

Nos. 19-71261 and 19-71447

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

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

**RADNET MANAGEMENT, INC. d/b/a San Fernando Valley Interventional Radiology
and Imaging Center; RADNET MANAGEMENT, INC. d/b/a San Fernando Valley
Advanced Imaging Center**

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) for enforcement, and the cross-petition of RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center and RadNet Management, Inc. d/b/a San Fernando Valley

Advanced Imaging Center (collectively, “RadNet”) for review, of a Board Order against RadNet reported at 367 NLRB No. 88 (Feb. 14, 2019). (ER.2-5.)¹

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”), and the Board’s Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The Board filed its application on May 21, and RadNet filed its cross-petition on June 11, 2019. The filings were timely because the Act imposes no time limit on the initiation of enforcement or review proceedings. Venue is proper in this Court under Section 10(e) and (f) of the Act because RadNet committed the unfair labor practices in California.

Because the Board’s Order is based in part on findings made in two underlying representation (election) proceedings, the records in those proceedings (Case Nos. 31-RM-209388 and 31-RM-209424) are also before the Court under Section 9(d) of the Act, 29 U.S.C. § 159(d). *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceedings. Rather, it authorizes review of the Board’s actions

¹ Citations are to the Excerpts of Record (“ER.”) filed with RadNet’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.

in those proceedings 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 cases in a manner consistent with the Court's ruling. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUE

The ultimate issue is whether substantial evidence supports the Board's finding that RadNet violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(1), (5), by refusing to bargain with National Union of Healthcare Workers ("the Union"), the certified collective-bargaining representative of two units of RadNet employees. The dispositive underlying issue is whether the Board acted within its broad discretion in overruling RadNet's election objections and certifying the Union.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the Act, the Board's Rules and Regulations, and the Board's Representation Casehandling Manual are reproduced in the Addendum to this brief, except for those already included in the addendum to RadNet's opening brief.

STATEMENT OF THE CASE

The Board certified the Union to represent two units of RadNet's technical employees after the Union prevailed in Board-conducted representation elections at RadNet's San Fernando Valley Interventional Radiology and Imaging Center ("SFV Interventional") and San Fernando Valley Advanced Imaging Center ("SFV Advanced"). (ER.3.) RadNet refused to bargain with the Union at either facility, and the Board found that its refusal violated Section 8(a)(5) and (1) of the Act. (ER.3.)

RadNet does not dispute that it refused to bargain (Br.15); rather, it contends that it had no duty to do so because the Board improperly certified the Union over RadNet's objections to the conduct of the election. But RadNet was not even entitled to a hearing on most of its objections because it failed to proffer specific evidence that would, if credited, warrant setting aside the election. (ER.125, 146.) Regarding the one objection (identical in each case) that the Board set for hearing, RadNet failed to present at the hearing *any* evidence of objectionable misconduct, let alone evidence of the type of conduct that warrants setting aside an election. (ER.172-73, 179-80, 314, 327.) 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

A. RadNet Files Two Petitions and Signs Two Stipulated Election Agreements; the Union Prevails in Each Election

RadNet administers diagnostic imaging services at various facilities in California, including SFV Interventional and SFV Advanced. (ER.2.) On November 3, 2017, RadNet filed with the Board two petitions for an election under Section 9(c) of the Act, in response to the Union's demand for recognition of its technical employees at each facility. (ER.168, 175; ER.107-08.) Subsequently, RadNet voluntarily entered into Stipulated Election Agreements with the Union governing the election for each facility. Each was approved by the Board's Regional Director for Region 31. Under those agreements, RadNet 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). The parties also agreed as to the appropriate bargaining unit for each facility:

Included: All full-time, regular part-time, and per diem Technical employees employed by the Employer at its facility at [facility name and address];

Excluded: All other employees, managers, confidential employees, physicians, service employees, office clericals, and guards and supervisors as defined by the Act, as amended.

(ER.3, 125, 146, 168, 175, 310, 323; ER.455-56, 458-63.)

The Union prevailed in the December 6 secret-ballot election at SFV Interventional, with 4 votes for the Union, 2 votes against, and 1 non-determinative, challenged ballot. (ER.3, 310; SER.177.) The Union also prevailed in the December 8 secret-ballot election at SFV Advanced. Initially, the vote tally was 4 votes for the Union, 3 votes against, and 1 challenged ballot. After RadNet withdrew its challenge to the ballot, and the Board opened and counted it, the final vote tally was 5-3 in favor of representation. (ER.3, 323; SER.178-79.)

B. RadNet Files Numerous Objections; the Regional Director Overrules All but One Without a Hearing

RadNet filed eight objections to the election at SFV Interventional and seven objections to the election at SFV Advanced, with accompanying offers of proof in support. (ER.125, 146; ER.109-20, 647-77.) Six of the objections were substantially the same in each case and included allegations that: (1) the Union engaged in a material misrepresentation by failing to disclose an affiliation with the International Association of Machinists and Aerospace Workers (“IAMAW”); (2) the Union and/or IAMAW harassed RadNet and eligible voters by filing false police reports; (3) the Board agent misrepresented the challenged ballot process to an eligible voter; (4) the Board erred by conducting an election in which the Union did not disclose its affiliation with IAMAW; (5) the Board erred by conducting an election in a unit that contained statutory guards; and (6) the Board erred by

conducting an election under its revised election rules. (ER.125-35, 146-57; ER.109-20.)

In addition, RadNet asserted three facility-specific objections. It claimed that the Board agent supervising the SFV Interventional election erred by failing to designate and police a “no-electioneering” zone and by allowing the union observer to use a highlighter while the polls were open. (ER.129-31; ER.111.) At SFV Advanced, RadNet claimed that the Union and/or union supporters harassed eligible voters by repeatedly asking them to vote for the Union. (ER.149-51; ER.119.)

On January 12, 2018, the Regional Director issued a Partial Decision on Objections and Notice of Hearing in each case. (ER.125-65.) In those decisions, the Regional Director found RadNet’s offers of proof “insufficient” to sustain the majority of RadNet’s objections and overruled all but Objection 2, the objection alleging false police reports. (ER.125, 146.)

C. The Board Conducts a Hearing on Objection 2; RadNet Presents No Evidence of Objectionable Conduct; the Regional Director Certifies the Union

RadNet’s Objection 2 was identical in each case and alleged that the Union and/or its agent filed false police reports against other RadNet facilities and individuals from those facilities for not supporting the Union. The Regional

Director found that RadNet’s offers of proof in support of those objections “raise[d] substantial and material issues of fact that can best be resolved on the basis of record testimony taken at hearing.” (ER.125, 128-29, 146, 148-49; ER.650-54, 667-70.) Although the Regional Director found that RadNet proffered no evidence connecting the Union or its agents to the alleged police reports, she set for hearing the question of whether the alleged misconduct “was ‘so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible’” – the Board’s standard for setting aside an election based on third-party misconduct.² (ER.129, 148-49.) The Regional Director consolidated the two cases for hearing. (ER.310-11, 324; ER.166.)

On Monday January 29, the Board’s Hearing Officer opened the hearing. (ER.169, 176.) RadNet presented only two witnesses. One witness testified about service of RadNet’s subpoenas. The other witness, union representative and organizer Sophia Mendoza, testified about her collection of subpoenaed documents as the Union’s records custodian and about the relationship between the Union and IAMAW. (ER.171, 178, 313, 326; ER.542-47, SER.2-15.) RadNet did not present the witnesses identified in its offers of proof—the subjects of the purported false

² *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).

reports—nor did it ask Mendoza any questions, or present any other testimonial or documentary evidence, about the purported false police reports and/or the dissemination of information about those reports to unit employees. (ER.171-72, 178-79, 313-14, 326-27; ER.543-47, SER.6-15.)

Instead, RadNet primarily focused the first day of hearing on its subpoenas. The Friday before the Monday hearing began, RadNet had served subpoenas requesting testimony and documents from the Union, Mendoza, the IAMAW, union volunteer Ryan Carrillo, and the Los Angeles Police Department (“LAPD”).³ (ER.314-15, 327-28; ER.513, 589-646, SER.24-76.) Aside from those directed at Mendoza and the Union, the subpoenas went unanswered. (ER.313, 326; ER.513.) Despite RadNet’s request, the Regional Director declined to pursue judicial enforcement proceedings for RadNet’s subpoenas, finding its offers of proof insufficient to warrant enforcement. (ER.171 n.4, 178-79 n.4, 317-20, 330-33; ER.532-34, 540, 559, 583-87, SER.16.) Nevertheless, that same day,

³ The subpoenas to the LAPD sought information about the purported subjects of the police reports and information about any contact from individuals who worked on the campaign, or anyone identifying themselves as a member of either the Union or IAMAW. (ER.315, 328; ER.590-602.) The subpoenas to Mendoza, the Union, IAMAW, and Carrillo sought their communications with employees regarding union sympathies; communications with the LAPD; and communications between or among the Union, IAMAW, and employees referencing police reports. (ER.315, 328; ER.517, 603-46, SER.24-76.)

RadNet arranged to serve more subpoenas on the LAPD, seeking any communications the LAPD received from additional individuals who purportedly worked on the Union's campaign and requesting a response the next day. (ER.314, 315, 328; ER.576-78, SER.77-95.)

On January 30, the Hearing Officer continued the hearing. She kept the hearing open a second day to give the subpoenaed parties additional time to respond and to allow RadNet another chance to put on evidence in support of its objections. (ER.315, 328; ER.553.) RadNet refused to put on any evidence, focusing again on the unanswered subpoenas, in addition to more subpoenas that it had prepared, but not yet served on an IAMAW representative and two union representatives who had attended a couple of organizational meetings before RadNet filed the petitions. (ER.172 n.5, 179 n.5, 315, 328; ER.576-82, SER.12-13, 96-176.) The additional subpoenas sought essentially the same information as that requested from Mendoza, the Union, IAMAW, and Carrillo. (ER.315, 328; SER.96-176.) The Regional Director declined to enforce RadNet's additional subpoenas to the LAPD, citing similar infirmities with RadNet's offers of proof. (ER.315, 317, 328, 330; ER.576-79, 584-85.) When RadNet continued to refuse to submit any evidence in support of Objection 2, the Hearing Officer closed the

record. (ER.171-72 n.4, 178-79 n.4, 315, 328; ER.576-77, 579-80, 585-87, SER.22.)

In post-hearing reports, the Hearing Officer recommended overruling Objection 2 in each case given RadNet's failure to prove objectionable conduct. (ER.172-73, 179-80.) The Regional Director agreed, and over RadNet's exceptions to the reports, issued a Decision and Certification of Representative in each case, certifying the Union as the collective-bargaining representative of the respective bargaining units. (ER.310-36.)

RadNet requested Board review of both the Regional Director's Partial Decision on Objections and her Decision and Certification of Representative in each case. (ER.450, 452.) The Board (Chairman Ring and Members Pearce and Kaplan) denied RadNet's requests, finding that they "raise[] no substantial issues warranting review." (ER.450-53.)

II. THE UNFAIR-LABOR-PRACTICE PROCEEDING

The Union requested that RadNet recognize and bargain with it as the unit employees' exclusive collective-bargaining representative at the two facilities. (ER.3 & n.3; ER.456, 470.) RadNet responded that it would not recognize and bargain with the Union because it was challenging the Board's certifications. (ER.3 & n.3; ER.456, 471-72.) The Union filed unfair-labor-practice charges and,

based on those charges, the Board's General Counsel issued a consolidated complaint alleging that RadNet's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act. (ER.2; ER.473, 475, 477-85.) In its answer to the complaint, RadNet admitted in part, and denied in part, the allegations. (ER.2; ER.494-98.)

The General Counsel subsequently filed a Motion for Summary Judgment, and the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. (ER.2; ER.89-106.) For each facility, RadNet filed a combined response to the Notice and opposition to the Motion for Summary Judgment, claiming that the Regional Director erred in certifying the Union. RadNet also filed an amended answer to the consolidated complaint, newly asserting affirmative defenses that mirrored its objections in each case. (ER.2; ER.62-88.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On February 14, 2019, the Board (Chairman Ring and Members Kaplan and Emanuel) issued its Decision and Order, granting summary judgment and finding that RadNet's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act. (ER.2-5.) The Board concluded that all representation issues raised by RadNet in the unfair-labor-practice proceeding were or could have been litigated in

the underlying representation proceedings, and that RadNet 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.2 & n.2.)

The Board's Order requires RadNet 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. Affirmatively, the Board's Order directs RadNet, on request, to bargain with the Union, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (ER.3-4.)

RadNet filed with the Board a motion for reconsideration in each case, which the same Board panel denied, as RadNet did not "identif[y] any material error or demonstrate[] extraordinary circumstances warranting reconsideration under Board Rules and Regulations." (ER.1.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that RadNet violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union following its victory in Board-conducted elections at its SFV Interventional and SFV Advanced facilities. RadNet admits its refusal, but defends its conduct by arguing

that the Board erred in overruling its election objections in the representation cases and certifying the Union. RadNet's arguments that the Board abused its discretion in the representation proceedings, however, "are marked more by imagination than substance." *San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1186 (D.C. Cir. 2012). The Board acted well within its broad discretion in overruling RadNet's many objections, most without a hearing.

Under settled law, RadNet was not entitled to a hearing on its objections unless it proffered specific evidence that would, if credited, warrant setting aside the election. RadNet claimed that the election should be overturned for myriad reasons. For all but one objection, however, RadNet failed to even meet the standard for obtaining a hearing. RadNet either asserted its claims too late, failed to allege conduct objectionable under Board law, or failed to offer specific evidence, rather than vague, conclusory allegations.

Regarding RadNet's objection (identical in each case) that the Board set for hearing, RadNet initially proffered evidence that that the Union and/or its agent filed false police reports against other RadNet facilities and individuals from those facilities because they did not support the Union. Yet, when RadNet showed up at the hearing, it refused to present that evidence, or any other evidence of the alleged objectionable misconduct or its dissemination to voting-eligible employees.

RadNet tries to blame its failure to prove its case on the Regional Director's refusal to institute judicial enforcement proceedings for its outstanding subpoenas and the Hearing Officer's closing the record. But the Board reasonably rejected those claims. "Regional Directors in representation cases have the discretion to close the record and refuse enforcement of subpoenas where, as here, the subpoenas constitute a mere 'fishing expedition.'" (ER.450 n.1, 452 n.1.)

Finally, RadNet's claim that the Board should have reviewed the representation proceedings again in the unfair-labor-practice case borders on the frivolous. Under the Board's well-established no-relitigation rule, a party is not entitled to relitigate representation issues that were or could have been litigated in the prior representation proceeding absent newly discovered evidence or other special circumstances. RadNet fails to show that the Board erred in applying that rule, rather than a rare exception.

In sum, RadNet has lodged baseless procedural and substantive gripes at every step, instead of actually marshalling evidence to prove its alleged objectionable conduct. This gamesmanship appears motivated more by "the inevitable delay that review of Board orders affords," *San Miguel Hosp.*, 697 F.3d at 1188, than by any legitimate concerns with the Board's representation elections.

ARGUMENT

THE BOARD ACTED WELL WITHIN ITS WIDE DISCRETION IN OVERRULING RADNET’S ELECTION OBJECTIONS; RADNET VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

An employer violates Section 8(a)(5) of the Act when it refuses to bargain with the exclusive collective-bargaining representative of its employees. 29 U.S.C. § 158(a)(5). A violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1), which makes it an unfair labor practice to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection [7]” of the Act.” 29 U.S.C. § 158(a)(1); *NLRB v. Swedish Hosp. Med. Ctr.*, 619 F.2d 33, 35 (9th Cir. 1980). RadNet admits (Br.15) that it 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 over RadNet’s objections. As shown below, the Board acted well within its broad discretion in finding each of RadNet’s objections, whether set for hearing or not, lacked merit, and therefore that RadNet violated the Act as alleged.

A. The Court Grants Wide Discretion to the Board in Conducting Elections and Does Not Lightly Set Them Aside

“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); *NLRB v. Sonoma Vineyards, Inc.*, 727 F.2d 860, 863 (9th Cir. 1984). This Court has “reiterated 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), given the Board’s broad discretion to determine the propriety of the union representation election process, *NLRB v. Cal-Western Transport*, 870 F.2d 1481, 1483 (9th Cir. 1989).

There is a strong “presumption that ballots cast under the safeguards provided by Board procedure reflect the true desires of the participating employees.” *NLRB v. Eskimo Radiator Mfg. Co.*, 688 F.2d 1315, 1317 (9th Cir. 1982). Thus, a party seeking to set aside a Board-certified election “faces a heavy burden.” *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1019 (9th Cir. 1981). “Although it is true that the stated goals of the [Board] are to establish ‘laboratory conditions’ for collective bargaining elections,” the Court “will set aside an election only when the election process is ‘significantly impaired.’” *NLRB v. Heath TEC Div./San Francisco*, 566 F.2d 1367, 1372 (9th Cir. 1978); *see Serv. Corp. Int’l v. NLRB*, 495 F.3d 681, 684 (D.C. Cir. 2007) (elections often valid though marked by “minor (and sometimes major, but realistically harmless) infractions”).

As a general matter, to overturn an election based on misconduct, an objecting party “must present evidence of proscribed conduct which prevented the employees from freely registering their choice of a bargaining representative.” *Spring City Knitting*, 647 F.2d at 1017; see *Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970). More specifically, to invalidate an election based on the conduct of a Board agent, an objecting party must prove more than the existence of improprieties; it must establish that “the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.” *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enforced*, 414 F.2d 999 (2d Cir. 1969). *Accord Bell Foundry Co. v. NLRB*, 827 F.2d 1340, 1346 (9th Cir. 1987). The standard for overturning an election is demanding in part because the delay incurred in ordering a rerun election poses its own danger to the effectuation of employee free choice. *Amalgamated Clothing v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984) (“forcing a rerun election may play into the hands of employers who capitalize on the delay to frustrate their employees’ rights to organize”).

Thus, consistent with the above principles, the Court will not overturn the Board’s decision to certify a union unless the Board has abused its discretion. *Cal-W. Transp.*, 870 F.2d at 1484. And the Court “must . . . enforce[]” the Board’s

Order regarding an 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.” *Id. Accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

B. A Party Bears a Heavy Burden to Show that the Board Abused its Discretion in Declining To Hold an Evidentiary Hearing on Objections

A party objecting to an election is not automatically entitled to an evidentiary hearing on its objections. *St. Elizabeth Cmty. Hosp. v. NLRB*, 708 F.2d 1436, 1444 (9th Cir. 1983). Rather, the objecting party bears a heavy burden to show substantial and material issues of fact that, if true, would warrant setting aside the election. *Vari-Tronics Co. v. NLRB*, 589 F.2d 991, 993 (9th Cir. 1979). A party is not entitled to an evidentiary hearing merely because it wants to “inquire further” into possible election improprieties. *Vari-Tronics Co.*, 589 F.2d at 993; *NLRB v. AmeriCold Logistics, Inc.*, 214 F.3d 935, 939 (7th Cir. 2000) (party “is not entitled to a hearing just because it wants one, just because it claims that the election was tainted, [or] just because it says it could really pin things down if it were granted a hearing”).

When the objecting party’s proffer, even if credited, would not justify setting aside the election under the Board’s substantive criteria as a matter of law, there is

simply nothing “to be heard,” and the Regional Director may resolve the objections without a hearing. *NLRB v. Carl Weissman & Sons, Inc.*, 849 F.2d 449, 452 (9th Cir. 1988); *see* 29 C.F.R. § 102.69(c)(1)(i). The Court reviews the Board’s decision not to hold an evidentiary hearing for abuse of discretion. *Bell Foundry*, 827 F.2d at 1344.

C. The Board Properly Overruled the Bulk of RadNet’s Objections Without a Hearing

The Board acted well within its broad discretion in overruling the majority of RadNet’s objections without a hearing.⁴ As shown below, RadNet failed to proffer evidence that, if true, would warrant setting aside the election. This Section first addresses RadNet’s substantively identical objections to the elections at each facility, then its three facility-specific objections. Section D addresses Objection 2 in each case—the only objections set for hearing.

a. Union Affiliation

In Objection 1 to the elections at both facilities, RadNet claimed that the Union engaged in a “material misrepresentation” by failing to disclose to eligible

⁴ RadNet has dropped its challenge to the Board’s revised election rule. By failing to raise that issue in its opening brief, RadNet has waived any argument regarding it. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996); Fed. R. App. P. 28(a)(8)(A).

voters an affiliation with IAMAW. (ER.125-26, 146-47; ER.110, 118.) In Objection 5 (SFV Advanced) and Objection 6 (SFV Interventional), RadNet alleged the same set of facts, but placed blame on the Board for conducting elections in which the Union failed to disclose that supposed affiliation. (ER.131-32, 153; ER.112, 120.)

RadNet's proffers in support of its affiliation objections, even if true, would not warrant setting aside the elections. (ER.125-26, 131-32, 146-47, 153.) RadNet claimed that its vice president would testify that an IAMAW organizer attended the pre-election conferences at SFV Interventional and SFV Advanced, where that organizer advised the Union and asked the Board agent and RadNet's counsel questions. RadNet also claimed that it had documentary evidence that would establish the Union's affiliation with IAMAW, including the unions' announcement of an affiliation in 2012 and evidence of their joint training, political campaigning, press releases, and organizing efforts. RadNet would also call employees to testify as to whether they would consider alleged information about IAMAW (*i.e.*, that its organizers are awarded cash incentives, it has been accused of engaging in unfair labor practices, and it has engaged in strikes) material to their decision to be represented by the Union. (ER.126, 132, 147, 153; ER.648-50, 659, 665-67, 674.)

At the outset, the Board found RadNet's proffer insufficient to show affiliation. (ER.126, 147.) Nothing in RadNet's proffer suggests that the unions' announcement of a possible affiliation, five years before the elections, ever came to fruition or that anything beyond strategic coordination between like-minded unions has occurred since.⁵

Further, the Board found that even if an affiliation exists, "the Union's failure to disclose an alleged affiliation with another union is not a misrepresentation that warrants setting aside the election." (ER.450 n.1, 452 n.1, 126, 132, 147, 153.) Under *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), the Board does not "probe into the truth or falsity of [] parties' campaign statements," and does "not set elections aside on the basis of misleading campaign statements." *Id.* at 133. *Accord NLRB v. Best Prod. Co.*, 765 F.2d 903, 913 (9th Cir. 1985). *Midland's* holding is based on the premise that employees are "mature individuals" who are capable of assessing campaign representations. 263 NLRB at

⁵ RadNet's claim that a union representative "confirmed" (Br.24) the unions' affiliation at the hearing on Objection 2, is not only irrelevant to whether RadNet's offers of proof on its affiliation objections were sufficient, but also false. The Union's counsel repeatedly stated on the record that "the [IAMAW] and the NUHW are not affiliated in any formal way." (ER.515, SER.18-19.) And the Union's representative testified not that the two were affiliates, but that the Union helped train IAMAW organizers because "the more organized healthcare workers there are, [] the more power workers have in our industry." (ER.545.)

132. And in keeping with that premise, the Board will only “intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is.” *Id.* at 133. Here, RadNet proffered no evidence that supports intervention under the forged-document exception, even assuming the Union misrepresented, by omission, its 2012 affiliation announcement and generic labor-related efforts with IAMAW.⁶

The Board also found that RadNet failed to proffer evidence that employees harbored serious doubts as to which labor organization their votes went. (ER.126, 132, 147, 153.) The Board will set aside an election where “employees’ right to select their bargaining representative, a right embedded in Sections 7 and 9 of the Act, was compromised” as a result of voter confusion about which union was on the ballot. *Pac. SW. Container*, 283 NLRB 79, 80 (1987) (ballot contained name of local union that no longer existed because of merger); *Humane Soc’y for*

⁶ RadNet’s argument for applying an exception to *Midland* for “abuse of the Board’s processes” (Br.24-25) finds no support in Board precedent. In this context, abuse of the Board’s processes typically refers to one party’s physical alteration of Board documents to suggest Board partiality. *E.g.*, *NLRB v. Rolligon Corp.*, 702 F.2d 589, 594-95 (5th Cir. 1983). Contrary to RadNet’s suggestion (Br.25), the Board in *Nelson Chevrolet Co.*, 156 NLRB 829, 831 (1966), did not apply *Midland*, or an exception thereto, and is distinguishable. There, the union lost an affiliation, which had a significant impact on the structure of the local organization and a significant effect on the expectations of employees who had signed authorization cards indicating affiliation. 156 NLRB at 831.

Seattle/King Cnty., 356 NLRB 32, 34 (2010) (Board found “widespread confusion among the unit employees regarding whether the voting concerned an existing union that represented employees of another employer or a newly organized union representing only the unit employees”). But that was not the case here. RadNet concedes “there was no evidence of employee confusion in the very scant record [it] developed.” (Br.25.) It suggests, however, that it was in the dark about what employees knew about the purported affiliation because “the evidentiary record was never developed by the Board.” (Br.25.) That claim betrays RadNet’s misunderstanding of the Board’s standard and RadNet’s burden, as “it is not up to the Board staff to seek out evidence that would warrant setting aside the election.” *Amalgamated Clothing*, 424 F.2d at 828.

As for RadNet’s argument that the Board erred in allowing the Union’s name to appear on the ballots without the purported affiliation (Br.26-27), that claim is foreclosed by the parties’ Stipulated Election Agreements, in which RadNet “stipulated to the name of the Union as it would appear on the ballot.” (ER.450 n.1, 452 n.1; ER.459, 462.) Crucially, RadNet does not address this Board finding in its opening brief, and thus waives any challenge to it. *Martinez-Serrano*, 94 F.3d at 1259. In any event, the Board had no affirmative duty to investigate whether the agreed-upon name in the Agreements was correct. And it

is well-settled that “election agreements are ‘contracts,’ binding on the parties that executed them.” *T&L Leasing*, 318 NLRB 324, 325 (1995). In the absence of special circumstances, not present here, the Board will enforce a stipulated election agreement, provided its terms are clear, unambiguous, and do not contravene express statutory exclusions or established Board policy. *T&L Leasing*, 318 NLRB at 325. *Accord Sonoma Vineyards*, 727 F.2d at 865. Even if RadNet did not know of the purported affiliation until the day of the elections, RadNet has since made no attempt to withdraw from them. *See T&L Leasing*, 318 NLRB at 325 (parties may withdraw from approved agreements on affirmative showing of unusual circumstances or agreement of all parties).

Finally, RadNet’s attempt to align this case with *Woods Quality Cabinetry Co.*, 340 NLRB 1355 (2003), falls flat. (Br.23, 26-27.) In fact, as the Board here pointed out (ER.450 n.1, 452 n.1), *Woods* makes clear that there is no “per se rule that an error in the designation of affiliation necessarily invalidates an election.” *Id.* at 1356. Rather, the question as to whether such an error warrants a new election is fact-specific. *Id.* *Woods* is readily distinguishable on its facts, as there, the union’s affiliation with AFL-CIO was material to the campaign, both parties addressed it when speaking with voters, employees were confused about the

affiliation, and the employer notified the Region about the erroneous designation before the election. *Id.* at 1355-56.

b. The challenged ballots

In Objection 4 to each election, RadNet claimed that the Board agents supervising the two elections erred by misrepresenting to the challenged voters in each election that their ballots would, in all circumstances, remain secret. Each objection alleges that a “fundamental infirmity” in the Board’s challenged ballot procedure requires a new election under some unspecified, revised procedure. (ER.129-30, 151; ER.111, 119-20.)

Again, RadNet’s proffer in support of its objections does not warrant overturning the elections. (ER.130-31, 151-53.) RadNet alleged that the Board agent supervising the SFV Interventional election instructed a challenged voter that his vote would still be by secret ballot, and that if his vote was counted, it would first be mixed in with the other ballots from the election. (ER.130; ER.111, 672.) RadNet further claimed that the Board agent supervising the SFV Advanced election told a challenged voter that her vote would be by secret ballot and would not be opened unless needed, but even then, it would remain secret. When the voter expressed a concern about confidentiality, the Board agent purportedly told her that the Board might hold a hearing regarding her eligibility, but her vote

would remain secret. (ER.151-52; ER.119, 657-58.) In both instances, RadNet claims, the Board agent did not instruct the challenged voters that in unique circumstances (*e.g.*, if their ballot was the only determinative, challenged ballot), their vote might be revealed. (ER.130, 152; ER.658, 672-73.) This error, RadNet claims, was more egregious at SFV Advanced, where RadNet withdrew its challenge, and the Board opened and counted the ballot. (ER.151-52; ER.657-59.)

RadNet's allegations, even if true, would not warrant setting aside the elections under Board law.⁷ As discussed above, there is no "per se rule that representation elections must be set aside following any procedural irregularity." *St. Vincent Hosp., LLC*, 344 NLRB 586, 587 (2005). The Board "requires more than mere speculative harm," *J.C. Brock Corp.*, 318 NLRB 403, 404 (1995), and will set aside an election "only if an examination of all the relevant facts surrounding the balloting raises a reasonable doubt as to the fairness and validity of the election," *Bell Foundry*, 827 F.2d at 1346.

⁷ The Second Circuit considered and rejected a similar argument, finding that the employer "point[ed] to no specific evidence that the 'secret ballot' label prejudiced it other than speculation that voters might have changed their votes (away from their true choices)." *NLRB v. Rossman Farms, Inc.*, 2005 WL 2650066, at *1 (2d Cir. 2005).

Here, RadNet failed to show that either Board agent's instructions "affected the integrity of the voting process or may have affected the results of the election." (ER.130, 152.) At most, the Board agents, in educating the two voters about the challenged-ballot process, did not apprise them of the unique situation in which a challenged vote is both determinative *and* the only one challenged. RadNet proffered no evidence that either Board agent deviated from the Board's standard challenged-ballot procedures, or that the instructions otherwise raised a reasonable doubt as to the fairness and validity of either election. *Cf. Harry Lunstead Designs Inc.*, 270 NLRB 1163, 1170 (1984) (election overturned where Board agent's erroneous instruction caused observer not to challenge ballot); *Paprikas Fono*, 273 NLRB 1326, 1328 (1984) (improper handling of determinative challenged ballots raised reasonable doubt as to fairness and validity of election); *B & B Better Baked Foods, Inc.*, 208 NLRB 493, 493 (1974) (Board agent arrived "so late as to possibly disenfranchise at least two employees whose shifts [had] ended"). RadNet does not insinuate that any voter, other than the challenged voters, were aware of, let alone "swayed by the agent's statement." *Eskimo Radiator*, 688 F.2d at 1319 (objection overruled where employee misunderstood Board agent's instruction and employer presented no evidence that other voters were affected).

Further, even if the instructions “essentially cajoled” the challenged voters into voting, rather than abstaining, as RadNet insinuates (Br.30), RadNet can show no resulting prejudice. At SFV Interventional, the challenged voter’s ballot was not determinative, not opened, and remained secret. And at SFV Advanced, the Board observed that the challenged voter’s “failure to vote would not have changed the election results in this case.” (ER.152.) Before RadNet withdrew its challenge, the vote tally was 4 votes for the Union, 3 against. Thus, an additional vote for the Union, putting the tally at 5-3, did not affect the result.

Although at SFV Advanced, the challenged voter’s ballot was opened, compromising its secrecy, RadNet fails to support its assertion that the outcome there was “demonstrably harmful.” (Br.31.) The mere fact that, under the unusual circumstances of the challenged vote being the only determinative one and thus revealed, is not in itself prejudicial to RadNet or harmful to the election process. There is no indication that the challenged vote, which turned out to be for union representation, would have been against the Union with different instructions by the Board agent. And, although the challenged voter’s decision to vote for the Union became “publicly known as an unavoidable result of the challenge procedure,” it is long settled that a revelation under such circumstances “does not invalidate [her] vote in the determination of the election results,” or warrant setting

aside the election. *Marie Antoinette Hotel*, 125 NLRB 207, 208 (1959). RadNet ignores this precedent, cited by the Board (ER.131, 153).

Instead, RadNet suggests that the Court should remand the case and require the Board to “reconsider” its longstanding challenged-ballot procedures, without proposing any viable solution that would address the unique circumstances in this case. (Br.27-28, 31.) Importantly, a Board agent’s instructing all challenged voters about the rare possibility that their votes could be revealed, as RadNet ominously puts it “to the Board, to the union, to their employer, to their peers, and to the public” (Br.28), could do more harm than good—confusing voters or causing them to abstain or reconsider their vote. The Board, with vast administrative expertise regarding its election procedures, is best positioned to determine whether such an instruction might actually detract from a free and fair election. *Cal-W. Transp.*, 870 F.2d at 1487 (Board’s “challenge procedures are part of a longstanding practice of the Board . . . [and] will not be disturbed except for an abuse of discretion.”).

c. MRI and Multi-Modality Technologists’ guard status

In Objection 6 (SFV Advanced) and Objection 7 (SFV Interventional), RadNet claimed that the Board “erred by conducting the election in violation of Section 9(b)(3)” of the Act, 29 U.S.C. § 159(b)(3), which requires “guards” to be

separated from non-guards for purposes of collective bargaining.⁸ (ER.132, 153; ER.112, 120.) RadNet contends that its MRI and Multi-Modality Technologists at each facility “could have met” (Br.35) the statutory requirements for guard status and that it was entitled to a hearing to determine whether, consistent with that provision, they should have been excluded from the units of technical employees.

In support of its objections, RadNet proffered its Medical and Health Physicist Hiendrick Vartani, who would testify that MRI and Multi-Modality Technologists maintain the security of two “zones” that surround the MRI machine and make sure that metal does not enter the room housing the machine. Those employees also purportedly can “forcibly” remove people from that room, or the general area, if necessary to ensure the safety of employees, visitors, and patients. Additionally, MRI and Multi-Modality Technologists are allegedly tasked with protecting employees, visitors, and patients (by canceling scans, clearing a room, or evacuating the facility) in the event an MRI machine malfunctions, as the

⁸ “[T]he Board shall not . . . decide that any unit is appropriate for [collective bargaining] if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer’s premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.” 29 U.S.C. § 159(b)(3).

machine can heat up and ultimately explode. (ER.132, 153-54; ER.659-61, 674-76.)

RadNet, however, raised the objections to its employees' purported guard status too late. (ER.132, 154, 450 n.1, 452 n.1.) The Board distinguishes between election *challenges*, which a party lodges before or during the election and concern the eligibility of prospective voters, and *objections*, which a party files after the election and relate to the working of the election mechanism and the process of counting ballots. *A.J. Tower*, 329 U.S. at 334; *see* 29 C.F.R. § 102.69(a). The Board "has long held that it will not entertain postelection challenges, or objections which are in the nature of postelection challenges." *Poplar Living Ctr.*, 300 NLRB 888, 888 n.2 (1990). *Accord A.J. Tower*, 329 U.S. at 331 ("One of the commonest protective devices [in an election] is to require that challenges to the eligibility of voters be made prior to the actual casting of ballots, so that all uncontested votes are given absolute finality."). Thus, "once a ballot has been cast without challenge and its identity has been lost, its validity cannot later be challenged' on post-election challenges to voter eligibility." *Saint-Gobain Indus. Ceramics, Inc. v. NLRB*, 310 F.3d 778, 779 (D.C. Cir. 2002) (quoting *A.J. Tower*, 329 U.S. at 331-32).

Here, RadNet’s claim that MRI and Multi-Modality Technologists are guards plainly ran “afoul of the Board’s longstanding rule against postelection challenges.” (ER.450 n.1, 452 n.1.) Before the election, RadNet stipulated that each unit, including “[a]ll . . . Technical employees,” was “appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.”⁹ (ER.458, 461.) RadNet furnished the lists of eligible voters, in accordance with those stipulations. (ER.459, 462.) 29 C.F.R. § 102.62(d). And RadNet failed to challenge the voting eligibility of these individuals before they cast their ballots. It was not until *after* the Union prevailed in each election that RadNet claimed that MRI and Multi-Modality Technologists are statutory guards and should be excluded. Thus, consistent with longstanding precedent, the Board declined to entertain RadNet’s impermissible post-election challenges.

RadNet does not convincingly challenge the Board’s finding that its post-election challenges were untimely. At most, it wrongly suggests (Br.36-37) that a guards challenge can never be too late, citing *Brink’s, Inc.*, 272 NLRB 868 (1985) and *University of Chicago*, 272 NLRB 873 (1984). But neither of those cases

⁹ The stipulations’ boilerplate language excluding statutory guards from the units cannot save RadNet from its procedural misstep. (Br.37.) Before the election, RadNet had to identify which Technical employee positions it believed fell within the exclusion.

addressed an untimely, *post*-election challenge to employees' status as guards. And neither case stands for the nonsensical proposition that RadNet appears to advance (Br.34, 37) – that the Board must go behind the parties' stipulations and affirmatively investigate guard status of employees the parties agreed to include in the unit. *See NLRB v. Paper Art Co.*, 430 F.2d 82, 85 (7th Cir. 1970) (“it was the responsibility of [the employer] or the union, rather than that of the Board’s agent, to make the challenge [that employees were guards] if any was indicated”).

RadNet cites a scrap of transcript from a prior related case to assert that the Regional Director was “particularly arbitrary” in not, at least, setting the guard objections for hearing. In that case, RadNet argues, the Regional Director found similar proof warranted a hearing on guard status.¹⁰ (Br.34 n.5.) But the Board has “long held that [unreviewed] Regional Director’s decisions do not have precedential value.” *S.H. Kress & Co.*, 212 NLRB 132, 132 n.1 (1974).

Moreover, that transcript was from a pre-election proceeding to determine the

¹⁰ The offer of proof in the prior case was not “virtually identical” (Br.34 n.5), as RadNet claims. In the prior proceeding, RadNet offered evidence about not just MRI technologists, but also nuclear medicine technologists. (ER.688-90.) RadNet also claimed that MRI technologists had the authority to report to police any individual who refuses to leave the MRI area (ER.687) and, unlike here, proffered details about its witness’s personal knowledge of the disputed employees’ job duties (ER.692).

employees' status before voting. The case was ultimately withdrawn, and in the instant cases, RadNet appeared to have abandoned its challenge by stipulating to the appropriate unit. It was not until after the two elections that RadNet belatedly revived its guards challenge. Thus, the Regional Director's *post*-election rejection of RadNet's offer, after it appeared that RadNet agreed to abandon the issue, is not comparable to any *pre*-election indication that a hearing was warranted.

In any event, even if RadNet's objection was procedurally proper, the Board found its proffer insufficient to establish that the MRI and Multi-Modality Technologists are statutory guards. (ER.132-34, 154-55.) Under Section 9(b)(3), a guard is an "individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." 29 U.S.C. § 159(b)(3). Interpreting that provision, the Board has described guard responsibilities as "those typically associated with traditional police and plant security functions, such as the enforcement of rules directed at other employees; the possession of authority to compel compliance with those rules; training in security procedures; weapons training and possession; participation in security rounds or patrols; the monitor and control of access to the employer's premises; and wearing guard-type uniforms or displaying other indicia of guard status." *Boeing Co.*, 328 NLRB 128, 130 (1999).

Congress chose to separate statutory “guards” from all other employees, in part, to minimize the danger of “conflicting loyalties in the event of a strike.” *Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5, 8 (2d Cir. 1985); *Lion Country Safari*, 225 NLRB 969, 970 (1976) (separation is to “insure an employer that he would have a core of plant protection employees, during a period of industrial unrest and strikes”). By segregating them, Section 9(b)(3) “limits the organizational rights of guards.” *Truck Drivers Local Union No. 807*, 755 F.2d at 8. Thus, any guard responsibilities must be more than “a minor or incidental part of [an employee’s] overall responsibilities.” *Boeing*, 328 NLRB at 130.

RadNet, as the party bearing the burden of proving guard status, was not entitled to a hearing on this objection simply by using declaratory words like “police,” “security,” and “forcibly remove” in its offers of proof.¹¹ “Mere conclusory statements are insufficient to support a request for a hearing,” *NLRB v. Adrian Belt Co.*, 578 F.2d 1304, 1311 (9th Cir. 1978), and the Board here found RadNet’s descriptions of its employees’ job duties suspiciously “lack[ing in] specificity.” (ER.133, 154.) Vartani’s proposed testimony focused on

¹¹ The burden is on the party asserting guard status. *Cf. NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001) (burden of proving supervisory status is on party asserting the exception).

hypothetical, worst-case scenarios and described “*potential* hazardous malfunctions and what the Technologists *could* do in those situations.” (ER.133, 155.) But he left unsaid whether, or how often, such incidents have occurred in the course of the Technologists’ day-to-day tasks. Tellingly, RadNet did not offer any evidence of Vartani’s personal knowledge of the Technologists’ job duties, nor did it offer testimony from employees who actually perform the work in question.

Moreover, RadNet failed to show that the employees’ purported guard-like duties (*e.g.*, maintaining “security” of the zones around the MRI machine) are anything more than incidental to their core functions as MRI or Multi-Modality Technologists. (ER.133, 155.) In its offers of proof and again here, RadNet shies away from any description of the Technologists’ actual jobs – performing diagnostic imaging examinations on patients. Instead, it plays up pseudo, guard-like tasks that are incidental to that function, like restricting access to the room where MRIs are performed. In similar circumstances, the Board has declined to extend guard status to employees whose purported guard-like duties were, as here, limited to monitoring access at the employer’s facility. *Wolverine Dispatch, Inc.*, 321 NLRB 796, 798 (1996) (receptionists who monitored access to employer’s front entry and lobby were not guards; guard-like duties were incidental to clerical duties); *55 Liberty Owners Corp.*, 318 NLRB 308, 310 (1995) (doorpersons and

elevator operators' monitoring access to buildings was incidental to primary function of providing courtesy-oriented and receptionist services).

The Board also pointed out that RadNet's proffer of the MRI and Multi-Modality Technologists' job duties did not present a concern about "conflicting loyalties during a period of industrial unrest and strikes" (ER.134, 155), which, contrary to RadNet's suggestion (Br.36), is a valid consideration. RadNet purports that beyond divided loyalties, the Board considers whether employees enforce company safety rules and/or report safety rule infractions to the appropriate authorities (Br.33-34, 36). But that argument is confusing, given that RadNet did not offer any specific and non-conclusory evidence that its MRI and Multi-Modality Technologists perform such tasks.¹²

Finally, RadNet's cited cases (Br.33-35) actually help illustrate that it proffered insufficient evidence of guard status. In those cases, unlike here, the employees were tasked with significant security responsibilities, given authority to use a firearm, possessed commonalities with the employer's other guard

¹² RadNet also halfheartedly attacks (Br.36 n.6) the Board for noting (ER.134, 155) that RadNet presented no evidence that the Technologists protect RadNet's property from theft. Although that might not be dispositive, or the most important factor in determining guard status, it is an uncontested factor that supports the Board's finding here.

employees, made rounds, and/or enforced company rules against fellow employees. Thus, even if RadNet had properly challenged the eligibility of its MRI and Multi-Modality Technologists, it failed to offer sufficient evidence of their guard status.

d. No-electioneering zone at SFV Interventional

In Objection 3, RadNet claimed that the election at SFV Interventional should be set aside because the Board agent did not designate nor police a “no-electioneering zone” at the polling place during the election. (ER.129; ER.111.) According to RadNet’s offer of proof, the Board agent supervising the election told RadNet’s counsel that the Board does not designate such a zone, but that she had posted signs nearby indicating the polling area. RadNet claimed that the door to the voting area was open just three inches during polling, and that the Board agent and parties could not observe or “police” what was happening outside the room. (ER.129; ER.671.)

Objection 3 and its accompanying proffer allege no objectionable conduct under Board law. As RadNet now seemingly acknowledges (Br.38), Board agents are not required to designate a “no-electioneering zone” (ER.129). Rather, the “establishment of an area in which electioneering is not permitted must in the first instance be left to the informed judgment of the regional director and agents

conducting the election.” *NLRB v. Aaron Bros. Corp.*, 563 F.2d 409, 412 (9th Cir. 1977). *Accord* NLRB Casehandling Manual, Part 2, Representation Proceedings, Section 11318 (2017) (“A no-electioneering area *may* be designated.” (emphasis added)). In elections where the Board agent does not designate a no-electioneering zone, electioneering is prohibited in “the customary area ‘at or near the polls.’” *Bally’s Park Place, Inc.*, 265 NLRB 703, 703 (1982).

RadNet did not proffer any evidence that the Board agent deviated from Board procedures or, “[i]mportantly[,] . . . allege unlawful electioneering” occurred. (ER.129.) RadNet, however, suggests (Br.38) that, even absent evidence of electioneering, the Board agent had an affirmative duty to “police” the area outside the door to the polling room. But none of its cited cases (Br.38) stand for that proposition; each involves electioneering. *Cf. Amalgamated Serv. & Allied Indus. Joint Bd. v. NLRB*, 815 F.2d 225, 231 (2d Cir. 1987) (rejecting employer’s request to overturn election because Board agent failed to prevent union observers from talking with employees and pro-union chanting during polling); *Victoria Station, Inc. v. NLRB*, 586 F.2d 672, 675 (9th Cir. 1978) (“Board’s agent at times might have been more attentive to the election, [but] these lapses caused no harm and provide no basis for setting the elections aside.”). Although RadNet laments the “severely limited” record on its objection (Br.38), it needed to allege conduct

objectionable under Board law and offer proof of that conduct. Surely, RadNet cannot meet its burden by claiming that the record “contain[ed] no evidence” (Br.38) that the Board agent met some (optional) duty to designate a no-electioneering zone or some vague obligation to “police” the area. It is not “entitled to a hearing merely by imagining fanciful acts of misconduct that find no support in the evidence.” *Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 61 (D.C. Cir. 2016).

e. List-keeping at SFV Interventional

In Objection 5 to the election at SFV Interventional, RadNet contended that the election should be overturned because the Board agent supervising the election allowed the Union’s observer to use a highlighter to make marks in a study guide during polling. (ER.131; ER.111, 673.) According to RadNet’s proffer, neither RadNet’s observer nor the Board agent reviewed the study guide to ensure that the Union’s observer was not keeping a list of employees who voted in the election. (ER.131; ER.673-74.)

Consistent with well-settled principles, the Board found this objection and accompanying offer of proof did not allege conduct that would warrant setting aside the election. (ER.131.) Except for the official eligibility list, parties are not permitted to keep a list of eligible voters at a polling place during a representation

election. *St. Elizabeth Cmty. Hosp.*, 708 F.2d at 1443; *Piggly-Wiggly*, 168 NLRB 792, 792 (1967) (setting aside election where union “admittedly checked off employees’ names as they entered the store for the purpose of determining which employees had voted”). “List keeping,” however, is grounds for setting aside an election only when it can be shown or inferred from the circumstances that employees knew their names were being recorded. *Chrill Care, Inc.*, 340 NLRB 1016, 1016-17 (2003).

Here, RadNet proffered no evidence that the Union observer actually kept a list, or that any voters saw her highlighting her study guide—let alone that they knew or could infer that she was recording their names, rather than studying.¹³ (ER.131.) Again, RadNet exposes a misunderstanding of its burden and the Board’s standard. Plainly, it is not entitled to a hearing to “confirm that no

¹³ *Piggly-Wiggly* and *Chrill* do not support RadNet’s contention (Br.41 n.7) that the Board here applied an overly demanding standard for its objection. In *Chrill*, the employer alleged that the union “record[ed] the names of employees who appeared to vote.” 340 NLRB at 1016. And in *Piggly-Wiggly*, the employer alleged that the union took notes on a separate sheet of paper “in full view of all employees” entering and exiting to vote, and the union admitted to list-keeping during the regional director’s investigation. 168 NLRB at 792. Here, RadNet raised nothing more than a reasonable inference that the Union’s observer was studying during polling.

unlawful activity had taken place” (Br.41 (emphasis added)) when it failed, in the first place, to allege that any unlawful activity took place.

f. Harassment at SFV Advanced

In Objection 3 to the election at SFV Advanced, RadNet claimed that two employees, acting as union agents, harassed eligible voters during the organizing campaign. (ER.149; ER.119.) In support of its objection, RadNet offered that Brittany Maguire (a non-bargaining unit employee who covered shifts at SFV Advanced), Patrice Patterson (Site Manager at SFV Advanced), and Laurie Touma (an employee at SFV Advanced) would testify that two SFV Advanced employees harassed and intimidated Maguire and an unspecified number of anonymous employees by repeatedly urging them to vote for the Union, while on working time and even while providing services to patients. Maguire, who was ineligible to vote as a non-unit employee, would also testify that a different pro-union employee “cornered” her and urged her to sign a union petition and that she felt so harassed that, despite her opposition to the Union, she agreed to sign union documents and told a union organizer she would vote for the Union. Site Manager Patterson would testify that one employee at SFV Advanced was so frightened of the Union that s/he wished to remain anonymous. Purportedly, pro-union employees “ceaselessly” harassed that employee, and s/he was so scared that s/he told them

s/he would vote for the Union despite her/his personal opposition. The anonymous employee told Patterson that s/he might vote for the Union, rather than risk the consequences of voting no, and that if the Union discovered her/his opposition to the Union, s/he would have no choice but to transfer to another job. (ER.149; ER.654-57.)

The Board's decision to overrule this objection without a hearing was well within its broad discretion. (ER.149-51.) Even assuming the pro-union employees were agents of the Union, as the Board did (ER.149-50 & n.3), and even assuming they repeatedly asked for support from other employees, RadNet failed to allege specific misconduct of the type that would warrant setting aside the election.¹⁴

As the Board found (ER.150), RadNet failed to proffer sufficient evidence that the Union's conduct had "the tendency to interfere with the employees' freedom of choice," under the Board's standard for setting aside an election based on party misconduct. *Taylor Wharton Div. Harsco Corp.*, 336 NLRB 157, 158 (2001) (listing nine factors relevant to Board's analysis). *Accord Spring City Knitting*, 647 F.2d at 1019. This is an objective test. *Capay, Inc. v. NLRB*, 714 F.

¹⁴ RadNet's agency arguments (Br.42-43) are irrelevant, given that the Board assumed *arguendo* that the pro-Union employees acted as union agents and analyzed the objection under the Board's less onerous party misconduct standard.

App'x 684, 686 (9th Cir. 2017). And here, the Board found that, on balance, the proffer weighed against finding the Union's alleged conduct objectionable.¹⁵ (ER.150.)

Indeed, several relevant factors weigh against such a finding. Significantly, RadNet's allegations were vague; they alleged neither a specific number of incidents, nor specific timing, which made it difficult for the Board to assess the proximity of the alleged misconduct to the election. Contrary to RadNet's assertion (Br.44), the Board acknowledged that RadNet broadly declared that union agents urged employees to vote for the Union "repeatedly" or "virtually non-stop" (ER.150); however, it discounted such conclusionary phrases as lacking in specificity. *Amalgamated Clothing Workers*, 424 F.2d at 828 (employer's burden is "not met by nebulous and declaratory assertions, wholly unspecified"). Indeed, despite claiming the harassment was "virtually non-stop" or "ceaseless[]" over an unspecified period of time, RadNet provided just two concrete examples, both

¹⁵ The Board took into consideration factors that weighed in favor of finding the conduct objectionable, including the percentage of voting-eligible employees subjected to the alleged misconduct; the close (5-3) vote tally; that RadNet apparently engaged in no misconduct; and that the misconduct arguably could be attributed to the Union. The Board simply found those factors outweighed by the other relevant considerations discussed next. (ER.150.)

primarily featuring the non-voting eligible employee. Further, even regarding RadNet's vague allegations of harassment, it offered no tangible evidence that the alleged misconduct disseminated beyond two bargaining-unit employees.¹⁶ (ER.150 n.4, 151.)

Critically, the Board found that “the offer of proof does not describe conduct that was severe[,] likely to cause fear among the employees in the bargaining unit,” or that would persist in the minds of voters. (ER.150-51.) Giving RadNet all benefit of the doubt, at most, union agents frequently asked two voting-eligible employees, sometimes while they were working, to vote for the Union.¹⁷ RadNet does not allege that they engaged in conduct that the Board has found objectionable, such as threats, intimidation, physical violence, vandalism, or refusing to leave the employer's premises. (ER.151.) *Cf. Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16, 16 (1991) (repeated, belligerent refusals to leave premises); *Kennicott Bros. Co.*, 284 NLRB 1125, 1125 (1987) (threats and

¹⁶ Contrary to RadNet's claim (Br.43), the Board did not discredit Maguire's proposed testimony. Although the Board mentioned that she was not employed at SFV Advanced, it did so in the context of analyzing “the number of employees in the bargaining unit subjected to the misconduct,” one of the factors relevant to determining the conduct's coerciveness. (ER.150 & n.4.)

¹⁷ RadNet presented no evidence that it prohibits employees from talking about non-work topics during work time.

physical violence). And the Board, with court approval, has found that even “aggressive” or “obnoxious” campaigning is not sufficient cause for setting aside an election. *Spring City Knitting*, 647 F.2d at 1019 (evidence of “election campaign marked by [u]nion conduct which was uniformly aggressive, sometimes overbearing, and occasionally obnoxious,” was insufficient to warrant hearing or overturn election); *AOTOP, LLC v. NLRB*, 331 F.3d 100, 104 (D.C. Cir. 2003) (election upheld where union agent “told fellow employees they ‘had to’ vote for the [u]nion, asked employees how they were going to vote, and followed an employee while she worked”).

Yet, RadNet inexplicably claims (Br.44-45) that 25% of the bargaining unit was so afraid of the Union that they pretended to support it out of fear of retribution. That allegation differs from RadNet’s offer of proof, which mentions only one (anonymous) voting-eligible employee who harbored such fears and indicated s/he “might” vote for the Union as a result. (ER.656.) In any event, RadNet’s “legally insufficient subjective impressions by employees” are not enough to show objectionable conduct or warrant a hearing. *Capay, Inc.*, 714 F. App’x at 686. Because RadNet does not describe the type of conduct that would objectively make reasonable employees afraid or hinder their freedom of choice in a secret ballot election, the Board did not err in overruling this objection without a

hearing. *Cf. NLRB v. Lovejoy Indus., Inc.*, 904 F.2d 397, 402 (7th Cir. 1990) (“[p]rofessions of fear from employees who do not or cannot explain its basis do not oblige the Board to conduct a hearing”).

D. After Conducting a Hearing, the Board Properly Overruled Objection 2

In Objection 2 to each election, RadNet claimed that the elections should be set aside because the Union and/or IAMAW harassed RadNet and eligible voters by filing false police reports against other RadNet facilities and employees. (ER.128, 148, 311, 324; ER.110, 118-19.) As shown below, the Board’s decision to overrule Objection 2, after a hearing, is well-supported and within its broad discretion. At the hearing, RadNet refused to present any evidence of objectionable conduct. And RadNet cannot blame the Board’s evidentiary and procedural rulings for its failure to prove its case.

1. RadNet failed to present evidence regarding Objection 2

As discussed above, an employer seeking to set aside an election based on pre-election conduct must show either that the union engaged in misconduct that has “the tendency to interfere with the employees’ freedom of choice,” *Taylor Wharton*, 336 NLRB at 158, or that a third party engaged in misconduct “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible,” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).

Accord Eskimo Radiator, 688 F.2d at 1319. Crucially, the employer must also show dissemination—*i.e.*, that the conduct in question reached employees in the voting unit. *See NLRB. v. Chicago Tribune Co.*, 943 F.2d 791, 795-96 (7th Cir. 1991) (rejecting employer’s objection because it failed to allege dissemination to voting unit); *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000) (“objecting party must establish dissemination of statements allegedly interfering with preelection conditions”); *Westwood Horizons Hotel*, 270 NLRB at 803 (dissemination relevant to conduct’s seriousness).

RadNet, however, presented no evidence at the hearing to support its allegations that anyone (Union or third party) filed police reports against other RadNet employees or facilities, that those reports were false, or that voting-eligible employees had any knowledge of the reports. RadNet refused to call the witnesses identified in its offers of proof—three Site Managers and two employees from other RadNet facilities—who, it initially claimed, would testify about the false police reports and their dissemination to unit employees. (ER.526-27, 537-40, 650-54, 667-70.) RadNet did not call any employees from SFV Interventional or SFV Advanced to testify about their experience with, or knowledge of, false police reports at other facilities. RadNet did not enter any documents into the record that would establish objectionable conduct or its dissemination. And, although union

representative Mendoza appeared in response to RadNet’s subpoena and testified both individually and as the Union’s records custodian, RadNet did not ask her any questions about the alleged misconduct.

Consequently, the Board found, the objections could not be sustained. For “under either the standard applied to party misconduct or the standard applied to third-party misconduct, other than record evidence regarding the closeness of the election, [RadNet] wholly failed to present any other relevant evidence . . .” that would allow the Board to evaluate the purported misconduct or its dissemination to the voting unit. (ER.314, 327.) *See Bell Foundry*, 827 F.2d at 1343 (employer presented no credible evidence that improprieties occurred, let alone that they interfered with employees’ free choice); *Eskimo Radiator*, 688 F.2d at 1319 (“The closeness of the vote is simply one factor the board and courts consider in scrutinizing pre-election conduct. It is not the controlling factor.”).

2. RadNet’s attacks on the fairness of the hearing are without merit

RadNet does not claim to have met the requisite evidentiary burden for setting aside an election based on pre-election misconduct. Instead, it purports (Br.45-51) that the Regional Director and Hearing Officer prevented it from proving its case by declining to institute judicial enforcement proceedings for its unanswered subpoenas and prematurely closing the record. But, as the Board

found, and as shown below, “Regional Directors in representation cases have the discretion to close the record and refuse enforcement of subpoenas where, as here, the subpoenas constitute a mere ‘fishing expedition.’” (ER.450 n.1, 452 n.1.) At the hearing, RadNet repeatedly refused to present any evidence of objectionable conduct, including the evidence—independent of that requested by its subpoenas—that it originally proffered. As for its subpoenas, RadNet offered only speculation that they would uncover any objectionable conduct or dissemination to the voting unit. Thus, RadNet can neither show that the Board’s procedural decisions were erroneous, nor that it was prejudiced from them.

a. Subpoena enforcement

The Board’s Rules and Regulations provide that “[u]pon the failure of any person to comply with a subpoena issued upon the request of a private party, the General Counsel will . . . institute enforcement proceedings in the appropriate district court, unless in the judgment of the Board the enforcement of the subpoena would be inconsistent with law and with the policies of the Act.” 29 C.F.R. § 102.31(d). Consistent with the latter part of the rule, the Board, with Court approval, will not institute enforcement proceedings for subpoenas that are merely fishing for possible relevant evidence. *Spartan Dep’t Stores*, 140 NLRB 608, 608 n.2 (1963) (judicial enforcement proceedings would be “inconsistent with the

policies of the Act” because subpoena was “fishing expedition” intended to delay proceeding). *Accord Bel Air Chateau Hosp., Inc.*, 611 F.2d 1248, 1253 (9th Cir. 1979) (Board properly refused to enforce employer’s subpoenas that were mere “fishing expedition”); *SR-73 & Lakeside Ave. Operations, LLC*, 365 NLRB No. 119, 2017 WL 3580355 at *2 n.2, 6 (2017) (refusing to delay proceedings to enforce employer’s subpoena because “waste of time involved clearly outweighs the remote chance that the subpoena will reveal probative material”).

“The Board’s decision regarding the enforcement of subpoenas is a discretionary one.” *Adrian Belt*, 578 F.2d at 1310; *see Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1153-54 (D.C. Cir. 2000). And a party challenging the Board’s decision not to seek judicial enforcement of its subpoena must not only show that the Board abused its discretion, but also that it was prejudiced by the error. *See Napili Shores Condo. Homeowners’ Ass’n v. NLRB*, 939 F.2d 717, 721 (9th Cir. 1991); *Adrian Belt*, 578 F.2d at 1310.

Here, the Regional Director did not abuse her discretion in declining to institute judicial enforcement proceedings for RadNet’s unanswered subpoenas. RadNet “failed to offer a sufficient offer or proof supported by a sound factual basis.” (ER.317, 330.) At most, RadNet surmised that the subpoenas to the LAPD *could* produce probative evidence about police reports involving unit employees

and that the other subpoenas *could* produce communications about police reports between subpoenaed individuals and unit employees. (ER.315, 317, 328, 330.)¹⁸ But RadNet did not provide any factual basis for that speculation other than its earlier, also unsupported, allegation that someone filed false police reports against Site Managers and employees from other facilities. (ER.317, 330; ER.517, 538-39, 578-79, 581-82.) Given the “total absence of evidence in the record regarding [those] alleged false police reports” (ER.318, 331), the Board reasonably dubbed RadNet’s subpoenas “a mere ‘fishing expedition,’” in search of possible pre-election misconduct (ER.318, 331, 450 n.1, 452 n.1). And the Regional Director properly exercised her discretion in declining to institute district court proceedings, and to delay the hearing, to further that end.

The Regional Director also noted that RadNet failed to show that its subpoenas to the LAPD would supply the requisite evidence of dissemination to the voting unit. (ER.318-19, 332.) *See Equinox Holdings, Inc. v. NLRB*, 883 F.3d 935, 940 (D.C. Cir. 2018) (no abuse of discretion in refusing to enforce employer’s

¹⁸ RadNet’s representations regarding its subpoenas reveal that it had no clue what evidence they would turn up: “[T]here *may or may not* be relevant evidence contained in them (ER.514 (emphasis added)); “I don’t have that [evidence]. That’s what the subpoena’s for” (ER.558). (See also ER.538, 561, 579, 581-82 regarding RadNet’s uncertainty about what evidence the subpoenas could yield.)

subpoena where employer “never made a proffer of testimony that might have been crucial”); *Adrian Belt*, 578 F.2d at 1310 (“probative value of the requested material would have been minimal”); see *SSC Mystic Operating Co., LLC v. NLRB*, 801 F.3d 302, 315 (D.C. Cir. 2015) (employer “was not prejudiced [by refusal to enforce subpoenas] because these records simply could not have changed the outcome”). At most, had the LAPD responded, it might have produced police reports about other RadNet facilities and employees and the LAPD’s response to those reports. But RadNet provided no indication that the subpoenaed evidence would reveal that any such reports were disseminated to unit employees. And, as made clear above, RadNet presented no factual basis at the hearing for its speculation, repeated here (Br.47 n.9), that voting-eligible employees themselves were subjects of false police reports.

As for the other subpoenas, the Regional Director found that RadNet “failed to make a sufficient offer of proof, beyond speculation, that its subpoenas *duces tecum* to IAMAW, Carrillo, [and others who may have worked on the campaign] would produce probative information not otherwise covered by its subpoenas to the Union and Mendoza.” (ER.319, 332.) *Cf. Brink’s Inc.*, 281 NLRB 468, 469 (1986) (in considering petition to revoke, Board can consider whether information sought is cumulative or duplicative). Those subpoenas essentially sought “the

same information from a different source.”¹⁹ (ER.319, 332.) Further, two of the not-yet-issued subpoenas sought information from individuals who only attended one or two employee meetings and did not work on the union campaign during the time the objectionable conduct supposedly occurred. (SER.12-13.) Thus, not only were the subpoenas to those individuals duplicative, but they were also unlikely to produce any information critical to proving RadNet’s objections. (ER.319, 332.)

Moreover, RadNet “could have obtained the subpoenaed evidence it sought by other means.” (ER.317, 330.) As discussed above, RadNet admitted that it could, but repeatedly refused to, present the evidence outlined in its offers of proof, which served as the basis for the Regional Director’s decision to set the objections for a hearing in the first place.²⁰ (ER.317, 330; ER.525, 527, 549, 552, 554-59, 562, 569-71, 650-54, 667-70, SER.1, 20-22.) Likewise, RadNet chose not to subpoena any of its employees in the two voting units, or to ask Mendoza any questions about the alleged police reports. Thus, “[t]he fact that [RadNet] chose to

¹⁹ In response to the subpoenas to the Union, Mendoza questioned Carrillo and two union representatives as to whether they had any information (including in their texts and work emails) responsive to the requests. (ER.316, 329; SER.8-10, 15.)

²⁰ In direct contradiction with its offers of proof (ER.653, 669-70), RadNet now asserts (Br.47-48 n.10) that its proffered witnesses could not have testified about dissemination after all.

not subpoena [those] witnesses and/or present any witness testimony regarding the alleged false police reports supports not seeking enforcement of [its] subpoenas.” (ER.317, 330.) Certainly, RadNet cannot show, as it must, that its case was prejudiced from the denial of enforcement, rather than from its own refusal to present the evidence admittedly at its disposal. *See 800 River Rd. Operating Co., LLC v. NLRB*, 846 F.3d 378, 387 (D.C. Cir. 2017) (employer, who failed to call relevant witnesses, “cannot simply create (or contribute to the creation of) prejudice and then plead reversible error. It must demonstrate the [Board]’s error was dispositive.”); *SSC Mystic*, 801 F.3d at 314 (employer “cannot complain that it was prejudiced when it failed to call the only witness whose testimony might have made the records relevant”). *Cf. Heath TEC Div./San Francisco*, 566 F.2d at 1372 (“Seeing how [employer] missed several opportunities to present a stronger case, we do not see how it can claim prejudice now.”).

RadNet claims that the Regional Director, in finding fault with RadNet’s offers of proof, used “circular logic” and an overly demanding standard for subpoena enforcement. (Br.47-48.) But this claim ignores that RadNet bears the burden to provide at least some factual basis, beyond speculation, to support its claim that the subpoenaed parties would provide pertinent information. RadNet also misconstrues the Regional Director’s decisions as maligning it for having “*too*

much evidence at [its] disposal.” (Br.48 n.11.) But she plainly did not find that RadNet had too much evidence. The problem was that RadNet presented *no* evidence. And tellingly, RadNet can point only to a dissenting opinion to support its claim (Br.48 n.11) that the Regional Director erred in considering RadNet’s ability to present evidence from other sources.

Finally, RadNet’s claim that the Regional Director erroneously applied the Board’s standard for revoking subpoenas (Br.49-50) is unclear and not supported by precedent. RadNet appears to argue that, in declining enforcement, the Board improperly analogized to cases where the Board revoked a party’s subpoena. (*E.g.*, ER.319, 332 (citing *Brink’s*, 281 NLRB at 469 and noting similar language in two standards).) But RadNet fails to identify any functional differences between the Board’s standard for revoking a subpoena and its standard for declining enforcement that would make such an analogy inappropriate.²¹ Nor do any distinctions between the two standards support the proposition that the Board must

²¹ As discussed above, the Board can decline to institute judicial enforcement proceedings, if, in its judgment, “the enforcement of the subpoena would be inconsistent with law and with the policies of the Act.” 29 C.F.R. § 102.31(d). Although the standard for revocation is, to some extent, more specific (“evidence whose production is required does not relate to any matter . . . in question . . . or the subpoena does not describe with sufficient particularity the evidence whose production is required”), the Board can also revoke a subpoena “if for any other reason sufficient in law the subpoena is otherwise invalid.” *Id.* § 102.66(f).

further a party's fishing expedition through subpoena enforcement proceedings, unless the subpoenaed entity petitions to revoke. To the contrary, the above-cited cases support the Regional Director's refusal to institute enforcement proceedings here. RadNet fails to grapple with this precedent or to show that prejudice, if any, resulted from the Regional Director's decisions, rather than its own refusal to put on a case.

b. Closing the hearing

For similar reasons, the Hearing Officer did not abuse her discretion in closing the hearing after RadNet, despite numerous opportunities, continued to refuse to call any witnesses in support of its objections. (ER.172-73 n. 4, 178-79 n.4, 320, 333; ER.576.) By the first day of the hearing, the subpoenaed witnesses and entities had already missed their deadline for responding to the subpoenas. And the Regional Director had declined to enforce RadNet's outstanding subpoenas for the well-supported reasons discussed above. Thus, "there was no reason to keep the record open any longer than it had been kept open in order to afford subpoenaed witnesses the standard five-day period to submit a petition to revoke the subpoena or, alternatively, to produce the subpoenaed documents."

(ER.320, 333.) *See* 29 C.F.R. § 102.66(f) (providing subpoenaed parties five days after service to file petition to revoke).

Without mention of its refusal to present any evidence, including the evidence it initially proffered, RadNet faults the Hearing Officer for assertedly shirking her “obligation to ensure the creation of a full, fair and complete record.” (Br.51.) But RadNet points to nothing in the Board’s Rules and Regulations, or its precedent, that requires a Hearing Officer to keep the record open when a party refuses to put on any evidence in support of its case, in order to wait for reluctant parties to respond to subpoenas that seek evidence that may or may not exist and that were served one business day before the hearing. And contrary to RadNet’s assertion, the Hearing Officer did not close the record “without explanation” or “arbitrar[ily] depart[] from her stated course.” (Br.50-51.) Rather, she made clear at the end of the first day of hearing that the next day, “I expect [RadNet] to present evidence regarding employee knowledge of misconduct at the two location[s] at issue.” (ER.553, SER.17.) Then, when RadNet refused to do so, the Hearing Officer gave a lengthy explanation of her decision to close the record. (ER.586-87, SER.23.)

The Board agreed (ER.450 n.1, 452, n.1) that the Hearing Officer properly exercised her discretion in closing the record because the outstanding subpoenas

were merely fishing for, as RadNet describes it, “potentially significant” evidence (Br.51 n.12). Thus, RadNet can show neither that the Hearing Officer abused her discretion in closing the record, nor (considering its refusal to put on any other evidence) that it was prejudiced therefrom. *See 800 River Rd.*, 846 F.3d at 390 (no reversible error where hearing officer excluded testimony of eight employees due to employer’s failure to “provide any basis . . . for that testimony”); *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 68 & n.13 (D.C. Cir. 2015) (no prejudice in hearing officer’s decision to close record absent indication that employer “sought to introduce relevant, non-cumulative evidence”).²²

E. The Board Properly Precluded RadNet from Relitigating Its Representation Claims

Lastly, RadNet’s challenge (Br.52-54) to the Board’s application of its longstanding no-relitigation rule borders on frivolous. Under this rule, in the absence of newly discovered evidence or other special circumstances, a party is not entitled to relitigate in a subsequent refusal-to-bargain unfair-labor-practice proceeding the representation issues that were or could have been litigated in the

²² In *Salem Hospital*, the D.C. Circuit expressed concern with RadNet counsel’s apparent use of subpoena requests as a delaying tactic to prevent the hearing officer from closing the record, finding such a tactic, if true, “regrettable.” 808 F.3d at 68 n.13 (noting counsel’s repeated “sharp practice” before court).

prior representation proceeding. 29 C.F.R. §§ 102.67(g), 102.69(c)(2); *see Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *Sahara Datsun, Inc. v. NLRB*, 811 F.2d 1317, 1320 (9th Cir. 1987). As this Court recognizes, “[t]he rule against re-litigation was designed to insure that such issues will be resolved early in the game, rather than permitting parties to hold back evidence knowing that they will get a second bite at the apple should they lose.” *NLRB v. W.S. Hatch Co.*, 474 F.2d 558, 562-63 (9th Cir. 1973); *see Pace Univ. v. NLRB*, 514 F.3d 19, 24 (D.C. Cir. 2008) (discussing purpose of rule).

RadNet claims that the Board erred in denying it another bite, pointing the Court to *Sub-Zero Freezer Co.*, 271 NLRB 47 (1984), and a handful of cases in which the Board, in its discretion, declined to apply its no-relitigation rule. (Br.52-54.) But, as the Board here found, those are “a limited number of cases in which the Board has departed from the rule.” (ER.2 n.2.) And, even though the Board has, in the past, departed from the rule, it does not necessarily abuse its discretion in declining to follow that rarely applied precedent, as RadNet asserts. (Br.54.) *See Alois Box Co. v. NLRB*, 216 F.3d 69, 78 (D.C. Cir. 2000) (reviewing for abuse of discretion Board’s decision not to hold hearing in technical 8(a)(5) case). Here, after considering its precedent and duly reviewing the record, the Board found “no basis for departing from [its] longstanding rule or disturbing [its] orders denying

review of the Regional Director’s decisions in the underlying representation cases.” (ER.2 & n.2.)

Furthermore, *Sub-Zero Freezer*, and RadNet’s other cited cases, are readily distinguishable. In *Sub-Zero Freezer*, union supporters threatened the property and lives of voting employees, “which resulted in an atmosphere of fear and reprisal” such that the Board could not “let stand a certification of representative premised on an election that was conducted in such an atmosphere.” *Id.* at 47, *vacating*, 265 NLRB 1521, 1522-23 (1982) (detailing threats and property damage). RadNet cannot credibly argue the facts are similar here. Likewise, RadNet has not put forth any special circumstances that would align this case with other fact-bound cases in which the Board departed from the rule. *See, e.g., St. Francis Hosp.*, 271 NLRB 948, 949 (1984) (reconsidering prior representation decision “[i]n view of the history of controversy surrounding the issue of appropriate bargaining units in the health care field”); *Atlanta Hilton & Towers*, 273 NLRB 87, 91 n.18 (1984) (reconsidering representation decision because “Regional Director erroneously applied existing precedent”), *vacated in part*, 275 NLRB 1413 (1985); *Heuer Int’l Trucks*, 273 NLRB 361, 361 (1984) (refusing to grant summary judgment because “there exists a conflict in Board law”).

RadNet also hyperbolically complains that the Board has somehow erred in maintaining the above-cited precedent because “it can apply [it] at will, with no preceding notice to the labor organizations and employers who appear before it.” (Br.54.) This argument ignores that the Board has repeatedly made clear the limited scope of precedent in which it permitted relitigation. *E.g.*, *Warren Unilube, Inc.* 357 NLRB 44, 44 n.3 (2011), *enforced*, 690 F.3d 969 (8th Cir. 2012); *Univ. of Chicago*, 367 NLRB No. 41, 2018 WL 6381434, at *1 n.1 (Dec. 4, 2018), *petition for review and cross-application for enforcement pending*, Seventh Cir. Case Nos. 18-3659, 19-1146. RadNet, which is ably represented by experienced labor counsel fully familiar with the Board’s refusal-to-bargain unfair-labor-practice procedures, cannot plausibly argue that it was surprised that the Board applied its well-established rule, rather than a rare exception.

Nor can RadNet show, as it must, that it was prejudiced therefrom. *Salem Hosp.*, 808 F.3d at 73 (no prejudice in Board’s applying no-relitigation rule, notwithstanding *Sub-Zero Freezer* precedent). RadNet failed to proffer sufficient evidence of objectionable conduct to warrant a hearing on all but one objection in each case. On the one objection set for hearing, RadNet refused to present any evidence to support its allegations. The Regional Director reviewed the decisions in the representation proceeding, and the Board reviewed the Region’s decisions.

RadNet offered no new evidence or special circumstances. Thus, RadNet cannot fault the Board for declining to look at that same evidence (or lack thereof) one more time in the unfair-labor-practice case.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying RadNet's cross-petition for review and enforcing the Board's Order in full.

STATEMENT OF RELATED CASES

Board counsel is unaware of any related cases pending in the Ninth Circuit.

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National Labor Relations Board
December 2019

STATUTORY AND REGULATORY ADDENDUM

Except for the following, all applicable statutes, rules, and regulations are contained in the brief or addendum of RadNet. *See* FRAP 28(f) and Circuit Rule 28-2.7.

National Labor Relations Act

Section 7 (29 U.S.C. § 157)	A1
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	A2
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	A2
Section 9(c) (29 U.S.C. § 159(c))	A2-A3
Section 9(d) (29 U.S.C. § 159(d)).....	A3-A4
Section 10(a) (29 U.S.C. § 160(a))	A4
Section 10(e) (29 U.S.C. § 160(e))	A4-A5
Section 10(f) (29 U.S.C. § 160(f)).....	A5

National Labor Relations Board’s Rules and Regulations

29 C.F.R. § 102.62(d)	A6
29 C.F.R. § 102.67(g)	A7
29 C.F.R. § 102.69(a)	A7-A8
29 C.F.R. § 102.69(c)(1)(i)	A8
29 C.F.R. § 102.69(c)(2)	A8-A9

National Labor Relations Board’s Casehandling Manual Part Two Representation Proceedings

Section 11318.....	A9
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NATIONAL LABOR RELATIONS ACT

Sec. 7. [§157.] Right of employees as to organization, collective bargaining, etc.

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.] Unfair labor practices

(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.] Representatives and elections

(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 subsection (a), 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 subsection (a); 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 subsection (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. 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 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 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) 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 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 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.] Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(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 proceedings, as provided in 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 questions 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.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

THE BOARD'S RULES AND REGULATIONS

Section 102.62 [29 C.F.R. § 102.62] Election agreements; voter list; Notice of Election.

(d) Voter list. Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction of election, within 2 business days after the approval of an election agreement pursuant to paragraphs (a) or (b) of this section, or issuance of a direction of election pursuant to paragraph (c) of this section, the employer shall provide to the regional director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (“cell”) telephone numbers) of all eligible voters. The employer shall also include in a separate section of that list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge, including, for example, individuals in the classifications or other groupings that will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction unless a longer time is specified in the agreement or direction. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction. A certificate of service on all parties shall be filed with the regional director when the voter list is filed. The employer’s failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Section 102.67 [29 C.F.R. § 102.67] 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.

Section 102.69 [29 C.F.R. § 102.69] Election procedure; tally of ballots; objections; certification by the regional director; hearings; hearing officer reports on objections and challenges; exceptions to hearing officer reports; regional director decisions on objections and challenges.

(a) Election procedure; tally; objections. Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the Regional Director, whose decision shall be final, have its name removed from the ballot, except that in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the Regional Director, disclaiming any representation interest among the employees in the unit. A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit. When the election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the Regional Director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7

days after the tally of ballots has been prepared, any party may file with the Regional Director objections to the conduct of the election or to conduct affecting the results of the election which shall contain a short statement of the reasons therefor and a written offer of proof in the form described in § 102.66(c) insofar as applicable, except that the Regional Director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause. Such filing(s) must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. The party filing the objections shall serve a copy of the objections, including the short statement of reasons therefor, but not the written offer of proof, on each of the other parties to the case, and include a certificate of such service with the objections. A person filing objections by facsimile pursuant to § 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile or electronically pursuant to § 102.114(f) or (i). The Regional Director will transmit a copy of the objections to be served on each of the other parties to the proceeding, but shall not transmit the offer of proof.

(c)(1)(i) Decisions resolving objections and challenges without a hearing. If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the regional director determines that the 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, the regional director shall issue a decision disposing of the objections and determinative challenges, and a certification of the results of the election, including certification of representative where appropriate.

(2) Regional director decisions and Board review. The decision of the regional director may include a certification of the results of the election, including certification of representative where appropriate, and shall be final unless a request for review is granted. If a consent election has been held pursuant to § 102.62(a) or (c), the decision of the regional director is not subject to Board review. If the election has been conducted pursuant to § 102.62(b), or by a direction of election issued following any proceeding under § 102.67, the parties shall have the right to Board review set forth in

§102.67, except that in any proceeding wherein a representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to §§ 102.62(b) or 102.67 the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision, and a request for review of the regional director's decision and direction of election shall be due at the same time as the exceptions to the administrative law judge's decision are due.

THE BOARD'S CASEHANDLING MANUAL, PART TWO, REPRESENTATION PROCEEDINGS

Sec. 11318 Preelection Conference

The Board agent(s) and observers (Sec.11310) should assemble at the polling place from 30 to 45 minutes (depending on the complexity of the election) prior to the opening of the polls. In very large elections it may be prudent to hold the preelection conference on the preceding day.

Those present should identify themselves. Substitute observers should be secured for absent observers, if possible; also see Secs. 11310.1 and 11310.2 in the event of absent observers. The parties, not Board agents, should obtain substitutes.

Board agent(s) should examine the polling place with the parties and check to see that all equipment is available and in place. Sec. 11316. "Voting place" and "Warning" signs should be posted. Arrangements for the release of voters should be confirmed. Sec. 11330.4. Last-minute changes to the voter list should be discussed. Sec. 11312.3.

The Board agent should not routinely inspect the notice of election posting, but may do so when requested by the parties. It may be desirable for the Board agent to post an extra notice of election in the polling place so that voters may refer to it if they have questions. A no-electioneering area may be designated. Sec. 11326.

Secs. 11318.1 through 11318.5 discuss other matters that should be addressed during the preelection conference

**UNITED STATES COURT OF APPEALS
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NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner/Cross-Respondent)	Nos. 19-71261
)	19-71447
v.)	
)	
RADNET MANAGEMENT, INC. d/b/a San)	Board Case No.
Fernando Valley Interventional Radiology and)	31-CA-222587
Imaging Center; RADNET MANAGEMENT, INC.)	
d/b/a San Fernando Valley Advanced Imaging)	
Center)	
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the Board certifies that its brief contains 13,989 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

s/ David Habenstreit
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(202) 273-2960

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

**UNITED STATES COURT OF APPEALS
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)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2019, I electronically filed the foregoing 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 11th day of December 2019