

Nos. 17-2042, 17-2111

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

**JAM PRODUCTIONS, LTD., EVENT PRODUCTIONS, INC.,
STANDING ROOM ONLY, INC., AND VICTORIA OPERATING CO.,
A SINGLE EMPLOYER**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of JAM Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc., and Victoria Operating Co., a single employer (“the Company”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of an

Order issued by the Board on May 16, 2017, and reported at 365 NLRB No. 75. (A. 446-50.)¹ The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices. The Board’s Order is final, this Court has jurisdiction over the petition and cross-application, and venue is proper pursuant to Section 10(e) and (f) of the Act. *Id.* § 160(e), (f). The Company’s petition for review and the Board’s cross-application for enforcement were timely, as the Act places no time limit on those filings.

The Board’s Order is based, in part, on findings made in an underlying representation (election) proceeding, *JAM Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc., and Victoria Operating Co., a single employer*, Board Case No. 13-RC-160240. The petitioner before the Board in that proceeding was Theatrical Stage Employees Union Local No. 2, IATSE (“the Union”), which the Board certified, after a secret-ballot election, as the exclusive bargaining representative of a unit of the Company’s stage-production employees, commonly called stagehands.

¹ “A.” references are to the Appendix. “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.

Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record before this Court includes the record in the representation proceeding. *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court may review the Board's actions in the representation proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's Order in whole or part. 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, *id.* § 159(c), to resume processing the representation case in a manner consistent with the Court's ruling. *Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999).

STATEMENT OF THE ISSUE

The ultimate issue is whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), by refusing to recognize and bargain with the Union. There are two underlying issues before this Court:

1. To obtain an evidentiary hearing on its objection, the objecting party must present evidence that raises "substantial and material factual issues" that, if proven, would be sufficient to set aside the election. Did the Board reasonably overrule the Company's election objection without a hearing?
2. In their stipulated election agreement, the Company and the Union agreed to a date on which employees had to be employed in order to be eligible to vote in the union representation election. Did the Board reasonably sustain challenges to four ballots cast by individuals who were hired after that election-eligibility date?

STATEMENT OF THE CASE

The Board found that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), by refusing to bargain with the Union, its employees' certified collective-bargaining representative. Because the Company admits its refusal to bargain, this case turns on its defense that the Board erred in certifying the Union. More specifically, the Company challenges the Board's decision in the representation proceeding to overrule the Company's election objection without conducting an evidentiary hearing and to sustain four ballot challenges. The evidence and procedural history relevant to the objection and challenges is set forth below.

I. The Representation Proceeding

The Company produces concerts, shows, and events at venues in the Chicago area, and employs stagehands to staff them. (A. 171.) After the Union filed a petition with the Board seeking to represent a bargaining unit of company employees, the Union and the Company agreed to a Stipulated Election Agreement ("Agreement"), which the Region approved on September 30, 2015. (A. 171.) The Agreement defined a bargaining unit of stagehands employed by the Company at three specific theaters, and excluding production

managers and crew leaders.² (A. 170; A. 5.) The Agreement required that, to be eligible to vote, unit employees must either have been employed during the payroll period ending on October 4, 2015, or have worked 18 company events during the year prior to that eligibility date. (A. 171; A. 6.) The Agreement also provided that the date, hours, and place of the election were “to be determined,” and stated that if the election were postponed, “the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.” (A. 5.)

The day after the parties signed the Agreement, the representation petition was held in abeyance pending investigation of unfair-labor-practice charges the Union had filed just after its election petition. (A. 176; A. 8-9.) After an investigation into those charges, the Region issued a complaint alleging that the Company had unlawfully terminated 53 bargaining-unit employees the day before the Union filed its representation petition.³ (A. 176; A. 144.) On April 6, 2016, the Regional Director approved a settlement between the Company and the Union, which included a non-admissions clause

² The unit also excluded office clericals, guards, professional employees, and statutory supervisors. (A. 170; A. 5.)

³ The 53 terminated bargaining-unit employees were all supervised by Jolly Roger, who the Company terminated at the same time because it believed Roger supported and facilitated the employees’ union organizing.

and provided that the Company would offer the discharged employees immediate and full participation in the Company's "on-call list" in a non-discriminatory manner, effectively reinstating them. (A. 176 n.6; A. 227.) The settlement agreement also provided that the representation election would be held not less than 21 days after the Regional Director approved the settlement. (A 172; A. 233.)

On May 5, the Regional Director informed the parties that the election would be held on May 16, 2016. (A. 172; A. 12.) The Company subsequently submitted the voter list, which included 8 employees it described as being hired after the eligibility date set forth in the parties' Agreement, who the Company contended should be permitted to vote. (A. 172; A. 157-58.) The Board's regional office conducted the election as scheduled. Twenty-two ballots were cast in favor of representation by the Union, 10 were cast against representation, and 21 were set aside based on challenges. (A. 172; A. 22.) Among the challenged ballots were four cast by employees hired during the two weeks following the eligibility date, who were treated as not being on the voter list. (A. 172; A. 53-54.)

After the election, the Company filed an objection alleging that the election was unfair because the Union had offered and provided "premium work" at union venues to bargaining-unit employees in order to induce them to

support the Union in the election. (A. 176; A. 23.) In support of its objection, the Company submitted an offer of proof that alleged the following facts. One of the Company's production managers, Behrad Emani, knows that at least 13 unit employees who later voted in the election worked jobs at union venues during the critical period before the election. (A. 176; A. 29.) He learned that from phone calls and text messages in which the employees turned down his offers of company jobs, explaining that they were not available because they were working conflicting jobs at union venues. (A. 176; A. 29.) The production manager also saw social media posts made by employees while they staffed union events, and overheard employee discussions about the work referrals they obtained through the Union's referral system. (A. 176; A. 29.) None of those 13 employees worked any of the three shows the Company had produced at union venues, using union-referred stagehands, in January and February of the same year (a few months before the critical period). (A. 30.) In addition, another non-unit company employee witnessed at least six unit employees working union events prior to the representation election. (A. 176; A. 30.)

The Company's offer of proof also stated that the Company expected that the reinstated employees eligible to vote in the election – including one, Justin Huffman, who was in “regular contact” with the Union – would testify

in a manner supporting its objection. Similarly, it expressed the Company's confidence that the Union's referral records would support the objection. (A. 176; A. 30-31.)

The Company also argued that the eligibility cut-off should have been moved back by two weeks to account for the months-long delay of the election date. (A. 172-73; A. 53-54.) Therefore, the Company argued, the challenges to the ballots cast by employees hired after the eligibility cut-off date should be overruled and the votes counted.

On June 20, 2016, the Regional Director issued a Corrected Report on Objection and Challenges and Certification of Representative finding the Company's offer of proof insufficient to warrant a hearing on its objection, sustaining the challenges to the ballots of the four employees who were hired after the agreed-upon eligibility date, and certifying the Union as the representative of the petitioned-for unit.⁴ (A. 170-79.)

The Company filed a request for review with the Board and, on January 5, 2017, a three-member panel of the Board (Chairman Pearce; Members

⁴ The Regional Director also sustained three undisputed challenged ballots and five ballots contested by the Union because the employees in question worked fewer than 18 events during the 1-year period immediately preceding the eligibility date of October 4, 2015. He did not resolve the remaining nine challenges because they would have been insufficient to affect the outcome of the election. (A. 171, 175.)

Miscimarra and McFerran) denied the Company's request, finding it raised no substantial issues warranting review.⁵ (A. 422-23.)

II. The Unfair-Labor-Practice Proceeding

After its certification as bargaining representative, the Union requested that the Company recognize and bargain with it. The Company refused. (A. 446; A. 439.) The Board's General Counsel issued a complaint against the Company, alleging that its refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 8(a)(5), (1), and moved for summary judgment before the Board. (A. 446; A. 425-32.)

On May 16, 2017, a three-member panel of the Board (Chairman Miscimarra; Members Pearce and McFerran) granted summary judgment, finding that the Company violated the Act as alleged. (A. 446-50.) 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 to adduce at a hearing any newly discovered or previously unavailable evidence, nor alleged

⁵ Phillip A. Miscimarra was named Acting Chairman in January 2017 and Chairman in April 2017. Then-Member Miscimarra joined the decision affirming the Union's certification but would have overruled the four ballot challenges based on the eligibility date set forth in the Agreement. (A. 422-23 n.1.)

the existence of any special circumstances that would require the Board to reexamine its decision in the representation proceeding. (A. 446-50.)

To remedy the unfair labor practice, the Board's Order requires the Company to cease and desist from refusing to recognize and bargain with the Union or, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act. (A. 448-50.) Affirmatively, the Board ordered the Company to: (1) bargain with the Union upon request and, if an understanding is reached, to embody that understanding in a signed agreement; and (2) post a remedial notice. (A. 448-50.)

SUMMARY OF ARGUMENT

The Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union is supported by ample record evidence. The Company admits its refusal to bargain, and its objection and challenges to the underlying election and certification are unavailing because the Board reasonably overruled the objection without an evidentiary hearing and adhered to precedent in sustaining the challenges.

First, substantial evidence supports the Board's rejection of the Company's election objection without an evidentiary hearing. To obtain a hearing, an objecting party is required to proffer evidence that raises substantial

and material factual issues that, if proven, would warrant setting aside the election. The Company ignored that heavy burden and, rather than offer facts supporting its objection, relied on speculation and conjecture. The Company argued the Union improperly steered work opportunities toward bargaining unit employees prior to the election to influence their votes. But it failed to proffer evidence that would show, or support, an inference that the referrals were made to otherwise ineligible employees or pursuant to a deviation from the ordinary administration of the Union's job-referral system.

Second, the Board reasonably sustained the challenges to ballots cast by voters hired after the election-eligibility date established in the parties' Agreement. Such eligibility dates are typically fixed and the Company has not shown that the Board erred in declining to modify the contractual date in this case after the election was postponed. The Board followed its established practice, which strictly limits such modifications to protect the stability and the integrity of the process.

STANDARD OF REVIEW

This Court defers to the Board’s legal conclusions unless they are “irrational or inconsistent with the Act.” *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union, AFL–CIO v. NLRB*, 544 F.3d 841, 848 (7th Cir. 2008). The Board’s factual findings are conclusive if they are supported by substantial evidence on the record taken as a whole, *NLRB v. Deutsch Post Global Mail, Ltd.*, 315 F.3d 813, 815 (7th Cir. 2003), which is “such relevant evidence as a reasonable mind might accept as adequate to support’ the Board’s conclusion.” *Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 829 (7th Cir. 2005) (quoting *Nat’l By-Products, Inc. v. NLRB*, 931 F.2d 445, 451 (7th Cir. 1991)). In applying the substantial-evidence standard, the Court does not “dabble in fact-finding, and . . . may not displace reasonable determinations simply because [the Court] would have come to a different conclusion if [it had] reviewed the case de novo.” *NLRB v. Illinois-American Water Co.*, 933 F.2d 1368, 1373 (7th Cir. 1991).

With respect to representation elections, “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.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324 (1946); accord *State Bank of India v. NLRB*, 808 F.2d 526, 537 (7th Cir. 1986). In

particular, whether an objecting party is entitled to an evidentiary hearing is best left to the Board because a decision “not to hold a hearing when confronted with certain evidence amounts to a decision that this evidence is not a prima facie case of *enough* misconduct to set aside an election. That is the sort of decision the Board was established to make, and to which the courts must defer.” *NLRB v. AmeriCold Logistics, Inc.*, 214 F.3d 935, 938 (7th Cir. 2000) (quoting *NLRB v. Lovejoy Indus., Inc.*, 904 F.2d 397, 402 (7th Cir. 1990)).

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 7 of the Act grants employees the right to choose a representative and to have that representative bargain with their employer on their behalf. 29 U.S.C. § 157. Employers have a corresponding duty to bargain with their employees' chosen representative, and refusal to bargain violates that duty under Section 8(a)(5).⁶ *NLRB v. Overnite Transp. Co.*, 938 F.2d 815, 821 (7th Cir. 1991).

Here, the Company admittedly refused to bargain with the Union. (A. 439.) As a defense, the Company asserts that the Board erred by overruling its objection alleging pre-election union misconduct without holding an evidentiary hearing and by sustaining challenges to four ballots cast by employees who were hired after eligibility date in the Agreement. As shown below, the Company's arguments are without merit and the Board properly certified the Union. Accordingly, the Board is entitled to enforcement of its Order finding that the Company's refusal to bargain violated Section 8(a)(5)

⁶ A refusal to bargain in violation of Section 8(a)(5) derivatively violates Section 8(a)(1). *Deutsch Post Global Mail*, 315 F.3d at 815; *G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1533 (7th Cir. 1989).

and (1) of the Act. *NLRB v. City Wide Insulation of Madison, Inc.*, 370 F.3d 654, 657-58 & n.1 (7th Cir. 2004).

A. The Board Reasonably Overruled the Company’s Objection without an Evidentiary Hearing

1. An evidentiary hearing is warranted only if the objector proffers evidence that, if proven, would warrant overturning the election

A Board-conducted representation election is presumed fair and regular unless proven otherwise. *Uniroyal Tech. Corp. v. NLRB*, 98 F.3d 993, 997 (7th Cir. 1996). An objecting party bears a “formidable” burden to demonstrate that the election should be overturned based on pre-election misconduct by the other party to the election. *NLRB v. Erie Brush & Mfg. Corp.*, 406 F.3d 795, 801 (7th Cir. 2005). It must prove both that improprieties occurred and that they interfered with employees’ exercise of free choice to such an extent that they prejudiced the fairness of the election. *Id.*; see also *NLRB v. WFMT*, 997 F.2d 269, 274 (7th Cir. 1993).

The objecting party is not, moreover, “entitled to a hearing just because it wants one, just because it claims that the election was tainted, [or] just because it says it could really pin things down if it were granted a hearing.” *AmeriCold Logistics*, 214 F.3d at 939. The Board’s practice “is designed to resolve expeditiously questions preliminary to the establishment of the

bargaining relationship and to preclude the opportunity for protracted delay of certification of the results of representation elections.” *Amalgamated Clothing Workers*, 424 F.2d 818, 828 (D.C. Cir. 1970) (quoting *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 32 (5th Cir. 1969)); accord *NLRB v. Nat’l Survey Serv., Inc.*, 361 F.2d 199, 205 (7th Cir. 1966) (need for limitations on the “allowance of a hearing on objections is apparent” due to potential of “protracted delay”). It follows that an objecting party may not use an evidentiary hearing as a “fishing expedition.” *Natter Mfg. Corp. v. NLRB*, 580 F.2d 948, 952 n.4 (9th Cir. 1978) (rejecting employer’s argument that, “without a hearing and the concomitant opportunity to subpoena and examine witnesses, it has no effective method of acquiring the evidence the Board demands” because it is not “entitled to a fishing expedition in order to prove its wholly unsubstantiated assertions”).

Rather, to obtain a hearing, the objecting party must proffer evidence that raises “substantial and material factual issues” that, if proven, would warrant setting aside the election.” *Durham School Servs. v. NLRB*, 821 F.3d 52, 58 (D.C. Cir. 2016) (quoting *Park Chevrolet-Geo, Inc.*, 308 NLRB 1010, 1010 n.1 (1992); see also 29 C.F.R. § 102.69(c)(1)(i)). To rise to the level of materially and substantially affecting the results of the election, the objecting party must demonstrate that its evidence is “relevant and potentially

dispositive under the prevailing legal standards.” *Lovejoy Indus.*, 904 F.2d at 400. In other words, as this Court has stated, to trigger a hearing the objecting party must “present[] facts sufficient to support a prima facie showing of . . . misconduct sufficient to set aside the election under the substantive law of representation elections.” *Clearwater Transp., Inc. v. NLRB*, 133 F.3d 1004, 1011 (7th Cir. 1998).

2. The Company’s offer of proof does not establish that the Union’s referral of work to bargaining-unit employees was objectionable

In its objection, the Company alleged that the Union had unlawfully provided economic benefits to employees to induce their support in the election, by referring them to coveted jobs at Union venues, to which they were otherwise not entitled. (A. 26-44.) The Regional Director reasonably found (A. 177-78) that, considering the evidence detailed in the offer of proof in the light most favorable to the Company, the Company failed to demonstrate a substantial and material factual issue that would warrant an evidentiary hearing respecting the union referrals, much less a rerun election.

a. Pre-election job referrals made in accordance with customary, pre-existing referral-system practices are not objectionable

During the critical period preceding a Board-administered representation election, a party commits objectionable misconduct by offering employees improper economic inducements to influence the outcome of the election. In its most straightforward application, this rule prohibits a union (or an employer) from promising or granting economic benefits that are expressly conditioned on employee support for (or opposition to) unionization. *See NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973); *NLRB v. Exchange Parts Co.*, 375 U.S. 405,409 (1964). In the specific context presented here – where a union exercises some degree of influence over access to employment through a job-referral program – a union is prohibited from conditioning favorable job referrals on support in a representation election. *Alyeska Pipeline Serv. Co.*, 261 NLRB 125, 127 (1982).

The doctrine also applies, however, to more “subtle forms of vote-buying,” in which a party “provid[es] a benefit in a way that tacitly obliges the employee to vote for it.” *Freund Baking Co. v. NLRB*, 165 F.3d 928, 931 (D.C. Cir. 1999). To constitute an objectionable economic inducement, the benefit or thing of value provided must be one to which the employees are not otherwise entitled in the ordinary course. *NLRB v. River City Elevator Co.*, 289

F.3d 1029, 1033 (7th Cir. 2002) (union may not promise or grant access to job referrals to which the employees are not legitimately entitled); *see also Mailing Servs., Inc.*, 293 NLRB 565, 565 (1989) (a union is “barred . . . from conferring on potential voters a financial benefit to which they would otherwise not be entitled”). When a union arranges job referrals in the ordinary course of its referral system, according to the pre-existing standards and practice, there is no reason for employees to see such referrals as an inducement for supporting the union, and the referrals are thus not objectionable. *Int’l Bhd. Of Elec. Workers Local Union 103*, 312 NLRB 591 (1993).

b. The facts in the Company’s offer of proof failed to establish that the Union’s job referrals to unit employees deviated from the normal administration of the referral system

The Company’s offer of proof fell short of raising any substantial and material question of fact that would entitle the Company to an evidentiary hearing. To be sure, if credited, the offer of proof demonstrates that some of the unit employees who voted in the election received job referrals through the Union’s referral system during the critical period. Indeed, as the Regional Director noted (A. 177), that fact is undisputed. But, even viewed in the light most favorable to the Company, the offer of proof was devoid of facts that would establish that the Union provided an economic benefit to employees in

order to induce them to support the Union by offering and providing “premium work at Union venues.” (A. 23.)

Specifically, as the Regional Director explained (A. 177-78), the Company failed to point to any facts showing that unit employees received any referrals they were not otherwise entitled to receive. Notably, the Company presented no evidence concerning the Union’s normal referral procedures and no evidence about whether the unit employees were treated differently from anyone else who had access to the referral system. The offer also described no fact indicating that the Union’s referral system was restricted to union members or, for that matter, any fact suggesting that the unit employees who received referrals were not union members. As the Regional Director noted (A. 177), the Union stated that the referral system was not based on union membership; referrals were available to members of the general public. And the Company appears to concede as much at different points in its brief (*e.g.*, Br. 4 (“members of the public can[,] in the Union’s discretion[,] be picked to fill slots”); Br. 20 (referrals “may have been available to the general public”)). Moreover, as the Regional Director also observed, “it would not be unusual for individuals in this industry to seek work through the [Union’s] referral system,” particularly those such as the reinstated unit employees who had recently been discharged from their jobs with the Company. (A. 178.)

In other words, the Company failed to present facts that would support an inference either that the Union intended to influence the election or that the referrals had a tendency to impact the fairness of the election. Instead, to establish that crucial element of its objection, the Company relied on conclusory statements and speculation as to evidence it might uncover during the hearing. But it failed to present specific facts within the knowledge of particular witnesses, as it must to obtain an evidentiary hearing. *NLRB v. Serv. Am. Corp.*, 841 F.2d 191, 195 (7th Cir. 1988) (in order to warrant hearing, objecting party must proffer “specific evidence from or about specific people”) (quoting *NLRB v. Douglas County Election Membership Corp.*, 358 F.2d 125, 130 (5th Cir. 1966)).

The offer of proof asserted that Justin Huffman, one of the reinstated employees, would testify (as a hostile witness) that he helped facilitate (presumably contrary to the normal operations of the referral system) union referrals for unit employees. The offer stated no fact that would explain why the Company expected that testimony, beyond the purported “common knowledge Huffman has been in regular contact with [the Union] since the inception of the organizing campaign to the present.” (A. 30). Even if accepted as true, that “fact,” which was not attributed to any particular individual’s personal knowledge, does not support an inference that Huffman

had any control over union referrals, or provide any explanation of how that would logistically work, given that individuals sign up for the referral system online. (A. 258-59.) Nor does it demonstrate that he had ever discussed referrals with any other employee, or even that his relationship with the Union during the organizational campaign was different from that of any other unit employee.

The offer of proof is also devoid of factual support for the Company's repeated assertion (*e.g.*, Br. 20, 22-23) that that the Union began referring employment opportunities to unit employees for the first time, or with increased frequency, during the critical period prior to the election. The offer of proof states that the Union's records, and any of the 21 reinstated unit employees who voted in the election, would confirm that the reinstated employees rarely worked union-referred jobs before the election petition was filed, and that they received multiple union referrals for very high-paying jobs during the critical period. (A. 31.) That speculation is unaccompanied by any fact explaining why the Company expects that the records would reveal, or the reinstated employees would support, it. The only facts the offer provides regarding the records or the 21 putative witnesses are: (1) one union show worked by unit employees during the critical period paid more than company work, and (2) the employees the Company proposed to call as witnesses were

reinstated unit employees who voted in the election. (A. 31.) Those facts do not support the Company's speculation regarding the evidence it might obtain through the records or testimony; a hearing to pursue that speculation would plainly have been an improper fishing expedition. *See Clearwater Transp.*, 133 F.3d at 1012 (no hearing required because objecting party's "conjecture and speculation [we]re insufficient to establish a prima facie case of misconduct sufficient to set aside the election").⁷

Similarly hollow are the Company's assertions (Br. 23) that either a non-unit employee's or a production manager's testimony would show that the frequency of referrals increased during the critical period. The offer of proof states that the non-unit employee would testify he saw unit employees working union events; it did not suggest he would also characterize that as unusual or state that he had never seen unit employees working union events prior to the filing of the representation petition, or even that he had seen them less frequently. Production manager Emani's proffered testimony would establish that none of the unit employees worked three shows the Company produced at a particular union venue (using union-referred stagehands) in January and

⁷ The offer of proof also contains unfounded speculation that the union records and 21 employees' testimony would confirm that the employees were not union members but, as noted, there is no reason to believe the employees' union-membership status was relevant to the operation of the referral system.

February 2016 (before the critical period), but some did work a Rihanna concert at the same venue the month before the election. (A. 30.)

Moreover, Emani had evidence of unit employees working various other union jobs not produced by the Company during the critical period in part because he was tracking company job offers and employee responses during the critical period to ensure compliance with the terms of the settlement (A. 29). (A. 29-30.) But the offer of proof does not suggest that Emani maintained comparable records before the reinstatement settlement that would allow for a meaningful comparison of referral frequencies, or that he was similarly mindful of employees' union/non-Company work before the settlement. It also does not state how many venues the Union's referral system covers beyond the one where the Company produced a few shows. Nor does the offer suggest Emani would testify that, as the Company argues in its brief (Br. 4-5, 22), employees rarely or never worked union jobs before the critical period. Like the rest of the Company's offer of proof, Emani's proposed testimony thus fails to identify substantial and material facts showing an increase in union referrals to unit employees during the critical period, or any deviation from past practice. The lack of evidence that unit employees received referrals that they would not have been eligible for or received in the normal course of the system's operations distinguishes this case from *NLRB v. River City Elevator*

Co., 289 F.3d 1029 (7th Cir. 2002). In that case, which the Company highlights (Br. 19-20, 25), the union offered a job-classification status to employees who had not completed the requisite courses or exams. As a result, the employees were “affirmatively given access to more lucrative jobs at a far lesser cost.” *Id.*

Finally, the Company attempts to circumvent its failure to demonstrate any deviation from the Union’s established job-referral practices by arguing that, because the Union’s referral system purportedly does not randomly assign jobs, the Company’s stagehands “were picked in lieu of regular dues-paying members of the Union and other members of the public vying for this work.” (Br. 20-21.) In support, the Company relies upon a sentence that was in the Regional Director’s original report (A. 167), but not in the operative Corrected Report on Objection and Challenges. That sentence stated that the Union’s referral system was open to “members of the general public with similar levels of relevant work experience and skill.” (Br. 20.) The corrected report contains no explanation for the initial inclusion or ultimate deletion of that language, which could have been due to inadvertence, thus neither the language nor the deletion can be imbued with substantive meaning.

In any event, even if the ordinary operation of the referral system entails some discretion (i.e., matching employees’ skills to those a job requires), that

would not demonstrate that the referrals to unit employees were objectionable. The Company has not shown unit employees were referred to jobs for which they were not qualified or pursuant to criteria not typically applied to effect referrals. For that reason, the Company's reliance (Br. 21-22) on *King Electric, Incorporated v. NLRB*, 440 F.3d 471 (D.C. Cir. 2006), is misplaced. In that case, a union allowed unit employees to use a referral system otherwise reserved for employees of union contractors, because at least 51% of the unit had signed authorization cards. *Id.* at 472. But the court rejected the Board's credibility determinations and held that the evidence failed to show whether the union used the "'51% rule' in the normal course, during organizing or otherwise, or whether it was merely something that was in the union's discretion to offer in appropriate situations – perhaps when necessary in order to encourage pro-union votes." *Id.* at 476.

c. The Company's speculation regarding the Union's job referral practices cannot replace specific, proffered facts to trigger an evidentiary hearing

The Company's cited cases (Br. 24, 26, 28) do not support its argument that the Board imposed an improperly high burden, of conclusively proving a violation had occurred, before granting a hearing (or investigation). In those cases, unlike here, the proffered evidence warranting a hearing established specific facts – rather than speculation – that, if credited, could meet the

standards for overturning an election. For instance, in *NLRB v. J-Wood/A Tappan Div.*, 720 F.2d 309 (3d Cir. 1983), where the union won the election by just one vote, the employer proffered several first-hand accounts of threats that different employees would lose their jobs if they voted against the union. *Id.* at 316. And in *NLRB v. Nixon Gear, Inc.*, 649 F.2d 906, 912-13 (2d Cir. 1981), the employer alleged that the union referred an employee to a better job based on his union support and in order to curry favor with other employees, and proffered several employee affidavits stating that the employee had told them as much.⁸

The Company's reliance (Br. 27) on *NLRB v. Bristol Spring Manufacturing Co.*, 579 F.2d 704 (2d Cir. 1978), is similarly misplaced. There, the Court concluded that a hearing was necessary to determine the purpose and effect of cash payments a union made to several bargaining-unit employees to reimburse them for attending union meetings and giving statements. Unlike

⁸ See also *Trimm Assoc., Inc. v. NLRB*, 351 F.3d 99, 106 (3d Cir. 2003) (employer alleged improper electioneering and proffered specific witnesses who saw alleged union agent approach employees during voting); *NLRB v. Valley Bakery*, 1 F.3d 769, 771-72 (9th Cir. 1993) (employer alleged improper electioneering and proffered witness who learned an alleged union agent told employees who previously signed authorization cards that they would be discharged if the Union did not win the election); *NLRB v. Serv. Am. Corp.*, 841 F.2d at 197 (employer presented affidavits of six employees who, prior to the election, heard or learned of two potential union agents telling employees they could be "terminated or hurt" for not supporting the union).

here, however, the allegedly objectionable benefits were not conferred pursuant to a pre-existing system indisputably available to both the employees and the general public.

Finally, there is no merit to the Company's related argument (Br. 29-31) that the Regional Director should have further investigated its objection, much less follow its investigatory "road map." The Board requires that a regional director investigate only if the objecting party presents "specific evidence, tantamount to an offer of proof, which, *prima facie*, [which] would warrant setting aside the election." *European Parts Exchange, Inc.*, 264 NLRB 224, 224 (1982); accord *Liquid Transporters, Inc.*, 336 NLRB 420, 420-21 (2001); *Allen Tyler & Son*, 234 NLRB 212, 212 (1978); *Regency Electronics, Inc.*, 198 NLRB 627, 627 (1972). Thus, the Regional Director's decision not to investigate further the Company's allegations was appropriate for the same reasons an evidentiary hearing was unnecessary: the Company failed to submit non-speculative evidence of a substantial and material fact that would require further investigation. See *Liebman & Co.*, 112 NLRB 88, 90 (1955) (Regional Director has no obligation to investigate employer's objections where

employer offered no evidence to support its objections); *accord Davenport Lutheran Home*, 244 F.3d 660, 663 (8th Cir. 2001).⁹

B. The Board Reasonably Sustained the Challenges to the Four Ballots Cast by Employees Hired After the Election Agreement’s Eligibility Cutoff

Although the Board conducts representation elections to give effect to the principle of majority rule, “the determination of whether a majority in fact voted for the union must be made in accordance with such formal rules of procedure as the Board may find necessary to adopt in the sound exercise of its discretion.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 333 (1946). Accordingly, the Supreme Court has explained that “[t]he principle of majority rule ... does not foreclose practical adjustments” designed to protect the election from the dangers of abuse and fraud. *Id.* at 331; *accord Tekweld Solutions*, 2014 WL 4060038, at *3 (Aug. 15, 2014), *enforced*, 639 F. App’x 16 (2d Cir. 2016); (Board precedent reflects “the reality that countervailing factors, which protect

⁹ Equally unavailing is the Company’s reliance on the Case Handling Manual, which it argues required the Regional Director to conduct a more comprehensive investigation. The Board’s Casehandling Manual is not binding authority. It is a source of guidance for the Board’s personnel, based on current Board law and policy. *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000); *NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794, 796 (3d Cir. 1999); *Sioux City Foundry Co. v. NLRB*, 154 F.3d 832, 838 (8th Cir. 1998); *see also* Casehandling Manual (Part Two) Representation Proceedings, “Purpose of the Manual.”

the overall process, will sometimes outweigh the value of enfranchising each and every employee”).

Under the Board’s election rules, parties may enter into stipulated election agreements resolving pre-election issues. 29 C.F.R. § 102.62(b). Of particular relevance here, such agreements set the election-eligibility date. *Id.* It is well established that “election agreements are ‘contracts,’ binding on the parties that executed them.” *T&L Leasing*, 318 NLRB 324, 325 (1995) (quoting *Barceloneta Shoe Corp.*, 171 NLRB 1333, 1343 (1968), *enforced mem.*, 1970 WL 5417 (1st Cir.1970)). Furthermore, “[a]fter approval by the Regional Director, election agreements may not be modified by either a party or an agent of the Board without the agreement of the other parties.” *Highlands Hosp. Corp.*, 327 NLRB 1049, 1050 (1999); *accord T&L Leasing*, 318 NLRB at 327. Accordingly, absent ambiguity in the agreement, when the parties have such an agreement, the Board’s role in determining voter eligibility “‘is limited to construing the agreement according to contract principles’ consistent with the intent of the parties.” *NLRB v. Speedway Petroleum*, 768 F.2d 151 (7th Cir. 1985) (quoting *Tidewater Oil Co. v. NLRB*, 358 F.2d 363, 365 (2d Cir.1966)); *see also Concepts & Designs, Inc.*, 318 NLRB 948, 959 (1995) (Board looks beyond express terms of election agreement “[o]nly where the terms of the election agreement are unclear or ambiguous”).

Election agreements are strictly enforced for good reason: “the Board has recognized the value of such agreements not only in saving the expenditure of time and effort by the Government, but also because of their tendency to stabilize labor-management relations and to expedite the settlement of labor disputes.” *United Dairies, Inc.*, 144 NLRB 153, 154 (1963), *enforced*, 337 F.2d 283 (10th Cir. 1964). “[P]arties are far less likely to enter into [election] agreements if they are worth little more than the paper they are printed on.” *Concepts & Designs, Inc.*, 318 NLRB at 959 (citing *Cmty. Care Sys.*, 284 NLRB 1147, 1147 (1987)).

In sustaining the challenged ballots cast by voters hired after the eligibility date, the Regional Director (A. 173), affirmed by the Board (A. 448), adhered to those established principles by enforcing the parties’ agreed-upon election-eligibility date. The Agreement expressly provided that the payroll period for eligibility would be the one ending on October 4, 2015, and it is undisputed that all four challenged ballots were cast by employees who began their employment after that date. *See also Airport Shuttle-Cincinnati v. NLRB*, 703 F.2d 220, 223 (6th Cir. 1983) (noting that a voter must be employed on the established eligibility date); *Roy Lotspeich Pub. Co.*, 204 NLRB 517, 517-18 (1973).

Contrary to the Company’s contention (Br. 35), the Regional Director did not abuse his discretion by declining to modify the unambiguous contractual eligibility date. A delay of seven months for the purpose of investigating, resolving, and remedying an unfair-labor-practice complaint is not, as the Company suggests (Br. 32-33), an unusual circumstance warranting deviation from the contractual language under Board precedent. For example, in *Tekweld*, 2014 WL 4060038, at *3, the Board rejected an employer’s argument that the Regional Director should have revised the voter eligibility date, or overruled the challenges to ballots cast by employees hired after the eligibility date, when the election had been postponed eight months due to pending unfair-labor-practice charges. *Cf. Lane Aviation Corp.*, 221 NLRB 898, 898 (1975) (the passage of “13 months that elapsed between the original election” and the direction of a runoff election was “insufficient” to justify departing from the Board’s “ordinary practice of using the prior eligibility period in runoff elections”).¹⁰ Both cases cited by the Company to support moving the election-eligibility date involved substantially longer delays. *See*

¹⁰ The Company cites several cases (Br. 33-34 n.9) for the proposition that the Board has at times considered work performed after an eligibility date to determine whether an employee qualifies as “regular part-time,” to be included in a bargaining unit. Those cases, however, all applied that exception to employees who had, unlike the employees here, been hired and performed some work before the election-eligibility date.

Hartz Mountain Corp., 260 NLRB 323, 327 (1982), *enforced*, 738 F.2d 422 (3d Cir. 1984) (Board ordered the employer to provide an updated voter eligibility list when two years had passed since original eligibility date); *Interlake Steamship Co.*, 178 NLRB 128, 129 (1969) (Board ordered the employer to provide an updated voter eligibility list after more than two years had passed from the time of the original eligibility date).

Nor did the delayed election modify a material term of the Agreement, as the Company suggests (Br. 34-35). The Agreement provided that “[i]f the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.” (A. 5.) Thus, it expressly took into account the possibility the election (though not the eligibility date) could be postponed and rescheduled. Moreover, the Company knew when it signed the Agreement that the Union’s unfair-labor-practice charge was pending, so it was aware of the possibility of election delay. *Cf. Van Leer Containers v. NLRB*, 841 F.2d 779, 787-88 (7th Cir. 1988) (because employer was aware of pending unfair-labor-practice proceedings at the time it entered an election stipulation, it waived its right to litigate the timing of the election based on those proceedings).

Finally, there is no merit to the Company’s argument (Br. 35) that the Regional Director disregarded the principle of maximizing employee

enfranchisement by giving undue weight to the parties' agreed-upon eligibility date. The Board decisions establishing the legal principles applied here did consider the importance of enfranchisement. For example, in addition to the policies supporting the strict enforcement of election agreements, the Board has explained that fixed election-eligibility dates (whether or not set by agreement) are "grounded on the principle that although [] newly hired employees do, in fact, have a vital interest in the outcome of a representation election, it is incumbent upon the Board to establish certain rules for the orderly conduct of its elections and to insure a certain degree of stability in the election process." *Roy Lotspeich Pub. Co.*, 204 NLRB at 517-18. And, as the Board noted in *Tekweld*, 2014 WL 4060038, at *3, maintaining a fixed eligibility date minimizes the possibility that hiring decisions will be made with the goal of influencing the election. *See, e.g., Trend Constr. Corp.*, 263 NLRB 295, 300 (1982) (finding that an employer violated the Act when it hired new employees in order to enlarge the bargaining unit and "thwart the efforts of its employees who were supporters of the Unions to secure representation"). In sum, the Board did not err in giving effect to terms contained in the parties' Agreement and sustaining the four challenges to ballots cast by voters hired after the eligibility date.¹¹

¹¹ If the Court were to find, contrary to the Board, that the four employees

hired the week after the eligibility date contained in the election stipulation were eligible to vote, the Court would need to remand the representation proceeding for the Board to resolve whether the remaining eight ballots challenged by the Union should be opened and counted.

CONCLUSION

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

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October 2017

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

JAM PRODUCTIONS, LTD., EVENT)	
PRODUCTIONS, INC., STANDING ROOM)	
ONLY, INC., AND VICTORIA OPERATING))	
CO., A SINGLE EMPLOYER,)	
)	
Petitioners/Cross-Respondents)	Nos. 17-2042, 17-2111
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD,)	13-CA-186575
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 7,538 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 6th day of October, 2017

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Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I 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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