evidence showing that the Union or its agents made any statements connecting the possibility of employer challenges at the election to race or racism. And although the Company now insists that the record establishes that one employee (Candace Comandao) changed her vote because of the suggestion, by an unknown person, that the Company's challenges were "a race thing," the evidence fails to establish that Comandao changed her vote based on any comment related to race, or that she even heard a racial statement. Rather, the evidence only shows that Comandao herself may

have speculated, after the election, that the Company's challenges were "a race thing." The Board accordingly found that the Company failed to prove its objections relating to inflammatory racial statements by the Union or its agents.

3. The Board properly rejected, as untimely, the Company's objections to the Board's new representation-case procedures, which the Company first raised in its brief on exceptions to the hearing officer's report, 60 days after objections were due under the Board's Rules and Regulations. The Board, with court approval, enforces the deadline for filing objections strictly, in order to ensure the integrity and efficiency of its post-election process. Accordingly, the Board considers untimely objections forfeited unless the party advancing them can show that they are not only newly discovered, but also previously unavailable. The Company made no such showing here. The Board therefore refused to consider the substance of the Company's objections to the new representation-case procedures at any stage. And as the Company's belated objections were rejected and never properly before the Board, the Court lacks jurisdiction to consider them now.

In its brief, the Company does not take issue with the Board's finding that its objections to the Board's new procedures were untimely, or to the Board's rejection of the objections on that basis. The Company, accordingly, is in no position to challenge the Board's rejection of its untimely objections here. In any event, the Company's skeletal briefing of the objections—amounting to a bare list

of claims—does not permit meaningful judicial review, and to the extent that any arguments are discernible, they do not provide any basis for questioning the Board’s reasonable procedures or overturning the election result in this case.

ARGUMENT

THE BOARD ACTED WITHIN ITS DISCRETION IN OVERRULING THE COMPANY’S ELECTION OBJECTIONS AND CERTIFYING THE UNION, AND THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees” 29 U.S.C. § 158(a)(5).³ Here, the Company has admittedly (Br. 1-2, 5) refused to bargain with the Union in order to challenge the Board’s certification of the Union following its election victory. There is no dispute that if the Board properly certified the Union as the employees’ collective-bargaining representative, the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, and the Board is entitled to enforcement of its Order. *See C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 881-82 (D.C. Cir. 1988). Accordingly, as further explained below, the issue before the Court is whether the Board abused its

³ An employer’s failure to meet its Section 8(a)(5) bargaining obligation constitutes a derivative violation of Section 8(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights” 29 U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

discretion in overruling the Company's election objections and certifying the Union. See *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 329-30, 335 (1946); accord *Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970).

A. Applicable Principles and Standard of Review

“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *A.J. Tower Co.*, 329 U.S. at 330; accord *C.J. Krehbiel Co.*, 844 F.2d at 882. There is a “strong presumption” that an election conducted in accordance with those safeguards “reflect[s] the true desires of the employees.” *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997); accord *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”); *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (same); *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (same). Therefore, the results of such an election “should not be lightly set aside.” *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 570 (D.C. Cir. 1970) (citations omitted).

Consistent with those principles, the party seeking to set aside an election bears a “heavy burden” of showing that the election results are invalid. *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996); *Amalgamated Clothing Workers*, 424 F.2d at 827; see also *NLRB v. Mattison Mach. Works*, 365 U.S. 123,

123-24 (1961) (per curiam). To meet that burden, the objecting party must demonstrate, 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.” *Amalgamated Clothing Workers*, 424 F.2d at 827 (citation omitted).

The Board generally does not consider alleged improprieties occurring outside the “critical period” prior to the election—that is, the period beginning with the union’s filing of an election petition and ending with the election. *Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). This Court has endorsed the Board’s critical-period rule as “a convenient device to limit the inquiry period near the election when improper acts are most likely to affect the employees’ freedom of choice.” *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1567 (D.C. Cir. 1984); *see also NLRB v. Lawrence Typographical Union No. 570*, 376 F.2d 643, 652 (10th Cir. 1967) (recognizing that the purpose of the rule is “to eliminate from post-election consideration conduct that is too remote to have prevented the free choice guaranteed by Section 7 of the Act”).

Ultimately, the determination of whether an objecting party has carried its burden of proving objectionable conduct pursuant to the above rules 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). On appeal, the case for

judicial deference to the Board's determination is particularly strong, "as 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." *C.J. Krehbiel*, 844 F.2d at 885 (internal quotation marks and citation omitted); accord *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 n.9 (D.C. Cir. 2002). And while election proceedings should be conducted in "laboratory . . . conditions as nearly ideal as possible" (*General Shoe Corp.*, 77 NLRB 124, 127 (1948)), the Court has recognized that this "noble ideal . . . must be applied flexibly," and that "[i]t is for the Board in the first instance to make the delicate policy judgments involved in determining when laboratory conditions have sufficiently deteriorated to require a rerun election." *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1562; accord *Service Corp. Int'l v. NLRB*, 495 F.3d 681, 684-85 (D.C. Cir. 2007).

Accordingly, the scope of appellate review is "extremely limited." *Id.* at 1562, 1564; accord *C.J. Krehbiel Co.*, 844 F.2d at 882. The Board's order is entitled to enforcement unless the Board abused its discretion in overruling the objections to the election. See *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996). Moreover, the Board's underlying factual findings are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); see *U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 961 (D.C.

Cir. 2007); *Pontiac Nursing Home, LLC v. NLRB*, 173 F. App'x 846, 846 (D.C. Cir. 2006). “Because substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” this Court has said that it “will reverse for lack of substantial evidence only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007) (internal quotation marks and citations omitted).

B. The Board Acted Well Within Its Discretion in Overruling the Company’s Election Objections

In the underlying representation proceeding before the Board, the Company objected to the Union’s election victory on two main grounds. First, the Company alleged (Objections 1 and 2) that Dorton was a statutory supervisor and therefore her pro-union conduct was coercive and prevented employees from freely deciding whether to vote for union representation in the election. Second, the Company alleged (Objections 3 and 4) that the Union, through its agents and representatives, intimidated employees into voting for the Union by suggesting that the Company would unfairly challenge the ballots of two union supporters (including Dorton), and effectively exclude their votes from consideration, because of their race. As shown below, the Board reasonably found that the Company failed to carry its burden of proving either form of objectionable conduct.

1. Dorton had no supervisory authority over the unit employees and therefore no power to coerce them into supporting the Union as the Company claims

The Company's allegations that Dorton engaged in coercive conduct depend on its theory that Dorton is a supervisor within the meaning of the Act. But, as shown below, the Company failed to prove that Dorton has any supervisory authority over bargaining-unit employees, so she could not have affected the election. Further, even assuming that the Company presented sufficient evidence to establish that Dorton supervises the non-bargaining-unit drivers, it has still failed to prove any objectively coercive conduct toward the bargaining-unit employees who voted in the election.

a. Dorton is not a statutory supervisor of any bargaining-unit employees

i. Supervisory status under the Act

Under Section 2(11) of the Act (29 U.S.C. § 152(11)), a "supervisor" is any individual who has "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances," or effectively recommend one of those actions, provided that "the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Thus, individuals are statutory supervisors only if "(1) they have the authority to engage in a listed supervisory function, (2) their exercise

of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer.” *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001); *accord Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

In interpreting Section 2(11), the Board is mindful of the statutory goal of distinguishing truly supervisory personnel, who are vested with “genuine management prerogatives,” from employees who enjoy the Act’s protections even though they perform “minor supervisory duties.” *Oakwood*, 348 NLRB at 688 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974)). In this way, the Board avoids “construing supervisory status too broadly” and “stripping workers of their organizational rights.” *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999).

As the Company acknowledges (Br. 17-18), the burden of proving supervisory status rests with the party asserting that an individual is a statutory supervisor. *Kentucky River*, 532 U.S. at 710-12; *Oakwood*, 348 NLRB at 687. It must support its claim with specific examples, based on record evidence. *Avista Corp. v. NLRB*, 496 F. App’x 92, 93 (D.C. Cir. 2013) (citing *Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971)); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305, 312 (6th Cir. 2012). Accordingly, conclusory or generalized testimony will not suffice. *Beverly*

Enters., 165 F.3d at 963; *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 18 (1st Cir. 2015). Nor can a party satisfy its burden with inconclusive or conflicting evidence. *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 69 (D.C. Cir. 2015); *Pac Tell Grp., Inc. v. NLRB*, 817 F.3d 85, 93, 95 (4th Cir. 2016). And because “the Act, by its terms, focuses on what workers are authorized to do, not what they are called,” a party cannot establish supervisory status based on job titles alone. *NSTAR*, 798 F.3d at 11-12.

ii. The Company failed to prove that Dorton assigns, responsibly directs, or performs any other supervisory function with respect to the bargaining-unit employees

Here, the Company stipulated that Dorton has no supervisory authority over two of the unit employees—Administrative Assistant Shirley Myers and Router Candace Comandao—and it presented no evidence to show that Dorton supervises the remaining routers (Susan Robbins and Sherry Head) or Payroll Assistant Darlene Corley. (JA 426; JA 248, 260.) Accordingly, the Company’s claim that Dorton interfered with unit employees’ free choice in regard to union representation rests on the theory that Dorton supervises the work of the only remaining unit employee—Dispatcher Adela Garcia.

The Company, however, failed to present Garcia as a witness. Instead, it presented the second-hand account of Administrative Assistant Myers, who testified that she has heard Dorton saying things to Garcia like, “did you call that

parent,” “did you route those kids,” “check the binder,” or “make sure those buses are in.”⁴ (JA 427; JA 231-32.) The Board properly found that such testimony is “wholly insufficient to establish that Dorton supervises Garcia” (JA 426-28, 490-91) by assigning or responsibly directing her work. (*See* Br. 23-24.)

The term “assign” under Section 2(11) of the Act means ““designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.”” (JA 426, quoting *Oakwood*, 348 NLRB at 689); *accord Pac Tell*, 817 F.3d at 92; *NSTAR*, 798 F.3d at 12. In this case, there is absolutely no evidence that Dorton determines Garcia’s work schedule or location, or gives her significant overall duties. And it was not “assign[ment],” within the meaning of the Act, for Dorton to give Garcia “ad hoc instructions to perform discrete tasks.” *Oakwood*, 348 NLRB at 689-90; *accord Pac Tell*, 817 F.3d at 92; *Frenchtown*, 683 F.3d at 311-12.

Moreover, the authority to direct another’s work does not qualify as supervisory under Section 2(11) of the Act unless the direction is “responsible.” *Oakwood*, 348 NLRB at 691. For direction to be “responsible,” the person giving it ““must be accountable for the performance of the task by the other, such that

⁴ Myers admitted that she could not recall precisely what Dorton had said. (JA 231.)

some adverse consequence may befall the one providing the oversight if the tasks performed by the [other] are not performed properly.” (JA 426, quoting *Oakwood*, 348 NLRB at 692); accord *735 Putnam Pike Operations, LLC v. NLRB*, 474 F. App’x 782, 784 (D.C. Cir. 2012); *Mars Home for Youth v. NLRB*, 666 F.3d 850, 854 (3d Cir. 2011). Here, although the Company argues that Dorton “issues directions” to Garcia along the lines suggested by Myers’ testimony, the Company does not even attempt to show that Dorton was held accountable for such directions so that they could qualify as “responsible” for purposes of Section 2(11). (Br. 23-24.)

As the Board reasonably found, Myers’ testimony suggests, at most, that Dorton gives Garcia “routine instructions” or “minor orders” based on “the common knowledge of employees in a small workplace” about what needs to be done next, or perhaps her “greater job skills.” (JA 428, 490-91.) Either way, the law is clear that such routine instructions and orders do not establish supervisory authority within the meaning of Section 2(11) of the Act. (JA 490-91, citing *Armstrong Mach. Co.*, 343 NLRB 1149, 1150 (2004), *Byers Engineering Corp.*, 324 NLRB 740, 741 (1997), and *Sears Roebuck & Co.*, 292 NLRB 753, 754 (1989).) See *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1410 (9th Cir. 1985) (“[T]he fact that an employee gives minor orders or ‘supervises’ the work of others in the common sense of the word does not necessarily make the employee a

‘supervisor’ within the meaning of the statute.”); *Goldies, Inc. v. NLRB*, 628 F.2d 706, 709 (1st Cir. 1980) (“The mere fact that an employee may give others routine instructions . . . does not make him a supervisor for purposes of the Act.”).

In the absence of direct evidence showing that Dorton supervises Garcia, the Company suggests (Br. 22-23) that Dorton’s authority over regular dispatch employees like Garcia may be inferred from Dorton’s relationship to Driver Paula Moncado. But Moncado was neither a regular dispatch employee nor a bargaining-unit employee. As the Board explained, “because Moncado was a driver who was only working in dispatch temporarily while she was on light duty, it follows that she would need guidance and instruction from Dorton where Garcia would not.” (JA 490.) And even if “[Dorton’s] considerable experience allowed [her] to train and guide workers in the performance of their jobs, an individual does not become a supervisor merely because [s]he possesses greater skills and job responsibilities than [her] fellow employees.” *NLRB v. Aquatech, Inc.*, 926 F.2d 538, 549 (6th Cir. 1991) (internal quotation marks and citation omitted); *accord Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111, 2015 WL 4101331, at *36 (2015). Thus, Dorton’s giving of instructions and orders to Moncado does not establish that she has supervisory authority over other employees working dispatch.

In any event, substantial evidence supports the Board's finding (JA 490) that any instructions or orders that Dorton gave Moncado were minor and routine in nature. Although Moncado testified that Operations Supervisor Wilson told her to get her assignments in dispatch from Dorton, she also testified that getting assignments simply meant asking Dorton "if anyone needed to be called." (JA 107.) And as Moncado explained, "all the duties kind of come from the phone calls . . . so you answer the phone and you help th[e caller] with the information." (JA 107-09.) Moreover, the Company produced no evidence to show that Dorton's initial instruction to make phone calls, or her equally basic instruction to pick things up from the printer down the hall, involved the use of "independent judgment" sufficient to make Dorton a statutory supervisor. *See Oakwood*, 348 NLRB at 693 (finding that to exercise independent judgment, the putative supervisor must "form an opinion or evaluation by discerning or comparing data"); *accord 735 Putnam Pike*, 474 F. App'x at 783.

Similarly, the Company failed to show that Dorton determined Moncado's work schedule while she was in dispatch. For the duration of her light duty, Moncado worked the same hours that she would otherwise have worked as a driver. (JA 106.) There is no evidence that Dorton had any role in setting this schedule. And although the Company now suggests (Br. 22) that Dorton could release Moncado early from work, the Board reasonably found that the Company

failed to carry its burden of proving that Dorton had such authority to alter Moncado's schedule. (JA 429.) Indeed, as the hearing officer noted (JA 427, 429), Moncado testified that it was Wilson, not Dorton, who approved her requests for leave from work. (JA 104-06.)

Likewise, although Moncado testified that Dorton ordered her to stop talking and return to work on one occasion, and criticized her work performance on another occasion, there is no evidence that those incidents resulted in discipline or affected Moncado's job status in any way. *See, e.g., Waverly-Cedar Falls Health Care Ctr. v. NLRB*, 933 F.2d 626, 630 (8th Cir. 1991) (oral and written warnings not indicative of supervisory status where they "do not affect job status"). Accordingly, the Board was entirely justified in refusing to find that Dorton had supervisory authority over dispatch employees based on her fleeting and ultimately inconsequential statements to Moncado.

Having failed to prove that Dorton actually possesses any of the specific forms of supervisory authority identified in the Act, the Company cannot establish that Dorton is a supervisor based on evidence that in some circumstances Dorton was called, or viewed as, the "lead" or "head" dispatcher. (Br. 7, 11, 19, 22-23.) "It is settled that secondary indicia [of authority], including the individual's job title or designation as supervisor, as well as the perception of others that the individual is a supervisor" are only relevant "when evidence of primary indicia is

present.” *Avante at Wilson, Inc.*, 348 NLRB 1056, 1061 (2006); *accord NSTAR*, 798 F.3d at 11-12. *See also VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) (stating that an employee “must possess at least one of the twelve types of authority set out in the statute” in order to have supervisory status).

In sum, the Company has failed to make out the basic premise of its Objections 1 and 2—that Dorton possessed supervisory authority over the bargaining-unit employees such that she could reasonably have interfered with their free choice in the election. As shown below, moreover, even if the Court proceeded to apply the test for supervisory pro-union conduct to Dorton’s pro-union activity in this case, on the assumption that she is a supervisor of non-bargaining-unit employees, the evidence still would not establish coercive conduct warranting a re-run election.

b. Even assuming that Dorton has some supervisory authority over non-bargaining-unit employees, the Company failed to prove that she engaged in objectively coercive conduct toward the bargaining-unit employees

In its brief, the Company relies heavily (Br. 19-21) on Dorton’s purported authority over non-bargaining-unit (*i.e.*, non-voting) employees—the Company’s drivers—to support its claim that Dorton engaged in objectionable coercion of unit employees before the election. But as the Board found, “even viewing the evidence . . . in the light most favorable to the [Company], and concluding that

Dorton meets the statutory definition of supervisor” as to the drivers, the evidence still fails to show objectionable conduct.⁵ (JA 428.)

The Company presented evidence that, both before and during the critical period before the election, Dorton offered authorization cards to fellow employees, encouraged them to attend union meetings and attended union meetings herself, expressed her view that the Union was necessary to “secure our jobs,” and told employees who were signing authorization cards at an initial meeting that “[i]f you want your job, you better sign this card.” (JA 430; JA 222-24, 238, 251.) In addition, the Company showed that when a fellow employee asked whether Dorton would hold it against her if she voted against the Union, Dorton assured her that she could vote however she wished but a “no” vote “would always be in the back of [Dorton’s] mind.” (JA 430; JA 225.) The Board reasonably found (JA 491-93) that these acts did not constitute coercive conduct under relevant law.

Where an objecting party alleges improper pro-union conduct by a supervisor—including pre-critical-period solicitation of union authorization

⁵ Because the Board assumed *arguendo* (JA 426, 428, 431, 490) that Dorton is a statutory supervisor with respect to the drivers, this case does not implicate the principle emphasized by the Company, that a person may be a statutory supervisor regardless of who they supervise or whether those employees are in the bargaining unit. (Br. 21) However, as discussed below, Dorton’s lack of authority over the bargaining-unit employees remains important to the ultimate question of whether her conduct was so coercive of the bargaining-unit employees’ free choice as to warrant setting aside the election result.

cards—the Board applies a multifaceted analysis. *See Harborside Healthcare*, 343 NLRB at 909, 912; *accord Chinese Daily News*, 344 NLRB 1071, 1072 (2005). First, the Board asks whether the supervisory conduct “reasonably tended to coerce or interfere with the exercise of employees’ free choice in the election,” considering “the nature and degree of supervisory authority possessed” by the person alleged to have engaged in the conduct, and “the nature, extent, and context of the conduct in question.” *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004). If, based on this initial set of considerations, the Board determines that the supervisor’s pro-union conduct had a reasonable tendency to interfere with employee free choice in the election, the Board proceeds to a further inquiry, whether the supervisor’s conduct “materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.” *Id.*

In applying the first prong of this analysis, the Board has consistently found that supervisors do not engage in objectionable pro-union conduct by attempting to organize employees they do not supervise. *See Glen’s Market*, 344 NLRB 294, 295 (2005) (where supervisors did not direct their pro-union activities toward any employee they supervised, their conduct could not reasonably have coerced or

interfered with employee free choice), *enforced*, 205 F. App'x 403 (6th Cir. 2006); *accord Laguna College of Art & Design*, 362 NLRB No. 112, slip op. at 1 n.3 (2015). *Cf. SNE Enterprises*, 348 NLRB 1041, 1042 (2006) (supervisors with broad authority to responsibly direct and assign work engaged in coercive conduct by soliciting support for union among their subordinates); *Harborside*, 343 NLRB at 909 (supervisor with “broad authority over the employees’ day-to-day working conditions” engaged in coercive conduct by soliciting authorization cards and otherwise pressuring supervisees to support the union).

Here, as shown above, Dorton has no supervisory authority over the bargaining-unit employees. In particular, the record is devoid of evidence that she has any power to discipline or discharge unit employees, or otherwise affect their job security. Thus, the Board reasonably interpreted Dorton’s comments to unit employees—that the Union would enhance job security, and that employees should sign a union authorization card “if [they] want[ed] [their] job[s],”—as “expression[s] of her own view that unionization would lead to job security rather than . . . threat[s] to retaliate against employees who did not support the Union.” (JA 432, 492.) Contrary to the Company’s contentions (Br. 26-28), this interpretation is entirely reasonable and logically follows from the fact that Dorton

had no demonstrated supervisory authority over the bargaining-unit employees, and certainly “no power to carry out a threat of job loss.”⁶ (JA 432, 492.)

Disregarding this clear basis for rejecting the Company’s allegations of objectionable threats, the Company attempts to meet its burden of proof by referring to evidence that “at least one employee took Dorton’s statement [about job security] as a direct threat.” (Br. 28.) As the Board noted, however, the subjective reaction of one unit employee (Myers, whom the parties stipulated was not supervised by Dorton) does not establish an objectively coercive threat. (JA 492-93.) *See Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1058, 1063 (D.C. Cir. 1971) (agreeing with the Board that “inquiries as to whether . . . conduct vitiates an

⁶ The Company takes issue (Br. 27) with the hearing officer’s passing reference to Dorton’s possible rank as a supervisor of (non-unit) drivers—that she is “a low-level supervisor, at best” (JA 432)—in determining that she lacked the power to effectuate any threat of job loss. The Company suggests that any reliance on a supervisor’s relative lack of authority represents a “drift[] into pre-*Harborside* analysis.” (Br. 27.) Aside from being irrelevant to coercion of unit employees here, that claim is simply false. The first prong of the *Harborside* analysis expressly calls for consideration of “the nature and degree of supervisory authority possessed” by the individual who engaged in the pro-union conduct. *Harborside*, 343 NLRB at 909. And cases applying *Harborside* make clear that, for purposes of determining the coercive tendency of supervisory pro-union conduct, it is highly relevant whether the individual involved was a low-level supervisor or someone with broader authority. *See, e.g., Laguna College*, 362 NLRB No. 112, slip op. at 1 n.3 (2015) (noting, as a “factor[] traditionally considered under the first prong” of *Harborside*, that individual involved in pro-union conduct was “a low-level supervisor”); *SNE Enterprises*, 348 NLRB 1041, 1042 (2006) (finding that supervisors with broad authority to responsibly direct and assign work engaged in coercive solicitation).

election are properly conducted on an objective standard, without probing the mental processes and understandings of the voters”). Moreover, the cited testimony of Myers does not show that she took Dorton’s statement to employees who were already signing authorization cards as a threat. Rather, the record only shows that Myers heard a statement (“[i]f you want your job, you better sign this card”), and that counsel for the Company characterized it as a “threat.” (JA 241, 251.) In any event, as shown above, Dorton plainly had no authority to carry out any threat of job loss and therefore her statement about job security could not have been objectively threatening. Put simply, “threats of job loss for not supporting the union, made by one rank-and-file employee to another, are not objectionable.” *Duralam, Inc.*, 284 NLRB 1419, 1419 n.2 (1987); accord *Pac Tell Grp., Inc. v. NLRB*, 817 F.3d 85, 95 (D.C. Cir. 2015).

Likewise, because Dorton had no authority over fellow bargaining-unit employees, the Board found (JA 432) that there was nothing coercive in her solicitation of union authorization cards from them. *See Glen’s Market*, 344 NLRB at 294-95 (holding that even assuming individual was a supervisor, she did not engage in objectionable conduct by soliciting employees outside her department to sign union authorization cards). Nor was there anything coercive in Dorton’s attending union meetings; encouraging unit employees to attend; and telling one employee that, while she could vote however she wanted, a vote against

the Union would always be in the back of Dorton's mind. Indeed, as the Board explained (JA 432), such mild manifestations of support for a union have not been found objectionable "even when directed at direct subordinates." See *Northeast Iowa Tel. Co.*, 346 NLRB 465, 467 (2006) (finding that even if individuals were supervisors, their "attending union meetings, participating in discussions at those meetings, signing authorization cards in front of employees, and mentioning some of the issues that a union could help resolve" was not objectionable conduct); accord *Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1271-73 (D.C. Cir. 2012). See also *NLRB v. J.S. Carambola, LLP*, 457 F. App'x 145, 150-51 (3d Cir. 2012) (holding that a supervisor's "strong opinion in support of, or against, a union, even an offensive one, does not by itself constitute coercive conduct that warrants overturning an election"). Accordingly, the Board reasonably found (JA 491-93) that the Company failed to meet its burden of proving that Dorton engaged in pro-union conduct that would reasonably tend to coerce or interfere with employees' exercise of free choice in the election.

Contrary to the Company's contentions (Br. 28-31), *Millard Refrigerated Services, Inc.*, 345 NLRB 1143 (2005), does not compel a different result. In *Millard*, the Board found that a group of supervisors who had "significant authority over day-to-day operations" and employees' terms and conditions of employment engaged in coercive pro-union conduct by soliciting employees, including one

another's employees, to sign union authorization cards. The evidence showed that some of the supervisors further coupled their solicitations with overt threats that "[i]f the union does not get in, everybody will probably be fired," and that employees' lives would be made "a living hell" if they did not vote for the union. 345 NLRB at 1144. On that factual record, the Board found it immaterial that the supervisors, who were acting as a group in promoting the union, sometimes crossed supervisory lines and solicited one another's supervisees to support the Union. The Board explained that "[w]here a group of supervisors are working together . . . engaging in coercive pro-union conduct, such conduct does not become nonobjectionable simply because some lines of supervision are crossed." *Id.* at 1145-46.

Here, unlike in *Millard Refrigerated*, there is no question of supervisors acting coercively as a group and sometimes targeting one another's supervisees. Rather, this case involves the pro-union activities of one alleged supervisor who made comments far less extreme than those in *Millard*, to employees over whom she had no authority. This factual scenario is clearly governed by cases like *Glen's Market*, which hold that a supervisor generally does not engage in objectionable pro-union conduct by soliciting union support among employees clearly outside the range of her supervisory authority.

As the Company, thus, failed to carry its burden of proving that Dorton engaged in coercive pro-union conduct under the first prong of *Harborside*, there was no need for the Board to proceed to the second prong of the analysis and consider whether Dorton's conduct had a material effect on the election. (JA 492-93.) The Board therefore properly overruled the Company's Objections 1 and 2, based on the Company's failure to make the required initial showing under *Harborside* that a supervisor engaged in conduct that reasonably tended to coerce eligible voters in the bargaining unit.

2. The Company failed to prove that union agents or anyone else alleged race-based company conduct during the critical period before the election

In its Objections 3 and 4, the Company alleged that the Union, through its agents or representatives, injected the issue of race or racist motivations into the pre-election campaign by suggesting that the Company would challenge the ballots of two African-American employees (Dorton and Corley) in order to prevent their votes from counting in the election. According to the Company, this alleged conduct materially affected the election result because it induced one employee—Router Candace Comandao—to vote for union representation, rather than against it. However, as the Board found, “the record contains no evidence that an agent or representative of the [Union], or even an employee, speculated about racist

motivations behind the [Company's] ballot challenges" during the critical period before the election. (JA 495.)

The Company sought support for its objections in the testimony of Union Organizer Smith that, a few days before the election, he had a telephone conversation with Dorton and at least one other employee about possible company challenges to their ballots. (JA 143-59.) But Smith categorically denied making any suggestion that the Company's challenges were race-based. (JA 148.) And he could not recall whether anyone else made a race-related statement. (JA 148.) He merely allowed that "if" anyone were to have injected the issue of race into the conversation, he would have simply "brushed it off." (JA 148.) As the Board reasonably found, "[t]his record evidence is not sufficient to find that [a race-based] statement was [in fact] made before the election and [that] the [Union] failed to refute it." (JA 494.)

As the Board further found (JA 493-94), the Company fared no better in citing the testimony of Comandao that, the day before the election, she overheard a speakerphone conversation in which employees Dorton and Head talked about the Company's plans to contest Dorton's and Corley's ballots. (JA 493; JA 256-59.) Comandao testified that she found it upsetting that the Company would challenge anyone's vote. (JA 258-59.) She considered it "scandalous" and did not understand "how you cannot have somebody vote in America in an election,

period.” (JA 258-59.) She accordingly decided “to change her vote from a ‘no’ to a ‘yes.’” (JA 493-94; JA 256-59.) As the Board found, however, “Comandao did not recall any mention of the challenges to the ballots of Dorton and Corley being race based and, significantly, she was not asked and did not testify whether [Union] Representative Smith took part in this call.” (JA 493-94.) In these circumstances, the Board reasonably rejected the Company’s theory that Comandao changed her vote based on a racially charged statement that she heard on a call with a union representative before the election.

In its brief to this Court, the Company continues to press its failed factual theory that Comandao changed her vote in the election because of a suggestion that the Company’s ballot challenges were “a race thing.” (Br. 35.) Tellingly, however, the Company does not identify who made the charge of racism that allegedly caused Comandao to change her vote. Thus, the Company speaks of the racism charge in the passive voice: “an allegation was raised that Dorton and Corley had been challenged because of their race,” “information was disseminated,” and “Durham was accused of racism.” (Br. 12, 15, 32-33.) It speculates that some unknown person (“perhaps” Bender) “may have” raised “possible” racism. (Br. 33.) But such speculative assertions are plainly insufficient to establish conduct so destructive of free choice as to warrant a re-run election. *See Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d

1559, 1568 (D.C. Cir. 1984) (upholding Board’s decision to overrule objections based on anonymous conduct and noting that “ordering a rerun election on the basis of anonymous incidents can be devastatingly unfair to the majority of employees who have voted for the union”); *NLRB v. Chicago Tribune Co.*, 943 F.2d 791, 796 n.6 (7th Cir. 1991) (speculations about improprieties not connected to any proven conduct by union or its agents cannot serve as basis for overturning election).

Moreover, the only specific evidence to which the Company refers in support of its theory that Comandao believed the Company’s challenges were “a race thing” consists of the hearsay testimony of employee Myers that Comandao herself speculated, *after the polls closed*, that the Company’s ballot challenges had been “a race thing.” (JA 234-35.) Such testimony about one employee’s speculation after an election certainly does not establish that the Union or its agents spread race-based concerns before the election that materially affected the election result. (JA 494-95 n.7.) *See Superior Truss & Panel, Inc.*, 334 NLRB 916, 916 (2001) (union attorney’s letter to employer, “sent *after* the election, cannot serve as grounds for a valid objection”); *Mountaineer Bolt*, 300 NLRB 667, 667 (1990) (post-election conduct ordinarily does not provide grounds for setting aside election). “It is axiomatic that the Board, in considering objections to an election, looks only to evidence of conduct which occurred between the time the petition is

filed and the election is held.” *Head Ski Co.*, 192 NLRB 217, 218 (1971); *accord Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1567 (D.C. Cir. 1984) (approving Board’s focus on the critical period before the election in determining whether improper acts tainted election result).

Thus, the Board properly overruled the Company’s Objections 3 and 4 because the Company entirely failed to show, as a factual matter, that the Union or its agents—or, indeed, anyone else—made inflammatory racial statements during the critical period that interfered with employee free choice in the election. In a vain effort to salvage its claims of objectionable conduct (Br. 32-36), the Company suggests a range of legal analyses that could apply depending on who the hypothetical perpetrator of the racism allegations may have been. But those possible legal analyses are irrelevant in the absence of a specific factual showing of misconduct warranting application of the law to the facts. Indeed, the Company’s inability to identify a definite analytical framework only underscores the speculative nature of its claim.

C. The Company’s Belated and Unsupported Challenges to the Board’s Election Procedures Are Not Properly Before the Court and, in Any Event, Unavailing

Sixty days after objections to the underlying representation election were due under the Board’s Rules and Regulations (29 C.F.R. § 102.69(a)), the Company objected to the Board’s new procedures enacted by final rule on

December 15, 2014 (“the final rule”). *See Representation–Case Procedures*, 79 Fed. Reg. 74,308, 74,308.⁷ Without explaining or even acknowledging this untimely action, the Company now seeks substantive court review of its objections to the final rule. However, as explained below, the Company’s objections (Br. 37-39) were forfeited in the underlying representation proceeding, the Court lacks jurisdiction to consider them, and in any event, they provide no basis for overturning the election result here.

1. The Court lacks jurisdiction to consider the Company’s untimely objections to the final rule

Section 10(e) of the Act provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). As the Court has explained, this provision “is an example of Congress’s recognition” that to facilitate “orderly procedure and good administration[,] . . . courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1284 (D.C. Cir. 1990) (quoting *United States*

⁷ The changes announced in the final rule are codified in 29 C.F.R. Parts 101, 102, and 103. *See* 79 Fed. Reg. at 74,308.

v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952)). Accordingly, to comply with Section 10(e) and “preserve objections for appeal[,] a party must raise [its objections] in the time and manner that the Board’s regulations require.” *Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011).

Under the Board’s rules, objections to a Board-conducted representation election “must be timely” and made “[w]ithin 7 days after the tally of ballots has been prepared.” 29 C.F.R. § 102.69(a). The Board will not consider objections filed outside the 7-day timeframe unless the objecting party presents “clear and convincing proof that [its untimely objections] are not only newly discovered, but also, previously unavailable.” *Burns Int’l Security Servs., Inc.*, 256 NLRB 959, 960 (1981). Where a party is unable to make this showing, its untimely objections are forfeited. *See NLRB v. Rhone-Poulenc, Inc.*, 789 F.2d 188, 191-92 (3d Cir. 1986) (upholding Board’s refusal to consider allegations first raised in affidavits submitted in support of timely objections, after the period for filing objections closed). Thus, a party ordinarily cannot secure administrative review of untimely election objections. *See NLRB v. Aaron’s Office Furniture Co.*, 825 F.2d 1167, 1170-71 (7th Cir. 1987) (rejecting untimely objection to election procedure pressed in subsequent unfair labor practice proceeding); *Van Tran Elec. Corp. v. NLRB*, 449 F.2d 774, 775 (6th Cir. 1971) (rejecting objections filed 56 days late because

of asserted error of counsel); *New Frontier Constr. Co. v. NLRB*, 22 F.3d 1184 (D.C. Cir. 1994) (table) (rejecting untimely objections).

Here, the Company first raised challenges to the “imposition” of the final rule in its brief in support of exceptions to the hearing officer’s report. But that was not until July 14, 2015, which was 60 days after all objections were due under Section 102.69(a). (JA 18, 488.) The Company, further, made no attempt to show, by “clear and convincing proof,” that its grounds for objection to the final rule were “newly discovered and previously unavailable.” *Burns*, 256 NLRB at 960.

Nor could it reasonably have done so. The final rule was well known and had been in the works for years. *See Representation–Case Procedures*, 79 Fed. Reg. at 74,311 (describing procedural history of rule, beginning with 2011 Notice of Proposed Rulemaking). Indeed, as the Company acknowledged in its brief to the Regional Director in support of exceptions to the hearing officer’s report, its challenges to the final rule mirrored challenges already asserted in several cases pending in the federal district courts. (JA 486-87.)⁸ Therefore, there was no

⁸ *See Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015) (complaint filed January 5, 2015 and plaintiffs’ motion for summary judgment filed February 5, 2015); *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D. Tex. 2015) (complaint filed January 13, 2015 and plaintiff’s motion for summary judgment filed February 9, 2015); *Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D. D.C. 2015) (complaint filed April 17, 2015 and amended April 21, 2015; case subsequently consolidated with *Chamber of Commerce*, supra).

reason why the Company could not have asserted the same challenges in timely objections filed by May 15, 2015.

Accordingly, the Board properly found that the Company was “precluded” from challenging the final rule because it effectively forfeited its objections by failing to timely assert them. (JA 496, 553 n.1.) And having forfeited the objections in the representation case, the Company could not easily resurrect them at a later stage. To present forfeited objections in the subsequent test-of-certification proceeding, the Company had to show “newly discovered or previously unavailable evidence,” or other special circumstances demanding re-examination of the decision in the representation proceeding. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 161-62 (1941); *accord Pace Univ. v. NLRB*, 514 F.3d 19, 23-24 (D.C. Cir. 2008). It made no such showing.

Thus, the Board properly refused to consider the Company’s challenges to the final rule, as they were not raised “in the time and manner” required under the Board’s practice. *Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 348 (D.C. Cir. 2011); *accord NLRB v. L.D. McFarland Co.*, 572 F.2d 256, 260 (9th Cir. 1978) (where employer failed to establish “special circumstances” justifying untimely filing of election objection, “[t]he Board did not abuse its discretion in refusing to consider the objection, either in the representation proceeding, or in the unfair labor practice action”). Accordingly, under Section

10(e) of the Act, the Court lacks jurisdiction to consider the substance of those objections for the first time on review. *See Spectrum Health-Kent Cmty. Campus*, 647 F.3d at 348; *Pace Univ.*, 514 F.3d at 24.

2. The Company has waived any challenge to the Board's rejection of its untimely objections and fails to develop any substantive arguments warranting review; in any event, the Company's cursory claims about the final rule are without merit

In its brief to this Court, the Company does not challenge the Board's finding that its objections to the final rule were untimely. The Company therefore has waived any argument that the Board erred in rejecting its objections based on untimeliness. *See New York v. EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005) (petitioners waive arguments that they fail to raise in their opening briefs); *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 (D.C. Cir. 1990) (same).

But even assuming that the Company's objections were timely or properly before the Court, the Company's opening brief fails to develop any arguments warranting judicial review. This Court requires that "parties' arguments be sufficiently developed lest waived." *Tribune Co. v. FCC*, 133 F.3d 61, 69 n.8 (D.C. Cir. 1998). Therefore "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005) (quoting *United States v. Zannino*, 895

F.2d 1, 17 (1st Cir. 1990)) (internal quotation marks omitted). Nor will cursory or conclusory statements in an opening brief suffice. *See City of Waukesha v. EPA*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003) (argument raised “only summarily” in opening brief, “without explanation or reasoning,” waived). Rather, under Federal Rule of Appellate Procedure 28(a)(8)(A), the opening brief must contain “appellant’s contentions and the reasons for them, with citations to the authorities . . . on which appellant relies.”

The two-and-a-half pages of the Company’s opening brief (Br. 37-39) addressing the final rule plainly fall short of this mark. The Company makes a series of one- or two-sentence claims about asserted defects in the final rule, without any supporting argument, and without citation to precedent or binding authority suggesting that its claims are correct. Instead, the Company rests on a parenthetical reference to two Board members’ dissents from the final rule. (Br. 37.) *See* 79 Fed. Reg. at 74,430-74,460. The Company, thus, has “le[ft] the court to do counsel’s work,” rather than “spell[ing] out its arguments squarely and directly” as this Court’s law and the Federal Rules of Appellate Procedure require. *See Schneider*, 412 F.3d at 200 n.1 (internal quotation marks and citation omitted).

In any event, to the extent that any specific arguments may be discerned in the Company's terse presentation, those arguments are unavailing.⁹ Indeed, two courts have rejected most of the claims that the Company cryptically mentions in its brief. *Associated Builders & Contractors of Texas, Inc. v. NLRB*, ___ F.3d ___, 2016 WL 3228174, at *5-9 (5th Cir, June 10, 2016) (“ABC”); *Chamber of Commerce of the United States of Am. v. NLRB*, 118 F. Supp. 3d 171, 206-15, 218-21 (D. D.C. 2015).

In particular, the courts in *ABC* and *Chamber of Commerce* rejected the theory, to which the Company refers in passing (Br. 37), that the Board's adoption of the final rule was “arbitrary and capricious.” *ABC*, 2016 WL 3228174, at *8-9; *Chamber of Commerce*, 118 F. Supp. 3d at 218-21. As the Fifth Circuit aptly explained in *ABC*, the Board adopted specific amendments to its representation case procedures following “exhaustive and lengthy review of the issues, evidence, and testimony” collected over comment periods spanning a total of 141 days, and in 4 days of hearings. *ABC*, 2016 WL 3228174, at *3; see *Representation–Case*

⁹ Judicial review of agency rulemaking is governed by the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. Under the APA, a court may set aside an agency rule where it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Applying this standard, the Court has stated that it will affirm an agency's rule “if the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made.” *Allied Local and Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 68 (D.C. Cir. 2012) (internal quotation marks and citations omitted).

Procedures, 79 Fed. Reg. at 74,308, 74,310. It settled on amendments designed “not only to increase the speed and efficiency of the election process, but also to reduce unnecessary barriers to elections, to modernize processes so as to reduce cost, and to ‘make effective use of new technology.’” *ABC*, 2016 WL 3228174, at *8 (quoting 79 Fed. Reg. at 74,315). And it provided factual and legal support for its determinations and responded to contrary arguments. *Id.* at *9. Thus, the Board’s enactment of its final rule was not “arbitrary and capricious,” but entirely rational and in furtherance of its mandate to “adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently, and speedily.” *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 331 (1946).

Next, contrary to the Company’s claim (Br. 37) and as the courts in *ABC* and *Chamber of Commerce* recognized, the final rule does not “violate the personal privacy rights of [] employees” by requiring disclosure of their personal email addresses and telephone numbers in preparation for a representation election. (*See* JA 497-98, citing 79 Fed. Reg. at 74,341-51.) *See ABC*, 2016 WL 3228174, at *5-7; *Chamber of Commerce*, 118 F. Supp. 3d at 208-15. The Board, with Supreme Court approval, has long required that parties to the election have access to a list, filed by the employer, containing the names and home addresses of all eligible voters. 79 Fed. Reg. at 74,335 (citing *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966), and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767-68 (1969)).

That information ensures a fair and free electoral choice by “maximiz[ing] the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation.” *Excelsior Underwear*, 156 NLRB at 1240-41.

In the final rule, the Board rationally concluded that the modern voter list should include employees’ personal email addresses and telephone numbers. It reasonably determined that such information “is as fundamental to a fair and free election and the expeditious resolution of questions concerning representation [today] . . . as was access to employee names and home addresses in 1966” when the voter-list requirement was established in *Excelsior Underwear*. 79 Fed. Reg. at 74,341. In making this determination, the Board “extensively considered . . . the privacy concerns of employees,” but found that those concerns did not outweigh the public interest in ensuring an informed electorate using technology that is “part of our daily life.” *ABC*, 2016 WL 3228174, at *6-7 (quoting 79 Fed. Reg. at 74,343 n.169). As the court held in *ABC*, it was not an abuse of discretion for the Board “to weigh competing interests and promulgate rules that advance the goals of the Act” in a way that is “rationally connected to . . . transformative changes in communications technology.” *Id.*, at *7; see also *Chamber of Commerce*, 118 F. Supp. 3d at 208-13.

There is similarly no substance to the Company’s claims (Br. 37-38) that the final rule compels employer speech or “compel[s] an election timeframe” that

interferes with employer and employee rights in the period before a representation election. (See JA 498-99, citing 79 Fed. Reg. at 74,318-26.) As the court recognized in *Chamber of Commerce*, “[n]othing in the [f]inal [r]ule constrains an employer from expressing its own opinion about the election.” 118 F. Supp. 3d at 194; accord 79 Fed. Reg. at 74,318-19. Moreover, the Board deliberately refrained from “establish[ing] any rigid timeline for the conduct of the election itself” in the final rule. 79 Fed. Reg. at 74,318, 74,323-24. Thus, “[t]he rule does not eliminate the opportunity for the parties to campaign before an election,” nor does it deprive employees of the opportunity to hear each party’s views. 79 Fed. Reg. at 74,319, 74,323-24. On the contrary, the final rule specifically accommodates robust debate by giving the Regional Director discretion to determine the date of the election based on “the desires of the parties, which may include their opportunity for meaningful speech about the election.” *ABC*, 2016 WL 3228174, at *8 (rejecting employer challenge that the final rule unlawfully curtails speech rights); *Chamber of Commerce*, 118 F. Supp. 3d at 206-07 (same); see 79 Fed. Reg. at 74,318, 74,324. The Company does not argue, much less show, that this mechanism for accommodating the speech rights of the parties failed in this case, or that it faced any particular obstacle in exercising its right to speak about the election here.

Nor has the Company established that the final rule effected an improper “reduction in [the] time for [it] to file its [o]bjections and offer of proof” (Br. 38).

(See JA 499-500.) The final rule, codified in relevant part at 29 C.F.R. § 102.69, “maintain[ed] the [pre-existing] time period (7 days after the tally) for the filing of objections,” and newly required that parties simultaneously file offers of supporting evidence. 79 Fed. Reg. at 74,411. However, as the final rule emphasized, the regional directors retain “discretion to permit additional time for filing the offer of proof upon a showing of good cause.” *Id.* Here, the Company complains that, under the new filing deadline, it lacked enough time to prepare its objections and present supporting evidence. But the Company does not explain why it did not simply request an extension, as the final rule expressly permits, nor does it explain why it required more time in the first place. (Br. 38.) In these circumstances, the Company has utterly failed to establish any unfairness in the implementation of amended Section 102.69 in this case.

CONCLUSION

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

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September 2016

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

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)	
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)	Nos. 16-1074 & 16-1116
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	32-CA-165556
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11,853 words of proportionally-spaced, 14-point type and the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben

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Dated at Washington, D.C.
this 29th day of September 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2016, I electronically filed the foregoing final brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, D.C.

this 29th day of September 2016

ADDENDUM

STATUTES AND REGULATIONS

**Relevant provisions of the National Labor Relations Act,
29 U.S.C. §§ 151-169:**

Sec. 2. [§152.] When used in this Act [subchapter]—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a

condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] 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, subject to the provisions of section 9(a) [section 159(a) of this title].

Sec. 9 [§ 159.]

(a) [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective- bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) [Determination of bargaining unit by Board] The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in

the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) [Hearings on questions affecting commerce; rules and regulations]

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place

on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) [Secret ballot; limitation of elections]

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and labor organization made pursuant to section 8(a)(3) [section 158(a)(3) of this title], of a petition alleging they desire that such

authorization be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

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

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

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

**Relevant provisions of the
Rules and Regulations of the National Labor Relations Board
29 C.F.R. §§ 102.60-102.69**

Subpart C—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

§102.60 Petitions.

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

Board. Whenever the regional director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

§102.62 Election agreements; voter list; Notice of Election.

(a) *Consent election agreements with final regional director determinations of post-election disputes.* Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into an agreement providing for the waiver of a hearing and for an election and further providing that post-election disputes will be resolved by the regional director. Such agreement, referred to as a consent election agreement, shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§102.69 and 102.70 except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, and except that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

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

(c) *Full consent election agreements with final regional director determinations of pre- and post-election disputes.* Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement, referred to as a full consent election agreement, providing that pre- and post-election disputes will be resolved by the regional director. Such agreement provides for a hearing pursuant to §§102.63, 102.64, 102.65, 102.66 and 102.67 to determine if a question of representation exists. Upon the conclusion of such a hearing, the regional director shall issue a decision. The rulings and determinations by the regional director thereunder shall be final, with the same force and effect, in that case, as if issued by the Board. Any election ordered by the regional director shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§102.69 and 102.70, except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, and except that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(d) *Voter list.* Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction of election, within 2 business days after the approval of an election agreement pursuant to paragraphs (a) or (b) of this section, or issuance of a direction of election pursuant to paragraph (c) of this section, the employer shall provide to the regional director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (“cell”) telephone numbers) of all eligible voters. The employer shall also include in a separate section of that list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge, including, for example, individuals in the classifications or other groupings that will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction unless a longer time is specified in the agreement or

direction. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction. A certificate of service on all parties shall be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

(e) *Notice of election.* Upon approval of the election agreement pursuant to paragraphs (a) or (b) of this section or with the direction of election pursuant to paragraph (c) of this section, the regional director shall promptly transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The employer shall post and distribute the Notice of Election in accordance with §102.67(k). The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

[79 FR 74479, Dec. 15, 2014]

§102.69 Election procedure; tally of ballots; objections; certification by the regional director; hearings; hearing officer reports on objections and challenges; exceptions to hearing officer reports; regional director decisions on objections and challenges.

(a) *Election procedure; tally; objections.* Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose Region the proceeding is pending. All elections shall be by secret

ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot, except that in a proceeding involving an employer-filed petition or a petition for decertification, the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the regional director, disclaiming any representation interest among the employees in the unit. A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit. When the election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the regional director an original and five copies of objections to the conduct of the election or to conduct affecting the results of the election which shall contain a short statement of the reasons therefor and a written offer of proof in the form described in §102.66(c) insofar as applicable, except that the regional director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause. Such filing(s) must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. The party filing the objections shall serve a copy of the objections, including the short statement of reasons therefor, but not the written offer of proof, on each of the other parties to the case, and include a certificate of such service with the objections. 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 if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile or electronically pursuant to §102.114(f) or (i). The regional director will transmit a copy of the objections to each of the other parties to the proceeding, but shall not transmit the offer of proof.

(b) *Certification in the absence of objections, determinative challenges and runoff elections.* If no objections are filed within the time set forth in paragraph (a) of this section, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to §102.70, the regional director shall forthwith issue to the parties a certification of the results

of the election, including certification of representative where appropriate with the same force and effect as if issued by the Board.

(c)(1)(i) *Decisions resolving objections and challenges without a hearing.* If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the regional director determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the regional director determines that any determinative challenges do not raise substantial and material factual issues, the regional director shall issue a decision disposing of the objections and determinative challenges, and a certification of the results of the election, including certification of representative where appropriate.

(ii) *Notices of hearing on objections and challenges.* If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, and the regional director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election and raise substantial and material factual issues, the regional director shall transmit to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided) a notice of hearing before a hearing officer at a place and time fixed therein. The regional director shall set the hearing for a date 21 days after the preparation of the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date, except that the regional director may consolidate the hearing concerning objections and challenges with an unfair labor practice proceeding before an administrative law judge. In any proceeding wherein the election has been held pursuant to §102.62(a) or (c) and the representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing, the administrative law judge shall, after issuing a decision, sever the representation case and transfer it to the regional director for further processing.

(iii) *Hearings; hearing officer reports; exceptions to regional director.* The hearing on objections and challenges shall continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise. Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§102.64, 102.65, and 102.66, insofar as applicable. Any party shall have the right to appear at the hearing in person, by counsel, or by other representative, 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 objections and determinative challenges that are the subject of the hearing. The hearing officer may rule on offers of proof. Post-hearing briefs shall be filed only upon special permission of the hearing officer and within the time and addressing the subjects permitted by the hearing officer. Upon the close of such hearing, the hearing officer shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. Any party may, within 14 days from the date of issuance of such report, file with the regional director an original and one copy of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the regional director. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the regional director may allow, a party opposing the exceptions may file an answering brief with the regional director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the regional director. Extra copies of electronically-filed papers need not be filed. The regional director shall thereupon decide the matter upon the record or make other disposition of the case. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

(2) *Regional director decisions and Board review.* The decision of the regional director may include a certification of the results of the election, including certification of representative where appropriate, and shall be final unless a request for review is granted. If a consent election has been held pursuant to §§102.62(a) or (c), the decision of the regional director is not subject to Board review. If the election has been conducted pursuant to §102.62(b), or by a direction of election issued following any proceeding under §102.67, the parties shall have the right to Board review set forth in §102.67, except that in any proceeding wherein a representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to §§102.62(b) or 102.67, the provisions of §102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision, and a request for review of the regional director's decision and direction of election shall be due at the same time as the exceptions to the administrative law judge's decision are due.

(d)(1)(i) *Record in case with hearing.* In a proceeding pursuant to this section in which a hearing is held, the record in the case shall consist of the notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exhibits, together with the objections to the conduct of the election or to conduct affecting the results of the election, offers of proof made at the post-election hearing, any briefs or other legal memoranda submitted by the parties, any report on such objections and/or on challenged ballots, exceptions, the decision of the regional director, any requests for review, and the record previously made as defined in §102.68. Materials other than those set out above shall not be a part of the record.

(ii) *Record in case with no hearing.* In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any decision on objections or on challenged ballots and any request for review of such a decision, any documentary evidence, excluding statements of witnesses, relied upon by the regional director in his decision, any briefs or other legal memoranda submitted by the parties, and any other motions, rulings or orders of the regional director. Materials other than those set out above shall not be a part of the record, except as provided in paragraph (d)(3) of this section.

(2) Immediately upon issuance of an order granting a request for review by the Board, the regional director shall transmit to the Board the record of the proceeding as defined in paragraph (d)(1) of this section.

(3) In a proceeding pursuant to this section in which no hearing is held, a party filing a request for review of a regional director's decision on challenged ballots or on objections or on both, or any opposition thereto, may support its submission to the Board by appending thereto copies of any offer of proof, including copies of any affidavits or other documentary evidence, it has timely submitted to the regional director and which were not included in the decision. Documentary evidence so appended shall thereupon become part of the record in the proceeding. Failure to append that evidence to its submission to the Board in the representation proceeding as provided above, shall preclude a party from relying on such evidence in any subsequent unfair labor proceeding.

(e) *Revised tally of ballots.* In any case under this section in which the regional director or the Board, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 7 days after the revised

tally of ballots has been made available, the regional director shall forthwith issue to the parties certification of the results of the election, including certifications of representative where appropriate with the same force and effect as if issued by the Board.

(f) *Format of filings with regional director.* All documents filed with the regional director under the provisions of this section shall be filed double spaced, on 8½ - by 11-inch paper, and shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Briefs in support of exceptions or answering briefs shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the regional director by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(g) *Extensions of time.* Requests for extensions of time to file exceptions, requests for review, supporting briefs, or answering briefs, as permitted by this section, shall be filed with the Board or the regional director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the regional director. A statement of such service shall be filed with the document.

[79 FR 74486, Dec. 15, 2014]