Nos. 06-1162, 06-1216

UNITED STATES COURT of APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEW YORK REHABILITATION CARE MANAGEMENT, LLC AND NEW YORK CENTER FOR REHABILITATION CARE, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certifies the following:

(a) *Parties and Amici*: The Board is respondent/cross-applicant before the Court. Its General Counsel was a party before the Board in the unfair labor practice case (Board Case No. 29-CA-26678) and its Regional Director issued decisions in the underlying representation/election cases (Board Case Nos. 29-RC-9785 and 29-RC-9937).

United Food and Commercial Workers Union Local 300S ("300S") was a petitioner before the Board in an underlying representation case (Board Case No. 29-RC-9785).

Service Employees International Union Local 1199 ("1199") was the charging party before the Board in the unfair labor practice case (Board Case No. 29-CA-26678) and a petitioner before the Board in an underlying representation case (Board Case No. 29-RC-9937).

New York Rehabilitation Care Management, LLC and New York Center for Rehabilitation Care, Inc., (collectively "the Company"), petitioner/cross-respondent before the Court, was respondent before the Board in the unfair labor practice case (Board Case No. 29-CA-26678) and employer in the representation cases (Board Case Nos. 29-RC-9785 and 29-RC-9937).

(b) *Rulings Under Review*: This case is before the Court on a petition filed by the Company for review of an order issued by the Board on July 29, 2005, and reported at 344 NLRB No. 148. The Board seeks enforcement of that order against the Company.

(c) *Related Cases*: This case has not been before this or any other court. Board counsel are unaware of any related cases either pending or about to be presented to this or any other court.

TABLE OF CONTENTS

Heading **Page(s)**

Statement of subject matter and appellate jurisdiction 1

Statement of the issues 3

Relevant statutory provisions 5

Statement of the case 5

Statement of facts 6

I. The Board's findings of fact 6

A. The representation/election proceeding 6

1. Entities involved 6

2. Procedural history; opening of NY Center and closure of Lyden 7

a. 300S election and certification 7

b. Anticipated and initial staffing of NY Center 8

c. Lyden employees and patients transfer to NY Center 10

d. 1199 petition; first hearing on revocation of 300S certification 12

e. The second hearing and second election 13

B. The unfair labor practice case 15

TABLE OF CONTENTS

Heading – Cont'd **Page(s)**

II. The Board's conclusions and order 16

Summary of argument.....17

Standard of review 18

Argument.....19

I. The Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with 1199 after its victory in the second election 19

II. The Board acted well within its discretion in revoking 300S' Certification and directing a second election.....20

A. The Board's authority to revoke certifications 20

B. The Company has waived its right to contest the Board's finding that its failure to notify the Board of 1199's interest in the case warranted revocation of 300S' certification 21

C. The first election was premature because, at that time, the Company did not employ a substantial and representative complement of its reasonably foreseeable future workforce.....26

1. Applicable principles 26

2. The Board did not abuse its discretion in finding that the first election was premature because the Company did not employ a substantial and representative complement of employees 28

3. The Company's arguments lack merit.....31

TABLE OF CONTENTS

Heading – Cont'd **Page(s)**

D. Because 300S' certification was invalid, the resulting collective-bargaining agreement cannot bar 1199's election petition and the Lyden employees cannot be accreted to a 300S bargaining unit.....35

1. Contract bar.....35

2. Accretion.....42

III. The Board did not abuse its wide degree of discretion in overruling the Company's objections to the conduct of the second election.....44

A. Applicable principles and standard of review.....44

B. The Board did not abuse its discretion in overruling the Company's electioneering objections.....45

1. Gathering at facility gate.....48

2. Provision of food and union paraphernalia.....51

IV. The Board properly denied the Company's motion for reconsideration based on the disaffiliation of the Service Employees International Union from the AFL-CIO.....54

Conclusion.....59

TABLE OF AUTHORITIES

Cases: **Page(s)**

AOTOP, L.L.C. v. NLRB,
331 F.3d 100 (D.C. Cir. 2003) 18,19,20,47

All County Electric Co.,
332 NLRB 863 (2000) 39,41

Amalgamated Clothing Workers of America v. NLRB,
424 F.2d 818 (D.C. Cir. 1970) 47

* *American Can Company*,
218 NLRB 102 (1975),
enforced, 535 F.2d 180 (2d Cir. 1976) 22

Appalachian Shale Products, Co.,
121 NLRB 1160 (1958) 40

Bituma Corp. v. NLRB,
23 F.3d 1432 (8th Cir. 1994) 26,27

Boire v. Greyhound Corp.,
376 U.S. 473 (1964).....3

Boston Gas Co.,
235 NLRB 1354 (1978) 42

* *Boston Insulated Wire & Cable Co.*,
259 NLRB 1118 (1982),
enforced, 703 F.2d 876 (5th Cir. 1983) 46,49

C.J. Krehbiel Co. v. NLRB,
844 F.2d 880 (D.C. Cir. 1988).....44

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82 F.3d 469 (D.C. Cir. 1996) 43

Chicagoland Television News, Inc.,
328 NLRB 367 (1999) 51

Chrill Care, Inc.,
340 NLRB 1016 (2003) 50

* *Clement-Blythe Cos.*,
182 NLRB 502 (1970),
enforced, 1971 WL 2966 (4th Cir. 1971) 26,27,30

Continental Oil Co. v. NLRB,
113 F.2d 473 (10th Cir. 1940) 56

District Lodge 64, IAM v. NLRB,
949 F.2d 441 (D.C. Cir. 1991) 41

Dunkin' Donuts Mid-Atlantic Distributing Ctr., Inc. v. NLRB,
363 F.3d 437 (D.C. Cir. 2004) 24

Electric Hose& Rubber Co.,
262 NLRB 186 (1982) 50

Endicott-Johnson de Puerto Rico, Inc.,
172 NLRB 1676 (1968) 30

Family Serv. Agency v. NLRB,
163 F.3d 1369 (D.C. Cir. 1999) 44

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230 NLRB 476 (1977) 35,36

Freund Baking Co.,
330 NLRB 17 (1999) 3

General Cable Corp.,
139 NLRB 1123 (1962) 35,40

General Extrusion,
121 NLRB 1165 (1958) 36

Gerlach Meat Co.,
192 NLRB 559 (1971) 30

Gilmore Motors, Inc.,
121 NLRB 1672 (1958) 29

Gold Bond Building Products,
280 NLRB 1004 (1986) 54

J.C. Penney Food Department,
195 NLRB 921 (1972),
enforced, 1972 WL 1087 (7th Cir. 1972) 54

Kux Manufacturing Co. v. NLRB,
890 F.2d 804 (6th Cir. 1989) 51

Kwik Care Ltd. v. NLRB,
82 F.3d 1122 (D.C. Cir. 1996) 44

Lach-Simkins Dental Laboratories, Inc.,
186 NLRB 671 (1970) 51

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346 N LRB No. 15, 2005 WL. 3590882 (2005),
enforced, 2006 WL 3770838 (4th Cir. 2006) 56,57

Leedom v. International Brotherhood of Electric Workers Local 108,
278 F.2d 237 (D.C. Cir. 1960).....35

M&M Bakeries, Inc.,
121 NLRB 1596 (1958),
enforced 271 F.2d 602 (1st Cir. 1959).....55,56

Macklanburg-Duncan Co.,
179 NLRB (7th Cir. 1972).....54

Mass. Society For Prevention of Cruelty To Children v. NLRB,
297 F.3d 41 (1st Cir. 2002).....20

Melrose-Wakefield Hospital Association v NLRB,
615 F.2d 563 (1st Cir. 1980).....49

Microimage Display Division of Xidex Corp. v. NLRB,
924 F.2d 245 (D.C. Cir. 1991).....19

Milchem, Inc.,
170 NLRB 362 (1968) 46

Nathan Katz Realty v. NLRB,
251 F.3d 981 (D.C. Cir. 2001).....49

NLRB v. AAA Alternator Rebuilders, Inc.,
980 F.2d 1395 (11th Cir. 1993) 26,27,29

NLRB v. A.J. Tower Co.,
329 U.S. 324 (1946).....18,43

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

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

NLRB v. Coca-Cola Bottling Co.,
132 F.3d 1001 (4th Cir. 1997) 51

NLRB v. Detective Intelligence Serv., Inc.,
448 F.2d 1022 (9th Cir. 1971) 20

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315 F.3d 813 (7th Cir. 2003) 26,27,31

NLRB v. Harris-Woodson Co.,
179 F.2d 720 (4th Cir. 1950) 56,58

NLRB v. Hood Furniture Manufacturing Co.,
941 F.2d 325 (5th Cir. 1991) 51

NLRB v. Mississippi Power & Light Co.,
769 F.2d 276 (5th Cir. 1985) 35

NLRB v. Springfield Hospital,
899 F.2d 1305 (2d Cir. 1990).....55

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276 F.2d 865 (7th Cir. 1960)
enforced 271 F.2d 865 (7th Cir. 1960) 55,56

North Brothers Ford,
220 NLRB 1021 (1975) 41

Nu-Skin,
307 NLRB 223 (1992) 51

Operating Engineers Local 627 v. NLRB,
595 F.2d 844 (D.C. Cir. 1979).....42,43

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

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

* *Overnite Transp. v. NLRB*,
140 F.3d 259, 269 (D.C. Cir. 1998) 46,49,51

Owens-Illinois, Inc.
271 NLRB 1235 (1984) 53

Passavant Retirement & Health Ctr., Inc.,
313 NLRB 1216 (1994) 43

Pentagon Plaza, Inc.,
143 NLRB 1280 (1963) 21

Perdue Farms, Inc. v. NLRB,
144 F.3d 830 (D.C. Cir. 1998) 19

Performance Measurements Co.,
148 NLRB 1657 (1964) 49.50

Prime Service, Inc. v. NLRB,
266 F.3d 1233 (D.C. Cir. 2001) 28

RC Aluminum Industrial, Inc. v. NLRB,
326 F.3d 235 (D.C. Cir. 2003) 24

R.L. White Co., Inc.,
262 NLRB 575 (1982) 51

Raymond's, Inc.,
161 NLRB 838 (1966) 36

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179 NLRB 56 (1969),
enforced, 432 F.2d 70 (1st Cir. 1970) 21,41

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108 NLRB 112 (1954) 29

Setzer's Supermarkets of Ga., Inc.,
145 NLRB 1500 (1964) 20

Silverlake Nursing Home,
178 NLRB 478 (1969) 36

Somerville Iron Works, Inc.,
117 NLRB 1702 (1957) 21,22

Sonicraft, Inc.,
276 NLRB 407 (1985) 51

St. Louis Harbor Service Company,
150 NLRB 636 (1964) 22

* *Stow Mfg. Co.*,
103 NLRB 1280 (1953)
enforced, 217 F.2d 900 (2d. Cir. 1954) 20,41,42

Teamsters Local 671,
199 NLRB 994 (1972) 20

Teamsters National United Parcel Service Negotiating Community v. NLRB,
17 F.3d 1518 (D.C. Cir. 1994) 42

Terrace Gardens Plaza, Inc. v. NLRB,
91 F.3d 222 (D.C. Cir. 1996) 3,35,36

* *Toto Industrial*,
323 NLRB 645 (1997) 26,27

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

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

* *U.S. Chaircraft, Inc.*,
132 NLRB 922 (1961) 21,22,23

Virginia Concrete Corp.
338 NLRB 1182 (2003) 40

Woods Quality Cabinetry Co.,
340 NLRB 1355 (2003) 57,58

Statutes **Page(s)**

* National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 7 (29 U.S.C. § 157) 16
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....3,5,16,19
Section 8(a)(5) (29 U.S.C. § 158(a) (5)).....3,5,16,19
Section 9(c) (29 U.S.C. § 159(c)) 3
Section 9(d) (29 U.S.C. § 159(d)).....3
Section 10(a) (29 U.S.C. § 160(a)) 2
Section 10(e) (29 U.S.C. § 160(e)) 2,19
Section 10(f) (29 U.S.C. § 160(f)) 2

Regulations **Page(s)**

29 C.F.R. §102.69(d) 47

Fed.R.App.P. 28(a)(9)(A) 24

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

TABLE OF AUTHORITIES

Miscellaneous **Page(s)**

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NLRB Casehandling Manual, Representation Proceedings, §11008 (1999) 22

NLRB Outline of Law and Procedure in Representation Cases §3-300 (2005).....22

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

GLOSSARY

300S	United Food and Commercial Workers Local 300S
1199	Service Employees International Union Local 1199
A__	Citations to the Joint Appendix
Act	The National Labor Relations Act, 29 U.S.C. § 151 et seq. (Relevant sections are reproduced in an addendum to this brief.)
Board	The National Labor Relations Board, Respondent/Cross-Petitioner
Br	Citations to New York Rehabilitation Care et al.'s opening brief
Company	Petitioners New York Rehabilitation Care Management, LLC, and New York Center for Rehabilitation Care, Inc., collectively
DOH	New York State Department of Health
Excelsior list	List of employees an employer believes are eligible to vote in a Board-conducted election
Lyden	Lyden Care Center, a skilled nursing facility located at 27-37 27th Street, Astoria, New York
NY Center	New York Center for Rehabilitation Care, the Company's skilled nursing facility located at 26-13 21st Street, Astoria, New York
Rehab Management	New York Rehabilitation Management, LLC, an entity established to operate NY Center
SA	Citations to the Supplemental Appendix
SEIU	Service Employees International Union

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Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-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 petition for review filed by New York Rehabilitation Care Management, LLC, and New York Center for Rehabilitation Care, Inc. (collectively "the Company"), and on the cross-application for enforcement filed by the National Labor Relations Board ("the Board"), of a Decision and Order issued by the Board against the Company. The Board's

Decision and Order issued on July 29, 2005, and is reported at 344 NLRB No. 148. (A 1189-92.)[1]

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended ("the Act").[2] The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act,[3] which provide that review of Board orders may be sought in this Court. The Company filed its petition for review on May 5, 2006. The Board filed its cross-application for enforcement on June 19, 2006. Both were timely; the Act places no time limit on the institution of proceedings to review or enforce Board orders. The Board's order is final under Section 10(e) and (f) of the Act.

The record in the underlying representation proceeding before the Board (Board Case Nos. 29-RC-9785, 29-RC-9937) also is before the Court pursuant to Section 9(d) of the Act,[4] because the Board's Order is based, in part, on findings

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[1] Record references in this final brief are to the appendices. "A" refers to the joint appendix and "SA" refers to the supplemental appendix. "Br" refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] 29 U.S.C. §§151, 160(a).

[3] 29 U.S.C. §160(e) and (f).

[4] 29 U.S.C. §159(d).

made in that proceeding.[5] 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, in whole or in part, the Board's unfair labor practice order. The Board retains authority under Section 9(c) of the Act[6] to resume processing the representation case in a manner consistent with the ruling of this Court.[7]

STATEMENT OF THE ISSUES

The ultimate issue in this case is whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act[8] by refusing to bargain with the Service Employees International Union Local 1199 ("1199") after the Board certified 1199 to represent the Company's employees following a Board-supervised election. The Company admits that it has refused to bargain with 1199. Its several defenses with respect to the Board's processing of the election cases make up the contested issues.

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[5] *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964); *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996).

[6] 29 U.S.C. §159(c).

[7] *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

[8] 29 U.S.C. §158(a)(5) and (1).

1. Whether the Board acted within its broad discretion in revoking the certification of United Food and Commercial Workers Local 300S ("300S"), and directing a second election with both 300S and 1199 on the ballot.

   a. Whether the Company has waived its right to contest the Board's finding that the Company's failure to notify the Board of 1199's interest in the case warranted revocation of 300S' certification.

   b. Whether the Board abused its discretion in finding the first election premature because, at that time, the Company did not employ a substantial and representative complement of its reasonably foreseeable future workforce.

2. Whether the Board acted within its broad discretion in concluding that, because 300S was never properly certified to represent the employees, the 300S collective-bargaining agreement could not bar the second election and there can be no accretion of additional employees to a 300S bargaining unit.

3. Whether the Board acted within its wide degree of discretion in overruling the Company's objections to the conduct of the second election, won by 1199.

4. Whether the Board properly denied the Company's motion for reconsideration based on the disaffiliation of the Service Employees International Union from the AFL-CIO.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the attached addendum to this brief.

STATEMENT OF THE CASE

The Board found that the Company violated Section 8(a)(5) and (1) of the Act[9] by refusing to bargain with 1199 as the certified collective-bargaining representative of an appropriate unit of the Company's employees. The Company admits that it refused to bargain. In its defense, the Company contends that: the Board erred by revoking the certification of 300S and directing the second election won by 1199; the 300S collective-bargaining agreement precluded the second election; 1199's electioneering tainted the second election; and the Board should have reconsidered 1199's certification due to the subsequent disaffiliation of the Service Employees International Union from the AFL-CIO. The procedural history and factual background of the case before the Board are set forth below.

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[9] 29 U.S.C. §158(a)(5) and (1).

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Representation/Election Proceeding

1. Entities involved

Lyden Care Center ("Lyden") was a 114-bed skilled nursing facility located at 27-37 27th Street, Astoria, New York. (A 1103; 286, 844.) Chaim Sieger was the facility's administrator. Sieger's son-in-law, Nathan Brachfeld, was the assistant administrator. (A 1103; 285-86.) For more than 20 years, 1199 represented the Lyden employees. The most recent collective-bargaining agreement expired on September 30, 2002. (A 1103-04; 147-49, 753-59.) As described below, in early October 2002, Lyden ceased operations and the employees and patients transferred to a new company facility ("NY Center").

NY Center is a 280-bed skilled nursing facility located at 26-13 21st Street, Astoria, New York, a few blocks from Lyden. (A 1104; 288-89, 437, 694-95.) Brachfeld, Lyden's former assistant administrator, became NY Center's administrator in January 2002. Sieger became NY Center's controller in January 2003. (A 1104, 1106; 281, 302.)

Sieger is also the majority owner of another entity, New York Rehabilitation Management, LLC ("Rehab Management"), which was established to operate NY Center. (A 1107-08; SA 4-41.) On November 15, 2001, Sieger submitted an

application on behalf of Rehab Management to the New York Department of Health (DOH) for a license to operate NY Center. (A 1107; SA 4-41.) The DOH approved Rehab Management's application on July 30, 2003. (A 1108; SA 57-58.) The Company does not contest the Board's finding that the three entities constituted a single employer.

2. Procedural history; opening of NY Center and closure of Lyden

a. 300S election and certification

On January 25, 2002, 300S filed an election petition seeking to represent employees at NY Center, although it had not yet begun admitting patients. On January 31, the Board's regional office approved the stipulated election agreement (which set forth the terms of the election) between 300S and the Company. Neither 300S nor the Company advised the regional office that NY Center was not fully operational, that the Company anticipated that the 1199-represented employees from Lyden would transfer to NY Center, or that 1199 had an interest in representing the employees at NY Center. (A 1098-99, 1113-14; 548-50, 629, 643-44.)

Pursuant to the Board-conducted February 22 election, the Board's Regional Director certified 300S as the collective-bargaining representative of the bargaining-unit employees at NY Center on March 13. (A 1099; 645.) On April

26, the Company and 300S executed a collective-bargaining agreement that was retroactively effective from March 26 through March 25, 2006. (A 1105; 734-52.)

b. Anticipated and initial staffing of NY Center

The Company planned the staffing of NY Center based on filling its 280 beds and the anticipated closure of Lyden. Sieger's November 2001 application to the DOH projected 80 percent occupancy within 12 months "since Lyden Nursing Home will be transferring its patients to the NY Center after a few months of operation." (A 1109; SA 42.)

In January 2002, NY Center Administrator Brachfeld anticipated hiring about 300 total employees based on an analysis of the staffing requirements for 280 beds. The nursing homes at which Brachfeld had previously worked had ratios of about one employee to one patient. (A 1109; 522, 566-67.) Brachfeld's aim was to transfer the Lyden patients and employees to NY Center. In January 2002, Brachfeld expected that filling the 280 beds would take 14 to 16 months if the Lyden patients transferred, and 2 years if they did not. Previously, the DOH had advised Brachfeld that, if the Lyden patients transferred to NY Center, it would be beneficial to have the Lyden staff come with them to avoid "transfer trauma." (A 1109; 521-25.)

The employees hired in January 2002 worked to prepare NY Center. Because no patients were admitted until April 29, 2002, they performed no patient

care. Instead, they did tasks such as cleaning, stocking the facility, preparing the kitchen, and organizing patient care binders. (A 1115; 531-33.)

The stipulated election agreement provided that only employees who had been hired by January 12 were eligible to vote. (A 643.) NY Center hired its first employees on January 7. The Company submitted to the Board's regional office a list—known as the "*Excelsior* list"—of 45 employees whom it believed were eligible to vote. (A 1116; 703, 760-840, 704-24.) The vast majority of those employees had worked fewer than 8 hours, total, as of January 12.[10] According to Brachfeld, most employees hired in January were not working full-time, and some worked only 4 to 6 hours per week. (A 1116; 576-80, 703, 760-840, 704-24.) By late April, when NY Center began admitting patients, most of the *Excelsior* list employees had disappeared from its payroll. (A 1116; 703, 760-840, 704-24.) Brachfeld believed that, as time passed before the facility opened, some employees became disheartened and left. (A 1117; 533-35.)

Once NY Center began admitting patients, its workforce increased. Payroll records reflect the following increase in employees:

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[10] The Company's payroll records only indicate the wages earned, not the hours worked. Hours can be computed by dividing the wages by the hourly rate. Brachfeld estimated that most employees were paid $5-7 per hour and that LPNs earned $15-16/hour. (A 1116 n.14; 573-81, 760-840, 704-24.)

Payroll dates	Number of bargaining unit employees
May 8	59
June 5	63
August 14	102
September 18	121

(A 1118; 685, 760-840, 704-24.) The number of employees previously named in the *Excelsior* list, however, continued to dwindle. (A 1117 n.15; 703, 760-840, 704-24.)

c. Lyden employees and patients transfer to NY Center

According to Sieger, he met with Lyden employees in early February 2002 to address their concerns that Lyden might close. He told them that, if it did close, they should all apply at NY Center. (A 1110; 392-96, 414.) 1199 sent a letter to Sieger on February 28 requesting a meeting about the rumored relocation and stating that employment at the new facility did not affect its members' rights under the existing 1199 contract. (A 1111; 842.)

In early March, Sieger met with 1199 representatives, but he refused to provide any information regarding the relocation. (A 1111; 435-36, 450-51.) After the meeting, the 1199 representatives walked over to NY Center; a guard told them that it was not open yet. (A 1111-12; 436-38, 451-52.) On March 21, 1199 asked Sieger to begin negotiations for a new contract to succeed the one expiring on September 30. Sieger refused. (A 1112, 439-40, 843.)

According to Lyden employees, Sieger held a staff meeting in spring or summer 2002, at which he told them that they would be moving to NY Center, but everything would be the same; they would have the same seniority, vacation and sick time. (A 1110; 468-69, 488-89.) On August 1, Sieger sent Lyden employees a memorandum stating that Lyden would close in early October. (A 1110; 841.)

In mid-August, 1199 representatives and Sieger met again. Sieger told 1199 that the DOH had approved the transfer of Lyden patients to NY Center, but that he was still waiting for his administrative license to operate it. Sieger stated that, if he did not obtain the license, he would keep Lyden open for another 3 years and sign another collective-bargaining agreement. He added that, if he did obtain the license, Lyden would close 30 days afterwards. (A 1112; 438-39.)

From October 7 to 9, Lyden ceased patient care as approximately 100 patients and 77 employees transferred to NY Center.[11] The payroll reflects the following numbers of unit employees at NY Center in October 2002 and afterwards:

[11] The Company compiled a list of 60 Lyden employees who transferred to NY Center. That list, however, omitted 17 other Lyden employees who transferred as reflected in a dues checkoff list submitted by Lyden to 1199. (A 1118; 44-45, 512-13, 725-33.)

Payroll dates	Number of bargaining unit employees
October 2, 2002	132
October 9	138
October 16	202
October 23	211
October 30	207
December 4	232
June 4, 2003	243

(A 1118-19; 685, 760-840, 704-24, 846-1094.) As of September 2003, there were about 215 to 220 unit employees. (A 1119; 287, 604.)

d. 1199 petition; first hearing on revocation of 300S certification

On October 22, 1199 filed an election petition seeking to represent the employees at NY Center. On October 25, it filed a motion to revoke 300S' certification. (A 1099-1100; 17-21, 646.)

On January 16, 2003, the Regional Director issued a notice of hearing to address: (1) whether the parties' failure to notify the region of 1199's interest should result in revocation of 300S' certification, (2) whether the February 2002 election was appropriate in light of the employee complement, job classifications, and nature of operations at that time, and (3) any other relevant issues that the parties wished to raise. (A 1100; 647-49.) That hearing was held on February 10-11. The Company and 300S did not participate beyond stating their positions and providing subpoenaed documents. They contended that the issues would be better

addressed in an unfair labor practice proceeding, rather than a representation/election case. (A 1100; 36-43.) After considering briefs from all parties, on March 21, the Regional Director issued an order revoking 300S' certification. (A 1101-02; 652-85.)

e. The second hearing and second election

The Company and 300S appealed that decision to the Board. The Board reversed and ordered the Regional Director to hold the representation/election case in abeyance until resolution of the unfair labor practices filed by 1199 against the Company and 300S, and then to provide the parties with a second opportunity to litigate all relevant issues. (A 1102; 686-87.)

On September 3, 2003 the Regional Director approved 1199's request to withdraw its unfair labor practice charges. On September 5, the Regional Director issued a notice of hearing to encompass the following issues: (1) whether Lyden, NY Center, and Rehab Management constituted a single employer; (2) whether the Company employed a substantial and representative complement of its workforce at the time of the election; (3) whether the Lyden employees should be an accretion to the 300S unit; and (4) any other relevant issues the parties wished to raise. (A 1102; 688-91, SA 3.)

The second hearing was conducted over 4 days, closing on October 2, 2003. The Company participated fully in the hearing. 300S participated initially, but its counsel failed to appear in the latter part of the hearing. (A 1103; 375, 509.)

On January 8, 2004, the Regional Director issued a supplemental order revoking 300S' certification and directing a second election, with 300S and 1199 on the ballot. He found that Lyden, NY Center, and Rehab Management constituted a single employer due to, among other things, the involvement of Sieger and Brachfeld in the entities' management, labor relations, and ownership. He revoked 300S' certification because: the NY Center workforce at the time of the election and certification was not a substantial and representative complement of the reasonably foreseeable future workforce; the Company's *Excelsior* list likely included employees ineligible to vote; and the Company and 300S failed to notify the Board of 1199's interest in representing the employees. Because 300S' certification was invalid, the Regional Director found that the 300S collective-bargaining agreement could not bar a second election and that the Lyden employees could not be accreted to a 300S bargaining unit. (A 1096-1143.)

After the Board denied requests for review of the supplemental decision, a second election was held on March 11. The tally of ballots showed 200 votes for 1199 and 5 for 300S. (A 1149.)

The Company and 300S filed objections to the conduct of the election claiming that 1199's electioneering tainted the vote. On May 20, the Regional Director issued a decision rejecting those objections and certifying 1199 as the representative of the employees. (A 1150-66.) On August 19, 2004, the Board rejected the appeals regarding the election objections. (A 1167-68.)

B. The Unfair Labor Practice Case

After the Board's decision in the representation proceeding, 1199 requested that the Company recognize it as the employees' exclusive bargaining representative and begin bargaining. The Company refused. (A 1171 ¶11, 1173 ¶1.)

Upon 1199's charges, the Board's General Counsel issued a complaint alleging that the Company's refusal to bargain was unlawful. (A 1169-72.) The General Counsel then moved for summary judgment. (A 1174-87.) The Board issued a notice to show cause why summary judgment should not be granted. (A 1188.) The Company opposed summary judgment based on the arguments it asserted in the representation case.

II. THE BOARD'S CONCLUSIONS AND ORDER

On July 29, 2005, the Board (Chairman Battista and Members Liebman and Schaumber) issued its Decision and Order granting summary judgment and finding that the Company's refusal to bargain with 1199 violated Section 8(a)(5) and (1) of the Act. (A 1189-92.) In so doing, the Board concluded that all issues raised by the Company in the unfair labor practice proceeding were, or could have been, litigated in the underlying representation proceeding and that the Company had neither offered to adduce any newly discovered evidence, nor shown any special circumstances that would require the Board to reexamine its decision to certify 1199. (A 1189-90.)

The Board's Order requires the Company to cease and desist from refusing to bargain with 1199 and from, in any like or related manner, interfering with its employees' exercise of their rights under Section 7 of the Act.[12] (A 1191.) Affirmatively, the Board's Order directs the Company to bargain with 1199 upon request, to embody any understanding reached in a signed agreement, and to post copies of a remedial notice. (A 1191.)

In August 2005, the Company asked the Board to reconsider its decision because it believed the Service Employee International Union's disaffiliation from

[12] 29 U.S.C. §157.

the AFL-CIO raised questions as to employees' choice of 1199. On January 31, 2006, the Board denied the Company's motion for reconsideration.[13] (A 1193-94.)

SUMMARY OF ARGUMENT

At the time of the first election at NY Center, won by 300S, the Company failed to advise the Board, as required, of two important facts: (1) another union, 1199, had an interest in the case because 1199 represented employees at another company facility, Lyden Care Center, who were going to be transferred to NY Center, and (2) its workforce at NY Center would soon expand significantly such that an election among the few employees employed at that time was premature. Because of the Company's failure to notify the Board of 1199's interest in the case—a failure the Company does not challenge before this Court—the Board acted well within its authority in election cases and revoked 300S' certification as the employees' bargaining representative. The significant expansion of the workforce provided an independent basis for revocation of 300S' certification. In the second election, which appropriately included both 1199 and 300S on the ballot, the employees elected 1199 in a landslide victory.

The Company, however, refuses to bargain with 1199. It urges the Court to ignore the circumstances of 300S' certification and argues that its collective-bargaining agreement with 300S precluded the second election. The Company's

[13] 346 NLRB No. 44, 2006 WL 287412 (2006).

effort is doomed by its failure to recognize the Board's broad discretion in both policing union certifications and in applying its contract bar doctrine. Where the Company abused the Board's election processes, it cannot seek refuge in the contract that was the direct result of that abuse.

Additionally, the Board acted within its wide authority in election cases in overruling the Company's objections that 1199's electioneering and distribution of doughnuts, pizza, and union paraphernalia to employees tainted the second election. Finally, the Board properly rejected the Company's motion for reconsideration based on 1199's disaffiliation from the AFL-CIO. The disaffiliation does not provide a defense because it occurred *after* the Company's unlawful refusal to bargain. The Company also offered no evidence that the disaffiliation affected 1199's identity as the employees' bargaining representative.

STANDARD OF REVIEW

The Board has "broad discretion to assess the propriety and results of representation elections."[14] The Board exercises a similarly "wide degree of discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."[15]

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[14] *AOTOP, L.L.C. v. NLRB*, 331 F.3d 100, 103 (D.C. Cir. 2003) (internal quotation marks omitted).

[15] *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946).

This Court's "review of the Board's factual conclusions is 'highly deferential.'"[16] Those findings of fact are "conclusive" if supported by substantial evidence considered on the record as a whole.[17] Thus, "[i]f there is substantial evidence to support the Board's conclusions, [this Court] will uphold the Board's decision even if [the Court] would have reached a different result had [it] considered the question *de novo*."[18] Standards of review specific to contested issues are set forth in the relevant sections.

ARGUMENT

I. THE COMPANY VIOLATED SECTION 8(a)(5) and (1) OF THE ACT BY REFUSING TO BARGAIN WITH 1199 AFTER ITS VICTORY IN THE SECOND ELECTION

An employer cannot obtain direct judicial review of the Board's decisions in representation/election cases. The employer must refuse to bargain with the union to bring the validity of the union's certification before the Court.[19] An employer violates Section 8(a)(5) and (1) of the Act[20] by refusing to recognize and bargain

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[16] *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) (citation omitted).

[17] 29 U.S.C. §160(e).

[18] *Perdue Farms*, 144 F.3d at 834 (citation and quotation marks omitted).

[19] *AOTOP*, 331 F.3d at 103.

[20] 29 U.S.C. §158(a)(5) and (1). A violation of the rights protected by Section 8(a)(5) constitutes a "derivative" violation of Section 8(a)(1). *See e.g. Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 250 (D.C. Cir. 1991).

with the duly certified collective-bargaining representative of the employees in an appropriate bargaining unit.[21] It is undisputed that the Company refused to bargain with 1199. Accordingly, if, as we show, the Board acted within its broad discretion in revoking 300S' certification and subsequently certifying 1199 as the employees' collective-bargaining representative, the Company's refusal to bargain with 1199 was unlawful.

II. THE BOARD ACTED WELL WITHIN ITS DISCRETION IN REVOKING 300S' CERTIFICATION AND DIRECTING A SECOND ELECTION

A. The Board's Authority to Revoke Certifications

The certification of election results is "not completely sacrosanct" and may be "rescinded by the Board at any time where necessary to effectuate the policies of the Act, even though such action involves a change or destruction of an existing bargaining status."[22] Thus, "'[t]he Board has consistently held that it may police its certifications by amendment, clarification, or even revocation.'"[23] Regional

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[21] *AOTOP*, 331 F.3d at 102-03.

[22] *Stow Mfg. Co.*, 103 NLRB 1280, 1305 (1953), *enforced*, 217 F.2d 900 (2d Cir. 1954).

[23] *Mass. Society For Prevention of Cruelty To Children v. NLRB,* 297 F.3d 41, 51 (1st Cir. 2002) (quoting 1 The Developing Labor Law 447 (Patrick Hardin ed., 3d ed. 1992)). *See also NLRB v. Detective Intelligence Serv., Inc.*, 448 F.2d 1022, 1025 (9th Cir. 1971) (representation case; correcting erroneous bargaining unit description); *Teamsters Local 671*, 199 NLRB 994, 994 (1972) (unfair labor practice case; revoking union's certification for failure to represent certain employees); *Setzer's Supermarkets of Ga., Inc.*, 145 NLRB 1500, 1502 (1964)

directors also may reconsider their decisions, under the Board's delegation of authority to them in representation cases.[24] Procedurally, as noted (A 1124) by the Regional Director here, revocation of a certification can be addressed via a supplemental proceeding in the underlying representation case.[25] Here, the Board acted within its wide authority in representation cases to revoke the certification of 300S due to: (1) the failure of 300S and the Company to notify the Board of 1199's interest in representing the employees—which the Company no longer contests, and (2) the lack of a substantial and representative complement of employees at the time of the first election.

B. The Company Has Waived Its Right to Contest the Board's Finding that Its Failure to Notify the Board of 1199's Interest in the Case Warranted Revocation of 300S' Certification

In election cases, Board rules require all parties to notify it of any other interested parties. In the instant case, the Board expressly requested that information from the Company. Yet, the Company failed to meet that obligation and does not contest that finding before the Court. That failure alone warranted revocation of 300S' certification.

(representation case; revoking union's certification for failure to represent certain employees).

[24] *Reed Rolled Thread Die Co.*, 179 NLRB 56, 64 (1969), *enforced*, 432 F.2d 70 (1st Cir. 1970); *Pentagon Plaza, Inc.*, 143 NLRB 1280, 1283 n.3 (1963).

[25] *U.S. Chaircraft, Inc.*, 132 NLRB 922, 923 (1961); *Somerville Iron Works, Inc.*, 117 NLRB 1702, 1703 (1957).

Under Board regulations, "all parties are requested to submit copies of any presently existing or recently expired contracts covering any of the employees as well as pertinent correspondence, and to notify the Board agent of any other interested parties entitled to be advised of the proceeding."[26] "Interested parties" include "labor organizations and individuals who claim or are believed to claim to represent any employees within the unit claimed to be appropriate and/or whose contractual interests would be affected by the disposition of the case."[27] They include any union that is party to an existing or recently expired collective-bargaining agreement covering the employees involved or other employees of the employer in other related units.[28]

The Board has revoked certifications based on the failure to notify the Board of another interested union if it resulted in that union being excluded from the ballot.[29] The Board has stated, "[i]t is for the Regional Director or the Board, and not the parties, to determine whether a claim has sufficient validity or vitality to

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[26] NLRB Outline of Law and Procedure in Representation Cases §3-300 (2005). *Accord* NLRB Casehandling Manual, Representation Proceedings, §11008.4 (1999). Both manuals are available at www.nlrb.gov/publications/manuals.

[27] NLRB Casehandling Manual, Representation Proceedings, §11008.1 (1999).

[28] *Id.* at §11008.1(d),(g).

[29] *American Can Company*, 218 NLRB 102, 104 (1975), *enforced*, 535 F.2d 180 (2d Cir. 1976); *St. Louis Harbor Service Company*, 150 NLRB 636, 645-46, 652-53 (1964); *U.S. Chaircraft*, 132 NLRB 922, 923 (1961); *Somerville Iron Works, Inc.*, 117 NLRB 1702, 1703 (1957).

require that notice of the proceeding be given to the claimant and an opportunity be given to be placed on the ballot ….”[30]

In accordance with those regulations, the regional office sent to the Company and 300S a cover letter, along with a copy of 300S’ petition, directly asking them to notify the regional office of “any other labor organization claiming to represent any of the employees in the petitioned-for unit.” (A 630.) At the time, the Company knew, or at the very least, anticipated, that the Lyden employees would transfer to NY Center and become part of that unit. It also knew that 1199 represented the Lyden employees and that those employees were covered by a valid collective-bargaining agreement. Yet, the Company ignored the Board’s request to provide it with that relevant information, which resulted in 1199 being left off the ballot in the first election and 300S becoming certified. By doing so, the Company impermissibly restricted employees’ election choices.[31]

In its opening brief, the Company offers no argument challenging the Board’s conclusion that the Company’s failure to notify the Regional Director of 1199’s interest warranted revocation of 300S’ certification. Further, the Company concedes (Br 10 n.3) the Board’s finding that Lyden, NY Center, and Rehab

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[30] *U.S. Chaircraft*, 132 NLRB at 923.

[31] See cases cited above at p. 22, n.29.

Management constituted a single employer.[32] In effect, there was only one employer with two facilities that it planned to merge. Thus, the Company cannot claim that NY Center and Lyden were separate entities such that the former had no obligation to advise the Board of 1199's interest in continuing to represent the latter's employees.

Accordingly, where, in its opening brief, the Company has failed to contest the Board's failure-to-notify finding, it is waived and deemed admitted.[33] Thus, on that basis alone, the Court must uphold the Board's revocation of 300S' certification and direction of the second election.

Any oblique references to notice in the Company's opening brief are insufficient to contest the Board's failure-to-notify finding. First, the Company offers no authority or record citation to support its puzzling statement (Br 19) that "ample public notice" of the first election is "imputed" to 1199. The Board does not publicize elections; the only notices of election are posted at the facility at which the election will be held. The Company does not explain how 1199 would or

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[32] Nominally separate business entities are treated as a single employer for the purposes of the Act where they are highly integrated with respect to ownership and operation. *See RC Aluminum Indus., Inc. v. NLRB*, 326 F.3d 235, 239 (D.C. Cir. 2003).

[33] *See e.g., Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) ("appellant's opening brief 'must contain' the 'appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.' We have enforced this rule before and we do so here again." (citing Fed.R.App.P. 28(a)(9)(A))).

could know about the election at NY Center. The Company's claim (Br 2) that "nothing was heard from 1199" erroneously shifts its burden to 1199. The Company was required to notify the regional office of 1199's interest; 1199 is not required to monitor all election cases filed in its territory on the off chance that it would have an interest in those cases.

Second, the Company suggests (Br 1-2, 43 n.15) that its alleged revisions to the stipulated election agreement to reflect that the NY Center facility was not fully operational shows that it did not conceal information. The agreement contained in the record contains no such revisions. The Company did not object to the accuracy or admission of that document. (A 120-21, 643-44.) Thus, there is no *record* evidence of any revisions agreed to by all parties and approved by the Regional Director. Indeed, the Company's claim only reinforces the impression that it was playing games with the Board's election process. It was obligated to forthrightly inform the Board of the relevant facts that the NY Center was not fully operational, that the unit would expand, and that the 1199-represented Lyden employees would transfer. Dropping hints and clues via any alleged revisions to the stipulated election agreement hardly suffices to provide the requisite notice of 1199's interest.

C. The First Election Was Premature Because, at that Time, the Company Did Not Employ a Substantial and Representative Complement of Its Reasonably Foreseeable Future Workforce

1. Applicable principles

In addition to the failure to notify the Board of 1199's interest, the lack of a substantial and representative complement of employees at the time of the first election also required the revocation of 300S' certification and a second election. In determining whether to direct an election where an employer plans to expand its operations and workforce, the Board applies its well-established and judicially-approved rule that an immediate election is appropriate only when the present workforce constitutes a "substantial and representative" complement of the employer's "reasonably foreseeable future workforce."[34] To determine whether a substantial and representative complement exists, the Board considers the following factors:

(1) the size of the workforce at the time of the representation hearing;

(2) the size of the employee complement eligible to vote;

(3) the size of the expected ultimate employee complement;

(4) the time expected to elapse before the full workforce is present;

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[34] *NLRB v. Deutsche Post Global Mail, Ltd.*, 315 F.3d 813, 815 (7th Cir. 2003). *See also Bituma Corp. v. NLRB*, 23 F.3d 1432, 1435-36 (8th Cir. 1994); *NLRB v. AAA Alternator Rebuilders, Inc.*, 980 F.2d 1395, 1397-98 (11th Cir. 1993); *Toto Indus.*, 323 NLRB 645, 645 (1997); *Clement-Blythe Cos.*, 182 NLRB 502, 502 (1970), *enforced*, 1971 WL 2966 (4th Cir. 1971).

(5) the rate of expansion, including the time and size of projected interim hiring increases before reaching the full complement;

(6) the certainty of expansion;

(7) the number of job classifications requiring different skills which are currently filled;

(8) the number of job classifications requiring different skills which are expected to be filled when the ultimate employee complement is reached; and

(9) the nature of the industry.[35]

Essentially, the Board must weigh directing an immediate election to allow quick union representation of employees against waiting to ensure that the election of the representative is based on more than a few currently employed employees.[36] The Board has explicitly rejected the use of strict numerical rules to define substantial and representative complements in the election-timing context in favor of a fact-specific, case-by-case analysis.[37] Courts review the Board's determination of when to conduct elections in the context of expanding units for abuse of discretion.[38] In successorship cases, this Court upholds the Board's determination

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[35] *Toto*, 323 NLRB at 645.

[36] *AAA Alternator Rebuilders*, 980 F.2d at 1397; *Toto*, 323 NLRB at 645; *Clement-Blythe*, 182 NLRB at 502.

[37] *See Deutsche-Post*, 315 F.3d at 815-16; *Bituma*, 23 F.3d at 1435; *Toto*, 323 NLRB at 645 & n.3.

[38] *Bituma*, 23 F.3d at 1435; *AAA Alternator Rebuilders*, 980 F.2d at 1397.

of whether a substantial and representative complement of employees existed where it is supported by substantial evidence.[39]

2. The Board did not abuse its discretion in finding that the first election was premature because the Company did not employ a substantial and representative complement of employees

Typically, in substantial-and-representative-complement cases, the employer seeks to delay the election, while the union argues that employees need immediate union representation. In those circumstances, the Board must attempt to predict the future of the alleged expansion to determine if an immediate election would be appropriate. Here, however, neither the Company nor 300S ever notified the Board at the time of the election that the bargaining unit was going to expand. When the Board subsequently learned of the unit's expansion and the Lyden employees' transfer, the investigation and examination of the situation was, of necessity, an after-the-fact comparison of the employee complement at the time of the first election to the actual expansion of the unit.

The Board's treatment of the unusual posture of the case is consistent with the limited precedent that exists. In at least one case, the Board compared the number of voters to actual (rather than anticipated) numbers of employees after a relocation; the reviewing court observed that an after-the-fact comparison "may be

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[39] *Prime Service, Inc. v. NLRB*, 266 F.3d 1233, 1238 (D.C. Cir. 2001).

more trustworthy than a pre-transfer projection of what the facts will be."[40] Also, the Board has revoked a union's certification and, in a separate case, directed a rerun election based on changes to the units that subsequently came to light.[41]

Here, applying the multifactor case-by-case analysis, the Board correctly found that the Company did not employ a substantial and representative complement at the time of the first election. In a November 2001 filing to the DOH, Sieger projected that NY Center would have 80 percent (*i.e.*, 224 of 280 beds) occupancy by October 2002. In January 2002 when the election petition was pending, the Company anticipated that the staff would grow and likely would include the 1199-represented Lyden employees. Specifically, at that time, NY Center Administrator Brachfeld anticipated hiring approximately 300 total employees, based on his analysis of the staffing requirements for a 280-bed facility. In his prior experience at nursing homes, there was about a one-to-one staff-to-patient ratio. Also at that time, Brachfeld believed that reaching full occupancy would take 14 to 16 months if the Lyden patients transferred to NY Center and 2 years if they did not. Based on the roughly one-to-one ratio, staffing 224 beds would require over 200 unit employees

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[40] *AAA Alternator Rebuilders*, 980 F.2d at 1397, 1399 (election held, but ballots impounded pending determination of substantial and representative complement after relocation).

[41] *See Gilmore Motors, Inc.*, 121 NLRB 1672, 1672-73 (1958) (certification revoked after employer acquired nonunion company and merged two groups of employees); *Riviera Mines Co.*, 108 NLRB 112, 113-14 (1954) (directing second election using new payroll eligibility date due, in part, to expanding unit).

by October 2002. Indeed, the actual patient census (A 845) followed Sieger's November 2001 projection that the facility would be 80 percent full by October 2002. Thus, in less than 8 months—from the date of the first election on February 22 to the early October transfer of the Lyden patients and employees—the unit expanded as Sieger had anticipated, from 45 unit employees to over 200 unit employees. That time period is comparable to those found reasonable for measuring the representative complement of employees in other cases.[42]

Thus, the evidence amply supports the Board's conclusion that the first election was premature because the Company did not employ a substantial and representative complement of employees at that time. Instead, a small group of 45 (possibly ineligible) voters selected the bargaining representative for a unit of more than 200 employees. Consequently, very few of the people who came to be represented by 300S and covered by its contract with the Company actually voted in the election.

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[42] *Gerlach Meat Co.*, 192 NLRB 559, 559 (1971) (2 years too remote, but 9 months was "more realistic date for measuring the substantiality of the present force"); *Clement-Blythe*, 182 NLRB at 502-03 (comparing workforce as of payroll eligibility date to projected workforce 9 months later); *Endicott-Johnson de Puerto Rico, Inc.*, 172 NLRB 1676, 1676-77 (1968) (comparing workforce at time of hearing to projected workforce 8 months later).

3. The Company's arguments lack merit

The Company's threshold observation (Br 33), that the Board's revocation of 300S' certification is not the Company's "business," is curious where the Company is fighting tooth and nail to save 300S' certification and contract—especially where 300S has not even intervened in this case. Regardless, its arguments with respect to the substantial-and-representative complement issues fail because it refuses to acknowledge the Board's wide discretion and authority to police the certifications it issues. Further, while the Company pays lip service to the principle that the Board takes a case-by-case approach rather than applying a rigid numerical test in determining whether a substantial and representative complement existed, it crunches the numbers of employees at various times to meet its asserted 30 percent standard for a requisite complement. As we show, the Company's arguments do not provide the Court with a basis to reverse the Board's substantial-and-representative-complement findings.

First, the Company acknowledges (Br 35) the established principle that the Board takes a case-by-case approach rather than applying a strict numerical formula.[43] Yet, it proceeds (Br 38) through various computations in an effort to show that the 45 employees on the *Excelsior* list comprised more than 30 percent of

[43] *See NLRB v. Deutsche Post Global Mail, Ltd.*, 315 F.3d 813, 816-17 (7th Cir. 2003) (rejecting hard and fast rules in favor of granting Board freedom to weigh many factors).

its workforce at various times—conveniently ending its calculations before the time when Lyden employees transferred. Even applying the 30 percent rule the Company urges, however, the 45 *Excelsior* list employees comprised 22.5 percent of the post-transfer workforce of, conservatively, 200 employees. Regardless of how the Company plays with the numbers, it cannot avoid the fact that at the time of the first election it knew that its workforce would, out of necessity, expand significantly as its patient census increased.

The Company's argument (Br 36-38) that the Board should have cut off its comparison before the Lyden employees transferred ignores the well-established case-by-case approach. The Board has not established any firm cutoff for determining a reasonable period for delaying an election. Thus, the Company's citation (Br 37) to cases where the Board declined to delay an election by longer than 7 to 8 months does not establish a firm cutoff, especially where, as shown (p. 30 n.42), the Board has waited longer.

The Company's own documents belie its claim (Br 40) that, at the time of the first election, it was uncertain of when the unit would expand, how many employees it would employ, and its source for hiring. Sieger's DOH filing shows that as early as November 2001, the Company believed that the Lyden employees would transfer to NY Center within a few months of its opening and that it anticipated having about 224 patients by October 2002, with a corresponding

number of employees. (A 1109; SA 42-56.) The Company's related gripe (Br 37) that it has the "unenviable task" of having to work backwards in time falls flat where the Company eliminated the Board's ability to make a pre-election determination of the issue because it failed to notify the Board of the anticipated unit expansion.

Next, the Company's attack (Br 42-45) on the Board's finding that the *Excelsior* list employees likely were not eligible to vote is unavailing.[44] As described, even if every one of the 45 employees was an eligible voter, that complement is insufficient where the Company expected (and the evidence showed) that the unit would soon expand to over 200 employees. In any event, the Company is incorrect in arguing (Br 42-43) that the Board cannot examine such matters if none of the parties to the election raises an objection. As described, the Board has both the authority and the obligation to police the certifications it issues. Where the Company failed to provide the Board with complete information, it can hardly argue that the Board is precluded from investigating the validity of the certification it issued under those circumstances.

To the extent that the Company challenges (Br 38) the Board's findings regarding whether the employees' job classifications at the time of the election were

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[44] The Regional Director found that most of the *Excelsior* list employees likely were not eligible to vote because they worked only part-time and had not been employed for a sufficient amount of time. (A 1130-31.)

legitimate, those arguments do not provide a basis for reversal. It is undisputed that, by the January 12 voting eligibility date, the payroll reflects that employees were employed in all unit job classifications. The Board, however, quite reasonably, observed (A 1117, 1133) that, at that time, there were no patients; thus, it was impossible for employees in patient-care classifications (*e.g.*, LPNs and various types of aides) to do the work entailed by those classifications. Indeed, Brachfeld testified that all employees in January largely performed cleaning and preparatory work for the time when the facility was approved to admit patients.

Finally, the Company's broad assertion (Br 33-34) that the issues in this case should have been raised solely through an unfair labor practice case, and not in an election case, once again ignores the Board's authority and obligation to police its certifications. A union may gain representative status in two ways: via the election process (as here) or via an employer's voluntary recognition of the union as the representative of its employees. Here, the Company did not grant voluntary recognition to 300S. Instead, the parties invoked the Board's election procedures to certify 300S as the exclusive bargaining representative of the employees. Where the case originated in an election context, the Board acted within its authority by retracing its steps in the election case and correcting problems within the context in which they arose. Moreover, even assuming that 1199 had a viable unfair labor

practice action, that does not mean that was the *only* path available to address the issues in this case.[45]

D. Because 300S' Certification Was Invalid, the Resulting Collective-Bargaining Agreement Cannot Bar 1199's Election Petition and the Lyden Employees Cannot Be Accreted to a 300S Bargaining Unit

1. Contract bar

In order to protect bargaining relationships from disruptive challenges during the term of a valid contract, the Board ordinarily will not entertain an election petition challenging an incumbent union's majority status during the first 3 years of a contract.[46] "The Board has, however, in implementing its *discretionary* contract-bar rules, developed exceptions to this general principle …."[47] The contract-bar rule is not statutory; it was created by the Board to balance labor stability and employee free choice.[48] As such, courts grant the Board "substantial discretion in deciding whether to apply the [contract-bar] rule in a particular case and in

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[45] See below at p. 39, n.53.

[46] *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 226 (D.C. Cir. 1996). *See generally Gen. Cable Corp.*, 139 NLRB 1123, 1125 (1962) (establishing 3 years as the contract bar limit).

[47] *Frank Hager, Inc.*, 230 NLRB 476, 476 (1977) (emphasis added).

[48] *See Terrace Gardens Plaza*, 91 F.3d at 228.

formulating the contours of the rule."[49] This Court upholds the Board's decision not to apply its contract-bar rule where it is "consistent with the Act and rational."[50]

In accordance with those principles, the Board examines the facts of each case to determine whether the contract-bar rule should apply.[51] The Board also has created broad categories of cases in which it likely will not apply its contract-bar rule. For example, *General Extrusion* created an exception to the contract-bar rule for expanding units.[52] And, as the Company acknowledges (Br 15), the Board has refused to apply the contract-bar rule in other situations, such as racially discriminatory or oral contracts. Thus, the Board's contract-bar rule is far from monolithic.

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[49] *NLRB v. Mississippi Power & Light Co*., 769 F.2d 276, 280 (5th Cir. 1985) (upholding Board's refusal to apply contract bar). *See also Leedom v. Int'l Bhd. of Elec. Workers Local 108*, 278 F.2d 237, 242 (D.C. Cir. 1960) (affording "great weight" to Board's application of contract bar; upholding Board's reduction of time period for contract bar).

[50] *Terrace Gardens Plaza*, 91 F.3d at 228 (refusing to apply contract-bar rule with unsigned contract).

[51] *See e.g., Frank Hager*, 230 NLRB at 476-77 (1977) (refusing to apply contract-bar rule where no bona fide negotiations occurred to create contract); *Silverlake Nursing Home*, 178 NLRB 478, 479-80 (1969) (no contract bar where contract did not track actual terms and conditions of employment); *Raymond's, Inc.*, 161 NLRB 838, 840 (1966) (refusing to apply contract bar where contract did not embody current terms and conditions of employment).

[52] 121 NLRB 1165, 1167 (1958).

On the facts of this case, the Board's decision not to apply its discretionary contract-bar rule was rational and consistent with the Act. The collective-bargaining agreement between the Company and 300S was the product of 300S' invalid certification. As described above, the Company and 300S ignored the Board's explicit request to notify it of any other interested unions and effectively excluded 1199 from the ballot in the first election. The Board acted well within the discretion afforded to it in contract bar and election cases in finding (A 1135) that the contract was essentially the fruit of a poisonous tree and could not bar 1199's petition for another election.

The Company's contract bar arguments (Br 10-21) boil down to three main points: (1) that the Board cannot consider the circumstances surrounding the creation of the contract and it instead must mechanically apply the contract-bar rule, (2) that the Board could examine the circumstances surrounding the creation of the Company-300S bargaining relationship and contract only via an ancillary unfair labor practice proceeding and not in the context of the election case, and (3) policy reasons support the maintenance of the Company-300S bargaining relationship. As we now show, all of the Company's contentions are meritless.

First, the Company apparently would have the Board mechanically apply the contract-bar rule and turn a blind eye to the particular facts of each case. Its contract bar argument (Br 10-21) ignores the revocation of 300S' certification and

assumes that a contract, no matter how it came into being, automatically bars any rival petition. As shown, the Board looks at the particular circumstances of each case and has the discretion to apply or waive the contract-bar rule. Moreover, the Company's argument is grounded in technicalities rather than common sense and fairness. Under the Company's logic, if a union has been improperly certified (as here), but it is not discovered until after the contract has been signed, the employees are simply stuck with that union unless another union steps forward during the open period, as long as 3 years later. Applying such a rigid rule would result in particularly harsh consequences in this case with 1199—which had represented the Lyden employees for over 20 years and was wrongly excluded from the first election—sitting on the sidelines for 3 years before it could challenge 300S' status as the employees' bargaining representative.

While the Company states (Br 12) that the Board cited no cases holding that an invalid certification eliminates the ability of the resulting contract to bar an election, it fails to cite any cases directly on point to show that the Board exceeded its authority in declining to apply its contract-bar rule here. None of the Company's cited cases involves a contract that was a product of an invalid certification. The Company overstates the import of the Board's decision as a "radical" and "revolutionary" change (Br 14 n.5, 20-21) and a departure from precedent (Br 11-

12). Instead, the Board found only that the Company's defense—contract bar—was inapplicable to these novel facts.

Next, in arguing (Br 11-21) that the 300S contract could only be invalidated via an unfair labor practice case, the Company overlooks two fundamental points: (1) 300S became the employees' representative through a Board-conducted election and certification *not* by voluntary recognition from the Company and (2) the Board has wide authority to police such certifications. The Company treats the instant case as though it were a recognition case rather than an election/certification case, stating the true, but irrelevant, point that: "union recognition can take place *without an NLRB election and certification* and a contract resulting therefrom will bar a rival petition…." (Br 15, emphasis in original).

The Company seems to assume, without any apposite support, that if a voluntary recognition can be challenged in an unfair labor practice case, any challenge to a *certification* likewise *must* be heard the same way. The Board, however, has held that just because an issue can be raised in an unfair labor practice case does not mean it cannot likewise be heard in a representation/election case.[53]

[53] *See, e.g., All County Elec. Co.*, 332 NLRB 863, 863 (2000) ("the mere fact that the need to determine whether one entity is an alter ego of another often arises in an unfair labor practice context does not mean that the Board is precluded from making such a determination in connection with the resolution of a representational issue").

Accordingly, the Company's citations to unfair labor practice cases dealing with voluntary recognition are not on point.

The Company's reliance (Br 13) on *Virginia Concrete Corp.*[54] is misplaced. In that election case, the Board found that where the "gravamen" of a party's election objection is an unfair labor practice, the Board cannot consider the objection if there is no corresponding unfair labor practice charge.[55] Here, where the issues are fundamentally representation/election issues, the Board was well within its authority in policing the certification it issued to 300S within that representation case. The Board revoked 300S' certification based on the (now-uncontested) failure to notify the Board of 1199's interest and the premature election due to the lack of a substantial and representative complement of employees. Both grounds are representation, not unfair labor practice, issues. Similarly, contract bar is a representation issue because it determines whether an election petition may be processed.[56]

Accordingly, because this case properly is an election case, the Company's lengthy discussion (Br 15-21) of the 6-month statute of limitations in unfair labor

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[54] 338 NLRB 1182, 1185-86 (2003).

[55] *Id.*

[56] *See, e.g., Gen. Cable Corp.*, 139 NLRB 1123, 1125 (1962) (representation case establishing 3 years as the contract bar limit); *Appalachian Shale Prods., Co.*, 121 NLRB 1160, 1163-64 (1958) (restatement of Board's contract-bar rule discussed in representation case)

practice cases is immaterial.[57] No such time-bar is applicable in representation cases, including revocations of certifications.[58] Perhaps if the Company had voluntarily recognized 300S, Section 10(b) may have shielded its conduct.[59] But, because the Company and 300S invoked—and abused—the Board's election process, the Board acted within its discretion (if not, obligation) to refuse to apply its contract-bar rule under the circumstances.

Finally, the Company's policy arguments (Br 20-21) regarding the importance of labor stability ring hollow where it refused to advise the Board that 1199, which had represented its Lyden employees for over 20 years, had an interest in the case. If anything, the Company undermined labor stability by circumventing

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[57] The Company miscites (Br 16-17) this Court's decision in *District Lodge 64, IAM v. NLRB*, 949 F.2d 441, 443-46 (D.C. Cir. 1991). It involved surface bargaining charges that were untimely reinstated—not, as the Company claims (Br 16), "a recognition and contract that was not timely attacked." The excerpt emphasized by the Company is dicta. The facts there were not remotely similar to those here.

[58] *All County Elec. Co.*, 332 NLRB 863, 863 (2000) (no time bar in representation cases; rejecting argument that §10(b) precluded alter ego finding); *Reed Rolled Thread Die Co.*, 179 NLRB 56, 64 (1969) (Regional Director has authority, as Board's delegate, to make independent post-election investigation regardless of time limitations for filing election objections), *enforced*, 432 F.2d 70 (1st Cir. 1970); *Stow Mfg. Co*., 103 NLRB 1280, 1305 (1953) (Board has power to rescind a union's certification "at any time"), *enforced*, 217 F.2d 900 (2d Cir. 1954).

[59] Thus, *North Bros. Ford*, 220 NLRB 1021, 1021-22 (1975), cited by the Company (Br 20), is distinguishable because it found that an employer could not attack its own *voluntary recognition* of a union after more than 6 months as a defense to its refusal to execute the contract.

its long-standing bargaining relationship with 1199. The Board does not allow parties to profit from their own wrongs.[60] Courts defer to the Board's balancing of the desire for labor stability against employees' free choice of their representative in considering whether to apply its contract-bar rule. Here, it was reasonable to conclude that, while stability in bargaining relationships is important, the cost of imposing on employees a union that was never validly certified was too great.

2. Accretion

The Company's argument (Br 28-29) that the Lyden employees should have been accreted to the 300S bargaining unit fails on similar grounds as its contract bar claim. An accretion is the absorption of new employees into an established bargaining unit, to be governed by that unit's prior choice of representative.[61] Further, when employees at different locations of an employer, represented by different unions, are consolidated into a single location, the Board may find an accretion if there is "no reason to question the majority status of the predominant Union."[62] While accretion serves the purpose of promoting bargaining stability, the

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[60] *Stow Mfg. Co*., 103 NLRB 1280, 1305-06 n.35 (1953), *enforced*, 217 F.2d 900 (2d Cir. 1954).

[61] *Teamsters Nat'l United Parcel Svc. Negotiating Comm. v. NLRB*, 17 F.3d 1518, 1520 (D.C. Cir. 1994); *Operating Engineers Local 627 v. NLRB*, 595 F.2d 844, 850 (D.C. Cir. 1979).

[62] *Boston Gas Co.*, 235 NLRB 1354, 1355 (1978).

Board applies the doctrine restrictively because the added employees do not select their own representative.[63]

Here, the Company has conceded that Lyden and NY Center constituted a single employer. Thus, it merged two groups of employees represented by different unions. The Lyden employees cannot be accreted to a 300S bargaining unit because, as described above, 300S was not validly certified as a bargaining representative. Accordingly, 300S' majority status has never been properly established. Because there never should have been a 300S bargaining unit, the Lyden employees cannot be accreted to that unit. The instant case highlights the soundness of the Board's policy of applying the accretion doctrine restrictively. The Lyden employees had been represented by 1199 for over 20 years and to place them in a 300S unit would strip them of their bargaining representative without even affording them the opportunity to vote on the matter.

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[63] *See Operating Engineers Local 627*, 595 F.2d at 851 (D.C. Cir. 1979); *Passavant Retirement & Health Ctr., Inc.*, 313 NLRB 1216, 1218 (1994).

III. THE BOARD DID NOT ABUSE ITS WIDE DEGREE OF DISCRETION IN OVERRULING THE COMPANY'S OBJECTIONS TO THE CONDUCT OF THE SECOND ELECTION

A. Applicable Principles and Standard of Review

The Supreme Court and this Court have recognized that Congress entrusted the Board with "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."[64] This Court therefore will overturn the Board's order to bargain only upon finding that the Board abused that wide discretion.[65]

A party seeking to overturn a Board-administered election thus shoulders a "heavy burden."[66] The objecting party must show not only that election misconduct occurred, but also that the misconduct "interfered with the employees' exercise of free choice to such an extent that it materially affected the election."[67] These determinations are "fact-intensive" and thus are "especially suited for Board review."[68]

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[64] *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946); *accord C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988).

[65] *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996).

[66] *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996).

[67] *C.J. Krehbiel*, 844 F.2d at 882.

[68] *Family Serv. Agency v. NLRB*, 163 F.3d 1369, 1377 (D.C. Cir. 1999).

B. The Board Did Not Abuse Its Discretion in Overruling the Company's Electioneering Objections

After revoking 300S' certification, the Board directed a second election, with both 300S and 1199 on the ballot. The Board acted well within its discretion in overruling the Company's contentions that 1199 representatives so impaired employees' free choice that it materially affected that election by congregating with its employee supporters at the gate to NY Center and by offering coffee, doughnuts, union hats and shirts, and pizza.

It is well settled that voting day electioneering is not *per se* improper. The Board and this Court recognize that "[a] representation election is often the climax of an emotional, hard-fought campaign and it is unrealistic to expect parties or employees to refrain totally from any and all types of electioneering in the vicinity of the polls."[69] Rather, the Board's approach, endorsed by this Court, is to consider a "range of factors and circumstances" to determine "whether electioneering activity is sufficient to justify overturning an election."[70]

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[69] *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118 (1982), *enforced*, 703 F.2d 876 (5th Cir. 1983), *quoted in*, *Overnite Transp. v. NLRB*, 140 F.3d 259, 269 (D.C. Cir. 1998).

[70] *Overnite*, 140 F.3d at 269.

Here, the Company's objections involve alleged conduct occurring *outside* the polling area.[71] Such conduct warrants setting aside the election "only if the electioneering 'substantially impaired the exercise of free choice.'"[72] In those circumstances, the Board applies a multifactor analysis, which this Court has approved.[73] Specifically, the Board considers: "the nature and extent" of the conduct, "whether it was contrary to the instructions of the Board's election agent," "whether it happened within a designated 'no electioneering' area," and "whether a party to the election objected to it."[74]

To support the Company's assertion (Br 25-26) that 1199 substantially impaired employee free choice by the "forced" granting of "hundreds" of hats, t-shirts, pizza, and breakfasts, it offered as its *only* evidence a single one-page affidavit from one of its human resources employees. As shown below, the affidavit failed to provide salient details, including how many employees were involved and what was said to them.

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[71] The Board applies a different analysis for contact between parties and voters *waiting to cast ballots*. *Milchem, Inc.*, 170 NLRB 362 (1968).

[72] *Overnite*, 140 F.3d at 270 (citation omitted).

[73] *Id.*; *Boston Insulated Wire & Cable Co.*, 259 NLRB 1119, 1118 (1982), *enforced*, 703 F.2d 876 (5th Cir. 1983).

[74] *Overnite*, 140 F.3d at 270.

Such weak evidence does not suffice to warrant a hearing, much less reversal. A postelection hearing is not a fishing expedition for the Company to scrape together some evidence to support its objections. Instead, the Company should have marshaled its evidence and submitted it during the investigation. It is well settled that the Board is not required to conduct a hearing with respect to a party's postelection objections, absent a showing that the objections raise "substantial and material factual issues."[75] If the objecting party fails to furnish specific evidence which, if proved, would warrant setting aside the election, it has failed to raise the requisite factual issues and the Board properly overrules the objections without a hearing.[76] The purpose behind this practice is "'to resolve expeditiously questions preliminary to the establishment of the bargaining relationship and to preclude the opportunity for protracted delay of certification of the results of representation elections.'"[77] Here, the Regional Director assumed the veracity of the sole affidavit supplied by the Company, but, as shown below, reasonably determined that those allegations did not afford a basis for setting aside

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[75] *See* 29 C.F.R. §102.69(d). *See also AOTOP, L.L.C. v. NLRB*, 331 F.3d 100, 103 (D.C. Cir. 2003).

[76] *See Amalgamated Clothing Workers of America v. NLRB*, 424 F.2d 818, 828 (D.C. Cir. 1970) ("to be entitled to a post-election hearing . . . the objector must supply the Board with specific evidence which prima facie would warrant setting aside the election, for it is not up to the Board staff to seek out evidence that would warrant setting aside the election").

[77] *Id.* (citation omitted).

the election. Accordingly, the Board properly overruled the objections without a hearing.

1. Gathering at facility gate

Here, the Regional Director concluded that the Company did not demonstrate that 1199's conduct substantially impaired employees' exercise of free choice. It relies (Br 21-22, 25) solely on the single-page affidavit of one human resources employee who stated that, on the day of the election, she observed a "large crowd of people" including at least ten non-employees and "numerous" employees at the facility gate. (A 1148 ¶3.) While stating (A 1148 ¶3) that employees entering the facility had to listen to statements made by the crowd, the witness failed to state: what was said to entering employees; how many employees she observed going through the crowd; or how long she observed the scene. Tellingly, the Company provided no evidence from anyone who actually heard anything. Nor did the Company provide evidence that any conversations took place in a designated no-electioneering area, that any conversations were contrary to the instructions of the Board agent, or that any conversations were anything other than a brief contact. Likewise, the Company offered no evidence showing that it advised the Board agent conducting the election of the situation. Courts, including this one, have

agreed that similar circumstances of supposed electioneering do not warrant overturning the results of the election.[78]

The Company's reliance (Br 22) on *Nathan Katz Realty* is unavailing.[79] There, the Court set aside the election due to facts not present in this case: the union agents' conduct occurred in a no-electioneering zone; their presence and actions were contrary to the instructions of the Board agent; and the employer lodged an objection to the union agents' conduct to the Board agent supervising the election.[80] Here, as described, the Company offered no such evidence or even made such claims.

The Company's quotation (Br 22) of the Court's observation in *Nathan Katz*[81] that two prior Board cases—*Performance Measurements Co.*[82] and *Electric*

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[78] *See Overnite*, 140 F.3d at 269 ("raucous" rally on election day near the polling center with free food and drink); *Boston Insulated Wire & Cable*, 703 F.2d at 878, 881-882 & n.6 (union agents spoke with and handed campaign leaflets to employees as they entered the building; building's doors "formed a physical barrier between the voters and the union representatives"); *Melrose-Wakefield Hosp. Ass'n v. NLRB*, 615 F.2d 563, 570 (1st Cir. 1980) (union agent spoke to employees in parking lot behind the building, but did not enter polling area and could not see it from his vantage point).

[79] 251 F.3d 981 (D.C. Cir. 2001).

[80] *Id.* at 991-92.

[81] *Id.* at 992-93.

[82] 148 NLRB 1657 (1964).

Hose & Rubber Co.[83]—"seem to stand for the proposition that a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote," likewise is misplaced. Those cases involved employer representatives stationing themselves very close to the entrance of the polling room, not outside the building. In *Performance Measurements*, the employer's president stood by the door to the balloting room, sat at a table six feet away, and entered the room during polling.[84] In *Electric Hose*, a supervisor stationed himself 10 to 15 feet outside the entrance to the voting area.[85] Here, the Company alleged that 1199 representatives were at the *fence gate* to the facility—which was not shown to have been designated a no-electioneering zone—not immediately outside the polling room, which was inside the building in the dining room. As shown above (p. 49), the Board, with court approval, in exercising its wide discretion in examining the conduct of elections, has found that electioneering *outside* the facility where voting took place does not require setting aside the election.[86]

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[83] 262 NLRB 186 (1982).

[84] 148 NLRB at 1659.

[85] 262 NLRB at 216.

[86] *See also Chrill Care, Inc.*, 340 NLRB 1016, 1016 (2003) (no objectionable conduct where "[u]nion supporters and agents outside the Employer's premises displayed union signs and insignia, made prounion statements, and attempted to speak to employees entering the area").

2. Provision of food and union paraphernalia

Equally lacking in factual and legal support are the Company's arguments (Br 22, 25-26) that, on the day of the election, 1199 interfered with employees' free choice by offering them coffee, breakfast, union hats and shirts, and pizza. The Board and courts agree that a union's distribution of food and campaign propaganda such as t-shirts does not taint an election.[87] Indeed, one court has observed that "supplying food and soft drinks is commonplace in American elections and is not the equivalent of buying votes."[88] The provision of free food and beverages becomes objectionable only when it improperly tends to influence the outcome of the election; that is, where the benefit is conditioned upon the recipient's support or where the cost of the benefit is so exorbitant as to amount to a bribe.[89]

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[87] *See Overnite*, 140 F.3d at 269 ("raucous" rally on election day near the polling center with free food and drink); *NLRB v. Coca-Cola Bottling Co.*, 132 F.3d 1001, 1005-06 (4th Cir. 1997) (t-shirts); *Chicagoland Television News, Inc.*, 328 NLRB 367, 367 (1999) (Board "will not set aside an election simply because the union or employer provided free food and drink to the employees"); *Nu-Skin*, 307 NLRB 223, 223-24 (1992) (picnic lunch and t-shirts); *R.L. White Co., Inc.*, 262 NLRB 575, 576 (1982) (employer unlawfully distributed t-shirts); *Lach-Simkins Dental Labs., Inc*., 186 NLRB 671 (1970) (lunch on election day).

[88] *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 810 (6th Cir. 1989).

[89] *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 330 (5th Cir. 1991); *Kux Mfg.*, 890 F.2d at 810; *Sonicraft, Inc.*, 276 NLRB 407, 413 (1985).

Here, the Company has not demonstrated that 1199 substantially impaired employees' free choice. The Company relies (Br 22, 25-26) on the same single-page affidavit that provided scant details. First, the witness stated that before and during the morning session of the election when employees entered the building, 1199 representatives offered them coffee and breakfast from Dunkin' Donuts and "asked and encouraged" them to accept union hats and t-shirts. (A 1148 ¶4.) Again, the witness failed to specify what employees were told, approximately how many employees were observed being offered the items, or how many of them actually accepted the items. Next, the witness stated (A 1148 ¶5) that after the morning voting session ended, the 1199 representatives offered pizza to employees leaving the building. She failed to state what, if anything, the 1199 representatives said to the employees, how many employees were offered the pizza, or how many employees accepted the pizza. There was no evidence that the items were given as a reward or with the condition that employees vote for 1199. With that vague affidavit, the Regional Director reasonably found that the Company failed to meet its burden of providing evidence sufficient to warrant even a hearing, let alone overturning the election results.

Where 1199 won the election almost unanimously, the Company can hardly claim that 100 to 200 employees sold their votes for some doughnuts, pizza, and

union paraphernalia.[90] The Company's related claim (Br 26 n.8) that the landslide win for 1199 was the product of pervasive electioneering is pure speculation, particularly where many of the employees had been represented by 1199 for years at Lyden and where most of the employees who voted for 300S in the first election no longer worked at NY Center.

Owens-Illinois, Inc.,[91] cited by the Company (Br 22-23) to show that 1199's distribution of union t-shirts and hats tainted the election, is distinguishable. In that case, the union distributed jackets. The Board reaffirmed the principle that a union ordinarily is entitled to distribute such "inexpensive pieces of campaign propaganda" including "T-shirts."[92] Further, the Board relied on the facts that the five or six voters who received the jackets could have made the difference in that close election and, also, one voter suggested that the jacket was a reward for his vote.[93] Here, the Company offers no evidence that 100 to 200 employees were offered or accepted the 1199 t-shirts.

The Company's other case citations likewise do not establish a basis for reversal. In quoting (Br 23-24) *Gold Bond Bldg. Prods.* regarding an employer's

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[90] The tally of ballots showed 200 votes for 1199, 5 votes for 300S, 1 vote for no union, 1 void ballot, and 1 challenged ballot. (A 1153; 1149.)

[91] 271 NLRB 1235, 1235-36 (1984).

[92] *Id.*

[93] *Id.* at 1235.

gift of jackets, the Company neglects to mention that its excerpt is nonprecedential because the Board majority set aside the election on different grounds.[94] Also, *Macklanburg-Duncan Co.*, cited by the Company (Br 24), involved an *employer* distributing antiunion t-shirts to employees which forced them to express their choice.[95] That situation is distinguishable because an employer is prohibited from polling employees, but unions are not.[96]

IV. THE BOARD PROPERLY DENIED THE COMPANY'S MOTION FOR RECONSIDERATION BASED ON THE DISAFFILIATION OF THE SERVICE EMPLOYEES INTERNATIONAL UNION FROM THE AFL-CIO

The Company contends (Br 29-33) that the Service Employees International Union's ("SEIU") disaffiliation from the AFL-CIO raises a "serious question of fact concerning the vote" that certified 1199—a local of the SEIU—as the employees' bargaining representative, and that an evidentiary hearing was necessary to determine the impact of the disaffiliation on voters. The Company ignores the fact that 300S, whose certification it is trying to resurrect, is a local of the United Food and Commercial Workers Union, which also disaffiliated from the AFL-CIO around the same time. In any event, as we show, the Board properly rejected the

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[94] 280 NLRB 1003, 1003 n.1 (1986) (one Board member disagreed with the quoted position and the other found it unnecessary to pass on the issue).

[95] 179 NLRB 848, 848-49 (1969).

[96] *See, e.g., J.C. Penney Food Dept.*, 195 NLRB 921, 921-22 n.4 (1972), *enforced*, 1972 WL 1087 (7th Cir. 1972).

Company's motion for reconsideration because SEIU's disaffiliation occurred after the Company's unlawful refusal to bargain and because it is well-established that disaffiliation, without more, is not sufficient to challenge a union's certification.

First, the Company cannot defend its refusal to bargain based on SEIU's after-the-fact disaffiliation from the AFL-CIO. The SEIU disaffiliated from the AFL-CIO on July 25, 2005, over 10 months after the Company refused 1199's request to bargain.[97] An employer cannot rely on a union's change of affiliation to defend its refusal to bargain where the change occurred *after* the employer's refusal to bargain.[98] The Company, in its opening brief, does not challenge those findings or the principle relied upon by the Board that subsequent events do not provide a defense for an earlier refusal to bargain.

In any event, the Company's argument clashes with settled law that a union's disaffiliation from the AFL-CIO, without more, is insufficient to raise a genuine issue as to the identity of the certified bargaining representative.[99] This is because a

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[97] 346 NLRB No. 44, slip op. at 1, 2006 WL 287412 (2006).

[98] *NLRB v. Weyerhaeuser Co.*, 276 F.2d 865, 873 (7th Cir. 1960); *M&M Bakeries, Inc.*, 121 NLRB 1596, 1602 (1958), *enforced* 271 F.2d 602 (1st Cir. 1959). *See also NLRB v. Springfield Hospital*, 899 F.2d 1305, 1315 (2d Cir. 1990) (union affiliation vote; recognizing that there is "'no useful purpose [to be] served by permitting the employer to defend the propriety of an earlier refusal to bargain by relying on subsequent events that had nothing to do with the refusal'" (citation omitted)).

[99] *Weyerhaeuser*, 276 F.2d at 873 (deeming union's disaffiliation from AFL-CIO not sufficient to raise doubts about its identity); *NLRB v. Harris-Woodson Co.*, 179

union's disaffiliation from the AFL-CIO does not result in the establishment of a new organization, or otherwise create confusion "'as to the identity of the organization designated by the employees to represent them.'"[100] In order to establish a change in the identity of the labor organization, the Company must show that the disaffiliation resulted in changes to 1199's "organic structure, composition, or leadership."[101] While urging (Br 32-33) the Court to find that the Board erred by not holding a hearing on this issue, the Company does not offer any specifics as to what, if any, evidence it would adduce at a hearing to show that the disaffiliation resulted in the establishment of a materially different organization.

Indeed, in a recent case, the Board found, on *summary judgment*, that the disaffiliation of the United Food and Commercial Workers Union from the AFL-CIO did not warrant overturning its certification.[102] There, as here, the disaffiliation occurred after the refusal to bargain and the employer failed to indicate what evidence it would adduce at a hearing to warrant overturning the

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F.2d 720, 723 (4th Cir. 1950) (identity of local union unchanged by change of affiliation from the CIO to the Textile Workers Union of America); *Continental Oil Co. v. NLRB*, 113 F.2d 473, 477-78 (10th Cir. 1940) (union's change in affiliation from the AFL to the CIO did not affect employer's obligation to bargain).

[100] *M&M Bakeries, Inc.*, 121 NLRB 1596, 1602 (1958)(citation omitted), *enforced* 271 F.2d 602 (1st Cir. 1959).

[101] *Weyerhaeuser*, 276 F.2d at 873.

[102] *Laurel Baye Healthcare of Lake Lanier*, 346 NLRB No. 15, slip op. at 1-3, 2005 WL 3590882 (2005), *enforced*, 2006 WL 3770838 (4th Cir. 2006).

union's certification.[103] The Fourth Circuit, in an unpublished opinion, rejected the employer's disaffiliation argument and enforced the Board's bargaining order.[104] The Company's attempt (Br 31) to distinguish the case on the basis that, there, the union was not identified to the employees as affiliated with the AFL-CIO, ignores the Board's other rationale that an employer cannot rely on an after-the-fact disaffiliation to excuse its refusal to bargain—a finding that the Company does not challenge in this case.

The Company's heavy reliance (Br 30-32) on *Woods Quality Cabinetry Co.*[105] is misplaced. There, the election notices and ballots incorrectly listed the union as being affiliated with the AFL-CIO. The Board found that the regional director's failure to correct the notices and ballots warranted overturning the union's election victory and directing a second election. The union and employer felt it was important to tell the employees that the union was not in fact affiliated with the AFL-CIO.[106] Under those circumstances, the Board found that a second election was required because employees could have been confused by the discrepancy between the Board's notices and ballots and the parties' statements to

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[103] 346 NLRB No. 15, slip op. at 3.

[104] 2006 WL 3770838 (4th Cir. 2006).

[105] 340 NLRB 1355 (2003).

[106] *Id.* at 1356.

them.[107] Here, however, the Company fails to even state what evidence it would adduce at a hearing to show that AFL-CIO affiliation was a material issue for the parties or voters.

Lacking anything beyond bare speculation, the Company's motion for reconsideration based on 1199's disaffiliation served to delay its obligation to bargain. At this point in a case with a long, tortured procedural history wrought largely by the Company's abuse of the Board's election procedures, "[t]he time has come for [the Company] to comply with the law without further delay or sophistry."[108]

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[107] *Id.*

[108] *Harris-Woodson*, 179 F.2d at 723.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Company's petition for review and enforce the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEW YORK REHABILITATION CARE MANAGEMENT, LLC AND NEW YORK CENTER FOR REHABILITATION CARE, INC.	:	
Petitioner/Cross-Respondent	:	
v.	:	Nos. 06-1162 , 06-1216
NATIONAL LABOR RELATIONS BOARD	:	Board No. 29-CA-26678
Respondent/Cross-Petitioner	:	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) the Board certifies that its brief contains 13,009 words of proportionally-spaced, 14-point Times New Roman type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 13th day of April 2007

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Respondent/Cross-Petitioner	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies each of the Board's final brief in the above-captioned case have this day been served by Federal Express upon the following counsel at the address listed below:

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STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Sec. 7. [29 U.S.C. § 157]

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. [29 U.S.C. § 158]

(a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> . . . .

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a

dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation or conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

Sec. 9 [29 U.S.C. § 159]

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(c)(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the

ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(c)(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(c)(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(c)(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10 [29 U.S.C. § 160]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

. . . .

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in such 2112 of title 28, United States Code. Upon the filing of such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive . . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

. . . .