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

**Nos. 19-1180 & 19-1194, 19-1181 & 19-1195, 19-1182 &
19-1191, 19-1183 & 19-1192, 19-1184 & 19-1193, and 19-1203 & 19-1207**

**RADNET MANAGEMENT, INC. d/b/a Orange Advanced Imaging
RADNET MANAGEMENT, INC. d/b/a West Coast Radiology – Irvine
RADNET MANAGEMENT, INC. d/b/a Anaheim Advanced Imaging
RADNET MANAGEMENT, INC. d/b/a West Coast Radiology – Santa Ana
RADNET MANAGEMENT, INC. d/b/a Garden Grove Advanced Imaging
RADNET MANAGEMENT, INC. d/b/a La Mirada Imaging**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS
FOR ENFORCEMENT OF ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**FINAL BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ELIZABETH A. HEANEY
Supervisory Attorney

REBECCA J. JOHNSTON
Attorney

**National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-1743
(202) 273-1066**

PETER B. ROBB
General Counsel

ALICE B. STOCK
Deputy General Counsel

RUTH E. BURDICK
Acting Deputy Associate General Counsel

DAVID HABENSTREIT
Assistant General Counsel

National Labor Relations Board

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

RADNET MANAGEMENT, INC. d/b/a)
ORANGE ADVANCED IMAGING)
))
Petitioner/Cross-Respondent) Nos. 19-1180, 19-1194
))
v.) Board Case No.
) 21-CA-242665
))
NATIONAL LABOR RELATIONS BOARD)
))
Respondent/Cross-Petitioner)

RADNET MANAGEMENT, INC. d/b/a)
WEST COAST RADIOLOGY – IRVINE)
))
Petitioner/Cross-Respondent) Nos. 19-1181, 19-1195
))
v.) Board Case No.
) 21-CA-242660
))
NATIONAL LABOR RELATIONS BOARD)
))
Respondent /Cross-Petitioner)

RADNET MANAGEMENT, INC. d/b/a)
ANAHEIM ADVANCED IMAGING)
))
Petitioner/Cross-Respondent) Nos. 19-1182, 19-1191
))
v.) Board Case No.
) 21-CA-242668
))
NATIONAL LABOR RELATIONS BOARD)
))
Respondent /Cross-Petitioner)

RADNET MANAGEMENT, INC. d/b/a)
WEST COAST RADIOLOGY – SANTA ANA)
))
Petitioner/Cross-Respondent) Nos. 19-1183, 19-1192
))
v.) Board Case No.

)	21-CA-242697
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent /Cross-Petitioner)	
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RADNET MANAGEMENT, INC. d/b/a)	
GARDEN GROVE ADVANCED IMAGING)	
)	
Petitioner/Cross-Respondent)	Nos. 19-1184, 19-1193
)	
v.)	Board Case No.
)	21-CA-243181
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent /Cross-Petitioner)	
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RADNET MANAGEMENT, INC. d/b/a)	
LA MIRADA IMAGING)	
)	
Petitioner/Cross-Respondent)	Nos. 19-1203, 19-1207
)	
v.)	Board Case No.
)	21-CA-242664
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent /Cross-Petitioner)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties and Amici

Petitioner/Cross-Respondent RadNet Management, Inc. was the Respondent before the Board in five of the six underlying proceedings (Board Case Nos. 21-CA-242660, 21-CA-242665, 21-CA-242668, 21-CA-242697, 21-CA-243181),

and RadNet Management, Inc. d/b/a La Mirada Imaging was the Respondent before the Board in the remaining underlying proceeding (Board Case No. 21–CA–242664). In each underlying proceeding, the Board’s General Counsel was a party before the Board. And the National Union of Healthcare Workers was the charging party before the Board.

B. Rulings Under Review

The matters under review are the following six Decisions and Orders of the Board (Chairman Ring and Members Kaplan and Emanuel):

1. *RadNet Management, Inc.*, 368 NLRB No. 53 (Aug. 28, 2019) (A.2125-28)
2. *RadNet Management, Inc.*, 368 NLRB No. 55 (Aug. 27, 2019) (A.2129-32)
3. *RadNet Management, Inc.*, 368 NLRB No. 56 (Aug. 28, 2019) (A.2113-16)
4. *RadNet Management, Inc.*, 368 NLRB No. 57 (Aug. 28, 2019) (A.2133-36)
5. *RadNet Management, Inc.*, 368 NLRB No. 58 (Aug. 27, 2019) (A.2117-20)
6. *RadNet Management, Inc. d/b/a La Mirada Imaging*, 368 NLRB No. 89 (Oct. 2, 2019) (A.2121-24)

The Decisions and Orders rely on findings made by the Board and Board officials in an earlier representation proceeding (Board Case No. 21-RC-226166). The findings in that representation proceeding are contained in an unpublished Regional Director’s (William B. Cowen) Decision and Direction of Election issued

on October 10, 2018 (A.1562-86); six unpublished Regional Director's Decisions and Certifications of Representative issued on February 19, 2019 (A.1149-58, 1307-12, 1461-69, 1599-1608, 1764-78, 1926-36); and six unpublished Board (same panel as above) orders issued on June 12, 2019 (A.1217, 1372, 1506, 1621, 1837, 1990), denying review of the Regional Director's Decisions.

C. Related Cases

The Decisions and Orders under review have not previously been before this Court, or any other court. Board counsel is not aware of any related cases currently pending.

/s/ David Habenstreit

David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570

Dated at Washington, D.C.
this 25th day of August, 2020

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of the issue	3
Relevant statutory provisions.....	4
Statement of the case.....	4
I. The Board’s findings of fact.....	5
A. RadNet’s operations	5
B. MRI technologists’ duties.....	5
C. Nuclear medicine/PET technologists’ duties	8
II. Procedural history	10
III. The Board’s conclusions and order	15
Summary of argument.....	15
Argument.....	17
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	17
A. The Court grants wide discretion to the Board in conducting elections and does not lightly set them aside.....	17
B. The Board’s decision to overrule RadNet’s election objections was well within its broad discretion	20
1. The MRI and nuclear medicine/PET technologists are not guards under the Act	20
a. Guard principles and standard of review	21
b. MRI technologists are not guards	23
c. Nuclear medicine/PET technologists are not guards	27

TABLE OF CONTENTS

Headings	Page(s)
2. The Board did not abuse its discretion in rejecting RadNet’s objections based on the 2014 amendments	31
3. The Board did not abuse its discretion by delaying the tallies	40
4. The Board did not abuse its discretion by overruling RadNet’s union-affiliation objections.....	50
5. The Board properly overruled RadNet’s facility-specific objections.	54
a. Irvine – security of ballot box	54
b. Irvine – observer’s cellphone use.....	56
c. Santa Ana – “Voting Place” signs.....	60
d. Garden Grove – “ <i>Milchem</i> ” issue	62
C. The Board properly precluded RadNet from relitigating its representation claims.....	65
Conclusion	70

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>55 Liberty Owners Corp.</i> , 318 NLRB 308 (1995)	26
<i>800 River Rd. Operating Co., LLC v. NLRB</i> , 846 F.3d 378 (D.C. Cir. 2017)	18
<i>AFL-CIO v. NLRB</i> , Civ. No. 20-CV-0675, 2020 WL 3041384 (D.D.C. June 7, 2020).....	31
<i>Allied Local & Reg’l Mfrs. Caucus v. EPA</i> , 215 F.3d 61 (D.C. Cir. 2012)	32
<i>Alois Box Co. v. NLRB</i> , 216 F.3d 69 (D.C. Cir. 2000)	66
<i>Am. Hosp. Ass’n v. NLRB</i> , 499 U.S. 606 (1991).....	21
* <i>Amalgamated Clothing v. NLRB</i> , 736 F.2d 1559 (D.C. Cir. 1984)	19, 46
* <i>Amalgamated Clothing Workers v. NLRB</i> , 424 F.2d 818 (D.C. Cir. 1970)	18, 19, 69
<i>Amalgamated Serv. & Allied Indus. Joint Bd., v. NLRB</i> , 815 F.2d 225 (2d Cir. 1987).....	64, 65
<i>Ass’n of Private Sector Colls. & Univs. v. Duncan</i> , 681 F.3d 427 (D.C. Cir. 2012)	32
* <i>Assoc. Builders & Contractors of Texas, Inc. v. NLRB</i> , 826 F.3d 215 (5th Cir. 2016)	32-37
<i>AT&T, Inc. v. FCC</i> , 886 F.3d 1236 (D.C. Cir. 2018).....	20
<i>Atlanta Hilton & Towers</i> , 273 NLRB 87 (1984), <i>vacated in part</i> , 275 NLRB 1413 (1985)	67
<i>Austill Waxed Paper Co.</i> , 169 NLRB 1109 (1968)	56
<i>Barre-National, Inc.</i> , 316 NLRB 877 (1995)	34

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Bell Foundry Co. v. NLRB</i> , 827 F.2d 1340 (9th Cir. 1987)	55
<i>Bellagio, LLC v. NLRB</i> , 863 F.3d 839 (D.C. Cir. 2017)	22, 23, 26, 30
<i>Benavent & Fournier, Inc.</i> , 208 NLRB 636 (1974)	56
* <i>Boeing Co.</i> , 328 NLRB 128 (1999)	22, 23, 24, 25, 26, 28
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	3
<i>Bowen v. Georgetown Univ. Hosp.</i> , 488 U.S. 204 (1988).....	40
<i>Canadian Am. Oil Co. v. NLRB</i> , 82 F.3d 469 (D.C. Cir. 1996).....	18, 19
<i>Ceva Logistics U.S., Inc.</i> , 357 NLRB 628 (2011)	42
* <i>Chamber of Commerce of the United States of Am. v. NLRB</i> , 118 F. Supp. 3d 171 (D.D.C. 2015).....	33-37
<i>Chrill Care, Inc.</i> , 340 NLRB 1016 (2003)	58
<i>Country Ford Trucks, Inc. v. NLRB</i> , 229 F.3d 1184 (D.C. Cir. 2000).....	23
<i>Diamond Walnut Growers, Inc.</i> , 308 NLRB 933 (1992)	43
<i>Drivers, Chauffeurs, Warehousemen & Helpers, Local 71 v. NLRB</i> , 553 F.2d 1368 (D.C. Cir. 1977).....	22
<i>Dunham’s Athleisure Corp.</i> , 315 NLRB 689 (1994)	55
* <i>Durham Sch. Servs., LP v. NLRB</i> , 821 F.3d 52 (D.C. Cir. 2016).....	18, 19, 48, 54, 61
<i>Elizabethtown Gas Co. v. NLRB</i> , 212 F.3d 257 (4th Cir. 2000)	56

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Excelsior Underwear, Inc.</i> , 156 NLRB 1236 (1966)	36
<i>Exxon Chem. Co. v. NLRB</i> , 386 F.3d 1160 (D.C. Cir. 2004)	17
<i>FCC v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009)	34, 40
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999)	3
<i>Halliburton Servs.</i> , 265 NLRB 1154 (1982)	43
<i>Hard Rock Holdings, LLC v. NLRB</i> , 672 F.3d 1117 (D.C. Cir. 2012)	61
<i>Harlan No. 4 Coal Co. v. NLRB</i> , 490 F.2d 117 (6th Cir. 1974)	58
<i>Heuer Int’l Trucks</i> , 273 NLRB 361 (1984)	67
<i>Highlands Hosp. Corp. v. NLRB</i> , 508 F.3d 28 (D.C. Cir. 2007)	23
<i>Human Life of Washington Inc. v. Brumsickle</i> , 624 F.3d 990 (9th Cir. 2010)	38
<i>Humane Soc’y for Seattle/King Cnty.</i> , 356 NLRB 32 (2010)	51
<i>Imperial Rice Mills, Inc.</i> , 110 NLRB 612 (1954)	43
* <i>Indep. Rice Mill, Inc.</i> , 111 NLRB 536 (1955)	43
* <i>IUOE Local 501, AFL-CIO v. NLRB</i> , 949 F.3d 477 (9th Cir. 2020)	22, 25, 31
<i>Joseph T. Ryerson & Son, Inc. v. NLRB</i> , 216 F.3d 1146 (D.C. Cir. 2000)	66
<i>LifeSource v. NLRB</i> , 2016 WL 6803740 (D.C. Cir. 2016)	57

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Manchester Knitted Fashions, Inc.</i> , 108 NLRB 1366 (1954)	43
<i>Medina Cnty. Publ'ns</i> , 274 NLRB 873 (1985)	3
<i>Midland Nat'l Life Ins. Co.</i> , 263 NLRB 127 (1982)	51
* <i>Milchem, Inc.</i> , 170 NLRB 362 (1968)	63, 64
<i>N. of Mkt. Senior Servs., Inc. v. NLRB</i> , 204 F.3d 1163 (D.C. Cir. 2000)	18
<i>Nathan Katz Realty, LLC v. NLRB</i> , 251 F.3d 981 (D.C. Cir. 2001)	44, 49
<i>Nat'l Ass'n of Home Builders v. EPA</i> , 682 F.3d 1032 (D.C. Cir. 2012)	40
<i>Nevada Sec. Innovations, Ltd.</i> , 337 NLRB 1108 (2002)	52
<i>NLRB v. A.J. Tower Co.</i> , 329 U.S. 324 (1946)	18, 38
<i>NLRB v. Browning-Ferris Indus. of Louisville, Inc.</i> , 803 F.2d 345 (7th Cir. 1986)	64
<i>NLRB v. Duriron Co.</i> , 978 F.2d 254 (6th Cir. 1992)	65
<i>NLRB v. Golden Age Beverage Co.</i> , 415 F.2d 26 (5th Cir. 1969)	18
<i>NLRB v. Kentucky River Community Care, Inc.</i> , 532 U.S. 706 (2001)	23
<i>NLRB v. Mar Salle, Inc.</i> , 425 F.2d 566 (D.C. Cir. 1970)	18
<i>NLRB v. Oesterlen Servs. for Youth, Inc.</i> , 649 F.2d 399 (6th Cir. 1981)	64
<i>NLRB v. Palmer Donavin Mfg. Co.</i> , 369 F.3d 954 (6th Cir. 2004)	65

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>NLRB v. WFMT, a Div. of Chicago Educ. Television Ass’n</i> , 997 F.2d 269 (7th Cir. 1993)	64
<i>NLRB v. RadNet Mgmt., Inc., et al.</i> , Nos. 19-71261 & 19-71447, 2020 WL 3265239 (9th Cir. June 17, 2020)	53, 68
<i>NLRB v. Wyman-Gordon Co.</i> , 394 U.S. 759 (1969).....	36
<i>Overnite Transp. Co. v. NLRB</i> , 140 F.3d 259 (D.C. Cir. 1998).....	63
* <i>Pac. Grain Prod.</i> , 309 NLRB 690 (1992)	61
<i>Pac. SW. Container</i> , 283 NLRB 79 (1987)	51
* <i>Pace Univ. v. NLRB</i> , 514 F.3d 19 (D.C. Cir. 2008).....	27, 66
<i>Packard Motor Car Co. v. NLRB</i> , 330 U.S. 485 (1947).....	23
<i>Paprikas Fono</i> , 273 NLRB 1326 (1984)	55
<i>Piggly-Wiggly</i> , 168 NLRB 792 (1967)	58
<i>Pittsburgh Plate Glass Co. v. NLRB</i> , 313 U.S. 146 (1941).....	66
<i>Polymers, Inc. v. NLRB</i> , 414 F.2d 999 (2d Cir. 1969).....	55
* <i>Polymers, Inc.</i> , 174 NLRB 282 (1969), <i>enforced</i> , 414 F.2d 999 (2d Cir. 1969).....	19, 55
<i>Pontiac Nursing Home, LLC v. NLRB</i> , 173 F. App’x 846 (D.C. Cir. 2006).....	58
<i>Pony Exp. Courier Corp. v. NLRB</i> , 981 F.2d 358 (8th Cir. 1992)	25

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>PruittHealth-Virginia Park, LLC v. NLRB</i> , 888 F.3d 1285 (D.C. Cir. 2018).....	61
<i>Purolator Courier</i> , 300 NLRB 812 (1990)	25, 28
<i>RadNet Mgmt., Inc. d/b/a San Fernando Valley Advanced Imaging Ctr.</i> , 2018 WL 3629315 (July 26, 2018), <i>enforced</i> , Nos. 19-71261 & 19-71447, 2020 WL 3265239 (9th Cir. June 17, 2020)	53
<i>RadNet Mgmt., Inc. d/b/a San Fernando Valley Interventional Radiology & Imaging Ctr.</i> , 2018 WL 3629317 (July 25, 2018), <i>enforced</i> , Nos. 19-71261 & 19-71447, 2020 WL 3265239 (9th Cir. June 17, 2020)	53
<i>Regent Assisted Living, Inc. v. NLRB</i> , 180 F. App'x 165 (D.C. Cir. 2006).....	63
<i>Reno v. Flores</i> , 507 U.S. 292 (1993).....	32
<i>Salem Hosp. Corp. v. NLRB</i> , 808 F.3d 59 (D.C. Cir. 2015).....	47, 68
<i>San Diego Gas & Elec.</i> , 325 NLRB 1143 (1998)	42
* <i>San Miguel Hosp. Corp. v. NLRB</i> , 697 F.3d 1181 (D.C. Cir. 2012).....	16, 20, 47
<i>Sawyer Lumber Co.</i> , 326 NLRB 1331 (1998), <i>enforced</i> , 225 F.3d 659 (6th Cir. 2000)	61
* <i>Sitka Sound Seafoods, Inc. v. NLRB</i> , 206 F.3d 1175 (D.C. Cir. 2000).....	27, 42, 44, 57, 60
<i>Sonotone Corp.</i> , 90 NLRB 1236 (1950)	11
<i>St. Elizabeth Cmty. Hosp. v. NLRB</i> , 708 F.2d 1436 (9th Cir. 1983)	57-58
<i>St. Francis Hosp.</i> , 271 NLRB 948 (1984)	67

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Sub-Zero Freezer Co.</i> , 271 NLRB 47 (1984)	66, 67, 68
<i>Truck Drivers Local Union No. 807 v. NLRB</i> , 755 F.2d 5 (2d Cir. 1985).....	22-23
<i>Univ. of Chicago</i> , 367 NLRB No. 41, 2018 WL 6381434 (Dec. 4, 2018), <i>enforced</i> , 944 F.3d 694 (7th Cir. 2019).....	68
<i>UPS Ground Freight, Inc. v. NLRB</i> , 921 F.3d 251 (D.C. Cir. 2019).....	38, 39
<i>US Ecology, Inc. v. NLRB</i> , 772 F.2d 1478 (9th Cir. 1985)	64
<i>Valcourt Bldg. Servs., Inc. v. NLRB</i> , 142 F. App'x 668 (4th Cir. 2005)	58
<i>Vari-Tronics Co. v. NLRB</i> , 589 F.2d 991 (9th Cir. 1979)	54
<i>Warren Unilube, Inc.</i> , 357 NLRB 44 (2011), <i>enforced</i> , 690 F.3d 969 (8th Cir. 2012)	68
<i>Wolverine Dispatch, Inc.</i> , 321 NLRB 796 (1996)	26
<i>Woods Quality Cabinetry Co.</i> , 340 NLRB 1355 (2003)	52

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

<u>Statutes</u>	<u>Page(s)</u>
Administrative Procedure Act	
5 U.S.C. § 706(2)(A).....	32
National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq.)	
29 U.S.C. § 153(b)	42
29 U.S.C. § 156	40
29 U.S.C. § 157	15, 17, 34
29 U.S.C. § 158(a)(1).....	3, 4, 14, 15, 17
*29 U.S.C. § 158(a)(5).....	3, 4, 14, 15, 17
29 U.S.C. § 159(b)	21, 33
*29 U.S.C. § 159(b)(3).....	10, 20, 21, 22, 23
29 U.S.C. § 159(c).....	3, 10, 42
29 U.S.C. § 159(c)(1).....	33
29 U.S.C. § 159(d)	3
29 U.S.C. § 160(a).....	3
29 U.S.C. § 160(e).....	3, 23
29 U.S.C. § 160(f).....	3
 <u>Regulations</u>	
Rules and Regulations of the National Labor Relations Board, Part 102, Subpart D, Representation–Case Procedures (29 C.F.R. § 102.60 et seq.)	
29 C.F.R. § 102.62(d) (2014).....	35, 36
29 C.F.R. § 102.62(e) (2014).....	60
29 C.F.R. § 102.63(a) (2014).....	33
29 C.F.R. § 102.63(b) (2014).....	35
29 C.F.R. § 102.64(a) (2014).....	33
29 C.F.R. § 102.66(a) (2014).....	33
29 C.F.R. § 102.67(g) (2014).....	66
29 C.F.R. § 102.67(k) (2014).....	60
29 C.F.R. § 102.67(l) (2014).....	35, 36
29 C.F.R. § 102.69(a) (2014).....	44
29 C.F.R. § 102.69(c)(1) (2014)	19
29 C.F.R. § 102.69(c)(2) (2014)	66

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

<u>Other Authorities</u>	<u>Page(s)</u>
Representation–Case Procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014)	10, 11, 13, 31-40
Representation–Case Procedures, 84 Fed. Reg. 69524 (Dec. 18, 2019)	31, 39-40
NLRB Casehandling Manual (Part Two) Representation Proceedings	
“Purpose of the Manual”	44
Section 11318	60
Section 11322.1	58
Section 11338.2(a)	58
Section 11338.4	58
Section 11340.1	44
Section 11340.11	44
Press Release, National Labor Relations Board Office of Public Affairs, NLRB to Implement All Election Rule Changes Unaffected by Court Ruling (June 1, 2020), <a href="http://10.18.2.35/news-outreach/news-story/nlr-to-implement-all-
election-rule-changes-unaffected-by-court-ruling">http://10.18.2.35/news-outreach/news-story/nlr-to-implement-all- election-rule-changes-unaffected-by-court-ruling	31-32

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GLOSSARY

The Act	The National Labor Relations Act (29 U.S.C. §§ 151 et seq.)
AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
The Board or NLRB	The National Labor Relations Board
Br.	Opening Brief of Petitioner/Cross- Respondent RadNet Management, Inc.
CT	Computed Tomography
Machinists	International Association of Machinists and Aerospace Workers
MRI	Magnetic Resonance Imaging
PET	Positron Emission Tomography
RadNet	Petitioner/Cross-Respondent RadNet Management, Inc. and/or RadNet Management, Inc. d/b/a Orange Advanced Imaging, RadNet Management, Inc. d/b/a West Coast Radiology – Irvine, RadNet Management, Inc. d/b/a Anaheim Advanced Imaging, RadNet Management, Inc. d/b/a West Coast Radiology – Santa Ana, RadNet Management, Inc. d/b/a Garden Grove Advanced Imaging, RadNet Management, Inc. d/b/a La Mirada Imaging
The Union	National Union of Healthcare Workers

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

These six consolidated cases are before the Court on RadNet Management, Inc.’s (“RadNet”) petitions for review, and the National Labor Relations Board’s (“the Board”) cross-applications for enforcement, of Board Decisions and Orders

issued against RadNet for its unlawful refusal to bargain with the National Union of Healthcare Workers (“the Union”) at six of its facilities, as reflected in the following chart:¹

RadNet Facility	Board Case No.	D.C. Case Nos.
Unit B: La Mirada Imaging (“La Mirada”)	Case 21–CA–242664, reported at 368 NLRB No. 89 (Oct. 2, 2019)	19-1203; 19-1207
Unit C: Orange Advanced Imaging (“Orange”)	Case 21–CA–242665, reported at 368 NLRB No. 53 (Aug. 28, 2019)	19-1180; 19-1194
Unit E: Garden Grove Advanced Imaging (“Garden Grove”)	Case 21–CA–243181, reported at 368 NLRB No. 58 (Aug. 27, 2019)	19-1184; 19-1193
Unit G: Anaheim Advanced Imaging (“Anaheim”)	Case 21–CA–242668, reported at 368 NLRB No. 56 (Aug. 28, 2019)	19-1182; 19-1191
Unit H: West Coast Radiology – Irvine (“Irvine”)	Case 21–CA–242660, reported at 368 NLRB No. 55 (Aug. 27, 2019)	19-1181; 19-1195
Unit J-2: West Coast Radiology – Santa Ana (“Santa Ana”)	Case 21–CA–242697, reported at 368 NLRB No. 57 (Aug. 28, 2019)	19-1183; 19-1192

¹ Throughout its brief, RadNet wrongly suggests that the six cases are against six separate employers. Five of the six underlying Board Orders run against RadNet Management, Inc. One Order runs against that same employer, but includes its operating name (RadNet Management, Inc. d/b/a La Mirada Imaging). RadNet did not argue in the underlying proceedings that the Board’s Orders named the wrong entity. The Board moved the Court to amend its captions so that they conform to the Board’s captions; those motions were denied.

The Board had jurisdiction over these matters under Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 160(a), and this Court has jurisdiction under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The petitions and cross-applications were timely; the Act imposes no time limit on such filings.

The Board’s unfair-labor-practice Orders are based, in part, on findings made in a single underlying representation proceeding: *RadNet Management, Inc.*, Board Case No. 21-RC-226166. Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the records before this Court also include the record in that proceeding. Section 9(d) authorizes judicial review of the Board’s actions in a representation proceeding for the limited purpose of deciding whether to “enforc[e], modify[], or set[] aside in whole or in part the [unfair-labor-practice] order of the Board.” 29 U.S.C. § 159(d); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964). 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 in the unfair-labor-practice cases. *See Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *Medina Cnty. Publ’ns*, 274 NLRB 873, 873 (1985).

STATEMENT OF THE ISSUE

The ultimate issue in this case 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)(5), (1), by refusing to bargain with the Union, the certified collective-bargaining representative of six units of RadNet's technical employees. The dispositive underlying issue is whether the Board acted within its broad discretion in overruling RadNet's objections to the elections.

RELEVANT STATUTORY PROVISIONS

The attached Addendum contains the pertinent statutory provisions.

STATEMENT OF THE CASE

These six consolidated unfair-labor-practice cases arise from RadNet's refusal to bargain with the Union, which the Board found violated Section 8(a)(5) and (1) of the Act. In the underlying representation proceeding, the Board certified, over RadNet's myriad objections, the Union as the exclusive collective bargaining representative of six units of technical employees working at separate RadNet facilities in Orange County, California. The Board's findings of fact and the procedural history of the representation and unfair-labor-practice proceedings are set forth below.²

² Record references in this final brief are to the Appendix ("A") filed by RadNet on August 17, 2020. "SA" refers to the Supplemental Appendix filed with this brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to RadNet's opening brief.

I. THE BOARD'S FINDINGS OF FACT

A. RadNet's Operations

RadNet offers diagnostic imaging services such as mammographies; x-rays; ultrasounds; and MRI (Magnetic Resonance Imaging), nuclear/PET (Positron Emission Tomography), and CT (Computed Tomography) scans at its various facilities throughout Southern California. RadNet offers different services at different facilities. As relevant here, RadNet's MRI technologists (discussed in Part B) perform MRI services at each facility except La Mirada. (A.1562-65; A.140-45.) RadNet's nuclear medicine/PET technologists (discussed in Part C) perform nuclear/PET scans at its Orange and Santa Ana facilities only. (A.1562-64, 1566-67; A.79, 140-45.)

B. MRI Technologists' Duties

RadNet's Lead MRI Technologists, MRI Technologists, and the two Multi-Modality Technologists who perform MRIs (collectively, "MRI technologists") conduct diagnostic imaging testing on patients referred by physicians to help diagnose soft-tissue pathologies.³ (A.1566, 1578; A.58, 67.) MRI technologists must understand physics to operate the MRI machine and be familiar with human pathologies, physiology, and anatomy. California does not require special

³ MRI Technologists and Lead MRI Technologists' job duties do not differ from a medical perspective. (A.1567; A.56, 68.) The two Multi-Modality Technologists at issue perform MRIs as one of their modalities. (A.1571, 1573, 1577; A.114-15.)

licensing for MRI technologists, but they must be certified by a state board for accreditation purposes. (A.1567; A.66-68.)

When a patient needs an MRI, the MRI technologist first asks the patient questions to determine whether the technologist is performing the correct test and to medically screen the patient for “contraindications,” or safety issues. (A.1567, 1572; A.67, 69, 74-75, 198-99.) Because the MRI machine contains a powerful magnet, the MRI technologist must ensure that the patient does not have metal in or on her body. (A.1567, 1572, 1577; A.58, 69, 74-75.) Some imaging studies also require the MRI technologist to start an intravenous line and inject contrast material into the patient before conducting the scan. For all MRI scans (with or without contrast), the MRI technologist is responsible for positioning the patient on the MRI unit, conducting the scan, and monitoring the imaging process from a console station outside the room to ensure a usable image. When finished, the technologist digitally transmits the images and data to a radiologist for analysis. (A.1567, 1572; A.67.) MRI technologists are also responsible for cleaning and housekeeping duties in their work areas. (A.1572; A.188-90.)

Within the framework of their duties as diagnostic technicians, the MRI technologists also ensure the safe operation of the MRI machine. (A.1578.) The MRI machine’s magnetism is always present, whether or not the machine is in use.

(A.1572; A.65.) The MRI machine must be kept at a safe temperature to prevent overheating. (A.1577; A.76-77.)

RadNet has incorporated safety guidelines developed by the American College of Radiology Accreditation into its department manual. (A.1567, 1572; A.69-71, 149-333.) According to those guidelines, the MRI area should be clearly demarcated with signage (dictated by the U.S. Food and Drug Administration) indicating the presence of the strong magnetic field. Access to the areas surrounding the MRI machine should be supervised and controlled. (A.1572 & n.10, 1577; A.191.) Typically, only the patient, MRI technologists, physicians, radiologists, and physicists are permitted to enter the room containing the MRI machine, designated as “Zone 4.” (A.1571-72; A.63-66, 72-73, 147.)

If an MRI technologist encounters a patient with contraindications attempting to enter Zone 4, the technologist should try to stop the patient and, if unable to stop her, call the police. (A.1572; A.76.) Other, non-MRI employees, like custodians, are also trained to ensure safety in the restricted areas. (A.1572; A.105-07, 161.) Although RadNet’s manual states that only MRI personnel should be issued keys to the restricted area, in practice, RadNet does not typically lock the doors to the room containing its MRI machine. (A.1572; A.75, 99, 191.)

MRI technologists do not carry weapons, clubs, or other security devices; they do not wear badges or uniforms identifying them as security personnel; they

do not sit in a security booth; and they do not make periodic rounds of the facility. If they identify a threat or suspicious activity at their facility, they, like non-MRI personnel, are instructed to call 911 or the police, rather than using force. They are to report any threats specific to the MRI unit to the site manager and/or complete an incident report particular to that modality. MRI technologists do not issue passes to visitors, monitor their comings and goings, or screen them, except for medically screening patients and escorting them through the imaging process. (A.1572, 1577-78; A.96-100.)

C. Nuclear Medicine/PET Technologists' Duties

RadNet's nuclear medicine/PET technologists also conduct imaging scans. They inject radioactive isotopes into patients for examination, so a physician can identify cancer cells or other anomalies. (A.1566-67; A.77-78.) As with MRI technologists, the nuclear medicine/PET technologists must first screen their patients to ensure they are performing the correct test. Then, they start an intravenous line, inject the isotopes into the patient, and conduct the imaging test. For a short time afterwards, they must monitor the patients. The injected isotopes make patients temporarily radioactive, and patients should limit contact with others during that time. (A.1567, 1572-73; A.80-81.) This is especially true with PET patients, who, because of the higher radiation and short half-life of the isotopes used in that test, must be temporarily isolated in a lead-lined room. (A.1567, 1573;

A.82.) PET technologists also monitor and clean the restrooms used by their patients because the patients' urine becomes radioactive. (A.1567; A.82-84.)

Nuclear medicine/PET technologists are licensed by the State of California after passing an exam in nuclear medicine. (A.1568; A.85.) In addition, they are overseen by an authorized physician. (A.1568; A.104.)

Within the framework of their duties as diagnostic technicians, these technologists are also responsible for maintaining the equipment they use for the imaging tests. (A.1567, 1578; A.80.) Nuclear medicine/PET technologists must take special care with the radioactive isotopes, which radiopharmaceutical companies deliver twice daily to the facility (depending on the patient schedule) in lead containers and secure in RadNet's "hot" lab. (A.1567, 1573; A.84-85.) Only authorized personnel (the technologists, supervising physician, and delivery employees) may access the hot lab. (A.1567, 1573 & n.11; A.84, 86-87.) Nuclear medicine/PET technologists must wear dosimetry badges to monitor their exposure to radioactive material and use protective equipment, such as syringe shields and lead glass, per California requirements. (A.1568; A.93-95.)

Like the MRI technologists, the nuclear medicine/PET technologists do not carry weapons, clubs, or security devices, nor are they identified as security personnel (*e.g.*, by wearing badges or uniforms). They do not sit in a security booth, make periodic rounds of the overall facility as part of their regular duties, or

monitor visitors' entrance and exit to the facility, except for escorting patients through the imaging process. They are not authorized to use physical force to counteract suspicious activity, but instead are instructed to call the police.

(A.1573, 1577-78; A.95, 108-10.)

II. PROCEDURAL HISTORY

On August 23, 2018, the Union filed a petition for certification under Section 9(c) of the Act, seeking to represent a multi-facility bargaining unit that included all full-time, part-time, and per-diem registered nurses and technical employees employed by RadNet at multiple facilities in Orange County. (A.1562; A.1559-60.)⁴ RadNet challenged the petitioned-for unit as inappropriate, arguing that it should be divided into single-facility units. RadNet further contended that the Board should dismiss the Union's petition because the petitioned-for unit included MRI and nuclear medicine/PET technologists, which, RadNet claimed, are guards within the meaning of Section 9(b)(3) of the Act, 29 U.S.C. § 159(b)(3). Finally, RadNet argued that the Board should dismiss the petition because the Board's 2014 amendments to its election procedures, Representation-Case Procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014) ("2014 amendments"), violate the law and public policy. (A.1562-65, 1578; A.126.) The Board conducted a two-

⁴ This final brief cites only one set of documents (Unit C) if documents are identical across cases.

day hearing on the first two issues. (A.1565.) The Board did not “permit litigation” on the 2014 amendments because RadNet’s counsel made clear that it was mounting a “facial challenge” only and had “no intention or need to put evidence into the record.” RadNet argued its facial challenges in its post-hearing brief. (A.1565, 1578; A.43-44, 47-48.)

On October 10, the Board’s Regional Director issued a Decision and Direction of Election. (A.1562-86.) He agreed with RadNet that single-facility units, rather than a multi-facility unit, were appropriate for collective-bargaining purposes. He also found that RadNet failed to prove that the disputed technologists were statutory guards and that RadNet’s various facial challenges to the Board’s 2014 amendments had already been addressed and resolved in the Board’s favor by the Board and the courts. (A.1565, 1577-78.)

The Regional Director directed separate secret-ballot elections in ten RadNet facilities (labeled Units A through J) to be conducted at overlapping times on October 24 and 25.⁵ (A.1579-83.) The Regional Director further directed the ballots to be impounded after each election. At the conclusion of the final polling period at the final election, the Board would tally the ballots for each voting unit

⁵ Unit J was sub-divided into J-1 (professional employees) and J-2 (non-professional employees) per *Sonotone Corp.*, 90 NLRB 1236 (1950). (A.1581 & n.23.) Presumably, RadNet refers to eleven units (Br.17) because it is counting J-1 and J-2 as separate units.

“as soon as possible” after 6:30 pm, on October 25, at RadNet’s Santa Ana facility.

(A.1584.)

Consistent with that direction, the Board conducted elections at the following RadNet facilities on the following dates and times. The tallies for each unit voting in favor of union representation are also included:

Unit	Election Date	Election Time	Tally
Unit A	October 25	11:30 a.m. to 1:00 p.m., 5:00 p.m. to 6:30 p.m.	n/a
Unit B: La Mirada	October 24	11:30 a.m. to 1:00 p.m.	3 eligible 3 (yes) - 0 (no)
Unit C: Orange	October 24	11:30 a.m. to 1:00 p.m., 5:00 p.m. to 6:30 p.m.	13 eligible 7 (yes) - 4 (no)
Unit D	October 25	11:30 a.m. to 1:00 p.m., 5:00 p.m. to 6:30 p.m.	n/a
Unit E: Garden Grove	October 24	7:30 a.m. to 9:00 a.m., 4:30 p.m. to 6:00 p.m.	9 eligible 6 (yes) - 3 (no)
Unit F	October 25	7:30 a.m. to 9:00 a.m.	n/a
Unit G: Anaheim	October 24	12:00 p.m. to 1:00 p.m., 2:30 p.m. to 3:30 p.m.	12 eligible 7 (yes) - 4 (no)
Unit H: Irvine	October 25	11:30 a.m. to 1:00 p.m., 5:00 p.m. to 6:30 p.m.	6 eligible 4 (yes) - 1 (no) ⁶
Unit I	October 25	11:30 a.m. to 12:30 p.m.	n/a
Unit J-1: Santa Ana (professional)	October 24	11:30 a.m. to 1:00 p.m., 5:00 p.m. to 6:30 p.m.	n/a

⁶ There were six challenged ballots at Irvine, which are not at issue.

Unit	Election Date	Election Time	Tally
Unit J-2: Santa Ana (non-professional)	October 24	11:30 a.m. to 1:00 p.m., 5:00 p.m. to 6:30 p.m.	21 eligible 10 (yes) - 9 (no)

(A.1582-83; A.1139, 1149, 1296, 1307, 1451, 1461, 1589, 1599, 1753, 1764, 1916 1926.)

RadNet filed objections to each election in which the Union prevailed, along with supporting offers of proof. Several of those objections and offers of proof were identical, alleging that: (1) the Board erred by conducting an election in a unit containing statutory guards; (2) the Board erred by conducting an election under its 2014 amendments; (3) the Board erred by impounding the ballots and delaying the vote tallies; and (4) the Union engaged in a material misrepresentation by failing to disclose an affiliation with the International Association of Machinists and Aerospace Workers (“Machinists”).⁷ (A.1600-07; A.1592-94.)

In addition, RadNet asserted several facility-specific objections. At Irvine, RadNet claimed that the Board agent responsible for conducting the election failed to maintain the security of the ballot box and that the Union’s observer used a cellphone during polling. (A.1772-76; A.1758-59.) At Santa Ana, RadNet alleged that the Board agent failed to post “Voting Place” signs. (A.1933; A.1921.) And at Garden Grove, RadNet asserted that an employee entered the polling area, not to

⁷ RadNet did not advance the guard objection at La Mirada.

vote, but to attempt to engage the Union's observer in a work-related conversation. (A.1314-16; A.1301-02.)

On February 19, 2019, the Regional Director issued six decisions, overruling RadNet's objections without a hearing and certifying the Union as the exclusive collective-bargaining representative of the technological employees in each unit.⁸ (A.1149-58, 1307-12, 1461-69, 1599-1608, 1764-78, 1926-36) RadNet requested Board review of the Regional Director's decisions, which the Board (Chairman Ring and Members Kaplan and Emanuel) denied. (A.1217, 1372, 1506, 1621, 1837, 1990.)

On April 8, the Union requested that RadNet recognize and collectively bargain with it. (A.1219, 1374, 1508, 1623, 1839, 1992.) Since then, RadNet has refused in order to test the validity of the Union's certifications. (A.1249, 1404, 1542, 1650, 1869, 2022.) In each case, the General Counsel issued a complaint and amended complaint against RadNet, alleging that its refusal to bargain violated Section 8(a)(5) and (1) of the Act and moved for summary judgment before the Board. (A.1225-29, 1243-45, 1380-84, 1398-1400, 1514-22, 1536-38, 1629-33, 1644-46, 1845-49, 1863-65, 1998-2002, 2016-2018.)

⁸ None of the units that voted for union representation include nurses.

III. THE BOARD'S CONCLUSIONS AND ORDER

On August 27, August 28, and October 2, 2019, the Board (Chairman Ring and Members Kaplan and Emanuel) issued Decisions and Orders, granting summary judgment to the General Counsel in each case, and finding that RadNet violated the Act by failing and refusing to recognize and bargain with the Union. The Board concluded that all representation issues raised by RadNet in the unfair-labor-practice proceedings were or could have been litigated in the underlying representation proceeding, 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 decisions to certify the Union. (A.2113-36.)

The Board's Orders each require 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 Orders direct RadNet, on request, to bargain with the Union, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (A.2113-36.)

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 six facilities. RadNet concedes its

refusal, but defends its conduct by arguing that the Board erred in overruling its election objections – those identical across cases and facility-specific – and certifying the Union. RadNet’s “blizzard of arguments” that the Board somehow abused its discretion in the representation proceeding, however, is “marked more by imagination than substance.” *San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1186, 1188 (D.C. Cir. 2012). The Board acted well within its broad discretion in overruling RadNet’s objections and certifying the Union.

Likewise, RadNet’s claim that the Board should have reviewed the representation proceeding again in the unfair-labor-practice cases borders on 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 marshalling evidence or honing its arguments to prove the alleged objectionable conduct. This gamesmanship appears motivated more by “the inevitable delay that review of Board orders affords,” *id.* at 1188, than by any legitimate concerns with the Board’s representation elections.

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

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); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004). Here, RadNet has refused to recognize and bargain with the Union, but argues that the Union’s certifications were improper because the Board abused its discretion in overruling its election objections. As shown below, the Board acted well within its discretion in finding each of RadNet’s objections 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

Section 7 of the Act provides employees “the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing” 29 U.S.C. § 157. Congress has entrusted the Board with an especially “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); *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996). In reviewing the validity of election results, the Court asks whether the Board “has followed appropriate and fair procedures, and has reached a rational conclusion” in addressing any objections to the election. *Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 58 (D.C. Cir. 2016). The party seeking to overturn an election bears a heavy burden, and the Court will overturn the Board’s decision to certify an election’s results “in only the rarest of circumstances.” *800 River Rd. Operating Co., LLC v. NLRB*, 846 F.3d 378, 385-86 (D.C. Cir. 2017) (quoting *N. of Mkt. Senior Servs., Inc. v. NLRB*, 204 F.3d 1163, 1167 (D.C. Cir. 2000)).

The Court has long “recognize[d] the basic truth that union elections are often not conducted under ideal conditions[and] that there will be minor (and sometimes major, but realistically harmless) infractions by both sides.” *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 571 (D.C. Cir. 1970). To overturn an election based on a party’s actions, an objecting party must demonstrate not only that misconduct occurred, but also that it “interfered with the employees’ exercise of free choice to such an extent that [it] materially affected the results of the election.”

Amalgamated Clothing Workers v. NLRB, 424 F.2d 818, 827 (D.C. Cir. 1970) (quoting *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969)). 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 Durham*, 821 F.3d at 61. 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”).

An objecting party does not have an absolute right to a post-election hearing on its objections. *Amalgamated*, 424 F.2d at 828. To justify a hearing, the objecting party must proffer evidence raising “substantial and material factual issues” that could constitute grounds for setting aside the election. 29 C.F.R. § 102.69(c)(1) (2014); *see Durham*, 821 F.3d at 58. When the objecting party’s proffered evidence, even if credited, would not justify setting aside the results of the election as a matter of Board law, a post-election hearing is not warranted, and the Board overrules the objections. *Durham*, 821 F.3d at 58.

The Court reviews the Board’s decision to overrule election objections without holding a post-election hearing for an abuse of discretion. *Canadian Am. Oil*, 82 F.3d at 473. The abuse-of-discretion standard is “highly deferential.”

AT&T, Inc. v. FCC, 886 F.3d 1236, 1245 (D.C. Cir. 2018). That is particularly true here, given the substantial deference afforded to the Board in the context of representation proceedings.

B. The Board’s Decision To Overrule RadNet’s Election Objections Was Well Within Its Broad Discretion

The Board did not abuse its discretion in overruling RadNet’s myriad objections to the six elections without a hearing. RadNet takes a “machine gun” approach to challenging these elections, *San Miguel*, 697 F.3d at 1188 – suggesting missteps where there are none, ignoring precedent, and mischaracterizing its proffered evidence. But the sheer volume of RadNet’s objections does not obscure the fact that, for each one, it failed to allege facts that, if credited, would warrant setting aside the elections. The objections that are largely identical across the six cases are addressed first, followed by the facility-specific objections.

1. *The MRI and nuclear medicine/PET technologists are not guards under the Act*

For all facilities except La Mirada, RadNet claimed that the elections were “conducted in violation of Section 9(b)(3)” of the Act because the units include guards. RadNet’s objections were accompanied by “substantially the same” testimony and documentation as that presented in the pre-election hearing, where the parties fully litigated the guard issue. (A.1600; A.1592, 1054.) The Board’s decision to overrule those objections thus turns on the evidence RadNet presented

at that hearing. The Board, in its Decision and Direction of Election, “fully considered the record evidence” and properly found that RadNet had not met its burden of proving that the units impermissibly include statutory guards. As RadNet did “not raise any additional evidence in support of [the objections] that was not already considered in the pre-election decision,” the Board reasonably overruled the objections without holding another hearing. (A.1600.)

a. Guard principles and standard of review

“[T]o assure to employees the fullest freedom in exercising the rights guaranteed by [the Act],” Section 9(b) empowers the Board to decide in each case whether “the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” 29 U.S.C. § 159(b); *see Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610-11 (1991). Section 9(b) also requires statutory “guards” to be separated from all other employees for the purposes of collective bargaining.⁹

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

⁹ The 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

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 "to minimize the danger of divided loyalty that arises when a guard is called upon to enforce the rules of his employer against a fellow union member." *Bellagio, LLC v. NLRB*, 863 F.3d 839, 849 (D.C. Cir. 2017) (quoting *Drivers, Chauffeurs, Warehousemen & Helpers, Local 71 v. NLRB*, 553 F.2d 1368, 1373 (D.C. Cir. 1977)); see *IUOE Local 501, AFL-CIO v. NLRB*, 949 F.3d 477, 482 (9th Cir. 2020) ("animating purpose of" Section 9(b)(3) is "minimizing divided loyalty between guards and non-guard employees"). By segregating them, Section 9(b)(3) "limits the organizational rights of guards." *Truck Drivers Local Union No. 807 v. NLRB*,

affiliated directly or indirectly with an organization which admits to membership, employees other than guards." 29 U.S.C. § 159(b)(3).

755 F.2d 5, 8 (2d Cir. 1985). Thus, any guard-like duties must be more than “a minor or incidental part of [an employee’s] overall responsibilities.” *Boeing*, 328 NLRB at 130.

“Determining what constitutes an appropriate [bargaining] unit ‘involves of necessity a large measure of informed discretion.’” *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)). Because the question of whether employees are guards under Section 9(b)(3) of the Act is “predominantly factual,” the Court will only disturb the Board’s determination if it is “unsupported by substantial evidence on the record considered as a whole.” *Bellagio*, 863 F.3d at 847 (alteration omitted); *see* 29 U.S.C. § 160(e); *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007) (Court “will reverse for lack of substantial evidence only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.”). The burden is on the party asserting guard status. *Cf. NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710-11 (2001) (burden of proving supervisory status is on party asserting the exception).

b. MRI technologists are not guards

Substantial evidence supports the Board’s finding that RadNet failed to prove that its MRI technologists are guards. As the Board found, “these employees are engaged to perform certain diagnostic testing, and not to ensure the safety and

security of [RadNet's] premises.” (A.1578.) As part of that diagnostic testing, MRI technologists question patients to ensure they are performing the correct test; confirm that patients have no metal in or on their bodies before entering the MRI room; inject contrast material intravenously into certain patients; position patients on the MRI unit; monitor the imaging process from the console station; and digitally transmit images to radiologists for analysis. And they must understand human pathologies, physiology, anatomy, and physics and be certified by a state board. RadNet, while accusing the Board of failing to review the “entirety of the evidentiary record” (Br.50), scarcely acknowledges this evidence, including that its MRI technologists do, in fact, perform MRIs.

Further, as the Board noted (A.1577-78), RadNet's MRI technologists lack many common indicia of guards, which although not dispositive, remain relevant. *See Boeing*, 328 NLRB at 130. They do not, for example, carry weapons, clubs, or other security devices. They do not wear uniforms or badges identifying them as security personnel. They do not sit in a security booth or make security rounds of the facility. They do not screen visitors (aside from medically screening patients) for entry into or exit from the facility. And, as for dealing with suspicious activity, if there is a threat to the MRI unit, they report it to the site manager and/or complete an incident report particular to that modality, just as employees who work in other RadNet modalities, like CT or mammography, do. (A.99-100.)

“[T]here is no evidence that these employees receive specialized instructions on what to do in the event that there is a threat to the security of the premises.”¹⁰

(A.1578; A.96-97.) Indeed, in that respect, they are no “different from any other employees in non guards occupations who, during the course of the workday, would presumably report suspicious job-related activity to their employer or to the police.” *Purolator Courier*, 300 NLRB 812, 814 & n.8 (1990); *see IUOE Local 501*, 949 F.3d at 482 (employees not guards where they had “no obligation to report employee misconduct beyond that of other employees”); *Pony Exp. Courier Corp. v. NLRB*, 981 F.2d 358, 363 (8th Cir. 1992) (same).

RadNet, however, plays up evidence of “minor or incidental,” guard-like duties its MRI technologists perform. *See Boeing*, 328 NLRB at 130. The Board considered this evidence, but found that these “safety protocols . . . relate to the operation of the diagnostic machines they utilize” (A.1578.) For example, MRI technologists make sure that the MRI machine operates at a safe temperature and that metal (particularly in implanted medical devices or on patients’ bodies) does not enter the areas closest to the MRI machine. They, along with other personnel, also ensure that only authorized individuals enter the restricted zones

¹⁰ RadNet claims that the Board erred in making this finding (Br.52), but points only to testimony that the technologists are required to “report [a threat *specific to the MRI unit*] to the on-site radiologist and the facility manager, and follow directions from that point on.” (A.97.)

around the MRI machine. But those minor or incidental duties, including monitoring access to restricted areas, do not transform them into statutory guards. *See id.*; *Wolverine Dispatch, Inc.*, 321 NLRB 796, 798-99 (1996) (receptionists who monitored access to employer's front entry and lobby were not guards; guard-like duties incidental to clerical duties); *55 Liberty Owners Corp.*, 318 NLRB 308, 310-11 (1995) (doorpersons and elevator operators' monitoring access to buildings was incidental to their courtesy-oriented and receptionist services).

In addition to exaggerating MRI technologists' guard-like responsibilities, RadNet mischaracterizes, in its statement of facts (Br.10), the evidence regarding a potential strike. RadNet's sole witness on the guard issue testified that the MRI technologists' leaving for a hypothetical strike "should be fine so long as they follow the safety protocols, I mean, you know, before they leave the center." (A.102-03.) His reference to a "fatal mistake," which RadNet quotes out of context, was if the technologists failed to secure the area when exiting, by leaving the door open or taking government-mandated signs down. Other than its cursory claim that "fellow employees" (Br.50) are among the individuals that MRI technologists prevent from accessing restricted areas and evacuate in an emergency, RadNet has not presented any "danger of divided loyalty that arises when a guard is called upon to enforce the rules of his employer against a fellow union member." *Bellagio*, 863 F.3d at 849.

c. Nuclear medicine/PET technologists are not guards

Nor did RadNet prove that its nuclear medicine/PET technologists are guards.¹¹ (A.1577-78.) Similar to MRI technologists, these employees are primarily tasked with conducting diagnostic imaging tests. They medically screen patients after they are admitted into the facility, inject radioactive isotopes into patients intravenously, and conduct imaging tests to help physicians diagnose cancer and other anomalies. To perform their duties, they must pass an examination in nuclear medicine and be licensed by the State of California.

Like the MRI technologists, the nuclear medicine/PET technologists do not share common indicia of guards. If faced with suspicious activity on the premises, they are not authorized to use force, but should call the authorities. And again, RadNet points to no evidence that the nuclear medicine/PET technologists “receive specialized instructions” (A.1578) related to security threats to the premises, as

¹¹ Before the Board (A.1812-16), and again here (Br.6, 11-13, 15), RadNet mistakenly asserts that nuclear medicine/PET technologists at Orange and *Irvine* should be excluded from the unit. But only the Orange and *Santa Ana* facilities employ nuclear medicine/PET technologists, as stipulated by the parties. (A.1562-64, 1566-67; A.79, 140-45.) RadNet has forfeited any argument related to the guard status of the nuclear medicine/PET technologist(s) at Santa Ana by abandoning the issue in its filings to the Board in both the representation and unfair-labor-practice proceedings (A.1938-88) and here. *See Pace Univ. v. NLRB*, 514 F.3d 19, 24 (D.C. Cir. 2008) (“representation issue not previously litigated is not properly before the court upon a petition for review of an order in the unfair labor practice proceeding”); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (issues not raised in opening brief are waived).

RadNet suggests (Br.52). *See Purolator*, 300 NLRB at 814 & n.8 and cases cited p.25.

As with the MRI technologists, any guard-like functions the nuclear medicine/PET technologists perform are minor or incidental to their primary role of conducting the diagnostic imaging tests described above. As the Board found, the nuclear medicine/PET technologists “may have some responsibility to ensure the safe operation of [RadNet’s] equipment,” but “that responsibility is within the framework of their duties as diagnostic technicians.” (A.1578.) The record amply supports this finding. Nuclear medicine/PET technologists must follow certain safety protocols because their imaging tests involve radioactive materials. For example, they monitor patients to ensure they have limited contact with others during the time they are briefly radioactive. They take special care with the radioactive isotopes, which are secured in a “hot” lab that only they, along with other authorized personnel, can access. And they protect themselves from exposure to radiation, by using protective equipment and wearing dosimetry badges. But an employee is not a statutory guard simply because she, as a minor or incidental part of her job, must work safely with and lock up the potentially hazardous materials necessary to do that job. *Boeing*, 328 NLRB at 130 and cases cited p.26.

RadNet wildly exaggerates these safety functions, characterizing its facilities as “locked-down” departments, requiring its technologists’ “ever-present” “polic[ing] and surveil[lance],” while brushing aside evidence that these technologists are primarily responsible for diagnostic imaging. (Br.51.) Likewise, RadNet overstates the technologists as actively “guard[ing] and restrain[ing]” patients from harming others. (Br.51.) But in characterizing the technologists’ work in this way, RadNet ignores that the patients are there for a scan to determine whether they have (for example) cancer, and that the technologists, in the process of guiding the patients through that procedure, must simply ensure that they use designated rooms, restrooms, and exits to avoid exposing others to radiation. RadNet’s reference to “security cameras” (Br.52) is similarly disingenuous; while the record shows that “[s]ome sites” (A.109) may use cameras to monitor PET patients, it does not reveal which sites.

RadNet also wrongly claims (Br.52) that the record contradicts two other factual findings. First, although nuclear medicine/PET technologists may “walk the patient out” after their exam (A.82, see A.1573), that evidence is consistent with the Board’s finding that “[t]hey do not monitor the entrance and exit of persons into the facility, *except to the extent that they escort their patients through the imaging procedure*” (A.1578 (emphasis added)). Second, the evidence regarding nuclear medicine/PET technologists’ “rounding” was limited to a brief

afterthought (revealed during cross examination) that they make some sort of rounds in the restricted area only. (A.110.) That offhanded testimony is not inconsistent with the Board's finding that they do not perform rounds of the facility "as part of their regular duties." (A.1578.)

As with the MRI technologists, RadNet also misrepresents, in its statement of facts (Br.15), the evidence regarding a hypothetical strike by the nuclear medicine/PET technologists. RadNet's witness testified that the technologists would "have to secure the nuclear medicine department before they leave the center," but that once secured, they would have no ongoing duties to secure the area during a strike because "the only person who could get back in there is [someone] who knows the . . . codes and things." (A.113-14.) Again, aside from including "fellow employees" among the individuals that may not access the department's restricted area (Br.51), RadNet points to no other record evidence suggesting that nuclear medicine/PET technologists would "enforce the rules of [their] employer against a fellow union member." *Bellagio*, 863 F.3d at 849.

Finally, RadNet supports its claim that both MRI and nuclear medicine/PET technologists are guards by pointing to cases finding guard status in a variety of job classifications outside the mainstream security context. (Br.47-49.) Those cases are distinguishable. There, unlike here, the employees were also tasked with significant security responsibilities, given authority to use a firearm, possessed

commonalities with the employer's other guard employees, and/or enforced company rules against fellow employees. In sum, adopting RadNet's "distended interpretation of guard status" here "would swallow the definition outright." *Cf. IUOE Local 501*, 949 F.3d at 482.

2. *The Board did not abuse its discretion in rejecting RadNet's objections based on the 2014 amendments*

For each election, RadNet asserted identical objections related to the Board's 2014 amendments to its representation election procedures. Those objections turn, in part, on pre-election litigation in the underlying representation proceeding. There, RadNet advanced a handful of facial challenges to the Board's 2014 amendments. Before the Court, RadNet (1) cursorily reasserts those facial challenges (Br.42-45); (2) claims that the Board overlooked its so-called as-applied challenges (Br.45-46), purportedly advanced via post-election objections; and (3) advances a legally unsupported argument (Br.46-47) pertaining to the Board's newly promulgated amendments to its election rule, Representation-Case Procedures, 84 Fed. Reg. 69524 (Dec. 18, 2019) ("2019 amendments").¹² To the

¹² The 2019 amendments were scheduled to take effect May 31, 2020. The United States District Court for the District of Columbia issued an order on May 30 and a memorandum opinion on June 7, setting aside five provisions of those amendments. *See AFL-CIO v. NLRB*, Civ. No. 20-CV-0675, 2020 WL 3041384 (D.D.C. June 7, 2020). The court found that the challenged sections were substantive rules and thus should have been promulgated using notice-and-comment rulemaking, as required by the Administrative Procedure Act. *Id.* at *13-18. The other provisions of the 2019 amendments have since taken effect. Press

extent any specific arguments may be discerned from RadNet's terse challenges to the Board's 2014 amendments, those arguments are unavailing, as shown below.

Under the Administrative Procedure Act, a court must uphold an agency rule unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). When a party alleges that a rule is arbitrary and capricious, the Court looks to whether "the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 68 (D.C. Cir. 2012). In evaluating an agency's decisionmaking, the Court's review is "fundamentally deferential." *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012). And the reviewing court applies "a presumption of validity." *Assoc. Builders & Contractors of Texas, Inc. v. NLRB (ABC)*, 826 F.3d 215, 220 (5th Cir. 2016).

To make a successful facial challenge to the Board's 2014 amendments, RadNet must show "that no set of circumstances exists under which the [challenged rule] would be valid." *Duncan*, 681 F.3d at 442 (quoting *Reno v. Flores*, 507 U.S. 292, 301 (1993)). It has failed to do so. As the Board found

Release, National Labor Relations Board Office of Public Affairs, NLRB to Implement All Election Rule Changes Unaffected by Court Ruling (June 1, 2020), <http://10.18.2.35/news-outreach/news-story/nlr-to-implement-all-election-rule-changes-unaffected-by-court-ruling>.

(A.1578), and as RadNet largely ignores, two courts have already considered and rejected a fleshed-out version of the facial claims that RadNet advanced to the Board and parrots here (Br.42-45). *ABC*, 826 F.3d at 215-29; *Chamber of Commerce of the United States of Am. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015).

To start, RadNet unpersuasively claims (Br.42-43) that the 2014 amendments violate Section 9(b) and 9(c)(1) of the Act, 29 U.S.C. § 159(b), (c)(1), by failing to give employers a “full opportunity” to be heard on questions of representation, particularly voter-eligibility issues, at a pre-election hearing. The 2014 amendments, however, do not conflict with, or eliminate, the statutory provision of an “appropriate hearing upon due notice” to determine whether a question of representation exists. 29 U.S.C. § 159(c)(1); 29 C.F.R. §§ 102.63(a), 102.64(a), 102.66(a) (2014); 79 Fed. Reg. at 74380, 74385. Rather, the 2014 amendments provide that “[d]isputes concerning individuals’ eligibility to vote or inclusion in an appropriate unit” – a different inquiry from whether a question of representation exists – shall “ordinarily” be deferred until after the election, 29 C.F.R. § 102.64(a) (2014). “[T]he rule neither ‘precludes’ nor ‘prevents’ the presentation of evidence regarding voter eligibility” during the representation

process. *ABC*, 826 F.3d at 222-24; *Chamber*, 118 F. Supp. 3d at 196-200.¹³ And the 2014 amendments give the regional director the discretion to authorize a hearing on the record *before an election* in an appropriate case, 79 Fed. Reg. at 74,390, as happened here. *See ABC*, 826 F.3d at 222. Indeed, RadNet is hard-pressed to show the 2014 amendments are not valid under any set of circumstances, when it received the very thing it claims they deny – a pre-election hearing on its employees’ purported guard status.

There is similarly no substance to RadNet’s claim that the 2014 amendments restrict employee or employer speech “envisioned by” Sections 7 and 8(c) of the Act,” by shortening the electioneering period between the date the union files a petition and the date of the election. (Br.43.) RadNet does not explain how a shortened election period violates Section 7, which grants employees the right to organize and engage in protected concerted activities. 29 U.S.C. § 157. As to its claim that the rule inhibits its free speech during a union campaign, RadNet has “failed to show that the [rule] inhibits this debate in any meaningful way,” and it

¹³ In the 2014 amendments, the Board reconsidered and overruled *Barre-National, Inc.*, 316 NLRB 877, 878-79 (1995) (discussing entitlement to pre-election hearing), relied on by RadNet (Br.43). 79 Fed. Reg. at 74,384-86; *see ABC*, 826 F.3d at 221 n.6 (citing cases and noting, without criticism, *Barre*’s overruling); *Chamber*, 118 F. Supp. 3d at 200-02 (same)); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agency can change position so long as it displays awareness that it is changing position and provides “reasoned explanation”).

“certainly ha[s] not shown that there is ‘no set of circumstances’ in which this aspect of the [rule] can be enforced consistently with the [Act] or the First Amendment.” *Chamber*, 118 F. Supp. 3d at 206-07; *accord* 79 Fed. Reg. at 74,318-26. Contrary to RadNet’s claim, the 2014 amendments accommodate robust debate by giving the regional director discretion to determine the date of the election based on “the desires of the parties, which may include their opportunity for meaningful speech about the election.” *ABC*, 826 F.3d at 226-27; *Chamber*, 118 F. Supp. 3d at 206-07; *see* 79 Fed. Reg. at 74,318 (Board deliberately refrained from “establish[ing] any rigid timeline for the conduct of the election”), 74,323-24. The circumstances here support that point. RadNet had approximately two months between the Union’s filing the petition (August 23) and the elections (October 24 and 25), and the Regional Director scheduled the elections for *after* RadNet’s preferred dates. (A.118-19, A.126-29, SA.1.)

RadNet is also wrong (Br.44) that the 2014 amendments somehow disregard employees’ privacy, expose employees to a greater threat of union intimidation and harassment, or impose a substantial burden on employers to produce employee information. *ABC*, 826 F.3d at 223-26; *Chamber*, 118 F. Supp. 3d at 208-15; *see* 29 C.F.R. §§ 102.62(d), 102.63(b), 102.67(l) (2014). The Board, with Supreme Court approval, has long required that parties to an election have access to a list, provided by the employer, containing the names and home addresses of all eligible

voters. 79 Fed. Reg. at 74,335 (citing *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966), and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767-68 (1969)). In the 2014 amendments, the Board rationally concluded that the modern voter list should also include “available” employees’ personal email addresses and telephone numbers, as such information “is as fundamental to a fair and free election and the expeditious resolution of questions concerning representation [today], as was access to employee names and home addresses in 1966,” when the voter-list requirement was established in *Excelsior*. 79 Fed. Reg. at 74,341.

Contrary to RadNet’s claim (Br.44), the Board extensively considered the privacy concerns of employees. It found those concerns did not outweigh the public interest in ensuring an informed electorate using technology that is “‘part of our daily life,’ and requires only the release of information that the employee has already shared with his or her employer.” *ABC*, 826 F.3d at 225 (quoting 79 Fed. Reg. at 74,342-43 & n.169); *Chamber*, 118 F. Supp. 3d at 212-13; *see* 79 Fed. Reg. at 74,341-51. Likewise, the Board considered RadNet’s fleeting concerns (Br.44) about the burden on employers, *see ABC*, 826 F.3d at 225 (citing 79 Fed. Reg. at 74,353-54), and the possibility that a Union could use the information to intimidate or harass employees, 29 C.F.R. §§ 102.62(d) (parties “shall not use the list for purposes other than [those related to] the representation proceeding”); 102.67(l) (2014) (same); *see ABC*, 826 F.3d at 225; *Chamber*, 118 F. Supp. 3d at 214-15; 79

Fed. Reg. at 74342-43, 74,358-60. Thus, the Board “weigh[ed] competing interests and promulgate[d] rules that advance the goals of the Act” in a way that is “rationally connected to the transformative changes in communications technology.”¹⁴ *ABC*, 826 F.3d at 226; *see Chamber*, 118 F. Supp. 3d at 208-15.

Nor was the Board’s adoption of the 2014 amendments “arbitrary and capricious,” as RadNet claims (Br.44-45). *See ABC*, 826 F.3d at 227-29; *Chamber*, 118 F. Supp. 3d at 218-21. Contrary to RadNet’s perfunctory assertion, the Board was not overly concerned with “speed in scheduling elections” (Br.45); rather, the Board acted with the goal of “increasing the efficiency and effectiveness of regulatory programs[, which] is well within the Board’s purview.” *ABC*, 826 F.3d at 227-28 (citing cases). Further, RadNet is wrong that the Board did not consider the attendant delays from other aspects of its election procedures. *See ABC*, 826 F.3d at 228-29. The Board “conducted an exhaustive and lengthy review of the issues, evidence, and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions.” *Id.* at 229; *Chamber*, 118 F. Supp. 3d at 220. Thus, the Board’s enactment of its 2014 amendments was not “arbitrary and capricious,” but entirely rational and in furtherance of its mandate to “adopt policies and promulgate rules and regulations

¹⁴ Both courts to consider the 2014 amendments found no conflict with federal privacy laws, an argument that RadNet repeats, but does not develop (Br.44 & n.7). *ABC*, 826 F.3d at 224; *Chamber*, 118 F. Supp. 3d at 209-10.

in order that employees' votes may be recorded accurately, efficiently, and speedily." *A.J. Tower*, 329 U.S. at 331.

Next, RadNet complains that the Board did not consider its "specific, 'as applied' challenges" to the 2014 amendments, which, it suggests (Br.45-46), it advanced via post-election objections. But RadNet's reframing its objections as "as-applied" challenges is not a magic wand that it can wave to escape the adverse precedent cited above. Indeed, RadNet's "specific, as-applied challenges" are a mystery. Before the Board, and again here, RadNet fails to explain how the 2014 amendments, if not facially deficient, were somehow invalid or inapplicable to these elections. *See Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1021-22 (9th Cir. 2010) (complaint was devoid of information from which court could determine as-applied challenge); *see also UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251, 256-57 (D.C. Cir. 2019) (rejecting employer's objections regarding application of Board's rules and regulations).

The full text of RadNet's rules-related objection for each facility states only that "[t]he Election was conducted subject to and in accordance with the Board's revised election rules, which violate the Act, the [Administrative Procedure Act], and the public policy considerations underlying a number of other federal statutes." (A.1605; A.1594.) RadNet's offer of proof in support claims only that the Union received the voter lists for each election, which purportedly included employees'

private contact information. (A.1605; A.1056.) Notably absent from its objections, and its brief to the Court, is what private employee contact information was disclosed, whose privacy was violated, how it was violated, or by whom. And, aside from vague handwringing about employee privacy, RadNet does not specify any other aspects of the 2014 amendments it believes the Board unlawfully or improperly applied, nor could it. As discussed above, RadNet received the very things it complains the 2014 amendments deny – a pre-election hearing and plenty of time after the Union filed its petition to speak to employees about the Union. *Cf. UPS*, 921 F.3d at 256 (regional director’s application of rules was “in the heartland of his discretion”). The Board, faced with RadNet’s vague and cursory claims, was right to reject RadNet’s objections, as they “would not constitute grounds for setting aside the election.” (A.1605, 1621 n.1.)

Finally, there is no merit to RadNet’s legally unsupported claim that the Board’s 2019 amendments somehow render the Board’s application of its 2014 amendments here “arbitrary and capricious.” (Br.46-47.) Regardless of whether the 2019 Board “agree[d] or disagree[d]” (A.1621 n.1) with the policy choices animating the 2014 amendments, it was certainly not arbitrary and capricious for it to apply its then-current representation procedures, found facially valid by two courts, to the elections here. RadNet does not argue, nor could it, that the 2019 amendments, which had yet to take effect, should have been applied retroactively.

See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (“a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms”); 29 U.S.C. § 156 (silent as to Board’s authority to promulgate retroactive rules).

Further, it is well-settled that agencies have the authority to reconsider past decisions and rules and to retain, revise, replace, and rescind those decisions and rules. *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-16 (2009); *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038-39, 1043 (D.C. Cir. 2012). The Board made clear that its 2019 amendments reflected “policy choices” and its effort to strike what it considered to be “a better balance among the competing interests.” 84 Fed. Reg. at 69524, 69527, 69557. The 2019 amendments were not, as RadNet suggests, an acknowledgment that the 2014 amendments were “unlawful.” (Br.47.) To the contrary, the Board recognized that two courts found the 2014 amendments facially valid and noted that its 2019 amendments did not “rely in any way on the arguments rejected by [those] courts,” 84 Fed. Reg. at 69527 & n.6 – the same arguments RadNet advances here.

3. *The Board did not abuse its discretion by delaying the tallies*

Nor did the Board abuse its discretion in overruling RadNet’s four objections, identical in each case, related to the Regional Director’s decision to

impound the ballots and tally them at the conclusion of the final election's polling period. The Board found the objections, detailed below, "substantially related" and considered them together. (A.1600-01; A.1592-93.)

First, RadNet claimed that delaying the tallies violated the Board's Rules and Regulations and was arbitrary and capricious under the Administrative Procedure Act. (A.1600; A.1592.) In support, RadNet proffered its agent, who would testify that the Board agent impounded the ballots at the conclusion of the elections, rather than immediately tallying them. (A.1601; A.1054.)

Second, RadNet asserted that, because the Board agents responsible for overseeing the other RadNet elections also delayed their tallies, the election violated Section 9(b) of the Act and Board precedent because it did not assure RadNet's employees the fullest freedom in exercising their rights under the Act. (A.1601; A.1592-93.) In support, RadNet proffered one voting-eligible employee from Santa Ana and one from Orange who would testify that they preferred to know the outcome of the other elections before they voted and viewed such information as relevant to exercising their rights under the Act. RadNet requested the Board infer from this proffered testimony that all RadNet employees felt the same way. (A.1602; A.1054-55.)

Third, RadNet alleged that delaying the tallies for the various elections violated Section 8(c) of the Act by restricting RadNet's "free speech" rights.

(A.1601; A.1593.) In support, RadNet’s agent would testify that RadNet wanted to communicate with its employees about the various election outcomes, but was prevented from doing so by the delayed tallies. (A.1602; A.1055.)

Fourth, RadNet claimed that the Board violated RadNet’s due process rights and the Administrative Procedure Act by treating the election as a “*de facto*” single election, despite finding the petitioned-for, multi-facility unit inappropriate.

(A.1601; A.1593.) In support, RadNet proffered the Decision and Direction of Election and testimony that, in addition to delaying the tallies, the Board had RadNet’s agent review and sign the voter lists for all the RadNet elections at the same time. (A.1602; A.1055-56.)

The Board acted well within its discretion in overruling these objections without a hearing.¹⁵ The Board delegates to its regional directors the powers under Section 9(c) of the Act to (among other things) direct representation elections. 29 U.S.C. § 153(b). Consistent with that delegation, “the mechanics of an election, such as the date, time, place, and method are left to the discretion of the Regional Director.” *Ceva Logistics U.S., Inc.*, 357 NLRB 628, 628 (2011); *see San Diego Gas & Elec.*, 325 NLRB 1143, 1144 (1998) (discretion to determine manual or

¹⁵ The Board found that “Unit B [La Mirada] was the first unit to complete voting, so the impoundment of ballots had no effect upon this unit.” (A.1506 n.1.) RadNet has not addressed this finding and has waived any challenge to it. *Sitka*, 206 F.3d at 1181.

mail ballot election); *Halliburton Servs.*, 265 NLRB 1154, 1154 (1982) (discretion to determine location of election). Regional directors are best positioned to determine election specifics because of their “close view of the election scene, including the many imponderables which are seldom reflected in a record.” *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954). Absent “unusual circumstances,” the Board will not “interfere with the Regional Director in the exercise of his discretion in making arrangements with respect to the conduct of elections and the counting of ballots.” *Indep. Rice Mill, Inc.*, 111 NLRB 536, 537 (1955) (regional director properly exercised discretion in impounding ballots of earlier election and counting them after completion of balloting in later elections); *see Diamond Walnut Growers, Inc.*, 308 NLRB 933, 933-34 (1992) (regional director did not abuse discretion in directing election with separate polling sessions two months apart).¹⁶

¹⁶ RadNet’s attempt to undercut the Regional Director’s reliance on *Independent Rice* is unavailing. It is not clear that the Board in that case combined the votes from the six separate elections in a single tally of ballots, as RadNet asserts (Br.34 n.6). *See* 111 NLRB at 536 (discussing tally of ballots for one of six employers); *Imperial Rice Mills, Inc.*, 110 NLRB 612, 614 (1954) (directing elections in six units – one for each employer). In any event, *Independent Rice* is instructive here. In both cases, the Board grappled with multiple elections and one union. *Independent Rice* recognizes the regional director’s discretion to deviate from typical procedures to address complications arising from multiple elections across multiple days. The Regional Director here exercised that discretion, consistent with that case. And, contrary to RadNet’s assertion (Br.34 n.6), the Regional Director acknowledged, but did not rely on, *Independent Rice*’s concern with “chain voting” as a rationale for the election arrangements here.

The Board's Rules and Regulations provide that "[u]pon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties." 29 C.F.R. § 102.69(a) (2014). The Board's non-binding Casehandling Manual states that "[t]he count of ballots should take place as soon after the close of voting . . . as possible" and a copy of the tally made available to each party "[a]s soon as the tally of ballots has been prepared." NLRB Casehandling Manual (Part Two) Representation Proceedings § 11340.1, 11340.11 (2017). The preface to the Board's Casehandling Manual, however, makes clear that it "expect[s] that" the Board's regional directors will exercise their professional judgment and discretion and "will adapt these guidelines to circumstances." *Id.* ("Purpose of the Manual"). *See Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1182 (D.C. Cir. 2000) ("Casehandling Manual does not bind the Board; it is intended merely to provide guidance to the Board's staff."). This Court has stated that the Board must provide a "reasoned explanation" when it departs from its usual election procedures. *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 994 (D.C. Cir. 2001) (remanding to Board for further explanation where regional director's only stated reason for impounding ballots and delaying tally was to prevent party's "unfair advantage").

As the Board found, the Regional Director properly exercised his broad discretion in briefly impounding the ballots and delaying the vote tallies due to the

“unusual circumstances of this case.” (A.1621 n.1.) Because the Regional Director found that the employees in the petitioned-for, multi-facility unit did not share a sufficient community of interest, he directed ten separate elections. Those elections took place at overlapping times on October 24 and October 25 at RadNet facilities across Orange County (see chart pp.12-13). After each election, the Board impounded the ballots. The Board then counted them “as soon as possible after 6:30 p.m. on October 25” at RadNet’s Santa Ana facility and thereafter provided tallies of ballots “immediately” to the parties. (A.1584, 1602-03, 1621 n.1.) The Board concluded that, given the unusual circumstances, the closing of the last set of polls was, in fact, “the earliest practicable time at which the count could take place.” (A.1621 n.1.)

In rejecting RadNet’s post-election objections to this arrangement, the Regional Director provided ample reasoning for his decision to coordinate the ballot count of the ten elections in this manner, which the Board approved on review. To start, “the number of elections and their overlapping schedules” posed significant “administrative challenges.” (A. 1604 n.3, 1621 n.1.) The Regional Director scheduled the elections on the earliest dates practicable, taking into consideration the arrangements proposed by the parties during the pre-election hearing. (A.1604; A.118-22, 126-29, SA.1.) In finding a solution to the administrative challenge of conducting overlapping elections over a two-day

period between the same union and employer in ten separate units with limited Board resources, the Regional Director considered the “administrative efficiency” of delaying some of the ballot counts to “allow[] all parties and their representatives to be present at one designated time in one centralized location to observe the ballot counts for all of the elections and receive the tallies of ballots for all of the elections.” (A.1604 n.3, 1621 n.1.) RadNet provides no support for its claim that the Board, to justify this arrangement, must show that it was “*significantly* more efficient” (Br.37 (emphasis added)) than counting the ballots after each election.

Moreover, administrative efficiency “standing alone” (Br.37) was not the Board’s only justification for administering the vote count that way. The Board also found it prudent, under the unique circumstances, that “*no one*, not the [Union], [RadNet], employees, Board agents, or third parties, would know the outcome of *any* of the earlier elections” and that “*everyone* would know the outcomes of *all* elections at the same time.” (A.1604.) RadNet’s argument that this arrangement impaired its free speech rights (Br.35) ignores that the Regional Director found this arrangement was necessary to eliminate the risk that parties, or even non-parties, would disseminate information about the results in an objectionable way to employees who had not yet voted, potentially upsetting the election results. *See Amalgamated*, 736 F.2d at 1562 (“representation election

should be held in laboratory conditions as nearly ideal as possible, to determine the uninhibited desires of the employees” (alteration and citation omitted)). The Board reasonably concluded that, on balance, employees’ “knowing the outcome of earlier-completed elections before all the elections were completed did not outweigh the potential for that information to be disseminated in an objectionable manner by either of the parties or its agents.” (A.1605.)

Notably, the Board was equally concerned with the Union communicating its October 24 victories to employees who had not yet voted in a way that “interfered with the[ir] freedom of choice” – misconduct that RadNet likely would have objected to, if given the chance. (A.1605.) *Cf. Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 68 n.13 (D.C. Cir. 2015) (noting RadNet counsel’s repeated “sharp practice” before the court, designed to achieve “inevitable delay” (citing *San Miguel*, 697 F.3d at 1188)). Indeed, throughout these related proceedings, RadNet expects the Board’s perfect adherence to its goal of conducting elections in laboratory conditions (Br.54-62), yet here calls the Board “unlawfully paternalistic” (Br.38) for taking reasonable prophylactic measures to safeguard those conditions.

On the other side of the coin, the Board rejected (as unsupported, paradoxical, and impossible to accommodate) RadNet’s assertion that voters in a later election somehow have a statutory right to know the outcome of an earlier

election in a separate voting unit. Before the Board, and again before the Court (Br.35-36), RadNet points to no relevant precedent indicating that voters must know the results of earlier elections to “assure . . . the fullest freedom in the exercise of their rights under the Act.” (A.1601, 1603 & n.2.) Moreover, RadNet’s claim “create[s] a paradox” (A.1604), as RadNet successfully argued, on the one hand, that voters share an insufficient community of interest with the voters in the other elections, yet, on the other hand, claims (Br.35-36) that they were nevertheless entitled (by statute) to know the outcome of those elections before casting their votes. This purported statutory right-to-know also makes no sense because, if true, then all RadNet voters would share the same right to prior related election results. The Board could not possibly accommodate this “illogical proposition” (A.1604); someone had to vote first. RadNet, without answering the Board’s findings on this point, instead continues to cite the same precedent the Board found irrelevant. And, while it expands on why it thinks the two employees in its proffer were “rational” (Br.35-36) for wanting to know the results from the earlier elections before voting, it fails to show, as it must, that the Board’s failure to satisfy their preferences warrants setting aside the elections as a matter of Board law. *See Durham*, 821 F.3d at 58.

Nor were the Board’s election arrangements, as RadNet claims (Br.36-37), inconsistent with its determination that single-facility units were appropriate for

purposes of collective bargaining. Those are two separate considerations. And consistent with the Regional Director's Decision and Direction of Election, each unit voted separately and had a separate tally of ballots. For administrative purposes, the Board impounded the ballots from the earlier elections so that it could count them all in a central location. But RadNet fails to show how that procedure adversely affected the end result: the Regional Director certified six units for collective bargaining purposes, wholly consistent with his determination that separate units, rather than a multi-facility unit, are appropriate.

Finally, both the Regional Director and the Board examined and persuasively distinguished this Court's opinion in *Nathan Katz*, 251 F.3d at 993-94 – RadNet's sole relevant authority (Br.33-34, 39). There, the Court examined the Board's decision to impound the ballots in the first of two elections and delay their tally until the second election finished. The Court did not find such an election arrangement impermissible. Rather, it found the Board's explanation for deviating from what the Court deemed "normal Board procedures" was not "immediately apparent" and remanded to the Board for further explanation. *Id.* at 994. Here, the Board provided just the explanation the Court found lacking. Moreover, the Board reasonably distinguished *Katz*, finding that "two successive elections held at different times on a single day" did not present the same administrative challenges that the ten elections, staggered over two days, did here. (A.1621 n.1.)

4. *The Board did not abuse its discretion by overruling RadNet's union-affiliation objections*

For each facility, RadNet also advanced the unconvincing claim that the Union engaged in a “material misrepresentation” by failing to disclose to eligible voters a purported affiliation with the Machinists. (A.1605-06; A.1594.) In support, RadNet proffered evidence that Machinists’ organizers attended pre-election conferences and other election-related events on behalf of the Union, and the Union used Machinists’ campaign materials and logos. RadNet also would present documentary evidence that, it claims, would establish the Union’s affiliation with the Machinists, including the unions’ announcement of an affiliation in 2012 and evidence of their joint training, political campaigning, press releases, and organizing efforts as recently as 2017. RadNet would show that Machinists’ organizers are awarded cash incentives for organizing employees (including, RadNet surmised, employees here), that it has been accused of engaging in unfair labor practices, and that it has engaged in strikes. RadNet would call employees to testify as to whether they would consider such information material to their decision to be represented by the Union. (A.1605-06; A.1056-58.)

The Board did not abuse its discretion in overruling this objection in each case without a hearing. Even assuming RadNet’s proffer was true, RadNet “failed

to establish any evidence to support a misrepresentation by the [Union] that would provide grounds for setting aside the election.” (A.1606.)

Although RadNet framed this objection as a campaign misrepresentation, the Board did not view RadNet’s allegations as such and declined to apply its decision in *Midland Nat’l Life Ins. Co.*, 263 NLRB 127, 133 (1982) (Board does not “probe into the truth or falsity of the parties’ campaign statements” or “set elections aside on the basis of misleading campaign statements”). Instead, the Board looked to cases where it has set aside an election because “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 Seattle/King Cnty.*, 356 NLRB 32, 34 (2010) (“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”).

The Board, however, found those cases distinguishable. Here, RadNet proffered no evidence that the Union misrepresented which labor organization would ultimately represent RadNet employees nor that voters were confused about which union appeared on the ballot. Throughout the proceedings, the Union, and

only the Union, sought “to represent the employees in the units . . . , [and n]o other labor organization claimed or attempted to claim any interest in representing the employees in the units.” (A.1606.) *Cf. Nevada Sec. Innovations, Ltd.*, 337 NLRB 1108, 1109 (2002) (overruling employer’s objection despite affiliated union’s letter to employees wrongly suggesting that it was participating in election because “employees knew for which union they were voting”). Likewise, the Union was the only labor organization that appeared on the sample ballots in the notices of election and on the official secret ballots at the elections. (A.1606.)

RadNet unconvincingly attempts (Br.39-41) to align this case with *Woods Quality Cabinetry Co.*, 340 NLRB 1355 (2003), a case addressing an undisputed error on the ballots, which wrongly designated the union as affiliated with the AFL-CIO. First, even if RadNet had presented enough facts to show an affiliation error on the ballots here, *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. And second, *Woods* is readily distinguishable on its facts. Not only was there an irrefutable affiliation error on the ballots, but the union’s AFL-CIO affiliation was material to the campaign, both parties addressed it when speaking with voters, employees were confused about the affiliation, and the employer notified the Board’s regional office about the erroneous designation before the election. *Id.* at 1355-56.

None of those facts are present here. RadNet alleged only that the two unions *announced* an affiliation back in 2012, but proffered no evidence that the affiliation actually happened. It otherwise alleged only strategic coordination and shared resources among the unions (*e.g.*, sharing logos or training sessions), without citing any precedent suggesting that the Union had to disclose such cooperation or risk invalidating the elections. RadNet has not shown, beyond speculation, that the issue was material to the elections, or that voters cared about the unions' purported relationship or the Machinists' so-called "aggressive organizing tactics." (Br.41.) And tellingly, RadNet did not bring up the issue until after the Union won the elections.¹⁷

RadNet exposes the speculative nature of its claims by arguing that it needs a hearing to determine "*whether* a question of affiliation existed, and *whether* the undisclosed affiliation *could have* affected the outcome of the elections." (Br. 41 (emphasis added).) But RadNet is not entitled to an "evidentiary hearing simply to

¹⁷ Given RadNet's purported misgivings about the Union's affiliation here and in two other representation elections, *RadNet Mgmt., Inc. d/b/a San Fernando Valley Interventional Radiology & Imaging Ctr.*, No. 31-RM-209388, 2018 WL 3629317, at *1 n.1 (July 25, 2018) & *RadNet Mgmt., Inc. d/b/a San Fernando Valley Advanced Imaging Ctr.*, No. 31-RM-209424, 2018 WL 3629315, at *1 n.1 (July 26, 2018), *enforced*, Nos. 19-71261 & 19-71447, 2020 WL 3265239 (9th Cir. June 17, 2020), it is puzzling that RadNet would stipulate on August 31, 2018 that the correct name of the petitioner union was "National Union of Healthcare Workers." (A.140.) Moreover, at the August 31 pre-election hearing, the hearing officer asked whether "the parties [are] aware of any other [] labor organizations that have an interest in these proceedings," to which RadNet did not reply. (A.42.)

‘inquire further’ into possible election improprieties.” *Vari-Tronics Co. v. NLRB*, 589 F.2d 991, 993 (9th Cir. 1979). Given that RadNet’s “evidence, even if credited, would not justify setting aside the election under [the Board’s substantive] criteria as a matter of law,” the Board rightfully overruled RadNet’s objections without a hearing; there was “simply ‘nothing to hear.’” *Durham*, 821 F.3d at 58 (citation omitted).

5. *The Board properly overruled RadNet’s facility-specific objections*

RadNet’s facility-specific objections fare no better. For each one, RadNet failed to proffer evidence that, if credited, would warrant setting aside the election under Board precedent.

a. *Irvine – security of ballot box*

At Irvine, RadNet objected that the Board agent failed to maintain the security of the ballot box because the box was “consistently out of her line of sight.” (A.1772; A.1758.) In support, RadNet proffered testimony that “for nearly the entirety” of polling, the Board agent “was seated in a chair that faced a wall and her back was turned to the entrance to the room in which the Election was taking place . . . and the ballot box.” According to RadNet, the Board agent also had her head down, reading a newspaper and/or using a cellphone. (A.1772-73; A.1063.)

RadNet's allegations, even if true, do not provide grounds for setting aside the election. The mere possibility of irregularity due to Board agent conduct does not preclude certification. *Polymers*, 414 F.2d at 1004. The Board will set aside an election because of Board agent conduct only if examination of all the relevant facts surrounding the balloting raises a "reasonable doubt as to the fairness and validity of the election." *Paprikas Fono*, 273 NLRB 1326, 1326 (1984) (quoting *Polymers*, 174 NLRB at 282); see also *Bell Foundry Co. v. NLRB*, 827 F.2d 1340, 1346 (9th Cir. 1987) (Board requires more than "appearance of irregularity" in balloting to set aside election).

Here, at most, the Board agent read a newspaper and/or used a cellphone during polling, and the ballot box was not in her "line of sight" at all times.¹⁸ Cf. *Dunham's Athleisure Corp.*, 315 NLRB 689, 689 (1994) (declining to overturn election where ballot box was intermittently out of observers' sight). RadNet does not allege that the election observers were not present to observe the election and/or report any ballot box issues. See *Polymers*, 414 F.2d at 1002 & n.2 ("Board agent was given no opportunity to rectify the alleged procedural deficiencies"). RadNet proffered no evidence that the Board agent left the polling area or was

¹⁸ RadNet's objection and proffer are imprecise and confusing. It is unclear whether the agent was inside or outside the room in which the election was taking place, and why her positioning (which presumably could be adjusted at any time) prevented her from addressing any issues.

otherwise unavailable to witness and address any balloting issues. Nor does it allege problems with the integrity or accuracy of the ballot count. And, aside from RadNet's conclusory statement that the agent failed to maintain the security of the ballot box, RadNet does not proffer concrete facts supporting that allegation or that the agent physically "left the ballot box unattended" for any period of time.

Compare Austill Waxed Paper Co., 169 NLRB 1109, 1109 & n.2 (1968)

(overturning election where ballot box was unsealed and unattended for up to five minutes during altercation, which "drew the attending officials away"), *with*

Elizabethtown Gas Co. v. NLRB, 212 F.3d 257, 268 (4th Cir. 2000) (upholding

election where Board agent left ballot box unattended for "a few minutes";

observers stayed with box and no votes were cast during absence), *and Benavent &*

Fournier, Inc., 208 NLRB 636, 636 n.2 (1974) (same).

The Board did not "refuse[] to review" (Br.54) the alleged conduct, as RadNet avers. Rather, the Board found that RadNet's objection and proffer, even if true, did not provide grounds for setting aside the election.

b. Irvine – observer's cellphone use

In two more objections to the election at Irvine, RadNet surmised that the Union's observer engaged in objectionable list-keeping because she was using her cellphone during polling. This conduct, RadNet asserts, was in plain view of eligible voters. Further, RadNet speculated, the observer used her phone to

contact, or assist the Union in contacting, employees who “might” vote in the election. (A.1773-74; A.1758-59.)

In support, RadNet proffered its observer, who would testify that during the first of two polling sessions, the Union’s observer “continuously” used her phone, sent text messages, and received at least one call, counter to the Board agent’s preliminary instructions. According to RadNet’s observer, the phone “would have been visible” to voters, though RadNet proffered no testimony from such voters.¹⁹ Additionally, the Union observer’s cellphone use “appeared” to be related to the individuals who voted subject to challenge because after each challenge, the observer would send and receive text messages. (A.1774; A.1063-64.)

Consistent with well-settled principles, the Board found (A.1775-76) this objection and accompanying offer of proof too speculative to warrant a hearing, let alone setting aside the election. *See LifeSource v. NLRB*, 2016 WL 6803740, at *1 (D.C. Cir. 2016) (“speculation does not amount to the ‘specific evidence’ necessary to warrant a hearing” (internal citation omitted)). 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. v. NLRB*, 708

¹⁹ RadNet also claimed that the Union observer looked at her phone, told the Board agent she needed to use the restroom, and exited the room for approximately ten minutes, during which time one person voted. As RadNet does not address this allegation, it has abandoned any possible arguments related to it. *Sitka*, 206 F.3d at 1181.

F.2d 1436, 1443-44 (9th Cir. 1983); *Piggly-Wiggly*, 168 NLRB 792, 792 (1967); Casehandling Manual, Part 2, § 11322.1. Observers, however, may keep a list of voters they plan to challenge. Casehandling Manual, Part 2, §§ 11338.2(a), 11338.4; see *Valcourt Bldg. Servs., Inc. v. NLRB*, 142 F. App'x 668, 672 (4th Cir. 2005) (citing cases). And “list keeping” 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); see *Pontiac Nursing Home, LLC v. NLRB*, 173 F. App'x 846, 847 (D.C. Cir. 2006).

RadNet's allegations of improper list-keeping here are purely speculative. RadNet speculates that the Union's observer *could have* used her phone to record voters or communicate information about the election. But RadNet did not proffer evidence to support that conjecture. In fact, as RadNet concedes, it wants a hearing to determine the very prerequisites for finding improper list-keeping: (1) “*whether* a list was being maintained by the Union's observer” and (2) “*whether* employees knew or could have known about the maintenance of the list.” (Br.58 (emphasis added).) But, as with its other objections, RadNet misunderstands its burden; it must actually allege conduct objectionable under Board law. See *Harlan No. 4 Coal Co. v. NLRB*, 490 F.2d 117, 121 (6th Cir. 1974) (employer proffered no evidence that union representatives either maintained a list of employees or, if such

a list had been maintained, that employees believed their names were being recorded).

Putting aside RadNet's speculation as to what the Union's observer could have been doing with her cellphone, the Board was left only with the allegation that an observer used her cellphone during a single polling session. While not condoning the observer's conduct, the Board was well within its discretion in finding such conduct insufficient to set aside the election, or warrant a hearing, absent "something more" than mere speculation that the observer was using her phone for impermissible purposes.²⁰ (A.1776.)

Further, the Board expressed concern that if it set the objections for hearing, RadNet would delve into the content of the observer's private telephone conversations to prove that she was keeping a list. The Board reasonably balanced the observer's privacy with RadNet's speculation that she was using her phone for list-keeping (rather than, for example, corresponding with a friend), finding that "[s]uch an intrusion into an employee's personal records is unwarranted absent argument or evidence that goes beyond mere speculation." (A.1776.) RadNet,

²⁰ RadNet's claim that it proffered evidence that the "Union observer's texting corresponded to the presentation of voters to cast ballots" (Br.58) is disingenuous. At most, RadNet alleged that the observer's cellphone use *appeared* related to the *challenged* voters. (A.1063-64.)

however, does not address the Board's concern with the observer's privacy, and any arguments regarding that finding are waived. *Sitka*, 206 F.3d at 1181.

c. Santa Ana – “Voting Place” signs

Next, RadNet objected that the Board agent at Santa Ana did not post any “Voting Place” signs, which, it unpersuasively claims, destroyed the laboratory conditions of the election. (A.1933; A.1921.) RadNet proffered that its agent would testify that the election occurred in a building physically removed from where eligible voters worked and that a determinative number of eligible voters (two) did not vote. (A.1933; A.1070.)

Again, the Board did not “refuse[] to consider” (Br. 59) this objection; rather, the Board examined it, along with RadNet's offer of proof, and found that it did “not warrant a post-election hearing because the allegations would not provide grounds for setting aside the election.” (A.1933.) The Board's Rules and Regulations require an employer to conspicuously post and (if applicable) electronically distribute copies of the Board's “Notice of Election,” which includes details about the date, time, and place of the election, or risk setting aside the election. 29 C.F.R. §§ 102.62(e), 102.67(k) (2014). Section 11318 of the Board's Casehandling Manual also provides that “‘Voting place’ and ‘Warning’ signs should be posted” at the election site during the parties' pre-election conference. A Board agent's failure to place “Voting Place” signs at the polling area, however, is

not grounds for setting aside an election; the Board “do[es] not invalidate elections based on minor deviations from the guidelines” in the Casehandling Manual. *Pac. Grain Prod.*, 309 NLRB 690, 690-91 & n.5 (1992); *see Sawyer Lumber Co.*, 326 NLRB 1331, 1331 fn. 5 (1998), *enforced*, 225 F.3d 659 (6th Cir. 2000) (table). *Cf. Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117, 1123 (D.C. Cir. 2012) (Board agent’s failure to follow Manual’s requirement that each observer wear a badge did not invalidate election).

In light of this precedent, RadNet’s continuing to advance this objection (Br. 59-60) is puzzling. RadNet does not claim that it shirked its duty to post or distribute the Notices of Election, informing its employees when and where to vote. Indeed, at least nineteen out of twenty-one eligible voters found the polling place – a participation rate of about 90%. Moreover, RadNet proffered no evidence, beyond speculation, that the Board agent’s purported failure to post the Voting Place signs had any effect on the election, let alone a material one. Although it surmises that the two voters who abstained did so because they could not find the polling place (notwithstanding the Notices of Election) (Br.60), “mere speculative harm is insufficient to overturn an election.” *Durham*, 821 F.3d at 61 (alteration and citation omitted). And contrary to RadNet’s suggestion (Br.60), a close vote, without more, is “insufficient to require the rerun of an election.” *PruittHealth-Virginia Park, LLC v. NLRB*, 888 F.3d 1285, 1297 (D.C. Cir. 2018).

d. Garden Grove – “*Milchem*” issue

Finally, RadNet objected that the Board agent at Garden Grove permitted an employee, who was not there to vote, to enter the polling area and attempt to engage the Union’s observer in conversation about workplace issues. In a related objection, RadNet added that the employee was a union agent or supporter. That conduct, according to RadNet, destroyed the election’s laboratory conditions. (A.1314; A.1301-02.)

In support, RadNet proffered that its election observer would testify that the employee stayed for about two minutes, did not vote, and attempted to engage the Union’s observer in conversation about patient procedures and workflow. The proffered witness would further testify that the Board agent did not address the employee’s “improper” presence or attempted interaction with the Union’s observer; that at the time of the employee’s visit, not all eligible employees had voted; and that given the polling area’s layout, an approaching voter would have been able to see and “likely” hear the visitor. (A.1314; A.1041-42.) RadNet would also present evidence that the employee was a union organizing committee member, her name and picture appeared on union campaign materials, and she tried (unsuccessfully) to serve as the Union’s election observer. (A.1314-15; A.1043.)

The Board reasonably found that the employee's brief presence in the polling area and her attempts to engage the Union's observer in conversation, "even if proven to be true," would not warrant setting aside the election. (A.1316.) Under the Board's "*Milchem* rule," a party's "sustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged," is grounds for setting aside an election. *Milchem, Inc.*, 170 NLRB 362, 362 (1968); *accord Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 269-70 (D.C. Cir. 1998). The Board, however, has made clear that application of *Milchem* should "be informed by a sense of realism." 170 NLRB at 363. And the rule does not apply to "chance, isolated, innocuous comment or inquiry." *Id.*

Even assuming, as the Board did, that RadNet proffered sufficient evidence that the employee was a Union agent, RadNet's allegations involved "neither 'prolonged conversations,' nor did they involve 'voters waiting to cast ballots.'"²¹ *Regent Assisted Living, Inc. v. NLRB*, 180 F. App'x 165, 167 (D.C. Cir. 2006). RadNet alleged that the employee was in the polling area for just two minutes and attempted to speak to the Union's observer about patient procedures and workflow – a "chance, isolated, innocuous comment or inquiry" that falls outside *Milchem's*

²¹ RadNet's agency arguments (Br.61-62) not only misstate the burden of proof, but they are immaterial. It is not the Regional Director's burden to "gather[] evidence." (Br.61.) And the Board assumed *arguendo* that RadNet had presented enough facts to show agency. (A.1315-16.)

scope. *See, e.g., Amalgamated Serv. & Allied Indus. Joint Bd., v. NLRB*, 815 F.2d 225, 228-29 (2d Cir. 1987) (no *Milchem* violation for two-minute conversation between observer and voter about injury and return to work); *NLRB v. Oesterlen Servs. for Youth, Inc.*, 649 F.2d 399, 400-01 (6th Cir. 1981) (no *Milchem* violation for conversation between observer and voter about work schedules). *Cf. NLRB v. Browning-Ferris Indus. of Louisville, Inc.*, 803 F.2d 345, 348 (7th Cir. 1986) (allegation that union supporter who already voted returned to polling place for a “few minutes” insufficient to overturn election). Here, RadNet claims only that the employee briefly *attempted* to engage the observer in conversation. *See US Ecology, Inc. v. NLRB*, 772 F.2d 1478, 1485 (9th Cir. 1985) (observer did not engage in “‘conversations’ covered by the *Milchem* rule because,” among other things, “they did not involve an exchange of words”).

And RadNet’s claim that “voting was taking place” (Br.20) at the time is disingenuous. RadNet alleged that the employee who entered the polling area “did not present to vote” (A.1301), and the only other voting-eligible employees present were acting as election observers at the time. *See NLRB v. WFMT, a Div. of Chicago Educ. Television Ass’n*, 997 F.2d 269, 275 (7th Cir. 1993) (no *Milchem* violation where only eligible voters present had already voted or were election observers, not waiting to cast ballots). Given the brevity of the intrusion, “the failure of the Board agent to prevent the alleged misconduct did not impugn the

integrity of the election.” *Amalgamated Serv.*, 815 F.2d at 231 (where disruption from electioneering was insufficient to set aside election, Board agent’s decision to refrain from intervening “did not impugn integrity of election”); *accord NLRB v. Duriron Co.*, 978 F.2d 254, 258 n.3 (6th Cir. 1992) (same).

RadNet, however, claims that it needed a hearing to suss out whether approaching voters saw or heard the non-voting employee and whether, consequently, such voters “may have been discouraged from voting.” (Br.62.) But RadNet proffered not a shred of evidence that an approaching voter overheard the “conversation,” let alone cited any legal precedent that such an occurrence would warrant setting aside the election. Moreover, RadNet’s allusion to possible disenfranchisement is misleading, given that every eligible Garden Grove voter cast a ballot. (A.1307; A.1296.) In suggesting that a hearing could have answered its speculations, RadNet “ignores that it was [its] burden to come forward with evidence that would warrant conducting a hearing in the first instance.” *NLRB v. Palmer Donavin Mfg. Co.*, 369 F.3d 954, 959 (6th Cir. 2004).

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

Lastly, RadNet’s challenge (Br.62-65) to the Board’s application of its longstanding no-relitigation rule borders on frivolous. Under this rule, absent 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 prior representation proceeding. 29 C.F.R. §§ 102.67(g), 102.69(c)(2) (2014); *see Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1151 (D.C. Cir. 2000). The purpose of the Board's no-relitigation rule is to "estop relitigation in a related proceeding" and to avoid "undue and unnecessary delay in representation elections." *Pace Univ. v. NLRB*, 514 F.3d 19, 24 (D.C. Cir. 2008). In the process, the rule "safeguards the results of a representation proceeding from duplicative, collateral attack in a related unfair labor practice proceeding." *Id.*

RadNet claims that the Board erred in denying it another bite at the apple in each unfair-labor-practice proceeding, 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.63-64.) But, as the Board here explained, those are "a limited number of cases in which the Board has departed from the rule." (A.2125 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. *See Alois Box Co. v. NLRB*, 216 F.3d 69, 78 (D.C. Cir. 2000) (reviewing Board's application of no-relitigation rule for abuse of discretion). Here, after considering that precedent and duly reviewing the record, the Board found in each case "no basis for departing from [its] longstanding rule or

disturbing [its] order denying review of the Regional Director's decision in the underlying representation case.” (A.2125 & n.2.)

RadNet halfheartedly attempts to find generic similarities (Br.64) between these cases and *Sub-Zero Freezer*. But *Sub-Zero Freezer*, and RadNet's other cited cases, are either factually distinguishable, *see* 271 NLRB at 47 (union supporters threatened property and lives of voting employees and Board could not “let stand a certification of representative premised on an election that was conducted in such an atmosphere” of fear and reprisal), or present special circumstances not applicable here, *see 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 [Board] 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 “maintain[ing],” rather than overruling, the above-cited cases because it rarely permits relitigation. (Br. 65.) That argument ignores that the Board, while long allowing exceptions to the no-relitigation rule for newly discovered evidence or

other special circumstances, has repeatedly made clear the limited scope of precedent, including the above-cited cases, in which it permitted relitigation. *E.g.*, *Univ. of Chicago*, 367 NLRB No. 41, 2018 WL 6381434, at *1 n.1 (Dec. 4, 2018), *enforced*, 944 F.3d 694 (7th Cir. 2019); *Warren Unilube, Inc.* 357 NLRB 44, 44 n.3 (2011), *enforced*, 690 F.3d 969 (8th Cir. 2012). 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 to these ordinary refusal-to-bargain cases, rather than a rare exception. *See NLRB v. RadNet Mgmt., Inc., et al.*, Nos. 19-71261 & 19-71447, 2020 WL 3265239, at *3 (9th Cir. June 17, 2020) (finding "nothing inherently inconsistent" with Board's discretionary application of no-relitigation rule).

Nor can RadNet show, as it must, that it was prejudiced therefrom. *Salem Hosp.*, 808 F.3d at 73-74 (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 post-election hearing on any of its objections in any of these six cases. The Board examined the Region's determinations and denied RadNet's requests for review. RadNet offered no new evidence or special circumstances. Thus, RadNet cannot fault the Board for declining to look at the same evidence (or lack thereof) one more time in the

unfair-labor-practice cases. *See Amalgamated*, 424 F.2d at 829 (“Just as there was ‘nothing to hear’ on the [c]ompany’s objections in the representation proceeding, so there was ‘nothing to hear’ on this issue in the unfair labor practice case.” (internal citation omitted)).

CONCLUSION

The Board submits that this Court should enter judgment denying RadNet's petitions for review and enforcing the Board's Orders in full.

/s/ Elizabeth A. Heaney
ELIZABETH A. HEANEY
Supervisory Attorney

/s/ Rebecca J. Johnston
REBECCA J. JOHNSTON
Attorney

National Labor Relations Board
1015 Half St. SE
Washington, D.C. 20570
(202) 273-1743
(202) 273-1066

PETER B. ROBB
General Counsel

ALICE B. STOCK
Deputy General Counsel

RUTH E. BURDICK
Acting Deputy Associate General Counsel

DAVID HABENSTREIT
Assistant General Counsel

National Labor Relations Board
August 2020

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NATIONAL LABOR RELATIONS BOARD)	
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Petitioner/Cross-Respondent)	Nos. 19-1184, 19-1193
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v.)	Board Case No.
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v.)	Board Case No.
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NATIONAL LABOR RELATIONS BOARD)	
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Respondent /Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its final brief contains 15,950 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

/s/ David Habenstreit

David Habenstreit

Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 25th day of August, 2020

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

RADNET MANAGEMENT, INC. d/b/a)	
ORANGE ADVANCED IMAGING)	
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Petitioner/Cross-Respondent)	Nos. 19-1180, 19-1194
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v.)	Board Case No.
)	21-CA-242665

NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

RADNET MANAGEMENT, INC. d/b/a)	
WEST COAST RADIOLOGY – IRVINE)	
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Petitioner/Cross-Respondent)	Nos. 19-1181, 19-1195
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v.)	Board Case No.
)	21-CA-242660

NATIONAL LABOR RELATIONS BOARD)	
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Respondent /Cross-Petitioner)	

RADNET MANAGEMENT, INC. d/b/a)	
ANAHEIM ADVANCED IMAGING)	
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Petitioner/Cross-Respondent)	Nos. 19-1182, 19-1191
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v.)	Board Case No.
)	21-CA-242668

NATIONAL LABOR RELATIONS BOARD)	
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Respondent /Cross-Petitioner)	

RADNET MANAGEMENT, INC. d/b/a)	
WEST COAST RADIOLOGY – SANTA ANA)	
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Petitioner/Cross-Respondent)	Nos. 19-1183, 19-1192
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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

/s/David Habenstreit
 David Habenstreit

Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 25th day of August, 2020

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 3(b) (29 U.S.C. § 153(b)).....	A2
Section 6 (29 U.S.C. § 156)	A2
Section 7 (29 U.S.C. § 157)	A2-A3
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	A3
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	A3
Section 8(c) (29 U.S.C. § 158(c))	A3
Section 9(c) (29 U.S.C. § 159(c))	A3-A5
Section 9(d) (29 U.S.C. § 159(d)).....	A5
Section 10(a) (29 U.S.C. § 160(a))	A5
Section 10(e) (29 U.S.C. § 160(e))	A5-A6
Section 10(f) (29 U.S.C. § 160(f)).....	A6-A7

National Labor Relations Board's Rules and Regulations

29 C.F.R. § 102.62(d)	A7-A8
29 C.F.R. § 102.62(e).....	A8
29 C.F.R. § 102.63(a).....	A8-A9
29.C.F.R. § 102.63(b)	A9-A13
29.C.F.R. § 102.64(a).....	A13-A14
29 C.F.R. § 102.66(a)	A14
29 C.F.R. § 102.67(g)	A14
29 C.F.R. § 102.67(k)	A14-A15
29 C.F.R. § 102.67(l)	A15
29 C.F.R. § 102.69(a).....	A16-17
29 C.F.R. § 102.69(c)(1)	A17
29 C.F.R. § 102.69(c)(2)	A17

National Labor Relations Board's Casehandling Manual Part Two

Representation Proceedings

PURPOSE OF THE MANUAL.....	A18
Section 11318.....	A19
Section 11322.1.....	A19-A20
Section 11338.2(a)	A20
Section 11338.4.....	A20-A21

Section 11340.1.....A21
 Section 11340.11.....A21

NATIONAL LABOR RELATIONS ACT

Sec. 3. [§ 153.]

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

Sec. 6. [§156.] Rules and regulations

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

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.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

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.

(e) *Notice of Election.* Upon approval of the election agreement pursuant to paragraphs (a) or (b) of this section or with the direction of election pursuant to paragraph (c) of this section, the Regional Director shall promptly transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The employer shall post and distribute the Notice of Election in accordance with §102.67(k). The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Section 102.63 [29 C.F.R. §102.63] Investigation of petition by Regional Director; Notice of Hearing; service of notice; Notice of Petition for Election; Statement of Position; withdrawal of Notice of Hearing.

(a) *Investigation; Notice of Hearing; notice of petition for election.*

(1) After a petition has been filed under §102.61(a), (b), or (c), if no agreement such as that provided in §102.62 is entered into and if it appears to the Regional Director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the Act will be effectuated, and that an election will reflect the free choice of employees in an appropriate unit, the Regional Director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a Notice of Hearing before a Hearing Officer at a time and place fixed therein. Except in cases presenting unusually complex issues, the Regional Director shall set the hearing for a date 8 days from the date of service of the notice excluding

intervening federal holidays, but if the 8th day is a weekend or federal holiday, the Regional Director shall set the hearing for the following business day. The Regional Director may postpone the hearing for up to 2 business days upon request of a party showing special circumstances. The Regional Director may postpone the opening of the hearing for more than 2 business days upon request of a party showing extraordinary circumstances. A copy of the petition, a description of procedures in representation cases, a “Notice of Petition for Election,” and a Statement of Position form as described in paragraphs (b)(1) through (3) of this section, shall be served with such Notice of Hearing. Any such Notice of Hearing may be amended or withdrawn before the close of the hearing by the Regional Director on the director’s own motion.

(2) Within 2 business days after service of the Notice of Hearing, the employer shall post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and shall also distribute it electronically if the employer customarily communicates with its employees electronically. The Notice of Petition for Election shall indicate that no final decisions have been made yet regarding the appropriateness of the petitioned-for bargaining unit and whether an election shall be conducted. The employer shall maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. The employer’s failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

(b)(1) *Statement of Position in RC cases.* If a petition has been filed under §102.61(a) and the Regional Director has issued a Notice of Hearing, the employer shall file with the Regional Director and serve on the parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The Regional Director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The Regional Director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The

Regional Director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The Regional Director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(i) The employer's Statement of Position shall state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; state whether the employer agrees that the proposed unit is appropriate, and, if the employer does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; state the employer's position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing.

(ii) The Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer.

(iii) The Statement of Position shall include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) 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.

(2) *Statement of Position in RM cases.* If a petition has been filed under §102.61(b) and the Regional Director has issued a Notice of Hearing, each individual or labor organization named in the petition shall file with the Regional Director and serve on the other parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The Regional Director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The Regional Director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The Regional Director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The Regional Director may permit each individual or labor organization named in the petition to amend its Statement of Position in a timely manner for good cause.

(i) *Individual or labor organization's Statement of Position.* Each individual or labor organization's Statement of Position shall state whether it agrees that the Board has jurisdiction over the employer; state whether it agrees that the proposed unit is appropriate, and, if it does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the individual or labor organization intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state its position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues it intends to raise at the hearing.

(ii) *Identification of representative for service of papers.* Each individual or labor organization's Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as its representative and accept service of all papers for purposes of the representation proceeding and be signed by the individual or a representative of the individual or labor organization.

(iii) *Employer's Statement of Position.* Within the time permitted for filing the Statement of Position, the employer shall file with the Regional Director and serve on the parties named in the petition a list of the full names, work locations,

shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. The list(s) 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. The employer's Statement of Position shall also state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date. The Regional Director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(3) *Statement of Position in RD cases.* If a petition has been filed under §102.61(c) and the Regional Director has issued a Notice of Hearing, the employer and the certified or recognized representative of employees shall file with the Regional Director and serve on the parties named in the petition their respective Statements of Position such that they are received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The Regional Director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The Regional Director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The Regional Director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The Regional Director may permit the employer and the certified or recognized representative of employees to amend their respective Statements of Position in a timely manner for good cause.

(i) The Statements of Position of the employer and the certified or recognized representative shall state each party's position concerning the Board's jurisdiction over the employer; state whether each agrees that the proposed unit is appropriate, and, if not, state the basis for the contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote each party intends to contest

at the pre-election hearing and the basis of each such contention; raise any election bar; and state each party's respective positions concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues each party intends to raise at the hearing.

(ii) The Statements of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer or the certified or recognized representative of the employees and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer or the certified or recognized representative, respectively.

(iii) The employer's Statement of Position shall also include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) 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. The employer's Statement of Position shall also provide the requested information concerning the employer's relation to interstate commerce and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date.

Section 102.64 [29 C.F.R. §102.64] Conduct of hearing.

(a) The purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. If, upon the record of the hearing, the Regional

Director finds that a question of representation exists, the director shall direct an election to resolve the question.

Section 102.66 [29 C.F.R. §102.66] Introduction of evidence: rights of parties at hearing; preclusion; subpoenas; oral argument and briefs.

(a) *Rights of parties at hearing.* Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The Hearing Officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

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.

(k) *Notice of Election.* The employer shall post copies of the Board's Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. of the day of the election and shall also distribute it electronically if the employer customarily communicates with employees in the unit electronically. In elections

involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election. The term working day shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays. The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

(1) *Voter list.* Absent extraordinary circumstances specified in the direction of election, the employer shall, within 2 business days after issuance of the direction, provide to the Regional Director and the parties named in such 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 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 direction respectively within 2 business days after issuance of the direction of election unless a longer time is specified therein. 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 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 102.69 [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

PURPOSE OF THE MANUAL

The Casehandling Manual is intended to provide procedural and operational guidance for the Agency's regional directors and their staffs when making decisions as to unfair labor practice and representation matters under the National Labor Relations Act. The Manual consists of three volumes: Part One—Unfair Labor Practice Proceedings; Part Two—Representation Proceedings; and Part Three—Compliance Proceedings.

This Manual has been prepared by the General Counsel for use by Agency personnel, pursuant to authority under Section 3(d) of the Act and as delegated by the Board. The Manual has been neither reviewed nor approved by the Board.

As to matters on which the Board has issued rulings, the Manual seeks to accurately describe and interpret Board law; while the Manual can thus be regarded as reflecting Board policies as of the date of its preparation, in the event of conflict, it is the Board's decisional law, not the Manual, that is controlling. Similarly, while the Manual reflects casehandling policies of the General Counsel as of the date of its preparation, such policies may be revised or amended from time-to-time.

The Manual is not a form of binding authority, and the procedures and policies set forth in the Manual do not constitute rulings or directives of the General Counsel or the Board. The Manual is also not intended to be a compendium of either substantive or procedural law, nor can it be a substitute for a knowledge of the law.

Although it is expected that the Agency's regional directors and their staffs will follow the Manual's guidelines in the handling of cases, it is also expected that in their exercise of professional judgment and discretion, there will be situations in which they will adapt these guidelines to circumstances. Thus, the guidelines are not intended to be and should not be viewed as binding procedural rules. Rather, they provide a framework for the application of the Board's decisional law and rules to the facts of the particular situations presented to the regional directors and their staffs, consistent with the purposes and policies of the Act.

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.

11322.1 Procedure at Checking Table

At the checking table are a set of observers, who sit behind the table, and a Board agent, who sits at one end. Before them is the part of the voter list applicable to that table. The observer for each party should be issued a different color pencil, which should be noted on the list.

Observers should not be permitted to make lists of those who have or have not voted. The official voter list is the only record made and shows whether a person named thereon has voted. The observers’ attention should be directed to the important task of checking that list and they should not be distracted by keeping other records. Observers may, however, maintain a list of voters they intend to challenge. Secs. 11312.3 and 11338.4.

The approaching voters, who should by that time have formed a line, should be asked to call out their names, last names first, as they reach the table. They may also be asked for other identifying information, as necessary. In sufficiently large or complex elections, the identifying information to be utilized by voters as they approach the checking table should be explored with the parties in advance of the election. Sec. 11312.3.

The voter should give his/her identifying information, not an observer. Once a voter's name has been located on the eligibility list, all observers are satisfied as to the voter's identity and no one questions his/her voting status, each observer at the checking table should make a mark beside the name. One party marks before the name and the other(s) after the name, both using a straight line or check mark, each with a different colored pencil.

Once a voter has been identified and checked off, the observers—or one of them designated by the others — should indicate this to the Board agent, who will then hand a ballot to the voter. The agent must look at each ballot to make sure that the ballot material has been photocopied onto the form and that there are no blanks. Only the Board agent handles unused ballots. They must remain in his/her personal custody at all times.

It is at the checking table, normally, that challenges are made. (For procedure to be followed, see Challenges, Sec. 11338.) In large elections, a challenge table may be established, to which challenged voters may be ushered directly.

Sec. 11338.2 Who May Challenge

11338.2(a) Observers

Any observer has the right to challenge a voter for cause. Observers may maintain a list of employees they intend to challenge. Sec. 11338.4.

11338.4 Notation of Potential Challenges

Observers may maintain lists of employees they intend to challenge; alternatively, the parties may note on the voter list, at the preelection check, the persons they intend to challenge. Any such marks made prior to an election, however, must be easily distinguishable from the marks to be made by observers at the election. Sec. 11312.3.

The observers may not keep a list of those who have or have not voted. Sec. 11322.1.

Sec. 11340.1 Time and Place

The count of ballots should take place as soon after the close of voting (Sec. 11324) as possible.

If more than one polling place is involved, the count should begin after the ballot boxes from all polling places have been collected. If the voting hours have been long and arduous, if the count is expected to be time-consuming (see below) and if the personnel participating in the count are the same as those who participated in the conduct of the election, a rest period or meal period before the count may be arranged. When there is any intervening period, care should be taken not only to preserve the integrity of the ballot box(es), but also to display this fact.

The count may take place at any central location. Typically, in the small election, the count is taken at the polling place. In a large election, if one of the polling places is large enough, the tally can take place there.

As a consideration in determining the time and place of a count, the Board agent should be aware that, using the “formal” method of counting (Sec. 11340.6), each counting table, attended by a team of one caller, two unfolders, and tallying observers can dispose of approximately 1000 votes per hour; considering this, as altered by the circumstances of the instant case, a fair estimate can be made of the period that will be consumed by the counting.

Sec. 11340.11 Distribution of Tally of Ballots

As soon as the tally of ballots has been prepared, a copy should be made available to a representative of each party.

If, at the time the tally is made available, one of the parties has no representative present, a copy of the tally should be mailed to that party as a courtesy. A party’s absence or refusal to accept the tally at the time it is made available does not affect the time for filing objections. Sec. 11392.2(a)(2); Sec. 102.69(a), Rules and Regulations.