

**Nos. 17-1200, 17-1214**

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

**GARDA CL ATLANTIC, INC.,**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

GARDA CL ATLANTIC, INC.,	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 17-1200, 17-1214
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD,	)	22-CA-196340
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

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

**A. Parties, Intervenors, Amici**

Garda CL Atlantic, Inc., (“the Company”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. United Federation of Special Police and Security Officers, Inc. (“the Union”) was the charging party before the Board. The Board’s General Counsel was also a party before the Board. There were no amici before the Board, and there are none in this Court.

## **B. Rulings Under Review**

This case involves the Company's petition to review and the Board's cross-application to enforce a Decision and Order the Board issued on July 24, 2017, and reported at 365 NLRB No. 108.

## **C. Related Cases**

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

/s/Linda Dreeben  
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Dated at Washington, DC  
this 26th day of January, 2018

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Garda CL Atlantic, Inc., (“the Company”) to review, and the cross-application of the National Labor Relations Board to enforce, a final Board Decision and Order issued on July 24, 2017, and

reported at 365 NLRB No. 108. (A. 179-81.)<sup>1</sup> In its Decision and Order, the Board found that the Company unlawfully refused to bargain with United Federation of Special Police and Security Officers, Inc. (“the Union”), as the duly certified collective-bargaining representative of a unit of its guards and drivers/messengers who perform guard duties at a New Jersey facility.

The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) (29 U.S.C. § 160(e)), which allows the Board to cross-apply for enforcement. The Company’s petition and the Board’s cross-application were timely because the Act imposes no limit on the time for initiating actions to review or enforce Board orders.

Because the Board’s Order is based in part on findings made in the underlying representation proceeding, the record in that proceeding (Case No. 22-RC-170477) is also before the Court under Section 9(d) of the Act (29 U.S.C. § 159(d)). *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceeding.

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

Rather, it authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice Order in whole or in part. The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the Court's ruling. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

### **RELEVANT STATUTORY PROVISIONS**

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

### **STATEMENT OF THE ISSUE**

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.

### **STATEMENT OF THE CASE**

After the Union prevailed in a Board-conducted representation election, the Board certified the Union to represent a unit of the Company's guards and drivers/messengers who perform guard duties. Thereafter the Company refused to bargain in order to seek court review of the Board's overruling of its election objections in the underlying representation case in which it claimed that the Board

agent who conducted the election made improper statements to two employees when they arrived to vote. After a hearing, the Board concluded that the Company's evidence was "woefully insufficient" to meet its considerable burden of showing that the Board agent's conduct raised a reasonable doubt as to the fairness and validity of the election. (A. 131.) Now, facing an even higher standard of review before the Court, the Company's contentions fair no better and the Board's bargaining Order should be enforced.

## **I. THE REPRESENTATION PROCEEDING**

The Company provides security-guard services from its Edison, New Jersey facility. (A. 126; A. 65, 164, 169.) After the Union filed a petition with the Board seeking to represent a unit of employees at that facility, the Company and the Union entered into a Stipulated Election Agreement ("the Agreement") to have a Board-conducted election among "[a]ll full time and regular part-time guards and drivers/messengers performing guard duties as defined in Section 9(b)(3) of the [Act]." (A. 126; A. 64-67.) *See* 29 U.S.C. § 159(b)(3).<sup>2</sup> Section 9(b)(3) defines the statutory term "guard," and prohibits the Board from certifying any unit that includes both guards and non-guards. *Id.*

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<sup>2</sup> Section 9(b)(3) defines a guard as "any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." 29 U.S.C. § 159(b)(3).

On March 25, 2016, a Board agent conducted the election at the Edison facility, in accordance with the Agreement's terms. (A. 126; A. 65-67, 81-82, 88.) Along with the Board agent, two observers, Jason Gonzales for the Company and Zachary Foster for the Union, were present for both the morning and the afternoon polling sessions. (A. 127-32; A. 13-15, 47-48.) Neither observer challenged any voters during the morning session. (A. 15, 48.)

During the afternoon polling session, Foster challenged the eligibility of voter Winston McKenzie as a supervisor, and separately challenged voters Norman Hoepel and Omar Aguilar-Ramas as "coin loaders."<sup>3</sup> (A. 127-32; A. 15-19, 34-38, 40-43, 48-53, 61.) In each instance, the Board agent informed the prospective voter of the challenge to his eligibility, and briefly asked him one or a few questions concerning his job classification and/or job duties. (A. 130-32; A. 16, 18, 21, 23, 35-37, 49-50, 52.) The agent consistently advised every challenged voter that he could vote, and that his ballot would be placed in a challenged-ballot envelope, or, that he could choose not to vote. (A. 130-32; A. 16, 18, 21, 37-38, 49-53.) The Board agent further explained to some of the challenged voters that non-guards cannot be represented by a guard union. (A. 130; A. 18-19.) McKenzie and Hoepel ultimately chose to cast challenged ballots, whereas

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<sup>3</sup> Statutory supervisors are expressly excluded from the stipulated unit. (A. 65.) "Coin loader" positions are not referenced in the Agreement; "cash vault service employees," however, are expressly excluded from the unit. (A. 127, 130; A. 65.)

Aguilar-Ramas chose instead not to vote. (A. 127-32; A. 16-18, 37-38, 40, 42-43, 50-52.) There may have been an additional, unidentified voter (“the Unidentified Voter”) whom Foster challenged as a coin loader and who, like Aguilar-Ramas, declined the opportunity to cast a challenged ballot.<sup>4</sup>

The election results were 38-35 in favor of the Union, with two unopened, challenged ballots, a number insufficient to affect the election’s outcome.<sup>5</sup> (A. 88.) On April 1, the Company timely filed objections, claiming that the Board agent engaged in misconduct that required that the election be set aside. (A. 126; A. 89-92.) A hearing on the objections was held on May 23. (A. 1, 62-63, 95.)

On September 2, the hearing officer issued a report recommending that the objections be overruled. (A. 97-118.) The Company filed exceptions, and on December 14, the Regional Director issued a Decision and Certification of Representative, affirming the hearing officer’s conclusions, overruling the objections, and certifying the Union as the unit employees’ exclusive collective-bargaining representative. (A. 119-35.) After the Company requested Board review of the Regional Director’s decision, the Board (Chairman Miscimarra and

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<sup>4</sup> From the evidence the Company presented at the hearing, it is unclear whether this voter, whom the observers could not identify in their testimony, was in fact Hoepel. Hoepel, whom the observers could not identify, initially left the polling area without voting after his eligibility was challenged, but later returned and cast a challenged ballot. (A. 127-29, 129 n.4, 131; A. 16-19, 23, 40, 42-43, 49-50.) Hoepel did not testify.

<sup>5</sup> As a result, there was no need to reach the merits of those challenges.

Members Pearce and McFerran), concluded that no substantial issues warranting review were raised, and denied the request on March 15, 2017. (A. 136-58, 161.)

## **II. THE UNFAIR-LABOR-PRACTICE PROCEEDING**

On December 29, 2016, and March 20, 2017, the Union requested bargaining, and the Company refused those requests. (A. 179-80; A. 166, 170.) After the Union filed a charge, the Board's General Counsel issued an unfair-labor-practice complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (A. 179; A. 162-68.) The General Counsel subsequently filed a motion for summary judgment, and the Board issued a notice to show cause why the motion should not be granted. (A. 179; A. 174-75.) In its responses, the Company admitted its refusal to bargain, but reasserted its contention that the Board had improperly certified the Union. (A. 179; A. 166, 169-70, 176.)

## **III. THE BOARD'S CONCLUSIONS AND ORDER**

On July 24, 2017, the Board (Chairman Miscimarra and Members Pearce and McFerran) issued its Decision and Order, granting the General Counsel's motion for summary judgment and finding that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A. 179-81.) 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 did not offer any newly discovered and previously unavailable evidence or allege any special circumstances that would require the Board to reexamine the decision to certify the Union. (A. 179.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A. 180.) Affirmatively, the Board's Order directs the Company, on request, to bargain with the Union, to embody any understanding reached in a signed agreement, and to post a remedial notice. (A. 180-81.)

### **SUMMARY OF ARGUMENT**

A Board-conducted election is presumptively fair and valid, and a party seeking to overturn the election results bears a heavy burden. Here, the Board acted well within its wide discretion in overruling the Company's objections to the election after finding that the Company failed to carry that burden. Specifically, the Company failed to adduce sufficient evidence to support its claim that the Board agent's questions and statements in response to the union observer's challenges to the eligibility of voter Omar Aguilar-Ramas and an Unidentified Voter compromised the fairness and validity of the election. As the Board found,

the evidence instead showed that the Board agent acted reasonably in seeking to clarify the challenge procedure and to determine whether there was a reasonable basis for the observer's challenges. In doing so, there is no dispute that the Board agent properly and consistently assured the employees that they were entitled to vote by challenged ballot. Those actions were wholly consistent with the Board's rules and policies and reasonable under the circumstances. Accordingly, the Board properly certified the Union as the employees' collective-bargaining representative, and the Company violated Section 8(a)(5) and (1) of the Act by admittedly refusing to bargain with the Union.

## ARGUMENT

### **THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN OVERRULING THE COMPANY'S ELECTION OBJECTIONS AND THEREFORE PROPERLY FOUND THAT THE COMPANY UNLAWFULLY REFUSED 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).<sup>6</sup> Here, the Company admits (Br. 6, 15) its refusal to bargain, but does so to contest the Board’s certification of the Union as the representative of its employees by challenging the Board’s overruling of its election objections. However, as the Board reasonably found, the Company failed to meet its heavy burden of showing, as it claimed in its objections, that the Board agent’s conduct warranted overturning the election.

#### **A. Applicable Principles and Standard of Review**

“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). Thus, on questions that arise in the context of representation

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<sup>6</sup> An employer that violates Section 8(a)(5) also derivatively violates 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 their statutory rights. 29 U.S.C. § 158(a)(1); see *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

elections, the Court “accord[s] the Board an especially ‘wide degree of discretion.’” *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996) (quoting *A.J. Tower*, 329 U.S. at 330); accord *800 River Rd. Operating Co., LLC v. NLRB*, 846 F.3d 378, 385 (D.C. Cir. 2017).

A party seeking to set aside a Board-certified election “‘carries a heavy burden.’” *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002) (quoting *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996)). This is because there is a “strong presumption” that such an election “reflects the employees’ true desires regarding representation.” *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997); see also *NLRB v. Mattison Mach. Works*, 365 U.S. 123, 123-24 (1961) (objecting party bears burden of proving election unfair); *NLRB v. Schwartz Bros.*, 475 F.2d 926, 930 (D.C. Cir. 1973) (Board-certified elections are presumptively valid).

In order to overturn an election on the basis of Board agent conduct, the objecting party must prove that “the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.” *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enforced, 414 F.2d 999 (2d Cir. 1969); accord *Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 54-55, 61 (D.C. Cir. 2016); *Physicians & Surgeons Ambulance Serv., Inc.*, 356 NLRB 199, 199 (2010), *aff’d*, 477 F. App’x 743 (D.C. Cir. 2012). As a threshold matter, the objecting party

must demonstrate that the Board agent engaged in some form of misconduct or irregularity—for there can be “no basis for finding objectionable conduct in a Board agent’s proper performance of election duties.” *Affiliated Midwest Hosp. Inc.*, 274 NLRB 900, 900 (1985), *enforced*, 789 F.2d 524 (7th Cir. 1986).

Merely establishing that such improprieties occurred, however, does not satisfy the objecting party’s burden. *NLRB v. Duriron Co.*, 978 F.2d 254, 256-57 (6th Cir. 1992) (“elections are not automatically voided whenever they fall short of perfection”). As the Court and Board have recognized, “[t]he representation election process . . . is not an abstract exercise in achieving ideal conditions; it is rather an intensely practical process designed to maximize employee free choice,” *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984), and “desired practices may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of circumstance.” *Polymers*, 174 NLRB at 282; *see also Serv. Corp. Int’l v. NLRB*, 495 F.3d 681, 684 (D.C. Cir. 2007) (representation elections often are valid although marked by “minor (and sometimes major, but realistically harmless) infractions”).

The standard for overturning an election is demanding in part because ordering a rerun election poses its own danger to the effectuation of employee free choice. *Amalgamated*, 736 F.2d at 1562-63. As the Court has acknowledged, the delay inherent in holding a second election after employees have voted for union

representation “almost inevitably works to the benefit of the employer and may frustrate the majority’s right to choose to be represented by a union,” by “play[ing] into the hands of employers who capitalize on the delay.” *Id.* at 1563; *accord NLRB v. Precise Castings, Inc.*, 915 F.2d 1160, 1164 (7th Cir. 1990).

The Court reviews the Board’s decision to overrule election objections for abuse of the Board’s wide discretion, *NCR Corp. v. NLRB*, 840 F.3d 838, 841-42 (D.C. Cir. 2016); *Canadian Am. Oil*, 82 F.3d at 473, and will uphold the Board’s decision to certify election results except in “the rarest of circumstances.” *800 River Rd.*, 846 F.3d at 385-86; *accord NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012) (review of Board’s election rulings is “extremely limited”). The Board’s findings of fact are “conclusive” if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-85 (1951). A reviewing court may not “displace the Board’s choice between two fairly conflicting views [of the facts], even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488.

**B. The Company Failed to Meet its Heavy Burden of Showing that the Board Agent’s Conduct Warranted Overturning the Election**

The objections before the Court are extremely narrow. In its opening brief, the Company relies exclusively on a pair of questions and a statement that the Board agent made to challenged voter Aguilar-Ramas, as well as to the

Unidentified Voter. (Br. 16-27.) The Board acted well within its wide discretion in concluding that the Company failed to carry its burden of demonstrating that “the manner in which the election was conducted raises a reasonable doubt as [to] the fairness and validity of the election.” (A. 126 (citing *Polymers*, 174 NLRB at 282)); (*see* pp. 11-12 above.) The evidence is clear, as the Board found, that the Board agent was merely attempting to clarify the challenged-ballot procedure and whether the election observer’s challenges were reasonable. (A. 130-32.)

Moreover, it is undisputed that the agent “gave every voter the opportunity to vote.” (A. 132). The Company—disappointed that Aguilar-Ramas, and perhaps the Unidentified Voter, chose to turn down that opportunity—“asks us to count uncast ballots as determinative challenges,” as the Board explained. (A. 132.) The Company’s efforts to convert the Board agent’s reasonable conduct, and an employee’s voluntary choice to forego voting, into bases for overturning the election results are unsupported by the evidence the Company presented at the hearing.

To begin, the Company acknowledges that there is no dispute that the unit agreed to by the parties was intended to only include guards as defined by Section 9(b)(3) of the Act. (*See* Br. 5 n.1.) According to the Stipulated Election Agreement, the unit included all “guards and drivers/messengers performing guard duties as defined in Section 9(b)(3).” (A. 65.) Further, there is no dispute that

union observer Foster challenged employees Winston McKenzie as a supervisor expressly excluded from the unit, and Normal Hoepel as a “coin loader,” which was not a classification included in the Agreement.<sup>7</sup> Moreover, it is undisputed that both men voted pursuant to the challenged-ballot procedure. And, as discussed below (pp. 19-20), the record evidence is unclear as to whether Hoepel was the Unidentified Voter.

When Aguilar-Ramas appeared at the polls, Foster challenged him as a coin loader. The Board agent told Aguilar-Ramas that his eligibility to vote had been challenged and then asked him whether he was a guard and whether he carried a gun. The Board’s Rules and Regulations allow observers to challenge a voter’s eligibility only “for good cause,” 29 C.F.R. § 102.69(a), and the Board agent’s questions were consistent with longstanding Board policy, which “encourages . . . agents to avoid unnecessary election delays because of groundless challenges.” *NLRB v. Sonoma Vineyards, Inc.*, 727 F.2d 860, 864 (9th Cir. 1984); accord *Fulton Bag & Prod. Co.*, 121 NLRB 268, 270 n.5 (1958). Moreover, the Board’s Casehandling Manual, which provides guidance for the running of elections, plainly contemplates that Board agents may ask challenged voters about their

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<sup>7</sup> The Company failed to introduce evidence regarding the “coin loader” position, but the record suggests that they wear a different uniform shirt than the guards and drivers/messengers and that their duties include loading coins onto trucks. (A. 127, 130; A. 17, 27-29, 40, 43, 48-51, 54-57.) The Agreement expressly excluded “cash vault service employees” from the unit. (A. 127, 130; A. 65.)

classifications, duties, or other issues rationally related to the challenge or the voter's eligibility. *See* Casehandling Manual § 11338.3.<sup>8</sup> As the Board concluded, the Board agent here “was merely attempting to clarify whether the challenge to a voter was reasonable.” (A. 131.)

After Aguilar-Ramas responded that he was a driver, and did not carry a gun, the Board agent further explained the challenged-ballot process. The credited testimony demonstrates that the Board agent assured Aguilar-Ramas that he could vote, and that his vote would be sealed in a challenged-ballot envelope, or, that he could choose not to vote. At some point, the Board agent also explained, consistent with Section 9(b)(3) of the Act and the parties' Agreement, that non-guards could not be represented by a guard union like the Union. Ultimately, Aguilar-Ramas chose not to vote rather than to cast a challenged ballot.

Contrary to the Company's arguments (Br. 22-24, 27), the Board agent appropriately followed up on Foster's challenge to Aguilar-Ramas as an ineligible “coin loader” by briefly asking him two simple questions that touched on his potential eligibility and the reasonableness of the challenge. *See Happ Mfg. Co.*,

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<sup>8</sup> The Casehandling Manual provides non-binding guidance for Board staff and sets forth standard or typically optimal practices and procedures. *See* Casehandling Manual, “Purpose of the Manual;” *see also Shepard Convention Servs., Inc. v. NLRB*, 85 F.3d 671, 674 & n.7 (D.C. Cir. 1996); *Kwik Care*, 82 F.3d at 1126-27; *Polymers*, 174 NLRB at 282-83. Part Two of the Casehandling Manual, which addresses representation proceedings, is available at: <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM%20Part%20II%20Jan%202017.pdf>

124 NLRB 202, 205-06, 206 n.9 (1959) (nothing objectionable where Board agent asked challenged voters questions concerning eligibility and grounds for observer's challenge); *Fletcher, H. E., Co.*, 121 NLRB 826, 829-30 (1958) (same, where agent's questions concerned challenged voters' duties and classifications). The question of whether Aguilar-Ramas held a guard position was relevant because the Agreement stipulated that eligible voters were "guards and drivers/messengers performing guard duties." The agent's question whether Aguilar-Ramas carried a gun was likewise relevant, because whether an employee is charged with carrying a firearm or other weapon in the performance of his job is a relevant factor, though by no means determinative, in considering his statutory guard status. *See, e.g., Boeing Co.*, 328 NLRB 128, 130 (1999); *Syracuse Univ.*, 325 NLRB 162, 167-68 (1997); *Indus. Contractors, Inc.*, 244 NLRB 1154, 1158 (1979). Even more significantly, the value of the question is demonstrated on this record by the fact that the same question helped to resolve a challenge to employee Phillip Petties' eligibility. (A. 129, 131; A. 21-22, 26-30, 51-52, 58.) Petties, who appeared at the polling location wearing a coin-loader shirt, was challenged by Foster as a coin loader, but when Petties responded affirmatively that he carried a gun, Foster withdrew his challenge and Petties cast an unchallenged ballot.<sup>9</sup> Thus, the

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<sup>9</sup> Petties explained his shirt, stating that he "come[s] in a little early to help out" with coin loading, but his "primary position" is a driver/messenger who carries a gun. (A. 27-29.)

Company has not met its burden of demonstrating that the Board agent's two questions—which accorded with the Board's Rules and Regulations, the Casehandling Manual, and Board precedent, and were reasonably addressed to the circumstances at hand—somehow amounted to misconduct that creates a reasonable doubt as to the fairness and validity of the election.

The Company comes no closer to meeting its evidentiary burden by citing the Board agent's reasonable and true statement about guard unions. The agent simply noted, correctly, that non-guards ultimately cannot be represented by a guard union like the Union here—consistent with the prohibitions of Section 9(b)(3) of the Act, and with the terms of the parties' Agreement. *See* 29 U.S.C. § 159(b)(3); A. 65. Importantly, it is uncontested that the agent made no assertion and expressed no opinion as to whether Aguilar-Ramas was, in fact, a guard (or ultimately would be represented by the Union).<sup>10</sup>

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<sup>10</sup> Throughout its brief, the Company improperly asserts (Br. 16, 20, 27) that Aguilar-Ramas is an “eligible voter[.]” whose position “meet[s] the statutory definition” of a guard, despite the fact that his status has not been fully litigated or proven. The Company's claim is contrary to settled law to the extent it suggests that an individual's statutory guard status can be determined by anything other than a careful examination of the employee's specific duties. *See* 29 U.S.C. § 159(b)(3); *Pony Exp. Courier, Corp. v. NLRB*, 981 F.2d 358, 362-64 (8th Cir. 1992). Indeed, the Company offers no record citation to support its assertion beyond referencing (Br. 7, 9) its unilaterally created voter eligibility list, which has never precluded a union from challenging the eligibility of voters whose names appear on the list (*see NLRB v. Speedway Petroleum*, 768 F.2d 151, 157 (7th Cir. 1985)), and Aguilar-Ramas' limited testimony, which actually differentiated his

Moreover, as the Board emphasized (A. 130, 132), the Board agent's statement must be viewed in light of the credited evidence that the agent provided clear and unwavering assurances to the challenged employees that they were entitled to vote. Indeed, the Company does not dispute, and its observer admitted (A. 16-19, 21), that the agent properly explained the challenge procedure to Aguilar-Ramas and expressly offered him the opportunity to cast a challenged ballot. *See Regency Hyatt House*, 180 NLRB 489, 490 & n.7 (1969) (because employee declined Board agent's offer to cast challenged ballot, agent engaged in "no failure of duty toward [employee] and [employee's] failure to vote furnishes no basis for objecting to the election"); *Happ Mfg.*, 124 NLRB at 204-06, 206 n.9 (agent did not deny challenged employees the opportunity to vote, nor did agent engage in objectionable conduct by asking them questions relating to observer's challenges, explaining eligibility requirements to them, and telling employees they "could elect either not to vote or vote a challenged ballot").

The other challenged voter, referred to as the Unidentified Voter, separately appeared at the polls and, like Aguilar-Ramas, was challenged by Foster as a coin loader. An exchange occurred between the Board agent and the Unidentified Voter in which the agent asked him whether he carried a gun, explained the challenged-ballot procedure, and explained that non-guards could not be represented by a

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position as a "CDL driver" who works at night from the drivers/messengers who work in the morning. (A. 35.)

guard union. Like Aguilar-Ramas, the Unidentified Voter declined the Board agent's offer to cast a challenged ballot and left without voting. For the same reasons discussed above, the question to this voter about carrying a gun and explanation of the guard unit and the challenged-ballot procedure fail to provide a basis for overturning the election.

Moreover, the Board specifically found (A. 129 n.4, 131) that the Unidentified Voter may have been Hoepel, who was challenged as a coin loader and left the polling area without voting, but later returned to the polls and cast a challenged ballot. The Company did not call Hoepel to testify at the hearing. Surprisingly, the Company's opening brief now claims that the Unidentified Voter is Tristan Jones (*see, e.g.*, Br. 8, 10, 16-17), although the Company concedes (Br. 10 n.5.) that Jones, like Hoepel, did not testify. Despite its belated attempts at identification, there is absolutely no probative record evidence that Jones was the Unidentified Voter. Rather than help its case, the Company's effort to now name this employee exemplifies its failure to provide sufficient evidence in support of its objections before the Board.

The Company's speculation about who chose not to vote, and the reasons for that choice, do not suffice to overcome the strong presumption that the election represents the employees' true desires regarding representation. In particular, there is no record support for the Company's repeated assertions (Br. 2, 16, 23-24, 27)

that the Unidentified Voter and Aguilar-Ramas “unquestionably perceived the Board [a]gent’s questions and comment[] as instructing them that it did not matter whether they voted because they did not hold a ‘guard’ position and, therefore, would not be represented by the Union.” (Br. 27.)<sup>11</sup>

As to the Unidentified Voter, the Company’s claimed omniscience about his perception is utterly perplexing, because the Company failed to call him as a witness at the hearing. Moreover, Foster testified that soon after the Unidentified Voter appeared at the polls, the Board agent—responding to a question from Gonzales about who was allowed to vote—read aloud, in the voter’s presence, the eligibility instructions from the Notice of Election. (A. 49, 81-82.) According to Foster, the Unidentified Voter chose not to vote even after being read those instructions, and despite the fact that the Board agent assured him of his right to vote at least twice, because, the voter insisted, “it didn’t affect him anyway because he’s a coin guy, not a regular route guy.” (A. 49-50.)

As for Aguilar-Ramas, his testimony undermines the Company’s claim, as it does not even mention the Board agent’s statement regarding representation of

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<sup>11</sup> The Board recognized (A. 127, 130) that the parties’ stipulated definition of the voting unit incorporated by reference the statutory definition of “guard” while also referencing both “guard” and “driver/messenger” job classifications, and left unresolved exactly which drivers/messengers qualified as “performing guard duties as defined in [the Act].” (A. 65.) To the extent, therefore, that some drivers/messengers may have felt uncertain as to their eligibility, such uncertainty was inherent in the parties’ Agreement, as the Board noted. (A. 130).

guards by the Union, much less assert that it had anything to do with his decision not to vote. Instead, in testimony discredited by the Board, Aguilar-Ramas stated that he turned down the Board agent's offer to vote only because he claimed the agent told him, in explaining the challenged-ballot procedure, not only that his vote would be put aside in an envelope, but also that his vote "won't count." (A. 128, 130; A. 37-38.) The Board explicitly rejected Aguilar-Ramas' version of the exchange, finding that "the overall record indicates that the Board agent repeated, in sum and substance, the same message to every challenged voter – that they could vote and their ballot would be placed in a challenged ballot envelope, or they could chose not to vote." (A. 130.)

Thus, the Board reasonably concluded that, "[a]t best, the evidence here indicates that one voter chose not to vote based on his understanding that his vote would not count"—evidence that is "woefully insufficient" to meet the Company's burden. (A. 131-32.) *See Antelope Valley*, 275 F.3d at 1095 ("[I]t is not the Board that bears the burden of demonstrating the validity of an election; rather, it is the party challenging the results . . . [that] carries a heavy burden of showing the election's invalidity.") (internal quotation marks omitted), and cases cited at pp.11-12. The simple fact that an employee may have "misunderstood" the Board agent's proper explanation of procedures "does not mean that the agent was guilty of misconduct," or that the election must be set aside. *NLRB v. Eskimo Radiator*

*Mfg. Co.*, 688 F.2d 1315, 1319 (9th Cir. 1982) (voter misinterpreted agent’s ballot instructions, believing agent had instructed him to vote for union); *see also* *Affiliated Midwest Hosp.*, 274 NLRB at 900 (voter confusion that is caused by or “incidental to [a] Board agent’s properly carrying out his duties” cannot justify overturning an election).

The Company’s repeated claim (Br. 2, 16, 20, 21, 22, 27) that the Board agent’s reasonable efforts to follow up on challenges “disenfranchised” two voters is without merit and wholly unsupported by the evidence. The Company relies (Br. 21-22, 27) on plainly inapposite authority by citing cases where Board agents caused the polls to be closed at times when they were scheduled to be open. *See Garda World Sec. Corp.*, 356 NLRB 594 (2011); *Wolverine Dispatch, Inc.*, 321 NLRB 796 (1996); *Dayton Malleable Iron Co.*, 123 NLRB 1707 (1959). Such circumstances—where an agent’s procedural error may have *literally prevented* prospective voters from casting ballots—are nothing like the circumstances here, where there is no dispute that the polls were open at all appropriate times and every employee who appeared was offered the chance to vote. Indeed, the Court has recognized that the reach of *Wolverine Dispatch* and similar cases is limited to circumstances where, unlike here, employees were “deprived of an opportunity to vote.” *See Antelope Valley*, 275 F.3d at 1091-92, 1092 n.6 (finding such precedent

“readily distinguishable” in situation where employees had adequate opportunity to vote).

The Company also posits scenarios unsupported in the record when it suggests, based on *Garda World Security*, 356 NLRB 594 (2011), that “it was possible” that Aguilar-Ramas or the Unidentified Voter “might have relayed” the Board agent’s questions or statement to “others” outside the polling area. (Br. 27.) The record is devoid of any such evidence. And, contrary to the Company’s suggestion, this is not a “potential disenfranchisement case[.]” (Br. 21.) Rather, as the Company itself admits (Br. 20), in a case like this one, the substantive standard that governs the Board’s determination is whether “the manner in which the election was conducted raise[s] a reasonable doubt as to the fairness and validity of the election.” *Durham Sch.*, 821 F.3d at 54 (internal quotation marks omitted). Under that standard, “mere speculative harm [is insufficient] to overturn an election.” *Id.* at 61 (internal quotation marks omitted); *accord Polymers*, 414 F.2d at 1002-04.

Moreover, the Company has proved only that Aguilar-Ramas voluntarily declined the Board agent’s invitation to cast a challenged ballot. This does not establish disenfranchisement, but only an employee’s exercise of free will and, indeed, of a statutory right—for, although the Company fails to appreciate it, the

Act guarantees to employees the right “to refrain from voting.”<sup>12</sup> *Antelope Valley*, 275 F.3d at 1094 n.8 (quoting *Lemco Const.*, 283 NLRB 459, 460 (1987)); accord *Parkway Centers Inn*, 240 NLRB 192, 194 (1979).

Finally, there is no comparison between the present case and *NLRB v. State Plating & Finishing Company*, 738 F.2d 733 (6th Cir. 1984), which the Company cites extensively. (Br. 24-27.) Unlike here, that decision addressed the distinct issue of whether comments by a Board agent during a hard-fought organizing campaign jeopardized the Board’s neutrality. In that different context, the court held the Board’s neutrality was destroyed by the agent’s pre-election comments that effectively “endorsed . . . the union’s position” on a local and contentious campaign issue; the comments misled employees into believing that their employer had lied to them, and were “widely discussed among all the employees” in the days leading up to the election. *Id.* at 735-36, 738-40. Here, by contrast, the Company—in an entirely different factual, legal, and evidentiary landscape—has shown no basis to impugn the Board’s neutrality. Rather, the Board agent fulfilled his obligation to ensure that the voting challenges were reasonable and to explain

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<sup>12</sup> See 29 U.S.C. § 157 (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities . . .*”) (emphasis added).

to challenged voters that they could cast their ballots pursuant to the challenged-ballot procedure or decide not to vote.

**CONCLUSION**

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

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January 2018

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

GARDA CL ATLANTIC, INC.,	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 17-1200, 17-1214
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD,	)	22-CA-196340
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 5,967 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC  
this 26th day of January, 2018

**STATUTORY AND REGULATORY  
ADDENDUM**

**STATUTORY AND REGULATORY ADDENDUM**

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## THE NATIONAL LABOR RELATIONS ACT

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

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

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

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

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

\* \* \*

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

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

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

\* \* \*

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to

protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

\* \* \*

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) . . .

. . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

\* \* \*

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

\* \* \*

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

\* \* \*

**Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:**

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

\* \* \*

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

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

## REGULATIONS

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

(a) *Election procedure; tally; objections.* Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending. All elections shall be by secret ballot. . . . A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit. When the election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the Regional Director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the Regional Director objections to the conduct of the election or to conduct affecting the results of the election which shall contain a short statement of the reasons therefor and a written offer of proof in the form described in §102.66(c) insofar as applicable, except that the Regional Director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause. Such filing(s) must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. The party filing the objections shall serve a copy of the objections, including the short statement of reasons therefor, but not the written offer of proof, on each of the other parties to the case, and include a certificate of such service with the objections. . . .

\* \* \*

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

GARDA CL ATLANTIC, INC.,	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 17-1200, 17-1214
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD,	)	22-CA-196340
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on January 26, 2018, 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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