

**Nos. 20-1435 & 20-1438**

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

**GADECATUR SNF LLC D/B/A EAST LAKE ARBOR**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**THE RETAIL, WHOLESALE & DEPARTMENT  
STORE UNION–SOUTHEAST COUNCIL**

**Intervenor**

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

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

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

### **A. Parties and Amici**

GADecatur SNF LLC, d/b/a East Lake Arbor (“the Company”), was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. The Board is Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. The Retail, Wholesale and Department Store Union–Southeast Council (“the Union”), was the charging party before the Board and has intervened on behalf of the Board. There were no intervenors or amici before the Board.

### **B. Ruling Under Review**

The ruling under review is a Decision and Order of the Board in *GADecatur SNF, LLC d/b/a East Lake Arbor*, 370 NLRB No. 34 (Oct. 15, 2020).

### **C. Related Cases**

This case has not previously been before this or any other court. Board counsel is not aware of any related cases.

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## GLOSSARY

BDX	Exhibits introduced by the Board
Br.	The Company's opening brief
DCR	The Decision and Certification of Representative
D&O	The Board's Decision and Order
HOR	The Hearing Officer's Report
MSJ	General Counsel's Motion for Summary Judgment
RX	Exhibits introduced by the Company
The Act	National Labor Relations Act, 29 U.S.C. § 151, et seq.
The Board	National Labor Relations Board
The Company	GADecatur SNF, LLC d/b/a East Lake Arbor
The Order	<i>GADecatur SNF, LLC d/b/a East Lake Arbor</i> , 370 NLRB No. 34 (Oct. 15, 2020)
The Union	The Retail, Wholesale and Department Store Union– Southeast Council
Tr.	Transcript of the hearing

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**BRIEF FOR  
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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the petition of GADecatur SNF LLC, d/b/a East Lake Arbor (“the Company”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Company on October 15, 2020, and reported at 370 NLRB No. 34. (D&O 1-3.)<sup>1</sup> The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”). 29 U.S.C. § 151, 160(a).

The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, which provides for the filing of petitions for review and cross-applications for enforcement of final Board orders in this Circuit. 29 U.S.C. § 160(e) and (f). The petition and cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings. The Retail, Wholesale and Department Store Union–Southeast Council (“the Union”), the charging party below, has intervened on behalf of the Board.

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<sup>1</sup> In this proof brief, “D&O” refers to the Board’s Decision and Order, “DCR” to the Decision and Certification of Representative, and “HOR” to the Hearing Officer’s Report. “Tr.” references are to the hearing transcript, “MSJ” to the General Counsel’s motion for summary judgment and exhibits, and “BDX” and “RX,” respectively, to exhibits introduced by the Board and the Company. “Br.” references are to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

As the Board's unfair-labor-practice Order is based, in part, on findings made in an underlying representation (union election) proceeding (D&O 1), the record in that proceeding (Board Case No. 10-RC-249998) is also before the Court pursuant to Section 9(d) of the Act. 29 U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Under Section 9(d), the Court has jurisdiction to review the Board's actions in the representation proceeding solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with the ruling of the Court. 29 U.S.C. § 159(c). *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

### **STATEMENT OF THE ISSUE**

The ultimate issue in this case is whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. That question turns on the dispositive underlying issue of whether the Board acted within its wide discretion in overruling the Company's sole election objection and certifying the Union.

### **RELEVANT STATUTORY PROVISIONS**

Relevant sections of the Act are reproduced in the Addendum to this brief.

## STATEMENT OF THE CASE

In this unfair-labor-practice case, the Company defends its otherwise unlawful, admitted refusal to bargain by asserting that the Board erroneously certified the Union in the representation proceeding. If the Court agrees that the Board acted within its wide discretion in overruling the Company's sole election objection, then the certification is valid and the refusal to bargain violates the Act.

### I. PROCEDURAL HISTORY

#### A. The Representation Proceeding

The Company operates a skilled nursing facility in Decatur, Georgia. (D&O 1; MSJ Ex. 13 ¶2, Ex. 14 ¶2.) On October 15, 2019, the Union petitioned for an election to represent a unit of the Company's certified nursing assistants, licensed practical nurses, and activity and maintenance employees. (DCR 1; MSJ Ex. 1.) The parties subsequently entered into a stipulated election agreement providing for the unit employees to vote in a Board-supervised, secret-ballot election at the Company's facility. (DCR 1; MSJ Ex. 2.)

The election was held on November 12, with morning (6:00 to 8:00 a.m.) and afternoon (2:00 to 4:00 p.m.) voting sessions. (DCR 2; MSJ Ex. 2.) Out of 48 eligible voters, 22 employees voted for union representation and 17 employees voted against it. There were four nondeterminative, challenged ballots, and five employees did not vote. (DCR 1; MSJ Ex. 3.) The Company filed three objections

to the conduct of the election but withdrew two during the hearing. The third objection, presently before the Court, alleged that misconduct by the Union warranted rejecting the election results. Specifically, the Company cited one incident during which several union representatives escorted a recently discharged employee to the voting area in the final minutes of the afternoon voting session and argued with company representatives as to whether she could vote. (DCR 1-2; BDX 1(c), (d).)

Following an administrative hearing, a Board hearing officer prepared a Report on Objections in which she concluded that the Company had not established that the Union's conduct tended to interfere with employee free choice and thus warranted setting aside the election. (HOR 1-8.) The Company filed exceptions to the hearing officer's report. (MSJ Ex. 6.) After considering the Company's exceptions, the Acting Regional overruled the objection and certified the Union as the unit employees' bargaining representative. (DCR 1-9.) The Company filed a request for review of the Acting Regional Director's Decision and Certification of Representative (MSJ Ex. 8), which the Board (Chairman Ring and Members Kaplan and Emanuel) denied on June 2, 2020 (MSJ Ex. 9).

### **B. The Unfair-Labor-Practice Proceeding**

On June 10, 2020, the Union requested that the Company recognize and bargain with it as the unit employees' certified representative, but the Company

refused. (D&O 2; MSJ Ex. 10, 11.) Based on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company's refusal violated Section 8(a)(5) and (1) of the Act and moved the Board for summary judgment. (D&O 1; MSJ & Ex. 12, 13.) The Company opposed the General Counsel's motion, reasserting its challenges to the Union's certification. (D&O 1 & n.1; Resp. to Mot.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On October 15, 2020, the Board (then-Chairman Ring and Members Kaplan and Emanuel) issued its Decision and Order granting the motion for summary judgment and finding that the Company had violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union. (D&O 1-2.) The Board concluded that all representation issues the Company raised in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company neither offered to adduce at a hearing any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances that would require the Board to reexamine its decision in the earlier proceeding. (D&O 1 & n.1.)

To remedy the unfair labor practice, the Board's Order requires the Company to cease and desist from failing and refusing to recognize and bargain with the Union or, in any like or related manner, interfering with, restraining, or

coercing employees in the exercise of their Section 7 rights. The Order further directs the Company to bargain with the Union on request, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (D&O 2-3.)

### **SUMMARY OF ARGUMENT**

To prevail in its efforts to set aside its employees' selection of the Union as their bargaining representative, the Company must carry the heavy burden of showing that the Union's conduct had a reasonable tendency to interfere with the employees' free choice, and did so to the extent that it materially affected the election. Applying its established multi-factor analysis to the record evidence, the Board acted well within its wide discretion in finding that the Union's alleged misconduct did not rise to that standard.

As the Board explained, most of the relevant considerations weighed in favor of upholding the election. There was just a single incident of ostensible misconduct, lacking in severity: when union representatives accompanied a recently discharged unit employee to the polls after the Company had barred her from accessing them, union and company representatives argued over her eligibility in a hallway outside the voting room. The argument was short-lived and, significantly, there was no credited evidence that eligible voters witnessed it or, given that it occurred in the final minutes of the last voting session, that its effects could have persisted in voters' minds or disseminated among voters and

impacted their preferences. The Company, moreover, precipitated the incident by refusing to allow an undeniably eligible voter to cast a ballot, which the Company could have quietly challenged without public incident. And during the argument, company representatives were equally engaged in the same potential misconduct for which it faults the Union. To be sure, the incident occurred during a voting period and the election's results were close—two factors that weighed in favor of setting aside an election. Considering all of the circumstances, however, the Board acted well within its wide discretion in weighing all the relevant factors and overruling the Company's unproven objection.

The Company's various arguments—many of which ignore (or mischaracterize) the credited evidence or Board findings—are unavailing. In particular, the Company repeatedly relies on the “fact” that eligible voters witnessed the incident, but it cannot overcome the hearing officer's reasonable decision not to credit the vague, uncorroborated testimony it cites on that point. The Company also exaggerates the severity of the incident—and, notably, entirely sidesteps the undisputed evidence that its representatives were equal participants. The Company fares no better in its attempts to shift all culpability for the incident onto the Union, ignoring its own role. Nor can it prevail by highlighting the few facts weighing against the Board's conclusion, which the Board amply considered.

## STANDARD OF REVIEW

This Court’s “role in reviewing an NLRB decision is limited.” *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). When supported by substantial evidence on the record as a whole, the Board’s findings of fact are “conclusive.” 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera*, 340 U.S. at 477. The Court also applies the substantial evidence test to the Board’s “application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the court might have reached a different conclusion *de novo*.” *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). And, the Court is deferential to Board findings based on credibility determinations, which it reverses only if they are “hopelessly incredible, self-contradictory, or patently unsupportable.” *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005) (quoting *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1134 (D.C. Cir. 2003)).

Moreover, the “scope of [judicial] review of the Board’s rulings regarding [an] election is extremely limited.” *NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012) (internal quotation marks omitted). Consistent with Congressional intent, the Court accords the Board an especially “wide degree of

discretion” on questions involving representation elections. *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002) (quoting *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946)). Accordingly, the Court overturns a Board election “only in the rarest of circumstances,” and it will enforce a Board order overruling an employer’s election objections unless the Board abused its discretion and the abuse of discretion was prejudicial. *800 River Rd. Operating Co., LLC v. NLRB*, 846 F.3d 378, 386 (D.C. Cir. 2017) (quoting *N. of Market Senior Servs., Inc. v. NLRB*, 204 F.3d 1163, 1167 (D.C. Cir. 2000)).

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION**

Section 7 of the Act grants employees the right to choose a representative and to have that representative bargain with their employer on their behalf. 29 U.S.C. § 157. Employers have a corresponding duty to bargain with their employees’ chosen representatives, and a refusal to do so violates Section 8(a)(5) of the Act. 29 U.S.C. § 158(a)(5). Finally, a violation of Section 8(a)(5) creates a derivative violation of Section 8(a)(1), which makes it unlawful for an employer to “interfere with, restrain, or coerce employees” in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1); *see Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

Here, the Company admittedly refused to bargain with the Union in order to challenge the Board's certification of the Union as bargaining representative. As the following discussion demonstrates, however, the Board acted well within its wide discretion in overruling the Company's sole election objection. Accordingly, the Company's refusal to bargain with the Union violates Section 8(a)(5) and (1) of the Act and the Board is entitled to enforcement of its Order. *See Downtown Bid Servs.*, 682 F.3d at 112.

**A. The Party Seeking To Set Aside an Election Bears the Heavy Burden of Showing that the Results Are Invalid**

“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *A.J. Tower*, 329 U.S. at 330. The results of a Board-supervised representation election are “not lightly set aside” and “[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000) (quoting *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991)). *Accord NLRB v. Coca-Cola Bottling Co. Consol.*, 132 F.3d 1001, 1003 (4th Cir. 1997); *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997); *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). Although the Board has long strived for “laboratory conditions” in elections, the Court has recognized that this “noble ideal . . . must be applied

flexibly” and it is “for the Board in the first instance” to determine “when laboratory conditions have sufficiently deteriorated to require a rerun election.” *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1562 (D.C. Cir. 1984). Accordingly, as this Court has recognized, the party seeking to overturn a Board-supervised election “carries a heavy burden of showing the election’s invalidity.” *Antelope Valley*, 275 F.3d at 1095 (internal quotation marks omitted).

Where, as here, a party challenges an election’s outcome based on alleged misconduct by a union or its agent, the objecting party must demonstrate that “the acts complained of interfered with the employees’ exercise of free choice to such an extent that they materially affected the results of the election.” *Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970) (internal quotation marks omitted). To make that determination, the Board employs an objective test, assessing whether the alleged misconduct had a reasonable tendency to interfere with employees’ freedom of choice. *See PruittHealth-Va. Park, LLC v. NLRB*, 888 F.3d 1285, 1295 (D.C. Cir. 2018); *Lake Mary Health & Rehab.*, 345 NLRB 544, 545 (2005).

The Board has articulated a number of factors it considers in that analysis, specifically: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the voting-unit

employees; (3) the number of voting-unit employees subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persisted in the minds of the voting-unit employees; (6) the extent of dissemination among voting-unit employees not subjected to the misconduct; (7) any effect of misconduct by the objecting party that cancels out the effects of the original misconduct; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom the objections are filed.

*See, e.g., Taylor Wharton Div. Harsco Corp.*, 336 NLRB 157, 158 (2001) (citing *Avis Rent-A-Car Sys., Inc.*, 280 NLRB 580, 581 (1986)). *See also Family Serv. Agency of S.F. v. NLRB*, 163 F.3d 1369, 1377 (D.C. Cir. 1999) (citing *Avis* and discussing several factors). The determination whether the objecting party has carried its burden of demonstrating interference with employees' free choice is "fact-intensive" and thus "especially suited for Board review." *Family Serv. Agency*, 163 F.3d at 1383.

**B. The Board Acted Within Its Wide Discretion in Overruling the Company's Objection**

Based on the record, the Board acted well within its discretion in finding that the Union's objected-to conduct did not have a reasonable tendency to interfere with employees' free choice to the extent that it materially affected the results of the election.

### **1. Facts relevant to the Company's objection**

The representation election was held at the Company's facility in a first-floor conference room located off of the main hallway. The voting room was approximately 20 feet from the facility's main entrance, which is always locked. Individuals without an access code ring a bell and are admitted by a receptionist, who sits at a desk along the hallway and across from the entryway. At one end of the hallway, just past the voting room, is the business office, which includes offices for human resources and for the facility's administrator, Lesly Gervil. On the far end of the hallway, visible from the voting-room door, is a nursing station. (DCR 2; Tr. 15-20, 43, 47, 87-88, RX 1.)

At approximately 3:45 p.m. on November 12, the day of the election, the receptionist notified Gervil and John Chobor, the Company's attorney, that recently discharged employee Tabatha Martin was in the facility. (DCR 2; Tr. 30-31, 52, 86.) Martin had been employed during the union campaign and was on the list of eligible voters when the Company discharged her on November 4. (HOR 3 n.3; Tr. 22-25, 85.) The Union had filed an unfair-labor-practice charge disputing her discharge, which was still pending when she came to vote. (DCR 3 n.2; Tr. 25, 85.)

Gervil and Chobor approached Martin, who was in the hallway near the voting room. When Martin claimed she should be allowed to vote, they told her

she could not because she had been discharged, and ordered her to leave the facility immediately. The exchange ended with Martin stating that she was going to call the Union, then exiting the facility. (DCR 3; Tr. 31-32, 89-92, 110.)

About ten minutes later, at roughly 3:55 p.m., Martin returned with approximately four union representatives and they were admitted to the facility. (DCR 3, HOR 4 n.5; Tr. 32-33, 52, 71, 92, 114, 117.) Gervil and Chobor intercepted the group near the reception desk and an argument ensued. Martin and the union representatives demanded that she be allowed to vote; Gervil and Chobor demanded that the group leave the premises and threatened to call the police when they refused. (DCR 3; Tr. 32, 35-36, 39-40, 57-58, 65-67, 92-93, 126.) Representatives of both the Company and the Union raised their voices. (DCR 3; Tr. 56, 58, 68-69, 72.) During the argument, the group drifted down the hallway until they were all standing outside the voting-room door. (DCR 3; Tr. 79-80.)

Around 4:00 p.m., the Board agent supervising the election opened the door and announced that the polls were closed. At that time the parties agreed that Martin could vote, subject to challenge. Martin then cast her ballot and departed the facility. (DCR 3; Tr. 41-42, 59, 72, 94, 96, 111-12, 117.) No one entered, exited, or approached the voting room while the parties were arguing over whether Martin could vote. (DCR 3; Tr. 76, 96.) The entire incident lasted approximately five minutes. (DCR 4-5; Tr. 32-33, 42, 52, 71, 92, 94, 112, 114-15, 117.)

**2. The Union's conduct during the Martin incident did not materially affect the election**

Analyzing those facts under its established multi-factor test for assessing party misconduct, the Board found that “[s]even of the nine factors . . . weigh[ed] against setting the election aside and therefore outweigh[ed] the remaining two factors that could lean in favor of rerunning the election.” (DCR 4.) As shown below, the Board’s findings as to each factor are reasonable and amply supported by the evidence, and its resulting decision to overrule the Company’s election objection is thus well within its wide discretion.

As to the first and second factors (number of incidents and severity of misconduct), the Board found that they weighed against setting aside the election. First, “there was only one incident, occurring within the last five minutes of the final polling session.” (DCR 4.) Second, “the incident lacked severity.” (DCR 4.) As the Board reasoned and the evidence shows, the incident was “short in duration” and “unlikely to cause fear among employees” because the parties’ “argument centered around whether a discharged employee could vote and did not involve any other subject matter.” (DCR 4.) In past cases, the Board has also found that those two factors weighed against setting aside elections under similar circumstances. *See, e.g., Reliable Trucking, Inc.*, 349 NLRB 812, 812 & n.2, 823-24 (2007) (single instance of union representatives interrupting company’s offsite employee meeting; arguments ensued, but no threats directed at employees);

*Midway Hosp. Med. Ctr., Inc.*, 330 NLRB 1420, 1420 & n.1, 1422 (2000) (single incident where union agent yelled for 30-minute period in employees' presence, but protestations were personal to her alleged harassment by security officer, not directed at employees).

The Board also reasonably found that the third, fifth, and sixth factors weighed against setting aside the results, consistent with its precedent. (DCR 4-7.) With respect to the third factor (number of voters subjected to misconduct), the Company failed to establish how many—if any—eligible voters directly witnessed the incident. (DCR 4, 6-7.) *See, e.g., Family Serv. Agency*, 163 F.3d at 1376, 1383 (emphasizing no evidence employees witnessed union organizer arguing with supervisor in her office); *Imperial Sales, Inc.*, 365 NLRB No. 95, slip op. 3, 2017 WL 2666021 (June 20, 2017) (other than union observer, no employees aware of parties' altercation before voting), *enforced mem.*, 740 F. App'x 216 (2d Cir. 2018). And because the final voting session ended immediately after the incident, the degree to which any misconduct persisted in voters' minds (factor 5) was “not an issue,” and there was “no chance” for the misconduct to disseminate to eligible voters who had not witnessed it (factor 6). (DCR 4.)

In other words, the Board reasonably found that there was no opportunity for the Martin incident to affect unit employees at all, much less percolate in their minds before they voted or spread to and influence other voters. *See, e.g., Imperial*

*Sales, Inc.*, 365 NLRB No. 95, slip op. 24 (parties' altercation occurred prior to polls opening, but no evidence it was disseminated among, or persisted in minds of, eligible voters before voting had ended). The facts of the present case are therefore unlike those where a persistent effect on multiple eligible voters weighed in favor of invalidating elections. *See, e.g., Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597-98 (2004) (sustaining objection when union threatened employee in weeks before election, which employee relayed to numerous coworkers such that threats became topic of conversation among voters leading up to election).

Finally, the Board found that the seventh and ninth factors also weighed against setting aside the election on account of the Company's own actions. With respect to offsetting misconduct (factor 7), the evidence established that both company and union representatives "engaged in the same potential misconduct as each took part in a verbal altercation directly outside the polling area while the polls were open." (DCR 5.) Moreover, the alleged misconduct was "partially" attributable to the Company (factor 9) because the Company "precipitated the incident" by refusing to allow Martin, an eligible voter, to cast a vote. (DCR 5.) Under similar circumstances, the Board has found that those two factors weighed against setting aside an election. *See Imperial Sales, Inc.*, 365 NLRB No. 95, slip op. 3, 23-24 (both parties' representatives engaged in loud argument, with brief

physical contact, partly caused by company blocking union from confirming facility's cameras disabled prior to voting).

With respect to the Company's role in instigating the incident, the Board specifically found that "Martin should have been allowed to vote, subject to challenge," because she was employed on the eligibility date—and named on the governing list of voters—and a charge disputing her discharge was pending at the time of the election. (HOR 3 n.3 (citing cases), *see also* DCR 3 n.2, 5, 8.) *See, e.g., Ms. Desserts, Inc.*, 299 NLRB 236, 237 n.8 (1990) ("a discharged individual may vote subject to challenge if the discharge is the subject of a pending Board charge"); NLRB Casehandling Manual (Part 2) § 11338.1 (2020) (discharged employees claiming unlawful termination may vote subject to challenge), *available at* <https://www.nlr.gov/sites/default/files/attachments/pages/node-174/chm-part-ii-rep2019published-9-17-20.pdf>. Consequently, the proper procedure for resolving the parties' dispute over Martin's eligibility—and the one they ultimately used—was to allow Martin to cast a challenged ballot. Instead, the Company twice blocked her access to the polls, which prompted a public argument in the hallway rather than a quiet challenge, out of sight in the voting room. *See Sabine Towing & Transp. Co.*, 226 NLRB 422, 422 (1976) (an individual has a right to claim eligibility to vote and "no party has a right to prejudge that claim or prevent the individual from presenting it to the Board agent").

Finally, the Board found that just two factors weighed in favor of setting aside the election. (DCR 5.) Under factor 4, the misconduct was proximate to the election because it “occurred during approximately the final five minutes” of the final voting session. (DCR 5.) And the final tally of ballots was close under factor 8, with 22 votes for the Union, 17 against it, and 4 challenged ballots. (DCR 5.)

“[W]hen considering all nine factors,” the Board ultimately found that “the evidence establishes the alleged misconduct did not have a reasonable tendency to interfere with employees’ free choice and therefore [did] not warrant setting aside the election.” (DCR 5.) Given the weight of the factors supporting that conclusion and the Board’s careful assessment of the interplay between them, the Board acted well within its wide discretion when overruling the Company’s election objection. (DCR 4-5, *see also* HOR 5-6.) Consequently, there is no support for the Company’s complaint that the Board erroneously discounted or minimized the two factors that weighed in favor of setting aside the election. (Br. 21-22, 27.) Nor is there any substance to the Company’s mischaracterization of the Board’s consideration of the nine factors as a mere “mathematical exercise” (Br. 18) or “purely numerical analysis” (Br. 28)—though the factors against invalidating the election are far more numerous than those in favor.

**C. The Company Failed To Prove that the Union’s Conduct Had a Reasonable Tendency To Interfere with Employee Choice**

In its brief, the Company contests the Board’s analysis of each factor—including those that the Board found weighed in favor of rerunning the election. But the Company’s supporting arguments are without merit and fail to show that the Board abused its wide discretion in finding that the Company did not carry its heavy burden of proving objectionable conduct.

**1. Many of the Company’s arguments rest on flawed factual foundations**

The substance of many of the Company’s arguments depend on alternate facts or hyperbolic descriptions of the events of November 12, which are inconsistent with the Board’s findings and the underlying credited evidence.

**a. The Board reasonably declined to credit vague, uncorroborated testimony that eligible voters witnessed the incident**

Significantly, the Company insists throughout its brief that eligible voters witnessed the argument between the parties. (*E.g.*, Br. 20-21 & n.6, 23, 26-27 & n.8.) The Board, however, found that there was “no specific evidence as to how many eligible voters witnessed the incident”; instead, company administrator Gervil’s “vague, uncorroborated testimony” was the only evidence that any eligible voters were subjected to the incident, and the Board declined to credit it. (DCR 4; Tr. 36-37, 39-41, 58, 74-75.)

The Board's assessment of witness credibility is given great deference and must be upheld unless it is "hopelessly incredible, self-contradictory, or patently unsupportable." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (quoting *Federated Logistics*, 400 F.3d at 924). Where, as here, the Board's factual finding turns on a hearing officer's credibility determination, the Court's review is especially deferential and it will uphold the determination "absent the most extraordinary circumstances." *U-Haul Co. of Nev. v. NLRB*, 490 F.3d 957, 962 (D.C. Cir. 2007) (quoting *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1445 (D.C. Cir. 1996)).

The Company presents no basis for the Court to accept its alternate version of events, much less a reason sufficient to reject the hearing officer's credibility determination. In assessing the credibility of his testimony, the hearing officer reasoned that "Gervil was unable to identify which eligible voters were present, or even how many were present." (HOR 5.) As the hearing officer pointed out, Gervil initially asserted that eligible voters came from other parts of the facility to see what was transpiring in the hallway (Tr. 36-37, 39-40), but "on cross-examination Gervil admitted that, other than the [union] representatives and Martin, he could only recall Chobor being present." (HOR 4; Tr. 58.) Beyond those individuals, Gervil was only "pretty sure" reception desk employees were present and that there was "a possibility" others were present, too. (Tr. 58.) And

while Gervil spoke of “seeing a few CNAs and LPNs here and there” in the hallway (Tr. 36), on cross examination he averred that there was one LPN, or “quite possibly” two (Tr. 75), and repeatedly conceded he “couldn’t tell” (Tr. 74, 75) and “d[id]n’t recall” (Tr. 75) how many were present. Perhaps seeking to explain his vague and inconsistent testimony, Gervil more than once candidly acknowledged that he could not recall “because [his] focus” was on removing Martin from the facility. (Tr. 75.)

In evaluating Gervil’s testimony, the hearing officer also emphasized the lack of any corroboration. The Company had “not provided any additional witnesses or evidence to support” his claim that eligible voters witnessed the argument, and there was “no testimony or evidence presented that any eligible voter was unable to vote or intimidated away from voting” due to the parties’ argument. (HOR 6.) To the contrary, the testimony—including Gervil’s—established that no one entered, exited, or “even approach[ed]” the voting room during the course of the incident. (HOR 5, *see also id.* at 4; Tr. 76, 96.)

Based on the foregoing, the hearing officer reasonably determined not to credit Gervil’s testimony on this matter, a determination upheld by the Acting Regional Director under the applicable Board standard. (DCR 6-7.) *See E.N. Bisso & Son*, 84 F.3d at 1444 (“the Board will not overrule a hearing officer’s credibility resolutions unless the clear preponderance of all the relevant evidence

convinces [it] that they are incorrect”) (internal quotation marks omitted).

Although the Company repeatedly invokes, and bases much of its argument on, the “fact” that eligible voters witnessed the incident in pressing its various claims (Br. 20-21 & n.6, 23, 26-27 & n.8), it falls well short of meeting the exacting standard necessary to overturn the hearing officer’s credibility determination rejecting that assertion.

For instance, the Company contends that Gervil’s testimony was uncontroverted and thus, “in the absence of any countervailing evidence, the [Board] lacked any objective basis to discredit” him. (Br. 20 n.6.) By raising that claim in a footnote, the Company has waived it. *See, e.g., NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007) (argument “found in a single footnote . . . is not enough to raise an issue” for review). In any event, the Company offers no support for its blanket assertion that uncontroverted testimony must be accepted as fact. To the contrary, the courts of appeals—including this one—have stated that factfinders may permissibly disregard such testimony where—as here—they articulate valid reasons for doing so. *See, e.g., Randall v. Comfort Control, Inc.*, 725 F.2d 791, 798 (D.C. Cir. 1984) (citing cases).

The Company similarly gains no ground by claiming Gervil’s testimony was erroneously dismissed simply “because the record does not contain actual names of employees who witnessed the altercation.” (Br. 20, *see also* Br. 23.) That

argument is not supported by a fair reading of the decision, which nowhere faults Gervil for not naming the alleged witnesses. Rather, his testimony about the presence of some eligible voters was not credited, in part, because it lacked any supporting details at all. (DCR 3, 4, 7, HOR 4, 5.) Given that unit employees made up just over half (48) of the total number of employees at the facility (80-86), it is far from evident that any bystanders would have been eligible voters. (DCR 1; Tr. 16.) Indeed, as shown, the only people Gervil could definitely identify were not. And while he claimed to have seen (eligible) CNAs and LPNs, he gave no indication of how he identified them as such.

The Company does not buttress its position by relying on lines-of-sight and how sound travels in the facility. (*E.g.*, Br. 19-23, 26.) The Board properly rejected that focus on who *could have*, rather than who *in fact*, witnessed or overheard the parties' argument. (DCR 7.) As the Company tacitly admits, it has not established that eligible voters saw or heard the incident—it believes that the Board, and by extension the Court, “should have inferred that at least some of these prospective voters were subjected to the Union’s misconduct.” (Br. 21.) That claim is particularly unavailing in the context of the Company’s dissemination argument (Br. 22-23), because the “Board places the burden of proof on the objecting party, and thus does not presume dissemination.” *Dairyland USA*

*Corp.*, 347 NLRB 310, 313 (2006), *enforced sub nom. NLRB v. Local 348-S, United Food & Commercial Workers Int'l Union*, 273 F. App'x 40 (2d Cir. 2008).

In any event, even assuming counterfactually that a few eligible voters witnessed (or overheard) the parties' argument, such exposure, alone, would not dictate that the election be set aside. To the contrary, ample precedent shows that an objection is not sustained, and an election automatically set aside, simply because employees witnessed misconduct. *See, e.g., Reliable Trucking*, 349 NLRB at 812 & n.2, 823-24; *Midway Hosp.*, 330 NLRB at 1420 & n.1, 1422.

**b. The Company mischaracterizes the dispute over Martin's right to vote**

In addition to disregarding the Board's credibility determination and consequent finding that there were no eligible-voter witnesses, the Company's brief often mischaracterizes or exaggerates other aspects of the dispute. For example, it frequently describes the incident as lasting 10 minutes. (Br. 16, 18, 21, 27.) The Board, however, found that it "lasted around five minutes" based on witness testimony—including that of Gervil. (DCR 5, *see also* HOR 4 n.5; Tr. 32-33, 42, 52, 71, 92, 94, 112, 114, 115, 117.) In any event, even if the Company can cite evidence to support a 10-minute duration, it is well established that the question on review is not "whether record evidence could support the [employer's] view of the issue, but whether it supports the [Board's] ultimate decision." *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22 (D.C. Cir. 2015). Moreover, as the Board

found, “even if the altercation had lasted ten minutes, this brief period” would not alter its finding as to the incident’s lack of severity. (DCR 5.)

Often in conjunction with its insistence that the incident lasted 10 minutes, the Company also repeatedly states that the union representatives blocked ingress to the polling room by stationing themselves outside of it. (Br. 18-19, 21-22, 24, 26-27.) However, the Board found, and the evidence shows (pp. 15), that the parties’ representatives initially came together in the hallway by the receptionist desk and then, over the course of roughly five minutes, “drifted down the hallway” until ultimately they were all stationed outside the voting room’s doorway. (DCR 3.) There is no merit to the suggestions that union representatives alone blocked the door, much less for the duration of the argument.

Relying in part on those counterfactuals, the Company argues that the Union’s conduct created an incident that was “fear-inducing.” (Br. 19.) In doing so, the Company also highlights the subject of the argument, contesting the Board’s contrary finding that “an argument between the parties regarding whether a discharged employee is allowed to vote is unlikely to cause fear among employees in the voting unit.” (HOR 5, *see also* DCR 4.) That finding is reasonable—a dispute over a discharged employee’s eligibility is certainly less threatening than, for example, threats to retaliate against an employee because of their stance on unionization. *See, e.g., Cedars-Sinai*, 342 NLRB at 597-98. And,

as the Board noted, the Company “cites no authority for finding that such a dispute would create fear among” eligible voters. (DCR 6.) Nor does the Company explain why it is likely that unit employees would, as it asserts (Br. 19), question their own eligibility based on an argument over whether Martin’s *discharge* made her ineligible—or how the Union’s defense of one voter’s right to vote would discourage others from trying. More generally, in describing the incident, the Company’s brief consistently resorts to hyperbolic language that, the Board respectfully submits, is not in accord with the evidence. (*E.g.*, Br. 15-17, 19, 21, 24-26.)<sup>2</sup>

**2. The Company disregards its responsibility for precipitating, and participating in, the incident**

In presenting its various challenges, the Company conveniently omits or fails to fully grapple with its own actions and culpability, shifting all blame for the incident onto the Union. Its attempts to shed any responsibility, however, are contrary to the Board’s findings and the underlying evidence.

Throughout its brief, the Company is quick to condemn the union representatives’ alleged misconduct during the incident. It cites their raised voices

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<sup>2</sup> For instance, it is hard to reconcile the verbal confrontation over Martin’s right to vote with a “melee.” (Br. 15, 25). *See* Merriam–Webster Dictionary Online, <https://www.merriam-webster.com/dictionary/melee> (last visited March 18, 2021) (defined as “a confused struggle,” and “*especially*: a hand-to-hand fight among several people”).

and that they blocked the voting-room door. (Br. 13, 15, 18-19, 24, 27.) Those arguments ignore the Board’s finding, based on “undisputed” evidence (DCR 3, 8), that company representatives “engaged in the same potential misconduct” (DCR 5, 8; Tr. 56, 72, 79-80).

Equally unavailing are the Company’s many efforts to sidestep any culpability for the argument, contrary to the Board’s finding that it was “partially” responsible for “precipitat[ing] the incident.” (DCR 5, *see also* DCR 8.) To find otherwise, the Court would have to accept not only the Company’s bold—and unsupported—claim that Martin “was no longer an eligible voter” (Br. 25), but also overlook the Company’s refusal to follow well-established, non-disruptive Board procedures for asserting such claims.

As discussed (p. 19), the Board found that Martin remained an eligible voter and “should have been allowed to vote, subject to challenge,” based on the evidence and consistent with well-established precedent. (HOR 3 n.3.) The Company does not—and cannot—dispute the precedent or evidence supporting that finding, because it failed to do so before the Board (MSJ Ex. 6). *See* 29 U.S.C. § 160(e) (“[n]o objection that has not been urged before the Board . . . shall be considered by the court,” absent extraordinary circumstances); *accord Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 224 n.4 (D.C. Cir. 2016). It has also waived any such challenge by failing to present supporting argument or

authority in its opening brief. *See United States v. Miller*, 799 F.3d 1097, 1108 (D.C. Cir. 2015); *NSTAR*, 481 F.3d at 800. Accordingly, there can be no question that Martin had a right to cast a ballot. To the extent the Company contested her eligibility, it had the right—which it ultimately exercised—to raise its challenge with the Board agent running the election, at which point Martin’s ballot would be segregated with the other challenged ballots.

In light of Martin’s eligibility and the available ballot-challenge procedure, the Company’s remaining contentions fall like dominos. (Br. 24-26.) Its accusation that the Union chose “confrontation over process” when there were “procedural mechanisms for handling” the eligibility dispute is particularly absurd. (Br. 26.) Notably, the Company fails to identify any procedural option available to Martin or the Union—other than insisting on casting a ballot—that would have preserved her ability to vote. It is the *Company* that failed to invoke the ballot-challenge mechanism when she sought to vote—instead publicly confronting her and the union representatives. Given that choice, its claim (Br. 25) that it was “attempt[ing] to deescalate” the situation by ordering the representatives to leave the premises—and accept Martin’s disenfranchisement—is not serious. Indeed, the Company’s professed concern that the confrontation denied eligible voters access to the polls rings hollow when it specifically confronted the Union in order to block Martin from voting.

The Company defends its actions by arguing it was “merely applying its policy” barring terminated employees from its facility. (Br. 24.) In other circumstances that claim may carry some weight, but the Company agreed to host the election, including opening itself to eligible voters and union observers. (MSJ Ex. 2.) And the representatives were specifically granted access to the locked facility and presented their legitimate request that Martin be allowed to vote before the Company demurred and demanded that they leave. (Tr. 33, 63-69.) For those same reasons, the Company makes no headway by repeatedly labeling (Br. 25-26) the union representatives “trespassers,” notwithstanding its citation to *Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16 (1991).

As the Board reasonably found, *Phillips Chrysler*’s facts were “completely distinguishable from the case at hand.” (DCR 8.) There, the Board found employees received the message that their employer was powerless to protect its legal rights against trespassing union agents after the agents entered the facility’s shop area and spoke with unit employees, engaged in a “shouting match” with the employer’s president, and “repeatedly and belligerently refused” to depart, despite requests from the president and, later, the police. *Phillips Chrysler*, 304 NLRB at 16. The “incident was a major one that continued for some time,” either “directly witnessed” by all unit employees, who were set to vote roughly one hour later, or else quickly disseminated among them. *Id.*

Those facts are readily distinguishable from the incident in this case, which was short-lived and during which the union representatives “did not engage in any electioneering, and there was no police confrontation.” (DCR 8.) And, significantly, there is no credited evidence any eligible voters witnessed the parties’ argument or that the incident was disseminated among them. *See Family Serv. Agency*, 163 F.3d at 1383 (distinguishing *Phillips Chrysler* for similar reasons). Moreover, whereas the Board in *Phillips Chrysler* found it relevant that the employer had not engaged in any misconduct, 304 NLRB at 16, the Company engaged in the same potential misconduct as the Union and “partially caused” the public dispute. (HOR 8.)

**3. Neither the presence of the Union’s representatives nor the narrow election margin requires a new election**

Finally, the Company does not advance its cause by arguing, essentially, that either the presence of union representatives at the polling site or the narrow margin of the Union’s election victory dispositively requires invalidation of the election.

First, the Company is mistaken that Circuit and Board precedent require a new election because of the “presence of the Union representatives in the polling area during the vote.” (Br. 15.) As an initial matter, two of the Company’s cases are inapposite because they arose under distinct Board jurisprudence addressing whether to set aside an election because a party engaged in unlawful electioneering or surveillance during voting. *See Nathan Katz Realty, LLC v. NLRB*, 251 F.3d

981, 991-93 (D.C. Cir. 2001) (remanding for Board to consider whether union agents' presence and conduct in no-electioneering zone constituted objectionable conduct); *Elec. Hose & Rubber Co.*, 262 NLRB 186, 216 (1982) (setting aside election in part because of supervisors' unexplained presence outside of and near polls constituted actual or apparent surveillance).

Moreover, the Board reasonably found all three of the Company's cases factually distinguishable "because in all those cases the party representative(s) were near the entrance to the voting area for most, if not all, of the voting session." (HOR 6.) *See Nathan Katz*, 251 F.3d at 991-93 (during voting period, union agents sat in parked car within 20 feet of entrance to building where poll located and gestured and honked at passing employees); *Elec. Hose*, 262 NLRB at 216 (supervisor "stationed" within 10 to 15 feet of entrance to polling area during voting period); *Performance Measurements Co.*, 148 NLRB 1657, 1659 (1964) (company president a "continued presence" during voting, occupying position at door to polling area or at table roughly six feet away). By contrast, the credited evidence established that the Union's representatives "were only present for a few minutes at the end of one session, not a persistent presence." (HOR 7.)

The Company contends that the duration of the union representatives' presence is "a distinction without a difference." (Br. 16.) But, as the Board rightly observed (HOR 6), *Performance Measurements* actually undercuts the Company's

argument, stating that “brief forays into the election area alone may not tend to interfere with the free choice of the employees.” 148 NLRB at 1659.

Fundamentally, as the Company concedes, the Board must “gauge[] the impact of the misconduct.” (Br. 16.) Here, the Union’s short-lived presence did not have an impact requiring a new election, as demonstrated by the Board’s detailed discussion of the many other relevant factors weighing against rejecting the election results, such as the incident’s lack of severity and the lack of voter witnesses.

Second, the Company is mistaken in suggesting that the close margin of the Union’s victory—which the Company exaggerates in service of its arguments—requires a new election. Factually, the Company’s repeated assertion that one vote could have changed the election’s outcome is an oversimplification built on a series of unproven assumptions. (Br. 16, 21-23, 27.) The one vote the Company cites would have to be cast against union representation or be challenged. In either case, the additional vote would not immediately alter the election result but would only make the challenged ballots determinative.<sup>3</sup> (DCR 6.) Then, all of the challenges to the impounded ballots—one of which belongs to Martin—would

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<sup>3</sup> The vote totals in such hypothetical cases would be: 22 votes for the Union, 18 against it, and 4 challenged ballots; or 22 votes for, 17 against, and 5 challenged ballots.

have to be rejected and all of the challenged ballots would need to be votes against union representation. Only in that purely speculative situation with multiple conditions falling in the Company's favor, would one more vote result in a tie-vote union loss.

In any event, the closeness of the vote is only one consideration in the Board's multi-factor assessment of alleged misconduct's reasonable tendency to impair employee free choice in an election, and the Board reasonably considered it here. The Board found the final vote was close and weighed it *in favor of* setting aside the election. However, the Board reasonably judged that other factors outweighed it. (DCR 5-6.) The Company does not further its argument that the Board incorrectly weighed the relevant factors by citing to cases (Br. 23, 27) where even closer margins (in one case a tie) combined with other factors, not present here, to invalidate elections. *See Jurys Bos. Hotel*, 356 NLRB 927, 927-29 (2011) (employer maintained three unlawful handbook rules with tendency to chill employees' pro-union activities, and union lost by one vote); *Peppermill Hotel Casino & Rainbow Casino*, 325 NLRB 1202 & n.2, 1208 (1998) (two employees subjected to coercive conduct before election, including promises of benefits for voting against union; union lost in tie vote, with two eligible voters not voting); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 & n.1 (1995) (employer misconduct included interrogation, threats of discharge, and disparate rule

application; union won by two votes, and Board ordered new election if 2 unopened challenged ballots resulted in loss). Notably, in each of those cases the Board specifically found that, unlike here, eligible voters were coerced or subjected to misconduct.

**CONCLUSION**

To protect Martin's right to vote after the Company barred her from accessing the polls, union representatives escorted her into the Company's facility and engaged in a short-lived argument with company representatives outside of the polling room, an incident not observed by other eligible voters. Because the Union's conduct did not reasonably tend to interfere with employees' free choice, the Board acted well within its wide discretion in overruling the Company's objection and certifying the Union. Accordingly, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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# Addendum

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**Relevant Provisions of the National Labor Relations Act,  
29 U.S.C. §§ 151-69:**

**Sec. 7 [Sec. 157]** 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 8(a)(3) [section 158(a)(3) of this title].

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**Sec. 8(a) [Sec. 158(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 7 [section 157 of this title];

\*\*\*

**(5)** to refuse to bargain collectively with the representatives of his employees . . . .

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**Sec. 9 [Sec. 159]**

**(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 section 9(a) [subsection (a) of this section], 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 section 9(a) [subsection (a) of this section]; 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 section 9(a) [subsection (a) of this section]; 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.

\*\*\*

**(d)** [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [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 section 10(e) or 10(f) [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.

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## **Sec. 10 [Sec. 160]**

**(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 8 [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 predominately 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 Act [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 proceeding, as provided in section 2112 of title 28, United States Code [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 question 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 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, United States Code. 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) of this section, 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.



