

**CASE NO. 19-70292 [CONSOLIDATED WITH 19-70596]
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EAST VALLEY GLENDORA HOSPITAL, LLC,

Petitioner and Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent and Cross-Petitioner,

and

SEIU LOCAL 121RN

Intervenor.

ON PETITION FOR REVIEW FROM
NATIONAL LABOR RELATIONS BOARD
367 NLRB NO. 72, CASE NO. 31-CA-229412

**PETITIONER EAST VALLEY GLENDORA HOSPITAL, LLC'S
PETITION FOR PANEL REHEARING AND REHEARING *EN BANC***

Maurice Baskin
Littler Mendelson, P.C.
815 Connecticut Avenue, NW, Suite 400
Washington, DC 20006-4046
202.842.3400
mbaskin@littler.com

Robert F. Millman
Littler Mendelson, P.C.
2049 Century Park East, 5th Floor
Los Angeles, CA 90067
310.553.0308
rmillman@littler.com

*Attorneys for Petitioner
East Valley Glendora Hospital, LLC*

CORPORATE DISCLOSURE STATEMENT

In accordance with Circuit Rule 26.1, Petitioner East Valley Glendora Hospital, LLC (the “Hospital”) certifies that its parent corporation for purposes of this rule is Prime Healthcare Services, Inc., and that no publicly held corporation owns 10% or more of its stock.

/s/ Maurice Baskin _____

Maurice Baskin
Littler Mendelson, P.C.

Attorney for East Valley
Glendora Hospital, LLC

TABLE OF CONTENTS

	PAGE
FRAP 35(B) STATEMENT	1
BACKGROUND INFORMATION.....	3
REASONS FOR GRANTING THE PETITION.....	6
1. The Panel Decision Creates a Circuit Conflict as to Both the Standard For Requiring a Hearing on Objections to NLRB Elections, and the Standard For Waiver of Such Objections, Both of Which Are Issues of Extraordinary Importance	6
a. As stated in the dissenting opinion, a hearing was required to determine the merits of the hospital’s claim that a supervisory employee improperly served as an election observer..	6
b. Contrary to the panel majority, the Hospital’s allegations of election interference by supervisory charge nurses were otherwise specific enough to raise issues of substantial and material fact justifying a hearing under this Court’s longstanding precedent.....	11
CONCLUSION.....	16
CERTIFICATE OF COMPLIANCE.....	17
CERTIFICATE OF SERVICE.....	18
PANEL OPINION	

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>AFL-CIO v. NLRB</i> , Civ. No. 20-cv-0675 (KBJ), 2020 U.S. Dist. LEXIS 99491 (D.D.C. May 30, 2020).....	6
<i>Bell Foundry Co. v. NLRB</i> , 827 F.2d 1340 (9th Cir. 1987)	11, 14
<i>Durham Sch. Servs., LP v. NLRB</i> , 821 F.3d 52 (D.C. Cir. 2016).....	11, 14
<i>Family Service Agency</i> , 331 N.L.R.B. 850 (2000)	6
<i>Harborside</i> , 343 N.L.R.B. at 911	13, 14
<i>Hospital & Service Employees Union v. NLRB</i> , 743 F.2d 1417 (9th Cir. 1984)	9
<i>HTH Corp. v. NLRB</i> , 823 F.3d 668 (D.C. Cir. 2016).....	10
<i>Liquid Transporters, Inc.</i> , 336 N.L.R.B. 420 (2001)	7
<i>Local 512, Warehouse & Office Workers’ Union v. NLRB</i> , 795 F.2d 705 (9th Cir. 1986), <i>abrogated on other grounds by</i> <i>Hoffman Plastic Compounds, Inc. v. NLRB</i> , 535 U.S. 137 (2002)	9
<i>Martinez-Serrano v. I.N.S.</i> , 94 F.3d 1256 (9th Cir. 1996)	8
<i>Mejia v. Ashcroft</i> , 298 F.3d 873 (9th Cir. 2002)	8

<i>Monarch Bldg. Supply</i> , 276 N.L.R.B. 116 (1985)	7, 8
<i>NLRB v. Advanced Sys., Inc.</i> , 681 F.2d 570 (9th Cir. 1982), <i>opinion amended and superseded</i> (9th Cir. June 23, 1982)	15
<i>NLRB v. Commercial Letter, Inc.</i> , 455 F.2d 109 (8th Cir. 1972)	14
<i>NLRB v. Conn. Foundry Co.</i> , 688 F.2d 871 (2d Cir. 1982)	15
<i>NLRB v. Ironworkers Local 433</i> , 850 F.2d 551 (9th Cir. 1988)	9
<i>NLRB v. Island Film Processing Co.</i> , 784 F.2d 1446 (9th Cir. 1986)	13
<i>NLRB v. Riverboat Hotel</i> , 105 F.3d 665, 1996 WL 738732 (9th Cir. 1996)	13
<i>NLRB v. Valley Bakery, Inc.</i> , 1 F.3d 769 (9th Cir. 1993)	5, 11, 13, 15
<i>Pinetree Transp. Co. v. NLRB</i> , 686 F.2d 740 (9th Cir. 1982)	5, 11, 13
<i>Sonoco Prod. Co. v. NLRB</i> , 399 F.2d 835 (9th Cir. 1968)	14
<i>SSC Mystic Operating Co., LLC v. NLRB</i> , 801 F.3d 302 (D.C. Cir. 2015)	13
Statutes	
29 U.S.C. § 160(e)	9
Other Authorities	
84 Fed. Reg. at 69553 (Dec. 19, 2019)	6
https://www.nlr.gov/news-outreach/news-story/nlr-to-implement-all-election-rule-changes-unaffected-by-court-ruling	6

FRAP 35(b) STATEMENT

Petitioner East Valley Glendora Hospital (the Hospital) hereby seeks rehearing by the panel and/or by this Court *en banc*, as to the denial of the Hospital's petition for review of the decision of the National Labor Relations Board (NLRB), on the following issues of extraordinary importance:

1. As the dissenting opinion found, the Hospital properly objected that a supervisor served as an election observer, which in and of itself was sufficient to deny enforcement of the NLRB's certification of the election, due to the Board's failure to conduct a hearing on the Hospital's objection. In rejecting the dissent, the panel majority made unjustified findings of waiver by the Hospital that are contrary to precedent in this Court and elsewhere on an issue of extraordinary importance. See *Mejia v. Ashcroft*, 298 F.3d 873 (9th Cir. 2002); *Hospital & Service Employees Union v. NLRB*, 743 F.2d 1417, 1426 (9th Cir. 1984); and additional cases cited.

2. With regard to the foregoing objection and the Hospital's numerous other objections to the election, the panel decision is also inconsistent with this Court's previous decisions regarding the standard for requiring NLRB hearings on election objections, creating a conflict within the Circuit and with other courts of appeals on a fundamental question of due process. See *NLRB v. Valley Bakery, Inc.*, 1 F.3d 769, 772 (9th Cir. 1993); *Pinetree Transp. Co. v. NLRB*, 686 F.2d 745 (9th Cir. 1982).

As further discussed below, the Hospital timely filed objections supported by specific offers of proof that eight supervisory charge nurses interfered in the election by campaigning for the SEIU Local 121RN (the Union). The Hospital offered to present evidence that the charge nurses were in fact supervisors, and that these supervisors solicited authorization cards, attended Union meetings, spoke in the Union's favor, wore Union paraphernalia, and told employees to vote for the Union. The Hospital identified the offending charge nurses by name and further named dozens of witnesses to the election misconduct of these supervisors, which culminated in the election day interference committed by the supervisory charge nurse who improperly served as the Union's election observer.

Notwithstanding the Hospital's objections and offer of proof, the Board certified the election without conducting a hearing as required by its own rules, in violation of the Hospital's due process rights. The panel majority erred by enforcing the Board's order for the reasons stated above. Due to the extraordinary importance of the due process rights at stake, and the circuit conflicts created by the panel majority's decision, a panel rehearing and/or rehearing *en banc* is called for. The dissenting opinion is correct and should be adopted by this Court.

BACKGROUND INFORMATION

The Hospital petitioned for review from an order by the NLRB charging it with refusing to bargain with the Union. The Hospital concedes that it refused to bargain, but maintains that it had no obligation to bargain because the Board improperly certified the Union as the exclusive bargaining representative, after refusing to conduct a hearing on the Hospital's objections to the election.

The Hospital's objections stemmed from election-related misconduct by eight supervisory "charge nurses," who improperly inserted themselves into the campaign on the Union's behalf. The charge nurses signed authorization cards; solicited cards from employees under their supervision; attended Union meetings; told employees under their supervision to attend the meetings as well; spoke out at the meetings in the Union's favor; distributed Union propaganda; lent their images to that propaganda; wore all black the day before the election to signal their support for the Union; encouraged employees under their supervision to wear all black as well; and on election day, served as the Union's designated election observer. In other words, the charge nurses campaigned vigorously on the Union's behalf, and their involvement improperly permeated the election process.

As further shown in the Hospital's objections, the charge nurses qualified as non-employee "supervisors." Among other things, they had the power to set schedules, issue discipline, and assign job duties. They also controlled certain job-

related materials and supplies, including emergency medicine. As detailed in the Hospital's opening brief, the Hospital's offer of proof in support of its objections listed 11 of the charge nurses' supervisory duties and detailed 14 acts of interference. The Hospital properly argued that the Board erred in failing to hold a hearing to determine whether this interference, coupled with the charge nurses' supervisory authority, created a coercive environment inconsistent with employee free choice.

In declining to order the Board to hold a hearing, the panel first found that the Hospital waived some of its objections, largely pertaining to Union misconduct, in the briefs to the Court. (Panel Op. at 3-4). The dissenting opinion accepted that finding. (Dissent at 4). While the Hospital does not concede this point, it is unnecessary to contest it for purposes of this petition for rehearing.¹

The Panel majority conceded that the Hospital properly preserved its objections 2, 5, 6, 8, 9, 11, 13, 15, 16, 18, 19, and 29. (Panel Op. at 5). These objections alleged improper attendance by supervisors at union meetings, soliciting cards from employees, engaging in electioneering activities, distributing campaign materials, directing employees to support the union (objections 2, 5, 8, 11, 15, 18,

¹The panel concluded the Hospital waived Objections 1, 3-4, 7, 10, 12, 13, 17, 20-23, and 28. These objections were intertwined with the additional objections the panel decision deemed to be properly preserved. The Hospital maintains it asserted all 29 of its objections in its initial request for review, it incorporated those same objections in the failure-to-bargain case, and it maintained the objections in its briefs to this Court. The Hospital reserves the right to pursue these claims in the event that rehearing is granted by this Court *en banc*.

and 29) and that employees were advised and made aware the supervisors supported the union or were otherwise engaged in pro-union activity (objections 6, 9, 13, 16, 19). The panel majority nevertheless found the objections did not establish with “sufficient specificity” that the supervisors’ conduct materially affected the outcome of the election and/or failed to raise a substantial and material issue of fact. The dissenting opinion disagreed with the majority’s handling of these objections, but found it unnecessary to reach them because it was clear to the dissent that the Board erred in declining to order a hearing on Objection 26, the supervisory observer issue.

As to the supervisory charge nurse serving as an observer, the panel majority rejected the Hospital’s assertion that it properly objected to allowing such a person to serve as an observer by contesting inclusion of the charge nurses in the voting unit and by arguing to the Court that the Board’s waiver ruling was “arbitrary,” “capricious” and “wrong on the facts and the law.” (Panel Op. at 6). The dissenting opinion disagreed, finding that the Board’s waiver rule was “inapplicable” because the parties, with the Board’s assent, stipulated to forego a pre-election conference, and the Hospital contested the supervisory status the charge nurses in the pre-election agreement. The Hospital thus received no advance notice of the supervisory Union observer to which it could otherwise object. The dissent properly found the Hospital’s offer of proof was sufficient to preserve its objection (including a statement of “who, what, where, and when” the violation occurred). The dissent

properly relied on this Court's holdings in *Valley Bakery* and *Pinetree Transp.* to find that a hearing must be ordered.

REASONS FOR GRANTING THE PETITION

I. The Panel Decision Creates Circuit Conflict As To Both The Standard For Requiring A Hearing On Objections To NLRB Elections, And The Standard For Waiver Of Such Objections, Both Of Which Are Issues Of Extraordinary Importance.

A. As stated in the dissenting opinion, a hearing was required to determine the merits of the Hospital's claim that a supervisory employee improperly served as an election observer.

In his dissent, Judge Bumatay correctly observed that the NLRB has a “well-established rule against supervisors serving as observers in elections over union representation.” (Dissent at 1, *citing Mid-Continent Spring Co.*, 273 NLRB 884, 887 (1984)).² The Hospital properly alleged that a supervisory charge nurse violated the Board's rule by serving as the observer of the election on behalf of the Union; in effect “the boss watching over the shoulder” of the voters. *Id.*; *see also Family Service Agency*, 331 N.L.R.B. 850, 851 (2000) (setting election aside solely because

² The NLRB has recently reinforced and codified its rule in this regard, stating as follows: “[T]o be clear, the intent of § 102.69(a)(5) is – absent agreement of the parties to the contrary – to limit observers to current nonsupervisory employees of the employer at issue.” 84 Fed. Reg. at 69553 (Dec. 19, 2019). Though the Board's new rule has been preliminarily enjoined by a district court on other grounds, the Board has announced its intent to appeal that ruling to the D.C. Circuit. *See AFL-CIO v. NLRB*, Civ. No. 20-cv-0675 (KBJ), 2020 U.S. Dist. LEXIS 99491 (D.D.C. May 30, 2020). *See also* <https://www.nlr.gov/news-outreach/news-story/nlr-to-implement-all-election-rule-changes-unaffected-by-court-ruling>.

a supervisor served as an observer).

In holding that the Hospital waived its objection to the supervisory observer, the NLRB relied entirely on the Hospital's failure to object to the observer at a pre-election conference. But as Judge Bumatay stated in his dissent:

“In doing so, the Board ignored that the parties agreed to *forego* the pre-election conference, and thus, none was held. Yet the Board still persisted with its waiver ruling. For this reason, I would grant the petition and remand.” (emphasis in original).

The panel majority did not cite any previous case in which the Board required an employer to object to an observer at a pre-election conference where no such conference was held. Based upon the briefs of the parties and the panel opinion, there appears to be no such case.³ Nevertheless the panel majority denied the Hospital's right to a hearing on this issue for the incorrect reason that the Hospital did not “dispute the applicability of the [Board's] requirement.” (Panel Op. at 6). To the contrary, as noted by the dissent, the Hospital did dispute the applicability of the waiver rule in its opening brief:

Broadly, the Hospital argued that the Board's waiver ruling was “arbitrary”, “capricious,” and “wrong on the facts and the law.” (citing Pet's Br. at 28). Specifically, the Hospital challenged whether the pre-election conference was the only venue to fully assert an election

³ In each of the cases cited to the Court by the opposing parties in their appellate briefs, a pre-election conference was held. *See Liquid Transporters, Inc.*, 336 N.L.R.B. 420, 420 (2001) (refusing to consider objection after employer failed to raise it at conference); *Monarch Bldg. Supply*, 276 N.L.R.B. 116, 116 (1985) (same). In no previous case has the Board or this Court penalized a party for not raising objections about a supervisory observer at a nonexistent conference.

observer challenge. *See id.* (“The Board does not require a party to fully articulate the nature of its objection at the pre-election conference.”) (simplified). Instead the Hospital contends that it sufficiently preserved its claim by raising the election–observer issue in the pre-election statement of position (in lieu of the pre-election conference). *Id.* Accordingly the Hospital is *necessarily* raising the applicability of the waiver rule imposed by the Board.

(Dissent at 3, n.1) (emphasis in original).

The panel majority declined to address Judge Bamatay’s findings as to the waiver bar “because the Hospital did not present that argument to the NLRB or to this court.” (Panel Op. at 6, n.1). But as to presenting the argument to the *court*, the dissent’s citations to the Hospital’s briefs are correct and the case cited by the majority, *Martinez-Serrano v. I.N.S.*, 94 F.3d 1256, 1259-60 (9th Cir. 1996), does not apply here.⁴

For similar reasons, the panel majority’s claim that the Hospital somehow failed to make its objection to the waiver bar to the NLRB in the first instance, as required by Section 10(e) of the Act, 29 U.S.C. §160(e), is again in conflict with

⁴ In *Martinez-Serrano*, the petitioner failed to address any argument in its brief to the court regarding a later challenged agency denial of a motion to reopen and reconsider. *Id.* Here the challenged agency order was the NLRB’s denial of a hearing on the Hospital’s objection regarding the supervisory observer, which the Hospital fully briefed to this Court. *See also Mejia v. Ashcroft*, 298 F.3d 873 (9th Cir. 2002) (holding that an asserted failure to recite the proper standard of review “does not constitute waiver of a properly raised merits issue.”).

numerous cases.⁵ This Court has held the statutory requirement is satisfied when a party gives notice to the Board it intends to pursue an issue. *See Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 714 (9th Cir. 1986), *abrogated on other grounds by Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). Contrary to the panel majority here, a party need not set out every possible fully formed argument by which an issue will be challenged; the party need only give the Board fair notice, as the Hospital certainly did here. *Id.*

Among the many cases reading the 10(e) notice requirement differently than the panel majority, the Court's attention is directed to the following: *Hospital & Service Employees Union v. NLRB*, 743 F.2d 1417, 1426 (9th Cir. 1984) (finding that objection was sufficiently specific because it notified the Board "that the statutory question of 'coercion' was an issue" allowing the party raise a more expansive constitutional argument based upon the same objection); *NLRB v. Ironworkers Local 433*, 850 F.2d 551, 556 (9th Cir. 1988) (rejecting General Counsel's 10(e) argument because the petitioner's objections were not "so

⁵ The panel majority disputes whether the Hospital contested the charge nurses eligibility in the pre-election position statement. (Panel Op. at 6). But the General Counsel admitted in its brief that the Hospital objected to the charge nurses' participation in the election in the Hospital's pre-election position statement GC Br. 47, and that this was the only pre-election opportunity to object to their serving as a Union observer, because there was no pre-hearing conference. GC Br. 5; *see also* ER 20, 23-26.

ambiguous as to be totally ineffective to adequately apprise the Board that the issue is disputed” (quoting *Warehouse & Office Workers' Union*, 795 F.2d at 714)); *NLRB v. Sw. Sec. Equip. Corp.*, 736 F.2d 1332, 1336 (holding that 10(e) did not bar petitioner from making arguments when the Board was on actual notice of its position); *see also HTH Corp. v. NLRB*, 823 F.3d 668, 673-74 (D.C. Cir. 2016) (cautioning courts against “hyper-refinement” of Section 10(e)’s notice requirements).

Finally, the panel majority erred in asserting the Hospital’s offer of proof “fails to raise a substantial and material issue of fact.” According to the majority, the Hospital’s offer of proof did not “identify the supervisor, list facts supporting the individual’s supervisory status, or provide any specificity to the facts underlying the objection.” (*citing Valley Bakery*, 1 F.3d at 772). But the majority did not address the dissent’s telling observations regarding the Hospital’s proof:

Board regulations only require that an offer of proof summarize each witness’s testimony and raise material and substantial factual issues. *See* 29 C.F.R. §§ 102.69(a), (c)(1)(i), 102.66(c). Glendora Hospital’s offer of proof was sufficient to preserve its objection. In its offer, it alleged that a charge nurse, a supervisory employee, served as an election observer on the date of the vote—all in violation of the Board’s rules. So, we have the who, what, where, and when of the violation. Nothing more should be required. It’s true that Glendora didn’t name which charge nurse served as the election observer. But our precedent doesn’t require that. *See NLRB v. Valley Bakery, Inc.*, 1 F.3d 769, 770–72 (9th Cir. 1993) (holding employer’s offer of proof sufficient to trigger an investigation even though the name of the employee who threatened those who voted against the union was kept

confidential). Accordingly, I would hold that the Hospital was entitled to an evidentiary hearing on Objection 26. *See Pinetree Transp. Co. v. NLRB*, 686 F.2d 740, 745 (9th Cir. 1982) (“[T]he right to a hearing attaches immediately once the objecting party supplies prima facie evidence presenting substantial material factual issues.”).

For each of the foregoing reasons, the Court should rehear this matter *en banc* in order to resolve the Circuit conflicts created by the panel majority opinion on the important questions of waiver and the equally important questions of due process rights to a hearing upon submission of prima facie evidence raising substantial material factual issues.

B. The Hospital Established a *Prima Facie* Case Requiring a Hearing As To Each Of The Objections.

Similar Circuit conflicts are created by the Panel majority’s treatment of the Hospital’s offers of proof regarding its numerous other objections in this matter. *NLRB v. Valley Bakery, Inc.*, 1 F.3d at 770-772; *Pinetree Transp. Co. v. NLRB*, 686 F.2d at 745. As discussed above, at the *prima facie* case stage, the employer is not required to prove the ultimate outcome; rather, this Court has held a *prima facie* case consists merely of substantial and material issues of fact that, if true, would justify setting the election aside. *Pinetree*, 686 F.2d at 745. In deciding whether a party has made out such a case, the Board must make all inferences in the party’s favor and assume that all the party’s allegations are true. *Bell Foundry Co. v. NLRB*, 827 F.2d 1340, 1344 (9th Cir. 1987); *see also Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 58 (D.C. Cir. 2016). If the party makes out a *prima facie* case, the Board must hold

a hearing. *Pinetree*, 686 F.2d at 745. The Board has no discretion in this matter; the party is entitled to a hearing as a matter of due process. *Id.*

Contrary to the panel majority opinion, at 5-6, the Hospital more than met the Circuit's standard. In its pre-hearing offer of proof, the Hospital identified eight charge nurses who engaged in election misconduct as supervisors. ER 29–31. The Hospital specifically alleged that the charge nurses solicited authorization cards, attended Union meetings, appeared in Union propaganda, told employees to attend Union meetings, and told these same employees to vote for the Union. *See id.* The offer of proof also alleged that the day before the election, the charge nurses wore all black to show their support for the Union. ER 42. *See also* ER 31, 38–39 (identifying more than 100 witnesses able to testify about this interference).

The Hospital's offer of proof also laid out very substantial supporting evidence. This evidence included 118 witnesses—the whole bargaining unit—each of whom had seen the charge nurses' election interference. ER 38–39. These witnesses would also have testified about the charge nurses' supervisory duties. ER 39–43. The offer listed 11 such duties, including assigning job tasks, issuing discipline, and scheduling unit employees for work. ER 40–41.

Far from offering “insufficiently specific” facts and evidence, the Hospital identified 14 discrete acts of interference and 118 witnesses to testify about those acts. ER 38–42. And again, the Hospital described 11 specific job duties qualifying

the charge nurses as statutory supervisors. ER 40–41. Absent a hearing to determine the cumulative effect of the supervisors’ misconduct, the panel majority’s insistence on additional proof was contrary to this Court’s holdings. *NLRB v. Valley Bakery, Inc.*, 1 F.3d at 770-772; *Pinetree Transp. Co. v. NLRB*, 686 F.2d at 745. *See also NLRB v. Riverboat Hotel*, 105 F.3d 665, 1996 WL 738732, at *1 (9th Cir. 1996) (observing that the Board reviews alleged interference as a whole); *NLRB v. Island Film Processing Co.*, 784 F.2d 1446, 1450 (9th Cir. 1986).

Here, the Hospital focused on interference by the charge nurses—i.e., statutory supervisors, and it is well established that supervisory interference can taint an election. *Id.* Elections must be held under laboratory conditions, and supervisors can destroy those conditions by campaigning for either side. *Id.* at 908; *SSC Mystic Operating Co., LLC v. NLRB*, 801 F.3d 302, 309 (D.C. Cir. 2015) (explaining that pro-union conduct by supervisors is just as damaging as anti-union conduct). Supervisors are not employees, and they have no Section 7 rights. *Id.* So when they participate, it is as if the employer itself is participating. *Id.* Their voices carry extra weight and can make employees believe there is a “right” way to vote. *See Harborside*, 343 N.L.R.B. at 911 (explaining that when a supervisor asks an employee to sign an authorization card, the employee naturally feels as if there is a “right” way to answer).

Here, the Hospital described supervisory interference throughout the

campaign: the charge nurses solicited authorization cards, signed cards themselves, let employees know they signed cards, told employees to vote for the Union, attended Union meetings, appeared in Union propaganda, dressed in black to show Union support, and served as the Union’s election observer. *See* ER 42. This conduct was seen by the entire bargaining unit. *See* ER 38–39 (identifying witnesses who saw the interference), and ER 42 (listing the various acts of interference). The charge nurses also exercised extensive supervisory duties, including assigning work, scheduling shifts, and issuing discipline. ER 40–41. This wide-ranging involvement and extensive supervisory authority fostered a coercive environment where there was only one right way to vote. *Cf. Harborside*, 343 N.L.R.B. at 913 (invalidating election when supervisor solicited employee signatures, required employees to attend union meetings, required an employee to wear a union pin, and asked employees if she could “count on” them).

The panel majority, like the NLRB, was required to assume the Hospital’s allegations were true. *See Bell Foundry*, 827 F.2d at 1344; *Durham Sch. Servs.*, 821 F.3d at 58. If the allegations created a factual dispute—for example, whether each witness really saw each act of interference—the Regional Director had to resolve that dispute through a hearing. *See, e.g., Sonoco Prod. Co. v. NLRB*, 399 F.2d 835, 839 (9th Cir. 1968) (explaining that when allegations raise a material factual issue, the Board must hold a hearing); *NLRB v. Commercial Letter, Inc.*, 455 F.2d 109,

114 & n.5 (8th Cir. 1972) (stating that when allegations raise factual issues, the Board must resolve the issues through an evidentiary hearing) (“Where . . . the known or uncontested facts show a need for further inquiry, an opportunity to be heard and cross-examine must be provided.”).

The panel majority also fails to address this Court’s longstanding rule that when deciding whether a party has made out a *prima facie* case, the Board must account for the party’s inability to compel witness cooperation. *See NLRB v. Valley Bakery, Inc.*, 1 F.3d 769, 772 (9th Cir. 1993) (finding it “unreasonable to expect an employer to document its objections with the kind of evidence that realistically could be uncovered only by subpoena and an adversarial hearing”). This Court has held it does not expect employers to offer pre-hearing evidence in the same detail they could offer it after a hearing. *Id.* To do so would offend not only simple fairness, but due process. *See NLRB v. Advanced Sys., Inc.*, 681 F.2d 570, 575 (9th Cir. 1982) (stating that the incompleteness of the record required the court to construe the employer’s allegations in the light most favorable to the employer), *opinion amended and superseded* (9th Cir. June 23, 1982); *NLRB v. Conn. Foundry Co.*, 688 F.2d 871, 879–80 (2d Cir. 1982) (holding that Board erred by penalizing employer for failing to gather information it could only have gathered through an evidentiary hearing).

CONCLUSION

For the reasons set forth above, Petitioner asks that its petition for rehearing be granted and that enforcement of the Board's order be denied.

Respectfully submitted,

Maurice Baskin
Littler Mendelson, P.C.
815 Connecticut Avenue, NW, Suite 400
Washington, DC 20006-4046
202.842.3400
mbaskin@littler.com

Robert F. Millman
Littler Mendelson, P.C.
2049 Century Park East, 5th Floor
Los Angeles, CA 90067
310.553.0308
rmillman@littler.com

*Attorneys for Petitioner
East Valley Glendora Hospital, LLC*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form11instructions.pdf>

9th Cir. Case Number(s)

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

Prepared in a format, typeface, and type style that complies with Fed. R. App.

P. 32(a)(4)-(6) and **contains the following number of words:** .

(Petitions and answers must not exceed 4,200 words)

OR

In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July 2020, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

/s/ Maurice Baskin

Maurice Baskin

Attorney for Petitioner
East Valley Glendora Hospital, LLC

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 29 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

EAST VALLEY GLENDORA HOSPITAL,
 LLC, DBA Glendora Community Hospital,

 Petitioner,

 v.

 NATIONAL LABOR RELATIONS
 BOARD,

 Respondent,

 SEIU LOCAL 121RN,

 Intervenor.

No. 19-70292

 NLRB No. 31-CA-229412

 MEMORANDUM*

NATIONAL LABOR RELATIONS
 BOARD,

 Petitioner,

 v.

 EAST VALLEY GLENDORA HOSPITAL,
 LLC, d/b/a Glendora Community Hospital,

 Respondent,

No. 19-70596

 NLRB No. 31-CA-229412

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

SEIU LOCAL 121RN,

Intervenor.

On Petition for Review of an Order of the
National Labor Relations Board

Submitted March 30, 2020**
Pasadena, California

Before: PAEZ, CALLAHAN, and BUMATAY, Circuit Judges.

Following a representation election, SEIU 121RN (“the Union”) was certified as the exclusive collective-bargaining representative of a unit of nurses employed by East Valley Glendora Hospital (“the Hospital”). After the election, the Hospital filed twenty-nine objections to the election and submitted an offer of proof supporting the allegations. The Regional Director held that the objections failed to demonstrate a prima facie showing of objectionable conduct, denied an evidentiary hearing, and issued a representative certification.

The Hospital continued to refuse to recognize and bargain with the Union. In the ensuing unfair labor practice case, the National Labor Relations Board (“NLRB” or “the Board”) issued an order granting summary judgment for the Union. The Hospital petitions for review of the NLRB’s order (No. 19-70292),

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

and the NLRB cross-petitions for enforcement of its order (No. 19-70596). The Union intervened on behalf of the Board. We deny the Hospital's petition for review and grant the NLRB's cross-petition for enforcement in full.

I.

The parties first dispute the scope of our review. We “lack[] jurisdiction to review objections that were not urged before the Board,” *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982), “unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances,” 29 U.S.C. § 160(e).

The Hospital's Request for Review does not address eleven of the initial twenty-nine objections (objections 1, 3, 4, 7, 10, 12, 14, 17, 22, 23, and 28). Those objections allege unlawful conduct by the Union. The Request, however, discusses only conduct by alleged supervisors or non-employees. The Hospital now argues that the alleged supervisors had “implied” or “apparent authority” to act on the Union's behalf, *see* Op. Br. of Hospital 27, but it did not pursue that argument before the Board or submit a concomitant offer of proof. We thus lack jurisdiction to review these objections.

For similar reasons, we cannot review objections 24 and 25. The Hospital now argues that the supervisors' willingness to provide photographs and statements is unlawful even if the conduct cannot be attributed to the Union or was

conducted on behalf of the Union, but, as the Hospital concedes, this argument was never presented before the NLRB. *See* Reply Br. of Hospital 11 (“[T]he Hospital argued below that the supervisors’ appearances in the propaganda were coercive: the only ‘new’ aspect is that the conduct need not be attributed to the Union.”). The Request did not put the NLRB on notice of the separate claims. *See, e.g., NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 350 (1953).

Finally, objections 20 and 21 are also not sufficiently preserved in the Request. They allege that the Union’s organizing drive was initiated by statutory supervisors. Although much of the Request discusses other conduct by statutory supervisors, there is no mention of the organizing drive.

For these reasons, the only objections reviewable on appeal are the remaining fourteen: objections 2, 5, 6, 8, 9, 11, 13, 15, 16, 18, 19, 26, 27, and 29.

II.

To obtain an evidentiary hearing on its objections, the objecting party must demonstrate that there is a “substantial material issue of fact relating to the validity of a representation election.” *Pinetree Transp. Co. v. NLRB*, 686 F.2d 740, 744 (9th Cir. 1982). “Material” facts are those which, “if accepted as true, must warrant a conclusion in favor of that party on the issue of the validity of the election.” *Id.* at 745. The offer of proof submitted with the objections must “summariz[e] each witness’s testimony,” 29 C.F.R. § 102.66(c), and “state the

specific findings that are controverted and [] show what evidence will be presented to support a contrary finding or conclusion. Mere disagreement with the Regional Director's reasoning and conclusions" is insufficient. *NLRB v. Kenny*, 488 F.2d 774, 775–76 (9th Cir. 1973) (internal quotation marks and citations omitted).

A. Objections 2, 5, 6, 8, 9, 11, 13, 15, 16, 18, 19, and 29

The Board did not abuse its discretion in affirming the Regional Director's denial of an evidentiary hearing on these objections. They allege either that (1) supervisors improperly attended meetings, solicited cards from employees, engaged in electioneering activities, distributed campaign materials, directed that employees support the union, or engaged in other pro-union activity (objections 2, 5, 8, 11, 15, 18, 29), or (2) employees "were advised and made aware" that supervisors supported the union or were otherwise engaged in pro-union activity (objections 6, 9, 13, 16, 19).

Even if fully credited, these objections do not establish with sufficient specificity that the alleged supervisors' conduct surpassed participation and amounted to coercion or interference, or "materially affected the outcome of the election." *Harborside Healthcare, Inc.*, 343 N.L.R.B. 906, 909 (2004).

The offer of proof also fails to raise a substantial and material issue of fact. The regulations do not explicitly require that "each witness's testimony [] be summarized separately from every other witness," Op. Br. of Hospital 14, but the

offer submitted by the Hospital states only that the witnesses will testify about “the facts presented in the objections,” facts which are themselves insufficiently specific. To warrant an evidentiary hearing, a prima facie showing of election interference “may not be conclusory or vague.” *NLRB v. Valley Bakery, Inc.*, 1 F.3d 769, 772 (9th Cir. 1993) (quoting *Anchor Inns, Inc. v. NLRB*, 644 F.2d 292, 296 (3d Cir. 1981)).

B. Objection 26

Objection 26 alleges that the Union assigned a statutory supervisor as its election observer. The Regional Director explained that the objecting party must raise the allegedly supervisory status of an election observer during the Board’s pre-election conference or it will be precluded. *See Liquid Transp. Inc.*, 336 N.L.R.B. 420, 420 (2001). The Hospital does not dispute the applicability of this requirement; it instead argues that it sufficiently objected to the supervisory status of the observer in the Stipulated Election Agreement. But the Agreement contains no mention or objection of charge nurses as election observers; the Hospital objected only to the inclusion of charge nurses in the bargaining unit.¹

¹ We do not address the applicability of the waiver bar raised by Judge Bumatay in dissent because the Hospital did not present that argument to the NLRB or to this court. *See Martinez-Serrano v. I.N.S.*, 94 F.3d 1256, 1259–60 (9th Cir. 1996) (issues not raised and argued in a party’s opening brief are waived). Before us, the Hospital argues only that it sufficiently preserved objection 26 in the Stipulated Election Agreement, and that its offer of proof was sufficient to merit an evidentiary hearing.

Even assuming the Hospital preserved this objection, the offer of proof again fails to raise a substantial and material issue of fact. It does not identify the supervisor, list facts supporting the individual's supervisory status, or provide any specificity to the facts underlying the objection. *See Valley Bakery*, 1 F.3d at 772.

C. Objection 27

Objection 27 is a catch-all statement comprised of legal conclusions. Unsupported by more specific statements, it does not introduce a “substantial material issue of fact relating to the validity of a representation election.” *Pinetree Transp. Co.*, 686 F.2d at 744.

* * *

For the reasons stated, we **DENY** the Hospital's petition for review (No. 19-70292). We **AFFIRM** the decision and order of the NLRB and **GRANT** the NLRB's cross-petition for enforcement of its order (No. 19-70596).

FILED*East Valley Glendora Hospital v. NLRB*, No. 19-70292+

MAY 29 2020

BUMATAY, Circuit Judge, dissenting:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In a fair election, your boss shouldn't be watching over your shoulder as you vote. As such, the National Labor Relations Board has a well-established rule against supervisors serving as observers in elections over union representation. *See Mid-Continent Spring Co.*, 273 NLRB 884, 887 (1984) (“The use of [supervisors as] observers is such a material and fundamental deviation from the Board’s established rules for the conduct of an election, that [the Board] will set aside an election without any showing of actual interference in the way the employees voted in the election.”).

In this case, East Valley Glendora Hospital alleges that a charge nurse—a statutory supervisor in its view—monitored the election securing union representation for its nurses. Instead of investigating this “material and fundamental deviation,” the Board held that the Hospital waived its objection by failing to make the allegation at a pre-election conference. In doing so, the Board ignored that the parties agreed to *forego* the pre-election conference, and thus, none was held. Yet the Board still persisted with its waiver ruling. For this reason, I would grant the petition and remand.

I.

Under Board regulation, any objection to the conduct of an election must be filed within seven days after the election. 29 C.F.R. § 102.69(a). Glendora Hospital

did this. But instead of following its own regulation, the Board held that the Hospital waived the objection under the “longstanding” rule that a challenge to a supervisor acting as an election observer must be made at the pre-election conference. *See In Re Liquid Transp., Inc.*, 336 NLRB 420, 420 (2001). This rule, however, is patently inapplicable here: the parties, with the Board’s assent, stipulated to do without a pre-election conference. *See* 29 C.F.R. § 102.62.

From its earliest implementation, the Board’s waiver rule requires that an objecting party have *advance* notice of the identity of the election observers before a waiver occurs. *Compare Northrop Aircraft, Inc.*, 106 NLRB 23, 26 (1953) (holding an election-observer objection waived when, “although on notice of their status prior to the election,” the employer raised no objection) *with Bosart Co.*, 314 NLRB 245, 247 (1994) (explaining that when no evidence showed that the objecting party was aware that a supervisor would serve as an observer, an objection made after the election was not waived).

Here, since no pre-election conference was held, nothing in the record suggests that Glendora Hospital received advanced notice of the identity of the Union’s election observers. Neither the Board nor the Union states otherwise. In fact, the Hospital entered a Board-approved, pre-election agreement with the Union that specifically prohibited the use of any supervisors as election observers and preserved its claim that charge nurses are statutory supervisors. So, the Union and

the Board were well aware of the Hospital's objection prior to the election. To my knowledge, the Board has never applied this waiver rule under similar circumstances. Accordingly, I would hold that the Board abused its discretion in holding that the Hospital waived Objection 26.¹

II.

Board regulations only require that an offer of proof summarize each witness's testimony and raise material and substantial factual issues. *See* 29 C.F.R. §§ 102.69(a), (c)(1)(i), 102.66(c). Glendora Hospital's offer of proof was sufficient to preserve its objection. In its offer, it alleged that a charge nurse, a supervisory employee, served as an election observer on the date of the vote—all in violation of the Board's rules. So, we have the who, what, where, and when of the violation. Nothing more should be required. It's true that Glendora didn't name which charge nurse served as the election observer. But our precedent doesn't require that. *See*

¹ Contrary to the majority's holding, the Hospital raised the applicability of the waiver rule in its opening brief. Broadly, the Hospital argued that the Board's waiver ruling was "arbitrary," "capricious," and "wrong on the facts and the law." Pet'r Br. at 28. Specifically, the Hospital challenged whether the pre-election conference was the *only* venue to fully assert an election observer challenge. *See id.* ("The Board does not require a party to fully articulate the nature of its objection at the pre-election conference.") (simplified). Instead, the Hospital contends that it sufficiently preserved its claim by raising the election-observer issue in the pre-election statement of position (in lieu of the pre-election conference). *Id.* Accordingly, the Hospital is *necessarily* raising the applicability of the waiver rule imposed by the Board.

NLRB v. Valley Bakery, Inc., 1 F.3d 769, 770–72 (9th Cir. 1993) (holding employer’s offer of proof sufficient to trigger an investigation even though the name of the employee who threatened those who voted against the union was kept confidential). Accordingly, I would hold that the Hospital was entitled to an evidentiary hearing on Objection 26. *See Pinetree Transp. Co. v. NLRB*, 686 F.2d 740, 745 (9th Cir. 1982) (“[T]he right to a hearing attaches immediately once the objecting party supplies prima facie evidence presenting substantial material factual issues.”).

III.

I concur with the majority that the Hospital abandoned Objections 1, 3–4, 7, 10, 12, 14, 17, 20–23, and 28, but I would find them waived because the Hospital failed to raise them in its opening brief. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). I would decline to reach the other objections at this time since an evidentiary hearing on Objection 26 could change the Board’s mind with respect to those objections. *See Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th Cir. 2012) (declining to reach alternative grounds for remand). For the foregoing reasons, I respectfully dissent from the denial of the petition for Objections 2, 5–6, 8–9, 11, 13, 15–16, 18–19, 24–27, and 29.