

**Nos. 15-1155, 15-1283**

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

**PARKVIEW COMMUNITY HOSPITAL MEDICAL CENTER**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**SEIU UNITED HEALTHCARE WORKERS-WEST**

**Intervenor for 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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MEDICAL CENTER	)	
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	)	
v.	)	Nos. 15-1155, 15-1283
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	Board Case No.
	)	21-CA-147256
and	)	
	)	
SEIU UNITED HEALTHCARE	)	
WORKERS-WEST	)	
	)	
Intervenor	)	

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

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

(a) *Parties and Amici*: The Board is respondent/cross-petitioner before the Court; its General Counsel was a party before the Board (Board Case No. 21-CA-147256). The SEIU United Health Care Workers-West (“SEIU-UHW” or “the Union”) was the charging party before the Board. Parkview Community Hospital Medical Center (“the Hospital”), petitioner/cross-respondent before the Court, was respondent before the Board.

(b) *Rulings Under Review*: This case is before the Court on a petition filed by the Company for review of an order issued by the Board on May 27, 2015, and reported at 361 NLRB No. 80. The Board seeks enforcement of that order against the Hospital.

(c) *Related Cases*: This case has not been before this or any other court. Board counsel are unaware of any related cases either pending or about to be presented to this or any other court as defined in D.C. Circuit Rule 28(a)(1)(C). The Union previously filed a petition for review in *SEIU-United Healthcare Workers-West v. NLRB*, 9th Cir. No. 15-71671, which the United States Court of Appeals for the Ninth Circuit dismissed on July 28, 2015. Mandate issued in that case on October 1, 2015.

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Dated at Washington, DC  
this 9th day of February, 2016

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**GLOSSARY OF ABBREVIATIONS**

Act	National Labor Relations Act
Board or NLRB	National Labor Relations Board
Br.	The Hospital's November 9, 2015 opening brief in this case
Hearing Officer or HO	Hearing Officer Jason E. Knepp
Hospital	Petitioner/Cross-Respondent Parkview Community Hospital Medical Center
Intervenor	SEIU United Health Workers-West (SEIU UHW) ("Union")
Regional Director	Regional Director of NLRB Region 21
Union	SEIU UHW, the Intervenor in this case

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the petition for review of Parkview Community Hospital Medical Center (“the Hospital”), and the cross-application

for enforcement of the National Labor Relations Board (“the Board”), of a Decision and Order issued by the Board on May 27, 2015, and reported at 362 NLRB No. 97. The Board’s Decision and Order (“D&O”) is final under Section 10(e) and (f) of the National Labor Relations Act (“the Act”), as amended.<sup>1</sup>

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices.<sup>2</sup> The Hospital’s petition for review and the Board’s cross-application for enforcement are timely, as the Act places no time limitation on such filings. The Court has jurisdiction over this proceeding under Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) of the Act, which allows the Board, in that circumstance, to cross-apply for enforcement.<sup>3</sup>

The Board’s Decision and Order is based, in part, on findings made in a representation (election) proceeding (Case No. 21-RC-121299). In that case, Service Employees International Union, United Healthcare Workers-West (SEIU-UHW) (“the Union”), the Intervenor in this case, sought to represent a unit of the Hospital’s employees. In that proceeding, the Board affirmed the Hearing

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<sup>1</sup> 29 U.S.C. § 151 *et seq.*, 160(e) and (f).

<sup>2</sup> 29 U.S.C. § 160(a).

<sup>3</sup> 29 U.S.C. § 160(e), (f).

Officer's Report ("HOR"), which recommended overruling the Hospital's objections and certifying the Union as the employees' bargaining representative. The record in that representation case is also before the Court pursuant to Section 9(d) of the Act.<sup>4</sup> The Court may review the Board's actions in the representation proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice order in whole or in part.<sup>5</sup> The Board retains authority under Section 9(c) of the Act,<sup>6</sup> to resume processing the representation case in a manner consistent with the ruling of the Court.<sup>7</sup>

### STATEMENT OF THE ISSUES

Whether the Board reasonably overruled the Company's election objections and certified 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. The subsidiary issues are:

1. Whether the Board acted within its wide discretion in finding no merit to the Hospital's allegations of union misconduct that affected the election's result, specifically:

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<sup>4</sup> 29 U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964); *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996).

<sup>5</sup> 29 U.S.C. § 159(d).

<sup>6</sup> 29 U.S.C. § 159(c).

<sup>7</sup> *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

- (a) whether the Union's campaign flyers constituted a forgery, pervasive misrepresentation, or artful deception, such that they interfered with employee free choice; and
- (b) whether the Union engaged in objectionable conduct warranting a new election by switching one of its observers midway through the first polling session.
2. Whether the Board acted within its wide discretion in finding no merit to the Hospital's allegations of Board agent misconduct including permitting the Union to substitute an observer, allowing one employee's name to be marked off the eligible-voters' list before she came to vote, and telling a voter not to worry about presenting identification.

### **RELEVANT STATUTORY PROVISIONS**

Relevant sections of the Act are reproduced in the Addendum to this brief.

### **STATEMENT OF THE CASE**

After the Union prevailed in the January 27, 2014 Board-conducted representation election by a vote of 251 to 190, the Board certified it to represent a unit of the Hospital's service, maintenance, and technical employees. Thereafter, the Hospital refused to bargain with the Union. The Board seeks enforcement of its Decision and Order finding that the Hospital violated Section 8(a)(5) and (1) of

the Act,<sup>8</sup> by refusing to recognize and bargain with the Union. The Hospital does not dispute that it is refusing to bargain with the Union; rather, it contends that it had no duty to do so because the Board improperly certified the Union in the underlying election proceeding.

In that proceeding, the Board overruled the Hospital's objections after reviewing the record from a seven-day hearing and adopting the Hearing Officer's findings and recommendations. The Board found that the Hospital failed to meet its burden of proof. The pertinent facts found by the Board, and the procedural history of the case, are set forth below.

## **I. THE BOARD'S FINDINGS OF FACT**

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

#### **1. Background**

The Hospital is an acute-care hospital in Riverside, California. (JA 536; 11-14.) On January 27, 2014, the Union filed a representation petition seeking certification as the collective-bargaining representative of a unit of service, maintenance, and technical employees. (*Id.*) The Hospital and the Union ("the parties") signed a Stipulated Election Agreement to hold an election supervised by the Board's Regional Director. (*Id.*)

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<sup>8</sup> 29 U.S.C. § 158(a)(5) and (1).

## **2. Union campaign flyers are distributed and posted**

Around mid-February, a two-page union flyer was posted in employee break rooms, in English on the front and Spanish on the back. (JA 158-61, 325-27, 332-33, 495-96.) The flyer included four group photographs of employees at the top and one individual photograph near the middle on the left side, and stated, *inter alia*, “Let’s Join Our RNs in Winning Fairness at Parkview,” and instructed readers to attend one of three informational meetings on February 19. (JA 495-96.) The Union also created a four-panel flyer, which was posted in the Hospital’s break rooms for a day or two before the March 13 election. The flyer contained a heading that said, “On March 13 THE STRONG MAJORITY ARE VOTING YES for SEIU-UHW at Parkview Community Hospital,” and underneath that heading were approximately 90 photographs of employees, which included individual and group shots. (JA 546; 150-52, 158-61, 180, 340-43, 387-91.)

## **3. The Union substitutes one election observer during the first polling session**

The March 13 election was held in four polling sessions: 6:30 a.m. to 8:30 a.m., 12:00 p.m. to 1:00 p.m., 2:30 p.m. to 4:00 p.m., and 6:00 p.m. to 8:30 p.m. (JA 544 n.3.) Before each polling session, the assigned Board agents held a pre-election conference with representatives of the Union and the Hospital. (JA 105-06, 169, 210-11, 218-20, 280.) During the conference before the first polling session, a union representative informed Board Agent John Hatem that the Union

intended to switch observers midway through the first session, and Hatem agreed. (JA 266, 280, 346, 389, 397, 420-21.) Employees Stephanie Cumpton and Gloria Gomez served as the Union observers for the first half of the first polling session, and Verano replaced Cumpton at approximately halfway through that session.<sup>9</sup> (JA 555; 130-31, 133, 246-49, 423.) The switch took no longer than one minute and no voters were present to witness the switch. (JA 555-56; 133, 169, 250, 394-95, 400, 412, 422.) Verano and Cumpton did not act simultaneously as Union observers. (JA 556-57.)

**4. One voter's name was already checked off the voting list when she went to vote**

Employee Melody Garcia went to vote during the second polling session, and she was informed that her name was already checked off the voter-eligibility list. Because her name was marked off, she voted a challenged ballot.<sup>10</sup> (JA 557-

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<sup>9</sup> Observers represent their respective parties at the election, monitor the voting process, identify voters, challenge voters and ballots, and assist the Board agent in the conduct of the election. *See* NLRB Casehandling Manual, Representation Proceedings, §11310.3 (2014) *available at* <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM2-Sept2014.pdf> (last visited Dec. 14, 2015).

<sup>10</sup> The Board's challenged ballot procedure involves having the challenged employee vote on a regular ballot and place it in a challenged-ballot envelope with her name, the reason for the challenge, the identity of the challenger, and the Board agent's initials on it. *See id.* at §11338.3. *See also id.* at §11340.8 (non-determinative challenged ballots are ordinarily not counted and, after the election, are maintained in a separate physical folder with the Board case name and number).

59; 61-63, 68, 77-80, 430-32, 463-72.) Garcia saw the voter-eligibility list that the female Board agent was holding and noticed that there were six Garcias on the list and that all of them had been checked off. (JA 559; 67-68, 81-83, 463-72.) Garcia asked Board Agent Hatem why her name was checked off and he told her that it was likely a mistake. (JA 557-58; 70, 84-86, 92-94, 107-09, 263.)

**5. After the second polling session, the Hospital requests that the Board require voters to present identification; for the last two polling sessions, the Regional Director requires identification if the observers cannot agree on the voter's identity**

During the conference after the second polling session, the Hospital's attorney requested that the Board agents require voters to present identification prior to receiving a ballot, because the Hospital had concerns about potential voter fraud. (JA 561; 348-53, 428, 447-48.) At the conference prior to the third voting session, Board Agent Hatem announced that the Regional Director authorized the Board agents to require identification if the observers could not agree on the voter's identity. (JA 561; 354-59, 429, 442, 449.) All of the Hospital's and Union's observer-witnesses from the third and fourth sessions agreed that the Board agents instructed them to check voter identification and that identification was consistently checked before voters received a ballot. (JA 562; 212-17, 221, 283, 419, 427.) No voter was permitted to vote without presenting identification or having each party's observers agree on the voter's identity. (JA 562; 194, 284-86, 299-300.)

**6. An employee overheard Board Agent Hatem tell a voter during the third session to show identification, but not to worry if the voter did not have identification**

Employee Sandra Lee Buehrle voted early in the third session. When she came into the polling room, she overheard Board Agent Hatem tell another voter, “you’ll come up to the table, give your name. If you have identification, show it. If you don’t, don’t worry about it,” and then he shrugged his shoulders. (JA 562; 193.) Buehrle understood his statement to mean that a voter would still get to vote without identification. (JA 193.)

**7. After the Union’s election victory, the Hospital has its observers review employee photographs to see if anyone voted more than once**

The official tally of ballots showed that out of 521 eligible voters, a total of 467 ballots were cast, with 251 employees voting for the Union and 190 employees voting against. (JA 536-38; 15.) There were 7 void ballots and 19 challenged ballots. (JA 538.) The number of challenged ballots was insufficient to affect the election results. (JA 538; 87.) The Hospital timely filed its 19 objections on March 20.<sup>11</sup> (JA 538; 16-19.)

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<sup>11</sup> As the Hospital explains (Br. 4, n. 4), after the Hospital withdrew Objections 3, 5, 6, 9, 14, and 19, the Hearing Officer renumbered the remaining Objections 1 through 13 in his Report. To avoid any confusion, the Board will also refer to the Hospital’s Objections by their original numbers.

At some point after the election, in late March or as late as mid-April, the Hospital had all of its election observers review photographs of unit employees that the Hospital had on file in order to determine if anyone voted more than once. (JA 558, 560; 111-12, 116-17, 120-22, 165, 229-31, 242-43, 245, 267-68, 270-74, 301-03.) The observers collectively identified 11 employees as voting during at least 2 different polling sessions, but each of those alleged double voters only voted once. (JA 559; 101-02, 134-40, 143, 197-98, 224-27, 251, 254-61, 268-69, 278-79, 287-91, 294-98, 366, 369, 373, 377-78, 381, 384, 386, 391, 454, 459, 462, 473-74, 478-84, 493-94.)

#### **8. The Board certifies the Union as the employees' bargaining representative**

The Objections remaining before the Court allege that the Union and Board agents engaged in misconduct that requires a new election.<sup>12</sup> Specifically, in Objection 4, the Hospital alleged that the Union misrepresented employee support for the Union by distributing a flyer containing employee names and photographs without their consent. (JA 18.) Objection 12 alleged that the Union had one more observer during the first voting session than the Hospital, which was not authorized by the Stipulated Election Agreement and the Regional Director's pre-election

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<sup>12</sup> The Hospital stated (Br. 5, n.5) that it is only pursuing Objections 4, 12, 13, 15, and 16 before this Court. It had previously withdrawn Objections 3, 5, 6, 9, 14 and 19. (JA 540; 534.)

letter providing for two observers per party for each voting session. Related Objection 13 alleged that the Board agents' permitting the Union to do that was improper. (JA 19.) Objection 15 alleged that someone must have cast an unchallenged ballot under employee Melody Garcia's name, because when she came to vote, her name had already been checked off, and therefore the Board agents failed to properly supervise and control the eligible-voter list. (*Id.*) Finally, Objection 16 alleged that one Board agent improperly told a voter not to worry about presenting identification if the voter did not have identification. (*Id.*)

After a preliminary investigation, the Regional Director ordered an evidentiary hearing. (JA 540; 21-55.) That hearing was held from June 3-6 and 9-11 and the parties filed post-hearing briefs. (JA 540; 57, 126, 236, 336, 361, 413, 443.)

On August 29, Hearing Officer Jason E. Knepp issued a report recommending that the Board overrule the remaining Objections. (JA 536-67.) The Hospital then filed exceptions to that report with the Board. (JA 568-79.) On January 30, 2015, the Board (Chairman Pearce, Members Johnson and McFerran) adopted the Hearing Officer's findings and recommendations and certified the Union as the bargaining unit employees' collective-bargaining representative. (JA 580-84.)

## II. THE UNFAIR-LABOR-PRACTICE PROCEEDING

The Union sent two letters to the Hospital in February 2015, which requested that the Hospital engage in collective bargaining. (JA 585-88.) The Hospital failed to respond to either letter. (JA 613.) On February 26, 2015, the Union filed a charge with the Board alleging that the Hospital unlawfully refused to recognize and bargain with the Union. (JA 580.) After an investigation, the Board's General Counsel issued an unfair-labor-practice complaint alleging that the Hospital violated Section 8(a)(5) and (1) of the Act.<sup>13</sup> (*Id.*) The Hospital admitted its refusal to recognize and bargain with the Union, but contested the validity of the Union's certification based on its Objections. (*Id.*) The General Counsel then filed a motion for summary judgment and the case was transferred to the Board. (*Id.*)

## III. THE BOARD'S CONCLUSIONS AND ORDER

On May 27, 2015, the Board (Chairman Pearce, Members Johnson and McFerran) granted the General Counsel's motion for summary judgment and found that the Hospital violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. (JA 580-81.) The Board found that all representation issues raised by the Hospital were or could have been litigated in the representation proceeding and that the Hospital neither offered to adduce newly-discovered or

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<sup>13</sup> 29 U.S.C. § 158(a)(5) and (1).

previously-unavailable evidence nor alleged any special circumstance that would require the Board to reexamine its decision in the representation proceeding. (JA 580.)

The Board's Order requires the Hospital to cease and desist from the unfair labor practices found and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.<sup>14</sup> (JA 581.) Affirmatively, the Board's Order requires the Hospital to bargain in good faith with the Union and, if an understanding is reached, embody the understanding in a signed agreement. (*Id.*) The Board's Order also requires the Hospital to physically and electronically post paper copies of a remedial notice to its employees. (JA 582.)

### SUMMARY OF ARGUMENT

The Board acted well within its wide discretion in overruling the Hospital's Objections. The Hospital failed to produce competent and credible evidence to establish that misconduct even occurred, much less that it was sufficiently serious to overturn the secret-ballot election.

**1. Union Campaign Flyers:** The Hospital's Objection 4, which alleges that the Union engaged in objectionable conduct by failing to obtain employees' express consent before using their names and photographs in its flyers, rests on the

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<sup>14</sup> 29 U.S.C. § 157.

dissenting opinions from two recent Board decisions. Under well-established Board precedent, however, the Union's flyers did not constitute objectionable election misconduct requiring a rerun election because they were identifiable as campaign propaganda and did not constitute a forgery, pervasive misrepresentation, or artful deception.

**2. Election Observer Substitution:** The Hospital's Objection 12 alleges that the Union engaged in misconduct by switching one observer for another during a polling session. Under court-enforced Board law, it is not objectionable conduct for a party to switch observers during a polling session, and the switch here comported with Board election procedures. The Hospital has offered no apposite authority to support its argument. And the Hospital's speculation that the substitution permitted the Union to potentially gain an unfair advantage and/or engage in unspecified misconduct is insufficient to meet its evidentiary burden.

The Hospital's Objection 13 varies from Objection 12 by alleging that the Board agent's conduct in permitting the observer switch, rather than the Union's conduct, requires a new election. The Hospital's Objection 13 fails for the same reasons that Objection 12 failed. Additionally, the Hospital failed to meet its evidentiary burden of providing objective evidence of the potential impact of the substitution on the election, especially where no voter even witnessed it.

**3. Alleged Voter Fraud:** The Hospital's Objection 15 alleges that voter fraud or the appearance of voter fraud requires a new election. Initially, its argument that the Board improperly "speculated" that the observers accidentally crossed off a voter's name, even though she had not voted, ignores court-enforced Board precedent permitting the Board to make logical inferences regarding benign reasons for why events, such as the employee's name already being checked off, occurred. Given the deference due the Board's credibility resolutions, which determined that no double voting or fraud occurred, the Hospital's attacks must fail. But, even if the credibility-based determination that the Hospital failed to establish double voting was incorrect, court-enforced Board precedent provides that a new election is not required in circumstances such as this one, because the Union would still prevail in the election if all the votes in question were added to the Hospital's total and deducted from the Union's.

**4. Voter ID Requirement:** Finally, the Hospital's Objection 16 frivolously argues that a new election is required because a Board agent told a voter not to worry about providing identification if the voter did not have it and then shrugged his shoulders. The Board reasonably found that nothing about the asserted statement or gesture indicated that the Board agent did not follow the proper procedure of having a voter who could not be identified vote subject to challenge or the directive to require identification where observers did not agree on a voter's

identity. Indeed, all witnesses who served as observers during those sessions testified that the Regional Director's directive was followed. Additionally, the Board agent's alleged statement was not contrary to the Regional Director's requirement. But, even if it was, a new election is not required because the Hospital failed to provide *any* objective evidence of the potential impact of the Board agent's statement on the election.

### ARGUMENT

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

An employer violates Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the representative of its employees.<sup>15</sup> The Hospital admits (Br. 4) that it has refused to bargain with the Union. It asserts, however, that its refusal did not violate Section 8(a)(5) and (1) because the Board improperly overruled its Objections and certified the Union. As shown below, the Hospital's arguments are meritless.

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<sup>15</sup> A violation of Section 8(a)(5) produces 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." *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

### A. Standard of Review

As the Supreme Court has recognized, when Congress enacted Section 9 of the Act, it “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>16</sup> Thus, on questions that arise in the context of representation elections, the Court “accord[s] the Board an especially ‘wide degree of discretion,’” and the Court will only overturn the Board’s order to bargain upon finding that the Board abused that wide discretion.<sup>17</sup> Furthermore, the Supreme Court has also recognized that a Board-conducted representation election is presumed to be fair and regular, unless proven otherwise, and the objecting party has an especially heavy burden.<sup>18</sup> In applying that presumption, the Court recognizes that “there will be minor (and sometimes major, but realistically harmless) infractions by both sides.”<sup>19</sup>

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<sup>16</sup> *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); accord *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996); *Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970).

<sup>17</sup> *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002) (quoting *A.J. Tower*, 329 U.S. at 330).

<sup>18</sup> See *NLRB v. Mattison Mach. Works*, 365 U.S. 123, 123-24 (1961) (per curiam); see also *Antelope Valley*, 275 F.3d at 1095.

<sup>19</sup> *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 571 (D.C. Cir. 1970) (courts give the Board “latitude in its effort to balance the right of the employees to an untrammelled choice, and the right of the parties to wage a free and vigorous campaign.”) (citation and internal quotation marks omitted); see also *NLRB v.*

Under the Act, the Board's findings of fact are "conclusive" if supported by substantial evidence considered on the record as a whole.<sup>20</sup> The Court may not displace the Board's choice between fairly conflicting views of evidence "even though the court would justifiably have made a different choice had the matter been before it *de novo*."<sup>21</sup> Board credibility determinations will only be disturbed upon a showing of "the most extraordinary circumstances" such as "utter disregard for sworn testimony or the acceptance of testimony which is on its face incredible."<sup>22</sup>

**B. The Board Did Not Abuse Its Wide Discretion in Overruling the Hospital's Election Objections Regarding Union Conduct**

A party objecting to the election based on another party's actions must demonstrate not only that misconduct occurred, but also that it "interfered with the employees' exercise of free choice to such an extent that [it] materially affected the

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*Lovejoy Indus.*, 904 F.2d 397, 402 (7th Cir. 1990) ("The statute does not require the Board to treat employees as if they were bacteria on a petri dish that must be kept free of contamination.")

<sup>20</sup> 29 U.S.C. § 160(e).

<sup>21</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); accord *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998); see also *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1988) (substantial evidence standard is satisfied "if it would have been possible for a reasonable jury to reach the Board's conclusion.").

<sup>22</sup> *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984) (citation omitted).

results of the election.”<sup>23</sup> The Hospital has not met that burden.

**1. The Board Reasonably Overruled Objection 4 Regarding the Union’s Campaign Flyers**

**a. Principles regarding campaign flyers alleged to be misleading**

The Hospital alleges (Br. 43-46) that the Board should have ordered a new election, because the Union’s flyers, which used employee names and photographs without their express consent, not only misrepresented employee support for the Union, but also interfered with employees’ free choice. As explained below, the Hospital’s contention is contrary to Court-enforced Board precedent.

The Board’s *Midland*<sup>24</sup> standard and its progeny, which the Court has recognized as the Board’s “longstanding and controlling precedent,” applies in cases where the objecting party seeks to overturn an election based on another party’s misrepresentations.<sup>25</sup> Under *Midland*, the Board “will not set elections aside on the basis of misleading campaign statements.”<sup>26</sup> Rather, campaign statements are objectionable “only in ‘cases where a party has used forged

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<sup>23</sup> *Amalgamated Clothing Workers*, 424 F.2d at 827 (citation omitted); *see also Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 270 (D.C. Cir. 1998); *CJ Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988).

<sup>24</sup> *Midland Nat’l Life Ins. Co.*, 263 NLRB 127, 133 (1982).

<sup>25</sup> *See Majestic Star Casino, LLC v. NLRB*, 373 F.2d 1345, 1348 (D.C. Cir. 2004).

<sup>26</sup> *Midland*, 263 NLRB at 133.

documents which render the voters unable to recognize propaganda for what it is.”<sup>27</sup> The Board has consistently applied *Midland* in cases “where unions circulate campaign literature that identifies individual employees as union supporters, as well as attributing pro-union statements to them or representing that they intend to vote for the union,” and it has “uniformly reject[ed] election objections based on such literature.”<sup>28</sup> The Court has upheld the Board’s application of *Midland* in those circumstances.<sup>29</sup>

Although slightly different than *Midland*, the Sixth Circuit’s *Van Dorn* standard—relied upon by the Hospital (Br. 44) and acknowledged as an additional rationale by the Board (JA 548)—provides that it is objectionable election misconduct where, although no forgery can be proved, “the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate

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<sup>27</sup> *Majestic Star Casino*, 373 F.3d at 1349 (quoting *Midland*, 263 NLRB at 133).

<sup>28</sup> *Durham Sch. Servs., LP*, 360 NLRB No. 108, 2014 WL 1879433, at \* 2 (May 9, 2014) (citing cases), *review pending*, Case Nos. 14-1284 & 15-1017 (D.C. Cir.).

<sup>29</sup> *See U-Haul Co. of Nev. v. NLRB*, 490 F.3d 957, 963 (D.C. Cir. 2007) (upholding Board’s application of *Midland* to overrule objection based on “a few allegedly forged signatures” on a petition the union distributed); *see also NLRB v. Enter. Leasing Co.-Se., LLC*, 722 F.3d 609, 617 (4th Cir. 2013) (approving Board’s application of *Midland* to overrule objection that union used employee’s photograph on campaign literature without his consent, which “would still amount to a mere misrepresentation”), *aff’d in* 2015 WL 7423185, at \*3 (4th Cir. Nov. 23, 2015) (*per curiam*).

truth from untruth and where their right to a free and fair choice will be affected.”<sup>30</sup>

There, the court concluded that, despite “misrepresentations concerning wage rates [obtained in a union contract with another employer] and, possibly, the identity of the union involved with the other employer,” the union’s distribution of the flyer shortly before the election was not objectionable where it was not a forgery.<sup>31</sup>

Recently, in *Durham School Services*, the Board found that under either the *Midland* or *Van Dorn* standards, a union did not engage in objectionable election conduct even if an employee did not actually support the union as a union flyer with her signature on a petition indicated, because it contained no forgery.<sup>32</sup>

Rather, at most, the employer’s evidence suggested “a possible misrepresentation of an employee’s sentiments” in the flyer, which was easily recognizable as campaign propaganda. That did not satisfy the either the Board’s *Midland* “forgery” standard or the *Van Dorn* “pervasive” misrepresentation or “artful” deception standard.<sup>33</sup>

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<sup>30</sup> *Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984).

<sup>31</sup> *Id.* at 347.

<sup>32</sup> 360 NLRB No. 108, 2014 WL 1879433, at \* 2-3.

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

**b. The Union's campaign flyers were not objectionable**

In the instant case, the Board reasonably found (JA 581, 547-48) that under either the Board's *Midland* "forgery" standard<sup>34</sup> or the *Van Dorn* "pervasive" misrepresentation or "artful" deception standard,<sup>35</sup> the Union's inclusion of Booker and Mirabel's pictures and names in its flyers was not objectionable conduct. The Hospital does not allege any forgery. With regard to the alleged misrepresentation or deception in the flyers, it alleges that Mirabel and Booker did not consent to having their photographs included. (JA 546-47 & n.6.) The Board concluded that, even assuming that Mirabel and Booker did not consent to have their photographs in the flyer, the Hospital's evidence did not satisfy either the *Midland* or *Van Dorn* standards. (JA 581, 546-47.) That is, at most, the Hospital's evidence established that "perhaps a bargaining unit employee's picture appeared in a campaign flyer distributed by the [Union] without the employee's express consent allowing the [Union] to use her likeness."<sup>36</sup> (JA 581, 547-48.) And applying the reasoning from *Durham School Services*, which "closely parallel[s] the fact scenario presented" here, the Board reasonably determined that the Union's flyer was not

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<sup>34</sup> See *Midland*, 263 NLRB 127.

<sup>35</sup> See *Van Dorn*, 736 F.2d at 348.

<sup>36</sup> See *U-Haul Co.*, 490 F.3d at 963 (allegedly forged signatures on union petition merely "suggested more employees supported the Union than may have been the case," but "would not have prevented employees from recognizing that the Union was circulating the petition to garner support for its cause.").

objectionable under *Midland* or *Van Dorn* because, even if it did include Mirabel's or Booker's photograph without their express permission, an employee would certainly understand the flyer as campaign propaganda because it was "clearly identified" as such.<sup>37</sup> (JA 581, 547-48.) This outcome is consistent with similar Board analyses of alleged misrepresentations of employee support in campaign material.<sup>38</sup>

In arguing (Br. 46) that the Union's flyer "artfully deceptive about employee support," the Hospital does not claim that the Board misapplied extant precedent. Instead, its position is premised (Br. 45-46) only on dissents in two recent Board decisions, which advocate for a change in the law whereby it would

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<sup>37</sup> See *Champaign Residential Servs.*, 325 NLRB 687, 687 (1998) (*Midland* standard not satisfied where "it was clear from the face of the flyer that it emanated from the [union]").

<sup>38</sup> See, e.g., *Somerset Valley Rehab. & Nursing Ctr.*, 357 NLRB No. 71, 2011 WL 4498270, at \*2-3 (Aug. 26, 2011) (union flyer included employee photographs and "voting yes" quotes; no forgery under *Midland* and no "pervasive misrepresentation or deception so artful that employees were unable to separate truth from untruth"), *petition for review pending*, Case Nos. 12-1031 and 12-1505 (3rd Cir.); *BFI Waste Servs.*, 343 NLRB 254, 254 n.2 (2004) (flyer could not be pervasive misrepresentation as only two employees' quoted sentiments were arguably misrepresented; no "artful deception," because employees could verify accuracy of union's quotes for themselves); *Champaign Residential Servs.*, 325 NLRB at 687 ("vote yes" petition not objectionable under *Van Dorn* where "misrepresentations in the gathering and compilation of the signatures were minimal" and most employees knew or should have known their signatures indicated support for the union and would be shared); *Findlay Indus.*, 323 NLRB 766, 766 (1997) (no pervasive misrepresentation where only 2 signatures out of 190 on a handbill may have been forged).

be objectionable conduct for a party to represent or disclose how employees intend to vote without their express permission. The Hospital quotes (Br. 45-46) at length *Allegheny Ludlum*,<sup>39</sup> which one of those dissents cited. *Enterprise Leasing* similarly involved a claim that a union used an employee's photograph in campaign literature without his consent.<sup>40</sup> In *Enterprise*, the Board recognized that *Allegheny Ludlum* "is inapposite"<sup>41</sup> because it did not involve alleged misrepresentation of employee support; that employer unlawfully *polled* employees by soliciting them to participate in a campaign video.<sup>42</sup> As in *Enterprise Leasing*, here the question before the Board here was an entirely different one—whether a piece of easily identifiable union campaign propaganda, which assertedly misrepresented the sentiments of 2 employees out of over 500, could so interfere with employees' free choice as to materially affect the results of the election.<sup>43</sup> Because employees would reasonably identify the flyer as Union campaign propaganda and no forgery, pervasive misrepresentation, or artful deception existed, the answer to that question under either *Midland* or *Van Dorn*,

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<sup>39</sup> 333 NLRB 734 (2001).

<sup>40</sup> 357 NLRB No. 159, 2011 WL 6853530, at \*2-4 (Dec. 29, 2011), *enforced*, 2015 WL 7423185, at \*3 (4th Cir. Nov. 23, 2015) (per curiam).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See generally *Amalgamated Clothing Workers*, 427 F.2d at 827.

as a matter of law, is “no.”

**2. The Board Acted Within its Wide Discretion in Overruling Objection 12, Which Alleged That the Union Improperly Substituted Election Observers Midway through the First Polling Session**

The Board acted well within its wide discretion in overruling the Hospital’s Objection 12 regarding the Union’s observer substitution where, as here, the election was conducted in accordance with the terms of the Stipulated Election Agreement and Board election procedures. (JA 581, 555-57.) Moreover, the record showed that the union observers who swapped places never served simultaneously as no voter was there or witnessed the swap, the switch took no longer than one minute, and the switch did not cause any disruption. The Hospital provided nothing other than baseless speculation about the harm it could have suffered from the substitution.

Under court-enforced Board law, it is not objectionable conduct for a party to swap observers during a polling session.<sup>44</sup> Additionally, the substitution of observers comports with Board election procedures. The Board’s Casehandling Manual for representation cases contemplates substitution of observers where it

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<sup>44</sup> *NLRB v. Innovative Facility Servs., LP*, 310 F. App’x. 415, 416 (2d Cir. 2008) (not objectionable for the union to use three observers who swapped into one position; no breach of election agreement that each party would have only one observer), *enforcing* 349 NLRB No. 9, 2007 WL 159728 (Jan. 18, 2007).

acknowledges that observers may “work in shifts” or “relieve each other.”<sup>45</sup>

As the Board explained (JA 556), the danger with an imbalance of observers is the impression of predominance and partiality of the Board. Here, however, at no time did the Union have more than two individuals functioning as observers. Thus, the Board properly found (JA 556-57) that the Union’s substitution of employees to fill one of its two observer positions created no imbalance warranting reversal of the election. Moreover, there was no evidence that any voter was affected by or was even aware of the quick substitution, as the record showed that no voters were in the polling area at that time. (*Id.*)

Despite lacking any evidence that the observer substitution affected any voter, the Hospital insists (Br. 40) that it materially breached the election agreement. It offers no apposite authority to show that a mere substitution is a material breach of the agreement. The cases the Hospital relies upon are easily distinguishable because they involved either an actual imbalance in the number of

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<sup>45</sup> NLRB Casehandling Manual, Representation Proceedings, §11310.3 (2014) (“[i]f observers are to work in shifts, or to relieve each other, all such arrangements are to be made and policed by the head observers”), *available at* <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM2-Sept2014.pdf> (last visited Dec. 14, 2015).

observers<sup>46</sup> or situations where a party was not permitted to have any observers.<sup>47</sup>

Here, there was no such actual imbalance, because the Union never had more than two individuals performing observer duties at any time, as the Hospital admits (Br. 41), and both parties were permitted to have two observers per polling session.

Thus, the Hospital cannot establish that the alleged misconduct interfered with the employees' exercise of free choice to such an extent that it materially affected the results of the election.

Lacking any supporting evidence or authority, the Hospital asserts (Br. 42) that the observer swap was done with "no reason whatsoever" (Br. 41), and then supplies its presumption (Br. 42) that the Union did it "to obtain information in the first voting session about who had and had not voted, and about what was transpiring in the election." Where the simple substitution comported with Board procedure, no explanation was necessary. And unfounded theories of nefarious union plots do not meet the Hospital's heavy burden of proving its objection with

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<sup>46</sup> See *Frontier Hotel v. NLRB*, 625 F.2d 293, 295 (9th Cir. 1980) (overturning the election results because "the *imbalance* in the number of observers, with the acquiescence of the Board agent, could create the impression of predominance on the part of the [u]nion and partiality on the part of the Board") (emphasis added).

<sup>47</sup> See *Browning Ferris Indus. of Calif.*, 327 NLRB 704 (1999) (new election required where union was prohibited from utilizing individuals who were no longer employees of the employer as observers, thereby allowing two employer observers and no observers for the union), and *Breman Steel Co.*, 115 NLRB 247, 248-49 (1956) (new election required where party was precluded from having an observer).

specific evidence.<sup>48</sup>

**C. The Board Acted Within Its Wide Discretion in Overruling the Hospital's Objections 13, 15, and 16, Which Alleged Board Agent Misconduct That Requires a New Election**

The Hospital alleges (Br. 27-43) that a rerun election is required because the Board agents (1) permitted the Union to substitute its election observers in one polling session, (2) allowed the appearance of voter fraud where one voter's name was incorrectly checked off as having voted and some employees allegedly voted more than once, and (3) a Board agent told a voter not to worry if the voter lacked identification. The Board reasonably overruled each of these objections because the Hospital failed to meet the standard for objectionable Board agent misconduct. Specifically, the Hospital failed to show that the “the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election[,]”<sup>49</sup> or provide “objective evidence of the potential impact of a Board agent's conduct on the election in order to establish the reasonable possibility that

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<sup>48</sup> *Amalgamated Clothing Workers*, 424 F.2d at 827-28 (citation omitted); *see also Mattison Mach. Works*, 365 U.S. at 123-24 (an objecting party must prove that the incident affected the election's fairness); *NLRB v. Arthur Sarnow Candy Co.*, 40 F.3d 552, 558-59 (2d Cir. 1994) (“[i]t is not enough to show merely the possibility that the election was unfair”).

<sup>49</sup> *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enforced*, 414 F.2d 999 (2d Cir. 1969).

the election process has been tainted.”<sup>50</sup>

**1. The Board acted within its wide discretion in overruling the Hospital’s Objection 13 regarding the Union-observer swap**

The Hospital argues (Br. 39) that a new election is required because “the Board Agents allowed the Union to station more Observers in the polling area than authorized by the Regional Director and stationed by the Employer.” Objection 13 varies from Objection 12 only in its allegation that the Board’s conduct of permitting the observer swap, rather than the Union’s conduct, requires a new election. This objection is frivolous for the same reasons discussed above, pp. 25-28. The Board agent’s handling of the situation comported with the Casehandling Manual, described above, which also states that “care should be taken, in any doubtful case, to accord each party every opportunity for representation.”<sup>51</sup> Indeed, had the substitution not been allowed, the *lack* of a second union observer may have breached the Stipulated Election Agreement’s requirement that each side have two observers, creating an objectionable imbalance in observers.<sup>52</sup>

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<sup>50</sup> *Allied Acoustics, Inc.*, 300 NLRB 1181, 1181 (1990).

<sup>51</sup> NLRB Casehandling Manual, Representation Proceedings, §11310.1, 11310.3.

<sup>52</sup> *See Browning-Ferris Indus.*, 327 NLRB at 704 (election overturned where Board agent allowed election to proceed with two employer observers and none for the union).

Contrary to the Hospital's contention (Br. 41-42), the Board properly relied on *Inland Waters Pollution Control*.<sup>53</sup> The Board cited it (JA 557) for the principle that it is within the Board agent's discretion to ascertain whether requested changes during the election are possible to implement. With the example of a late-arriving observer, a Board agent would determine if it was possible to instruct and position that observer without interrupting the polling or creating an appearance of unfairness.<sup>54</sup> That principle was applicable here, because the observer switch did not cause any disruption, as Verano did not need instructions because she had attended the pre-election conference. In addition, because no voter observed the switch, it could not create any appearance of partiality or impression of unfairness.

**2. The Board acted within its wide discretion in overruling the Hospital's Objection 15 alleging voter fraud**

**a. Applicable principles regarding alleged voting irregularities**

The Board has long recognized that the "safeguards of accuracy and security thought to be optimal in typical election situations . . . may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of

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<sup>53</sup> 306 NLRB 342, 343 (1992).

<sup>54</sup> *Id.*

circumstance.”<sup>55</sup> Accordingly, the Board, with court approval, applies a rule of reason to objections based on alleged election irregularities.<sup>56</sup> Under the Board’s rule, as applied by this Court, an election will not be set aside because of alleged election irregularities attributable to Board agent conduct unless the objecting party presents “evidence that raises a reasonable doubt as to the fairness and validity of the election” as a result of that conduct.<sup>57</sup> Thus, a party alleging that a Board Agent deviated from typical election procedures “must show that such deviation had a material effect on the election such as an impact on an individual vote.”<sup>58</sup> If the alleged deviations do not rise to that standard, “minor (and sometimes major, but realistically harmless) infractions” do not necessitate overturning the election.<sup>59</sup>

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<sup>55</sup> *Polymers*, 174 NLRB at 282; *see also Serv. Corp. Int’l v. NLRB*, 495 F.3d 681, 684 (D.C. Cir. 2007).

<sup>56</sup> *See, e.g., Rochester Joint Bd., Amalgamated Clothing & Textile Workers Union v. NLRB*, 896 F.2d 24, 27 (2d Cir. 1990) (there is no “*per se* rule that representation elections must be set aside following any procedural irregularity”); *NLRB v. Precise Castings, Inc.*, 915 F.2d 1160, 1164 (7th Cir. 1990) (because “[r]erunning elections, or litigating about their validity, may frustrate indefinitely the implementation of the employees’ legitimate selection[,] [c]hoosing how much imperfection to accept is for the Board”).

<sup>57</sup> *Physicians & Surgeons Ambulance Serv., Inc.*, 356 NLRB No. 42, 2010 WL 4929682, at \*1 (2010) (internal quotations omitted), *aff’d*, 477 F. App’x 743 (D.C. Cir. 2012); *accord Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 263 (4th Cir. 2000).

<sup>58</sup> *Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117, 1123 (D.C. Cir. 2012).

<sup>59</sup> *Serv. Corp. Int’l*, 495 F.3d at 684; *accord Elizabethtown Gas Co.*, 212 F.3d at 263.

Indeed, in cases where there was credited evidence that an employee voted more than once, the Board, with court approval, concluded that the incidents did not require a rerun election if the extra vote, when credited toward the objecting party, would not change the election results.<sup>60</sup>

**b. The Board acted within its wide discretion in concluding that the Hospital had not met its burden of demonstrating that the Board agents allowed voter fraud**

In Objection 15, the Hospital alleges that the Board agents failed to supervise the eligible-voter list where one employee's name was checked off before she arrived to vote. The Hospital took this single innocuous incident and spun a theory of employees voting more than once in order to allege widespread voter fraud. To augment its theory, it went so far as having its election observers go through hundreds of unit employee file photographs to see if they collectively recalled particular employees appearing at more than one session. (JA 558; 120-21, 267.) Based on this exercise, the Hospital identified 11 employees as possibly

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<sup>60</sup> See, e.g., *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 608 F.2d 108, 111, 113 (4th Cir. 1979) (new election was not required where one employee cast an excess vote because the vote would not affect the election because of the number of votes the union received, and noting that the Board “correctly found that the two incidents of voters actually receiving more than one ballot were as the result of inadvertence and were *de minimus*”); *J.I. Case Co.*, 85 NLRB 576, 578 (1949) (overruling employer's objection alleging that voter had voted twice because, even assuming that employee had voted twice and that his second ballot was cast in favor of the union, deducting that vote from the union's total would still result in the union winning the election).

voting twice. Additionally, the Hospital presented hearsay testimony from employees Ellen Carnehl and Clarissa Young about conversations regarding double voting that they purportedly overheard while they were passing by. (JA 557-58; 181-84, 189-92.) The Board determined that their testimony was unreliable because it lacked probative detail. (JA 559-60.) The Board's conclusion (JA 581-82, 558-61) that the Hospital's evidence did not satisfy its burden of proof is well supported as shown next.

First, the Board reasoned that (JA 581-82, 559) because Melody Garcia was one of six Garcias listed on the voter-eligibility list and there were over 500 eligible voters in the unit, it was likely that the Hospital's and the Union's observer had made a "simple mistake" by checking her name off before she presented to vote. This finding is consistent with Board precedent permitting the acceptance of such a benign reason as long as, after evaluating the objecting party's evidence in conjunction with evidence indicating that the reason for a given occurrence was benign, the Board's conclusion is "reasonable."<sup>61</sup> For example, in *Newport News Shipbuilding & Dry Dock Co.*, the Board employed similar logic in overruling the employer's objection regarding a voter's name being crossed off before he

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<sup>61</sup> See, e.g., *T.K. Harvin & Sons*, 316 NLRB 510, 534, 537 (1995) (concluding that Board agent's benign explanation for why one ballot was found folded inside of another—that one voter's ballot slipped inside of another's ballot because of how they were folded—was more "reasonable" than employer's allegation of double voting).

arrived.<sup>62</sup> It concluded that “such an occurrence is not necessarily indicative of vote fraud, since an observer may have inadvertently checked off the wrong name,” and the Fourth Circuit affirmed that finding.<sup>63</sup>

Second, the Board credited the testimony of each of the employees who the Hospital alleged had voted twice, and each testified that they had voted only once. (JA 559.) The credibility determinations were based on various considerations, including observations of the witnesses’ demeanor.<sup>64</sup> (JA 541.)

In contrast, the Board concluded that the Hospital’s observers’ testimony was unreliable because it “lacked sufficient probative detail to be relied upon,” such as when the observers reviewed the photographs. Specifically, the hospital observers’ recollections as to when they reviewed the photographs were hazy and inconsistent. Liset Ayala, Joffre Roberts, and Courtney Contreras estimated that they viewed the photographs, respectively, in late March, mid-April, and “awhile after the election.” (JA 560; 111-12, 121-22, 165, 230.) Observers Dee Dee

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<sup>62</sup> 239 NLRB 82, 86 (1978), *enforced*, 608 F.2d 108, 112-13 (4th Cir. 1979).

<sup>63</sup> *Id.*, *aff’d in relevant part*, 594 F.2d 8, 12 (4th Cir. 1979) (affirming rejection of allegation regarding voter’s name being prematurely checked off, but remanding for hearing on other allegations) (per curiam) and *enforced*, 608 F.2d 108, 112-13 (4th Cir. 1979) (affirming certification of union and enforcing bargaining order).

<sup>64</sup> *See, e.g., Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 337-38 (D.C. Cir. 2003) (noting particularly great deference is owed to credibility determinations that are based, at least in part, on witness demeanor); *Tim Foley Plumbing Serv., Inc. v. NLRB*, 68 F. App’x 206, 207 (D.C. Cir. 2003) (per curiam) (the Board’s credibility determinations “are ordinarily not judicially second-guessed.”)

Olivarez and Wayne Charles Rowzee could not even provide rough estimates of when they reviewed the photographs. (JA 560; 242-43, 245, 303.) And their recollections of who voted when were likely “hazier” because of the passage of time. (JA 560-61.) Further, the Board concluded (JA 560) that hospital observers Ayala and Shannon Kidwell’s testimony conflicted with each other’s testimony, including that they each testified that alleged double voters Moises Perez and Zahirra Mayorga checked in at the other’s table. Moreover, neither could confirm that Perez or Mayorga were checked off the voter-eligibility list or that Perez received a ballot. (JA 137-38, 143, 259-61, 274, 276.)

Third, the Board (JA 559-60) concluded that the Hospital witnesses Carnehl and Young’s collective testimony regarding the conversations about potential voter fraud that they overheard as they were passing by, was not reliable, because it was hearsay testimony and lacked “sufficient probative detail to be relied upon.” Specifically, they were not participants in the conversations they testified about, they could not recall the names of the individuals who were part of the conversations, and they heard the conversations as they were passing by. (JA 560; 181-84, 189-92, 200-09.)

The Board’s determination that Young and Carnehl’s testimony was hearsay and unreliable was reasonable, because they did not identify the employees who allegedly made the statements about voting twice. Thus, those unknown

employees were out-of-court declarants whose claims could not be subjected to probing on direct or cross-examination at trial. Moreover, as this Court recognized, such evidence does not suffice to overturn an election: it “cannot possibly be thought to overcome the presumption—if the presumption is going to have any force at all—in favor of adhering to the results of the electoral process.”<sup>65</sup>

Fourth, the Board reasoned (JA 581-82, 560-61) that if, as the Hospital alleged, the eleven people had voted twice there would have been more evidence that they had done so. Such evidence would have included additional voters being challenged because their names were already checked off the voter-eligibility list and testimony that an employee witnessed an individual using another voter’s name when checking in to vote.

Fifth, the Board reasoned (JA 581-82, 561) that the logistics of implementing a double-voting plan would be difficult to implement, because each alleged double voter “would have to assume that no one in the polling area, either the observers or other voters, would know the person they were impersonating.” *Newport News* supports the Board’s use of logical reasoning in finding that such logistics made the alleged plot unlikely. In that case, there was credited evidence

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<sup>65</sup> *Transp. Maint. Servs. v. NLRB*, 275 F.3d 112, 115 (D.C. Cir. 2002) (remanding to Board for resolution of union-decertification election based on court’s rejection of employee hearsay statement that employees wished to retain union representation and withdraw the pending decertification petition).

that was more substantial than what the Hospital presented here, including that, *inter alia*, one voter voted twice, nine more employees were recorded as casting ballots than the number of ballots actually cast, pieces of ballots were found outside of two polling places, and voters in four polling places found unmarked ballots.<sup>66</sup> The Fourth Circuit enforced the Board's finding that the alleged scheme was "unlikely" or "virtually nonexistent" and "more theoretical than real" based on the Board's logical inferences drawn from the evidence.<sup>67</sup>

Accordingly, the Board reasonably concluded (JA 581-82, 561-62) that the Hospital did not satisfy its evidentiary burden with the mere evidence of one incident of an employee's name being checked off without her actually voting, "which was likely an administrative error" on the observers' part, and with discredited claims of double voting.

**c. The Hospital's claims lack merit and do not warrant overturning the election**

**i. The Hospital ignores precedent in challenging the Board's findings regarding Garcia**

The Hospital's evidence, which consists only of uncredited testimony and the undisputed fact that Garcia's name was marked off before she voted, is insufficient to meet its burden of proof. The same was true in *Farrell-Cheek Steel*

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<sup>66</sup> 608 F.2d at 110.

<sup>67</sup> *Id.* at 110-12.

Co., where the Board found the employer's evidence, showing that an employee left the polling area with a ballot and two more ballots were cast than the number of names that were checked off of the eligibility list, was insufficient and only demonstrated the opportunity for voter fraud.<sup>68</sup> Contrary to the Hospital's claim (Br. 35-36), its sketchy evidence of Garcia's name being checked off and the discredited and hearsay testimony purporting to show double voting is no stronger than that in *Farrell-Cheek Steel*.<sup>69</sup>

Furthermore, as discussed pp. 33-34, the Hospital errs in arguing (Br. 28, 34) that it was improper for the Board to "speculate" that the reason Garcia's name was crossed off when she went to vote was more likely benign. Board precedent permits the acceptance of such a benign reason as long as, after evaluating the objecting party's evidence in conjunction with evidence indicating that the reason for a given occurrence was benign, the Board's conclusion is "reasonable."<sup>70</sup> The Board made a reasonable conclusion here (JA 559) by determining that the fact that Garcia's name was checked off was "nothing more than a simple mistake." The Hospital's view that it was not a simple error is further undercut by hospital observer Contreras' testimony (JA 96-99) that she witnessed union observer

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<sup>68</sup> 115 NLRB 926, 928 (1956).

<sup>69</sup> *Id.* at 928-29 (voters were inadvertently not checked off and margin of victory showed that even such an irregularity was immaterial).

<sup>70</sup> *See, e.g., T.K. Harvin & Sons*, 316 NLRB at 534, 537.

Jonathan Maya accidentally check off the name below the actual voter's name and the Board agent corrected that error. Consequently, the Hospital errs in arguing (Br. 34) that the standard of proof that it must satisfy as an objecting party—providing more than speculation to support its objections—somehow precludes the Board from applying logical reasoning when evaluating evidence.<sup>71</sup>

**ii. The Hospital's challenges to the Board's credibility resolutions fall far short of the standard of review**

The Hospital unpersuasively argues (Br. 29-32) that the Board should not have discredited employee Ellen Carnehl's and Clarissa Young's testimony or rejected it as hearsay. The Hospital has not established that the Board's determinations show “utter disregard for sworn testimony” or that the Board accepted “testimony which on its face is incredible.”<sup>72</sup> Indeed, the Hospital's brief omits this well-established standard of review.

The Hospital's additional argument (Br. 29-31) that Young and Carnehl's hearsay testimony is corroborated by other evidence is simply incorrect. Carnehl testified that she went to the polling room and spoke to Board Agent Hatem about what she overheard (JA 185-87), and Contreras' testimony confirms that Carnehl did speak to him. (JA 94-96, 109-10.) Contreras' testimony (*Id.*) at best indicated

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<sup>71</sup> See, e.g., *Mattison Mach. Works*, 365 U.S. at 123; *Amalgamated Clothing Workers*, 424 F.2d at 827-28; *Arthur Sarnow Candy Co.*, 40 F.3d at 558-59.

<sup>72</sup> *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1563.

that Carnehl told a Board agent that she was concerned about people voting falsely. But Carnehl's discussion with Board Agent Hatem about what she purportedly heard and Contreras' testimony that she heard Carnehl speaking to him about her concerns do not establish that double voting occurred. The Board acted within its discretion in not overturning the election based only on hearsay evidence of an overheard conversation.<sup>73</sup>

The Hospital argues (Br. 31) that the union counsel's questioning of Alice Verano about whether she made any statement similar to what Young and Carnehl purportedly overheard lends credence to its objection. The questioning was understandable because Young thought one of the women in the conversation was named Alice. The union counsel's questioning of Verano hardly remedies the Hospital's failure to have its witnesses clearly identify who the out-of-court declarants were—notwithstanding that it had Verano's picture in its possession at trial and entered it as an exhibit in connection to this same objection. (JA 499.) Therefore, the additional testimony upon which the Hospital relies (Br. 29-31) is simply not corroborative of the allegation that Hospital sought to establish—that any employee, including Verano, voted twice, or that any female employee told

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<sup>73</sup> *NLRB v. Hepa Corp.*, 597 F.2d 166, 167 (9th Cir. 1979) (Board properly upheld election and rejected hearsay testimony “of an employee who said that a second employee had overheard a third employee tell a fourth employee that two other employees would be hurt for opposing the union.”).

another employee that she had voted twice—and, by rejecting this hearsay testimony, the Board, did not show ““utter disregard for sworn testimony”” or accept ““testimony which on its face is incredible.””<sup>74</sup>

In further support of its credibility challenges, the Hospital notes (Br. 33-34) that two hospital witnesses’ testimony regarding *when* alleged-double-voter Florentina Avila voted conflicts with Avila’s testimony on that issue. But, this dispute as to *when* Avila voted—an issue that the Board made no credibility findings for—does nothing to meet the Hospital’s burden of establishing that her testimony that she voted once is facially incredible.<sup>75</sup> In addition to the inconsistencies in Hospital observers’ testimony that the Board specifically addressed (JA 560), the Hospital’s own factual recitation regarding the testimony of hospital observers Contreras and Rowzee (Br. 13) is conflicting. The Hospital states (Br. 13) that Contreras testified (JA 101-02) that Avila gave her own name when she voted during the second session and that Contreras crossed Avila’s name off the list, whereas Rowzee testified (JA 290, 306) that Avila presented her badge when she voted during the fourth session and he crossed her name off the list. Avila testified that she voted once, during the third session. (JA 454.) It is impossible that both witnesses testified accurately that each crossed off Avila’s

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<sup>74</sup> *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1563.

<sup>75</sup> *Id.*

name, because Avila's name would have already been crossed off when she presented to vote assertedly during the fourth session. Accordingly, there is no reason to credit the conflicting testimony of hospital witnesses over a voter's own confirmation of voting only once.

**iii. The Hospital's position is contrary to precedent**

The Hospital's position clashes with established principles for resolving election objections. First, even if this Court accepted the Hospital's allegations of double voting, court-enforced Board precedent does not require overturning election results unless the election outcome is affected by adding the alleged double votes and challenged votes to the objecting party's total and deducting the double votes from the prevailing party.<sup>76</sup> Here, the Union would win the election by a vote of 239 to 221 rather than 251 to 190 if all 19 non-determinative challenged ballots, the 11 alleged double votes, and the 1 vote of the individual who allegedly voted under Garcia's name were added to the Hospital's total and 12 votes were subtracted from the Union's total.

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<sup>76</sup> See *Newport News*, 608 F.2d at 111, 113; see also *J.I. Case Co.*, 85 NLRB at 578; see generally *Escapade Fashions*, 238 NLRB 387, 387 nn.2 & 5 (1978) (one challenged ballot "mistakenly placed directly into the ballot box without first being placed in the challenged ballot envelope" is not a basis for overturning election unless one vote was determinative).

Second, the Hospital only knocks down a straw man in claiming (Br. 35) that “[w]hile it may be asserted that Parkview, acting through its observers, had the opportunity to prevent such [voter] fraud.” The Board never found that the Hospital or its observers were responsible for preventing possible fraud. Accordingly, the Hospital’s reliance on *Avondale Industries, Inc. v. NLRB*<sup>77</sup> (Br. 35) to state that the Board is responsible for conducting the election properly is superfluous. The Board only found that the Hospital was required to prove its claims of voter fraud or otherwise demonstrate that the Board did not properly conduct the election. Notwithstanding the opportunity prove its objections during seven days of hearings, the Hospital failed to establish that misconduct occurred or that even the appearance of voter fraud was disseminated among employees and affected their voting.<sup>78</sup>

**iv. The record, including the conditional identification requirement imposed for two polling sessions, does not show fraud**

The Hospital wrongly claims (Br. 32) that the voter-identification requirement imposed in the last two polling sessions somehow is an admission of

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<sup>77</sup> 180 F.3d 633, 638 (5th Cir. 1999).

<sup>78</sup> *Id.* at 635, 638 (determining that where, in 4000-employee election that was conducted in 5 voting areas, employer was precluded from offering evidence of potential voting abnormalities and/or fraud during hearing, the Board improperly failed to afford the employer an evidentiary hearing and the normal procedure of remanding the case for an evidentiary hearing was inappropriate because six years had elapsed since the election).

voter fraud. The Regional Director only partially granted the Hospital's request—an action to which the Hospital did not object—by requiring identification if the observers did not agree on a voter's identity. That shows nothing more than the Regional Director's accommodation of the Hospital's (unproven) concerns about voter fraud. The Hospital cites no authority showing that an identification requirement pursuant to a party's request constitutes evidence of voter fraud.

Notably, there is no evidence of anyone voting under another person's name. In contrast to the Hospital's claims of double voting based on overheard hearsay, the record showed, at most, that Garcia's name was incorrectly and prematurely marked off. Despite the Hospital's claims of 11 voters casting multiple ballots, no other employee's name was marked off prematurely. Moreover, the record is replete with testimony that even before the identification requirement, during the first two polling sessions voters presented their identification cards to the observers on their own initiative (JA 373-75, 418), observers viewed identification badges (JA 398, 424), and voters wore visible identification badges when voting. (JA 190, 417.) Nor has the Hospital provided evidence, let alone established, that the voters had any knowledge of potential voter fraud or double voting that would indicate an appearance of fraud that materially affected how the employees voted or otherwise affected their free choice.

**3. The Board properly acted within its wide discretion in overruling the Hospital's Objection 16 alleging that a Board agent incorrectly told a voter that identification was not required**

The Hospital alleges (Br. 37-39) that Board Agent Hatem told a voter sometime early in the third session, "You'll come up to the table, give your name. If you have identification, show it. If you don't, don't worry about it," and shrugged his shoulders. (JA 193.) It claims a rerun election is required because his statement "created the appearance that the Board was failing to ensure a fair election process." The Board, however, reasonably concluded (JA 581, 562-63) that, even if Board Agent Hatem did make the alleged statement and shrugged, that was insufficient to overturn the election results. As the Board noted (JA 581-82, 562-63), if a voter did not have identification and the observers could not agree on that person's identity, then the proper procedure would have been to have the voter vote subject to challenge.<sup>79</sup> Accordingly, the Board found (*Id.*), nothing about his asserted statement or his asserted gesture indicated that the proper procedure was not followed. Furthermore, irrespective of what the Board agent may have said, as the Board found (JA 581-82, 562), all witnesses who served as observers during

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<sup>79</sup> See *Harlem River Consumers Coop., Inc.*, 191 NLRB 314, 320 (1971) (an individual claiming to be an employee whose name was on the voter-eligibility list was required to cast a challenged ballot on the basis that an observer claimed that he was not the individual he claimed to be); see also *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1243 (1966) (noting how "prompt disclosure of the employee names" will "eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity").

the third or fourth session consistently testified that the Board agents instructed them to “check voter identification and that voter identification was consistently checked before voters received a ballot,” and “[t]here was no evidence that any voter during the last two polling sessions received a ballot without providing identification.” (JA 194, 212-17, 221-22, 283-86.) Accordingly, because the Board assumed *arguendo* that the Buehrle’s testimony accurately conveyed what the Board agent said, the Hospital’s challenge (Br. 38) to the Board’s description of Buehrle’s testimony as hearsay is irrelevant.

The Hospital is incorrect (Br. 38-39) in suggesting that Board Agent Hatem’s alleged statement establishes that the Board agents were not enforcing the Regional Director’s identification directive. The Hospital admits (Br. 32) the directive was “that for the remainder of the election, if the observers did not agree upon the identity of the individual presenting a name, the individual must provide identification.” (JA 283-84, 442, 449.) Thus, given the condition regarding observer agreement, there was no requirement that every voter must present identification. And the record shows no instance of a voter casting a ballot in the third and fourth session without either presenting identification or the observers agreeing on the voter’s identity. Indeed, hospital observer Rowzee testified regarding two incidents where voters came to vote without identification. The first voter without identification was permitted to vote only when she returned with her

driver's license, and the observers agreed to allow the second voter without formal identification to vote because they all knew her name and she also presented her paycheck to establish her identity. (JA 284-86.)

And, even if the alleged statement was somehow contrary to the Regional Director's directive (which it was not), the mere fact that it was said does not warrant setting aside the election. As the Board has explained, a party challenging an election result must provide "objective evidence of the potential impact of a Board agent's conduct on the election in order to establish the reasonable possibility that the election process has been tainted."<sup>80</sup> The Hospital has presented no such objective evidence that any voter was affected by Board Agent Hatem's alleged statement. As with each of its objections, the Hospital presents only speculation and innuendo, not the objective evidence precedent requires.

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<sup>80</sup> *Allied Acoustics, Inc.*, 300 NLRB at 1181.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Hospital's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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February 2016

# **ADDENDUM**

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

PARKVIEW COMMUNITY HOSPITAL	)	
MEDICAL CENTER	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 15-1155, 15-1283
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	Board Case No.
	)	21-CA-147256
and	)	
	)	
SEIU UNITED HEALTHCARE	)	
WORKERS-WEST	)	
	)	
Intervenor	)	

**STATUTORY ADDENDUM**

The following provisions of the National Labor Relations Act (“the Act”), 29 U.S.C. §§ 151, *et. seq.*, are excerpted below pursuant to FRAP 28(f) and Circuit Rule 28(a)(5):

Section 7 (29 U.S.C. § 158(a)(1)).....	2
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2
Section 9(c) (29 U.S.C § 159(c) .....	2-3
Section 9(d) (29 U.S.C § 159(c) .....	3
Section 10(a) (29 U.S.C. § 160(a)) .....	3
Section 10(e) (29 U.S.C. § 160(e)) .....	4-5
Section 10(f) (29 U.S.C. § 160(f)) .....	5

**Section 7 of the Act (29 U.S.C. § 157): Rights of Employees.**

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 of such activities . . . .

**Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.**

(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 157 of this title;

\* \* \*

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

**Section 9 of the Act (29 U.S.C. § 159): Representatives and Elections.**

(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.

**Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.**

(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. . . .

\* \* \*

(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. . . . 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. . . . 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 a court a written petition praying that the order of the Board be modified or set aside. . . .

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

PARKVIEW COMMUNITY HOSPITAL	)	
MEDICAL CENTER	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 15-1155 & 15-1283
	)	
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	21-CA-147256
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
SEIU UNITED HEALTHCARE	)	
WORKERS-WEST	)	
	)	
Intervenor for	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,104 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/Linda Dreeben  
Linda Dreeben  
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Dated at Washington, DC  
this 9th day of February, 2016

**UNITED STATES COURT OF APPEALS  
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SEIU UNITED HEALTHCARE	)	
WORKERS-WEST	)	
	)	
Intervenor for	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on February 9, 2016, I electronically filed the foregoing 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 all participants in the case are registered CM/ECF users and

that service will be accomplished by the appellate CM/ECF system.

s/Linda Dreeben

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