

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 1**

ST. LUKE'S HOSPITAL,

Respondent,

And

MASSACHUSETTS NURSES  
ASSOCIATION,

Petitioner.

Case No. 01-RC-230363

**EMPLOYER'S REQUEST FOR REVIEW OF HEARING OFFICER'S DECISION AND  
CERTIFICATION**

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# TABLE OF CONTENTS

	<b>PAGE</b>
TABLE OF AUTHORITIES .....	i
I. NOTICE OF EMPLOYER’S REQUEST FOR REVIEW .....	1
II. STATEMENT OF THE CASE.....	2
III. STATEMENT OF FACTS .....	5
A. The MNA’s Authorization Cards.....	5
B. The MNA’s “Mission Statement”.....	6
C. The MNA’s Flyer.....	7
D. The Fraudulent Vote .....	10
IV. LAW AND ARGUMENT .....	12
A. The Regional Director Erred by Incorrectly Concluding that the Fraudulent Vote did not Warrant Setting Aside the Election. ....	12
B. The Regional Director Erred by Incorrectly Concluding that the MNA’s “We’re Voting Yes” Flyer did not Warrant Setting Aside the Election. ....	18
1. The Flyer Contained Forgeries That Rendered Voters Unable to Recognize the Flyer as Mere Propaganda.....	19
2. The Flyer’s Pervasive and Artful Deception Prevented Employees From Separating Truth From Untruth, Affecting Their Right to a Free and Fair Election.....	24
a. The Precedent upon Which the Regional Director Relied is Inapposite.....	25
b. The MNA’s Authorization Cards did Not Permit the Union to Repurpose Employee Signatures on Union Flyers. ....	28
c. The MNA Made No Effort to Ensure that Employees Who Signatures Appeared on the Flyer Actually Supported the Union.....	31

d.	The Regional Director Improperly Minimized the Coercive Nature of the Union’s Flyer. ....	32
3.	The Flyer Impermissibly Disclosed Employees’ Support for the Union and their Intended Votes. ....	35
V.	CONCLUSION.....	38

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Albertson's, Inc.</i> , 344 NLRB 1357 (2005) .....	20, 24
<i>Allegheny Ludlum Corp.</i> , 333 NLRB 734 (2001), enfd. 301 F.3d 167 (3d Cir. 2002).....	37
<i>APT Ambulance Serv.</i> , 323 NLRB 893 (1997) .....	36
<i>Athbro Precision Engineering Corp.</i> , 166 NLRB 966 (1967) .....	14
<i>Austill Waxed Paper Co.</i> , 169 NLRB 1109 (1968) .....	14, 16, 17
<i>Avondale Indus. v. NLRB</i> , 180 F.3d 633 (5th Cir. 1999) .....	14, 15, 17
<i>Baja's Place</i> , 268 NLRB 868 (1984) .....	12, 17, 18
<i>BFI Waste Servs.</i> , 343 NLRB 254, 254 n.2 (2004) .....	28, 32, 34
<i>Champaign Residential Services, Inc.</i> , 325 NLRB 687 (1998) .....	21, 22, 25
<i>Cross Pointe Paper Corp.</i> , 330 NLRB 658 (2000) .....	12
<i>Durham School Services</i> , 360 NLRB No. 108 (2014) .....	<i>passim</i>
<i>Enterprise Leasing Co. SW, LLC</i> , 357 NLRB 1799, 1799-1800 (2011).....	<i>passim</i>
<i>Farrell-Cheek Steel Co.</i> , 115 NLRB 926 (January 1, 1956).....	13, 14, 15

<i>Fed. Stainless Sink Div. of Unarco Indus., Inc.,</i> 197 NLRB 489 (1972) .....	36
<i>Fessler &amp; Bowman, Inc.,</i> 341 NLRB 932 (2004) .....	35
<i>General Shoe Corp.,</i> 77 NLRB 124 (1948), enf'd., 192 F.2d 504 (1951), cert. denied, 343 U.S. 904 (1952).....	12
<i>GTE Lenkurt, Inc.,</i> 209 NLRB 473 (1974) .....	26
<i>Meat Cutters Union Local 81 United Food &amp; Commer. Workers Int'l Union,</i> 284 NLRB 1084 (1987) .....	36
<i>Midland National Life Insurance Co.,</i> 263 NLRB 127 (1982) .....	18, 21, 35
<i>Mt. Carmel Medical Center,</i> 306 NLRB 1060 (1992) .....	20
<i>NLRB v. A.J. Tower Co.,</i> 329 U.S. 324, 330 (1946).....	12
<i>NLRB v. Gormac Custom Mfg., Inc.,</i> 190 F.3d 742, 749 (6th Cir. 1999) .....	34
<i>NLRB v. L&amp;J Equipment Co., Inc.,</i> 745 F.2d 224 (5th Cir. 1984) .....	12
<i>NLRB v. New Columbus Nursing Home, Inc.,</i> 720 F.2d 726 (1st Cir. 1983).....	18
<i>NLRB v. Savair Mfg. Co.,</i> 414 U.S. 270, 94 S. Ct. 495, 38 L. Ed. 2d 495 (1973) .....	23
<i>Northwest Packing Co.,</i> 65 NLRB 890 (1946) .....	35
<i>Parkview Cmty. Hosp. Med. Ctr., No. 21-RC-121299</i> .....	13

<i>Picoma Industries,</i> 296 NLRB 498 (1989) .....	24
<i>Sawyer Lumber Co.,</i> LLC, 326 NLRB 1331 (1998) .....	14
<i>Somerset Valley Rehabilitation &amp; Nursing Center,</i> 357 NLRB No. 71 (2011) .....	<i>passim</i>
<i>Van Dorn Plastic Machinery Co. v. NLRB,</i> 736 F.2d 343 (6th Cir. 1984) .....	18, 24, 35
<i>Vitek Electronics, Inc.,</i> 268 NLRB 522 (1984) .....	33
<b>Statutes</b>	
29 USC § 157 .....	36
<b>Other Authorities</b>	
Hearing Officer’s Guide, pp. 148-149 .....	31
Rules and Regulations of the National Labor Relations Board, Sections 102.67 and 102.69 .....	3

## **I. NOTICE OF EMPLOYER’S REQUEST FOR REVIEW**

St. Luke’s Hospital (“St. Luke’s” or the “Hospital”), the employer in the above-captioned proceeding, hereby requests, pursuant to Section 102.67 of the National Labor Relations Board’s Rules and Regulations, as amended, that the Board review the Regional Director’s Decision on Objections and Certification of Representative (“RDD”) to affirm the Hearing Officer’s Report and Recommendations (“HOR”), dated February 27, 2019. The Board should grant the Employer’s Request for Review to correct the legal errors made by the Regional Director in the instant matter and to clarify governing legal standards for the benefit of other employers, unions, and NLRB decision-makers.

The uncontested evidence reveals that at least one fraudulent vote was cast during the election. Besides creating the appearance of voter fraud, which cast doubt on the validity of the election, this fraudulent vote created a coercive atmosphere that impermissibly interfered with the election and tainted the minimum laboratory conditions necessary for a free and fair election. After the close of the second polling session, the Board Agent informed both parties that the fact that incident seriously violated the National Labor Relations Board’s election processes and could be sufficient, by itself, to set aside the election. Indeed, in overruling St. Luke’s Objection, the Regional Director ignored decades of longstanding Board precedent holding that an election should be set aside where there is the potential for voter fraud. That precedent, coupled with the actual fraudulent vote, warrants setting aside the election and ordering a second one.

Even before the election began, however, the Massachusetts Nurses Association (the “MNA” or “Union”) engaged in objectionable conduct. Shortly before the election, the MNA widely distributed a flyer containing the forged signatures of approximately four hundred individuals. The MNA’s flyer, by turns, both misrepresented the level of support for the Union – making it appear as though the election had already been decided – and unlawfully disclosed

both the employee's support for the Union and how they intended to vote. The MNA did not have, and did not seek, authorization from employees to affix their signatures to the flyer or disclose their union sympathies. The artful and deceptive use of employee signatures prevented employees from recognizing the MNA's propaganda for what it was and rendered voters unable to separate truth from falsity. The flyer material misrepresentation of unassailable union support coerced voters, interfering with the election and tainting the minimum laboratory conditions necessary for a free and fair election.

As amplified below, St. Luke's requests review on the grounds that:

1. Substantial questions of law and policy are raised because of both the absence of, and the Regional Directors departure from, officially reported Board precedent.
2. That the Regional Director's decision on several substantial factual issues is clearly erroneous on the record and such error prejudicially affects St. Luke's rights under the Act.
3. There are compelling reasons for reconsideration of important Board precedent.

Indeed, the Regional Director ignored uncontradicted evidence and misapplied Board precedent. The Regional Director also failed to address significant gaps and contradictions in Board precedent identified by the Hearing Officer. The Board should overrule the Regional Director and set aside the result of the November 29, 2018 election.

## **II. STATEMENT OF THE CASE**

On November 2, 2018 the Union filed a Petition with the Board seeking a representation election with Region One of the NLRB in the following unit of registered nurses employed by St. Luke's:

Including all full-time, regular part-time and per diem Registered Nurses, Attending Nurses, Resource Nurses, Cardiopulmonary Care Nurses, Case Coordinators, RDC Coordinators, Professional

Practice Specialists, RN II, RN II – Enterostomal, Bed Placement Coordinators, Childbirth Educators, Clinical Nurse Experts, Educator I, Educator II, Imaging Services, Infection Control Specialists, Lactation Consultants, Psychiatric Coordinators, Substance Use Disorder Coordinators, Surgical Coordinators, and Wound Care RNs. employed by the Employer at its St. Luke’s Hospital site.

Excluding all other employees, guards, managers, and supervisors as described in the Act.

An election occurred on November 29, 2018, and the tally of ballots revealed that although there were 731 eligible voters, only 633 were cast in total: 350 for the MNA, 283 voting no, and 26 challenged ballots. Seventy-two eligible voters did not vote.

On December 6, 2018, pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations, St. Luke’s filed the following Objections to Conduct Affecting the Results of the Election:

**Objection 1:** During the second voting session of the election, an eligible voter’s ballot was challenged because another individual fraudulently voted using the eligible voter’s identity, resulting in the disenfranchisement of an eligible voter and thereby permitting an individual to cast a ballot under another employee’s name and creating the appearance of voter fraud which, in turn, cast doubt on the validity of the NLRB’s election, creating a coercive atmosphere that impermissibly interfered with the election and tainted the minimum laboratory conditions necessary for the rendering of a free and fair election.

**Objection 2:** During the critical period before the election, Petitioner distributed materials, which contained forgeries that rendered voters unable to recognize propaganda for what it is, thereby interfering with the election and tainting the minimum laboratory conditions necessary for the rendering of a free and fair election.

**Objection 3:** During the critical period before the election, Petitioner distributed materials which contained forgeries and misrepresentations that rendered voters unable to separate truth from falsity, thereby interfering with the election and tainting the minimum laboratory conditions necessary for the rendering of a free and fair election.

**Objection 4:** During the critical period before the election, Petitioner distributed materials, which materially misrepresented the intended votes of employees, undermined the secret-ballot process, and coerced voters, thereby interfering with the election and tainting the minimum laboratory conditions necessary for the rendering of a free and fair election.

**Objection 5:** During the critical period before the election, Petitioner distributed materials, which materially misrepresented the strength of union support and coerced voters, thereby interfering with the election and tainting the minimum laboratory conditions necessary for the rendering of a free and fair election.

**Objection 6:** During the critical period before the election, Petitioner distributed materials, which improperly publicized employees' purported intended votes, which undermined the secret-ballot process and coerced voters, interfering with the election and tainting the minimum laboratory conditions necessary for the rendering of a free and fair election.

**Objection 7:** Petitioner intentionally misrepresented the purpose of union authorization and the effect of signing such cards, which coerced voters, interfering with the election and tainted the minimum laboratory conditions necessary for the rendering of a free and fair election.

The Region held a hearing in Boston, Massachusetts before Hearing Officer Colleen Fleming on January 11, 2019. On or about February 4, 2019, the Hearing Officer issued her Report on Objections. Although the Hearing Officer recognized several gaps and inconsistencies in extant Board precedent bearing on the St. Luke's Objections and failed to address some of the Hospital's arguments, she nevertheless recommended that the Region overruled the Objections, in part based on factual findings that were not supported by the record evidence.

The Hospital's Exceptions timely followed. The Union also filed timely exceptions aimed at the Hearing Officer's credibility findings. The Regional Director issued his Decision and Certification (the "RDD") adopting the Hearing Officer's recommendation in its entirety. In so doing, he failed to address, let alone reconcile, the gaps and inconsistencies in Board precedent that bear on the Hospital's exceptions. The Regional Director further erred by

completely failing to even address the Hearing Officer's erroneous findings and other arguments raised by St. Luke's in support of its Objections.

St. Luke's Request for Review of the Regional Director's Decision

### **III. STATEMENT OF FACTS**

St. Luke's Hospital is an acute care Hospital in New Bedford, Massachusetts. Sometime in 2018, the Massachusetts Nurses Association, led by its Director of Strategic Campaigns, Ole Kushner Hermanson, began an effort to organize a bargaining unit of approximately seven hundred thirty-three St. Luke's Nurses. Tr. 8. According to Mr. Hermanson, he, an Organizer from the MNA, John Neale, three or four members of the MNA-Affiliated Northeast Nurses Association, and approximately fifty St. Luke's Nurses solicited authorization cards from St. Luke's employees. Tr. 66. The MNA began collecting authorization cards on September 13, 2018. Tr. 136.

#### **A. The MNA's Authorization Cards**

The MNA's authorization cards contain two sections. The top section reads:

We are nurses united in our goal to build a union and gain an organized voice to make improvements at St. Luke's Hospital. We have come together to help build a better hospital for our patients, our coworkers, and our community. As professionals who provide day-to-day care, on every shift and in every department, we are tired of the disregard for our concerns in OUR hospital. If St. Luke's is going to be "more than medicine," nurses need real decision-making power that cannot simply be overruled by administrators who have moved away from the bedside.

United by our resolve to improve staffing, safety, equipment, wages, benefits, and working conditions, we are coming together to build this new organization under one principle: that WE are the union, and that conditions can be better once WE, the nurses of St. Luke's Hospital, have an equal authority in how our hospital is run. We invite all of our coworkers to join us in standing up and finding our voice!

Pet. Exh. 1. Below that section, the card contains forty-three names of St. Luke's Nurses

followed by the name of the unit on which each of those nurses works. *Id.*

A perforated line separates that top portion of the authorization card from a lower section, which reads:

I choose to join with my co-workers in forming a union within the Massachusetts Nurses Association for the purpose of negotiating improvements in staffing, wages, benefits, and working conditions.

*Id.* The lower section of the authorization card contains spaces for individuals to fill-in personal information, including their names, addresses, and contact information, and a rectangular box for employees to sign the authorization card. Directly above the signature box, in a font smaller than the rest of the writing on the authorization card, the card contains a statement that “I understand my signature will be added to a public petition once a majority of nurses have signed.” *Id.*

The MNA filed its Petition for an Election with the Region on November 2, 2018. When the MNA filed its Petition, it also filed the signed authorization cards as proof of the requisite showing of support. Tr. 67.

**B. The MNA’s “Mission Statement”**

After obtaining signed authorization cards from a majority of St. Luke’s nurses, the MNA published a “Mission Statement,” which it delivered to Southcoast’s Chief Executive Officer, Keith Hovan on the same day it filed the Petition with the Board. Tr. 112. The Mission Statement sought recognition for the MNA and contained the signatures of several St. Luke’s nurses. Tr. 71. At the Hearing, Mr. Hermanson testified that nurses did not sign the Mission Statement, and that the MNA digitally copied their signatures from signed authorization cards. Tr. 71-72. Mr. Hermanson further testified that, in creating the mission statement, he sought permission from each and every one of the nurses whose names were appended to the Mission Statement to use their digitally recreated signatures on that document. *Id.*

**C. The MNA's Flyer**

On or about November 26, 2018, three days before the election, the MNA distributed a flyer entitled "St. Luke's Nurses Say: We're Voting Yes." The front of the flyer contained fifty-one photographs of various individuals, many of whom held signs stating "Union Yes."

The inside of the flyer contained the following language:

St. Luke's Nurses UNITED [sic]

We are nurses united in our goal to build a union and gain an organized voice to make improvements at St. Luke's Hospital. We have come together to help build a better hospital for our patients, our coworkers, and our community. As professionals who provide day-to-day care, on every shift and in every department, we are tired of the disregard for our concerns in OUR hospital. If St. Luke's is going to be "more than medicine," nurses need real decision-making power that cannot simply be overruled by administrators who have moved away from the bedside.

United by our resolve to improve staffing, safety, equipment, wages, benefits, and working conditions, we are coming together to build this new organization under one principle: that WE are the union, and that conditions can be better once WE, the nurses of St. Luke's Hospital, have an equal authority in how our hospital is run. We invite all of our coworkers to join us in standing up and finding our voice

We are Voting Union YES! [sic]

E. Exh. 1. Approximately four-hundred signatures of St. Luke's nurses surround that language. Nurses did not sign that document. *Id.*; Tr. 70. The MNA forged their signatures by copying them from authorization cards or other sources. Tr. 70.

Although Mr. Hermanson initially testified that the signatures for the MNA's flyer came from the signed authorization cards, Tr. 70, his subsequent testimony reveals that "most" of the forged signatures *could not* have come from the authorization cards. Tr. 109. As Mr. Hermanson testified, the MNA began digitally scanning the signatures during the week of November 16th, well after it submitted the authorization cards to the Region. Tr. 109. The

MNA offered no evidence explaining this discrepancy. However, according to Mr. Hermanson, the MNA “created many flyers off of discretely signed things.” Tr. 70.

Importantly, Mr. Hermanson testified that the MNA did not rely on the cards as the authorization for placing their signatures on the flyer and disclosing how they intended to vote. Tr. 84. Mr. Hermanson initially testified that he “personally ask[ed]” individuals if the MNA could use their signatures on the flyer when soliciting authorization cards, Tr. 73-75, but later conceded, under questioning from the Hearing Officer, that he did not actually ask any employees whether or not “they wanted their name on the [flyer],” Tr. 119. According to Mr. Hermanson, he “explained to them what a petition was and asked them to sign a union authorization card.” Tr. 75. Mr. Hermanson repeatedly asserted that he had this conversation with “many” individuals. Tr. 73. Although Mr. Hermanson testified that he told “every” employee from whom he solicited a card that the Union intended to lift their signatures from the authorization cards for the flyer, the Hearing Officer allowed that “at best” Mr. Hermanson explained to “about twenty” employees that their signatures would be “used on a petition that would be published in the Hospital and sent out to all the people.” HOR at 10;<sup>1</sup> Tr. 114-15. For context, twenty cards would account for only about five percent of the signatures on the flyer. *See* E. Exh. 1. The MNA offered no other evidence as to what employees were told when approached to sign a card.

More saliently, Mr. Hermanson ultimately admitted that he had no knowledge whether “anyone at the Union ever reached out to a rank and file employee” about the flyer or “asked if they wanted their signature on it.” Tr. 120. Mr. Hermanson’s testimony that “many of the people that agreed to be on this petition agreed to that for me, personally, in my experience after

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<sup>1</sup> The MNA did not except to the Hearing Officer’s conclusion that Mr. Hermanson only solicited about twenty cards.

I explained to them what a petition was and asked them to sign an authorization card,” Tr. 75, was, therefore obviously false, as was his claim that “[m]any of those conversations happened at the time that cards were signed. Many of them happened again afterwards to make sure that people were still comfortable.” Tr. 76. The Hearing Officer found Mr. Hermanson’s testimony inconsistent and “evasive,” HOR at 10-1, and expressly “d[id] not credit Hermanson’s testimony that the Union sought authorization from the nurses to use their signatures on the flyer.” HOR at

11. As the Hearing Officer explained:

Hermanson admitted on several occasions that the Union never sought the permission of nurses to use their signatures when creating the flyer, told them that their signatures would be transposed on the flyer, showed them the flyer, or asked if they wanted their name on the flyer. Tr. 79-80, 119-20.

HOR at 10-11.

The MNA intended the flyer to represent how employees intended to vote and to show the level of support for the MNA. Tr. 82-83, 105. Mr. Hermanson expressly testified that the MNA intended to show union supporters they were not alone in supporting the union. Tr. 82-83. But, Mr. Hermanson admitted that the MNA understood that at least some employees who signed cards did not, in fact, support the union or intend to vote “yes,” because “over the course of time people change.” Tr. 108-109. Mr. Hermanson further conceded that he could not say whether all individuals whose names were on the flyer “authorized the MNA to disclose how they were going to vote.” Tr. 84. Nevertheless, the MNA made no attempt to contact employees to ensure that they intended to vote for the union, likely because the MNA knew that a significant portion of those employees no longer supported the Union.

The MNA’s widely disseminated its flyer. MNA printed 1200 copies of the flyer and distributed 900 of those. Tr. 68-69. The MNA posted copies of the flyer on the Hospital’s bulletin boards, mailed it to various employees’ houses, and delivered copies to some employees.

Tr. 68, 121. If the MNA distributed a copy of the flyer to each of the 733 employees in the bargaining unit, and Mr. Hermanson claimed that they did not, that means approximately 170 copies of the flyer were publicly posted or distributed by some other means. *See* Tr. 112.

On November 28, 2018, Alysa Lopes posted on Facebook, writing:

[t]he MNA made a flyer with my signature, as well as, [sic] many others saying I am voting yes for the union. I am so upset about this because I never once said I was voting yes and never gave my permission to put my name out there to begin with.

E. Exh. 2.

At the Hearing, nurse Kelly Perry testified that, although her signature appears on the document, she did not sign it or give the MNA permission to use her signature on the flyer. Tr. 17. She also testified that contrary to the message on the flyer, at the time the MNA published the flyer, she did not intend to vote “yes” for the MNA and that, consequently, the MNA’s flyer made her “angry.” Tr. 18, 22. Carol Holland, the Hospital’s Vice President of Human Resources Operations testified the Hospital received similar complaints from several nurses. Tr. 132-133.

#### **D. The Fraudulent Vote**

The election was held on November 29, 2018 in the living room of the White Home building at St. Luke’s. Eligible employees voted during three polling periods: 6 a.m. – 9 a.m., 2 p.m. - 4:30 p.m., and 6:30 p.m. - 9 p.m. St. Luke’s and the MNA each had one observer present during the polling periods. While the MNA had different observers for each voting session, Beth Sweet served as the Hospital’s observer for all three sessions. Tr. 40.

Ms. Sweet testified that during the first two voting sessions, one voter was permitted inside the room at a time. Tr. 38-39. A voter appearing to vote would state his or her name and each observer would check the voter’s name off the voter list. *Id.* A Board Agent, Hilary Bede,

stationed herself directly behind the observers to ensure that they checked off the correct name. Tr. 39. Although many voters brought identification with them they did not have to present it or otherwise prove their identity, to vote. *Id.*

At approximately 2:30 p.m., during the second voting session of the election, Courtney Beaulieu entered the polling area to vote. Ms. Sweet, the MNA's observer, Brenda Lucille, and Ms. Bede indicated that Ms. Beaulieu's name had already been checked off the voter list. Tr. 40; E. Exh. 3. Ms. Sweet, Ms. Lucille, and Ms. Bede checked the voter list to see if there was another "Beaulieu" on the voter list to determine whether there had been a clerical error. Tr. 131. The voter list included one other "Beaulieu," Kimberly Beaulieu. Pet. Exh. 3. Kimberly Beaulieu had also already voted. Tr. 131.

Ms. Sweet informed Courtney Beaulieu she had already been checked off the voting list as having voted. Tr. 40; E. Exh. 3. Ms. Beaulieu had not voted. E. Exh. 3. After Ms. Beaulieu presented identification confirming who she was, Ms. Bede permitted Ms. Beaulieu to vote subject to challenge. Tr. 40-41; E. Exh. 3. Her vote was not counted, but the Board counted the vote of the individual who had voted in her place.

Ms. Beaulieu immediately returned to her unit and told her coworkers and her manager, Lori Frazer, what had happened. Tr. 56. Ms. Beaulieu also called at least one nurse who was not present on the unit. Tr. 86. Ms. Frazer contacted Ms. Holland, who instructed Ms. Frazer to have Ms. Beaulieu provide a written statement. Tr. 56. The story spread through St. Luke's quickly. Mr. Hermanson conceded that he learned of the incident before the second voting session polls closed. Tr. 86.

When Mr. Hermanson and Ms. Holland returned to the polling place after the close of the polls, Ms. Bede informed them of the incident and indicated that the fraudulent vote could

overturn the election. Tr. 135.

#### IV. LAW AND ARGUMENT

“The goal of holding a representative election is to allow employees to choose freely and fairly whether they want a Union to act as their collective bargaining representative.” *NLRB v. L&J Equipment Co., Inc.*, 745 F.2d 224, 235 (5th Cir. 1984), citing, *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). It is the obligation of the Board to ensure the necessary laboratory conditions are maintained for conducting a free and fair election. In *General Shoe Corp.*, 77 NLRB 124 (1948), enf’d., 192 F.2d 504 (1951), cert. denied, 343 U.S. 904 (1952), the Board stated:

In election proceedings it is the Board’s function to provide a laboratory in which an experiment may be conducted under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees ... When in the rare extreme case the standard drops too low, because of [the Board’s] fault or that of others the requisite laboratory conditions are not present, then the experiment must be conducted over again.

*Id.* at p. 127. In assessing whether the conduct of a party constitutes objectionable conduct sufficient to set aside the results of an election, the Board attempts to determine whether the conduct “reasonably tend[ed] to interfere with the employees’ free and uncoerced choice in the election.” *Baja’s Place*, 268 NLRB 868 (1984).” Activity that reasonably can be construed as improper is proscribed whether or not the activity is, in fact, improper.” *Cross Pointe Paper Corp.*, 330 NLRB 658, 662 (2000)

##### **A. The Regional Director Erred by Incorrectly Concluding that the Fraudulent Vote did not Warrant Setting Aside the Election.**

St. Luke’s first objection turns on the fraudulent vote cast in Ms. Beaulieu’s name. The undisputed facts establish that *someone* voted in place of Ms. Beaulieu. The facts further establish that Ms. Beaulieu learned of the incident during the second voting session when she

attempted to vote and news of the fraudulent vote traveled through the Hospital so quickly that nurses, the MNA representatives and the Hospital, all knew of the issue before the polls closed during the second voting session. Finally, while the MNA attempts to downplay Ms. Bede's admonition, it ultimately concedes that she warned the parties that the fraudulent vote could warrant setting aside the election.

In overruling Objection No. 1, the Regional Director and Hearing Officer relied on *Parkview Cmty. Hosp. Med. Ctr.*, No. 21-RC-121299, 2015 WL 413882, \*2 n.3, for the proposition that "the mere opportunity for voter fraud is not sufficient to overturn an election in the absence of specific evidence of actual fraud." HOR at 5; RDD at 3. In so doing, the Regional Director and Hearing Officer misapplied *Parkview* and misperceived the facts here. In *Parkview*, the Board held that, *under the specific circumstances of that case*, the employer had failed to meet its burden of proof, not that the alleged conduct – the Board's failure to properly supervise and control the voting list, permitting an employee to cast a ballot under another employee's name and creating the appearance of voter fraud – was not objectionable conduct. *Parkview, supra* at \*2 n.3 ("Member Johnson notes that although voter fraud is a significant issue, here the Employer failed to meet its burden of proof."). Nowhere in *Parkview* did the Board describe what if any evidence the employer actually produced in that case. The Regional Director's reliance on that decision, here, where there is uncontested evidence that an individual voted in place of an eligible voter and that the incident was broadcast throughout the Hospital, such that both St. Luke's management and the MNA learned of the incident before the end of the voting session in which it occurred, is, therefore misplaced.<sup>2</sup>

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<sup>2</sup> Notable, the Board's decision in *Parkview* turned on the misapplication of Board precedent. There, the Board relied exclusively on *Farrell-Cheek Steel Co.*, 115 NLRB 926, 928 (January 1, 1956). As discussed below, the Board's holding in *Farrell-Cheek*, that opportunity to voter fraud is not sufficient to overturn an election is inconsistent with the Board's subsequent holdings. The Board should overrule *Farrell-Cheek*.

The Regional Director's reliance on *Farrell-Cheek Steel Co.*, 115 NLRB 926, 928 (January 1, 1956), also misses the mark. RDD at 3. There, a voter removed a ballot from the polling place and the tally of ballots revealed two more votes cast than eligible voters checked off on the voter list. Again, the Board's decision was based on the specific facts of the case – two employees offered unchallenged testimony that the observers failed to check their names off the voter list when they voted, thereby explaining the discrepancy. *Farrell-Cheek, supra* at 928. In that case, the Board concluded that the opportunity for voter fraud did not warrant setting aside the election.

However, in the over sixty years since *Farrell-Cheek*, the Board has refined its standard for objectionable conduct. “When the integrity of the election process is challenged, the Board must decide whether the facts raise a ‘reasonable doubt as to the fairness and validity of the election.’” *Sawyer Lumber Co., LLC*, 326 NLRB 1331, 1331 (1998) (citation omitted). The test is whether the conduct at issue “tends to destroy confidence in the Board’s election process, or which reasonably could be interpreted as impugning the election standards [the Board] seek[s] to maintain.” *Athbro Precision Engineering Corp.*, 166 NLRB 966, 966 (1967). Potential voter fraud casts the requisite reasonable doubt. *Avondale Indus. v. NLRB*, 180 F.3d 633, 638 (5th Cir. 1999) (overturning election based on *potential* voter fraud). “The integrity of an election cannot be maintained without assurance that the voters who cast ballots were eligible to do so.” *Id.* Given more recent developments in Board precedent, the Regional Director’s reliance on the obsolete precedent of *Farrell-Cheek* is plain error. *See, e.g., Austill Waxed Paper Co.*, 169 NLRB 1109 (1968) (mere opportunity for election fraud sufficient to overturn election).

In *Avondale*, the Court of Appeals found sufficient reasonable doubt to invalidate an

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election where a post-election review of the voting list uncovered “*potentially* suspicious voting.” *Id.* at 636 (emphasis added). The Hearing Officer distinguished *Avondale* because “there were more than a hundred incidents with various issues.” HOR at 5-6, n.3. While that is true, the unit at issue in *Avondale* included approximately four thousand employees. All of the evidence of impropriety in *Avondale* came from the employer’s examination of the actual voter lists used in the election, which were unavailable to St. Luke’s here. St. Luke’s cannot reasonably be faulted for failing to introduce evidence to which it was not permitted access. Here, unlike in *Avondale* – or *Farrell-Cheek* – the evidence established that at least one individual voted using the name of an eligible voter.

In reaching his conclusion, the Regional Director relied on the Hearing Officer’s erroneous conclusion that “[t]he Hospital presented no evidence to show that another individual used Ms. Beaulieu’s name at the polling place.” HOR at 6. *See* RDD at 3. The Hearing Officer’s conclusion, and by extension, the Regional Director’s Decision, ignores the undisputed evidence that when Ms. Beaulieu arrived to vote, her name had already been checked off the voter list as *having voted*. The inescapable conclusion is that someone, but not Ms. Beaulieu, voted.

Moreover, the Regional Director ignored the fact that the Hearing Officer based her erroneous conclusion on patent speculation that “[i]n the absence of any evidence indicating otherwise, the event was most likely the result of a clerical error in which Beaulieu’s name was mistakenly checked off by the observers.” *Id.* No evidence supports this theory; the MNA did not offer the testimony of their own observer, and the General Counsel did not act on the employer’s request for the testimony of the Board Agent. The Hearing Officer based her speculation solely on the fact that voter list contains another “Beaulieu,” and four other eligible

voters named “Courtney.” HOR at 6. Putting aside Ms. Sweet’s unrebutted testimony that the other “Beaulieu,” had also already been checked off as having voted, the Hearing Officer’s hypothesis requires that three individuals – both observers and the Board Agent stationed over their shoulders – to have all misheard another employee when s/he identified herself when s/he came to vote. Not only must they all have misheard that employee, but they all must have misheard that employee *in the exact same way* for the “clerical error” espoused by the Hearing Officer to have occurred. It is far more likely that an individual identified him or herself as Ms. Beaulieu and improperly voted in place of Ms. Beaulieu than for three individuals to have all made the identical error required by the Hearing Officer’s conclusion. Taken to its logical extreme, *e.g.*, that all three individuals were susceptible to mistaking employees’ self-identification and marking the voter list accordingly, the Hearing Officer’s conclusion shines a spotlight on the inefficacy of the Board’s identification procedures; anyone could have voted for anyone else, so long as their names sound enough alike.

Similarly, the Regional Director ignored the fact that no evidence supports the Hearing Officer’s conclusion that the fraudulent vote was an “isolated event,” HOR at 6, the evidence establishes that *at least* one individual voted using the identity of another person. Because they do not have access to the voter list, the parties cannot discount the possibility additional fraudulent voting occurred.<sup>3</sup> In that regard, this case resembles *Austill Waxed Paper Co.*, 169 NLRB 1109 (1968). There, the Board overturned an election in which the unsealed ballot box was left unattended for between two and five minutes. The Board refused to speculate whether

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<sup>3</sup> Notably, the voter list used during the election would reveal (1) whether the remaining “Courtneys” voted; and (2) whether there were additional episodes of fraudulent votes. In accordance with Board procedures, the marked voter list is not available to the employer. However, that evidence is available to the Board. During the Hearing, the Hearing Officer indicated that she was unwilling to have the marked voter list put into evidence. Tr. 125. This effectively precluded the admission of relevant evidence that was not otherwise available to the employer. Individuals who vote fraudulently likely will not reveal that fact to St. Luke’s. St. Luke’s should not be faulted for its failure to present evidence that was not available to it, particularly where that evidence is in the possession of the Region, but is excluded from consideration.

or not fraudulent voting occurred during that brief interlude, and, as in *Avondale, supra*, instead held that the mere possibility of such conduct warranted setting the election aside. As the Board explained,

The Board, through its entire history, has gone to great lengths to establish and maintain the highest standards possible to avoid any taint of the balloting process; and where a situation exists, which, from its very nature, casts a doubt or cloud over the integrity of the ballot box itself, the practice has been, without hesitation, to set aside the election.

*Id.* The same rationale applies here, where direct evidence establishes that at least one individual cast a fraudulent vote thereby “cast[ing] doubt over the integrity of the [election].” *Id.* The Regional Director erroneously failed to reconcile his conclusions with *Austill Waxed Paper*, or otherwise distinguish that precedent. *See also Baja’s Place*, 268 NLRB 868, 869 (1984) (rejecting hearing officer’s conclusion that objectionable conduct was “was ‘isolated’ merely because it involved only one employee.”).

Finally, the Regional Director erred in adopting the Hearing Officer’s flawed conclusion that “the Employer adduced no evidence . . . that knowledge of the incident involving Beaulieu’s vote was widely disseminated” of “it was prejudiced by this single instance of procedural irregularity” RDD at 4-5; see HOR at 6. The undisputed evidence established that after learning that someone else had voted using her identity, Ms. Beaulieu returned to her unit and informed other nurses of the incident. From there, news of the incident spread quickly to Hospital management, members of MNA and other nurses.<sup>4</sup> Besides creating the appearance of voter fraud, which cast doubt on the validity of the NLRB’s election, the fraudulent vote also created a coercive atmosphere that impermissibly interfered with the election and tainted the minimum laboratory conditions necessary for the rendering of a free and fair election. St. Luke’s was

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<sup>4</sup> Mr. Hermanson testified that he learned of the incident from the hospital’s nurses. Tr. 86.

certainly prejudiced by the coercive atmosphere. Nurses quickly learned of the incident and over ten percent of eligible voters – a determinative amount – chose not to vote.

In *Baja's Place*, 268 NLRB at 868-869, the Board overturned an election based on an incident involving just one individual, because – as here – the evidence established that an employee repeated news of the incident to management and other employees. The Board should take the same action here. The available evidence establishes the fraudulent vote “reasonably tend[ed] to interfere with the employees’ free and uncoerced choice in the election,” *id.*, and requires overturning the result of the election.

**B. The Regional Director Erred by Incorrectly Concluding that the MNA’s “We’re Voting Yes” Flyer did not Warrant Setting Aside the Election.**

St. Luke’s remaining Objections concern the MNA’s publication and distribution of the “We’re Voting Yes” flyer. Although the Board generally declines to “probe into the truth or falsity of the parties’ campaign statements,” it will “set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made.” *Midland National Life Insurance Co*, 263 NLRB 127, 33 (1982). In *Midland*, the Board held that, misleading statements will set aside an election if “a party has used forged documents which render the voters unable to recognize propaganda for what it is.” 263 NLRB at 133.

Aside from forgeries, “some misrepresentations may be so material and fraudulent as to undermine the employees’ freedom of choice, rendering their section 7 right to self-organization a nullity.” *NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726, 729 (1st Cir. 1983). For that reason, the Board will also set aside an election “where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected,” *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984) (citing *NLRB v. New*

*Columbus Nursing Home, Inc.*, 720 F.2d 726, 728 (1st Cir. 1983).

Here, the Union's conduct violates either standard. The evidence establishes there was a clear forgery: at least some employees did not sign the document or even support the viewpoint espoused therein. The forgery precluded nurses from recognizing the campaign propaganda for what it was. Nurses reasonably believed that each of the purported signatories endorsed the message in the flyer and intended to vote for the Union. This was not true. However, the forgeries that the flyer contained made it impossible for nurses to separate truth from falsity as it related to the representations made in the flyer.

**1. The Flyer Contained Forgeries That Rendered Voters Unable to Recognize the Flyer as Mere Propaganda.**

The uncontested evidence establishes that although the flyer contained approximately four-hundred signatures, no employee signed the flyer. Mr. Hermanson claimed during the hearing that the MNA forged those signatures by digitally copying them from the signed authorization cards. But, Mr. Hermanson's testimony on that fact cannot be true because he admitted that the Union submitted the signed authorization cards to the Region with the Petition on November 2, 2018, but did not scan "most of the signatures" until the week of November 16, 2018. Tr. 70, 109. Because the cards had already been submitted to the Region, those signatures could not have come from the cards. Both the Regional Director and Hearing Officer ignored this critical fact.

At the hearing, the MNA proffered black and white copies of four authorization cards. U. Exh. 2. A comparison between the signatures on that document and those on the flyer reveals that if the signatures came from the MNA's photocopies of the cards, not only were the signatures digitally transposed, but also digitally altered. Compare U. Uxh. 2 with E. Exh. 1. The vast majority of the signatures on the flyer are in a shade of blue ink, rather than the black

color the MNA's exhibit. Emp. Exh. 2. On their respective authorization cards, Krystyna Pavao's and Kelly Perry's signatures cross over the lines of the signature box. U. Exh. 2. However, those lines are not visible on the flyer. Emp. Exh. 2.<sup>5</sup>

In forgery cases, “[t]he ultimate question, as Midland National makes clear, is whether employees were able – under all the circumstances – to recognize the forged document for what it was.” *Albertson's, Inc.*, 344 NLRB 1357, 1361 (2005). In *Mt. Carmel Medical Center*, 306 NLRB 1060 (1992) the union distributed a forged LM-2 report was distributed to employees before the election. The Board, in a brief decision, set aside the election because the document was not an obviously recognizable forgery. The Board concluded distributing a true copy of the LM-2 report was not likely to expose the forgery for what it was because employees would not be able to distinguish the forged document from the genuine one. *Id.*

Similarly, in *Albertson's*, 344 NLRB 1357 (2005), the Board overturned an election where the union distributed a forged document on the employer's letterhead. There, although the Hearing Officer found that the document was “an obvious forgery,” the Board concluded that because a reasonable employee would not have the information necessary to determine whether or not the document was forged, an employer would not be able to determine that the document was forged. Notably, the Board reached this conclusion even though the employer informed employees that the document was a forgery.

Here, as in *Mt. Carmel Medical Center* and *Albertson's*, few employees would recognize the signatures as forgeries. While one employee may recognize that he or she did not sign the document and/or support the union, that employee would not know whether other employees signed the document or support the union. This is particularly true of the over three-hundred

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<sup>5</sup> On the flyer, Ms. Pavao's signature is located at the bottom of the sixth column from the left. Ms. Perry's signature is the eighth from the bottom in the seventh column from the left.

bargaining unit employees whose signatures did not appear on the document – a significant portion of the 733-member unit.

The Regional Director ignored this precedent, instead summarily rubber-stamping the Hearing Officer’s conclusion that under the Board’s decision in *Champaign Residential Services, Inc.*, 325 NLRB 687 (1998), “the use of photocopied signatures is not a forgery.” HOR at 12; RDD at 4. Nothing in *Champaign Residential* supports such a blanket conclusion. In that two-decade old decision, the Board held that the union’s use of photocopied signatures from one piece of union campaign propaganda, a “Vote Yes!” petition that employees admittedly signed, onto another piece of campaign propaganda, a flyer, did not constitute a forgery on the facts of that case. *Champaign Residential*, 325 NLRB at 687 (“the document *here* does not constitute a forgery”) (emphasis added). The Regional Director relied on no other precedent for his conclusion that the MNA’s unilateral appropriation of signatures, without the input or approval of the signers, was not an objectionable “forgery” under *Midland*.

Moreover, here, unlike the union in *Champaign Residential*, the MNA did not merely photocopy signatures from piece of campaign propaganda to another. It digitally scanned employees’ signatures from union authorization cards, and other sources,<sup>6</sup> altered at least some of them, and then repurposed them as a showing of majority of support on a flyer widely distributed shortly before the election, without making any effort to ensure that the employees

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<sup>6</sup> In an effort to bolster the similarities between this case and *Champaign Residential*, the Regional Director asserts “[i]n both cases, employees signed documents that unequivocally expressed support for a labor organization and in some form authorized the use of that signature on a public document.” RDD at 4, n.2. In so doing, the Regional Director assumes – without evidence – that all of the signatures on the MNA’s flyer came from the authorization cards. Mr. Hermanson’s own testimony reveals that that could not have been the case. Tr. 70, 109. Not only did Mr. Hermanson testify that “most” of the signatures were digitally scanned *after* the cards had been submitted to the Region, but the Hearing Officer expressly “d[id] not credit Hermanson’s testimony that the Union sought authorization from the nurses to use their signatures on the flyer.” HOR at 11. Moreover, contrary to the Regional Director’s assertion, the MNA’s authorization cards do not broadly authorize the use of employee signatures on a public “document.” The MNA’s lack of authorization to repurpose employees’ signatures is discussed in greater detail below.

whose signatures were included on the flyer still supported the MNA. In so doing, the Union misrepresented the intent behind those signatures. Thus, contrary to the Hearing Officer's assertion, apparently adopted by the Regional Director, the MNA's flyer is not "exactly like the flyer in *Champaign Residential*." HOR at 16; RDD at 4. *Champaign Residential* did not hold, as the Regional Director and Hearing Officer appear to believe, that once a union obtains employee signatures on authorization cards it is free to then digitally re-apply and reuse those signatures as it sees fit without the approval of the signing employees. To the extent that that is the holding of *Champaign Residential*, it should be overruled. In this modern era of increasingly sophisticated identity theft, such conduct is beyond the pale.

No precedent supports the Hearing Officer's apparent conclusion, seemingly adopted by the Regional Director without consideration or discussion, that for a document to be an objectionable forgery, it must take the form of "completely manufactured a false letter on the other party's letterhead or created an entirely fake financial disclosure form" or the like. HOR at 16. Here, by forging employee signatures, the MNA created a document that purported to demonstrate that an insurmountable majority of employees intended to vote in favor of the Union. Employees would not recognize the document as mere campaign propaganda, but rather as an indication that most employees intended to vote for the MNA, and *that the election had already been decided*. To be sure, Mr. Hermanson admitted the purpose of the flyer was to represent "the level of support" for the MNA. Tr. 105. By including the signatures of more than half the bargaining unit, the MNA therefore, intended to send the message that it had already won the election. Such an indication is especially damaging here where far fewer than the approximately 400 "signers" of the widely disseminated flyer voted for the MNA, and a determinative number of eligible voters – approximately ten percent of the unit – did not vote.

The Regional Director's assertion, that the "evidence establishes that the flyer, at most, misportrayed the sentiments of just one voter" is both false and misleading. Even a cursory comparison of the number of signatures on the MNA's flyer with the Tally of Ballots reveals that approximately fifty fewer employees actually voted for the MNA than the MNA placed signatures on the document. The record further shows that the MNA did not even attempt to contact employees to ensure that those employees intended to vote for the union, likely because the MNA knew that a significant portion of those employees no longer supported the Union.

Moreover, the coercive nature of the flyer was not derived solely from its misrepresentation of specific employees' votes, but rather the widely disseminated false implication, through the use of forged signatures, that an unassailable majority of the entire unit supported the union. Said differently, this case is not merely about whether the MNA misrepresented the sentiments of a specific voter, but rather whether they misrepresented their level of support on the whole.<sup>7</sup> As the U.S. Supreme Court has held, improperly procured "outward manifestation" of employee support paints a false picture of employee support and thereby convinces other employees to vote for union. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277-278, 94 S. Ct. 495, 38 L. Ed. 2d 495 (1973). The MNA's widely disseminated false statement of undefeatable majority based on the use of forged signatures was necessarily pervasive. By minimizing the flyer's misportrayals, the Regional Director missed the forest for the trees.

The Union's use of the re-purposed and forged signatures was coercive. The Board evaluates the coerciveness of objectionable conduct under an objective standard. Contrary to the Hearing Officer's apparent conclusion, adopted by the Regional Director, an objecting party

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<sup>7</sup> The Hearing Officer concluded that "[t]he record shows that the Union had knowledge some nurses no longer supported the Union." By making the conscious decision not to verify employees' support before publishing the flyer, the Union bore the risk that it was actively misrepresenting employee sentiment in furtherance of its message.

need not adduce evidence that the conduct at issue actually coerced specific employees. *Picoma Industries*, 296 NLRB 498 (1989). The standard is “whether the misconduct, taken as a whole, warrants a new election because it has ‘the tendency to interfere with employees’ freedom of choice’ and ‘could well have affected the outcome of the election.’” Given the nature of the MNA’s forgery, its wide distribution, and the relative closeness of the election, the MNA’s flyer interfered with employees’ free choice and affected the outcome of the election. Moreover, unlike the employer in *Albertson’s*, the nature of the forgery here precluded St. Luke’s from exposing the MNA’s conduct because St. Luke’s, like many of its employees, had no way of knowing that employees had not signed the document, and/or that the document did not accurately represent employees’ support. Because the document was released just a few days before the election, by the time St. Luke’s learned of the forgery, it could not effectively respond to flyer.

The Board should overturn the Regional Director’s Decision and Certification and set aside the election and order a second election.

**2. The Flyer’s Pervasive and Artful Deception Prevented Employees From Separating Truth From Untruth, Affecting Their Right to a Free and Fair Election.**

Even the signatures on the MNA’s flyer were not a forgery, the Board should still set aside the Election. As noted above, the flyer misrepresented both the level of support for the Union at the time the MNA published it and individuals’ specific union support and vote. While the Board has not expressly adopted the *Van Dorn* standard, it has repeatedly applied it where the evidence reveals no forgery. *See, e.g., Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB No. 71 (2011); RDD at 5, n.3.

**a. The Precedent upon Which the Regional Director Relied is Inapposite.**

The Hearing Officer erroneously concluded that the “Union’s use of the statements ‘We are Voting Union Yes!’ and ‘WE’RE VOTING YES’ are almost identical to the statements found not to be objectionable on the flyers in *Champaign Residential*, *Durham School*, and *Somerset Valley*. HOR at 13. While the Regional Director did not specifically address this erroneous conclusion, he appeared to have nevertheless adopted it implicitly. RDD at 5. This case is markedly different from *Champaign Residential*, *Somerset Valley*, and *Durham School Services*.

In *Champaign Residential*, the Board did not concern itself with whether the message of the flyer contained misrepresentations, but rather whether or not the union made “misrepresentations in the gathering and compilation of the signatures.” 325 NLRB 687. As discussed above, in *Champaign Residential*, employees had already signed other union campaign propaganda – union petitions – thus, the Board found “all employees who signed the petition knew or should have known that their signatures indicated their support for the Union and all but two knew or should have known that their signatures would be shared with other voters.” *Id.*

Here, by contrast, employees’ signatures were not merely photocopied from one piece of public propaganda, but instead taken from authorization cards and other sources and digitally manipulated. Unlike the “Vote Yes!” petitions at the heart of *Champaign Residential*, the cards were not campaign propaganda. The Hearing Officer’s conclusion that “[a]ll the employees who signed the authorization cards knew or should have known that their signatures indicated support for the Union because it states that they choose to join in forming a union, which inherently requires a vote yes for a union if it comes to an election,” fundamentally overstates the effect of signing a card. Even after signing a card, employees remain free not to support the union and/or to vote against the union in a resulting election. “The fact that an employee may or may not sign

an authorization card does not in any way bind him as to how he may cast his ballot.” *GTE Lenkurt, Inc.*, 209 NLRB 473, 477 (1974).

In *Somerset Valley*, the Union circulated a flyer that contained photographs of and quotes attributed to employees. Specifically,

[t]he cover of the flyer displayed the words “We’re Voting Yes for 1199SEIU!” between two group photographs of employees. These words were repeated on the back of the flyer, surrounded by individual photographs and employee statements. The flyer included statements from approximately 48 individual employees, and approximately 25 of the statements included the words “I’m voting yes,” although none of the employees expressly authorized the Union to use those specific words.

357 NLRB No. 71 (2011).

Moreover, explaining to employees that the Union was making a campaign flyer, the Union obtained signed release forms from employees willing to be photographed and/or videotaped and to provide statements of support for the Union. Employees who signed the release forms authorized the Union ‘to use pictures made of me and comments made by me on this date in video tapes, printed material, digital and online media, advertisements, and any other materials.’

*Id.* The Employer objected to the Union’s use of the words “I’m/We’re voting yes,” claiming that the “voting yes” quotes were unauthorized misrepresentations that deceived voters. The Board rejected that contention, holding “no reasonable employee reading the Union’s flyer would think that all the listed employees actually got together and literally said, ‘We’re voting yes’” and “is not attributed to any specific employee.” The Board further explained that the Union verified employees’ union support before publishing the flyer.

In *Durham School Services*, 360 NLRB No. 108 (2014), the Board, relying on *Somerset Valley*, overruled an employer’s objections concerning a similar flyer, because employees had signed “a document provided by the Union (entitled “Release Form,” with a Teamsters logo and name) containing the following preprinted statement: “I hereby give permission to the

International Brotherhood of Teamsters to use my likeness and name in Teamster publications.”

In those cases, the statements in the flyers were not accompanied by digitally reproduced employee signatures, but rather photographs of various employees. While in the case of photographs, employees may not think that employees “got together and literally said, “We’re voting yes” or that the sentiments were “not attributed to any specific employee,” the use of digitally reproduced signatures creates the opposite effect. Use of signatures is particularly coercive because signatures have significant, and sometimes legal, import. By using signatures, the MNA created the impression that the signers had expressly endorsed the statements in the flyer. As Mr. Hermanson testified, the purpose of the MNA’s flyer was to represent how employees intended to vote. Tr. 105. Specifically, Mr. Hermanson testified that the MNA intended the flyer to show employees who supported the union that “they’re not alone” and that “they were supported by many of their colleagues . . . .” Tr. 82-83. The express purpose of the MNA’s flyer was to attribute the flyer’s statements to the employees whose signatures appeared on the document. Unlike the photographs in *Somerset Valley* and *Durham School Services*, the MNA intended its use of signatures here to suggest that employees had in fact “got[ten] together and literally” signed off on the MNA’s flyer.

As the Hearing Officer conceded “the content on the Union’s flyer goes somewhat further [than that in *Somerset Valley* and *Durham School Services*] because it includes a two-paragraph statement on the middle two pages of the flyer that is the same as the two-paragraph statement on the top section of the authorization cards.” HOR at 13. On the cards, however, the MNA specifically attributes that language to 43 individual nurses, by reproducing it in the flyer, the MNA specifically attributed it to over 350 more individuals. Nothing on the card indicates that the signing employee agrees with those sentiments or otherwise authorizes the MNA to

attribute those sentiments to him or her.

In an effort to sweep this significant discrepancy under the rug, the Hearing Officer relied on *Enterprise Leasing Co. SW, LLC*, 357 NLRB 1799, 1799-1800 (2011) and *BFI Waste Servs.*, 343 NLRB 254, 254 n.2 (2004) for the proposition that “any such misrepresentation from the inclusion of this statement on the flyer is not so ‘pervasive’ to warrant setting aside the election.” HOR at 13. Not only does this, as discussed above, mischaracterize the significance of the flyer’s misrepresentation, but, *Enterprise Leasing*, 357 NLRB at 1799-1800, involved the unauthorized use of a single employee’s photograph, *BFI Waste Servs.*, 343 NLRB at 254 n.2, involved the attribution of quotes to just two employees and, in both cases, employees had signed releases respectively authorizing the union to use their photographs and attribute quotes to them. Here, the MNA attributed the language to several hundred individuals without such a release. Contrary to the Hearing Officer’s conclusion, this widely disseminated mass attribution is far from “limited in nature” and, as discussed above, the MNA’s use of signatures differentiate the MNA’s flyer from the mere propaganda that at issue in each case upon which the Hearing Officer relied. HOR at 14. Notably, the Regional Director failed to even address this issue.

**b. The MNA’s Authorization Cards did Not Permit the Union to Repurpose Employee Signatures on Union Flyers.**

Similarly, the Regional Director also failed to address the Hearing Officer’s erroneous conclusion that the MNA’s authorization cards “support a conclusion that there is no objectionable conduct.” HOR at 14. Unlike the broad releases in *Somerset Valley* and *Durham School Services*, upon which the Hearing Officer relied for this premise, the MNA’s authorization cards did not authorize the Union to use employees’ signatures in whatever “publications,” “documents,” or “other materials” it desired. Unlike the release in *BFI Waste Servs.*, the MNA’s authorization cards did not authorize the MNA to attribute quotes to

individuals. By its express terms, the authorization card indicates only that the signer “understand[s] that [his/her] signature will be added to a public petition . . .” By relying on the authorization cards as evidence that employees agreed to have their signatures digitally reproduced on the flyer, the Hearing Officer focused on the terms “signatures” and “public,” and incorrectly ignores the cards express limitation permitting the use of those signatures only on a “petition.” HOR at 14.

In concluding that the authorization cards “authorized the Union to use [individual’s] signatures in a public *document*,” the Hearing Officer re-writes the MNA’s authorization card, fashioning an expansive definition of “petition” that far exceeds the normal understanding of that term. HOR at 14. According to Merriam-Webster, the dictionary definition of “petition,” is “an earnest request” or “formal written request made to an official person or organized body.” <https://www.merriam-webster.com/dictionary/petition>. The MNA’s flyer requests nothing and no reasonable employee would understand it to be a petition. When Ms. Perry, the only witness for either party whose signature actually appears on the document, was asked to identify the document, she did not identify it as a petition, but as a “pamphlet.” Tr. 17. Neither the Regional Director nor the Hearing Officer found that the MNA’s flyer amounted to a “petition.” On the contrary, both repeatedly refer to the MNA’s document as “the flyer.” *See, e.g.*, HOR at 14; RDD at 4-5. The truth is that both MNA counsel and Mr. Hermanson referred to the document as a “flyer” repeatedly throughout the hearing. *See, e.g.*, Tr. 70, 80, 95-96, 100, 103, 104, 105.<sup>8</sup>

The document at issue here was not a “petition.” Rather, it is a naked attempt to encourage employees to vote for the MNA that relies on the signatures to show that a determinative number of St. Luke’s employees intended to vote “yes.” Nothing on the

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<sup>8</sup> At one point, the MNA counsel even referred to Employer Exhibit 1 as “the petition,” before expressly correcting himself and referring to the document as “the flyer.” Tr. at 97.

authorization card indicates that the signer authorized the MNA to disclose how the employee intended to vote. At most, the MNA's authorization cards permit the MNA to use employees' signatures on a public petition, not a flyer or other "document."<sup>9</sup> The Hearing Officer's misreading of the authorization cards as a release permitting the reproduction of employee signatures on the flyer – a misreading upon which both her recommendations, and by extension the Regional Director's Decision depend – amounted to plain error.

Perhaps more importantly, Mr. Hermanson testified that the MNA did not rely on the cards as the authorization for placing their signatures on the flyer and disclosing how they intended to vote. Tr. 84. Mr. Hermanson conceded that when creating the Mission Statement that preceded the flyer, he specifically asked nurses whether the MNA could put their signatures on that document. Tr. 71. If the MNA intended that the authorization card's language to be as broad as the Hearing Officer concluded, there was no need to obtain authorization to append nurses' signatures to the mission statement. Tr. 71. That the MNA did so, establishes that even *the Union* did not view the authorization card's language concerning "a public petition," to permit the Union to reproduce employees' signatures on any public "document."

The Regional Director also ignored other uncontested evidence on this point. The only witness other than Mr. Hermanson to testify concerning the authorization cards, Kelly Perry, testified that when union supporter Deb Falk approached her to sign the card, she signed the card, Ms. Falk did not inform her that the MNA would use her signature on the flyer or disclose her vote. Tr. 16. She further testified that no one from the MNA informed her it intended to put

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<sup>9</sup> Aside from the union stretching the definition "public" and "petition," the language in the card refers to using the signature on "a public petition," *i.e.*, one single petition. Unlike the cases relied upon by the Hearing Officer, in which, the release at issue involved "publications," "documents," or other plural terms, the authorization here was clearly and explicitly singular. As such, the MNA could only use employees' signatures once, and was used by the MNA when it appended the signed authorization cards to the RC Petition. Even if the flyer could constitute a "public petition," the card language fails to cover the MNA's deception here.

her signature on the flyer or asked for authorization to do so. Tr. 17-18. If, as Mr. Hermanson testified, at the time the MNA was collecting signed cards, the Union intended to create and disseminate the flyer the MNA plainly misrepresented the purpose of the cards. Tr. 110-11. Although the MNA subpoenaed several nurses, including Ms. Falk, and that Ms. Falk,<sup>10</sup> MNA organizer John Neale, and others also attended the hearing, the MNA called no other witnesses to support Mr. Hermanson's account, or refute the testimony of Ms. Perry. The Board should draw an adverse inference against the MNA, concerning what employees were told when signing authorization cards and whether or not they authorized the MNA to use their signatures on the flyer and/or publicize their union support. *See* NLRB Hearing Officer's Guide, pp. 148-149 and the precedent cited therein.

**c. The MNA Made No Effort to Ensure that Employees Who Signatures Appeared on the Flyer Actually Supported the Union.**

The evidence further reveals that, although employees signed the authorization cards roughly two months before the creation of the flyer, the MNA made no effort to ensure that at the time of publication employees still intended to vote "yes." As the Hearing Officer concluded, "[t]he record shows that the Union had knowledge some nurses no longer supported the Union because they removed their signatures from the flyer and the Union acknowledged that some employees change their union sentiments with the passage of time." HOR at 15 n.12. Despite that knowledge, or more likely, because of it, the MNA made no effort to verify that, at the time of the flyer's publication, employees still supported the Union and/or still wanted their union support broadcast through the Hospital. Tr. 119-120. By largely choosing to ignore shifting employee sentiments in favor of putting as many signatures as possible on the flyer, the

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<sup>10</sup> Because Ms. Falk's name appears on the MNA's authorization card as a "signatory" to the card's message, and because she solicited cards from nurses on behalf of the MNA, Ms. Falk should be viewed as favorably disposed to the MNA. The same is true of Mr. Neale, who is an MNA employee.

MNA intentionally bore the risk of misrepresenting employees' union support.

According to the Hearing Officer, the Board has never weighed in on whether and to what extent the passage of time vitiates consent predicated on an employee's release, and "[i]t seems more prudent to obtain the release or disclaimer from the employees closer to the distribution of the campaign materials to ensure that the individuals who sign the release continue to support the union when the material is distributed." HOR at 14, n.3. The Regional Director improperly ignored this issue. Where, as here, the undisputed evidence reveals that the Union knew of shifting employee sentiments and did not try to verify the support of the vast majority of employees; the Board should conclude the MNA's reliance on the two-month old authorization cards' disclaimer insufficient to support the use of employee signatures on the flyer.

**d. The Regional Director Improperly Minimized the Coercive Nature of the Union's Flyer.**

Further, as the Hearing Officer noted,

the Board in *Enterprise Leasing* observed that there was no evidence in the record to show that the employee whose photograph was used on a flyer did not support the Union. *See* 357 NLRB at 1799. Such a discussion indicates that the Board found the question of whether the union misrepresented the employees' union support *was a material question*.

HOR at 15 (emphasis added). Again, the Regional Director improperly ignored this discrepancy.

The Board has long held that it "do[es] not condone the creation and attribution of quotes to employees, at least where the union makes no pre-publication effort to verify that the quotes fairly represent the views of the quoted employees." *BFI Waste Services*, 343 NLRB 254, 254 n.2 (2004). Here, not only did the MNA attribute specific language to the flyer's signatories, but, as Mr. Hermanson's testimony revealed, it did so without verifying employees' sentiments at the time of publication. Mr. Hermanson admitted that he knew employees who signed cards

no longer supported the MNA, nevertheless, he did not ask any employees whether or not “they wanted their name on the [flyer],” Tr. 119. He admitted that he had no knowledge whether “anyone at the Union ever reached out to a rank and file employee” about the flyer or “asked if they wanted their signature on it.” Tr. 120. He had no knowledge whether employees whose signatures the MNA copied onto the flyer had authorized the MNA to disclose their vote. Tr. 84, 89, 108-109. Thus, while the MNA presented that the support of an irrefutable majority of employees, it had no way of knowing whether that was, in fact, true.

As explained above, the misrepresentations in the flyer were undoubtedly coercive. “Employees would tend to give particular weight to the misrepresentation because it came from a party that . . . was in an authoritative position to know the true facts,” or where “employees would believe the speaker had ‘special knowledge.’” *Vitek Electronics, Inc.*, 268 NLRB 522, 537 (1984), enf’d in relevant part, 763 F.2d 561 (3d Cir. 1985) (citations omitted). By digitally reproducing employees’ signatures on the flyer, the MNA’s flyer presents itself as an authoritative representation of employees’ support and intent to vote. No one could have more “special knowledge” of an employee’s support or intent than the employee whose signature adorns and ostensibly ratifies the MNA’s message. That message was widely disseminated; the MNA distributed more copies of the flyer than there were eligible voters.

Contrary to the Hearing Officer’s conclusion, the record reveals reliable evidence that far more than “one employee – Ms. Perry – did not support the Union when it used her signature.” Although the MNA’s flyer claims the support of four hundred nurses, substantially fewer, 350, voted for the Union. By including four hundred signatures, instead of the signatures of the 350 individuals that actually intended to vote for the Union, the MNA represented that an invulnerable majority of the bargaining unit intended to vote for representation. By

misrepresenting employees' support for the Union and their intended votes, the MNA conveyed to a determinative number of voters that the Union election was already decided, and did so in a manner that was so artfully deceptive that it precluded employees from separating truth from untruth, and made it impossible for St. Luke's to respond to the deception.

The Board has historically recognized that coercive impact inherent in the misrepresentation of employee votes. As Member Hayes explained "the employee so depicted will be deterred from taking a different position and his or her coworkers will be influenced to adopt the same view." *Enterprise Leasing*, supra at 1803 (Member Hayes, dissenting). Member Miscimarra echoed that sentiment: "such a flyer may deceptively induce other employees to support the union or, by exaggerating the extent of union support, deceptively persuade union opponents to refrain from voting." *Durham School Services*, supra (Member Miscimarra, dissenting in part) (citing *Somerset Valley Rehabilitation*, 357 NLRB No. 71, slip op. at 3 (Member Hayes, dissenting); *BFI Waste Services*, 343 NLRB 254, 254 (Member Meisburg, concurring); *NLRB v. Gormac Custom Mfg., Inc.*, 190 F.3d 742, 749 (6th Cir. 1999)). Thus by distributing the flyer with artfully repurposed signatures, the MNA essentially sought to coerce employees in two ways: it sought to pressure them into voting for the union regardless of their current level of support, and it sought to pressure others by misrepresenting the overall support for the union.

Ultimately, the evidence, when viewed through the prism of applicable Board precedent, reveals that the Union's use of digitally recreated employee signatures was an artful deception that prevented employees from separating truth from untruth and improperly affected their right to a free and fair election. In overruling St. Luke's Objections, the Regional Director disregarded record evidence, misperceived the coercive impact of the Union's misconduct, failed

to address significant gaps and conflicts in Board precedent, and relied on inapposite pronouncements. The Board should overrule the Regional Director's Decision and Certification, sustain St. Luke's objections, set aside the election, and order a second election.

**3. The Flyer Impermissibly Disclosed Employees' Support for the Union and their Intended Votes.**

Beyond the issues created by the forgeries and misrepresentations, the MNA's flyer further flaunted the law by divulging both the support and votes of some nurses, without their permission, undermining the Board's secret ballot procedures. Relying on *Durham School Services*, supra, at 852-853, the Regional Director, echoing the Hearing Officer, noted that the Board has "declined to adopt a rule that prohibits the disclosure of how employees *will* vote." RDD at 6 (emphasis added) Both the Regional Director and the Board's decision in *Durham School Services* miss the point. Publicizing an employee's intended vote not only risks misrepresentation of union support – the evil that *Midland* and *Van Dorn* target – but also threatens ballot secrecy and implicitly coerces voters – evils for which *Midland*, *Van Dorn*, and their progeny fail to account. See, e.g., *Northwest Packing Co.*, 65 NLRB 890, 891 (1946) ("The secrecy of the ballot is essential in a Board-conducted election, and it may not be jeopardized."); *Fessler & Bowman, Inc.*, 341 NLRB 932, 934 (2004) (stating that "the secrecy of balloting . . . is a hallmark of our election procedures."). As discussed above, the Hearing Officer conceded that the majority's opinion in *Durham School Services* irreconcilably conflicts with the Board's prior precedent in *Enterprise Leasing*. HOR at 15.

Moreover, neither *Durham School Services* nor the Regional Director's Decision reflect that not only did the MNA's flyer misrepresent some employees' intended votes and reveal other's intended votes, but it also necessarily revealed employees' *actual* votes. Employees have a right to maintain the secrecy of their actual vote, as well as their intended vote. For an

employer, “inquiring how an employee voted in a representation election . . . is violative of Section 8(a)(1) of the Act.” *Fed. Stainless Sink Div. of Unarco Indus., Inc.*, 197 NLRB 489, 500 (1972). “This is so because such conduct tends to undermine the very purpose of a Board-conducted election, *i.e.*, the opportunity for an employee to cast a secret ballot without the necessity of publicly declaring his position toward a proposed bargaining representative.” *Id.* (internal quotation marks and brackets omitted). By affixing employees’ signatures to its flyer, some of whom supported the Union and intend to vote yes, the MNA’s flyer waived those employees’ rights to ballot secrecy, without permission to do so. In reaching its erroneous decision in *Durham School Services*, the Board failed to consider this necessary implication. 360 NLRB No. 108. Neither *Durham School Services* nor the Hearing Officer’s recommendation identify any precedent permitting a Union to out employees’ actual union sympathies.

Although the Regional Director ignored the issue, the implications of revealing employees’ intended votes go far beyond just ballot secrecy. The MNA’s flyer violated employees’ Section 7 rights in another, much more insidious way. As Member Hayes explained “Section 7 of the Act protects individual employees’ rights to choose whether, and to what extent, to become involved in a representation campaign.” *Enterprise Leasing*, *supra* at 1801 (Member Hayes, dissenting). *See, e.g., Meat Cutters Union Local 81 United Food & Commer. Workers Int’l Union*, 284 NLRB 1084, 1092 (1987). *See also* 29 USC § 157 (“employees . . . shall also have the right to refrain from any or all such activities . . .”). Included in these protections is “the exercise of a precious right under [the Act] – the right to keep his union sympathies in general, and his vote in particular, a secret from his employer.” *APT Ambulance Serv.*, 323 NLRB 893, 899-900 (1997).

To the extent the MNA’s flyer included the names of employees who did not support the

Union or intend to vote for the Union, the Union violated those employees' Section 7 rights to refrain from supporting and/or assisting the Union. The MNA's conduct, therefore, required employees to forgo either (1) their right to keep their union sympathies and vote secret; or (2) their right to refrain from assisting and supporting the union. The Act guarantees employees both rights and, the MNA's decision to force some employees to choose between these rights flagrantly violated the Act. The Regional Director report does not even attempt to reconcile this Hobson's choice.

The Board has long held that this principle prohibits an employer from using an employee's photograph in campaign material in a manner that reasonably tends to indicate the employee's position on union representation, without the employee's consent. *See, e.g., Allegheny Ludlum Corp*, 333 NLRB 734, 745 (2001), *enfd.* 301 F.3d 167 (3d Cir. 2002). In *Allegheny Ludlum Corp*, the Board explained that Section 7 protects not only an employee's right to participate or to refrain from participation in election campaigns, but also the "right to choose the *degree* to which he or she wishes to express support for, or opposition to, union representation." 333 NLRB at 740 (emphasis in original). Thus, the fact that an employee expresses support (or opposition) in one form, (*e.g.*, signing a card or petition) does not deprive the employee of the right to refrain from other activity, such as appearing in a flyer or having his or her vote broadcast throughout the unit. *Id.* The same rationale applies here.

To the extent the Regional Director relies on *Somerset Valley* and *Durham School Services* for the proposition that a union's publication of employee votes does not constitute objectionable conduct, those cases, The Board's decisions in those cases concerned only whether or not the union's conduct infringed upon ballot secrecy in the election. Neither of those decisions discussed, or even considered, employees' rights not to disclose their union sympathies

or voting intent. *See Durham School Services* 360 NLRB No. 108 (2014); *Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB No. 71 (2011). Here, the MNA's conduct not only undermined the Board's ballot secrecy, but also infringed upon employees' Section 7 rights.

For the reasons discussed above, the Union's unlawful disclosure of employees' support and voting intent coerced employees in their free choice, affecting the outcome of the election. The Board should overrule the Regional Director's Decision and Certification, sustain St. Luke's objections, set aside the election, and order a second election.

## V. CONCLUSION

The Union, through its representatives, agents, and/or supporters, before and throughout the critical election period, destroyed the laboratory conditions and so tainted the election process as to deprive eligible employee-voters of a free and fair choice in the election. Under these circumstances, the Board should overrule the Regional Director's Decision and Certification, sustain St. Luke's objections, set aside the result of the November 29, 2018 election.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of March, 2019, I e-filed the foregoing Employer's Request for Review of Hearing Officer's Decision and Certification on the NLRB's E-Filing system and served a copy of the document by electronic mail upon:

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