

[ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED]

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In The United States Court Of Appeals For The D.C. Circuit

**RadNet Management, Inc., d/b/a Orange Advanced Imaging;  
RadNet Management, Inc., doing business as 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,**

*Petitioners,*

v.

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent.*

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**NATIONAL LABOR RELATIONS BOARD,**

*Petitioner,*

v.

**RadNet Management, Inc., d/b/a Orange Advanced Imaging;  
RadNet Management, Inc., doing business as 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,**

*Respondents.*

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

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**REPLY BRIEF OF PETITIONERS/CROSS-RESPONDENTS**

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## PRELIMINARY STATEMENT

As the Petitioners / Cross-Respondents in the above-captioned cases, RadNet Management, Inc. d/b/a Anaheim Advanced Imaging (“Anaheim”); RadNet Management, Inc. d/b/a Garden Grove Advanced Imaging (“Garden Grove”); RadNet Management, Inc. d/b/a La Mirada Imaging (“La Mirada”); RadNet Management, Inc. d/b/a Orange Advanced Imaging (“Orange”); RadNet Management, Inc. d/b/a West Coast Radiology - Irvine (“Irvine”); and RadNet Management, Inc. d/b/a West Coast Radiology - Santa Ana (“Santa Ana”) (collectively, the “Petitioners” or “Employers”) hereby reply, by and through the Undersigned Counsel, to the Answering Brief (hereafter, for the sake of citation, the “AB”) filed by the Respondent / Cross-Petitioner, the National Labor Relations Board (the “Board”) in response to the Employers’ Principal Brief (hereafter, for the sake of citation, the “PB”) in support of the Employers’ Petitions for Review of the Board’s August 27, 2019, August 28, 2019, and October 2, 2019 Decisions and Orders.<sup>1</sup>

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<sup>1</sup> The Answering Brief filed by the Board claims that the Employers “wrongly suggest[ed]” that the instant cases are against six separate employers. (AB 2, FN 1) However, the underlying records in these cases make clear that the six facilities are indeed separate entities, for purposes of these proceedings. The Motions referenced by the Board’s footnote were denied by the Court on June 26, 2020.

## **SUMMARY OF ARGUMENT**

The Board's arguments, as set forth in its Answering Brief, do little to justify the manner in which the Employers' cases were handled before the Board. The Board has still failed to explain how the concrete evidence presented by the Employers' Offers of Proof in support of their Objections to the elections held at their facilities was insufficient to require the Board to hold fact-finding hearings concerning the Employers' Objections. The evidence presented by the Employers concerning the guard status of certain employees pursuant to §9(b)(3) of the Act illustrated clearly that those employees' responsibilities to secure and police the Employers' facilities rendered those employees guards. The Board's cursory rejection of the Employers' Objections to the Board's 2014 revisions to its election rules failed to take into consideration the Employers' "as applied" challenges to the rules, as well as the dynamics presented by the Board's abrupt decision to reverse course on many components of those election rules in 2019.

Next, the Board wholly failed to provide any compelling explanation whatsoever for the Regional Director's curious and unjustified refusal to count ballots after each Employer's election, in virtually-direct violation of Nathan Katz Realty, LLC v. NLRB, 251 F.3d 981 (D.C. Cir. 2001). Thereafter, the Board rejected out of hand the Employers' legitimate challenges to the hidden and undisclosed affiliation of the National Union of Healthcare Workers (hereafter, the

“Union” or the “NUHW”) with the International Association of Machinists and Aerospace Workers (hereafter, the “IAMAW”), despite compelling evidence that this affiliation would have material consequences for employees. The Board also erred by rejecting the facility-specific Objections raised by Irvine, Santa Ana, and Garden Grove, based largely upon the ironic position that the Employers had not presented sufficient evidence to sustain the Objections, where the Board refused to grant the Employers the opportunity for an evidentiary hearing. Finally, the Board’s continued refusal to acknowledge the existence of two inherently contradictory lines of precedent concerning the relitigation of representation case issues constitutes a clear abuse of the agency’s discretion. Thus, for all these reasons, this Court must vacate the Board’s Decisions and Orders, the underlying decisions of the Regional Director, and the underlying elections in the instant cases, and remand the cases to the Board.

## **ARGUMENT**

### **I. The Board’s Flawed Analysis of the Employers’ Objections**

#### **A. The Standard for Holding a Hearing on Objections**

As the Board admits in its Answering Brief (AB 19), the Act, the Board’s rules, and the Board’s precedent all require that a hearing on an objection to an election must be held when the objection raises substantial material issues of fact. 29 U.S.C.A. §159; NLRB Rules and Regulations §§102.69(d), (f); Intl. Union of

Elec., Radio, and Mach. Workers, AFL-CIO v. NLRB, 418 F.2d 1191, 1196 (D.C. Cir. 1969); Sonoco Products Co. v. NLRB, 399 F.2d 835, 839 (9<sup>th</sup> Cir. 1968). The Board's rules require an objecting party to provide an offer of proof in support of its objection(s) to an election. NLRB Rules and Regulations §102.69(a). The offer of proof must set forth each witness the party would call, and summarize their testimony. NLRB Rules and Regulations §102.69(a), §102.66(c). However, it is equally clear that the Board's Rules do not require that an offer of proof be in any manner dispositive of the factual inquiry.

Indeed, to the extent the offer of proof establishes the existence of a material factual issue, an evidentiary hearing must follow, so that the factual circumstances surrounding the objection, and the effect of those facts on the outcome of the election, can be fully and appropriately considered. NLRB Rules and Regulations §102.69(c); Pinetree Transp. Co. v. NLRB, 686 F.2d 740, 744 (9<sup>th</sup> Cir. 1982). In this regard, the discretion afforded to the Board in representation proceedings to determine whether a hearing should be held is not unlimited, and the Board is required to hold an evidentiary hearing when a party's objections raise substantial material issues of fact. Id.; NLRB v. Commercial Letter, Inc., 455 F.2d 109, 115 (8<sup>th</sup> Cir. 1972). See Also, Alson Mfg. v. NLRB, 523 F.2d 470, 472 (9<sup>th</sup> Cir. 1975) (It is essential that the trier of fact be afforded the opportunity to observe witnesses whose subjective state of mind is at issue.)

While the Board's Answering Brief acknowledges its obligation to ensure that the conduct objected to by the Employers did not interfere with employee free choice, and / or raise reasonable doubt as to the fairness of the election (AB 19), throughout these proceedings, the Board made no effort whatsoever to meaningfully undertake the factual inquiry with which it is statutorily tasked. In point of fact, a review of the Employers' Offers of Proof and the Board's precedent establish that the Offers of Proof were indeed sufficient grounds upon which evidentiary hearings should have been held on each of the Employers' Objections. Thus, the failure to "marshal evidence" on these issues of fact lies not – as the Board suggests (AB 17) – with the Employers, but instead with the Board itself.

*1. Employees' Guard Status*

The Board's finding that the MRI Technologists and Nuclear Medicine Technologists employed by the Employers<sup>2</sup> do not constitute statutory guards

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<sup>2</sup> The Answering Brief's claim (AB 27, FN 11) that Santa Ana waived its argument concerning the guard status of its Nuclear Medicine Technologists, because those individuals were identified as working at Irvine instead of Santa Ana, is unavailing. Section 10(e) of the Act ensures that no argument not presented to the Board to consider on the merits in the first instance can be presented to the Courts. Marshall Field & Co. v. NLRB, 318 U.S. 253, 256 (1943). While prior submissions to the Board and this Court identified Nuclear Medicine Technologists as being employed at Irvine rather than Santa Ana, the Board was clearly on notice of the claim that *all* of the Nuclear Medicine Technologists employed by the Employers, regardless of the specific facility at which they were located, constituted statutory guards. The Board contended with this issue of guard status by affirming without substantial modification the findings of the Regional Director's Decision and Direction of Election, which correctly identified Nuclear Medicine Technologists as employed at

pursuant to §9(b)(3) of the Act remains wholly unsupported by substantial evidence in the record from the underlying representation case. Indeed, the Board's own Answering Brief admits the myriad security functions espoused by both MRI Technologists and Nuclear Medicine Technologists. The Board explains that MRI Technologists "ensure the safe operation of the MRI machine" (AB 7), "supervised and controlled" the areas surrounding the MRI machine (AB 7), stop visitors from entering certain parts of the facility and call the police if visitors do not comply (AB 8), and possess keys to restricted areas of the facility (AB 8). The Board further admits that Nuclear Medicine Technologists must monitor their patients (AB 9, 28), isolate them in holding rooms<sup>3</sup> (AB 9) and "take special care with the radioactive isotopes" that they control in the hot lab (AB 10, 28-29). Despite these uncontested responsibilities for safeguarding the Employers' properties, premises,

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Santa Ana, based on the testimony given by Dr. Vartani. See Election Decision 3, 10-12; App. at 1114, 1121-1123, 2Tr. 103-104; App. at 78-79. Thus, there is no question that the Board rejected the argument that Nuclear Medicine Technologists employed at *any* facility in the Union's original, petitioned-for unit were guards pursuant to the Act. Furthermore, in the event this Court were to rule that the Nuclear Medicine Technologists at Orange *did* constitute statutory guards, the Board would have no choice but to review the inclusion of Nuclear Medicine Technologists in the Santa Ana unit, due to the fact that §9(b)(3) of the Act does not permit the Board to endorse a mixed unit of guards and non-guards, and the record illustrates that the duties and responsibilities of the Nuclear Medicine Technologists at Orange and Santa Ana are the same. See 2Tr. 105-113, 114-120; App. at 80-88, 89-95.

<sup>3</sup> The monitoring and detaining of individual patients are not always "brief", as claimed by the Answering Brief. (AB 28) In fact, Dr. Vartani testified that some patients would be detained for up to two hours. 2Tr. 107; App. at 82.

employees, and guests, the Board nevertheless claims that the employees do not receive “specialized instructions” on their roles (despite four, 150- plus-page manuals to the contrary). See E. Exs. 4, 7-9; App. at 149-334; 337-1030. Contrary to the Board’s position, these well-documented and specialized duties are thus not, as the Board suggests, “minor” or “incidental” (AB 26, 28) – rather, they are fundamental to the continued safe operation of the facility, and the continued safe provision of services to patients.<sup>4</sup>

As a related matter, the cases concerning “minor” and “incidental” guard duties relied upon the Board’s Answering Brief are readily distinguishable from the cases at bar. In Boeing Co., 328 NLRB 128 (1999), the employer asserted that the firefighters at issue possessed “guard duties” only during periods when other employees were on strike, rather than as part of their everyday responsibilities. The infrequency of the firefighter’s “guard duties” in Boeing is opposite the circumstances presented by the instant cases, wherein the MRI Technologists’ and Nuclear Medicine Technologists’ “guard duties” constitute an integral and important part of their daily responsibilities, each and every day that they work.

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<sup>4</sup> The Board repeatedly claims, without citation to the record, that “other non-MRI employees, like custodians” also ensure safety in restricted areas and report safety violations (AB 8) “just like” MRI Technologists (AB 25, 26). This claim is not only unsupported by the record, but in fact expressly contradicted by the record, given Dr. Vartani’s detailed testimony concerning the specific guard duties possessed only by the MRI Technologists.

Similarly, in Wolverine Dispatch, Inc., 321 NLRB 796 (1996) and 55 Liberty Owners Corp., 318 NLRB 308 (1995), the full extent of the “guard duties” of the employees at issue in those cases were their roles as “gatekeepers” to the buildings in which they worked. By contrast, the security duties and responsibilities of the MRI Technologist and Nuclear Medicine Technologist positions extend far beyond a “gatekeeper” role, and require the continued monitoring and policing of both employees and visitors, as well as the safeguarding of volatile and expensive Employer property, such as the MRI magnet and the radioactive isotopes utilized in Nuclear Medicine.

Returning to the evidence, the Board is simply wrong in its assertion that MRI Technologists and Nuclear Medicine Technologists do not round or monitor employees and visitors within the facility. (AB 8, 10, 25) In fact, Dr. Vartani explicitly testified that MRI Technologists conduct surveillance in Zones 3 and 4 of the MRI suites, and Nuclear Medicine Technologists both monitor patients and make rounds within the Nuclear Medicine Department. 2Tr. 89, 106, 135; App. at 64, 81, 110.<sup>5</sup> This evidence clearly establishes that both MRI Technologists and Nuclear Medicine Technologists do more than simply “escort” a patient “through the imaging procedure”, as the Board attempts to claim. (AB 30) Neither MRI

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<sup>5</sup> The Board makes much the fact that the question of the rounds completed by Nuclear Medicine Technologists arose during cross-examination, but this distinction has no bearing on the credibility of Dr. Vartani’s testimony.

Technologists nor Nuclear Medicine Technologists serve as a mere escort – rather, they literally “guard” certain areas of the facility from trespass, and monitor the comings and goings of employees and visitors alike in and around those areas. Similarly incorrect is the Board’s continued insistence, despite its own crystal-clear precedent to the contrary, that the fact that MRI Technologists and Nuclear Medicine Technologists call the police or 911, rather than attempting to use force themselves, is somehow relevant to whether those employees constitute guards. (AB 8, 10, 25, 28) In fact, the Board, and this Court, have made clear that it is not. See Bellagio, LLC v. NLRB, 863 F.3d 839, 848 (D.C. Cir. 2017), and cases cited therein.

Similarly, status as a guard pursuant to §9(b)(3) of the Act is not limited to “traditional guard duties” such as carrying weapons and wearing security badges or uniforms, as the Board repeatedly claims (AB 8, 10, 22, 24-25, 28). As the Board later admits in its own Answering Brief (AB 24), these factors are not dispositive. Rather, employees with a wide variety of the job titles and job duties have been found by the Board to constitute statutory guards, including coin room operators, firefighters, toll operators, and others – many of whom did not carry weapons or wear uniforms. See PB 51, and cases cited therein. Furthermore, the “conflicting loyalties logic” cited by the Board (AB 22-23, 26-27, 30) is equally not a dispositive inquiry. The Board has noted that “Section 9(b)(3) [...] is not

limited to the divided loyalty situation [...] but is broader”, and that the inquiry into guard status is not primarily concerned with “whether guards would be faced with a conflict of interest or loyalty at their particular plant”. International Harvester Co., 154 NLRB 1747, 1750 (1964).) Even so, the issue of divided loyalty on the part of MRI Technologists and Nuclear Medicine Technologists was, in fact, confirmed by Dr. Vartani’s testimony. 2Tr. 127, 138-139; App. at 102, 113-114. Additionally, contrary to the Board’s claims (AB 27, 30-31), much of Dr. Vartani’s testimony focused on rules that the MRI Technologists and Nuclear Medicine Technologists would have to enforce against their fellow employees, including rules about employee access to certain areas of the facility and employee access to certain equipment or isotopes.

For all of these reasons, it is clear that the Employers have conclusively established that MRI Technologists and the Nuclear Medicine Technologists constitute statutory guards, and therefore, that the bargaining units at issue in the instant cases should not have been certified by the Board.

## 2. *The Board’s Revised Election Rules*

The Board next rejects the Employers’ challenges to the Board’s 2014 revisions to its election rules. First, the Board claimed that all of the Employers’ arguments were rejected by the Courts in Assoc. Builders & Contractors of Texas, Inc. v. NLRB, 826 F.3d 215, 220 (5<sup>th</sup> Cir. 2016) and Chamber of Commerce of the

United States of Am. v. NLRB, 118 F. Supp. 3d. (D.D.C. 2015). (AB 33)

However, this argument does not contend with the “as-applied” challenges raised by the Employers <sup>6</sup>, concerning the ways in which the Board’s revised election rules impacted the Employers, specifically, in the context of the instant elections. Additionally, the reasoning in those cases is flawed.

First, the Board claims that the 2014 amendments did not impact a party’s right to a hearing on questions concerning representation. (AB 33) The Board fails to recognize that the 2014 amendments so greatly whittled down the right to a hearing on questions concerning representation, that the impact was to virtually eliminate that right. Similarly, the Board’s claim that employee and employer free speech were not impinged by the shortened election period prescribed by the 2014 amendments (AB 34-35) is belied not only by the cases at bar <sup>7</sup>, but by the Union’s

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<sup>6</sup> The Board correctly indicates that the Employers did not raise these “as-applied” challenges to the 2014 amendments during the representation case proceedings, given that many of the issues were not yet ripe. However, contrary to the Board’s claim, the Employers’ “as-applied” challenges are not a “mystery”. (AB 38) In fact, the Employers’ Objections clearly delineate each Employers’ “as-applied” challenges to the 2014 amendments. See Offers of Proof; App. at 1034, 1041, 1050, 1056, 1062, 1070.

<sup>7</sup> The Board’s claim that the Employers essentially received more time to campaign than they had asked for (AB 35) is a fallacy. The Employers proposed hearing dates while operating within the paradigm of the 2014 amendments, knowing that any request for a reasonable campaign period would be flatly denied by the Regional Director, and leaving them with no say whatsoever in the determination of the election details. For similar reasons, the Employers wholeheartedly reject the Board’s claim that the Employers had “ample time” to discuss the subject of unionization with their employees. (AB 36)

professed affinity for the revised rules, which limit the opportunity for meaningful discourse and debate, and thereby grant an advantage to labor organizations. See Tr. 36; App. at 45 (Professing that the Union “loves” the revised election rules). Finally, contrary to Board’s assertion (AB 36), the 2014 amendments’ requirement that employers provide labor organizations with employee email addresses and telephone numbers constitutes a much higher level of invasion of privacy than the previous requirement that employers provide employee home addresses. Access to employee email addresses and phone numbers allows labor organizations to contact employees they have never met. This access also facilitates the ease with which a labor organization or its agents can harass employees. Thus, for all these reasons, the Employers’ facial challenges to the Board’s 2014 amendments continue to merit consideration, regardless of the precedents cited by the Board.

Finally, the Board claims that the Board’s 2019 election amendments, which reversed in part the 2014 election amendments, are of no import to the instant cases. (AB 39-40) However, as the Board admits, the Administrative Procedure Act (hereafter, the “APA”) does not permit agency rules that are “arbitrary” or “capricious”, or that constitute “an abuse of discretion”. (AB 32), *citing* 5 U.S.C. §706(2)(A). The 2014 amendments can hardly be considered rational, or the Board’s action not seen as capricious, when the Board worked so quickly to reverse those amendments a mere five years later. See, Dept. of Homeland Security v.

Regents of the University of California, No. 18-587 (June 26, 2020) (Sotomayor, dissenting) (“The [agency’s] abrupt change in position [...] raises the possibility of a significant mismatch between the decision [...] made and the rationale [...] provided”) (internal quotations omitted). In the cases at bar, the question is not whether the 2019 revised election rules were a sound change (the question addressed by FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009), which was relied upon by the Board), but rather, whether the 2014 revised election rules were problematic, as further evidenced by the Board’s haste to abandon many of those revisions a short time later. For all these reasons, the Employers’ Objections to the Board’s 2014 revised election rules should have been heard and sustained.

### 3. *The Delayed Vote Tallies*

The Board next fails in its efforts to defend the Regional Director’s decision to delay the vote tallies until the final of the six elections at issue in these cases had been completed. The Board relies heavily upon its delegation of discretion to the Board’s Regional Directors to determine election arrangements (AB 43), but this discretion is far from absolute. This Court need look no further than its own precedent in Nathan Katz Realty, LLC v. NLRB, 251 F.3d 981 (2001), which illustrates that a Regional Director must provide a well-reasoned explanation for delaying the vote count in consecutive elections. Try as it may, the Board is unable to escape this precedent. Its heavy reliance Independent Rice Mill, Inc., 111

NLRB 536 (1955), remains unavailing for all of the reasons set forth in the Employers' Principal Brief (See PB 37, FN 6), including the noteworthy fact that the most recent precedent the Board could find to endorse the approach adopted by the Regional Director in the instant cases is 65 years old.

Pursuant to Nathan Katz Realty, the Board acknowledged the Regional Director's obligation to provide a "reasoned explanation" for departure from the Board's normal election procedures – namely, the decision to impound all of the ballots until all elections had been completed. (AB 45) However, the Board incorrectly asserted that the Regional Director's vague citation to the "unusual circumstances of the case" (AB 45) was sufficient "reasoned explanation" to meet this standard. Citing generally and opaquely to alleged "unusual circumstances" of the case, without elaboration, is no more sufficient a reasoned explanation for departure than was "preventing unfair advantage" in Nathan Katz Realty. Furthermore, the specific "unusual circumstances" that the Board relies most heavily upon – namely, the fact that the elections were held at overlapping times over the course of two days throughout Orange County, and therefore caused "administrative challenges" (AB 46) - were caused solely by the Regional Director's exercise of discretion in scheduling the elections in such a manner. If scheduling the elections in this manner prevented proper administration of the elections by the Region, the Regional Director should have exercised his discretion

to schedule them differently, rather than deviate from standard Board procedure by impounding votes.

As a related point, the Board's claim that the closing of the last set of polls was the "earliest practicable time at which the count could take place" (AB 46) makes absolutely no logical sense. Each facility had a polling place, a Board Agent present, and representatives of the union and the facility present on the day and time of their individual election. Most facilities had a total of a dozen or fewer eligible voters. Therefore, the tallies could have been completed efficiently by the Board Agent who conducted the election immediately after the elections took place at each site – such a tally, with such small bargaining units, would have taken no more than fifteen minutes. The Board offers no explanation – and thus, obviously, no sufficient explanation – for its claim that vote tallies at each site, immediately following each election, were impossible.<sup>8</sup>

The additional rationale relied upon by the Board to endorse the actions of the Regional Director in fact serves to prove the issue with the Regional Director's deviation from standard Board procedure, rather than justify it. Namely, the Board claims that it was proper to impound the votes so that "*no one*" "would know the

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<sup>8</sup> In this same vein, the Board's claim that impounding the ballots and counting them all at one vote tally did not undermine the Regional Director's decision to conduct separate elections must be rejected. (AB 49) This decision created, at the very least, the insinuation of cohesion between the bargaining units, which the Regional Director had just found to be unsupported by the factual record.

outcome of *any* of the earlier elections” (AB 47) (emphasis in original). This “rationale” is, in fact, a statement of one of the Employers’ fundamental objections to the Regional Director’s decision. Both employees, in order to exercise their rights to the fullest freedom under the Act, and the Employers, in order to exercise their free speech rights under the Act, were entitled to know the results of each election immediately after they occurred.<sup>9</sup> Contrary to the Answering Brief’s assertion (AB 47), the Employers did not “ignore” the Regional Director’s claim that this arrangement eliminated the risk that the results would be disseminated in an “objectionable way”. Rather, the Employers rejected this argument as impermissibly paternalistic and speculative, and as an improper suppression of their free speech rights under the Act. (See PB 40-41) This is particularly so where the Regional Director and the Board had no basis, given the history of the instant cases, to assume that any wrongdoing would take place, and / or that any such issues could not be adequately addressed *via* the filing of objections to the

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<sup>9</sup> Related to this point, the Board’s Answering Brief gives short shrift to those elections in which employees voted *not* to be represented by the Union, or from which the Union had withdrawn, which were interspersed amongst the elections in the instant cases. (See AB 12-13; Election Decision 21-22, App. at 1132-1133) The Employers had a legitimate interest in communicating the alternate outcome of those elections to employees, and employees had a right to know about these outcomes before they cast their own votes.

elections.<sup>10</sup> The Board's reliance upon this rationale is therefore badly misplaced, as it is nearly identical to the speculative assumption about "unfair advantage" in Nathan Katz Realty that was previously rejected by this Court.

Finally, the Board's attempts to downplay the effect of the Regional Director's decision on employee free choice (AB 42) must fail. Contrary to the Board's position (AB 48), the fact that employees belonged to separate voting units does not mean that they could not have a legitimate interest in the outcome in other, related units. The Employers are all part of a regional network of facilities, and their bargaining power as part of the Union might well be determined by how many other facilities voted to be represented by the Union in the elections. By dint of the Regional Director's decision to impound the ballots, employees at each facility were required to vote with impaired knowledge, because they did not know whether they would be voting for a Union that was accepted or rejected by the colleagues who voted before them - which could go directly to the heart of the Union's strength in the region and the industry, and thus to the Union's strength at the bargaining table. Therefore, it is clear that the fact that employees were in separate bargaining units is not mutually exclusive with the concept that they

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<sup>10</sup> It's particularly ironic to think the Regional Director would take this step and impound the ballots on the basis of a concern about wrongdoing with *no* evidence of wrongdoing by any party (AB 47), while simultaneously refusing to hold an evidentiary hearing on any of the Employers' Objections in the face of *ample* evidence of misconduct during the elections.

might have a common interest in the collective election outcomes, as the Board appears to argue. (AB 48)

In conclusion, therefore, the Board's attempts to distinguish the instant cases from Nathan Katz Realty (AB 50) are wholly unavailing. The Board has *not* provided "just the explanation the Court found lacking" in Nathan Katz Realty (AB 50), and the "administrative challenges" allegedly presented by the instant cases constitute no more sufficient a basis for impounding in this case than the "unfair advantage" claimed in Nathan Katz Realty. Given that the Regional Director's decision to impound the ballots in the instant cases is therefore entirely unsupported by a reasoned explanation, the Court should reverse the Regional Director's Election Decision and vacate the elections in the cases at bar.<sup>11</sup>

#### 4. *The Union's Undisclosed Affiliation*

With respect to the Employers' Objections concerning the Union's undisclosed affiliation with the IAMAW, the Board continues to ignore the fact that the Union's affiliation with the IAMAW should have been analyzed pursuant to Board's standard, as set forth in Woods Quality Cabinetry Co., 340 NLRB 1355 (2003). The Answering Brief's attempts to distinguish the instant cases from

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<sup>11</sup> Contrary to the Board's unsupported assertion (AB 43 FN 15), La Mirada did not waive its right to object to the treatment of its facility as part of the *de facto* larger combined-tally unit, or to claim that the decision-making was, in this regard, arbitrary and capricious, simply because La Mirada was the first facility to vote.

Woods (AB 53) are unconvincing. Contrary to the Board's assertion (AB 53), the Union's identity was equally as "material to the campaign" in the instant cases as it was in Woods. The Union never disclosed its affiliation with the IAMAW during the campaign, which had the same effect as the affiliation being disclosed, but untrue, in Woods. It is obvious, therefore, that voter confusion would result in this case based upon the affiliation, just as the Board found it had in Woods. Accordingly, the Board's attempts to distinguish Woods must fall flat.

The Board's efforts to minimize the compelling documentary evidence of affiliation between the NUHW and the IAMAW presented by the Employers' Offers of Proof further illustrate how badly the Employers' Objections were mishandled by the Board. First the Board claimed that the Employers had presented "no evidence" that NUHW misrepresented its affiliation with the IAMAW, that the affiliation had even happened, or that employees would have cared about the undisclosed affiliation. (AB 52, 53-54) <sup>12</sup> In making these

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<sup>12</sup> The Board attempts to make much of the fact that the Employers did not advise the Region of the undisclosed affiliation in the instant cases before the elections. However, the Board failed to recognize that the affiliation was not confirmed until the elections took place, and it was made clear by IAMAW's presence that IAMAW was operating as a partner with the NUHW at the instant facilities. This timeline of events rendered advanced notice to the Region of the sort contemplated by the Board's Answering Brief impossible. Though the Board claims that the Employers should have been on notice of the possible affiliation of the NUHW with the IAMAW (AB 54, FN 17), the Employers could not have known whether the NUHW was still acting in affiliation with the IAMAW until representatives from the

assertions, the Board inherently acknowledges that it refuses to accept the factual assertions of the Employers' Offers of Proof as truth, as is required by the Board's standard. Furthermore, the Board's position either fails to grasp, or refuses to acknowledge, that the NUHW engaged in misrepresentation by omission, which is equally duplicitous, and had an equal effect of creating latent voter confusion about the identity of the union that they had voted for or against.<sup>13</sup> The Employers' Offer of Proof, if treated as though the factual assertions were true as required by the Board's precedent, established a clear ground to overturn election. Accordingly, by this standard, the Board should have held an evidentiary hearing, and sustained the Employers' Objections.

Similarly, the Board's efforts to minimize the material effect of the undisclosed affiliation on employees must fail. The issue at the heart of the Board's concern about misrepresentation is whether employees knew who they were voting to be represented by, and for what that organization stood. The employees at the Employers' facilities voted for representation by the NUHW – a healthcare-

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IAMAW held themselves out as representing NUHW at the elections that took place at the Employers' facilities.

<sup>13</sup> As a related point, the Board's heavy reliance upon the lack of evidence of voter confusion in the record is asinine. Because the affiliation was not disclosed until after the elections were underway, the record would obviously contain no evidence of voter confusion over the affiliation. This result is due to the fact that the affiliation was hidden, rather than the fact, as the Board contends, that voter confusion did not exist. (AB 52)

specific labor organization. The employees did not vote for the IAMAW – a labor organization of machinists with a history of labor strikes, unlawful practices, and cash incentives paid to organizers to organize as many employees as possible. These are fundamentally different labor organizations, and voting for one is not akin to voting for the other. When NUHW affiliated with IAMAW, it therefore made a fundamental change to its identity as a labor organization, which employees were entitled to know about. Because NUHW never disclosed this affiliation, employees never knew this fundamental change, and voted without the benefit of this important information. A hearing on objections was required to establish that employees felt it would have affected how they would have voted if they had known. For all these reasons, the Board’s overly simplistic view that, simply because NUHW didn’t change its name after affiliating with IAMAW, there was no “change” in the party representing employees (AB 52), must be rejected. As illustrated, the considerations are far more nuanced, and in the instant cases, required a hearing to resolve.

##### 5. *Security of the Ballot Box During the Irvine Election*

The Board’s defense of its refusal to hold an evidentiary hearing concerning the Board Agent’s failure to secure the ballot box during the Irvine election is equally flawed. The Board itself admits that its own standard requires “examin[ation] of all the relevant facts surrounding the balloting” (AB 55), which

it clearly did not undertake in the case of the Irvine election. Instead, the Board attempts to attack the facts presented in Irvine's Offer of Proof, rather than assuming for the sake of the review of Irvine's Objections, that the evidence presented in the Offer of Proof would be proven true. For example, rather than accept as true the Offer of Proof's assertion that the ballot box was out of the Board Agent's line of sight for virtually the entire election, the Board instead challenges where exactly the Board Agent was positioned, and what she could see from that location. (AB 56, FN 18) Even if the Board's "confusion" was genuine, the resolution of that factual issue clearly required an evidentiary hearing on, rather than dismissal of, Irvine's Objection. The Board's attack on the facts presented by Irvine's Offer of Proof in this manner also serves to distinguish the instant case from cases such as Polymers, Inc. v. NLRB, 414 F.2d 999 (2d Cir. 1969), wherein the Board held that the employers' offer of proof, *even if treated as true*, would not suffice to sustain the employer's objection.

Furthermore, the Board failed to distinguish the instant case from those in which the Board and Courts have held that a Board Agent's failure to maintain control of the ballot box warranted overturning the result of the election. Contrary to the Board's assertion, Irvine *does* claim that the Board Agent was "unavailable to witness and address any balloting issues" (AB 56) and that the Board Agent "left the ballot box unattended". Irvine's Offer of Proof makes clear that the Board

Agent wasn't watching the box and couldn't see the box. Irvine OOP 5; App. at 1063. This renders the situation in the instant case most similar to Austill Waxed Paper Co., 169 NLRB 11009 (1968), in which a Board Agent's *five minute* failure to maintain control of the ballot box was sufficient to overturn the election results. Furthermore, unlike the circumstances presented by Elizabethtown Gas Co. v. NLRB, 212 F.3d 257 (4<sup>th</sup> Cir. 2000) and Benavent & Fournier, Inc., 208 NLRB 636 (1974), which were relied upon by the Board (AB 57), votes were presumably cast during the period of time Board Agent was either unable to see or not paying any attention to the ballot box during the Irvine election, as the conditions at issue persisted for most of the balloting period. Irvine OOP 5; App. at 1063.

Finally, the Board's Answering Brief asserts that, because the election observers were present and monitoring the ballot box, the election was properly monitored. (AB 56) This is a completely inaccurate assessment. Election observers are not intended to serve as standalone monitors of the Board's elections - if they were, the Board would not assign a Board Agent to oversee each election proceeding. Election observers receive little to no training before they begin serving as observers, and they certainly do not receive training on the duties and responsibilities of the Board Agent, so that they can "fill in" if that person does not feel like performing their job. In the instant case, the Board Agent's lack of attention to the ongoing election created ample opportunity for balloting issues to

occur, and created the appearance of impropriety which badly affected the required laboratory conditions for the election.<sup>14</sup> It is not appropriate to assume that the election observers can salvage the Board Agent's dereliction of duty. Thus, at the very least, these facts warranted the Region setting Irvine's Objection for hearing. See NLRB v. Monroe Auto Equipment Co., Hartwell Div., 406 F.2d 177 (5<sup>th</sup> Cir. 1969) (Fifth Circuit found that an employer's objection alleging that the ballot box was left unattended warranted an evidentiary hearing before the Board).

6. *List-Keeping and Cell Phone Use During the Irvine Election*

The Board's analysis of Irvine's Objections concerning potential list-keeping and confirmed cell phone usage by the Union's election observer are equally flawed. First, the Board faulted Irvine for lacking detailed evidence about what each and every employee thought when they saw the Union's election observer using her cell phone, when it was the Board who refused to hold an evidentiary hearing that could have established precisely those facts. (See AB 58-59) Similarly, the Board faulted Irvine for "surmising" and "speculating" about the evidence (AB 57, 59), when the reason for the lack of certainty was, once again, due entirely to the Board's refusal to hold an evidentiary hearing which would have

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<sup>14</sup> For related reasons, Dunham's Athleisure Corp., 315 NLRB 689 (1994), which dealt with an observer's intermittent failure to maintain sight of the ballot box, is distinguishable from the instant case, which concerns the *Board Agent's continued* failure to maintain sight of the ballot box.

permitted further clarity. This is precisely why the Board's attempts to distinguish Chrill Care, Inc., 340 NLRB 1016 (2003) (AB 59) must fail, given that the Board's decision to draw inferences of voter knowledge of list-making in Chrill Care were based upon careful analysis of the detailed facts presented by those cases. Those facts were presented to the Board by way of an evidentiary hearing – an opportunity that Irvine was denied in the instant case by dint of the Regional Director's rulings.

However, it is clear that the facts presented by Irvine's Offer of Proof, had they been assumed true for the purposes of analysis as required by the Board's precedent, presented circumstances which would require the Board to overturn the election results. Irvine's Offer of Proof establishes that there was improper cell phone usage by the Union's election observer that correlated with challenged voters presenting to vote.<sup>15</sup> These facts distinguish the instant case from Harlan No. 4 Coal Co. v. NLRB, 490 F.2d 117 (6<sup>th</sup> Cir. 1974), which was relied upon by

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<sup>15</sup> The Board continually refuses to accept as true Irvine's assertion that the Union election observer's use of her cell phone correlated to challenged voters presenting to vote, first claiming that Irvine's allegation was simply that the Union's observer had "used" her cell phone (AB 59), and later asserting that the correlation between challenged voters presenting and the Union observer using her cell phone was somehow "disingenuous". (AB 60) To the contrary, Irvine's Offer of Proof clearly asserts the correlation between the challenged voters and cell phone usage, stating that the proffered witness would testify that "Clark's use of her telephone appeared to be related to the people who voted in the Election subject to challenge, given the fact that, following the challenge to the person's vote, Clark would send and receive text messages." Irvine OOP 6; App. at 1064.

the Board (AB 59), and in which the employer presented “no evidence” of listkeeping (and instead, only evidence that union representatives were near the polling place). By comparison to Harlan, Irvine’s evidence was not “too speculative” (AB 58) to set the Objection for a hearing, and in fact, far more similar facts were determined sufficient to warrant an evidentiary hearing by the Board in Chrill Care, Inc., *supra*. Thus, for all these reasons, it is clear that the Board should have held an evidentiary hearing concerning Irvine’s Objections.

7. *Lack of Voting Place Signs at Santa Ana*

The Board’s rejection of Santa Ana’s Objection concerning the Board Agent’s failure to post a Voting Place sign is similarly misguided. First, the Board attempted to argue that, assuming that Santa Ana posted the Notices of Election required by the Board’s Rules, there could be no confusion sufficient to warrant overturning the election. (AB 61, 62) This outrageous argument truly strains credulity, as it requires one to assume that the Board believes its own election requirements - namely, the posting of both the Notice of Election *and* the Voting Place sign – are, generally speaking, superfluous. Furthermore, the Board ignores the fact that the two postings serve very different purposes – the Notice of Election gives employees advance notice of where the election will take place, but it is the Voting Place sign that employees will seek out on the day of the election as they are attempting to vote.

Furthermore, the Board Agent's failure to post a Voting Place sign is not so inconsequential an error as the Board attempts to assert. At Santa Ana, there were two eligible voters that did not vote. Santa Ana Tally of Ballots; App. at 1916. The margin of victory for the Union in the Santa Ana election was one vote. *Id.* Unlike in PruittHealth-Virginia Park, LLC v. NLRB, 888 F.3d 1285 (D.C. Cir. 2018), Santa Ana does not rely solely on the closeness of the vote, but rather the closeness of the vote *combined* with the Board Agent's failure to posting the Voting Place sign. Thus, the narrow margin of victory, in concert with an obvious error on the part of the Board Agent, required the Board to conduct a hearing regarding Santa Ana's Objection.

8. *Inappropriate Conversations at Garden Grove*

The Board's Answering Brief next addresses the inappropriate presence of and comments made by a Union supporter during voting at Garden Grove. At first, the Board appears to doubt that the Union supporter's behavior was improper (See AB 63). There can be no dispute that the Union supporter's presence in the voting area, when not casting a ballot, was improper – the Board's Rules clearly do not permit such activity. See NLRB Casehandling Manual §11322.4; Milchem, Inc., 170 NLRB 362 (1968). Next, the Board claims that the Union supporter's conduct could not possibly be sufficient to destroy the laboratory conditions of the Garden Grove election. The Board asserts that Garden Grove did not illustrate that

any voters were waiting to cast ballots (AB 64, 65), but this assertion is undermined by Garden Grove's Offer of Proof, which clarifies that every eligible voter had not yet voted<sup>16</sup>, and that Garden Grove's witness could not see whether any individuals approached the polling place to vote while the Union supporter lingered in the polling area, nor whether any voters left without voting due to the Union supporter's presence. See Garden Grove OOP 5; App. at 1042.

Furthermore, the cases cited by the Board in support of its decision not to hold an evidentiary hearing concerning Garden Grove's Objection are readily distinguishable. In both Amalgamated Serv. & Allied Indus. Joint Bd. v. NLRB, 815 F.2d 225 (2d Cir. 1987) and NLRB v. Oesterlen Servs. for Youth, Inc., 649 F.2d 399 (6<sup>th</sup> Cir. 1981), the facts involved conversations between an election observer and an eligible voter who was present to vote. These facts remove from the equation the completely unwarranted and unjustified presence of a Union supporter who was not there to cast a ballot, and was instead loitering without purpose in the polling area. The latter facts, present in the Garden Grove election, therefore constitute a more serious breach of the Board's standard election

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<sup>16</sup> The Board asserts that because all eligible voters did ultimately vote in the election, there could have been no harm caused by the Union supporter's presence in the polling area. (AB 66) This claim overlooks that fact that all eligible employees had not voted at the time the events involving the Union supporter occurred, and therefore, those employees who voted after could have been intimidated when casting their votes, causing them to vote without the freedom prescribed to them by the Act. See Garden Grove OOP 5; App. at 1042.

procedure. Browning-Ferris Indus. Of Louisville, Inc. v. NLRB, 803 F.2d 345 (7<sup>th</sup> Cir. 1986) is also distinguishable, as the Board found in that case that the individual at issue was not an agent of the union (as opposed to the instant case, wherein the Board assumed agency when reviewing Garden Grove's Offer of Proof), and the Board Agent assigned to that election (unlike the Board Agent assigned to the election at Garden Grove), took measures to prevent any taint to the laboratory conditions of the election by instructing the individual to leave. Thus, given the entirety of the circumstances presented by the instant case and the inapplicability of the precedent cited by the Board, the Board should have set Garden Grove's Objection for hearing.

## **II. The Board's Unconvincing Arguments Concerning Sub-Zero Freezer**

Finally, the Board's attempts to minimize and dismiss the Employers' arguments concerning Sub-Zero Freezer Co., 271 NLRB 47 (1984) must be rejected by this Court. (See AB 66-69) Far from "frivolous" (AB 16, 66), the Employers raise a very real question as to how and why an administrative agency can or should be permitted to allow two inherently contradictory lines of precedent to continue to exist for over thirty years, without ever adequately explaining the contradiction, or meaningfully distinguishing the cases. The Board's claim that relitigation of representation issues is precluded under "well-established" precedent (AB 16) is quite clearly refuted by the existence of Sub-Zero and its

progeny. While the Board readily acknowledges the split in its precedent, it never distinguishes or explains the continued viability of both lines of cases, and instead relies blindly upon its “discretion” (AB 67) and its unexplained definition of “special circumstances” (AB 16) to apply one line of cases over the other going forward.

Though the Board claims the Sub-Zero line of cases have a “limited scope” (AB 68), this assertion rings hollow where the Board has not defined the limits of the application of those precedents in any way, shape, or form. In fact, in both of the cases wherein the Board claims that the Board has “made clear the limited scope of precedent [...] in which it permitted relitigation” (AB 68-69), all the Board has *actually* done is parrot that Sub-Zero “is one of a limited number of cases in which the Board has departed from its rule” concerning relitigation, without providing an explanation or means of distinguishing why relitigation was permitted in Sub-Zero, as opposed to other cases. Univ. of Chicago, 367 NLRB No. 41, 2018 WL 6381434 at 1, FN 1 (Dec. 4, 2018); Warren Unilube, Inc., 357 NLRB 44, 44 FN 3 (2011). The Board’s ongoing refusal to provide an explanation for the continued maintenance of the Sub-Zero line of cases in this manner thus constitutes

arbitrary and capricious agency action, which violates the Administrative Procedure Act, prejudices the Employers, and thus cannot stand.<sup>17</sup>

### **CONCLUSION**

For all the reasons set forth above, the Employers respectfully request that this Court reject the unconvincing arguments set forth by the Board in its Answering Brief, grant the Employers' Petitions for Review, and vacate the Board's Decisions and Orders, as well as the underlying rulings and election proceedings in the instant cases.

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<sup>17</sup> The Board claims that the Employers did not show prejudice resulting from the Board's refusal to permit the relitigation of representation issues during the unfair labor practice proceedings. (AB 69) In making this assertion, the Board overlooks the Employers' position that the representation issues were wrongly decided, and thus that the Employer was precluded from an opportunity to obtain corrected rulings on those issues.

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

PER CURIAM ORDER [1823151] filed granting motion to consolidate and exceed word limits [1810915-3] [1809752-2] [1810916-2]. Directing that RadNet Management, Inc. and the National Labor Relations Board may each file one principal brief not to exceed 16,000 words. RadNet Management, Inc. may file one **reply brief not to exceed 8,000 words**.

this brief contains **7,972** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 31st day of August, 2020, I caused this Brief, to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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