

Nos. 19-1127, 19-1132

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

**TROUTBROOK COMPANY, LLC
d/b/a BROOKLYN 181 HOSPITALITY, INC.**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

NEW YORK HOTEL AND MOTEL TRADES COUNCIL, AFL-CIO

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Troutbrook Company, LLC d/b/a Brooklyn 181 Hospitality, Inc. was the Respondent before the Board and is the Petitioner/Cross-Respondent before the Court. The New York Hotel and Motel Trades Council, AFL-CIO was the charging party before the Board and has intervened on behalf of the Board. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board.

B. Ruling Under Review

The ruling under review is a Decision and Order of the Board in *Troutbrook Company, LLC d/b/a Brooklyn 181 Hospitality, Inc.*, 367 NLRB No. 139 (June 3, 2019).

C. Related Cases

This case has not previously been before this or any other court. This proceeding relies on a representation proceeding before the Board, Case No. 29-RC-216327, and the Board's December 13, 2018 order in that case, published at 367 NLRB No. 56. Board counsel is not aware of any other related cases.

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GLOSSARY

Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
Board	National Labor Relations Board
Br.	Troutbrook's opening brief
JA	The parties' deferred joint appendix
Local 811	Warehouse Production Sales & Allied Service Employees Union Local 811, AFL-CIO
Troutbrook	Troutbrook Company, LLC d/b/a Brooklyn 181 Hospitality, Inc.
Union	New York Hotel and Motel Trades Council, AFL-CIO

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**BRIEF FOR
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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Troutbrook Company, LLC
d/b/a Brooklyn 181 Hospitality, Inc. to review, and the cross-application of the

National Labor Relations Board to enforce, a Board Order issued against Troutbrook on June 3, 2019, reported at 367 NLRB No. 139. (JA 458-61.)¹ The New York Hotel and Motel Trades Council, AFL-CIO (the Union) has intervened on the Board’s behalf. The Board had subject-matter jurisdiction under Section 10(a) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce.

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

As the Board’s unfair-labor-practice Order is based, in part, on findings made in an underlying representation (election) proceeding, the record in that proceeding (Board Case No. 29-RC-216327) is also before the Court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the Board’s actions in the representation proceeding solely for the purpose

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

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

ISSUE PRESENTED

Did the Board abuse its broad discretion in rejecting Troutbrook’s election objections without a hearing and therefore determining that Troutbrook’s refusal to bargain with the Union violated Section 8(a)(5)?

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set forth in Troutbrook’s brief.

STATEMENT OF THE CASE

I. THE REPRESENTATION PROCEEDINGS

On March 12, 2018, the Warehouse Production Sales & Allied Service Employees Union Local 811, AFL-CIO (Local 811) petitioned the Board to represent a unit of housekeeping, front desk, bell, and food and beverage employees at a hotel in Brooklyn, New York. (JA 7.) The Union sought to represent the same unit of employees and intervened in the proceedings. (JA 8.)

A. The Board Conducts the First Election

On March 23, the Board's Regional Director for Region 29 placed the representation proceeding in abeyance pending proceedings under Article XXI of the AFL-CIO Constitution, which is a mediation and dispute resolution mechanism for multiple AFL-CIO-affiliated unions seeking to represent the same unorganized bargaining unit. (JA 9-10.) At the AFL-CIO's request, the Board then issued an order holding the Board's representation case in abeyance for 40 days or until the Article XXI process was completed, whichever came first. (JA 11-12.)

On April 30, following the conclusion of the Article XXI proceeding, the Regional Director resumed processing the representation case. (JA 13-14.) After Troutbrook took over as the employing entity, the Union filed an amended petition and the Regional Director postponed the election. (JA 193.) The Regional Director thereafter directed an election in the petitioned-for unit with both the Union and Local 811 on the ballot, with Troutbrook named as the employer. (JA 15-22.) The Union won a majority of votes. (JA 194; 48.)

B. Troutbrook Files Election Objections; the Regional Director Finds Merit to One of Them

Troutbrook filed 12 election objections. Troutbrook's objections alleged that the Union repeatedly threatened and intimidated unit employees and lied to them about collective bargaining and the Board's processes. (JA 49-50.)

Troutbrook further alleged that several Board actions and policies were

objectionable, including the adjournment of proceedings to accommodate the Article XXI process, the Regional Director's postponement of the election, the late notice of the cancellations of a hearing and postponement of the election, the Board's 2014 revisions to its election rules, and the Board's failure to provide Troutbrook with correct election notices. (JA 51-53.) As a remedy, Troutbrook requested that "the election be set aside and a new election ordered as soon as the Regional Director deems the circumstances permit, and such other relief be granted as is appropriate." (JA 53-54.)

Because Troutbrook's objections alleged misconduct on the part of Board's regional office, the Board's Regional Director for Region 22 took over processing of the representation case. On August 3, that Regional Director found merit to Troutbrook's Objection 12, which alleged that the Board issued an incorrect notice of election and failed to provide Troutbrook with a corrected notice. The Regional Director also rejected Troutbrook's challenge to the Board's election rules and found it unnecessary to pass on any of Troutbrook's other objections. (JA 123-26.) As a remedy, the Regional Director ordered a second election with a new notice to employees that included the following language:

The election conducted on June 26, 2018 was set aside because the National Labor Relations Board found that the Board issued an incorrect Notice of Election and failed to provide the Employer a correct Notice of Election and this interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Second Election. All eligible voters should understand that the

National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

(JA 127.)

C. The Union Wins the Rerun Election; Troutbrook Raises Substantially the Same Objections

On August 23, Local 811 requested to withdraw from the election proceedings and the Regional Director granted that request on August 27, setting the election for September 6. (JA 194.) The Union won the rerun election with 18 votes out of a total of 26 votes cast. (JA 194-95; 135.) Troutbrook again filed 12 election objections, the first 11 of which were identical to its first set of objections; Objection 12 alleged that the Board agent impermissibly changed the voting times during the *first* election. (JA 195-96; 136-40.) Troutbrook's offer of proof included proffered testimony and documents relating to alleged threats and Board improprieties that occurred before the first election. (JA 144-52.) To remedy its alleged objections, Troutbrook again requested "that the election be set aside and a new election ordered as soon as the Regional Director deems the circumstances permit, and such other relief be granted as is appropriate." (JA 141.)

D. The Regional Director's Decision Overruling Objections to the Rerun Election

On September 24, the Regional Director overruled all of Troutbrook's objections and certified the Union as the bargaining unit's representative. (JA 193-

98.) In doing so, he noted that Objections 1 through 10 and Objection 12, along with the accompanying offer of proof, dealt solely with conduct that occurred from the initial filing of the representation petition through the date of the first election. Citing settled Board precedent, the Regional Director found that the critical period during which conduct could constitute grounds for overturning the rerun election ran from the initial election through the date of the rerun. Thus, he reasoned, those 11 objections all concerned conduct that occurred before or during the first election and therefore outside the critical period and had already been remedied by overturning the initial election. (JA 196.) The Regional Director rejected Objection 11, which challenged the Board's 2014 revisions to the Election Rules, for the same reasons as he had done so on August 3. (JA 197.)

After Troutbrook appealed to the Board for review, the Board issued an Order denying review of the Decision and Certification. The Board observed that Troutbrook's Objection 12 regarding the Board agent's allegedly changing the voting times during the first election "relies on conduct that occurred on the date of the first election, but before and during the time that the first election was being held," which is outside the "critical period" under governing precedent. (JA 219 n.2.)

II. THE UNFAIR-LABOR-PRACTICE PROCEEDINGS

Following the Regional Director's certification of the Union, Troutbrook refused to bargain with it. Acting on a charge the Union filed, the Board's General Counsel issued a complaint alleging that Troutbrook's refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). The Board's General Counsel then moved for summary judgment on the grounds that Troutbrook admitted its refusal to bargain in its answer to the complaint. The Board then issued a notice to show cause why summary judgment should not be granted. (JA 458.)

On June 3, 2019, the Board (Chairman Ring and Members McFerran and Kaplan) granted the General Counsel's motion for summary judgment and found that Troutbrook's refusal to bargain violated Section 8(a)(5) and (1). The Board concluded that all representation issues raised in the unfair-labor-practice proceeding were or could have been litigated in the underlying representation proceeding, and that Troutbrook neither offered any newly discovered and previously unavailable evidence nor alleged the existence of any special circumstances that would require the Board to reexamine its decision to certify the Union. (JA 458.)

The Board's Order requires Troutbrook to cease and desist from refusing to bargain with the Union, and from in any like or related manner interfering with,

restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. (JA 459.) The Board's Order also directs Troutbrook to, on request, bargain with the Union, and to post a remedial notice. (JA 459-61.)

SUMMARY OF ARGUMENT

When a party alleges that misconduct interfered with a rerun election, the Board will overturn the rerun only if objectionable misconduct occurred in the critical period between the initial election and the rerun election. Here, all of the alleged misconduct occurred before the end of the initial election—in other words, outside the critical period for the rerun election. Therefore, applying its well-established precedent, the Board reasonably concluded that none of that alleged misconduct could provide a basis for overturning the rerun election.

The Board also reasonably found that the alleged misconduct had already been remedied. The remedy for objectionable conduct before an election is to conduct a rerun election, which the Board already had done. Therefore, the Board did not abuse its discretion in overruling Troutbrook's objections, which sought a second rerun election due to conduct that was already remedied by the first rerun.

Troutbrook's contention that an exception should apply to the critical-period rule because the Regional Director did not rule on all of its objections to the first election has no basis in the Board's or this Court's precedent and makes no sense. Troutbrook received exactly the remedy it requested—a new election—in response

to its first set of objections. It never objected to that remedy or to the language the Regional Director included in the notice of a new election. Allowing its already remedied objections to warrant overturning another election would eviscerate the critical-period rule.

Finally, none of Troutbrook's objections contended that any of the alleged misconduct had a continuing effect during the critical period. Its offer of proof contained evidence solely outside the critical period. Its contentions that objectionable conduct could have caused Local 811 to withdraw or otherwise affected the rerun election are pure speculation and have no basis in its objections or offer of proof. In those circumstances, the Board's decision to overrule Troutbrook's objections without a hearing was not an abuse of discretion.

ARGUMENT

THE BOARD DID NOT ABUSE ITS BROAD DISCRETION IN OVERRULING TROUTBROOK’S OBJECTIONS TO THE RERUN ELECTION, THEREFORE, TROUTBROOK’S REFUSAL TO BARGAIN WITH THE UNION VIOLATED SECTION 8(a)(5) AND (1)

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees”

29 U.S.C. § 158(a)(5). An employer’s failure to meet its Section 8(a)(5) bargaining obligation produces a derivative violation of Section 8(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights” 29 U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Troutbrook has admittedly refused to bargain with the Union in order to challenge the Board’s certification of the Union following its election victory. (JA 458.)

There is no dispute that if the Board properly certified the Union as the employees’ collective-bargaining representative, Troutbrook violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. *See C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 880-82 (D.C. Cir. 1988). Accordingly, the issue before the Court is whether the Board abused its broad discretion in overruling Troutbrook’s election objections and certifying the Union. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 329-30, 335 (1946); *Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970).

Troutbrook has abandoned its objection to the Board's 2014 revisions to its election rules. Its remaining objections fall into two categories: contentions that the Union unlawfully threatened employees before the first election, and objections to the Board's conduct through the end of the first election. But the Board fully remedied those objections by overturning the first election and ordering a rerun. Troutbrook's objections to the initial election did not request any remedy other than a rerun election, which is exactly what it got. It now seeks a third election for the very same reasons that the Board ordered a second election. As the Board found, governing precedent precludes granting that extraordinary request.

A. The Board Has Broad Discretion in Conducting Representation Proceedings

“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *A.J. Tower Co.*, 329 U.S. at 329-30, 335; *accord C.J. Krehbiel Co.*, 844 F.2d at 882. Accordingly, the scope of appellate review of the Board's decision to certify a union is “extremely limited.” *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1562, 1564 (D.C. Cir. 1984). The Board's order is entitled to enforcement unless the Board abused that wide discretion in overruling the objections to the election. *See Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996). The Court similarly reviews the Board's decision not to hold a hearing on election objections

for an abuse of discretion. *Majestic Star Casino, LLC v. NLRB*, 373 F.3d 1345, 1350 (D.C. Cir. 2004); *Amalgamated Clothing Workers*, 424 F.2d at 829.

There is a “strong presumption” that an election conducted in accordance with the Board’s safeguards “reflect[s] the true desires of the employees.” *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997); accord *NLRB v. Coca-Cola Bottling Co. Consol.*, 132 F.3d 1001, 1003 (4th Cir. 1997) (“outcome of a Board-certified election [is] presumptively valid”). Therefore, the results of such an election “should not be lightly set aside.” *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 570 (D.C. Cir. 1970) (citations omitted); accord *800 River Rd. Operating Co. v. NLRB*, 846 F.3d 378, 385-86 (D.C. Cir. 2017) (court will overturn a Board decision to certify a union “in only the rarest of circumstances”) (internal quotation marks and citation omitted). Thus, “there is a heavy burden on [the employer] in showing that the election was improper.” *Amalgamated Clothing Workers*, 424 F.2d at 827. Moreover, “[i]t is for the Board in the first instance to make the delicate policy judgments” involved in requiring a new election. *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1562; see also *C.J. Krehbiel Co.*, 844 F.2d at 885 (recognizing that “Congress has charged the Board, a special and expert body” with determining any effects on employee free choice in elections).

B. Alleged Improprieties Justify Setting Aside an Election Only When They Occur During the Critical Period

The Board generally will not consider alleged improprieties occurring outside the “critical period” prior to an election. *Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). The critical-period rule is a “convenient device to limit the inquiry to the period near the election when improper acts are most likely to affect the employees’ freedom of choice.” *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1567. Absent “extremely unusual circumstances,” conduct occurring before the critical period cannot be the basis for overturning an election. *Id.* When an election has been set aside and the Board orders a rerun, the critical period is the period “between the two elections.” *Nestle Co.*, 248 NLRB 732, 733 n.3 (1980), *enforced*, 659 F.2d 252 (table), 108 Lab.Rel.Rep. (BNA) 2175 (D.C. Cir. 1981).

“When laboratory conditions have sufficiently deteriorated” due to conduct before an election, the Board orders a rerun. *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1562. If a party requests that it do so, the Board may include in the new election notice language explaining to employees why it ordered a new election. *Keystone Auto. Indus., Inc.*, 365 NLRB No. 60, slip op. at 1 n.2 (2017). The purpose of doing so is to “provide official notification to all eligible voters, without detailing the specific conduct involved, as to the reason why the elections were set aside.” *Lufkin Rule Co.*, 147 NLRB 341, 341 n.2 (1964); *accord Nat’l*

By-Products, Inc. v. NLRB, 931 F.2d 445, 451 n.3 (7th Cir. 1991). When there has been objectionable conduct by the Board or a regional director, the Board’s practice is to include so-called *Lufkin Rule* language in the new election notice even absent a specific request “if in the judgment of the regional director the situation warrants it.” NLRB, *Casehandling Manual (Part Two) Representation*, § 11452.3 (available at <https://www.nlr.gov/how-we-work/national-labor-relations-act/guidance-documents>).

C. Because All of Troutbrook’s Objections Involve Conduct That Occurred Outside the Critical Period, the Board Reasonably Overruled Them

The conduct Troutbrook alleges to be objectionable all occurred before the end of the first election. Thus, citing *Star Kist Caribe, Inc.*, 325 NLRB 304 (1998), *Times Wire & Cable Co.*, 280 NLRB 19, 20 n.10 (1986), and *Singer Co.*, 161 NLRB 956, 956 n.2 (1966), the Regional Director found that the conduct at issue fell outside the critical period for the rerun election. (JA 196.) As the Board clarified, conduct *during* the first election also falls outside the critical period. (JA 219 n.2.) None of the objections alleged any exception to the Board’s critical-period rule; indeed, Troutbrook explicitly—and incorrectly—claimed that the alleged union threats happened during the critical period. (JA 136-38.) As such, once the Board determined that the objections concerned conduct outside the critical period, there was nothing left to consider.

Regardless of the merits of Troutbrook’s objections, the Board already remedied them. As the Regional Director reasoned, the only remedy for misconduct before an election is “to rerun that election.” (JA 196.) Once the Board did so, “the same allegations of objectionable conduct may not form the basis for overturning a subsequent and otherwise valid rerun election.” (JA 196.) That stands to reason; otherwise, union or Board misconduct before an initial representation election could indefinitely stop employees from selecting their choice of representative. Indeed, the Ninth Circuit has found that an instance of election misconduct “cannot justify indefinite postponement of a vote on union representation to which employees are statutorily entitled.” *NLRB v. Carl Weissman & Sons, Inc.*, 849 F.2d 449, 451 (9th Cir. 1988) (rejecting employer’s contention that Board was required to specifically determine that taint from first-election misconduct had dissipated before scheduling rerun). The Board therefore did not abuse its discretion in declining to consider Troutbrook’s objections, all of which fell outside the critical period.

D. The Board Reasonably Declined To Create a New Exception to the Critical-Period Rule

Troutbrook does not dispute that its preserved objections relate solely to conduct outside the critical period for the rerun election. However, it claims that the Board should have applied “an exception to the general proposition that conduct outside of the critical period is unobjectionable.” (Br. 28.) It contends

(Br. 27) that Board precedent defining a rerun election's critical period as the period between elections is inapposite because of supposedly unremedied misconduct during that period here. Essentially, Troutbrook argues that a rerun election is only valid if the Board has considered and ruled on every election objection and included language in the notice for the new election that addresses each instance of misconduct. But as explained below, that position conflicts with both the Board's precedent applying the critical-period rule to rerun elections and the Board's standard election-notice practices. Moreover, Troutbrook never asked the Board to review the Regional Director's decision setting aside the first election or objected to any part of the Regional Director's new-election remedy. To allow it to do so now, only after unit employees again selected the Union as their representative in the rerun, would subvert the Act's protection of employees' free choice of bargaining representative.

Troutbrook points to no case that supports extending the critical period when the Board did not address *all* alleged misconduct that occurred before the first election. Indeed, the Board has held to the contrary. In *Times Wire*, the employer committed a host of misconduct before an initial election, including repeatedly threatening plant closure. 280 NLRB at 19-20. The union won the election but the parties agreed to set it aside due to the union's own allegedly objectionable conduct. *Id.* at 19 n.7. After the union lost the rerun election, it objected to the

results due to employer conduct both before and after the election. The administrative law judge found that the plant-closure threats and other actions violated Section 8(a)(1) and constituted grounds for setting aside the election. The Board agreed that the misconduct violated Section 8(a)(1) but explicitly rejected the contention that “conduct which occurred between the filing of the petition and the first election constituted interference with the exercise of free choice in the second election.” *Id.* at 20. The Board then ordered a new election based solely on the employer’s conduct between the two elections. *Id.*

Thus, *Times Wire* teaches that misconduct by a party before an initial election will not suffice to overturn a rerun election. Indeed, unlike here, the alleged misconduct before the first election in *Times Wire* consisted of unfair labor practices that were not adjudicated or remedied until after the second election. *Id.* at 19-21. There is simply no basis to distinguish this case from any other rerun election. The Board’s decision to apply its well-settled critical-period rule here thus comports with governing precedent.

Troutbrook further claims that the Regional Director “erred in declining to review the entirety of Troutbrook’s objections to the Board’s conduct at the June 26 election” (Br. 34). But a party that objects to a Regional Director’s decision must request review with the Board in order for the Board to consider its arguments. *See* NLRB Rules and Regulations, 29 C.F.R. § 102.67(e) (Board

review requires Request for Review containing all issues raised). Troutbrook failed to request Board review of the Regional Director's decision setting aside the first election and upholding only one of its objections, instead waiting until after the rerun election to raise its arguments. That failure precludes consideration of its argument now. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (issue must be raised to agency "at the time appropriate under its practice"). By failing to request review, Troutbrook deprived the Board of the opportunity to consider its remaining objections after the first election. Thus, it can hardly blame the Board for not doing so. In any event, as discussed below (p. 22-23), requiring the Regional Director to investigate and hold a hearing over whether to sustain further election objections when the Regional Director has already determined that objectionable conduct occurred would serve no purpose.

Even if the Regional Director had done as Troutbrook now belatedly asks and investigated all of the election objections, the outcome would have been exactly the same—rerunning the election. Although Troutbrook claims (Br. 29-30) the rerun election did not provide a full remedy after the first election because the notice of election did not detail its additional objections, that does not render the rerun anything less than a complete remedy. The Board sometimes adds so-called *Lufkin Rule* language to rerun-election notices to explain why it set aside an election, but Troutbrook cites no case holding that the such language is essential.

Indeed, the Board only orders a *Lufkin Rule* notice due to union misconduct “when requested.” *Keystone Auto.*, 365 NLRB No. 60, slip op. at 1 n.2; *see also* NLRB, *Casehandling Manual (Part Two) Representation*, § 11452.3 (available at <https://www.nlr.gov/how-we-work/national-labor-relations-act/guidance-documents>) (*Lufkin Rule* language is not mandatory even though Board looks favorably on requests for it). That practice comports with the purpose of the *Lufkin Rule* language, which is to inform employees in general terms why they are voting again “without detailing the specific conduct involved.” *Lufkin Rule*, 147 NLRB at 342 n.2. Troutbrook did not request a *Lufkin Rule* notice in its objections to the first election. If it had a problem with the new notice of election that the Regional Director ordered, it could have raised that issue to the Board in a request for review. *See Fieldcrest Cannon, Inc.*, 327 NLRB 109, 111 n.3 (1998) (granting union’s exceptions to a hearing officer’s failure to include *Lufkin Rule* language in a notice of new election). But instead of pointing out the Regional Director’s supposed “clear error” (Br. 29) in the notice language, Troutbrook waited until after a new election had been held before objecting to the election notice. Ordering a third election because the second election notice lacked nonmandatory language that no party requested and to whose omission nobody objected would have been grossly unfair to the employees who selected their representative. The Board did not abuse its discretion in declining to do so.

Ultimately, Troutbrook’s efforts to craft a new exception to the critical period fail, as exceptions to the critical-period rule apply only in “extremely unusual circumstances.” *Amalgamated Clothing & Textile Wkrs.*, 736 F.2d at 1567. Thus, in *Amalgamated Clothing*, the Court reasoned that multiple anonymous threats to antiunion employees, including one that there were “5 sticks of dynamite for [the recipient’s] house” and another that “something bad is liable to happen to your truck,” were insufficiently egregious to warrant an exception to the critical-period rule. *Id.* Conduct that the Board or courts have found warranted an exception to the critical-period rule, including in the cases Troutbrook cites (Br. 26-28), tends to fall into a few narrow categories that do not apply here.

For example, one exception to the critical-period rule, developed in response to *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), involves union agents’ solicitation of the union-authorization cards supporting an election petition by using threats of job loss or unlawful promises of benefits. *See e.g., Royal Packaging Corp.*, 284 NLRB 317, 317-18 (1984) (union offered employment in exchange for signing authorization cards); *Lyons Rests.*, 234 NLRB 178, 179 (1978) (union warned employees they would not work for employer if they did not sign authorization cards); *Gibson’s Discount Ctr.*, 214 NLRB 221, 221-22 (1974) (union solicited authorization cards with unlawful promise to waive union-initiation fees). The Board has also recognized that alleged supervisory

misconduct, particularly involving card solicitation, may also warrant an exception to the critical-period rule. *See Harborside Healthcare, Inc.*, 343 NLRB 906, 912 (2004). None of Troutbrook's objections allege that the Union promised benefits or threatened employees when soliciting authorization cards or that any of Troutbrook's supervisors engaged in pro-union misconduct.

Troutbrook claims (Br. 28) that the Board should have created a new exception here because the Regional Director never investigated or remedied the Union's alleged misconduct. But the proposed exception would nearly swallow the critical-period rule. Conduct outside the critical period is only rarely remedied before an election. None of the threats at issue in *Amalgamated Clothing* had been remedied by the election. And as discussed above (pp. 17-18), the Board has specifically evaluated unremedied conduct that happened in the critical period for an initial election and determined that it did not constitute a basis for objecting to a rerun election. *Times Wire*, 280 NLRB at 19-20. The point of a Regional Director's investigation of post-election objections is to determine whether to set aside the election. To require the Regional Director to continue to investigate or even hold an evidentiary hearing after already unearthing enough information to warrant overturning the election makes no sense. Therefore, the Board did not abuse its discretion in declining to create a new exception to the critical-period rule.

As with the allegations regarding conduct *before* the first election, Troutbrook is incorrect in claiming that conduct *during* that election warrants overturning the results of the rerun election. It wrongly contends that the Board “shockingly” failed to consider its Objection 12, which alleged, *inter alia*, that the Board agent changed the voting times at the first election. The Board explicitly cited that objection and pointed out that Board precedent precluded consideration of conduct that occurred during the first election. (JA 219 n.2, citing *Nestle Co.*, 248 NLRB 732, 733 n.3 (1980).) Troutbrook has given no reason to disturb the Board’s well-settled precedent. And the Board’s rule stands to reason; after the first representation election, Troutbrook could have alleged any objectionable conduct through the end of that election, which was the end of the first critical period. As discussed above, holding a rerun election would remedy any election objection that occurred during that first critical period. Thus, the Board did not abuse its discretion by applying its rule limiting the critical period for the rerun election to the time after the first election ended.

E. Troutbrook Neither Alleged in its Objections Nor Proffered Evidence of an Effect During the Critical Period

Troutbrook contends (Br. 35-36) that the Board’s and the Union’s alleged misconduct caused continuing effects after the first election that affected the fairness of the rerun election. But as the Board observed, Troutbrook offered no supporting evidence of a “continuing impact” and did not file any unfair labor

practice charges alleging any union misconduct. (JA 219 n.2.) Although Troutbrook contends that it “presented evidence” that the Board’s conduct impacted the rerun election, none of its objections allege any such link. (JA 136-40.) Similarly, Troutbrook’s offer of proof contains no statements supporting its view that the Board’s election notice somehow misled employees into thinking there was no merit to most of Troutbrook’s first batch of election objections. Indeed, every single item in Troutbrook’s offer of proof relates to an event that happened during or before the first election. (JA 144-52.) Clearly, evidence from before the first election cannot show confusion about a rerun election that had not yet been ordered or scheduled. Even if there were such confusion, it is difficult to see how the general language of a *Lufkin Rule* notice, which does not mention specific instances of misconduct, could have helped.

As to the Union’s alleged misconduct, Troutbrook’s claim that “Local 811 withdrew from the [r]erun [e]lection as a result of [the Union’s] unlawful campaign and the Board’s ongoing course of conduct” (Br. 35) has no basis in the offer of proof it submitted. The Board was not presented with evidence about the reason for Local 811’s withdrawal. Troutbrook did not allege in its objections that any instance of misconduct by the Union or the Board forced Local 811 to withdraw; indeed, all of the alleged misconduct happened before or during the first election, in which both unions participated. It is unlikely that an action by the

Union or the Board that did not cause Local 811 to withdraw from the first election would somehow cause it to withdraw from a rerun election that was held months later. Troutbrook's claim (Br. 28) that Local 811 withdrew because of the Union's campaign is therefore pure speculation, unsupported by its objections or offer of proof. Absent any evidence or even an objection specifically alleging it, the Board was not required to assume, *sua sponte*, that Local 811 had withdrawn because of objectionable conduct.

CONCLUSION

After the initial election, the Regional Director ordered a rerun based on one of Troutbrook's objections and declined to pass on the remainder. Troutbrook did not request that the Board review that decision. Only after the Union won a rerun election did Troutbrook complain, despite clear Board precedent that conduct before the first election cannot invalidate a rerun. Because Troutbrook has not given any convincing reason why the Board should have departed from its precedent, its refusal to bargain with the Union violates Section 8(a)(5) of the Act. The Board therefore respectfully requests that this Court enforce its Order in full.

Respectfully submitted,

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December 2019

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BROOKLYN 181 HOSPITALITY, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 19-1127, 19-1132
)	
)	
v.)	Board Case No.
)	29-CA-232891
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
NEW YORK HOTEL AND MOTEL TRADES)	
COUNCIL, AFL-CIO)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 5,625 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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

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Intervenor)	

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 District of Columbia Circuit by using the appellate CM/ECF system. I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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