

Nos. 16-1427, 17-1013

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

EQUINOX HOLDINGS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 87

Intervenor

**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**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (the Board) certifies the following:

A. Parties and Amici

Equinox Holdings, Inc. (the Company), was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. The Service Employees International Union, Local 87 (the Union) was the charging party before the Board and has intervened on behalf of the Board. The Board's General Counsel was a party before the Board.

B. Ruling under Review

The ruling under review is a Decision and Order of the Board in *Equinox Holdings, Inc.*, 365 NLRB No. 3 (December 16, 2016). The Decision and Order relies on findings made by the Board and Board officials in unpublished decisions in an earlier representation proceeding, Board Case 20-RC-153017, including a Hearing Officer's Report (September 18, 2015), a Decision and Certification of Representative (November 10, 2015), and an Order Denying Review (August 26, 2015).

C. Related Cases

This case has not previously been before this or any other court. Board counsel is not aware of any related cases.

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GLOSSARY

Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
Board	National Labor Relations Board
Br.	The Company's opening brief
Company	Equinox Holdings, Inc.
JA	The parties' deferred joint appendix
Union	Service Employees International Union, Local 87

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Equinox Holdings, Inc. (the Company) to review, and the cross-application of the National Labor Relations Board (the Board) to enforce, a Board Decision and Order issued against the

Company on December 16, 2016, reported at 365 NLRB No. 3. (JA 178-180.)¹ In its Decision and Order, the Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(5) and (1), by refusing to recognize and bargain with the Service Employees International Union, Local 87 (the Union) as the duly certified collective-bargaining representative of an appropriate unit of employees at the Company's San Francisco, California facilities. (JA 179.)

The Board had subject matter jurisdiction under Section 10(a) of the Act, 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). Venue is proper under Section 10(f), which provides that petitions for review may be filed in this Court. The Company's petition and the Board's cross-application were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

As the Board's unfair labor practice Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding (Board Case No. 20-RC-153017) is also before the Court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the

¹ References preceding a semicolon are to the Board's findings; those following are to supporting evidence. "JA" refers to the parties' deferred joint appendix.

Board's actions in the representation proceeding solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 29 U.S.C. § 159(d). 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 ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

ISSUE PRESENTED

Whether the Board acted within its wide discretion in overruling the Company's election objections and certifying the Union, and therefore properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set forth in the Company's brief.

STATEMENT OF THE CASE

The Board seeks enforcement of its Order finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the collective-bargaining representative of a unit of maintenance and janitorial employees at the Company's facilities. The Company does not dispute that it has refused to bargain with the Union, but claims the Board abused its discretion in finding that the Company failed to meet its burden of showing that

objectionable conduct occurred and that such conduct prevented a fair election.

The Board's findings in the representation proceedings and unfair-labor-practice proceedings are summarized below.

I. THE REPRESENTATION PROCEEDING

A. The Board's Findings of Fact

1. The Company's operations; the Union starts an organizing campaign

The Company operates three fitness facilities in San Francisco, California: a larger gym on Market Street and two smaller gyms on Pine Street and Union Street. (JA 32; 193.) In the spring of 2015, the Union started organizing the Company's maintenance and custodial employees, culminating in a May 27 petition to represent the Company's maintenance associates, maintenance managers-on-duty, and building operations associates (mechanics) at all three facilities. (JA 30, 36; 13, 237.)

2. The employees exchange Immigration and Customs Enforcement rumors

During the time between the filing of the petition and the election, discussions occurred at all three facilities regarding Immigration and Customs Enforcement (ICE) and its relationship, if any, to the election. (JA 44.)

In late May 2015, employee Ademar told another employee, Elvia Contreras, that Ademar would see that Contreras would be terminated if she did not vote for the

Union. (JA 34; 222.) In early June, employee Elipidio Garay asked another employee, Julio Hernandez, if “they” would call ICE if the Union won the election; Garay did not further define “they.” Hernandez replied, “No,” and stated that it was illegal to do so. (JA 33; 239-40.) Garay did not discuss ICE with any employee other than Hernandez. (JA 37; 218.)

About 2 weeks before the election, employee Minerva Basera and a coworker named Guillermo asked employee Esther Paniagua questions about ICE. Specifically, Basera asked Paniagua if either the Union or the Company would call ICE, and Guillermo asked Paniagua if the Union would call ICE if the Union lost the election. Paniagua replied to both questions that she did not know. (JA 34; 221.)

Another employee, Tanisha, who was against the Union and who served as an election observer for the Company, told employees at the Pine Street location on numerous occasions that if the Union won the election, undocumented workers would be replaced with workers supplied by the Union. (JA 44; 230.) Shortly before the election, an employee at the Pine Street location asked maintenance worker Naeli Mendoza if the Union would attempt to deport undocumented workers if it won the election. Mendoza overheard several other employees asking the same question. (JA 44; 227-28.)

During this same time period, Union President Olga Miranda heard rumors from employees that the Company would call ICE if the Union won the election. (JA 35; 188.) Two days before the election, Miranda called Contreras and told her that she had heard from other employees that the Company had threatened “to bring ICE in.” (JA 43.) Contreras did not personally hear any such threat, but the next day she told a co-worker, Leo, that the Company was going to “bring immigration in.” (JA 44; 222.)

3. Employee Jared Quarles possesses an airsoft gun at the Market Street facility

On June 15, 2015, four days before the election, an employee reported that another employee, Jared Quarles, had a gun at the Market Street facility. When Company Regional Vice President Jack Gannon learned this information, he called the police. When the police arrived, they discovered the gun in Quarles’ backpack in a locker. (JA 38; 197-98.) Police “briefly” handcuffed Quarles and escorted him to a private office on another floor—an event witnessed by “a handful” of Market Street employees. (JA 51, 153 n.1; 198-200.) When the police determined the gun was a replica “airsoft” gun,² they removed the handcuffs. (JA 38; 198-200.) The Company then suspended Quarles, and police escorted him from the building—an event witnessed by the same employees who previously saw Quarles

² An “airsoft” gun is a non-lethal, realistic-looking “replica firearm” used in combat-type games. (JA 51 n.4.)

in handcuffs. (JA 51-52; 200.) The Company later discharged Quarles. (JA 52 n.7; 202-03.)

That week, word of Quarles' encounter with the police spread throughout the Market Street location. (JA 39; 225.) About four to five employees at the Pine Street location also became aware of the incident. At least two of those employees, Maeli Mendoza and Miguel Pineda, heard that Quarles had been found with some kind of unidentified weapon, but did not know he had been handcuffed or otherwise detained. (JA 39; 226, 233.)

4. The preelection conference; Quarles serves as an observer for the Union

On June 1, the Union hired Rosario Rodriguez, whom the Company had discharged on May 5, to help with its organizing campaign. (JA 35; 245.) The Union also hired Quarles about 2 days before the election, shortly after he had been suspended, to participate in a phone bank. (JA 35; Tr. 72-73.) The Union did not notify any employees that it had briefly hired either Rodriguez or Quarles. (JA 35, 37, 44; 191-92.)

On June 19, the day of the election, the Board held a preelection conference at a room in the Market Street facility. The Union's and the Company's election observers and representatives were present at the meeting. The Union's observers included Rodriguez, Quarles, and employee Soga Eneliko; the Union does not pay its election observers for their service. (JA 32; 189, 191-92.) At the preelection

conference, the Company notified the Union that it had discharged Quarles, and objected to his service as observer on that basis. This notification was the first time the Union heard about Quarles' discharge. (JA 53, 153 n.1; 189-90.) Neither the Company nor the Union notified any voting employees that Quarles had been discharged, or that the Company had objected to his service as observer. (JA 53, 53 n.7.)

B. Procedural History

On June 19, 2015, the Board held a secret-ballot election among the employees in the proposed bargaining unit. The tally of ballots showed 41 votes for the Union, 33 votes against representation, and one non-determinative challenged ballot. (JA 48; 13.) On June 26, 2015, the Company filed objections, alleging, as relevant here, that (1) the Union and others acting on its behalf threatened employees that they would call immigration authorities and employees would lose their jobs if they did not vote for the Union (Objection 1); (2) employee Quarles, acting on behalf of the Union, showed employees a firearm and threatened them, and employee Eneliko, also acting on behalf of the Union, threatened to report an employee's misconduct if that employee did not vote for the Union (Objection 2); (3) the Union engaged in electioneering and surveillance at

the polling place (Objection 3);³ and (4) union supporters' conduct destroyed the atmosphere necessary to conduct a fair election (Objection 5).

The Board's Regional Director for Region 20 ordered a hearing on the objections. (JA 49; 18-29.) On the first day of the three-day hearing, the Company, in support of its allegations concerning Quarles' and Eneliko's conduct, presented Area Maintenance Manager Eric Fernandez's testimony concerning an unnamed employee's claim to Fernandez that Eneliko had threatened to report the employee's misconduct if he did not vote for the Union. Fernandez also testified that the unnamed employee informed him that Quarles brought a gun to work, showed it to three employees, and told them he had it "in case any fuckers want to get crazy." (JA 38; 207-11.) On the last day of the hearing, the Company subpoenaed the unnamed witness who had reported those incidents to Fernandez, but that witness refused to testify. (JA 39 n.11.)

The Company requested enforcement of the subpoena to compel the witness to testify. The Hearing Officer referred the request to the Regional Director, who, as the official with authority to review the Hearing Officer's decision, declined to get involved. (JA 39 n.11.) The Hearing Officer also declined the request. In doing so, the Hearing Officer expressed doubt that he had the authority to enforce

³ As discussed below, pp. 42-44, the Company has waived any argument that the Board erred in overruling Objection 3. Therefore, we have omitted evidence regarding this objection from the statement of facts.

the subpoena, and in any event, the Company had failed to make an offer of proof showing that Quarles and Eneliko were union agents or that Quarles' alleged threat was tied to the Union's organizing campaign. Given the absence of this evidence, the Hearing Officer determined that "the harm caused by the delay in seeking enforcement would override the benefit, if any, of seeking to compel the witness to testify." (JA 39 n.11; 248.)

At the end of the hearing, the Hearing Officer issued a report recommending that the objections be overruled. (JA 30-47.) The Company filed exceptions to the Hearing Officer's report, and on November 10, 2015, the Regional Director issued a decision that adopted the Hearing Officer's rulings, findings and recommendations, and certified the Union as the employees' collective-bargaining representative. (JA 47-55.)

The Company requested Board review of the Regional Director's decision certifying the Union. On August 26, 2016, the Board (Chairman Pearce and Member Hirozawa, Member Miscimarra dissenting in part)⁴ denied the Company's request for review, finding that the request "raised no substantial issues warranting review." The Board then adopted the hearing officer's findings and recommendations and affirmed the Regional Director's certification of the Union. (JA 153-56.)

⁴ On April 24, 2017, Member Miscimarra was designated Chairman.

II. THE UNFAIR LABOR PRACTICE PROCEEDING

By letters dated December 14, 2015 and September 9, 2016, the Union requested that the Company recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the certified unit. (JA 179; 149-51, 157-59.) The Company ignored those requests. Acting on a charge filed by the Union (JA 152), the Board's General Counsel issued a complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (JA 178; 160-64.) In its answer to the complaint, the Company admitted that it refused to bargain with the Union. (JA 178; 166.)

The General Counsel then moved for summary judgment, and the Board issued a notice to show cause why the motion should not be granted. (JA 178; 170.) In response, the Company admitted its refusal to bargain but contended that the Board erred by certifying the election results. (JA 178; 171-77.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On December 16, 2016, the Board (Chairman Pearce and Members Miscimarra and McFerran) issued its Decision and Order, granting the General Counsel's motion and finding that the Company's refusal to bargain violated Section 8(a)(5) and (1). (JA 178-80.) 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 neither offered any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances that would require the Board to reexamine its decision to certify the Union. (JA 178.)

The Board's Order requires the Company to cease and desist from refusing to 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 Section 7 of the Act, 29 U.S.C. § 157. (JA 179.) Affirmatively, the Board's Order directs the Company, on request, to bargain with the Union, and post a remedial notice. (JA 179-80.)

SUMMARY OF ARGUMENT

The Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158 (a)(5) and (1)) by refusing to bargain with the Union, which the Board certified as the collective-bargaining representative of the Company's janitorial and maintenance employees in the underlying representation proceeding. Before this Court, the Company challenges the Board's decision overruling its election objections. Because the credited evidence does not substantiate any of the Company's objections, the Board did not abuse its discretion in overruling them and certifying the Union.

The Board did not abuse its discretion in finding that discharged employee Quarles' service as an election observer did not interfere with the employees' free

choice of a bargaining representative. It is well established that using a discharged employee as an observer is not objectionable, absent evidence of that employee's misconduct as an observer. Substantial evidence supports the Board's finding that Quarles did not engage in any misconduct during his service as observer, and the Company presents no evidence to the contrary. The Board reasonably found the incident giving rise to Quarles' discharge—bringing an airsoft gun to the Market Street location where he worked four days before the election—did not render Quarles' service as an observer objectionable. The Company presented no evidence that Quarles acted as an agent of the Union such that his behavior could be attributed to the Union for any purpose other than his service as an observer. The Company also failed to present evidence tying the airsoft-gun incident to the Union in any way. Indeed, the evidence showed that the two events—the airsoft gun incident and the election—were entirely unrelated.

Moreover, the Company cannot blame its failure to prove objectionable conduct on the Hearing Officer's refusal to enforce the Company's subpoena that sought to compel an unnamed witness' testimony regarding Quarles' alleged brandishing of a gun and accompanying threat. The Hearing Officer properly denied the request, explaining that the sought-after testimony did not address a core issue and that the delay in obtaining enforcement far outweighed the testimony's questionable benefit.

The Board also properly found that employee Soga Eneliko's alleged threat to get another employee fired if that employee did not vote for the Union was not objectionable. This claim rests entirely on uncorroborated hearsay that the Hearing Officer discredited. Moreover, the Company has presented no evidence that Eneliko was an agent of the Union such that his behavior could be attributed to the Union.

The Board also did not abuse its discretion by overruling the Company's objection that the Union and others threatened employees with deportation. Neither the Union nor its agents made any such threat; Union President Olga Miranda simply repeated a rumor that the *Company*, not the Union, had threatened to call ICE. Moreover, the credited testimony does not establish that any employee threatened another one with deportation if the Union did not win the election. At most, the record reveals ambiguous rumors, which are insufficient to render a fair election impossible.

Finally, the Company has waived its objections alleging improper election-day electioneering and surveillance of voting employees. It did not raise those objections in its opening brief, and merely mentioning them when reciting the facts of the case is insufficient to preserve them.

ARGUMENT

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

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).⁵ Here, the Company has admittedly refused to bargain with the Union in order to challenge the Board’s certification of the Union following its election victory. (JA 178.) There is no dispute that if the Board properly certified the Union as the employees’ collective-bargaining representative, the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, and the Board is entitled to enforcement of its Order. *See C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 880-82 (D.C. Cir. 1988). Accordingly, the issue before the Court is whether the Board abused its discretion in overruling the Company’s election objections and certifying the Union. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 329-30, 335 (1946); *accord Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970).

⁵ An employer’s failure to meet its Section 8(a)(5) bargaining obligation constitutes a derivative violation of Section 8(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights” 29 U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Because the Company failed to produce sufficient evidence to support its claims of objectionable conduct, the Board did not abuse its discretion in overruling the Company's objections. As shown below, the Company's story of a "Wild West" election (Br. 2) bears no resemblance to the facts and relies on discredited testimony and unsupported inferences.

A. The Board Has Broad Discretion in Conducting Representation Proceedings, and the Party Seeking To Overturn a Board-Approved Election Bears a Heavy Burden

"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." *A.J. Tower Co.*, 329 U.S. at 329-30, 335; accord *C.J. Krehbiel Co.*, 844 F.2d at 882. Accordingly, the scope of appellate review of the Board's decision to certify a union is "extremely limited." *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1562, 1564 (D.C. Cir. 1984). The Board's order is entitled to enforcement unless the Board abused that wide discretion in overruling the objections to the election. See *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996).

There is a "strong presumption" that an election conducted in accordance with those safeguards "reflect[s] the true desires of the employees." *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997); accord *NLRB v. Coca-Cola Bottling Co. Consol.*, 132 F.3d 1001, 1003 (4th Cir. 1997) ("the outcome of a

Board-certified election [is] presumptively valid”). Therefore, the results of such an election “should not be lightly set aside.” *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 570 (D.C. Cir. 1970) (citations omitted); *accord 800 River Rd. Operating Co. v. NLRB*, 846 F.3d 378, 385-86 (D.C. Cir. 2017) (court will overturn a Board decision to certify a union “in only the rarest of circumstances”) (internal quotation marks and citation omitted). Thus, “there is a heavy burden on [the employer] in showing that the election was improper.” *Amalgamated Clothing Workers*, 424 F.2d at 827. To meet that burden, the objecting party must demonstrate not only that improprieties occurred, but that they “interfered with the employees’ exercise of free choice to such an extent that they materially affected the results of the election.” *Id.* (citation omitted).

The determination of whether an objecting party has carried its burden of proving objectionable conduct is “fact-intensive” and thus “especially suited for Board review.” *Family Serv. Agency S.F. v. NLRB*, 163 F.3d 1369, 1377 (D.C. Cir. 1999). The Board’s factual findings are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). “Because substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” this Court has said that it “will reverse for lack of substantial evidence only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Highlands Hosp. Corp. v. NLRB*, 508

F.3d 28, 31 (D.C. Cir. 2007) (internal quotation marks and citations omitted). A hearing officer's "credibility determinations may not be overturned absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible." *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1563. Thus, arguments that require reversing a hearing officer's credibility determinations are "at best specious[.]" *EN Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1445 (D.C. Cir. 1996).

Although election proceedings should be conducted in "laboratory . . . conditions as nearly ideal as possible," the Court has recognized that this "noble ideal . . . must be applied flexibly." *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1562 (quoting *Gen. Shoe Corp.*, 77 NLRB 124, 127 (1948)). Moreover, "[i]t is for the Board in the first instance to make the delicate policy judgments involved in determining when laboratory conditions have sufficiently deteriorated to require a rerun election." *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1562; *accord Serv. Corp. Int'l v. NLRB*, 495 F.3d 681, 684-85 (D.C. Cir. 2007).

When an employer challenges the outcome of an election based on a union agent's alleged misconduct, the Board will overturn the election only if the conduct at issue has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Educ., Inc.*, 316 NLRB 716, 716 (1995). When the

conduct at issue is the action of a third party, not a union agent, the Board will overturn the election only if that conduct “is so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); accord *Overnite Transp. Co. v. NLRB*, 140 F. 3d 259, 264-65 (D.C. Cir. 1998).

B. The Board Did Not Abuse Its Discretion in Finding that the Union’s Selection of Quarles as an Observer Did Not Warrant Setting Aside the Election

The Company contests the Board’s decision to overrule its objection which alleged that Quarles’ service as an observer intimidated and coerced employees into voting for the Union. The credited evidence, however, shows that Quarles did not engage in any misconduct during his service as the Union’s election observer and that his service did not affect the election results. The Company points to the June 15 incident of Quarles bringing an airsoft gun to work as a basis for finding his observer service objectionable. But the Company failed to connect Quarles’ possession of the imitation gun to the Union or the election. In those circumstances, the Board reasonably rejected the Company’s claim that Quarles’ uneventful service as election observer warrants overturning the election.

The credited evidence shows that Quarles had an airsoft gun in his backpack at the Market Street facility 4 days before the election. (JA 153 n.1.) The Company summoned the police, who briefly handcuffed and detained Quarles

before determining that the gun was not a real firearm. The police then released Quarles and escorted him from the facility. (JA 153 n.1.) Several employees saw Quarles handcuffed, but those same employees “also observed Quarles subsequently exit . . . uncuffed and otherwise unrestrained.” (JA 52-53.) After that incident, the Company suspended and eventually discharged Quarles. Subsequently, the Union designated Quarles as its unpaid election observer for part of one 2.5-hour polling session at the Pine Street location. The Union did not learn of Quarles’ discharge until the morning of the election—too late to select and train a substitute. (JA 153 n.1.)

Parties to an election may have an observer of their choosing present at polling times. *See* 29 C.F.R. §102.69. That observer serves as the party’s agent at the polling location. But because agency status ““must be established with regard to the specific conduct that is alleged to be unlawful,”” an employee who serves as a party’s observer is the party’s agent “only with respect to his conduct as an election monitor.” *NLRB v. Downtown BID Services Corp.*, 682 F.3d 109, 115 (D.C. Cir. 2012) (quoting *Cornell Forge Co.*, 339 NLRB 733, 733 (2003)). Absent misconduct by that employee as an observer, a union’s selection of a discharged employee to serve as its observer during an election does not constitute objectionable conduct. *Embassy Suites Hotel, Inc.*, 313 NLRB 302, 302 (1993). Moreover, an employee’s previous misconduct does not, by itself, render that

employee's service as election observer objectionable. *See Kelley & Hueber*, 309 NLRB 578, 578 n.4 (1992) (union's designation of former supervisor, who had been discharged for discriminating against minority employees, as election observer was not objectionable).

Applying these principles, the Board reasonably found that because Quarles did not "engag[e] in any misconduct during his service as an election observer," overturning the election based on that service was not warranted. (JA 153 n.1.) As the Board explained, the record is "devoid" of any evidence showing that Quarles engaged in any misconduct while serving as an observer. (JA 153 n.1.) Indeed, the Company, which bore the "heavy" burden of showing objectionable conduct, offered no evidence refuting that finding. *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002).

Likewise, substantial evidence supports the Board's finding (JA 153 n.1) that the events of June 15 did not render Quarles' service as an election observer objectionable. In doing so, the Board found that outside his service as an observer, Quarles "did not serve in any capacity as an agent for the Union." (JA 153 n.1.) The Board undertakes a careful examination of the evidence to determine whether a given employee is an agent of a labor organization, applying common-law principles of agency. *Mar-Jam Supply Co.*, 337 NLRB 337, 337 (2001); *accord Overnite Transp. Co.*, 140 F.3d at 265-66. Under those principles, an employee is

a union agent—such that the union is responsible for that employee’s actions—if the employee has either actual or apparent authority to act on behalf of the union. *Cornell Forge Co.*, 339 NLRB 733, 733 (2003).⁶ Here, the Company “offered no evidence” that Quarles was an agent for the Union, such that the Union was responsible for his actions outside his role as an observer.⁷ (JA 36 n.8, 10.)

Although Quarles supported the Union, this Court has recognized that “‘not every employee who supports [a] union or speaks in its favor is a union agent.’”

Overnite Transp., 140 F.3d at 264 (quoting *NLRB v. Herbert Halperin Distrib. Corp.*, 826 F.2d 287, 291 (4th Cir. 1987)).⁸

As for the June 15 incident, the Board properly found it bore no relation to his service as an observer. (JA 153 n.1.) The Board has consistently found that an

⁶ The Company, citing separate opinions in *Downtown BID Services*, notes (Br. 42-43 n.13) that “this Court has expressed more flexibility than the Board” in finding agency status. But those separate writings are not the opinion of the Court, and the standard remains as the majority stated, namely that agency status must be established with regard to the specific conduct that is alleged to be unlawful. *Downtown Bid Services*, 682 F.3d at 115.

⁷ The Company repeatedly misrepresents that (Br. 6-7, 14, 28, 31, 36-37) Quarles was paid for his service as election observer. The Union hired Quarles for the limited purpose of participating in a phone bank. Union President Miranda’s testimony on this matter was unequivocal and uncontroverted; she stated that Quarles was paid “[j]ust to help phone bank.” (JA 192.) Moreover, the Union did not pay any election observers. (JA 191-92.) Thus, nothing in the underlying record indicates that the Union paid Quarles to observe the election.

⁸ The Company, providing no record citations, asserts (Br. 35) that Quarles was one of four members of the Union’s organizing committee, but the record contradicts that claim. (JA 185.) In any event, membership in a union organizing committee is insufficient to establish that an employee is a union agent. *Overnite Transp.*, 140 F.3d at 266 (collecting cases).

election observer's previous, unrelated conduct does not constitute grounds for overturning an election. As the Hearing Officer observed, it is well established that discharged employees may serve as observers, and "it follows almost necessarily that the discharged employee was discharged for some alleged misconduct." (JA 40.) For instance, in *Kelley & Hueber*, 309 NLRB 578, 578 n.4 (1992), the Board found unobjectionable a former supervisor's service as election observer where that supervisor had previously threatened an employee and had discriminated against minority employees. Likewise, in *McFarling Bros. Midstate Poultry & Egg Co.*, 123 NLRB 1384, 1392 (1959), the Board declined to set aside an election where one of the union's observers had previously pulled a knife on another employee during a personal dispute that occurred prior to the election and did not involve the union "in any way." Indeed, as the Hearing Officer explained, because discharged employees have usually been discharged for a reason, the Board's rule allowing their service as observers indicates that previous misconduct does not disqualify them.⁹

⁹ For that reason, the Company errs where it attempts to distinguish *Embassy Suites*, 313 NLRB at 302 on the basis that Quarles' earlier misconduct, unlike that of the former employee in that case, "by its very nature intimidates." (Br. 46-47, n.14.) The Board has never found that conduct unconnected to an election can disqualify an employee from serving as observer. Moreover, the Company ignores that only one employee who knew of the June 15 incident voted while Quarles was observing. See pp. 29-30, below.

The Company claims *McFarling* is inapplicable here because Quarles, unlike the employee at issue in *McFarling*, “was closely associated with the Union throughout the campaign and served on the Union employee organizing committee.” (Br. 40.) First, the Company overstates Quarles’ union ties. There is no evidence that Quarles served on the organizing committee, or that he was “one of the Union’s four strongest supporters.” (Br. 55.) No employee even testified to knowing of Quarles’ union support. And, in any event, Quarles’ union support is insufficient to attribute his behavior to the Union. Moreover, in *McFarling*, the Union was not responsible for the observer’s prior misconduct because it “was in no way connected with the election.” 123 NLRB at 1392.

As in *McFarling*, here, the Board also properly found that “there is no evidence linking [Quarles’] possession of the airsoft gun to the Union or the organizing campaign.” (JA 153 n.1.) The credited evidence shows that Quarles brought an airsoft gun to work, was briefly detained, and then was discharged. The Company failed to show that the incident “had anything to do with the union campaign” (JA 153 n.1.); indeed, the events were “wholly unrelated,” (JA 52). Absent any connection of the June 15 events to the campaign or the election, the Company has failed to show that Quarles’ possession of the gun, and his subsequent service as an observer, “significantly impaired the election process.”

Nightingale Oil Co. v. NLRB, 905 F.2d 528, 530-31 (1st Cir. 1990) (quoting *New England Lumber v. NLRB*, 646 F.2d 1, 3 (1st Cir. 1981)).

For that reason, the Company is incorrect when it contends (Br. 41-42) that the Board should have also considered Quarles' misconduct under the third-party standard, under which the Board will overturn an election if third-party misconduct is "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons*, 270 NLRB at 803. There is no reason to engage in a third-party conduct analysis when the conduct at issue bears no relation to the election. In that regard, the Company's reliance on *ManorCare of Kingston PA, LLC v. NLRB*, 823 F.3d 81, 83-84 (D.C. Cir. 2016), where the Board applied the third-party standard to find union supporter election misconduct objectionable, is misplaced. There, the employer presented direct testimony from multiple employees that two other employees had threatened to physically harm them and their vehicles if they did not vote for the Union. *Id.* at 83-84. Here, there is no direct testimony, or any credible evidence, linking Quarles' possession of the airsoft gun to the election or indicating that Quarles made any union-related threats to any employee. Absent any such connection, the Board had no obligation to evaluate Quarles' conduct under the third-party standard.

1. The Company has failed to show that Quarles' service as an observer warrants overturning the election results

The Company claims (Br. 36-37) that the Board wrongly viewed Quarles' observer role and the June 15 events as independent from each other. In support, the Company offers the bare and unsubstantiated claim that a "determinative" number of voters "voted under the watchful eye of a Union agent" whom employees believed had been removed from work for possessing a gun and "whom [employees] had an objective reason to fear." (Br. 37.) But this argument misstates the record evidence. As shown below, there is no credited evidence that Quarles brandished a firearm. Moreover, Quarles observed only part of a polling session at the Pine Street location, not the Market Street location where the June 15 incident occurred. The record is devoid of evidence that a determinative number of Pine Street voters both knew of Quarles' misconduct and voted while he served as the Union's observer.

a. Quarles did not brandish a firearm or threaten employees

In contending that Quarles' conduct was objectionable, the Company embellishes the narrative, frequently claiming that Quarles brandished the airsoft gun and threatened employees. But the Company offered only uncorroborated hearsay to support those claims. The Board therefore reasonably rejected the

brandishing story as “unsubstantiated” and explicitly found that Quarles did not engage in any such misconduct.¹⁰ (JA 153 n.1.)

More specifically, on the first day of the hearing, Manager Eric Fernandez testified that an unnamed employee told him that Quarles had, at some point, waved what turned out to be an imitation gun in front of three employees, stating that he had it “in case any fuckers want to get crazy.” (JA 210-11.) Notably, only the Company knew the identity of the employees other than Quarles who were involved in that alleged incident. The Company subpoenaed the employee who spoke to Fernandez, but that employee refused to testify. The Company did not call the other two employees who witnessed the alleged brandishing and threat, and the Hearing Officer properly drew an adverse inference against the Company for this failure. (JA 39.)

This Court has explained that, when a party does not introduce evidence within its control, “it may be inferred that the evidence is unfavorable to the party suppressing it.” *Int’l Union (UAW) v. NLRB*, 459 F.2d 1329, 1338 (D.C. Cir. 1972). The decision whether to draw an adverse inference is “within the discretion of the fact finder.” *Overnite Transp.*, 140 F.3d at 266 n.1. Here, the Company was

¹⁰ The Hearing Officer, whose findings the Board adopted, did not find that Quarles brandished the gun, and explicitly discredited the hearsay testimony that Quarles did so. (JA 39.) Although the Regional Director mistakenly “accept[ed] the finding that Quarles brandished an imitation gun,” the Board pointed out that the Hearing Officer made no such finding, and corrected the Regional Director’s error. (JA 52 n.5, 153 n.1.)

the only party who knew the identity of the employees who allegedly witnessed the brandishing incident, and it declined to take any steps to secure their testimony.

The Hearing Officer therefore acted well within his discretion in holding the Company's evidentiary failure against it and inferring that those two witnesses, if called, would not support Fernandez's testimony. (JA 39.) Thus, in the absence of any competent evidence that the gun-brandishing incident occurred, the Hearing Officer properly rejected the claim as "uncorroborated hearsay."¹¹ (JA 39.)

Moreover, as the Board found, even if the brandishing and accompanying statement had occurred, "there is no evidence whatsoever, hearsay or otherwise, that the alleged incident . . . had anything to do with the union campaign." (JA 153 n.1.) Quarles' alleged threat was at best an "ambiguous proclamation" that did not mention the Union and "cannot reasonably be linked to the election[.]" (JA 52.) Indeed, "it is just as likely if not more likely," that Quarles was referring to anyone "on the streets of San Francisco" rather than any employee who did not vote for the Union. (JA 39 n.11.) Thus, even accepting Fernandez's version as true, the Board

¹¹ In addition to being uncorroborated, Fernandez's testimony did not indicate that the alleged brandishing incident occurred during the critical period after the filing of the election petition and before the election. (JA 153 n.1.) *See Amalgamated Clothing & Textile Workers*, 736 F.2d at 1567 ("an election will not be set aside based on conduct that occurred prior to the filing of the election petition"). Thus, even if the brandishing incident had occurred, the Board reasonably found it was not objectionable because the Company did not carry its burden of showing that it happened during the critical period. (JA 153 n.1.)

still did not abuse its discretion in overruling the objection for the simple reason that the Company failed to tie any alleged gun brandishing and threat to the election.¹²

b. Quarles' presence at the polls did not intimidate voters

The Company similarly fails to support its claims (Br. 15, 37, 42) that Quarles' service as an observer interfered with the employees' free and uncoerced choice in the election and that a determinative number of employees were affected by Quarles' presence at the polls. As the Hearing Officer found, "[n]o evidence was offered that [Quarles'] use as an observer intimidated any voter, nor is there basis to infer such intimidation." (JA 40.)

Although four or five employees at the Pine Street location knew that Quarles had been caught with a weapon, the Company presented the testimony of only one employee—Maeli Mendoza—who claimed knowledge of the June 15 incident and who also saw Quarles at the polls.¹³ Mendoza, however, did not know

¹² Given the Company's failure to show that the gun-brandishing incident occurred or that it was connected to the election, its reliance (Br. 38) on *National Conference of Firemen & Oilers v. NLRB*, 145 F.3d 380, 383-84 (D.C. Cir. 1998), is misplaced. There, a supervisor pointed a high-powered rifle with telescopic sight at employees on a picket line. Here, although the Company claims that a voter saw Quarles' gun (Br. 41) and concluded it was a "powerful weapon," there is no credited evidence supporting that claim.

¹³ Although the Hearing Officer found that four or five Pine Street employees knew that Quarles had been found with a weapon, only two, Mendoza and Miguel

that Quarles had been handcuffed, did not think he had brandished the weapon, and did not know when the incident happened. (JA 226.) None of the other Pine Street voters had any reason to suspect Quarles had engaged in any misconduct; indeed, none of them knew that Quarles had been discharged or that the Company had objected to his role as an observer. (JA 53 n.6.) The Union won the election by eight votes. Thus, absent evidence that at least four Pine Street employees saw Quarles observing and knew about any misconduct on Quarles' part, let alone about the actual events leading to his discharge, the Company cannot show that the airsoft-gun incident affected the election results.

In finding that the June 15 events did not affect the election, the Board is not, contrary to the Company's assertions (Br. 41), minimizing the incident because it involved an imitation gun.¹⁴ The Board never stated that Quarles' misconduct was not serious simply because the airsoft gun was not deadly. As the Board explained, although it shares the Company's concerns regarding workplace violence, it adheres to Board precedent that an election observer's unrelated prior misconduct "would not warrant setting aside the election." (JA 153, n.1.)

Pineda, testified to that effect at the hearing, and neither stated that they told any other Pine Street employees. (JA 226, 233.)

¹⁴ In making this claim, the Company (Br. 41) points to the Regional Director's explanation regarding what an airsoft gun is. (JA 51 n.4.) Simply defining the nature of an airsoft gun is not, contrary to the Company's claim, the same as claiming the possession of such a gun is "harmless." (Br. 41.)

2. The Board reasonably declined to seek enforcement of the Company's belated subpoena of a reluctant witness

After the unnamed employee who allegedly told Fernandez about the gun brandishing incident refused to testify, the Hearing Officer denied the Company's request to enforce the subpoena to compel the testimony. The Company points to this refusal (Br. 48-55) and claims that the Hearing Officer deprived it of the opportunity to prove its objections. But the Hearing Officer properly refused to enforce the subpoena, reasoning that the questionable relevancy of the information sought did not warrant delaying the representation proceeding. As shown below, the Company has failed to show that the Board abused its discretion and that it suffered prejudice as a result.

The Court will uphold a denial of a request to enforce a subpoena unless the Board abused its discretion. *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1153-54 (D.C. Cir. 2000). The party challenging the denial must demonstrate it was prejudiced by the error. *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 67 (D.C. Cir. 2015). Whether an error is prejudicial depends on a number of factors, including, as relevant here, "the centrality of the issue in question." *800 River Rd.*, 846 F.3d at 386 (quoting *Huthnance v. District of Columbia*, 722 F.3d 371, 381 (D.C. Cir. 2013)).

The Hearing Officer did not abuse his discretion in refusing to enforce the subpoena. Contrary to the Company's argument (Br. 54), the evidence it sought to

present did not go to a “core issue in the hearing.” The core issue is whether Quarles engaged in conduct that warranted overturning the election. As the Hearing Officer reasonably found (JA 39, 39 n.11), there was no reason to believe that the reluctant witness had any information about Quarles’ status as an agent (so as to tie his purported gun brandishing to the Union) or that connected the purported gun brandishing to the election. Indeed, the Company “did not even make an offer of proof that the unnamed witness had any evidence relevant to Quarles’ . . . status as [a] Union agen[t],” nor did the unnamed employee “link the gun to the Union’s organizing campaign. (JA 39 n.11.) In such circumstances, where the subpoenaed testimony “would not have altered the Board’s determination that the election was valid,” the Board did not abuse its discretion by denying enforcement of the subpoena. *SSC Mystic Operating Co., LLC v. NLRB*, 801 F.3d 302, 314 (D.C. Cir. 2015) (hearing officer’s refusal to enforce subpoena was not an abuse of discretion where sought-after evidence would not have changed the outcome).

Given the questionable value of the sought-after testimony, the Hearing Officer properly concluded that “the harm caused by the delay in seeking enforcement would override the benefit, if any, of seeking to compel the witness to testify.” (JA 39 n.11.) As this Court has acknowledged, enforcement proceedings “can be costly and time consuming, particularly in administrative proceedings

where the enforcement process is of necessity collateral to the main case.” *UAW*, 459 F.2d at 1339. Notably, the Company contributed to the delay, waiting until the second or third day of the three-day hearing to subpoena a potentially corroborating witness whose identity the Company knew before it even filed objections. (JA 51-52.) Given that a delay in representation proceedings can affect the outcome of those proceedings and prejudice employees, the Hearing Officer did not abuse his discretion in refusing to delay the hearing to obtain testimony that did not go to a core issue of the case. *See Salem Hosp.*, 808 F.3d at 68 (noting no prejudice occurs where “excluded evidence would not compel or persuade to a contrary result”).

The Company claims that it “presented more than enough evidence” to establish the relevancy of the sought-after testimony. (Br. 54.) Specifically, it claims that the subpoenaed employee would talk about how “one of the Union’s four strongest employee supporters” brandished a gun, and that the employee told Fernandez about “his own fear of the Union that [the] threats caused.” (Br. 55.) Contrary to the Company’s claim—which is noticeably unaccompanied by supporting citations—the record does not reveal that Quarles was “one of the four strongest” union supporters. And again, the subpoenaed employee had not mentioned the Union whatsoever in relaying the brandishing incident to Fernandez,

nor had the employee tied Quarles to the Union. Thus, the Company's claim (Br. 54) that it has established a "threshold" showing of relevancy lacks record support.

The Company claims that the Hearing Officer's refusal to enforce the subpoena because it had not presented sufficient information is "circular" logic, arguing that absent the subpoena, "it could not provide the additional facts the Hearing Officer demanded." (Br. 54.) But this claim ignores that it is the Company's burden to provide any basis for its claim that the subpoenaed witness would provide relevant information. As discussed (p. 32), the Company did not make an offer of proof that the subpoenaed employee "had any evidence relevant to Quarles' alleged status as a union agent," nor did the Company show that the subpoenaed witness could link Quarles' alleged gun brandishing to the Union. (JA 39 n.11.) The Board does not allow a party to a representation hearing to call witnesses solely on the "hope[] examination of these witnesses would elicit evidence to support its claim." *Sears, Roebuck & Co.*, 112 NLRB 559, 569 n.1 (1955). Mere speculation that the unnamed employee could have tied Quarles' alleged statement to the Union is insufficient absent an offer of proof or some other indication of "how [the Company] knew what the witness[] would *likely* say." *800 River Rd.*, 846 F.3d at 390 (no reversible error where hearing officer excluded testimony of eight employees due to employer's failure to "provide any basis . . . for that testimony"). *See also Salem Hosp.*, 808 F.3d at 70 (employer was not

prejudiced by hearing officer's premature closing of the record where employer failed to make a proffer or provide "any other specific evidence of potential witness' testimony," thereby rendering court unable to determine "that the excluded evidence was either relevant or material").

Moreover, the Company's claim (Br. 50) that the Board has placed a "barrier" on the Company's ability to prove its case ignores the role that the Company played in failing to provide evidence to support its claim. The subpoenaed witness was not the only witness who could provide information regarding the purported gun brandishing. As the Hearing Officer noted, two other employees, whose identities were known only to the Company, witnessed the alleged incident and could have testified regarding Quarles' conduct. (JA 39.) The Company provided no explanation for why it did not promptly seek to secure their testimony.

In short, there was no reason to believe the subpoenaed witness had any information that would go to the core issue of whether Quarles engaged in objectionable conduct. Because enforcing the subpoena would have unduly delayed the hearing only to obtain testimony unlikely to affect the outcome, the Hearing Officer did not abuse his discretion in refusing to seek enforcement.¹⁵

¹⁵ The Company faults (Br. 51-53) the Hearing Officer for questioning whether he or the Regional Director could enforce the subpoena. The Hearing Officer referred the enforcement request to the Regional Director, who declined to get involved,

C. There Is No Evidence that Eneliko, Acting as a Union Agent, Threatened an Employee If He Did Not Vote for the Union

The evidence fully supports the Board's finding that Eneliko was not a union agent, and that he never threatened to report an employee's misconduct if that employee did not vote for the Union. (JA 39.) Therefore, the Board did not abuse its discretion in overruling the Company's objection alleging that Eneliko's conduct affected the election.

As the Hearing Officer found, the Company "offered no evidence" that Eneliko "was an agent of the Union," such that the Union was responsible for his actions. *See* 29 U.S.C. §152(13). (JA 36 n.8.) The Company, in claiming that Eneliko was a union agent, misrepresents the underlying record. Specifically, the

citing his position as the reviewing authority of the Hearing Officer's decision. (JA 39 n.11.) The Hearing Officer likewise expressed doubt that he could enforce the subpoena. (JA 39 n.11; 248.) As the Company notes (Br. 50-53), however, the Board's Rules and Regulations do not preclude the General Counsel from instituting subpoena-enforcement proceedings, *see* 29 C.F.R. §§ 102.64-102.69, and the Board's *Guide for Hearing Officers in Representation Proceedings* allows for enforcement. Nonetheless, any error on the Hearing Officer's part regarding his ability to enforce subpoenas was harmless. As the Company acknowledges (Br. 51), the Hearing Officer did not "rely on this explanation." Instead, as detailed above, the Hearing Officer provided additional reasons for declining to enforce the subpoena, and those reasons are supported by both the underlying record and applicable precedent. *See 800 River Rd.*, 846 F.3d at 386 (an error is harmless unless it affects the outcome of the underlying proceedings). Moreover, the Board's *Guide for Hearing Officers* "provides nonbinding guidance" and "should not be viewed as binding procedural rules." *Kwik Care, Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996) (quoting Board's *Casehandling Manual*, part 2, "Purpose of the Manual"). The Board's decisional law, not the casehandling manual, controls, and the Hearing Officer's decision accords with that law.

Company cites to “Miranda’s admission that Eneliko’s contact with employees was similar to that of Rodriguez, whom the Board found to be a Union agent[.]” (Br. 59.) But Miranda never testified that the Union hired Eneliko, as it did Rodriguez; rather, Miranda merely stated that Eneliko helped collect authorization cards and served on the Union’s organizing committee. As discussed above, pp. 22-23 n.8, serving on an organizing committee and soliciting authorization cards are insufficient to establish agency status. *Overnite Transp. Co.*, 140 F.3d at 266 (serving on an organizing committee insufficient to confer agency status); *Davlan Engineering*, 283 NLRB 803, 804 (1987) (soliciting authorization cards insufficient to confer general agency status). And the record does not support the Company’s claim (Br. 17) that Eneliko also worked at the Union’s phone bank. In short, as the Hearing Officer found, the thin evidence of Eneliko’s contact with the Union is “too slender a reed upon which to base a finding” that he was an agent of the Union. (JA 36 n.8.)

In addition to failing to prove Eneliko’s agent status, the Company also failed to prove that he engaged in the alleged misconduct. The only evidence offered in support of this claim was Fernandez’s uncorroborated hearsay, which the Hearing Officer did not credit. Therefore, the Board properly found that the Company failed to sustain its burden, explaining that the Company “offered no

competent evidence that [Eneliko] threatened to expose misconduct by an employee and get him terminated if he did not vote for the Union.” (JA 39.)

The Company (Br. 59-60) again blames the Hearing Officer’s refusal to enforce the subpoena for its inability to meet its burden of proof, claiming that the refusal rendered it unable to “present evidence on the issue[.]” The Company’s objection rests solely on the premise that Eneliko was an agent of the Union; it does not contend that Eneliko’s testimony rendered a fair election impossible under the Board’s third-party standard. But as the Hearing Officer pointed out, there is no reason to believe “that the unnamed witness had any evidence relevant to . . . Eneliko’s alleged status as [a] Union agen[t].” (JA 39 n.11.) Thus, absent any evidence, proffer, or other reason to believe that the subpoenaed witness would testify on the agency issue, the Company was not prejudiced by the refusal to enforce the subpoena. *See* pp. 31-34, above.

D. The Board Did Not Abuse Its Discretion in Overruling the Company’s ICE-related Objections

The Company filed objections contending that the Union and its supporters threatened employees with deportation if they did not vote for the Union. The Board did not abuse its discretion in overruling those objections because the credited evidence reveals no such threats. At most, employees circulated unsubstantiated rumors that ICE would be contacted, but those rumors did not reference any threat that the Union would call ICE if it lost the election.

The Board properly found “no credible competent evidence that the Union or its agents threatened any unit employee that ICE would be brought in if the Union lost the election.” (JA 37.) In support of its objection, the Company (Br. 57) points to Union President Miranda’s statement to employee Contreras that Miranda had heard rumors that the Company would call ICE if the Union won. As the Board noted, Miranda never told Contreras that the *Union* would call ICE if it lost, she merely shared a rumor that the Company had made such a threat. Sharing a rumor is not akin to an express warning of dire consequences should the employee not support the Union. The Company, therefore, misplaces its reliance on *Westside Hospital*, 218 NLRB 96, 96-97 (1975), where the union agent directly threatened an employee with deportation if he did not sign a union authorization card.

The Company falls far short of proving its hyperbolic claim that the Union, through its agents, “sought to enrage and anger” employees against the Company by making comments “designed to appeal to ethnicity.” (Br. 57.) As an initial matter, the Company did not argue to the Board that the Union improperly appealed to racial prejudice, so this Court is without jurisdiction to consider the issue. (JA 18-23, 88-90, 171-76.) *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary

circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (stating Section 10(e) precludes court of appeals from reviewing claim not raised to the Board). Moreover, the Company’s relevant objection stated only that the Union told unit employees that the *Union* would call ICE if employees did not vote “yes” in the election. (JA 49.) Perhaps realizing that it has not come close to proving its objection, the Company has changed course, and now contends that the Union told unit employees that the *Company* would call ICE if the Union won. The Company also failed to litigate the latter theory before the Board, rendering the Court without jurisdiction to consider this matter as well. 29 U.S.C. § 10(e). In any event, one passing remark by Miranda that employees told her of the Company’s threat to call ICE does not qualify as an appeal to racial prejudice.

In addition to failing to show deportation threats by agents, the Company failed to meet its burden of establishing similar third-party conduct that was “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election possible.” *Westwood Horizons*, 270 NLRB at 803. Contrary to the Company’s contention (Br. 58), there is no credible evidence that any employee threatened another with deportation if the Union lost the election; rather, at most, the employees exchanged rumors, asked questions, and relayed concerns regarding the Company’s actions if it lost. (JA 45.)

The only third-party conduct the Company relies on (Br. 58) to support its claim that deportation threats created an atmosphere of fear and reprisal, rendering a free election possible, is the testimony of employee Miguel Pineda, who claimed that, months before the election, he overheard three unit employees discussing that they would contact ICE if the Union lost. (JA 231-32, 234.) The Company ignores that the Hearing Officer discredited this evidence and provides no reason to overturn the Hearing Officer's credibility finding. The Hearing Officer gave Pineda's testimony little weight for two reasons. First, it referred to events outside the critical period between the petition for an election and the election. The Board generally does not overturn elections based on conduct occurring outside the "critical period"—the period beginning with the filing of an election petition and ending with the election. *Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). Second, Pineda's claim was plainly nonsensical because, as the Hearing Officer explained, it did not "seem likely" that "approximately two months" before the employees even contacted the Union, "they would be plotting to win an election by threatening to call ICE." (JA 36.)

To the extent the Company relies on "rumors and statements made by Union partisans" (Br. 58), the credited evidence reveals that none constituted a threat. Specifically, the credited evidence shows that Contreras told an employee, Leo, that the *Company*, not the Union, intended to bring ICE in if the Union won. (JA

222.) Similarly, an employee told Naeli Mendoza that the employee heard that undocumented workers might be at risk if the Union won. (JA 227-28.) Two employees asked Esther Paniagua if ICE would be called, and Paniagua replied that she did not know. (JA 221.) Finally, employee Tanisha told Pine Street employees that undocumented workers would be replaced if the Union won. (JA 230.) None of those statements constitutes a threat to bring in ICE if the Union lost. *See e.g., Mike Yurosek & Sons*, 225 NLRB 148, 150 (1976), *enforced* 597 F.2d 661 (9th Cir. 1979) (threat by employee to call immigration authorities during election is not objectionable).

The facts here are markedly different from *QB Rebuilders, Inc.*, 312 NLRB 1141, 1141-42 (1993), on which the Company relies (Br. 56-57). In that case, an employee made repeated and widely disseminated threats to call immigration authorities to report employees who did not vote for the union. Those threats were followed by immigration authorities' removal of an employee the day before the election in full view of other bargaining-unit members. That conduct is noticeably different from the speculative statements, questions, and answers at issue here.

F. The Company Has Forfeited Its Objection to the Union's Alleged Electioneering and Surveillance of Employees

The Company also filed an objection alleging that the Union coerced employees during the election through electioneering and surveillance. (JA 40.) Although the Company pursued that objection before the Board, it has not done so

here. As shown below, the Company's failure to adequately brief the issue to the Court renders it waived.

Under Rule 28(a)(8)(A) of the Federal Rules of Appellate Procedure, an opening brief must contain all contentions “with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.” As this Court has observed, “appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Thus, failure to enforce [Rule 28(a)(8)(A)] will ultimately deprive [the Court] in substantial measure of that assistance of counsel which the system assumes—a deficiency that [the Court] can perhaps supply by other means, but not without altering the character of [the] institution.” *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983); *see also Altman v. SEC*, 666 F.3d 1322, 1329 (D.C. Cir. 2011). Accordingly, assertions “alluded to . . . in the statement of facts” without any supporting argument are considered waived. *AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 n.** (D.C. Cir. 2000).

Here, the Company has presented no argument that the Union engaged in impermissible electioneering or that Eneliko coercively surveilled voting employees by keeping a list of employees who voted. Although the Company mentions the facts underlying those objections in its statement of facts, doing so is

insufficient to preserve them. The Company has therefore waived any contention that Eneliko's list-keeping or the Union's election-day rally at the preelection meeting warrants overturning the election.

CONCLUSION

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

Respectfully submitted,

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National Labor Relations Board
June 2017

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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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)	Nos. 16-1427, 17-1013
v.)	
)	Board Case No.
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)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
SERVICE EMPLOYEES INTERNATIONAL)	
UNION, LOCAL 87)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 10,471 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 30th day of June, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 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 those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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