Oral Argument Not Yet Scheduled

Nos. 16-3617 and 16-3671

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

HANSON COLD STORAGE COMPANY OF
INDIANA d/b/a HANSON LOGISTICS

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

USHA DHEENAN
Supervisory Attorney

MOLLY G. SYKES
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2948
(202) 273-1747

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

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BRIEF FOR
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STATEMENT OF JURISDICTION

Although the Petitioner/Cross-Respondent's statement of jurisdiction is correct, it is incomplete. This case is before the Court on the petition of Hanson Cold Storage Company of Indiana d/b/a Hanson Logistics ("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 September 13, 2016, and is reported at 364 NLRB No. 121. (App. 1 at 1-3.)[1] The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act ("the Act")[2], as amended, by failing and refusing to bargain with the International Brotherhood of Teamsters, Local 142 ("the Union"). The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the Act,[3] 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,[4] because the Board's Order is final and the Company maintains a facility in Hobart, Indiana. The Company filed its petition for review on October 5, 2016. The Board filed its cross-application for enforcement on October 14, 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. 13-RC-169141), the record

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[1] "App." references are to the Appendix filed by the Company, 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.

[2] 29 U.S.C. §§ 151, 158(a)(5) and (1).

[3] 29 U.S.C. § 160(a).

[4] 29 U.S.C. § 160(e) and (f).

in that proceeding is also before the Court under Section 9(d) of the Act.[5] Section 9(d) does not give the Court general authority over the representation proceeding. Rather, it authorizes review of the Board's action 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...."[6] The Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with this Court's ruling.[7]

STATEMENT OF THE ISSUE PRESENTED

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 the Board's finding in the underlying representation proceeding that a determinative challenged ballot clearly manifested the voter's intent to vote for the Union. Thus, the dispositive inquiry for this Court is whether the Board abused its discretion in interpreting and validating a determinative challenged ballot as a vote for the Union and certifying the Union based on that finding.

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

[6] 29 U.S.C. § 159(d).

[7] 29 U.S.C. § 159(c); *see, e.g., Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *Medina Cnty. Publ'ns*, 274 NLRB 873, 873 (1985).

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 by upholding the Acting Regional Director's review and disposition of a determinative challenged ballot in the representation case and, consequently, upholding the certification of the Union as the duly-elected representative of its employees. 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.

A. The Representation Proceeding

The Company is a temperature-controlled logistics provider specializing in refrigerated warehousing and transportation services. (App. 1 at 1.) On February 6, 2016, the Union filed an election petition with Region 13 of the Board, seeking to represent a bargaining unit of the Company's warehousemen, dockworkers, pickers, runners, team leads, inventory workers and maintenance workers at its facility in Hobart, Indiana. (App. 5.) Pursuant to a stipulated election agreement, the Company and the Union agreed to a Board-conducted election to be held at the Company's Hobart facility. (App. 12 at 1.)

On February 29, the Board conducted the election. (*Id.*) The Tally of Ballots for the election showed 18 votes for the Union, 17 votes against the Union,

and 2 challenged ballots, a sufficient number to affect the results of the election.[8] (App 12 at 1; App. 7.) The Company challenged one ballot because, in addition to a large "X" in the "Yes" box, it contained some irregular marks in and extending just beyond the "Yes" box. (App. 12 at 1-3; App. 8.) The Company challenged the ballot, arguing that the voter's intent was unclear and that the ballot should therefore be voided. (App. 12 at 1.) The Union challenged another ballot asserting that the employee, Lawrence Kelly, was ineligible to vote due to an extended absence from work. (*Id.*)

The Acting Regional Director for Region 13 issued a Decision and Certification of Representative overruling the Company's challenge to the irregularly marked ballot and counting the ballot as a vote in favor of the Union. (App. 12 at 1-4.) The Acting Regional Director explained that the Board maintains a long-standing presumption that if marks are made in only one box, despite some irregularity, then a ballot will be counted. (App. 12 at 2-3.) Because the remaining challenged ballot from employee Kelly was no longer determinative of the election

[8] During an election, the Board agent or any party has the right to challenge for good cause any ballot cast in the election. Those ballots are separated, allowing the Board to temporarily reserve ruling on the challenges so that the election may continue uninterrupted. After the election, the Board will then rule on challenged ballots only if they are determinative. *See* Rules and Regulations of the NLRB, 29 C.F.R. § 102.69(a) (2015); NLRB Casehandling Manual (Part Two) Representation Proceedings § 11338, 11340.7 11340.8(b), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/CHM2-Sept2014.pdf.

results, that challenge was moot and the Acting Regional Director did not pass on it.[9] (App. 12 at 1-2.)

The revised Tally of Ballots showed 19 votes for the Union, 17 votes against the Union, and 1 challenged ballot. (App. 12 at 3.) Accordingly, the Acting Regional Director certified the Union as the exclusive collective-bargaining representative of the unit. (App. 12 at 3-4.) Thereafter, the Company sought Board review of the Acting Regional Director's Decision and Certification of Representative. (App. 13.) The Board denied the Company's request for review, upholding the Acting Regional Director's decision. (App. 4.)

B. The Unfair Labor Practice Proceeding

On June 6, 2016, the Union requested that the Company bargain with it as the certified bargaining representative of the unit employees. (App. 1 at 1; App. 14.) The Company refused to recognize and bargain with the Union. (App. 1 at 1-3; App. 15.)

Based on the Company's refusal, the Union filed an unfair labor practice charge with the Board's Regional Office. (App. 1 at 1; App. 16.) Thereafter, the General Counsel issued a complaint alleging that the Company violated Section

[9] Because prompt resolution of challenges is a priority, if more readily resolved challenges are of a sufficient number to render less easily resolved challenges nondeterminative, then partial resolution of challenges is ideal. *See* NLRB Casehandling Manual (Part Two) Representation Proceedings § 11360.1, 11361.3, available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/CHM2-Sept2014.pdf.

8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. (App. 1 at 1; App. 17.) In response, the Company filed an answer admitting its refusal to bargain, but contesting the Board's certification of the Union. (App. 1 at 1; App. 18.) 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. (App. 1 at 1; App. 19.) The Company filed a response, again admitting its refusal to bargain but contesting the Board's certification of the Union. (App. 1 at 1; App. 20.)

C. The Board's Conclusions and Order

On September 13, 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. (App. 1 at 1-3.) 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. (App. 1 at 1.)

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. (App. 1 at 2.) Affirmatively, the Board's Order directs the Company to bargain with the Union upon request, to embody any understanding reached in a signed agreement, and to physically post and electronically distribute a remedial notice. (*Id.*)

SUMMARY OF ARGUMENT

The Board did not abuse its discretion in overruling the Company's challenge to the irregularly marked ballot and counting the ballot as a vote for the Union. The Board, therefore, properly certified the Union as the collective-bargaining representative of a unit of the Company's employees and the Company's refusal to bargain violates Section 8(a)(5) and (1) of the Act. In interpreting the determinative challenged ballot, the Board relied on long-standing precedent establishing a presumption that marks in only one box on a ballot, despite some irregularity, are a clear indication of the voter's intent to cast their ballot for that party. The Company has failed to meaningfully challenge that established Board precedent, thereby failing to prove its claim that the Board engaged in improper speculation in validating the determinative challenged ballot as a vote for the Union. By raising unfounded and meritless arguments and failing to properly address established precedent regarding the Board's and Court's interpretation of ballots, the Company is patently using the review process to stave off its bargaining responsibilities. Accordingly, because the

Board properly certified the Union after its election victory, 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 OVERRULING THE COMPANY'S BALLOT CHALLENGE AND 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.[10] Here, although the Company's employees chose the Union as their representative in a Board election, the Company, by its own admission, has refused to recognize the Union or bargain with it. The Company contends that its refusal is lawful because the Board erred in overruling its ballot challenge and certifying the Union. Specifically, the Company argues that the Board abused its discretion by interpreting a determinative challenged ballot as a vote for the Union. As we now show, the Company's contentions have no merit, and the Board's Order should therefore be enforced.

[10] 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).

A. Applicable Principles and Standard of Review

The Board is entitled to "a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives by employees."[11] Generally, in reviewing representation proceedings, this Court treats the results of a Board-conducted election as presumptively valid, and will "affirm the Board's certification of a union if that decision is supported by substantial evidence."[12] Evidence is considered substantial when a "reasonable mind might accept it as adequate to support the Board's conclusion."[13] Accordingly, review of the Board's decision to certify a collective-bargaining representative following a Board-conducted election is "extremely limited."[14] More specific to the issue in this case, the Board's interpretation of a ballot is given even greater deference, and will be reversed only for "abuse of discretion."[15] This deference is warranted by the Board's "experience and expertise in labor elections."[16]

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[11] *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946).

[12] *AmeriCold Logistics, Inc.*, 214 F.3d 935, 937 (7th Cir. 2000); *Clearwater Transp., Inc. v. NLRB*, 133 F.3d 1004, 1008 (7th Cir. 1998).

[13] *Uniroyal Tech. Corp., Royalite Div. v. NLRB*, 98 F.3d 993, 998 (7th Cir. 1996).

[14] *NLRB v. Chicago Tribune Co.*, 943 F.2d 791, 794 (7th Cir. 1991); *accord NLRB v. Erie Brush and Mfg. Corp.*, 406 F.3d 795, 801 (7th Cir. 2005).

[15] *AmeriCold Logistics*, 214 F.3d at 939; *Ruan Transport Corp. v. NLRB*, 674 F.3d 672, 675 (7th Cir. 2012).

[16] *Nat'l By-Products, Inc. v. NLRB*, 931 F.2d 445, 451 (7th Cir. 1991) (quoting *NLRB v. S. Health Corp.*, 514 F.2d 1121, 1123 (7th Cir. 1975)).

B. The Board Did Not Abuse Its Discretion in Interpreting the Determinative Challenged Ballot as Expressing the Voter's Intent to Elect the Union

The Board's primary goal in representation proceedings is to "protect the right[s] of individual employees to choose whether or not to be represented by a union."[17] Accordingly, the Board's policy – and indeed this Court's policy – is to count ballots where "the voter's intent is clear, despite irregularities in the manner in which the ballots have been marked."[18] Over decades, the Board has developed three general principles for interpreting irregularly marked ballots.[19] First, the Board assumes that, by casting a ballot, a voter "evinces an intent to participate in the election process and to register a preference."[20] Second, the Board tries to "give effect to voter intent whenever possible."[21] Third, the Board will avoid "speculation or inference regarding the meaning of atypical 'X's, stray marks, or physical alterations."[22]

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[17] *In re Aesthetic Designs, LLC*, 339 NLRB 395, 395 (2003) (quoting *Gen. Shoe Corp.*, 77 NLRB 124, 127 (1948), *enforced,* 192 F.2d 504 (6th Cir. 1951)).

[18] *Ruan Transport*, 674 F.3d at 675 (quoting *AmeriCold Logistics*, 214 F.3d at 937).

[19] *In re Daimler-Chrysler Corp.*, 338 NLRB 982, 982-83 (2003) (collecting cases).

[20] *Id.* at 982; *see Harry Lunstead Designs*, 265 NLRB 799, 800 (1983) (quoting *Gregg Moore, Inc.*, 178 NLRB 483, 484 (1969)) ("By appearing at the polls, and by casting a marked ballot, it appears that the voter did wish to register his preference.").

[21] *Brooks Bros., Inc.*, 316 NLRB 176, 176 (1995) (citing *Hydro Conduit*, 260 NLRB 1352, 1352 (1982)).

[22] *In re Daimler-Chrysler*, 338 NLRB at 983 (citing *Kaufman's Bakery, Inc.*, 264 NLRB 225, 225 (1982)).

In *Kaufman's Bakery*, the Board established a presumption that marks in only one box, rather than both boxes, evinced a clear indication of voter intent.[23] The ballots in that case, as in this one, were marked with both an "X" and additional marks within the "Yes" box.[24] The Board rejected the prior policy of *San Joaquin Compress & Warehouse Co.,* which required examination of "random markings" to determine whether there was an adequate manifestation of voter intent.[25] Specifically, *San Joaquin* required the Board to painstakingly review stray markings on a ballot to determine whether a voter was merely emphasizing his vote or was attempting to scratch out his vote.[26]

Rejecting the policy of *San Joaquin*, the Board found that it was "impossible to determine with absolute certainty what meaning a voter attaches to any stray marks he makes on a ballot."[27] The Board instead decided it would thereafter consider "a mark in only one box, despite some irregularity, as presumptively a clear indication of the intent of the voter."[28] The Board explained that establishing such a

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[23] *Kaufman's Bakery*, 264 NLRB at 225 (1982); *see also Hamilton Plastic Prods.*, 309 NLRB 678, 687-88 (1992) (citing *Kaufman's* and the presumption it established regarding ballots with markings in only one box), *enforced*, 12 F.3d 219 (11th Cir. 1993); *In re Aesthetic Designs*, 339 NLRB at 395 (citing *Kaufman's* with approval).

[24] *Kaufman's Bakery*, 264 NLRB at 225.

[25] 251 NLRB 23 (1980).

[26] *Id.* at 23.

[27] *Kaufman's Bakery*, 264 NLRB at 225.

[28] *Id.*

presumption not only avoided the speculation inherent in trying to determine the meaning of every stray mark on a ballot, but also reduced the risk of "unnecessary voter disenfranchisement" stemming from challenges on the basis of what, if anything, stray marks meant.[29] In so finding, the Board explicitly rejected the argument that the voter may have been attempting to 'cancel' his initial selection and cast a "no-choice" vote.[30] The Board concluded that such a voter strategy was "unlikely," given the ballot's clear instructions that "[i]f you spoil this ballot return it to the Board Agent for a new one."[31]

The present case involves a ballot with a clear "X" in the "Yes" box, with additional marks extending just beyond the box, and no markings in the "No" box – almost identical to the situation in *Kaufman's*. As in *Kaufman's*, the fact that the voter made markings in addition to an "X," however irregular, in only the "Yes" box, evinced a clear intention of the voter's intent to vote for the Union. (App. 12 at 3.) First, the Board cited *Kaufman's* rejection of the argument that the voter cast a "no-choice" vote, as such a strategy would make little sense given the clear ballot instructions that "[i]f you spoil this ballot return it to the Board Agent for a new one." (App. 12 at 2.) In doing so, the Board's decision was consistent with *Kaufman's* proscription against invalidating a ballot "whenever there is the slightest

[29] *Id.*

[30] *Id.*

[31] *Id.*

variance" and thereby unnecessarily disenfranchising voters. Second, by counting the vote, the Board followed its long-standing policy of giving effect to voter intent whenever possible. (App. 12 at 2-3.) Finally, the Board avoided speculation as to what, if anything, the additional marks meant by focusing instead on the fact that the marks were almost entirely in the "Yes" box and there were no markings in or near the "No" box. (*Id.*) Under those circumstances, such markings presumptively showed a clear indication that the voter intended to vote for the Union. (App. 12 at 2.) Accordingly, the Board did not depart from established precedent, nor did it abuse its discretion, by overruling the Company's challenge and counting the ballot as a vote for the Union.

C. Contrary to the Company's Assertions, the Board Did Not Improperly Speculate as to the Voter's Intent or Depart From Its Precedent in Interpreting the Challenged Ballot

The Company asserts that the Board abused its discretion by engaging in speculation in interpreting the determinative challenged ballot, thus departing from precedent. (Br. 8.) In support of this argument, the Company cites *TCI West, Thiele Industries, J.L.P. Vending,* and *Mercy College*, claiming that they require that a ballot "unambiguously evidence[] a clear intent to vote for one party on its face."[32]

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[32] *TCI West, Inc.*, 322 NLRB 928 (1997) (voiding ballot where "X" in one box and a diagonal line in the other based on precedent that where voter marks both boxes and voter's intent cannot be ascertained from other markings, ballot is void); *Thiele Indus., Inc.*, 325 NLRB 1122 (1998) (counting as vote for union ballot with one diagonal line in "No" box, boldly marked "X" in the "Yes" box, and word "Yes" circled); *Mercy College*, 212 NLRB 925 (1974) (voiding ballot where "X" in both

(*Id.*) Those cases, however, only stand for the unremarkable principle that the Board cannot speculate as to the intent of a voter. As explained above, the Board did not speculate as to the intent of the voter when it applied *Kaufman Bakery's* presumption that markings in only one box on a ballot, as is the case here, clearly indicate voter intent. Indeed, by applying *Kaufman Bakery's* presumption, the Board avoided speculation as to what meaning, if any, the voter attached to the irregular marking of the "Yes" box. Thus, the Company's cases do not require a different result.

First, those cases are inapplicable because they concern the Board's treatment of ballots where *both* the "Yes" box and the "No" boxes contain markings. In those situations, as the Company correctly notes, the intent of the voter must be clear, because such markings could mean either a "Yes" vote, a "No" vote, or no vote at all.[33] In contrast, under *Kaufman's Bakery*, markings in only one box are "presumptively a clear indication of the intent of the voter."[34] In fact, *Mercy College* demonstrates the wisdom of this presumption. In *Mercy College*, the Board found the ballot to be ambiguous because either marking in each box, absent the other,

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boxes with one heavily shaded over); *J.L.P. Vending Co.*, 218 NLRB 794 (1975) (counting ballot where, despite markings in both boxes, it was evident that voter attempted to erase markings in one box).

[33] *Mercy College*, 212 NLRB at 925.

[34] *Kaufman's Bakery*, 264 NLRB at 225.

"would be considered a clear indication of the intent of the voter."[35] In the instant case, the "clear indication of the intent of the voter" that was lacking in *Mercy College* is present – only *one* box on the ballot is clearly marked.

Second, by citing those cases, the Company appears to argue that the determinative challenged ballot, with markings in only one box, is somehow less clear than ballots containing markings in both boxes, and that therefore a clear expression of voter intent is impossible to discern. That argument is nonsensical, and it fails to comport with this Court's precedent in *Ruan Transport.*[36] In *Ruan Transport*, the Court found that it was possible to discern a clear expression of the voter's intent where a ballot contained an "X" in each box, but one "X" was partially scratched out and colored over with a highlighter closely matching the color of the ballot paper.[37] Compared with the more complicated ballot markings in *Ruan Transport* that were deemed sufficiently clear by the Board and this Court, the Company can hardly ask this Court to find the ballot in the instant case ambiguous enough to warrant finding that the Board abused its discretion in counting it.

Third, the Company contends that the voter here could have intended two different results: the markings could be emphasizing the voter's "Yes" vote, or they could be an attempt to scratch out and invalidate the vote. (Br. 9.) It goes further to

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[35] *Mercy College*, 212 NLRB at 925.

[36] *Ruan Transport*, 674 F.3d 672 (7th Cir. 2012).

[37] *Id.* at 676.

posit that the voter "changed his mind and was too embarrassed" to request a new ballot, despite the ballot's explicit direction to do so in such a situation. (*Id.*) Thus, the Company contends, the ballot "does not clearly manifest the intent of the unknown voter." (*Id.*) Initially, the Company cannot simultaneously claim that such markings are ambiguous while *also* claiming that the markings are "obviously an attempt to change the vote." (Br. 10.) More importantly, the Company's argument is the exact conjecture and reasoning rejected by the Board over thirty years ago in *Kaufman's*.[38] Rather than directly challenging *Kaufman's* underlying reasoning, however, the Company simply accuses the Board of "speculation" — all the while engaging in its own speculation in suggesting possible states of mind of the voter. Yet the presumption provided by *Kaufman's* achieves the opposite result: it provides a bright line rule that ensures standardization of ballot interpretation. As courts have recognized, the Board has unique expertise in labor relations that merits broad discretion in the exercise of its power to regulate Board elections.[39]

Nonetheless, the Company attempts to undermine *Kaufman's* by suggesting

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[38] *Kaufman's Bakery*, 264 NLRB at 225 (where ballots contained an "X" and additional marks within the "Yes" box, the Board rejected the employer's theory that the voter could have been cancelling his initial selection).

[39] *See, e.g. Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002) ("This court is without authority to impose upon the NLRB the kind of election procedures it may deem most appropriate."); *NLRB v. Whitinsville Spinning Ring Co.*, 199 F.2d 585, 587 (1st Cir. 1952) ("[T]he Board has wide latitude not only in choosing policies, but also in promulgating rules by which an elector's intent is to be determined.").

that it is no longer good law. However, the Company merely cites one conflicting case, *Weill's, Inc.,* which precedes *Kaufman's* by nearly two decades.[40] (Br. 10.) Even if *Weill's* is inconsistent with *Kaufman's*, the presumption promulgated by *Kaufman's* renders *Weill's* obsolete. Although the Board did not specifically mention *Weill's* in the *Kaufman's* decision, the Board need not list and specifically overrule every contrary prior ruling when promulgating a new rule.

The Company also attacks *Kaufman's* by noting that "there have been only about 10 reported decisions that cite to *Kaufman's*" and that none of them examine the exact same factual scenario. (Br. 10-11.) The fact that 10 decisions cite *Kaufman's* hardly supports the Company's suggestion that *Kaufman's* is not good law. Indeed, they show the opposite: *Kaufman's* continuing vitality where those subsequent cases still rely on *Kaufman's* underlying principles regarding ballot interpretation even if applied to different facts.[41]

Next, the Company argues that the voter in this case forfeited the right to have his vote counted because he "assume[d] the risk" of his ballot being rendered void by not clearly marking his ballot to reflect "his or her actual intent." (Br. 11.) The

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[40] *Weill's, Inc.,* 108 NLRB 731 (1954).

[41] *See, e.g., In re Daimler Chrysler*, 338 NLRB at 983 (stating principle that Board will "avoid speculation or inference regarding the meaning of atypical "X"s, stray marks, or physical alterations"); *In re Aesthetic Designs*, 339 NLRB at 395 (citing *Kaufman's* for same principle); *Columbia Textile Servs.*, 293 NLRB 1034, 1034 at n.4, 1050 (1989) (relying on *Kaufman's* reasoning in finding clear expression of voter's intent where ballot contained single hole punch in one box).

Company points to the ballot instruction that states, "[i]f you spoil this ballot, return it to the Board Agent for a new one." (*Id.*) Rather than secure a replacement ballot, the Company asserts, the voter assumed the risk of his vote being ambiguous and thus void. However, as noted by this Court, the Board has consistently rejected the argument that a voter relinquishes their vote by virtue of deviating from ballot instructions.[42] Indeed, as *Kaufman's* makes clear, the Board avoids disenfranchising voters in situations like this, where the voter's marks marginally stray from the "normal manner of ballot marking."[43] Where the Board has found the markings on a ballot clearly indicate the intent of the voter, despite some irregularity, and do not disclose the identity of the voter, it will accept such ballots even where markings do not conform to ballot instructions.[44]

General Photo Products, relied on by the Company (Br. 11), does not dictate a different result.[45] There, the Board voided a ballot because the voter identified

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[42] *Ruan Transport*, 674 F.3d at 675 ("Neither the fact that a ballot has irregular markings, nor the fact that a ballot instructs the voter to obtain a new ballot if the ballot is spoiled, are reasons to invalidate the ballot.").

[43] *Kaufman's*, 264 NLRB at 225.

[44] *See, e.g.*, *Brooks Bros.,* 316 NLRB at 176 (rejecting Regional Director's reliance on ballot instructions to void ballot; counting as no vote ballot containing clear "X" in "No" box and clearly obliterated "X" in "Yes" box); *Harry Lunstead Designs,* 265 NLRB at 800 (counting ballot as no vote where it had word "no" marked in each box, despite ballot instructions); *Standard-Coosa-Thatcher Co.*, 115 NLRB 1790, 1791-92 (1956) (overturning Regional Director's decision to void ballot that had non-standard markings; counting as no vote ballot with "C" in "No" box).

[45] *Gen. Photo Prods.*, 242 NLRB 1371 (1979).

himself and his vote by holding his marked ballot in the air and declaring to other voters, "This is a 'no' vote against the [u]nion."[46] Relying on its policy of maintaining the secrecy of the ballot in elections, the Board concluded that the voter by his own conduct had "forfeited any right to have his ballot counted."[47] In the present case, the voter did not in any way implicate the Board's policy of secrecy, and thus did not "assume the risk" of his vote being rendered void under Board precedent.

D. The Company's Remaining Contentions are Meritless

Apart from its claim that the Board abused its discretion in interpreting the determinative challenged ballot, the Company makes two final arguments: first, that substantial evidence does not support the Acting Regional Director's interpretation of the determinative challenged ballot; and second, that this Court should "remand the case to the Regional Director" to make a "formal finding" regarding the challenged ballot of Lawrence Kelly. (Br. 12-14.) As explained below, those arguments are without merit.

The Company argues that substantial evidence does not support the Acting Regional Director's interpretation of the ballot. First, the Company's argument mistakes the applicable standard of review. The appropriate standard of review for the Board's interpretation of a ballot is abuse of discretion, not the substantial

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[46] *Id.* at 1371-72.

[47] *Id.* at 1372.

evidence standard applied to general fact-finding.[48] Next, the Company argues that the "only evidence" that the Acting Regional Director relied upon was the "ballot at issue," and that substantial evidence did not support his description of the ballot. (Br. 12-13.) Initially, it is unclear what *other* evidence the Company expected the Acting Regional Director to rely upon since, as the Company itself observed, ordinarily "no testimony or extrinsic evidence can be presented to aid in a determination of the voter's intent." (Br. 9.) Nonetheless, the Acting Regional Director's description of the ballot did not itself determine the ultimate outcome; the Board had the opportunity to review the ballot for itself, as it was in the record and appended to the Acting Regional Director's decision. And the Company's critique of the Acting Regional Director's description is only that the additional marks he described were, in the Company's view, "an attempt by the voter to scratch out the 'Yes' vote." (Br. 13.) Declining to guess at the voter's intent is not a factual error by the Acting Regional Director; indeed, voiding the ballot would require ignoring the established presumption, described above, and acceptance of the Company's speculation about the voter's intent. While the Company may disagree with the Acting Regional Director's *description* of the determinative challenged ballot, the Company presents no persuasive argument here that the Board abused its discretion in its *interpretation* of the ballot.

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[48] *AmeriCold Logistics*, 214 F.3d at 939; *Ruan Transport*, 674 F.3d at 675.

Similarly, the Company's argument that the Court should require that the Acting Regional Director resolve the challenge to the ballot of Lawrence Kelly misunderstands the process of an appeal of a Board order. As the Acting Regional Director made clear in his decision, once he overruled the Company's challenge, Kelly's ballot was no longer determinative and therefore moot. (App. 12 at 3.) Accordingly, the Acting Regional Director made no finding as to Kelly's eligibility to vote. Neither did the Board in its review of the Acting Regional Director's decision. (*Id.*) It is not the Court's role to do so in the first instance. Thus, even if the Court were to find the Board abused its discretion in overruling the Company's objection, the case would have to be remanded to the Board. Upon remand, after following the Court's ruling regarding the unknown voter's ballot, the Board would resolve Kelly's ballot.[49]

As demonstrated, the Company has not shown that the Board abused its discretion in overruling the challenged ballot and counting it as a vote for the Union. Thus, the Board properly certified the Union as the collective-bargaining representative of the unit employees and the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. The Company's persistence in challenging the Board's certification, despite established contrary Board law, only demonstrates its true intent – to stave off its bargaining obligation as long as possible.

[49] 29 U.S.C. § 159(c); *see, e.g., Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *Medina Cnty. Publ'ns*, 274 NLRB 873, 873 (1985).

Accordingly, we respectfully request that the Court enforce the Board's order and ensure that the Company fulfills its legal responsibilities under the Act.

CONCLUSION

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

/s/ Usha Dheenan
USHA DHEENAN
Supervisory Attorney

/s/ Molly G. Sykes
MOLLY G. SYKES
Attorney
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2948
(202) 273-1747

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
January 2017

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

HANSON COLD STORAGE COMPANY OF INDIANA d/b/a HANSON LOGISTICS	)	
Petitioner/Cross-Respondent	)	Nos. 16-3617 and 16-3671
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case No. 13-CA-178619
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 5,546 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 25th day of January, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh 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:

Donald J. Vogel, Attorney
Sara L. Pettinger, Attorney
Scopelitis, Garvin, Light, Hanson & Feary, PC
30 W. Monroe Street, Suite 600
Chicago, IL 60603-0000

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 25th day of January, 2017