

Nos. 19-70292 & 19-70596

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

**EAST VALLEY GLENDORA HOSPITAL, LLC, D/B/A GLENDORA
COMMUNITY HOSPITAL**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

SEIU LOCAL 121RN

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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STATEMENT OF JURISDICTION

These consolidated cases are before the Court on the petition of East Valley
Glendora Hospital, LLC, d/b/a Glendora Community Hospital (“Glendora”) to

review, and the cross-application of the Board to enforce, the Board Decision and Order reported at 367 NLRB No. 72 (Jan. 24, 2019). (ER 5-14.)¹ SEIU Local 121RN (“the Union”), the charging party before the Board, intervened on behalf of the Board.

The Board had jurisdiction over this matter under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”). The Board’s Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f).

Glendora filed its petition for review on February 1, 2019, and the Board filed its cross-application on March 12. The filings were timely because the Act imposes no time limit on the initiation of review or enforcement proceedings. Venue is proper in this Court pursuant to Section 10(e) and (f) of the Act because the unfair labor practices were committed in California.

Because the Board’s Order is based in part on findings made in the underlying representation (election) proceeding, the record in that proceeding (Case No. 31-RC-219293) is also before the Court under Section 9(d) of the Act, 29 U.S.C. § 159(d). *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964).

¹ Citations are to the Excerpts of Record (“ER”) filed with Glendora’s opening brief (“Br.”) and the Supplemental Excerpts of Record (“SER”) filed with the Board’s brief. References preceding a semicolon are to the Board’s findings; references following it are to the supporting evidence.

Section 9(d) does not give the Court general authority over the representation proceeding. Rather, it authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice order in whole or in part. The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the Court's ruling. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).²

STATEMENT OF THE ISSUE

The ultimate issue in this case is whether substantial evidence supports the Board's finding that Glendora violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, the certified collective-bargaining representative of a unit of its employees. The dispositive underlying issue is whether the Board acted within its wide discretion in overruling Glendora's election objections and certifying the Union without conducting an evidentiary hearing.

² The Court, therefore, lacks jurisdiction to grant Glendora's request (Br. 8, 30) that the Court "order" the Board to hold a hearing. While the Court has the authority to deny enforcement of the Board's Order in the unfair-labor practice case, the Court lacks direct authority over the Board's representation proceedings. Should the Court deny enforcement, the Board, pursuant to Section 9(c), will process the representation case in a manner consistent with that ruling.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief, except for those already included in the addendum to Glendora's opening brief.

STATEMENT OF THE CASE

After the Union prevailed by a vote of 77 to 8 in a Board-conducted representation election, the Board certified it to represent Glendora's registered nurses. (ER 5.) Glendora refused to bargain with the Union, and the Board found that its refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (ER 2.)

Glendora does not dispute that it refused to bargain; rather, it contends that it had no duty to do so because the Board improperly certified the Union. In support of that claim, Glendora argues that the Board abused its discretion in the underlying representation case by overruling Glendora's election objections without conducting an evidentiary hearing. An objecting party, however, is not automatically entitled to a hearing on its objections; rather, a hearing is held only when the objections raise a substantial and material issue of fact sufficient to show a prima facie case of objectionable conduct that would materially affect the election result. Applying that settled law, the Board found that Glendora was not entitled to a hearing because it failed to present specific evidence that would, if

credited, warrant setting aside the election. The Board's findings of fact and the procedural history of the representation and unfair-labor-practice proceedings are set forth below.

I. THE REPRESENTATION PROCEEDING

Glendora operates a general acute-care hospital in Glendora, California. (ER 1.) On April 30, 2018, the Union filed a petition with the Board seeking certification as the bargaining representative of Glendora's registered nurses at the hospital. (ER 15-16.) On May 7, Glendora voluntarily entered into a Stipulated Election Agreement with the Union, which was approved by the Board's Regional Director for Region 31. (ER 17-22.) Under the Agreement, Glendora and the Union waived their respective rights to a pre-election hearing, otherwise mandatory under Section 9(c)(1) of the Act, 29 U.S.C. § 159(c)(1). (ER 17.) Instead, Glendora agreed with the Union as to the appropriate bargaining unit, which was to include all full-time, regular part-time and per diem registered nurses employed at the hospital. (ER 17.)

The parties also agreed that Charge Nurses, the Case Manager, and an interim director could vote in the election, but "their ballots will be challenged since their eligibility has not been resolved." (ER 18.) The parties further agreed that "[n]o decision has been made regarding whether the individuals in these classifications or groups are [statutory] supervisory RNs." Rather, the eligibility or

inclusion of those employees in the bargaining unit was to “be resolved, if necessary, following the election.” (ER 18.)

The secret-ballot election was held on May 23 pursuant to the parties’ stipulation, and the tally of ballots showed 77 votes for the Union and 8 votes against it. (ER 5; ER 27.) There were 12 non-determinative challenged ballots. (ER 27.)

On May 30, Glendora filed 29 objections to the election and an offer of proof in support of those objections, requesting a rerun election, or, alternatively, a hearing on its objections. (ER 28-34.) The objections alleged misconduct by the Union and its agents, including using supervisors to assist its campaign in several ways and using photographs and statements of employees and supervisors in its campaign material. As relevant to this appeal, the objections also alleged that Glendora’s Charge Nurses are statutory supervisors, and that some of them engaged in pro-union conduct during the organizing campaign that tainted the election. That alleged conduct included signing and soliciting employees to sign authorization cards, wearing union paraphernalia, attending union meetings and directing employees to do the same, telling employees to support the Union, and posting union campaign literature. (ER 28-30, objections 2, 5, 6, 8-9, 11, 13, 15-16, 18-19, ER 8, heading “b.”) Further, Glendora alleged that the Union tainted the election when it chose a statutory supervisor as its observer. (ER 31, objection

26, ER 11, heading “f.”) Finally, the “catchall” objections (ER 31, objections 27-29, ER 12, heading “g.”) claimed that the foregoing conduct tainted the results of the election.

Glendora’s offer of proof identified 119 individuals that it claimed would testify to the Charge Nurses’ supervisory status and to their purported misconduct. (ER 6; ER 35-46.) It was silent as to any misconduct by the Union or its agents and instead was limited to pro-union supervisor conduct. The offer also added the contention, not raised in the objections, that the Board’s election rules, under which the election was held, are flawed and impractical. (ER 43.)

On June 22, the Regional Director issued a Decision overruling Glendora’s objections without a hearing and certifying the Union as the employees’ bargaining representative. In doing so, the Regional Director found that the offer of proof “failed to specify conduct that would warrant a hearing, much less setting aside the election results.” (ER 5-14.) As to the overall sufficiency of the offer, the Regional Director, noting that the Board’s Rules and Regulations required Glendora’s offer of proof to “summariz[e] each witness’s’ testimony,” 29 C.F.R. § 102.66(c), explained that Glendora failed to meet that requirement, offering only a broad statement that each of its 119 witnesses “will testify about the facts presented in the objections.” (ER 6.) The Regional Director further explained that the offer of proof specified “[n]o underlying facts regarding any conduct,” and

proffered only “nebulous and declaratory assertions that contain no specific evidence of specific events from or about specific people.” (ER 6.) Given those deficiencies, the Regional Director determined that the objections and the supporting offer of proof failed to raise any “substantial and material issues of fact sufficient to support a *prima facie* showing of objectionable conduct.” (ER 7.)

The Regional Director also found that “even assuming the sufficiency of [Glendora’s] offer of proof,” the objections failed to raise an issue for “additional reasons.” (ER 7.) As to the allegations concerning Union misconduct, the Regional Director found that the objections failed to establish that any of the alleged misconduct—using supervisors to further the organizational campaign in various ways—was attributable to the Union or its agents and failed to present any evidence that, if introduced at a hearing, would be grounds for setting aside the election. (ER 7-8.) Similarly, the Regional Director found that the objections alleging supervisor pro-union conduct provided “no specifics,” did not identify “any details regarding what the alleged supervisors said, to whom and when,” and discussed conduct that was not “per se objectionable.” (ER 10.) Given that sparseness, the Regional Director concluded that the evidence in the offer of proof, if introduced at a hearing, would not be grounds for setting aside the election, “particularly given the lopsided” election results. (ER 10.) As to Glendora’s claim that a supervisor improperly served as an election observer, the Regional Director

found that claim precluded because Glendora failed to raise it during the pre-election conference, as required, and, in any event, there was no evidence proffered to show that the observer was a supervisor. (ER 12.)

Glendora requested review of the Regional Director's Decision and Certification of Representative, challenging various Board election rules and arguing that the election was tainted by supervisors' pro-union conduct and should be set aside and that the Regional Director should have ordered a hearing. (SER 1-29.) Glendora did not challenge the Regional Director's findings regarding alleged Union misconduct and did not address other alleged objectionable conduct. The Board (Chairman Ring and Members McFerran and Kaplan) denied Glendora's request for review, explaining that Glendora raised no substantial issues warranting review.³ (ER 4.)

II. THE UNFAIR LABOR PRACTICE PROCEEDING

On about October 4, 2018, the Union requested that Glendora recognize and bargain with it as the unit employees' exclusive collective-bargaining representative. (ER 2; ER 47-50.) Glendora has admittedly refused to do so. (*See* Br. 6; ER 1-2, ER 49-50.) Based on unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that Glendora's

³ Chairman Ring and Member Kaplan expressed no view regarding "the revisions made to the Board's Election Rule," but agreed "it applies here and warrants denial of Glendora's request for review in this case." (ER 4 n.1.)

refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (ER 1; ER 53-61.) In its answer, Glendora admitted its refusal, but claimed it had no duty to bargain because the Board should not have certified the Union. (ER 1; ER 62-67.)

The General Counsel subsequently filed a motion for summary judgment, and the Board issued a notice to show cause. (ER 1.) In its opposition, Glendora admitted its refusal to bargain, but reasserted its position, rejected in the representation proceeding, that the unit is inappropriate because the Charge Nurses, who voted under challenge, are supervisors; that the Union was improperly certified because of the Charge Nurses' pro-union participation in the election campaign; and that the Regional Director erred in failing to conduct a hearing on Glendora's election objections. (ER 1; ER 77-85.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On January 24, 2019, the Board (Chairman Ring and Members McFerran and Kaplan) issued its Decision and Order, granting the General Counsel's motion for summary judgment and finding that Glendora's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (ER 1-2.) The Board concluded that all representation issues raised by Glendora in the unfair-labor-practice proceeding were or could have been litigated in the underlying representation proceeding, and that Glendora did not proffer any newly

discovered or previously unavailable evidence or allege any special circumstances that would require the Board to reexamine its decision to certify the Union.

(ER 1.)

The Board's Order requires Glendora to cease and desist from refusing to bargain with the Union, and 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. (ER 2.) Affirmatively, the Board's Order directs Glendora, on request, to bargain with the Union, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (ER 2-3.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that Glendora violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union following the Union's lopsided victory in a Board-conducted election. Glendora admits its refusal, but defends its conduct by arguing that the Board erred in overruling its election objections in the representation case without an evidentiary hearing and in certifying the Union. Not every objecting party, however, is entitled to a hearing. Glendora's offer of proof, which failed to provide any specific evidence, let alone any evidence that, if true, would warrant setting aside the election, presented the Board with nothing to hear.

Although Glendora initially filed election objections alleging that both union misconduct and the Charge Nurses' pro-union supervisor conduct materially affected the election, the only objections before this Court concern the Charge Nurses' conduct and whether it coerced the employees and interfered with their free choice. The Board correctly found that Glendora was not entitled to a hearing on those objections because its objections and offer of proof were fatally devoid of any specifics regarding the Charge Nurses' alleged supervisor status and pro-union conduct. Glendora did not, as required, summarize each witness's testimony, but only vaguely asserted that 119 witnesses would each "testify about the facts presented in the objections." Its offer of proof described no underlying facts, but was merely a bare bones list of 11 ways the Charge Nurses assertedly engaged in supervisory conduct, and 14 ways in which they engaged in conduct that tainted the election. The Board properly concluded that Glendora's offer of proof—which was lacking in evidence and heavy on conclusory allegations—failed to raise any substantial or material factual issues, rendering a hearing unnecessary.

The Board also correctly determined that even assuming the Charge Nurses were supervisors and engaged in the alleged conduct, a hearing was still unwarranted because the proffered facts, if credited, failed to show objectionable conduct. Pro-union supervisory conduct is not *per se* objectionable, and applicable precedent requires the Board to examine multiple factors for evidence that such

conduct coerced or interfered with employees' free choice. Given Glendora's failure to describe any facts regarding the underlying conduct, such as who said what to whom and when or whether the supervisors' conduct was directed at employees under their direct supervision, the Board acted well within its discretion in finding that Glendora's proffered evidence, if credited, would not be grounds for finding objectionable conduct. And even if the conduct was coercive, that would not invalidate the election absent specific evidence that the conduct actually influenced the outcome—evidence that was sorely lacking, particularly given the Union's lopsided (77-8) margin of victory.

Glendora offers nothing that would warrant disturbing those findings. The Court should reject its absurd claim—unsupported by precedent—that compiling a large number of nebulous assertions and a large number of witnesses, without describing the supporting evidence and testimony, suffices to warrant a hearing. At best, Glendora has established that it needs a hearing to go on a fishing expedition to substantiate its unfounded allegations—a practice that this Court's precedent forbids and that would frustrate the Board's policy of expeditious resolution of representation issues.

Glendora has likewise abandoned its challenge concerning the Union's use of supervisors' images and statements in election "propaganda." For the first time, it now contends that it did not have to show that this conduct was attributable to

the Union or its agents, and that such conduct would be unlawful if the supervisors acted on their own. Because Glendora never presented that allegation to the Board, the Court is barred from considering it.

The Board also properly found that Glendora waived any claim that the election should be overturned due to a supervisor acting as an election observer, because Glendora failed, as required, to raise that objection during the pre-election conference. Indeed, Glendora does not even claim to have met that requirement.

STANDARD OF REVIEW

This Court “must . . . enforce[]” the Board’s Order regarding Glendora’s unlawful refusal to bargain if the Board “correctly applied the law and . . . its findings of fact are supported by substantial evidence on the record viewed as a whole.” *NLRB v. Cal-Western Transport*, 870 F.2d 1481, 1483 (9th Cir. 1989). *Accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

Moreover, this Court has stated “on numerous . . . occasions” that its review of Board union certifications is “a very limited one,” *NLRB v. Big Three Indus., Inc.* 602 F.2d 898, 901 (9th Cir. 1979), because the Board has broad discretion to determine the propriety of the union representation election process. *Cal-Western*, 870 F.2d at 1483. As the Supreme Court has explained, “Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining

representatives by employees.” *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946); *see NLRB v. Sonoma Vineyards, Inc.*, 727 F.2d 860, 863 (9th Cir. 1984). Therefore, a Board decision not to grant an evidentiary hearing on election objections is reviewed only for an abuse of discretion. *Bell Foundry Co. v. NLRB*, 827 F.2d 1340, 1344 (9th Cir. 1987) (citation omitted); *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1017 (9th Cir. 1981). *Accord Capay, Inc. v. NLRB*, No. 16-70699, 2017 WL 5630276 (9th Cir., Nov. 2, 2017) (unpublished).

ARGUMENT

THE BOARD ACTED WELL WITHIN ITS WIDE DISCRETION IN OVERRULING GLENDORA’S ELECTION OBJECTIONS AND CERTIFYING THE UNION WITHOUT A HEARING, AND, THEREFORE, PROPERLY FOUND THAT GLENDORA VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

An employer violates Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the representative of its employees.⁴ Glendora admits (Br. 6) that it has refused to bargain with the Union. It asserts, however, that its refusal did not violate Section 8(a)(5) and (1) because the Board improperly certified the Union without conducting a full evidentiary hearing on Glendora’s objections. As shown below, Glendora’s arguments are without merit.

As an initial matter, although Glendora filed a total of 29 objections, this Court has jurisdiction to address the Board’s disposition of only 14 of those objections. Specifically, Glendora never raised to the Board in its Request for Review of the Regional Director’s decision any challenge to the disposition of 15 objections, including the Regional Director’s overruling of Glendora’s numerous objections regarding Union misconduct. Glendora’s failure to do so bars the Court from considering any challenge to those findings here.

⁴ A violation of Section 8(a)(5) 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.” *See NLRB v. Swedish Hosp. Med. Ctr.*, 619 F.2d 33, 35 (9th Cir. 1980).

Settled precedent and Board regulations provide that a representation issue “not previously litigated is not properly before the court upon a petition for review of an order in the unfair labor practice proceeding.” *Pace Univ. v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008); *accord NLRB v. Hydro Conduit Corp.*, 813 F.2d 1002, 1005-06 (9th Cir. 1987); *see* 29 C.F.R. § 102.67(g) (formerly §102.67(f)) (“[f]ailure to request review” with the Board of a Regional Director’s findings “shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding”). *See also* 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 review of claim not raised to the Board); *NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1126-27 (9th Cir. 2011) (same). Thus, even assuming the sufficiency of Glendora’s bare assertions regarding alleged Union misconduct in its opposition to summary judgment in the *unfair labor practice case*, its total failure to raise such contentions to the Board in the *representation proceeding* precludes the Court from considering any challenges here. (ER 79, 81-82.) *See United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[s]imple fairness to those who are engaged in the task of

administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice”). *Accord NLRB v. Best Prods. Co.*, 765 F.2d 903, 909 (9th Cir. 1985) (employer who challenges a representation-election irregularity must present its objection both in the certification (representation) proceeding and the unfair-labor practice proceeding to preserve the issue for appellate review).

In addition to failing to pursue a majority of objections in the representation proceeding, Glendora does not mention those objections, let alone challenge the Board’s decision that the objections were insufficient to warrant a hearing, in its brief to this Court. By failing to raise those issues in its opening brief, Glendora has waived any argument regarding them. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (arguments not raised in employer’s opening brief are waived); Fed. R. App. P. 28(a)(8)(A).⁵

⁵ The 11 jurisdictionally barred and waived objections concerning union misconduct alleged that the Union, by its agents, enlisted supervisors to solicit authorization cards, attend union meetings, and engage in other pro-union conduct (ER 28-30, objections 1, 3-4, 7, 10, 12, 14, and 17, ER 7, heading “a.” and the “catchall” objection 28, ER 12, heading “g.”); and that the Union, by its agents, used manipulated and unauthorized employee photos and statements in its campaign materials to mislead or coerce employees into voting for the Union (ER 31, objections 22-23, ER 10, heading “d.”). Glendora also failed to raise to the Board and to the Court any arguments regarding its two objections alleging that the Union’s organizing drive was initiated by statutory supervisors (ER 30, objections 20-21, ER 10, heading “c.”).

Glendora has also waived any challenge to the Board's election rules. Before the Board, Glendora's Request for Review listed several provisions of the election rules, which, it claimed, were "inherently flawed" and facially invalid. (SER 26-28.) Glendora does not repeat, and has therefore waived, any such challenge to those rules in its opening brief.⁶ See cases cited at p. 17.

Thus, the only objections properly before the Court concern Glendora's allegations that the Charge Nurses were supervisors who engaged in objectionable conduct by signing and soliciting employees to sign authorization cards, wearing union paraphernalia, attending union meetings and directing employees to do the same, telling employees to support the Union, posting union campaign literature, and serving as an election observer. (ER 28-30, objections 2, 5, 6, 8-9, 11, 13, 15-16, 18-19, ER 8, heading "b."; ER 31, objection 26, ER 11-12, heading "f."; ER 31, "catchall" objections 27, 29, ER 12, heading "g.") As shown below, the Board acted within its discretion in overruling those objections without a hearing.

As discussed below (pp. 45-46), although Glendora's opening brief does challenge the Board's findings regarding the Union's use of supervisors' photographs and statements in campaign materials (ER 31, objections 24 and 25, ER 11, heading "e."), it relies on arguments that it raises for the first time on appeal, rendering this Court without jurisdiction to consider them. Thus, in total, Glendora has forfeited 15 objections.

⁶ Notably, the two courts to have considered the issue have upheld the validity of the Board's election rules. *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 223-27 (5th Cir. 2016); *Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 171, 189-220 (D.D.C. 2015).

A. To Justify an Evidentiary Hearing, Glendora Must Offer Facts in Support of its Objections that, if Credited, Would Warrant Overturning the Election

It is settled that a party objecting to an election is not automatically entitled to an evidentiary hearing. *St. Elizabeth Cmty. Hosp. v. NLRB*, 708 F.2d 1436, 1444 (9th Cir. 1983); *Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 58 (D.C. Cir. 2016). A hearing will not be held merely because a party “disagree[s] with the Regional Director’s findings,” *NLRB v. L.D. McFarland Co.*, 572 F.2d 256, 261 (9th Cir. 1978), wants to “inquire further” into possible election improprieties, *Vari-Tronics Co., Inc. v. NLRB*, 589 F.2d 991, 993 (9th Cir. 1979), or seeks to go on a “fishing expedition” or subpoena witnesses in order to support unsubstantiated allegations. *Natter Mfg, Corp. v. NLRB*, 580 F.2d 948, 952 n.4 (9th Cir. 1978). On the contrary, the objecting party bears a heavy burden to supply “prima facie evidence, presenting ‘substantial and material factual issues’ which would warrant setting aside the election.” *Vari-Tronics Co.*, 589 F.2d at 993 (citation omitted); *NLRB v. Metro-Truck Body, Inc.*, 613 F.2d 746, 751 (9th Cir. 1979) (objecting party faces “heavy burden” of providing specific evidence to overcome “presumption that ballots cast under the safeguards provided by Board procedure reflect the true desires of the participating employees”) (citation omitted)).

Vague or conclusory assertions of misconduct are, therefore, insufficient to warrant a hearing. Rather, the objecting party’s offer of proof must “include

specific evidence of specific events from or about specific people.” *Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 828 (D.C. Cir. 1970). *Accord NLRB v. Valley Bakery, Inc.*, 1 F.3d 769, 772 (9th Cir. 1993) (to establish a prima facie case, the proffer of evidence “may not be conclusory or vague; it must point to specific facts and people”) (internal quotation marks and citations omitted); *XPO Logistics Freight, Inc. v. NLRB*, 2018 WL 2943939, * 2, No. 17-1177 (D.C. Cir. May 25, 2018) (rejecting as insufficient offer of proof that was “devoid of factual specifics”). *See also Bell Foundry*, 827 F.2d at 1346 (“[m]ere speculation cannot be considered either an offer or proof or evidence” of objectionable conduct that would warrant setting aside an election). Accordingly, to ensure the requisite specificity, Section 102.66(c) of the Board’s Rules and Regulations, 29 C.F.R. §102.66(c), provides that the offer of proof must “summariz[e] each witness’s testimony.”

When the objecting party’s evidence, even if credited, would not justify setting aside the election under the Board’s substantive criteria as a matter of law, there is nothing “to be heard” and the Regional Director may resolve the objections, without a hearing, following an administrative investigation. *NLRB v. Carl Weissman & Sons, Inc.*, 849 F.2d 449, 452 (9th Cir. 1988) (citation omitted); *Durham Sch. Servs.*, 821 F.3d at 58; *see* 29 C.F.R. § 102.69(c)(1)(i) (hearing not required where “evidence described in the accompanying offer of proof would not

constitute grounds for setting aside the election if introduced at a hearing, and the regional director determines that any determinative challenges do not raise substantial and material factual issues”). *See also Metro-Truck*, 613 F.2d at 751 (Board not required to conduct administrative hearing unless objecting party has proffered “specific evidence” of misconduct, which, if true would warrant setting aside election). The Board’s practice in this regard “is designed to resolve expeditiously questions preliminary to the establishment of the bargaining relationship and to preclude the opportunity for protracted delay of certification of the results of representation elections.” *Amalgamated Clothing Workers of Am.*, 424 F.2d at 828 (quoting *Golden Age Beverage Co.*, 415 F.2d 26, 32 (5th Cir. 1969)). That goal would be “defeated if the Board were obliged to conduct an evidentiary hearing into intimidation every time . . . a worker spoke vociferously in favor of a union to co-workers,” *NLRB v. AmeriCold Logistics, Inc.*, 214 F.3d 935, 939 (7th Cir. 2000), or every time an objecting party wants “simply to ‘inquire further’ into possible election improprieties,” *Vari-Tronics Co.*, 589 F.2d at 993.

B. The Board Did Not Abuse Its Discretion in Overruling Glendora’s Conclusory Election Objections Without a Hearing

Glendora primarily contests the Board’s decision to overrule, without a hearing, Glendora’s objections alleging that its Charge Nurses were supervisors and that their pro-union conduct materially affected the results of the election by coercing employees into voting for the Union. The Board properly found that the

offer of proof, which contained no specific facts about either the Charge Nurses' alleged supervisory status or their alleged pro-union conduct, was insufficient to sustain the objections and failed to raise any issue requiring a hearing. The Board also correctly determined that, even assuming the offer of proof was sufficient to demonstrate that the Charge Nurses were supervisors who engaged in the alleged conduct, the evidence in the offer of proof, if introduced at a hearing, demonstrated non-objectionable conduct and "would not be grounds for setting aside the election," rendering a hearing unnecessary. (ER 7.)

1. Glendora's offer of proof failed to raise any substantial and material issues of fact sufficient to warrant an evidentiary hearing

The Board properly found (ER 6-12) that because the objections and offer of proof were fatally devoid of any specifics regarding the Charge Nurses' alleged supervisor status and their pro-union conduct, Glendora failed to raise any issues of "substantial or material facts" sufficient to support a prima facie showing of objectionable conduct. As the Board explained, to show the required substantial and material issues of fact, the Board's regulations require offers of proof to "summariz[e] each witness's testimony," 29 C.F.R. § 102.66(c), and the objecting party cannot rely on conclusory assertions but must point to "specific evidence of specific events from or about specific people." (ER 6) (quoting *Amalgamated Clothing Wrkrs*, 424 F.2d at 828)). *Accord Valley Bakery*, 1 F.3d at 772

(conclusory or vague proffers are insufficient), and cases cited at pp. 20-21. The Board properly concluded that Glendora’s offer of proof, which simply “listed 119 witnesses” and generally claimed that “each will testify as to the supervisory status of the Charge Nurses and to fourteen allegations of [their] widespread conduct,” fell far short of those straightforward requirements and was insufficient to show any factual issue warranting a hearing.

When Glendora made its offer of proof, it bore the burden of raising a substantial and material factual issue as to supervisory status under the substantive criteria provided by the Act. *See NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711-12 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006) (party asserting supervisory status bears burden of demonstrating it). Section 2(11) of the Act, 29 U.S.C. §152(11), defines a “supervisor” as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Supreme Court has explained that, under this language, “[e]mployees are statutory supervisors if (1) they hold the authority to engage in 1 of the 12 listed supervisory functions; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their

authority is held in the interest of the employer.” *Kentucky River*, 532 U.S. at 711-12 (internal quotations omitted); accord *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 551 (9th Cir. 1997). Independent judgment requires a showing that a person “act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood*, 348 NLRB at 692–93 (citation omitted). Judgment is not independent under the Act if it is “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.” *Oakwood*, 348 NLRB at 693.

The burden of proof on supervisory status cannot be met by presenting conclusory or generalized testimony. See *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999); *Lynwood Manor*, 350 NLRB 489, 490 (2007). Rather, the party must support its claim with specific, “tangible examples” demonstrating the existence of actual supervisory authority. See *Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“[W]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.”). Thus, Glendora, to warrant a hearing on the supervisory issue, had to proffer specific, non-conclusory evidence that, if credited, would meet the foregoing burden.

Despite the specificity required to demonstrate supervisor status, Glendora's offer of proof provided only a bare-bones list of 11 ways in which the Charge Nurses assertedly engaged in supervisory conduct. Rather than offering tangible examples of supervisory authority supported by underlying facts, the sum total of the evidence contained in the offer of proof is a litany of conclusory assertions, claiming, without offering supporting facts, that the Charge Nurses "discipline," "evaluat[e]," "schedul[e]," "assign," "direct," and "train[]" other employees. (ER 6; ER 40-41.) The absence of such facts is notable because an employer reasonably would be expected to have easy access to such information about its own employees.

The absence of specifics also renders disingenuous Glendora's claim that a hearing on the supervisory issue is necessary because determining whether a Charge Nurse is a supervisor requires a "painstaking analysis of the facts." (Br. 12 n.3) (quoting NLRB Gen. Counsel Mem. OM 99-44, at 2 (Aug. 24, 1999)). That point is misplaced, even putting aside the fact that the quoted General Counsel Memorandum is not Board precedent. *See Geske & Sons Inc.*, 317 NLRB 28, 56 (1995) (memoranda issued by Board's General Counsel do not constitute Board precedent), *enforced*, 103 F.3d 1366 (7th Cir. 1997); *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (rejecting as "rather silly" employer's argument that a Board decision was unreasonable because it conflicted with a

General Counsel memorandum). It is precisely because of the need for a painstaking analysis of the facts that Glendora's offer of proof must be more substantial than the bare-bones list of job duties provided here. Simply put, the Regional Director cannot be expected to engage in a painstaking analysis of facts that Glendora—the party with the evidentiary burden—failed to provide.⁷

In addition to raising no factual issues regarding supervisory status, Glendora's offer of proof similarly failed to raise any material and substantial factual issues regarding the purported supervisors' pro-union conduct. As the Board explained, the offer merely listed "fourteen allegations of widespread conduct" with "no underlying facts regarding any conduct." (ER 6.) Those "fourteen allegations" stand alone with "no specific evidence of specific events from or about specific people." (ER 6.) For example, they merely stated, without describing any accompanying facts, that Charge Nurses "[s]olicited authorization cards," "[s]olicited and required employees to attend union meetings," "[a]ttended union meetings and told employees to vote yes," "[p]osted campaign material," "[p]rovided [prounion] statements" and "allowed the use of their photographs on

⁷ Glendora misreads the Decision on Objections when it asserts that the Regional Director never "contested" the claim that the Charge Nurses are supervisors (Br. 12 n.3). As discussed above (pp. 23-26), the Regional Director never made a determination on their status because Glendora's objections and offer were too "nebulous and declaratory" (ER 6) to raise a material and substantial issue of fact that warranted a hearing regarding supervisory status.

union campaign material,” and “[w]ore union buttons and stickers.” (ER 42.) That is the sum total of Glendora’s “proof,” which is, in fact, nothing more than a list of conclusions.

Nor can Glendora earn a hearing with its claim that its 119 witnesses “will testify” regarding both supervisory status and the alleged conduct. In lieu of the required summary as to each witnesses’ testimony, Glendora’s offer of proof provided that the witnesses would testify that Charge Nurses “exercise authority” over staff by performing 11 listed tasks and, in doing so, “use their independent judgment” and “discretion in the interests of [Glendora].” (ER 39.) Similarly, Glendora asserted that the same 119 witnesses “will testify” to the Charge Nurses’ “widespread activities during the campaign . . . that show they tended to coerce or interfere with the employee’s exercise of free choice to the extent that it materially affected the outcome of the election.” (ER 41.) The Board properly found that those “broad” statements that witnesses “will testify about the facts presented in the objections” do not raise an issue requiring a hearing. (ER 6.)

Glendora wrongly asserts (Br. 14-15) that the Board erred by requiring Glendora to provide a separate summary for each of these 119 witnesses, and even suggests that the Board faulted it for identifying “too many” witnesses. (Br. 15-16.) Not so. The Board simply adhered to applicable regulations and settled law to find that Glendora’s bare and unsupported promise that 119 witnesses will

testify about “the facts presented in the objections” failed to raise any substantial or material issue warranting a hearing. *See XPO Logistics*, 2018 WL 2943938, at *2 (D.C. Cir. May 25, 2018) (offer of proof claiming that witnesses “would testify on the kinds of topics the law makes relevant” is insufficient to warrant a hearing).⁸

Moreover, as the Board further explained, because there is no summary of each witness’s testimony that contains any specifics, as Board regulations require, “it is impossible to know whether any testimony would provide direct evidence or hearsay,” and “[h]earsay evidence without any direct corroboration would be insufficient to overturn” election results. (ER 6 n.3.) The conclusory offer of proof therefore failed to raise any substantial and material issue of fact sufficient to support a *prima facie* showing of objectionable conduct, and absent such a showing, the Board was correct—and certainly did not abuse its wide discretion—in finding that the objections failed to raise an issue requiring a hearing.

⁸ Glendora errs in faulting (Br. 17) the Board’s reliance on *XPO*. In that case, as here, the employer’s offer of proof failed to provide any “factual specifics about who said or did what to whom” and offered “nothing concrete” to support its conclusory allegations of misconduct, and, therefore, a hearing on those allegations was unwarranted. 2018 WL 2943938, at *2.

2. Glendora's claim that its offer of proof regarding supervisory status and pro-union conduct was sufficiently specific to warrant a hearing lacks merit

Glendora's argument that a hearing is warranted relies on a misreading of precedent and turns a blind eye toward the blatant insufficiency of its offer of proof. Glendora also makes the misguided attempt to blame the Board's election procedure for Glendora's inability to muster any evidence supporting its objections. All of those claims lack merit.

Glendora ignores the factually devoid nature of its offer of proof when it argues that it "detailed" 11 specific supervisory duties shared by all Charge Nurses, as well as 14 "specific" instances of election interference by "a large number" of Charge Nurses. (Br. 11-12, 15-16.) Glendora confuses a bullet-pointed list of conclusory assertions in its offer of proof with providing "specific evidence" regarding "specific events and people." Slapping the label "specific" or "detailed" on its conclusory objections and offer of proof, however, does not make a silk purse out of sow's ear.

Misunderstanding precedent, Glendora wrongly assumes that it is entitled to a hearing simply because of the sheer number of allegations of misconduct (14) and witnesses (119) that it presented, which, it observes, exceed the numbers in some other cases where hearings were held. (Br. 12-15.) The cited cases reiterate, however, that an offer of proof that is conclusory and devoid of specific fact is

insufficient; there is no numerosity exception. *See, e.g., Valley Bakery*, 1 F.3d at 772 (vague and conclusory proffer insufficient; objecting party must point to specific events and facts). In other words, a hearing is not warranted by compiling larger numbers of conclusory allegations.

Accordingly, the objecting parties in the cited cases were afforded a hearing on their objections because, unlike Glendora, they proffered particular facts and evidence. *See NLRB v. Belcor, Inc.*, 652 F.2d 856, 860 (9th Cir. 1981) (party introduced multiple employee affidavits stating that union offered employees fee waiver for signing cards); *Valley Bakery*, 1 F.3d at 770-71, 773 (management-employee declaration stated that unit employee told her the union won the election because it threatened employees with job loss in the event the union lost the election); *Pinetree Transp., Co. v. NLRB*, 686 F.2d 740, 742, 746 (9th Cir. 1982) (supervisory affidavit and specific facts, including actual employee turnout, warranted hearing on whether placement of election notice deterred participation in election.) Glendora claims (Br. 14-15) that its sparse and factually barren offer of proof was, in fact, “much more specific” than those presented in the foregoing cases. However, Glendora does not—and cannot—explain how.

Next, unable to deny the conclusory nature of its offer of proof, Glendora switches tactics and claims that it did the best it could. For example, it protests that because it cannot compel reluctant employee witnesses to cooperate with its

investigation into election misconduct, it cannot provide a “complete account” of fully detailed evidence, at least not without access to subpoenas and a hearing. (Br. 18-19.) As an initial matter, Glendora misstates the issue: the Regional Director did not fault Glendora for failing to provide a complete account of fully detailed evidence, but for failing to describe any specific facts or proffered testimony in its offer of proof. Further, this Court has rejected the argument, implied by Glendora (Br. 18-19), that a party is entitled to use hearings and subpoenas as a “fishing expedition” to substantiate unfounded or speculative allegations. *Natter Mfg. Corp. v. NLRB*, 580 F.2d 948, 952 n.4 (9th Cir. 1978); *see also Vari-Tronics Co. v. NLRB*, 589 F.2d 991, 993 (9th Cir.1979) (“A party cannot demand an evidentiary hearing simply to ‘inquire further’ into possible election improprieties.”) Thus, as the Regional Director noted, hearings are not mere discovery tools. (ER 6 n.2.)

Moreover, Glendora’s claim (Br. 20) that it was “impossible” for it to obtain employee testimony without a hearing is specious given Glendora’s assertion that 119 witnesses (the entire employee unit) stood ready to testify on its behalf. This begs the question of why, despite the witnesses’ claimed enthusiasm, Glendora failed to provide any specifics as to what any of those witnesses would discuss on the stand. And its reluctant-witness excuse is nonsensical with respect to facts regarding the nature and extent of the Charge Nurses’ alleged supervisory

authority, as management employees should have been able to provide that information. Requiring a hearing in such circumstances would upend the Board's judicially approved practice (*see* p. 22) of holding hearings only where the objecting party has proffered specific evidence of misconduct, which, if true, would warrant setting aside the election, and undermine the Board's goal of expeditiously resolving questions regarding an election's validity.

Next, for the first time in this proceeding, Glendora argues that the requirement in the Board's rules, that election objections be filed within seven days of the preparation of the tally of the ballots (which in this case was prepared on the same day as the election) left Glendora with insufficient time to investigate and factually support its election objections. (Br. 19-20; *see* 29 C.F.R. §102.69(a).) Glendora, however, did not raise any concern with that seven-day provision in its Request for Review with the Board. And Glendora did not argue to the Board—as it does now before the Court—that the provision denied it sufficient time to investigate the election and prepare its objections. Accordingly, the Court is jurisdictionally barred (*see* p. 17) from considering any argument based on that provision.⁹

⁹ Notably, Glendora omitted any reference to the seven-day provision from the list of nine other provisions (SER 27-28) that it had included in its now-abandoned (*see* p. 19) facial challenges to the election rules before the Board.

In any event, the argument lacks merit. Particularly specious is any suggestion that the seven-day time limit is why Glendora failed to marshal any specific evidence that its Charge Nurses are supervisors, which, as noted, is information an employer should have readily available. And, despite having seven days from the election to do so, Glendora described no specific facts to support its claim that those employees had engaged in pro-union conduct. Glendora's professed lack of access to such facts is odd given its generalized assertion that supervisors "made no secret" of their pro-union activity. (Br. 22.) This casts in a suspicious light any claim that if only Glendora had a little more time, it would have adequately supported its objections.

3. The Board properly found that even assuming pro-union supervisory conduct occurred here, Glendora still presented no evidence that, if credited, would warrant setting aside the election

As the Board explained (ER 9-10), even assuming the Charge Nurses were supervisors and engaged in the alleged pro-union supervisory conduct, the objections still fail to raise any facts that, if true, would warrant setting aside the election. Glendora claims (Br. 22-27) that the Board, in rejecting its objections without a hearing, misapplied its test for supervisory election misconduct from *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), and progeny. As shown below, however, the Board's careful analysis was faithful to that precedent and should therefore be affirmed.

The Board in *Harborside* enunciated a multifaceted, context-driven test to determine whether a rerun election is warranted based upon evidence that supervisors were involved in an organizing effort. *Id.* at 909. First, the Board will determine “[w]hether the supervisor’s prounion conduct reasonably tended to coerce or interfere with the exercise of free choice in the election.” *Id.* To answer that inquiry, the Board will “(a) consider[] the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) . . . the nature, extent, and context of the conduct in question.” *Id.* If the Board determines that such misconduct has occurred, the Board will then address the second and determinative issue—that is, “whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election.” *Id.* That question, the Board explained, would be answered “based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known [to employees]; and (e) the lingering effect of the conduct.” *Id.*

Applying those principles, the Board has found that the mere fact that a statutory supervisor expresses support for a union is not itself objectionable. *Harborside Healthcare*, 343 NLRB at 911. The Board has made plain that there is nothing the least bit objectionable about noncoercive prounion campaign speech by

supervisors because “just as an employer, through its supervisors, can speak against representation . . . , a supervisor can also speak in favor of the union.” *Id.* Therefore, as long as no promise or threat is implicit in what supervisors say in support of unionization, such comments add to the free flow of ideas that has long been recognized as the bedrock of an informed electorate. *See id.* at 909, 911. *See also NLRB v. Hawaiian Flour Mill, Inc.*, 792 F.2d 1459, 1462, 1463-64 (9th Cir. 1986) (pro-union statements by a statutory supervisor, standing alone, do not constitute objectionable conduct); *accord NLRB v. Riverboat Hotel*, 105 F.3d 665, 1996 WL 738732, at *1-2 (9th Cir. 1996) (unpublished). Indeed, a strong opinion in support of, or against, a union, even an offensive one, does not by itself constitute coercive conduct that warrants overturning an election. *NLRB. v. J.S. Carambola, LLP*, 457 F. App’x 145, 151 (3d Cir. 2012).

Further, the Board, applying *Harborside*, has consistently found that supervisors do not engage in objectionable pro-union conduct by attempting to organize and solicit cards from employees they do not supervise. Indeed, in *Harborside*, the Board explained that supervisory solicitation “may” be objectionable, and whether it materially affects an election depends on “the specific facts and circumstances of each case.” *Harborside*, 343 NLRB at 911, 914. *See Glen’s Market*, 344 NLRB 294, 295 (2005) (where supervisors did not direct such pro-union activities toward any employee they supervised, their

conduct could not reasonably have coerced or interfered with employee free choice), *affirmed*, 205 F. App'x 403, 408-09 (6th Cir. 2006) (under *Harborside*, supervisory solicitation “may” be, but is not necessarily, objectionable, and “some showing of coercion” and “quanta” of supervisory authority is required); *accord Laguna College of Art & Design*, 362 NLRB 965, 965 n.3 (2015) (supervisor signing card in presence of employees and asking whether they would sign unobjectionable where supervisor lacked direct authority over the employees involved).

Absent evidence of coercion, such as actual or implied threats of retaliation, supervisors may openly express their pronoun support, attend union meetings, discuss the union with employees, and wear union paraphernalia. Such conduct is not itself objectionable. *See Northeast Iowa Tel. Co.*, 346 NLRB 465, 466-67 (2006) (upholding election union won by two votes where supervisors attended union meetings with employees, participated in discussions about union, signed authorization cards in front of employees, and told them the union could help prevent layoffs); *Laguna College of Art*, 362 NLRB at 965 n.3 (supervisor emailing bargaining unit about unionization and being quoted in union flyer not inherently coercive); *Glen's Market*, 344 NLRB at 294-95 (supervisors' initiation of union campaign, holding union meeting, and expressing union support, not inherently coercive). *Accord Hawaiian Flour Mill*, 792 F.2d at 1463-64 (election

not invalidated where supervisor expressed his personal support for union, signed union-authorization card, and passed out cards to employees).

Applying the foregoing principles, the Board reasonably found (ER 9-10) that Glendora provided no specific facts which if true required setting aside the election. In terms of the “the nature and degree of supervisory authority possessed by” the supervisors who allegedly solicited cards, and “the nature, extent, and context” of that conduct, Glendora failed to describe any specific evidence showing that any particular Charge Nurse was a supervisor at all, much less describe the “nature and degree” of that supervision. Further, as the Board observed (ER 10), Glendora “alleged no specific facts regarding whether the [alleged] supervisors solicited authorization cards or signatures for the petition from employees under their direct authority, or solicited employees under their direct authority to attend union meetings.” That omission is material because, as shown, absent evidence of coercion, such supervisory conduct is unobjectionable when not aimed at direct subordinates.

Indeed, as to all of the alleged pro-union supervisory conduct, Glendora failed to “identify any details regarding what the alleged supervisors said, to whom, and when” (ER 10), or even to identify which supervisors and employees were involved in any particular interaction. As such, the Board properly concluded

that “the evidence in [Glendora’s] offer of proof . . . if introduced at a hearing, would not be grounds for setting aside an election.” (ER 10.)

Moreover, even if the supervisory conduct identified by Glendora were objectionable under *Harborside*, it still would not warrant a hearing absent a substantial factual issue as to whether “it actually influenced the outcome” of the election. *SSC Mystic Op. Co., LLC v. NLRB*, 801 F.3d 302, 309-10 (D.C. Cir. 2015) (describing *Harborside* test). Accordingly, in applying *Harborside*, the Board would assess whether the supervisory conduct would materially affect the election results based on multiple factors including the margin of victory, and the severity and extent of the conduct (i.e., whether it was widespread or threatening). *Harborside*, supra at 909. Particularly given the Union’s large (77-8) margin of victory in the election, Glendora’s *ipse dixit* (Br. 23) that “this conduct permeated the workplace and materially affected the election” will not suffice to warrant a hearing on this issue. Glendora’s offer of proof does not even identify which employees, or how many of them, were involved in the alleged misconduct. Likewise, it described no specific facts showing that the conduct occurred “throughout the campaign,” was “well known” to unit employees, and “touched the entire bargaining unit.” (Br. 23). In short, the Board is not, at this stage, requiring Glendora to prove supervisory misconduct that materially affected the election;

rather, it is merely requiring that Glendora present evidence sufficient to raise a factual issue as to that misconduct—a burden that Glendora utterly failed to meet.

4. Glendora’s other arguments about *Harborside* lack merit

Glendora fails to show that the Regional Director departed from *Harborside* or other applicable precedent, or otherwise committed reversible error. Rather, in claiming that it identified sufficient misconduct to warrant a hearing, Glendora (1) misstates the applicable test for assessing supervisory misconduct during an election campaign; (2) relies on factually distinguishable cases, which highlight the essential elements that, by comparison, are missing from Glendora’s conclusory offer of proof; and (3) relies on arguments that it failed to present to the Board.

As discussed above, Board precedent does not support Glendora’s claim that bare allegations of supervisory solicitations, without more, make a prima facie case of objectionable conduct that warrants a hearing. Glendora relies (Br. 21-23) on factually distinguishable cases, like *Harborside*, which involved close elections where supervisors solicited cards from their direct subordinates, and did so in a bullying, threatening, or harassing manner. *See also SNE Enter., Inc.*, 348 NLRB 1041, 1043-44 (2006) (supervisory solicitation of 30 direct subordinates was objectionable conduct that invalidated election won by five votes); *Chinese Daily News*, 344 NLRB 1071, 1071-73 & nn.6, 16 (2005) (supervisors solicited and collected cards from employees they directly supervised and had the power to

reward; such conduct may affect results of close election). Glendora, however, omitted such specifics in its objections and offer of proof, failing to allege which supervisors solicited cards from which employees, how many employees they solicited and at which times, or whether they solicited employees they directly supervised, much less that they did so in a threatening or harassing manner.

Glendora fleetingly responds that it “identified other coercive conduct” by alleged supervisors, including that the Charge Nurses wore union paraphernalia, attended union meetings, appeared in union campaign materials, openly expressed their union support, and told employees to support the Union. (Br. 22.) However, because such conduct is not *per se* objectionable, merely “identifying” such conduct without describing any underlying facts or context is insufficient to warrant a hearing. To take one example, Glendora asserts (Br. 16, 22) that Charge Nurses “told” employees to support the Union, but does not specify what was said or how this was conveyed, and as the Board explained in *Harborside* (*see* pp. 35-36), supervisors may appropriately share their prounion views.

Glendora fails in its attempt to fault the Board’s reliance on *Laguna College* and *Northeast Iowa Telephone* (*see* p. 37) when it observes that the Board in those cases evaluated the supervisor’s alleged conduct after a hearing, which Glendora claims is “contrary” to the Regional Director’s denial of a hearing here. (Br. 25.) Glendora misunderstands the relevancy of those cases, which is that they apply a

substantive standard pursuant to which the conduct alleged by Glendora is not *per se* objectionable, and, therefore, just identifying such conduct, without more, will not warrant a hearing.

Glendora's attempt to distinguish (Br. 23-24) *Northeast Iowa Telephone* on the grounds that it involved managers with "limited" supervisory authority who engaged in "limited" union activities, fails because Glendora's conclusory objections and offer of proof, which do not reveal the extent of the supervisory authority and conduct alleged, prevent any substantive comparison between the cases. Glendora further protests (Br. 24) that the facts here are different because it alleged that the Charge Nurses solicited cards, appeared in union campaign materials, and instructed employees to support the Union. However, such conduct is not *per se* objectionable, and Glendora's compilation of conclusory allegations does not constitute underlying "facts" that, if presented at a hearing, would show that the conduct materially affected the election results.

Glendora also misses the mark with its undeveloped assertion (Br. 24) that the Board's reliance on *Laguna College* is misplaced because that case involved an employer's anti-union campaign. While Glendora (Br. 24) paints the purported absence of an anti-union campaign here as an absence of mitigating circumstances, the fact is that Glendora failed to sufficiently allege any coercive supervisory conduct that needed to be mitigated.

For the first time in this proceeding, Glendora contends (Br. 25) that the Board erred in concluding (ER 9) that the alleged supervisory solicitations were “not objectionable” because there was no evidence that the Charge Nurses solicited cards from their direct subordinates. Observing that the Board cited *Glen’s Markets*, 344 NLRB at 295, for this conclusion, Glendora asserts that the Board subsequently rejected that interpretation in *Millard Refrig. Svcs., Inc.*, 345 NLRB 1143, 1145-46 (2005). According to Glendora, the Board erred because *Millard* stands for the proposition that supervisory solicitation can interfere with employee free choice even when the supervisors solicit outside their individual chains of command. (Br. 25-26.) Glendora’s argument comes too late, and in any event lacks merit because the Board followed applicable law.

As discussed, Section 10(e) bars judicial consideration of objections that were not presented to the Board. *See* cases cited at p. 17. Before the Board, Glendora did not cite *Glen’s Market* in its Request for Review, much less challenge the Board’s reliance on that case, and it cited *Millard* only for the general and undisputed proposition that the relevant inquiry is whether the allegedly objectionable conduct “reasonably tended to have a coercive effect” on employee free choice. (SER 8-9.) Glendora never discussed whether or not the instant employees were solicited by their direct supervisors, or put the Board on notice that Glendora was challenging the Board’s view regarding that distinction’s

relevancy to determining objectionable coercive conduct. Therefore, Section 10(e) bars this Court from considering it.

In any event, Glendora's attack fails. Contrary to Glendora's mischaracterization, the Board did not apply a broad *per se* rule to the effect that supervisory solicitation of non-direct subordinates will never be coercive in any circumstances. *Cf. Millard*, 345 NLRB at 1145 (doubting that *Glen's Market* stood for such a broad proposition). Rather, consistent with precedent, the Board found that Glendora failed to meet its hearing burden where its objections and offer of proof failed to address the context surrounding the alleged solicitation, including whether the supervisors had targeted their direct subordinates.

Moreover, *Millard* is factually distinguishable. There, the objecting party presented specific evidence of repeated supervisory solicitations, interrogations, and threats, including that employees would lose their jobs and supervisors would make their lives a "living hell" if they did not support the union, which, considered together with the supervisors' broad authority over the solicited employees, warranted setting aside the election. 345 NLRB at 1143-44, 1145-47. In addition, specific evidence showed that the misconduct impacted enough employees to materially affect the election results. *Id.* at 1145-47. The same result is unwarranted here because Glendora's conclusory objections and offer of proof

provide no comparable allegations or evidence that would raise any material issue of fact as to the election's validity.

C. Glendora Improperly Raises New Claims Regarding Election Propaganda for the First Time in its Brief

Glendora asserts (Br. 26-27) that the Board erred in refusing to order a hearing on its objections that the Union used Charge Nurses' photographs and statements in union propaganda. (ER 31, objections 24-25.) Specifically, Glendora claims that the alleged conduct would be unlawful even if those alleged supervisors had acted on their own and disputes any requirement that Glendora had to show that the conduct was attributable to the Union. However, because Glendora never presented that argument to the Board, Section 10(e) bars the Court from considering it now. *See* p. 17. Glendora also did not present to the Board the additional (and contradictory) claim it now makes (Br. 27) that the supervisors had "implied" or "apparent authority" to act on behalf of the Union, and it certainly did not describe any "facts" showing that authority in its objections or offer of proof.

Glendora also inexplicably claims that the "law is not so narrow" as to require a showing that the conduct is attributable to the Union (Br. 26-27). This confusing assertion ignores that Glendora's objections alleged only that "*the Union*, by its representatives, agents and supporters" utilized photos or statements of supervisors in its campaign materials (which Glendora calls "propaganda"). (ER 31, objections 24 and 25, ER 11) (emphasis added). Thus, it was Glendora

that “narrow[ed]” the objection, not the Board. And, as the Board correctly noted, and which Glendora fails to contest, the use of supervisors’ photographs and statements in campaign material “is not per se objectionable.” (ER 11, citing *Laguna College*, 362 NLRB at 965 n.3 (use of supervisor’s quotation in union flyer not objectionable conduct).

D. Glendora’s Offer of Proof Contained No Facts Showing that the Election Should Be Overturned Due to a Supervisor Acting as an Election Observer

It is general Board policy that supervisors should not be election observers for either the employer or the union. *First Student Inc.*, 355 NLRB 410 (2010); *Family Servs. Agency, San Francisco*, 331 NLRB 850 (2000). However, it is also well-established Board law that a party must raise the alleged supervisory status of an election observer during the Board’s pre-election conference, or such an objection will be precluded. *See Liquid Transp., Inc.*, 336 NLRB 420, 420 (2001) (rejecting as untimely employer’s objection to supervisory status of union observer raised for first time in post-election objections) (collecting cases); *accord Detroit East, Inc.*, 349 NLRB 935, 935-36 (2007). Here, as the Board found (ER 12), Glendora did not include in its objections or offer of proof (ER 28-46) any allegation (much less any specific evidence) that it raised the alleged supervisory status of the Union’s observer during the pre-election conference. Accordingly,

following settled law, the Board properly rejected this objection as waived. (ER 31, objection 26.)

Moreover, as the Board further found, Glendora failed, even belatedly in its post-election objections or offer of proof, to identify the name or position of the individual who served as the Union observer or to describe any specific facts that would establish that the individual was a statutory supervisor. (ER 12; ER 31, 35-46.) Accordingly, even putting aside waiver, the Board properly found that Glendora's offer of proof in regard to this objection, if introduced at a hearing, would not be grounds for setting aside an election. *Id.*

Glendora fails to undermine the Board's well-supported findings. (Br. 22, 27-28.) Quoting the Board's decision in *Detroit East*, Glendora objects that a party may sufficiently "raise[] the status of the objectionable observer" at the pre-election conference, without "fully articul[at]ing the nature of its objection." (Br. 28.) That proposition does not apply here, because Glendora does not allege that it raised the status of the Union's designated observer, at all, during the pre-election conference, a fact which, *Detroit East* confirms, will result in waiver of the objection. 349 NLRB at 935-36. Moreover, in *Detroit East*, the Board found that there was specific testimony that, if credited, would show that the union had challenged the employer's designated observer during the pre-election conference. *Id.*

Glendora also asserts that it objected to the observer not at that conference, but during an earlier phase of the pre-election proceedings when it submitted a position statement “challenging all charge nurses as supervisors.” (Br. 27-28, ER 23.) Obviously, “challenging all charge nurses” as ineligible to vote in the election is not the same as objecting to the status “of the Union’s election observer” *during* the pre-election conference, as settled law requires. Absent Glendora presenting its objection at the pre-election conference, the Board agent running the election would not know about, and therefore could not act on, the observer’s supposed supervisory status. Glendora cannot now complain about an irregularity that it failed to bring to the Board’s attention at the appropriate time.

CONCLUSION

The Board respectfully requests that the Court deny Glendora's petition for review and enforce the Board's Order in full.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Board counsel are unaware of any related cases pending in this Court.

Respectfully submitted,

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National Labor Relations Board
August 2019

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

EAST VALLEY GLENDORA HOSPITAL, LLC,)	
D/B/A GLENDORA COMMUNITY HOSPITAL)	
)	
Petitioner/Cross-Respondent)	Nos. 19-70292
)	19-70596
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case No.
)	31-CA-229412
Respondent/Cross-Petitioner)	
)	
and)	
)	
SEIU LCOAL 121RN)	
)	
Intervenor)	

STATUTORY ADDENDUM

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Sec. 7. [§157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Sec. 8 [§158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Sec. 9 [§ 159.]

(c) [Hearings on questions affecting commerce; rules and regulations] (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe

that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

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

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of

such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10 [§ 160] (a) [Powers of Board generally] The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial

evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

29 C.F.R. § 102.67(g) [Proceedings before the Regional Director; further hearing; action by the Regional Director; appeals from actions of the Regional Director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list]

(g) Finality; waiver; denial of request. The Regional Director's actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

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and)	
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SEIU LCOAL 121RN)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,046 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

s/ David Habenstreit
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Dated at Washington, DC
this 30th day of August, 2019

**UNITED STATES COURT OF APPEALS
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)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 30th day of August, 2019