

Nos. 16-1265, 16-1330, 16-1331

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

OBERTHUR TECHNOLOGIES OF AMERICA CORPORATION
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

**GRAPHIC COMMUNICATIONS CONFERENCE, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, LOCAL 14M**
Intervenor

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

OBERTHUR TECHNOLOGIES OF AMERICA CORPORATION
Respondent

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD, CONSOLIDATED WITH AN APPLICATION FOR ENFORCEMENT OF
A SECOND BOARD ORDER**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**UNITED STATES COURT OF APPEALS
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OBERTHUR TECHNOLOGIES OF AMERICA)	
CORPORATION)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 16-1265, 16-1330
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	04-CA-160992
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
GRAPHIC COMMUNICATIONS)	
CONFERENCE, INTERNATIONAL)	
BROTHERHOOD OF TEAMSTERS,)	
LOCAL 14M)	
)	
Intervenor)	

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
)	No. 16-1331
v.)	
)	Board Case Nos.
OBERTHUR TECHNOLOGIES OF AMERICA)	04-CA-086325
CORPORATION)	04-CA-087233
)	
Respondent)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties, Intervenors, Amici

Oberthur Technologies of America Corporation (“the Company”) was the respondent before the Board and is the petitioner/cross-respondent and respondent before the Court. The Board is the respondent/cross-petitioner and petitioner before the Court. Graphic Communications Conference, International Brotherhood of Teamsters, Local 14M (“the Union”) was the charging party before the Board and is the intervenor before the Court. The Company, the Board’s General Counsel, and the Union appeared before the Board in Case numbers 04-CA-086325, 04-CA-087233, and 04-CA-160992. There were no amici before the Board, and there are none in this Court.

B. Rulings Under Review

This case involves the petition of the Company to review, and the cross-application of the Board to enforce, a Board Decision and Order (364 NLRB No. 59) issued against the Company on July 27, 2016, as well as the application of the Board to enforce the unfair-labor-practice provisions of a Board Decision, Order, and Certification of Representative (362 NLRB No. 198) issued against the Company on August 27, 2015.

C. Related Cases

The rulings under review have not previously been before this Court or any other court. Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court.

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Dated at Washington, DC
this 7th day of February, 2017

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

These consolidated cases are before the Court on the petition of Oberthur Technologies of America Corporation (“the Company”) to review, and the cross-application of the National Labor Relations Board to enforce, a Board Decision and Order (364 NLRB No. 59) (“2016 Order”) issued against the Company on July 27, 2016 (A. 151-54), and on the application of the Board to enforce the unfair-labor-practice provisions of a Board Decision, Order, and Certification of Representative (362 NLRB No. 198) (“2015 Order”) issued against the Company on August 27, 2015. (A. 68-82.)¹

The Board had subject matter jurisdiction over the proceedings under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Orders are final with respect to all parties. The Court has jurisdiction over these consolidated cases under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is proper for the Board’s application for enforcement because the Company transacts business in the District of Columbia. Those filings were timely because the Act imposes no limit on the time for initiating actions to review or enforce Board orders. Graphic

¹ “A.” references are to the joint appendix. “Br.” references are to the Company’s opening brief. Where applicable, references preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

Communications Conference, International Brotherhood of Teamsters, Local 14M (“the Union”), has intervened on the Board’s behalf.

Because the Board’s 2016 Order is based in part on findings made in the underlying representation proceeding, the record in that proceeding (Case No. 04–RC–086261) is also before the Court under Section 9(d) of the Act (29 U.S.C. § 159(d)). *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceeding. Rather, it authorizes review of the Board’s actions in that proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board’s 2016 unfair-labor-practice Order in whole or in part. The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the Court’s ruling. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

RELEVANT STATUTORY PROVISIONS

Relevant statutory and regulatory provisions are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by telling employees that they could not discuss the Union in work areas or during work time.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by withholding and delaying employee benefits during the pendency of the election.

3. Whether the Board acted within its discretion in certifying the Union as unit employees' bargaining representative after determining that the Union's challenges to two ballots should be sustained because they were cast by professional employees. If so, then the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain and furnish information to the Union.

STATEMENT OF THE CASES

In its 2015 Order, the Board resolved (A. 68-71, 75-77, 80) a representation case that had been consolidated with related unfair-labor-practice allegations involving the Company's pre-election conduct. Specifically, the Board decided issues related to two challenged ballots, certified the Union as the employees' bargaining representative, and found (A. 68-70, 77-80) that the Company committed unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. In its 2016 Order, the Board found (A. 151-53) that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union or furnish it with requested information. The Company admits these refusals, contending that the Board erred in certifying the Union. Summaries of the factual and procedural background and the Board's conclusions and Orders are summarized below.

Additional facts relevant to the Board's determination of professional-employee status are provided later in the Argument.

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations; the Union Begins Organizing and the Company Initiates a Counter Campaign; Supervisor Frank Belcher Repeatedly Instructs Employees Not to Talk About the Union While on the Plant Floor or During Work Time

The Company, a multinational enterprise, manufactures credit cards, debit cards, governmental identification cards, and related products at its Exton, Pennsylvania plant. (A. 75; A. 91-93, 220-21, 225-29, 293-94, 701, 1198.) Within the Exton plant, about 229 full-time employees work in the 15 departments listed in the stipulated bargaining unit in this case. (A. 68-69, 74-76; A. 91-94, 99-101, 944-49.) The Union conducted a campaign to organize the Company's employees in early 2012. The Company countered in July with its own anti-union campaign. (A. 77; A. 240-44, 276, 302, 338-39, 344, 357, 609, 1166-69, 1180, 1196-97.)

On several occasions during the organizing campaign, Frank Belcher, the Company's third-shift finishing supervisor, told employees that they could not talk about the union on the plant floor or during work time. (A. 77; A. 251-53, 278, 296, 301, 405-07, 425-27, 433, 436-37, 457, 500-08, 558-60, 571, 1170-73, 1202.) For example, on about July 25, Belcher summoned employees Kevin Connaghan and Scott Grove into his office and instructed them not to talk about union matters on the work floor. Belcher added that the employees could only talk about the

Union during their breaks or in the parking lot. (A. 77; A. 251-53, 278, 405-07, 425-26, 1202.) Similarly, on another occasion in late July or early August, Belcher told a group of employees in the tacking/lamination area that the Union was not to be discussed on the work floor. If employees wanted to talk about the Union, Belcher said, they should do so outside of the secure doors that separate the plant's production and non-production areas, such as in the cafeteria or near the lockers, or outside of the plant. (A. 77; A. 225-26, 500-02.)

The Company did not have any pre-existing rule or policy concerning discussions between employees on the plant floor or during work time. For years, the Company had permitted employees to discuss non-work-related matters while working. (A. 68 n.4, 77; A. 254-56, 318-19, 407-08, 413-14, 437-39, 470-72, 489, 492-93, 509-10, 560-62, 1172, 1202.)

B. The Company's Wage-Increase and Spot-Bonus Programs; After the Union Files for an Election, the Company Implements a New Policy of Withholding All Employee Wage Increases, Bonuses, Transfers, and Promotions During the Pendency of the Election; the Company Tells Employees of the Policy

The Company pays nearly all unit employees on an hourly basis. (A. 75-76; A. 391.) It maintains wage-increase programs that allow employees to receive a raise if they acquire new skills, or are transferred or promoted to a higher-compensated position. Such raises may be paid all at once, or, alternatively, over a series of scheduled steps, such as once every three months for an 18 or 24-month

period. (A. 78; A. 373-79, 381-82, 389, 603-09, 667, 673-75, 1206.) The Company also maintains a spot-bonus program, which it uses to reward employees for specific exemplary actions, like performing extra work or catching a production error. Each spot bonus ranges from \$50 to \$150, and an employee can earn multiple spot bonuses, up to a maximum of \$1,000 in a calendar year. (A. 78 & n.8; A. 259-60, 359-69, 372, 580-87, 594.)

On July 30, 2012, the Union filed a petition with the Board seeking a representation election. (A. 77; A. 89-90.) On August 1, the Company's human resources manager, Diane Ware, sent an email to all managers and supervisors alerting them of the Union's petition. (A. 78; A. 384-85, 1042, 1168-69, 1194.)

The email further stated:

[A]ll increases, promotions, transfers and even spot bonuses are on "hold" as they could be perceived as if we are trying to "buy" an employee's "NO" vote. . . . If one of your employees is waiting for an increase—please use the following phrase, "During this period, we have to keep the status quo on all issues related to wages, transfers, and promotions." PLEASE NOTE: We cannot say things like, "it's because of the union", or "your promotion will be processed once we vote the union down". These phrases, although very likely true, will be viewed as a promise and we need to make sure that doesn't happen. Hopefully, with the phrase, "during this period", employees will realize that it may be linked to unions, but we cannot draw that conclusion for them.

(A. 78; A. 1168.)

Pursuant to Ware's email, the Company immediately implemented a policy of withholding and delaying employee wage increases, bonuses, transfers, and

promotions during the pendency of the election; this policy remained in effect until sometime after the September 7 election. (A. 68, 78-80; A. 384-87, 674.) As a result, a number of employees did not receive raises or bonuses that they otherwise would have received but for the policy. (A. 78-80; A. 386-91, 542-45, 574-78, 648-50, 665-67, 671, 673-75, 1208-09, 1216-19.) For example, the Company withheld an approved wage increase for employee Efrain Marrero (A. 78-79; A. 374-75, 380-83, 389-90, 539-45, 574-78, 652-53, 673-75, 1208), and withheld approved spot bonuses for Merle Corle and other employees. (A. 78; A. 263-65, 360-61, 366-69, 386, 497-99, 648-50, 671, 1136-41, 1217-19.) Similarly, the Company delayed wage increases that it had previously scheduled for Lorraine Dolowski, Yaritza Jimenez-Perez, Alejandra Garcia, and Sio Doe. (A. 78-79; A. 387, 389-90, 667, 675, 1216.)

Although Ware's August 1 email was not transmitted to unit employees, many of them soon became aware that the Company was withholding raises and bonuses, including employees who were directly affected. (A. 78-79; A. 340, 347, 498-500, 515-16, 555, 615-16, 633-36, 648-50, 933-34.) Consistent with Ware's directive, the Company did *not* tell employees that the withholding was only temporary, or that the raises and bonuses were being deferred until after the election regardless of the outcome. (A. 78-79; A. 543-44, 575-78, 609-14, 1168, 1204-05.)

On August 2, when Efrain Marrero asked his supervisor, Anthony Ganci, why he had not received his wage increase, Ganci responded that no raises or promotions were going to be handed out until further notice, and he read from Ware's email, stating, "during this period, we have to keep the status quo on all issues related to wages, transfers, and promotions." (A. 79; A. 543-45, 573-78, 702, 1042, 1194, 1204-05.) Similarly, in mid-August, employee Marcellus Barnett overheard Ware tell another employee that all raises were on hold until after the election. (A. 79; A. 609-12.) Barnett then approached Ware, and told her he wanted to hear for himself whether employees' raises would be affected by "this whole union thing." Ware answered that the raises were on hold until the outcome of the election. (A. 79; A. 612-14.) Barnett replied that he did not think that was fair, because his and other employees' wage increases had been scheduled before the "union thing." Ware offered no clarification or response. (A. 79; A. 612-14.)

Notwithstanding the absence of any assurances prior to the election, the Company did eventually pay most of the raises and bonuses that it had withheld or delayed pursuant to its policy—but not until October, weeks after the election. (A. 80; A. 387, 390, 667, 1216-19.) Marrero never received his approved wage increase; he quit a few days after his conversation with Ganci. (A. 79-80; A. 539, 545.)

II. THE PROCEDURAL HISTORY

A. The Consolidated Proceedings Concerning the Pre-Election Unfair Labor Practices and the Representation Case

In July and August 2012, the Union filed unfair-labor-practice charges against the Company, and the Board's Regional Director directed an investigation of the allegations. (A. 75.) Also in July, the Union filed an election petition with the Board seeking to represent a unit of employees at the Company's Exton plant. (A. 74; A. 89-90.) The following week, the Union and the Company signed a stipulated election agreement, which the Board's Regional Director approved. (A. 68-69, 74; A. 91-93.) In their stipulation, the parties agreed that the Board would conduct a conventional representation election among the employees in the following unit:

Included: All full-time employees employed by the Employer in litho printing, finishing card and sheet, ink, facilities janitorial, card auditing plastics, pre-press composition, QC [quality control], smart card embedding, screen making, screen printing, production expeditor, quality systems analyst, warehouse plastic, customer service manufacturing, and maintenance departments at its facility located at 523 James Hance Court, Exton, Pennsylvania.

Excluded: All other employees, temporary and seasonal employees, confidential employees, guards and supervisors as defined in the Act.

(A. 68-70, 74-75; A. 91-93.) The parties also agreed that the election and all post-election procedures would conform to the Board's Rules and Regulations. (A. 91-93.)

The Board conducted the election on September 7. (A. 69, 74; A. 91-94.) During the voting, the Union's election observer challenged the ballots of three individuals—John DiTore, Birendra Sahijwani, and Scott Hillman. (A. 69, 74-75; A. 94, 99, 200.) The Company's observer did not challenge anyone's ballot. (A. 69.) When the polls closed, 108 votes had been cast for union representation and 106 votes had been cast against; the 3 uncounted challenged ballots were sufficient to determine the outcome of the election. (A. 69, 74-75; A. 94, 99.) The Union, in addition to its challenges of the 3 ballots, filed timely election objections within 7 days of the election, alleging that the Company and certain employees had engaged in conduct that affected the election results. (A. 69, 75; A. 96-101.) The Company did not file any objections—either to any alleged conduct affecting the results of the election or to the conduct of the election itself. (A. 69-70.)

After continued investigation of the Union's unfair-labor-practice charges, the Regional Director issued a complaint, which she later amended, alleging that the Company violated Section 8(a)(1) of the Act by prohibiting employees from discussing the Union in work areas or during work time; violated Section 8(a)(3) and (1) of the Act by implementing a policy of withholding employee wage increases, bonuses, transfers, and promotions; and violated Section 8(a)(1) by telling employees of that policy. (A. 75; A. 1042-44.) Soon thereafter, following an investigation in the representation case, the Regional Director issued a notice of

hearing on the Union's challenges and objections. (A. 68, 74; A. 99-101.) Finding common issues between the unfair-labor-practice and representation cases, the Regional Director consolidated the cases for hearing before an administrative law judge. (A. 68, 74, 151 n.3; A. 99-101.)

After a hearing, the judge found that the Company committed the unfair labor practices as alleged. (A. 77-80.) Resolving the representation-case issues, the judge recommended overruling the challenge to Hillman's ballot but sustaining the challenges to DiTore and Sahijwani's ballots, based on their status as professional employees under Section 2(12) of the Act (29 U.S.C. § 152(12)). The judge reasoned that, as statutory professionals, DiTore and Sahijwani could not be included in the bargaining unit as a matter of law, because the election had not utilized the Board's "*Sonotone*" procedures, *Sonotone Corp.*, 90 NLRB 1236, 1240-42 (1950), which require, consistent with Section 9(b)(1) of the Act (29 U.S.C. § 159(b)(1)), that professional employees vote in a separate voting group, using special ballots to determine first whether they wish to be included in a unit with nonprofessionals and, second, whether they want union representation.² (A. 69, 76-77, 80-81.) The judge also recommended sustaining one of the Union's

² The judge concluded, in the alternative, that even if DiTore and Sahijwani were not professional employees, the challenges to their ballots should be sustained because they do not share a community of interest with the other unit employees. The Board declined to pass on this alternative conclusion. (A. 69 n.7, 77.)

objections, concluding that the Company's conduct had affected the outcome of the election and would have been sufficient to set aside the result, had the Union lost. (A. 80.)

The Company filed exceptions to the judge's decision with the Board, contending that the judge erred in finding the unfair labor practices. It further contended that DiTore and Sahijwani are not professional employees, and therefore, the challenges to their ballots should be overruled and their ballots should be opened and counted. (A. 68-69; A. 16-37.) The Company also argued that if they are professionals, the Board should go a step further and nullify the entire election and order a new *Sonotone* election in which DiTore and Sahijwani could vote first on their inclusion in the unit of nonprofessionals and second on whether they want union representation. (A. 69-70; A. 22-23.)

The Board (Members Hirozawa and Johnson; Member Miscimarra dissenting in part), on August 27, 2015, issued a Decision, Order, and Certification of Representative. (A. 68-74.) On the unfair-labor-practice allegations, the Board found no merit to the Company's exceptions and adopted the judge's findings and recommended order, as modified. (A. 68, 70-71.) In the representation case, the Board affirmed the judge's finding that DiTore and Sahijwani are professional employees under Section 2(12) of the Act. (A. 68-69.) It also upheld the judge's determination to sustain the Union's challenges to their ballots. (A. 68-70.) The

Board reasoned that, even assuming the parties had intended to include the two professionals in the stipulated unit, giving effect to that intent, and thus, counting their ballots, would contravene Section 9(b)(1) of the Act, because the parties also stipulated to a conventional election. Therefore, DiTore and Sahijwani had not been afforded a separate vote, as Section 9(b)(1) requires, on their inclusion in a combined unit with nonprofessional employees. (A. 69-70.) The Board further rejected as untimely and procedurally improper the Company's request to set aside the election. (A. 69-70.)

As the Board explained, its decision resulted in a final tally of 108 votes for representation, 106 votes against, and one non-determinative challenged ballot.³ (A. 70.) Accordingly, the Board certified the Union as the exclusive collective-bargaining representative of the unit employees. (A. 70-71.) It declined to reach the Union's objections, which were mooted by the certification. (A. 69 n.6.)

B. The Refusal-to-Bargain Proceeding

Following certification, the Company refused the Union's requests to bargain and to furnish it with information concerning the employees' terms and conditions of employment. (A. 151-52; A. 118-121, 125-138.) The Union filed a

³ Although neither party excepted to the judge's recommendation to overrule the challenge to Hillman's ballot, the Board ruled that his ballot should not be opened, since it was non-determinative, in light of the Board's decision not to open the challenged ballots of DiTore and Sahijwani. (A. 69 n.6.)

charge, and the Board's General Counsel issued a complaint alleging that the Company's refusals violated Section 8(a)(5) and (1) of the Act. (A. 151; A. 123-30.) The General Counsel subsequently filed a motion for summary judgment, and the Board issued a notice to show cause why the motion should not be granted. (A. 151; A. 83-88, 140-46.) In its responses, the Company admitted its refusals but claimed they were lawful because the Board had improperly certified the Union. (A. 151; A. 131-38, 147-50.)

III. THE BOARD'S CONCLUSIONS AND ORDERS

A. The 2015 Order

On August 27, 2015, the Board (Members Hirozawa and Johnson; Member Miscimarra dissenting) issued its decision in which it agreed with the administrative law judge's recommendations in the representation case, sustained the Union's challenges to the ballots of DiTore and Sahijwani, and certified the Union as unit employees' bargaining representative. (A. 68-71.) The unanimous panel further found, in agreement with the judge, that the Company violated Section 8(a)(1) of the Act by telling employees that they could not discuss the Union in work areas or during work time, violated Section 8(a)(3) and (1) of the Act by implementing a policy of withholding and delaying employee wage increases, bonuses, transfers, and promotions during the pendency of the

representation election, and violated Section 8(a)(1) by informing employees of that policy. (A. 68.)

The Board's Order directs the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act. (A. 70-71.) Affirmatively, the Order directs the Company to rescind the instruction prohibiting discussion of the Union in work areas or during work time, make employees whole for any losses suffered as a result of the Company's unlawful conduct, and post a remedial notice. (A. 70-71.)

B. The 2016 Order

On July 27, 2016, the Board (Chairman Pearce and Members Miscimarra and Hirozawa) issued its decision granting the General Counsel's motion for summary judgment and finding that the Company's refusals to bargain and furnish information violated Section 8(a)(5) and (1) of the Act. (A. 151-54.) 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 that resulted in the 2015 Order, and that the Company neither offered any newly discovered and previously unavailable evidence, nor alleged the existence of any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. (A. 151-52.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, 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 (29 U.S.C. § 157). (A. 153.) Affirmatively, the Board's Order directs the Company to post a remedial notice, furnish the Union with the requested information, and, on request, bargain with the Union. (A. 153.)

SUMMARY OF ARGUMENT

1. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) by discriminatorily restricting employees' union-related speech in a manner unlawful under settled law. As Supervisor Frank Belcher admitted, and the Board rightly found, he instructed employees not to talk about the Union while on the plant floor or during work time despite the Company's longstanding, continuing practice of allowing workers to discuss other subjects unrelated to their jobs while working.

2. The Board's finding that the Company violated Section 8(a)(3) and (1) by withholding and delaying employee benefits during the pendency of the Union's election petition is similarly supported by substantial evidence and consistent with law. Again, the Company admits the essential facts demonstrating its unfair labor practice. There is no dispute that, solely because of the organizing campaign, the Company withheld and delayed benefits, including raises and bonuses, which

employees otherwise would have received. Its only proffered justification for doing so—that Board precedent supposedly required that it take these actions—is mistaken. And, as the Board further found, the Company failed to take the requisite steps to neutralize the coercive effect of its withholding and delay. Finally, the Company does not contest that, if it unlawfully withheld these benefits, it also violated Section 8(a)(1) by telling employees that benefits were on hold until after the election.

3. The Board acted well within its discretion in certifying the Union after reasonably determining that the Union’s challenges to the ballots of employees John DiTore and Birendra Sahijwani should be sustained on the basis of their status as professional employees. Accordingly, the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain and furnish information to the Union must be upheld.

The parties’ stipulated election agreement called on the Board to run a conventional election for a bargaining unit that did not appear to include any professional employees. Hence, there was no need for the Board to use the two-question *Sonotone* ballot that, consistent with Section 9(b)(1) of the Act, first asks professional employees if they want to be included in a nonprofessional unit.

Having run the election without using any *Sonotone* ballots, the Board then properly sustained the Union’s challenges to the ballots of DiTore and Sahijwani.

Substantial evidence supports the Board's finding that they are both professional employees and, without having been given the separate self-determination vote that Section 9(b)(1) requires, they could not now be included in the unit. Importantly, DiTore and Sahijwani work in specialized engineering positions, and they must use their knowledge, acquired through extensive education and training, to address the plant's wide variety of process-improvement and product-quality issues. Thus, applying the factors identified in Section 2(12) of the Act, the Board found that DiTore and Sahijwani qualify as professionals because their work requires advanced knowledge, is predominantly intellectual and varied rather than routine or standardized, and consistently involves the use of discretion and judgment.

The Board reasonably rejected the Company's alternative argument that the Board should rerun the election based on DiTore and Sahijwani's status as professional employees. As the Board explained, having failed to file objections to the election or assert that the election was improperly conducted until months after the objections' deadline had passed, the Company's claim came too late. And, as the Board further explained, its settled practice is not to set aside an election based merely on challenged ballots.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY COMMITTED PRE-ELECTION UNFAIR LABOR PRACTICES

A. Standard of Review and Relevant Statutory Provisions

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-85 (1951). The Court thus will uphold the Board's findings unless the record "is so compelling that no reasonable factfinder could fail to find to the contrary." *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015). The Board's application of the law to the facts is also reviewed under the substantial-evidence standard. *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). Moreover, the Court "will uphold the Board's legal determinations so long as they are neither arbitrary nor inconsistent with established law." *Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 357 (D.C. Cir. 2016).

Section 7 of the Act guarantees employees the right "to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(a)(1) and Section 8(a)(3) give teeth to this guarantee. Section 8(a)(1) of the Act makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights

guaranteed in [Section 7].” 29 U.S.C. § 158(a)(1). And Section 8(a)(3) of the Act prohibits “discrimination in regard to . . . any term or condition of employment to . . . discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3).⁴

B. The Company Violated Section 8(a)(1) of the Act by Telling Employees They Could Not Discuss the Union in Work Areas or During Work Time

An employer violates Section 8(a)(1) by conduct that has a “reasonable tendency” to interfere with or restrain Section 7 rights. *Venetian Casino Resort, L.L.C. v. NLRB*, 484 F.3d 601, 610 (D.C. Cir. 2007). The Board has long held that “an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced or enforced only in response to specific union activity in an organizational campaign.” *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003); accord *Teledyne Advanced Materials*, 332 NLRB 539, 539 (2000). This Court has repeatedly recognized that principle of non-discrimination in upholding such Board findings. See *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1006 (D.C. Cir. 2001) (even facially neutral restrictions on work-time solicitations or discussions may not be applied in non-neutral fashion to restrict union activities); *Frazier Indus. Co. v. NLRB*, 213 F.3d 750, 759 (D.C. Cir. 2000) (company

⁴ The two provisions overlap to the extent that a Section 8(a)(3) violation derivatively violates Section 8(a)(1). See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

promulgated invalid rule prohibiting employees from talking about union during working time), *enforcing* 328 NLRB 717 (1999); *accord Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 833 (7th Cir. 2005) (employer violates Section 8(a)(1) “when it discriminatorily prohibits employees from discussing union-related topics during work time while tolerating other subjects of discussion”).

Here, as the Board reasonably found (A. 68 n.4, 77), the Company engaged in precisely that type of unlawful conduct, through Supervisor Belcher’s repeated instructions to employees. (*See* pp. 5-6.) Indeed, Belcher himself admitted that he told “all of the employees under [his] supervision” that “discussions about the union or organizing had to take place in common areas, not work areas”—*despite* the admitted absence of any company policy or rule generally prohibiting “discussions between employees in the work areas [or during] work time” or limiting “the topics [that] employees may discuss.” (A. 558-60, 571, 1170-73.) As Belcher elaborated, the Company’s employees have “always”—as a matter of “routine”—freely discussed other non-work-related subjects while they are working: “football, basketball, vacations . . . you name it . . . anything they want.” (A. 561-62.) Thus, as the Board properly concluded, the Company’s instructions to employees “that they could not discuss the Union in work areas or on worktime . . . constituted a discriminatory restriction on union-related speech.” (A. 68 n.4).

In the face of this settled law and largely undisputed facts, the Company offers the simple truism that “[t]he existence of [a] union campaign does not deprive an employer of the right to expect employees to work while on the clock.” (Br. 30.) This axiom misses the point entirely; the Company was free to maintain “nondiscriminatory policies that forward its legitimate objectives,” but not to issue discriminatory instructions or rules that “target, either through design or enforcement, activity protected by the Act.” *Brandeis*, 412 F.3d at 834; *accord Gerry’s Cash Markets, Inc. v. NLRB*, 602 F.2d 1021, 1024-25 (1st Cir. 1979).

C. The Company Violated Section 8(a)(3) and (1) of the Act by Withholding and Delaying Employee Benefits During the Pendency of the Election

Under Section 8(a)(3), an employer “may not, without valid reason, treat employees differently in the promise or offer of important employee benefits based on the employees’ participation in protected activities.” *Care One*, 832 F.3d at 357. Accordingly, while a union-organizing campaign is underway, an employer must decide whether to grant employee benefits “precisely as it would if the union were not on the scene.” *Id.* (quoting *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 927 (D.C. Cir. 2005)); *accord Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 102 (D.C. Cir. 2000). “It follows that an employer may not withhold a wage increase that would have been granted but for a union organizing

campaign.” *Federated Logistics*, 400 F.3d at 927; *accord Care One*, 832 F.3d at 358; *Traction Wholesale*, 216 F.3d at 102.

The Board has recognized a limited exception to these settled principles to provide employers with a safe harbor. An employer acting in good faith can avoid liability for the withholding of benefits pending a union election if it explains its decision to its employees in a manner that neutralizes the decision’s coercive effect. Thus, the Board has ruled that “an employer may postpone such a wage or benefit adjustment so long as it ‘[makes] clear’ to employees [1] that the adjustment would occur whether or not they select a union, and [2] that the ‘sole purpose’ of the adjustment’s postponement is to avoid the appearance of influencing the election’s outcome.” *Atl. Forest Prod.*, 282 NLRB 855, 858 (1987) (quoting *Uarco, Inc.*, 169 NLRB 1153, 1154 (1968)); *accord Sams Club*, 349 NLRB 1007, 1012 (2007). The employer must communicate these two points to its employees in order to avoid liability; there are no “magic words,” however, in which the points must be couched. *Sams Club*, 349 NLRB at 1012-13.

Applying these principles here, the Board reasonably found (A. 68, 79-80) that the Company violated Section 8(a)(3) and (1) of the Act by withholding and delaying employee wage increases, bonuses, transfers, and promotions during the pendency of the union election. The Company concedes that—“because of the Union organizing campaign” (Br. 32)—it “suspend[ed],” “delayed,” and “placed

on hold” (Br. 33, 36) such employee benefits “during the period between the filing of the Union’s representation petition and the election.” (Br. 10.) In fact, the Company appears to further concede (Br. 11, 33, 36), and Humans Resources Manager Diane Ware readily admitted (A. 384-91, 667, 673-75) that the Company continued to give effect to this policy until sometime after the election, and that a number of employees’ raises and bonuses were delayed pursuant to the policy. (See pp. 7-9.) The Company therefore does not, and could not, dispute that it withheld employee benefits that it would have granted “but for [the] union organizing campaign,” *Federated Logistics*, 400 F.3d at 927, as the Board found. (A. 78-79.)

As in *Care One*, the Company’s “only proffered justification” for its decision to withhold employees’ benefits based solely on the organizing campaign is its “legally erroneous view that the Board’s precedent so required.” *Care One*, 832 F.3d at 360. (See Br. 31-36, and pp. 7-8.) “[R]eliance on [such] dubious legal advice does not excuse [the Company’s] discrimination.” *Care One*, 832 F.3d at 360 (internal quotation marks omitted).

Moreover, the Board rightly found (A. 79) that the Company did not take the necessary steps to neutralize the coercive effect of its withholding, and thus, that it did not avail itself of the Board’s safe-harbor exception. (See pp. 8-9.) As the Board highlighted, the Company “did *not* tell employees that the freeze was going

to be temporary and that withheld bonuses and wage increases would only be deferred until after the election regardless of the outcome.” (A. 79.) Nor did it inform them that the sole purpose of its withholding decision was to avoid the appearance of influencing the election. While the Company seems to rely (Br. 32-36) on Ware’s emailed statement to managers and supervisors claiming that the Company wanted to avoid the perception that it was trying to “buy” votes (A. 1168), supervisors did not convey that message *to the employees*.⁵ (See pp. 8-9.) Thus, the Company violated Section 8(a)(3) and (1) by withholding and delaying employee benefits.⁶

⁵ Nor would such statements, standing alone, suffice to relieve the Company of liability even had it made them to the employees. *See, e.g., Noah’s Bay Area Bagels, LLC*, 331 NLRB 188, 189-91 (2000) (finding violation where employer told employees it was acting to avoid “do[ing] anything . . . that could be considered ‘buying’ your votes,” and “solely to avoid any risk of improper influence,” but where it nonetheless failed to communicate to employees any “assurance that [the] benefits would . . . be restored to them retroactively following the election, regardless of its outcome”).

⁶ The Company errs (Br. 36) in its alternative remedial challenge to the Board’s 2015 Order, which is limited to the claim that enforcement of the make-whole provisions would be unduly speculative with respect to spot bonuses. The Board expressly reserved this issue for compliance, stating: “we leave for compliance the identification of employees unlawfully denied spot bonuses and the determination of the amount they should receive, including interest. In a subsequent compliance proceeding, the Company may renew its contention that this determination would involve improper speculation.” (A. 68 n.5.) (See also A. 70.) And we note the Board’s ultimate resolution of this issue in that proceeding would be subject to later court review.

The Company also independently violated Section 8(a)(1) by telling employees that wage increases, bonuses, transfers, and promotions were on hold until after the election. (A. 68, 79-80.) *SNE Enterprises Inc.*, 347 NLRB 472, 472, 480, 499 (2006) (employer independently violated Section 8(a)(1) by statements to employees that wage increases not being given because of pending representation petition); *see also Enter. Leasing Co. of Florida v. NLRB*, 831 F.3d 534, 543-44 (D.C. Cir. 2016) (employer independently violated Section 8(a)(1) by telling employees it was terminating short-term disability benefits on account of their union membership). Because the Company does not contest this separate and independent violation in its brief, it has waived the issue, and the Board is entitled to summary enforcement of the corresponding portion of its 2015 Order remedying this finding. *See, e.g., Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011).

II. THE BOARD ACTED WITHIN ITS DISCRETION IN CERTIFYING THE UNION, AND THEREFORE THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN AND FURNISH INFORMATION TO THE UNION

A. Introduction and Standard of Review

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees” 29 U.S.C. § 158(a)(5).⁷ An employer’s duty to bargain includes the obligation to “provide information that is needed by the bargaining representative for the proper performance of its duties.” *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *accord N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011). Here, following an election, the Board certified the Union as employees’ collective-bargaining representative, and thereafter, the Company admittedly (Br. 9, A. 125-27, 136) refused to recognize and bargain with the Union and to provide it with relevant requested information. Therefore, unless the Company carries its “heavy burden” of showing the Board’s certification is invalid, *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002) (internal quotation marks omitted), the Company’s admitted refusals violated Section 8(a)(5) and (1) of the Act. *See NCR Corp. v. NLRB*, 840 F.3d 838, 841 (D.C. Cir. 2016); *NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012).

⁷ An employer that violates Section 8(a)(5) also violates Section 8(a)(1). *See Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

The Court will uphold the Board’s decision to certify an election except in “the rarest of circumstances.” *800 River Road Operating Company, LLC v. NLRB*, ___ F.3d ___, slip. op. at 12-13 (D.C. Cir. Jan. 24, 2017). This “extraordinary deference,” *id.*, flows from the Board’s “especially ‘wide degree of discretion’” in deciding questions that arise in the course of representation proceedings. *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996) (quoting *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946)). In reviewing such decisions, the Court’s role is “extremely limited,” as “[it] must respect the Board’s broad discretion.” *Downtown Bid*, 682 F.3d at 112 (internal quotation marks omitted); *accord 800 River Road*, slip. op. at 12-13.

B. The Board’s Regional Director Conducted a Conventional Election Based on the Parties’ Stipulated Election Agreement and the Reasonable Assumption that the Unit Did Not Contain Any Professional Employees

The parties to a representation proceeding may, with the approval of the Board’s regional director, enter into a stipulated election agreement specifying the contours of the bargaining unit and setting forth how the election will be conducted. *See* 29 U.S.C. § 159(c)(4); 29 C.F.R. § 101.19(b); 29 C.F.R.

§ 102.62(b).⁸ A regional director will approve such an agreement unless it facially

⁸ The Addendum to this brief, excerpted from <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/Manual-Part%20101%20.pdf> and <https://www.nlr.gov/sites/default/files/attachments/basic-page/node->

violates the Act or settled Board policy. *Atlanta Hilton & Tower*, 278 NLRB 474, 478 (1986); *Hollywood Med. Ctr.*, 275 NLRB 307, 308 (1985); *see also Associated Milk Producers, Inc. v. NLRB*, 193 F.3d 539, 543 (D.C. Cir. 1999) (when parties stipulate bargaining unit, Board has “more limited role” and must “ensure that the stipulated terms do not conflict with fundamental labor principles”) (internal quotation marks omitted).

Section 9(b)(1) of the Act specifies that the Board “shall not ... decide that any unit is appropriate ... if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.” 29 U.S.C. § 159(b)(1). Congress enacted this provision, as part of the 1947 Taft-Hartley Amendment, to ensure professional employees that the Board would not submerge their special interests by including them, against their will, in bargaining units with nonprofessionals. *See Leedom v. Kyne*, 358 U.S. 184, 188-91 (1958), *affirming* 249 F.2d 490, 491-92 (D.C. Cir. 1957); *Retail Clerks Local 324*, 144 NLRB 1247, 1251-52 (1963); S. Rep. No. 105, 80th Cong., 1st Sess. (1947), at pp. 3, 11.

1717/rules_and_regs_part_102.pdf, contains relevant sections of the Board’s rules and regulations, codified at 29 C.F.R. §§ 101 & 102, that were in effect at the time of this case. Since then, there have been revisions. 79 Fed. Reg. 74,308, 74,308 (Dec. 15, 2014).

To safeguard this right, the Board long ago adopted procedures for a type of election known as a “*Sonotone* election,” which it uses when a proposed bargaining unit seeks to combine professional employees with nonprofessional employees. *See San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1183 & n.2 (D.C. Cir. 2012); *Sonotone Corp.*, 90 NLRB 1236, 1240-42 (1950). In a *Sonotone* election, the professional employees vote using special ballots that include two questions: first whether they wish to be included in a combined unit of professional and nonprofessional employees and second whether they wish to be represented by the union or unions involved. *Sonotone*, 90 NLRB at 1241-42. The professional employees’ majority vote as to the first question dictates whether their votes on the second question will be counted together with the nonprofessionals’ votes in a single, combined unit. *Sonotone*, 90 NLRB at 1241-42.

In the absence of a *Sonotone* election, or alternative procedures that would satisfy the mandate of Section 9(b)(1), the Board is forbidden from certifying a unit that includes both professional and nonprofessional employees. *Leedom*, 358 U.S. at 188-89. Accordingly, the Board’s regional directors must not approve a proposed stipulation that calls for a conventional (*i.e.*, non-*Sonotone*) election in a unit that, on its face, appears to combine professionals and nonprofessionals. *Sunrise, A Cmty. for the Retarded, Inc.*, 282 NLRB 252, 252 & n.2 (1986); *Valley View Hosp.*, 252 NLRB 1146, 1146-47 (1980); *cf. Hollywood*, 275 NLRB at 307-

08 (regional director properly accepted facially valid stipulation notwithstanding party's post-election claim that some employees included in professionals voting group were actually nonprofessionals, in violation of Section 9(b)(1)).

Here, the parties agreed in their stipulated election agreement to have voting conducted under the terms of a conventional election in a bargaining unit defined as “[a]ll full-time employees” in 15 listed departments at the Company’s manufacturing plant. (A. 91-93.) As the Board found, this unit “did not appear on its face to include professional employees.” (A. 70 n.12.) For example, “it was not readily apparent from the face of the stipulation,” that the reference to employees in the “QC [quality control]” department “might have entailed the inclusion of professional employees.” (A. 70 n.12.) Accordingly, since the parties’ stipulation did not facially contravene Section 9(b)(1), the Board’s Regional Director properly approved it.

Thereafter, prior to the election, there was nothing to indicate that the stipulated unit might include professional employees. Therefore, the Regional Director rightly proceeded, having received no notice of potential impropriety, to conduct a conventional election. *Cf. Pontiac Osteopathic Hosp.*, 327 NLRB 1172, 1172-73 (1999) (regional director erred in proceeding with conventional election where employer and group of unit employees supplied information prior to election

putting director on notice of substantial issue as to professional status of some unit employees).

C. The Board Reasonably Excluded the Challenged Ballots of DiTore and Sahijwani

The parties' stipulated election agreement here provided that the conduct of the election and all post-election procedures would conform to the Board's Rules and Regulations. (A. 91-93.) *See also* 29 C.F.R. § 101.19(b); 29 C.F.R. § 102.62(b). Under long-established Board procedures, a party to a representation election "may challenge . . . the eligibility of any person to participate in the election," 29 C.F.R. § 102.69(a), provided that it does so before the prospective voter's ballot has been cast.⁹ *A.J. Tower*, 329 U.S. at 331-34; *Norris, Inc.*, 63 NLRB 502, 512 (1945). Such challenged ballots are impounded and excluded from the tally of votes prepared upon conclusion of polling; the challenges are not resolved unless the total number of challenged ballots is sufficient to determine the outcome of the election. *See* 29 C.F.R. § 102.69(a)&(b); 29 C.F.R. § 101.19(b); *A.J. Tower*, 329 U.S. at 327 n.3, 332; *Norris*, 63 NLRB at 512. When the Board resolves a challenge, it determines whether that particular ballot will be opened and counted. *See* 29 C.F.R. § 102.69(h); *Norris*, 63 NLRB at 512; *Owens-Corning Fiberglas Corp.*, 61 NLRB 546, 551-52 (1945). The Board's wide discretion in

⁹ Consistent with these procedures, the stipulation here provided that "[e]ach party may station an equal number of authorized . . . observers at the polling places . . . to challenge the eligibility of voters." (A. 92.)

representation proceedings extends to its disposition of challenged ballots, which the Court upholds unless the Board has abused its discretion. *See, e.g., Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117, 1120 (D.C. Cir. 2012).

Here, the Union challenged DiTore and Sahijwani's ballots and those two challenges became determinative in light of the 108-106 tally. To resolve the challenges, the Board found it necessary to determine whether they were statutory professional employees. If they were, the Board was required to exclude their ballots because they had not been given the special self-determination ballot asking them whether they, as professionals, wished to be included in a combined unit with the approximately 227 nonprofessional employees. (A. 69-70; A. 91-94, 99, 944-49.) (*See* pp. 30-31.)

Indeed, the Company does not dispute that if DiTore and Sahijwani are statutory professionals, Section 9(b)(1) required the Board to sustain the challenges to their ballots. As the Board explained (A. 69-70), even if the parties had intended to include DiTore and Sahijwani in the unit, their exclusion was required because they had not been given an opportunity to vote on whether they wished to be included in a unit with nonprofessional employees. *See* 29 U.S.C. § 159(b)(1); *Leedom*, 358 U.S. at 188-89. It is settled that, when resolving challenged ballots in stipulated-unit cases, the Board will not effectuate the parties' stipulation or intent if doing so would contravene a provision of the Act or established Board policy.

NLRB v. Speedway Petroleum, 768 F.2d 151, 155 (7th Cir. 1985) (“Even if the pre-election stipulation clearly indicates which employees are eligible to vote, it has been held on numerous occasions that the inclusion or exclusion of employees in a unit per [such] a ... stipulation may not contravene or violate the [Act] or ... settled Board policy”); *Knapp-Sherrill Co. v. NLRB*, 488 F.2d 655, 659-60 (5th Cir. 1974) (intent does not control when “inconsistent with any statutory provision or with established Board policy”) (internal quotation marks omitted); *Halsted Commc’ns*, 347 NLRB 225, 225 (2006) (same).¹⁰

D. Substantial Evidence Supports the Board’s Finding that DiTore and Sahijwani Are Professional Employees

Substantial evidence supports the Board’s determination that DiTore and Sahijwani are professional employees and therefore their ballots were not opened

¹⁰ See also, e.g., *Brom Mach. & Foundry Co. v. NLRB*, 569 F.2d 1042, 1043-44 (8th Cir. 1978) (upholding Board’s decision, notwithstanding parties’ pre-decertification-election stipulation, to sustain challenges to ballots of employees not included in unit recognized under most recent collective-bargaining agreement, where counting such employees’ ballots “would be in derogation of the statute, and violative of the purpose sought to be achieved”); *NLRB v. Joclin Mfg. Co.*, 314 F.2d 627, 634-35 (2d Cir. 1963) (upholding Board’s decision to sustain challenges to ballots of college-student employees based on “sufficiently crystalized” Board policy regarding such employees, notwithstanding that pre-election stipulation “literally provided for the inclusion of all workers on the payroll during the test period except those expressly excluded, and college students were not so excluded”); *W. W. Grainger, Inc.*, 207 NLRB 966, 966 n.1 (1973) (Board will consider ballot challenges based on individuals’ alleged supervisory status “[n]otwithstanding . . . that those challenged held job titles that are included in the stipulated unit description,” since “to do otherwise would violate express statutory provisions and established Board policy”).

and counted in determining the final election tally. Section 2(12) of the Act defines the term “professional employee,” in relevant part, as:

[A]ny employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes[.]

29 U.S.C. § 152(12)(a). A determination of professional-employee status therefore requires “a concrete analysis of the duties of the particular employees in question.” *NLRB v. HMO Int’l/California Med. Grp. Health Plan, Inc.*, 678 F.2d 806, 811 (9th Cir. 1982); accord *NLRB v. Springfield Hosp.*, 899 F.2d 1305, 1313 (2d Cir. 1990). Though the inquiry must focus on the character of the work performed (*HMO Int’l* 678 F.2d at 811 & 811 n.13; *Springfield Hosp.*, 899 F.2d at 1313), the employees’ educational background is relevant to determining whether that work “requir[es] knowledge of an advanced type” within the meaning of Section 2(12)(a)(iv). *Avco Corp/Textron Lycoming Div.*, 313 NLRB 1357, 1357 (1994); *Ryan Aeronautical Co.*, 132 NLRB 1160, 1164 (1961). That requirement is presumptively satisfied when the classification at issue consists primarily of

individuals who hold professional degrees. *Avco*, 313 NLRB at 1357-58; *Ryan*, 132 NLRB at 1164.

As the Board is charged with the “special function of applying the general provisions of the Act to the complexities of industrial life,” *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963), questions of employee status in general are committed to its expertise. *See Local No. 207, Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers Union v. Perko*, 373 U.S. 701, 706 (1963).

Accordingly, the Board’s determination of whether particular employees qualify as professionals under Section 2(12) of the Act is entitled to considerable deference. *See Springfield Hosp.*, 899 F.2d at 1314 (upholding Board’s finding of professional status, notwithstanding that record could support contrary conclusion, where Board did not abuse discretion); *Twin City Hosp. Corp. v. NLRB*, 889 F.2d 1557, 1560 (6th Cir. 1989) (Board determination of professional status may only be reversed if constitutes abuse of discretion).

1. Facts relevant to the Board’s determination

John DiTore and Birendra Sahijwani are salaried engineers who work in the Company’s quality control department. (A. 76; A. 391, 704-05, 713-14, 769, 781-82, 784-85, 789, 802-03, 814, 823, 886-87, 895-96, 907-08, 937.) They report to Director of Quality Joe Blossic; Blossic’s engineering education and experience enable him to understand and evaluate their work. (A. 76; A. 702-04, 746, 781,

784, 803, 826, 885-87, 898-99, 907-09, 937.) DiTore and Sahijwani have distinct jobs; each of them performs work not done by anyone else in the plant. (A. 782-83, 791, 796-800, 813-14, 816, 818, 891.)

DiTore joined the Company in June 2009 as its lean engineer. (A. 76; A. 764, 769, 773, 940-41, 1023-24.) Lean engineering is a subspecialty of industrial engineering concerned with maximizing efficiency and productivity in workplace processes; it involves the use of engineering, applied mathematics, and other scientific principles and methods. (A. 76; A. 769, 771-72, 777-78, 793, 798-99, 887, 900-02.) DiTore holds a Bachelor of Science degree in mechanical engineering from Pennsylvania State University, as well as a Master of Business Administration degree and a Master of Science degree in operations management from Temple University. His Master of Science studies incorporated an industrial-engineering focus. DiTore also holds a “six sigma black belt” certification in statistics-based problem solving, and has completed numerous lean-manufacturing trainings. (A. 76; A. 770, 772, 780-81, 793, 798-99, 940-41.)

As the Company’s lean engineer, DiTore’s job is to use his specialized knowledge and skills to analyze the plant’s processes, develop plans to improve their efficiency and productivity, and oversee the implementation of such plans. (A. 76-77; A. 705-06, 766, 769, 771, 773, 777-80, 790, 793-94, 796-801, 818, 887, 891, 900-02, 940-41, 950, 1025-31.) His responsibilities extend to every

department and area of the plant. (A. 769, 775, 779, 790, 818-19, 887, 891-892, 950, 1025-31.) DiTore's work is primarily project-based, and it varies greatly. On each project, he focuses on a specific problem or opportunity within a particular plant process—for example, reducing the amount of time or labor a given manufacturing step requires, the amount of scrap it produces, or the buildup of inventory between steps. (A. 76-77; A. 774-75, 777, 787, 794-96, 800-01, 887, 900-02, 950, 1025-31.)

DiTore uses various intellectual tools and techniques to fulfill his lean-engineering function. He may, for example, devise and conduct time and motion studies; draft “fishbone” causation diagrams; utilize statistics-based problem-solving methodologies; and create and oversee design experiments to test process variables and modifications. (A. 76-77; A. 772, 777-79, 793-801, 818, 900-02, 950.) As part of his work on a given project, DiTore often assembles a cross-functional group of supervisors and employees with knowledge and direct experience concerning the process under his review; DiTore will lead these groups in discussions to gather information and perspective that will aid his study and analysis. Occasionally, he also conducts employee trainings and presentations regarding process-improvement issues. (A. 76; A. 268, 288, 322-23, 333-34, 519, 618-619, 775-77, 779-80, 786-88, 790, 794-97, 801, 901.)

Sahijwani joined the Company in March 2008 as its quality engineer. (A. 76; A. 740-41, 803, 1011.) He holds a Bachelor of Science degree in engineering from Florida Institute of Technology, a Master of Business Administration degree from Widener University, and a Master of Science degree in electrical engineering from Villanova University. Sahijwani also holds a “six sigma green belt” certification in manufacturing quality standards, and has completed additional quality-standards trainings. (A. 76; A. 740, 804-05, 1007-10, 1034-36.)

As the Company’s quality engineer, Sahijwani must use his specialized knowledge and skills to ensure that the plant’s products maximally satisfy all applicable quality standards. (A. 76-77; A. 713-14, 718, 803, 806-16, 818, 825-26, 888-89, 891, 954-55, 963-69.) Those standards, which include voluminous and highly detailed technical specifications, may be established by the Company, by independent bodies, such as the International Organization for Standardization and the American National Standards Institute, as well as by the Company’s major clients, including multinational financial-services firms American Express, Visa, and MasterCard. (A. 807-811, 813, 816-17, 891, 954-55.) Sahijwani’s responsibilities encompass all plant products, and therefore, all production departments, and nearly the entire plant; his work is primarily project-based, and it varies significantly. (A. 76-77; A. 803, 806, 809-10, 812-13, 816, 825-26, 888-89, 891-92, 954-55, 963-69.)

Principally, Sahijwani analyzes product defects (that is, failures to meet quality standards) in order to determine their root causes, then studies how to best prevent the defects from recurring, and recommends corrective actions accordingly. (A. 76; A. 335, 806-07, 809-16, 825-26, 888-89, 954-55, 963-69.) In performing this function, Sahijwani uses sophisticated instruments, machines, and computer programs—as well as his own expertise—to take various measurements, collect relevant data, and analyze it. (A. 76-77; A. 288-89, 806-07, 810-12, 816, 954-55, 963-69.) For every defect under his examination, the root cause and potential means of correction may lie in either the raw materials, the machines, or the processes involved—or, in any combination of the three. (A. 76; A. 807, 810-16, 888-89.) As for raw materials, a single defective credit card may, for example, incorporate five layers of distinct plastics, each with different physical characteristics, such as temperature and pressure tolerances. (A. 76; A. 811-13.) As part of his investigations, Sahijwani often communicates with the Company's raw-material suppliers; he sometimes visits their facilities to inspect their manufacturing processes for flaws. (A. 76; A. 810, 814-17, 889, 954-55, 963-69.)

Sahijwani also is responsible for developing manufacturing procedures and protocols that reflect and support the governing quality standards. (A. 76; A. 807, 809, 815, 954-55, 963-69.) For example, he developed such protocols as part of the Company's effort to obtain a particular certification from the International

Organization for Standardization; and he adjusts such protocols as necessary to incorporate clients' changes to their quality standards. (A. 807, 809, 817, 891.) Sahijwani communicates with clients regarding such changes and other quality issues. (A. 76; A. 817, 954-55.)

2. The Board reasonably found that DiTore and Sahijwani are professionals

Substantial evidence supports the Board's finding that "DiTore and Sahijwan[i] are professional employees under Section 2(12) of the Act." (A. 69.) (*See also* A. 76-77, 80.) Although mere job titles do not determine professional-employee status (*Illinois Valley Cmty. Hosp.*, 261 NLRB 1048, 1049 (1982); *see* pp. 36-37), the Supreme Court has recognized that employees working as engineers typically qualify as statutory professionals. *NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 184-85 (1981) (Section 2(12) "was intended to cover 'such persons as ... engineering ... personnel'" (quoting H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 36 (1947), U.S. Code Cong. Serv.1947, p. 1141.18); *accord* *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 284 n.13 (1974); *see also* S. Rep. No. 105, 80th Cong., 1st Sess. (1947), at p. 19 (Section 2(12) was drafted "to cover only strictly professional groups such as engineers"). Consistent with the Supreme Court's observation, and applying the statutory criteria in each case, the Board "has consistently found that employees with professional engineering degrees working in specialized fields of engineering

qualify as professionals.” *Avco*, 313 NLRB at 1358. Here, the Board carefully applied Section 2(12)(a)’s four factors to DiTore and Sahijwani’s specific work, and reasonably concluded that they satisfy the statutory standard.

To begin, DiTore and Sahijwani perform work that “requir[es] knowledge of an advanced type,” 29 U.S.C. § 152(12)(a)(iv), as the Board found. (A. 76.) Each of them occupies a unique engineering position within the plant, and each holds three degrees from institutions of higher learning, including a bachelor’s degree in engineering and a master’s degree in either engineering or an engineering-focused management science. *See Avco*, 313 NLRB at 1357-58, 1361 (majority of manufacturer’s disputed engineers’ holding at least bachelor’s degree in engineering raised presumption that all disputed engineers’ work required knowledge of advanced type). Further, the uncontroverted testimony amply establishes that without their extensive education and training, DiTore and Sahijwani could not do their jobs. (A. 705-06, 793-94, 796-99, 806-07, 810-12, 816, 900-02.) For example, when asked if one must have Sahijwani’s education to perform the type of data analysis he does, Sahijwani unequivocally affirmed. (A. 816.) Thus, like the product quality engineers and value engineers found to be professionals in *Avco*, DiTore and Sahijwani’s work requires “sufficient expertise to understand, evaluate, and improve the manufacturing process[es]” of the Company and/or its suppliers. 313 NLRB at 1360-62.

As the Board further found, DiTore and Sahijwani's work is "predominantly intellectual and varied as opposed to being routine or standardized." (A. 77.) *See* 29 U.S.C. § 152(12)(a)(i)&(iii). Their work consists mainly of the intellectual exertion of applying their advanced knowledge to concrete manufacturing situations. (*See* pp. 37-42.) As DiTore remarked, by way of illustration, when it comes to running a design experiment for a printing-press procedure, he "wouldn't operate the press"—rather, he is "the one that knows how to set up the experiment," and how to analyze and interpret its results. (A. 797-98.) (*See also* A. 796-99.)

Moreover, DiTore and Sahijwani's work varies considerably, because it involves an ever-changing array of projects concerning the diverse manufacturing problems and opportunities that arise across the plant's numerous departments, processes, and products. (*See* pp. 38-41.) *See* 29 U.S.C. § 152(12)(a)(i); *Avco*, 313 NLRB at 1360-62 (product quality engineers "work[ed] throughout the facility" to "determine the root cause of a problem and then recommend and implement corrective action," which included "looking at all the variables in the manufacturing process" and analyzing diverse data); *Gen. Dynamics Corp.*, 213 NLRB 851, 863-64 (1974) (systems analysts worked on varying projects "servic[ing] all major functions and ... departments as required" to support the

“analysis, development, and improvement of work procedures and ... management control systems”).

Accordingly, as both DiTore and Sahijwani “perform a wide variety of duties in several different departments,” and their “day-to-day duties ... cannot be predicted with any degree of certainty,” so too the results of their labor “cannot be standardized in relation to a given period of time.” *Twin City Hosp.*, 889 F.2d at 1561-62 (final quotation quoting 29 U.S.C. § 152(12)(a)(iii)). Indeed, the non-standardizable nature of their work is underscored by the fact that the Company pays them a salary, rather than an hourly wage, and they often work outside of their normal schedule. (A. 236, 790, 792-93, 964-65, 967, 969.) *See Firestone Tire & Rubber Co.*, 181 NLRB 830, 831-32 (1970) (employees frequently worked outside their normal hours at their own discretion).

Finally, DiTore and Sahijwani’s work also “involv[es] the consistent exercise of discretion and judgment,” 29 U.S.C. § 152(12)(a)(iii), as the Board moreover found. (A. 76-77.) Both of them, for example, are responsible for analyzing and interpreting experiment/test data, in order “to make some sense out of it” (A. 811-12), and then deciding what conclusions or recommendations, if any, should be made. *See Firestone*, 181 NLRB at 831 (employees in chemist-analytical position who test raw materials and products “must exercise their judgment ... in the interpretation of the [test] results”). More fundamentally, since

DiTore and Sahijwani's basic function is to apply abstract knowledge, concepts, and methods to an always-changing stream of dissimilar, concrete concerns, they "must exercise discretion and judgment on a daily basis in solving the varying problems which they face." *Firestone*, 181 NLRB at 831-32 (physical and chemical engineers whose duties included process-improvement and defect-correction); *see also Avco*, 313 NLRB at 1358, 1360-62 (product quality and value engineers "work[ed] in jobs requiring the consistent exercise of discretion and judgment"). As Director of Quality Blossic explained with respect to DiTore, he "ha[s] to determine what [is] the best course of action to find the answers [he's] looking for," and must tailor how he applies his knowledge based on "which process [he is] trying to improve," or "as the type of problem that's trying to be solved warrants." (A. 900-02.) As shown, the same is true regarding Sahijwani.

The Company errs in claiming that the Board applied a "one-size-fits-all standard" that anyone with an engineering job title is "inherently" professional. (Br. 18-19, 21.) As demonstrated, the Board properly applied Section 2(12)(a)'s four factors to the specific facts concerning DiTore and Sahijwani's work, and reasonably found that they satisfied the statutory-professional standard. For its part, the Company, in contesting the Board's finding, neither mentions the statutory factors nor disputes the facts. (Br. 1-37.)

Moreover, contrary to the Company's assertion (Br. 18-21), the Board's finding is supported by precedent. (*See* pp. 36-37, 42-46.) Indeed, the Board has found professional status as to manufacturing employees who,¹¹ like DiTore and Sahijwani, use advanced knowledge to perform varied functions like analyzing and improving plant processes, or diagnosing and preventing product defects, in order to "improve [product] quality and/or reduce cost, waste, seconds, or scrap," *Firestone*, 181 NLRB at 832, or to "achieve the ultimate in efficiency and effectiveness of [manufacturing] systems." *Gen. Dynamics*, 213 NLRB at 864; *accord Avco*, 313 NLRB at 1360, 1362 (employees' function was to "improve ... quality and reduce ... cost" or "make the process more efficient").

In contrast, the nonprofessional "engineers" in the cases cited by the Company (Br. 20-21) "generally performed routine work" and had substantially lower education levels, as the Board explained in *Avco* when distinguishing those employees from the professional engineers in that case. *Avco*, 313 NLRB at 1358 & 1358 n.3 (distinguishing nonprofessional "engineer" positions in *Aeronca, Inc.*, 221 NLRB 326, 329 (1975), *Gen. Dynamics*, 213 NLRB at 863, and *F.W. Sickles Co.*, 81 NLRB 390, 392-93 (1949)). Thus, while the Company compares the "quality control engineer" in *Aeronca* to Sahijwani, that individual "ha[d] only 2

¹¹ *See Avco*, 313 NLRB at 1360-62 (product quality engineers and value engineers); *Gen. Dynamics*, 213 NLRB at 863-64 (systems analysts); *Firestone*, 181 NLRB at 831-32 (various physical-engineer and chemical-engineer positions).

years of college” in an undisclosed field of study and performed tasks far less intellectually sophisticated than Sahijwani. *See* 221 NLRB at 329. Similarly, the “senior service engineers” in *Gen. Dynamics* were “primarily concerned with writing publications to assist the [e]mployer’s customers,” and there is no mention of their education levels. 213 NLRB at 863. And finally, six out of the eight “manufacturing methods engineers” in *F.W. Sickles* had only high school diplomas, and the Board explicitly found that their work did “not require any substantial amount of knowledge of an advanced type.” 81 NLRB at 393.¹²

E. The Company’s Alternative Argument that, if the Two Voters are Professional Employees, the Board Should Rerun the Election, Has No Merit

As noted, the Company does not contest that, if DiTore and Sahijwani are professional employees, the Board must sustain the Union’s challenges to their ballots. Nonetheless, it asserts (Br. 21-29, 37 n.4) that, rather than certifying the

¹² The Board rightly rejected (A. 70 n.13) the Company’s contention (Br. 26-27) that employee Khalid Husain, whom the Company claims is an engineer, improperly voted in the election. The Company’s argument boils down to an impermissible post-election challenge to Husain’s ballot and, as the Board noted (A. 70 n.13), it is well established that a party cannot contest a Board certification by challenging a voter’s eligibility after his ballot has been cast and commingled with others. *A.J. Tower*, 329 U.S. at 331-33; *Schoolman Transp. Sys., Inc. v. NLRB*, 112 F.3d 519, 521-22 (D.C. Cir. 1997). Nonetheless, we note the record is devoid of evidence concerning the nature of the work that Husain performs, though it does establish that, whatever its nature, it is different than DiTore and Sahijwani’s work. (A. 782-83, 791, 799-800, 813-14.) There is therefore no basis for the Company’s suggestion that, if DiTore and Sahijwani are professionals, Husain must be as well.

Union, the Board must set aside the election and order a rerun election allowing DiTore and Sahijwani to vote using *Sonotone* ballots (and forcing the more than 200 nonprofessional employees to vote again using conventional ballots). The Board reasonably rejected this contention. (A. 70.)

To begin, as the Board emphasized (A. 70), the Company “did not file objections to the conduct of the election on any basis, let alone on the specific grounds” that DiTore and Sahijwani were improperly denied a *Sonotone* election. In contrast to challenges to individual ballots, election objections concern the propriety of the election itself. *See* 29 C.F.R. § 102.69(a); *A.J. Tower*, 329 U.S. at 334; *Owens-Corning*, 61 NLRB at 551-52. Such objections “must be timely” and filed “[w]ithin 7 days after the tally of ballots has been prepared.” 29 C.F.R. § 102.69(a); *accord* 29 CFR 101.19(b); *Sundor Brands, Inc. v. NLRB*, 168 F.3d 515, 520 (D.C. Cir. 1999). This seven-day deadline “reflects [the Board’s] long-standing policy favoring finality in election results in order to further industrial peace.” *Manhattan Ctr. Studios, Inc. v. NLRB*, 452 F.3d 813, 816 (D.C. Cir. 2006); *see also Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 828 (D.C. Cir. 1970).

Here, objections were due by September 14, 2012. *See* 29 C.F.R. § 102.69(a). (A. 70, 74; A. 94.) When voting concluded on September 7, the Company knew that a conventional election had been conducted, without *Sonotone*

procedures, and that DiTore and Sahijwani's ballots had been challenged by the Union. Indeed, the Company now admits it "was made aware of the alleged professional status of DiTore and Sahijwani . . . when the Union challenged their ballots at the time of the election." (Br. 28.) The Company, however, as the Board noted (A. 70; A. 16-37), failed to file objections of any kind, and failed to contend in any manner that the election was improperly conducted or should be set aside until filing its exceptions to the administrative law judge's decision, more than 6 months after the objections deadline had passed. *See Sundor*, 168 F.3d at 520 (Board "properly declined to consider" objection raised after seven-day deadline passed, as employer "neither raised its objection in a timely fashion nor alleged special circumstances that could excuse its tardiness"); *Van Tran Elec. Corp. v. NLRB*, 449 F.2d 774, 774-75 (6th Cir. 1971) (upholding Board refusal to consider objections filed 56 days late due to asserted error of counsel).¹³

¹³ There is no basis to the Company's suggestion (Br. 27-28) that it was excused from asserting an objection concerning the lack of *Sonotone* procedures until the judge ultimately found, in considering the Union's ballot challenges, that DiTore and Sahijwani are professionals. As explained, objections to the conduct of an election must be filed within 7 days of the tally of ballots; the objections deadline is not measured with respect to any resolution of determinative challenged ballots. *See* 29 C.F.R. § 102.69(a) (objections "must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election"). And even if the Company wished to maintain the (meritless) position that DiTore and Sahijwani are not professionals, it nonetheless could have timely filed a conditional objection, urging that, *if* the Board concludes, in resolving the Union's challenges, that DiTore and Sahijwani are professionals, then the Board should set

Accordingly, the Board properly had before it—when confronted with DiTore and Sahijwani’s professional-employee status—only the Union’s challenges to their ballots. As the Board explained (A. 70), in the absence of objections, it is the Board’s settled practice not to set aside an election based only on challenged ballots. *Tekweld Sols., Inc.*, 361 NLRB No. 18 (2014), 2014 WL 4060038, at *2-3, *affirmed*, 639 F. App’x 16 (2d Cir. 2016); *see also Adskon, Inc.*, 290 NLRB 501, 501 n.2 (1988) (resolving ballot challenges and unfair-labor-practice charges, declining to set aside election “[b]ecause the [employer’s] objections are overruled and the [u]nion filed no objections”); *Keeshin Charter Serv., Inc.*, 250 NLRB 780, 780 n.4 (1980) (declining to set aside election “since . . . there were no objections properly before the [administrative law judge]”); *Rock Tenn Co.*, 234 NLRB 823, 825 (1978) (declining to set aside election “[s]ince no objections were filed pursuant to Section 102.69(a) of the [Board’s rules and regulations]”).

The Board’s settled practice is supported by the fundamental principle that, whereas an election objection concerns the propriety of the election itself, a ballot challenge concerns only “the eligibility of [a] person to participate in the election.” 29 C.F.R. § 102.69(a). Indeed, the Board observed more than 70 years ago that

aside the election due to the lack of *Sonotone* procedures. *See, e.g., Knapp-Sherrill Co.*, 171 NLRB 1547, 1548 (1968) (considering employer’s alternative objections).

“[a]n objection, if sustained, voids the results of the election, while a challenge, [if] sustained, merely eliminates the objectionable ballot.” *Owens-Corning*, 61 NLRB at 551-52. The Supreme Court has recognized the distinction, explaining:

“Objections and challenges are two different things Objections relate to the working of the election mechanism and to the process of counting the ballots accurately and fairly. Challenges, on the other hand, concern the eligibility of prospective voters.” *A.J. Tower*, 329 U.S. at 334; *accord Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1380 (D.C. Cir. 1999). Courts “are not free to disregard” this distinction. *A.J. Tower*, 329 U.S. at 334.

The Board acknowledged (A. 70 n.12) that the result might differ in a case where the stipulation appeared to violate Section 9(b)(1) on its face. In that instance, the Board explained (A. 70 n.12), the regional director never should have approved the stipulation (*see* pp. 29-31), and therefore, should not have conducted the election. Thus, the Board noted (A. 70 n.12), in *Sunrise*, it set aside an election in the absence of objections where the regional director had approved a stipulation that provided for a conventional election in a single bargaining unit that combined “registered nurses” with nonprofessional employees.¹⁴ *Sunrise*, 282 NLRB at 252 & n.2. In setting the election aside in *Sunrise*, the Board found that the stipulated

¹⁴ *See, e.g., Centralia Convalescent Ctr.*, 295 NLRB 42, 42 (1989) (“The Board has traditionally held that registered nurses are professional employees.”).

unit violated Section 9(b)(1) “on its face.” *Id.* at 252. Here, by contrast, as explained above (p. 32), there was nothing facially improper about the parties’ stipulation, and the Regional Director properly approved it.

The Company wrongly contends (Br. 25-26) that the Board misinterpreted *Sunrise*. Seizing on isolated language in that decision (Br. 25-26), the Company insists that the Board’s specific finding there, 282 NLRB at 252, that the stipulation violated Section 9(b)(1) on its face, was not integral to its disposition of the case. But this Court “[has] repeatedly held . . . [that] an agency’s interpretation of its own precedent is entitled to deference.” *Ceridian Corp. v. NLRB*, 435 F.3d 352, 355 (D.C. Cir. 2006) (internal quotation marks omitted); *accord Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 333 (D.C. Cir. 2015). Moreover, the Board, in setting aside the election in *Sunrise*, cited *Valley View Hospital*, 252 NLRB 1146 (1980), another case where the stipulated unit facially violated Section 9(b)(1), and where the Board made clear that the regional director never should have accepted the stipulation. 252 NLRB at 1146-47. Thus, contrary to the Company’s claims (Br. 23-26, 28-29), *Sunrise* is consistent with the Board’s decision in this case.¹⁵

¹⁵ As explained, while election objections were not filed in *Sunrise*, the Board’s decision to set aside the election there was based not on the challenged ballots but on the facial inappropriateness of the stipulation.

Here, where the Regional Director did not err in approving the parties' stipulated election agreement and conducting the conventional election, and where the Company failed to assert timely objections to the conduct of the election, the Board, in rejecting the Company's belated request to set the election aside, reasonably "decline[d] to deviate from [its] established procedural requirements." (A. 70.) The only question properly before the Board was whether to sustain the Union's challenges to DiTore and Sahijwani's ballots. Upon sustaining the challenges, because these two employees are professional employees, the Board properly certified the Union.¹⁶

¹⁶ If the Court were to find, contrary to the Board, that DiTore and Sahijwani are not professional employees, the Court would need to remand the representation proceeding for the Board to resolve a number of questions, including whether: (1) DiTore and Sahijwani are nonetheless excluded from the unit because they do not share a community of interest with the other unit employees; (2) if the Board determines that DiTore and/or Sahijwani's ballots should be opened and counted, opening and counting Hillman's ballot should it then become a determinative ballot; and (3) if, upon resolving the challenged ballots, the tally of ballots shows the Union lost the election, passing on the administrative law judge's determination that the Company's objectionable conduct would be sufficient to set the election aside.

CONCLUSION

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

Respectfully submitted,

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February 2017

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

OBERTHUR TECHNOLOGIES OF AMERICA)
CORPORATION)

Petitioner/Cross-Respondent)

v.)

NATIONAL LABOR RELATIONS BOARD)

Respondent/Cross-Petitioner)

and)

GRAPHIC COMMUNICATIONS)
CONFERENCE, INTERNATIONAL)
BROTHERHOOD OF TEAMSTERS,)
LOCAL 14M)

Intervenor)

NATIONAL LABOR RELATIONS BOARD)

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v.)

OBERTHUR TECHNOLOGIES OF AMERICA)
CORPORATION)

Respondent)

Nos. 16-1265, 16-1330

Board Case No.

04-CA-160992

No. 16-1331

Board Case Nos.

04-CA-086325

04-CA-087233

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 12,718 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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**STATUTORY AND REGULATORY
ADDENDUM**

STATUTORY AND REGULATORY ADDENDUM

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THE NATIONAL LABOR RELATIONS ACT

Section 2 of the Act (29 U.S.C. § 152) provides in relevant part:

* * *

(12) The term “professional employee” means--

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; . . .

* * *

Section 7 of the Act (29 U.S.C. § 157) provides:

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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

* * *

(5) to refuse to bargain collectively with the representatives of his employees

Section 9 of the Act (29 U.S.C. § 159) provides in relevant part:

* * *

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

* * *

(c) (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) . . .

. . . 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. . . . 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.

* * *

(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.

* * *

(d) Whenever an order of the Board made pursuant to section 10(c) 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), 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) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce. . . .

* * *

(e) The Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall file in the court the record in the proceeding 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 make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . 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 Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction . . . in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

REGULATIONS

29 C.F.R. § 101.19 provides in relevant part:

Consent adjustments before formal hearing.—The Board has devised and makes available to the parties three types of informal consent procedures through which representation issues can be resolved without recourse to formal procedures. These informal arrangements are commonly referred to as consent-election agreement followed by Regional Director's determination, stipulated election agreement followed by Board certification, and full consent agreement, in which the parties agree that all pre- and postelection disputes will be resolved with finality by the Regional Director. Forms for use in these informal procedures are available in the Regional Offices.

* * *

(b) The stipulated election agreement followed by a Board determination provides that disputed matters following the agreed-upon election, if determinative of the results, can be the basis of a formal decision by the Board instead of an informal determination by the Regional Director, except that if the Regional Director decides that a hearing on objections or challenged ballots is necessary the Director may direct such a hearing before a hearing officer, or, if the case is consolidated with an unfair labor practice proceeding, before an administrative law judge. If a hearing is directed, such action on the part of the Regional Director constitutes a transfer of the case to the Board. Thus, except for directing a hearing, it is provided that the Board, rather than the Regional Director, makes the final determination of questions raised concerning eligibility, challenged votes, and objections to the conduct of the election. If challenged ballots are sufficient in number to affect the results of the election, the Regional Director conducts an investigation and issues a report on the challenges instead of ruling thereon, unless the Director elects to hold a hearing. Similarly, if objections to the conduct of the election are filed within 7 days after the tally of ballots has been prepared, the Regional Director likewise conducts an investigation and issues a report instead of ruling on the validity of the objections, unless the Director elects to hold a hearing. The Regional Director's report is served on the parties, who may file exceptions thereto within 14 days with the Board in Washington, D.C. The Board then reviews the entire record made and may, if a substantial issue is raised, direct a hearing on the challenged ballots or the objections to the conduct of the election. Or, the Board may, if no substantial issues are raised, affirm the Regional Director's report and take appropriate action in termination of the proceedings. If a hearing is ordered by the Regional Director or the Board on the challenged ballots or objections, all parties are heard and a report containing findings of fact and recommendations as to the disposition of the challenges or objections, or both, and resolving issues of credibility is issued by the hearing officer and served on the parties, who may file exceptions thereto within 14 days with the Board in Washington, D.C. The record made on the hearing is reviewed by the Board with the assistance of its staff counsel and a final determination made thereon. If the objections are found to have merit, the election results may be voided and a new election conducted under the supervision of the Regional Director. If the union has been selected as the representative, the Board or the Regional Director, as the case may be, issues its certification and the proceeding is terminated. . . .

* * *

29 C.F.R. § 102.62 provides in relevant part:

* * *

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

* * *

29 C.F.R. § 102.69 provides in relevant part:

(a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending. All elections shall be by secret ballot. . . . Any party may be represented by observers of its own selection, subject to such limitations as the Regional Director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the Regional Director an original and five copies of objections to the conduct of the election or to conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. . . . Within 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections shall furnish to the Regional Director the evidence available to it to support the objections.

(b) If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to section 102.70, the Regional Director shall forthwith issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

* * *

(h) In any such case in which the Regional Director or the Board, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 7 days after the revised tally of ballots has been made available, the Regional Director shall forthwith issue to the parties certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board. The proceeding shall thereupon be closed.

* * *

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2017, I electronically filed the foregoing document 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 further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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