

Nos. 18-1318, 19-1006

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

**STATION GVR ACQUISITION, LLC, D/B/A
GREEN VALLEY RANCH RESORT SPA CASINO**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

JOINT EXECUTIVE BOARD OF LAS VEGAS

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Station GVR Acquisition, LLC, d/b/a Green Valley Ranch Resort Spa Casino was the Respondent before the Board and is the Petitioner/Cross-Respondent before the Court. Joint Executive Board of Las Vegas was the charging party before the Board and has intervened on behalf of the Board. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board.

B. Ruling Under Review

The ruling under review is a Decision and Order of the Board in *Station GVR Acquisition, LLC, d/b/a Green Valley Ranch Resort Spa Casino*, 367 NLRB No. 38 (November 26, 2018).

C. Related Cases

This case has not previously been before this or any other court. This proceeding relies on a related representation proceeding before the Board, Case No. 28-RC-208266, and the Board's unpublished July 18, 2018 order in that case. Board counsel is not aware of any other related cases.

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GLOSSARY

Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
Board	National Labor Relations Board
Br.	Green Valley's opening brief
Green Valley	Station GVR Acquisition, LLC, d/b/a Green Valley Ranch Resort Spa Casino
JA	The parties' joint appendix
Union	Joint Executive Board of Las Vegas

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**BRIEF FOR
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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Station GVR Acquisition, LLC, d/b/a Green Valley Ranch Resort Spa Casino (Green Valley) to review, and

the cross-application of the National Labor Relations Board to enforce, a Board Order issued against Green Valley on November 26, 2018, reported at 367 NLRB No. 38. (JA 393-96.)¹ The Joint Executive Board of Las Vegas (the Union) has intervened on the Board’s behalf. The Board had subject-matter jurisdiction under Section 10(a) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce.

The Court has jurisdiction over this appeal because the Board’s Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). Venue is proper under Section 10(f), which provides that petitions for review may be filed in this Court. Green Valley’s petition and the Board’s cross-application were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

As the Board’s unfair labor practice Order is based, in part, on findings made in an underlying representation (election) proceeding, the record in that proceeding (Board Case No. 28-RC-208266) is also before the Court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the Board’s actions in the representation proceeding solely for the purpose

¹ “JA” refers to the parties’ joint appendix and “Br.” refers to Green Valley’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to supporting evidence.

of “enforcing, modifying or setting aside in whole or in part the [unfair-labor-practice] order of the Board.” 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

ISSUES PRESENTED

Did the Board act within its wide discretion in overruling Green Valley’s election objections and in therefore finding that Green Valley violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union?

RELEVANT STATUTORY PROVISIONS

In relevant part, Section 10(e) of the Act, 29 U.S.C. § 160(e), provides: “No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” Other relevant statutory provisions are set forth in Green Valley’s brief.

STATEMENT OF THE CASE

The Board seeks enforcement of its Order finding that Green Valley violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the collective-bargaining representative of a unit of over 800 of Green Valley’s hotel, resort, and casino employees. Green Valley admits that it has

refused to bargain with the Union but claims the Board abused its discretion in finding that Green Valley failed to meet its burden of showing that objectionable conduct occurred and prevented a fair election. The Board's findings in the representation and unfair-labor-practice proceedings are summarized below.

I. THE REPRESENTATION PROCEEDING

A. The Union Organizes Green Valley Employees, Petitions for an Election, and Distributes Election Signup Sheets

In 2017, the Union started organizing Green Valley's hotel, resort, and casino employees. In June 2017, it opened an office close to Green Valley's property and began steadily increasing the number of organizers assigned to that office. (JA 312; 224-25, 239-41.) The Union also formed a committee of about 60-70 volunteers from the putative bargaining unit to assist organizing Green Valley. (JA 312; 176-77, 223, 237.) Those unit employees wore buttons with the union logo and the words "committee leader." (JA 312; 66, 141, 151, 176-77, 198-99, 293.)

Committee leaders initially helped with the Union's organizing efforts by soliciting authorization cards, which are cards that employees sign to show that they support the Union becoming their exclusive representative. Committee leaders also accompanied organizers during home visits, distributed leaflets, and brought employees to the Union's office and union meetings. (JA 312; 58, 64, 99-101, 142-43, 146, 196-97, 223-24, 229, 232, 235.) The Union petitioned the Board

for an election to represent the casino employees on October 19, and the Board's Regional Director scheduled the election for November 8 and 9. (JA 309.)

Between the petition and the election, committee leaders assisted with the Union's get-out-the-vote campaign. As part of that campaign, the Union distributed short lists of employees' names, all of whom were known union supporters, to each committee leader, and requested that committee leaders ask those voters to commit to a day and time that they would vote. (JA 312; 59, 69, 90, 124-25, 177, 181, 245.)

The documents the Union distributed to committee leaders were titled "Election Day Sign Up" and contained a list of employee names and contact information, plus the election schedule. There was a space for committee leaders to mark when each employee on the list planned to vote. (JA 316; 124-25, 291-92.) The Union only put employees' names on the lists if they had signed authorization cards and openly wore pro-union buttons. It used the contact information from the authorization cards that those employees had signed. (JA 316-17; 178, 244.) The Union assigned employees to committee leaders based on whether the employees spoke the same language and worked in the same department as the committee member. (JA 317; 71-74, 88, 91-92, 102-03, 185.) The Union did not tell any of the committee leaders that other committee leaders

also received lists, except for when it gave duplicates of the same list of employees to multiple committee leaders. (JA 317; 89, 177.)

The Union's organizers instructed committee leaders to inform the employees on their respective lists of the polling times and ask those employees when they would vote. After committee leaders did so, the Union requested that they report back which employees agreed to vote on which days. (JA 317; 59-62, 69-70, 105, 127-28, 168, 180.) If an employee refused to commit to voting, the Union would assess that employee as a "no" vote. (JA 317; 245.) The Union further instructed committee leaders to ask their assigned employees whether they had voted at the time they agreed to vote, and to report that information back to the Union. The Union cautioned committee leaders to leave their signup sheets at home and not to use any physical lists on the days of the election. The Union did not tell committee leaders why it was distributing the lists. (JA 317, 331, 352; 89-91, 136-40, 180-85, 188, 208, 244-45.)

B. Committee Leaders Ask Other Employees Whether They Had Voted and Report Results to the Union

Committee leaders followed the Union's instructions. Before the election, committee leaders asked employees on their signup sheets when those employees would vote and reported the answers back to the Union. (JA 318; 76, 77-79, 81, 103-04, 126-30, 147-50.) On the election days, committee leaders asked some of the employees if they had voted yet and reported the responses back to the Union.

There is no evidence that any committee member carried a list on the days of the election or that any employee observed a committee member reporting whether an employee had voted. (JA 331; 85-87, 107-09, 135-39.)

The Union tracked which of its presumed “yes” voters had voted in an electronic database. It did not tell any committee members or other unit employees about the database. The Union did not print any information about which employees had voted. The Union used the information to call its supporters who had not yet voted to remind them to vote the second day of the election. (JA 331; 180-85.)

C. The Union Wins the Election and the Board Certifies It as the Unit’s Representative

On November 8 and 9, 2017, the Board held a secret-ballot election among the employees in the proposed bargaining unit. The tally of ballots showed 571 votes for the Union, 156 votes against representation, and 3 non-determinative challenged ballots. (JA 342; 8.) Green Valley timely filed 12 objections to the conduct of the election. Green Valley has abandoned all of its objections except Objection 8, which alleges that the Union impermissibly kept a list of unit employees who had voted, thereby intimidating and coercing employees and giving employees the impression that the Union was surveilling whether they voted. (JA 342; 289.)

The Board's Regional Director ordered a hearing on the objections. (JA 286-290.) The hearing officer conducted a hearing, then issued a report recommending that the objections be overruled in their entirety. (JA 308-41.) In relevant part, the hearing officer found that the committee leaders were special agents of the Union for the limited purpose of asking supporters when they intended to vote and whether they voted. (JA 320.) Treating the committee leaders as union agents, the hearing officer found that the Union had not engaged in objectionable list keeping because even if its computer records could be considered a list of voters, the Board has only found list-keeping at or near the polls objectionable and no employees knew or suspected that the Union had kept a list of voters. (JA 333-34.)

After Green Valley filed exceptions to the hearing officer's report, the Regional Director affirmed and certified the Union as the exclusive representative of the bargaining-unit employees. (JA 342-55.) The Regional Director affirmed the hearing officer's rulings for the reasons stated in the hearing officer's report and reasoned that Green Valley had not shown any circumstances that would lead voters to believe that the Union kept a list of who had voted. (JA 352-54.) Green Valley requested review of the Regional Director's decision, and the Board denied review on July 18, 2018. (JA 369-70.)

II. THE UNFAIR LABOR PRACTICE PROCEEDING

A. Procedural History

On July 23, 2018, the Union filed an unfair-labor-practice charge alleging that Green Valley had refused to bargain with it. (JA 371.) After the Board's General Counsel issued a complaint alleging that Green Valley had so refused, Green Valley admitted in its answer that it had failed and refused to bargain with the Union in order to challenge the Union's certification. (JA 393; 375, 378.) The General Counsel then moved for summary judgment, and the Board issued a notice to show cause why the motion should not be granted. (JA 393.) In response, Green Valley admitted its refusal to bargain but contended that the Board erred by certifying the election results. (JA 393; 381-92.)

B. The Board's Conclusions and Order

On November 26, 2018, the Board (Chairman Ring and Members McFerran and Emanuel) issued its Decision and Order, granting the General Counsel's motion and finding that Green Valley's refusal to bargain violated Section 8(a)(5) and (1). (JA 393-96.) The Board concluded that all representation issues raised by Green Valley in the unfair labor practice proceeding were or could have been litigated in the underlying representation proceeding, and that Green Valley neither offered any newly discovered and previously unavailable evidence nor alleged the

existence of any special circumstances that would require the Board to reexamine its decision to certify the Union. (JA 393.)

The Board's Order requires Green Valley to cease and desist from refusing to bargain with the Union, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. (JA 394.) The Board's Order also directs Green Valley to, on request, bargain with the Union, and to post a remedial notice. (JA 394-96.)

SUMMARY OF ARGUMENT

Keeping an unauthorized list of who has voted is grounds for overturning an election if, and only if, employees know that their votes are being recorded.

Although the Union kept some data on which of its supporters voted on the first day of the election, as the Board found, there is no evidence that any voter knew the Union was doing so. None of the committee leaders who helped the Union's get-out-the-vote efforts knew what the Union intended to do with their reports about who had voted. There was no reason for any of them to believe that the Union was recording a list of who had voted, as opposed to simply tracking its overall turnout number or contemporaneously contacting supporters to get out the vote. In such circumstances, the Board reasonably found that committee leaders did not know that the Union was recording a list of voters.

Similarly, there is no record evidence that any other employees knew of the Union's data collection. Although the Union intended to contact supporters who had not yet voted to remind them to vote, there is no evidence that it actually did so. Even if it did, there is no evidence that the Union told such voters that it knew whether they voted. In those circumstances, the Board was not required to infer that employees whom the Union reminded to vote between sessions would somehow know, from that minimal information, that the Union kept a list of voters.

There is similarly no evidence that any committee leader kept a partial list of employees who voted. Committee leaders used signup sheets exclusively *before* the election. The sheets only contained employee names and the election schedule; the committee leaders did not record information about who voted on them. The Union instructed them to leave those sheets at home during the election, and there is no record evidence that any committee leaders disregarded those instructions. Committee leaders' mere knowledge of who voted does not constitute recording a list. Indeed, Board procedures allow parties to designate election observers who see each employee voting, and there is no prohibition on observers remembering or reporting what they see so long as they do not record voters' names. Because there is no evidence that committee leaders kept partial lists of voters, the Board did not

abuse its discretion in declining to analyze whether hypothetical partial lists could warrant overturning an election.

Finally, the Board reasonably found that the Union did not create the impression that employees' votes were under surveillance. No employees had any reason to think or suspect that anybody watched them vote. The only employees who had any reason to even suspect that the Union collected data about employee votes were the committee leaders, who were the ones doing the collecting. All the Union instructed committee leaders to do was to ask other employees whether they voted. Simply asking employees whether they voted does not establish that those employees were under surveillance when they voted. And Green Valley has forfeited its claim of coercion by failing to raise it in its request for review. Even if its claim had been raised to the Board, there is no evidence that any union supporter coerced any employee into revealing whether the employee voted. Therefore, the Board's overruling of Green Valley's objections was not an abuse of its discretion.

ARGUMENT

BECAUSE THE BOARD ACTED WITHIN ITS WIDE DISCRETION IN OVERRULING THE OBJECTION THAT THE UNION KEPT AN UNAUTHORIZED LIST OF VOTERS, GREEN VALLEY’S REFUSAL TO BARGAIN WITH THE UNION VIOLATES SECTION 8(a)(5)

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees” 29 U.S.C. § 158(a)(5). An employer’s failure to meet its Section 8(a)(5) bargaining obligation produces a derivative violation of Section 8(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights” 29 U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). Green Valley has admittedly refused to bargain with the Union in order to challenge the Board’s certification of the Union following its overwhelming election victory. (JA 393.) There is no dispute that if the Board properly certified the Union as the employees’ collective-bargaining representative, Green Valley violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. *See C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 880-82 (D.C. Cir. 1988). Accordingly, the issue before the Court is whether the Board abused its discretion in overruling Green Valley’s one disputed election objection and certifying the Union. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 329-30, 335 (1946); *Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970).

As stated above, Green Valley has abandoned all of its objections except for its objection alleging that the Union maintained a list of who had voted, thereby interfering with employees' rights to refrain from voting and giving the impression that employees' votes were being monitored. As shown below, Green Valley has not shown that the Board abused its discretion in overruling that objection. Instead, substantial evidence supports the Board's findings that Green Valley failed to prove that any employee recorded the names of voters and that any voter knew that the Union kept a list of voters. As such, the Board reasonably concluded that no objectionable conduct occurred.

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

“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *A.J. Tower Co.*, 329 U.S. at 329-30, 335; *accord C.J. Krehbiel Co.*, 844 F.2d at 882. Accordingly, the scope of appellate review of the Board's decision to certify a union is “extremely limited.” *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1562, 1564 (D.C. Cir. 1984). The Board's order is entitled to enforcement unless the Board abused that wide discretion in overruling the objections to the election. *See Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996).

There is a “strong presumption” that an election conducted in accordance with those safeguards “reflect[s] the true desires of the employees.” *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997); accord *NLRB v. Coca-Cola Bottling Co. Consol.*, 132 F.3d 1001, 1003 (4th Cir. 1997) (“the outcome of a Board-certified election [is] presumptively valid”). Therefore, the results of such an election “should not be lightly set aside.” *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 570 (D.C. Cir. 1970) (citations omitted); accord *800 River Rd. Operating Co. v. NLRB*, 846 F.3d 378, 385-86 (D.C. Cir. 2017) (court will overturn a Board decision to certify a union “in only the rarest of circumstances”) (internal quotation marks and citation omitted). Thus, “there is a heavy burden on [the employer] in showing that the election was improper.” *Amalgamated Clothing Workers*, 424 F.2d at 827.

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

find to the contrary.” *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007) (internal quotation marks and citations omitted).

Although election proceedings should be conducted in “laboratory . . . conditions as nearly ideal as possible,” the Court has recognized that this “noble ideal . . . must be applied flexibly.” *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1562 (quoting *Gen. Shoe Corp.*, 77 NLRB 124, 127 (1948)).

Moreover, “[i]t is for the Board in the first instance to make the delicate policy judgments involved in determining when laboratory conditions have sufficiently deteriorated to require a rerun election.” *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1562; *accord Serv. Corp. Int’l v. NLRB*, 495 F.3d 681, 684-85 (D.C. Cir. 2007).

B. Maintaining a List of Voters Separate From the Official Eligibility List Is Grounds for Setting Aside an Election Only When Employees Know Their Names Are Being Recorded

When an employer challenges the outcome of an election based on a union agent’s alleged misconduct, the Board will overturn the election only if the conduct at issue has “the tendency to interfere with employees’ freedom of choice.”

Cambridge Tool Pearson Educ., Inc., 316 NLRB 716, 716 (1995). The Board has held that conduct in the polling area that undermines the Board’s rules and procedures, such as electioneering in a designated no-electioneering zone, can interfere with employee free choice. *See Bally’s Park Place, Inc.*, 265 NLRB 703,

703 (1982). The Board's election rules provide that there be one voter eligibility list, and each party's selected observer checks voters' names off that one list.

NLRB, *Outline of Law and Procedure in Representation Cases*, § 22-108.

Because the Board's rules provide for only one official voter list in the polling area, other lists are prohibited, thereby guaranteeing "confidence in and respect for" Board procedures. *Int'l Stamping Co.*, 97 NLRB 921, 923 (1951). Allowing only one voter list also limits the potential for reprisal or discipline based on whether employees voted because although both the union and the employer can have observers view the list during polling times, those observers do not keep a copy of the list after the election. *Mead Coated Bd., Inc.*, 337 NLRB 497, 497-98 (2002) (citing *Masonic Homes of Cal.*, 258 NLRB 41, 48 (1981)).

There is no opportunity for confusion or fear of retaliation unless voting employees know their names are being recorded. Therefore, maintaining a list of employees who have voted is only grounds for setting aside an election "when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded." *Days Inn Mgmt. Co.*, 299 NLRB 735, 737 (1990) (finding objectionable conduct where employer stood at hotel entrance with a list of recently terminated employees, asked employees their names as they entered, crossed names off the list, and directed them to the security guards who escorted them to the polling area); *see also Elizabethtown Gas Co. v. NLRB*, 212

F.3d 257, 267 (4th Cir. 2000) (list keeping not objectionable absent “evidence, direct or circumstantial, that any voter noticed the company observers recording their vote”). Thus, even recording voter names in the polling area is not objectionable conduct if there are no voters present at the time. *See, e.g., NLRB v. S. Miss. Power Ass’n*, 616 F.2d 837, 839 (5th Cir. 1980) (employer’s observer’s statement that union observer marked off employee names on unauthorized list during polling times did not warrant an objections hearing because no voters other than union observer were present).

Conduct that could give rise only to employee suspicions of list-keeping is insufficient to meet the knowledge requirement. For instance, in *NLRB v. WFMT*, 997 F.2d 269, 277 (7th Cir. 1993), after being relieved as the union’s observer, an employee remarked to other employees that an eligible voter had not yet voted. Those circumstances were insufficient to show that the former observer had kept an unauthorized list of employees who had not voted. *Id.* Similarly, the Board has found an alleged employer agent’s conduct unobjectionable when he spoke the name of employees as they went to vote and wrote something down, because no employee “actually testified to having seen a list of any kind.” *Snap-On Tools, Inc.*, 342 NLRB 5, 7 (2004), *enforced mem.*, 54 F. App’x 502 (D.C. Cir. 2002).

In short, the Board’s list-keeping doctrine provides grounds to overturn an election only when voters know that their names are being recorded. Green Valley

claims that the Union’s electronic records constituted an impermissible list of voters and that committee leaders kept “partial lists” of union supporters who had voted. As to the former, there is no record evidence that any employee knew that the Union was keeping such records. As to the latter, there is no evidence that committee leaders ever recorded whether anybody voted. Thus, as shown below, the Board reasonably concluded that no objectionable list-keeping occurred, and Green Valley has not carried its heavy burden of establishing that the Board abused its discretion in overruling Green Valley’s election objection.

C. Green Valley Has Not Shown that any Employees Knew that the Union Kept Track of Which Supporters Had Voted

Regarding Green Valley’s first claim of list-keeping—the electronic records kept by the Union—the record does not show that any employee knew about it. Green Valley contends only that two groups of employees, the committee leaders and any union supporters who did not vote the first day and received follow-up calls or visits from the Union, knew about the Union’s records. As to the committee leaders, as the Board found, there is no evidence that they were “aware that the [Union] kept track of who had voted.” (JA 332.) Notably, both committee leaders who testified at the hearing stated that they did not know why the Union wanted information about who had voted. (JA 353.) The Union did not tell the committee leaders that it had electronically recorded the information they provided. Similarly, committee leaders did not tell any employees that information

about who voted would be recorded. No employees “testified to seeing or hearing about lists or note-taking in connection with voting” or “any indications of list-keeping by any party.” (JA 353.) Thus, the Board aptly compared this case to *Indeck Energy Services*, 316 NLRB 300, 301 (1995), wherein “there was no ‘clear’ evidence that the [union’s] observer or representative actually kept a list or that the employees even suspected that their names were being recorded.” (JA 369 n.1.)

Moreover, even if committee leaders believed that the Union was keeping a list of voters, the Board has never extended the list-keeping doctrine to proscribe keeping track of information voluntarily provided to a party. List-keeping is only objectionable when employees know “that they are being monitored.” *Pontiac Nursing Home, LLC v. NLRB*, 173 F. App’x 846, 847 (D.C. Cir. 2006) (citing *Med. Ctr. of Beaver County, Inc. v. NLRB*, 716 F.2d 995, 999 (3d Cir.1983)). As the Board observed, it has never found that employees know they are being monitored absent parties physically recording votes near the voting area. (JA 332, 369 n.1.) Employees who voluntarily report to the Union whether they voted would not believe their votes are also being monitored, as the Union would have no reason to do so. Nor could the situation here lead to employee concerns about retaliation for not voting; committee leaders solely asked employees if they had voted on the first day of polling and reminded those who said they had not that there was a day

remaining in the election. There is no evidence that the Union did anything to track who voted on the second polling day.

Green Valley further contends (Br. 17-18) that the Union's collection of information gave employees the impression that whether they voted was under surveillance. But it has not cited a single case where the Board overturned an election based solely on a union's collection of voluntarily provided information. Indeed, this Court has found that list-keeping did not constitute grounds for overturning an election when "any interactions between employees and [u]nion organizers on the day of the election were voluntary and uncoerced." *Pontiac Nursing Home*, 173 F. App'x at 847. That stands to reason; employees would not assume that the Union had monitored whether they voted if they were the ones who informed the Union about it. Despite Green Valley's claim that "[t]here is no exception that permits a party to request, monitor, track, compile and use information about who has and has not voted if it receives the information 'voluntarily,'" (Br. 17) the Board did not address voluntarily provided information in the case Green Valley cites in support. Rather, in *Days Inn*, 299 NLRB at 737, the employer created an impression of surveillance by crossing employee names off a list in view of employees as they went to vote. Thus, Green Valley's totally unsupported argument that voluntarily provided information can give an

impression of surveillance does not carry its burden of showing that the Board abused its discretion.

Whether “a rational employee would assume the Union intended to use the information it went to great pains to collect” (Br. 20) is irrelevant. List-keeping is objectionable only when employees *know* their names are being *recorded*. *Days Inn*, 299 NLRB at 737. An employee’s hypothetical assumption does not establish knowledge, especially in light of the heavy burden an employer must overcome to warrant overturning a Board-sanctioned election. Notably, both committee leaders who testified stated that they did not know why the Union sought the information at issue and did not mention inferring the existence of any master list. (JA 353.) Committee leaders could have thought the Union simply wished to keep track solely of the *number* of its supporters who had voted, not their names, in order to determine the effectiveness of its turnout operation. Indeed, as the Board found, the Union created the signup sheets primarily to determine whether it could count on its supporters to turn out in the election. (JA 320.) Moreover, even if committee leaders knew that the Union intended to contact its supporters who had not yet voted, that knowledge would not establish that the Union *recorded a list* of those supporters. The Union’s organizers could have sent voting reminders contemporaneously as it received the information without recording a list.

Similarly, Green Valley's claim that employees who were targeted for follow-up per the Union's get-out-the-vote effort after the first voting day would know about the Union's list of voters stretches the record evidence too far. It is unclear if any such employees even exist; none testified or were identified by name or otherwise at the hearing. None of the Union's representatives or committee leaders testified to personally reaching out to any employees after polls opened. The only reason to believe such employees exist is because a union representative testified that the Union intended to use the information provided by committee leaders to reach out to such employees. (JA 180-82.) There is no evidence that the Union actually did so.

Even if the Union did contact employees who had not yet voted, however, all that the Union's representative said was that the Union would "give them a call just to remind them that [. . .] the polls are open later in the day or the polls are open the next day." (JA 181.) There is no evidence that the Union told such employees that it knew they had not yet voted. Nor is there evidence that the Union even specifically targeted employees who it knew had not voted, as opposed to employees who had not informed committee leaders whether they voted. There is therefore no reason for such employees to assume that the Union had targeted them, as opposed to simply contacting all of its supporters in order to get out the vote in the remaining polling sessions. All that Green Valley has established is

that the Union may have called some of its supporters in between the two polling dates to encourage them to vote the second day. Such electioneering is common, innocuous, and does not provide grounds for overturning an election. *See, e.g., AOTOP, LLC v. NLRB*, 331 F.3d 100, 105 (D.C. Cir. 2003) (noting that “we have upheld the Board in holding unobjectionable more serious conduct” than a putative union agent telling employees that they had to vote for the union).

Green Valley’s contention (Br. 19-20) that voters would have reasonably inferred the existence of the Union’s records is both legally mistaken and factually inaccurate. Under the *Days Inn* standard, which Green Valley has never disputed applies here, list-keeping is objectionable “when it can be shown or inferred from the circumstances that they employees *knew* that their names were being recorded.” *Days Inn*, 299 NLRB at 737 (emphasis added). The standard as stated requires Green Valley to produce evidence that would allow the *Board* to reasonably infer that employees knew their names were being recorded. Green Valley has cited no case where the Board has overturned an election based on employees’ possible inference that a list of their names might exist. Indeed, as stated above (p.XX), mere employee suspicions of list-keeping do not establish objectionable conduct and the Board has refused to set aside an election absent “clear” evidence that a union agent kept a list and employees had reason to know about the list. *Indeck Energy*, 316 NLRB at 301.

Finally, even if a reasonable inference on employees' part were sufficient here, Green Valley has not established that any employees inferred that the Union kept a list of whether they had voted. As the Board noted, it has never concluded that "employees reasonably inferred list keeping away from the polls based exclusively on being asked by a co-worker if they had voted, which is all the evidence here establishes." (JA 353.) Committee leaders who were explicitly told to leave their signup sheets at home and not to keep lists of any kind on the election day would infer that those sheets had served their purpose. No employees testified that they suspected their names were being recorded. Nor did any committee leaders testify that they thought the Union was keeping any kind of list. Indeed, one of the two committee leaders who testified stated that she knew some employees had voted but did not tell the Union about it because those employees were not on her signup sheet. (JA 85.) Thus, her actions indicate that she did not think the Union was interested in compiling a list of all employees who had voted. In short, as the Board found, Green Valley failed to prove that any employees even would have "inferred that the [Union] had made a list of employees who had not yet voted in the election." (JA 369 n.1.)

D. Green Valley Has Not Proven that Committee Leaders Kept Lists of Employees Who Voted, Partial or Otherwise

Green Valley's second claim of list-keeping—the committee leaders' so-called "partial lists" of who voted—also lacks record support. Specifically, it

contends that, even if no employees knew that the Union recorded information about who had voted, committee leaders kept partial lists of voters and knew about their own partial lists. But as the Board found, there is no record evidence that any committee leaders kept any kind of list on the day of the election. (JA 353.) The only lists that committee leaders had were the election signup sheets, which contained a short list of 4 to 15 union supporters. (JA 176-79.) Committee leaders asked the supporters listed on their signup sheets when they intended to vote and recorded those intentions on the signup sheets before the polling days. The signup sheets were not intended for use during the election itself; they have spaces for marking when employees intended to vote but do not have any spaces for marking whether those employees voted. (JA 292.)

Indeed, the Union specifically instructed committee leaders to leave their signup sheets at home and refrain from making or using any lists during the days of the election. (JA 182.) There is no record evidence that any committee leader disregarded those instructions; thus, the Board found that the signup sheets “were not used on election day.” (JA 353.) When there is no evidence that employees’ names were in fact being recorded, it is impossible to prove that employees know that their names were being recorded, which the Board’s list-keeping doctrine requires objecting parties to prove. That is particularly so for the committee leaders, who would have been sure that they had not recorded their own names.

Thus, the record fully supports the Board's factual finding that committee leaders did not make any lists and that the only list at issue is the information the Union electronically stored. (JA 352-53.)

At most, committee leaders knew that some subset of the employees on their lists told them whether they had voted. But even if the plain language of the Board's list-keeping test did not make clear that lists must be recorded, the Board's precedent and procedures show that mere knowledge that employees have voted does not constitute a list of voters. For instance, in *WFMT*, a pro-union employee clearly knew who had voted and who had not when he asked an employee to find another employee who had not yet voted and remind her to vote. *WFMT*, 997 F.2d at 277. The Board also allows parties to have observers at elections, who afterward could presumably recall at least partial "lists" of employees who had voted. The Board similarly does not prohibit employees from standing in line to vote or from being in the polling area at the same time as another voter. This Court has even found that pro-union employees standing outside of the polling area and quizzing each employee who leaves as to how that employee voted does not merit overturning an election so long as nobody invades any no-electioneering areas designated by the Board agent. *Family Serv. Agency*, 163 F.3d at 1382. In short, although they may have known that certain employees voted, committee

leaders did not assemble anything that could possibly be considered a list within the meaning of Board and this Court's precedent.

Contrary to Green Valley's claim (Br. 15), the Board was not required to address any partial lists because, as discussed above, there were no such lists. Green Valley's admission that committee leaders "orally transmitted" (Br. 15) the names of employees who had voted to the Union seems to acknowledge the lack of evidence that any partial lists were recorded. Even if the committee leaders did record names of employees who had voted, which they did not, doing so would not be objectionable on this record. Despite Green Valley's claim to the contrary (Br. 16), the Board has consistently declined to overturn elections due to impermissible list-keeping if the only voters who know about it are the ones doing it. (JA 332.) *See Southland Containers*, 312 NLRB 1087, 1087 (1993) (only employees who possibly knew of list-keeping were the two employees keeping the list); *Cerock Wire & Cable Group*, 273 NLRB 1041, 1041 (1984) (union observer kept list of number of presumed "yes" and "no" votes based on voters' buttons and t-shirts but only other employee to see her do so was nonvoting employer observer). Indeed, the Board explicitly relied on that principle, citing *Robert's Tours, Inc.*, 244 NLRB 818, 818 n.5, 824 (1979), *review denied mem.*, 633 F.2d 223 (9th Cir. 1980), for the proposition that the voting choices of "the union adherents involved in the list

keeping . . . could hardly have been affected” by their own actions. (JA 369 n.1, internal quotation marks omitted.)

No committee leaders kept lists. Even if they had, no other employees knew about those lists, and Board law is clear that elections cannot be overturned due to unauthorized list-keeping when only the employees making the lists knew about it. Similarly, no employee knew that the Union had kept a list, and even if committee leaders knew about it, their votes could not have been affected. Green Valley has therefore not come close to meeting its burden of showing that the Board abused its discretion by certifying an election that the Union won by 450 votes (a nearly 4-to-1 margin).

E. Green Valley Has Shown Neither that the Union Coerced Employees Nor that Employees Thought the Union Was Observing Whether They Voted

Green Valley’s contentions (Br. 17-18) that some employees involuntarily provided information to the Union, either because the Union coerced them or because the Union spied on them, is meritless. This Court lacks jurisdiction to review Green Valley’s contention (Br. 18) that committee leaders’ “direct questioning” coerced employees into revealing whether they voted. This Court cannot review arguments that were not raised to the Board. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of

extraordinary circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (stating Section 10(e) precludes court of appeals from reviewing claim not raised to the Board). In its Request for Review to the Board, Green Valley did not argue that committee leaders or anybody else coerced employees into revealing whether they voted. (JA 361-67.) That failure precludes consideration of its argument now. See NLRB Rules and Regulations, 29 C.F.R. § 102.67(e) (requiring that the Request for Review be a self-contained document enabling the Board to rule on the issues on the basis of its contents); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (issue must be raised to agency “at the time appropriate under its practice”). The Board, with this Court’s approval, does not allow parties to raise representation issues in a subsequent unfair-labor-practice proceeding. *Pace Univ. v. NLRB*, 514 F.3d 19, 23-25 (D.C. Cir. 2008).²

In any event, Green Valley has not come close to establishing that the Union coerced any voter. It did not present testimony from any employees who had been asked by committee leaders whether they had voted. Both committee leaders who testified stated that they simply asked an employee or two and did not testify to any

² Although Green Valley’s objection initially included a claim that the Union’s alleged list-keeping was “intimidating and coercive” (JA 352), it did not raise any argument in its Request for Review that the committee leaders coercively asked employees whether they voted.

possibly coercive circumstances. In short, there is no record evidence that any committee leader coercively questioned any employee about whether the employee voted.

Absent such evidence, Green Valley contends (Br. 18 n.2) that the hearing officer improperly excluded evidence of the Union's earlier coercive conduct, which would inform how employees reacted to questions about whether they voted. But Green Valley did not raise any objection to the hearing officer's exclusion of its proffered evidence in its Request for Review. (JA 361-68.) Even if Green Valley had preserved its challenge (Br. 18 n.2), the proffered evidence was from weeks or months before the election was held and did not deal with any committee leaders asking union supporters if they had voted yet. Moreover, Green Valley's offer of proof relates to the Union's general campaign before the petition was filed and employees being asked to sign union-representation cards. (JA 9-14, 316, 347-48.) Green Valley did not offer testimony from any individuals who were union supporters at the time of the election and who were asked if they had voted. Finally, as the hearing officer and the Regional Director found, Green Valley did not allege coercive pre-petition conduct in its objections, so it was reasonable to exclude evidence regarding that conduct at the hearing on the objections. (JA 13-14, 316, 347-48.)

Green Valley also contends that some committee leaders tracked employees' votes through "direct observation" (Br. 17), and that such observation led to an impression of surveillance. Even if committee leaders had done so, that would not constitute objectionable conduct, because there is no evidence that the employees being observed thought or knew that they were being observed. The committee leaders themselves would not think that the Union was engaging in surveillance because they were not asked to personally observe whether other employees voted or to spy on any other employees. Similarly, contrary to Green Valley's contention (Br. 18), employees who were asked by committee leaders whether they had voted would not think the Union was surveilling them as they voted; the Union would have no reason to ask if they voted if it were spying on the polling area.

Moreover, there is no record evidence that any committee leader actually observed other employees voting. Although the Regional Director once used the word "observe," in context, it appears that the Regional Director considered being told an employee had voted to be an observation. (JA 352 ("The evidence showed that during the election, Committee Leaders did observe and make some verbal reports to [the Union's] organizers that certain team members had voted, or at least told Committee Leaders that they voted.")) And the Board's denial of Green Valley's Request for Review makes clear that all information given to the Union was voluntary. (JA 369 n.1.) The record supports that finding; the Union

instructed committee leaders only to ask other employees if they had voted, not to personally watch the polls. Although one of the committee leaders testified that she told the Union that some employees on her list had voted whom she had not asked, the record does not reveal how she knew that those employees had voted. (JA 85-87.) There is no evidence that those employees did not tell her of their own accord or tell another employee to tell her, let alone that she physically watched those employees as they voted or that those employees thought she observed them voting on behalf of the Union.

CONCLUSION

The Union won an election in a large bargaining unit by a nearly 4-1 margin. Green Valley has sought to delay its employees' right to a bargaining representative by claiming that the Union engaged in objectionable conduct by maintaining a list of voters, when no voter testified to seeing, knowing of, or even suspecting the existence of such a list. Because Green Valley has not shown election-related misconduct, its refusal to bargain with the Union violates Section 8(a)(5) of the Act. The Board therefore respectfully requests that this Court enforce its Order in full.

Respectfully submitted,

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April 2019

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

STATION GVR ACQUISITION, LLC, D/B/A)	
GREEN VALLEY RANCH RESORT SPA)	
CASION)	
Petitioner/Cross-Respondent)	Nos. 18-1318, 19-1006
)	
v.)	Board Case No.
)	28-CA-224209
NATIONAL LABOR RELATIONS BOARD)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
JOINT EXECUTIVE BOARD OF LAS VEGAS)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 7,779 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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Dated at Washington, DC
this 11th day of April, 2019

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Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2019, I electronically filed the foregoing 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 certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 11th day of April, 2019