

Nos. 17-1150, 17-1167

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

JACMAR FOODSERVICE DISTRIBUTION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 630

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

KIRA DELLINGER VOL
Supervisory Attorney

VALERIE L. COLLINS
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0656
(202) 273-1978

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

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

JACMAR FOODSERVICE DISTRIBUTION)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 17-1150 & 17-1167
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	21-CA-193952
)	
Respondent/Cross-Petitioner)	
)	
INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS LOCAL 630)	
)	
Intervenor)	
)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. *Parties and Amici:* Jacmar Foodservice Distribution was the respondent before the Board, and is the Petitioner/Cross-Respondent in this Court proceeding. The Board’s General Counsel was a party before the Board. Food, Industrial, and Beverage Warehouse, Drivers, and Clerical Employees, Teamsters Local 630, International Brotherhood of Teamsters was the charging party before the Board, and has intervened in support of the Board.

B. *Rulings Under Review:* The case under review is a Decision and Order of the Board issued on June 6, 2017, and reported at 365 NLRB No. 91.

The Decision and Order relies on findings made by the Board and Board officials in an earlier representation (election) proceeding (Board Case No. 21-RC-175833).

The Board's findings in the representation proceedings are contained in an unpublished Acting Regional Director's Decision on Objections and Decision and Certification of Representative issued on September 26, 2016, and a Board order issued February 22, 2017, and reported at 365 NLRB No. 35, denying review of the Acting Regional Director's Decision on Objections and Decision and Certification of Representative.

C. *Related Cases:* This case has not previously been before this Court. The Board is not aware of any related cases pending or about to be presented to this Court or any other court.

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

Dated at Washington, DC
this 30th day of January, 2018

GLOSSARY OF ABBREVIATIONS

Act	National Labor Relations Act
Board	National Labor Relations Board
Br.	Opening proof brief of Petitioner/Cross-Respondent Jacmar Foodservice Distribution
Union	Food, Industrial, and Beverage Warehouse, Drivers, and Clerical Employees, Teamsters Local 630, International Brotherhood of Teamsters

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THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of Jacmar Foodservice Distribution (“Jacmar”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Board Order issued on June

6, 2017, and reported at 365 NLRB No. 91. (A. 152-54.)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 Decision and Order is based, in part, on findings made in an underlying representation (election) proceeding, *Jacmar Food Service Distribution*, Board Case No. 21-RC-175833. The petitioner in that proceeding was Food, Industrial, and Beverage Warehouse, Drivers, and Clerical Employees, Teamsters Local 630, International Brotherhood of Teamsters (“the Union”), which the Board certified as the exclusive bargaining representative of a unit of Jacmar’s delivery drivers in City of Industry, California.² The record in that representation case is also before the Court pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964);

¹ “A.” references are to the Deferred Appendix. “Br.” refers to Jacmar’s brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

² The Union has intervened in support of the Board.

Terrace Gardens Plaza, Inc. v. NLRB, 91 F.3d 222, 225 (D.C. Cir. 1996). 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 unfair-labor-practice order in whole or in 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. *See Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999) (citing cases).

STATEMENT OF THE ISSUE

The ultimate issue is whether substantial evidence supports the Board's finding that Jacmar violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. The dispositive underlying issue is whether the Board acted within its wide discretion in overruling Jacmar's election objections and certifying the Union, and doing so without an evidentiary hearing.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set forth in Jacmar's brief.

STATEMENT OF THE CASE

The Board found that Jacmar violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. §158(a)(5) and (1), by refusing to bargain with the Union after the Board certified the Union as the exclusive bargaining representative of an appropriate unit of Jacmar's delivery drivers. Jacmar does not dispute its refusal to bargain, but instead contests the Board's certification of the Union. The Board's findings of fact and the procedural history of the representation and unfair-labor-practice proceedings are set forth below.

I. THE REPRESENTATION PROCEEDING

Jacmar operates a warehouse and distributes food products to customers, primarily restaurants, from its City of Industry location. (A. 73.) In the spring of 2016, the Union began a campaign to organize a unit of delivery drivers at that facility and, on May 9, the Union filed a petition for representation ("the petition") with the Board. (A. 57; 14-16.) Subsequently, Jacmar and the Union entered into a stipulated agreement to hold a secret-ballot representation election under Board supervision. (A. 57; 17-25.)

The Board's regional office conducted the election on May 26, 2016. Fifteen votes were cast in favor of representation by the Union and nine votes were cast against representation, with one non-determinative challenged ballot and one void ballot. (A. 57-58; 27.) After the election, Jacmar filed three objections based

on asserted pre-election misconduct by the Union or its agents, and one objection based on purported Board-agent bias in favor of the Union during the election. (A. 58; 28-34.)

In support of its objections, Jacmar submitted an offer of proof consisting of a narrative and attached declarations. (A. 58-59; 35-55.) The offer alleged that during the Union's organization campaign, but over a month prior to the petition being filed, driver Alfredo Chavez was asked on three separate occasions by a driver named Carlos to sign a union authorization card. Chavez, who was then a probationary employee, declined Carlos's entreaties the first two times. The third time, Carlos said that if Chavez did not sign the card, "I will tell [Chavez's supervisor] that you are not a good worker so you will not pass probation." Chavez signed the card because he was afraid to lose his job. (A. 58; 39.) Another driver named Esteban asked driver Miguel Bertoglio to sign a card, which he did. However, Bertoglio "did not really feel that [he] did so voluntarily," as he "really just wanted to be part of the other drivers." Later, Bertoglio decided not to support the Union, and he served as an observer for Jacmar during the election. (A. 58; 41.)

The offer of proof also alleged that, after the Union filed its petition but before the election, driver Dennis Garcia discovered that a pro-Union sticker had been placed on his car without his knowledge or permission. (A. 58; 38, 46.)

Then, on May 20, one week before the election, Director of Human Resources Gonzalo Ventura, Jr., found eight pro-Union posters on Jacmar's property, in violation of its no-solicitation/no-distribution policy. Two were in the drivers' room, near the Board's election notice, and the others were elsewhere in the facility. (A. 59; 37, 44.) Ventura immediately removed all eight posters and, after reviewing security footage, determined that the two in the drivers' room had been posted by Esteban Ochoa, a driver who later served as the Union's election observer. (A. 58; 44, 48-49.)

Finally, the offer of proof contained alleged facts related to conduct by the Board agent who conducted the election. Specifically, it alleged that, on the day of the election, the Board agent instructed observers designated by Jacmar and the Union to check the names of employees who came to vote, rather than using the voter list to do so herself. In addition, one of Jacmar's observers thought that when the Board agent explained to voters how to mark a "yes" or "no" vote, the agent "seemed to favor the 'yes' side in how she spoke to employees and explained how to vote." Jacmar's election observer also noticed that the agent brought more ballots than necessary and believed that she did not know how many employees were in the unit or could vote. (A. 61; 41-42.)

During the ballot count, the Board agent unfolded and read each ballot aloud. Ventura, who observed the count, thought that the agent announced "yes"

votes more enthusiastically than she announced “no” votes. (A. 61; 45.) At one point, the agent unfolded two ballots that had been folded together: one was marked “yes,” and the other was blank. (A. 61; 45, 46.) Jacmar’s observers believed that the agent had given both ballots to one voter. When Jacmar’s attorney objected to both ballots as void, Ventura observed that the agent appeared annoyed and dismissive of the objection. (A. 61; 46.) She then counted the “yes” ballot as a vote for the Union and placed the blank ballot in an envelope for challenged ballots. (A. 61; 41, 46.) After announcing all of the votes, the agent counted the “no” votes three times and the “yes” votes twice. She then commented that because she had counted the ‘no’ votes three times, she should also count the “yes” votes a third time, and proceeded to do so. As she turned to prepare the tally-of-ballots form, the agent commented, “Now . . . we have the fun part over with,” apparently referring to the voting. She then added, “Well maybe not the fun part.” (A. 61; 45.)

On September 26, 2016, the Board’s Acting Regional Director for Region 21 issued a Report on Objections and Certification of Representative. The Report found Jacmar’s offer of proof insufficient to warrant a hearing on its objections, much less necessitate setting aside the election results. (A. 59.)

Jacmar filed a request for review with the Board and, on February 22, 2017, a three-member panel of the Board (Members Pearce and McFerran; Chairman

Miscimarra, dissenting in part)³ denied Jacmar's request, finding it raised no substantial issues warranting review. (A. 107.)

II. THE UNFAIR-LABOR-PRACTICE PROCEEDING

After its certification, the Union requested to bargain with Jacmar as the unit's exclusive collective-bargaining representative but Jacmar refused to do so in order to test the Union's certification.⁴ (A. 153; 111, 118.) In February 2017, the Union filed a Board charge and, after an investigation, the Board's General Counsel issued an unfair-labor-practice complaint alleging that Jacmar's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (A. 152; 114, 119-23.) The General Counsel then filed a motion for summary judgment, which Jacmar opposed, and the case was transferred to the Board. (A. 152; 5-13, 143-51.)

³ Phillip A. Miscimarra was named Chairman in April 2017. While not weighing in on the merits of Jacmar's objections, Chairman Miscimarra believed that Jacmar's first and fourth "objections sufficiently raise[d] factual issues warranting a hearing." (A. 107.)

⁴ See *NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012) (explaining that the Act's statutory scheme allows employers to seek judicial review of Board certification decisions by refusing to bargain and defending ensuing unfair-labor-practice charge); see generally *Boire*, 376 U.S. at 477.

III. THE BOARD'S CONCLUSIONS AND ORDER

On June 6, 2017, the Board (Chairman Miscimarra; Members Pearce and McFerran) granted the General Counsel's motion for summary judgment and found that Jacmar violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. (A. 152-53.) The Board found that all representation issues raised by Jacmar in the unfair-labor-practice proceeding were, or could have been, litigated in the representation proceeding, and that Jacmar neither offered to adduce at a hearing any newly discovered or previously unavailable evidence, nor alleged any special circumstance that would require the Board to reexamine its decision in the representation proceeding. (A. 152 & n.1.)

To remedy that unfair labor practice, the Board's Order required Jacmar 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. 153.) Affirmatively, the Board ordered Jacmar 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. 153-54.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that Jacmar violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. Jacmar admits that conduct. Its sole defense is its contention that the Board erred in overruling its election objections in the representation case without an evidentiary hearing and in certifying the Union. Jacmar, however, failed to meet its heavy burden to proffer facts that, if credited, would either warrant a hearing or demonstrate objectionable conduct that rendered the election results invalid. Accordingly, the Board acted well within its discretion in overruling Jacmar's objections and in doing so without holding an evidentiary hearing. Therefore, Jacmar's admitted refusal to bargain violates the Act.

As to Jacmar's first objection, based on alleged incidents that occurred before the Union filed the representation petition, Jacmar failed to offer facts that would support a departure from the general rule that pre-petition conduct cannot serve as a basis for nullifying the subsequent election results. Notably, Jacmar presented no facts suggesting a coercive impact that would carry through to the election, which occurred two months later. And, in any event, the proffered facts did not establish misconduct that would have a tendency to create a general atmosphere of fear and reprisal rendering a free election impossible, as required to satisfy the third-party-misconduct standard. Nor did Jacmar allege facts indicating

that the misconduct was attributable directly to the Union or its agents, as required to support applying the more lenient party-misconduct standard. Jacmar's challenges to the Board's decision on this objection rely in large part on facts not proffered in its offer of proof.

As to Jacmar's second and third objections, which were based on union propaganda posted during the time between the filing of the petition and the election, Jacmar failed to proffer facts demonstrating any potential coercive impact on the election. It cited only pro-union posters and a pro-union sticker, neither of which, it admits, contained any threatening language. Those facts fall woefully short of establishing objectionable conduct: it is well established that such propaganda does not compromise employee choice in an election.

Finally, Jacmar's offer of proof failed to substantiate the allegation in its fourth objection, that the Board agent compromised the integrity of the election. The agent followed customary Board practice in allowing party representatives to check names off of the voter list as employees arrived to vote and having extra ballots available. She did not compromise the election's integrity when, after discovering two ballots stuck together, she counted the clearly marked ballot and preserved the blank one. And Jacmar's observers' impression that the agent's tone may have demonstrated bias in favor of the Union did not substantiate its allegation of a material effect on the election.

STANDARD OF REVIEW

The Board's findings of fact "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole," 29 U.S.C. § 160(e), and the Court "may not disturb" a Board decision that is "consistent with [Board] precedent and supported by substantial evidence in the record," *NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012). Moreover, appellate review of the Board's decision to certify a bargaining representative is "extremely limited." *Id.* (citation omitted). This Court will respect the Board's "broad discretion" to assess representation elections, *Id.* (citation omitted). Accordingly, the Court will enforce a Board Order overruling an employer's election objections unless the Board abused its discretion and the abuse of discretion was prejudicial. *Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117, 1120 (D.C. Cir. 2012). The same standard applies to review of the Board's denial of an evidentiary hearing on objections. *Majestic Star Casino, LLC v. NLRB*, 373 F.3d 1345, 1350 (D.C. Cir. 2004) (Court will enforce a Board's denial of an evidentiary hearing unless the Board abused its discretion and the abuse of discretion was prejudicial).⁵

⁵ Jacmar's assertion (Br. 25), based on out-of-circuit case law, that this Court reviews the Board's denial of an evidentiary hearing *de novo* is incorrect.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT JACMAR 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 *See C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 880-82 (D.C. Cir. 1988).

Here, Jacmar admittedly refused to bargain with the Union in order to challenge the Board’s certification of the Union. (A. 152.) It defends its otherwise unlawful refusal by asserting that the Board erred in certifying the Union. Specifically, it contends that the Board improperly overruled its objections to the election and additionally erred in doing so without conducting a full evidentiary hearing. As shown below, Jacmar’s arguments are without merit and, therefore, the Board properly certified the Union based on the Union’s election victory.

Accordingly, the Board is entitled to enforcement of its Order finding that the

⁶ A violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights” *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 n.1 (D.C. Cir. 2011).

Jacmar's refusal to bargain violated Section 8(a)(5) and (1) of the Act. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 329-30, 335 (1946); *accord Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970).

A. An Objecting Party Bears the Heavy Burden of Showing Improprieties That Warrant Disregarding Election Results; No Evidentiary Hearing Is Required Absent an Offer of Proof That, if Credited, Would Meet That Burden

In Section 9 of the Act, Congress entrusted the Board with the task of conducting representation elections and establishing “procedure[s] and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. at 330; *accord C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988). Although the Board has long strived for “laboratory conditions” in elections, the Court has recognized that this “noble ideal . . . must be applied flexibly.” *Amalgamated Clothing & Textile Workers*, 736 F.2d 1559, 1562 (D.C. Cir. 1984) (quoting *Gen. Shoe Corp.*, 77 NLRB 124, 127 (1948)). As a result, a party seeking to overturn a Board election shoulders the heavy burden of establishing that an election was “improper,” *Amalgamated Clothing Workers*, 424 F.2d at 827, and the Court will overturn a Board decision to certify a union “in only the rarest of circumstances,” *800 River Rd. Operating Co. v. NLRB*, 846 F.3d 378, 385-86 (D.C. Cir. 2017) (internal quotation marks and citation omitted).

Moreover, it is settled that an objecting party is not automatically entitled to an evidentiary hearing. *See Amalgamated Clothing Workers*, 424 F.2d at 828; *Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 418 F.2d 1191, 1196 (D.C. Cir. 1969). “[T]he swift resolution of union certification disputes would be defeated if the Board were obliged to conduct an evidentiary hearing into intimidation every time a party requested,” *NLRB v. AmeriCold Logistics*, 214 F.3d 935, 939 (7th Cir. 2000), or every time an objecting party wants “simply to inquire further into possible election improprieties,” *Vari-Tronics Co., Inc. v. NLRB*, 589 F.2d 991, 993 (9th Cir.1979). “Rather, a post-election hearing is required only when the objecting party “produc[es] ‘specific evidence which prima facie would warrant setting aside the election.’” *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1182 (D.C. Cir. 2000) (quoting *Amalgamated Clothing Workers*, 424 F.2d at 828). *See also Transcare New York, Inc.*, 355 NLRB 326, 327 (2010) (objecting party must establish that “it could produce specific evidence at a hearing that, if credited, would warrant setting aside the election”). That burden cannot be met by “nebulous and declaratory assertions.” *Sitka Sound Seafoods*, 206 F.3d at 1182 (quoting *Amalgamated Clothing Workers*, 424 F.2d at 828) (brackets omitted).

Whether the proffered evidence establishes a prima facie case necessarily depends upon the Board’s “substantive criteria” for each objection. *Durham Sch. Servs. v. NLRB*, 821 F.3d 52, 58 (D.C. Cir. 2016) (citation and internal quotation

marks omitted). When the evidence, even if credited, would not justify setting aside the election under those criteria as a matter of law, there is simply ““nothing to hear,”” and the objection may be resolved on the basis of an administrative investigation. *Amalgamated Clothing Workers*, 424 F.2d at 829 (quoting *NLRB v. Air Control Prods.*, 335 F.2d 245, 249 (5th Cir. 1964)). *Accord Micro Pac. Dev., Inc. v. NLRB*, 178 F.3d 1325, 1326 n.14 (D.C. Cir. 1999). *See* 29 C.F.R. § 102.69(d) (hearing only required “with respect to those objections or challenges which . . . raise substantial and material factual issues”). The Board’s practice in this regard “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 at 828 (quoting *NLRB v. Golden Age Beverage*, 415 F.2d 26, 32 (5th Cir. 1980)).

Three of Jacmar’s objections are based on purported misconduct by the Union or its agents or sympathizers before the election, and one objection alleges bias or misconduct by the Board agent managing the election. As shown below, the Board reasonably held that the conduct alleged by Jacmar, if all facts proffered in Jacmar’s offer of proof were credited, did not raise any material and substantial

issue of fact that would warrant a hearing on any of Jacmar's objections, much less necessitate setting aside the election.⁷

B. The Board Did Not Abuse Its Discretion in Overruling, without a Hearing, Jacmar's Objections Based on Alleged Misconduct by the Union, Union Agents, or Union Sympathizers

The standard for evaluating pre-election misconduct differs based on the identity of the actor. When an employer challenges the outcome of an election based on a union agent's alleged misconduct, the Board will overturn the election if the conduct at issue has "the tendency to interfere with employees' freedom of

⁷ Jacmar misreads the Board's decision in arguing (Br. 16, 30-31, 34) that the Board improperly required Jacmar to establish facts. To the contrary, the Board explicitly explained that an "objecting party has the duty of furnishing evidence or description of evidence that, if credited at a hearing, would warrant setting aside the election." (A. 107 n.2.) Moreover, the Acting Regional Director cited the "evidence proffered" in concluding that "the alleged conduct," accepted as true, "would not have" established interference with employees' freedom of choice. (A. 60-61.) *See also* A. 61 ("[e]ven if [Jacmar's] proffered testimony was found to be fact," it failed to show objectionable conduct).

Relatedly, Jacmar misses the mark (Br. 35-36) in arguing that the Board erroneously implemented a "higher pleading standard" by failing to construe Jacmar's objections liberally. Jacmar cites two cases where courts considered "well pleaded factual assertions" contained in objections because, under the then-applicable Board regulation, the Board, and the court, never received the full record from the Regional Director. *See NLRB v. Belcor, Inc.*, 652 F.2d 856, 859 (9th Cir. 1981); *Prestolite Wire Div. v. NLRB*, 592 F.2d 302, 305-06 (6th Cir. 1979) (same). Subsequently, the Board revised the applicable regulation to require transmission of the full record, including all materials that were before the Regional Director. 29 C.F.R. § 102.68. Thus, unlike in *Prestolite* and *Belcor*, the Board had Jacmar's offer of proof before it to assess the necessity of a hearing.

choice.” *Cambridge Tool Pearson Educ., Inc.*, 316 NLRB 716, 716 (1995);
accord Family Serv. Agency v. NLRB, 163 F.3d 1369, 1383 (D.C. Cir. 1999).

When the conduct at issue is the action of a third party, such as employees supporting the union, the election will be set aside only where the misconduct is “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *accord Overnite Transp. Co. v. NLRB*, 140 F. 3d 259, 264-65 (D.C. Cir. 1998); *Family Serv. Agency*, 163 F.3d at 1377. In either situation, the effect of the alleged misconduct is evaluated objectively, from the perspective of a reasonable employee. *See Downtown Bid Servs.*, 682 F.3d at 116.

To determine which standard applies, the Board may need to assess whether the actor is a union agent, which requires either that the union authorized or later ratified his actions, or that he had apparent authority. 29 U.S.C. § 152(13); *see also Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 213-14 (1979) (Board applies common-law agency principles). It is settled that apparent authority is “created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question.” *Serv. Emps. Local 87 (West Bay Maint.)*, 291 NLRB 82, 82-83 (1988) (citing *NLRB v. Donkin’s Inn, Inc.*, 532 F.2d

138, 141 (9th Cir. 1976), and *Alliance Rubber Co.*, 286 NLRB 645, 646 n.4 (1987)).

Jacmar's objections challenging purported misconduct by the Union or its agents or supporters fall into two different categories. One objection alleges misconduct in the solicitation of union-authorization cards prior to the Union's representation petition, and two objections allege misconduct relating to union campaign materials posted after the petition was filed, but prior to the election. None of the objections warrant either a hearing or a second election.

1. Jacmar's offer of proof, if credited, would not establish pre-petition objectionable conduct

Jacmar's first objection alleged that misconduct during the solicitation of union-authorization cards had a tendency to interfere with employee free choice in the election. The Board acted well within its discretion in finding (A. 107 n.2; 60-61) that the facts Jacmar proffered in support of that objection, if accepted as true, did not warrant a hearing on the issue, much less establish objectionable conduct. The underlying incidents occurred before the Union filed its representation petition and were characterized by several factors lessening their potential impact on employee choice; Jacmar's counterarguments rely principally on facts it did not proffer in support of the objection.

a. The circumstances of this case do not warrant an exception to the rule that pre-petition conduct will not warrant overturning election results

As the Board explained (A. 107 n.2; 60), conduct occurring prior to the filing of a representation petition generally cannot serve as the basis for setting aside the subsequent election. *See Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961); *see also Amalgamated Clothing Workers*, 736 F.2d at 1567 (“an election will not be set aside based on conduct that occurred prior to the filing of the election petition”); *NLRB v. Lawrence Typographical Union No. 570*, 376 F.2d 643, 652 (10th Cir. 1967) (“The purpose of this rule . . . is to eliminate from post-election consideration conduct too remote to have prevented the free choice guaranteed by Section 7 of the Act.”). The Board has acknowledged a very narrow exception to that rule in unusual circumstances where the conduct is likely to have a strong coercive impact even after the petition is filed. *See, e.g., Harborside Healthcare*, 343 NLRB 906, 911 (2004) (applying “previously-developed narrow exception to the *Ideal Electric* rule” in case of pre-petition coercion by supervisor, which carried into post-petition campaign period due to supervisor’s inherent, ongoing authority); *Gibson’s Discount Ctr.*, 214 NLRB 221, 221-22 & n.3 (1974) (citing *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973) (noting union’s unlawful pre-petition waiver of initiation fee had potentially affected a large portion of the unit and thus likely influenced other employees)). But in this case, the Board

properly concluded that Jacmar's first objection—which is based almost entirely on a single alleged threat by an employee a month before the Union filed the petition—falls squarely within the well-established *Ideal Electric* rule.⁸

Jacmar's proffered evidence does not describe unusual circumstances that would support overturning the election based on pre-petition conduct. Jacmar's offer of proof, if credited, establishes that one month before the Union petitioned for a representation election, driver Alfredo Chavez signed a union-authorization card after previously refusing to do so, because another driver, Carlos, threatened to "tell [Chavez's supervisor] that you are not a good worker so you will not pass probation." (A. 39, ¶ 4.) The offer of proof further alleges that driver Miguel Bertoglio signed a union-authorization card, also before the petition was filed, because he "really just wanted to be part of the other drivers." (A. 41, ¶ 3.) The Board did not abuse its discretion in finding that those incidents do not, by themselves or together, warrant a departure from *Ideal Electric*.

As the Board detailed (A. 107 n.2, 60), several factors support its decision to overrule this objection. The alleged threat made to Chavez was an isolated remark

⁸ Jacmar's argument (Br. 38-43) that the Board failed to apply the proper legal standard or address controlling precedent in analyzing the objection based on pre-petition conduct rings hollow. The Board explicitly cited (A. 107 n.2, 60) the rule from *Ideal Electric*. It further discussed and distinguished *Lyon's Restaurants*, which applies an exception to *Ideal Electric*. As *Lyon's Restaurants* acknowledges, that exception originated in *Gibson's* to accommodate *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

by a driver who did not appear to be a union agent or capable of carrying out the threat. The offer of proof, which describes Carlos only as a “driver,” does not indicate that he has any association to the Union beyond soliciting authorization cards. Nor does it proffer any fact demonstrating that he has a position of authority at Jacmar, influence with management beyond that of any other driver employed by the company, or otherwise suggesting he has the capacity to cause job loss.⁹ *See Downtown Bid Servs.*, 682 F.3d at 116 (inability to carry out threat diminishes coerciveness of the alleged threat). Moreover, the alleged threat was addressed to one driver only and occurred nearly two months prior to the election. Jacmar did not offer to prove either that there were similar threats against other drivers or that the Carlos threat was disseminated to other employees. *See id.* (lack of dissemination diminishes coerciveness of alleged threat); *Mastec North Am.*, 356 NLRB 809, 810-11 (2011) (new election unwarranted where objecting party failed to show threats targeted significant portion of unit employees and failed to show dissemination).

As for Bertogolio’s decision to sign a card because he wanted to be “part of the group,” the Board reasonably found (A. 107 n.2) that “there is absolutely no

⁹ Jacmar suggests (Br. 34) that a hearing might elicit facts showing that Carlos had a particular relationship with the person who had authority to fire Chavez, but that information was within Jacmar’s control—it had only to speak to its own supervisor.

hint of objectionable conduct by the Union” or reason to speculate that his decision would “shed light on the asserted threat against” Chavez.¹⁰ *See also* A. 60 (Jacmar offered “no specific conduct” other than the fact another driver asked him to sign an authorization card). Moreover, as the Acting Regional Director noted, Bertoglio later decided not to support the Union and overtly switched his affiliation, acting as an election observer for Jacmar. (A. 60.)

Moreover, neither *Lyon’s Restaurants*, 234 NLRB 178 (1978), nor *Harborside Healthcare*, 343 NLRB 906, support Jacmar’s position. The contrast between the circumstances in this case and in *Lyon’s* support the Board’s decision here, as the Regional Director explained (A. 60). In *Lyon’s*, unlike here, the threats were made by a union representative and occurred “against the backdrop of an expired union-security clause of a sister local.” 234 NLRB at 179 n.6. In addition, the case involved “checkoff by the Employer that continued for more than a year after the contract expiration, until shortly before a petition filed by another local of the same International [union].” *Id.* Given that “most unusual” context, the Board found that the threats were “necessarily confusing to unit employees.” *Id.*

¹⁰ This aspect of the Board’s analysis explicitly considers the cumulative effect of the two incidents alleged in objection 1. Moreover, the Acting Regional Director, after considering seriatim each of the incidents alleged as misconduct in objections 1-3, separately stated that the “evidence proffered . . . fails to establish that the [the Union’s] conduct interfered with employees’ freedom of choice.” (A. 60-61.)

Likewise, *Harborside Healthcare*, 343 NLRB 906, which Jacmar asserts is “exactly like” (Br. 42) this case, reinforces—by its material difference—the inapplicability of the exception here. In *Harborside*, the Board specifically reaffirmed the *Ideal Electric* rule but considered an objection based on a *supervisor’s* pre-petition authorization-card solicitation. *Id.* at 911 (restating distinct standard for assessing objections alleging supervisory misconduct). The Board relied on the inherently coercive nature of supervisory solicitation and explained that the effects of such solicitation “would ordinarily continue to be felt” after the filing of an election petition “because of the power of the supervisor over an employee” which would, among other things, deter the employee from changing his mind. *Id.* at 911-12; *see also Royal Packaging Corp.*, 284 NLRB 317, 317-18 & n.6 (1987) (union agent’s pre-petition promise of economic benefit objectionable where employees could reasonably believe the agent was in a position to implement the promise because her husband was a supervisor who overtly supported the union). In short, nothing in Jacmar’s offer of proof supports a departure from the Board’s well-established *Ideal Electric* rule.

b. The proffered facts do not meet the standard for overturning an election based on third-party conduct

For essentially the same reasons that it did not warrant an exception to the *Ideal Electric* rule, the alleged pre-petition misconduct cannot, as the Board found (A. 107 n.2, 60), meet the standard for overturning an election based on third-party

misconduct. As noted, that standard requires conduct “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.”

Westwood Horizons, 270 NLRB at 803. Several factors weigh against finding the third-party conduct alleged here objectionable, including that the conduct was aimed at just one employee, there was no dissemination to other employees, the speaker lacked the ability to carry out alleged threat (i.e., directly fire Chavez), and the alleged conduct occurred before the representation petition was filed.

Westwood Horizons, 270 NLRB at 803; *see also* cases cited p. 22. Considered in light of those factors, Jacmar’s proffer does not, as described above (p.5), state a prima facie objectionable threat.

Jacmar is flat-out wrong in arguing that “the critical question is the effect of the threat on the person hearing the threat” (Br. 33), and that “all that matters” (Br. 33-34 n. 6) is Chavez’s subjective interpretation of Carlos’s statement. Both the Board and courts have made clear that, in evaluating alleged prohibited conduct, the “[s]ubjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.” *NLRB v. Media Gen. Operations*, 360 F.3d 434, 442 (4th Cir. 2004) (quoting *Kmart Corp.*, 332 NLRB 1014, 1015 (1997)). To the contrary, and as the Board noted (A. 59), “[i]n determining whether to set aside an election, the Board applies an objective test,” and “look[s] at the objective circumstances in which the election took place,” and not “the

subjective reactions of the employees,” *Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 185 (2d Cir. 1989); *see also Frito Lay, Inc.*, 341 NLRB 515, 515 (2004); *Picoma Industries*, 296 NLRB 498, 499 (1989).

c. Jacmar relies on facts not proffered in support of its objection

Jacmar’s argument that the alleged pre-election misconduct warranted overturning the election, or at least an evidentiary hearing, relies on facts it did not proffer in support of its objection. Because of that, they could not have created an issue of fact warranting a hearing on Jacmar’s objection, much less necessitated a new election.

Presumably to enhance the perceived force of Carlos’ statement to Chavez, Jacmar characterizes (Br. 26, 49) Carlos as an “experienced” and “senior driver” and states that Carlos threatened to tell “the Transportation Manager” about Chavez’s performance. But nothing in its offer of proof identifies Carlos as a “senior” driver—nor does it, incidentally, identify him as “Carlos Garcia.” That full name is mentioned for the first time in Jacmar’s brief to this Court. In Jacmar’s offer of proof, Chavez states Carlos threatened to give a negative report to “Jesus,” Chavez’s supervisor, and makes no mention of a Transportation Manager. (A. 39.)

Along the same lines, Jacmar represents in its brief that both Chavez’s and Bertoglio’s declarations describe Esteban Ochoa as “aggressive, to say the least, in

soliciting Union cards.” (Br. 49.) But its proffered evidence does not support that characterization. Notably, Bertoglio states simply that “Esteban, one of the other drivers, asked me whether I would sign a union authorization card.” (A. 41, ¶ 3.) Not only is there no mention of Esteban’s last name, there are no facts that would support a conclusion that Esteban was “aggressive, to say the least.” (Br. 49.) Chavez does not mention Esteban at all. (A. 39.)

The utter lack of supporting facts in the offer of proof is especially glaring with respect to the issue of agency. As the Board found A. 107; *see also* A. 60), Jacmar proffered “no evidence whatsoever indicating that the employee who purportedly made the threat [to Chavez] was an agent of the Union.” (A. 107 n.2.) To reiterate, Jacmar’s offer of proof provided no specific information about Carlos, not his full name or his work history, much less any detail illuminating his purported relationship with the Union beyond that he solicited authorization cards (along with at least one other driver). Nor was their information as to whether or how his relationship to the Union differed from that of other drivers or how he was perceived by fellow employees. Jacmar asserts that it “offered proof that at least one employee saw the solicitor of Union cards as representing the Union.” (Br. 33 (citing A. 39, ¶¶ 3-5).) But nothing in its offer of proof substantiates that assertion. While Jacmar’s objection alleges that “a driver who either was an actual or *de facto* union agent or a union supporter, repeatedly pressured another driver to sign

a union authorization card” (A. 29-30), neither its narrative proffer nor the attached Chavez declaration describe Carlos as “representing the Union.” (A. 39). Equally unsupported are Jacmar’s claims to the Court that the Union had no access to Jacmar’s premises and that the Union’s access was “obviously” through “the senior drivers in question” (Br. 49).

Rather than offer specific facts that would raise a material and substantial factual issue regarding Carlos’s agency status, Jacmar appears to divine an agency relationship from the mere fact that that the driver supported the Union as evidenced by his solicitation of union-authorization cards. The suggestion, however, that the Board should find an employee to have been self-deputized, or an apparent agent in the eyes of his fellow drivers, on that fact alone is supported by neither common law agency principles nor common sense. *See generally Overnite Transp.*, 140 F.3d at 264 (“not every employee who supports [a] union or speaks in its favor is a union agent”) (internal quotation and citation omitted); *see, e.g., Amalgamated Clothing Workers*, 736 F.2d at 1564-66 (pro-union employee not agent although he had previously “drafted, endorsed, and distributed leaflets, solicited employees to join the union, wore pro-union insignia, and even made visits to the homes of fellow employees to urge them to support the union”). Even apparent agency requires a manifestation by the principal to the third party that the third party reasonably interprets as encompassing the conduct at issue. *See W. Bay*

Maint., 291 NLRB at 83 (citation omitted); *accord Millard Processing Servs.*, 304 NLRB 770, 771 (1991), *enforced*, 2 F.3d 258 (8th Cir. 1993).

In an attempt to circumvent its deficient proffer regarding Carlos's agency status, Jacmar argues that, in declining to hold an evidentiary hearing, the Board applied an unreasonably high burden. The cases Jacmar cites (Br. 23-24, 29, 32), however, do not support its position because, in each case, the court ordered a hearing where the employer had, unlike Jacmar, proffered some specific facts suggesting agency. For example, in *Trimm Associates, Inc. v. NLRB*, 351 F.3d 99, 105 (3d Cir. 2003), the employer had proffered evidence supporting its theory that two former employees were union agents, including that the union referred to them as "our . . . lead organizers" in a related filing before the Board, and as union representatives in pre-election meetings. *Id.* at 106. In addition, the employer offered affidavits from employees who described the former employees as union organizers. *Id.* Similarly, in *NLRB v. West Coast Liquidators*, 725 F.2d 532, 535-36 (9th Cir. 1984), the employer had submitted a letter from the Union listing employees "that have been acting on behalf of [the union] in the organizing drive now in progress at your Company." Evidence in the record also indicated that one of the listed employees acted as a union spokesman at employer meetings. *Id.* And in *May Department Stores v. NLRB*, 707 F.2d 430 (9th Cir. 1982), the employer had submitted evidence that the union trained the alleged union agents.

In addition, the proffer alleged the union “represented the [purported agents] to other employees as people who could answer their questions.” *Id.* at 433. In those very different circumstances, the court found their “authorized acts” were “answering certain questions of other employees relating to what the Union could do for employees, encouraging attendance at Union meetings and soliciting support for the [Union] at the election.” *Id.* at 433.

Equally unavailing is Jacmar’s attempt (Br. 22) to analogize its overall proffer in support of this objection, beyond the agency question, to cases where courts have remanded for hearings. In several, for example, the Regional Director had relied on evidence submitted by the opposing party *ex parte* in overruling the objection without a hearing. *See, e.g., Swing Staging, Inc. v. NLRB*, 994 F.2d 859 (D.C. Cir. 1993) (Regional Director did not accept proffered evidence as true and instead “explicitly relied on information obtained through *ex parte* investigations to deprecate the [objecting party’s] factual allegations”); *May Dept. Stores*, 707 F.2d at 433 (Regional Director relied on evidence submitted by the union that was unknown to the employer); *ATR Wire & Cable v. NLRB*, 671 F.2d 188 (6th Cir. 1982) (Regional Director relied upon union affidavits in rejecting the employer’s claims, rather than assuming the offer of proof as fact). Jacmar has not cited any case requiring a hearing where, as here, the proffer provides few specific facts to substantiate its conclusory allegations, and none suggesting that the objecting party

could meet any standard for overturning the election, even if every aspect of the offer were credited. In sum, even accepting as true the facts detailed in the offer of proof, Jacmar failed to demonstrate a substantial and material factual issue that would warrant an evidentiary hearing regarding union agent or supporter misconduct, much less a rerun election. Therefore, the Board did not abuse its discretion in overruling this objection without an evidentiary hearing.

2. Jacmar's offer of proof, if credited, would not establish objectionable conduct during the period between the petition and the election

Jacmar's second and third objections argue that "coercion and intimidation by the Union or its agents . . . irretrievably compromis[ed]" the election. In support of those objections, Jacmar proffered the declaration of Gonzalo Ventura, the Director of Human Resources, who reported that driver Dennis Garcia informed him that "someone had put a sticker on his car without his knowledge or permission" at some point "during the campaign before the election." (A. 46, ¶ 18.) Ventura also stated that, on May 20, Jacmar's Director of Operations called him and told him there were pro-Union posters in the drivers' room. "Immediately after" learning of the posters, Ventura went into the drivers' room, found two posters and removed them, then walked around Jacmar's facility, finding and removing six more. (A. 44, ¶¶ 5-6.) The posters announced "We've filed for our Election!" and "We're One Step Closer to Becoming Teamsters. In Jacmar's view,

the posters violated its Solicitation and Distribution policy. (A. 45, ¶¶ 10, 11-14.) Subsequently, Ventura reviewed video footage of the drivers' room and saw driver Estaban Ochoa, who later served as the Union's election observer, putting one of the two posters on the wall. (A. 44, ¶ 7.) The Board reasonably concluded (A. 107 n.2, 60) that Jacmar's proffer failed to present any substantial or material issues of fact warranting an evidentiary hearing, much less establish interference with employee free choice.

As the Board observed (A. 60), the union posters—which Jacmar removed immediately—did not contain any threats against employees who failed to support the Union. *See Contech Div., SPX Corp. v. NLRB*, 164 F.3d 297, 307 (6th Cir. 1998) (non-coercive campaign propaganda “is common in almost all representation election” and employees are “free to evaluate” campaign literature); *accord Durham Sch. Servs.*, 821 F.3d at 59 (absent forgery, easily recognizable campaign propaganda will not warrant setting aside an election). While Jacmar emphasizes (Br. 53) that the posters violated its distribution policy, it fails to explain how that fact would make the posters coercive or more likely to impair employees' free choice.

Jacmar also argues (Br. 53) that, despite the lack of “express threat,” the posters and sticker should be construed as intimidating in light of the “aggressive solicitation” of union-authorization cards. But even unlawful solicitation would

not render indisputably innocuous union propaganda “menacing,” particularly when, as here, the solicitation took place over a month before the posters appeared. And, in any event, Jacmar has not offered to show that any employee other than Chavez was aware of his exchanges with Carlos. Likewise, Jacmar proffered no evidence to suggest any employees saw, or learned about, the posters—indeed, as the Board noted (A. 60), Jacmar removed them immediately.¹¹

As to the sticker, Jacmar offered to prove only that the sticker supported the Union, not that its wording or message was offensive or coercive. Nor did Jacmar proffer any evidence that anyone besides the owner of the car saw, or learned about, the sticker.

Finally, Jacmar proffered no facts identifying the person who affixed the posters outside the drivers’ room or placed the pro-union sticker on the car. Such anonymous alleged misconduct is weighed less heavily than misconduct attributed to known third parties. *Amalgamated Clothing Workers*, 736 F.2d at 1568. As to the driver (and union observer) who placed the posters in the drivers’ room, Jacmar’s proffer did not indicate that any employee had reason to know he was

¹¹ Jacmar’s hyperbolic assertion that the placement of a union poster near the Board’s election notice “sent a clear message that the process is not neutral and that employees had no choice, except to support the Union” (Br. 53) is illogical. The two documents were separate, with distinct authors, and posted independently at different times—nothing suggested a relationship between the two.

responsible for the posting. Nor is it clear how knowing that a union observer posted union propaganda would alter employees' perceptions of that propaganda.

**C. Jacmar's Offer of Proof, if Credited, Would Not Establish
Objectionable Board-Agent Misconduct**

Jacmar's fourth objection alleges that a rerun election is required because the Board agent: (1) did not know how many employees were in the unit and, as a result, had more ballots than were necessary; (2) allowed the observers to use the voter list in order to check names off the list when employees came to vote; (3) used a more favorable tone when explaining how to vote for the Union as compared to when she explained how to vote against representation; (4) appeared to count the votes for the Union more enthusiastically; (5) counted the "no" votes three times, while counting the "yes" votes twice, before voluntarily counting the "yes" votes a third time; and (6) counted a "yes" vote that was stuck together with an unmarked ballot. The Board acted well within its discretion in overruling that objection without a hearing.

The Board has long recognized that the "safeguards of accuracy and security thought to be optimal in typical election situations . . . may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of circumstance." *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enforced*, 414 F.2d 999 (2d Cir. 1969); *see also Serv. Corp. Int'l v. NLRB*, 495 F.3d 681, 684 (D.C. Cir. 2007). Accordingly, the Board, with court approval, applies a rule of reason to

objections based on alleged election irregularities. *See, e.g., Rochester Joint Bd., Amalgamated Clothing & Textile Workers Union v. NLRB*, 896 F.2d 24, 27 (2d Cir. 1990) (there is no “*per se* rule that representation elections must be set aside following any procedural irregularity”). Under the Board’s rule, as applied by this Court, an election will not be set aside because of alleged election irregularities attributable to Board-agent conduct unless the objecting party proffers “evidence that raises a reasonable doubt as to the fairness and validity of the election” as a result of that conduct. *Physicians & Surgeons Ambulance Serv., Inc.*, 356 NLRB 199, 199 (2010) (internal quotations omitted), *aff’d*, 477 F. App’x 743 (D.C. Cir. 2012); *accord Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 263 (4th Cir. 2000). Thus, a party alleging that a Board agent deviated from typical election procedures “must show that such deviation had a material effect on the election such as an impact on an individual vote.” *Hard Rock Holdings*, 672 F.3d at 1123. If the alleged deviations do not rise to that standard, “minor (and sometimes major, but realistically harmless) infractions” do not necessitate overturning the election. *Serv. Corp. Int’l*, 495 F.3d at 684.

Jacmar’s offer of proof fell far short of making the required showing. As the Board explained (A. 107, 61-62), Jacmar’s proffer, if accepted as true, does not indicate that the agent deviated from normal election processes or impaired the integrity of the electoral process. Jacmar faults the Board (Br. 55-56) for not

directly addressing the contention that the Board agent did not know exactly how many employees were eligible to vote or personally check voters on the eligibility list. But Jacmar cites no authority for the proposition that either procedure was required, or even standard. Moreover, the agent had sufficient—even extra—ballots for the election, and the observers checked each voter. As the Board explained, it “customary Board practice” for agents to bring extra ballots in the event a voter spoils a ballot. (A. 107 n.2 (citing NLRB Case Handling Manual (Part 2) Voting Procedures § 11322.3 (“A voter who spoils his/her ballot and returns it to the Board agent should be given a new ballot.”); A. 61)). As the Board further accurately noted, having election observers check off employee names as the employees vote “is standard procedure.” (A. 107 n.2 (citing Case Handling Manual (Part 2) Voting Procedures § 11322.1; A. 61-62.)) *See* Case Handling Manual (Part 2) Voting Procedures § 11322.1 Procedure at Checking Table (“observers’ attention should be directed to the important task of checking [the voter list]”); Case Handling Manual (Part 2) Election Details § 11310.3 (in addition to “carrying out the important functions of challenges voters and generally monitoring the election process,” observers “also assist the Board agent in the conduct of the election”). In fact, observers must be actively involved in the checking of the voters as they vote, as observers from both sides are required to check off each voter from the voter list as they vote. Case Handling Manual (Part

2) Voting Procedures § 11322.1. Board agents are also specifically instructed to explain the procedure for checking voters' names with the election observers.

Case Handling Manual (Part 2) Voting Procedures § 11318.2(c).

Jacmar also faults the agent for counting the "yes" ballot that was paired with a blank ballot (which she set aside) and insists (Br. 56) that the Board erred in failing to appreciate that the irregularity called into question the electoral procedures. The Board reasonably found, however, that the double ballot did not undermine the election's integrity because the Board agent properly preserved the blank ballot. (A. 107 n.2; 60-61). *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 608 F.2d 108, 111, 113 (4th Cir. 1979) (new election not required where two incidents of voters inadvertently receiving multiple ballots, without material effect on election). It further found that the deviation was not material, observing that the employee's vote would not have impacted the results of the election. (A. 107 n.2; 62.) *See, e.g., id.* (new election not required where one employee cast excess vote because vote would not affect the election given margin of victory).

More broadly, Jacmar questions the Board agent's neutrality. It cites proffered evidence that she seemed to favor a "yes" vote when she explained the ballots and that, when she counted the ballots, she "smiled and enthusiastically announced 'Yes!' But when she found a 'no' vote, [she] simply read 'no,' as if to

dismiss the vote.” (A. 107 n.2, 61; 41, 46.) In addition, the agent counted to “no” votes three times but only counted the “yes votes two times. Then, the board agent commented that because she had counted the ‘no’ votes three times, she also had to count the ‘yes’ votes a third time.” (A. 41, 46.) Jacmar’s objection boils down to an impression that the Board agent’s “tone at the election showed favoritism.” (Br. 57). It does not explain how the Board agent’s alleged favorable reaction to the Union’s election victory, after the fact, could have tainted the election. Nor, as the Board found, does the contention that the agent “seemed” to favor “yes” votes when she explained the ballots “demonstrate that the Board agent’s instructions affected the integrity of the voting process.”¹² (A. 107 n.2.)

Finally, the cases Jacmar cites (Br. 24) as analogous, where courts remanded for hearings on alleged Board-agent misconduct, involve both more serious alleged misconduct and more substantial proffers than Jacmar’s objection and offer of

¹² Jacmar also asserts (Br. 14-15 n.3) that the Board agent has since gone to work for a union, a fact not documented in the record and which Jacmar was avowedly unaware when it filed its objections to the election. To the extent Jacmar suggests any such employment would demonstrate Board-agent bias, the Court lacks jurisdiction to consider that argument because Jacmar never raised it to the Board, even in a motion for reconsideration. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court”); 29 C.F.R. § 102.48(d)(1) (parties may move to reconsider Board decisions); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (claim jurisdictionally barred where party failed to move for reconsideration); *Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011) (same). In any event, the Board agent’s subsequent employment is irrelevant to Jacmar’s allegation that the integrity of the election process was tainted by her conduct on that day.

proof. For example, in *North of Market Senior Services v. NLRB*, 204 F.3d 1163 (D.C. Cir 2000), the Board agent authorized union agents, “in full Union regalia,” to announce that “they were sent by the NLRB [and] personally and warmly greet[] each employee,” and tell them when they could vote. *Id.* at 1168-69. And in *NLRB v. Superior of Missouri*, 233 F.3d 547, 551-52 (8th Cir. 2000), the Board agent failed to appear for a scheduled election-day meeting, leading employees to believe that the employer had “corrupted the Board’s neutrality.” *Id.* at 552. After the missed meeting, the election was rescheduled but the Board agent’s absence was never explained to employees, and several employees submitted affidavits “stating that some number of bargaining unit employees changed their vote because of the [missed meeting].” *Id.* Here, Jacmar proffered no such evidence.

CONCLUSION

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

Respectfully submitted,

/s/ Kira Dellinger Vol

KIRA DELLINGER VOL
Supervisory Attorney

/s/ Valerie L. Collins

VALERIE L. COLLINS
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-0656
(202) 273-1978

PETER B. ROBB

General Counsel

JOHN W. Kyle

Deputy General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

January 2018

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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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)	Nos. 17-1150 & 17-1167
v.)	
)	Board Case No.
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Respondent/Cross-Petitioner)	
)	
INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS LOCAL 630)	
)	
Intervenor)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 9,386 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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

Dated at Washington, DC
this 30th day of January, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 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:

Robert K. Carrol, Attorney
Arent Fox LLP
55 Second Street, Suite 2100
San Francisco, CA 94550

Renee Sanchez, Attorney
Hayes, Ortega & Sanchez
3625 Ruffin Toad, Suite 300
San Diego, CA 92123

/s/Linda Dreeben

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

Dated at Washington, DC
this 30th day of January, 2018