

Nos. 16-1871, 16-2031

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

**THESIS PAINTING, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
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**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Thesis Painting, Inc. (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a final Board Decision and Order. The Board’s Decision and Order issued on July 20, 2016, and is reported at 364 NLRB No. 53.

(JA 243-45.)<sup>1</sup> The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (“the Act”),<sup>2</sup> as amended, by failing and refusing to bargain with International Union of Painters and Allied Trades, District Council 51 (“the Union”). The Board has subject matter over the proceeding below under Section 10(a) of the Act,<sup>3</sup> which empowers the Board to prevent unfair labor practices affecting commerce.

This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act,<sup>4</sup> because the Board’s Order is final and the Company maintains an office in Springfield, Virginia. The Company filed its petition for review on August 1, 2016. The Board filed its cross-application for enforcement on September 8, 2016. The petition and cross-application were timely because the Act places no time limitations on such filings.

Because the Board’s Order is based, in part, on findings made in the underlying representation proceeding (Board Case No. 05-RC-155713), the record in that proceeding is also before the Court under Section 9(d) of the Act.<sup>5</sup> Section

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

<sup>2</sup> 29 U.S.C. §§ 151, 158(a)(5) and (1).

<sup>3</sup> 29 U.S.C. § 160(a).

<sup>4</sup> 29 U.S.C. § 160(e) and (f).

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

9(d) does not give the Court general authority over the representation proceeding. Rather, it authorizes review of the Board's actions in that proceeding for the limited purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair labor practice] order of the Board...."<sup>6</sup> The Board retains authority under Section 9(c) of the Act<sup>7</sup> to resume processing the representation case in a manner consistent with this Court's ruling.<sup>8</sup>

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<sup>6</sup> 29 U.S.C. § 159(d).

<sup>7</sup> 29 U.S.C. § 159(c).

<sup>8</sup> See *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999). *Contra NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26-27 (4th Cir. 1996). *Lundy's* holding that the Board lacks the authority to resume processing the representation case rests on inapposite cases dealing not with Section 9(d)'s limitations on judicial control over representation cases but with Section 10(e)'s limitations on the Board's authority to revisit unfair labor practice issues once a reviewing court has considered them. See *Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945) (absent fraud or mistake, Board is not entitled to have court's enforcement order vacated so Board can enter new remedial order that, in retrospect, it decides is more appropriate); *W.L. Miller Co. v. NLRB*, 988 F.2d 834, 835-38 (8th Cir. 1993) (once court enforces Board's order in unfair labor practice proceeding, Board lacks authority to reopen proceeding to award additional relief); *George Banta Co. v. NLRB*, 686 F.2d 10, 16-17 (D.C. Cir. 1982) (rejecting employer's argument that Board lacked jurisdiction to adjudicate charges of post-strike unfair labor practices while a case against the same employer concerning pre-strike unfair labor practices was pending in court); *Serv. Emps. Local 250 v. NLRB*, 640 F.2d 1042, 1044-45 (9th Cir. 1981) (Board lacks jurisdiction to adjudicate union's unfair labor practice claim when earlier court decision implicitly rejected that claim).

## **STATEMENT OF THE ISSUES**

The ultimate issue in this case is whether the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of a unit of the Company's employees following a Board-conducted election. Resolution of this issue turns on whether the Board abused its discretion by finding that the Company failed to prove that Union agents engaged in objectionable conduct that warranted overturning the election. Specifically, the Board found that the Company failed to prove that: 1) Adan Guzman was an agent of the Union, and therefore his conduct during the election was objectionable under precedent regarding agent conduct; and 2) Jose Raymundo, who may have been the Union's limited agent while serving as its election observer, engaged in objectionable conduct by wearing a Union T-shirt before the election began.

## **STATEMENT OF THE CASE**

The Company does not dispute its refusal to bargain with the Union. Rather, it contends that the Board abused its discretion in the underlying representation case by upholding the Regional Director's certification of the Union as the duly-elected representative of its employees, and thus failing to set aside the election. Summaries of the Board's findings of fact, the procedural history of the

representation and unfair labor practice proceedings, and the Board's Decision and Order, are below.

## **STATEMENT OF FACTS**

### **A. Background**

The Company provides commercial painting services throughout the Washington, D.C. metropolitan area, and has an office in Springfield, Virginia. (JA 243; JA 123.) On July 9, 2015, the Union filed an election petition with Region 5 of the Board, seeking to represent the Company's painters. (JA 137; JA 177.) On July 15, pursuant to a stipulated election agreement, the Company and the Union agreed to a Board-conducted election at the Company's Springfield office. (JA 137.)

### **B. Pre-Election Home Visit to Employee Viera**

Before the election, the Union's marketing representative and lead organizer, Sandro Baiza, made home visits to eligible voters. (JA 141-42; JA 126; JA 79, 81-82, 84.) Baiza asked a former company employee, Adan Guzman, to accompany him. (JA 141-42; JA 81-82.) Because Guzman had only recently left the Company, Baiza thought voters would feel more comfortable opening their doors and listening to Baiza if they saw Guzman with him. (JA 141-42; JA 64, 81-82.)

Guzman agreed to accompany Baiza on a single visit, to the home of his friend, Jose Viera. (JA 141-42; JA 68-71, 84-85.) During this visit, Guzman

showed Viera a copy of his paycheck from his new, unionized employer, Federal Painting. (JA 141; JA 67-68.) Guzman was not involved in the campaign besides accompanying Baiza on the single visit to Viera's home. (JA 141.)

**C. The Day of the Election and the Allegedly Objectionable Conduct**

On July 31, 2015, the Board conducted the election from 3:00 p.m. to 5:00 p.m. (JA 137.) At the election, former-employee Jose Raymundo, who had recently left the Company, served as an election observer for the Union.<sup>9</sup> (JA 142; JA 74.) Raymundo arrived at 2:00 p.m. for the pre-election conference. (JA 74.) When he arrived, Raymundo was wearing a T-shirt with the Union's insignia on it. (JA 142; JA 46, 75.) Before the election began, Raymundo changed into a nondescript T-shirt, which he wore during the election. (JA 142; JA 46-48, 76-77.) Raymundo did not speak to any employees or tell any employees how to vote. (JA 142; JA 61, 74.)

At 3:00 p.m., Guzman arrived at the election site to cast a ballot. (JA 142-43; JA 65-66.) After voting, Guzman shook hands and spoke briefly to some employees waiting in line to vote in the lobby. (JA 142-43; JA 33-34, 76.) The

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<sup>9</sup> Each party to an election may be represented at the polling place by designated observers, who represent their principals and carry out the important functions of challenging voters, monitoring the election process, and assisting Board agents in the conduct of the election. NLRB Casehandling Manual (Part Two) Representation Proceedings § 11310.1, 11310.3.

Union won the election with 21 votes for the Union, 11 votes against the Union, and 5 challenged ballots. (JA 137; JA 180.)

**D. Post-Election Objections, Hearing, and Certification of the Union**

The Company filed two objections to the election. (JA 7-9.) The Company's first objection was that "the Union, through its agents and/or representatives, engaged in improper electioneering, pressure, or surveillance immediately outside the polling area while the polls were open and while employees were waiting to vote." (JA 7-8.) The Company's second objection alleged that "the Union, through employees who were its agents and/or representatives, or alternatively through employees who supported the Union, engaged in improper electioneering, pressure or surveillance of voters within or immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote." (*Id.*) The Regional Director ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. (JA 137.) At the hearing, the Company primarily argued that 1) two former employees, Adan Guzman and Jose Raymundo, were Union agents or representatives, 2) they had engaged in improper electioneering or surveillance, and 3) either person's conduct warranted overturning the election. (JA 127; JA 20-84.)

The hearing officer issued a report concluding that “employees would not have reasonably believed that Guzman or Raymundo were speaking on behalf of the [Union] at any time.” (JA 140-42; JA 128.) Consequently they were not union agents and their conduct had to be “analyzed under the Board’s standard governing third party conduct.” (*Id.*) Under that standard, the hearing officer found that the Company failed to establish that their conduct “reasonably tended to interfere with employee free choice.” (JA 130.) Accordingly, the hearing officer issued a report recommending that the Company’s objections be overruled in their entirety. (JA 137.)

The Company filed 13 exceptions to the hearing officer’s report, contending that the hearing officer made incorrect findings of fact and, based on those facts, misapplied the legal standards. (JA 137-38.) The Regional Director affirmed the hearing officer’s rulings and issued a Decision and Certification of Representative. (JA 137-44.) The Company filed a Request for Review with the Board, arguing that review should be granted “because the Regional Director’s departure from Board precedent raised ‘substantial question of law or policy’ and because the Regional Director made ‘clearly erroneous findings’ on ‘substantial factual issues.’” (JA 145.)

The Board denied the Company’s Request for Review. (JA 156.) The Board agreed with the Regional Director’s finding that Guzman was not an agent

of the Union, and thus “his conduct during the election was not objectionable” under the standard applicable to parties’ actions. (JA 156 n.1.) In so finding, the Board did not pass on the Regional Director’s alternate finding that, even if Guzman were an agent, his conduct would not have been objectionable. (*Id.*) Regarding Raymundo, the Board found that “although Jose Raymundo may have been the [Union’s] limited agent during the election” while serving as the Union’s election observer, “his wearing of a union t-shirt before the election started was not objectionable.” (*Id.*)

#### **E. The Unfair Labor Practice Proceeding**

On March 28, 2016, the Union requested that the Company bargain with it as the certified bargaining representative of the employees. (JA 244; JA 212.) The Company refused to recognize and bargain with the Union. (JA 243-44; JA 214.)

Based on the Company’s refusal, the Union filed an unfair labor practice charge with the Board’s Regional Office. (*Id.*) Thereafter, the General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. (JA 243; JA 218-22.) In response, the Company filed an answer admitting its refusal to bargain, but contesting the Board’s certification of the Union. (JA 243; JA 226-29.) The General Counsel filed with the Board a motion for summary judgment, and the Board issued an order transferring proceedings to itself and a notice to show cause

why the motion should not be granted. (JA 243; JA 230.) The Company filed a response, again admitting its refusal to bargain but contesting the Board's certification of the Union. (JA 243; JA 231-42.)

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

On July 20, 2016, the Board issued a 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.<sup>10</sup> (JA 243-45.) In doing so, 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 had neither offered to adduce any newly discovered evidence, nor shown any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. (*Id.*)

The Board's Order requires the Company to cease and desist from failing and refusing to recognize and bargain with the Union and from, in any like or related manner, interfering with, restraining, or coercing its employees' exercise of their rights under Section 7 of the Act.<sup>11</sup> (JA 244.) Affirmatively, the Board's Order directs the Company to bargain with the Union upon request, to embody any

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<sup>10</sup> 29 U.S.C. § 158(a)(5) and (1).

<sup>11</sup> 29 U.S.C. § 157.

understanding reached in a signed agreement, and to physically post and electronically distribute a remedial notice. (JA 244-45.)

### **SUMMARY OF ARGUMENT**

The Board did not abuse its discretion in finding that, under all the circumstances surrounding the election, the Company failed to meet the heavy burden necessary to overturn the employees' vote for union representation. First, regarding Guzman, the Company simply comes nowhere near establishing the requisite agency relationship. It has not shown that employees would have reasonably believed that Guzman was an agent of the Union on the basis of his visit to an employee's home with a union representative. Because the Company failed to show that Guzman was an apparent union agent, the Board did not abuse its discretion in finding that his conduct during the election was not objectionable under the standard applicable to parties. Second, as to Raymundo, the Company has not shown that, by wearing a union T-shirt before the election began, he engaged in such objectionable conduct as to interfere with voter free choice. Accordingly, the Board properly certified the Union after its election win and this Court should enforce the Board's Order requiring the Company to bargain with the Union.

## ARGUMENT

### **THE BOARD DID NOT ABUSE ITS DISCRETION IN CERTIFYING THE UNION, AND THEREFORE PROPERLY CONCLUDED THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION**

Section 8(a)(5) and (1) of the Act prohibits an employer from refusing to bargain collectively with the certified representative of its employees.<sup>12</sup> Here, although the Company's painters chose the Union as their representative in a Board election, the Company, by its own admission (Br. 3), has refused to recognize the Union or bargain with it. (JA 243-45.) The Company contends that its refusal is lawful because the Board erred in overruling its election objections and certifying the Union. (Br. 3, 6.) As we now show, the Company's contentions have no merit, and the Board's Order should therefore be enforced.

#### **A. Applicable Principles and Standard of Review**

Assessing whether an election for union representation should be set aside requires a "quality and degree of expertise uniquely within the domain of the Board."<sup>13</sup> Accordingly, the Board's decision that an election properly resulted in

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<sup>12</sup> 29 U.S.C. § 158(a)(5) and (1). A violation of Section 8(a)(5) results in a derivative violation of 8(a)(1) by interfering with employees' collective-bargaining rights. *See, e.g., NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990); *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n. 4 (1983).

<sup>13</sup> *NLRB v. Hydrotherm, Inc.*, 824 F.2d 332, 334 (4th Cir. 1987) (citing *NLRB v. Klingler Elec. Corp.*, 656 F.2d 76, 85 (5th Cir. 1981)).

union representation “is discretionary and entitled to great deference.”<sup>14</sup> In line with these principles, this Court treats the results of a Board election as “presumptively valid” and will overturn an election “only where the Board has clearly abused its discretion.”<sup>15</sup>

A party seeking to overturn the results of a Board election “bears a heavy burden.”<sup>16</sup> In order to overturn the results, the challenging party must not only prove “by specific evidence” that election misconduct occurred, but also that this misconduct “prevented a fair election.”<sup>17</sup> When evaluating whether a party has met that burden, this Court is “mindful of the real world environment in which an election takes place.”<sup>18</sup> Similarly, the Court recognizes that, although the Board strives to hold elections under “laboratory conditions . . . clinical asepsis is an

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<sup>14</sup> *NLRB v. Columbia Cable TV Co.*, 856 F.2d 636, 638 (4th Cir. 1988); *see NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946) (“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.”).

<sup>15</sup> *NLRB v. Md. Ambulance Servs., Inc.*, 192 F.3d 430, 433 (4th Cir. 1999); *see Case Farms of N.C., Inc. v. NLRB*, 128 F.3d 841, 844 (4th Cir. 1997).

<sup>16</sup> *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 262 (4th Cir. 2000).

<sup>17</sup> *Id.*

<sup>18</sup> *NLRB v. Coca-Cola Bottling*, 132 F.3d 1001, 1003 (4th Cir. 1997).

unattainable goal.”<sup>19</sup> Thus, the circumstances in which representation elections take place must be viewed “in light of the realistic standards of human conduct.”<sup>20</sup>

In assessing election objections, less weight is given to the conduct of third parties than to the conduct of parties to a Board election.<sup>21</sup> When it is alleged that a party to a Board election has engaged in objectionable conduct, the challenging party must show by specific evidence that “threats, acts of coercion, or other improprieties occurred and ‘materially affected the election results.’”<sup>22</sup> Less weight, however, is given to the conduct and statements of third parties.<sup>23</sup> As this Court has explained, “third parties are not subject to the deterrent of having an election set aside, and third party statements do not have the institutional force of statements made by the employer or the Union.”<sup>24</sup> Given that distinction, third-party misconduct merits setting aside an election only if it created a “general atmosphere of confusion, violence, and threats of violence” that would reasonably

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<sup>19</sup> *Id.* (internal quotation marks and citations omitted).

<sup>20</sup> *Case Farms*, 128 F.3d at 844 (internal quotation marks and citations omitted).

<sup>21</sup> *NLRB v. Herbert Halperin Distr. Corp.*, 826 F.2d 287, 290 (4th Cir. 1987)

<sup>22</sup> *NLRB v. Ky. Tenn. Clay Co.*, 295 F.3d 436, 442 (4th Cir. 2002) (quoting *Herbert Halperin*, 826 F.2d at 290).

<sup>23</sup> *Herbert Halperin*, 826 F.2d at 290; *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1242 (4th Cir. 1976) (“[I]n determining whether an election is to be set aside, less weight is to be accorded to conduct which is attributable to neither the employer nor the union...”).

<sup>24</sup> *Ky. Tenn. Clay*, 295 F.3d at 441-42 (quoting *Herbert Halperin*, 826 F.2d at 290).

be expected to render impossible a “rational uncoerced expression of choice as to bargaining representative.”<sup>25</sup>

The Board’s determination regarding the validity of an election will often turn on factual findings, which are conclusive if supported by substantial evidence on the record as a whole.<sup>26</sup> As a result, this Court will not “displace the Board’s choice between two conflicting views” of the evidence, even where it “would justifiably have made a different choice had the matter been before it de novo.”<sup>27</sup> Particularly relevant here is this Court’s principle that “[g]enerally, the existence and scope of agency relationships are factual matters.”<sup>28</sup> As such, the Board’s determination of the existence of an agency relationship and its scope “will not be disturbed on appeal if supported by substantial evidence on the record as a whole.”<sup>29</sup>

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<sup>25</sup> *Herbert Halperin*, 826 F.2d at 290.

<sup>26</sup> Section 10(e) of the Act, 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951); *WXGI, Inc. v. NLRB*, 243 F.3d 833, 840 (4th Cir. 2001).

<sup>27</sup> *Universal Camera*, 340 U.S. at 488; accord *Elizabethtown Gas*, 212 F.3d at 262.

<sup>28</sup> *Metco Prods., Inc. v. NLRB*, 884 F.2d 156, 159 (4th Cir. 1989).

<sup>29</sup> *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 990 (4th Cir. 2012) (quoting *Metco Prods.*, 884 F.2d at 159).

## **B. The Company Failed to Show that Guzman Was an Agent of the Union**

The Company asserts (Br. 8-13) that the Board erred by not finding that Guzman was an agent of the Union and, consequently, erred by not applying *Milchem, Inc.*<sup>30</sup> and/or *Nathan Katz Realty*.<sup>31</sup> In *Milchem*, the Board established its rule governing unlawful electioneering at or near the polls by parties. If *representatives* of a party to the election engage in “prolonged conversations” with voters waiting to cast their ballots, the Board will set aside the election “without inquiry into the nature of the conversation.”<sup>32</sup> The Board’s strict rule rests on concern for the “potential of distraction, last minute electioneering or pressure, and unfair advantage” that may flow from such conduct.<sup>33</sup> *Nathan Katz*, conversely, addressed circumstances not encompassed within the *Milchem* rule.<sup>34</sup> There, the court denied enforcement where union *agents* parked their car adjacent to the polling place and motioned, gestured, and honked at employees as they entered the polling site.<sup>35</sup> The court found that the union agents had engaged in conduct that substantially impaired employees’ exercise of free choice, even if they “did not

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<sup>30</sup> 170 NLRB 362 (1968).

<sup>31</sup> *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001).

<sup>32</sup> *Milchem*, 170 NLRB at 362.

<sup>33</sup> *Id.*

<sup>34</sup> *Nathan Katz*, 251 F.3d at 991.

<sup>35</sup> *Id.*

actually talk to any employee.”<sup>36</sup> The other cases cited by the Company (Br. 19) also involve (employer) agents’ conduct.<sup>37</sup>

As we demonstrate below, the Board did not abuse its discretion by concluding that the Company failed to produce sufficient evidence to establish the agency status of Guzman. Accordingly, the Board properly did not pass on the Company’s arguments regarding Guzman’s conduct under *Milchem* or *Nathan Katz Realty* because those cases involved agents’ conduct. (JA 156.)

**1. The Company has not shown that employees would have a reasonable belief that Guzman had authority to act on the Union’s behalf**

The Company failed to demonstrate the Guzman was a union agent. The Board, and this Court, evaluate the question of whether an employee acted as an actual or apparent agent of a labor organization under common-law principles of agency.<sup>38</sup> An alleged agent has apparent authority “when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.”<sup>39</sup> In labor relations, “[t]he final inquiry is always whether the amount of association between the Union and [an

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<sup>36</sup> *Id.* at 993.

<sup>37</sup> *Elec. Hose & Rubber Co.*, 262 NLRB 215, 216 (1982); *Performance Measurements Co.*, 148 NLRB 1657, 1659 (1964).

<sup>38</sup> *Georgetown Dress*, 537 F.2d at 1244.

<sup>39</sup> Restatement (Third) of Agency § 2.03 (2006).

individual] is significant enough to justify charging the Union with the conduct.”<sup>40</sup>

Accordingly, this inquiry is highly fact specific, and “[e]very case must be determined under the totality of the circumstances.”<sup>41</sup>

The Company’s claim that Guzman, a former employee, was an apparent union agent rests primarily on a single visit to a friend’s house with a union organizer and his presence at the election, where he cast a ballot although he was later determined to be ineligible to vote. The record does not support the Company’s claim, nor has the Company met the test for showing that employees would have a reasonable belief, that Guzman was acting on behalf of the Union. Furthermore, the Company’s argument stretches the bounds of apparent agency beyond the extant campaign-related caselaw.

Baiza asked Guzman to accompany him for the purpose of “getting employees to open the door and listen to [Baiza].” (JA 141; JA 81-82.) Guzman agreed to do so, but only to his friend Viera’s house. (JA 141; JA 40-41, 68-69, 82.) At this visit, Guzman showed Viera a copy of his paycheck earned with the unionized employer he joined after leaving the Company. (JA 143.) As the Board observed, the Company presented “no further evidence to suggest that Guzman played a more active role in organizing, or that [the Union] held Guzman out in

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<sup>40</sup> *Ky. Tenn. Clay*, 295 F.3d 436, 442 (4th Cir. 2002) (citing *PPG Indus., Inc. v. NLRB*, 671 F.2d 817, 822-23 n.8 (4th Cir. 1982)).

<sup>41</sup> *PPG Indus.*, 671 F.2d at 823 n.8.

such a role.” (JA 141-42.) The Union organizer merely asked for Guzman to accompany him “because [he] thought the employees were comfortable with Guzman.” (*Id.*)

As the Board concluded here, “the scant evidence in this record” did not meet the Company’s burden of proving that employees would have reasonably believed that Guzman was an agent of the Union. (JA 141.) Here, the Company has not even claimed that Guzman played a key role in the campaign or had been delegated organizing functions. The Company’s record citations do not support its claim that Guzman solicited a union authorization card from Viera or made a “joint organizing presentation” (Br. 4, 11) with Baiza. The record contains *no* evidence that Guzman ever solicited an authorization card and the Company simply stretches the record to characterize Baiza’s visit, with Guzman, to Viera’s home as a joint presentation. Similarly, there is no evidence that Baiza asked Guzman to show Viera his paycheck from his new, unionized employer, as the Company claims (Br. 12). Additionally, the Company presented no evidence that the Union relied on Guzman or other employees rather than actively conducting its own campaign. In short, the Company failed to provide sufficient evidence showing that employees would have reasonably believed that Guzman was an agent of the Union based on his visit to Viera.

Before the Board, the Company relied on Guzman's visit to Viera's home as the sole basis for its agency claim. Now, the Company injects the new suggestion that Guzman's presence at the election also shows his agency status. It claims that, as a former employee of the Company, Guzman's "sole reason for attending the vote could only have been to act as the eyes, ears and voice of the Union." (Br. 9.) Pursuant to Section 10(e) of the Act, the Court lacks jurisdiction to consider arguments not raised before the Board.<sup>42</sup> In any event, the Company again stretches the record with this new claim. In fact, the record shows only that Guzman simply came to the polling site to vote. (JA 141-42.) Because it did not elicit Guzman's testimony about why he voted, there is no support for the Company's present speculation that Guzman's voting was a ruse to surveil or campaign for the Union rather than the product of ignorance or a misunderstanding of voter eligibility requirements. Additionally, as the Regional Director noted, Guzman had only recently stopped working for the Company at the time of the election. (*Id.*) Moreover, the Company offered no evidence that the Union asked

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<sup>42</sup> *NLRB v. HQM of Bayside, LLC*, 518 F.3d 256, 262 (4th Cir. 2008) ("Pursuant to Section 10(e) of the Act, '[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.A. § 160(e) [...] This statutory provision represents a jurisdictional bar against judicial review of issues not raised before the Board." (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982))).

or even expected Guzman to come to the election as a voter or in any other capacity.

The Company's paltry showing plainly fails to demonstrate that Guzman was an apparent agent of the Union under this Court's law. Guzman's presence at one union home visit or even his presence at the election to vote does not compare to the conduct of the agents in the Company's cited cases (Br. 8-9). This Court requires much more involvement in organizing efforts to find apparent agency. For example, in *Georgetown Dress*, cited by the Company (Br. 8), the volunteer employee-members of the in-plant committee were "the union's only in-plant contact with workers," who performed core organizing tasks such as "soliciting employees to sign authorization cards, to attend [u]nion meetings, or to support and vote for the [u]nion."<sup>43</sup> In those circumstances, the Court found that the employee-members had apparent authority because "in the eyes of other employees [they] were the representatives of the union on the scene and the union authorized them to occupy that position."<sup>44</sup> In another case cited by the Company (Br. 9), *Kentucky Tennessee Clay*, employees were apparent agents of the union because they "carried out all of the organizing efforts within the facility" and were

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<sup>43</sup> *Georgetown Dress*, 537 F.2d at 1242-43.

<sup>44</sup> *Id.* at 1244.

“instrumental in every step of the campaign process.”<sup>45</sup> As this Court summarized and distinguished in *Ashland Facility Operations*, the Court in *Kentucky Tennessee Clay* found “hardly ‘any participation whatsoever’ by the union official responsible for overseeing the organizing campaign.”<sup>46</sup> In *PPG Industries*, also cited by the Company (Br. 8), the Court found the in-plant organizing committee, consisting of 300 of 1,400 bargaining-unit employees, was the union’s apparent agent where it operated as the union’s “alter ego,” fulfilling the union’s request that it solicit employees’ union support at work and at their homes, distribute union literature, and be the union’s “eyes and ears,” among other tasks.<sup>47</sup>

In contrast, in *Ashland Facility Operations*, the Court rejected the employer’s claim that the Virginia NAACP was a union agent where the union was actively running the campaign and the putative agent was not shown to be “instrumental in every step of the campaign process.”<sup>48</sup> Similarly, in *Herbert Halperin Distribution Corp.*, the Court found “the evidence [of agency] tenuous at best” where employees were outspoken union supporters but “the professional union staff was heavily involved in the campaign.”<sup>49</sup>

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<sup>45</sup> *Ky. Tenn. Clay*, 295 F.3d at 443.

<sup>46</sup> *Ashland Facility*, 701 F.3d at 990.

<sup>47</sup> *PPG Indus.*, 671 F.2d at 821.

<sup>48</sup> *Ashland Facility*, 701 F.3d at 991 (quoting *Ky. Tenn. Clay*, 295 F.3d at 443).

<sup>49</sup> *NLRB v. Herbert Halperin Distr. Corp.*, 826 F.2d 287, 291 (4th Cir. 1987).

Thus, while the Company claims that the Board departed from precedent (Br. 8-9, 11), the standard the Board applied here comports with Board and in-circuit law: the issue turns on whether third parties (here, employees) would *reasonably believe* Guzman was a union agent. (JA 141 (apparent agency shown “by evidence that the principal created a reasonable belief for a third party to believe that the alleged agent is authorized to act on behalf of the principal”).) More specifically, the cases discussed above illustrate that, in the campaign context, the Court has looked at the extent to which unions delegate organizing tasks to the putative agents or rely on their campaigning.<sup>50</sup> Where there is such delegation or reliance, it would make sense for other employees to reasonably believe that those individuals were acting on the unions’ behalf. Here, the Company has failed to show such a basis on which employees would have reasonably believed that Guzman was acting on the Union’s behalf.

## **2. The Company’s remaining factual and legal claims lack merit**

In arguing that employees perceived Guzman as an agent of the Union, the Company again mischaracterizes the evidence and standard. The Company alleges that employees Caceres and Viera perceived Guzman as “a union organizer speaking at the behest of the union and on the union’s behalf.” (Br. 12.) First, individual employees’ subjective belief is not the standard; it is their reasonable

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<sup>50</sup> *Ashland Facility*, 701 F.3d at 990-91.

belief.<sup>51</sup> Moreover, Caceres admitted that Guzman and Baiza never visited him, so his testimony about Guzman's role in the home visit was a second-hand account based on what he claims Viera told him. (JA 38.) The Company did not call Viera to testify at the hearing so its speculation regarding Viera's account of the home visit hardly fulfills its burden of proving Guzman's agency status. (Br. 12.) Similarly, apart from Viera telling Caceres about the home visit, the Company cites nothing in the record to support its additional speculation that Viera "told other employees in the small voting unit" about the home visit or that Guzman was a Union agent. (*Id.*)

In addition to mischaracterizing the facts, the Company misconstrues the Board's precedents. While the Company is correct that *Pratt Towers, Inc.*<sup>52</sup> and the cases it cites state that agency principles should be expansively construed, that phrasing only reflects that the Act's language includes apparent, as well as actual, authority.<sup>53</sup> Section 2(13) thus only states that in determining agency, "the

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<sup>51</sup> See *Metco Prods.*, 884 F.2d at 159 ("an agent is imbued with apparent authority...if a third person could reasonably interpret acts or omissions of the principal as indicating that the agent has authority to act on behalf of the principal").

<sup>52</sup> 338 NLRB No. 8 (2002).

<sup>53</sup> See *Longshoreman ILA (Coastal Stevedoring Co.)*, 313 NLRB 412, 415 n.6 (1993) (noting that Section 2(13) was added expressly to avoid a Supreme Court interpretation of the Norris-LaGuardia Act which might exempt organizations from liability for illegal acts committed in labor disputes absent a showing of actual authority).

question of whether specific acts performed were actually authorized or subsequently ratified shall not be controlling.”<sup>54</sup> It does not require that the Board must expansively apply that definition.<sup>55</sup> As we have shown, the Company failed to establish that Guzman had even apparent authority to act on the Union’s behalf.

Similarly, the Company overstates the legal significance of Guzman being an “individual” rather than an “employee.” (Br. 12-13.) This is a distinction without a difference. First, the Company does not cite any authority to support its distinction between prounion individuals and prounion employees. Election-related cases involving former employees draw no legal distinction regarding their status as nonemployees in determinations of agency.<sup>56</sup> Indeed, in *Ashland Facility*, described above, the putative agent was an organization – not even an individual, employee, or former employee – and this Court applied the same test of apparent agency applied to determine whether, under the specific circumstances, there is a reasonable belief that the putative agent is authorized to act on the principal’s behalf.<sup>57</sup>

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<sup>54</sup> 29 U.S.C. 152(13).

<sup>55</sup> *Id.*

<sup>56</sup> *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328-29 (5th Cir. 1991) (in upholding Regional Director’s determination that former employee was not an agent, court did not address any implications of nonemployee status).

<sup>57</sup> *Ashland Facility*, 701 F.3d at 990.

Given this lack of authority, the Company's objection (Br. 12-13) to the Regional Director's reliance on *Cornell Forge's* reasoning regarding prounion employees/individuals bears little significance.<sup>58</sup> (JA 142.) In fact, *Cornell Forge* holds that the Board will only find employees to be union agents when they "serve as the primary conduits for communication between the union and other employees or are substantially involved in the election campaign in the absence of union representatives."<sup>59</sup> This is the very standard that the Company, as shown above, fails to meet. Indeed, *Cornell Forge's* examination of whether professional union staff were spearheading the campaign or whether the union relied on employee organizers is consistent with the Court's approach, described above. Further, the Company's claim that the Board wrongly failed to analyze the fact pattern as one distinguishing between individuals and (former) employees overlooks that its own objection framed the analysis as involving "employees."<sup>60</sup> Its second objection alleged that "the Union, through *employees* who were its agents...engaged in improper electioneering, pressure or surveillance." (JA 7-9.)

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<sup>58</sup> *Cornell Forge Co.*, 339 NLRB 733 (2003).

<sup>59</sup> *Id.*

<sup>60</sup> *See Precision Prods. Group, Inc.*, 319 NLRB 640, 640-41 (1995) (a hearing officer does not have the authority to consider issues that are not "reasonably encompassed within the scope of the objections").

For the foregoing reasons, Company's argument fails both factually and legally to show that the Board abused its discretion in rejecting its allegations regarding Guzman. As the Company failed to establish Guzman's agency, the Board did not pass on the Company's arguments regarding his alleged electioneering or surveillance. (JA 156.)

**C. The Company Failed to Show that Raymundo's Wearing of a Union T-Shirt Before the Election Constituted Grounds for Setting Aside the Election**

The Company argues that Raymundo – as an election observer and, therefore, agent of the Union – engaged in improper electioneering requiring setting aside the election. (Br. 14, 18-19.) However, the Board has long held that an election observer's mere wearing of union insignia does not constitute improper electioneering that interferes with a free and fair election. Accordingly, while Raymundo may have been the Union's limited agent while serving as its election observer, his wearing of a T-shirt bearing the Union's insignia before the election started did not constitute objectionable conduct requiring the setting aside of the election.

Courts give the Board broad discretion in determining the "safeguards necessary to insure the fair and free choice of bargaining representatives by employees."<sup>61</sup> When assessing allegations of impermissible electioneering, the

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<sup>61</sup> *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 300 (1946).

Board determines whether the conduct, under the circumstances, “is sufficient to warrant an inference that it interfered with the free choice of the voters.”<sup>62</sup> The Board has long held that the wearing of pronunion or antiunion insignia by election observers is not per se objectionable. As it explained in *Larkwood Farms*: “[a]lthough Board instructions direct observers not to wear or display buttons and other insignia in the polling place, it has been held that the wearing of pronunion insignia by union observers does not in itself constitute interference with an election.”<sup>63</sup> This is so because “the identity of the union observer, and his special interest, are generally known to the employees,” and thus the coercive effect of observers wearing such insignia is not significant.<sup>64</sup>

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<sup>62</sup> *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118-19 (1982), *enforced*, 703 F.2d 876 (1983).

<sup>63</sup> *Larkwood Farms*, 178 NLRB 226, 226 (1969) (concluding that the wearing of a “Vote No” hat by employer’s observer at the polls did not “constitute the kind of electioneering at or near in the polling place which affects the results of an election”); *see also*, *Battle Creek Health System*, 341 NLRB 882, 900 (2004) (rejecting employer’s argument that election observers interfered with employee free choice by wearing union insignia, noting that “[l]ongstanding Board precedent persuasively explains the fallacy of such a fragile view of voters’ independence”); *W. Electric Co.*, 87 NLRB 183, 184-85 (1949) (“[t]he wearing of buttons or similar insignia at an election by participants therein is not prejudicial to the fair conduct of the election”).

<sup>64</sup> *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 864-65 (5th Cir. 1966) (citing *W. Electric*, 87 NLRB at 185); *see also* *The Nestle Co.*, 248 NLRB 732, 742 (1980) (union observer’s wearing of a pronunion bumper sticker during the election not objectionable), *enforced mem.*, 659 F.2d 252 (D.C. Cir. 1981).

The Board's rejection of the Company's assertion that Raymundo engaged in unlawful electioneering by wearing a union T-shirt as an observer thus comports with the Board's established precedent. Not only may a union observer wear union insignia before the election has started, but an observer's wearing of insignia even *during* the election does not necessitate setting the election aside.<sup>65</sup> Moreover, here several witnesses stated that Raymundo arrived at the polling place in a T-shirt with the Union's insignia on it and then changed out of this shirt *before* the polls opened. (JA 210; JA 192; JA 46-48, 75, 77.) Given that a union observer's wearing of union insignia *during* an election does not by itself constitute interference, it makes little sense to find objectionable Raymundo's conduct in simply walking by employees while wearing a union T-shirt before the election had even begun.

The Company's attempt to distinguish *Larkwood Farms* – by claiming that “it did not involve multiple union agents parading past and actually standing in the line of waiting voters” (Br. 19) – misses the point. The Board cited the case (JA 156 n.1) for the proposition that observers' wearing union insignia during voting is not in itself objectionable, a matter of law the Company does not dispute. Having failed to show objectionable conduct by Raymundo, the Company tosses in a claim that a mysterious “third union agent” wore a union T-shirt along with Raymundo,

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<sup>65</sup> *W. Electric Co.*, 87 NLRB at 184-85.

and that this constituted prohibited electioneering (Br. 17-18.) But the Company cites to evidence rejected by the hearing officer (JA 123-26), without disputing the credibility findings before this Court – and therefore waiving them.<sup>66</sup> Even ignoring that the hearing officer rejected testimony concerning this “third” unidentified person, the Company’s brief does not even identify this person to show he was a union agent or show that he engaged in objectionable conduct.

The Company also attempts to distinguish (Br. 16-18) the Board’s ruling in *Boston Insulated Wire*, claiming that the electioneering that allegedly occurred in the present case is substantially more egregious.<sup>67</sup> In *Boston Insulated Wire*, union agents passed out campaign leaflets and spoke to employees as they entered the building where the polling place was located, an area designated as a no-electioneering zone.<sup>68</sup> Nonetheless, despite noting the significance of a designated no-electioneering zone,<sup>69</sup> the Board concluded that the evidence of electioneering was insufficient to “warrant an inference that it interfered with the exercise of the

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<sup>66</sup> See, e.g., *Yousefi v. INS*, 260 F.3d 318, 326 (4th Cir. 2001) (claims not raised in opening brief are waived and cannot be raised in a reply brief).

<sup>67</sup> *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), *enforced* 703 F.2d 876 (5th Cir. 1983).

<sup>68</sup> *Id.* at 1118.

<sup>69</sup> *Id.* at 1119 n. 14 (“The Board has found the absence of a designated ‘no electioneering’ area to be significant.”).

employee's free choice.”<sup>70</sup> In contrast, here, there is no evidence or even claim that Raymundo spoke to employees on their way to vote or passed out any prounion literature while wearing a union T-shirt. Indeed, the Company claims (Br. 14, 16, 18) only that wearing the union T-shirt “in this manner communicated his pro-union message” to employees. Raymundo then entered the voting area, wearing a plain T-shirt, only for the legitimate purpose of serving as the Union's election observer. As for the unidentified “third union agent,” his agency has not been shown. Accordingly, *Boston Insulated Wire* is inapplicable because it only applies to agents. Even accepting the Company's unsubstantiated factual assertions regarding a third person's wearing a union T-shirt, the alleged electioneering in this case is insufficient to “warrant an inference that it interfered with the exercise of the employees' free choice.”<sup>71</sup>

For the foregoing reasons, the Board did not abuse its discretion in finding that Raymundo's wearing of a union T-shirt before the election was not objectionable conduct and therefore did not constitute sufficient grounds for setting the election aside. Rather, the Board comported with established precedent and properly rejected the Company's objection.

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<sup>70</sup> *Id.* at 1119.

<sup>71</sup> *Id.*

## CONCLUSION

The Company has failed to demonstrate that the Board abused its discretion in certifying the Union as the employees' bargaining representative. It accordingly must bargain with the Union. Therefore, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

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National Labor Relations Board

November 2016

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

THESIS PAINTING, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-1871, 16-2031
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	05-CA-172905
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 7,224 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC  
this 3rd day of November, 2016

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

THEISIS PAINTING, INC.	)	
	)	
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	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	05-CA-172905
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on November 3, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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

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