

**A Review of Developments in NLRB
Representation Case Law During 2018
February 2019**

This paper—summarizing developments in representation case law during 2018—was initially presented at the 2019 Midwinter Meeting of the Development of the Law Under the NLRA Committee, which is part of the American Bar Association’s Section of Labor and Employment Law. The paper’s format utilizes the structure of *An Outline of Law and Procedure in Representation Cases* to indicate recent noteworthy developments in this area. The *Outline* is a NLRB manual that is available on the NLRB website (<https://www.nlr.gov/reports-guidance/manuals>).

The *Outline* was most recently updated in September 2017 to include developments through June 2017. A supplement covering developments during 2017 (following the same format as this paper) is also available on the NLRB website. As the *Outline* is now an electronic publication, it will likely be updated more frequently and regularly than was sometimes the case in the past, but in the interim this paper, along with the 2017 paper, serves as a supplement to the *Outline*.

Virtually all published representation case decisions (Board and court) from 2018 are covered here, as are consolidated representation and unfair labor practice cases in which the Board itself passed or commented on the representation issues. Several unfair labor practice cases that involves issues relevant to representation case law (e.g., supervisory status, joint employer, jurisdictional issues) are also included. In addition, there are entries for several unpublished NLRB representation case decisions that may be of interest to the researcher, although such decisions are, of course, not binding on the Board. Where relevant, the views of dissenting Board members have been noted.

Terence G. Schoone-Jongen
Office of Representation Appeals
National Labor Relations Board
Washington, DC
Terence.Schoone-Jongen@nlrb.gov

Chapter 1 Jurisdiction

1-213 – Indian Tribes

Pauma v. NLRB, 888 F.3d 1066 (9th Cir. 2018): In this ULP case, the court held that it was reasonable for the Board to conclude that tribal employers are within the Act’s coverage (as the Board held in *San Manuel Indian Bingo and Casino*, 341 NLRB 1055 (2004)), that federal Indian law did not preclude the Board’s application of the Act to the employer, and that there was no conflict between the Act and the Indian Gaming Regulatory Act displacing application of the Act to the employer. The employer filed a petition for certiorari on 1/8/19 (Case No. 18-873).

1-401 – State or Political Subdivision

LTTS Charter School, Inc. d/b/a Universal Academy, 366 NLRB No. 38 (2018) (KPE): The Board affirmed the ALJ’s finding that the respondent was a political subdivision exempt from the Board’s jurisdiction under Section 2(2) because its governing body was responsible to public officials. The Board distinguished *Hyde Leadership Charter School – Brooklyn*, 364 NLRB No. 88 (2016), in this regard.

Excalibur Charter School, Inc., 366 NLRB No. 49 (2018) (KPMc): The Board adopted the ALJ’s finding that the Respondent was not an exempt political subdivision. In a footnote, then-Chairman Kaplan noted that the Board may decline to exercise jurisdiction over charter schools as a class or category of employers under Section 14(c)(1), observed that the respondent did not contend the Board should decline jurisdiction on that basis, and stated his belief that current Board precedent regarding charter schools might warrant review by a full five-member Board in a future case.

Voices for International Business and Education, Inc. v. NLRB, 905 F.3d 770 (5th Cir. 2018): The court enforced the Board’s decision finding this charter school was not a political subdivision, concluding the Board’s definition of this phrase was consistent with the common meaning of “political subdivision” of a state and held it was not error for the Board to look solely at whether the school was created or controlled by the public.

1-402 – Employers Subject to the Railway Labor Act

ABM Onsite Services – West, Inc., 367 NLRB No. 35 (2018) (RKE; Mc dissenting): The Board deferred to the advisory opinion of the National Mediation Board, which had concluded that the employer and its employees were subject to the Railway Labor Act. In doing so, the NMB returned to its traditional six-factor carrier control test. The Board agreed that substantial evidence supported the NMB’s conclusions. Member McFerran dissented, contending that the Board should refer the matter to NMB again given that NMB had not explained why it had reverted to the six-factor carrier control test.

American Sales and Management Organization, LLC d/b/a Eulen America, 367 NLRB No. 42 (2018) (RMcK): In this ULP case, the Board applied the six-factor carrier control test and determined that the employer was not controlled by a carrier. Member McFerran joined the majority while reiterating her view that the NMB had not adequately explained its return to the six-factor test.

1-500 – Jurisdiction Declined for Policy Considerations

Excalibur Charter School, Inc., 366 NLRB No. 49 (2018) (KPMc): See 1-401.

Chapter 2 Regional Directors' Decisionmaking Authority in Representation Cases

2-100 – Statutory and Administrative Delegation

Hospital of Barstow, Inc. v. NLRB, 897 F.3d 280 (D.C. Cir. 2018): The court deferred to the Board's holding that a regional director retained authority to certify the union during the period in which the Board lacked the authority to take this action due to a lack of quorum where the election was conducted pursuant to a consent election agreement.

2-500 – Board Review

National Express the Ride, 01-RC-212044, req. granted 1/2/18 (PMcE): The Board granted the Employer's request to postpone the pre-election hearing.

West Virginia American Water Co., 09-RC-219179, order 6/4/18 (RPK): The Board denied the employer's request for a stay of election, but on its own initiative directed that the ballots be impounded in order to permit additional time for the Board to determine the impact, if any, of pending litigation in the United States District Court for the Western District of Pennsylvania on the processing of the petition. See 7-110 for the resolution on the merits.

Chapter 3 Initial Representation Case Procedures

Request for Information, 82 Fed. Reg. 58783 (12/14/17): A full-Board majority (MKE; PMc diss) invited the public to submit information regarding three questions: 1) Should the 2014 Election Rule be retained without change? 2) Should the 2014 Election Rule be retained with modifications? If so, what should be modified? 3) Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Representation Election Regulations? If the Board should make changes to the prior Representation Election Regulations, what should be

changed? The majority stated that it was not engaging in rulemaking, but merely requesting information on these questions. Responses were due 4/18/18.

3-810 – Statement of Position

IGT Global Solutions, 01-RC-176909, order remanding 4/25/18 (PMcK): Due to remanding the case for further consideration in light of the issuance of *PCC Structurals*, the Board permitted the employer to file a new statement of position, rendering moot the petitioner’s argument that the employer’s statement at the original hearing was untimely and thus the employer should have been precluded from litigating the appropriateness of the unit. The Board limited its holding to the particular circumstances of the case.

3-890 – Regional Director’s or Board Decision and Request for Review

PruittHealth-Virginia Park, LLC, v. NLRB, 888 F.3d 1285 (D.C. Cir. 2018): The court declined to consider the employer’s arguments on a particular objection (photographing employees) the employer failed to include in its request for review, and rejected the argument that the employer had preserved this claim by objecting to the “totality of the Hearing Officer’s conclusions” in its exceptions to the hearing officer’s report.

3-940 – Relitigation

Temple University Hospital, 366 NLRB No. 88 (PMcE): The Board found there was no basis for departing from the rule that in the absence of newly discovered or previously unavailable evidence or special circumstances, representation issues cannot be relitigated in test-of-certification proceedings.

Dycora Transitional Health & Living d/b/a Kaweah Manor, 367 NLRB No. 22 (2018) (RMcK): In this case, the regional director found that certain nurses were not statutory supervisors; the predecessor employer did not request review of this finding and the unit was certified. The Board held that the successor employer’s inability to present this issue in the underlying representation case did not warrant departing from the Board’s longstanding rule against litigating representation issues in test-of-certification proceedings.

University of Chicago, 367 NLRB No. 41 (2018) (RKE): The Board applied its longstanding rule against relitigation of representation issues in test-of-certification cases where the employer sought to relitigate whether the petitioned-for students were statutory employees. See also 20-400.

Chapter 6 Qualification of Representative

6-110 – Application of the Statutory Definition

UPMC, 366 NLRB No. 185 (2018) (PMc; E dissenting on other grounds): In this ULP case, the Board affirmed the ALJ’s finding that an entity called the “ESS Employee Council” was a labor organization within the meaning of the Act, noting that employees participated in the organization and that there were at least four examples of bilateral dealings concerning statutory terms and conditions of employment between it and the employer.

Chapter 7 Existence of a Representation Question

7-110 – Prerequisite for Finding a Question Concerning Representation

West Virginia American Water Co., 09-RC-219179, rev. denied 8/20/18 (RK; P dissenting): Given there was no dispute that the petitioner was a labor organization within the meaning of Section 2(5), the Board followed established precedent in refusing to entertain arguments by the intervenor and employer that the outcome of pending LMRDA litigation (contending that the petitioner was created via improper disaffiliation from the intervenor and raising related trusteeship issues) could preclude a question concerning representation. Former Member Pearce expressed concern that the legality of the disaffiliation would indeed be dispositive of whether there is a question of representation, that the petition appeared to directly contravene a court-ordered consent decree, and that another region had postponed processing of other petitions involving similar issues.

Chapter 9 Contract Bar

9-310 – Fixed-Term Contracts

Silvan Industries, a Division of SPVG, 367 NLRB No. 28 (2018) (RKE; Mc dissenting): The union and the employer entered into a collective bargaining agreement in October with an effective date of November 7. On October 25, the employer was presented with an employee petition expressing opposition to the union and accordingly filed an RM petition while also signing the agreement on that day. The regional director—drawing on precedent concerning withdrawals of recognition—concluded that the employer was precluded from challenging the union’s majority status in this manner, but the Board reversed, finding that under the contract bar doctrine, a petition is not barred when filed after an agreement’s execution but before its effective date, and that because the employer had not actually withdrawn recognition, precedent involving such withdrawals was inapplicable. Member McFerran would have affirmed the regional director given

that the employer entered the agreement before filing the petition, and because policy and precedent supported the regional director's dismissal of the petition.

9-510 – Time of Filing of Petition

Silvan Industries, a Division of SPVG, 367 NLRB No. 28 (2018) (RKE; Mc dissenting): See 9-310.

9-520 – Amendment of Petition

Needham Excavating, Inc., 25-RD-195949, rev. denied 1/19/18 (KMc; P dissenting): The Board affirmed the regional director's decision to permit the petitioner to amend and clarify its original petition covering a single unit of all mechanics to seek two elections in two units. The Board commented that under the circumstances, the petitioner's actions were understandable, and that the amendment of the petition to cover two units was timely because the original petition had identified the employees sought with reasonable accuracy and the amendment had not substantially enlarged the character or size of the unit. Member Pearce would not have permitted the amendment.

9-1000 – Special Statutory Provisions as to Prehire Agreements

Colorado Fire Sprinkler, Inc. v. NLRB, 891 F.3d 1031 (D.C. Cir. 2018): As it has in the past, the court criticized the Board's test (articulated in *Staunton Fuel*) for determining whether an agreement is governed by Section 9(a) or 8(f) and concluded that the Board's decision that the agreement in question was a 9(a) agreement was both unsupported by substantial evidence and arbitrary and capricious.

Chapter 10 Prior Determinations and Other Bars to an Election

10-200 – The 1-Year Certification Rule

Veritas Health Services, Inc. v. NLRB, 895 F.3d 69 (D.C. Cir. 2018): In this ULP case, the court enforced the Board's order finding that the employer had unlawfully withdrawn recognition during the certification year bar, which had been extended due to a prior refusal to bargain, and rejected an argument that under the circumstances, the extended certification year should have begun prior to the parties' first formal bargaining session due to alleged unreasonable delay by the union.

10-300 – Settlement Agreement as a Bar

Cablevision Systems Corp., 367 NLRB No. 59 (2018) (RKE; Mc dissenting): The Board held that *Truserv Corp.*, 349 NLRB 227 (2007), precluded dismissal (or refusal to reinstate) a decertification petition on the basis of settled unfair labor practice charges. The Board concluded that although, unlike in *Truserv*, ALJs had found ULP violations, these

findings were not final decisions by the Board, and there accordingly was no basis for refusing to reinstate a petition when the ULPs were settled prior to the Board adjudicating them. Member McFerran would have found the ALJ decisions were a sufficient basis for dismissing the petition.

Technica LLC, 28-RD-218554, order remanding 8/9/18 (RMcE): The Board agreed with the regional director that the petition had to be dismissed if a reasonable period for bargaining pursuant to a settlement agreement had not passed, but found that the regional director had erred by applying *Lee Lumber* to calculate the reasonable period, as opposed to the *Poole Foundry* test. As the regional director's dismissal letter did not contain sufficient facts to determine whether a reasonable period has elapsed under *Poole Foundry*, the Board remanded.

10-700 – Contracting Units and Cessation of Operations

NLRB v. Retro Environmental, Inc., 738 Fed. Appx. 200 (4th Cir. 2018): See 14-600.

Chapter 11 Amendment, Clarification, and Deauthorization Petitions

11-220 – Accretion v. Question Concerning Representation

Schuylkill Medical Center South Jackson Street, 04-UC-200537, rev. granted 1/25/18 (KMc; P dissenting in relevant part): The Board granted review as to whether the regional director's finding that employees at the employer's East hospital were an accretion to the existing unit (historically based at South hospital) was consistent with the standard articulated in *Safeway Stores, Inc.*, 256 NLRB 918 (1981). Member Pearce would have found that an accretion finding was warranted.

Recology, Inc. d/b/a Hay Road Landfill, 20-UC-191943, rev. granted 2/13/18 (KE; P dissenting): The Board granted review as to whether the regional director's finding that the employer's Material Receiving Coordinators constitute an appropriate accretion to the unit was consistent with standard articulated in *Safeway Stores*. Member Pearce would have found that the accretion finding was consistent with *Safeway Stores*.

Chapter 12 Appropriate Unit: General Principles

12-120 – Craft Units

*PCC Structural*s, 19-RC-202188, rev. denied 11/28/18 (McKE): See 12-210.

12-210 – Community of Interest

Although the Board has not applied *PCC Structural*s in any published cases as of this writing, the Board has dealt with that case in a variety of unpublished contexts. Two cases involved a regional director's application of the standard announced in that case:

- *Rhode Island LFG Genco, LLC*, 01-RC-208704, rev. denied 11/7/18 (RKE): The Board agreed with the regional director that the petitioned-for day utility technicians had interests "sufficiently distinct" from maintenance-department technicians to warrant their exclusion from the petitioned-for unit given their separate departments, separate supervision, and lack of interchange and contact.
- *PCC Structural*s, 19-RC-202188, rev. denied 11/28/18 (McKE): Members McFerran and Emanuel agreed with the regional director's finding that the petitioned-for unit of rework welders, rework specialists, and a crucible welder was appropriate under craft unit precedent. Members McFerran and Kaplan also found the unit appropriate based on the petitioned-for employees' shared community of interest sufficiently separate from excluded employees. Member McFerran also would have found the unit appropriate under *Specialty Healthcare*.

The Board also remanded two pending cases for further appropriate action consistent with *PCC Structural*s:

- *Colonial Parking*, 04-RC-187843, ordering remanding 3/23/18 (KPE)
- *IGT Global Solutions*, 01-RC-176909, order remanding 4/25/18 (PMcK)

Further, the Board rejected (or denied review of regional directors' rejection of) several arguments premised on *PCC Structural*s:

- *National Hot Rod Association (NHRA)*, 22-RC-186622, rev. denied 4/16/18 (PMcE): As *PCC Structural*s did not change the standard for analyzing voter eligibility, the Board rejected the employer's contention that it should be permitted to withdraw from its stipulation to a voter eligibility formula based on *PCC Structural*s.
- *Baker DC, LLC*, 05-RC-135621, motion denied 4/24/18 (PMcK): The Board denied a motion to reopen the record or alternatively for reconsideration based on the issuance of *PCC Structural*s, finding that the motion was untimely and that the employer had not demonstrated extraordinary circumstances warranting reconsideration, given that this representation matter was no longer pending when *PCC Structural*s issued and thus *PCC Structural*s did not apply retroactively.
- *Pacific Gas and Electric Co.*, 32-RC-213182, rev. denied 6/7/18 (RPK) and *King Soopers, Inc.*, 27-RC-215705, rev. denied 8/21/18 (RMcK): In both cases, the Board denied review of regional directors' findings that *PCC Structural*s had not altered the standard for determining whether a self-determination election is appropriate.

12-500 – Accretions to Existing Units

Schuylkill Medical Center South Jackson Street, 04-UC-200537, rev. granted 1/25/18 (KMc; P dissenting): See 11-220.

Recology, Inc. d/b/a Hay Road Landfill, 20-UC-191943, rev. granted 2/13/18 (KE; P dissenting): see 11-220.

Chapter 13 Multilocation Employers

Clifford W. Perham, Inc., 01-RC-191238, rev. denied 1/4/18 (KPMc): The Board found that the petitioned-for two-facility unit was appropriate under the Board’s traditional multi-facility community of interest analysis because the two groups of employees shared a community of interest that was distinct from employees at a third facility the employer contended had to be included in the unit.

Rocky Mountain Planned Parenthood, Inc. d/b/a PPRM, rev. granted 4/16/18 (KE; Mc dissenting): The Board granted review as to whether the directed unit was appropriate consistent with Board precedent concerning petitioned-for multi-facility units. Member McFerran would have denied review, as the unit was a reasonably, if not perfectly, distinct grouping of employees (with Denver-area facilities at its core), and the employer-wide unit urged by the employer would involve facilities 700 miles distant from each other that would impede free choice and collective bargaining. The request for review was subsequently withdrawn.

Chapter 14 Multiemployer, Single Employer, and Joint Employer Units

14-500 – Single Employer

Hy-Brand Industrial Contractors, Ltd., 366 NLRB No. 94 (2018) (RPMc): See 14-600.

14-600 – Joint Employer

Hy-Brand Industrial Contractors, Ltd., 366 NLRB No. 26 (2018) (KPMc): The Board vacated its earlier decision (365 NLRB No. 156 (2017)), which overruled *Browning-Ferris* (362 NLRB No. 186 (2015)), due to Member Emanuel’s participation in the earlier decision. The Board accordingly stated that the overruling of *Browning-Ferris* was of no force or effect. The Board (RPMcK) subsequently denied a motion for reconsideration (366 NLRB No. 93 (2018)), and a panel (RPMc) adopted the ALJ’s single-employer status finding, affirmed the violations found on that basis, and accordingly did not pass on the joint employer issue (366 NLRB No. 94 (2018)).

NLRB v. Retro Environmental, Inc., 738 Fed. Appx. 200 (4th Cir. 2018): The court granted the Board's petition for enforcement. The underlying Board decision (364 NLRB No. 70) had applied *Browning-Ferris* to find that Retro and Green JobWorks were joint employers, and also found that they had not proved the cessation of their joint operations was both imminent and definite.

Browning-Ferris Industries of California, Inc. v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018): The court largely affirmed the *Browning-Ferris* joint employer test, approving that test's consideration of both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment (as opposed to confining consideration to actual and direct control). Regarding consideration of indirect control, the court emphasized that the concern that indirect control can be "dispositive" of the joint employer question was not before it. But the court also denied enforcement and remanded because, it held, the Board had not confined its consideration of indirect control consistent with common-law limitations, in that the Board had not distinguished evidence of indirect control bearing on employees' essential terms and conditions from evidence that "simply documents the routine parameters of company-to-company contracting." The court also commented that were the Board to again find joint employer status, it would need to explain which terms and conditions are "essential" to permit "meaningful collective bargaining" and clarify what the latter phrase entails and how it works.

The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46681 (Sept. 14, 2018) (RKE; Mc dissenting): The Board proposed a new rule defining its joint employer inquiry, which would require a showing that the putative joint employers share or codetermine the employees' essential terms and conditions of employment, and that a putative joint employer must possess and actually exercise substantial direct and immediate control over essential terms and conditions in a manner that is not limited and routine. (Note: in *Browning Ferris*, the D.C. Circuit commented that it was willing to resolve that case notwithstanding the pending joint employer rulemaking because the courts, not the Board, are tasked with defining the common-law scope of "employer"). Comments were due on 1/28/19, with comments replying to the initial comments due on 2/11/19.

14-700 – Alter Ego

Island Architectural Woodwork, Inc. v. NLRB, 892 F.3d 362 (D.C. Cir. 2018): In this ULP proceeding, the court found that the Board's alter ego finding was supported by substantial evidence and comported with the alter ego doctrine under the court's case law. The court focused on the factors of identity of business purpose, operations, and equipment; substantial control; and anti-union motive.

Chapter 17 **Statutory Exclusions**

17-510 – Supervisory “Authority” as Defined in Section 2(11)

Thyme Holdings, LLC v. NLRB, 2018 WL 3040701 (D.C. Cir. May 22, 2018): The court held that, as a general matter, the employer had attempted to meet its burden of establishing the supervisory status of its Licensed Vocational Nurses by relying on “general statements,” which are not sufficient under Board precedent.

Matson Terminals, Inc. v. NLRB, 728 Fed. Appx. 8 (D.C. Cir. 2018): See 17-526.

17-511 – Independent Judgment

Thyme Holdings, LLC v. NLRB, 2018 WL 3040701 (D.C. Cir. May 22, 2018): See 17-521.

Matson Terminals, Inc. v. NLRB, 728 Fed. Appx. 8 (D.C. Cir. 2018): See 17-521, -523, -525 and -526.

Cranesville Block Co., Inc. v. NLRB, 741 Fed. Appx. 815 (D.C. Cir. 2018): See 17-521.

2850 Grand Island Boulevard Operating Co., LLC v. NLRB, 740 Fed. Appx. 753 (2d Cir. 2018): Even assuming LPNs occasionally assigned tasks, the court agreed with the Board that these assignments did not involve independent judgment because they were based on routine decisions, and although LPNs had the authority to deviate from resident care plans (set by higher-level employees), such deviation only required “the exercise of commonsense decisionmaking.”

17-513 – Power Effectively to Recommend

Coral Harbor Rehabilitation and Nursing Center, 366 NLRB No. 75 (2018) (PKE): See 17-523.

Thyme Holdings, LLC v. NLRB, 2018 WL 3040701 (D.C. Cir. May 22, 2018): See 17-524.

Cranesville Block Co., Inc. v. NLRB, 741 Fed. Appx. 815 (D.C. Cir. 2018): Although a putative supervisor once recommended that a mechanic be terminated for improperly performing a task, a manager independently investigated the incident and ultimately did not follow the recommendation, and accordingly the incident did not establish the putative supervisor had the authority to discipline or effectively recommend discipline.

17-521 – Assign

Thyme Holdings, LLC v. NLRB, 2018 WL 3040701 (D.C. Cir. May 22, 2018): The court agreed with the Board that the employer’s LVNs possessed only a limited authority to assign, and that this limited authority was routine and did not require independent judgment.

Matson Terminals, Inc. v. NLRB, 728 Fed. Appx. 8 (D.C. Cir. 2018): The court agreed with the Board that certain employees' preparation of barge plans did not constitute "assignment," and that scheduling of laborers did not require independent judgment.

Cranesville Block Co., Inc. v. NLRB, 741 Fed. Appx. 815 (D.C. Cir. 2018): The court agreed with the Board that substantial evidence did not show a putative supervisor exercised independent judgment when assigning others to work, as the putative supervisor assigned work based solely on the "known skill or experience" of the mechanics.

2850 Grand Island Boulevard Operating Co., LLC v. NLRB, 740 Fed. Appx. 753 (2d Cir. 2018): See 17-511.

The Arc of South Norfolk, 01-RC-213174, rev. granted in part 8/15/18 (RK; P dissenting in part): The Board granted review with respect to whether the employer's Program Coordinators possessed the authority to assign or responsibly direct employees. Member Pearce would have denied review.

Atlantic City Electric Co., 04-RC-221319, rev. granted 12/13/18 (McKE): The Board granted review with respect to whether the employer's System Operators possessed the authority to assign employees to places and to responsibly direct employees using independent judgment. Member McFerran would have granted review solely based on assignment, given that the Board is presently considering a similar issue in *Entergy Mississippi*.

17-522 – Responsibly Direct

Matson Terminals, Inc. v. NLRB, 728 Fed. Appx. 8 (D.C. Cir. 2018): The court agreed with the Board that the employer had presented no evidence showing that the putative supervisors had the authority to take corrective action against other employees, even if they were subject to adverse consequences for their subordinates' failures.

Cranesville Block Co., Inc. v. NLRB, 741 Fed. Appx. 815 (D.C. Cir. 2018): The court agreed with the Board that the evidence did not show a putative supervisor was held accountable within the meaning of *Oakwood Healthcare*.

2850 Grand Island Boulevard Operating Co., LLC v. NLRB, 740 Fed. Appx. 753 (2d Cir. 2018): The court agreed with the Board that LPNs were not held accountable for the performance of their subordinates and thus did not responsibly direct them.

The Arc of South Norfolk, 01-RC-213174, rev. granted in part 8/15/18 (RK; P dissenting in part): The Board granted review with respect to whether the employer's Program Coordinators possessed the authority to assign or responsibly direct employees. Member Pearce would have denied review.

Atlantic City Electric Co., 04-RC-221319, rev. granted 12/13/18 (McKE): See 17-521.

17-523 – Discipline, Discharge, and Suspension

Coral Harbor Rehabilitation and Nursing Center, 366 NLRB No. 75 (2018) (PKE): In affirming the ALJ's finding that the employer's LPNs are not supervisors, the Board observed that the same result would obtain under the Third Circuit's test for effective recommendation of discipline, as (1) the LPNs did not have discretion to decide whether to fill out a disciplinary notice, (2) the evidence did not establish that the LPNs initiated progressive discipline because the evidence did not show the employer followed a progressive policy, and (3) the respondent had not shown the LPNs' involvement with the notices increased the severity of the consequences of a future rule violation.

Thyme Holdings, LLC v. NLRB, 2018 WL 3040701 (D.C. Cir. May 22, 2018): The court agreed with the regional director that although the employer's LVNs filled out and signed disciplinary forms, the employer had not shown the LVNs exercised anything beyond essentially reportorial disciplinary authority.

Matson Terminals, Inc. v. NLRB, 728 Fed. Appx. 8 (D.C. Cir. 2018): Although putative supervisors issued incident reports, the court agreed with the Board that there was no evidence showing they did so with independent judgment, as the only two incident reports in the record involved flagrant violations of company policy.

Cranesville Block Co., Inc. v. NLRB, 741 Fed. Appx. 815 (D.C. Cir. 2018): See 17-513.

17-524 – Hire

Thyme Holdings, LLC v. NLRB, 2018 WL 3040701 (D.C. Cir. May 22, 2018): The court agreed with the Board that there was no evidence that the employer's LVNs were involved in initial screening or final decision-making stages of hiring, and there was only a single example of a LVN's comment about an applicant factoring into management's hiring decisions.

17-525 – Adjust Grievances

Coral Harbor Rehabilitation and Nursing Center, 366 NLRB No. 75 (2018) (PKE): The Board commented that although the Third Circuit has found, contrary to Board precedent, that the authority to adjust minor grievances is sufficient to establish supervisory status, there was no evidence in this case that the employers' LPNs possessed the authority to adjust even minor grievances.

Matson Terminals, Inc. v. NLRB, 728 Fed. Appx. 8 (D.C. Cir. 2018): The court stated that even if the authority to adjust the pay of laborers who are accidentally dispatched to lower-hour jobs than they should have received under a CBA constitutes adjusting grievances, there was no evidence this required independent judgment.

17-526 – Reward/Evaluate

Thyme Holdings, LLC v. NLRB, 2018 WL 3040701 (D.C. Cir. May 22, 2018): The court held that the employer had not established its LVNs had the authority to “reward” based on completing performance evaluations because the employer had not shown a direct correlation between the evaluations and pay increases employees received.

Matson Terminals, Inc. v. NLRB, 728 Fed. Appx. 8 (D.C. Cir. 2018): The court concluded it was reasonable for the Board to find putative supervisors were not authorized to “tack on” time, given conflicting testimony on this count, and that they granted leave as a routine matter without exercising independent judgment.

17-530 – Secondary Indicia

Matson Terminals, Inc. v. NLRB, 728 Fed. Appx. 8 (D.C. Cir. 2018): The court refused to consider the ratio of non-supervisor employees to supervisors in a supervisory status case, stating it had no jurisdiction to consider the argument because the employer had not raised this issue in the underlying representation case.

Chapter 18 Statutory Limitations

18-220 – Guards Defined

In a series of cases, the Board rejected contentions that slot technicians employed at Las Vegas-area casinos were, consistent with the D.C. Circuit’s 2017 opinion in *Bellagio, LLC v. NLRB* (863 F.3d 839), guards within the meaning of the Act:

- *GNLV Corp. d/b/a Golden Nugget Las Vegas*, 28-RC-216070, rev. denied 3/29/18 (KMCE)
- *NP Palace LLC*, 28-RC-211644, rev. denied 4/12/18 (PMCE)
- *NP Lake Mead LLC d/b/a Fiesta Henderson Casino Hotel*, 28-RC-218426, rev. denied 7/25/18 (RMCE)
- *NP Sunset LLC d/b/a Sunset Station Hotel Casino*, 28-RC-222992, rev. denied 9/7/18 (RMCK)

Chapter 20 Effect of Status or Tenure on Unit Placement and Eligibility to Vote

20-400 – Student Workers

University of Chicago, 13-RC-198365, rev. denied 5/21/18 (PKE): The Board noted that the Employer had again raised the issue of whether the petitioned-for student employees were statutory employees and stated that the Board does not consider repetitive requests for review and thus the issue was not before the Board at this juncture. Members

Emanuel and Kaplan, did, however, note that they would consider whether and under what circumstances students qualify as statutory employees in a future appropriate case. The Employer subsequently raised the employee status argument again in test-of-certification proceedings, and the Board refused to consider the issue there as well. 367 NLRB No. 41 (2018) (RKE) (see 3-940).

Chapter 22

Representation Case Procedures Affecting the Election

22-112 – Challenges

Advanced Masonry Associates, LLC d/b/a Advanced Masonry Associates, 366 NLRB No. 57 (2018) (KPMc): The Board reiterated that the party challenging eligibility bears the burden of proof. See 22-112, -113, and -114.

Radnet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center, 31-RM-209388, rev. denied 7/25/18 (RPK), and *Radnet Management, Inc. d/b/a San Fernando Valley Advanced Imaging Center*, 31-RM-209424, rev. denied 7/26/18 (RPK): The Board noted that by failing to raise the putative guard status of certain employees until after the election had occurred, the employer ran afoul of the Board's longstanding rule against postelection challenges. Member Kaplan relied solely on the Employer's failure to present sufficient evidence demonstrating guard status in the offer of proof.

22-119 – Hearing on Objections

Equinox Holdings, Inc. v. NLRB, 883 F.3d 935 (D.C. Cir. 2018): The court ruled that the hearing officer's decision not to enforce a subpoena was reasonable because the employer failed to make a proffer of testimony that might have been crucial (namely, the employer wanted to call a witness who would testify as to what a union observer had said during an earlier incident in which that observer alleged brandished a gun, but the employer never asserted the witness would testify that the observer had linked the gun to the election or union campaign). See also 24-424.

Radnet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center, 31-RM-209388, rev. denied 7/25/18 (RPK), and *Radnet Management, Inc. d/b/a San Fernando Valley Advanced Imaging Center*, 31-RM-209424, rev. denied 7/26/18 (RPK): The Board observed that regional directors in representation cases have the discretion to close the record and refuse enforcement of subpoenas where, as in these cases, the subpoenas constitute mere fishing expeditions.

Jam Productions, Ltd. v. NLRB, 893 F.3d 1037 (7th Cir. 2018): See 24-130.

22-121 – Rerun Elections

Troutbrook Co. LLC d/b/a Brooklyn 181 Hospitality LLC, 367 NLRB No. 56 (RMcK): See 24-110.

Novelis Corp. v. NLRB, 885 F.3d 100 (2d. Cir. 2018): The court agreed with the Board’s findings that the employer committed ULPs before and after an election, but vacated the Board’s *Gissel* bargaining order and remanded the case. On remand (367 NLRB No. 47 (2018) (RMcK)), the Board deleted the bargaining order but did not direct a second election, given that the union had not asked for the petition to be reinstated; the Board also commented that due to the passage of time, reinstating and directing an election would be counter to the Board’s rules instructing regional directors to schedule elections “for the earliest date practicable,” but emphasized the union was free to file a new petition if and when it was ready to proceed to an election. Member McFerran would have reinstated the petition and ordered a second election, given that it had been dismissed solely based on the now-vacated *Gissel* order and absent that order a rerun election would have been the default remedy.

22-122 – The Certification

Dycora Transitional Health & Living d/b/a Kaweah Manor, 367 NLRB No. 22 (2018) (RMcK): The Board reiterated that the fact that a respondent was not a party to an underlying Board election does not constitute a “special circumstance” that permits it to challenge a union’s certification. See also 3-940.

Northwestern University, 13-RC-177943, decision on review 9/27/18 (RMcK): Based on the resolution of the merits (see 23-530), the Board vacated a certification and found it unnecessary to address the employer’s request to stay the now-vacated certification, which had issued despite the pendency of a request for review addressing a potentially-dispositive number of ballots. Chairman Ring added that although issuance of the certification (and the employer’s duty to bargain attached thereto) was consistent with the Board’s rules and precedent, he believed that the Board should look with favor on requests to stay certifications under these circumstances in light of the problems that may be created by the issuance of a certification while contested election issues remain unresolved.

Chapter 23 Voting Eligibility

23-112 – Voluntary Quits

Advanced Masonry Associates, LLC d/b/a Advanced Masonry Associates, 366 NLRB No. 57 (2018) (KPMc): See 23-114.

23-113 – Discharged Employees

Advanced Masonry Associates, LLC d/b/a Advanced Masonry Associates, 366 NLRB No. 57 (2018) (KPMc): The Board found that the employer met its burden of proving that a challenged voter was terminated for cause and thus ineligible to vote in the election, given a variety of evidence including testimony about the poor quality of his work (and the fact that he was treated and behaved differently from the employees found to have been laid off—see 23-114).

23-114 – Laid-Off Employees

Advanced Masonry Associates, LLC d/b/a Advanced Masonry Associates, 366 NLRB No. 57 (2018) (KPMc): The Board concluded that the evidence showed that certain challenged employees were laid off and thus eligible to vote in the election, and that evidence suggesting they had been terminated for cause or had voluntarily quit was inconsistent with other evidence identifying these voters as laid off, and the employer accordingly had not carried its burden of showing they were ineligible to vote.

23-530 – Construing Stipulations of the Parties in Representation Cases

Jam Productions, Ltd. v. NLRB, 893 F.3d 1037 (7th Cir. 2018): Given that the parties stipulated to a specific eligibility date in their election agreement, the court rejected the employer’s contention that the Board erred by refusing to count the ballots of employees who started working after that date, instead of accepting the employer’s request to push back the date by two weeks based on a delay caused by blocking charges.

Northwestern University, 13-RC-177943, decision on review 9/27/18 (RMcK): Applying *Caesar’s Tahoe*, 337 NLRB 1096 (2002), the Board interpreted the parties’ stipulated unit description and reversed the acting regional director’s sustaining of challenges to 25 ballots, finding 18 employees were unambiguously included in the unit and 7 should be included on community-of-interest grounds.

Chapter 24 Interference With Elections

24-110 – Objections Period

Troutbrook Co. LLC d/b/a Brooklyn 181 Hospitality LLC, 367 NLRB No. 56 (RMcK): The Board stated that conduct that occurs before and during a first election, even if it occurs on the date of the election, cannot form the basis for an objection to a rerun election because it does not occur within the critical period for the rerun election, which is the time between the two elections.

Jacmar Foodservice Distribution v. NLRB, 2018 WL 3040515 (D.C. Cir. 2018): The court agreed that the Board did not need to hold a hearing on an objection involving a single alleged threat made by a union supporter during prepetition solicitation of authorization cards.

24-130 – Duty to Provide Evidence of Objections

XPO Logistics Freight, Inc., 2018 WL 2943938 (D.C. Cir. May 25, 2018): The court agreed that the Board had not abused its discretion by denying the employer an evidentiary hearing on its objections, which alleged named witnesses were “intimidated,” “harassed,” “threatened,” or “coerced” by union supporters (or agents), but otherwise provided no factual specifics of who said or did what to whom.

Jacmar Foodservice Distribution v. NLRB, 2018 WL 3040515 (D.C. Cir. 2018): The court found that the Board had not abused its discretion by denying the employer an evidentiary hearing on its objections, which alleged pre-election threats by the union, placement of pro-union bumper stickers and posters without the car owner’s or employer’s permission, and Board agent misconduct. See also 24-110, -313, and -410.

Jam Productions, Ltd. v. NLRB, 893 F.3d 1037 (7th Cir. 2018): The court held that the employer had presented enough evidence in support of its objections to warrant a hearing and accordingly remanded the case. The court rejected the Board’s contention that the offer of proof was nothing more than a fishing expedition, given that the Board faulted the offer of proof for not containing evidence on the very questions the employer sought to have answered with its offer of proof, and the employer had provided as much evidence as it had available suggesting objectionable conduct in the absence of subpoena power. See also 24-302.

24-150 – Estoppel and Waiver in Objection Cases

Ohio College Preparatory School, 08-RC-199371, D&O remanding 7/30/18 (KE; P dissenting): In this *Sonotone* election, there was no dispute that the employer inadvertently included two potentially-dispositive professional employees on the nonprofessional employee voting list under incorrect job titles, as a result of which the two professional employees voted using the wrong ballot. The employer objected, and although the root of the problem was the employer-provided voter list, the Board applied the *Republic Electronics* exception to the rule foreclosing a party from filing an objection based on its own failure to fully comply with the voter list requirements. Specifically, the omission was not due to bad faith, the votes were potentially dispositive, and the Board concluded the voters were disenfranchised from voting in the professional election through no fault of their own, given that they had shown up and attempted to vote and could reasonably rely on the implicit assumption they had been given the correct ballots. Member Pearce would have found the voters disenfranchised themselves given the notice of election, which included a sample professional ballot, and their failure to ask questions when provided with the wrong ballot and incorrect job titles.

24-241 – Unfair Labor Practices: “Virtually Impossible”

Advanced Masonry Associates, LLC d/b/a Advanced Masonry Associates, 366 NLRB No. 57 (2018) (KPMc): Upon finding various 8(a)(1) and (3) violations, the Board noted that the principle that elections will not be set aside due to 8(a)(1) violations so minimal that “it is virtually impossible” to conclude they could have affected the election results has never been applied to 8(a)(3) violations. Then-Chairman Kaplan agreed that the “virtually impossible” exception did not apply here, but observed that the Board has also never held that this exception should never apply to 8(a)(3) violations.

Taylor Motors, Inc., 366 NLRB No. 69 (2018) (PMcK): The Board set an election aside based on finding an 8(a)(1) suspension and discharge, noted that the respondent did not contend that the “virtually impossible” exception applied, and found that in any event that exception did not apply, given the discriminatee’s active and open union support, the timing of his suspension, and the narrowness of the election results.

24-242 – Other Conduct: “Tendency to Interfere”

Franklinton Preparatory Academy, 366 NLRB No. 67 (2018) (PMc, K dissenting in part): See 24-301

24-243 – Narrowness of the Election Results

PruittHealth-Virginia Park, LLC, v. NLRB, 888 F.3d 1285 (D.C. Cir. 2018): The court stated that in the absence of misconduct, a close vote simply shows divided views among employees, and thus a close vote alone cannot require a rerun.

Taylor Motors, Inc., 366 NLRB No. 69 (2018) (PMcK): See 24-241.

Franklinton Preparatory Academy, 366 NLRB No. 67 (2018) (PMc, K dissenting in part): See 24-301.

24-301 – Threats

Advanced Masonry Associates, LLC d/b/a Advanced Masonry Associates, 366 NLRB No. 57 (2018) (KPMc): The Board affirmed the ALJ’s finding that the employer engaged in objectionable conduct when its safety director threatened that wages would decrease if the union won the election.

Franklinton Preparatory Academy, 366 NLRB No. 67 (2018) (PMc, K dissenting in part): The Board found that an email sent by the employer’s COO to an employee was an objectionable threat. The COO stated his suspicion that the employer’s board “will take a very hard line on the pay, benefits, working conditions, [professional development] days and other things that I’ve worked so hard to bring to [the employer],” reminded the employee that he (the COO) worked for the board, and stated “it is unrealistic to believe that the [b]oard will welcome unionization.” The Board found that employees would

reasonably understand these statements as a threat of the loss of existing benefits and terms and conditions if they voted for the union, and that the statements lacked an objective basis and were not predictions of demonstrably probable consequences beyond the employer's control. The Board also found that under the circumstances, including the COO's position, the timing of the statements, their dissemination, and the narrowness of the vote, the statement would reasonably tend to interfere with employee free choice. Member Kaplan would have found that employees would reasonably understand the statement as a lawful reference to the give and take of good-faith bargaining.

Con-Way Freight, Inc., 366 NLRB No. 183 (2018) (PMc, R dissenting on other grounds): The Board adopted the ALJ's recommendation to overrule objections alleging receipt of a threatening text and rumors of vandalized cars at another facility as lacking evidentiary support. The Board also adopted the ALJ's recommendation to overrule an objection regarding dissemination of an alleged "knife incident" between a putative union agent and another individual because, even assuming a union agent was involved, that agent had not in fact threatened the other individual with a knife and there was no evidence the union was involved in circulating information about this supposed incident.

Equinox Holdings, Inc. v. NLRB, 883 F.3d 935 (D.C. Cir. 2018): See 24-320.

XPO Logistics Freight, Inc., 2018 WL 2943938 (D.C. Cir. May 25, 2018): See 24-130.

PruittHealth-Virginia Park, LLC, v. NLRB, 888 F.3d 1285 (D.C. Cir. 2018): See 24-320.

24-302 – Promises and Grants of Benefits

Franklinton Preparatory Academy, 366 NLRB No. 67 (2018) (PMcK): The Board found that the employer's COO's statement that "[i]f I haven't done what I say we can do, another Union election can be held in 366 days" was not an objectionable implicit promise of benefits, as the statement did not promise that anything particular would happen, and it was not accompanied by any request to air specific concerns or any other promise or grant of specific benefits.

Jam Productions, Ltd. v. NLRB, 893 F.3d 1037 (7th Cir. 2018): The court held that the employer had presented enough evidence to warrant a hearing on its objection alleging that the union had given voters a tangible economic benefit during the critical period by offering them higher-paying jobs outside of the union's preexisting standards and practice for its referral system.

24-306 – Assembly of Employees at a Focal Point of Authority and Home Visits

XPO Logistics Freight, Inc., 2018 WL 2943938 (D.C. Cir. May 25, 2018): See 24-130.

Con-Way Freight, Inc., 366 NLRB No. 183 (2018) (PMc, R dissenting on other grounds): The Board adopted the ALJ's recommendation to overrule an objection concerning home

visits by a particular individual as there was no evidence that the individual had visited employees at home in the days preceding the election.

24-307 – Misrepresentation

1621 Route 22 West Operating Co. v. NLRB, 725 Fed. Appx. 129 (3d Cir. 2018): The court upheld the Board's finding that the union's distribution of a flyer featuring employee statements obtained without the employees' permission, and which the employees did not actually make, was merely unobjectionable campaign propaganda. The court expressed concern over the process by which the flyer had been made, but deferred to the Board's findings on this topic and noted that the employer presented no evidence that the employees featured on the flyer did not support the union or felt unduly compelled to vote for it; the court concluded that any deceit on the union's part had not undermined employee free choice.

Radnet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center, 31-RM-209388, rev. denied 7/25/18 (RPK), and *Radnet Management, Inc. d/b/a San Fernando Valley Advanced Imaging Center*, 31-RM-209424, rev. denied 7/26/18 (RPK): The Board agreed with the regional director that the petitioner's failure to disclose an alleged affiliation with another union is not a misrepresentation that warranted setting aside the election (and further noted that the employer had stipulated to the name of the union as it would appear on the ballot, *sans* affiliation).

24-309 – The Voter List (Excelsior Rule)

Advanced Masonry Associates, LLC d/b/a Advanced Masonry Associates, 366 NLRB No. 57 (2018) (KPMc): Based on the Board's endorsement of the ALJ's decision to conditionally set the election aside based on ULPs and other objections, the Board found it unnecessary to pass on the ALJ's finding that the employer failed to substantially comply with the Board's voter list requirements.

Ohio College Preparatory School, 08-RC-199371, D&O remanding 7/30/18 (KE; P dissenting): See 24-150.

Transit Connection, Inc. v. NLRB, 887 F.3d 1097 (11th Cir. 2018): The court upheld the Board's invalidation of an initial election due to the employer's failure to provide mailing addresses, in addition to home addresses, on the voter list. In doing so, the court noted that although *Excelsior* at times referred to "home addresses," and in most cases home addresses are sufficient, that case never limited production solely to home addresses, and the purpose of the requirement is to provide "complete and accurate" information for voters, and based on the vagaries of mail delivery system on Martha's Vineyard, the employer knew home addresses were not likely to allow the union to reach employees by mail, and there was no reason the employer could not have provided the mailing addresses it admittedly had available. The court also relied on the fact that more than 40% of the home addresses the employer did provide were inaccurate.

Garda CL Southwest, 14-RC-209886, rev. denied 8/21/18 (RMcK): Chairman Ring and Member Kaplan observed that this case demonstrated how the Board’s 2014 Election Rule has led to unintended and illogical results, because under prior precedent, regional directors could analyze whether an employer substantially complied with voter list requirements despite untimely service, but the current rules as interpreted in Board decisions do not allow regional directors discretion to excuse untimely service of a voter list, and here the petitioner had an initial voter list for 76 days and a second list for 21 days before the rerun election, yet current rules and precedent required setting the election aside based on the employer serving the second list one day late.

24-313 - Miscellaneous Party Conduct

Jacmar Foodservice Distribution v. NLRB, 2018 WL 3040515 (D.C. Cir. 2018): The court stated that, viewed objectively, the conduct as alleged—placement of a pro-union bumper sticker on an employee’s car without the owner’s knowledge or consent, and placement of 8 pro-union posters on the employer’s property without permission—could not have interfered with the fairness of the election and did not warrant a hearing.

PruittHealth-Virginia Park, LLC, v. NLRB, 888 F.3d 1285 (D.C. Cir. 2018): The court found that substantial evidence supported the Board’s conclusion that pro-union demonstrators who distributed literature at the entrance to the employer’s premises did not engage in objectionable conduct where credited evidence showed they approached employees in a peaceful manner, did not prevent access to the premises, and at most caused momentary inconvenience to employees entering or exiting the premises.

Grill Concepts Services, Inc. d/b/a The Daily Grill, 31-RC-209589, rev. granted 11/20/18 (RKE): The Board granted review with respect to whether union representatives’ offers to help employees with their mail ballots, including offers to help employees fill out their mail ballots, constituted objectionable conduct.

24-320 – Third-Party Conduct

Equinox Holdings, Inc. v. NLRB, 883 F.3d 935 (D.C. Cir. 2018): The court noted that although the Board is sensitive to threats of deportation in an election campaign, no evidence was presented that the union was responsible for such threats, and although third party threats can taint an election, the hearing officer had discredited the witness who claimed pro-union employees made the threats and this resolution was “really not subject to challenge.” See also 24-424.

PruittHealth-Virginia Park, LLC, v. NLRB, 888 F.3d 1285 (D.C. Cir. 2018): Under the standard for third-party conduct, the court found no reason to overturn the Board’s finding that alleged threats were not objectionable, particularly given the hearing officer’s credibility determinations and the objective nature of the third-party standard.

Jacmar Foodservice Distribution v. NLRB, 2018 WL 3040515 (D.C. Cir. 2018): See 24-110.

Con-Way Freight, Inc., 366 NLRB No. 183 (2018) (PMc, R dissenting on other grounds): The Board adopted the ALJ's recommendation to overrule objections based on a blog that contained pro-union and anti-management commentary, including posts critical of a manager and an employee, given that there was insufficient evidence to show that any of the posts had a reasonable tendency to influence the outcome of the election; instead, employees voluntarily chose to view the blog, the only "threat" conveyed was that employees who made false statements about the union would be named, and the statements on the blog lacked specificity regarding the election. As the third-party standard applied, the ALJ found these derogatory and unkind comments would not render a free election impossible.

XPO Logistics Freight, Inc., 2018 WL 2943938 (D.C. Cir. May 25, 2018): See 24-130.

Transit Connection, Inc. v. NLRB, 887 F.3d 1097 (11th Cir. 2018): The court upheld the Board's refusal to vacate a second election based on statements two employees made to a third employee that they were going to "kill" him if he did not vote for the union, given the more stringent third-party standard, evidence supporting the Board's conclusion the statements were made in jest among friends, and the employer's burden to prove objectionable conduct.

24-410 – Board Agent Conduct

Garda CL Atlantic, Inc. v. NLRB, 2018 WL 2943941 (D.C. Cir. May 22, 2018): The court upheld the Board's findings that brief exchanges involving the Board agent and two employees were not objectionable. The voting unit was a guard unit, and when these two employees arrived to vote and were challenged by a union observer, the Board agent asked several questions relevant to guard status, informed the voters non-guards were ineligible to vote, and offered them the opportunity to cast challenged ballots, which the employees declined. The court noted the Board has long held that asking a few eligibility-related questions in the face of challenges is appropriate and found that the regional director reasonably concluded the questions asked here were innocuous and that any ambiguity in the questions was offset by the fact the agent offered the employees the opportunity to cast challenged ballots.

Jacmar Foodservice Distribution v. NLRB, 2018 WL 3040515 (D.C. Cir. 2018): No hearing was required where the conduct alleged by employer (the Board agent did not know how many employees were eligible to vote and relied on observers instead of the official voter list to monitor eligibility, gave a voter an extra ballot which the voter turned in blank and which the agent disposed of according to the Casehandling Manual, and expressed preference for the union via her demeanor during the vote count) failed to show "a material effect on the election," given the agent's alleged errors were either alleviated by following proper procedure or were so minimal they could not have had an effect on the election (and any favoritism displayed during the vote count could not have affected voters who had already voted). Judge Lecraft Henderson stated the Board should have at least held a hearing on the failure to use a voter list and the voter who received the extra ballot.

24-422 – Opening and Closing of the Polls

Bronx Lobster Place, LLC, 02-RC-191753, D&O remanding 2/2/18 (McE; P dissenting): The Board reversed the regional director and set the election aside because the polls were opened 7 minutes late and a potentially-determinative number of employees did not cast a ballot and thus were potentially disenfranchised, requiring a new election under Board precedent. Member Pearce would have upheld the election based on testimony that no employees appeared at the polls or attempted to vote during the delayed opening.

24-424 – Observers

Equinox Holdings, Inc. v. NLRB, 883 F.3d 935 (D.C. Cir. 2018): The employer in this case objected to the union’s use of a discharged individual—allegedly discharged due to his earlier brandishing of a gun—as an observer. The court rejected the Board’s argument that the behavior leading to the discharge was irrelevant as a matter of Board law, but upheld the Board’s overruling of the objection because regardless of whether the observer had brandished a gun and regardless of what he said when doing so, there was no assertion he had connected his possession of the gun with the election or union campaign, and thus the Board’s overruling of the objection was within the scope of its discretion. The court accordingly found it unnecessary to analyze the alleged conduct under the standards for party or third-party conduct.

Jacmar Foodservice Distribution v. NLRB, 2018 WL 3040515 (D.C. Cir. May 29, 2018): See 24-410.

24-425 – Opportunity to Vote and Number of Voters

Ohio College Preparatory School, 08-RC-199371, D&O remanding 7/30/18 (KE; P dissenting): See 24-150.

24-426 – Secrecy of the Ballot

1621 Route 22 West Operating Co. v. NLRB, 725 Fed. Appx. 129 (3d Cir. 2018): The court upheld the Board’s overruling of an objection alleging that ballot secrecy was compromised, as the testimony showed only that the voting booth was easily jostled and repositioned throughout the day, some employees thought their arms and hands may have been visible at times, and the employer’s observer testified she was able to watch voters marking their ballots. The court noted a lack of direct evidence anyone actually saw how a ballot was marked, and found substantial evidence supported the Board’s finding that any voting booth problems did not create a reasonable doubt as to the election’s fairness and validity.

24-427 – Mail Ballots

Grill Concepts Services, Inc. d/b/a The Daily Grill, 31-RC-209589, rev. granted 11/20/18 (RKE): See 24-313.

24-440 – Electioneering

and

24-442 – The Milchem Rule

1621 Route 22 West Operating Co. v. NLRB, 725 Fed. Appx. 129 (3d Cir. 2018): The court agreed with the Board that the union’s text messaging and telephoning employees on election day was not objectionable, the court emphasizing that there was no evidence any employees received communications while waiting in line to vote and the employees were free to disregard the communications, which were delivered to them in isolation.

24-446 – Agents Stations Near Polling Place

University of Chicago, 13-RC-198365, rev. denied 5/21/18 (PKE): In finding the petitioner did not engage in objectionable surveillance, the Board noted that the petitioner’s agents stationed outside libraries containing the polling rooms could not have distinguished between students entering the libraries to study and voters entering them to vote.

CoreCivic of Tennessee, LLC, 28-RC-213154, rev. denied 9/6/18 (RMcK): The Board agreed with the regional director that *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001), was distinguishable, but relied on the fact that the alleged party conduct in *Katz* took place within an established no-electioneering zone, was contrary to the instructions of a Board agent, and involved a “continued presence” in an area employees “had to pass” in order to vote.

Bio-Medical Applications of Alabama, Inc. d/b/a Fresenius Kidney Care Dauphin Island Parkway, 15-RC-201753, rev. denied 10/1/18 (McKE): The Board found the employer’s offer of proof insufficient to warrant a hearing based on *Katz* or *Electric Hose* because the employer had not alleged that a union representative “stationed” herself in a no-electioneering zone, acted contrary to the instructions of a Board agent, or maintained a “continued presence” in an area employees “had to pass” in order to vote.