No. 10-4600-ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

SNELL ISLAND SNF LLC d/b/a SHORE ACRES REHABILITATION AND NURSING CENTER, LLC AND HGOP, LLC d/b/a CAMBRIDGE QUALITY CARE, LLC

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ON APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce a final Board order issued against Snell

Island SNF LLC d/b/a Shore Acres Rehabilitation and Nursing Center, LLC ("Shore Acres") and HGOP, LLC d/b/a Cambridge Quality Care, LLC ("HGOP") (collectively "the Company") (A. 200-04) finding that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. §§ 151, 158(a)(5) and (1)) ("the Act") by failing to recognize and bargain with the United Food and Commercial Workers Union, Local 1625 ("the Union"). The Board's Decision and Order issued on November 9, 2010, and is reported at 356 NLRB No. 24 (2010). (A. 118-21.)[1]

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the Act (29 U.S.C. § 160(a)). The Board's Order is a final order with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Court has jurisdiction over this case under Section 10(e) of the Act because HGOP's principal office is located in Brooklyn, New York.

Because the Board's Order is based, in part, on findings made in an underlying representation proceeding (Board Case No. 12-RC-9281), the record in that proceeding 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).

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[1] "A." references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following a semicolon are to the supporting evidence.

The Court has jurisdiction to review the Board's actions in the representation case 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 (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the Court's rulings. *See Freund Baking Co.*, 330 NLRB 17 n.3 (1999) (citing cases).

The Board's application for enforcement filed on November 9, 2010 (A. 203-04), was timely; the Act places no time limit on proceedings to enforce Board decisions.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board abused its discretion by overruling, without a hearing or interviewing witnesses, the Company's election Objections 1 and 2, and therefore properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the Board-certified representative of a unit of its employees.

STATEMENT OF THE CASE

The Board found (A. 118-20) that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the certified collective-bargaining representative of an appropriate unit of employees at its St. Petersburg,

Florida facility.[2] The Company (Br. 2) does not dispute that it refused to bargain. It contests the Union's certification on the ground that the Board abused its discretion by overruling its election Objections 1 and 2 without conducting a hearing or interviewing witnesses. Relevant portions of the procedural history of the case before the Board are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

Shore Acres, a Florida company, operates a nursing home on Indianapolis Street in St. Petersburg, Florida. (A. 119; 96, 102.) HGOP, a New York company, provides employee staffing to operators of nursing homes and other health care facilities, including the Shore Acres' St. Petersburg facility. (A. 119; 102-03.) Shore Acres and HGOP are joint employers. (A. 119; 97, 104.) On November 1, 2007, the Union filed a representation petition with the Board seeking to represent a unit of the Company's employees at its St. Petersburg facility. (A. 9.)

On December 12, 2007, pursuant to a stipulated election agreement, the Board conducted a secret-ballot election among the designated employees. (A. 11-

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[2] The bargaining unit includes "[a]ll full-time, regular part-time and PRN Certified Nursing Assistants, restorative aides, staffing coordinators, ward clerks, central supply clerks, cooks, dietary aides, housekeeping assistants, laundry aides, maintenance assistants, activity assistants and receptionists." (A 119.)

19.) The tally of ballots showed that, of approximately 82 eligible employees, 49 cast ballots for the Union and 23 against it, with 1 challenged ballot, an insufficient number to affect the election results. (A. 20.) The Company filed 13 timely objections to the election. (A. 22-26, 31-33.)

After reviewing the Company's evidence in support of its objections to the election, the Board's Regional Director issued her Report on Objections without a hearing, recommending that the Company's objections be overruled, and that the Union be certified as the employees' bargaining representative. (A. 34-43.) The Company filed exceptions to the Regional Director's decision relating to Objections 1-4 and 6, including an exception claiming that the Regional Director erred by overruling the Company's objections without conducting a formal hearing. (A. 47-64.) Before this Court, the Company has challenged only the Regional Director's overruling of Objections 1 and 2, where the Company alleged that employee union supporters and union agents engaged in improper threats and coercion.

On March 13, 2008, the Board (Members Liebman and Schaumber) adopted the Regional Director's recommendations and certified the Union as the exclusive

bargaining representative of a unit of the Company's employees at its St. Petersburg, Florida facility. (A. 65-66.)[3]

B. The Initial Unfair Labor Practice Proceeding

After the Board's certification issued, the Company refused to bargain with the Union. (A. 90-91; 71, 78-79.) Based upon the Union's unfair labor practice charge, a complaint issued alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (29 U.S.C. §158(a)(5) and (1).) (A. 67-73.) The Company admitted its refusal to bargain, but disputed the validity of the Union's certification as the employees' bargaining representative. (A. 78-79.) In light of the Company's admission that it refused to bargain with the Union, the Board's General Counsel filed a motion for summary judgment, and a notice to show cause why the General Counsel's motion should not be granted. (A. 90; 81-88.) The Company responded, arguing that the Board should not grant summary

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[3] Since the Company did not file exceptions with the Board to the Regional Director's overruling of Company Objections 5, and 7-13, it is barred from challenging those findings. 29 U.S.C. § 160(e). *See Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666-67 (1982); *NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 435 (2d Cir. 2001). The Company has waived any challenge to the Regional Director's, as affirmed by the Board, overruling of Objections 3, 4, and 6, by concededly (Br. 10 n.3) not challenging those findings in its opening brief. *See Gaetano & Associates, Inc. v. NLRB*, 183 Fed. Appx. 17, 22 (2d Cir. 2006).

judgment because it had improperly certified the Union as the exclusive bargaining representative in the underlying representation proceeding. (A. 91; 88-89.)

On July 18, 2008, the only two sitting members of the Board issued a Decision and Order granting the General Counsel's motion for summary judgment, and finding that the Company's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act. (A. 90-92.)

C. The Prior Appeal and the Court's Remand

Following the Board's initial Decision and Order, the Company petitioned the Court for review of the Board's Order, and the Board cross-applied for enforcement. (Case Nos. 08-3822-ag and 08-4366-ag). The case was briefed and then argued on April 15, 2009, before Circuit Judges Winter, Cabranes, and Sack. On June 17, 2009, the Court denied the Company's petition for review and enforced the Board's cross-application for enforcement. 568 F. 3d 410. (A. 130-52.) On August 5, the Court granted the Company's motion to stay the mandate pending the filing and disposition of a petition for writ of certiorari. On September 11, 2009, the Company filed a petition for certiorari, 78 U.S.LW. 3130. (A. 154-80.)

On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that the two-

member Board did not have authority to issue decisions when there were no other sitting Board members. On June 28, 2010, the Supreme Court granted the Company's petition for writ of certiorari, and remanded the case to this Court for further considerations in light of *New Process*. (A. 198.) The Board then requested that this Court remand the case for further proceedings consistent with the Supreme Court's decision, which this Court granted on August 25, 2010. (A. 199.)

II. THE BOARD'S CONCLUSIONS AND ORDERS AFTER THIS COURT'S REMAND

On August 27, 2010, the Board issued a Decision, Certification of Representative, and Notice to Show Cause. (A. 93-94.) The Board explained that because its July 18, 2008 Decision and Order that the Company had unlawfully refused to recognize the Union was decided by a two-member Board, it would not give that decision "preclusive effect." (A. 93.) The Board "also considered the postelection representation issues raised by the [Company]" and "reviewed the record in light of the exceptions and brief." (A. 93.) On that basis, the Board certified the Union as the exclusive collective-bargaining representative of a unit of the Company's employees, and adopted the Regional Director's "findings and recommendations to the extent and for the reasons stated in [its] March 13, 2008

Decision and Certification of Representative," which the Board "incorporated by reference." (A. 93-94.)

The Board recognized the "possib[ility] that other events may have occurred during the pendency of [the] litigation that the parties may wish to bring to [the Board's] attention." (A. 93.) Accordingly, the Board gave the Acting General Counsel leave to amend the complaint "to conform with the current state of the evidence," and gave the Company leave to file an answer to any amended complaint. (A. 93.) The Board also gave the Company until October 12, 2010, to file a motion to show cause as to why the Board should not grant the motion for summary judgment and to file a supporting brief or statement. (A. 94.)

After the Board's certification issued, the Company continued to refuse to bargain with the Union. (A. 119.) The Board then issued an amended complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (29 U.S.C. §158(a)(5) and (1).) (A. 118; 95-101.) The Company filed an answer to the amended complaint in which it admitted its refusal to bargain, but disputed the validity of the Union's certification as the employees' bargaining representative. (A. 118; 102-09.)

On November 9, 2010, the Board (Chairman Liebman and Members Becker and Hayes) issued its Decision and Order, granting the General Counsel's motion

for summary judgment. (A. 118-21.) The Board found that "[a]ll representation issues raised by [the Company] were or could have been litigated in the prior representation proceeding." (A. 118.) The Board also found that the Company did "not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceedings." (A. 118.) Accordingly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. (A. 118-19.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (A. 120.) Affirmatively, the Order directs the Company to bargain with the Union upon request, to embody any understanding reached in a signed agreement, and to post and electronically distribute an appropriate remedial notice to employees. (A. 120.)

SUMMARY OF ARGUMENT

The Company admittedly has refused to bargain with the Union as the Board-certified representative of a unit of its employees. The Board did not abuse its discretion by overruling, without a hearing or interviewing witnesses, the

Company's election Objections 1 and 2. The Company offered vague hearsay evidence, including a mere allegation that union agents had engaged in misconduct. Having failed to offer specific evidence that, if credited, would warrant setting aside the election, the Company was not entitled to a hearing. For the same reason, the Board did not abuse its discretion by declining to investigate Objections 1 and 2.

Unable to meet its heavy burden of reversing the Board's overruling of Objections 1 and 2, the Company attacks the process in which the Board issued its Certification of Representative. The Company, however, had an opportunity to complain about that process to the Board prior to the Board's ultimate Decision and Order in the case. The Board in its Notice to Show Cause expressly gave the Company the opportunity to raise such issues with the Board, but the Company chose not to raise them. Accordingly, Section 10(e) of the Act creates a jurisdictional bar to judicial review of the Company's belated claims. In any event, the Company's mere speculation about the Board's decision-making process falls well short of overcoming the presumption that the Board acted properly.

ARGUMENT

THE BOARD DID NOT ABUSE ITS DISCRETION BY OVERRULING, WITHOUT A HEARING OR INTERVIEWING WITNESSES, THE COMPANY'S ELECTION OBJECTIONS 1 AND 2, AND THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION AS THE BOARD-CERTIFIED REPRESENTATIVE OF A UNIT OF ITS EMPLOYEES

A. Applicable Principles

An employer violates Section 8(a)(5) and (1) of the Act[4] by refusing to recognize and bargain with the duly certified representative of its employees. *See NLRB v. HeartShare Human Servs. of New York, Inc.*, 108 F.3d 467, 470 (2d Cir. 1997). Since the Company concedes (Br. 2) that it has refused to bargain with the

[4] Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," and Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." Section 7 of the Act (29 U.S.C. § 157), in turn, grants employees "the right to self-organization . . . [and] to bargain collectively through representatives of their own choosing . . . . " A violation of Section 8(a)(5) of the Act results in a "derivative" violation of Section 8(a)(1). *See Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004), and cases cited.

Union in order to test the validity of the Union's certification,[5] the Court must uphold the Board's conclusion that the Company violated Section 8(a)(5) and (1), unless, as the Company argues, the Union was improperly certified. *See id.*; *NLRB v. Arthur Sarnow Candy Co.*, 40 F.3d 552, 556 (2d Cir. 1994).

When an employer seeks to set aside an election by raising allegations of objectionable conduct by a union or company agent, the Board, with judicial approval, will set aside the election only if the misconduct "'reasonably tended to interfere with the employees' free and uncoerced choice in the election.'" *Serv. Corp., Int'l v. NLRB*, 495 F.3d 681, 684 (D.C. Cir. 2007) (citation omitted). *Accord NLRB v. Superior of Mo., Inc*., 233 F.3d 547, 553 (8th Cir. 2000). To meet this heavy burden, the employer is required to "come forward with evidence of actual prejudice resulting from the challenged circumstances," not simply evidence demonstrating "merely a 'possibility' that the election was unfair." *NLRB v. Black Bull Carting, Inc.*, 29 F.3d 44, 46 (2d Cir. 1994).

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[5] Courts cannot directly review Board election cases. To obtain judicial review of a union's certification, an employer must refuse to bargain, prompting an unfair labor practice finding, which the Court may review. *See NLRB v. Arthur Sarnow Candy Co.*, 40 F.3d 552, 556 n.5 (2d Cir. 1994).

Parties objecting to the conduct of elections often argue, as here (Br. 21), that elections must occur under "laboratory conditions." Yet, this Court recognizes that "'clinical asepsis is an unattainable goal in the real world of union organizational efforts.'" *Arthur Sarnow Candy*, 40 F.3d at 559 (citation omitted)). Since "'it is probably not possible to completely achieve such ideal conditions . . . elections will not automatically be voided whenever they fall short of that standard. Rather, the idea of laboratory conditions must be realistically applied.'" *Id*. (citation omitted).

The Court's role in reviewing the Board's decision to certify a union is limited to determining whether the Board acted within the "wide degree of discretion" entrusted to it by Congress in establishing the "safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). *Accord HeartShare Human Servs*., 108 F.3d at 470. Accordingly, the party objecting to the election bears the heavy burden of showing that the Board "abuse[d] its discretion in certifying the election." *Arthur Sarnow Candy Co.*, 40 F.3d at 556 (citation omitted).

B. The Evidence the Company Proffered

In Objection 1, the Company alleged that employees and/or union representatives threatened employees with bodily harm and coerced employees.

(A. 44, 47.) In Objection 2, the Company alleged that employees and third parties threatened employees with bodily harm. (A. 44, 45, 48.) In support of those Objections, the Company relied on a two-page letter from its attorney, and a statement from Administrator Janet Keller. (A. 36, 55, 57-58.)

In the attorney's letter, the Company asserted that maintenance employee Larry Reeve would testify that before the election several certified nursing assistants, including Virginia Norman and Audrey Boucher, had "told him that supporters of the [U]nion told them 'that if they were going to vote "No" it would be best for them not to vote at all,'" and that Boucher, Norman, Reeve, and Administrator Keller could verify those statements. (A. 57.) The letter also asserted that Housekeeping and Laundry Director Betsy Smith "would testify that [unit employee] Debra Smith told her that she felt intimidated by the campaign atmosphere and that if she were to have voted 'No' that the [U]nion and its supporters would physically harm her." (A. 58.)

In Administrator Keller's statement, she asserted that "[d]uring the week leading up to the election . . . several employees [including Larry Reeve and Debra Smith] told me or their supervisors that union supporters had told them that if they were going to vote no then it would be better for them if they did not vote at all," and that "both employees felt the [u]nion supporters were trying to discourage

them from voting against the Union because they would be potentially harmed physically and otherwise retaliated against." (A. 55.) Keller further asserted that unit employee Christina Winthrop told her that "she felt intimidated and threatened when she attended a [u]nion meeting in the week leading up to the election." (A. 55.)

C. The Board Did Not Abuse Its Discretion by Overruling Objections 1 and 2 Without a Hearing or Interviewing the Company's Witnesses

As the Regional Director explained (A. 38), the Company appears to be asserting that the employees had a reasonable fear of physical harm or retaliation when they were told that if they planned to vote against the Union, it would be "better" or "best" not to vote at all. And the Company claims that another employee felt threatened when she went to a union meeting. The Company does not argue, as it had before the Board (A. 33, 53), that the alleged threatening conduct warranted overturning the election. Instead, the Company argues solely (Br. 18-27) that it proffered evidence sufficient to require a hearing or, at minimum, to require the Regional Director to interview its proposed witnesses. That argument misconstrues the burdens placed on the Company as the objecting party.

As shown above, an objecting "party is entitled to a hearing 'only if it demonstrates by *prima facie* evidence the existence of "substantial and material factual issues" which, if resolved in its favor, would require the setting aside of the representation election.'" *NLRB v. Semco Printing Ctr., Inc.*, 721 F.2d 886, 891 (2d Cir. 1983) (citation omitted). *Accord Lipman Motors, Inc. v. NLRB*, 451 F.2d 822, 827 (2d Cir. 1971); *NLRB v. Whitney Museum of American Art*, 636 F.2d 19, 23 (2d Cir. 1980). As this Court has explained, such a policy is "'not only proper, but necessary to prevent dilatory tactics by employers or unions disappointed in the election returns.'" *Polymers, Inc. v. NLRB*, 414 F.2d 999, 1005 (2d Cir. 1969) (citation omitted). The Court reviews the Board's decision to grant a hearing under an abuse of discretion standard. *See Whitney Museum*, 636 F.2d at 23.

Here, the Regional Director provided the Company with the opportunity to present evidence in support of Objections 1 and 2. (A. 25, 30, 35-36.) Since the Company no longer asserts, as it did before the Board, that the objectionable conduct warranted overturning the election, its "argument that it is entitled to an opportunity to provide further evidence in support of its objections at an evidentiary hearing is tantamount to an admission that the evidence it submitted to the Regional Director fell short of the *prima facie* proof required to invalidate the election or require a hearing. It is not the Board's responsibility to seek out

evidence that would warrant setting aside the election." *NLRB v. Hood Furniture Mfg., Co.*, 941 F.2d 325, 332 (5th Cir. 1991). Accordingly, the Board did not abuse its discretion in overruling the objections without a hearing.

As for the allegation that employees were told that it would be "better" or "best" that they not vote in the election if they opposed the Union, the Company does not dispute the Regional Director's finding (A. 37-38) that the evidence it proffered constituted double or triple hearsay. The Company failed to include any evidence from an employee who had first-hand knowledge of the alleged statement. As the Regional Director explained (A. 37-38), the reference in the attorney's letter to purported testimony from maintenance employee Reeve was double hearsay because the letter did not claim that Reeve would testify that the "better" or "best" statement was made to him, but only would assert that others had told him that the statement was made to them. Similarly, as the Regional Director explained (A. 38), Administrator Keller's statement constituted double, or even triple, hearsay, because she asserted only that employees had spoken to her or their unidentified supervisors about such a statement made by unidentified union supporters. Such hearsay is insufficient to establish the truth of the allegation that the statement was made to any employee. *See NLRB v. Basic Wire Products, Inc*. 516 F.2d 261, 264 (6th Cir. 1975) (overruling election objections without a hearing

where employer offered self serving hearsay evidence of alleged comments); *NLRB v. Saulk Valley Mfg. Co*., 486 F.2d 1127, 1131 (9th Cir. 1973) (overruling election objections without a hearing where employer proffered evidence that was "patently hearsay").

In addition to constituting hearsay, the Company does not dispute the Regional Director's finding (A. 37-38) that neither the attorney's letter nor Keller's statement proffered any evidence that the alleged statement was made by employees acting as union agents or union representatives.[6] Indeed, the Company's evidence failed to even identify who made the alleged statement. The "bare assertion" of agency status set forth in the Company's objections, without any supporting evidence, "hardly makes out a *prima facie* case of agency sufficient to require a hearing." *NLRB v. Semco Printing Ctr., Inc*., 721 F.2d 886, 891 (2d

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[6] A distinction between union agents and third parties is significant, because "'[l]ess weight is accorded the comments and conduct of third parties than to those of the . . . union.'" *Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 186 (2d Cir. 1989) (citation omitted). Accordingly, "[w]hen the objectionable conduct is the act of rank-and-file employees rather than union agents," the employer must show that the "conduct created such an atmosphere of fear and reprisal that the rational, uncoerced selection of a bargaining representative was rendered impossible." *NLRB v. Erie Brush & Mfg. Corp*., 406 F.3d 795, 801 (7th Cir. 2005). *Accord NLRB v. V&S Schuler Eng'g., Inc.*, 309 F.3d 362, 375 (6th Cir. 2002); *NLRB v. Hydrotherm, Inc.*, 824 F.2d 332, 337 (4th Cir. 1987).

Cir. 1983) (overruling, without a hearing, employer's objections that union agents coerced employees into signing authorization cards).

Yet a third reason supporting the Regional Director's decision not to hold a hearing was the fact that the Company's evidence relied totally on unquestioned acceptance of the subjective reactions by these unnamed employees. Instead, as the Company recognizes (Br. 26), the Board applies an objective test based on the tendency to coerce. *See Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 185 (2d Cir. 1989); *AOTOP, LLC v. NLRB*, 331 F.3d 100, 104 (D.C. Cir. 2003); *Molded Acoustical Products, Inc. v. NLRB*, 815 F.2d 934, 939-40 (3d Cir. 1987). Here, on its face, the alleged objectionable statement did not objectively "threaten physical harm, loss of employment, or lack of support from the [u]nion in matters of general representation" if the union won the election but then learned that an employee had voted against the union representation. *Semco Printing Ctr.*, 721 F.2d at 891. Nor did the Company, as the Regional Director explained (A. 38-39), offer any context as to how the statement would objectively invoke fear of physical harm or retaliation to constitute a threat.

Accordingly, the Regional Director reasonably found (A. 38) that the alleged objectionable statement, even if made by a union supporter or union agent, was "too vague and ambiguous" to engender fear in a reasonable person. That finding

is consistent with numerous other cases where the Board, with Court approval, has declined to order a hearing because the alleged objectionable comments are ambiguous, conclusionary, innocuous, or isolated, and therefore facially fail to establish *prima facie* evidence of coercive conduct.[7]

The Regional Director (A. 39), as affirmed by the Board (A. 93), was also wholly warranted in finding that Laundry Director Smith's proposed testimony that an unidentified employee told her that she felt intimidated and afraid of physical harm if she voted no, and Administrative Keller's statement that employee Winthrop had told her that she "felt intimidated" at a union meeting, failed to establish *prima facie* evidence of objectionable conduct that warranted a hearing.

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[7] *AOTOP, LLC v. NLRB*, 331 F.3d 100, 104-05 (D.C. Cir. 2003) (union agent telling employees that they "'had to' vote for the union," and following employee around the plant was "innocuous conduct"); *NLRB v. Precision Indoor Comfort, Inc.*, 456 F.3d 636, 638, 639-40 (6th Cir. 2006) (employee who was told that if he voted against the union the "'guys are going to' want to do him physical harm" was isolated, and question by union representative to the same employee whether "he was 'feeling o.k.,'" was "without any context . . . . ambiguous and not threatening"); *NLRB v. O'Daniel Trucking Co.*, 23 F.3d 1144, 1150 (7th Cir. 1994) (remarks by employees that "'they are coming down hard on me,'" and that a union agent is "'leaning on me,'" do "not contain any specific threat, and at most are vague remarks subject to more than one interpretation, including legitimate campaign propaganda"); *NLRB v. Hood Furniture Mfg., Co.*, 941 F.2d 325, 329 (5th Cir. 1991) (statements to employees that they "know damn well the way you're supposed to vote" were "ambiguous at best"); *NLRB v. Basic Wire Products, Inc.*, 516 F.2d 261, 265 (6th Cir. 1975) (alleged statement to employee that "she was 'gonna be sorry' and would 'regret it' if she did not vote for the [u]nion" constituted a "conclusionary assertion").

As shown above, subjective reactions are irrelevant. Here, as the Regional Director explained (A. 39), the Company has offered no objective evidence of conduct or statements that would support a finding "that even one employee reasonably felt intimidated or threatened by the Union's campaign." Indeed, the Company has not even proffered evidence of who engaged in such alleged misconduct.

In sum, because the Company "could not have prevailed even if its allegations were assumed to be true," the Board "did not err in denying [the Company's] request for a hearing after the election" on Objections 1 and 2. *NLRB v. Davenport Lutheran Home*, 244 F.3d 660, 663 (8th Cir. 2001).

The Company's related argument (Br. 19, 22, 25-27)—that the Board's Regional Director erred by failing to conduct an adequate investigation of its Objections 1 and 2—is equally without merit. "While a Regional Director is obliged to carefully investigate any objective evidence offered by an objecting party to show demonstrable misconduct, he is not charged with independently ferreting possible misdeeds when presented with only speculation that improprieties *may* have occurred." *Georgia-Pac. Corp.*, 197 NLRB 252, 252 n.1 (1972) (emphasis in original). *Accord Davenport Lutheran Home*, 244 F.3d at 663; *NLRB v. Dobbs House, Inc.*, 613 F.2d 1254, 1260 (5th Cir. 1980).

Further, given the Board's need to resolve election issues expeditiously and with finality, the Board, in deciding whether the agency must undertake an investigation of election objections, reasonably applies standards similar to those that it applies in deciding whether to hold a hearing on objections. Thus the objecting party must present "specific evidence, tantamount to an offer of proof, which, *prima facie*, would warrant setting aside the election, before the Board will require a Regional Director to pursue an investigation." *European Parts Exchange, Inc*., 264 NLRB 224, 224 (1982). *Accord Liquid Transporters, Inc.*, 336 NLRB 420, 420-21 (2001)*; Allen Tyler & Son*, 234 NLRB 212, 212 (1978); *Regency Electronics, Inc*., 198 NLRB 627, 627 (1972). *See also Dobbs House*, 613 F.2d at 1260 ("[S]pecific evidence requirement is . . . also properly applied to the question of whether an investigation is required.").

Here, for the reasons stated above, the Company did not submit evidence of a substantial and material fact that would require further investigation of Objections 1 and 2. Just as the Board can properly decline to hold a hearing when an employer's objections are based on hearsay or mere allegations of union agency, or do not allege material facts that would warrant setting aside the election, the Board's Regional Director can properly decline to further investigate the objections for those reasons. *See Georgia-Pac. Corp*., 197 NLRB at 252 n.1

(Regional Director had no duty to further investigate employer's objections where it offered evidence that constituted "double hearsay which in no case even identified any individual alleged to have made an improper statement"); *Liebman & Co*., 112 NLRB 88, 90 (1955) (Regional Director had no obligation to investigate employer's objections where employer offered no evidence of agency to support its objections).

The Board's certifying the results of the election here is not undermined by the Company's reliance (Br. 26) on *Contempora Fabrics, Inc.*, 344 NLRB 851, 852-53 (2005). That case analyzed a completely different question: whether an employee, who had received prior warnings for threatening behavior and who had a known history of domestic violence, could be lawfully warned again when he told another employee she had better vote against the union. In upholding the discipline of the employee there, the Board made no suggestion that the employee's conduct created such an atmosphere of fear and reprisal that the rational, uncoerced selection of a bargaining representative was rendered impossible. *See NLRB v. Erie Brush & Mfg. Corp*., 406 F.3d 795, 801 (7th Cir. 2005).

The Company's reliance (Br. 14, 21-25) on *NLRB v. Nixon Gear, Inc*., 649 F.2d 906 (2d Cir. 1981), *NLRB v. Hale Mfg. Co*., 602 F.2d 244 (2d Cir. 1979), and

Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224 (2d Cir. 1974) is also unavailing. In those three cases, the character and quality of evidence presented by the employer in support of its objections was in sharp contrast to the vague hearsay evidence offered here. Thus, in *Nixon Gear*, unlike here, the employer presented *prima facie* evidence, which, if true would have required setting aside the election. 649 F.2d at 910-13. In *Hale*, unlike here, the employer showed the potential for the requisite objective tendency to coerce that would affect the election result by presenting evidence that showed the intentional shattering of glass on an employee who had declined to express support for the union. 602 F.2d at 247-48. And in *Henderson Trumbull*, unlike here, the objections "were not 'nebulous and declamatory assertions, wholly unspecified,' . . . nor based on 'equivocal hearsay,' . . . but referred to specific events and listed specific people who were witnesses to these events." 501 F.2d at 1227-28 (citations and footnote omitted).[8]

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[8] Moreover, in each of those cases the Court was particularly concerned with the lack of a hearing where the election results were extremely close. Such concerns are inapplicable here, given that the Union won by a margin of over two-to-one. *See NLRB v. V&S Schuler Eng'g.*, 309 F.3d at 377 (rejecting employer's objections "especially given the fact that the [u]nion received two-thirds of the votes in the . . . election"); *Bridgeport Fittings*, 877 F.2d at 182, 186 (rejecting employer's election objection where union won by a two-to-one margin).

D. The Court Lacks Jurisdiction To Consider the Company's Belated Claims that the Board Gave Inadequate Consideration To the Case on Remand; in Any Event, the Claims Are Meritless

The Company asserts (Br. 12-18) that the Court should deny enforcement because the Board gave inadequate consideration to the case when it issued its 2010 Certification of Representative. The Company, however, never raised any criticisms of the Board's decision-making process to the Board prior to the Board issuing its subsequent Decision and Order in which the Board found that the Company had unlawfully refused to recognize and bargain with the Union after certification. Therefore, the Court is jurisdictionally barred from considering the Company's belated attack on the Board's process. In any event, it is well settled that courts grant administrative agencies like the Board a presumption of regularity in their decision-making processes, and will not delve into their deliberative methods based on the kind of speculation the Company offers here. Nor has the Company shown how it was prejudiced by the specific procedures that the Board utilized in this case. Accordingly, the Court should reject the Company's belated and meritless contentions.

1. The Company is jurisdictionally barred by Section 10(e) of the Act from raising Its challenges to the Board's deliberative process

When a three-member panel of the Board issued its August 27, 2010 Certification of Representative, the Board gave the Company until October 12, 2010, to respond to its Notice to Show Cause with a motion and accompanying brief or statement as to why the Board should not grant the Acting General Counsel's motion for summary judgment. (A. 93-94.) The Company merely filed an answer with the Board to the Acting General Counsel's amended complaint in which the Company admitted its refusal to bargain. (A. 102-09.) The Company filed no objection to the Board's decision-making process when issuing its Certification of Representative.

Because the Company failed to provide the Board with an opportunity to address the Company's arguments about the Board's decision-making process when issuing its Certification of Representative, the Court is barred from considering those claims to this Court. Under Section 10(e) of the Act (29 U.S.C. § 160(e)) "No objection that has not been urged before the Board . . . shall be considered by the Court . . . [absent] extraordinary circumstances." *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (holding that the court of appeals lacked jurisdiction to consider an issue not raised by the employer

before the Board); *Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 115 (2d Cir. 2001) (same).[9] Here, the Company offers no extraordinary circumstances to excuse its failure to raise arguments to the Board over its decision-making process.

An extraordinary circumstance "exists only if there has been some occurrence or decision that prevented a matter which should have been presented to the Board from having been presented at the proper time." *NLRB v. Allied Prods., Corp.*, 548 F.2d 644, 654 (6th Cir. 1977). Here, nothing prevented the Company from raising to the Board issues about the Board's decision-making process when issuing its Certification of Representative. To the contrary, the Company declined to take advantage of the explicit opportunity the Board

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[9] *See generally United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts . . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."). *Accord NLRB v. Newton-Haven Co.*, 506 F.2d 1035, 1038 (2d Cir. 1974).

provided it to present arguments regarding the Board's certification of the Union.[10]

Nor could the Company plausibly assert that raising an argument to the Board over its process in issuing its Certification of Representative would have been futile. Futility is a narrow exception to Section 10(e): "an objection would be futile only when the Board has unequivocally rejected a party's position by expressly refusing to follow the authority or line of authorities relied upon by that party." *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 358 n.13 (6th Cir. 1983). The Company cannot make such a showing here. Simply put, "probable futility cannot be equated with extraordinary circumstances." *Keystone Roofing Co. v. OSHA*, 539 F.2d 960, 964 (3d Cir. 1976) (rejecting the employer's argument that it was not required to raise an issue before OSHA because the agency had issued a prior

[10] The Board, by immediately filing its application for enforcement after the Board issued its Decision and Order, simply attempted to expedite resolution of this matter, which has been significantly delayed. The Company does not claim, nor could it, that the Board's prompt filing prevented it from raising objections to the Board's decision-making process in its response to the Board's Notice to Show Cause.

ruling that was contrary to the outcome that the employer sought).

In sum, the Company failed to give the Board an opportunity to address the Company's challenges to the Board's decision-making process when issuing its Certification of Representative. Accordingly, the Court lacks jurisdiction to consider the Company's belated claims.

2. In any event, courts afford administrative agencies a presumption of regularity and will not delve into agencies' internal deliberative processes based on pure speculation

In any event, there is no merit to the Company's assertion (Br. 12-18) that the Court should deny enforcement because the Board processed its Certification of Representative in a hasty and perfunctory manner in which its decision was "preordained." It is settled that courts afford administrative agencies like the Board a presumption of regularity in their decision making, and will not delve into their internal deliberative processes. The Company offers nothing but conjecture in asserting its claims. Thus, even if the Court considers the Company's claim that the Board failed to engage in reasoned decision making, it should reject that claim as unmeritorious.

a. The Company fails to rebut the presumption of regularity that courts afford to administrative agencies

As noted above (p. 26), courts apply a "presumption of regularity" pursuant to which they presume that public officials have properly discharged their official

duties, absent "clear evidence to the contrary." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *see also Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967) ("A strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues and adverted to the views of their colleagues."). The Company's speculation cannot rebut this presumption of regularity.

For instance, in *United States v. Morgan*, 313 U.S. 409, 422 (1941), the Supreme Court concluded that it was error to permit the Secretary of Agriculture to be deposed regarding the process by which he reached his decision, including the extent to which he studied the record and consulted with subordinates. As the Court explained, the courts may not "probe [the Secretary's] mental processes" because, "[j]ust as a judge cannot be subjected to such a scrutiny, . . . so the integrity of the administrative process must be equally respected." Following this logic, the Supreme Court has held that it will accept at face value the Board's assurances that it adequately considered the record before issuing a decision. *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229-30 (1947) (rejecting argument that Board failed to consider additional evidence upon remand where the Board

assigned case to the same trial examiner, and the Board, in turn, issued virtually the same order as it had the first time).

Contrary to the Company's view (Br. 4, 16-17), the fact that the Board issued its 2010 Certification of Representative shortly after this Court remanded the earlier unfair labor practice proceeding to the Board does not counter the presumption that the Board members properly discharged their duties. Courts have consistently rejected attempts to delve into administrative agencies' decision-making processes based on how quickly they carried out their duties. *See, e.g.*, *National Nutritional Food Ass'n v. FDA*, 491 F.2d 1141, 1146 (2d Cir. 1974) (FDA Commissioner issued new regulations 13 days after he took office; court rejects claims that it was impossible for the Commissioner to have reviewed and considered the more than 1,000 exceptions filed in opposition to the proposed regulations); *NLRB v. Biles Coleman Lumber Co.*, 98 F.2d 16, 17 (9th Cir. 1938) ("bare allegation" that Board failed to read transcript or examine exhibits is not a viable allegation of denial of due process).

Nor does the Company overcome the presumption of regularity by complaining (Br. 13, 16-18) that the Board simply incorporated its prior Certification of Representative. In its August 27, 2010 Certification of Representative, the Board explicitly stated that it had "considered the postelection

representation issues raised by the [Company]," and had "reviewed the record in light of the exceptions and brief." (A. 93.) Only then, did the Board "adopt[] the Regional Director's findings and recommendations to the extent and for the reasons stated in its March 13, 2008 Decision and Certification," and incorporate that decision by reference. (A. 93.) The Company offers no relevant support, much less any "clear evidence to the contrary" as the Supreme Court requires, *Chemical Foundation*, 272 U.S. at 14-15, that would warrant disregarding this explanation or delving into the Board's deliberative processes. Moreover, this Court and other courts have also routinely upheld agency decisions to incorporate previously infirm decisions by reference. *See e.g.*, *Shenxing Zeng v. Mukasey*, 280 F.App'x 93, 94-95 (2d Cir. 2008) (enforcing Bureau of Immigration Affairs (BIA's) decision and noting procedural posture of BIA incorporating by reference previous vacated order); *Wu Xiong Tao v. Holder*, 367 F.App'x. 898, 901 (10th Cir. 2010) (enforcing BIA's decision incorporating by reference an earlier vacated order); *Combs v. Comm'r of Social Sec.*, 459 F.3d 640, 651-52 (6th Cir. 2006) (noting with approval incorporation by reference of vacated decision); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707 (D.C. Cir. 1996) (taking the FEC's post-reconstitution ratification of its prior decisions at face value and treating that ratification as an adequate remedy for an earlier constitutional violation).

Accordingly, the Court should reject the Company's claim that the Board acted improperly.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	No. 10-4600-ag
	*	
v.	*	
	*	Board Case No.
SNELL ISLAND SNF LLC d/b/a SHORE ACRES REHABILITATION AND NURSING CENTER, LLC AND HGOP, LLC d/b/a CAMBRIDGE QUALITY CARE, LLC	*	12-CA-25854
	*	
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Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 7,443 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the petitioner/cross-respondent. The Board counsel further certifies that the CD-ROM has been scanned for viruses.

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Dated at Washington, DC
this 6th of June, 2011

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AND HGOP, LLC d/b/a CAMBRIDGE QUALITY	*	
CARE, LLC	*	
	*	
Respondent	*	

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 6th of June, 2011