

Nos. 17-1098, 17-1159

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

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

SPECTRUM JUVENILE JUSTICE SERVICES

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

KIRA DELLINGER VOL
Supervisory Attorney

MOLLY G. SYKES
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0656
(202) 273-1747

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of issues.....	3
Statement of the case.....	3
I. The representation proceeding.....	4
II. The unfair-labor-practice proceeding	6
III. The Board’s Conclusions and Order.....	7
Standard of review	7
Summary of argument.....	8
Argument.....	10
Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.....	10
A. In deciding whether Board-agent conduct invalidates the results of a representation election, the Board and this Court assess whether the conduct raises a reasonable doubt as to the fairness and validity of the election.....	11
B. Board agents’ use of an incomplete voter list, and the Board’s ballot-challenge procedure, did not compromise the Board’s neutrality or warrant setting the election aside	13
Conclusion	17

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	3
<i>Davison Chem. Co.</i> , 115 NLRB 786 (1956).....	15
<i>Durham Sch. Servs., LP v. NLRB</i> , 821 F.3d 52 (D.C. Cir. 2016).....	12
<i>Fresenius USA Mfg.</i> , 352 NLRB 679 (2008).....	12
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999).....	3
<i>G.H. Skipper, Inc.</i> , 254 NLRB 453 (1981).....	15
<i>Gen. Shoe Corp.</i> , 77 NLRB 124 (1948), <i>enforced</i> , 192 F.2d 504 (6th Cir. 1951).....	11
<i>Med. Ctr. at Bowling Green v. NLRB</i> , 712 F.2d 1091 (6th Cir. 1983).....	14
<i>Medina Cnty. Publ'ns</i> , 274 NLRB 873 (1985).....	3
<i>Metro. Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	10
<i>NLRB v. A.J. Tower Co.</i> , 329 U.S. 324 (1946).....	8
<i>NLRB v. Conn. Foundry Co.</i> , 688 F.2d 871 (2d Cir. 1982).....	15

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>NLRB v. Corral Sportswear Co.</i> , 383 F.2d 961 (10th Cir. 1967)	14
<i>NLRB v. Curtin Matheson Sci., Inc.</i> , 494 U.S. 775 (1990).....	10
<i>NLRB v. Dickinson Press, Inc.</i> , 153 F.3d 282 (6th Cir. 1998)	11
<i>NLRB v. Doctors' Hosp. of Modesto, Inc.</i> , 489 F.2d 772 (9th Cir. 1973)	14
<i>NLRB v. Duriron Co.</i> , 978 F.2d 254 (6th Cir. 1992)	8, 11, 12
<i>NLRB v. First Union Mgmt., Inc.</i> , 777 F.2d 330 (6th Cir. 1985)	8, 12
<i>NLRB v. Oesterlen Servs. for Youth, Inc.</i> , 649 F.2d 399 (6th Cir. 1981)	12, 15-16
<i>NLRB v. Palmer Donavin Mfg. Co.</i> , 369 F.3d 954 (6th Cir. 2004)	11
<i>NLRB v. Precision Indoor Comfort Inc.</i> , 456 F.3d 636 (6th Cir. 2006)	8
<i>NLRB v. V & S Schuler Eng'g, Inc.</i> , 309 F.3d 362 (6th Cir. 2002)	8
<i>Pannier Corp., Graphics Div. v. NLRB</i> , 120 F.3d 603 (6th Cir. 1997)	8
<i>Polymers, Inc.</i> , 174 NLRB 282 (1969), enforced, 414 F.2d 999 (2d Cir. 1969)	11, 12

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Prestige Hotels, Inc.</i> , 125 NLRB 207 (1959)	15
<i>Sweetener Supply Corp.</i> , 349 NLRB 1122 (2007)	13, 14
 Statutes:	
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 8(a)(1) (29 U.S.C. § 158(a)(1))	3, 4, 6, 7, 9, 10, 17
Section 8(a)(5) (29 U.S.C. § 158(a)(5))	3, 4, 6, 7, 9, 10, 17
Section 9(c) (29 U.S.C. § 159(c))	3
Section 9(d) (29 U.S.C. § 159(d))	2, 3
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2
Section 10(f) (29 U.S.C. § 160(f))	2
 Regulations:	
29 C.F.R. § 102.62(d)	4
 Other Authorities:	
NLRB Casehandling Manual (Part Two), Representation Proceedings, §§ 11338, 11338.2(b), 11340, 11340.3	5

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

Nos. 17-1098, 17-1159

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

SPECTRUM JUVENILE JUSTICE SERVICES

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce, and the cross-petition of Spectrum Juvenile Justice Services (“the Company”) to review, a final Board Decision and Order. The Board’s Decision and Order issued against the Company on November

22, 2016, and is reported at 364 NLRB No. 149. (AR 82-84.)¹ The Board had subject-matter jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151, 160(a) (“the Act”), which empowers the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over the Board’s application and the Company’s cross-petition pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), and venue is proper because the unfair labor practice at issue took place in Michigan. The Board’s application and the Company’s cross-petition were timely because the Act imposes no time limit on the initiation of enforcement or review proceedings.

The Board’s Order is based, in part, on findings made in the underlying representation proceeding, *Spectrum Juvenile Justice Services*, Board Case No. 07-RC-169521. (AR 15-18.) Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record before this Court therefore includes the record in the underlying representation proceeding. Section 9(d) authorizes judicial review of the Board’s actions in representation proceedings for the limited purpose of “enforcing, modifying, or setting aside in whole or in part the [unfair labor practice] order of

¹ “AR” references are to the pages of the Agency Record and “Br.” references are to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

the Board”² 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 this Court’s ruling.³

STATEMENT OF ISSUES

The ultimate issue in this case is whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with its employees’ certified bargaining representative. Resolution of that issue turns on whether the Board abused its discretion in determining that Board agents’ inadvertent omission of thirty-five employees from the voting list, and the resulting challenges to those employees’ ballots, did not warrant a rerun election.

STATEMENT OF THE CASE

This unfair-labor-practice case arises from the Company’s admitted refusal to bargain with the International Union, Security, Police and Fire Professionals of America (“the Union”), the exclusive collective-bargaining representative of a unit of its employees. (AR 82; 64-65.) Before the Board, the Company contested the validity of the Union’s certification based on challenges that it had first raised in

² 29 U.S.C. § 159(d); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964).

³ *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999); *Medina Cnty. Publ’ns*, 274 NLRB 873, 873 (1985).

the underlying representation proceeding. (AR 7-19.) Having rejected those challenges, the Board held that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (AR 82-84.) The facts and procedural history relevant to both the representation and the unfair-labor-practice proceedings are set forth below.

I. THE REPRESENTATION PROCEEDING

The Company operates maximum-security juvenile detention centers in Highland Park, Michigan. (AR 82.) On February 11, 2016, the Union filed an election petition with Region 7 of the Board, seeking to represent security officers at two of the Company's locations. (AR 15; 67.) In accordance with the Board's Rules and Regulations, the Company submitted a voter list.⁴ (AR 16.)

On March 3, the Board conducted an election at two sites, the Company's Calurnet Center and Lincoln Center, with concurrent voting sessions held in the morning and afternoon. (AR 15-16, 82.) When dividing the voter list between the two locations, Board agents inadvertently omitted the names of approximately thirty-five eligible voters. (AR 16.) Relying on the faulty voter lists, the Board agents running the election challenged the ballots of those thirty-five employees,

⁴ See C.F.R. § 102.62(d) (within two days of the approval of election agreement, employer must provide regional director and parties named in agreement a list of eligible voters and their contact information).

according to the Board's standard election procedures.⁵ (AR 16.) Prior to the ballot count, the Company and the Union agreed that the employees who cast the thirty-five challenged ballots were eligible to vote, so the challenged ballots were co-mingled with the other ballots before all were opened and counted, again, according to established procedure.⁶ (AR 16.) The election results were 74-56 in favor of the Union. (AR 15; 68.)

The Company filed an Objection to the Conduct of the Election based on the inadvertent omission of the thirty-five eligible employees from the voter lists. (AR 16.) It contended that the employees whose ballots had been challenged may have believed that the Company had intentionally left them off the voter list and, as a result, a determinative number of voters may have changed their votes to favor union representation. (AR 16.)

On March 24, the Regional Director issued a Decision and Certification of Representative overruling the Company's objection. (AR 15-18.) The Regional Director concluded that, although the voter lists were incomplete, the use of those lists did not interfere with the rights of voters or the laboratory conditions required for a fair and free election. (AR 17.) Additionally, the Regional Director rejected

⁵ See NLRB Casehandling Manual (Part Two) Representation Proceedings §§ 11338, 11338.2(b), available at <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM2-Sept2014.pdf>.

⁶ See *id.* at §§ 11340, 11340.3.

as speculative the Company's claim that a determinative number of voters changed their votes because their ballots were challenged. (AR 17.) The Company filed a request for review with the Board (AR 7-9), which the Board denied on June 1, upholding the Union's certification. (AR 20.)

II. THE UNFAIR-LABOR-PRACTICE PROCEEDING

On March 31 and June 1, the Union requested that the Company bargain with it as the certified representative of the unit employees. (AR 82-83.) The Company refused to recognize and bargain with the Union. (AR 83.) Based on that refusal, the Union filed unfair-labor-practice charges with the Board. (AR 82; 39, 42, 44.) Thereafter, the General Counsel issued a complaint, later amended, alleging that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. (AR 82; 46-51, 57-61.) In response, the Company filed answers admitting its refusal to bargain, but contesting the Board's certification of the Union. (AR 82-83; 54-56, 64-66.) The General Counsel filed a motion for summary judgment, and the Board issued an order transferring proceedings to itself and a notice to show cause why the motion should not be granted. (AR 82.) The Company filed a response, again admitting its refusal to bargain but contesting the Union's certification. (AR 82.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On November 22, 2016, the Board issued a Decision and Order granting the General Counsel's motion for summary judgment and finding that the Company's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act. (AR 82-84.) In doing so, the Board concluded that all representation issues raised by the Company in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company had neither offered to adduce any newly discovered evidence nor shown any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. (AR 82.)

The Board's Order requires the Company to cease and desist from failing and refusing to recognize and bargain with the Union and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act. (AR 83.) Affirmatively, the Board's Order directs the Company to bargain with the Union upon request, to embody any understanding reached in a signed agreement, and to post a remedial notice. (AR 83.)

STANDARD OF REVIEW

Congress has "entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free

choice of bargaining representatives by employees.”⁷ Accordingly, this Court does not “lightly set aside the results of a NLRB-supervised representation election.”⁸ In reviewing the Board’s determination that “the circumstances of an election have allowed the employees to exercise free choice in deciding whether to be represented by a union,” this Court will reverse only for abuse of discretion.⁹ The Court will find an abuse of discretion if it determines that the Board’s order does not have “a reasonable basis in law,” “either because the proper legal standard was not applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning.”¹⁰

SUMMARY OF ARGUMENT

The Board did not abuse its discretion in overruling the Company’s objection to the representation election. Specifically, the Board reasonably concluded that the Board agents’ inadvertent omission of thirty-five employees from the voter list used at the election, and consequent use of the Board’s standard

⁷ *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); accord *NLRB v. V & S Schuler Eng’g, Inc.*, 309 F.3d 362, 367 (6th Cir. 2002) (“Congress has given the Board a broad range of discretion in supervising representation elections and establishing their procedures.”).

⁸ *NLRB v. First Union Mgmt., Inc.*, 777 F.2d 330, 336 (6th Cir. 1985); *NLRB v. Precision Indoor Comfort Inc.*, 456 F.3d 636, 639 (6th Cir. 2006).

⁹ *NLRB v. Duriron Co.*, 978 F.2d 254, 256-57 (6th Cir. 1992).

¹⁰ *V & S Schuler Eng’g*, 309 F.3d at 367 (quoting *Pannier Corp., Graphics Div. v. NLRB*, 120 F.3d 603, 606 (6th Cir. 1997) (internal quotations omitted)).

challenge procedure for resolving questions of voter eligibility, did not compromise the integrity and neutrality of the election processes. In so finding, the Board relied upon established Board law and rejected the Company's speculative assertions of harm arising from the challenges to the thirty-five ballots. By presenting only unfounded speculation, the Company has not met its substantial burden of showing that the election was conducted unfairly. The Board, therefore, properly certified the Union as the collective-bargaining representative of a unit of the Company's employees, and the Company's refusal to bargain with the Union violates Section 8(a)(5) and (1) of the Act. Accordingly, the Board is entitled to enforcement of its Order requiring the Company to bargain with the Union.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees”¹¹ Here, the Company does not dispute that it refused to recognize and bargain with the Union. Rather, the Company contends that its refusal is lawful because the Board erred by overruling its objection to the conduct of the election and, consequently, in certifying the Union as the bargaining representative of the unit employees. Specifically, the Company argues that the Board abused its discretion by finding that Board agents’ inadvertent omission of thirty-five employees from the voter list used at the election, and the attendant challenges to those employees’ ballots, did not warrant setting aside the election. As demonstrated below, the Company’s contentions have no merit, and the Board is entitled to enforcement of its order.

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

A. In Deciding Whether Board-Agent Conduct Invalidates the Results of a Representation Election, the Board and this Court Assess Whether the Conduct Raises a Reasonable Doubt as to the Fairness and Validity of the Election

In conducting representation elections, the Board “strives to maintain ‘laboratory conditions.’”¹² However, “elections are not automatically voided whenever they fall short of perfection,” and “the Board has broad discretion in determining whether election conditions allowed for the fair and free choice of bargaining representatives by employees.”¹³ The party seeking to set aside an election “bears the significant burden of demonstrating that the election was conducted unfairly.”¹⁴

In cases like this one, involving objections to elections based on the conduct of Board agents, the Board determines whether “the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.”¹⁵ The dispositive issue, thus, is whether the conduct in question

¹² *Duriron Co.*, 978 F.2d at 256 (citing *Gen. Shoe Corp.*, 77 NLRB 124, 127 (1948), *enforced*, 192 F.2d 504 (6th Cir. 1951)).

¹³ *NLRB v. Dickinson Press, Inc.*, 153 F.3d 282, 284 (6th Cir. 1998).

¹⁴ *NLRB v. Palmer Donavin Mfg. Co.*, 369 F.3d 954, 957-58 (6th Cir. 2004).

¹⁵ *Duriron Co.*, 978 F.2d at 259 (quoting *Polymers, Inc.*, 174 NLRB 282, 282-83 (1969), *enforced*, 414 F.2d 999 (2d Cir. 1969)).

compromises the neutrality of the Board or the integrity of the election process.¹⁶ Similarly, this Court will not disregard the results of a representation election based on minor irregularities in Board agents' conduct of the election that had no clear effect on the neutrality of the Board or the integrity of the election process. It has, for example, enforced Board decisions overruling election objections based on a Board agent having permitted a union's election observer to wear a different badge than the employer's observer,¹⁷ and based on an agent having left the ballot box unattended for a short period of time.¹⁸ To overturn an election on the basis of a Board agent's conduct, both the Board and this Court require more than "mere speculative harm."¹⁹

¹⁶ *Id.* at 258-59 (enforcing Board decision where Board agent's conduct, while contrary to Board policy, did not vitiate "the required integrity and neutrality of the election process").

¹⁷ *See First Union Mgmt.*, 777 F.2d at 335-36 (Board neutrality not compromised where agent allowed union observer to wear badge with large, hand-written letters when employer observer's badge had smaller, type-written letters).

¹⁸ *See Duriron Co.*, 978 F.2d at 258-59 (integrity of election not vitiated where ballot box remained sealed and no employees entered voting area while Board agent was absent).

¹⁹ *Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 61 (D.C. Cir. 2016) (quoting *Fresenius USA Mfg.*, 352 NLRB 679, 680 (2008)). *See NLRB v. Oesterlen Servs. for Youth, Inc.*, 649 F.2d 399, 400 (6th Cir. 1981) (rejecting challenge to election because employer presented "no evidence" in support of argument that employees failed to vote because of Board agent's brief absence from polling area).

B. Board Agents' Use of an Incomplete Voter List, and the Board's Ballot-Challenge Procedure, Did Not Compromise the Board's Neutrality or Warrant Setting the Election Aside

Here, the Board agents' use of an incomplete voter list did not raise a reasonable doubt as to the fairness and validity of the election – either by impugning the Board's neutrality or by compromising the integrity of the election processes. There is no dispute that the Board agents, when dividing the voter list between the two election sites, made a mistake that resulted in the omission of thirty-five eligible voters. But there is also no dispute that they resolved the resulting election-eligibility issues using the Board's standard challenged-ballot process prior to the actual ballot count. Under those circumstances, the Board's certification of the results of the election is well within its discretion, both reasonable and consistent with precedent.

First, the Board relied (AR 17) on its established precedent in *Sweetener Supply Corp.*, which held that a Board agent's use of an incomplete voter list did not destroy the laboratory conditions of the election.²⁰ The minor factual distinctions of *Sweetener* raised by the Company (Br. 2) are immaterial to the application of that holding here.²¹ The Company does not explain, for example, why it would make a difference whether the list was incorrect because, as here, the

²⁰ 349 NLRB 1122, 1122 n.3, 1124-25 (2007).

²¹ *Id.* at 1124-25.

Board agents omitted names in dividing it for two election sites or, as in *Sweetener*, the agent used the wrong list (one provided for an earlier election).²² From the employees' perspective, the result – incorrect omission from the voting list – is identical.

Second, the Board reasonably rejected the Company's related assertion that the Board agents' use of the challenged-ballot procedure to resolve the voter-eligibility questions created by the faulty list rendered the election unfair. This Court and others have approved the challenge procedure as a longstanding Board practice.²³ As the Board explained (AR 17), the challenge procedure is used "to avoid needless litigation and resolve voter eligibility issues in a manner consistent with the need to expeditiously resolve questions concerning representation." Indeed, the Board routinely relies on the challenge procedure, even in circumstances more extreme than the present case. For instance, it has done so

²² *Id.*

²³ See, e.g., *Med. Ctr. at Bowling Green v. NLRB*, 712 F.2d 1091, 1093 (6th Cir. 1983) (challenge procedure "enables the Board to conduct an immediate election" where voter eligibility is unclear); *NLRB v. Doctors' Hosp. of Modesto, Inc.*, 489 F.2d 772, 776 (9th Cir. 1973) ("Such challenge procedures are part of a longstanding practice of the Board."); *NLRB v. Corral Sportswear Co.*, 383 F.2d 961, 965 (10th Cir. 1967) (in determining voter eligibility, "it was neither improper nor unusual for the Board to resort to the challenge procedures").

when many or all voters are challenged.²⁴ And it has done so even where the procedure unavoidably compromises the secrecy of a voter's ballot.²⁵ Given the Board's consistent use of the challenge procedure, even in extraordinary circumstances, the Company's assertion that the voters here were unduly affected by the procedure in this case is baseless.

Finally, the Company has not explained its speculation that voters changed their votes in response to their ballots being challenged, much less proffered evidence substantiating any such effect. Rather, the Company only presents a string of unfounded assumptions: that the challenged voters *may* have blamed their omission from the voting list on the Company; that they *may* have believed that the Company intentionally left them off the list; and that "some, or many, of those 35 eligible voters" *may* have changed their decision to vote against the Union (Br. viii). The Board reasonably found that the Company, having lost an election, cannot overturn the results based on mere speculation as to what *may* have happened, without the least reason to believe it actually *did*. Indeed, in *NLRB v.*

²⁴ See, e.g., *NLRB v. Conn. Foundry Co.*, 688 F.2d 871, 874 & n.7 (2d Cir. 1982) (94 out of 212 ballots challenged); *G.H. Skipper, Inc.*, 254 NLRB 453, 453 (1981) (all ballots challenged).

²⁵ See, e.g., *Prestige Hotels, Inc.*, 125 NLRB 207, 208 (1959) (where challenged ballot is tie-breaking vote, Board will count vote even though "voter's identity may be publicly known as an unavoidable result of the challenge procedure"); *Davison Chem. Co.*, 115 NLRB 786, 786-87 (1956) (approving use of challenge procedure even where "the choice of one or more of the eligible voters becomes public knowledge").

Oesterlen Services for Youth, this Court similarly rejected an employer's speculation that a Board agent may have influenced voter conduct (by leaving the ballot box with observers for a time) because the employer provided "no evidence . . . in support of such contention."²⁶

In sum, the Company has not met the significant burden of demonstrating that the election was conducted unfairly. Accordingly, the Board acted well within its discretion in finding that the Board agents' use of an incomplete voter list, and the attendant challenges to certain ballots, did not warrant a new election.

²⁶ 649 F.2d at 400.

CONCLUSION

Because the Board properly certified the Union as the collective-bargaining representative of the unit employees, the Company's admitted refusal to recognize or bargain with the Union violates Section 8(a)(5) and (1) of the Act. Accordingly, the Board respectfully requests that the Court grant the Board's application for enforcement and deny the Company's petition for review.

/s/ Kira Dellinger Vol
KIRA DELLINGER VOL
Supervisory Attorney

/s/ Molly G. Sykes
MOLLY G. SYKES
Attorney
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-0656
(202) 273-1747

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

June 2017

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

NATIONAL LABOR RELATIONS BOARD)
)
 Petitioner/Cross-Respondent)
) Nos. 17-1098, 17-1159
 v.)
) Board Case No.
 SPECTRUM JUVENILE JUSTICE SERVICES) 07-CA-180451
)
 Respondent/Cross-Petitioner)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 3,475 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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

Dated at Washington, DC
this 2nd day of June, 2017

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

NATIONAL LABOR RELATIONS BOARD)
)
Petitioner/Cross-Respondent)
) Nos. 17-1098, 17-1159
v.)
) Board Case No.
SPECTRUM JUVENILE JUSTICE SERVICES) 07-CA-180451
)
Respondent/Cross-Petitioner)

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Sheryl A. Laughren
Robert Wayne Morgan
Berry Moorman
535 Griswold, Suite 1900
Detroit, MI 48226

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

Dated at Washington, DC
this 2nd day of June, 2017