10-4631

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

NEW COUNTRY AUDI, INC.

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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INTRODUCTION

In July of 2009, the National Labor Relations Board ("the Board") conducted an election in which a majority of employees at New Country Audi, Inc. ("the Company") voted to be represented by the Machinists and Aerospace Workers, DL 26 ("the Union"). The Board enjoys broad discretion in conducting representation elections and ensuring the safeguards necessary for employee free choice because of its administrative expertise in this area. Accordingly, the courts give Board election certifications great deference. *NLRB v. HeartShare Human Serv. of NY,*

Inc., 108 F.3d 467, 470 (2d Cir. 1997). Before this Court, the Company argues that the Court should overturn the election results without showing that a single instance of objectionable conduct occurred. The Company has so far succeeded in delaying bargaining by clinging to frivolous objections, unsupported by the scant evidence it offered. Worse, the Company seeks further delay by demanding a Board hearing so it can conduct a fishing expedition to dredge up the evidence of misconduct that it failed produce following the election. This case raises the very real concern that the employees' desire for union representation, as reflected in the election results, will ultimately be frustrated, since this type of delay "almost inevitably works to the benefit of the employer." *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984). Respectfully, the Company should not be allowed to continue to deprive its employees of their chosen bargaining representative, and this Court should enforce the Board's Order requiring the Company to bargain with the chosen union.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the Board's application for enforcement of its Decision and Order against the Company. The Board's Order issued on November 9, 2010 and is reported at 356 NLRB No. 22. (JA 167-69.)[1]

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

The Board had jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151 *et seq.*, 160(a)) ("the Act"), which empowers the Board to prevent unfair labor practices. The Court has jurisdiction over this proceeding pursuant to Section 10(e), which allows the Board to apply for enforcement of its Orders. Venue is proper in this Court because the unfair labor practices occurred in Greenwich, Connecticut. The Board's Order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C § 160(e)). The Board's application for enforcement is timely, as the Act places no time limit on such filings.

The record in the underlying representation proceeding before the Board (Case No. 34-RC-2320) is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)), because the Board's Order is based, in part, on findings made in that proceeding. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceeding; rather, it authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair labor practice order in whole or in part. The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of this Court. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUES

Did the Board act within its broad discretion in overruling the Company's election objections, and therefore properly find that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union? Specifically, did the Board abuse its discretion by overruling the following objections:

1. Before the pre-election "critical period," at a voluntary union campaign meeting, a union agent boasted to employees that President Obama, the federal government, and the Board would support the Union.
2. Before the pre-election "critical period," at a voluntary union campaign meeting, a union agent stated that union representatives would be present in the Company's parking lot to support employees on the day of the election.
3. On election day, outside the presence of eligible voters, an employee "stuck his head through the doorway" of the polling place and told the Union's election observer that a named employee, the last eligible voter, was on his way to the polls.

STATEMENT OF THE CASE

This case revolves around the Company's objections to an election held July 17, 2009. On November 18, 2009, the two-member Board (Chairman Liebman and Member Schaumber) issued a Decision and Certification of Representative overruling the Company's objections and certifying the Union as the bargaining

representative of the Company's full-time and part-time service technicians. (JA 44-45.) The Union requested bargaining, but the Company refused in order to challenge the validity of the Board election. The Union filed an unfair labor practice charge upon which the General Counsel issued a complaint and filed for summary judgment. (JA 47-53, 59-122.) On March 2, 2010, the two-member Board (Chairman Liebman and Member Schaumber) granted the General Counsel's motion and held that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with its employees' certified representative. (JA 131-33.)

On March 15, 2010, the Company filed a petition for review in the District of Columbia Circuit, challenging the Board's decision on the merits and on the basis that it was issued by a two-member quorum of the Board. The Board filed a cross-application for enforcement on April 1, 2010. The D.C. Circuit held the case in abeyance along with other cases challenging the two-member quorum, pending resolution of the issue by the U.S. Supreme Court.

On June 17, 2010, the Supreme Court held that Chairman Liebman and Member Schaumber, acting as a two-member quorum of the three-member group delegated all the Board's powers in December 2007, did not have the authority to issue decisions under Section 3(b) of the Act. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). Accordingly, the Board set aside its November 2009 and March 2010 Orders and the D.C. Circuit dismissed the case as moot on August 20, 2010.

On August 24, 2010, the Board (Chairman Liebman and Members Becker and Hayes) issued another Decision and Certification of Representative adopting the Regional Director's findings and certifying the Union as the representative of an appropriate unit of employees. (JA 153.) On November 9, 2010, the Board (Chairman Liebman and Members Schaumber and Hayes) granted summary judgment, finding that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union as the certified collective-bargaining representative of an appropriate unit of the Company's employees. (JA 167-69.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

The Company operates a car dealership engaged in auto sales, service, and repair in Greenwich, Connecticut. (JA 167-68; 1, 47, 54.) On June 8, 2009, the Union filed a petition with the Board seeking certification as the representative of a unit of the Company's full- and part-time service technicians at this facility. (JA 153; 1.)

On July 17, 2009, pursuant to a stipulated election agreement between the parties, the Board conducted an election from 10:30 a.m. to 12 noon in the technicians' lunchroom at the Company's facility. (JA 168; 2-3, 4.) Following the

election, the official tally of ballots showed that of the 22 eligible voters, 13 voted in favor of union representation and 9 voted against. (JA 153; 5, 17.) There were no challenged ballots. (JA 5.)

On July 24, 2009, the Company filed four timely objections alleging that certain misconduct by Union representatives and supporters affected the results of the election. (JA 167; 6-7.) Following an administrative investigation, the Regional Director issued a Report on Objections in which he recommended that the Board overrule the objections be overruled in their entirety. (JA 167; 17-21.) The Company filed timely exceptions to the Regional Director's recommendations to overrule objections 2-4 and his decision to proceed without a hearing. (JA 167; 22-25.) Objections 2-4 referred to two pre-petition statements by Union agents and one election-day comment by an employee. On August 24, 2010, the Board (Chairman Liebman and Members Schaumber and Hayes) issued a Decision and Certification of Representative in which it adopted the Regional Director's findings and recommendations and certified the Union as the employees' collective bargaining representative. (JA 153.)

B. The Unfair Labor Practice Proceeding

Following the two-member Board's certification, on December 14, 2009, the Union sent the Company a letter requesting that it recognize and begin bargaining with the Union for an initial contract. (JA 168; 51.) The Company responded on

December 24, 2009, refusing the Union's request for recognition and bargaining and citing its disagreement with the validity of the certification. (JA 168; 52.) The Union filed an unfair labor practice charge upon which the Board's General Counsel issued a complaint. (JA 167; 46, 47-53.) The Company admitted its refusal to bargain, disputing the validity of the Union's certification and challenging the Board's authority to act with only two sitting members. (JA 167; 54-58, 158-60.) In light of the Company's admission, the General Counsel moved for summary judgment. (JA 167; 59-122.) Following the Board's decision to set aside its original certification, the General Counsel amended its original Complaint to rely on the August 2010 Decision and Certification of Representative. (JA 155-57.) The Company filed an amended response to the original motion for summary judgment. (JA 167; 161-66.)

II. THE BOARD'S CONCLUSIONS AND ORDER

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 and finding that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (JA 167.) In so doing, the Board concluded that all representation issues raised by the Company in the unfair labor practice proceeding were, or could have been, litigated in the underlying representation proceeding. The Company also failed to

produce any newly discovered evidence or show any special circumstances that would require the Board to reexamine its certification. (JA 167.)

The Board's Order requires the Company to cease and desist from refusing to bargain with the Union and from, in any like or related manner, interfering with its employees' exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (JA 168.) Affirmatively, the Board's Order directs the Company to bargain with the Union upon request, to embody any understanding reached in a signed agreement, and to post copies of a remedial notice at its Greenwich, Connecticut facility. (JA 168-69.)

SUMMARY OF ARGUMENT

The Company in this case has refused to bargain with the Union to challenge the Board's certification of the election results. However, the Company fails to prove a single one of its frivolous objections, let alone meet its heavy burden of proving that the Board abused its discretion in certifying the election.

First, the Company alleged that weeks before the Union had even filed its representation petition, a union agent told employees that (1) President Obama, the federal government, and the Board would support Union, and (2) the Union would be in the Company's parking lot to show its support on election day. Because the Union representative made these remarks prior to the election, well outside the established "critical period," the conduct did not interfere with employees' free

choice. Moreover, even if they had been made during the critical period, these remarks are not coercive under established Board and court precedent. The first is typical campaign propaganda, which the Board trusts employees to evaluate for themselves. The second was an innocuous statement that the Union would support employees by being present on voting day, rendered especially harmless by the fact that the Union ultimately made no such appearance.

The Company's third objection, that an employee commented to the Union's election observer that another voter was on his way to the polls, would likewise not coerce employees in their exercise of free choice. The Company claims that this amounted to electioneering or showed possible list keeping. But having failed to show that the employee was acting as a Union agent, the Company fails to acknowledge that third-party election conduct is considered less disruptive than party conduct. Moreover, the Company failed to proffer any evidence of a list, let alone that employees would reasonably believe that their names were being recorded or their voting activities monitored. Perhaps most importantly, no eligible voters heard the employee's remark. Since all but one employee had already voted at the time of the remark, it is statistically impossible that this comment could have affected an election with a four vote margin of victory. Thus, the Board reasonably overruled this objection.

Finally, the Board properly certified the results of the election without considering the “cumulative impact” of the above incidents and without conducting a hearing. Contrary to the Company’s claims, this case involves, not a series of coercive incidents, but a few isolated and unrelated instances of unobjectionable conduct. Moreover, the Company was not entitled to an evidentiary hearing because the Company’s evidence, even when accepted as true, raised no material factual issues to be resolved and did not make a prima facie case of misconduct. The Company may not delay the results of the election by using the Board’s processes to go on a fishing expedition for further evidence to meet its burden. Therefore, the Board acted within its broad discretion in certifying the results of the election.

ARGUMENT

THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN OVERRULING THE COMPANY'S ELECTION OBJECTIONS WITHOUT A HEARING, AND THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

An employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the duly certified collective-bargaining representative of an appropriate unit of its employees.[2] *See NLRB v. HeartShare Human Serv. of NY, Inc.*, 108 F.3d 467, 470 (2d Cir. 1997). Here, the Company is refusing to bargain to test the validity of the Union's certification, because courts cannot directly review Board election cases. Instead, to obtain judicial review, an employer must refuse to bargain, prompting an unfair labor practice proceeding in which the Court may examine the underlying certification. *See NLRB v. Arthur Sarnow Candy Co.*, 40 F.3d 552, 556 n.5 (2d Cir. 1994); *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1561 (D.C. Cir. 1984). This Court must uphold the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act unless it finds that the Board abused its

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[2] An employer that violates Section 8(a)(5) of the Act also commits a "derivative" violation of Section 8(a)(1) of the Act, which makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise" of their rights under the Act. 29 U.S.C. § 158(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chemical Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

discretion in overruling the election objections and certifying the Union. *See id.; Arthur Sarnow Candy*, 40 F.3d at 556.

A. The Board Enjoys Broad Discretion in the Conduct of Elections and an Employer Challenging the Certification of a Representative Bears the Burden of Showing that an Election Should be Set Aside

In Section 9 of the Act, Congress entrusted the Board with the task of conducting representation elections and establishing the "safeguards necessary to ensure the fair and free choice of bargaining representatives." *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946). Although the Board has long strived for "laboratory conditions" in elections, this Court has recognized that "the idea of laboratory conditions must be realistically applied." *Amalgamated Serv. and Allied Indus. v. NLRB*, 815 F.2d 225, 227 (2d Cir. 1987). This Court has adhered to the view that application of an inflexible "laboratory conditions" standard is not productive, in part because "clinical asepsis is an unattainable goal in the real world of union organizational efforts." *Arthur Sarnow Candy*, 40 F.3d at 559 (citations omitted). As the Court has further explained, it is for the Board to decide whether the circumstances came sufficiently close to achieving employee free choice. *See Amalgamated Serv.*, 815 F.2d at 227.

There is a "strong presumption" that an election conducted according to the Board's safeguards reflects the "true desires of the employees." *NLRB v. Hood Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991). *See also NLRB v. VSA, Inc.*, 24 F.3d

588, 591 (4th Cir. 1994) ("results of a Board-supervised representation election are presumptively valid"). Therefore, the Courts have made clear that the party seeking to overturn a Board election shoulders the heavy burden of establishing that an election "was unfairly conducted." *NLRB v. Rolligon Corp.*, 702 F.2d 589, 592 (5th Cir. 1983). *See also NLRB v. Black Bull Carting Inc.*, 29 F.3d 44, 46 (2d Cir. 1994) (per curiam) ("A party seeking to overturn an election on the ground of a procedural irregularity has a heavy burden."); *Polymers, Inc. v. NLRB*, 414 F.2d 999, 1004 (2d Cir. 1969) (same). The Board will not invalidate elections where the conduct underlying an objection does not affect employees' exercise of free choice. *Amalgamated Serv.*, 815 F.2d at 229. *Accord Service Corp., Int'l v. NLRB*, 495 F.3d 681, 685 (D.C. Cir. 2007) (conduct justifies setting the election aside only if it "reasonably tended to interfere with the employees' free and uncoerced choice") (citation omitted). Therefore, the objecting party must do two things: (1) show that the election misconduct occurred and (2) "come forward with evidence of actual prejudice." *Arthur Sarnow Candy*, 40 F.3d at 558-59.

Because of the Board's administrative expertise, it enjoys "broad discretion in the conduct and supervision of elections" and is afforded "considerable deference" by this Court. *HeartShare*, 108 F.3d at 470 (citing *A.J. Tower*, 329 U.S. at 330). *See also Amalgamated Serv.*, 815 F.2d at 227 (noting that elections are a "purely administrative function" and deferring to "the expertise that the Board has

developed in supervising" them). Accordingly, this Court limits itself to "the narrow question of whether the Board abused its discretion in certifying the election." *Arthur Sarnow Candy*, 40 F.3d at 555 (citing *Rochester Jt. Bd., Amalgamated Clothing & Textile Workers Union v. NLRB*, 896 F.2d 24, 27 (2d Cir. 1990)). Notably, it refrains from interfering "save for the most glaring discrimination or abuse." *Id.* (quoting *NLRB v. Olson Bodies, Inc*, 420 F.2d 1187, 1189 (2d Cir. 1970)).

The Company misrepresents both the standard of review and its own burden, asserting (Br. 5, 16) that the Board's findings should be reviewed for "substantial evidence" and arguing (Br. 19) that it was "incumbent on the Regional Director" to produce that evidence. The "substantial evidence" standard of review is not applicable in this case because it is applied to the Board's factual findings where the facts were disputed and a hearing was held. *See, e.g., Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 116 (2d Cir. 2001) (reviewing the factual findings underlying the Board's unfair labor practice determination for "substantial evidence"); *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1427 (2d Cir. 1996) (same). Here, a hearing was unnecessary because the Board accepted all of the Company's evidence as true. The evidence presented no material issues of fact to be resolved and the Regional Director's further investigation revealed no controversies. *See Polymers, Inc. v. NLRB*, 414 F.2d 999, 1004-05 (2d Cir. 1969) (Regional Director accepted

employer's factual allegations as true, no facts remained to be developed, therefore a hearing was unnecessary). And as explained above, the burden of producing the evidentiary support to overturn an election is the Company's, not the Regional Director's. Accordingly, as discussed above, this Court reviews the Board's action for an abuse of discretion, not substantial evidence.

B. The Board Acted Within its Broad Discretion in Overruling the Company's Objections to Alleged Pre-Petition Conduct

The Board properly overruled the Company's objections to two statements made by union agents weeks before the Union even filed its election petition. First, the Company alleges (Br. 18) that a union agent coerced voters by suggesting that the federal government and the Board supported the Union. Second, the Company claims (Br. 21) that a union agent impermissibly threatened surveillance or electioneering by telling an employee that the Union would be in the Company's parking lot on election day. However, the Company's evidence asserts that the union agents made both of these comments at a voluntary campaign meeting weeks before the Union filed its election petition—well outside of the pre-election "critical period" during which the Board polices party conduct. Moreover, under extant Board law, these campaign statements would not have coercively interfered with the election, even if they had occurred during the critical period. Therefore, the Board reasonably overruled both of these objections.

The Board has a court-approved rule establishing a "critical period" prior to a representation election during which allegedly coercive conduct is subject to Board review. With few exceptions, conduct occurring outside that time period cannot serve as the basis for setting aside an election. *See Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 186 (2d Cir. 1989); *Ideal Electric and Mfg. Co.*, 134 NLRB 1275, 1278 (1961). The critical period begins on the date the union files its representation petition and runs until the election is complete. *Ideal Electric*, 134 NLRB at 1278; *accord NLRB v. Semco Printing Ctr., Inc.*, 721 F.2d 886, 893 n.5 (2d Cir. 1983). Courts have approved this rule as "a convenient device to limit the inquiry period near the election when improper acts are most likely to affect the employees' freedom of choice." *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1567 (D.C. Cir. 1984). *See also NLRB v. Lawrence Typographical Union No. 570*, 376 F.2d 643, 652 (10th Cir. 1967) ("The purpose of this rule, according to the Board, is to eliminate from post-election consideration conduct too remote to have prevented the free choice guaranteed by Section 7 of the Act.").

Departures from the "critical period" rule are rare and limited to "clearly proscribed conduct likely to have had a significant impact on voting post-petition." *Semco Printing*, 721 F.2d at 893. *See also Amalgamated Clothing & Textile Workers*, 736 F.2d at 1567 (noting the appropriateness of this rule "[a]bsent

extremely unusual circumstances").[3] Examples of conduct serious enough to have a lingering impact include acts of violence, *see Willis Shaw Frozen Food Express, Inc.*, 209 NLRB 267, 268 (1974) ("a series of abhorrent acts" including shootings, stabbings, and assaults), or solicitation of authorization cards based on threats of job loss or unlawful promises of benefits, *see Semco Printing*, 721 F.2d at 893 (discussing *Lyons Restaurants*, 234 NLRB 178, 179 (1978) (union warned employees that if they did not join the union they would not work for the employer)), and *Gibson's Discount Ctr.*, 214 NLRB 221, 221-22 (1974) (union solicited authorization cards with an unlawful promise to waive union initiation fees)). Such conduct is not presented here. Accordingly, *Madison Square Garden Ct., LLC*, 350 NLRB 117, 120, 122 (2007) (coercive solicitation of authorization cards in the pre-petition period) and *Harborside Healthcare, Inc.*, 343 NLRB 906, 917 (2004) (same), cited by the Company (Br. 28), are inapposite.

1. The Company's evidence

In support of its objections to the Union's pre-election conduct, the Company provided a letter from its attorney outlining a list of witnesses and a summary of the evidence and testimony that they could provide the Board. (JA 8-10.) The

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[3] Although pre-petition misconduct will not serve as an independent basis for an objection, it may be relevant if it "adds meaning and dimension to related post-petition conduct." *Dresser Indus., Inc.*, 242 NLRB 74, 74 (1979); *accord Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 186-87 (2d Cir. 1989). However, the Company alleged no related misconduct occurring in the critical period.

Regional Director interviewed these witnesses during his administrative investigation. (JA 17-21.)

The Company's letter suggested that Elizam Mangual would testify that he attended a pre-election campaign meeting during which a Union agent told employees that "the federal government and President Obama were 'very pro-Union,'" and that the Union would "get the full support of the Labor Board" if elected. (JA 9-10, 19.) This witness stated that this meeting occurred on either May 6 or May 13, 2009. (JA 19.) The Union filed its petition for representation several weeks later, on June 8, 2009. (JA 1, 17.)

The Company also asserted that Mangual could testify that at one of these pre-petition campaign meetings, a union representative told employees that only a government agent would be present in the polling area, but that Union representatives would be in the parking lot to show their support on election day. (JA 9.) The Company asserted that portions of the parking lot "abut and cross through" the employees' path to the designated voting area.[4] (JA 19.) There was no evidence of a union presence or electioneering in the parking lot on election day. (JA 20.)

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[4] Although the Company baldly claims (Br. 22) that 19 out of 22 eligible voters had to cross through the parking lot to reach the polls, it failed to make this claim in its objections or in the evidence supporting them. (JA 6-10.) In any event, this fact is irrelevant because even if employees had to cross the parking lot to vote, the Company did not claim, nor is there any evidence, that any union representative was in the parking lot on the day of the election.

2. The union agent's pre-petition statement suggesting government support for the Union's organizing effort is not objectionable

The Regional Director properly dismissed this objection based on its pre-petition timing. As the Company concedes (Br. 24), none of the facts are in dispute. The union agent's statements of government and Board support occurred at a campaign meeting on May 6 or May 13, 2009, nearly a month prior to the start of the critical period on June 8, 2009. (JA 19.) Even accepting all of the employer's claims and evidence as true, the Regional Director reasonably overruled this objection because the statement was made far outside the well-established "critical period." *See Ideal Electric*, 134 NLRB at 1278; *accord Bridgeport Fittings v. NLRB*, 877 F.2d 180, 186 (2d Cir. 1989).[5]

In any event, contrary to the Company's strained arguments (Br. 26-27), this was not a case where the Board's impartiality was seriously called into question by the Union's claims of support. Indeed, the Board has overruled objections to such misrepresentations unless a party has actually altered or forged Board documents so that it appears that the Board itself is making the statement, making it impossible

[5] The Company repeatedly mischaracterizes this meeting (Br. 7-9, 11) as a "captive audience speech," a term with a long-established meaning under Board law that does not apply here. *See Peerless Plywood Co.*, 107 NLRB 427, 428-29 (1953) (holding a mass employee assembly on company time to deliver election speeches within 24 hours of the election is an objectionable "captive audience meeting"). The Company's evidence showed that this was a voluntary Union campaign meeting, held off-site, after work hours, months before the election.

for employees to recognize propaganda as such. *See NLRB v. Rolligon Corp.*, 702 F.2d 589, 594-95 (5th Cir. 1983) (explaining "crucial and material differences" between misstatements of Board action or position and alteration of a Board document); *accord Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 160-61(2d Cir. 1981). In cases presenting common campaign falsities by a union agent, the Board trusts employees to weigh such propaganda for themselves, rarely finding them objectionable conduct. *See Riveredge Hosp.*, 264 NLRB 1094, 1095 (1982); *Midland Nat'l Life Ins. Co*., 263 NLRB 127, 133 (1982). *See also NLRB v. Rhone-Poulenc, Inc.*, 789 F.2d 188, 190 (3d Cir. 1986). Here, the statement of government and Board support was readily identifiable as campaign puffery, coming as it did from a union agent during a campaign meeting. Absent any concealment of the statement's source, the Board has found similar "actions speak for themselves, and will show up any misrepresentation for what it is." *Riveredge Hosp.*, 264 NLRB at 1095.

Therefore, the Company's reliance (Br. 26) on cases involving altered sample ballots or forged documents distributed during the critical period, is misplaced. *See GAF Corp.*, 234 NLRB 1209, 1213 (1978) (leaflet bearing the image of U.S. Capitol, said "NLRB," and used the Board's typeface); *see also Ryder Memorial Hosp.*, 351 NLRB 214, 214-17 (2007) (overruling an objection because the altered sample ballots were clearly not the Board's handiwork); *Sofitel San Francisco Bay*,

343 NLRB 769, 769-71 (2004) (altered sample ballots). Similarly, *Goffstown Truck Center,* cited by the Company (Br. 26), is inapposite because there, the union agent told employees she was speaking to them "on behalf of the NLRB," which the Board found was analogous to distributing an altered Board document. *Goffstown Truck Ctr., Inc.*, 356 NLRB No. 33, slip op. at 2-3 (2010).[6]

In stark contrast to these cases, the Union's statements were made outside of the critical period and, in any event, were readily identifiable as campaign puffery. Consequently, the Board did not abuse its discretion by overruling the Company's objections to this conduct.

3. The Union agent's pre-petition comment to employees that union representatives would be in the Company's parking lot on election day is not objectionable.

For similar reasons, the Board reasonably overruled the objection to the Union's statement that union representatives would show their support by being in the parking lot on election day.[7] The statement was made weeks before the petition

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[6] Incidentally, the Company is incorrect (Br. 27 n.14) that *Goffstown* overrode the holding of *Columbia Tanning Corp.,* 238 NLRB 899, 900 (1978) (distribution of a letter of endorsement from the Massachusetts Commissioner of Labor, on official state stationery, 24 hours before the election, threatened the appearance of Board impartiality). The Board has consistently held that it is objectionable to mislead employees about the Board or government's neutrality by misrepresenting the source of the endorsement, whether in writing or orally.

[7] Curiously, the Company spends two pages (Br. 35-36) asserting that the Regional Director failed to consider its evidence on this objection. But as is clear from his Report on Objections, although he faulted the Company for conclusory language

was filed, so the conduct in question indisputably occurred outside of the critical period and is therefore not objectionable. *Ideal Electric*, 134 NLRB at 1278. Moreover, in any event, there was no evidence that any Union representative was even present in the parking lot on election day. Therefore, the Board reasonably exercised its discretion in overruling this objection.

Despite the absence of evidence or allegations of any Union presence near the polls on election day, the Company curiously cites case law (Br. 34) where, unlike here, the union came to the election site and created the impression of surveillance. The Company relies (Br. 34-35) on *Performance Measurements Co., Inc.*, 148 NLRB 1657 (1964), *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982), and *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001), asserting that it is "well recognized that union or management representatives who are in close proximity to the voting area, without valid explanation, are engaged in objectionable surveillance." But in the absence of even the suggestion of, much less evidence of, such proximity on election day, these cases are completely inapposite. Indeed, as the Board found in *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195, 196 (2004), despite the presence of a union representative in the parking lot on election day, and his conversation with a handful of voters, the union's conduct was

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and lack of specificity in the objection, the Regional Director investigated the conduct, considered the evidence, and determined that the statement was unobjectionable. (JA 19-20.)

not objectionable because he was not in the polling area, waiting area or near the line of voters. Here, the Company's objection is based on the Union's single (and unfulfilled) statement, well outside the critical period and months before the election, that it would come to the parking lot on election day to support the employees. The Board did not abuse its discretion by overruling this objection because it occurred outside *Ideal Electric's* critical period.

B. The Board Acted Within its Broad Discretion in Overruling the Company's Objection to an Employee's Election Day Comment

The Board reasonably overruled the objection to an employee's ten-second appearance at the polls with the unremarkable information that another employee was on his way to vote. The Company claims (Br. 29-33) that this was evidence of electioneering or an indication of recordkeeping or other surveillance by the Union sufficient to require a rerun. It is wrong for three reasons. First, this statement cannot be attributed to the Union because the Company failed to provide an iota of evidence that the employee was acting as a union agent. Second, it is only with the most strained of interpretations and a large helping of speculation that the employee's statement could approach electioneering or suggest monitoring. Third, no eligible voters were present when the comment was made, and all but the one employee had voted, so it could not have affected the election results. Thus, the Board reasonably exercised its discretion in overruling this frivolous objection.

1. The Company's evidence

The Company offered evidence that at around 11:30 a.m. on the day of the election, an employee "stuck his head" through the doorway of the polling area, looked at the Union's observer, and said that another named employee was on his way and would be coming to vote. (JA 18.) While the employee was speaking to the Union's observer, the Board agent conducting the election quickly interrupted, informed the employee that he could not talk to the observers, and instructed the Union's observer not to respond. (JA 18.) The Board agent then shut the door. (JA 18.) The entire incident lasted approximately 10 seconds, and the only eligible voters present were the election observers and the employee who made the comment at the door. (JA 18.) By that time, all eligible voters had voted except for the named employee. (JA 19.)

2. The third-party employee's remark to the Union observer is not objectionable

As a threshold matter, the Company's objection is based upon its unfounded assertion (Br. 30) that the employee who made the statement in question is an agent of the Union. But this employee may only be deemed a union agent if the Union authorized or later ratified his actions, or if he had apparent authority. *See* Section 2(13) of the Act (29 U.S.C. § 152(13)); *see also Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 213-14 (1979) (Board applies common-law agency principles); *NLRB v. Semco Printing Ctr.*, 721 F.2d 886, 891 (2d Cir. 1983)

(applying agency principles). Apparent authority is created when a principal supplies to a third party "a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question." *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 82-83 (1988) (citing *NLRB v. Donkin's Inn, Inc.*, 532 F.2d 138, 141 (9th Cir. 1976), and *Alliance Rubber Co.*, 286 NLRB 645, 646 n.4 (1987)). *See, e.g., Semco Printing*, 721 F.2d at 891 (*prima facie* case of apparent authority where employee was known to other employees as "the one who did all the organizing for the Union," "brought the cards in," and "answered everybody's questions").

The Company has offered no evidence that the Union either expressly or impliedly directed, ratified, or encouraged this employee's conduct. Instead, the Company divines an agency relationship from the mere fact that that this employee *spoke to* the Union observer. The suggestion that the Board should find this employee to have been self-deputized on this fact alone is supported by neither common law agency principles nor common sense. Thus, this "bare assertion" of agency does not make a "*prima facie* case of agency sufficient to require a hearing" on the issue, let alone an agency finding. *See Semco Printing*, 721 F.2d at 891 (employer relied exclusively on its assertion that two employees "apparently acted in concert" to show that they were union agents). Therefore, the Board appropriately declined to attribute this employee's comment to the Union.

The appropriate standard for judging an election disruption by a third-party like this employee is whether the conduct "substantially impaired the exercise of free choice." *Amalgamated Serv. v. NLRB*, 815 F.2d 225, 230 (2d Cir. 1987) (distinguishing *Claussen Baking Co.*, 134 NLRB 112 (1961)). The Company's characterization of this remark as "electioneering" (Br. 31 n.16) that interfered with employees' free choice in the election similarly strains imagination. Contrary to the Company's suggestion, there is no support for the claim that communicating with a union observer is a "clear and overt" sign of union support. Likewise, the employee's comment that a voter was on his way to the polls fails to even approach the conduct at issue in *Claussen Baking Co.*, 134 NLRB 111, 112 (1961), where an employee stood near the polls for a substantial period and urged several employees to vote against the Union. The Company's own evidence revealed that no other eligible voters were present, so the Company's professed concern for the effect it could have had "if observed by other employees" is moot. The Regional Director therefore reasonably found no electioneering.

Next, the Company speculates (Br. 31-33) that the employee's statement is evidence of possible "recordkeeping." The Board will overturn the results of an election if a party to the election maintains voter lists and the employees "know, or reasonably can infer that their names are being recorded on unauthorized lists." *Medical Ctr. of Beaver County, Inc. v. NLRB*, 716 F.2d 995, 999 (3d Cir. 1983)

(internal quotations omitted). Here, the Company produced no evidence that anyone kept a list. Instead, it engages in wild speculation (Br. 33) that the employee must have had a conversation with the incoming voter about his voting status and "potentially" other voters' status. In reality, the Company's evidence shows only that an employee announced that another voter was on his way to the polls. There is no evidence that he was keeping any list or that he knew the voting status of any other voters. Nor did the Company offer evidence showing that a single employee believed his name was being recorded. Thus, accepting all of the proffered evidence as true, the Board reasonably found that there was no indication of recordkeeping.

Contrary to the Company's claims (Br. 32), *Janler Plastic Mold Corp.*, 208 NLRB 167 (1974), supports the Board's decision both legally and factually. As the Company concedes, *Janler Plastic* holds that recordkeeping objections "require[] a showing that the employees knew that their names were being recorded." *Id.* at 172. Accordingly, the Board overruled the list-keeping objection because, as here, there was no evidence that any employees believed that their names were being tallied when they voted. *Id.* at 173. The Company has failed to provide any basis for finding the Board abused its discretion by rejecting the Company's claim of unlawful recordkeeping.

Likewise, the Company's more general claim of surveillance (Br. 33) fails for lack of support. The Company cites only *Med. Ctr. of Beaver County v. NLRB*, 716 F.2d 995 (3d Cir. 1983) (finding objectionable recordkeeping). But the Company failed to show, even in the broadest sense, that employees knew or reasonably could infer that they were being monitored by the Union on election day.

The Company's evidence shows no possible prejudice or interference as a result of this employee's comment to the Union's election observer. There were no eligible voters in the polling area when the employee poked his head in. Indeed, the single employee on his way to the polls was the only employee who had not yet voted. The Company fails to explain how the comment could have interfered with votes that had already been cast. *See NLRB v. Dickinson Press, Inc.*, 153 F.3d 282, 287 (6th Cir. 1998) (rule against conversations near the polls not violated when only eligible voter present for union observer's comments had already voted); *Wald Sound, Inc.*, 203 NLRB 366, 366 n.1 (1973) (remark could not have affected election results when all ballots had been cast). Moreover, the last employee's vote could not have altered the election outcome because the Union won the election by four votes. Accordingly, the Board reasonably exercised its discretion in overruling this objection because it did not compromise the integrity of the election or interfere with employees' free choice in the election.

C. The Company's Cumulative Effect Argument is Unavailing

The Company is grasping at straws when it claims (Br. 25, 29) that the Board failed to consider the "cumulative impact" of its three objections. A party arguing cumulative impact must show "conduct that is legally actionable in its component parts" or that formed a pattern that influenced the election. *See NLRB v. WFMT*, 997 F.2d 269, 279 (7th Cir. 1993). *See also NLRB v. Monark Boat Co.*, 800 F.2d 191, 195 (8th Cir. 1986) ("cumulative impact" argument rejected where the employer failed to prove misconduct by anyone connected with the union). The cumulative impact argument "may not be used to turn a number of insubstantial objections to an election into a serious challenge." *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1569 (D.C. Cir. 1984).

Since the Board determined that the incidents were innocuous standing alone, it stands to reason that their "cumulative" effect was likewise unobjectionable. Moreover, the small number of unrelated incidents shows no problematic pattern. The Company characterizes its handful of objections as "greater than the sum of its parts" (Br. 25), but in this case each part was isolated and meritless. More succinctly, zero plus zero is still zero. Therefore, the Board, having reasonably exercised its discretion in overruling the objections individually, did not abuse its discretion by certifying the results of the election without considering them cumulatively.

D. The Regional Director Acted Within his Broad Discretion in Declining to Hold an Evidentiary Hearing on the Objections

The Regional Director did not abuse his discretion by overruling the Company's objections without a hearing because the Company's evidence raised no material factual issues. Essentially, the Company is arguing (Br. 23-24) that it was entitled to an evidentiary hearing to fish for "possible" evidence to support its objections.[8] As discussed above at pp. 14-15, under established precedent the Company has the burden of offering sufficient evidence to support its objections. It failed. The Regional Director accepted all of the Company's proffered evidence as true and his investigation revealed nothing to contradict that evidence. Indeed, the Company admits (Br. 14) that "[a]ll facts are undisputed in the Regional Director's report." There was, therefore, nothing factually to resolve in a hearing and the Regional Director reasonably proceeded without one.

It is well settled that a party challenging a representation election is not entitled to a post-election evidentiary hearing as a matter of right. *NLRB v. Hood Mfg. Co.*, 941 F.2d 325, 332 (5th Cir. 1991); *Amalgamated Clothing Workers of America*, 424 F.2d 818, 828 (D.C. Cir. 1970). This Court has long acknowledged how important it is that "questions preliminary to the establishment of the

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[8] Throughout its brief, the Company wildly speculates about "potential" misconduct. *See, for example*, Br. 19 ("potential" that employee who spoke to union observer was acting at the Union's behest); Br. 24 ("potential" that alleged conduct coerced employees); Br. 31 (employee "potentially" had conversation with another employee about voting status).

bargaining relationship be expeditiously resolved." *NLRB v. Semco Printing Ctr.*, 721 F.2d 886, 891 (2d Cir. 1983). Therefore, the Board requires an objecting party to come forward with *prima facie* evidence of objectionable conduct *before* it is entitled to a hearing. *Id.* at 891; *Polymers, Inc. v. NLRB*, 414 F.2d 999, 1004-05 (2d Cir. 1969) (noting that this requirement is "necessary to prevent dilatory tactics by [parties] disappointed in the election returns"). In the absence of any "substantial and material factual issues" raised by the party's evidence, as here, an administrative investigation is sufficient. Board Rules and Regulations, 29 C.F.R. § 102.69 (d); *NLRB v. Whitney Museum of American Art*, 636 F.2d 19, 23 (2d Cir. 1980); *Polymers, Inc.*, 414 F.2d at 1004-05.

Further, it most certainly is not "incumbent upon the Regional Director to conduct additional investigation" (Br. 19) when the Company's evidence falls short. The Company cannot avoid its burden by claiming that "'a more comprehensive investigation by the Regional Director could have turned up evidence that would have met the burden.'" *Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 187 (2d Cir. 1989) (quoting *NLRB v. Hudson Oxygen Therapy Sales Co.*, 764 F.2d 729, 734 (9th Cir. 1985)). In the absence of evidence supporting the Company's claim that misconduct tainted the election process and interfered with employees' free choice of union representative, the Board will not facilitate delay by indulging in fishing expeditions. Here, the Board appropriately proceeded

without a hearing and certified the results of the election. The employees freely chose representation by the Union, and the Company should honor the employees' desire by bargaining with their selected representative.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enforce the Board's Order in full.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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	*	
Petitioner	*	No. 10-4631
	*	
v.	*	
	*	Board Case No.
NEW COUNTRY AUDI, INC.	*	34-CA-12563
	*	
Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 7,702 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 10th day of June, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 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 the counsel listed below through the CM/ECF system. In addition, I certify that a copy of the PDF of the foregoing was e-mailed to the counsel:

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